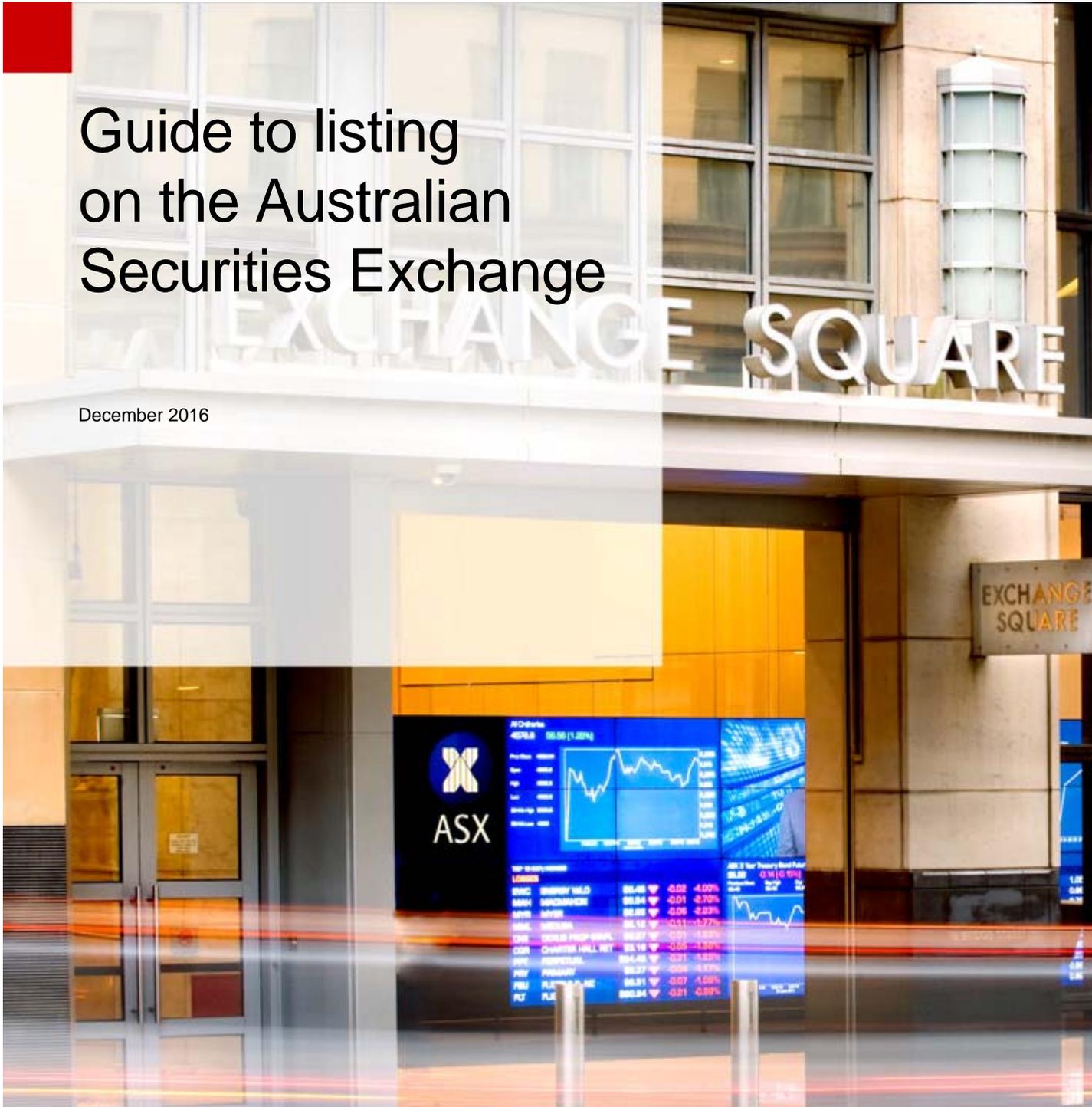


Guide to listing on the Australian Securities Exchange

December 2016



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Introduction

Many private companies will consider an initial public offering (**IPO**) and associated listing on the Australian Securities Exchange (**ASX**) as a means of accelerating growth, creating new opportunities for their business and providing a liquid market for their securities. In addition, foreign companies may consider an ASX listing to access the Australian capital markets and private equity investors use IPOs to exit their investments.

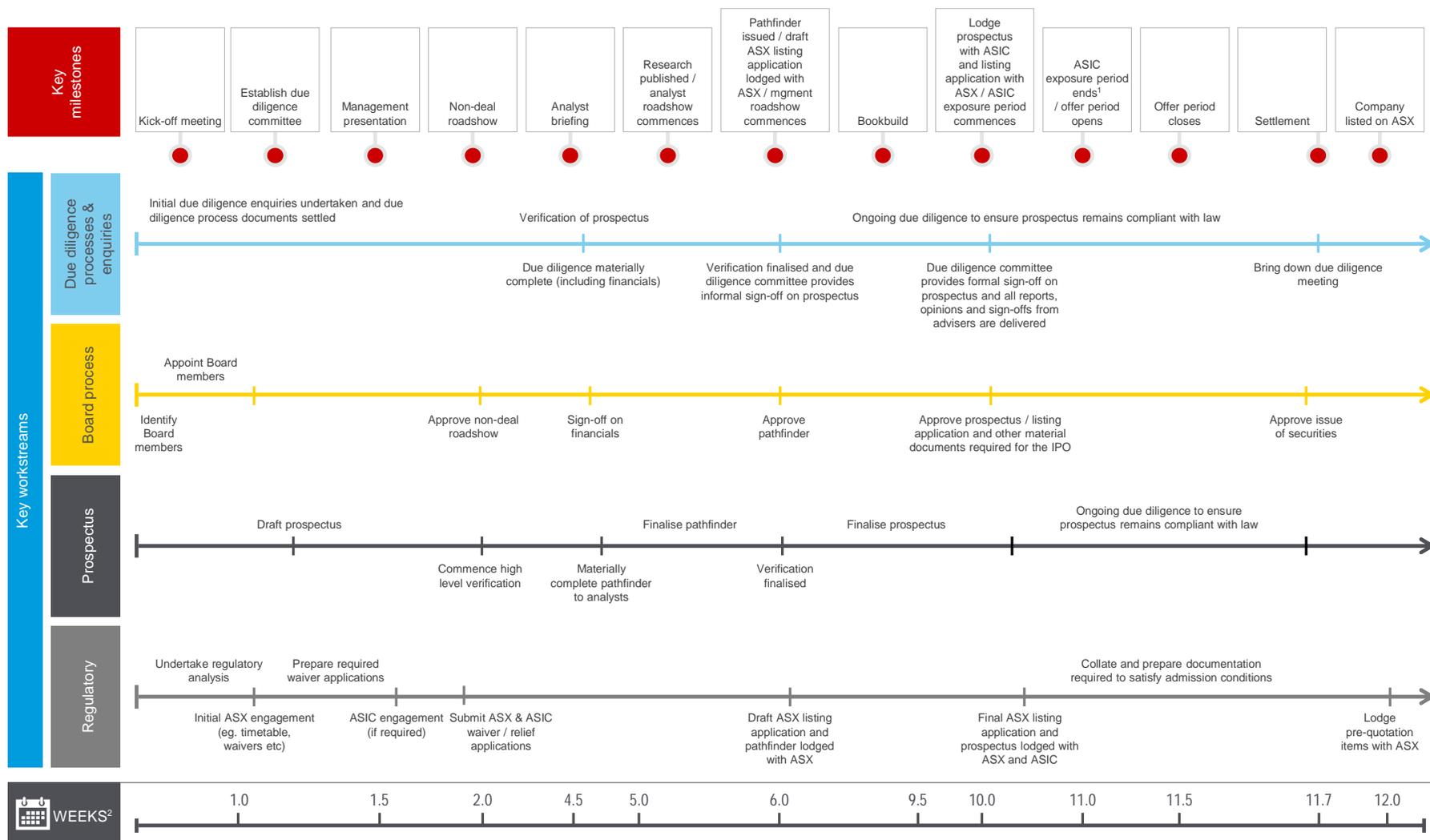
Regardless of the stage in the company's development, it is important for the directors and owners of such businesses to weigh up the pros and cons of a listing, consider alternative methods of achieving their goals and understand the IPO process in advance of taking this significant step.

This guide is not intended to be a blueprint for an IPO. Rather, it aims to assist companies in making an informed decision as to whether to seek a listing and to demystify the IPO process.

The best advice we can give is to seek advice early. Once the decision to list has been made, a well-equipped team to help guide the listing process is vital.



1 Indicative timeline for the IPO process



¹The initial ASIC exposure period is seven days, however, ASIC can extend this period by a further seven days

² A 12-week timeline assumes a well prepared team and a process free from unusual complexity



Phase	Scoping, structuring and planning	Due diligence and drafting	Execution and lodgement	Post-lodgement and completion
Other workstreams and items	<ul style="list-style-type: none"> ▪ Appoint advisers. ▪ Consider offer structure for IPO. ▪ Consider whether any changes are required to be made to the company's corporate and/or capital structure. ▪ Consider whether ASX listing requirements can be satisfied. ▪ Agree basis on which prospectus to be drafted (eg. committee approach vs comments to central point). 	<ul style="list-style-type: none"> ▪ Due diligence committee meets as required. ▪ Negotiate underwriting / offer management agreement. ▪ Draft corporate governance policies and charters and put in place appropriate corporate governance structures. ▪ Discuss voluntary escrow position with underwriter / lead manager. ▪ Finalise executive employment agreements, director appointment letters and any long term incentive arrangements which are to be put in place. ▪ Draft and negotiate any pre-IPO restructure documentation. ▪ Obtain required third party consents (eg. those required under the company's contracts and those required to quote third parties in the prospectus). ▪ Prepare forecasts for inclusion in prospectus (if any). ▪ Prepare roadshow marketing materials. ▪ Make banking arrangements to receive application money under the IPO. 	<ul style="list-style-type: none"> ▪ Sign due diligence planning memorandum. ▪ Obtain final due diligence and experts reports from advisers. ▪ Obtain sign-offs and opinions from advisers. ▪ Due diligence committee meeting to approve prospectus and its lodgement with ASIC and provide final report to Board. ▪ Obtain required consents to be named in the prospectus from the company's advisers and other third parties quoted in the prospectus. ▪ Board meeting to approve prospectus and its lodgement with ASIC. ▪ Obtain consents to lodgement of the prospectus from each director of the company. ▪ Sign underwriting / offer management agreement. ▪ Execute pre-IPO restructure documentation. ▪ Execute escrow agreements. 	<ul style="list-style-type: none"> ▪ Lodge application money received under the IPO in a separate bank account until issue of securities. ▪ Monitor need for supplementary or replacement prospectus. ▪ Liaise with share registry to ensure holding statements for the IPO are despatched. ▪ Satisfy ASX spread requirements and other pre-quotation conditions prescribed by ASX. ▪ Prepare for any potential post-vet by ASIC.

2 Is an IPO right for you?

Weigh up the pros and cons that an IPO may provide and choose a path that best achieves the company's objectives.



Pros

- It substantially improves the company's capital raising ability (in terms of available capital and speed of raising) allowing it to fund future growth and acquisitions and to pay down debt.
- It can facilitate an exit for private equity investors or founders.
- Equity incentive schemes can be more attractive to attract, retain and incentivise management and employees.
- The market will have a greater awareness of the company and its business.
- Enables the company's securities to be used as 'currency' for acquisitions.
- The company's securities may be more attractive as collateral security.
- The ASX Listing Rules encourage the implementation of good corporate governance practices, if they are not already in existence, and help to improve existing practices.
- The company and its business and products may enjoy enhanced public status.
- There is greater liquidity in the company's securities and there is no stamp duty on share transfers.
- A listing may attract domestic and foreign institutional interest in the company as a result of increased liquidity and transparency.



Cons

- The previous owners necessarily give up some control – the extent depends on the size of the IPO.
- A loss of privacy caused by media interest.
- Restrictions on the freedom of the owners to deal with the company and its assets without shareholder approval.
- Complying with the ASX Listing Rules and corporate regulations applicable to public companies involves additional time and costs including initial listing fees, annual listing fees and the increased costs of convening shareholder meetings.
- There is greater accountability to shareholders.
- Directors need to fully disclose their interests in the company on a continuous basis.
- The price and liquidity of the company's securities may be affected by market conditions as a whole no matter how well the business is run.
- The company will be subject to much greater disclosure and reporting requirements both during the IPO and subsequently as a listed company.
- A large amount of management time may be diverted from running the business during the lead up to the IPO.

3 Preliminary considerations

Prior to undertaking an IPO, the company should consider issues associated with commercial matters, transaction structuring and company specific objectives.



Commercial considerations

Is the company in the right stage of its development?

The company must be sufficiently developed as a business and at the right stage of its life cycle prior to undertaking an IPO. In some instances it can be better to delay the IPO if the company is in its infancy or if the industry in which it operates or its business is facing issues which may result in the perception that the company is not an attractive investment. An IPO should generally only be pursued once the company has established a suitable track record on which investors may base their investment decision.

Do key stakeholders and financial advisers agree on the IPO valuation?

The IPO valuation is generally based on the price/earnings multiples at which similar businesses to the company's trade on ASX and discounted by a percentage as an incentive to entice investors and, in some cases, may be discounted to reflect the company's lack of trading history.

Is it the right time to undertake an IPO?

The IPO should be timed to maximise the level of market interest. The industry in which the company operates should ideally be in favour with the market. In addition, times when there are likely to be similar IPOs in the market or during a holiday period should also be avoided.

Will the aftermarket be stable

Following completion of the IPO and listing, there needs to be sufficient market interest, especially by institutions, to ensure ongoing trade in the company's securities. Generally, we would suggest that there be at least one broker who will provide ongoing research coverage on the company and promote the company to the market.



Transaction structuring considerations

Who will be on the IPO team?

It will be essential for the company to ensure that it engages appropriately qualified advisers (who are familiar with IPOs and the listing process) to assist with the transaction prior to commencing the IPO process (see section 5 for further information).

Is the company's corporate structure appropriate?

The company will need to review the structure of its existing corporate group to determine whether it is appropriate for the listed environment. Tax, stamp duty and other issues will be relevant when reviewing these matters. We recommend that the company obtain legal, accounting and tax advice as early as possible in the IPO process, to determine whether its existing structure is appropriate or whether some form of (major or minor) restructuring is required, including (possibly) for legal liability management reasons (see section 5 for further information).

Is the company eligible to list on ASX?

The company must be able to satisfy the ASX 'profit' test or 'assets' test as well as meet the 'spread' and other requirements imposed by ASX (see section 4 for further information). If the company is not able to satisfy the profit test, ASX will impose a mandatory escrow on all or some of the existing security holders (unless the company can demonstrate a track record of revenues or profitability which is acceptable to ASX) (see section 13 below for further information).

What offer structure should be adopted for the IPO?

The company will need to consider, among other things, whether the IPO will be underwritten, what jurisdictions the IPO will be extended into, how the IPO will be priced (eg. fixed price or determined by bookbuild) and whether post-IPO stabilisation techniques will be used (see section 12 for further information).



Company-specific considerations

Are changes required to be made to the Board or corporate governance arrangements?

The typical makeup of a successful Board includes a reputable industry leader as independent chairman, a managing director and other executive and non-executive directors with appropriate skill sets. In addition the ASX Corporate Governance Council's 'Principles of Good Corporate Governance and Best Practice Recommendations' (**Recommendations**) recommend that a majority of the directors of the company be independent (see section 5 for further information).

Is your current management team appropriate, equipped and incentivised?

The management team is critical to an IPO's success. The CEO and CFO are heavily involved in the IPO marketing via roadshow presentations, so they must have a thorough knowledge of the company and industry and be convincing presenters. IPOs are time consuming, so the company should ensure that management has the resources to both run the business and prepare for the IPO. Finally, investors will take a keen interest in senior managements' remuneration, so it is important to ensure adequate (but not excessive) incentives (see section 5 for further information).

Are major stakeholders ready?

Listing will make the company more accountable to its shareholders, will require the company to make increased disclosure relating to its business and corporate governance practices and will result in increased scrutiny of the company by the market. Major stakeholders must be prepared to accommodate these new influences. In addition, the company's major stakeholders will generally also need to agree on the structure of the IPO to ensure that the IPO is not impeded.

Are the company's capital structure and financing arrangements appropriate?

Capital structure

It is often the case, whether the IPO is by way of a new issue of securities or a sell down of existing securities, that the company's capital structure and dividend policy needs to be reviewed and, if necessary to ensure the marketability of the IPO, modified.

Financing

If the company has existing finance facilities which will be retained post-IPO, their terms will need to be reviewed to ensure that the IPO does not breach any prescribed change of control or similar banking covenants and that the facilities provide sufficient flexibility post-IPO. Alternatively, new or replacement finance facilities can be put in place, with existing facilities being repaid from the proceeds of the IPO (see section 5 for further information).

Are all of the company's material contracts in place and are there issues under existing ones?

Material contracts which need to be in place prior to lodgement of the prospectus should be prepared, negotiated and finalised early in the IPO process as failure to finalise the terms of such contracts may delay the IPO. In addition, the company's existing material contracts will need to be reviewed to determine whether there are any termination or other consequences that arise by virtue of the IPO (eg. change in control provisions).

4 Key ASX admission criteria

The ASX Listing Rules set the minimum admission criteria which a company must meet to obtain a listing on ASX. Key criteria are summarised below.

KEY PRINCIPLE	REQUIREMENT
 Number of shareholders	Minimum 300 investors @ A\$2,000*
 Company size	Profit test <ul style="list-style-type: none"> • Same business activity for the last 3 full financial years; and • A\$1 million aggregated profit over past 3 years; and • A\$500,000 consolidated profit over last 12 months*
	Assets test <ul style="list-style-type: none"> • A\$4 million net tangible assets after deducting costs of fundraising*; or • A\$15 million market capitalisation*; and • Working capital of at least A\$1.5 million; and • A statement must also be included in the prospectus that the company has enough working capital to carry out its stated objectives
 Minimum free float requirement	A company must have a 20% minimum 'free float' (being the percentage of the company's quoted securities which are not subject to escrow (either voluntary or ASX-imposed) and which are held by non-affiliated security holders)*
 Financial reporting	Profit test <ul style="list-style-type: none"> • Audited accounts for the last 3 full financial years; • Audited or reviewed accounts for the last half year if the last full financial year ended more than eight months before making the application for admission to ASX; and • Pro forma balance sheet reviewed by auditor (unless ASX agrees otherwise).
	Assets test <ul style="list-style-type: none"> • Audited accounts for 2 full financial years for the company seeking admission as well as any entity or business that it acquired in the 12 months prior to applying for admission or that it proposes to acquire in connection with its listing*
 Satisfaction of ASX's good fame and character requirements	Directors must obtain a national criminal history check and bankruptcy check for each country in which they have resided for the last ten years as well as provide a statutory declaration affirming that they have not been the subject of disciplinary or enforcement actions by an exchange or regulator
 Registration as a foreign company	A foreign entity seeking admission to the official list of ASX must be registered as a foreign company under the <i>Corporations Act 2001</i> (Cth) (Corporations Act)
 Disclosure document	The company will be required to either: <ul style="list-style-type: none"> • prepare a prospectus which complies with the requirements of the Corporations Act (see section 7 for further information); or • with ASX's consent and provided that no capital is being raised in connection with the listing, prepare an information memorandum which has prospectus type disclosure

*With effect from 19 December 2016.

Under the assets test, less than half of your total tangible assets (including any IPO proceeds) must be cash or readily convertible to cash. If the company is not able to meet this test, it will be treated as a 'cash box' and must have commitments consistent with its stated business objectives to spend at least half of such assets. These objectives, together with an expenditure program, must be set out in the prospectus. A cash box will be subject to ASX quarterly reporting for the first eight quarters following listing.

What are the requirements for the admission of foreign companies?

ASX is a globally renowned equity market and has an international reputation for conducting markets of integrity. This provides investors with the confidence which is required for active securities trading. Foreign companies can seek either a primary or dual listing on ASX in order to access the Australian capital market and create a new market for the company's securities.

There are two forms of listing available to foreign companies:

- 1. A foreign exempt listing (for entities other than those listed on the New Zealand securities exchange)** – only available for large companies with a primary listing on another stock exchange which is acceptable to ASX and which meet one of the following criteria:
 - Operating profit before tax for each of the last three financial years of at least A\$200 million; or
 - Net tangible assets of at least A\$2 billion or a minimum market capitalisation of A\$2 billion.Entities that are, or will be at the time of admission to the official list of ASX, listed on the Main Board of the New Zealand securities exchange can list in the foreign exempt category, but will only have to satisfy the substantially lower profit or assets test of the standard admission conditions (set out above) and will not be required to meet the shareholder spread requirements. However, they will be required to comply with the requirement for directors to be of good fame and character (see section 5 for further information), a condition which is not applicable to other foreign entities seeking a foreign exempt listing.
- 2. Full ASX listing** – any foreign company can seek a full ASX listing provided that it meets ASX's admission criteria including the financial thresholds and shareholder spread requirements set out on page 8.

While companies with a foreign exempt listing are only subject to minimal requirements under the ASX Listing Rules, any foreign company with a full ASX listing will be subject to all of the ASX Listing Rules and related disclosure obligations except to the extent that ASX has waived the application of a particular ASX Listing Rule. ASX may waive the requirement to comply with a particular ASX Listing Rule in certain circumstances where it is confident that the rules of another stock exchange which apply to the company are at least as stringent as ASX requirements or where a waiver is required to avoid conflict with the laws of the home jurisdiction.

As the trading of shares of foreign companies can generally not be settled through ASX's electronic trading system, CHESSE, the shares are instead traded in the form of depositary receipts known as CHESSE Depositary Interests or CDIs.

Compliance listing

This type of listing is generally used where the company wishes to create a trading facility for its securities (ie. it does not wish to raise any capital in connection with its application for admission to the official list of ASX). In such cases, the company may, with the consent of ASX, prepare an information memorandum (which is not required to be lodged with the Australian Securities and Investments Commission (**ASIC**)) which has prospectus type disclosure and provide it to ASX.

Backdoor listing

This type of listing is achieved when a company is able to become listed by 'backdoor' its business into an already listed but inactive company. One of the advantages of a backdoor listing is that it gives the company an immediate spread of security holders (assuming that, being listed, the listed company has the required spread). In return for transferring the company's business into the already listed company, the company's major stakeholders usually get a controlling security in the listed company.

Prior notice of a proposed backdoor listing must be given to ASX who will decide the terms on which it may proceed. Shareholder approval is usually required for the process and the company will need to comply with ASX listing requirements as if it were applying for a new listing.

Corporate governance

The company will be required to disclose in connection with its admission to the official list of ASX and, following listing, in each of its annual reports, the extent to which it complies with the ASX Corporate Governance Council's '*Principles of Good Corporate Governance and Recommendations*'. If the company is not able to comply with the recommendations it must disclose the reasons why.

Timing and key documents

Timing for submission of application for admission to the official list of ASX

While ASX aims to process applications for admission to the official list of ASX as quickly as possible, an application for listing will generally take ASX between four to six weeks to process from the time the application for listing and all other required documents (see below) are lodged with ASX.

In most cases, ASX will not commence its review of the company's listing application until the company has lodged its prospectus with ASIC. However, in circumstances where the company proposes to use a 'pathfinder' prospectus (see section 7 for further information), ASX may agree to 'front end' its review of the company's listing application based on the pathfinder prospectus and complete most of its work in assessing the company's listing application before the company formally lodges its final prospectus with ASIC. By doing this, ASX will generally be able to commence official quotation of the company's securities approximately two weeks after the date the company formally lodges its prospectus with ASIC.

If ASX agrees to fast track the company's listing application, the company must lodge its pathfinder prospectus, together with a draft of its listing application and drafts or final versions of all supporting documentation that would ordinarily accompany the listing application, no less than 4 weeks prior to the date on which the final prospectus is lodged with ASIC. A final version of the application, prospectus and supporting documents must be lodged with ASX following lodgement of the prospectus with ASIC.

If the company intends to seek waivers from the ASX Listing Rules in connection with its application for admission to the official list of ASX, an application seeking such waivers will need to be lodged with ASX 4 weeks prior to the date on which the pathfinder prospectus is lodged with ASX.

What key documents are required to be submitted to ASX?

The table below sets out the key documents which will need to be submitted by the company to ASX as part of its application for admission to the official list of ASX:

KEY ASX DOCUMENTATION

1.	Appendix 1A – 'ASX Listing Application and Agreement'
2.	Information Form and Checklist (ASX Listing)
3.	ASX application and agreement for use of electronic lodgement facility and entity details facility
4.	Deed of indemnity for deferred or conditional trading (if applicable)
5.	Prospectus or information memorandum (as applicable)
6.	Audited financial statements for the last three financial years, audited half-yearly financial statement (in certain circumstances) and audited pro-forma statement of financial position
7.	A copy of the company's certificate of incorporation, certificate of registration or other evidence of status
8.	A copy of the company's constitution
9.	A corporate governance statement which sets out the extent to which the company has complied with the Recommendations
10.	Criminal history checks for each director of the company in respect of each country in which they have resided for the last 10 years
11.	Bankruptcy checks for each director of the company in respect of each country in which they have resided for the last 10 years
12.	Statutory declarations for each director of the company.
13.	A copy of any dividend or distribution reinvestment plan
14.	A copy of any employee incentive plans
15.	Copies of all material contracts (which are provided to ASX on a confidential basis)
16.	Copies of all voluntary and mandatory escrow agreements with security holders
17.	Certain pre-quotation disclosure items which customarily include: <ul style="list-style-type: none">▪ a statement setting out the names of the 20 largest shareholders, and the number and percentage of securities held by them;▪ a distribution schedule of each class of equity securities to be quoted;▪ a copy of the company's share register; and▪ bank statements confirming receipt of IPO proceeds.

5 Getting ready for your IPO

What are the preliminary steps the company should consider when preparing for an IPO?

The Advisers

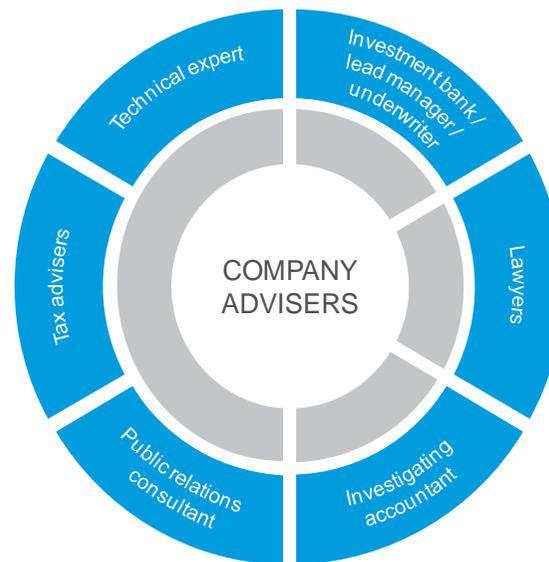
As noted earlier, it is essential that the company engage advisers who are familiar with IPOs and the listing process. Appropriately qualified advisers will help the company assess whether or not a listing is suitable as well as ensure a smooth transition to the listed environment. Meeting with professional advisers at an early stage is the most effective way to identify the issues and minimise costs.

The following advisers will usually make up the IPO team:

Investment bank / lead manager

The investment bank or lead manager will be the adviser who has primarily responsible for coordinating the IPO process and the company's other advisers. Its role may include advising on the structuring of the IPO including the size of the issue, timing and pricing of the IPO, and advising on and conducting marketing of the IPO including coordinating and running roadshows with the company.

The investment bank will also be responsible for managing the offer so as to ensure that the IPO will be successful (including achieving the required shareholder spread) and, if underwritten, to guarantee that the underwriter will acquire, or place, any shares not taken up by the public.



If the IPO is underwritten, the underwriter is contractually obliged under the underwriting agreement to apply for any securities which are not subscribed for in the IPO, subject to certain termination events. The fee paid to an underwriter is typically between 2.5–5% of the amount raised under the IPO. Generally, the higher the amount raised, the lower the percentage fee which is payable to the underwriter. In some circumstances, the underwriter will appoint a sub underwriter to spread its risk, or co-lead managers and co-managers to share responsibility for the marketing of the IPO, and will pay them out of their underwriting fee.

In most circumstances, the underwriter will be appointed at the commencement of the IPO process by a mandate letter which contains the material terms of appointment. The underwriting agreement will then be negotiated in the period prior to lodgement of the prospectus and is typically signed immediately prior to lodgement of the prospectus with ASIC.

Lawyers

MinterEllison advises companies on all legal aspects of preparing for listing including matters such as converting to a public company, implementing any required pre-IPO reorganisation, appointing and removing directors, changing the company's constitution and directors' and managements' service contracts, tax related issues and preparing corporate governance policies. MinterEllison also coordinates the due diligence process and conducts the legal aspects of due diligence, assists with the preparation and verification of the prospectus and advises on underwriting or offer management arrangements.

Investigating accountant

The role of the investigating accountant is to prepare the materiality guidelines used to decide whether due diligence findings are material, to conduct financial and accounting due diligence, to assist with the preparation of the financial information disclosure in the prospectus and to provide a 'review' level assurance report (for inclusion in the prospectus) on the company's historical and forecast financial information for inclusion in the prospectus.

Public relations consultant

The role of the public relations consultant will be to liaise with media to ensure that media coverage relating to the company and the IPO is appropriately managed, subject to the strict Corporations Act requirements relating to pre-prospectus publicity (see section 12 for further information). A public relations consultant may also assist in managing shareholder communications in connection with the IPO.

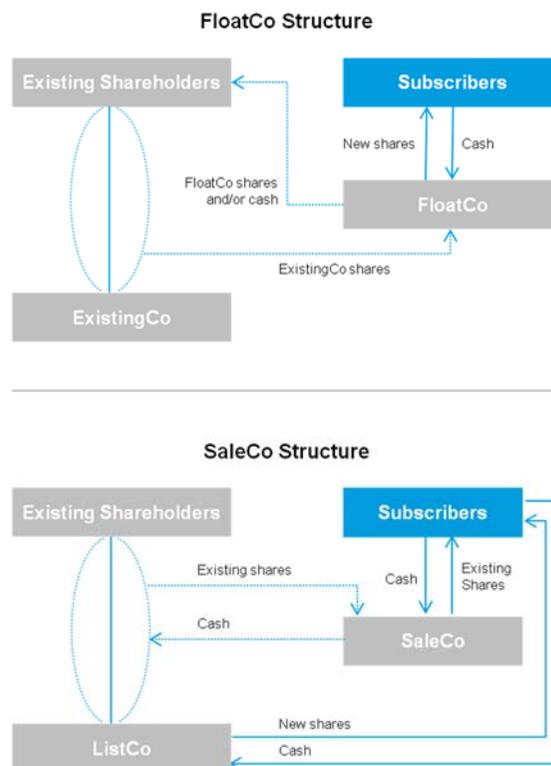
Other advisers

The company will also need to appoint tax advisers (note, this role can often be fulfilled by the company's lawyers or an investigating accountant) and may require experts to report on specific matters (eg. Independent Geologist for resources companies, Patent-Attorney for biotech companies etc).

Corporate structure

Corporate structuring considerations vary depending on the circumstances of each case. For example, depending on the facts and, for some matters, the accounting, tax and stamp duty implications, it may be necessary to:

- convert the company from a proprietary company to a public company (as proprietary companies are not permitted under the Corporations Act to raise monies under a prospectus) and adopt an ASX compliant constitution. The process of converting the company to a public company usually takes approximately 2 months;
- put in place a share split mechanism so that the capitalisation of the company to be listed is appropriate for an ASX-listed company;
- transfers of assets into or out of the group (if applicable);
- obtain member approval for particular matters; or
- particularly in the case of companies held by private equity investors, work through exit arrangements or unwind private company-appropriate capital structures (eg. preference shares, management interests etc).



Where the IPO involves a sell down by existing shareholders, consideration should also be given to whether a corporate structure which offers the sellers a measure of protection from the prospectus liability provisions (which are described in section 10). The most common structures used for this purpose are the 'FloatCo' (or 'top-hat') and 'SaleCo' (or 'sidecar') structures.

Broadly, the FloatCo structure involves, the incorporation of a new public company as the listing vehicle (ie. 'FloatCo'). FloatCo then offers its own shares to the public in the IPO and buys (using as consideration the IPO proceeds and, to the extent that existing shareholders are not selling down, Floatco shares) either the securities in, or business of, the company.

By comparison, the SaleCo structure interposes a special purpose company as the seller of existing shares. A new public company (ie. 'SaleCo') is incorporated and it makes arrangements with the existing shareholders to acquire from them, using IPO proceeds, the number of shares offered by SaleCo in the IPO. SaleCo then acquires the existing shares from existing shareholders immediately prior to completion of the IPO and transfers them on to successful applicants in the IPO.

The FloatCo and SaleCo structures often bring with them significant accounting, tax and stamp duty considerations – some negative and some positive. It is imperative to obtain detailed advice on these areas so that any pros and cons from these perspectives can be weighed against the liability shielding benefits of these structures.

Business plan and model

It is important that the company has a clear idea of where it is heading. It should have a business plan setting out its strategic objectives and course of action over the next three to five years. The listing should fit within a broader direction and growth strategy for the company that is reflected in its business plan. Having a sound business plan documented and in place will also assist in preparing the prospectus and, ultimately, in securing investor confidence.

In addition, the company should also ensure that it has collated sufficient data (eg. historical and projected financial statements (and the notes and assumptions relating to the same), planned sources of expenditure and revenue, a summary of projected costs associated with future business activities and a financial plan including sources and uses of funds to achieve business objectives etc) to ensure that the lead manager / underwriter or investigating accountant appointed to assist with the IPO is able to assist with generating a financial projections model for the company which will be used to determine a valuation for the company and market the IPO.

Collation of due diligence materials

To ensure that the IPO process progresses smoothly, we would recommend that the company establish an online data room which contains, for example, copies of all of the group's contractual arrangements with suppliers, customers, distributors etc, corporate governance materials (eg. board minutes, business plans, share registers, constitutions etc), leases, financing arrangements, employment agreements with key management personnel and historical financial information of the group, prior to commencing the IPO process.

While the data room may need to be supplemented with additional documentation throughout the due diligence process undertaken for the IPO (see section 6 for further information), establishing a data room early in the IPO process will ensure that advisers have access to the requisite information concerning the company and are able to commence their due diligence enquiries immediately upon being engaged by the company.

Financing

As mentioned above, if all or some part of company's existing finance facilities are to be retained post-IPO, their terms will need to be reviewed to ensure that the capital raising does not breach any prescribed change of control or similar banking covenants and that the facilities provide sufficient flexibility for the company following its listing on ASX. Alternatively, new or replacement finance facilities can be put in place with effect from listing, with existing facilities to be wholly or partially repaid from the IPO proceeds.

If existing finance facilities include the provision of bank guarantees that need to be retained post-IPO, then it would be preferable that any new or amended facilities incorporate these existing bank guarantee arrangements to avoid the need to have existing bank guarantees returned and/or replaced.

For ongoing facilities, two key areas of focus in terms of covenants will need to be whether there are restrictions on:

- payment of dividends;
- further share issues or changes in control.

Although it is not unusual for a listed company to resist the imposition of these types of covenants, it is common for financiers to impose some form of control or restriction on these events even for listed entities. Accordingly, care should be taken to craft these types of provisions appropriately to suit the company's requirements.

Ultimately, it should be ensured that any ongoing finance facilities are of a type, amount and term which provide adequate flexibility and diversity of funding for the company's operations.

The Board and corporate governance

The company will need to assess whether its Board is comprised of sufficiently experienced directors. Following this assessment, it may be appropriate to appoint additional directors to add independent oversight, further financial, operational and general business experience, and to make the company more attractive to potential investors.

Typically, the lead managers/underwriter appointed by the company to assist with the IPO will be able to provide suggestions as to an appropriate Board composition for the company. Board members are each usually paid annual fees of \$40,000 – \$50,000 (small/medium companies) or \$130,000 – \$200,000 (large companies). Additional fees may be paid for participating in the IPO process and for attending Board committee meetings (eg. audit and remuneration committee meetings etc).

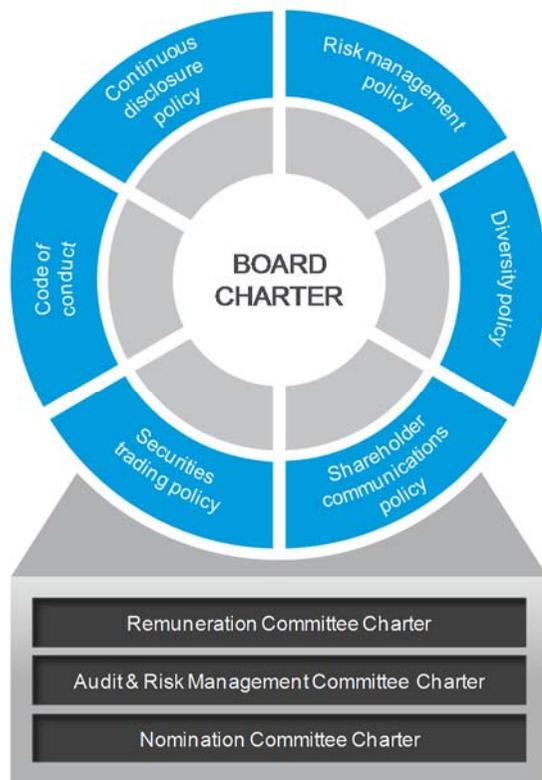
Given that any director who joins the Board before lodgement of the prospectus with ASIC will be liable for the prospectus (see section 10 for further information), we would recommend that any directors which are to be appointed to the Board are appointed early in the IPO process so that they can be taken through, and satisfied with, the due diligence process (see section 6 for further information).

The later in the IPO process that new directors join the Board, the greater the potential for the IPO to be delayed, as the new directors take time to inform themselves and receive advice regarding the company and the IPO process.

As noted previously, the ASX Corporate Governance Recommendations recommend that a majority of the directors of the company be independent. While the Recommendations are generally not mandatory, the ASX Listing Rules require that the company disclose the extent to which it has complied with the Recommendations at the time of admission to the official list of ASX and in each annual report. If the company has not complied with a Recommendation, it will be required to disclose the reasons why it has not complied with the particular Recommendation.

The Recommendations also cover other aspects of corporate governance such as risk, financial reporting, shareholder communications and remuneration. The company will also need to review its existing corporate governance arrangements for compliance with the Recommendations and it may be necessary to implement, new policies, procedures, charters and Board committees.

To ensure compliance with the Recommendations, the company will need to prepare and implement formal corporate governance policies and procedures as well as establish the following committees (an illustration of which is set out on the following page):



Management

As noted in section 3, undertaking an IPO is a labour intensive and time consuming process. Accordingly, it will be important to ensure that the company's management team are appropriately equipped to assist with the IPO and that sufficient resources are on hand to ensure that the running of the company's business is not impeded as a result of the IPO process.

While companies often hire specialist project management, internal financial or internal legal resources during the IPO preparation phase (to alleviate pressure on the management team) key management members (including the CEO and CFO) will still need to dedicate a significant amount of time to the due diligence process and enquiries, prospectus drafting and IPO marketing efforts (eg. the management roadshow).

Thought should be given to the individuals that will fulfil the role of CEO and CFO of the company, given that these individuals will be critical to the success of the IPO. The CEO and CFO should be intimately familiar with the company's business and financial model and will be required to 'market' the company at management roadshows to ensure sufficient investor interest is garnered for the IPO.

Finally, the management structure of the company should also be reviewed together with the company's incentive programs to ensure that they are appropriate for a listed company. In this respect, the company will need to consider (with the assistance of its lawyers):

- whether executive employment agreements for management and executive directors need to be amended to reflect that the company will be a publicly listed company (eg. restrictions are imposed on the ability of a public company to pay certain retirement/termination benefits in the absence of shareholder approval as well as a prohibition on the payment of a termination benefit to an officer of the company in the event of a change in control of the company);
- whether existing equity incentive plans need to be amended to ensure that they sufficiently incentivise management to deliver value for shareholders; and
- the structure of remuneration and equity incentives which are proposed to be provided to management given that the Corporations Act provides shareholders with the ability (after following the procedure set out in the Corporations Act known as the 'two strikes rule') to require the entire board of the company to stand for re-election if shareholders disagree with how much executives are being paid.

IPO insurance

The company should also consider taking out IPO insurance as D&O insurance policies do not usually cover IPO liability. Obtaining targeted IPO insurance will provide directors protection from potential IPO liability.

6 Due diligence enquiries

Understanding the phases of the due diligence program is key to a well organised IPO.

The Corporations Act requires that offers of securities in IPOs be made in a prospectus lodged with ASIC. The Corporations Act prospectus provisions set out content requirements for the prospectus (see sections 7 to 9 for further information) and contain the liability regime that applies where a prospectus is defective (see section 10 for further information).

In order to ensure that the IPO prospectus complies with the content requirements or, if the prospectus is defective, those with potential liability have legal defences, it is usual for companies to undertake a formal due diligence process. The process also helps to:

- ensure that the prospectus is not misleading or deceptive;
- identify legal impediments to the IPO (eg. the need for consent under a material contract) which can be dealt with prior to completion of the IPO; and
- enhance market comfort by establishing the reputation of the company and showing quality corporate governance.

Ultimately, the main purpose of the process is to minimise, and provide a defence against, the potential liability which may arise under Australian law for all those involved in the preparation of the prospectus.

Establishing a due diligence committee

A due diligence committee (**Committee**) will need to be established to manage and coordinate the due diligence process with a view to ensuring that the above objectives are met. The Committee will usually comprise representatives from the board and management of the company, any major selling security holder, the company's lawyers and tax advisers, the investment bank/stockbroker or underwriter of the IPO and the independent accountant. In some cases, other experts may also be members of the Committee.

Where a FloatCo or SaleCo structure is used, the existing shareholders (who are, in effect, selling down) would not usually be members of the Committee. Rather, their representatives may merely observe at Committee meetings.

The chairman of the Committee is usually a representative from the company's lawyers, and the secretary of the Committee is usually a representative from the company's lawyers. Other Board members, management and experts are entitled to attend Committee meetings as observers.

The Committee will hold regular formal meetings throughout the IPO process to ensure that the due diligence program is properly implemented and each member of the Committee will be required to contribute to the due diligence process in relation to their area of expertise.

Due diligence planning memorandum

A due diligence planning memorandum (**DDPM**) is usually prepared by the company's lawyers and governs the operation of the Committee. It describes the prospectus content and liability regime and sets out a process for the Committee to develop a due diligence program. The DDPM is usually drafted at the beginning of the IPO process but is not signed until just before the prospectus is lodged with ASIC. This reflects the fact that the DDPM is a 'living document' which guides the process but can change as circumstances change. The final DDPM will reflect the due diligence process that was undertaken.

The phases of the due diligence program

Phase 1 Scoping	<ul style="list-style-type: none"> Managing presentation Set materiality guidelines Approve areas and scopes of due diligence enquiries Approve form of reports, sign-offs and certificates
Phase 2 Enquiry and prospectus drafting	<ul style="list-style-type: none"> Due diligence enquiries undertaken Due diligence updates given and reports prepared DDC considers issues Prospectus drafted in conjunction
Phase 3 Verification and sign-offs	<ul style="list-style-type: none"> Verification of prospectus Expert and management sign-offs and reports DDC final report to the board(s)
Phase 4 Continuing due diligence	<ul style="list-style-type: none"> Continuing due diligence after prospectus release up until securities are issued Final DDC meeting – held after close of offer and before issue of securities

Phase 1 – scoping

Part of the Committee's role is to decide, having regard to the circumstances, upon the nature and scope of the due diligence enquiries to be undertaken for the IPO. The enquiries must be sufficient to ensure that the prospectus content requirements are met and to attract the defences to prospectus liability (such as the due diligence defence).

The scoping involves:

- identifying the areas in which due diligence will be undertaken (eg commercial, financial, legal and tax due diligence);
- identifying the persons who will undertake them (eg senior management, the investigating account, the lawyers and tax advisers) (**Reporting Persons**);
- settling the scopes of the enquiries to be undertaken by the Reporting Persons; and
- settling the forms or reports, sign-off and opinions to be delivered by the Reporting Persons (and by the Committee to the Board).

Senior management of the company will usually provide a presentation to the Committee at the start of the IPO process to bring the Committee up to speed on its business, competitive strengths and risks. This assists the Committee with its scoping tasks.

The Committee also decides, in the scoping phase, the materiality thresholds which are applied during the due diligence enquiries. The quantitative guidelines are usually 5–10% of a representative profit measure and 5–10% of a representative balance sheet measure. If a due diligence finding is below the quantitative guideline, it is usually disregarded unless it is material from a qualitative perspective. Qualitative guidelines deal with matters such as loss of reputation.

Phase 2 – enquiry and prospectus drafting

In this phase, the Reporting Persons undertake the due diligence enquiries in accordance with the scopes / work programs approved by the Committee. The Reporting Persons provide periodic updates to the Committee, as well as drafts of, and presentations summarising, their reports.

In particular, the Reporting Persons must draw to the attention of the Committee any matter identified in their due diligence enquiries which may potentially be material. The Committee then needs to make that call on whether the matter is sufficiently material to require disclosure in the prospectus, or whether some other action may be taken that renders the matter immaterial.

The due diligence enquiries are undertaken in parallel with the drafting of the prospectus. The decisions of the Committee in relation to disclosures of material matters are then fed into the prospectus.

Phase 3 – verification and sign off

Shortly before prospectus lodgement, a thorough and laborious line-by-verification process on the prospectus is undertaken (see section 7 for further information).

Following verification and immediately before the prospectus is lodged with ASIC, the Reporting Persons will be required to provide their final report, sign-offs and opinions to the Committee confirming the accuracy of the prospectus and that they are satisfied with the adequacy of the due diligence process undertaken for the IPO. These sign-offs are provided by advisers and management in relation to their respective areas of expertise. Following receipt of these sign-offs, the Committee will, in turn and in reliance on the adviser sign-offs, provide a sign-off to the Board confirming the accuracy of the prospectus and the adequacy of the due diligence process. The prospectus will then be signed by a director of the company and lodged with ASIC.

Phase 4 – continuing due diligence

Following lodgement of the prospectus with ASIC, the due diligence process should continue until the issue of securities to ensure that the Committee is made aware of any material new circumstances which may impact on the accuracy of the information in the prospectus.

Before the securities are issued, management and advisers will be required to provide updated sign offs to the Committee confirming the continuing accuracy of the information in the prospectus. The Committee will then provide an updated sign off to the Board following which the securities are issued.

7 Preparation of the prospectus

Key requirements associated with prospectus preparation and the circumstances in which a replacement /supplementary prospectus may be required.

If the company intends to offer securities to the public in connection with its IPO, it will ordinarily be required to prepare a prospectus. However, in certain circumstances where the company is not looking to raise capital at the time of seeking admission to the official list of ASX, ASX will instead permit the company to prepare an information memorandum, which can have marginally lower disclosure requirements and does not attract the statutory prospectus liability regime.

Content of the prospectus

The Corporations Act does not prescribe all matters that should be included in a prospectus. However, section 710 of the Corporations Act provides that a prospectus must contain:

'all information that investors and their professional advisers would reasonably require to make an informed assessment of the rights and liabilities attaching to the securities offered and the assets and liabilities, financial position and performance, profit and losses and prospects of the issuer'.

The prospectus must include this information if it is known to the offeror, its directors and proposed directors, the underwriter and advisers or if it could be reasonably found out by those people. This is why due diligence is conducted in relation to the prospectus.

The fact that certain information is confidential is a relevant consideration in what is reasonable for investors and their advisers to expect to see in the prospectus. However, the overriding rule is that if information is material to investors it cannot be omitted from the prospectus on the basis that it is confidential.

There is also certain prescribed information which must be included in a prospectus such as the terms and conditions of the offer, disclosure of certain payments made to directors and advisers in connection with the IPO, information about the ASX listing, lodgement of the prospectus with ASX and the expiry date for the prospectus.

A sample contents page for a prospectus is set out on the next column.¹

¹ Depending on the nature of the business there may be a requirement for additional expert reports (eg. a mining entity would need a JORC Report, a biotech company may need an Intellectual Property Report etc)

CONTENTS		Approx # of pages
Important information and Chairman's letter		
Provision of statutory information, disclaimers, key dates for the IPO, IPO statistics and Chairman's letter		
1.	Investment overview – Overview of the company, its business, financial information, purpose and use of funds, capital structure, dividend policy, risks associated with an investment in the company and the IPO	12
2.	Industry overview – Overview of the industry in which the company operates	9
3.	The company's business – Description of the company's business and business model	20
4.	Financial information – The past financial performance, forecast and pro-forma financial information of the company as prepared by the directors	20
5.	Risk factors – The main risk factors which apply to the company's business and an investment in the company's securities	10
6.	Board, management and corporate governance – Overview of the directors and senior management of the company, directors and managements interests and benefits and the company's approach to corporate governance	11
7.	Details of the offer – Structure of the IPO and how to apply for securities under the IPO	9
8.	Investigating Accountant's Report – Investigating Accountant's Report on the historical and forecast financial information of the company	9
10.	Additional information – Summary of material contracts and additional information about the company, its securities and the interests of various parties such as professional advisers	10
11.	Glossary Definitions of words, terms and abbreviations used in the prospectus	3
Corporate directory		1

In addition to containing the prescribed content, the Corporations Act also requires that the prospectus be worded and presented in a 'clear, concise and effective' manner so that investors (in particular, retail investors) can understand the potential opportunities and risks associated with an investment in the company's securities.

ASIC has released a regulatory guide (ASIC Regulatory Guide 228) regarding its expectations for the content of prospectuses and compliance with the requirements of the Corporations Act including the 'clear, concise and effective' requirement. The guide also sets out ASIC's view of what information investors expect to see in a prospectus and requires that prospectuses include an effective investment overview section which highlights key information at the beginning of the prospectus. ASIC Regulatory Guide 228 also requires, among other things, that the prospectus clearly explain:

- the company's business model (ie, how the company proposes to make money and generate income or capital growth for investors (or otherwise achieve the company's objectives)). Key dependencies will also need to be explained (eg. factors that the company will rely on in order to make money or achieve its objectives); and
- the key risks to the company's ability to make money or generate income or otherwise meet its objectives (eg. the risks inherent to the company's business model) as well as the key risks associated with the IPO and the company's securities.

Other marketing materials, such as roadshow presentations, are typically drafted at the same time as the prospectus. These materials fall outside of the prospectus content and liability regime. So, while they are not subject to the stringent content requirements, the offeror and its directors are subject to (other types) of liability but do not benefit from the prospectus defences. We typically advise companies to ensure that the information included in the other marketing materials is consistent with the prospectus disclosure. This ensures the information in those materials has been subjected to due diligence enquiries and verification (as to which, see below).

Verification

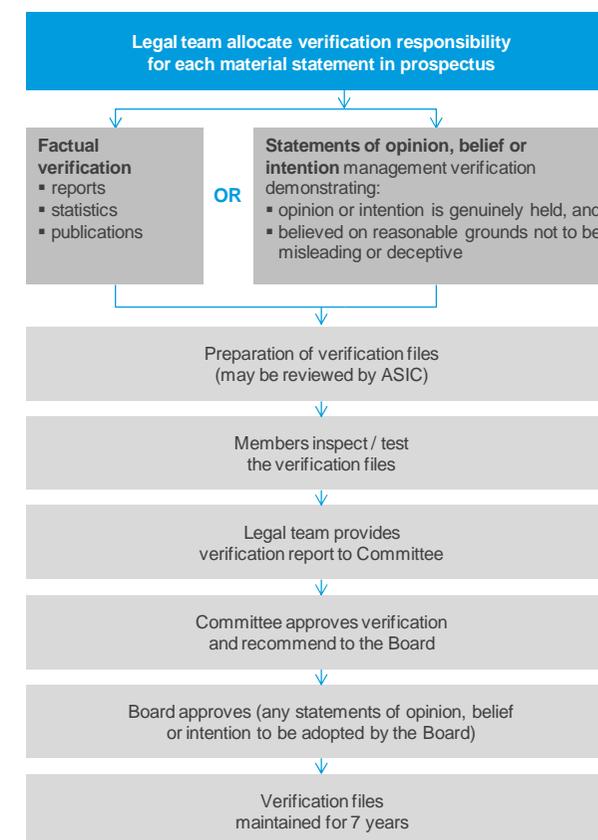
ASIC does not review prospectuses prior to lodgement and launch of the IPO. Accordingly, the onus is on directors, underwriters and others involved with the issue of the prospectus to ensure that it complies with the requirements of the Corporations Act. Substantial penalties can apply in the event that the prospectus contains misleading information or omits material information.

As a result, a key part of the due diligence process will be to undertake a verification exercise to seek to ensure that:

- all statements of fact in the prospectus can be verified or substantiated;
- all statements of opinion and intention are made on a reasonable basis and are genuinely held; and
- having made all enquires (if any) that are reasonable in the circumstances, all statements are believed on reasonable grounds not to be misleading or deceptive and that there have been no omissions from the prospectus.

The verification process is usually coordinated by the company's lawyers and involves each material statement in a substantially final form of the prospectus being referenced back to a verifying source document to ensure its accuracy. Where there are statements of opinion, forecasts or expectations on, for example, future performance, growth or development of the business, the verification process will need to investigate the reasonableness of the assumptions on which these views are based.

A typical verification process is shown below:



As noted above, the authors of material statements in the prospectus verify the accuracy of their statements either by a source document or a verification certificate signed by them. Folders containing evidence of verification should be kept as ASIC may review the verification process as part of a random ASIC post vet.

Pathfinder

A pathfinder prospectus is a near final version of the prospectus which is used to allow certain institutional investors to consider the company and the IPO prior to the lodgement of the prospectus with ASIC. Potential liabilities differ in relation to the use of a 'pathfinder prospectus' (and it should be noted that the statutory due diligence defences which may be available to offers made under the prospectus will not apply to the pathfinder (see section 10)). Further, the specific content and presentation requirements for a prospectus do not apply to a pathfinder. However, it is generally the case that a pathfinder and the prospectus contain virtually identical information (other than that the prospectus will contain a final offer price for the securities).

Lodgement

The company must lodge a copy of its prospectus with ASIC as well as lodge its application for admission to the official list of ASX with ASX within seven days of lodging its prospectus with ASIC. The maximum life of a prospectus is 13 months.

ASIC exposure period

ASIC will not review a prospectus before it is lodged. However, ASIC is prepared (on a non binding basis) to discuss how certain complex or unique issues should be dealt with in the prospectus.

Following lodgement, the prospectus is subject to an exposure period to allow any concerns about the prospectus to be raised by the market. During the exposure period, the company may receive (but must not process) applications and the prospectus must be made generally available on an internet site. The initial exposure period is seven clear days. ASIC may extend the exposure period for a further seven days if it is concerned that there is a defect in the prospectus which is not resolved in the first seven days.

Supplementary or replacement prospectuses

If there is a significant change affecting any matter contained in the prospectus, or a significant new matter arises after lodgement of the prospectus with ASIC which renders the information provided in the prospectus being false, misleading or deceptive or a new circumstance arises which would have been required to be disclosed in the prospectus if it had been in existence at the date of the prospectus, this will need to be disclosed by way of a supplementary or replacement prospectus if the new information is materially adverse from the point of view of an investor.

If supplementary disclosure is needed, the company will need to prepare a supplementary prospectus (which amends part of the original prospectus) or a replacement prospectus (which replaces the original prospectus in its entirety) and lodge this document with ASIC. Offers made after lodgement of a supplementary prospectus must be accompanied by copies of both the original prospectus and the supplementary prospectus. Offers made after lodgement of a replacement prospectus must be accompanied by the replacement prospectus.

Right of refund

If the prospectus deficiency is materially adverse to an investor, the company must either repay application moneys or give investors a one month period during which they can choose to be repaid their application moneys.

8 Prospectus drafting tips

Ensuring the drafting process progresses smoothly requires consideration of each of the following factors.

Who will 'hold the pen'?

At the start of the IPO process, the company should ascertain who will have primary responsibility for coordinating drafting of the prospectus. This is usually the underwriter/lead manager, who will prepare the prospectus in conjunction with the company.

Do not inadvertently include a forecast

Any forward looking number included in a prospectus will be treated by ASIC as a forecast and will be subject to the forecast requirements set out below in section 9. Accordingly, when preparing the prospectus care should be taken not to inadvertently include a forecast.

Information reasonably required

The content requirements for a prospectus are set out in section 7. To ensure the prospectus meets ASIC's expectations we generally suggest that you look at prospectuses prepared by other companies (particularly companies in the same or a similar industry to the company), to understand what information meets this test and what ASIC's disclosure expectations are.

ASIC concerns

When writing the prospectus you should have regard to areas likely to be of particular concern to ASIC (see section 11 for further information). ASIC will often discuss their current views on such matters before prospectus lodgement.

Ensure the prospectus can be verified

As noted in section 7 above, the company will need to ensure that each material statement in the prospectus is verifiable and start collecting verification materials during the early stages of the prospectus drafting process.

Incorporation by reference

To reduce the length of the prospectus, the company may incorporate information by reference, the company will need to include a reference in the prospectus to a separate document which contains the information. Where the information is primarily of interest to professional investors, the prospectus must state this and provide a description of the content of the incorporated document. In all other cases, the prospectus must provide sufficient information to allow investors to decide whether to obtain a copy of the document. The incorporated document must be lodged with ASIC and investors must be given a free copy on request.

Disclose events which are likely to occur during offer period

If an event is likely to happen during the offer period for the IPO, the company should consider including a section in the prospectus that deals with the possibility of that event occurring and its consequences. This may prevent the need of a supplementary or replacement prospectus if the event occurs during the IPO offer period.

The only changes that can be made to a prospectus once it has been lodged with ASIC and before printing are to correct trivial errors (eg. typographical errors) which do not change the meaning of the prospectus.

Third party consents

Consent must be obtained from a third party if a statement is included in the prospectus which is said to be made by that party. There are limited exceptions to this requirement which relate to statements of official persons (ie. government officials), statements in a public official document (ie. government publications), statements in books and journals, statements by credit ratings agencies and statements available on the internet. Even if not required by law, we would recommend that the consent of all third parties referred to in the prospectus are obtained to avoid disputes about ownership of that statement or breaches of confidentiality. Given the time which it can take to obtain third party consents, we recommend that the process for obtaining consents is commenced as early as possible in the IPO process.

9 Forecasts

ASIC treats any forward looking number in a prospectus as a forecast subject to the forecast requirements below. ASIC's policy and views on forecasts are set out in ASIC Regulatory Guide 170.

When should you include forecast information in a prospectus?

Forecasts should only be included in a prospectus where there are reasonable grounds for doing so. Forecasts based on hypothetical assumptions, rather than reasonable grounds, are likely to be misleading and trigger queries from ASIC.

Having reasonable grounds for a statement means that there must be a sufficient objective foundation for the statement. There are several factors that may amount to reasonable grounds, such as where the information relates to forward-sales contracts or leases, the information is underpinned by independent industry experts' reports or independent accountants' reports or the information includes reasonable short term estimates.

Forecast time period

In the absence of contrary evidence, a forecast which extends beyond a two year period may not have a reasonable basis. As a result, forecasts in prospectuses are typically for periods of between 6 and 18 months.

Forecast preparation requirements

The prospectus must contain sufficient information to enable investors to assess whether the forecast is relevant and reliable and should clearly identify the facts, circumstances and assumptions that are used to prepare and support the forecast. Forecasts should be supported by:

- full details of the underlying assumptions used to prepare the forecast which must be based on reasonable grounds;
- the forecast period and any specific considerations that affect that time period (such as cyclical or seasonal factors that may mislead investors as to how representative that forecast period is);
- an independent expert's sign off on the reasonableness of the forecast and the forecast assumptions;
- an explanation of how the forecasts were calculated and the reason for any departure from accepted accounting standards;
- a discussion of the risk that the forecast will not be achieved (eg. a clear warning that forecasts are predictive in nature and actual results may differ); and
- a sensitivity analysis showing how changes in material assumptions used in preparing the forecast are likely to affect the forecast outcome.

Disclosing forecast assumptions

The forecast assumptions must contain sufficient information to allow investors to assess:

- the validity of the assumptions on which the forecast is based;
- the likelihood of the assumptions being met; and
- the effect on the forecast if the assumptions vary.

The forecast and associated materials (eg. assumptions, sensitivity analysis and forecast risks) must be located together and be given equal prominence in the prospectus.

10 Potential liabilities for the prospectus

When is a prospectus defective, who is exposed to liability for the defect, to what extent and what defences are available?

Liability for the prospectus

A person may be subject to civil and criminal liability under the Corporations Act in relation to an IPO if:

- the prospectus contains a false, misleading or deceptive statement or omits information which is required to be included under the Corporations Act; or
- after the prospectus was lodged, a new circumstance has arisen which would have been required to be disclosed in the prospectus if it had arisen before the prospectus was lodged, and an amended supplementary or replacement prospectus has not been issued.

In addition, the company, its directors or a person responsible for statements in the prospectus may be liable at common law for a fraudulent or negligent misrepresentation in the prospectus.

Who may be liable?

A number of parties involved in the preparation of the prospectus may be subject to criminal and civil liability including (amongst others) the offeror of securities (being the company and/or any selling shareholder), directors and proposed directors, underwriters and persons who are involved in the contravention of the Corporations Act.

Ambit of liability

A person who contravenes or is involved in a contravention of the Corporations Act may be subject to both criminal and civil liability. The extent of the potential liability will differ depending on the person involved. In particular, in the event that the prospectus is defective the company, any selling shareholder, their respective directors and any underwriter will bear responsibility for the entire prospectus and will potentially be liable for any loss or damage suffered.

Other avenues of potential liability

In addition to the specific liability set out above, liability may also arise for other actions taken or statements made in connection with an IPO. For example, a person could potentially contravene the Corporations Act by making a false, misleading or deceptive statement during marketing activities undertaken as part of the IPO or by breaching the pre-prospectus advertising restrictions (see section 12 for further information). Accordingly, directors and management should be very careful about any statements they make about the company or the IPO during the IPO process.

Defences to liability

There are a number of defences available to potential civil and criminal liability, some of which include that an appropriate due diligence process was undertaken (which requires reasonable enquiries and a reasonable belief that the relevant statement was not defective), reasonable reliance on others defence (which requires reasonable reliance on a third party such as an adviser), withdrawal of consent (which requires the public withdrawal of consent to be named in the prospectus) and unawareness of a new matter (which applies where the new matter has arisen since the prospectus was lodged).

11 Dealing with ASIC and ASX

Matters to consider when dealing with the regulators and other ancillary matters.

ASIC

ASIC regulates the offer of securities by companies in Australia and certain associated matters such as insider trading, market misconduct and pre-prospectus advertising (see section 12 for further information).

Applications for relief

If relief is required from the Corporations Act in connection with the IPO, the company will need to apply to ASIC for modifications of the law (eg. to allow the company to inform its employees of the IPO despite the pre-prospectus publicity restrictions (see section 12 for further information)). These applications are made in a submission to ASIC and typically take two to four weeks to process the application and grant the requested relief.

Review of prospectus

ASIC generally does not pre-vet prospectuses. However, MinterEllison has excellent relationships with senior staff in ASIC's Corporate Finance division and, based on recent experience, they are willing to discuss potentially contentious individual disclosure issues ahead of the lodgement of the prospectus. We would recommend this, as it can sometimes lead to a more expansive discussion with ASIC which assists with prospectus drafting and the avoidance of regulatory scrutiny. However, it is important to bear in mind that while ASIC may be prepared to give its indicative view on the issue, ASIC will not be bound by it and ASIC may raise additional concerns during the seven day 'exposure' period (**Exposure Period**).

In reviewing the prospectus during the Exposure Period, ASIC typically focuses on:

- ensuring that there is balanced disclosure throughout the prospectus (eg. benefits and risks are balanced – ASIC usually requires that the risks are dealt with, at least in summary, early on in the prospectus and given the same prominence as the benefits of the investment);
- forecasts and reasonableness of underlying assumptions;
- whether complex issues have been clearly explained and information has been organised in a clear and logical way;
- the length of the prospectus and whether it is clear, concise and effective;
- the implications of certain accounting treatments (especially if they lead to unusual consequences);
- inconsistencies between different parts of the prospectus; and
- clear presentation and labelling of diagrams.

Acceptance of applications

Companies are prohibited from accepting applications under an IPO until the expiry of the Exposure Period during which time market participants and ASIC have an opportunity to scrutinise the prospectus.

Stop orders

If ASIC considers that the prospectus is defective (eg. if it contains a false, misleading or deceptive statement or omits material information, it can issue a stop order to prevent the company from offering, issuing or selling securities under the prospectus while the order is in force. ASIC may also require the company to issue a supplementary prospectus or replacement prospectus to address the deficiency in the original document.

Post-vetting

ASIC may post-vet a prospectus. This occurs where ASIC randomly picks a company after the securities have been issued and requests copies of the IPO related materials such as prospectus drafts, due diligence materials and verification materials. This is one reason why it is important to have well ordered folders containing these materials.

ASX

ASX Limited regulates the admission of companies to trading on the official list of ASX and governs the conduct of listed companies. ASX's primary focus is on compliance with the ASX Listing Rules and satisfaction of the ASX admission requirements, rather than prospectus content.

Initial approach

We strongly recommend that a company has an initial discussion with ASX early in the IPO process to discuss with them the features of the proposed IPO, any novel and complex issues relating to ASX Listing Rule requirements and the IPO timetable. This will ensure that any issues are identified and resolved at an early stage.

Initial discussions are usually followed by a submission to ASX dealing with matters such as:

- compliance with the relevant admission test (assets or profit test);
- any required listing rule waivers or confirmations (eg. confirmation of escrow terms, confirmation that the company's constitution is compliant with the ASX Listing Rules etc);
- the form of accounts which need to be provided to ASX to meet the admission requirements;
- whether the IPO timetable is acceptable to ASX;
- any securities trading formalities (eg. if the company will have conditional and deferred settlement trading);
- the company's ASX code on listing; and
- any ASX related matters which are required to be dealt with in the prospectus.

ASX will grant listing approval subject to standard pre-quotation conditions (eg. the close of the IPO, the issue of securities, satisfaction of the spread requirements and the provision of certain information to ASX when the offer closes) and any other specific conditions sought by ASX.

Application for admission

The formal application to ASX for admission to its official list is required to be made within seven days of lodgement of the prospectus with ASIC. However, entities typically lodge a copy of the prospectus and listing application with ASX at the same time the prospectus is lodged with ASIC.

In certain circumstances, ASX may agree to 'fast track' the company's listing application (see section 4 for further information).

ASX listing fees

ASX listing fees are based on the market capitalisation of the entity. The current initial listing fees payable by the company are set out below:

Initial listing fees

Value of securities for which quotation is sought	Fee (payable on application for admission to ASX)
Up to A\$3 million	A\$30,000
A\$3,000,001 – A\$10 million	A\$30,000 + 0.5% on excess over A\$3 million
A\$10,000,001 – A\$50 million	A\$65,000 + 0.10000001% on excess over A\$10 million
A\$50,000,001 – A\$100 million	A\$105,000 + 0.06% on excess over \$50 million
A\$100,000,001 – A\$500 million	A\$135,000 + 0.04% on excess over A\$100 million
A\$500,000,001 – A\$1,000 million	A\$295,000 + 0.036% on excess over A\$500 million
Over A\$1,000 million	A\$475,000 + 0.03% on excess over \$1,000 million

Continuing obligations

Once listed, the company is required to comply with the ASX Listing Rules which prescribe certain reporting obligations and shareholder approval requirements as further described in section 14 below.

12 Offer structure and marketing

The considerations to be borne in mind when structuring and marketing the offer are set out below.

Offer structure

Overview

The term 'offer structure' is a general term for the features of the IPO and it can be used to refer to any one or more of the following aspects of the IPO:

- the persons to whom the offer is made and the manner in which it is made to them;
- the duration of the offer period;
- the way in which the price is set;
- whether there is a 'greenshoe' or 'over-allotment' option; and
- the persons who are making the offer (that is, is there a sell down and/or is the company being listed also issues securities to raise funds for itself).

As part of the IPO process, the company will need to decide on the nature of securities to offer (eg. shares, options, convertible notes or a combination), whether it will offer new securities, existing securities or both, the extent to which the interests of existing security holders will be diluted, the amount which will be raised and the company's preferred shareholder base (usually 50–60% institutions, 30–40% retail investors and 5–10% employees and 'friends' of the business).

The company will also need to consider how the offer of securities in its IPO should be structured. The structure will depend on the company's ultimate aims. For example, the company should consider whether it needs to raise a specific amount of capital or whether it needs to facilitate the exit of existing shareholders.

Components of the IPO – persons to whom the offer is made

An IPO can comprise offers to different types of investors (whether under an offer for subscription or sale), including one or more of the following:

THE OFFER

Institutional offer

An offer to invited sophisticated or professional investors

Retail offer – Broker firm offer

An offer to certain clients of brokers granted allocations of securities

Retail offer – Priority offer

An offer available to certain persons on a priority basis (eg. a chairman's list or an offer to employees or holders of securities in the company or a related company)

Retail offer – General public offer

An offer to the public generally

Retail offer – Employee offer

An offer to certain selected employees of the company

Following lodgement of the prospectus with ASIC and expiry of the Exposure Period, the offer will open and applications can be accepted by the company.

Pricing of the IPO

The underwriter/lead manager managing the IPO will provide advice on the appropriate pricing structure. Bookbuilds are commonly used, especially on medium to large-size floats, primarily to maximise the issue price in light of the proposed size of the IPO. A bookbuild is essentially a process by which an investment bank will build a book of demand for securities in the company. Investors submit bids to the bank specifying the price at which they would acquire securities and when the book has closed, the investment bank will evaluate the collected bids and set the final issue price. Bookbuilds can either be used at the beginning of the offer period (typically before lodging the prospectus with ASIC) to determine a fixed price, which will then be specified in the prospectus, or a price range can be specified in the prospectus, with the final price determined by way of an institutional bookbuild at the end of the offer period.

Greenshoe

A 'greenshoe' or over-allotment option is sometimes used as a stabilising mechanism to protect the security price against excessive volatility immediately post-IPO. Generally, under a greenshoe mechanism, a pool of securities is retained either by the lead manager/underwriter or the selling security holder to sell into the post-listing market to protect against undue price pressure caused by excess demand. On the other hand, if the security price falls below the issue price, the lead manager/underwriter or selling security holder will boost the price by buying securities on market at the issue price.

An ASIC 'no action' letter is typically obtained if a greenshoe is to be used.

Proceeds of issue

All funds raised under the IPO must be held in a separate trust account. The company may not use them until the securities have been issued and allotted.

Issue and commencement of trading

Once the offer is closed, the company will decide, in conjunction with the investment bank managing the process, on the allocation of securities and then, once issued, trading in the securities on ASX can commence once all of ASX's conditions to quotation are satisfied.

Publicity restrictions

Pre-prospectus publicity

Prior to and during the offer period, the company will wish to market the IPO to ensure that there is a good take up of its securities and that the best possible listing price is obtained. However, the Corporations Act imposes strict restrictions on advertising an IPO before the prospectus is lodged with ASIC.

Subject to certain exceptions, the company will be prohibited from advertising the IPO before the prospectus is lodged with ASIC. This prohibition is intended to stop the public applying for securities without first reading the prospectus. Accordingly, prior to lodgement of the prospectus with ASIC, the company will only be able to advertise the IPO by a tombstone advertisement which identifies the offeror and the securities and advises investors that the prospectus will be made available when the securities are offered and that anyone wanting to acquire the securities will need to complete the application form in, or accompanying, the prospectus. Nothing more can be said other than an optional additional sentence on how to receive a copy of the prospectus.

Post-prospectus publicity

There is more flexibility in terms of advertising the IPO once the prospectus has been lodged with ASIC. However, the advertising must not be false, misleading or deceptive (including by omission) and must be consistent with the disclosures made in the prospectus. The advertisement must also include a statement that the securities are offered under the prospectus and that applicants must read the prospectus before applying for securities and must complete the application form in, or accompanying, the prospectus in order to apply for securities in the company.

Exceptions to the prospectus publicity restrictions

The exceptions to the prospectus publicity restrictions are:

- notices or reports of general meeting;
- reports about the company which do not contain information that materially affects the business and do not refer to the IPO;
- genuine media reports or commentary about either of the above, or about a prospectus which has already been lodged with ASIC;
- distribution of 'pathfinder' prospectus to professional or sophisticated investors to assess market interest in the IPO;
- roadshow presentations to AFSL holders or professional or sophisticated investors;
- market research which complies with ASIC requirements and is designed to assist in marketing the IPO; and
- obtaining relief from ASIC to permit a prospectus pre-registration campaign (where people who pre-register for a prospectus receive a benefit such as a guaranteed allocation of securities).

Image advertising

The image advertising restrictions in the Corporations Act will not prohibit the company from continuing its normal business advertising provided that such advertising relates only to the company's business (and not the IPO).

Roadshows

An IPO is generally marketed for a period of between one to two weeks before the prospectus is lodged with ASIC to ensure there is sufficient demand for the IPO. This process is called the roadshow. The underwriter/lead manager will need a near final prospectus prior to undertaking a roadshow and will usually sign the underwriting agreement/offer management agreement and agree to lodgement of the prospectus with ASIC following a successful roadshow. A roadshow is an exemption to the prospectus publicity restriction.

Responding to queries regarding the IPO

Before the IPO, management may be asked about the proposed IPO by employees, business associates and the public. As ASIC monitors compliance with the advertising restrictions set out above and has sent 'please explain' letters to companies which appear not to have complied with these restrictions, it is important that management are aware of what they can and cannot say in the period prior to lodgement of the prospectus with ASIC.

While the company may apply to ASIC for relief to allow it to talk to employees about the proposed IPO, for other third party enquiries, it is preferable to say 'no comment' or to explain that the law does not allow the company to discuss the proposed IPO.

13 Escrow

Mandatory escrow arrangements are those which are imposed by ASX.
Voluntary escrow arrangements are imposed by the lead manager/underwriter.

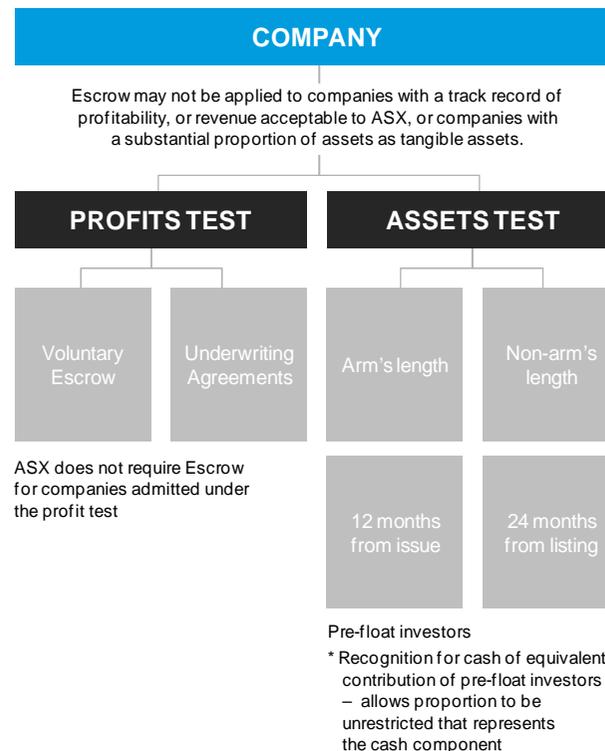
Mandatory escrow

ASX imposed escrow will apply if the company does not meet the profit test or does not have a revenue history, profit history or level of tangible assets acceptable to ASX. ASX imposed escrow is designed to prevent the founding security holders unfairly profiting (at the expense of new security holders) by selling their securities shortly after the IPO before the company has established a track record of profitable operations.

The type of ASX imposed escrow which will apply will depend on the type of security holder (eg. whether the security holder is a seed capitalist (there is an exception for genuine venture capitalists), a vendor of assets or a consultant to the company). Depending on the type of security holder and the circumstances in which they acquired their securities, the escrow period is either 12 or 24 months beginning either from the date they acquired their securities or the date on which the company's securities are quoted on ASX.

The proportion of securities which will be escrowed will depend on the circumstances in which the securities were acquired and/or the price paid for them compared to the price for securities issued under the IPO. As a rule of thumb, the lower the price paid by the security holder, the greater the number of securities escrowed.

An illustrative example of the ASX imposed escrow framework is set out below:



Voluntary escrow

The lead manager/underwriter may want to escrow the securities of the company's major security holders as this will often make it easier to market the IPO as investors will have confidence that major security holders will not sell down their security holdings, depressing the security price, immediately after the IPO. Voluntary escrow is typically to the end of the forecast period which has been included in the prospectus.

Exceptions to escrow

Both voluntary and mandatory escrow arrangements will customarily contain an exception from the restriction from dealing in securities to permit the holder of the escrowed securities to:

- accept a bona fide takeover bid for all the securities of the company;
- agree to the transfer or cancellation of their securities as part of a scheme of arrangement relating to the company under section 411 of the Corporations Act; and
- transfer their escrowed securities to an immediate family member or other related parties of the security holder.

Disclosure

The number of securities subject to escrow and the period for which such securities are escrowed is required to be disclosed in the company's prospectus.

14 Obligations for listed companies

Once trading of the company's securities commences on ASX, the company will need to comply with the detailed continuing obligations in the ASX Listing Rules. Key obligations are described below.

Continuous disclosure	<p>The company must notify ASX immediately of any information concerning it that a reasonable person would expect to have a material effect on the price or value of its securities. Exceptions to this rule include information relating to confidential negotiations on an incomplete proposal and for information produced for internal management purposes (such as financial projections).</p> <p>In addition, there are specific disclosure requirements for matters such as changes to directors' interests, security issues, notifications of AGM dates, changes of officers and auditors, dividends, release of securities from escrow, lodgement of a disclosure document with ASIC, prepared addresses delivered at a general meeting and results of voting at meetings etc.</p>
Financial reporting	<p>ASX requires listed companies to publish prescribed financial reports on an annual, half-yearly and, in some cases, quarterly basis, generally within 60 days of the relevant reporting period (this is a much shorter period than applies under the Corporations Act).</p>
Re-election of directors	<p>Each director of a listed company (other than a managing director) must stand for re-election every three years.</p>
Limitations on securities issues	<p>Listed companies are generally limited to issuing new securities equal to no more than 15% of their issued capital (or 25% for SMEs) over a rolling 12 month period, unless shareholder approval is obtained or one of a number of specified exceptions apply.</p>
Transactions with related parties	<p>The ASX Listing Rules prescribe shareholder approval requirements for certain transactions between a company and its directors and other related parties.</p>
Significant transactions	<p>Shareholder approval requirements are prescribed for certain major acquisitions and disposals.</p>
Corporate governance	<p>ASX publishes best practice recommendations for the corporate governance of listed companies. There are only a small number of binding corporate governance requirements while the majority of these guidelines are not mandatory. Instead, ASX applies an 'if not, why not' approach, requiring companies to explain in their annual report why they have not complied with any of the best practice recommendations.</p>

AGMs

The AGM is the company's main opportunity to interact with its security holders. There are a number of formal requirements for an AGM, including laying the financial, directors' and auditor's reports before the meeting, giving members an opportunity to ask questions of management and the auditor, electing directors and considering the remuneration report. The AGM also usually includes a report from the chair and/or CEO on the company's business activities over the previous year and its expectations for the future.

Trading windows

The insider trading provisions of the Corporations Act prohibit a person from dealing in the company's securities if they are in possession of materially price sensitive information which has not been made generally available to the market. Accordingly, the company will need to put in place procedures to limit the distribution of such information as well as set out the times during which staff, management and directors can trade in the company's securities. The allowed trading windows are usually after the release of half year and full year results and after the AGM.

Investor, media and analyst contact

Following listing, the company will need to liaise with its security holders, the media and analysts. This is an important task, as it assists in creating a market for the company's securities, however, it usually requires a significant commitment from the company's managing director. Accordingly, we often find that many companies will appoint a specialist investor relations manager to assist with managing this. The company should bear in mind that once listed it will be subject to continuous disclosure requirements and must be careful not to selectively disclose to any person (including to the media, the public or an analyst) any information which ought to be disclosed to ASX first.

Special requirements for foreign companies listed on ASX

Generally, unless a foreign company has a foreign exempt listing, overseas companies are required to comply with the same continuing obligations as Australian companies. However, in certain circumstances, ASX will impose additional disclosure requirements, or may waive certain ASX Listing Rules, for foreign companies. For example:

- As the Australian takeover and substantial shareholder provisions do not apply to companies incorporated outside Australia, ASX requires a statement of that fact to be included in each annual report and requires an undertaking from the company to immediately inform the market on becoming aware of any person becoming or ceasing to be a 'substantial shareholder' (as defined in the Corporations Act) or a movement of at least 1% in the number of securities in which a 'substantial shareholder' has an interest.
- ASX may permit foreign companies to report in the currency of their home jurisdiction and under the recognised accounting policies of that jurisdiction and will in certain circumstances waive its financial reporting requirements where it considers that the equivalent requirements of the company's primary exchange are sufficiently stringent to keep the market informed.

15 How to ensure a successful IPO

To ensure a successful IPO we would recommend that a company take the following steps in advance of the IPO.



Consider whether an IPO is the right option as well as whether ASX is the most appropriate securities exchange.

Start preparations early and view the IPO as a continuing process, not a one-off financial event – lack of planning can diminish the company's chances of obtaining an optimal valuation on listing.

Have in place a solid business plan and credible investment story showing an achievable plan for growth in the medium term which will form the basis for the prospectus.

Appoint an experienced IPO team early in the process including investment bankers/underwriters, lawyers, accountants and a share registry who can lead the company through the process efficiently and minimise disruption to the business during the IPO process.

Start acting as a public company before listing, for example:

Ensure robust financial, operating and information systems are in place.

Establish corporate governance arrangements appropriate for a listed company are in place.

Ensure that the company has a strong management team including in particular the CEO and CFO who will be the key focus of institutional investors during marketing of the IPO.

Ensure there is appropriate expertise and independence on the Board.

Appoint an investor relations consultant to ensure that the right messages are reaching the market both before, during and after the IPO.

Consider whether appropriate incentive plans are in place for executives to ensure that they are appropriately incentivised to grow the business after listing.

Be realistic – it is important to understand the amount of time and work involved in preparing for an IPO to obtain the real benefits of a listing.

16 Key contacts

Below are the key Equity Capital Markets team contacts in Australia. In addition, this team is supported by lawyers throughout the region in our international network in New Zealand, Hong Kong, the People's Republic of China, Mongolia and London.

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How can MinterEllison assist in the IPO process?

With its presence in Australasia, Hong Kong, and London, MinterEllison's Equity Capital Markets team is at the forefront of the capital markets in the Asia Pacific and globally. The team is well respected, having been involved in innovative and cutting-edge transactions, acting both for issuers and exiting shareholders on listings and capital raisings to support their growth and strategy, as well as acting for underwriters and lead managers on underwritings and offer structuring.

The team has advised on some of the largest and most complex transactions in Australasia, with MinterEllison's IPO experience and expertise including listings on ASX, NZX, LSE and AIM (including dual listings and mutual recognition offerings), as well as Australian law aspects of listings of Australian entities on a variety of global exchanges.

We understand the challenges that businesses operating in a globalised marketplace face, and offer clients services that are multi-disciplinary and industry facing, with our lawyers working across industry sectors, specialist legal areas and offices to add value. Through our international network of offices, and strong relationships with top tier counterparts in other jurisdictions, we offer in-depth knowledge of how business is conducted globally, local language skills (including Mandarin), and a proven track record for delivering outstanding work. This means that clients have access to local experience and expertise that is informed by an international perspective.

MinterEllison can assist companies through the entire IPO process including:

- Evaluating the company's corporate and capital structure.
- Effecting any required pre-IPO reorganisation.
- Advising on the offer structure to be adopted for the IPO.
- Advising the company and its directors on all legal aspects of the IPO, including the prospectus content and liability regime and the practical steps which can be taken to minimise the risk.
- Advising on the due diligence process and undertaking legal due diligence investigations.
- Assisting in the drafting and verification of the legal sections of the prospectus and reviewing other marketing materials.
- Advising on the terms of any underwriting/offer management agreement and associated investor commitment documentation.
- Preparing the ASX listing application.
- Advising on tax issues.
- Advising on corporate governance issues and board structures.
- Liaising with regulators involved in the IPO process.

Our international network of offices





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