

# A&O SHEARMAN



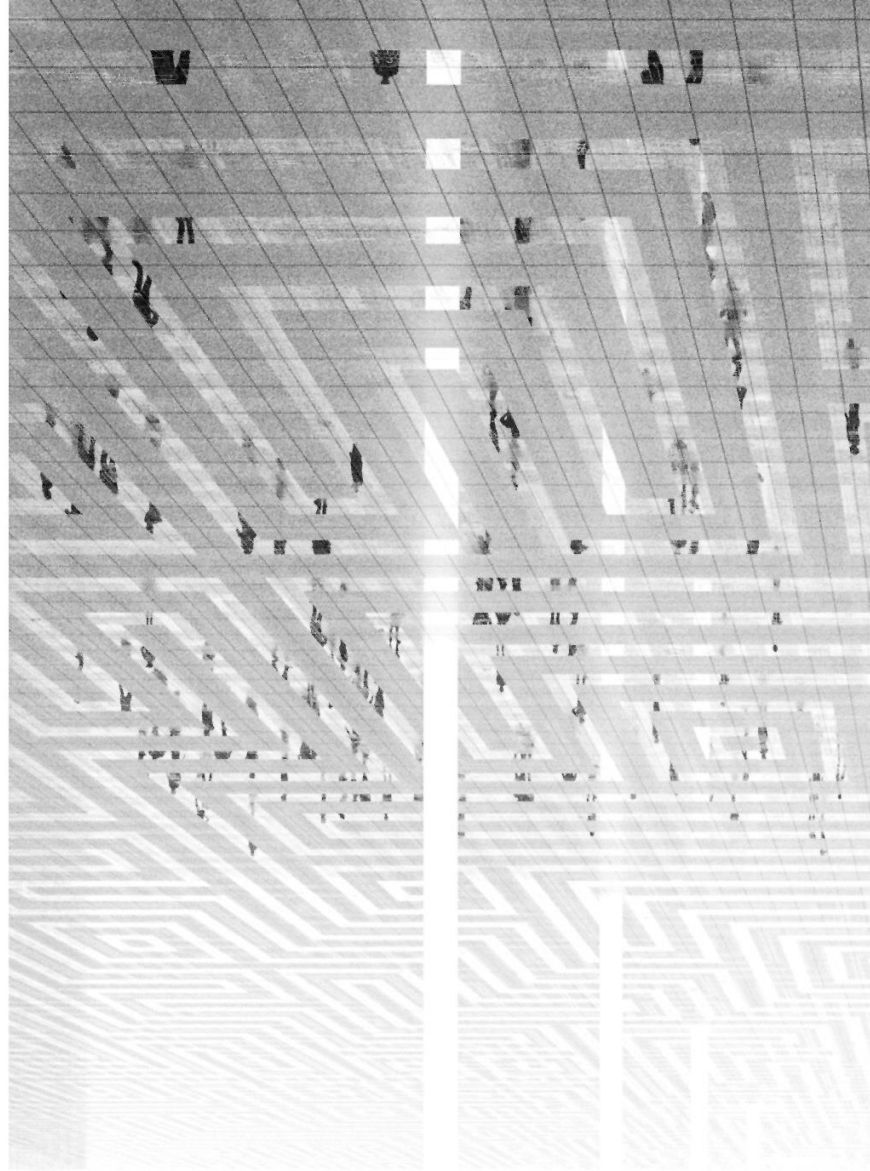
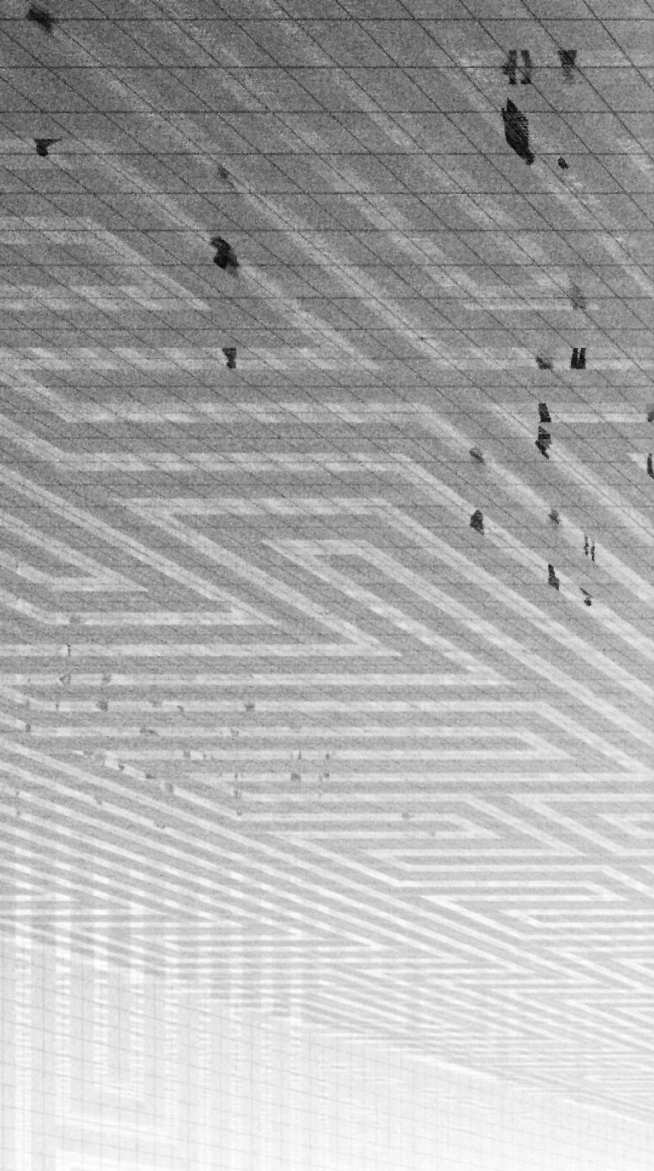
## A client's guide to initial public offerings in Australia

CURRENT AS OF JANUARY 2024

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# A&O Shearman's approach

There are many reasons to list your business. These may include realising value for securityholders and management, incentivising your employees and improving your access to capital. However, the benefits of listing should be weighed against the benefits of remaining a private concern.

The A&O Shearman team can work with you to determine whether an initial public offering (**IPO**) is appropriate. This will involve an examination of whether other fundraising opportunities exist or whether other exit alternatives are viable, such as a trade sale.

If a decision is made to list, we can assist you from the outset in relation to: the engagement of other advisers, determining the optimal offer structure, developing an achievable timetable, and designing an appropriate due diligence process.

Integrated into our capital markets practice is a group of U.S. securities lawyers, enabling us to also advise on U.S. law aspects if the decision is made to include a U.S. offer as part of the IPO.

We will liaise with your key stakeholders, other advisers, and regulators, to identify and resolve the legal issues relevant to your IPO and guide you through the Australian Securities Exchange (**ASX**) listing process.

# An introduction to this guide

This guide provides a general introduction to the steps involved in conducting an IPO and listing on the ASX.

It is designed to:

- ♦ provide guidance on the legal framework for undertaking an IPO in Australia;
- ♦ describe the documentation and timing involved in executing an IPO;
- ♦ outline the customary due diligence process;
- ♦ summarise potential statutory liability for those involved and the available defences;
- ♦ highlight the key issues which commonly arise during an IPO; and
- ♦ act as a reference guide for directors, executives, and in-house counsel of entities considering a listing on ASX.

Depending upon the size of the offer and the likely level of interest in overseas markets, the IPO may

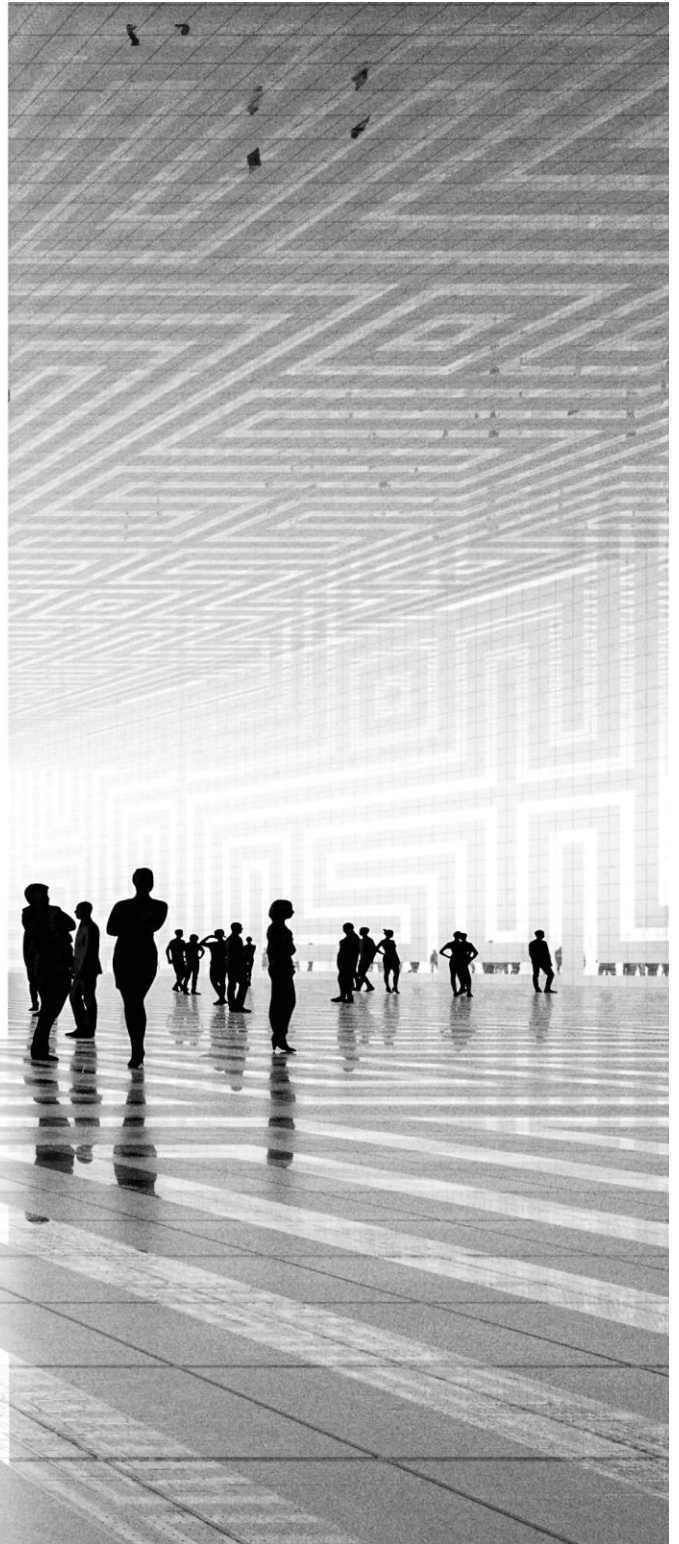
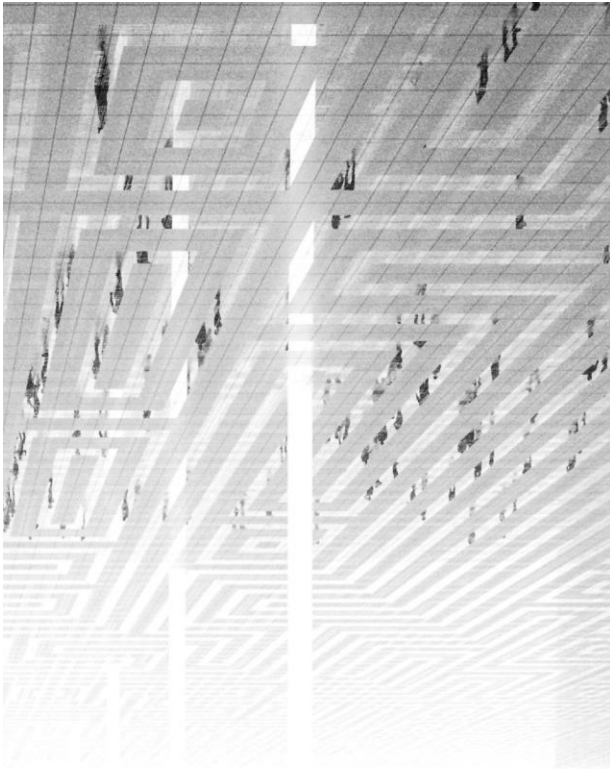
include a U.S. offer. We are uniquely placed to advise because of our ability to field a single integrated team providing top-tier Australian and U.S. advice. Section 10 of this guide provides an overview of the principal implications for the Australian IPO process when deciding whether to include a U.S. offer.

This guide summarises relevant law and current practice and does not provide an exhaustive analysis of all the issues which may be relevant. It is intended as a guide only and is not a substitute for legal advice. If you would like further information or require legal advice in connection with a potential IPO, please contact one of the key contacts listed at the end of this guide.





# 1. Preparing for an IPO



There are a number of initial steps that an entity proposing to list on ASX (**ListCo**) must take once it has decided to commence an IPO. Key members of the management team will need to be heavily involved in the IPO process and that typically includes the CEO, CFO, general counsel and at least one non-executive director (when appointed).

The appointment of core advisers will need to occur early in the process. A list of common appointments is outlined below. Many of these advisers will be members of the due diligence committee (**DDC**) that will need to be established.

**Table 1**

ADVISERS	ROLES
<b>Lead manager/financial advise</b>	Assisting ListCo with structural, marketing and pricing matters related to the IPO.  Coordinating and managing significant elements of the IPO, including: coordinating the preparation of the prospectus; investor marketing; determining the size, price and timing of the offer; and underwriting the offer (if agreed).
<b>Legal counsel</b>	Advising on any pre-listing corporate restructuring matters.  Advising on the legal requirements for the IPO, including an appropriate due diligence programme and the conduct of any foreign offers.  Undertaking legal due diligence and coordinating the verification of the prospectus.  Providing an opinion on the legal aspects of the IPO.
<b>Investigating accountant</b>	Advising on accounting matters relating to the IPO, including preparing materiality guidelines for the due diligence programme.  Undertaking accounting due diligence and assisting in the preparation of financial statements. Reviewing and providing a sign-off on the pro forma historical and forecast financial information. Preparing an investigating accountant's report for inclusion in the prospectus.
<b>Tax adviser</b>	Advising on tax issues relating to the IPO, including undertaking tax due diligence and advising on any pre or concurrent tax structuring for the IPO.  Reviewing tax disclosure in the prospectus.
<b>Industry experts</b>	Advising on specialist matters relating to ListCo's industry (e.g. estimates of market share, industry structure, market forecasts or tenement reports for entities in the mining sector).  Preparing a report for inclusion in the prospectus or verifying disclosures
<b>Share registry</b>	Handling the receipt and processing of applications to participate in the IPO.  Establishing and managing the share register.
<b>PR consultant</b>	Managing media and investor engagement as well as employee communications.



An IPO will require the execution and coordination of multiple workstreams. These will generally include the following:

**Table 2**

<b>WORKSTREAM</b>	<b>TASKS</b>	<b>RESPONSIBILITY</b>
<b>Structuring</b>	Considering ListCo's corporate group structure, including legal, tax, accounting and regulatory implications.  Considering the proposed offer structure, including pricing mechanism and offer jurisdictions.	ListCo/legal counsel/financial adviser/lead manager/accountant/tax adviser
<b>Financial information</b>	Preparing financial disclosure.  Preparing forecasts (if intended).	ListCo/accountant
<b>Due diligence</b>	Establishing the DDC.  Undertaking due diligence enquiries in accordance with the DDC's due diligence planning memorandum.	ListCo/legal counsel/lead manager/accountant/DDC members
<b>Documentation</b>	Preparing offer documents, including prospectus and other marketing materials.	ListCo/legal counsel/lead manager
<b>Regulatory</b>	Considering regulatory issues.  Applying to ASIC, ASX and other relevant regulators for any relief, waivers, confirmations or rulings required for the IPO or for pre-offer restructuring.	ListCo/legal counsel
<b>Board and corporate governance</b>	Identifying and appointing board members.  Preparing and adopting corporate governance and board policies and charters.	ListCo/lead manager/financial adviser/legal counsel
<b>Marketing</b>	Coordinating pre-IPO investor education by research analysts.  Conducting management roadshows.  Establishing research guidelines.	ListCo/lead manager/PR consultant
<b>Logistics</b>	Managing other logistical workstreams, including registry, typesetting, printing and settlement.	ListCo/lead manager/financial adviser/registry

The typical stages and an indicative timetable for a simple IPO are illustrated in Figure 1 on the following page.



## INDICATIVE IPO TIMETABLE<sup>1</sup>

**Figure 1**



<sup>1</sup> This timetable provides a high level summary of the ASX 'fast track' IPO process, which is usually only available for entities that will not have 'restricted securities' on issue. It also does not reflect refinements such as: deferred settlement trading; stabilisation arrangements; anchor or cornerstone investor early commitments; or 'dual track' trade sale process requirements. Variations will also be required depending upon whether a front-end or back-end bookbuild is selected.

<sup>2</sup> ListCo will need to consider the 135 day rule if the offer includes a U.S. offer. Under U.S. accounting standards, an auditor may only include the customary negative assurances in the comfort letter the banks will require as a closing deliverable if the cut-off date of the letter is less than 135 days after the balance date of the most recent audited or reviewed financial statements. This rule can have a significant impact on deal timing (although issuers can always prepare and have reviewed additional interim financial statements to restart the 135 day period).

<sup>3</sup> In-principle advice must be sought from the ASX four weeks prior to lodgement of the pathfinder prospectus.

<sup>4</sup> The draft listing application and pathfinder prospectus must be with the ASX at least four weeks before final prospectus lodgement with ASX and ASIC.

<sup>5</sup> The ASIC exposure period of seven days can be extended to up to fourteen days.

<sup>6</sup> The timing of the admission and trading dates is subject to whether there is a front-end or back-end bookbuild.

## 2. ASX admission requirements



## MAIN ADMISSION CRITERIA FOR LISTING ON ASX

Any entity seeking to list on ASX must comply with the listing conditions in Chapter 1 of the Listing Rules or obtain a waiver.

Early engagement with ASX in relation to the suitability of the entity to list is also required.

An entity's formal application for admission is made by completing the listing application form in Appendix 1A of the Listing Rules. Before that, an application should be made under Listing Rule 1.1 condition 1 to establish an entity's suitability for admission.

The final listing application is lodged with ASX together with a significant number of supporting documents and checklist responses.

ASX will take into account the particular circumstances of each application and in certain circumstances may grant waivers from, or confirmations in respect of, the Listing Rules.

### 2.1 MAIN ADMISSION REQUIREMENTS

Chapter 1 of the Listing Rules sets out the admission conditions. The main conditions are set out in Table 3 below.

**Table 3**

CONDITION	DESCRIPTION
<b>Structure and operations</b>	ListCo's structure and operations must be appropriate for a listed entity. This is a subjective requirement enabling ASX to reject applicants whose structure or operations may be inconsistent with ongoing listing requirements or current ASX policy.
<b>Constitution</b>	ListCo's constitution must be consistent with the Listing Rules.  Generally, constitutions of listed entities incorporate the provisions of Appendix 15A or Appendix 15B which incorporate the overriding requirements of the Listing Rules.
<b>Disclosure documents</b>	ListCo must lodge a prospectus with ASIC which complies with the disclosure requirements of the Corporations Act. It must also include a prominent statement that ASX takes no responsibility for the contents of the prospectus.
<b>Quotation of main class</b>	ListCo must apply for quotation of all securities in its main class of securities.
<b>Spread of shareholders</b>	ListCo will need to satisfy the following spread requirements: <ul style="list-style-type: none"><li>♦ 300 shareholders who are not affiliated with ListCo; and</li><li>♦ each of those shareholders must hold a parcel of the main class of shares (that are not 'restricted securities' or subject to voluntary escrow) with a value of at least AUD 2,000.</li></ul>
<b>Free float</b>	At least 20% of ListCo shares must be held by non-affiliated shareholders (who are not associates or related parties of ListCo) whose shares are not 'restricted securities' or subject to voluntary escrow.
<b>Profit or assets test</b>	ListCo must satisfy either the profit test or the assets test (as described in sections 2.2 and 2.3 of this guide).  An advantage of satisfying the profit test is that the entity's securities will not automatically be subject to mandatory escrow.



CONDITION	DESCRIPTION
<b>Escrowed Securities</b>	<p>If ListCo is subject to mandatory escrow and, therefore, has 'restricted securities', it must send restriction notices to the holders of those Escrowed Securities, and (subject to certain exceptions) each controller.</p> <p>The mandatory escrow provisions are applicable to securities held by various types of holders, including: related parties; promoters; associates of related parties and promoters; seed capitalists; and vendors of classified assets.</p> <p>An escrow period of either 12 or 24 months from the date of listing (or issue of securities) may apply, depending on the relationship between the parties.</p>



## 2.2 PROFIT TEST

The requirements of the **profit test** are summarised in Table 4 below.

**Table 4**

REQUIREMENT	DESCRIPTION
<b>Going concern</b>	ListCo must be a going concern or a successor of a going concern.
<b>Same business activity</b>	ListCo's main business activity must be the same as it was during the last three full financial years.
<b>Provision of financial statements</b>	<p>ASX must be provided with each of the following:</p> <ul style="list-style-type: none"> <li>audited accounts for the last three full financial years or, if ListCo applies for admission less than 90 days after the end of its last financial year and does not have audited accounts for its latest full financial year, the accounts for the last three prior financial years plus audited or reviewed accounts for the half-year of the prior year;</li> <li>if ListCo applies for admission more than six months and 75 days after the end of its last financial year, the accounts for the last three full financial years plus audited or reviewed accounts for the half-year of the current year; and</li> <li>a reviewed pro forma balance sheet (this is usually contained in ListCo's prospectus), unless ASX agrees that the pro forma balance sheet is not needed.</li> </ul> <p>In each case, ListCo must provide the audit report or review to ASX and the audit report or review must not contain a modified opinion or 'emphasis of matter', or other matter that ASX considers unacceptable.</p> <p>Equivalent information must be provided if ListCo has in the 12 months prior to applying for admission acquired, or is proposing to acquire, another entity or business that is significant in the context of ListCo.</p>
<b>Historical profitability</b>	<p>ListCo must have:</p> <ul style="list-style-type: none"> <li>aggregated profit from continuing operations for the last three full financial years of at least AUD 1m; and</li> <li>consolidated profit from continuing operations for the period 12 months to a date no more than two months before the date of the listing application of at least AUD 500,000.</li> </ul>
<b>Current profitability</b>	The prospectus needs to contain a statement by the directors of ListCo confirming that they have made enquiries and nothing has come to their attention to suggest that ListCo (or the economic entity) is not continuing to earn profit from ongoing operations up to the date of application for listing. Failing this, the directors of ListCo must give ASX an equivalent statement that is signed by all the directors.

## 2.3 ASSETS TEST

The requirements of the **assets test** (other than for investment entities) are summarised in Table 5 below.

**Table 5**

REQUIREMENT	DESCRIPTION
<b>Net tangible assets/market capitalisation</b>	ListCo must have net tangible assets of at least AUD4m after deducting IPO costs, or a market capitalization of at least AUD 15m.
<b>Binding commitments</b>	<p>Either:</p> <ul style="list-style-type: none"> <li>less than half of ListCo's total tangible assets (after raising any funds) are cash or in a form readily convertible to cash; or</li> <li>ListCo has commitments consistent with its stated business objectives to spend at least half of its cash and assets readily convertible to cash. ListCo's prospectus must include an expenditure program setting out those commitments. If the prospectus does not contain a statement of the business objectives, ListCo must give a statement of its business objectives to ASX.</li> </ul>
<b>Working capital</b>	<p>ListCo must satisfy each of the following:</p> <ul style="list-style-type: none"> <li>the prospectus must state the objectives the entity is seeking to achieve from its admission and any capital raising undertaken in connection with its admission; and</li> <li>if its prospectus does not contain an express statement from ListCo's directors indicating that it has enough working capital to carry out its stated objectives, it must give ASX that confirmation from an independent expert; and</li> <li>its working capital (as shown in its reviewed pro forma statement of financial position) must be at least AUD 1.5m.</li> </ul>
<b>Provision of financial statements</b>	<p>Unless ASX agrees otherwise, ASX must be provided with:</p> <ul style="list-style-type: none"> <li>audited accounts for the last two full financial years or, if ListCo applies for admission less than 90 days after the end of its last financial year and does not have audited accounts for its latest full financial year, the accounts for the last two full financial years plus audited or reviewed accounts for the half-year of the prior year;</li> <li>if ListCo applies for admission more than six months and 75 days after the end of its last financial year, the accounts for the last two full financial years plus audited or reviewed accounts for the half-year of the current year; and</li> <li>a reviewed pro forma balance sheet (this is usually contained in ListCo's prospectus), unless ASX agrees that the pro forma balance sheet is not needed.</li> </ul> <p>In each case, ListCo must provide the audit reports or reviews to ASX, and the audit reports or reviews must not contain modified opinions, 'emphasis of matters', or other matter unacceptable to ASX.</p> <p>Equivalent information must be provided if ListCo has in the 12 months prior to applying for admission acquired, or is proposing to acquire, another entity or business that is significant in the context of ListCo.</p>

The requirements of the **assets test** for investment entities are summarised in Table 6 below.

**Table 6**

REQUIREMENT	DESCRIPTION
<b>Net tangible assets</b>	<p>ListCo must satisfy one of the following:</p> <ul style="list-style-type: none"> <li>it must have net tangible assets of at least AUD 15m after deducting the costs of fundraising; or</li> <li>it must be a pooled development fund and have net tangible assets of at least AUD 2m after deducting the costs of fundraising.</li> </ul>
<b>Provision of financial statements</b>	<p>Unless ASX agrees otherwise, ASX must be provided with:</p> <ul style="list-style-type: none"> <li>audited accounts for the last two full financial years or, if ListCo applies for admission less than 90 days after the end of its last financial year and does not have audited accounts for its latest full financial year, the accounts for the last two full financial years plus audited or reviewed accounts for the half-year of the prior year;</li> <li>if ListCo applies for admission more than six months and 75 days after the end of its last financial year, the accounts for the last two full financial years plus the half-year for the current year; and</li> <li>a reviewed pro forma balance sheet (this is usually contained in ListCo's prospectus), unless ASX agrees that the pro forma balance sheet is not needed.</li> </ul> <p>In each case, ListCo must provide the audit reports or reviews to ASX and the audit reports or reviews must not contain modified opinions, emphasis of matters, or other matter unacceptable to ASX.</p> <p>Equivalent information must be provided if ListCo has in the 12 months prior to applying for admission acquired, or is proposing to acquire, another entity or business that is significant in the context of ListCo.</p>

## 2.4 FOREIGN EXEMPT LISTING

A large foreign entity (or any entity listed on the main board of the New Zealand Stock Exchange (**NZX**)) may apply for a secondary listing on ASX through a foreign exempt listing if certain conditions are met, including that its securities are listed on a recognized foreign exchange. See section 9.1 for further information.

## 2.5 GROUNDS FOR REJECTION

ASX has absolute discretion to reject a listing application if ASX has concerns, for any reason, about:

- ♦ the suitability of the ListCo for admission as a listed entity;
- ♦ the suitability of the ListCo's securities for quotation on a public securities market; or
- ♦ the calibre of the promoters or advisers involved in the application.

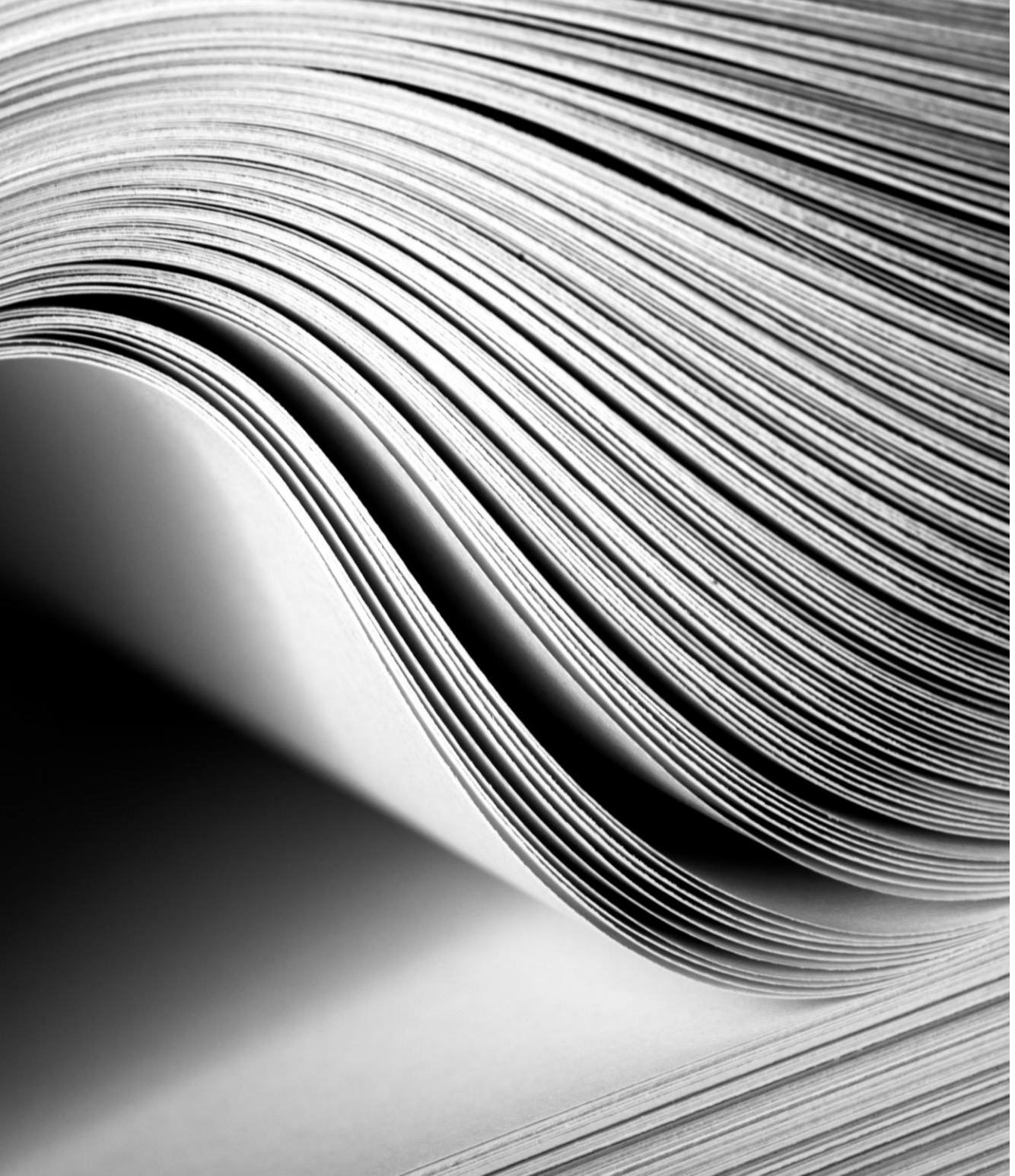
ASX may exercise its absolute discretion to not admit an entity to the official list even where it meets, or is expected to meet, the specific listing conditions. Examples of where ASX may do so are set out in Table 7:

**Table 7**

REQUIREMENT	AREAS OF CONCERN
<b>Suitability for admission as a listed entity</b>	<ul style="list-style-type: none"> <li>♦ ASX has concerns that the applicant's structure, business, financial condition, governance arrangements, board or management may not be suitable for an entity listed on ASX;</li> <li>♦ the applicant is established or has its main business operations in an emerging or developing market, and ASX has concerns about the regulatory environment or business ethics in that market;</li> <li>♦ ASX has concerns about the genuineness of the applicant's interest in accessing the Australian equity market;</li> <li>♦ ASIC or another corporate regulator has expressed concerns to ASX about the admission of the applicant to the official list;</li> <li>♦ the applicant has been denied admission to the official list of another exchange;</li> <li>♦ the applicant has entered into an agreement or transaction that, if it had been entered into after listing, would have required approval under the Listing Rules, and ASX has concerns about the commerciality of the agreement or transaction; or</li> <li>♦ ASX otherwise has concerns that admitting the applicant to the official list may put at risk the reputation of the ASX market as one of quality and integrity.</li> </ul>
<b>Suitability of directors, promoters or advisers involved</b>	<ul style="list-style-type: none"> <li>♦ ASX has had prior unacceptable dealings with the applicant or director, CEO or CFO of the applicant;</li> <li>♦ ASX is not satisfied with the qualifications and experience of the auditor, investigating accountant, any other expert or professional adviser who conducted a review or provided a report for the prospectus;</li> <li>♦ ASX has had prior unacceptable dealings with a promoter, broker, auditor, investigating accountant, expert or professional adviser involved in the application;</li> <li>♦ the applicant has not engaged experienced legal and/or accounting advisers to assist it with the preparation of its listing prospectus, giving rise to potential concerns about the quality of that document and the due diligence supporting it; or</li> <li>♦ the applicant has not engaged experienced brokers or other financial advisers to assist it with its capital raising, giving rise to potential concerns about the applicant's ability to meet ASX minimum spread requirements without using artificial means.</li> </ul>



### 3. The prospectus



### 3.1 DISCLOSURE REQUIREMENTS

Section 710 of the Corporations Act requires that a prospectus must contain all general information that investors and their advisers reasonably require and would reasonably expect to find in the prospectus relating to:

- ♦ ListCo's financial position, assets and liabilities, profits and losses, and prospects; and
- ♦ the rights attached to the securities being offered.

Specific information is also required on prescribed matters such as the terms of the offer, disclosure of payments made to directors and advisers, and the expiry date of the prospectus.

### 3.2 TYPICAL PROSPECTUS CONTENTS

Table 8 below sets out the typical contents of a prospectus.

**Table 8**

SECTION	DESCRIPTION
<b>Chairman's letter</b>	Chairman's address to prospective investors about the purpose of the IPO and an investment in ListCo.
<b>Investment overview</b>	An overview of ListCo, how it operates and the key terms of the offer and key risks.
<b>Industry overview</b>	An overview of the industry in which ListCo operates.
<b>Business description</b>	A description of ListCo's business and business model.
<b>Financial information</b>	Historical and pro forma financial performance information.
<b>Risk factors</b>	Details of the main risk factors that apply to an investment in ListCo.
<b>Board and interests of key people</b>	An overview of ListCo's management, its approach to corporate governance and the benefits and interests of key personnel.
<b>Details of the offer</b>	The structure of the offer and how to apply for shares.
<b>Investigating accountant's report</b>	The investigating accountant's report on past and future financial information.
<b>Additional information</b>	Additional information about ListCo, its shares and the interests of certain parties, material contracts summaries and details of regulatory relief.

### 3.3 REGULATORY GUIDANCE

ASIC has provided regulatory guidance on prospectus disclosure, including in:

- ♦ ASIC Regulatory Guide 170—on the presentation of prospective financial information including forecasts;
- ♦ ASIC Regulatory Guide 228—on the presentation of prospectus disclosure generally; and
- ♦ ASIC Regulatory Guide 230—on the presentation of financial information.

### **3.4 DRAFTING THE PROSPECTUS**

The prospectus is primarily drafted by ListCo's management with assistance from advisers and is usually coordinated by the lead manager. Specific sections may be prepared by advisers, including the investigating accountant's report and any experts' reports on any specialist or technical areas.

### **3.5 VERIFICATION PROCESS**

A verification process is undertaken to ensure as far as possible that the prospectus is not defective.

Due diligence enquiries are conducted while the prospectus is being drafted. However, upon completion of the due diligence and prospectus drafting, a formal verification process takes place to ensure the accuracy of the prospectus.

ListCo's legal counsel coordinates the process to ensure that verifiers can demonstrate that statements are supported by independent verifying source materials wherever possible. In the case of forward-looking statements or statements of opinion, the verification process will seek to ensure that such statements are made on reasonable grounds.

### **3.6 SUPPLEMENTARY OR REPLACEMENT PROSPECTUSES**

If circumstances change, new information is obtained, or any defects is identified, following prospectus lodgement with ASIC, disclosure in a supplementary or replacement prospectus will be required if the change is material to investors.

## 4. Prospectus liability





## 4.1 WHO MAY BE EXPOSED TO LIABILITY?

The Corporations Act extends potential liability to, among others: ListCo; any selling shareholders; directors (of either); proposed directors; any named underwriters; persons involved in a contravention of the Corporations Act; and anyone who has consented to a statement in the prospectus (for that statement).

Those persons may be subject to civil and criminal liability under the Corporations Act in relation to a defect in the prospectus as described in Table 9 below.

**Table 9**

LIABILITY	DESCRIPTION
<b>Misleading or deceptive statement or omission</b>	If the prospectus contains a misleading or deceptive statement, or if it omits information required to be included under the Corporations Act.
<b>New circumstances after lodgement</b>	If, after the prospectus has been lodged, a new circumstance arises that would have been included in the prospectus if it had arisen before lodgement, and a replacement or supplementary prospectus containing information about the new circumstance has not been lodged.

## 4.2 EXTENT OF LIABILITY

The extent of liability depends on a number of factors, including the role that the person played in the IPO process.

If a prospectus is found to be defective, those persons liable (other than those persons liable for making specific statements) may be responsible for the entire prospectus and are potentially liable for any loss or damage suffered.

## 4.3 OTHER SOURCES OF LIABILITY

Liability may also arise for various actions or statements made during the IPO process or in connection with it. In particular, the Corporations Act imposes liability on persons who contravene or are involved in a contravention of the pre-prospectus advertisement restrictions.

In addition, the general misleading and deceptive conduct provisions of the Corporations Act apply to statements made outside of the prospectus. As such, ListCo's directors and management should take care with any communications they make about ListCo or the IPO during the process.

## 4.4 DEFENCES

**Table 10**

DEFENCE	DESCRIPTION
<b>Due diligence defence</b>	The person has made all enquiries which are reasonable in the circumstances and, having made those enquiries, believed on reasonable grounds that the statement was not misleading or deceptive or that there was no omission from the prospectus of required information.
<b>Reliance</b>	A person reasonably relied on information provided by someone (other than their employees) in relation to statements made in the prospectus or omissions of required information.
<b>Withdrawal of consent</b>	A person who is potentially liable for a statement attributed to them in a prospectus has withdrawn their consent to the inclusion of that statement.



DEFENCE	DESCRIPTION
<b>New circumstances</b>	A new circumstance arises, and it can be demonstrated that the person was unaware of the new circumstance.

## 5. Key regulators



## 5.1 ASIC

ASIC is Australia's primary securities regulator. It regulates the offer of securities and certain related matters such as financial disclosure, financial services licencing and market misconduct.

### ASIC's role in IPOs

ASIC reviews many prospectuses after they have been lodged.

ASIC undertakes its review during a seven-day 'exposure period' under the Corporations Act, during which time ListCo is prohibited from processing applications. The period may be extended to up to 14 days.

The exposure period is designed to give market participants and ASIC a chance to examine the prospectus.

If ASIC considers the prospectus may be defective, it can:

- ♦ prevent ListCo from issuing or selling shares under the prospectus by issuing an interim or final stop order; or
- ♦ request that ListCo issues a replacement or supplementary prospectus.

## 5.2 ASX

ASX manages the admission of entities to its official list and supervises the conduct of listed entities under the Listing Rules.

### Initial engagement

Early engagement with ASX is required to ensure that potential structuring and admission issues are identified and resolved from the outset. Initial engagement can cover issues such as:

- ♦ the extent of any mandatory escrow periods;
- ♦ the satisfaction of the listing conditions; and
- ♦ the availability of any waivers of the Listing Rules.

### Applications for admission

The formal request to ASX for admission to its official list must be made within seven days of lodgement of the prospectus with ASIC (and is commonly lodged at the same time).

### Ongoing obligations

After being listed, ListCo must comply with the Listing Rules' ongoing continuous and periodic reporting obligations as well as securityholder approval requirements.

## 6. Marketing the offer



## MARKETING THE OFFER

The key marketing considerations for an IPO are described in Table 11 below.

**Table 11**

STAGE	DESCRIPTION
<b>The offer structure components</b>	<p>Generally, an IPO will include one or more types of offer, such as:</p> <ul style="list-style-type: none"> <li>♦ an institutional offer to sophisticated, professional or wholesale investors;</li> <li>♦ a broker firm offer to selected retail clients of brokers;</li> <li>♦ a general retail offer to members of the general public (for larger IPOs); and</li> <li>♦ a priority offer to, for example, employees of the company or a 'Chairman's List'.</li> </ul> <p>The formal offer will open following the lodgement of the prospectus with ASIC and subsequent expiry of the exposure period. However, many offer processes include earlier commitments from cornerstone or anchor institutional investors through a separate offer and/or through the conduct of a pre-lodgement 'front-end' bookbuild.</p>
<b>Pre-marketing</b>	<p>In the lead-up to an IPO, ListCo will, with its lead managers, market the IPO to ensure that there will be adequate demand for its securities at the best possible price.</p> <p>However, the degree of marketing is limited to select institutional investors, as the Corporations Act imposes restrictions on pre-prospectus publicity. That is to protect retail investors by ensuring that they only acquire shares based on the information contained in the final prospectus.</p> <p>Despite those restrictions, the IPO can be marketed to institutional investors using a pathfinder prospectus and a management roadshow (a series of meetings between management of ListCo and institutional investors organised by the lead manager). See section 7.3 below also.</p>
<b>Pricing</b>	<p>The lead manager will generate and record demand for securities in an IPO using a process called a 'bookbuild'. In this process, the lead manager will receive bids from investors specifying the price at which they would be prepared to acquire securities in ListCo. The lead manager will then use those bids to set a final price for the securities.</p> <p>Bookbuilds usually occur:</p> <ul style="list-style-type: none"> <li>♦ before the prospectus is lodged with ASIC to set a fixed price for the securities that will be included in the prospectus (a 'front-end' bookbuild); or</li> <li>♦ at the end of the offer period within a price range disclosed in the lodged prospectus (a 'back-end' bookbuild)</li> </ul>
<b>Offer proceeds</b>	<p>Until ListCo issues its securities under the IPO, the offer proceeds must be held in a separate trust account.</p>
<b>Allotment and trading</b>	<p>ListCo decides, with input from the lead manager, the allocation of securities after the offer closes. Trading in the securities commences after allotment, provided all of ASX's listing conditions have been satisfied.</p> <p>Subject to satisfying certain conditions, trading can commence on a deferred settlement basis before the allotment of the securities.</p>



# 7. Common IPO issues

## 7.1 BOARD STRUCTURE AND SELECTION

Board structure and selection needs to be considered early as the establishment of a board with the relevant skills and appropriate governance regime takes time (as do the checks and searches that ASX requires). Several helpful matters to bear in mind when appointing board members are as follows:

- ♦ board structure and the selection of independent directors are important considerations but there is no 'one size fits all' rule;
- ♦ boards comprising between five to seven directors with a majority of independent directors are common for entities seeking admission;
- ♦ regard must be had to the ASX Corporate Governance Council's 'Corporate governance principles and recommendations' (**ASX Council's Recommendations**) and failure to comply with those principles or recommendations must be disclosed with reasons in the prospectus; .
- ♦ the ASX Council's Recommendations require majority independent board with an independent chair;
- ♦ a strong independent board with commercial experience will assist in mitigating investors' 'overhang' concerns with respect to any retained stakes;
- ♦ appointment of individuals with significant and relevant sector experience should be considered;
- ♦ board members with a strong public track record of performance are in demand and sufficient time should be allowed to identify the best candidates;
- ♦ each director, and the CEO and CFO, will need to satisfy ASX that they are of good fame and character. In making this assessment, ASX will have regard to:
  - ♦ the relevant officer's criminal and bankruptcy checks;
  - ♦ a statutory declaration provided by the individual, confirming they have not been subject to any criminal or civil penalty proceedings or any enforcement action by a government agency; and
  - ♦ any other information in its possession, including any prior dealing with the ASX.



## 7.2 CORPORATE GOVERNANCE

Listed entities are subject to a range of corporate governance and compliance requirements and guidelines. These arise from various sources, including:

- ♦ the Corporations Act;
- ♦ the Listing Rules
- ♦ the ASX Council's Recommendations; and
- ♦ compliance with ESG risk management and governance recommendations (in addition to meeting sustainability financial reporting standards).

Implementing appropriate and tailored corporate governance policies should be a priority for any entity considering listing. Common corporate governance charters or policies which ListCo will need to consider include:

- ♦ continuous disclosure policy;
- ♦ securities trading policy;
- ♦ board charter;
- ♦ audit, finance and risk committee policies;
- ♦ nomination committee charter;
- ♦ risk management policy;
- ♦ shareholder communication policy;
- ♦ code of conduct and ethics;
- ♦ whistleblower policy;
- ♦ anti-bribery and corruption policy;
- ♦ diversity policy;
- ♦ cyber security policy; and
- ♦ other sector-specific charters or policies (such as technology and innovation committee charters)

## 7.3 PRE-IPO MARKETING

As noted above, as a general rule an IPO cannot be advertised or marketed prior to lodging the prospectus with ASIC. However, a number of exceptions exist, including:

- ♦ reports regarding ListCo which do not contain information about the IPO;
- ♦ roadshow presentations to exempt investors (i.e. institutional investors) (see Table 11 also);
- ♦ distribution of pre-deal research reports (also known as 'investor education') which complies with relevant regulatory guidance and guidelines produced by legal counsel (including U.S. counsel, where relevant). Investor education is designed to assist professional and sophisticated investors' knowledge and to promote an understanding of ListCo and its business;
- ♦ distributing a draft of the prospectus (referred to as a 'pathfinder' prospectus) to institutional investors (see Table 11 also);
- ♦ where ASIC has provided relief to undertake a formal marketing or pre-registration campaign prior to lodgement of the prospectus (usually for large IPOs); and
- ♦ genuine media reports or commentary.

## 7.4 IPO STRUCTURES

The most appropriate listing structure will need to be identified from a legal, tax, stamp duty and accounting perspective. A key consideration will also be choosing a structure that provides logistical efficiency (where there are a number of selling securityholders). Below are several structuring options which are often considered (and sometimes in combination).

**Table 12**

STAGE	DESCRIPTION
<b>FloatCo</b>	A new holding company is formed to be the listed entity which issues shares to investors in the IPO and also to the vendors in exchange for their shares in the existing operating entity of the business ( <b>HoldCo</b> ) (sometimes referred to as 'top-hatting').
<b>SaleCo</b>	A new company ( <b>SaleCo</b> ) is formed, which conducts a sale of new and existing shares in HoldCo or FloatCo.
<b>Buy-back and new issue</b>	A buy-back from the vendors of existing shares in HoldCo is undertaken and new shares in HoldCo are offered to IPO investors.
<b>Direct offer and sell down</b>	New and existing shares in HoldCo are offered for issue and sale under the prospectus.

## 7.5 OTHER VENDOR CONSIDERATIONS

In addition to considering potential prospectus liability, the current shareholders that propose to sell shares as part of the IPO will need to consider other structural issues, including:

- ♦ unwinding any existing shareholder agreements and arrangements or structuring ongoing shareholder arrangements to comply with the Listing Rules;
- ♦ achieving a variable level of sell-down (so as to enable vendors to reserve the ability to meet excess demand);
- ♦ the application of foreign law to the vendors (including Listing Rule compliance if a vendor is listed on another exchange);
- ♦ any necessary new or ongoing shareholder arrangements with ListCo, including continuing governance arrangements (particularly in a situation where a vendor may retain a major holding). This will require a balance between:
  - ♦ the vendor's desire to have ongoing influence over ListCo (or an ability to control its future further sell downs); and
  - ♦ ListCo's management of information protocols and continuous disclosure obligations; and
  - ♦ whether ASX mandatory escrow will apply or voluntary escrow arrangements are required by the lead manager.

## 7.6 VOLUNTARY ESCROW

ASX may impose a mandatory escrow on certain securityholders where ListCo does not meet the profit test or does not have revenue history, profit history or level of tangible assets acceptable to ASX (see Table 3 in section 2.1 of this guide).

The lead manager may also recommend a voluntary escrow restriction on vendors who retain a securityholding in ListCo post-completion of the IPO. Vendor-retained holdings are typically expected to be held in voluntary escrow for 12 to 24 months by the Australian market, or covering at a minimum the forecast period identified in the prospectus.

However, since these arrangements are commercially negotiated with the lead manager, there is flexibility (unlike with ASX mandatory escrow). Voluntary escrow is often used to address potential investor concerns regarding the alignment of management's and vendors' interests during the forecast period and to manage any 'overhang' where a material stake is retained.

Often conditions relating to the performance of the business must be satisfied before early release from voluntary escrow occurs.

## 7.7 DUAL TRACK EXITS

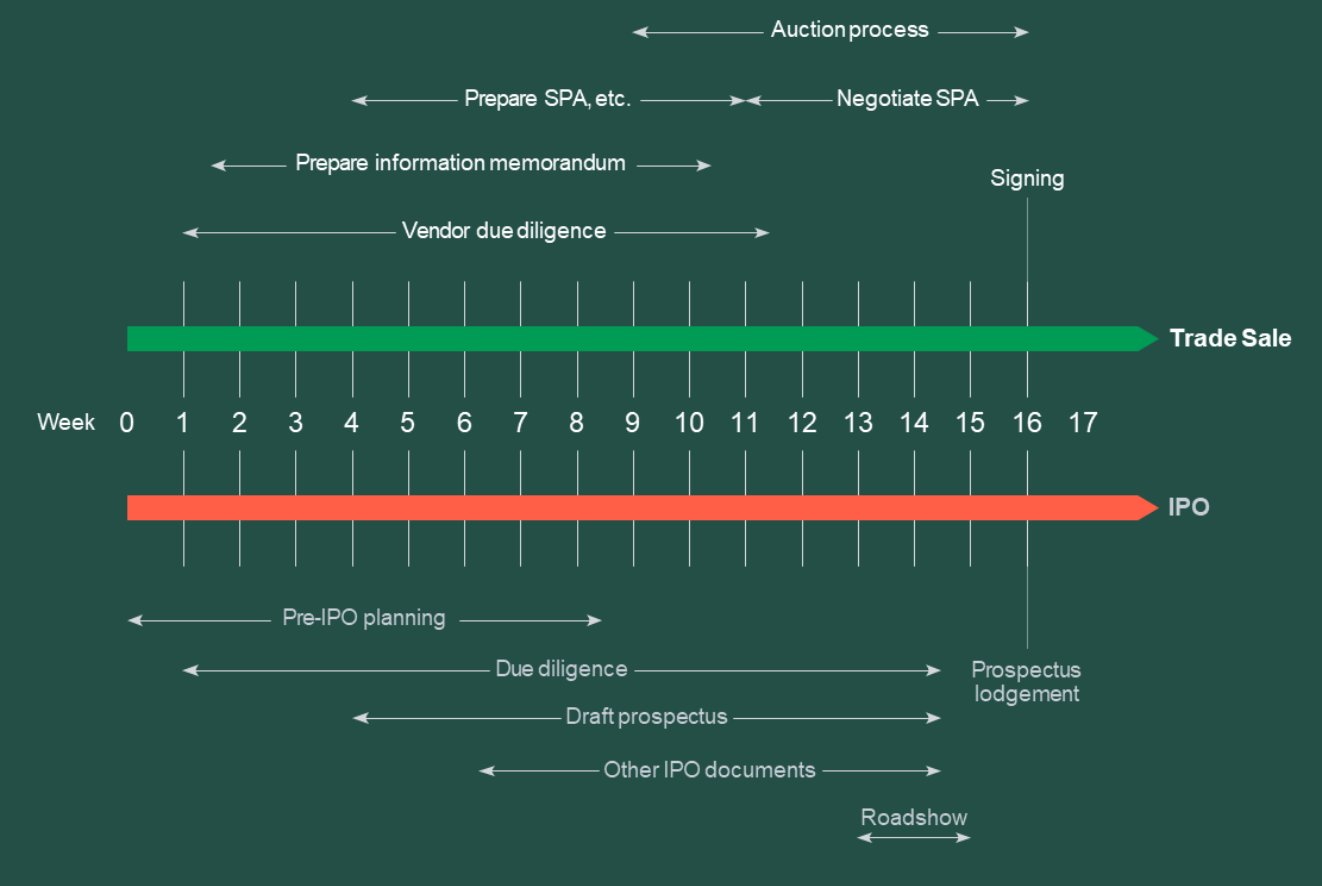
Vendors, in particular private equity sponsors, may choose to pursue an IPO and private trade sale process simultaneously (in a 'dual track exit'). The dual track exit should preserve flexibility while maintaining competitive pressure on pricing. Below are a number of considerations that should be taken into account in determining whether to choose one form of exit over the other.

**Table 13**

TRADE SALE EXIT FEATURES	IPO EXIT FEATURES
Gives the vendor a 100% exit.	A vendor may be unlikely to achieve a 100% exit on listing (and will be exposed to market movements if locked into a voluntary or mandatory escrow).
Potential warranty and indemnity exposure (warranties are often resisted and insurance may be an option).	Potential prospectus liability.
Possible price adjustment exposure.	Some warranty and indemnity risk in an underwriting agreement (but only if the vendors are required to act as guarantors and there is actual liability).
Potentially quick and simple exit process.	Longer and more structured exit process .

An indicative timetable for a dual track exit is set out in Figure 2 below.

Figure 2





## 7.8 FORECASTS

Great care is required in the preparation and presentation of forecasts.

The Corporations Act requires that the prospectus discloses ListCo's 'prospects' but also provides that forward-looking statements will be deemed to be misleading unless based on reasonable grounds.

The following should be borne in mind when preparing forecasts:

- ♦ forecast periods should be limited to what is necessary and reasonable for investors and their advisers to form a view of value and growth opportunities;
- ♦ ASIC's position (set out in ASIC Regulatory Guide 170) is that there may be reasonable grounds to include forecasts for up to two years for existing businesses, provided that other requirements are satisfied, such as obtaining an investigating accountant's report;
- ♦ it is often typical to include a forecast period of 6 to 12 months in the prospectus;
- ♦ a longer forecast period is not necessarily more helpful to investors and risks being discounted by the market due to uncertainty; and
- ♦ the longer the duration of the forecast period, the greater the reputational and legal risk for ListCo.

## 7.9 STABILISATION ARRANGEMENTS

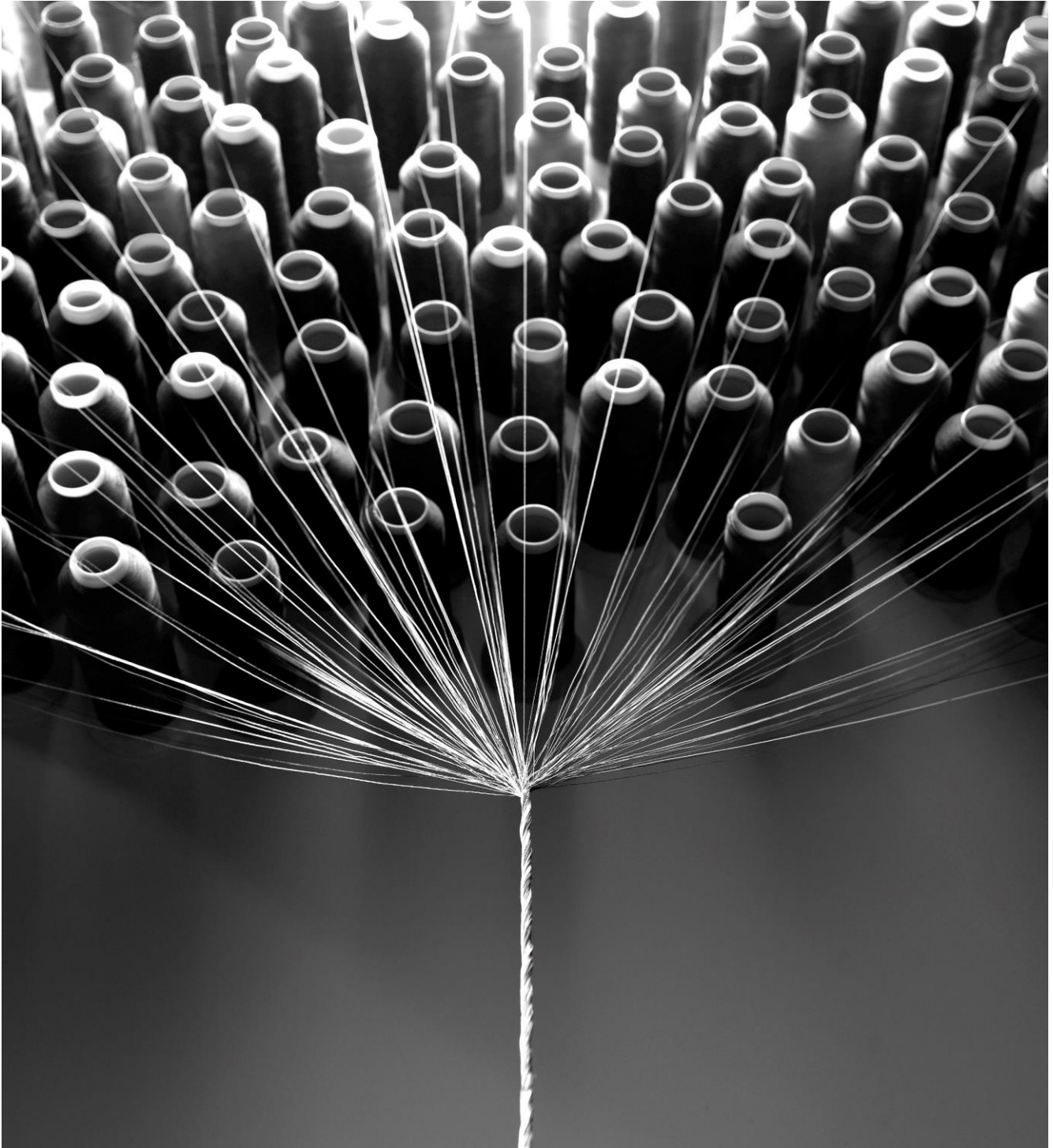
Stabilization, 'greenshoe' and over-allocation arrangements are means of managing the initial aftermarket trading price of ListCo's securities.

Stabilisation arrangements are designed to assist in orderly trading in securities after completion of the IPO.

While such arrangements may constitute market manipulation under the Corporations Act, ASIC has a policy of providing 'no action' letters to permit such stabilisation arrangements for larger IPOs, provided certain conditions are satisfied.

Stabilisation is often achieved through over-allocating the total number of securities available under the IPO. The over-allocated securities are commonly borrowed by a broker from the vendors. An option is also granted to the broker for the same number of over-allocated securities for 30 days after completion of the IPO. The broker will either buy securities on the market, or exercise the option, in order to return the securities to the vendors (or by a combination of both). Such trades require regulatory waivers and must be conducted within specific parameters and trade disclosure.

## 8. Continuing obligations



## CONTINUING OBLIGATIONS

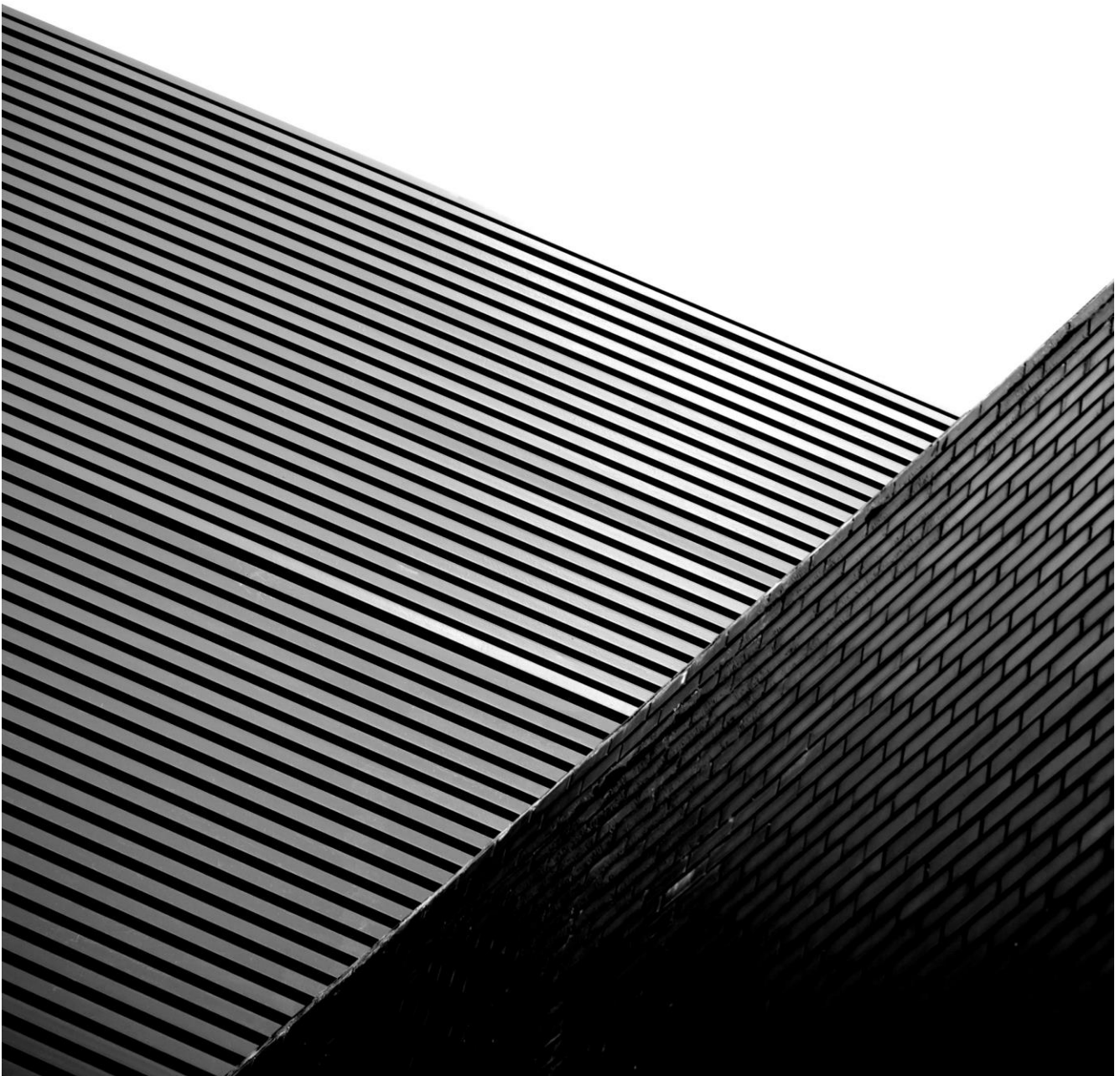
Once ListCo's securities begin to be traded on ASX, the newly listed entity will need to comply with the ongoing disclosure and securityholder approval requirements of the Listing Rules.

Key ongoing requirements are set out in Table 14 below.

**Table 14**

OBLIGATION	DESCRIPTION
<b>Continuous disclosure</b>	<p>As a 'disclosing entity' for the purposes of the Corporations Act and Listing Rules, a listed entity must immediately notify ASX of any information that a reasonable person would expect to have a material effect on their securities' value or price.</p> <p>This obligation is subject to a number of exemptions, such as for confidential negotiations for an incomplete proposal and information generated for internal management purposes (in all cases, where a reasonable person would not expect the information to be disclosed).</p>
<b>Financial reporting</b>	Listed entities must publish annual and half-yearly reports. Some entities may also have to publish quarterly reports.
<b>Capital issue limitations</b>	<p>Listed entities can generally only issue up to 15% of their issued capital as new securities over a rolling 12-month period, unless securityholder approval is obtained or an exception applies.</p> <p>Small to mid-cap entities can issue additional capital equal to a further 10% of their issued capital, subject to meeting certain conditions.</p>
<b>Related-party transactions</b>	Securityholder approval is required for transactions between ListCo and its directors or other related parties or persons in a position of influence.
<b>Significant transactions</b>	Securityholder approval is required for major acquisitions and disposals over certain thresholds.
<b>Corporate governance</b>	The ASX Council's Recommendations are not mandatory, but to the extent that ListCo does not comply with the recommendations, it must disclose the reasons for its non-compliance.

## 9. Listing foreign entities





## 9.1 FOREIGN EXEMPT LISTINGS

If certain conditions are met, a large foreign entity or NZX-listed entity may apply for a secondary listing on ASX through a foreign exempt listing. Its securities must already be listed on a recognised foreign exchange approved by ASX (or NZX). An advantage of being listed as a 'foreign exempt entity' is that ListCo would be exempt from compliance with most of the requirements of the Listing Rules (provided that it complies with equivalent listing rules in its home jurisdiction). The main conditions to be met for a foreign exempt listing are set out in Table 15 below.

**Table 15**

OBLIGATION	DESCRIPTION
Home exchange	The foreign entity's home exchange must be a member of the World Federation of Exchanges and be acceptable to ASX or be NZX.
Compliance with rules of home exchange	ASX must be satisfied that the foreign entity is subject to and complies with the listing rules (or equivalent) of its home exchange.
Profit or assets test	<p>The foreign entity (other than an entity listed on the main board of NZX) must satisfy either:</p> <ul style="list-style-type: none"><li>♦ a profit test that requires the operating profit derived from the foreign entity's ordinary activities before income tax for each of the last three full financial years to be at least AUD 200m; or</li><li>♦ a net tangible assets test that requires the foreign entity to have net tangible assets of at least AUD 2bn at the time of admission or a market capitalisation of AUD 2bn.</li></ul> <p>An NZX-listed entity must satisfy the usual ASX profit or assets test thresholds.</p>
Registration of foreign entities	If the foreign entity is a company, it must be registered as a foreign company carrying on business in Australia under the Corporations Act unless it is an NZX-listed entity.

## 9.2 CHESS DEPOSITORY INSTRUMENTS

Foreign companies domiciled in a country whose laws do not recognise uncertificated holdings or electronic transfers of title must offer CHESS depository instruments (**CDIs**) over their shares when making an offer of listed securities in Australia that is because the settlement of transfers of the underlying financial product (i.e., the share of the foreign company) cannot occur through CHESS.

A CDI is a unit of beneficial interest in a financial product of a foreign body where title to the underlying financial product is registered in the name of a depository nominee (usually, CHESS Depository Nominees).

The difference between holding CDIs and the underlying financial product is that the CDI holder will have beneficial ownership of the equivalent number of underlying financial products rather than legal ownership.

This means that the CDI holder will generally receive the same economic benefits as registered holders, such as dividends, bonus issues, rights issues, interest payments and maturity payments or similar corporate actions.

A CDI holder may also choose to convert the CDIs into the underlying financial product so that legal title may be held directly. This may be facilitated by the foreign issuer's Australian registry or a broker.

### 9.3 DUAL LISTINGS

A dual listing on ASX provides a foreign listed entity with access to the Australian market in addition to its home market. Such entities have the opportunity to raise capital from Australian institutional investors that may be required to invest exclusively in ASX-listed companies under their investment mandates.

An entity considering a dual listing on ASX should commence discussions with ASX as early as possible. ASX may provide relief from compliance with specific Listing Rule where it is satisfied that the entity is in compliance with comparable obligations imposed by its home exchange, even where the entity does not qualify for a foreign exempt listing (described above). Some examples of the waivers which ASX has granted in the context of dual listings are shown in Table 16.

**Table 16**

REQUIREMENT	DESCRIPTION
<b>Securityholder voting rules</b>	Where the entity is incorporated in a jurisdiction outside of Australia, the laws of its home jurisdiction rather than the Listing Rules may be used to determine whether a securityholder is entitled to vote at a securityholders' meeting.
<b>Financial reporting</b>	The foreign entity may prepare its accounts in its home jurisdiction's currency and in accordance with its home jurisdiction's generally accepted accounting principles and auditing standards.
<b>Substantial securityholder information</b>	The foreign entity may provide substantial securityholding information in accordance with the laws and listing rules of its home jurisdiction.
<b>Annual and half-yearly reports</b>	The foreign entity may lodge its annual and half-yearly reports in the form required by its home exchange as long as it provides any additional information required by the Listing Rules as an annexure to the report.

Unless specific waivers such as those set out above are granted then, unlike a foreign exempt listing, the entity will need to comply with the full admission conditions and ongoing obligations of the Listing Rules.

### 9.4 OTHER ISSUES FOR FOREIGN ENTITIES

A foreign entity would also need to consider the following matters:

- ♦ appointment of a process agent: every foreign entity listed on ASX must appoint an agent for service of process in Australia;
- ♦ appointment of a person responsible for communications with ASX: every entity listed on ASX must nominate at least one person responsible for communicating with ASX in respect of Listing Rule matters. That person must be able to communicate in English and have a high degree of familiarity with the foreign entity's operations and be available during (and one hour either side of) normal trading hours on ASX;
- ♦ foreign regulatory approvals: a foreign entity should have all necessary foreign approvals for listing on ASX before applying to ASX; and
- ♦ differences between foreign law and Australian law: the prospectus for the ASX listing should disclose the material differences between the laws of the jurisdiction of the entity's incorporation and the laws of Australia that apply to ASX-listed entities generally.



## 10. U.S. offers



## 10.1 LEGAL FRAMEWORK

Depending upon the size of the offer and the likely level of interest in overseas markets, the IPO may include an international component, including a U.S. offer. A&O Shearman is uniquely placed in our ability to field a single integrated team providing top-tier Australian and U.S. advice, eliminating the need to have two law firms do essentially the same work.

Cross-border Australian IPOs with a U.S. tranche have traditionally been structured in a manner intended to make them exempt from the registration requirements of the U.S. Securities Act of 1933 (**U.S. Securities Act**). The U.S. portion of the offer is typically conducted in reliance on Rule 144A under the U.S. Securities Act which allows securities to be sold to 'qualified institutional buyers' (**QIBs**) in the United States without registering with the U.S. Securities and Exchange Commission (**SEC**). QIBs are generally institutions with at least USD 100m of securities under management.

In these cross-border transactions, investors in the U.S. and certain other jurisdictions outside Australia and New Zealand receive an offering memorandum, which comprises:

- ♦ the Australian prospectus;
- ♦ a 'wrap' containing certain additional information that is relevant to U.S. and other international institutional investors; and
- ♦ historical financial statements of ListCo (typically three years of audited financial statements).

While Rule 144A exempts an offer from the requirement to register with the SEC, it does not provide an exemption from the various U.S. anti-fraud laws, in particular the broad anti-fraud provisions of Rule 10b-5 under the U.S. Securities Exchange Act of 1934, under which ListCo, its directors, its underwriters and others may potentially be liable to U.S. investors if the offering memorandum or other offering materials contain an untrue statement of a

material fact or omit to state a material fact necessary to make the statements that are made therein not misleading, and investors suffer a loss as a result. To be found liable in a private lawsuit under Rule 10b-5, the defendant must have acted with 'scienter' (i.e. the intent to deceive or defraud, which essentially requires that the material misleading statement or omission has been made intentionally or with reckless indifference as to its accuracy).

The exercise of reasonable care in the form of a carefully conducted due diligence investigation makes it hard for a plaintiff to allege the intent to deceive or recklessness required for a 10b-5 claim. As a consequence, due diligence meeting U.S. standards has become a critical component of a defence to liability in Rule 144A offerings. As part of that exercise, underwriters typically request what are known as '10b-5 disclosure letters' from both their own and ListCo's U.S. counsel, which are negative assurance letters as to the absence of any such misstatement or omission in the prospectus, as well as a 'comfort letter' from ListCo's auditor. Between them, these requirements necessitate that the Australian prospectus meet U.S. disclosure standards, in addition to the standards that apply in Australia.

Given this legal framework, the manner in which ListCo's Australian IPO will be executed will change in a number of ways, including with regard to:

- ♦ due diligence;
- ♦ scope of disclosure in the Australian prospectus;
- ♦ financial information in the Australian prospectus; and
- ♦ contents of offer management/underwriting agreement and the sign-offs required to be delivered in connection with the U.S. offer.

Each of these is discussed in more detail below.

## 10.2 DUE DILIGENCE

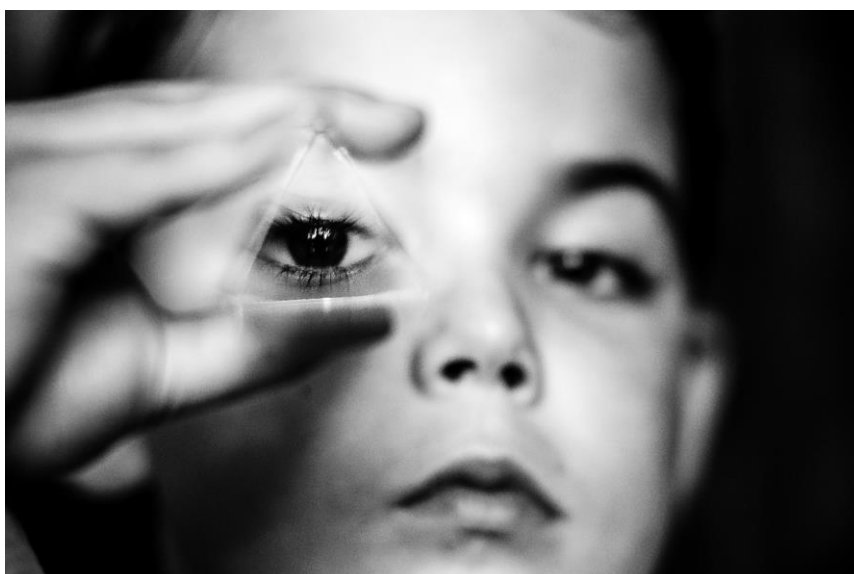
Due diligence is the best way to ensure that the offering memorandum does not contain any material misstatement or omission that can be the basis of disclosure liability under the anti-fraud provisions of the U.S. federal securities laws. Typical U.S. due diligence procedures differ from Australian due diligence procedures in that the U.S. process is not normally conducted through a formal DDC process that relies on the delegation of particular tasks to certain participants.

Despite those differences, the practice on cross-border IPOs is generally to coordinate the U.S. due diligence requirements with the Australian IPO due diligence process as follows:

**Table 17**

U.S. DUE DILIGENCE REQUIREMENTS	COORDINATION WITH AUSTRALIAN IPO DUE DILIGENCE PROCESS
<b>Management and accounting due diligence presentations</b>	U.S. counsel participates in the Australian due diligence process by attending DDC meetings as an 'observer', which allows them to participate in management presentations and presentations by ListCo's independent auditors. U.S. counsel also receives all materials distributed to DDC members.
<b>Drafting of the offer document</b>	U.S. counsel participates in the Australian prospectus drafting process. A&O Shearman is adept at ensuring that the Australian prospectus meets U.S. standards while retaining the format and feel that is familiar to Australian investors.
<b>Documentary due diligence review</b>	A U.S. due diligence process involves a review of company documents such as board papers and minutes, material contracts and organisational documents. A&O Shearman serving as combined Australian and U.S. counsel to ListCo issuers eliminates the duplication that usually results from these requirements

Participation in the Australian due diligence process and the Australian prospectus process, together with the conduct of underlying legal due diligence, are prerequisites to U.S. counsel being able to deliver a 10b-5 disclosure letter.



## 10.3 PRINCIPAL DISCLOSURE IMPLICATIONS

Where there is a U.S. offer, the U.S. members of our team participate in the prospectus drafting process to ensure that it meets U.S. standards as well as Australian. Table 18 below highlights aspects of the prospectus where U.S. input tends to be most significant:

**Table 18**

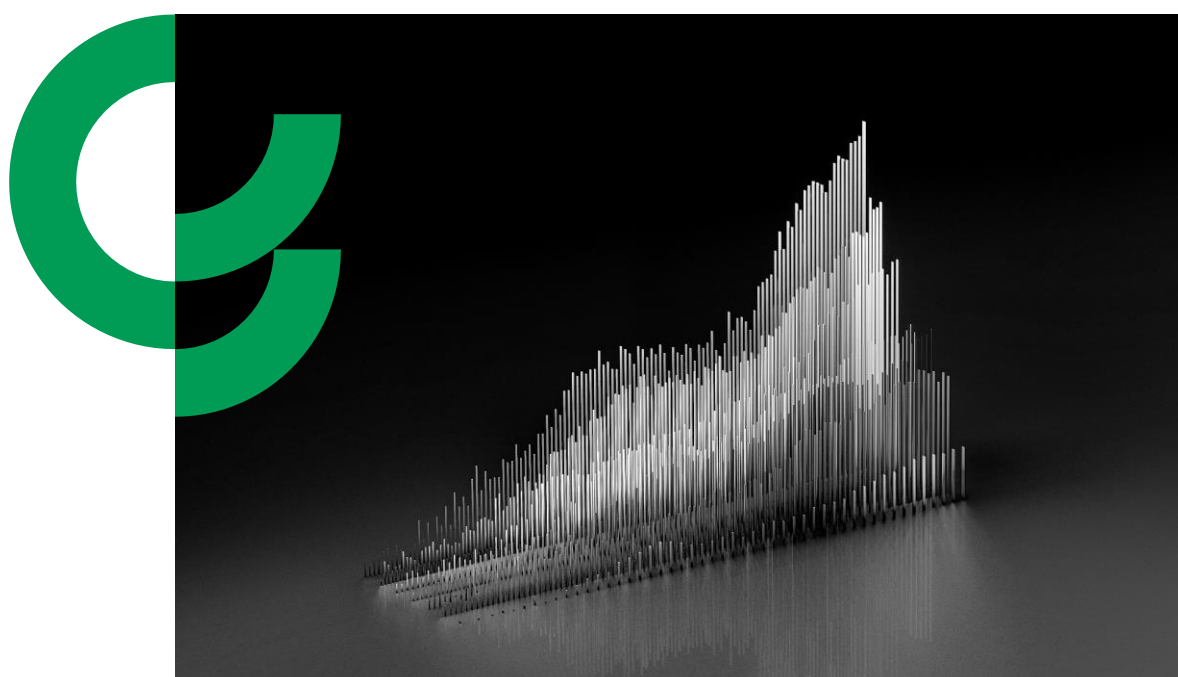
<b>Risk factors</b>	U.S.-style risk factors tend to be more detailed and specific (and therefore lengthier). Examples are often used to illustrate risks.
<b>Management's Discussion and Analysis</b>	<p>There are a number of specific U.S. requirements for the financial disclosure (although a number of these have carried over to Australian offers without a U.S. component). These include:</p> <ul style="list-style-type: none"><li>• discussion of the composition of key income statement line items and their drivers;</li><li>• a period-to-period discussion of the income statement on both an actual and pro forma basis (to the extent they are meaningfully different); and</li><li>• detailed information about sources of cash as well as capital expenditures (including contracted future amounts).</li></ul>
<b>Financial forecasts</b>	Given the inherent risks (financial forecasts are not typical in U.S. IPOs due to liability concerns), U.S. counsel focuses on the disclosures around the forecast financial information, including ensuring clear disclosure of the assumptions and sensitivities, together with appropriate cautionary language.



## 10.4 FINANCIAL INFORMATION

The content, presentation and assurance requirements of the U.S. process differ from the Australian process in a number of respects:

- ♦ three years of audited general purpose financial statements are typically required in a U.S. offer (although there have been exceptions where, for example, financial statements for three full years are not available or the earliest year is not relevant because of changes in the business);
- ♦ full financial statements (including notes and the audit reports) are included in the U.S. offering document;
- ♦ where a significant acquisition or disposal has recently occurred, it may be necessary to provide pro forma financial information reflecting the transaction prepared in accordance with U.S. rules; and
- ♦ underwriters to a U.S. offer will require ListCo's auditors to deliver a U.S.-style 'comfort letter' regarding the financial information in the prospectus. Because auditing standards restrict accountants' ability to deliver these letters (as of a date more than 135 days after the balance date of the most recent audited or reviewed financial statements), this requirement may impose timing constraints on the offer that should be understood at the outset of the process.



## 10.5 OFFER MANAGEMENT/UNDERWRITING AGREEMENT AND SIGN-OFFS

The changes to the offer management/underwriting agreement to accommodate the U.S. tranche are not extensive and largely involve the inclusion of a number of additional representations, warranties and covenants to ensure the availability of the relevant U.S. private placement exemptions. It is customary in U.S. offerings for the issuer to give a 'Rule 10b-5' representation on the offering documentation to the effect that the offering document does not contain any material misstatements or omissions.

In addition, it is also customary for an underwriting/offer management agreement to contain indemnity and contribution provisions for losses which the underwriters suffer as a result of material misstatements or omissions in the offering memorandum, to the extent that such indemnities are enforceable under applicable law.

The underwriting/offer management agreement for a U.S. offer will usually require the following closing deliverables:

- ♦ legal opinions from Australian counsel and, where relevant, other local counsel to ListCo;
- ♦ legal opinions from U.S. counsel to ListCo, including a 'no registration' opinion, an Investment Company Act opinion and a 'fair and accurate' opinion regarding the U.S. tax disclosure in the wrap;
- ♦ 10b-5 disclosure letter from U.S. counsel; and
- ♦ a 'comfort letter' at pricing/allocation and 'bring-down comfort letters' at settlement being delivered by the accountants with respect to the financial information in the offering memorandum.

## 10.6 PUBLICITY

Rule 144A requires, among other things, that shares are not sold to the public in the U.S. There are also restrictions more generally relating to improperly conditioning the U.S. market in relation to the shares placed outside of the U.S. market.

As a consequence of these and related requirements, detailed publicity procedures need to be followed in the context of an Australian IPO with a U.S. tranche, including with regard to internet publicity and the posting of any offer materials on ListCo's website without an appropriate 'gateway' blocking access to persons in the U.S. Applied with care and sophistication, these procedures should not materially impact the marketing of the deal in the customary way in Australia.



# Glossary

Capitalised terms have the following meanings in this guide.

<b>ASIC</b>	The Australian Securities and Investments Commission.
<b>ASX</b>	ASX Limited or the Australian Securities Exchange (as applicable).
<b>CDI</b>	A CHESS depositary interest.
<b>Corporations Act</b>	The Australian Corporations Act 2001 (Cth).
<b>DDC</b>	The due diligence committee formed by ListCo in connection with the IPO.
<b>Escrowed Securities</b>	Restricted securities as defined under the Listing Rules.
<b>HoldCo</b>	The entity that holds the existing operating entity of the business.
<b>IPO</b>	An initial public offering of securities.
<b>ListCo</b>	The entity that proposes to list on ASX.
<b>Listing Rules</b>	The listing rules of ASX.
<b>QIB</b>	A 'qualified institutional buyer' as defined in Rule 144A under the U.S. Securities Act.
<b>SaleCo</b>	The entity that is formed to conduct a sale of new and existing securities in HoldCo held by the vendors.

# A&O Shearman IPO experience

## Redox

Acting for the joint lead managers on Redox Limited's AUD 402m IPO.

## Retail Zoo Holdings

Acting as the joint lead managers' counsel on Retail Zoo's proposed IPO before its ultimate trade sale.

## Elliott Green Power

Acting as Elliott Green Power's counsel on its dual-track IPO and ultimate trade sale process.

## Beforepay

Acting for the joint lead managers for BeforePay's AUD 35m IPO.

## Vulcan Energy

Acting for the listing agent on ASX-listed Vulcan Energy's dual listing on the Frankfurt Stock Exchange.

## SiteMinder

Acting for the joint lead managers for SiteMinder's AUD 627m IPO.

## GQG Partners

Acting as the joint lead managers' counsel on GQG Partners' AUD 1.19bn IPO. 'Excellence Award' at the 2022 Australasian Law Awards for Equity Capital Markets Deal of the Year.

## PEXA Group Limited

Acting for Australia's leading property settlement platform on its AUD 1.174bn IPO as part of a dual-track process. Winner of 'Equity Capital Markets Deal of the Year' Australasian Law Awards 2022.

## Silk Logistics

Acting as the joint lead managers' counsel on Silk Logistics' AUD 70m IPO

## Australian Clinical Labs

Acting for the joint lead managers on Australian Clinical Labs' AUD 408.6m IPO.

## DDH1

Acting for the joint lead managers on DDH1's IPO.

## Iris Energy

Acting for Iris Energy, a sustainable bitcoin miner, on its proposed ASX IPO, before its eventual listing on NASDAQ.

## Liberty Financial Group

Acting as Australian and U.S. counsel to Credit Suisse as underwriter and lead manager of Liberty Financial Group's AUD 321m IPO.

## HWL Ebsworth

Acting for law firm HWL Ebsworth on its proposed IPO, which was ultimately withdrawn before lodgement.

## Credit Clear

Acting for Credit Clear on discrete matters related to its initial public offering to raise AUD 15m.

## Tritium

Acting for major shareholder Varley on the NASDAQ SPAC IPO of electric vehicle charging station manufacturer Tritium.

## NeoGames

Acting for U.S. focused i-lottery business NeoGames on its proposed ASX IPO, before its ultimate NASDAQ listing.

## Life360

Acting as joint lead managers' counsel on the AUD 820m IPO of Life360. Life360 was the biggest U.S. tech company to list on the ASX.

## Viva Energy

Acting for Viva Energy Group Limited as issuer's U.S. and international counsel on its IPO on the ASX.

## Property Exchange Australia

Acting for PEXA on its dual-track IPO and ultimate trade sale process for AUD 1.62bn in 2018.

## Bingo Industries

Acting as Macquarie's Australian counsel on Bingo Industries' AUD 440m IPO.

## Lattice Energy

Acting as Bank of America Merrill Lynch, Macquarie and UBS' Australian and U.S. counsel on the proposed IPO and eventual trade sale of Lattice Energy.

## Viva Energy Real Estate Investment Trust (REIT)

Acting for Viva Energy REIT on its AUD 911m IPO. This was the first ever gas station REIT in Australia and the second-largest Australian REIT IPO ever.

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**Australian Unity Office Property Fund**

Acting as underwriters' counsel for Credit Suisse, UBS and NAB on Australian Unity Office Property Fund's AUD 391m IPO.

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**Moly-Cop Group Limited**

Acting as joint Australian and U.S. lead managers' counsel on the proposed IPO of Moly-Cop Group Limited.

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**Global Traffic Network**

Acting as Macquarie's Australian counsel on Global Traffic Network's AUD 188m IPO.

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**Link Group**

Acting as Link Group's Australian counsel on its IPO to raise approximately AUD 950m making it the largest initial public offering on the ASX for 2015 with a market capitalisation of AUD 2.2bn. The deal won 'Best IPO' at FinanceAsia Awards 2015.

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**Mesoblast**

Acting as J.P. Morgan's and Credit Suisse's U.S. counsel on Mesoblast's U.S. IPO and Nasdaq listing.

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**Wisetech Global**

Acting as WiseTech Global's U.S. counsel on its AUD167m IPO, which valued the company at AUD 970m.

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**Clydesdale**

Acting as Clydesdale's Australian and U.K. counsel on its demerger from NAB and its listing on both the ASX and LSE.

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**Mcgrath Group**

Acting as McGrath's Australian counsel on its IPO to raise approximately AUD 130m with a market capitalisation of approximately AUD 280m.

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**APN Outdoor**

Acting as UBS' and Morgan Stanley's Australian counsel on APN Outdoor's AUD 458m IPO.

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**Veda Group**

Acting as Veda's Australian counsel on its IPO which, with a market capitalisation of AUD 1.1bn, made it one of the largest and most successful IPOs in 2013.

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**Mantra Group**

Acting as UBS' Australian counsel, as an existing shareholder, on the Mantra Group IPO.

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**Estia Health**

Acting as Deutsche Bank's and Morgan Stanley's U.S. counsel on Estia Health's AUD 725m IPO.

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**Commonwealth Of Australia And Medibank Private Limited**

Acting as Commonwealth of Australia's and Medibank Private Limited's U.S. counsel on the AUD 5.7bn privatisation and IPO.

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**Healthscope**

Acting as CIMB's, Credit Suisse's, Goldman Sachs' and Merrill Lynch's U.S. counsel on Healthscope's AUD 2.25bn IPO.

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**Asaleo Care**

Acting as Citi's, Macquarie's and Merrill Lynch's U.S. counsel on Asaleo Care's AUD 656m IPO.

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**Ausco Modular**

Acting as Ausco Modular's Australian counsel on its dual track trade sale/IPO process.

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**Spotless Group Holdings**

Acting as Spotless' U.S. counsel on its AUD 1bn IPO.

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**Pioneer Credit**

Acting as Evans & Partners' Australian counsel on Pioneer Credit's AUD 72.2m IPO.

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**Burson Auto Parts**

Acting as Morgan Stanley's and UBS' Australian counsel on Burson Auto Parts' AUD 298m IPO.

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**Cover-More Group**

Acting as UBS' and Macquarie's Australian counsel on Cover-More Group's AUD 521m IPO.

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**Hotel Property Investments**

Acting as Goldman Sachs' and J.P. Morgan's Australian counsel on Hotel Property Investments' AUD 300m IPO.

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**Lifehealthcare Group**

Acting as UBS' Australian counsel on LifeHealthcare Group's AUD 77m IPO.

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**Chemical distribution company**

Acting for the lead manager on the potential IPO.

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**Meridian Energy**

Acting as Meridian Energy's U.S. counsel on its NZD 1.9bn partial privatisation and IPO.

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**Ozforex Group**

Acting as underwriters' U.S. counsel on OzForex Group's AUD 430m IPO.

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**Steadfast Group**

Acting as J.P. Morgan's and Macquarie's Australian counsel on Steadfast Group's AUD 334m IPO.

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**Laramide Resources**

Acting as Laramide's Australian counsel on its Australian IPO of CDIs.

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**Cellarmasters Dual Track**

Acting as Archer Capital's Australian counsel on The Cellarmasters Group's AUD 340m dual track sale/IPO process.

# A&O Shearman awards and recognition

## Shortlisted

*Equity Market Deal of the Year*  
for Orica's capital raising

Australasian Law Awards 2023

## Winner

*Equity Market Deal of the Year*  
for PEXA IPO

Australasian Law Awards 2022

## Shortlisted

*Equity Market Deal of the Year*  
for GQG Partners IPO

Australasian Law Awards 2022

## Shortlisted

*Equity Market Deal of the Year*  
for CSL capital raising

Australasian Law Awards 2022

## Winner

*Equity Market Deal of the Year*  
for IOOF combined COVID super-sized  
placement and accelerated non-renounceable  
entitlement offer

Australasian Law Awards 2021

## Winner

*Equity Market Deal of the Year*  
for Westpac capital raising

Australasian Law Awards 2020

## Shortlisted

*Equity Market Deal of the Year*  
for Life360 IPO

Australasian Law Awards 2020

## Winner

*Equity Market Deal of the Year*  
for Transurban equity raising

Australasian Law Awards 2019

## Winner

*Energy and Resources Deal of the Year*  
for Lattice Energy dual-track IPO

Australasian Law Awards 2018

## Winner

*Equity Market Deal of the Year*  
for VIVA Energy REIT IPO

Australasian Law Awards 2017

## CLIENT TESTIMONIALS

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*“Their general client service is fantastic, very user-friendly and reliable. They have a very approachable team, and I am always impressed by their specialist knowledge.”*

Chambers 2024 (Capital Markets)

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*“The team is very professional and efficient and available.”*

Legal 500 2022 (Capital Markets)

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*“They are really good to deal with, contribute to industry standards and are really respected.”*

Chambers 2023 (Capital Markets)

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A client praises the team’s “communication, ability to meet deadlines and solve problems, and responsiveness and accessibility.”

Chambers 2021 (Capital Markets)

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*“Their technical expertise is outstanding,”* comments a pleased client, adding: “As is their capacity to deliver to a tight timetable, their communication and their ability to engage with all parties.”

Chambers 2022 (Capital Markets)

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Another client highlights its “good reputation and strong capability on financing matters,” going on to note: “They deliver timely and good-quality advice consistently.”

Chambers 2021 (Capital Markets)

## LEAGUE TABLES



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*No.1 for four years in a row Global Debt, Equity & Related Issuer & Manager*

Refinitiv 2019-2022

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*In 2021, we became the first firm to lead Bloomberg’s league tables for both Debt and Equity (acting for issuer) since it began 1999.*

# Key Australian contacts



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## Global presence

A&O Shearman is an international legal practice with nearly 4,000 lawyers, including some 800 partners, working in 29 countries worldwide. A current list of A&O Shearman offices is available at [aoshearman.com/en/global-coverage](https://aoshearman.com/en/global-coverage).

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