Baker McKenzie.

IPO GUIDE

LISTING A COMPANY ON THE AUSTRALIAN SECURITIES EXCHANGE

2022

Baker McKenzie's IPO expertise and experience

To achieve a successful IPO, a number of significant legal, structural and process issues need to be addressed – often within tight timeframes. This IPO Guide can assist issuers and their directors and advisers to understand and address these issues.

We approach IPOs by committing an experienced core team of lawyers and utilising our well-developed project management systems to provide quality advice and ensure the successful completion of an IPO in an efficient and cost-effective manner. Our strong working relationships with ASX and ASIC better enable us to assist clients in satisfying listing and other regulatory requirements as well as implementing innovative offer structures.

Having been involved in some of the most significant IPOs in recent years, Baker McKenzie is recognised for its extensive experience advising on IPOs and listings on the ASX.

Many large Australian IPOs involve international offers, so we offer a market-leading "one-stop shop" capability, providing Australian and US securities law advice under one roof in Australia. This enables us to advise Australian companies on raising capital in the United States in a more cost-effective and convenient manner than engaging separate Australian and US law firms.

We are also able to assist issuers to access other international capital markets utilising our database known as the "World Sky Survey for Australian Issuers", developed in conjunction with Baker McKenzie's international offices, which deals with the requirements applicable to Australian issuers if they want to offer their securities internationally in any of the 20 countries where Australian companies most frequently raise capital.

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All dollar amounts stated in this Guide are Australian dollars.

The law is stated as at January 2022, unless otherwise indicated.

1. Introduction

An initial public offering (IPO) or "float" is the process by which securities in an entity are offered to the public for the first time and the entity is listed on a stock exchange, enabling its securities to be quoted and traded on that exchange.

1.1 Purpose

This document is a guide to implementing an IPO and floating a company on the Australian Securities Exchange (ASX), the principal stock market in Australia.[1] This Guide provides a broad overview of the IPO process, and outlines the applicable legal and regulatory requirements and associated practical issues.

> In deciding whether to float, it is important to assess the company's suitability and preparedness for listing.
>
> The market will generally be looking for a proven business model, a track record of revenue and profitability, strong management and corporate governance, clearly articulated strategic growth plans and the ability to deliver on them.

1.2 Regulation of IPOs

The main bodies regulating IPOs are:

- the Australian Securities and Investments Commission (ASIC), which supervises compliance with the *Corporations Act 2001* (Cth) (Corporations Act), including the prospectus requirements; and
- ASX Limited which, as the stock market operator, is responsible for admitting companies to the official list of ASX and supervising compliance with the ASX Listing Rules (Listing Rules).

The Listing Rules govern the initial listing of a company on ASX, and also set out the requirements that must be met for a company to maintain its listed status. The Listing Rules are enforceable under the Corporations Act.[2]

1.3 Why undertake an IPO and float on ASX?

The most common reason for a company to undertake an IPO and float on ASX is to gain access to a large and developed capital market from which to raise funds for growth, expansion or acquisitions, or to reduce existing debt.

Additional advantages include the following:

- Creating a market for shares. Listing creates a market for trading in a company's shares, stimulates liquidity, and allows shareholders to realise their investment. This can broaden the company's shareholder base and facilitate further capital raisings.
- Attracting institutional investment. Listing generally makes it easier for a company to attract professional and institutional investors. This may generate greater business credibility and stability, and potentially greater access to capital should the company require additional funds in the future.
- Exit strategy. Listing may facilitate an orderly exit strategy for a company's founders or private equity investors, subject to possible escrow restrictions.

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1 This Guide refers to companies, but registered managed investment schemes (MIS) may also float on ASX, most commonly in the form of a unit trust or an entity issuing stapled securities. The IPO process for an MIS is largely the same as that for companies, but the applicable legal and regulatory requirements differ. In particular, instead of a prospectus, the IPO of interests in an MIS involves the issue of a product disclosure statement (PDS) or combined PDS and prospectus.

2 Sections 793C and 1101B of the Corporations Act.

- Improved market value. Being listed facilitates an independent valuation of a company by the market. The value of listed companies may be higher than those of comparable private companies, principally reflecting the increased availability of information and trading liquidity.
- Higher public and investor profile. Listing generally raises a company's profile with customers, suppliers, investors and the media. A listed company may also be covered in analyst reports and included in stock market indices. This heightened profile may help sustain demand for its shares.
- Employee incentives. Listing simplifies the process of remunerating a company's employees with shares through appropriately structured employee incentive plans. This can help align the interests of key personnel with the goals of the company.
- Greater efficiency. The rigorous disclosure and governance requirements applicable to a listed company tend to promote better internal systems and controls, potentially leading to greater operating efficiency for its business as a whole.

However, in deciding whether to float, a company should weigh up the advantages against the potential downsides of listing, including the following:

- Susceptibility to market conditions. The price and liquidity of a listed company's shares can be affected by market conditions and activities beyond its control.
- Greater accountability. Greater accountability to shareholders puts management decisions under the spotlight. Underperformance may attract media comment and impact on the price of a listed company's shares.
- Disclosure, reporting and governance requirements. A listed company is subject to greater disclosure, reporting and corporate and financial governance requirements. This requires investment in financial reporting, information and compliance systems.
- Restrictions on certain transactions. Under the Listing Rules, certain corporate transactions, such as those with related parties, may require the prior approval of shareholders.
- Costs and fees. There are considerable costs involved in implementing an IPO, floating a company on ASX and maintaining its listing, particularly for small companies.
- Management time. Operating as a listed company, and the IPO process itself, can absorb a large amount of management time.

Determining whether or not an IPO and listing on ASX is the most appropriate option for a company depends on its objectives and expectations, and should involve the consideration of viable alternatives.

1.4 Potential alternatives

Instead of undertaking an IPO and floating on ASX, a company may consider:

- seeking a "backdoor listing" on ASX (which would involve an existing listed entity or the "shell" of a listed entity being used as the listing vehicle);[3]
- as an alternative, or in addition, to an ASX listing, seeking a listing on the Alternative Investment Market or Main Market of the London Stock Exchange, Toronto Stock Exchange or another overseas exchange;[4] or
- remaining unlisted and obtaining capital from private equity investors.

These alternatives are not covered in this Guide, so please contact us for further information.

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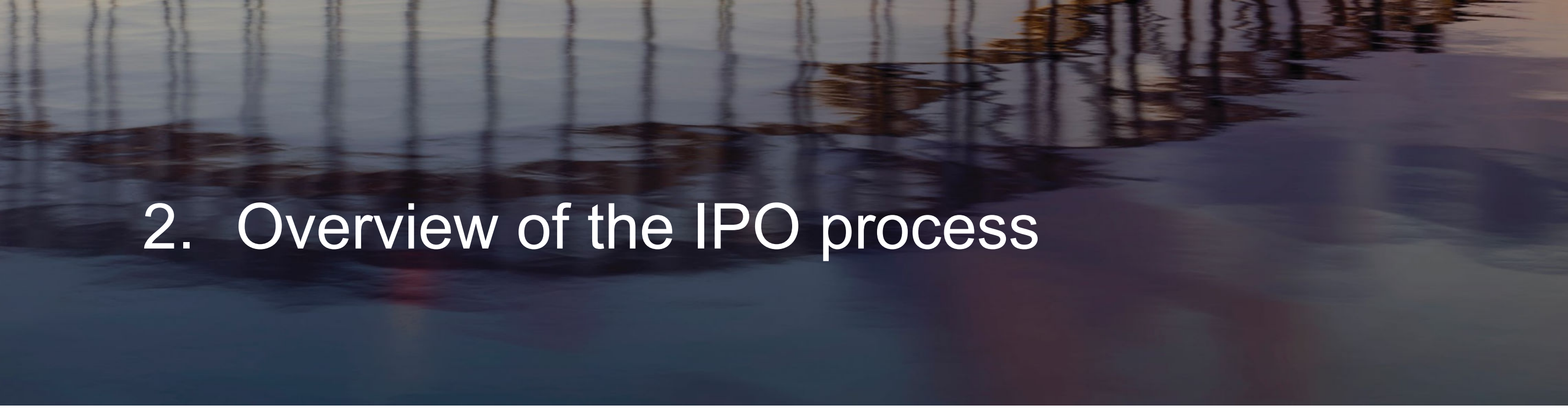
3 Backdoor listings have typically accounted for around 25% of all ASX listings, but have become somewhat less attractive as a result of recent changes to ASX guidance and policy. Generally, the same requirements for an IPO would need to be satisfied for a backdoor listing. While an increasing number of stock exchanges now permit the listing of special purpose acquisition companies, or SPACs, it would require a sizeable policy shift on behalf of ASIC and ASX to allow for the IPO of a SPAC in Australia.

4 There are now many Australian companies with secondary listings on exchanges like LSE, TSX and the New Zealand Stock Exchange.



2. Overview of the IPO process

2.1 IPO process

The key steps typically involved in an IPO are set out in section 2.2. Each step is outlined in detail in the relevant section of this Guide. Depending on a company's circumstances, the need for, and order of, these steps may vary.

Effective IPO planning and management is critical.

2.2 IPO timetable

An indicative minimum IPO timetable is set out below. In practice, the timetable will largely depend on an IPO's complexity and scale. A simple IPO can be completed in around three months. A larger, more complex IPO can take from six months to a year. A standard timetable is set out below.

Effective IPO planning and management is critical. Preparatory work, including by management prior to the appointment of professional advisers, should save significant amounts of time.

INDICATIVE IPO TIMETABLE

Assumes a "front-end" bookbuild structure, where the price and institutional allocations are determined prior to lodgement of the prospectus with ASIC.

KEY TASK	MONTH 1	MONTH 2	MONTH 3	MONTH 4	MONTH 5
Finalise key appointments – legal, tax, accounting, lead manager, financial adviser					
Scoping of due diligence enquiries					
Management briefings					
Confirm corporate and capital structure					
Corporate and capital restructuring					
Due diligence and monitoring					
Prepare historical and forecast financials					
Prospectus drafting					
Due Diligence Committee (DDC) meetings					
Determine offer structure and escrow arrangements					
Confirm corporate governance arrangements and finalise board and sub-committee members					
Audit financials / prepare Investigating Accountant's Report					
Verification of prospectus					
Finalise syndicate appointments (lead managers and retail brokers)					
Brief syndicate research analysts and research preparation					
Pre-deal research publication and marketing					
Management roadshows					
Bookbuild and allocations					
Lodge prospectus (and ASIC exposure period)					
Offer period					
Settlement					
Listing on ASX					

ROADMAP TO AN IPO

STAGE 1

Company Preparations

1. **Appointment of IPO team and advisors**
   - Appoint key advisers – legal, tax, accounting and financial adviser.
   - Decide timing for appointment of full lead manager(s) syndicate. Timing of appointments can impact confidentiality, competitiveness, pricing point and streamlined preparation.
   - Consider deferring full lead manager(s) syndicate appointment until later in process (where financial adviser engaged or more than one lead manager being considered).
2. Planning sessions
   Establish workstreams:
   Corporate structuring
   Financials
   Due diligence
   Governance and board
   Capital structure
   Offer structure
   Regulatory
   Prospectus
   Marketing
3. **Determine transaction structure**
   Corporate restructuring
   - Decide appropriate transaction structure – FloatCo, SaleCo, direct company issuance, CDIs etc.
   - Tax and accounting effects important.
   - Decide level of sell down (if any), nature of securities etc.
   - Outcome determines nature of required corporate restructuring.
4. Establish corporate governance systems
5. Prepare for due diligence
6. Commence preparation of historical and forecast financial information

STAGE 2

Offer & Capital Structure

1. Determine capital structure and commence debt refinancing/consents
2. Develop working model for offer structure
3. Develop working model for escrow arrangements
4. Cornerstone equity considerations (if relevant)

STAGE 3

Due Diligence, Financials & Prospectus

1. Establish DDC and kick off diligence process
2. Undertake due diligence workstreams and reporting
3. Prepare prospectus and marketing materials
4. Finalise and audit / review financials
5. Finalise board appointments and management incentives
6. Submit ASX listing / waiver applications
7. Submit ASIC modifications / exemptions (if any)
8. ASIC pre-vet of prospectus (if applicable)
9. Verify prospectus

STAGE 4

Marketing & Execution

1. **Finalise syndicate**
   - Finalisation of full lead manager(s) syndicate can occur at this later stage with deal structure and disclosure well settled – ensures competitive process.
   - Allows briefing of analysts and preparation of research reports to follow shortly after appointment, along with confirmation of offer structure and underwriting.
2. **Finalise offer structure (front-end / back-end) and escrow**
3. Brief syndicate research analysts and investor education reports prepared
4. **Research analyst investor education**
   - Key decision regarding publication of analyst research and commencement of analyst investor education.
   - Distribution of research is the first time the IPO "goes public" and confidential details regarding the Company will be provided to a wide range of potential investors.
   - Media scrutiny of research content and IPO process should be expected.
5. Management roadshow
6. **Sign cornerstone commitments (if any) and conduct bookbuild**
7. Pricing and allocation
8. Sign underwriting agreement
9. Prospectus lodgement, exposure period and offer period
10. Settlement and ASX listing

■ Key decision-making points (shown in **bold**)
Note: Assumes front-end bookbuild structure

2.3 IPO costs

The costs of an IPO also depend on its complexity and scale. The underwriting/management fee is typically the largest single IPO cost, and is generally calculated as a percentage of the amount raised. Other costs include brokers' fees, legal, accounting and share registry fees, printing costs, listing fees and marketing expenses. Effective IPO planning and management, and the use of professional advisers, should keep costs down.

As a rough guide, total IPO costs for a small offer (of less than $50 million) are likely to be 8-10% of the amount raised, with 5-6% of this representing the underwriting/management fee. Total costs for a larger offer are likely to be 3-7% of the amount raised, with 2-5% of this representing the underwriting/management fee.

3. ASX listing requirements

A company must meet specific requirements set out in the Listing Rules in order to be eligible to list on ASX.[5] The key requirements include a set of minimum admission criteria, as described below, which limit admission to companies which are of sufficient size and quality to be likely to attract investor interest. "Escrow" restrictions may also be imposed on the disposal of shares held by certain shareholders for a specified period after listing.

A company, through its professional advisers, should liaise regularly with ASX throughout the IPO process to ensure that it will be able to meet all the ASX listing requirements. ASX may be prepared to waive compliance with a Listing Rule. A waiver may be granted on conditions, which the company must comply with for the waiver to be effective.

> ASX carefully scrutinises compliance with the spread requirement

3.1 Structure, operations and constitution

A company must ensure that its structure and operations are appropriate for a listed entity.[6] A company must also have a constitution, which must be consistent with the Listing Rules.[7] The company should submit a draft of its constitution to ASX for review before it is adopted.

3.2 Shareholder spread

A company must achieve a satisfactory spread of shareholders after the IPO.[8] This requires a company to have at least 300 non-affiliated shareholders each holding shares with a value of at least $2,000, excluding restricted securities. Non-affiliated shareholders are shareholders who are not related parties of the company, an associate of a related party of the company, or a person whose relationship to the company or its related parties or their associates is such that, in ASX's opinion, they should be treated as affiliated with the company.

ASX carefully scrutinises compliance with the spread requirement. The requirement cannot be met by artificial means (for example, by giving shares away, offering non-recourse loans to prospective shareholders to acquire their shares, or shareholders splitting their holdings by, for example, using nominee companies).

There are no mandated Australian residency requirements in connection with the spread test, although the ASX retains the discretion to impose requirements in connection with a particular listing. ASX will generally exercise this discretion for applicants from emerging or developing markets by imposing a requirement for at least 75% of the minimum spread to come from Australian resident investors.

3.3 Minimum free float

The company must have a minimum free float at the time of listing of not less than 20%.[9] The "free float" is the percentage of the company's shares that are not restricted securities or subject to voluntary escrow, and that are held by non-affiliated shareholders.

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[5] See generally Chapter 1 of the Listing Rules, and particularly Listing Rules 1.1 to 1.7 for an ASX Listing. Different admission requirements apply if the company is seeking an ASX Debt Listing admission under Listing Rule 1.8 or an ASX Foreign Exempt Listing admission under Listing Rule 1.11.

[6] Listing Rule 1.1, condition 1.

[7] Listing Rule 1.1, condition 2.

[8] Listing Rule 1.1, condition 8.

[9] Listing Rule 1.1, condition 7.

3.4 Profit test and assets test

The main threshold requirement to list on ASX is to satisfy either the "profit test" or the "assets test", as described below.[10]

REQUIREMENT	PROFIT TEST[11]	ASSETS TEST[12]
Financial threshold	The company must have both: ▪ aggregated operating profit for the last three full financial years of at least $1 million; and ▪ consolidated operating profit for the 12 months prior to listing of more than $500,000. The company must include in the prospectus or give to ASX a statement from its directors confirming that, following enquiries, nothing has come to their attention to suggest that the company is not continuing to earn profit from continuing operations up to the date of the prospectus.	The company must have, on listing, either: ▪ net tangible assets of at least $4 million (after IPO costs); or ▪ a market capitalisation of at least $15 million.
Working capital	No minimum requirement.	The company must have working capital of at least $1.5 million as shown in its reviewed pro forma balance sheet, which will reflect the effect of the IPO and, for example, any related acquisition. The prospectus must state that the company has enough working capital to carry out its stated objectives, or the company must give ASX such a statement from an independent expert.
Form of assets	No minimum requirement.	Either: ▪ less than 50% of the company's total tangible assets (after any fundraising) must be cash or in a form readily convertible to cash; or ▪ the company must have commitments consistent with its stated objectives to spend at least 50% of its cash and assets in a form readily convertible to cash, and the prospectus must include

10 Listing Rule 1.1, condition 9.

11 Listing Rule 1.2. Sometimes an IPO will involve a new holding company being established for an existing business. While the holding company itself may not have the necessary trading and profit history, ASX may accept that the profit test can be satisfied on the basis of the underlying business acquired by that company.

12 Listing Rule 1.3. Investment entities, such as pooled development funds, must satisfy different requirements in order to meet the assets test. Investment entities must, at the time of listing, either have net tangible assets (after IPO costs) of at least $15 million, or be a pooled development fund and have net tangible assets (after IPO costs) of at least $2 million. Investment entities must also satisfy the "Accounts" requirements.

REQUIREMENT	PROFIT TEST[11]	ASSETS TEST[12]
		an expenditure program setting out these commitments.
Business	The company must be: ▪ a going concern or a successor of a going concern; and ▪ must have conducted the same business activity during the last three full financial years.	The prospectus must state the objectives the company is seeking to achieve from its listing and any fundraising.
Accounts	The company must give ASX: ▪ audited financial statements for the last three full financial years[13] together with unqualified audit reports;[14] and ▪ a reviewed pro forma balance sheet, reflecting the effect of the IPO, together with the review conducted by an auditor or independent accountant.[15] If the company has acquired another entity or business during the last three years, ASX will also require audited accounts for that other entity or business where its results have not been consolidated into the audited accounts of the company.	The company must give ASX: ▪ audited financial statements for the last two full financial years,[13] together with unqualified audit reports;[14] and ▪ a reviewed pro forma balance sheet, reflecting the effect of the IPO, together with the review conducted by an auditor or independent accountant.[15] The requirement for audited accounts extends to significant entities or businesses acquired in the 12 months prior to, or in connection with, applying for admission. An acquired entity or business will generally be "significant" if, at the company's most recent balance date, it accounts for 25% or more of the company's consolidated total assets, total equity, annual revenue, EBITDA or annual profit before tax. ASX may agree to accept less than two full financial years of audited accounts for the company or for a significant entity or business acquired (or being acquired) where the company: ▪ has been operating for less than two full financial years; or ▪ underwent a major and transformative change during its most recent financial year.[16]

13 If the company's last full financial year ended more than 6 months and 75 days before the company applies for admission, audited or reviewed accounts for the last half year must also be provided to ASX.

14 Audit or review reports must not contain a modified opinion, emphasis of matter or other matter paragraph that ASX considers unacceptable subject to limited exceptions such as opening balance qualifications in the oldest set of accounts.

15 The pro forma balance sheet would usually be included in the prospectus.

16 ASX Guidance Note 1: Applying for Admission - ASX Listings.

3.5 Prospectus

A company must issue a prospectus, lodge it with ASIC and give it to ASX.[17] The prospectus sets out the terms of the IPO. It also includes detailed information about the company's business, its directors and management, financial position, results of operations and prospects, the industry in which it operates and key risk factors so that investors can make an informed investment decision (see section 7)

3.6 Responsible person

A company must appoint a person responsible for communications with ASX in relation to Listing Rule matters.[18] This person must have satisfactorily completed an approved Listing Rule compliance course. The company secretary will generally be the appropriate person.

3.7 Good fame and character

A company must satisfy ASX that each director or proposed director, CEO or proposed CEO, and CFO or proposed CFO of the company at the date of listing is of good fame and character.[19] Police and bankruptcy checks will be required to satisfy this requirement, and depending upon the jurisdictions in which company officers have resided over the past 10 years, obtaining these checks can take significant time. Accordingly, these checks should be commenced early in the IPO preparation process.

3.8 Listing application and fees

A company must complete a listing application and submit it to ASX within seven days after the date of the prospectus.[20] As noted above, ASX reserves the discretion whether or not to admit the company to the official list, and may admit the company on any conditions it thinks appropriate.[21]

The listing application must include the prescribed listing fees (which include an initial listing fee and a pro rata annual listing fee).

The fees are calculated on the basis of the value of the shares for which quotation is sought.[22]

Checklist of key documents to be lodged with ASX

- ✓ ASX listing application
- ✓ Prospectus
- ✓ Constitution
- ✓ Employee incentive plan rules
- ✓ Dividend reinvestment plan rules
- ✓ Corporate governance policies
- ✓ Share trading policy
- ✓ Executed restriction deeds
- ✓ Schedule confirming spread of shareholders, minimum free float and Top 20 shareholders
- ✓ "Good fame and character" requirements
- ✓ Material contracts

17 Listing Rule 1.1, condition 3. If a company seeking to list establishes that it has not raised capital in the past three months and does not expect to in the next three months, and has the required shareholder spread, ASX may agree to the issue of an information memorandum instead of a prospectus. However, the disclosure requirements for information memorandums are substantially similar to those for prospectuses. In addition, the use of information memorandums may create secondary trading issues under section 707 of the Corporations Act.

18 Listing Rule 1.1, condition 13. ASX expects the person appointed to have a high degree of familiarity with the company's operations or have ready access to senior management who have responsibility for day to day management of the company.

19 Listing Rule 1.1, condition 20.

20 See section 723(3) of the Corporations Act and Listing Rule 1.7. The listing application is in the form of Appendix 1A to the Listing Rules.

21 Listing Rule 1.19.

22 See ASX Guidance Note 15A: Schedule of ASX Listing Fees.

3.9 Restricted securities

Some or all of the company's shares issued before or in connection with the IPO may be classified as "restricted securities".[23] These shares are held in "escrow", meaning that they cannot be sold or otherwise dealt with by holders for a period of up to two years after listing. For as long as the company has restricted securities on issue, the company's constitution must include prohibitions on dealing with restricted securities except as permitted under the Listing Rules.[24] The company must also either, at ASX's election, give each holder of restricted securities a restriction notice or enter into a restriction deed with each holder.[25]

The escrow restrictions are designed to protect the integrity of the market. They prevent the holders of restricted securities from realising the value of their holdings until the company's true market value becomes more apparent and the price of its shares reflects that value.

Escrow restrictions can restrict the ability of shareholders to sell their shares as part of an IPO. It is therefore important to consult with ASX at an early stage in the IPO process to determine if escrow restrictions will apply.

Escrow restrictions can apply to a broad range of shareholders.

The escrow restrictions will generally apply where the company is admitted under the assets test, rather than the profit test, except where the company has a track record of profitability or revenue acceptable to ASX or, in ASX's opinion, has a substantial proportion of its assets as tangible assets or assets with a readily ascertainable value.[26]

The escrow restrictions restrict both on-market and off-market transfers, the granting of security interests (such as mortgages), agreements to transfer (even if such agreements are only to take effect after the expiry of the escrow period), and changes in control of the registered holder. Accordingly, their effect is extensive.

There are various categories of restricted securities and the category will generally dictate whether the company may issue a restriction notice or whether the holder is required to enter into a restriction deed with the company. The table below sets out ASX's general approach to each category of holder of restricted securities.

Relationship of holder to company	Restriction deed	Restriction notice
Related party, promoter[27] or associate	✓	
Substantial holder[28]	✓	
Other seed capitalist		✓
Vendors of a classified asset (10 or fewer vendors)[29]	✓	
Vendors of a classified asset (more than 10 vendors)[30]		✓
Professional adviser or consultant	✓	

23 See Chapter 9 of the Listing Rules, Appendix 9B and Guidance Note 11: Restricted Securities and Voluntary Escrow.

24 Listing Rules 9.1(a) and 15.12.

25 Listing Rule 9.1. Refer to the table on this page for further details.

26 Listing Rule 9.2.

27 Promoters include persons who, in ASX's opinion, have had a material involvement in the formation or promotion of the company.

28 A substantial holder is a person who has or will have a relevant interest in 10% or more of the company's securities on completion of the listing. The onus lies on the substantial holder to establish, to ASX's satisfaction, that they have had no material involvement in the formation or promotion of the company. Guidance Note 11: Restricted Securities and Voluntary Escrow provides guidance on ASX's approach to this issue.

29 Classified assets include, for example, interests in intangible property that is substantially speculative or unproven, or has not been profitably exploited for at least three years, and interests in assets that, in ASX's opinion, cannot be readily valued.

30 Excludes related parties, promoters or associates or substantial (10%+) holders.

ASX also has discretion to treat any other securities as restricted securities.

The number of securities to be escrowed and the applicable escrow period depends on the nature of the relevant holder's relationship with the company, and the consideration for the issue of the securities.

Generally, all securities issued other than for cash to vendors, promoters, professional advisers and consultants will be escrowed. Seed capitalists who paid cash for their securities at a discount to the IPO price, and related parties (such as directors) and promoters who received securities under an employee incentive scheme, will be escrowed in accordance with a "cash formula" based on the proportion that the cash they paid for their securities bears to the IPO price. For instance, if seed capitalists paid 20 cents per share and the IPO price is $1.00, those seed capitalists would be able to sell 20% of their shares and the remaining 80% would be escrowed.

The escrow period for seed capitalists and vendors who are neither related parties nor promoters is usually one year from the date of issue of the securities. The escrow period for other holders who are related parties, promoters, professional advisers or consultants can extend to two years from the date of quotation of the company's securities.

Voluntary escrow arrangements (that is, arrangements that are not ASX imposed) may also be entered into by key persons associated with the company prior to the IPO (such as directors and senior management) to voluntarily "lock-up" their holdings for a limited period after listing. Such arrangements may be required by the underwriter to minimise the potential suppression on demand (known as an "overhang") these shares may cause after the IPO.

Related parties and promoters may have all of their securities escrowed.

The escrow period can extend for up to two years after listing.

ASX does not accept voluntary escrow arrangements as a substitute for mandatory ASX escrow.

4. Establishing an IPO team

A successful IPO requires a concerted team effort on the part of the company and a number of professional advisers. It is imperative that the role and responsibilities of each team member are understood and agreed at the commencement of the IPO process.

4.1 The role of the company

A successful IPO requires a substantial commitment of management time and resources, particularly during the drafting of the prospectus and the due diligence process.

This commitment needs to be balanced against the ongoing demands of running and continuing to grow the company's business. Careful planning and a disciplined allocation of resources are vital. It is common for a company to establish internal steering or sub-committees to oversee and implement the IPO process. These committees should be supported by a strong team of skilled and experienced professional advisers.

4.2 The role of professional advisers

Professional advisers play an integral role in the IPO process. They can assist the company with a wide range of issues, including underwriting, legal, financial, prospectus preparation, due diligence, and marketing the IPO.

Underwriter. An underwriter gives a degree of certainty to the success of an IPO by agreeing to subscribe for, or purchase, any shares not taken up by investors. There is no requirement to appoint an underwriter, but many companies do to ensure the receipt of sufficient funds. The underwriter's reputation may also provide some assistance to a newly listed company seeking to establish its credibility in the market. Underwriters generally will also provide offer management services and assist in the marketing and sale of the company's shares.

Broking firms, investment banks or other financial institutions usually provide underwriting services. To the extent that market stabilisation is undertaken in connection with an offer, the underwriter will usually perform this function (see section 5.8).

The underwriter provides its services to the company under a mandate letter and an underwriting agreement (see section 5.5).

Offer manager. If an IPO is not underwritten, then the company will typically appoint a lead manager to market and sell the company's shares. The lead manager has a similar role to an underwriter (but without having to take up any shortfall in subscriptions) and will enter into an offer management agreement with the company which has similar terms to an underwriting agreement. The lead manager will also provide advice and assistance in structuring and marketing the IPO and will offer the company's shares for sale to their institutional client base.

Broker. A broker (who is often the underwriter or related to the underwriter) is often appointed in larger IPOs to assist in selling the company's shares, predominantly to retail investors. The broker markets the IPO using existing channels and contacts, procures subscribers from its institutional and retail client bases, and may be involved in sub-underwriting the offer.

Independent financial adviser. A financial or corporate adviser may also be appointed to advise the company on the corporate and strategic implications of the IPO, including its structure, size and timing, valuation and pricing issues, prospectus disclosure (in particular financial disclosure) and the marketing strategy. These advisory services can be provided by a lead manager or underwriter to the IPO, but an independent financial adviser (who has no role in selling the securities or assuming underwriting risk) is often appointed by a company's board or management to provide independent advice and accordingly can also assist in the appointment of underwriters, lead managers and brokers to the IPO. The corporate adviser may also work closely with the company's legal adviser to drive the due diligence process and preparation of the prospectus.

Legal adviser. The legal aspects of an IPO can be complex, so it is important that a company appoints a well-credentialed legal adviser with strong capital raising experience. It is also advantageous if the legal adviser has an established profile and working relationship with ASIC and ASX.

The legal adviser will typically be responsible for advising the company on the legal aspects of preparing to float and associated legal documentation (for example, the company's constitution), and on all legal issues throughout the IPO, including Listing Rule requirements and Corporations Act matters. The legal adviser will typically assist in the design and implementation of the due diligence process, and will conduct legal due diligence, including a review of the company's material contracts. The legal adviser will draft sections of the prospectus and coordinate its verification, and will liaise with ASIC and ASX on behalf of the company, particularly in relation to regulatory relief and the company's listing application.

Accountant. The accountant will typically be responsible for reporting on the company's historical and pro forma financial results, reviewing any forecasts or projections included in the prospectus and conducting financial and tax due diligence. The accountant may also provide corporate advisory services. Often the accountant is the auditor of the company, but this is not always the case.

Other technical experts. Depending on the nature of its business, it may be necessary for a company to obtain advice or a report (which may be included in the prospectus) from a technical expert. Examples of technical reports include intellectual or real property valuations, reports on patents, engineering reports and reports on mining tenements.

Communications consultant. A company may appoint a communications consultant to assist in marketing and publicising the IPO to generate maximum interest in the offer. The consultant may liaise with the media to ensure the IPO gets sufficient press coverage, assist in preparing media releases and other public statements, and assist in organising investor roadshows. After the IPO, ongoing press interest can help sustain awareness of the company and liquidity in its shares.

Registry. A company will need to appoint a registry to create and manage its shareholder register. The registry's role generally also includes processing applications for shares, compiling various records concerning shareholdings to be presented to ASX prior to the company listing, the ongoing maintenance of the shareholder register and the ongoing despatch of documents to shareholders.

5. Structuring an IPO

There are a number of ways to structure an IPO. Determining the appropriate structure will require an assessment of a number of different factors, including the likely identity of prospective investors, the likely level of demand for the company's shares, the nature of the company's business and its size. The company should seek specific structuring advice from its professional advisers in order to achieve a structure that balances the liability considerations for the company and its directors with the desire to achieve the best price possible under the IPO.

5.1 Issue of new shares and/or sell down

An IPO typically involves an issue of new shares by a company under a prospectus. However, subject to applicable escrow restrictions (see section 3.9), an IPO can also be effected, or accompanied, by a sell down of shares by existing shareholders (for example, the company's original owners or early stage investors). These shares are offered for sale under the prospectus.

In a sell down, the selling shareholders will need to obtain stamp duty and capital gains tax advice to ensure that their liability for stamp duty or tax on any capital gain made as a result of the sell down is legitimately minimised.

Refer to section 6.1 for further detail on alternative corporate structures for executing the IPO.

5.2 Type of securities

This Guide generally refers to an IPO of shares, but there are a number of different types and combinations of securities a company may issue, including options, debt securities, hybrid securities and stapled securities.

The type of securities to be issued depends on the nature of the company or entity, its capital needs and the profile of prospective investors. For example:

- corporate bonds give an investor a return which is largely predictable if held to maturity, compared with shares that will fluctuate in line with the profitability of the company, general equity market conditions and other factors;
- hybrid securities pay a fixed return (like a corporate bond) but also have an option to convert into equity (that is, shares) in the company; or
- stapled securities may be a preferred option for some corporate groups because the individual securities that are stapled together (for example, a share and a unit) are treated separately for tax purposes.

An offer can also be made on a partly-paid or instalment receipt basis, with the outstanding balance to be paid at a later time.

5.3 Type of offer

An IPO may be structured into a number of components. It will typically comprise an institutional offer and a retail offer (which can include a broker firm offer, an employee offer, a priority offer and/or a general public offer).

Institutional offer	An institutional offer is an offer of shares to institutional investors in Australia (and commonly in certain overseas jurisdictions). Institutional offers are usually undertaken via a bookbuild process (see section 5.7).

Broker firm offer	Brokers appointed to the IPO will usually be provided with a firm allocation of shares that they can offer to their retail clients. A broker firm offer is an offer of shares to retail investors who have received a firm allocation of shares from their broker.
Employee offer	An employee offer is an offer of shares to those of the company's Australian resident employees who satisfy certain eligibility criteria. Employee offers commonly involve guaranteed minimum or preferential allocations of shares, and may be made at a reduced price. A small number of shares may also be "gifted" to employees, subject to certain conditions.
Priority offer	A priority offer (also known as a "Chair's List" offer), is an offer of shares to certain Australian resident investors who are personally invited to participate in the offer by the company. A priority offer can include a guaranteed minimum or preferential allocation of shares.
General public offer	This is an offer of shares to Australian resident retail investors (i.e. to the general public), and is usually reserved for larger IPOs where significant retail demand is required (or desired).

Small offers (of less than $50 million) can usually be filled by a retail offer, but larger offers will require a degree of institutional support. It is generally preferable to have a spread across retail and institutional investors, as a solid institutional investor base is a clear indication to the market that sophisticated investors support the company's stock.

An IPO may also extend beyond the Australian market. The decision to make an offer in an overseas jurisdiction will be influenced by a number of factors, including the size of the IPO and the company's capital requirements, the expected level of demand for the company's shares in overseas markets, the strength of the Australian market and the desire or need for a secondary listing on an overseas exchange.

Large IPOs typically involve an international offer tranche to institutional investors, often in the US.

5.4 Considerations for large IPOs

Large offers will typically include an overseas tranche, usually as part of an institutional offer. An offer of shares in an overseas jurisdiction must comply with the securities laws of that jurisdiction, which may give rise to potential differential disclosure issues and marketing activities across jurisdictions and the need to coordinate compliance with both Australian and overseas regulatory requirements.

Large Australian IPOs typically include a US tranche to institutional investors known as "qualified institutional buyers", or QIBs,[31] pursuant to Rule 144A or another exemption from the registration requirements of the US Securities Act of 1933. While extending an Australian IPO into the US to QIBs can be relatively easily achieved, it overlays additional workstreams to the Australian process to ensure that the offer and sale of securities in the US is conducted pursuant to a valid private placement and that the disclosure in the offer document meets the applicable US disclosure standards. Key additional workstreams for a concurrent offer of shares to QIBs in the US typically include the following:

- preparation of detailed publicity procedures designed to ensure that the issuer, its directors and officers and syndicate members do not engage in any activities that would constitute general solicitation, general advertising or directed selling efforts under US securities law;

[31] A QIB is a large or professional institutional investor (e.g. large pension funds, mutual funds, hedge funds and institutional investors) that owns and invests on a discretionary basis at least US$100 million worth of securities.

- consideration of US disclosure standards customary for Rule 144A offerings, which results in the Australian offer document being drafted to satisfy the disclosure requirements for both the Australian and US markets. Key areas of focus tend to include risk factors disclosure and financial information / management's discussion and analysis disclosure. A separate "wrap" is typically prepared with regard to US specific matters such as tax and US securities law transfer restrictions, which, together with the Australian offer document and financial statements of the issuer, comprise the US offer document;
- undertaking a customary US "due diligence" process, including documentary due diligence, management interviews and drafting sessions at which management is present;
- engaging US counsel to deliver a negative assurance letter with regard to the non-financial information included in the disclosure (which necessitates US counsel participating in the above-mentioned due diligence and drafting process);
- requiring the issuer's auditors to deliver a customary "comfort letter" with respect to the financial information in the offering document;
- inclusion of certain provisions in the underwriting or offer management agreements to reflect the concurrent Rule 144A offering, including US securities laws representations, warranties and undertakings and a US style indemnity for the US portion of the offer; and
- providing advice to the directors and officers of the issuer on their potential liability as a result of the US offer, including potential liability under the anti-fraud provisions of US securities laws.

Baker McKenzie has a Sydney-based US securities law practice that can advise on any US aspect of your IPO.

5.5 Underwriting the IPO

As noted in section 4.2, there is no requirement for a company to appoint an underwriter, but in many cases companies do engage one or more underwriters to give some certainty to the success of the IPO. An IPO may be fully or partially underwritten.

In some circumstances, a company will decide not to retain an underwriter. For example, a "blue chip" company embarking on a large IPO may assess the risk of shortfall as small and may not consider underwriting necessary. The risk of shortfall may be further reduced if the IPO price is determined through a bookbuild process (see section 5.7).

A company embarking on a smaller, speculative IPO may have difficulty retaining an underwriter and will often go to the market without one. The main risk for the company is that it may not have sufficient funding to carry out its stated objectives if there is a significant shortfall, and it is likely to receive a poor reception from the market when it is listed. This risk may be managed to an extent if the company mandates an investment bank or broker to manage the marketing and selling of its shares (see section 4.2). The IPO may also be made subject to the company receiving a minimum number of applications for shares.

The underwriter will enter into an underwriting agreement with the company under which it will agree, subject to certain conditions, to take up any shortfall in subscriptions. The underwriter is paid a fee, which reflects the underwriting risk taken and the work that the underwriter has to do to market and sell the company's shares. In some cases, the underwriter will seek to lay off its risk to sub-underwriters who will take up all or part of the shortfall for which the underwriter is obliged to subscribe.

The underwriter is typically initially appointed by the company under a mandate letter that sets out the basic engagement terms. A formal underwriting agreement will generally not be concluded until the prospectus is finalised and ready to be lodged with ASIC. The agreement will set out the circumstances under which the underwriter may terminate the underwriting agreement and its underwriting obligation. These circumstances typically include ASIC taking action to prevent offers being made under the prospectus, a material adverse change to the company or its business, or significant falls in relevant ASX market indices and other stock exchanges. The termination provisions in the underwriting agreement are usually vigorously negotiated by the company and the underwriter.

5.6 Research and marketing

There are significant restrictions on marketing an IPO prior to lodgement of the prospectus with ASIC (refer to section 9 for further detail). Notwithstanding this, the underwriter, lead manager and brokers may prepare a research report on the company in order to educate potential investors about the company and the market it operates in. This pre-deal research is prepared by the analysts using the near-final version of the prospectus (including the financial information).

ASIC has issued regulatory guidance[32] on sell-side research in the context of IPOs to address potential conflicts of interest and companies will need to be aware of the restrictions it places on interactions between the company and the underwriter's corporate advisory and/or research teams.[33]

Management may also conduct institutional investor roadshows using a final draft (or "pathfinder") version of the prospectus. Investor feedback from the research analyst marketing and management roadshows are used to assist in setting the price range for the IPO.

5.7 Pricing the IPO

The underwriter and the company's corporate adviser will generally assist the company in setting an appropriate IPO price.

The price is typically set having regard to the earnings or cashflow multiples at which shares of listed companies in the same industry are trading, expected demand for the company's shares and the need to ensure an orderly aftermarket in those shares once the company is listed. For a yield stock, consideration may also be given to comparative yields achieved by alternative investments.

> Most large IPOs involve a bookbuild component.

The final IPO price involves a trade off between maximising IPO proceeds and achieving orderly aftermarket trading.

The company may make either a fixed price offer or an open price bookbuild offer of its shares.

Fixed price offer ("front-end bookbuild")	Underwritten fixed price offers have historically been the most common approach in Australia. Under a fixed price offer, the price is set and quoted in the prospectus. To determine the appropriate price, the "pathfinder" draft of the prospectus is frequently issued to institutions without a price included. This is used to assess demand in the market and to obtain an indication of the price that the market would be willing to pay for the shares. In an underwritten offer, the fixed price and allocations will be determined by way of a bookbuild process that is conducted prior to lodgement of the prospectus. Once the bookbuild is complete, the underwriting agreement is signed and the prospectus lodged with ASIC. This process is referred to as a "front-end bookbuild" process.
Open price bookbuild offer ("back-end bookbuild")	Open price bookbuild offers have become increasingly common and are now standard for large IPOs involving large institutional components. The price is set through an institutional offer which is either completely open or, more commonly, set within a range that includes a minimum floor price.

[32] ASIC Regulatory Guide 264.

[33] These restrictions are typically summarised in research guidelines prepared by counsel for the underwriters.

	The final institutional offer price is determined through a bookbuild process managed by one or more brokers after the prospectus is lodged with ASIC and usually during the last week (or shortly following the close) of the retail offer period. This is known as a "back-end bookbuild" process. Institutional investors are invited to bid for a number of shares and the price they are prepared to pay. A "book" of bids is "built" and, at the end of this process, a price is set which clears the book, but also has regard to other factors, such as the level of demand under the retail offer and the desire for an orderly aftermarket. The retail offer price is either the same as, or at a slight discount to, the institutional offer price.

Both fixed price or open price bookbuild offers can be fully or partially underwritten.

In order to maximise the IPO price, particularly for large IPOs, a company may consider an offer by instalments. This involves investors paying a portion of the IPO price upfront and paying the outstanding balance at a later time. This may help avoid the problem of insufficient funds being available in the market at the time of the IPO to take up all of the shares being offered. However, these structures are now rarely used due to the poor aftermarket performance of some partly-paid IPOs which resulted in investors being called to pay instalment amounts on shares that were trading poorly in the market.

Sometimes instalment receipts or similar instruments are issued to investors at the outset. Once the final instalment is paid, the instalment receipts are exchanged for shares. This method has previously been used in IPOs effected by a sell down of shares by a major shareholder, particularly a government in the context of a privatisation.

5.8 Market stabilisation or "greenshoe"

A new listing of shares may lead to a fall in the market price of the shares below the IPO price because of the sudden increase in supply or imperfections in the pricing and allocation process.

To counter this effect, the underwriter may attempt to stabilise the price of the shares by purchasing, or offering to purchase, shares on market for a limited period following their issue. This is referred to as "market stabilisation" or "stabilisation trading". It aims to prevent or slow any fall in the market price of newly issued shares so as to achieve a more orderly secondary market for those shares, thereby enhancing investor confidence. Market stabilisation arrangements are generally only employed in large IPOs.

ASIC may, by issuing "no-action" letters, permit market stabilisation arrangements in limited circumstances and on defined conditions.[34] In the absence of such relief, stabilisation trading may contravene the Corporations Act.[35]

Market stabilisation arrangements typically involve the following steps:

- The underwriter is given an option to buy additional shares from the company (or selling shareholders) equivalent to no more than 15% of the total number of shares being made available under the IPO. The option is known as the "greenshoe" option. The underwriter also borrows an equivalent amount of shares from one or more existing shareholders;
- Following the close of the offer, the underwriter can allocate more shares to investors than were made available under the original offer. The size of this short position is limited by the size of the option (and equivalent stock loan) held by the underwriter;

[34] ASIC's current non-final policy position in relation to market stabilisation is outlined in its Consultation Paper 63. The conditions that ASIC will generally impose in no-action letters in relation to market stabilisation arrangements are set out in Attachment A to Schedule 1 of the paper.

[35] Market stabilisation may contravene Part 7.10 of the Corporations Act, in particular, sections 1041A (market manipulation), 1041B and 1041C (false trading and market rigging), 1041H (misleading or deceptive conduct) and 1043A (insider trading).

- If, during the first 30 days following listing, the market price of the shares falls below the final IPO price as determined under the bookbuild process, the underwriter may buy shares on market on the terms set out in the ASIC no-action letter. This will push up demand for the shares and therefore the market price; and
- If the underwriter is not able to buy a sufficient number of shares on market to cover its short position (this will be the case in the event of a price increase following listing) it may exercise its option to the extent necessary to do so.

The company must notify the market if the underwriter exercises its option and ASIC usually requires the underwriter to "tag" any stabilisation trades so the market is aware of the underwriter's activity.

5.9 Secondary listings

A company may seek a secondary listing on an overseas exchange. Principal overseas exchanges that a company might consider include the London Stock Exchange (including the Main Market and the Alternative Investment Market for small or new companies), the Singapore Stock Exchange, NASDAQ, and the New York Stock Exchange.

The decision to seek a secondary listing will be influenced by a number of factors, including:

- access to potential investors;
- the desire or need to raise the company's profile in an overseas jurisdiction;
- the geographic focus of the company's business;
- the entry or listing requirements of the overseas exchange; and
- the level of ongoing regulation imposed by the overseas exchange.

It is important to note that even if a company extends an offer overseas, it may not be necessary for it to seek an additional listing in that jurisdiction. For example, as discussed in section 5.4, a company may decide to extend its offer to institutional investors in the US by way of a concurrent private placement to QIBs under Rule 144A or another exemption from the registration requirements of the US Securities Act of 1933 without a listing on the New York Stock Exchange or NASDAQ.

6. Preparing a company for an IPO

A company will need to review its corporate and capital structure, board composition and corporate governance procedures and policies before floating. It may also put in place some form of employee incentive plan and a dividend reinvestment plan.

6.1 Structure

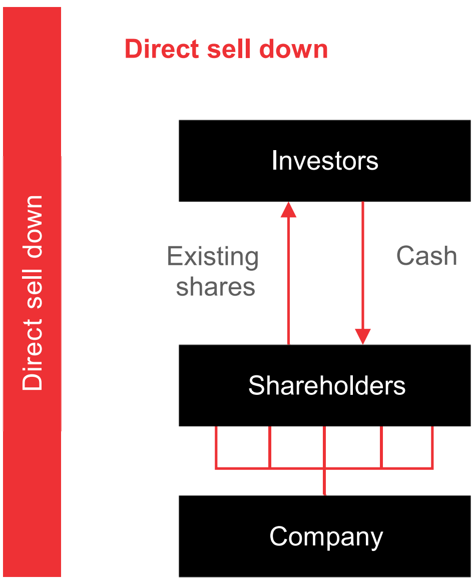
In addition to the Listing Rule requirement that a company's structure and operations be appropriate for a listed entity, there are specific requirements in relation to a company's corporate and capital structure that must be attended to before an IPO proceeds.

- Public company. The issuer must be a public company. This can involve:
  - using an existing public company;
  - converting an existing proprietary company to a public company, which requires shareholder approval; or
  - establishing a new "top-hat" public company to acquire the existing corporate group or business.

The issuer must have a constitution consistent with the Listing Rules and approved by ASX.

There are a number of different transaction structures that can be used to effect the IPO, with the more complex structures seeking to minimise vendor liability while achieving a suitable level of sell down.

POTENTIAL IPO STRUCTURES

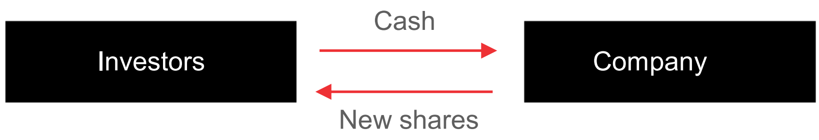


- Existing shareholders offer their shares for sale under the prospectus
- Those vendor shareholders (and their directors) are liable for the entirety of the prospectus
- Can be combined with company issuance (below)

POTENTIAL IPO STRUCTURES

Company issuance

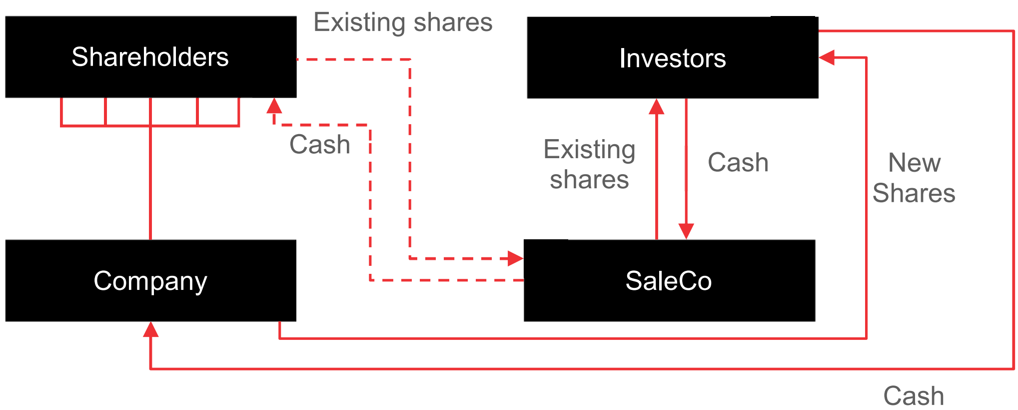
Company issuance



- Company issues new shares under the prospectus to raise primary capital
- Company and its directors liable for the entirety of the prospectus

SaleCo structure

SaleCo structure

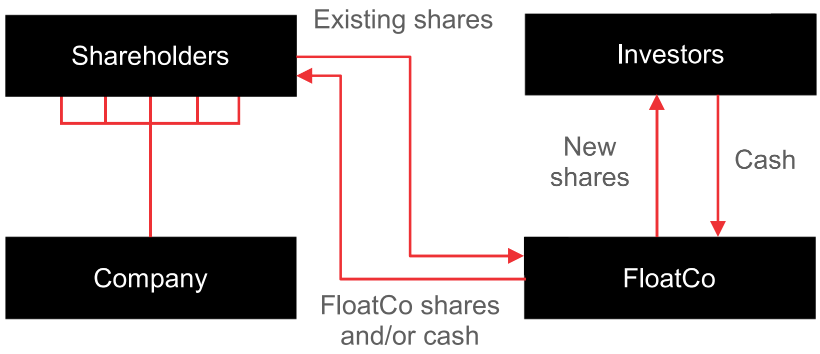


- Selling shareholders grant SaleCo entity the right to acquire some or all of their shares in the company. SaleCo offers to sell those shares under the prospectus
- SaleCo accepts offer from the selling shareholders upon confirmation the company will be admitted to ASX
- SaleCo and its directors liable for the entirety of the prospectus. As SaleCo is a special purpose vehicle, the company often indemnifies SaleCo for any liability in connection with the IPO
- Can be combined with company issuance

POTENTIAL IPO STRUCTURES

FloatCo structure

FloatCo structure



- Selling shareholders grant FloatCo entity the right to acquire some or all of their shares in (or the business of) the company, conditional upon settlement of the IPO
- FloatCo issues new shares under the prospectus and uses funds raised to acquire the shares / business of the company
- For those shareholders who wish to retain a holding in the company, a portion of the purchase price from FloatCo is reinvested back in FloatCo shares
- FloatCo and its directors liable for the entirety of the prospectus

- Capital restructure. A company's capital may need to be restructured to ensure that:
  - there are, or will be after the IPO, an appropriate number of shares on issue;[36]
  - there is only one class of ordinary shares on issue unless ASX approves another class, or the additional class is of partly paid shares which, if fully paid, would be in the same class as the ordinary shares;[37] and
  - the issue price of the shares is at least 20 cents each.[38]

  A company may also need to refinance its existing debt arrangements to ensure they are suitable for a listed company and for the needs of the company going forward.
- Corporate structure. A company should consider, to the extent necessary, restructuring its corporate and business structure to try to maximise its profitability and streamline its operations.

  It will be more difficult for a company to restructure its business once floated, particularly as shareholder approval may sometimes be required. Any acquisitions or divestments of non-core businesses should therefore be implemented by a company as a matter of priority (and, if possible, before its conversion to a public company).[39]

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[36] This typically involves a share split where each existing share is divided proportionately into a greater number of shares.

[37] Listing Rule 6.2.

[38] Listing Rule 2.1, condition 2.

[39] Note the ASX requirement for audited historical accounts to be provided for certain businesses acquired prior to listing (see section 3.4).

6.2 Board composition

A company's board of directors needs to be finalised before its prospectus is lodged.

Putting together a board of an effective composition, size and commitment to discharge its responsibilities and duties, and to add value to the company, is a difficult task. A company should commence this exercise as early as possible.

The board will consist of both executive and non-executive directors. Non-executive directors are not employees of the company and as such are not involved in day to day operational management. Non-executive directors are expected to bring particular skills and qualifications to the board, offering the company an "outsider's view". The skill sets of non-executive directors commonly fall within a range of disciplines, such as financial or relevant industry experience.

Under best practice corporate governance recommendations,[40] a majority of the board should be independent non-executive directors, and the Chairperson should be an independent non-executive director. The roles of Chairperson and CEO should also not be exercised by the same individual.

Independent non-executive directors should not only be independent of management and substantial shareholders but also free of any business or other relationship that could materially interfere with the exercise of their unfettered and independent judgement.

Independent non-executive directors should be appointed early in the IPO process to ensure their full participation in the due diligence process (see section 8). They will need to be satisfied with the scope and nature of the due diligence conducted because they will have personal liability for the prospectus. A potential new director who is approached late in the process and who isn't sufficiently familiar with the company's business may be reluctant to join the board immediately prior to the IPO for this reason.[41]

The board will need to set remuneration levels for non-executive and executive directors. Non-executive directors of larger listed companies are generally paid $100,000+ per year, with the Chair typically being paid two to three times the fee payable to other non-executive directors. The maximum aggregate remuneration payable to non-executive directors will usually be confirmed by shareholder resolution prior to the IPO.

The company may also need to enter into service contracts with key executive directors if there are no existing contracts. This is to make sure that they are tied to the company for a reasonable time after the IPO and enter into reasonable non-compete agreements. Increasingly these agreements state that executive directors are taken to have resigned from the board in the event that they cease to be engaged as executives.

It is also common practice for the company to enter into formal letters of appointment with non-executive directors.

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40 See the ASX Corporate Governance Council's Corporate Governance Principles and Recommendations (available through the ASX website at www.asx.com.au), particularly recommendations 2.4 and 2.5.

41 Although insurance can usually be obtained to protect directors against potential prospectus liability (either as part of a D&O Insurance policy or a specialised stand-alone Prospectus Liability Insurance policy), such insurance is costly and may not cover all eventualities or completely eliminate the risks.

6.3 Corporate governance

It is important that the company review and supplement its corporate governance procedures to ensure that it can comply with the legal requirements and obligations imposed on public listed companies under the Listing Rules and the Corporations Act. These requirements and obligations are supplemented by ASIC policy and the ASX Corporate Governance Council's Corporate Governance Principles and Recommendations.[42]

In particular, the Listing Rules make it mandatory for any company included in the S&P All Ordinaries Index to have an audit committee,[43] and it is recommended that a company also have a nomination and remuneration committee.

Corporate governance charters, codes and policies can be useful tools for outlining and managing these requirements.

A company generally should establish and adopt all of the following charters, codes and policies prior to its IPO, with some being mandatory:

- Board charter;
- Audit and risk committee charter;
- Nomination and governance committee charter;
- Remuneration committee charter;
- Continuous disclosure policy;
- Communications policy;
- Security trading policy;
- Diversity policy;
- Anti-bribery and corruption policy;
- Whistleblower policy; and
- Code of conduct.

Baker McKenzie's Public Listed Companies Guide describes these charters, codes and policies in more detail.

In establishing an appropriate corporate governance platform, a company will also need to consider a number of matters, including the duties of directors to the company, the manner in which conflicts of interest are to be dealt with, and indemnification and insurance issues.

6.4 Dividend policy

Before a company proceeds with an IPO, it will typically establish a dividend policy. This policy should be disclosed in the prospectus and may have an impact on the pricing of the offer. Generally, the directors determine a targeted percentage of profits which will be paid out as dividends, depending on the company's ongoing capital requirements and expected profits. The prospectus usually sets out the extent to which dividends are expected to be franked.

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[42] While the ASX Corporate Governance Principles and Recommendations are not legally binding, they do provide guidance and assistance in the conduct of public listed companies' affairs. Further, under Listing Rule 4.10.3, public listed companies are required in their annual report to state the extent to which they have followed the ASX Corporate Governance Principles and Recommendations, identify any recommendations that have not been followed and give reasons for not following them.

[43] Listing Rule 1.1, condition 17 requires companies included in the S&P All Ordinaries Index on admission to the official list of ASX to have an audit committee, and any company in the ASX 300 Index to comply with the ASX Corporate Governance Principles and Recommendations in relation to the composition and operation of the audit committee.

6.5 Employee incentive plans

It is common for a company to introduce some form of employee incentive plan on listing, to align the interests of key executives with the goals of the company. Companies can also take advantage of the fact that a prospectus is being produced for the IPO which can also be relied on to satisfy any disclosure requirements for such plans.

Employee incentive plans provide employees with the opportunity to become part-owners of the company and have a financial interest in its success, thereby aligning the interests of employees with the goals of the company. Where the receipt of shares or the vesting of options is deferred or staggered under a plan, this also provides a strong incentive for senior management and other key employees to remain with the company after it is listed.

The structure of any employee incentive plan must comply with the Listing Rules, and a company should submit a draft of its plan to ASX for review before adoption. Such plans are also structured to take advantage of tax concessions which may be available.

These are most common forms of plans:

Share plans	There are many forms of these plans, including: ▪ tax exempt plans, where employees can receive up to $1,000 of shares per annum tax free; ▪ salary sacrifice plans, where employees can contribute part of their salary to acquire shares on a tax deferred basis; and ▪ loan plans to enable employees to purchase shares in the company. The loans are usually at nil interest, and recourse is limited to the shares acquired.
Option plans	Under these types of plans, employees are issued with options to acquire shares (or other securities) in the company. The options are exercisable on certain conditions being met, including, for example, the employee reaching a particular sales target or the company reaching a particular profit target. The exercise price is usually set beforehand at a premium to the offer price.

There are other types of plans, and each has its advantages and disadvantages. The decision as to which plan to adopt will often be driven by tax considerations. Baker McKenzie can provide structuring and tax advice as to the type of plan that is most appropriate for a particular company.

There are advantages to introducing employee incentive plans prior to listing. For example, shares issued under a plan whose terms are summarised in the prospectus do not count towards the 15% maximum of capital that a listed company can issue in any 12 months without shareholder approval.[44]

6.6 Dividend reinvestment plan

It is also common for a company to introduce a dividend reinvestment plan (DRP) on listing. A DRP gives shareholders the option to reinvest dividends in new shares in lieu of cash.

A DRP has many benefits. For example, a DRP supports the ongoing capital needs of a company. Where a DRP is in place, the take up rate is typically between 25% and 50% (but this can vary considerably from period to period). Having a DRP may also allow a company to raise capital over time more cheaply than a new issue of securities to the market.

[44] See Listing Rules 7.1 and 7.2 exception 13(a) which provides, in the case of a plan established before a company is listed, that Listing Rule 7.1 does not apply to an issue under the plan if within three years before the date of issue a summary of the terms of the plan and the maximum number of equity securities proposed to be issued under the plan were set out in a prospectus.

In some cases, as an incentive to shareholders, shares are offered under a DRP at a discount to the prevailing market price. The discount can range from about 1% to about 5%. Another benefit to shareholders is the low transaction costs, as no brokerage applies to the acquisition of shares under a DRP.

A company can elect to activate or suspend a DRP depending on its capital requirements from time to time. DRPs can also be fully or partially underwritten, ensuring the company can retain some or all of the cash it would otherwise pay out as dividends. Further, shares issued under a DRP whose terms are summarised in the prospectus do not count towards the 15% maximum of capital that a listed company can issue in any 12 months without shareholder approval.[45]

A company should submit a draft of its DRP to ASX before adoption. DRPs can also be put in place following listing.

[45] See Listing Rules 7.1 and 7.2 exception 4 which provides that Listing Rule 7.1 does not apply to an issue under a dividend or distribution plan which does not impose a limit on participation. The exception also applies to any shares issued to an underwriter of the DRP if details of the underwriting agreement were disclosed before the date for payment of the dividend or distribution and the issue is made within 15 business days after that date.

7. Drafting a prospectus

Under the Corporations Act, an offer of securities generally requires disclosure to investors through a disclosure document.[46] The relevant form of disclosure document for an IPO is a prospectus.[47] A prospectus must comply with the disclosure requirements prescribed in the Corporations Act, while at the same time serving as the principal selling tool for the IPO.

7.1 Disclosure and presentation requirements

- General disclosure requirement. 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 being offered; and
  - the assets and liabilities, financial position and performance, profits and losses, and prospects of the company.[48]

  Information only needs to be disclosed in the prospectus if a specified person whose knowledge is relevant either knows the information or ought reasonably to have obtained it by making enquiries. Persons whose knowledge is relevant include the company's directors and proposed directors, the underwriter of the offer, experts quoted in the prospectus and other advisers named in the prospectus.[49]

  Information cannot be withheld from the prospectus just because it is confidential.
- Specific disclosure requirements. A prospectus must also disclose:
  - the terms and conditions of the offer;
  - the nature and extent of interests held by, and benefits given to, for example, directors, advisers, promoters and underwriters;
  - if the prospectus states or implies that the shares will be able to trade on a financial market, information on the quotation of the shares;
  - the expiry date of the offer; and
  - the fact that the prospectus has been lodged with ASIC.[50]
- Incorporation by reference. A prospectus may incorporate by reference information that is contained in a document lodged with ASIC.[51] The reference must, among other things, inform investors of their right to obtain a copy of the document free of charge, and include sufficient information about the contents of the document to allow an investor to decide whether to obtain a copy.

  For example, some companies choose to incorporate by reference detailed financial information lodged with ASIC (primarily for the benefit of sophisticated investors).

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46 See Part 6D.2 of the Corporations Act. There are limited exceptions to this general rule (see sections 708 and 708A of the Corporations Act), but these exceptions are not applicable to a public offer of securities.

47 The Corporations Act allows companies to raise up to $10 million over their life by means of an Offer Information Statement (OIS) for which there is a lower disclosure standard. However, an OIS is not a prospectus for the purposes of Listing Rule 1.1, condition 3 (see section 3.5), and therefore would not be accepted by ASX as the basis of an ASX listing.

48 Section 710 of the Corporations Act.

49 Section 710(3) of the Corporations Act.

50 Section 711 of the Corporations Act.

51 Section 712 of the Corporations Act.

- Clear, concise and effective presentation. A prospectus must be worded and presented in a "clear, concise and effective" manner.[52] This requirement can be difficult to balance against the need for full disclosure, and the advice of experienced advisers is essential.

An example of the typical contents of a prospectus is set out below.

CONTENT	
Chair's letter	An introduction to investors.
Investment overview	Summary of important investment information for the company, including key financial ratios, purpose of the offer, use of proceeds and dividend policy.
Details of the offer	Includes offer price, number of shares being offered, offer structure, allocation policy and how to apply.
Company background	Includes a description of the company's business, structure, operations, past performance, strategy and prospects.
Industry background	Includes a description of the industry in which the company operates.
Risk factors	Discussion on specific and general risks relating to the company and its business.
Board of directors and senior managers	Includes experience and background of directors and senior managers, their interests in the company and remuneration structures, and a description of the company's corporate governance structures.
Company financial information summary	Summarises and comments on historical and forecast financial information, underlying assumptions and sensitivity analysis.
Accountant's report	Reports on historical financial information and forecasts.
Additional reports	Reports from special experts (for example, property valuers, mining engineers, technology specialists).
Additional information	Includes summaries of material contracts, material litigation, the constitution of the company, employee share and option plans, related party transactions, taxation information for investors and other specific information required under the Corporations Act.
Application forms	Application forms and instructions on how to apply for shares.

52 Section 715A of the Corporations Act.

7.2 ASIC guidance on better prospectus disclosure

ASIC has issued guidance on the preparation and content of prospectuses (Regulatory Guide).[53] The Regulatory Guide has three main focuses: the prospectus disclosure requirements, how to present a "clear, concise and effective" document, and specific disclosure issues that have arisen in practice.

- Disclosure requirements. The Regulatory Guide provides examples of information that, in ASIC's experience, investors and their professional advisers would expect to find in a prospectus.

  ASIC encourages prospectus issuers to consider the information requirements of their target investors and to tailor prospectuses to their specific needs.

- Clear, concise and effective prospectuses. To ensure compliance with this requirement, and to discourage prospectus issuers from seeking to limit their liability through "over-disclosure", the Regulatory Guide recommends that prospectus issuers:

  - make prospectuses as short as possible to effectively communicate information;
  - omit extraneous information that will not affect an investment decision;
  - highlight key information about the issuer, its business and the securities at the front of the prospectus;
  - focus on communicating with retail investors while also catering to the needs of professional advisers and institutions;[54]
  - incorporate technical and detailed financial information by reference;
  - use plain and direct language, avoid jargon and legalistic or overly complex expression;
  - organise information in a logical way, from the simple to the more detailed, technical information; and
  - use navigational aids like tables of contents and signposting, and a range of communication tools such as diagrams, boxes and graphs.

  The Regulatory Guide makes clear that, where ASIC is not satisfied that the clear, concise and effective requirement has been met, it may issue a "stop order" on the prospectus, which prevents offers, issues, sales or transfers of shares from being made (see section 10.2).

- Specific disclosure issues. The Regulatory Guide also provides guidance on certain specific prospectus disclosure issues that have arisen in practice, including in relation to the disclosure of risks, the use of proceeds of a capital raising, interests and benefits given to, for example, professional advisers, directors and underwriters, pro forma financial information and any share allocation policy.

  Importantly, the Regulatory Guide emphasises that risk disclosure should be both accurate and meaningful. Risks should be ranked having regard to their potential impact on the company and likelihood of occurring. Remote risks with limited impact should not be disclosed. Risks should be highlighted in the front of the prospectus, and should be at least as prominent as information relating to the potential benefits of the offer.

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53 Regulatory Guide 228: Prospectuses: Effective Disclosure for Retail Investors.

54 Where necessary, an issuer may consider "user testing" a prospectus to see that it meets the needs of retail investors. ASIC may give relief from the pre-prospectus advertising restrictions (see section 9) to permit an issuer to do this with a limited sample of investors.

7.3 Disclosure of historical financial information

The Regulatory Guide sets out ASIC's expectation regarding historical financial information, which requires the disclosure of three years of audited historical financial information for the company (or two and a half years, depending on the date of the prospectus).[55] Specifically, the prospectus must include:

- a consolidated audited statement of the company's financial position for the most recent financial year (or audited or reviewed half-year depending on the date of the prospectus);
- the following audited financial information for at least the three most recent financial years (or two years of audited information and a half-year of reviewed information, depending on the date of the prospectus):
  - a consolidated income statement showing major revenues and expense items, and profit or loss, including EBIT and net profit after tax;
  - a consolidated cash flow statement showing, at a minimum, operating and investing cash flows;
  - other information that is material from financial statements, notes to the financial statements and other documents attached to the financial report; and
  - any modified opinion by the auditor (e.g. a going concern emphasis of matter or qualification);
- all events that have had a material effect on the company since the date of the most recent financial statements; and
- a warning that past performance is not a guide to future performance.

Further, if one or more entities or businesses (that alone or together are "significant"[56]) are acquired in connection with the IPO or have been acquired in the previous 12 months, two years of audited historical financial information will also generally be required for those entities or businesses.

7.4 Disclosure of prospective financial information

The Corporations Act does not mandate the disclosure of prospective financial information, such as financial forecasts, in a prospectus. However, in practice, the requirement to disclose information about a company's "prospects" often translates into the disclosure of prospective financial information.

ASIC's view is that a prospectus should only include prospective financial information if there are objectively reasonable facts or circumstances which support the information.[57] Under the Corporations Act, if a prospectus contains a statement about a future matter and there are no reasonable grounds for making the statement, the statement is taken to be misleading.[58] Start-ups or companies seeking to float with no track record of operations should not include forecasts in their prospectuses.

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55 Two and a half years of historical financial information will be acceptable where the prospectus includes the most recent half-year audited or reviewed financial statements and the prospectus is lodged with ASIC less than three months after year end. There are some exceptions to the requirement to disclose two and a half or three years of audited historical financial information in the prospectus, such as in the case of start-up companies, roll-up listings, or companies that have undergone major changes to their main business undertaking. See Section F of ASIC Regulatory Guide 228.

56 An acquisition will be "significant" where it accounts for more than 25% of an issuer's consolidated annual revenue (or for an exploration or other entity that is not earning material revenue from operations, consolidated annual expenditure), income, total assets or total equity. Significance is assessed using the most recent 12 months of historical financial information. See Section F of ASIC Regulatory Guide 228.

57 See ASIC Regulatory Guide 170: Prospective financial information. ASIC's view is that prospective financial information without reasonable grounds is not material to investors, nor would an investor reasonably require it or reasonably expect to find it in a prospectus.

58 Section 728(2) of the Corporations Act, and see section 8 of this Guide.

ASIC requires any prospective financial information included in a prospectus to be accompanied by:

- full details of the assumptions used to prepare the information, which must be reasonable and not merely the directors' best estimates or hypothetical assumptions;
- the time period covered by the information (which, in most cases, should be less than two years);
- the risks that the forecast will not be achieved; and
- an explanation of how the information was calculated.

In addition, a sensitivity analysis is normally included showing the impact of changes in key assumptions.

It is market practice for an investigating accountant to report on the prospective financial information and the assumptions underlying it. The report may be a way for a company to demonstrate that it has reasonable grounds for stating the information.

The accountant's report, which is typically included in the prospectus, is generally in the form of a "negative assurance" opinion. It is a confirmation that nothing has come to the accountant's attention to suggest that the prospective financial information or the underlying assumptions are unreasonable.

Forecasts should only be included if they are relevant and reliable – there must be a reasonable basis for their inclusion.

Where the existence of reasonable grounds for prospective financial information included in a prospectus is unclear, ASIC may place a stop order on the prospectus.

In circumstances where there are no reasonable grounds for disclosing prospective financial information, the prospectus should still contain general narrative disclosure about the prospects of the company, including an explanation as to why prospective financial information would not be reliable.

7.5 Accountant's report

The prospectus will include an investigating accountant's report. The report will typically include a review of the company's historical financial information, together with its financial statements, generally for at least three financial years. These financial statements may be adjusted to ensure compatibility with results over prior years. The review may include an audit if the company's financial statements were not previously audited.

The report may also include a review of the company's pro forma (historical and prospective) financial information, adjusted to reflect the company's structure and performance once the IPO is completed. Importantly, ASIC has released guidance on the use of non-IFRS financial information (including pro-forma financial information).[59] It contains specific guidelines for presenting such information in prospectuses, to help reduce the risk of users being misled.

7.6 Expert's reports

Depending on the nature of its business, it may be necessary for a company to retain an independent expert, such as a technical expert, to provide an overview of the technical aspects of the company's business operations for inclusion in the prospectus. Experts' reports are more likely to be required where the company's business is untested.

Examples of technical experts' reports include:

- a legal report on the intellectual property owned by the company;
- an engineering report on the quality of a building structure;

59 See ASIC Regulatory Guide 230: Disclosing non-IFRS financial information.

- a report from a mining consultant on the geology of the company's tenements, and its reserves and resources; and
- a legal report on the validity of the company's tenements and any native title claims.

7.7 Drafting the prospectus

Although the company has the primary responsibility for drafting the prospectus (see section 8), the task of coordinating the drafting is usually delegated to one or more of the IPO team members (normally the corporate adviser or underwriter or a prospectus drafting sub-committee of the due diligence committee). Other team members will have specific responsibility for drafting particular sections of the prospectus.

Initially, the company will compile all recent business plans and other documentation and provide it to the drafting coordinator who will then, in conjunction with the company, prepare a first draft of the prospectus.

Regular prospectus drafting meetings are generally held at which the drafting coordinator will accept comments on the document from members of the due diligence committee and the IPO team. Further drafts of the prospectus will be prepared and circulated.

Although all directors of the company will be unlikely to attend the various prospectus drafting meetings, they should review advanced drafts of the prospectus to satisfy themselves as to its completeness and accuracy.

As the due diligence process nears its conclusion, the prospectus will be handed over to the legal adviser who will coordinate its verification.

7.8 Verification

Before the prospectus is finalised, it undergoes a process of verification. This involves cross-referencing all material statements in the prospectus to an independent or other source which supports the statement or, for statements involving future events, establishing that there are reasonable grounds for making the statements. Verification is a laborious but very important step in the IPO process.

A verification report is typically compiled for the due diligence committee which includes a compilation of supporting material for each material statement in the prospectus. Where ASIC conducts a post-lodgement compliance review of the prospectus (see section 10.2), this supporting material will be one of the most important records examined by ASIC. It should therefore be comprehensive and well-ordered.

7.9 Consents

Each of the company's directors and proposed directors and any underwriter must consent to the issue of the prospectus. In addition, under the Corporations Act, a prospectus may only include a statement by a person (or a statement said in the prospectus to be based on a statement by a person) if:

- the person has consented to that statement being included in the prospectus in the form and context in which it is included;
- the prospectus states that the person has given this consent; and
- the person has not withdrawn this consent before the prospectus is lodged with ASIC.[60]

This generally requires the consent of the investigating accountant, legal advisers and any technical experts.

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[60] Section 716(2) of the Corporations Act. ASIC Regulatory Guide 55 (Statements in disclosure documents and PDSs: Consent to quote) sets out how ASIC administers the consent requirement and the relief ASIC gives from the consent requirement to cite government officials, publications, geological reports and trading data.

7.10 Approval of prospectus by the board

Once the verification process is complete and the due diligence committee is satisfied with the form of the prospectus, it is presented to the company's board together with a report of the due diligence committee (see section 8.6). The prospectus and its lodgement with ASIC is then approved by resolution of the entire board.

7.11 Supplementary and replacement prospectuses

If the company, its directors or others involved in the preparation of the prospectus become aware after the prospectus is lodged with ASIC that:

- there is a misleading or deceptive statement in the prospectus;
- the prospectus omits information required to be included in it; or
- there has been a change in circumstances which requires disclosure,

then the company must correct the defect by preparing and lodging with ASIC either:

- a supplementary prospectus, which is an "addendum" to be distributed with the original document; or
- a replacement prospectus, which is a new prospectus that has been updated or corrected.

A replacement prospectus would usually be used if the defect or new circumstance became apparent at an early stage and the prospectus had not yet been printed.

8. Prospectus liability and the due diligence process

8.1 Why is due diligence necessary?

Due diligence is the process of making reasonable enquiries to ensure that the prospectus contains all information material to investors, and that there are no material misstatements or omissions.

> Due diligence is an integral part of the IPO process.
>
> Due diligence is primarily aimed at ensuring that the prospectus complies with the Corporations Act, and that due diligence defences can be established.

Due diligence is necessary to:

- ensure that the prospectus complies with the disclosure and presentation requirements of the Corporations Act;
- ensure that the prospectus does not contain any misleading or deceptive statements, or omit any material which is required by the Corporations Act;
- ensure that the company, its directors and other persons involved in the preparation of the prospectus have due diligence defences available to them in the event that the prospectus is defective; and
- facilitate a potential compliance review of the prospectus by ASIC at a later stage.

8.2 Prospectus liability

The Corporations Act and other laws may impose civil and criminal liability on the company, its directors and other persons involved in the preparation of the prospectus.

In particular, civil liability is imposed if:

- the prospectus contains a misleading or deceptive statement;
- the prospectus omits material which is required by the Corporations Act; or
- a new circumstance has arisen since the prospectus was lodged that would have been required to be included in the prospectus if it had arisen before lodgement,

and the deficiency has not been remedied by a supplementary or replacement prospectus.[61]

Criminal liability is imposed, in particular, if the misleading or deceptive statement in, or omission from, the prospectus or the new circumstance is materially adverse from an investor's point of view.[62]

Those with potential civil liability include:

- the company or any other person making an offer under the prospectus, such as selling shareholders;
- each of the company's directors and shadow directors, and any person named in the prospectus with their consent as a proposed director;
- any underwriter named in the prospectus with their consent; and

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61 Sections 728(1) and 729 of the Corporations Act. Civil liability may also arise under the common law, including the torts of deceit and negligence, and under various other provisions of the Corporations Act and other legislation for misleading, dishonest or reckless statements and conduct in relation to the content of the prospectus or the IPO.

62 Section 728(3) of the Corporations Act. Criminal liability may also arise under various other provisions of the Corporations Act for misleading, dishonest or reckless statements and conduct in relation to the content of the prospectus or the IPO.

- any person named in the prospectus with their consent as having made a statement which is included in the prospectus (for example, an expert or other adviser who provides a report which is included in the prospectus), or on which a statement in the prospectus is based (for example, an information source on which an expert relies).

The extent of potential civil liability will depend on the person involved. Importantly, the company, any other person making an offer under the prospectus, the company's directors and proposed directors and the underwriter are potentially liable for any loss or damage caused by a defective prospectus, irrespective of whether or not they were responsible for, involved in or knew about the defect.

Criminal liability may be imposed on the company and any other person making an offer under the prospectus. Criminal liability can also extend to any other person who aided, abetted, counselled, procured, or who was knowingly involved in, or party to, the offence. This could include the company's directors and the members of the due diligence committee.

8.3 Due diligence defences

The Corporations Act provides due diligence defences to certain civil and criminal liability. The defences are based on the concept of having reasonable grounds for believing the prospectus does not contain a misleading or deceptive statement or any omission.

A person may have a defence to certain civil or criminal liability if they prove:

- they made all enquiries that were reasonable in the circumstances and, after doing so, believed on reasonable grounds that the statement was not misleading or deceptive, or that there was no omission from the prospectus;[63] or
- they placed reasonable reliance on information supplied by someone other than an employee, agent or director of that person.[64]

A person also has a defence to certain civil or criminal liability because of a new circumstance that has arisen after the prospectus is lodged, if they prove that they were not aware of the new matter.[65]

The availability of the due diligence defences to an individual will depend on that individual applying their independent and questioning mind in relation to the content of the prospectus and the report of the due diligence committee (see section 8.6). In doing so, the individual must take into account any special expertise or knowledge they may have in relation to the affairs of the company.

This is particularly important for directors, who should at least review the final draft of the prospectus carefully, and cannot rely solely on the due diligence committee.

These due diligence defences do not apply to all sources of civil and criminal liability in relation to the prospectus and the IPO, but liability can generally be avoided or minimised by acting honestly and with appropriate care.

[63] Section 731 of the Corporations Act.

[64] Section 733 of the Corporations Act. A person is not an agent for this purpose merely because they perform a particular professional or advisory function for the person.

[65] Section 733(4) of the Corporations Act.

8.4 The due diligence committee

The company's directors generally delegate the task of implementing the due diligence process to a committee, which is typically composed of representatives of the company (including one or more directors) and key members of the IPO team.[66]

The role of the due diligence committee is generally to:

- determine the scope of the due diligence to be conducted, including appropriate materiality guidelines, and to oversee and coordinate the process of enquiry to ensure that it is properly carried out;
- engage experts to conduct detailed investigations on matters within their expertise;
- review reports provided to it and identify the manner in which issues arising from those reports should be dealt with in the prospectus, and to redirect due diligence efforts where necessary;
- supervise and assist in the verification of the prospectus;
- report on the due diligence process to the company's directors on a regular basis; and
- ensure that by the end of the process, a complete and thorough understanding has been obtained of all matters relevant to the prospectus before it is finalised.

The due diligence process is formalised and documented by a due diligence planning memorandum and is illustrated on the following page.

The due diligence committee will meet regularly during the due diligence process. Meetings are intended to provide updates on the progress of the due diligence, to assist in prompt decision making in relation to the process to ensure it flows smoothly to schedule, and to ensure that all issues identified are raised and dealt with appropriately.

A secretary will typically be appointed who will take minutes of all due diligence committee meetings. The secretary should also be responsible for collating a master due diligence file documenting all aspects of the process (see section 8.7).

It is important at the outset to establish clear responsibilities for aspects of the due diligence. Usually, such responsibilities are allocated as follows:

- company/management – business, operations, commercial and financial matters;
- accountant – review of financial matters (including forecasts) and tax matters;
- legal adviser – legal matters (including material contracts); and
- other technical experts – specific areas (for example, intellectual property, mining tenements, market experts etc).

[66] A typical due diligence committee comprises a chairperson (preferably one of the company's non-executive directors), directors of the company (on behalf of the company and to report to fellow directors), members of the company's senior management, the underwriter, the company's corporate and legal advisers, and the accountant.

DUE DILIGENCE PROCESS

			Timeline
Management presentations Identification of key issues Commencement of legal, accounting and tax reviews	**Phase 1: Review and scoping**	Agree planning memorandum Agree materiality thresholds Agree draft key issues list Delegate tasks to reporting persons and settle due diligence work programs Agree form of reporting persons' sign-offs and management sign-offs	
Detailed due diligence enquiries based on key issues list and due diligence work programs Legal, accounting and tax reviews	**Phase 2: Detailed enquiries**	Draft prospectus Update key issues list (add additional issues to the extent identified through due diligence and prospectus drafting and state manner in which each issue is resolved)	
Experts' reports for prospectus Finalise draft prospectus Management sign-offs Professional advisers' sign-offs Director confirmations	**Phase 3: Verification and sign-offs**	Verify prospectus Due diligence committee members sign the following to give to the board: ▪ planning memorandum ▪ final due diligence committee report Board approval of prospectus	Immediately before lodgement of prospectus
New circumstance sign-offs	**Phase 4: Continuing due diligence**	Final due diligence committee meeting	Immediately after close of offer and before date on which shares are issued

8.5 Materiality

At the start of the due diligence and prospectus drafting processes, the due diligence committee should set both qualitative and quantitative materiality guidelines to focus due diligence efforts and to guide drafting efforts:

- Qualitative materiality. There is no specific definition in the Corporations Act of what information is material for the purposes of investors making an informed assessment of the company. However, it is generally considered that information is material if there is a substantial likelihood that a reasonable investor would consider the matter important in making an investment decision.
- Quantitative materiality. Usually, the accountant will advise as to quantitative measures of materiality in accordance with the accounting standards.[67] As a rule of thumb, quantitative materiality guidelines are frequently set at a specific percentage (typically 5% to 10%) of the company's net assets and its normalised pre-tax profits (or, if the company is not yet profitable, an appropriate alternative such as operating cashflow). A dollar figure based on these percentages is typically set, and all items having a value above the materiality level are considered for incorporation in the prospectus.

The materiality guidelines should be made as clear as possible so they can act as effective filters on non-material issues and also to make sure that all material issues are considered. In some cases, whether an issue should be considered for inclusion in the prospectus (especially where the issue may fall within the qualitative guidelines) will involve the judgement of the due diligence committee. Where in doubt, issues should generally be considered for inclusion.

8.6 Due diligence reports and sign-offs

Towards the completion of the due diligence process, certain experts' reports will be presented to the due diligence committee for consideration by the due diligence committee and, in some cases, inclusion in the prospectus. Formal sign-offs will also typically be provided to the committee by the company's legal adviser on certain legal matters, and the accountant on certain accounting and tax matters.

The company's CEO and CFO, as well as other senior members of management, may also provide a sign-off to the committee confirming their participation in the due diligence process and that they have no knowledge of any material misstatement in, or omission from, the prospectus.

Each member of the committee will then sign a due diligence committee report confirming the due diligence process and scope. Each member will generally be required to confirm (relying, in the case of matters falling outside their area of expertise, on other members with the appropriate expertise) that nothing has come to their attention that causes them to believe that:

- the prospectus is defective; or
- the due diligence process has not been conducted in accordance with the due diligence planning memorandum, or reasonable due diligence steps have not been taken.

The due diligence committee report will then be presented to the board.

8.7 Retention of due diligence documents

It is important for a clear paper trail to be maintained which records all aspects of the due diligence process. The experts' engagement letters, reports and sign-offs, copies of the verification materials, minutes of all due diligence committee meetings and other relevant documents should be collated in files and retained until the time limit for liability expires.

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67 See AASB 1031 (Materiality).

8.8 Ongoing due diligence

The due diligence process continues until the shares are issued.

Each due diligence committee member must notify the other committee members if, after the prospectus is lodged but before the shares are issued, they become aware of any misleading or deceptive material statement in the prospectus, any material omission of required information or any material new circumstance requiring disclosure.[68] If notice is given, the company will need to consider whether a supplementary or replacement prospectus is required (see section 7.11) or any other action should be taken.[69]

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68 Section 730(1) of the Corporations Act.

69 See sections 719 and 724 of the Corporations Act.

9. Marketing an IPO

The right approach to marketing an IPO is critical to its success. Generally, the marketing strategy is dealt with by the underwriter and broker, but in IPOs with a large retail component it will often be appropriate for a company to involve a communications consultant.

9.1 Pre-lodgement marketing

There are significant restrictions on marketing, publicising, or even referring to, an IPO before the prospectus is lodged with ASIC.[70] The restrictions serve to protect investors from being induced into making investment decisions without the benefit of adequate disclosure.

The ways in which an IPO can be marketed before the prospectus is lodged are limited to the following:

Tombstones	The company may publish notices that identify the company and the shares, and include statements referring to the impending release of the prospectus, the need to complete an application form and how to obtain a copy of the prospectus. The notice must not contain any other information.[71]
Market research	ASIC has granted relief to allow the company, or a genuine market research organisation engaged by it, to conduct limited market research[72] to determine the number of prospectuses which should be printed to meet demand, who to market the IPO to, and the type and extent of marketing required.[73] Survey questions may refer or call attention to the proposed offer but only to the extent necessary to enable respondents to understand the questions asked.
Institutional roadshows	The underwriter or broker to the IPO may wish to undertake pre-marketing activities to institutions. These activities commonly involve giving presentations to institutions and brokers, and providing institutions and brokers with copies of the draft "pathfinder" prospectus, presentation slides, other marketing material and research reports prepared by the underwriter's or broker's analysts. ASIC has granted relief to allow the company and persons authorised by it to conduct these activities in relation to institutions (specifically, holders of an Australian financial services licence or their representatives) before the prospectus is lodged.[74] Draft prospectuses ("pathfinders") are also permitted to be sent to sophisticated investors and professional investors.[75] Presentations to institutions and brokers may be oral or written, and can take the form of "one on ones" through to "roadshows". The company and its advisers must be careful not to disclose during the course of any such presentations any more information than that contained in the prospectus.

70 See section 734 of the Corporations Act and ASIC Regulatory Guide 254: Offering securities under a disclosure document. ASIC's stop order powers extend to cover advertising of quoted and unquoted securities.

71 Section 734(5) of the Corporations Act.

72 No more than 5,000 people may be surveyed.

73 See ASIC Corporations (Market research and roadshows) Instrument 2016/79.

74 See ASIC Corporations (Market research and roadshows) Instrument 2016/79.

75 Section 734(9) of the Corporations Act.

	These activities help gauge institutional interest in the IPO. Usually, the underwriter will only sign the underwriting agreement, and therefore formally commit to the IPO, if it receives indications during roadshows that a substantial proportion of the offer will be taken up by institutions or sub-underwriters.
Employees and shareholders	ASIC has granted relief to allow the company to make certain factual statements to shareholders and current or former employees about the IPO and its effect on them, provided there is no communication about the advantages, benefits or merits of the IPO and the company has adequate arrangements in place to keep relevant statements up-to-date.[76]

9.2 Post-lodgement marketing

Once the prospectus has been lodged, the marketing campaign for retail investors can begin. In smaller IPOs this is generally limited to brokers calling private clients and small scale marketing. In large IPOs it can include television commercials, newspaper advertisements and brochures.

Advertisements and publications after the prospectus is lodged must:

- identify the company;
- state that the prospectus is available and where it can be obtained;
- state that offers of shares will be made in, or accompanied by, a copy of the prospectus, and that persons should consider the prospectus before deciding whether to acquire shares; and
- state that anyone who wants to acquire shares will need to complete the application form in or accompanying the prospectus.[77]

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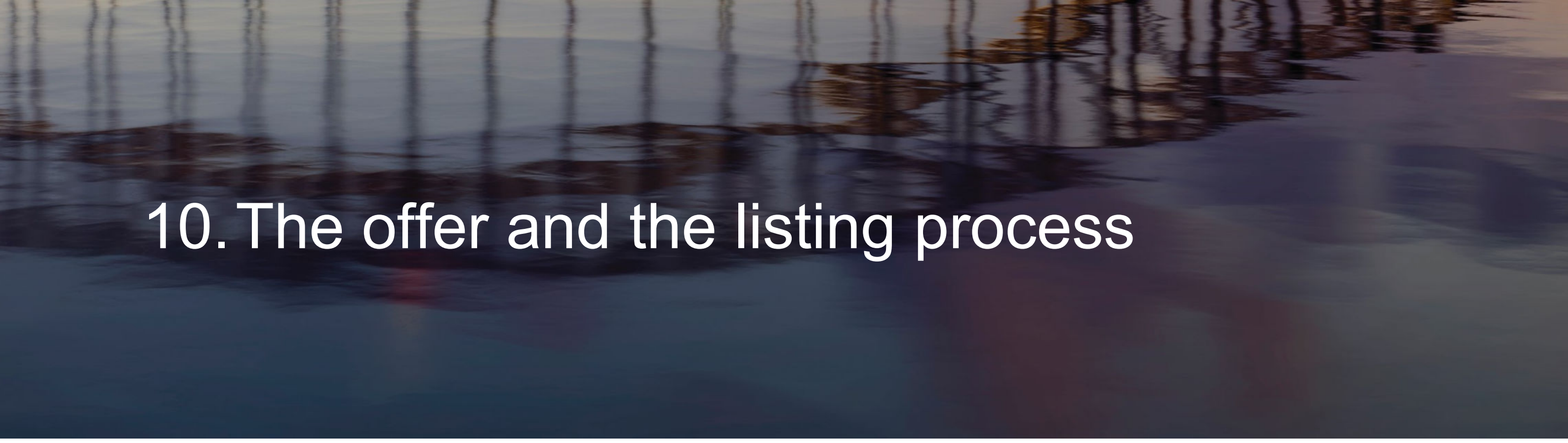
76 ASIC Corporations (IPO Communications) Instrument 2020/722.

77 Section 734(6) of the Corporations Act.



10. The offer and the listing process

10.1 Lodgement of the prospectus and the exposure period

Once the prospectus is approved by the company's board, it must be lodged with ASIC and given to ASX.[78]

After lodgement, the prospectus is subject to an "exposure period" of seven days during which the company must make copies of the prospectus generally available to the public, preferably through a website.[79] This gives the market and ASIC time to assess the offer.

The company must not process any applications for shares during the exposure period.[80]

ASIC may extend the exposure period by up to seven days, particularly where it is not satisfied that the prospectus has been made generally available or where it appears to ASIC that the prospectus may be defective.

10.2 ASIC post-lodgement reviews and stop orders

ASIC does not usually pre-vet prospectuses, but it does conduct selective post-lodgement compliance reviews. ASIC may identify prospectuses that may be categorised as open to compliance risk for review (such as those for higher yield, higher risk securities or those issuers that are from emerging countries). ASIC may also decide to review a prospectus following receipt of credible information from external sources that warrants the undertaking of such a review, or simply at random.

If it appears to ASIC that a prospectus may be defective, it may extend the exposure period for an additional seven days. ASIC will then generally work with the company to resolve its concerns. ASIC may conduct an audit of the prospectus, which generally involves ASIC examining the due diligence committee minutes, reports and verification materials to see if there is any information which supports an apparent deficiency in the prospectus.

ASIC does not generally pre-vet prospectuses, but conducts post-lodgement reviews of a significant proportion of prospectuses.

If ASIC's concerns cannot be satisfactorily resolved within the exposure period, ASIC may impose an interim stop order on the prospectus (for up to 21 days).[81] The company cannot offer, issue, sell or transfer shares under the prospectus while the order is in place.

ASIC may lift the interim order if the company issues a supplementary or replacement prospectus that corrects any deficiencies (see section 7.11). If not, ASIC may impose a final (and permanent) stop order on the prospectus.[82]

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78 Section 718 of the Corporations Act and Listing Rule 1.1, condition 3.

79 See ASIC Regulatory Guide 254: Offering securities under a disclosure document. To assist with the public exposure of prospectuses, all prospectuses lodged with ASIC are listed in a public database called Offer Notice Board. This allows the issuer to publish summary data about their offer to better describe their offer to the market. Information as to where and how the prospectus may be accessed during the exposure period can also be provided.

80 Section 727(3) of the Corporations Act.

81 Section 739(3) of the Corporations Act.

82 Section 739(1A) of the Corporations Act.

10.3 Listing application

The company must submit a listing application to ASX within seven days of lodging the prospectus with ASIC.[83] ASX will review the application and the prospectus to ensure compliance with the Listing Rules. ASX may seek additional information from the company to ensure that sufficient information is available for investors to make informed decisions.

Once ASX has considered the listing application, the company will be advised in writing of the outcome. This will be in the form of resolutions containing:

- the conditions that must be satisfied before the company is admitted to the official list, such as closing the offer, raising the minimum subscription amount, allotting and issuing shares and having sufficient shareholder spread; and
- the conditions that must be fulfilled before quotation can commence, such as the despatch of holding statements, return of any refund money, the provision of a shareholder distribution schedule, a statement setting out the names of the top 20 shareholders, and copies of restriction deeds and details of restriction notices for all escrowed shares.

ASX generally requires six weeks to process a listing application. In most cases ASX does not commence its review until the prospectus has been lodged with ASIC. Where a pathfinder prospectus is used, however, ASX may agree to "front-end" its review of the application based on the pathfinder prospectus. This "fast track" process can enable a draft listing application to be lodged with a pathfinder four weeks prior to formal lodgement with ASIC, meaning approval for quotation may be granted approximately two weeks after formal lodgement of the prospectus. These are a guide only and ASX can require longer periods in times of high demand or market activity.

10.4 Offer period

Once the exposure period ends, the offer period begins. The offer period generally runs anywhere from as short as one week, up to three to four weeks, depending on the size of the offer and the level of retail participation required.[84] During this period, the company and the underwriter (and brokers) market the IPO to investors, monitor the level of interest in the offer and receive applications.

Application moneys received during the offer period must be held on trust for applicants until such time as the shares are issued to them.[85]

The company may close the offer early (if fully subscribed) or extend the offer period. An extension usually indicates, however, that the offer has not been well received by the market.

10.5 Close of offer and underwriter's obligation to subscribe for shortfall

If the IPO is underwritten and is not fully subscribed by investors at the end of the offer period, then the underwriter will be required to subscribe for the balance of the shares, unless an event has occurred entitling it to terminate the underwriting agreement. If the offer closes oversubscribed, or the offer is not underwritten and any minimum subscription condition has been met, then the company will allocate the shares amongst applicants. This process allows the company to effectively manage the spread of its shareholders. The shares will then be issued to successful applicants, and the application moneys are released to the company. If the offer is not underwritten and any minimum subscription condition has not been met, then no shares may be allocated and all application moneys must be returned to investors.[86]

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[83] See section 723(3) of the Corporations Act and Listing Rule 1.7. The listing application is in the form of Appendix 1A to the Listing Rules.

[84] Short retail offer periods will generally require the ASX listing application to be considered under the ASX "fast track" process – see section 10.3.

[85] Section 722 of the Corporations Act.

[86] Section 723 of the Corporations Act.

10.6 Listing and quotation

When ASX is satisfied that all of the conditions to listing and quotation have been fulfilled, it will then nominate a day for the company to be admitted to the official list, and for its shares to be quoted (and therefore freely traded on ASX). Quotation normally commences on the second business day following the despatch of holding statements (see section 10.7).

Subject to the company achieving the required shareholder spread and satisfying the other requirements for listing, ASX may grant the company conditional listing by the end of the offer period. The listing will be conditional on satisfaction of various quotation prerequisites (see section 10.3).

In some cases (such as for large IPOs), ASX may also allow the company to commence deferred settlement trading before the conditions are satisfied. This allows shares to be bought and sold on ASX before entries are made in CHESS in respect of shareholdings and before holding statements are despatched (see section 10.7). When holding statements are despatched, deferred settlement trading ceases and the shares trade on a normal settlement basis.

10.7 Holding statements and CHESS

The company must apply to ASX to participate in its Clearing House Electronic Subregister System, known as CHESS. Under CHESS, the company does not issue certificates to investors. Instead, investors receive a statement (similar to a bank account statement) that sets out the number of shares allotted to each of them under the prospectus. Further monthly statements are provided to shareholders that reflect any changes in their holding during the month.

CHESS also manages the settlement process. Settlement takes place two business days after a trade date (known as "T+2"). CHESS also facilitates settlement of share issues on a delivery versus payment ("DvP") basis, meaning that the transfer of both shares and money between participants in the system (i.e. brokers and institutions) is simultaneous and irrevocable once the settlement process starts.

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