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## LAWYERS

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### A SIMPLE GUIDE TO LISTING YOUR COMPANY ON THE ASX



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## 1. INTRODUCTION

Achieving a listing on the Australian Securities Exchange ('**ASX**') is a significant milestone in the life-cycle of a company. In addition to the prestige associated with an ASX listing, there are also significant advantages for the listed company, such as the ability to raise capital from a broader market and to grow the profile of the company among institutional and professional investors. For the company's shareholders, an ASX listing increases the liquidity of their investment and allows them to trade their holdings in a reputable and recognised market. For the company's founders and early stage investors, an ASX listing provides an opportunity to exit, either fully or partially, through a sell-down as part of an initial public offering ('**IPO**') or through ongoing market trades.

In determining whether an ASX listing is right for your company, the above advantages should be weighed up against the additional cost and compliance burden that comes with being a listed company.

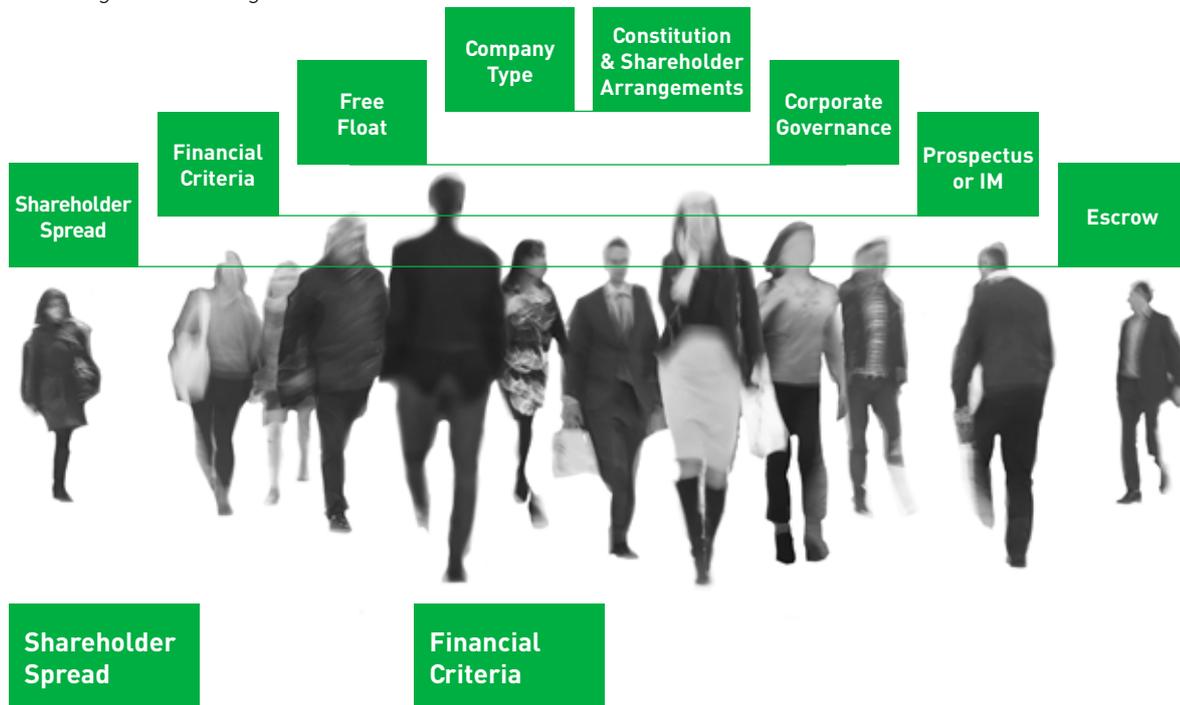
The questions to ask your advisers are:

- What does my company need to do to get ready to list?
- What is involved in the listing process itself?
- What additional compliance requirements will apply to the company after listing?

Kain Lawyers can assist you in answering these questions and guiding you through the listing process.

## 2. GETTING READY TO LIST –WHAT ARE THE REQUIREMENTS?

To be eligible for listing on the ASX, your company will need to satisfy the ASX's admission requirements, including the following:



The ASX needs to ensure that there will be an appropriate market in the company's securities. As such, the company to be listed will need to have at least 300 non-affiliated shareholders<sup>1</sup>, each holding a parcel of shares with a value of at least \$2,000 (excluding shares subject to escrow).

The ASX also needs to ensure that the company is financially suitable for listing, by satisfying either the **profit test** or the **asset test**.

The **profit test** requires the company to demonstrate a track record of achieving \$1 million net profit in aggregate over the last 3 financial years and net profit of \$500,000 for the 12 months up to a date no more than 2 months prior to applying for listing. The company must be a going concern and its main business activity must have been the same for the last 3 years.

The **asset test** requires the company to have:

- net tangible assets of at least \$4 million (after deducting fundraising costs) **or** a market capitalisation of at least \$15 million<sup>2</sup>;
- less than half of the company's total tangible assets (after raising funds) in cash or in a form readily convertible to cash (or, if this test is not satisfied, the company must have commitments consistent with its business objectives to spend at least half of its cash or assets readily convertible to cash);
- working capital of \$1.5 million (or to be able to show that it would meet this test if its budgeted revenue for the first full financial year after listing was included in working capital) after allowing for the first full financial year's budgeted administrative costs and any asset acquisitions funded out of working capital that are referred to in the prospectus; and
- sufficient working capital for its stated objectives.

The company must have a free float at the time of admission of not less than 20%. The free float is the percentage of the company's main class of securities that are not subject to escrow and are held by non-affiliated shareholders<sup>1</sup>.

<sup>1</sup> This excludes the company's related parties, such as controllers, directors, their close relatives and entities that any of them control, and their associates.

<sup>2</sup> Different thresholds apply for 'investment entities', which are entities set up to invest in non-controlling stakes in other entities or futures contracts.

## Company Type

Under Australian law, proprietary companies must have no more than 50 non-employee shareholders and must not offer shares to the public where a prospectus or other disclosure document would be required.

If the current holding company of your group is a proprietary company (a 'Pty Ltd'), it will need to be converted to a public company before listing. Alternatively, a restructure can be undertaken to insert a new public company as the holding company of your group. Public companies are subject to additional compliance obligations, particularly with respect to related party transactions, so careful planning is required around these preparatory steps.

## Corporate Governance

The company must provide a statement to the ASX of the extent to which it will follow the *Corporate Governance Principles and Recommendations* of the ASX Corporate Governance Council. If the company does not propose to adopt any particular one of those recommendations, it must explain why not. The recommendations cover matters such as board structure, independent directors, committees and codes of ethics.

The company must also satisfy the ASX that each of its directors and proposed directors is of good fame and character.

## Escrow

Certain categories of persons associated with the company to be listed (such as promoters, seed capitalists and persons who have sold certain assets to the company in exchange for shares) may be subject to escrow requirements under the ASX Listing Rules, which will restrict their ability to trade their shares after admission.

Even if the ASX escrow provisions do not apply, the lead manager or underwriter of an IPO may still require that founders or other early stage investors are subject to voluntary escrow requirements for a period after listing.

## Constitution & Shareholder Arrangements

The company must have a constitution that is consistent with the ASX Listing Rules. The company can choose either to include the standard provisions in Appendix 15A or 15B, which essentially provide that the Listing Rules prevail to the extent of any inconsistency, or can provide the ASX with a completed ASX Constitution Checklist to confirm that its constitution complies with the Listing Rules. We would recommend putting in place a new 'best practice' ASX-compliant constitution.

## Prospectus or IM

If your company is raising capital at the time of listing, or if the existing shareholders are selling down their shares, then a prospectus will be required. Otherwise, the ASX may instead accept an Information Memorandum ('IM') which has slightly reduced disclosure requirements and does not attract the statutory prospectus liability regime.

If a prospectus is required, it must include certain **specific disclosures**, such as the terms and conditions of the offer. It must also satisfy the **general disclosure test** of providing all information the investors and their professional advisers would reasonably require (to the extent reasonable) to make an informed assessment of certain material matters in relation to the company to be listed (including its assets and liabilities, financial position and performance, profits and losses and prospects, and the rights and liabilities attached to its securities).

Parties involved in an IPO may be subject to criminal or civil liability in the event that the prospectus contains a misleading or deceptive statement or omits information required to be included under the Corporations Act 2001 (Cth) ('**Corporations Act**'), or if a replacement or supplementary prospectus is not issued where required to disclose any new information arising after lodgement of the original prospectus.

### 3. THE LISTING PROCESS

An overview of the listing process is set out below. We recommend engaging your core IPO team (including lead manager, legal adviser, tax adviser and independent accountant) at an early stage to assist you with this process.

STEP	INDICATIVE TIMING BEFORE LISTING (WEEK #)																			
	18	17	16	15	14	13	12	11	10	9	8	7	6	5	4	3	2	1	L	
1	Appoint IPO team and agree structure																			
2	Due diligence																			
3	Drafting and verification of the prospectus																			
4	Lodgement of draft listing application and 'pathfinder' prospectus with ASX																			
5	Roadshows and marketing																			
6	Lodgement of the prospectus with ASIC																			
7	Exposure period																			
8	Lodgement of final listing application with ASX																			
9	Offer period																			
10	Listing																			

#### 1. Appoint IPO team and agree structure

The first step in the listing process is to appoint the lead manager / underwriter, legal adviser, tax adviser and independent accountant. The team will then consider whether any pre-IPO restructuring of the business is required in order to prepare for listing.

**18 weeks before listing**

#### 2. Due diligence

Due diligence is conducted to ensure that the prospectus is not misleading or deceptive and contains all information required by the Corporations Act. It is also essential to establishing the statutory 'due diligence defence' to liability for persons involved in the offer of securities under the prospectus.

This step initially involves setting up a Due Diligence Committee ('DDC') and preparing a Due Diligence Planning Memorandum to set out the scope and materiality level of the due diligence enquiries. The ongoing due diligence process involves detailed enquiry into the legal, tax and accounting affairs of the company to be listed, and reporting of material issues to the DDC. These issues are then considered by the DDC at its periodic meetings and reflected appropriately in the prospectus.

**16 weeks before listing to Listing Date**

### 3. Drafting and verification of the prospectus

Drafting of the prospectus takes place while the due diligence process is continuing, as the results of the due diligence will need to be reflected in the disclosures made in the prospectus.

Once the prospectus has been drafted, a verification process is undertaken (overseen by the DDC) to ensure that all material statements in the prospectus are supported by appropriate evidence and signed-off.

**15 weeks before listing to 6 weeks before listing**

### 4. Lodgement of draft listing application and 'pathfinder' prospectus with ASX

ASX generally requires four to six weeks to consider a listing application, and in most cases ASX will not commence its review until the prospectus has been filed with Australian Securities and Investments Commission ('ASIC'). However, ASX has a fast track process which allows lodgement of a draft listing application and 'pathfinder' prospectus no less than four weeks prior to the formal ASX lodgement date. ASX will then 'front end' its review, which will generally mean that ASX only requires two weeks to review the formal application once it is lodged.

**9 weeks before listing**

### 5. Roadshows and marketing

The Corporations Act contains strict restrictions on advertising and publicity in relation to an IPO. Prior to lodgement of the prospectus with ASIC, only very limited statements are permissible. After lodgement of the prospectus, it is permissible to market the offer more generally, but all advertisements and publications must contain statements directing investors back to the prospectus.

Despite these restrictions, it is possible to market to sophisticated and professional investors prior to lodgement of the prospectus with ASIC by sending them a 'pathfinder' prospectus and conducting roadshows to gauge interest and build institutional support for the IPO.

**8 weeks before listing to listing date**

### 6. Lodgement of the prospectus with ASIC

Once the prospectus has been drafted and verified, it is approved by the DDC and the company's Board and lodged with ASIC.

**6 weeks before listing**

### 7. Exposure period

After lodgement with ASIC, the prospectus is subject to an 'exposure period'. During this period the prospectus is made available for public review and comment, and the company cannot accept applications under the offer. This is a minimum of 7 days, but can be extended to 14 days.

**6 weeks before listing to 4 weeks before listing**

### 8. Lodgement of final listing application with ASX

The company must apply to ASX for quotation of its securities within 7 days after the date of the prospectus by lodging an Appendix 1A listing application. As noted above, although ASX requires four to six weeks to consider this application, it is possible to accelerate this process and reduce the review period to two weeks by lodging a draft application and 'pathfinder' prospectus at an early stage.

**5 weeks before listing**

### 9. Offer period

Once the exposure period has ended, the offer period will usually commence. This is the period during which investors can subscribe for securities under the prospectus. The length of the offer will depend on how the offer is structured, including whether it is a combination of a retail and institutional offer, and whether the price is fixed or determined by way of a book-build.

**4 weeks before listing to immediately prior to listing**

### 10. Listing

Provided that the company satisfies the listing requirements, it will normally be granted conditional listing approval at the end of the offer period. The conditions to listing will ordinarily relate to the close of the offer and the provision of initial listing information to ASX for release to the market.

**Listing date**

## 4. ONGOING COMPLIANCE REQUIREMENTS

Once listed on the ASX, the newly listed company will be subject to certain additional compliance requirements on an ongoing basis, including the following:



### Continuous Disclosure

A listed company must notify ASX immediately upon becoming aware of information concerning it that a reasonable person would expect to have a material effect on the price or value of the company's securities. This rule is subject to a limited exception, which allows the company to delay disclosure while the information remains confidential, while a reasonable person would not expect it to be disclosed and while one of five specific situations applies (including where the information concerns an incomplete proposal or negotiation or the matter is insufficiently definite to warrant disclosure).

### Periodic Disclosure

In addition to the listed company's continuous disclosure obligations, it must also periodically release reports to the market. The main financial reports are the Half Year Report (in the form of Appendix 4) and the Preliminary Final Report (in the form of Appendix 4E). The company's Annual Report must also be released to ASX at the same time as it is required to be lodged with ASIC. Some listed companies must also report on a quarterly basis.

### Restrictions on share issues

Subject to various exceptions, listed companies are restricted from issuing new shares comprising more than 15% of their issued share capital over a rolling 12 month period without shareholder approval. Smaller listed companies may issue a further 10% of their issued share capital, if pre-approved by shareholders at the company's last AGM.

### Related party transactions

Public companies are subject to the related party transaction rules in Chapter 2E of the Corporations Act. Listed companies are also subject to additional related party transaction rules under the ASX Listing Rules, which don't include an exemption for transactions on 'arm's length terms'.

### Significant changes

Where a listed company undergoes a significant change in its scale or activities, that change may require shareholder approval. In extreme cases, the ASX may require the listed company to re-comply with the ASX admission requirements due to the significant change.

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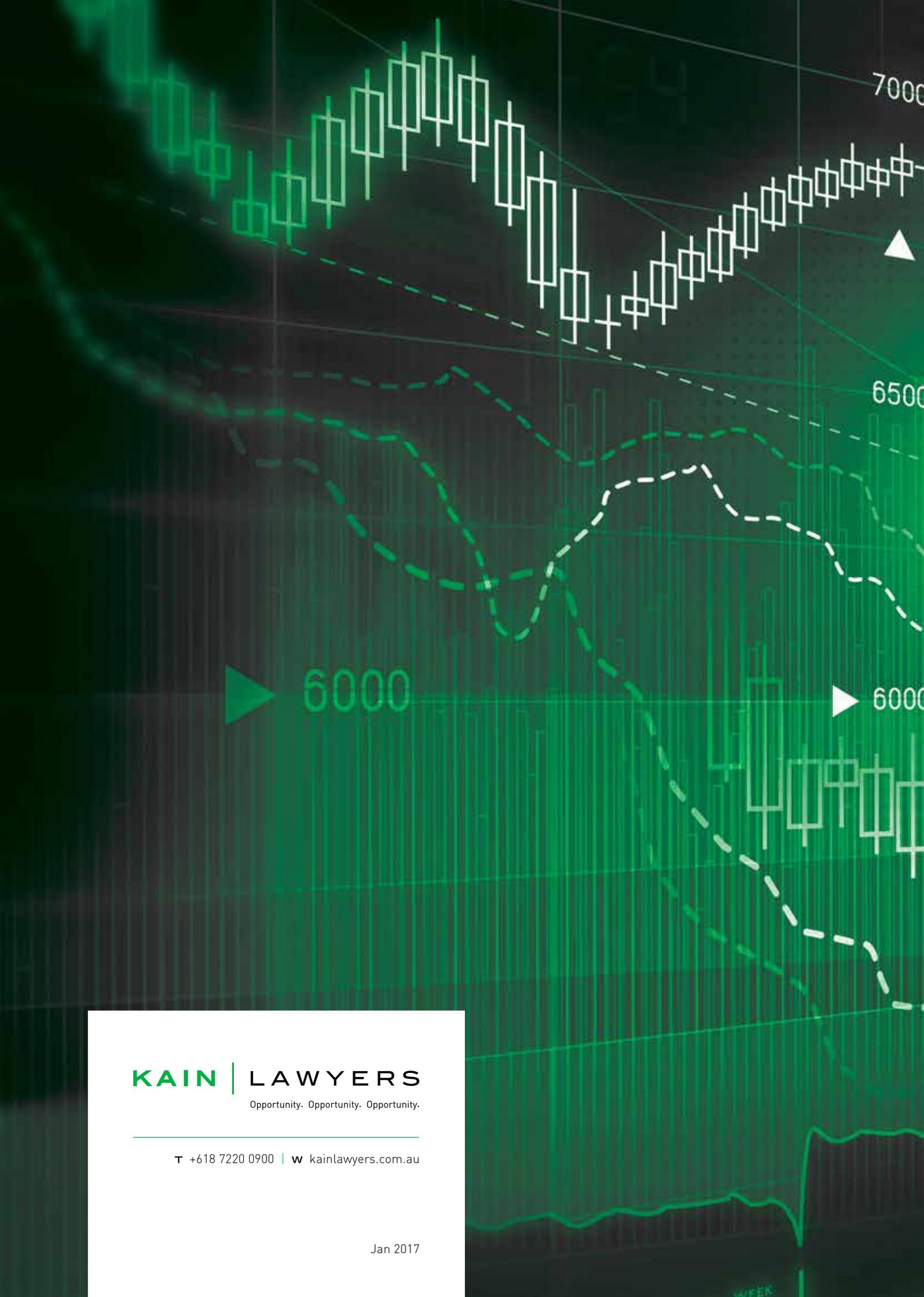
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