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Australian IPO Guide for US issuers

July 2025

Contents

About this Guide

This guide provides general information to help you better understand the laws and processes involved when looking at listing in Australia in accordance with the law as at July 2025.

The guide does not provide legal advice and it should not be used in place of obtaining legal advice. Johnson Winter Slattery accepts no liability for reliance on information contained in this guide.

Why JWS?

Australia continues to establish itself as a leading destination for US companies looking to raise funds on account of its access to capital, active exchange and receptiveness to start ups and smaller companies.

We have built a strong reputation as a market leader for advising US issuers on their Australian IPOs and ASX listings.

Johnson Winter Slattery (**JWS**) is an independent national Australian law firm with offices across Australia. We work alongside leading Australian and international businesses to guide them through their most strategic and complex transactions and legal disputes.

In capital markets, we have represented arrangers, issuers and underwriters in IPOs, rights issues, hybrid security issues and the development of a wide range of structured financial products.

In recent years there has been a trend towards technology and healthcare listings on ASX, and this is reflective of JWS' experience, with JWS acting as Australian legal counsel on the IPOs for US-based Imricor Medical Systems, Inc (2019), Laybuy Group Holdings Limited (2020), US-based medical device company EBR Systems, Inc. (2021), CurveBeam AI Limited (2023) and Toronto Stock Exchange listed Novo Resources Corp. on its secondary listing on ASX (2023).

We can assist with the preparation of IPO prospectuses and product disclosure statements, as well as all underlying documentation. We also undertake due diligence and the preparation of information memoranda for private offerings including private equity, seed capital and unregistered managed investment schemes.

Our expertise includes liaising with ASIC and ASX in regulatory matters, including innovative relief applications.

At the heart of our approach is the hands-on reputation of our lawyers. They are recognised for obtaining superior outcomes on some of the most high profile and complex transactions in the market.

With offices in Sydney, Perth, Melbourne, Canberra, Brisbane and Adelaide, we coordinate cohesive teams across the country, to ensure the best people, with the right skill set, are on each assignment.

Section 1 - Introduction

JWS has extensive experience advising US issuers in connection with their Australian IPOs and ASX-listings. This guide has been prepared specifically to assist US companies and their advisors to better understand the Australian IPO process. The JWS team are widely acknowledged as a market leader in this area.

1.1 ASX INTERNATIONAL LISTINGS

US issuers are increasingly seeking to raise funds in the Australian capital markets generally, and on the ASX in particular.

Indeed, ASX remains one of the world's most active exchanges by volume of new listings.[1] ASX recorded 45 new listings in 2023 and 67 new listings in 2024,[2] outperforming the number of new listings on the London Stock Exchange and the New York Stock Exchange in both years.[3] The ASX has been an increasingly attractive listing venue for foreign companies, particularly those from the US, with 41 US entities listed on ASX and a total of 216 international listings as of 31 January 2025.[4]

Notwithstanding a subdued global IPO market, ASX continues to be an active market to raise capital. In FY24, approximately A$28 billion in net new capital was quoted on the exchange, and ASX ranked first globally for metals and mining IPOs.[5]

Signs of renewed IPO activity are also emerging. The listings of Guzman y Gomez (ASX:GYG) in June 2024, Cuscal Limited (ASX:CCL) in November 2024 and Digico Infrastructure REIT (ASX:DGT) in December 2024, the three largest IPOs since the 2021 peak, together with the listings of Virgin Australia (ASX:VAH) and Greatland Resources (ASX:GGP) in June 2025 signal improving market conditions and growing investor confidence in supporting new listings.[6]

In recent times, JWS has acted as Australian legal counsel on the IPOs for US based Imricor Medical Systems, Inc (2019), NZ buy-now pay later provider Laybuy Group Holdings Limited (2020), US based medical device company EBR Systems, Inc. (2021), medical imaging and diagnostics provider CurveBeam AI Limited (2023) and Canadian incorporated and TSX-listed gold explorer, Novo Resources Corp. (2023).

1.2 AUSTRALIAN REGULATORY BODIES

The main bodies regulating Australian IPOs are:

- the Australian Securities & Investments Commission (**ASIC**), which is responsible for the oversight of IPOs in Australia, including supervising prospectus compliance with the requirements of the Australian *Corporations Act 2001* (Cth) (**Corporations Act**); and
- ASX Limited, which is responsible for admitting companies to the ASX and supervising compliance with the ASX Listing Rules (**Listing Rules**).

The Listing Rules set out the requirements that must be met for a company to be admitted to the ASX and maintain its listed status. The Listing Rules are enforceable under the Corporations Act.

[1] ASX, 26 June 2024: https://www.asx.com.au/blog/listed-at-asx/asx-thrives-with-net-new-capital-continuing-to-be-added
[2] ASX, 7 January 2025: https://announcements.asx.com.au/asxpdf/20250107/pdf/06d9p1523vytnh.pdf
[3] ASX, 26 June 2024: https://www.asx.com.au/blog/listed-at-asx/asx-thrives-with-net-new-capital-continuing-to-be-added; Ernst & Young, 6 January 2025: https://www.ey.com/en_uk/newsroom/2025/01/london-stock-market-ends-2024-on-a-high-after-q4-boost (note, London Stock Exchange had 18 new listings in 2024); Reuters, 17 December 2024: https://www.reuters.com/markets/us/nasdaq-tops-nyse-listings-6th-straight-year-ipo-optimism-grows-2024-12-16/ (note, New York Stock Exchange had 34 new listings in 2024)
[4] ASX, 31 January 2025: https://www.asx.com.au/listings/why-list-on-asx/international-companies
[5] ASX, 16 August 2024: https://www.asx.com.au/content/dam/asx/about/media-releases/2024/36-16-august-2024-full-year-results-market-release.pdf (page 3)
[6] ASX, 5 February 2025: https://www.asx.com.au/blog/listed-at-asx/asx-capital-markets-2024-review-and-2025-outlook.

1.3 ADVANTAGES OF LISTING IN AUSTRALIA

There are a number of drivers of the trend to ASX:

- **Access to capital:** ASX is an attractive market for raising capital fuelled by Australia's compulsory superannuation system. As of September 2024, Australia has approximately A$4.1 trillion invested in superannuation assets,[7] making it the fifth largest pension pool globally.[8] Australia's superannuation assets are also forecast to grow to over A$11 trillion by 2043, making Australia one of the fastest-growing pension pools.[9] The ASX also attracts considerable offshore institutional interest, with approximately 46% of all institutional investment in the S&P/ASX 200 coming from overseas.[10]
- **Active market:** The ASX is a highly active exchange, averaging over 130 new listings annually over the last 5 years, and A$7b of equities traded daily. [11]
- **Receptive market:** ASX has always been receptive to smaller companies (by US standards) at an early stage of development. These companies can sometimes struggle to attract interest from investors in large capital markets like the US, because they must compete for attention with companies with higher profiles and larger revenue streams.
- **Main board:** ASX is the main Australian exchange and small to mid-cap companies in particular benefit from being eligible to list on a main board, which can lead to a wider investor base compared with a listing on a secondary board such as AIM or TSXV. An ASX listing can provide a springboard to reach a size where they can attract attention in their home market.
- **Access to key indices:** The entry point to key ASX indices requires a considerably lower market capitalisation when compared to other major markets. As at 31 December 2024, the market capitalisation of the smallest entrant was A$135 million for the S&P/ASX All Tech, A$195 million for the S&P/ASX 300, and A$545 million for the S&P/ASX 200, which compares favourably to £1.1 billion (approx. A$2.2 billion) for the FTSE 100 and US$5.7 billion (approx. A$9.2 billion) for the S&P 500.[12] Listing on the ASX also takes half the time and cost when compared to the US.[13] Therefore, key indices can be accessed at a comparatively earlier stage, enhancing liquidity and institutional investment.
- **Reduced costs:** An ASX listing is less burdensome and costly than a NASDAQ/NYSE listing (approximately 50% of the initial and ongoing costs). Yet the ASX maintains a robust regulatory environment with high standards of corporate governance and disclosure.
- **Strong valuations and equity growth for tech/health stocks:** Traditionally, high-growth opportunities in technology and healthcare have been exclusively in the domain of venture capitalists, with very little access available to institutional investors or the public. The ASX provides such investors with access to these industries, often much earlier than on other exchanges, which leads to the possibility of additional upside participation. The introduction of the S&P/ASX All Technology Index in February 2020 further raised the profile of the ASX technology sector and the attractiveness of the ASX for new technology-focused listings.

[7] Australian Prudential Regulation Authority, 27 November 2024: https://www.apra.gov.au/news-and-publications/apra-releases-superannuation-statistics-for-september-2024
[8] ASX, 30 September 2024: https://www.asx.com.au/listings/why-list-on-asx/international-companies
[9] ASX, 26 June 2024: https://www.asx.com.au/blog/listed-at-asx/asx-thrives-with-net-new-capital-continuing-to-be-added
[10] ASX, 26 June 2024: https://www.asx.com.au/blog/listed-at-asx/asx-thrives-with-net-new-capital-continuing-to-be-added
[11] 12 month rolling average to December 2024 across ASX & Cboe – ASX, 31 January 2025: https://www.asx.com.au/listings/why-list-on-asx/international-companies
[12] S&P Global Index Finder, 17 January 2025: www.spglobal.com/spdji/en/index-finder and FTSE 100 overview: London Stock Exchange, 17 January 2025: www.londonstockexchange.com
[13] ASX, 16 August 2024: https://www.asx.com.au/content/dam/asx/about/media-releases/2024/37-16-august-2024-full-year-results-presentation-slides.pdf (slide 50)

Section 2 - Overview of IPO process

Annexure 1 sets out a draft IPO timeline, and an abbreviated overview of the timeline is set out below.

(a) Preliminary Preparations (Month 1)

- **Appoint IPO Team:** Appointing the right team is essential. Professional advisors typically include a lead manager or underwriter (investment bank or stockbroker), legal advisor, investigating accountant and advisors to produce any expert's reports for the IPO. A US issuer will also need US legal advisors.
- **Agree on structure:** Determining the ideal structure of an IPO is also critical. Considerations include the level of sell- down (if any), the nature of the securities offered, as well as tax and accounting effects. If a restructure is necessary, shareholder approvals may be required, all of which feed into the timeline. Some venture-backed US companies have preference shares that do not automatically convert into common stock for an ASX-listing for example.
- **Assemble Board and management team:** If any changes to the Board or management are contemplated, service agreements will need to be negotiated and finalised.

(b) Due Diligence, Documentation (Months 1 – 4)

- **Due Diligence:** A Due Diligence Committee (**DDC**) will meet regularly. Legal, financial and tax diligence will commence, management questionnaires will be issued and the company should liaise with customers, suppliers, landlords, financiers etc to the extent consents to the IPO are required. The due diligence process in Australia is very process driven and quite different to the US. Please refer to Section 9 below for further information.
- **Drafting of documentation:** Prospectus and roadshow presentation drafting commences, financial information is collated and the investigating accountant's report and other expert's reports (if required) are prepared. The underwriting agreement is negotiated and finalised.
- **Verification:** The verification process for the prospectus commences, consents and legal and accounting sign-offs are obtained, and the Board approves the final form of the prospectus.

(c) Regulatory Engagement (Months 1 – 4)

- **Waivers/modifications:** ASX and ASIC are approached regarding required waivers/ modifications for the IPO, discussions commence with ASX regarding listing conditions and escrow periods and the company will liaise with ASIC regarding any potential disclosure issues.
- **Lodgement:** The listing application and the pathfinder prospectus are lodged with ASX. The final prospectus is lodged with ASX and ASIC. Note that certain listings will be eligible to be fast-tracked. Refer to section 8.7 for details.

(d) Marketing and Allocations (Month 4)

- **Marketing:** Underwriting syndicate is finalised, analysts are briefed and management roadshows and investor briefings commence.
- **Allocations:** IPO pricing and institutional allocations are finalised.

(e) Announcement and Dispatches (Months 4 – 5)

- **Exposure Period:** An 'exposure period' of seven days starts from the date of lodgement of the prospectus with ASIC. During this time, the prospectus is subject to review and comment, and the company cannot accept any applications under the offer. ASIC can extend the exposure period to 14 days.
- **Offer Period:** The offer to retail investors starts after the exposure period and is usually open for a period of three to five weeks. During this period, the prospectus is dispatched to investors.

(f) Trading on ASX (Month 5)

In the final step, the offer closes, funds are received by the company, CDIs are allocated, the company is admitted to the official list of the ASX and trading commences.

Section 3 - ASX admission criteria

The Listing Rules set out the minimum admission criteria that an entity must satisfy in order to list on ASX.

3.1 NUMBER OF SHAREHOLDERS

(a) Spread

A company must have at least 300 non- affiliated securityholders holding a parcel of the company's main class of securities with holdings valued at a minimum of A$2,000 each. This is to demonstrate that there is sufficient interest in the company to justify its listing and to ensure that the company has a certain level of liquidity.

"Restricted securities" or securities subject to voluntary escrow (see below) are not considered for the purpose of determining whether the minimum spread has been achieved.

For the purpose of the admission criteria, a "non-affiliated securityholder" means a securityholder who is not:

- a related party of the company;
- an associate of a related party of the company; or
- a person whose relationship to the company or to a person referred to above is such that ASX determines that they should be treated as an affiliate of the company.

While there is no specific requirement for a minimum number of Australian resident securityholders, ASX encourages entities seeking admission to have a reasonable number of securityholders resident in Australia at the time of listing in order to promote local interest and liquidity in securities.

ASX generally considers securities registered in the name of a custodian or nominee as a single holding to determine whether the entity meets the minimum spread requirement and assumes that these securities are held on behalf of foreign residents. Where more than two holdings are registered at the same address, they will be treated as two holdings only for the purpose of determining if the spread requirement has been met.

(b) Free float

A company must have a free float of no less than 20% at the time of its listing. A free float is the percentage of the company's main class of securities that:

- are not "restricted securities" or subject to voluntary escrow; and
- are held by non-affiliated security holders.

The 20% free float requirement does not include securities held by or for an employee incentive plan.

3.2 FINANCIAL TESTS

A company must satisfy either the profits test or the assets test to be eligible to list.

(a) Profit test

To satisfy the profit test, a company must:

- be a going concern or be the successor of a going concern;
- have conducted the same main business activity during the last 3 full financial years and through to the date of its admission to ASX;
- have aggregated profit from continuing operations for the last 3 full financial years of at least A$1 million; and
- have consolidated profit from continuing operations for the 12 months to a date no more than 2 months before the date of its application for admission of at least A$500,000.

The company must also provide:

- audited financial statements that do not contain a modified opinion or emphasis of a matter that ASX considers unacceptable; and
- a directors' statement from the directors confirming that there is no indication that the company will not continue to earn profit from continuing operations.

There is no working capital requirement if a company seeks admission under the profit test.

(b) Assets test

To satisfy the assets test, a company that is not an investment company:

- must have, at the time of admission:
  - net tangible assets of at least A$4 million after deducting the costs of fund raising; or
  - a market capitalisation post-IPO of at least A$15 million;
- must either have:
  - less than half of its total tangible assets (after any fundraising) in cash or in a form readily convertible to cash; or
  - commitments consistent with its stated objectives to spend at least half of its cash or assets readily convertible to cash, as set out in an expenditure program detailing these commitments in the listing prospectus; and
- must have at least A$1.5 million of working capital (this may take into account budgeted revenue for the first full year post listing, but no amount allocated to working capital such as administration costs or accounts payable).

The company must also include in its prospectus:

- details about the objectives the company seeks to achieve and any capital raising undertaken in connection with its admission; and
- an express statement from its directors, or an equivalent statement from an independent expert, that the company will have enough working capital at the time of its admission to carry out those objectives.

3.3 ESCROW

There are two types of escrow: ASX or mandatory escrow and an underwriter determined voluntary escrow. A company should confirm that relevant securityholders are prepared to sign escrow agreements early in the IPO process. This is particularly the case for US issuers, given that Australian escrow periods are longer than typical US lock-up periods.

(a) ASX escrow

ASX generally only imposes escrow on companies admitted under the assets test.

ASX escrow restrictions are designed to prevent the founders unfairly profiting (at the expense of new securityholders) by selling their securities shortly after the IPO. ASX can require escrow for any “restricted securities”.

Restricted securities are securities issued before admission to either a seed capitalist, a vendor of a classified asset (defined below), a promoter of the company, a professional advisor or consultant to the company and certain persons under an employee incentive scheme. The proportion of securities held by such persons that are restricted securities will depend on the time and price at which, and the circumstances in which, the securities were issued.

If the company issued securities as consideration for the acquisition of a classified asset from a related party of the company or a promoter during the two years before the date of the company’s application for admission, such securities will be restricted securities. Classified assets include an interest in an intangible property that is substantially speculative or unproven, or an interest that in ASX’s opinion cannot readily be valued.

For early stage companies, there is usually a submission to ASX as to which investors need to be escrowed. Smaller shareholders may sometimes be excluded even if they fall within the Listing Rules.

Under the ASX escrow agreement, restricted securities are placed in escrow and cannot be sold for up to two years (but usually between 12 and 24 months), beginning either from the date the securities were acquired or the date of ASX quotation.

(b) Voluntary escrow

Separate to ASX escrow, the underwriter may want major securityholders to voluntarily escrow their securities. This makes it easier for the underwriter to market the IPO.

Applicants will have the confidence that major securityholders will not sell down their security holdings immediately after the IPO, thereby depressing the security price.

3.4 GOOD FAME AND CHARACTER

ASX must be satisfied that each director of the company, the CEO and the CFO is of good fame and character at the date of the listing and will primarily take into account the criminal history and bankruptcy check for each of these persons when considering this.

ASX will not waive the "good fame and character" requirements and may request the same documents from other persons who will likely be involved in management of the company.

3.5 CONSTITUTION AND CORPORATE GOVERNANCE

A US company must have by-laws that are consistent with the Listing Rules or contain wording prescribed by ASX to a similar effect. In that regard, the company must also provide a statement disclosing the extent to which the company will follow the recommendations of the ASX Corporate Governance Council's (**ASXCGC**) Corporate Governance Principles and Recommendations.

For each recommendation that the company decides not to follow, it must identify the reasons for not following such recommendation and indicate whether it intends to apply alternative governance practices instead. This information is usually included in the prospectus, but can also be provided separately in a corporate governance statement.

3.6 STRUCTURE AND OPERATIONS

As a condition to ASX permitting a company to list, a company's structure and operations must be appropriate for a listed entity. ASX strongly recommends that all companies make an in-principle application to ASX regarding their suitability to list prior to commencing the IPO process. If positive advice is received from ASX in response to the application, this gives the company a reasonable degree of certainty that no fundamental hurdles should arise when the company submits its application for admission. ASX has given guidance on the various factors the Listings Review Panel will consider when assessing suitability, particularly for early-stage or growth companies. While no single factor is determinative, the following factors are relevant:

- Early-stage technology and biotechnology sectors:
  - **promoter involvement:** organic growth vs recent acquisition by promoters?
  - **funding:** were material funds raised over several years, or has funding been "in-kind" over a shorter period?
  - **development stage:** have clinical trials been completed, commenced, or are trials ready to commence?
  - **revenue and commercialisation:** does the business have revenue or binding agreements for sales greater than A$1 million?
  - **IP/asset ownership:** are IP rights granted in all jurisdictions where the entity operates?
  - **investment history:** has the entity undertaken more than two material rounds of seed raising and have funds raised directly contributed to technology and business advancement?
- Early-stage renewable energy sector:
  - **established tech:** the tech used in the business should be established to generate/distribute energy (including the use of renewables for hydrogen capture).
  - **pre-feasibility study:** the business should have completed a pre-feasibility study.
  - **land access rights:** these should be in place.
  - **regulatory approvals:** relevant regulatory approvals should have been obtained.
  - **demand for offtake arrangements:** is there a demonstrable demand for their offering through offtake arrangements?
  - **No backdoor listings**

3.7 OTHER CRITERIA

ASX also retains absolute discretion with respect to admitting an entity to its official list. Set out below are examples of circumstances where ASX may elect to exercise its discretion not to allow a company to be admitted to the official list:

- Concerns that the company's structure, business, financial condition, governance

arrangements, Board or management may not be suitable for an entity listed on ASX.

- Concerns about the genuineness of the company's interest in accessing the Australian equity market.
- ASX has had prior unacceptable dealings with the company, its CEO, its CFO or one of its directors.
- ASX has had prior unacceptable dealings with a promoter, broker, auditor, investigating accountant, expert or professional advisor involved in the IPO.
- ASIC or another corporate regulator has expressed concerns to ASX about the admission of the company to the official list.
- The company has been denied admission to the list of another exchange.

Section 4 - Additional considerations for US companies

4.1 FOREIGN EXEMPT LISTING OR STANDARD LISTING

US companies seeking to list on the ASX will be required to make decisions regarding listing form and structure.

With respect to listing form, US companies may either seek:

- an ASX Foreign Exempt Listing, which is for companies listed on another securities exchange and meet certain eligibility criteria; or
- a standard ASX listing, which is for companies that will have ASX as their primary listing venue or that do not meet the eligibility criteria for an ASX Foreign Exempt Listing.

To be eligible for a Foreign Exempt Listing, a company must either have operating profits before income tax of at least A$200 million for each of the last three financial years, or net tangible assets or a market capitalisation of at least A$2 billion.

4.2 Most US companies will seek to list under a standard ASX listing. Companies in this category are subject to the Listing Rules, even if they are listed on another exchange. CDIs

In Australia, the Clearing House Electronic Subregister System (**CHESS**) is a system that manages the settlement of transactions on ASX and is used for the electronic transfer of legal title over quoted securities and uncertificated holdings.

Since CHESS cannot be used directly for the transfer of some types of products (including shares of US companies), ASX has developed CHESS Depository Interests (**CDIs**). A CDI is a financial product which is a type of depositary receipt and reflects a unit of beneficial ownership in an underlying financial product. CDIs are the securities that trade on the ASX for US entities.

The main difference between holding CDIs and holding foreign financial products directly is that the CDI holder has beneficial ownership of the equivalent number of foreign financial products instead of legal title. That being said, the CDI holder still obtains all economic benefits of foreign securities and has the same rights as if the CDI holder was the legal owner of the underlying share, with the exception of voting arrangements and some corporate actions of foreign companies domiciled in certain jurisdictions.

4.3 CAPITAL STRUCTURE

Many US companies have considerably more complicated capital structures than Australian companies, which need to be "cleaned-up" for IPO purposes. In particular, financial sponsor-backed companies typically have a capital structure that has been through various rounds of financing, often with different levels of preferential rights. Further, the constituent documents often do not have automatic conversion rights for an ASX-listing. For an ASX-listing, the capital structure will need to be converted to common stock, which usually requires stockholder approvals. Additionally, the capital structure may need to be discussed with ASX as part of any escrow submissions.

4.4 AUSTRALIAN TOP-HAT

A US company can choose to list as a US entity or incorporate an Australian holding company as the listed entity. However, even with an Australian holding company, the company may still be regarded as a US issuer for US securities law purposes and have to comply with the additional US requirements discussed in this guide.

This will be the case where more than 50% of the company's voting securities are held by US residents, and:

- the majority of its executive officers or directors are US citizens or residents;
- more than 50% of the company's assets are located in the US; or

- the company business is administered principally in the US.

In any case, an Australian holding company may not be an appropriate structure. For example, an Australian holding company would not be able to report in US GAAP and may lose certain benefits of US governance that would otherwise be available. While this topic is beyond the scope of this guide, issuers should seek legal advice prior to determining a listing structure as the decision may have various long-term consequences, including tax implications.

4.5 FOREIGN COMPANY REGISTRATION

Assuming the US company retains its US domicile to list, the company must register as a foreign company in Australia.

The process for registering as a foreign company is relatively simple and requires, among other things, providing copies of incorporation and constituent documents and the appointment of a local agent in Australia.

Once registered, a foreign company will also have ongoing obligations in Australia, such as maintaining a registered office. Many of these obligations can be outsourced to a third-party provider.

4.6 GOVERNING LAW

A company listed on the ASX will be principally governed by the laws of its jurisdiction of incorporation, rather than by Australian law.

Thus, usual corporate activities of a US company will continue to be governed by the laws of its jurisdiction of incorporation, such as Delaware.

4.7 AUSTRALIAN RESIDENT DIRECTORS

While there is no requirement for Australian resident directors to be appointed to the Board of directors of a foreign company, ASX generally expects at least one Australian resident director with ASX experience.

4.8 DIRECTOR ID'S

Directors are required to have applied for their Director Identification Number (**DIN**) with the Australian Business Registry Services prior to their appointment. Civil and criminal penalties can be imposed for breach of the DIN provisions.

4.9 SEC "NO ACTION" LETTER

A US company undertaking an IPO in Australia is subject to the stringent conditions under Regulation S (**Reg S**) of the US Securities Act of 1933, as amended (**US Securities Act**).

However, the US Securities & Exchange Commission (**SEC**) granted 'no action' relief to ASX in an effort to make ASX listings relatively easy for US companies, specifically by ameliorating some of the requirements of Reg S. Indeed, the ASX is one of the few exchanges in the world that has been able to get a "modification" of Reg S of the US Securities Act to facilitate IPOs of US entities.

The relief provides that certain alternative procedures and processes set up by ASX are equivalent to and may take the place of those requirements of Reg S. This means that US companies can raise capital on the ASX without registering their securities under the US Securities Act and without having to prepare a prospectus that complies with the US Securities Act, provided certain conditions are met.

US companies must comply with the following terms of the no action letter:

- the prospectus must disclose that purchasers will be deemed to have made representations regarding their non-US status and agree to restrictions on resale under Reg S;
- the global share certificate representing the CDIs must contain a restrictive legend;
- any press release or information made public about the IPO must include a statement that the CDIs have not been registered under the US Securities Act and are subject to restrictions under Reg S;
- the trading symbol must include the "FOR US" designation, indicating to brokers that the CDIs are restricted under Reg S and, as a result, may not be sold to US persons (excluding "qualified institutional buyers", as defined and in compliance with Rule 144A under the US Securities Act);
- confirmations sent to shareholders must indicate that the CDIs are subject to restrictions;
- companies must instruct their registrars that no CDIs may be transferred from the Reg S

global security without a favourable opinion of US counsel; and

- companies must provide notification in their annual report, interim reports and notices of shareholder meetings that the ASX-listed CDIs are restricted under Reg S and may not be sold to US persons (excluding "qualified institutional buyers", as defined and in compliance with Rule 144A under the US Securities Act).

While the SEC "no action" letter restricts the ability of US persons to purchase securities of a US company on the ASX, it does not restrict the ability of any US person to sell such securities in brokered transactions on the ASX.

Section 5 - Role of the regulators

5.1 ASIC

ASIC reviews prospectuses, monitors advertising or publicity that takes place during an IPO and reviews a company's conduct after an IPO to ensure compliance with continuous disclosure obligations and corporate governance responsibilities.

Unlike the SEC, ASIC does not usually pre-vet prospectuses, but instead ASIC undertakes selective compliance reviews of prospectuses lodged with it during the exposure period. This is generally seven days, but can be extended to 14. The ASIC process is much more iterative and informal.

ASIC's review will generally focus on:

- ensuring that key offer information is highlighted and there is balanced disclosure in terms of the benefits and risks of participating in the offer;
- ensuring that there is adequate disclosure and explanation of key risks;
- confirming whether there is a reasonable basis for any forward-looking statements;
- ensuring the wording and presentation of the prospectus is clear, concise and effective.

If it appears to ASIC that a prospectus may be defective, ASIC will generally work with the company to resolve its concern.

If ASIC's concerns cannot be satisfactorily resolved within the exposure period, ASIC can impose an interim stop order on the prospectus (for up to 21 days).

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

5.2 ASX

Companies should seek to engage with ASX early in the IPO process to discuss potential issues related to a proposed IPO.

Indeed, ASX strongly recommends that all companies submit an in-principle application regarding suitability to list on ASX prior to starting the IPO process. Please refer to section 3.6 for further details on the factors ASX considers when determining whether a prospective IPO candidate is suitable to list on ASX. ASX is not bound by its initial assessment of suitability, in that it is open for ASX to change its suitability assessment when considering an applicant's formal listing application. However, this pre-assessment means that those companies which are too early-stage to warrant an ASX listing will find out sooner in the IPO process, prior to incurring the significant cost and expense of the IPO process.

Within seven days of lodgement of the prospectus with ASIC, a company must lodge a formal listing application with ASX. The ASX will review the application and the prospectus to ensure compliance with the Listing Rules. The ASX may seek additional information from the company to ensure that sufficient information is available for investors.

The ASX generally requires six weeks to process a listing application and in most cases the ASX does not commence its review until the prospectus has been lodged with ASIC.

Section 6 – Structuring an IPO

IPO structures can vary significantly and any particular offer structure will be based on a number of factors, including the amount of funds targeted to be raised, the identity of prospective investors and the size and nature of the company's business. Advisors should be engaged to provide structuring advice to ensure the most appropriate structure is selected.

6.1 NEW SHARES/SELL-DOWN

Generally an IPO will involve the offer of new securities to investors in order to raise capital for the company. However, an IPO can also include an offer of existing securities enabling founders and others to exit their investment. Whether a sell-down of existing securities is appropriate will depend on the amount of capital required to be raised and the intentions of existing securityholders.

Alternatively, a company may conduct a compliance listing. This occurs where a company does not intend to raise additional capital, but instead wants to create a trading facility for its securities. For example, where a company seeks a dual listing on the ASX in order to access the Australian market.

6.2 TYPES OF OFFERS

An IPO offer will usually comprise an **institutional** and a **retail** component, with the latter comprising a few different types of offers.

(a) Institutional Offer

An offer to sophisticated or professional investors both in Australia and certain foreign jurisdictions (subject to applicable laws), usually via a bookbuild process. Institutions 'bid into the book' by indicating how many securities they are prepared to buy at what prices. The bids are used by the company and the lead manager to determine allocations to institutional investors and the institutional IPO price.

(b) Retail Offers

The retail offer can take on a few different forms:

- **Broker Firm Offer:** Brokers appointed to the IPO may be allocated a set number of securities to offer to their retail clients.
- **Employee Offer:** An offer of securities to Australian resident employees who satisfy certain eligibility criteria. These often involve guaranteed minimum or preferential allocations of securities, and may be made at a discount to the IPO price to encourage participation.
- **General Public Offer:** An offer to the general public (being Australian and NZ resident retail investors).
- **Priority Offer or Chairman's List:** An offer to selected resident investors personally invited by the company to participate in the offer.

6.3 PRIVATE PLACEMENTS

Many Australian IPOs incorporate a private placement to foreign institutional investors. This is particularly relevant for US companies, which may realise considerable benefits from making an offer of CDIs to its existing US institutional shareholders. If there are US investors that are not a Qualified Institutional Buyer (**QIB**) or an eligible fund manager, any such offer is usually undertaken as a concurrent private placement to "accredited investors" pursuant to Regulation D under the US Securities Act.

Alternatively, if a US company wishes to make an offer of CDIs to institutional investors in the US, a US offering circular (known as a "wrapper") can be prepared containing information of particular interest to US investors, such as income tax considerations and transfer restrictions.

In order for foreign institutional offers to be made, securities law advice will need to be sought to ensure compliance with the applicable local laws and regulations.

6.4 UNDERWRITING

If the IPO is underwritten, the underwriter agrees to apply for any securities not subscribed for in the IPO (the shortfall) in accordance with the terms set out in the underwriting agreement negotiated between the underwriter and the company.

In practice, the underwriting fee tends to be in the order of 4-6% of the total amount raised under the IPO, with lower percentage fees negotiated for IPOs that are targeted to raise higher amounts of capital. In some instances, the underwriter will appoint sub-underwriters to manage risk and share responsibility for marketing of the IPO.

While there is no requirement for an IPO to be underwritten, engaging an underwriter to underwrite (or at least partially underwrite) the IPO will provide the company with certainty that the targeted amount of capital will be raised.

At the commencement of the IPO process, a mandate letter is agreed between the underwriter and the company which sets out, at a high level, the basic underwriting terms. A more formal underwriting agreement will then be negotiated and finalised around the time the prospectus is lodged with ASIC.

An IPO requires a complementary team comprised of members of the company and a number of professional advisors. Set out below are the key tasks for a company to consider in order to prepare it for the IPO process.

Section 7 - Preparing a company for an IPO

7.1 THE COMPANY

(a) Management

The company should consider whether the existing management has the requisite skills to take the company through the IPO process and operation in a public environment. This is particularly important during the drafting of the prospectus and the due diligence process. The company may also consider whether any additional management incentives should be implemented or new personnel recruited.

(b) Board

The company should undertake a review of the board to ensure it has a sufficient mix of skills and experience and has an appropriate balance of executive, non-executive and independent directors. Although not a legal requirement, the underwriter, not to mention investors, will expect a US company to have a least one resident Australian director with appropriate ASX experience.

7.2 ADVISORS

The company should appoint a skilled team of professional advisors experienced in the listing process. There are various advisory roles, the principal ones of which are:

(a) Underwriter/Lead Manager

The underwriter will be intimately involved in the listing process, and will subscribe for any securities not taken up by investors under the IPO, thereby assuming the market risk of fundraising and ensuring that the company will receive sufficient funds.

(b) Australian legal advisors

Engaging experienced and commercial legal teams is essential. Legal advisors with strong capital raising experience often have an existing working relationship and a certain credibility with ASIC and ASX which can be invaluable.

The Australian legal advisors will provide advice on the Australian legal requirements associated with the proposed listing. This will include managing the listing application and due diligence process, communicating with regulators and providing legal input on the offer structure. The Australian legal advisors will also be responsible for preparing, reviewing and negotiating documents required for the listing, including the prospectus, the underwriting agreement and any escrow agreements.

(c) US legal advisors

A US legal advisor is also required for US companies. US legal advisors will undertake US legal due diligence on the issuer and provide advice on the application of US laws and US securities matters relevant to the IPO.

(d) Investigating accountant

The role of the investigating accountant includes conducting financial and tax due diligence, reporting on historical financial results and reviewing any forecasts in the prospectus. An investigating accountant also ensures that financial data is compliant with all relevant legal and regulatory obligations. The investigating accountant will provide a report for inclusion in the prospectus.

(e) Tax advisors

The role of the tax advisor is to provide taxation and general financial advice on the structure of the IPO.

(f) Marketing/communications advisors

Communications advisors may be helpful to market and publicise the IPO and ensure

that the company's messaging to prospective investors is appropriate. Press coverage and other communications help ensure that the IPO attracts the requisite level of interest from investors, particularly retail investors.

(g) Share registry

Share registries are appointed to manage a listed company's register of securityholders. Their role includes receiving and processing applications for the IPO and maintaining the share register. On an ongoing basis, share registries handle registers, share transfers, dividend payments and share purchase plans, as well as dispatching

documentation and communications to shareholders.

(h) Industry experts/other advisors

Depending on the nature of the business, industry experts may be required to give specialist advice on industry issues that may impact the IPO or provide reports used for the prospectus. Other advisors may also assist with the analysis of the company and industry to help determine the level of investor demand.

7.3 STRUCTURE

(a) Change of control

The IPO may trigger change of control clauses in the company's contracts with counterparties such as suppliers, landlords, customers and financiers. Early identification of any consents required to conduct the IPO will ensure that the process of obtaining such consents does not unduly delay the process.

(b) Corporate structure

The company should consider whether the chosen offer structure or ASX admission criteria will require the company to undertake any corporate restructuring prior to commencing the IPO. Obtaining tax and accounting advice will be essential to this process.

(c) Offer structure

IPO structures can vary significantly between listings. The company's advisors should be engaged as early as possible to provide structuring advice to ensure the most appropriate offer structure is selected.

(d) Financial information

As a general rule, the company will need to disclose at least three years of audited accounts in the prospectus. The company should ensure that its accounting and management reporting systems will be able to produce financial reports that comply with a listed entity's disclosure obligations.

(e) Data room

The company should establish an online data room to assist with the IPO due diligence process. The data room should contain copies of the company group's key contracts (eg supply agreements, customer contracts, leases, employment contracts and financing documents), historical financial information and corporate governance documents (eg Board minutes, constitutions and corporate structure charts).

(f) Insurance

Directors and officers (**D&O**) insurance policies will not usually cover IPO liability. As such, the company should consider taking out IPO prospectus insurance as this will provide the directors with protection from potential IPO liability. It may also be prudent for the company to review its insurance policies to ensure that the company's main assets are appropriately insured.

7.4 GOVERNANCE

The ASXCGC's Corporate Governance Principles and Recommendations (**Principles and Recommendations**) set out recommended corporate governance practices for entities listed on the ASX that, in the ASX's view, are likely to achieve good governance outcomes and meet the reasonable expectations of investors.

For a US company, given that the Principles and Recommendations differ to some degree from standard US practice, the company must decide whether to implement changes to comply with the Principles and Recommendations, or to leave practices as is, and identify the reasons for not following the recommendations.

At a minimum, companies should have a dedicated:

- remuneration/compensation committee;
- nomination committee; and
- audit/risk committee.

In addition, companies will need to adopt a range of policies including:

- Board charter;
- share trading policy;
- continuous disclosure policy;
- shareholder communication policy;
- code of conduct for management and staff; and
- diversity policy.

7.5 COSTS

The costs associated with undertaking an IPO and maintaining an ASX listing can be significant and

will vary based on the complexity and scale of the IPO.

Relevant costs include underwriting fees (discussed in more detail in Section 6.4 above), brokers fees, legal, accounting and share registry fees, printing costs, marketing expenses and ASX listing fees (which vary depending on the market capitalisation at the time of listing). Effective planning and management should assist with minimising these costs.

Total IPO costs tend to be around 5 - 10% of the total amount raised, with the costs of smaller offers generally representing a higher proportion of the total amount raised.

Section 8 - Drafting a prospectus

8.1 DRAFTING RESPONSIBILITIES

Unlike in the US, in Australia the company and the lead manager are primarily responsible for the drafting and the preparation of the prospectus, rather than the lawyers.

As such, an Australian prospectus looks very different to a US prospectus, and may seem more reader friendly. However, it is still a legal document to which personal liability attaches for those involved in its preparation.

8.2 DISCLOSURE REQUIREMENTS

The Corporations Act sets out the prospectus disclosure regime, which is summarised in further detail in Section 9. In essence, the company will be required to ensure the prospectus:

- is worded and presented in a 'clear, concise and effective' manner;
- meets the general statutory disclosure test;
- makes specific disclosures; and
- is not misleading or deceptive.

It is important to note that prospectuses should be as concise as possible while still meeting the necessary disclosure requirements. ASIC also issues a number of regulatory guides which provide guidance about prospectus content.

8.3 FINANCIAL INFORMATION

To comply with the general disclosure test under the Corporations Act, prospectuses are required to contain information about the company's financial position, performance and prospects.

(a) Historical

US companies should prepare and audit or review historical financial information included in the prospectus. Unless an exception applies, the following should be included in the prospectus.

- 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).
- For the three most recent financial years (or two years of audited information and a half-year of reviewed information, depending on date of prospectus):
  - consolidated income statement showing major revenues and expense items, and profit or loss including EBIT and net profit after tax;
  - consolidated cash flow statement with operating and investing cash flows;
  - other information that is material from financial statements, such as notes to financial statements; and
  - any modified opinion by the auditor.
- All events that have had a material effect on the company since the date of the most recent financial statements.
- A warning that past performance is not a guide to future performance.

Additionally, current financial information should be included in the prospectus and when the most recent financial statement relates to a half-year, the prospectus should include financial information based on those audited or reviewed statements.

(b) Prospective financial information

Whilst the Corporations Act does not specifically require disclosure of prospective financial information in the prospectus, investors may find such information useful, provided that there is reasonable basis for that prospective information. Failure to have a basis for that prospective information may give rise to such statements being considered misleading, regardless of the use of warnings or cautionary language.

It is common market practice for companies with an operating history to provide prospective financial information in a prospectus at least to the end of the current financial year (but only when there are reasonable grounds to do so). Should the company not be able to include detailed prospective financial information, the prospectus should disclose the company's prospects and the basis for those prospects.

(c) Investigating accountant's report

The investigating accountant is responsible for conducting due diligence enquiries into financial and accounting matters, and will prepare a report for inclusion in the prospectus.

The report should provide an independent review of the company's historical, pro-forma historical and prospective financial information. The report should review the assumptions on which the financial information has been prepared and comment on whether there was a reasonable basis for such assumptions.

8.4 EXPERT'S REPORTS

Companies involved in technical or complex industries or business may require an industry expert to provide an expert report for inclusion in the prospectus. Such reports break down the technical elements or complexities of the company's business, for example a geological expert's report when mining tenements are involved, or a patent attorney's report for a biotech company.

8.5 US SPECIFIC DISCLOSURES

(a) SEC's "no action" letter

If a US company is relying on the SEC no action letter, the prospectus must also include:

- statements to the effect that securities have not been registered under the US Securities Act and may not be offered or sold in the US or to US persons (other than distributors) unless the securities are registered, or an exemption from the registration requirements is available and that hedging transactions involving those securities may not be conducted unless in compliance with the US Securities Act;
- statements to the effect that all purchasers from a distributor in the offering will be deemed to have made representations regarding their non- US status (or other exempt status, such as QIB status under the Rule 144A exemption from registration) and agreements regarding restrictions on resale and hedging under Reg S of the US Securities Act (and where appropriate, Rule 144A); and
- a statement to the effect that while ASX and ASX Settlement maintain the systems and procedures outlined in the SEC no action letter, neither of them is responsible for any failure by the issuer to comply with those systems and procedures.

(b) ASX guidance

ASX separately requires foreign companies to disclose in the prospectus:

- a statement of the company's place of incorporation, registration or establishment;
- that as the company is not established in Australia, its general corporate activities (apart from any offering of securities in Australia) are not regulated by the Corporations Act or by ASIC, together with the name of the applicable governing legislation and the corporate regulator administering that legislation; and
- a concise summary of the rights and obligations of securityholders under the law of its home jurisdiction.

(c) CDIs

US companies issuing CDIs must disclose in the prospectus the differences between holding CDIs of a company as opposed to holding the underlying securities, despite holders of each potentially having the same rights and entitlements.

The company should, amongst other things:

- explain what a CDI is;
- explain specific features of the CDI and the impact such features will have on the rights and entitlements of CDI holders;
- explain what a depository nominee does;
- identify who has been appointed as depository nominee;
- explain the process and provide instructions on how CDI holders may convert CDIs into the underlying foreign securities;
- explain how CDI holders may exercise voting rights;
- explain the entitlements of CDI holders to dividends and other capital distributions;
- explain that for corporate actions, CDI holders will generally receive equal entitlements to that of the underlying foreign securityholders; and

- explain that the depository nominee may only accept a takeover offer where CDI holders instruct it to do so.

8.6 SUPPLEMENTARY/ REPLACEMENT PROSPECTUSES

Companies will be required to lodge supplementary or replacement prospectuses to correct deficiencies in an original prospectus or to update investors about the offer. A supplementary prospectus accompanies or is attached to an original prospectus. A replacement prospectus replaces an original disclosure document.

A company should immediately lodge a supplementary or replacement prospectus upon becoming aware of any of the following circumstances, where such circumstances are considered to be materially adverse from an investor's point of view:

- the prospectus contains a misleading or deceptive statement;
- the prospectus omits information required to be disclosed under the Corporations Act; or
- a new circumstance has arisen since the prospectus was lodged which, had it arisen before the prospectus was lodged, would have been required to be disclosed in the prospectus in accordance with Corporations Act.

A supplementary or replacement prospectus may be used to:

- correct a deficiency in the original prospectus that is not material;
- update the original prospectus by providing information about something that has happened since the prospectus was prepared, regardless of materiality; or
- provide additional information, regardless of materiality.

8.7 FAST-TRACK IPO PROCESS

ASIC is undertaking a two-year trial of a shorter IPO timetable for eligible entities (**fast-track process**).

The key changes introduced as part of the fast-track process include:

- **Informal review of offer documents:** Eligible entities can provide a pathfinder prospectus or pathfinder Product Disclosure Statement (**PDS**) to ASIC for informal review at least 14 days before formal lodgement. This allows the entities to make necessary adjustments before the statutory exposure period begins. ASIC will then generally not need to extend the seven-day exposure period to 14 days after lodgement, other than where new material information comes to light or where there is an extended delay between the informal review completing and formal lodgement of the prospectus or PDS.
- **Faster retail investor access:** ASIC has also announced a no-action position where an eligible entity accepts retail investor applications for non-quoted securities (under a prospectus or PDS issued by the entity) during the exposure period, rather than waiting until the end of the exposure period. This aligns IPOs more closely with managed fund offerings and reduces administrative delays. Entities do not need to apply to ASIC to avail themselves of this no-action position.
- **Shorter IPO timetable**: These changes could shave up to a week off the standard IPO timeline for eligible entities, reducing the deal execution risk resulting from market volatility and consequential pricing changes.

To be eligible for the fast-track process, an entity must have a market capitalisation of at least A$100 million upon listing and not be subject to ASX imposed escrow. This means that entities applying to list under the asset test will generally be ineligible for the fast-track process.

Section 9 - Prospectus liability and the due diligence process

9.1 OVERVIEW

Failure to comply with the disclosure requirements may lead to liability for certain persons involved in the preparation of the prospectus. In order to minimise the risk of liability and to maximise the potential availability of statutory defences for those persons, a due diligence process should be implemented.

The due diligence process in Australia is very process driven and quite different to the US. In Australia, it is best practice for persons involved in the preparation of a prospectus to be appointed to a single DDC to co-ordinate, conduct and supervise the due diligence process. The due diligence process will generally comprise four principal phases:

- **Scoping:** identification of material issues, allocation of due diligence responsibilities and development of work programs;
- **Enquiry:** analysis of disclosures required in the prospectus;
- **Verification and sign-off:** formal sign- off and verification of the prospectus; and
- **Continuing due diligence:** continuing due diligence enquiries until completion of the offer.

9.2 DUE DILIGENCE PRACTICES IN IPOS

(a) Due diligence process

Companies and their directors need to engage in a robust and thorough due diligence process supported by their advisors, as they are ultimately responsible and liable for the information contained in the prospectus.

ASIC suggests that an adequate approach to the due diligence process will generally include:

- devising a due diligence plan or system;
- establishing a DDC to coordinate and supervise the due diligence process;
- arranging regular meetings of the DDC to ensure the due diligence process is being implemented;
- delegation of tasks by the DDC to relevant parties to make particular inquiries, including administering questionnaires to appropriate parties;
- a verification process for disclosures of material statements of fact or opinion in the prospectus; and
- a final due diligence report to the Board of directors outlining the procedures followed, inquiries undertaken and a conclusion.

Importantly, the due diligence process should continue following lodgement of the prospectus with ASIC until the issue and allotment of securities under the IPO. If a person potentially liable for the prospectus becomes aware of a new circumstance or defect in the prospectus within this period, the DDC should immediately be informed via the chair or secretary of the DDC.

(b) Due Diligence Committee

Market practice is to establish a DDC to oversee and coordinate the IPO due diligence process. The DDC is generally established by delegation of the Board and should report periodically to the Board on the conduct of the diligence process.

DDC members are usually directors (typically one executive and one non-executive director), legal advisors, investigating accountants, underwriters and lead managers. DDC members are generally expected to actively participate in the due diligence enquiries and deliberations, and apply an independent and inquiring mind to the prospectus and due diligence process.

The DDC is generally responsible for:

- coordinating and reviewing the information gathering process from management and experts with a view that, by the end of the due diligence process, a complete and thorough understanding of all relevant facts will be obtained and resolved before finalisation of the prospectus;

- determining the scope of due diligence enquiries and agreeing on quantitative and qualitative materiality thresholds;
- identifying issues for investigation and disclosure in the prospectus;
- ensuring all potentially material issues identified during the course of the due diligence process are appropriately disclosed in the prospectus or resolved as not material;
- ensuring adequate supervision at all stages of the due diligence process, including a system of continuing enquiry and monitoring after lodgement of the prospectus with ASIC;
- supervising drafting and verification of the prospectus;
- providing a final report to the Board that outlines the enquiries undertaken and enables the Board to form the view that disclosure in the final prospectus is complete and free from material misstatement; and
- documenting the due diligence process to provide evidence of enquiries made and the basis on which opinions have been formed, including retention of those materials.

(c) Verification process

The verification process seeks to ensure the prospectus does not contain any false, misleading or deceptive statements or any statements that are likely to be false, misleading or deceptive. In order to prevent this from occurring, statements in the prospectus should be verified by cross-referencing external source documents. Where this is not possible, the prospectus should disclose that the statement is one of opinion as well as the source and basis of that opinion.

Market practice is to document the verification process, with lawyers to collect and retain all supporting evidence as part of the verification process. Upon completion of the verification process, the company's lawyers should:

- review the verification materials and check for the existence of a source document for each statement (except for statements of opinion or those verified by the Board); and
- undertake an exercise of 'spot-checking' randomly selected material statements to confirm whether responses refer to independent objective evidence or reliable source documents.

To conclude the verification process, company management and advisors must formally acknowledge responsibility for the statements they have verified via a verification sign-off.

9.3 LIABILITY

The Corporations Act establishes a liability regime if a prospectus is found to be defective. Liability may be civil and/or criminal. Civil liability extends to persons including the company, each of its directors, the underwriter or persons named in the prospectus such as an advisor or expert. Criminal liability extends to the company and persons who make an offer under the prospectus, and to the company's directors and, potentially members of the DDC.

(a) A person may be subject to civil liability if:

- the prospectus contains a misleading or deceptive statement or there is an omission of material required by the Corporations Act;
- the person makes a reckless statement or engages in misleading or deceptive conduct; or
- a new circumstance arises since the prospectus was lodged with ASIC which would have been disclosed if it had arisen prior to lodgement.

(b) A person may be subject to criminal liability if:

- they make a misleading or deceptive statement or omit material required to be disclosed under the Corporations Act; and
- the relevant statement or omission is materially adverse from the point of view of an investor.

A negligent or deliberate misstatement in a prospectus may also lead to civil liability under general tort law, while a deliberate misstatement or other fraudulent conduct may lead to criminal liability under various criminal provisions.

9.4 DEFENCES

The Corporations Act prescribes two key defences in relation to misleading or deceptive statements in or omissions from a prospectus:

(a) The due diligence defence is available to persons who can prove that they made all

enquiries (if any) 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.

(b) The reasonable reliance defence is available to persons who can prove that they placed reasonable reliance on information given to them by a person other than their own employees or agents (or in the case of a company, their directors).

(c) Additionally, it is a defence to a prosecution for an offence relating to a misleading or deceptive statement or omission if a person is named in the prospectus as:

- a proposed director or underwriter;
- making a statement included in the prospectus; or
- making a statement on the basis of which a statement is included in the prospectus, proves they publicly withdrew their consent to being named in the prospectus in that way.

9.5 NEW CIRCUMSTANCES POST LODGEMENT

Securities must not be offered under a prospectus that has been lodged with ASIC if a new circumstance has arisen since the prospectus was lodged, which would have been required to be included in the prospectus if it had arisen prior to lodgement. If the securities offered under the prospectus have not yet been issued, then the deficiency can be corrected by issuing a supplementary or replacement prospectus.

While civil liability may still arise for loss or damage suffered because of the deficient prospectus, the issue of a supplementary or replacement prospectus will be taken into account in assessing liability. Criminal liability may also arise if the new circumstance is materially adverse from the point of view of an investor. However, a person will not be civilly or criminally liable because of a new circumstance if the person can prove they were not aware of the matter.

Section 10 - The offer

10.1 MARKETING

The Corporations Act imposes restrictions on advertising or publicity for offers of securities under an IPO. This is to prevent drip-feeding of selective information to the market; discourage inadequate analysis of a prospectus; and deter investment decisions from being made on the basis of an advertising campaign, rather than a detailed review of the prospectus.

(a) Pre-prospectus publicity

Prior to lodgement of the prospectus with ASIC, marketing of an IPO is restricted to the following activities:

(i) **Roadshows:** The lead manager, broker or underwriter to the offer may wish to undertake pre-marketing activities to institutional investors. ASIC has granted relief to allow such activities in relation to holders of an Australian Financial Services Licence because this class of institutional investor can be bound by confidentiality agreements and will be subject to the insider trading restrictions, protecting the information being presented from being leaked to the market or investors making a decision before they are presented with the prospectus. These activities are often used by the underwriter to gauge institutional interest in the IPO, and the underwriter may not decide to underwrite the offer if institutions show a lack of interest in the IPO during these roadshows.

(ii) Presentations to institutions may be oral or written, and can take the form of individual briefings through to presentations to a large number of investors. The company and its advisors must be careful not to disclose during the course of any such presentations any more information than that contained in the prospectus. Draft "pathfinder" prospectuses (similar to a preliminary or red herring prospectus in the US) are also permitted to be sent to sophisticated investors and professional investors.

(iii) **Market research:** the company or its advisors can engage a genuine market research organisation to conduct research directed to ascertaining the number of prospectuses that should be printed to meet anticipated public demand; to whom the IPO offer should be marketed; and the type and extent of marketing that should be undertaken in relation to the offer. Research activities may refer to the proposed offer, proposed advertisements, or proposed prospectus only to the extent necessary to enable participants to participate in the market research activities.

(iv) **Tombstones:** the company is permitted to issue a tombstone notice which identifies the company and the securities and advises investors that the prospectus will be made available when the securities are offered and that anyone wanting to acquire the securities will need to complete the application form accompanying the prospectus. Nothing further can be said, other than information detailing how to receive a copy of the prospectus.

(b) Post-prospectus publicity

Once the prospectus has been lodged with ASIC, marketing to retail investors can commence. However, the advertising must not be misleading or deceptive (including by omission) and must be consistent with the prospectus. It must also include a statement that the securities are offered under the prospectus and that applicants must use the application form in the prospectus to apply.

Under US securities laws, no general advertising or solicitation may occur in the US.

10.2 PRICING

The lead manager, investment bank or other financial advisor to the IPO offer will provide advice on the appropriate pricing structure.

(a) Fixed price offer

Under a fixed price offer, the price is set and quoted in the prospectus. To determine the appropriate price, the pathfinder prospectus is frequently provided to institutional investors without including a price. During investor roadshows, the company and its advisors will

assess demand in the market and to obtain an indication of the price that the market would be willing to pay for the securities.

In an underwritten offer, the fixed price and allocations may be determined by way of a bookbuild process. Investors submit bids specifying the price at which they would acquire securities and when the book has closed, the lead manager or investment bank will evaluate the collected bids and set the final issue price. Once the bookbuild is complete, the underwriting agreement is signed and the prospectus lodged with ASIC.

(b) Open price bookbuild offer

In an open price bookbuild offer, the price is set through an institutional offer that is either completely open, or set within a range that includes a minimum floor price.

The final institutional offer price is determined through a bookbuild process after the prospectus is lodged with ASIC and usually during the last of the retail offer period. Institutional investors are invited to bid for a number of securities 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 need for an orderly aftermarket and the level of demand under the retail offer. The retail offer price is either set at the same as, or at a slight discount to the institutional offer price.

10.3 OFFER PERIOD

The offer period commences after the exposure period and is usually scheduled for three to five weeks depending on the size of the offer and the level of retail participation required. During this period, the company and the underwriter 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 securities are issued to them.

If the offer is fully subscribed, the company may close the offer early. Conversely, if the IPO has not been well received by the market, the offer period can be extended.

10.4 CLOSE OF OFFER

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 CDIs (unless an event triggering a termination right under the underwriting agreement has occurred). If the offer closes oversubscribed, or the offer is not underwritten, then the company will allocate the securities amongst applicants. This process allows the company to effectively manage the spread to comply with ASX listing criteria. The securities will then be issued to successful applicants, and the application moneys are released to the company.

If the offer is not underwritten and the offer included a minimum subscription condition which was not met, then no securities may be allocated and all application moneys must be returned to applicants.

10.5 INITIATING TRADING

Once ASX confirms 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 CDIs to be quoted (and therefore freely traded on the ASX). Quotation normally commences on the second business day following the dispatch of holding statements.

Subject to the company achieving the ASX admission criteria (including the required shareholder spread), the ASX may grant the company conditional listing by the end of the offer period. In some cases, the ASX may also allow the company to commence deferred settlement trading before the conditions are satisfied. This allows CDIs to be bought and sold on the ASX before entries are made in CHESS in respect of shareholdings and before holding statements are dispatched. When holding statements are dispatched, deferred settlement trading ceases and the shares trade on a normal settlement basis.

Section 11 - Next steps

There are a number of factors that will ensure a successful listing; all are important and most are within a company's control.

(a) **Start early:** Early preparation and long-term planning is an essential part of any successful listing and is likely to result in more optimal financial outcomes for the company. An IPO should be viewed as one step in an ongoing process, rather than a standalone event.

(b) **Appoint the right advisory group:** Listing can be a complex and demanding process. Assembling the right group of advisors, including corporate advisors, lawyers, accountants and the share registry, will help to streamline the process and navigate the inevitable challenges as and when they arise.

(c) **Develop a sound business plan:** A sound business plan and convincing investment story demonstrating a clear and realistic plan for growth in the medium term should form the basis for the prospectus and will be a focus for institutional and retail investors.

(d) **Assemble a complementary Board and management team:** In order to attract interest from institutional investors, any changes to the Board and management should be in place prior to commencing roadshow presentations. Board and management should be appropriately incentivised to grow the company post-listing.

(e) **Implement changes now:** Listed companies have higher reporting standards and corporate governance requirements than unlisted companies. Acting like a listed company prior to listing will put a company in good stead for when it really matters.

(f) **Listing window:** What is not in your control are market conditions. So be ready. All of the above factors will help you be ready. And JWS is there to assist.

Section 12 - Key Contacts

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Annexure – Draft Timeline

Key milestones	Month 1	Month 2	Month 3	Month 4	Month 5	Month 6
1. Preliminary preparations						
Appoint advisors						
Prepare Due Diligence Planning Memorandum (**DDPM**)						
Consider offer structuring						
Consider capital restructuring						
Identify directors and agree terms						
2. Due diligence process and documentation						
Appoint Due Diligence Committee members						
Determine legal and financial due diligence scope						
DDC meetings (every fortnight)						
Commence due diligence and issue management questionnaires						
Draft Pathfinder Prospectus						
Draft Accountant's Report						
Prepare roadshow presentation						
Appointment of share registry, printers and PR						
Prepare and negotiate underwriting agreement						
Verification process for Pathfinder/Prospectus						
Obtain consents and legal and accounting sign offs						
Finalise and execute Underwriting Agreement						
Board of Company to approve Final Prospectus						
Pre lodgement DDC meeting						
Post listing DDC Meeting						
3. Regulatory engagement						
Adoption of ASX-compliant certificate of incorporation and by-laws						
Consider the need for modifications and waivers from regulators						
Liaise with ASIC regarding any contentious prospectus disclosure issues						
Discuss listing conditions with ASX (including making escrow submissions)						
ASX approval of constituent documents						
Lodge application to register as a foreign company						
Lodge outstanding ASX listing application and supporting documents						
Build offer website						
Lodge final prospectus with ASIC[14] and ASX						
4. Marketing and allocations						
Early look roadshow						
Internal JLM desk briefings						
Pre-lodgement roadshow						
Firm bids received						
Institutional/lead manager(s) firm allocations						
Formal research published by JLMs						
5. Announcement and dispatches						
Exposure period (initially 7 days, however ASIC can extend it)[14]						
Printing of prospectus						
Dispatch of prospectus						
Offer period						
6. Trading on ASX						
Settlement of offer						
Expected allotment date of shares to general public						
Funds received by the company						
Dispatch of holding statements						
Admission of official list of ASX and quotation - shares commence trading						

[14] Note subject to meeting eligibility criteria, entities can provide a pathfinder prospectus or pathfinder PDS to ASIC for informal review at least 14 days before formal lodgement. See section 8.7 for details.

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SLATTERY

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