# Equity capital markets in Australia: regulatory overview

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A Q&A guide to equity capital markets law in Australia.

The Q&A gives an overview of main equity markets/exchanges, regulators and legislation, listing requirements, offering structures, advisers, prospectus/offer document, marketing, bookbuilding, underwriting, timetables, stabilisation, tax, continuing obligations and de-listing.

To compare answers across multiple jurisdictions visit the equity capital markets *Country Q&A tool*.

This Q&A is part of the global guide to equity capital markets law. For a full list of jurisdictional Q&As visit *global.practicallaw.com/equitycapitalmarkets-guide*.

## Main equity markets/exchanges

1. What are the main equity markets/exchanges in your jurisdiction? Outline the main market activity and deals in the past year.

### Main equity markets/exchanges

The Australian Securities Exchange (ASX) is Australia's primary exchange (*www.asx.com.au*). The ASX offers listing, trading, clearing and settlement services across a range of asset classes including equities, fixed income and derivatives.

Entities admitted to the official list of the ASX fall within one of the following categories:

- ASX listing: the main category of admission.
- ASX debt listing: for entities seeking to quote debt securities only.

 

- ASX foreign exempt listing: for large entities listed on recognised overseas exchanges.

There were 2,128 entities listed on the ASX as at 9 July 2020. Of these, around 138 (or 6%) were foreign incorporated entities. New Zealand (36%), US (12.3%), Canada (7.2%), UK (7.2%), Bermuda (7.2%), Singapore (5.8%) and Hong Kong (4.3%) were the most represented foreign jurisdictions on the ASX.

The National Stock Exchange of Australia (NSX) (*www.nsx.com.au*) and the Sydney Stock Exchange (SSE) (*www.ssx.sydney*) are exchanges offering alternative listing platforms to the ASX that specialise in listing small to medium enterprises. In recent years, Australia has also adopted alternative trading systems, including Chi-X Australia (*www.chi-x.com.au*).

While the ASX is by far the most broadly used exchange for listing within Australia, the NSX and SSX provide alternatives for smaller entities seeking to float with a minimum of 50 investors (whereas the ASX requires a minimum of 300 non-affiliated investors). The NSX has historically been used by some agricultural, resource and tech companies but this remains the exception, with the ASX hosting the majority of listing activity in Australia. Chi-X Australia, while capable of listing entities in its own right, is primarily used by institutional and sophisticated investors who seek to take advantage of tighter buy-sell spreads that are particularly attractive to high-volume traders of ASX-listed stocks.

The Australian exchanges operate in a highly regulated environment that is overseen primarily by the Australian Securities and Investments Commission (ASIC), which is the Australian corporate regulator.

## Market activity and deals

Although 2019 was a strong year with the ASX 200 gaining 21%, it only saw a total of 63 IPOs, down from 93 in the previous year. The average return on these IPOs was 35% compared to the share price return of about 18% for the overall market.

There has been a sharp decrease in the number of IPOs in the first half of 2020 as global and domestic markets react to the 2019 novel coronavirus disease (COVID-19) pandemic. The increased uncertainty has seen businesses delay plans to list on the ASX and foreign exchanges, whilst at the same time listed entities have rushed to the market to seek additional capital with a strong run of secondary capital raisings. In the first half of 2020, AUD36.3 billion in capital has been raised on the ASX as of 31 August 2020. This included capital raisings by:

- National Australia Bank (AUD4.25 billion).
- Sydney Airport (AUD2.0 billion).

 

- Qantas Airways (AUD1.43 billion).
- Lendlease (AUD1.15 billion).
- Oil Search (AUD1.08 billion).
- IOOF (AUD1.04 billion).
- Flight Centre (AUD700 million).

This is an astounding and disproportionate result given that Australia represents only 2% of the Morgan Stanley Capital Index.

Australia's large number of capital raisings during the COVID-19 pandemic is partly due to the facilitative regulatory environment provided by the ASX and the ASIC. In late March 2020, they implemented temporary emergency capital raising relief measures in response to the COVID-19 pandemic which helped facilitate a large number of capital raisings. The ASIC's relief is set to expire on 2 October 2020 and the ASX's relief is set to expire on 30 November 2020.

2. What are the main regulators and legislation that applies to the equity markets/exchanges in your jurisdiction?

## Regulatory bodies

ASIC. The Australian Securities and Investments Commission (ASIC) is Australia's corporate, markets and financial services regulator. The ASIC supervises real-time trading on domestic markets and has extensive powers to enforce the laws and regulations that govern financial markets in Australia.

ASX. The Australian Securities Exchange (ASX) also has supervisory jurisdiction under its listing rules (ASX Listing Rules), operating rules and corporate governance standards that it has established. The ASX supervises publicly listed entities to ensure that they comply these rules and standards. The other securities exchanges also have rules.

## Legislative framework

The Australian Corporations Act 2001 (Cth) (Corporations Act) and the ASIC Market Integrity

 

Rules set out a number of important laws and regulations with respect to financial markets which are monitored by the ASIC. These laws and regulations relate to various matters, including:

- Directors' duties.
- Insider trading.
- Misleading and deceptive conduct in relation to securities.
- Misconduct by market participants.
- Errors or omissions in documents.

The ASX's rules and standards govern important issues, including:

- Admission.
- Quotation.
- Periodic and continuous disclosure.
- Changes in capital and new issues.
- Significant transactions.
- Trading rules.
- Board composition.

Sections 793C and 1101B of the Corporations Act give the ASX Listing Rules statutory significance and allow the courts to make an order to ensure compliance with the ASX Listing Rules.

## Equity offerings

3. What are the main requirements for a primary listing on the main markets/exchanges?

 

## Main requirements

For an entity to be admitted to the official list of the ASX, the following main requirements must be satisfied:

- Condition 1. The entity's structure and operations must be appropriate for a listed entity.
- Condition 2. The entity must have a constitution which is consistent with the ASX Listing Rules.
- Condition 3. A prospectus, product disclosure statement or information memorandum must be issued and lodged with the Australian Securities and Investments Commission (ASIC) and given to the ASX or, if the ASX agrees, an information memorandum may be substituted, but only where appropriate.
- Condition 4. The entity must apply for, and be granted, permission for quotation of all the securities in its main class of securities.
- Condition 5. The entity must have at least 300 non-affiliated shareholders with holdings not subject to escrow valued at a minimum of AUD2,000 each (*see below*, *Minimum shares in public hands*).
- Condition 6. The entity must satisfy either the profit test or the assets test (*see below*).
- Condition 7. The entity must satisfy the ASX that each director or proposed director of the entity, its chief executive officer or proposed chief executive officer, and its chief financial officer or proposed financial officer at the date of listing is of good fame and character.
- Condition 8. The entity must have a minimum free float at the time of its admission of 20%.
- Condition 9. The entity must appoint a person to be responsible for communication with the ASX in relation to the listing rule matters who has completed an approved listing rule compliance course and attained a satisfactory pass mark in the examination for that course.
- Condition 10. If the entity is a foreign entity, it must, in addition to the above main admission requirements, satisfy the following:
    - be registered as a foreign company under the Corporations Act 2001 (Cth) (Corporations Act); and
    - appoint an agent for service of process in Australia.

The entity must meet either the profit test or the assets test to be admitted to the official list of the ASX.

Profit test. To meet the profit test, the following main requirements must all be satisfied:

 

- The entity must be a going concern and must continue to earn profit from continuing operations up to the date of application.
- The entity's main business activity at the date it is admitted must be the same as it was during the last three full financial years.
- The entity's aggregated profit from continuing operations for the last three full financial years must have been at least AUD1 million.
- The entity's consolidated profit from continuing operations for the past 12 months to a date no more than two months before the date the entity applied for admission must exceed AUD500,000.

Assets test. To meet the assets test, the following main requirements must all be satisfied:

- At the time of admission, the entity must have net tangible assets of at least AUD4 million after deducting the cost of fundraising, or a market capitalisation of at least AUD15 million.
- The entity must ensure that its cash reserves (or assets readily convertible to cash) do not account for more than half of its total tangible assets.
- The entity's working capital, as shown in its reviewed pro forma statement of financial position, must be at least AUD1.5 million.

These main requirements apply to all entities that want to be admitted to the official list of the ASX (including sovereign controlled entities), unless a waiver is received or the entity is a foreign exempt listing. Different requirements apply to foreign exempt listings (*see Question 4*).

## Minimum size requirements

There are no minimum size requirements unless the entity seeks admission via the assets test, in which case its market capitalisation may have to be at least AUD15 million (*see above, Main requirements*).

## Trading record and accounts

Accounts. The entity must give the ASX a reviewed pro forma statement of its financial position together with its audited accounts for either the last:

- Three full financial years, if admitted under the profit test.
- Two full financial years, if admitted under the assets test (unless the ASX agrees that such

 

accounts are not required).

While only two financial years of audited accounts are required under the assets test, where a prospectus must be issued, the ASIC will generally require the entity to produce three full financial years of audited accounts, provided the entity has been in existence for that long.

These requirements will also apply to foreign entities with a primary listing on the New Zealand Stock Exchange which are applying for admission as an ASX foreign exempt listing.

Trading record. Unlike most other securities exchanges, an entity is not required to have a trading record to be admitted to the official list of the ASX.

As noted above, there are two ways an entity can be admitted to the official list of the ASX from a financial metrics perspective (the profit test and the assets test). Under the profit test, an entity must have aggregated profits of at least AUD1 million for the last three financial years and will therefore require a trading record. However, the assets test does not require an entity to have a trading record. While an entity seeking admission under the assets test must submit audited accounts for the last two to three financial years, this is only required if the entity has been in existence for that long.

## Minimum shares in public hands

An entity must have a free float at the time of its admission to the official list of the ASX of not less than 20%.

An entity must have at least 300 non-affiliated securityholders, each of whom holds a parcel of the main class of securities that are not restricted securities or subject to voluntary escrow, with a value of at least AUD2,000.

4. What are the main requirements for a secondary listing on the main markets/exchanges?

## Main requirements

There are two ways in which a foreign entity may list its shares on the Australian Securities Exchange (ASX):

 

- As a standard ASX listing: this category is for entities that wish to have the ASX as their primary listing venue, or which do not meet the eligibility criteria to be admitted as a foreign exempt listing. These entities are subject to all of the ASX Listing Rules and must issue a prospectus as part of their listing (see *Question 3* for the admission requirements for a standard ASX listing).
- As an ASX foreign exempt listing: this category is for entities listed on another securities exchange that wish to have a secondary listing on the ASX and which meet certain eligibility criteria. Entities with a foreign exempt listing are only subject to minimal requirements under the ASX Listing Rules. Foreign entities usually seek listings on the ASX if they have very significant business in Australia, or are using their scrip for an Australian takeover and want their scrip to be attractive. If the entity is raising funds in Australia, it must issue a prospectus.

To gain admission as an ASX foreign exempt listing, an entity must (among other things):

- Have as its home exchange a stock exchange or market that is acceptable to the ASX.
- Comply with the listing rules of its overseas home exchange.
- Register as a foreign company under the Corporations Act 2001 (Cth) (Corporations Act) (if the entity is a company).

The ASX has given guidance that the following home exchanges are acceptable: Borsa Italiana; Deutsche Börse; EuroNext (Amsterdam); EuroNext (Brussels); EuroNext (Lisbon); EuroNext (Paris); Frankfurt Stock Exchange; HKSE; LSE; SGX; SIX Swiss Exchange; TSE (Tokyo); NASDAQ; NYSE; and NZX.

## Minimum size requirements

The foreign entity must satisfy either:

- The foreign entity profit test: at least AUD200 million operating profit before tax for each of the last three years.
- The foreign entity assets test: net tangible assets or a market capitalisation of at least AUD2 billion.

However, if the foreign entity's primary listing is on the New Zealand Stock Exchange, it need only satisfy one of the following:

 

- The New Zealand entity profit test: aggregated profits of at least AUD1 million from continuing operations for the last three full financial years and consolidated profits of at least AUD500,000 from continuing operations for the past 12 months to a date no more than two months before the date of the application for admission.
- The New Zealand entity assets test: at the time of admission, net tangible assets of at least AUD4 million after deducting the costs of fundraising or a market capitalisation of at least AUD15 million.

## Trading record and accounts

Accounts. Under the foreign entity profit test, the foreign entity must produce accounts for the last three full financial years that have been audited to a standard acceptable to the ASX. There is no requirement to produce audited accounts under the foreign entity assets test.

Trading record. A foreign entity is not required to have a trading record to be admitted as an ASX foreign exempt listing, provided it seeks admission under the foreign entity assets test. However, if an entity seeks admission under the foreign entity profit test, it must have aggregated profits of at least AUD200 million for the last three financial years and will therefore require a trading record (*see above, Minimum size requirements*).

## Minimum shares in public hands

There is no minimum free float or minimum number of securityholders required for ASX foreign exempt listings.

### 5. What are the main ways of structuring an IPO?

The following are the main methods by which an entity can structure an IPO on the Australian Securities Exchange (ASX). The preferred structure is driven by whether there are multiple selling securityholders involved, as well as accounting and tax matters.

IPOs are often underwritten by investment banks for a fee, which provides funding certainty for issuers and selling securityholders.

## Direct

 

The entity (ListCo) makes an offer to investors who may subscribe for newly issued securities in the entity. This is the most common offer structure and is used in the absence of multiple sellers of existing securities.

## Top hat structure

A new entity (ListCo) is registered, which then both:

- Makes an offer to investors who may subscribe for newly issued securities in ListCo.
- Purchases the securities and/or business of the existing entity (usually using the funds raised under the IPO).

The selling shareholders would not ordinarily face substantive liability as they are not offerors under the IPO.

## Side car structure

The entity (ListCo) may make a direct offer of newly issued shares. In addition, a new entity (SaleCo) is registered, which then both:

- Purchases the existing securities of ListCo from the selling securityholders.
- Offers and transfers those existing securities to successful IPO applicants.

The selling shareholders would not ordinarily face substantive liability as they are not offerors under the IPO and have no legal ownership interest in SaleCo.

## Stapled structures

Finally, stapled structures are extremely popular in Australia. These involve at least two different securities being linked in trading to maximise tax or legal flexibility.

6. What are the main ways of structuring a subsequent equity offering?

 

Subsequent equity offerings are commonly referred to as "secondary" offerings. These offerings can often be made under a cleansing notice rather than a prospectus or product disclosure statement, provided that certain conditions are met (*see Question 11, Placements and rights issues*). The following are the main methods by which an entity can structure a subsequent equity offering.

## Placements

Placements can be made without a prospectus to professional or sophisticated investors and can be conducted more quickly than a securities purchase plan (SPP) or rights issue, making them the most popular equity offering structure during the COVID-19 pandemic given market volatility. Dilution of 15% per annum (and up to 25% for smaller entities that receive an annual securityholder approval mandate) is permitted under the ASX Listing Rules without securityholder approval.

Under the ASX's temporary emergency capital raising relief (*see Question 1*), issuers can apply to the ASX for the benefit of class waiver relief that allows dilution of up to 25% per annum subject to certain conditions being met. This relief is set to expire on 30 November 2020.

## SPP

An SPP refers to an offer to existing holders of additional securities in the entity at a discounted price. A full-form disclosure document is not required if certain conditions are met, including that holders are not issued more than AUD30,000 worth of shares of the entity per annum (there are certain exceptions for custodians). SPPs often occur in conjunction with a placement as they give retail holders an opportunity to participate and minimise dilution. SPP securities are a further exemption to the 15% dilution limit.

## Rights issues

Rights issues are generally popular in Australia and do not have the negative connotations that they have in some developed jurisdictions.

A rights issue may occur on a traditional or an accelerated timetable. An accelerated timetable is unique to Australia and enables unconditional funds to be raised from the institutional portion of an equity's register quickly, with a "same price" follow on to the balance of the register on a more conventional timetable.

As rights issues operate on a longer timetable than placements, they have been less popular as an equity offering structure than placements during the COVID-19 pandemic given market volatility.

 

7. What are the advantages and disadvantages of rights issues/other types of follow on equity offerings?

Which equity offering is preferred will depend on the register structure, need for funding certainty and desired speed of execution (for example, funding certainty is often more critical when tied to an acquisition or where needed for distressed issuers during the COVID-19 pandemic). Selecting the appropriate structure is important as it may impact on securityholder value.

Placements can be conducted very quickly and can give boards the opportunity to select the investors who participate. However, placements have dilutive impacts, although these can be limited to some extent by combining a placement with a securities purchase plan or a rights issue (*see also Question 6 and Question 14*).

A rights issue is considered to be fairer than a placement as it provides all eligible holders with an opportunity to participate. Renounceable rights issues are viewed as the fairest as they allow holders the opportunity to receive compensation for dilution if they do not exercise all of their rights (if there is a premium). Non-renounceable rights issues are less fair but as a result lead to higher participation by holders at a smaller discount.

The institutional tranche of a rights issue can be conducted quickly if an accelerated timetable is used. Even so, the longer overall offer period means that rights issues generally have offer prices which are at a greater discount to placements (*see also Question 6 and Question 14*).

8.What are the main steps for a company applying for a primary listing of its shares? Is the procedure different for a foreign company and is a foreign company likely to seek a listing for shares or depositary receipts?

## Procedure for a primary listing

 

The key steps, in the case of a company (as distinct from a trust), are as follows:

- Prepare a prospectus under which the company will offer shares to the public in its IPO.
- Undertake due diligence at the same time the prospectus is drafted.
- A unique feature in Australia is that a due diligence committee is typically established to:
  - oversee and guide the due diligence enquiries;
  - supervise the drafting of the prospectus;
  - receive sign-offs and opinions from management and experts; and
  - present the prospectus to the company's board.
- Lodge the prospectus with the Australian Securities and Investments Commission (ASIC) for review. During the exposure period of seven days from the date of lodgement, the company must not accept any applications for the offer. The ASIC may extend the exposure period to 14 days.
- Lodge the formal listing application with the Australian Securities Exchange (ASX) within seven days after lodgement with the ASIC. To be eligible to list, the company must satisfy minimum admission criteria, such as in relation to structure, size and the number of securityholders, and satisfy a profit or assets test (*see Question 3*).

### Procedure for a foreign company

As noted in *Question 4*, foreign entities typically list their securities on the ASX under a standard ASX listing or an ASX foreign exempt listing.

Foreign entities will only seek a listing of depository receipts if they are established in a jurisdiction that does not recognise the paperless transfer of legal ownership of shares. Trades in ASX-quoted securities are cleared and settled through an electronic system called the Clearing House Electronic Sub-register System (CHESS) which facilitates the paperless transfer of ownership of ASX-quoted securities through an electronic sub-register system. If a foreign entity is established in a jurisdiction whose laws have the effect that CHESS cannot be used for holding legal title to securities, it will be required under the ASX Listing Rules to have CHESS depositary interests (CDIs) issued over its quoted securities. CDIs allow investors to obtain all the economic benefits of owning securities without actually holding legal title to them.

## Advisers: equity offering

 

9. Outline the role of advisers used and main documents produced in an equity offering. Does it differ for an IPO?

Entities undertaking an equity offering typically engage investment banks, accountants, tax advisers, lawyers and media advisers. Investment banks are engaged as lead managers to structure and market the offer, underwrite the offer (in some cases) and to manage the bookbuild process. Boutique investment banks are sometimes engaged to stand between these lead managers and the entity undertaking the offering to make independent recommendations to the board.

Lawyers and accountants are engaged to assist with the due diligence process and navigating the listing process.

An IPO will require a prospectus (if a company), a product disclosure statement (PDS) (if a trust) and a combined prospectus/PDS for most stapled structures (*see Question 10*). Unlike in an IPO, most equity offerings do not require a prospectus or PDS when they are made pursuant to exemptions to the prospectus requirements in the Corporations Act 2001 (Cth) (Corporations Act) and certain Australian Securities and Investments Commission class order relief. The main documents produced in these offers are typically the Australian Securities Exchange (ASX) announcement, the offer document and the "cleansing notice", which sets out information which has been excluded from disclosure by the issuer in accordance with their continuous disclosure obligations.

## Equity prospectus/main offering document

10. When is a prospectus (or other main offering document) required? What are the main publication, regulatory filing or delivery requirements?

### Prospectus (or other main offering document) required

 

The Corporations Act 2001 (Cth) (Corporations Act) regulates all fundraising activity within Australia. It applies to all financial products offered within Australia, whether or not the financial products are issued by an Australian or a foreign issuer. “Financial products” is defined broadly to include:

- Shares.
- Units in a trust.
- Partnership interests.
- Debentures.
- Many other financial instruments.

The rules apply to offers of financial products that are received in Australia, regardless of where any resulting issue, sale or transfer occurs.

Subject to the exemptions outlined in *Question 11*, a person must not make an offer of financial products unless a disclosure document is prepared and, in certain circumstances, lodged with the Australian Securities and Investments Commission (ASIC).

Chapter 6D of the Corporations Act requires an offer for issue or sale of securities to be made using a disclosure document, unless the offer falls into a relevant exception.

The main forms of disclosure documents for securities in Australia are:

- Prospectus (including a short-form prospectus and a transaction-specific prospectus).
- Product disclosure statement (PDS).
- Offer information statement (OIS).
- Two-part simple corporate bonds prospectus (for offers of simple corporate bonds).

Securities are defined as:

- Debentures, stocks or bonds issued, or proposed to be issued, by a government.
- Shares in, or debentures of, a body.
- Interests in a managed investment scheme.
- Units of those shares.

 

ASIC Regulatory Guide 228 requires that all disclosure documents have clear, concise and effective disclosure (section 715A of the Corporations Act requires this for any disclosure document, for example, a prospectus or PDS).

PDS. A PDS is required for financial products other than securities (for example, trust units). A PDS is prepared by or on behalf of the issuer or seller of the financial product, and must contain sufficient information so that a retail client may make an informed decision about whether to purchase a financial product.

A PDS includes information such as:

- Fees payable in respect of a financial product.
- Risks of a financial product.
- Benefits of a financial product.
- Significant characteristics of a financial product.

Certain financial products do not require a PDS, including:

- Basic deposit products.
- Self-managed superannuation funds.
- Group life insurance products.
- General insurance products offered over solicited phone calls (under certain conditions).

Prospectus. A prospectus is the most common type of disclosure document for an offer of securities for issue or sale that requires disclosure under Chapter 6D of the Corporations Act. The Corporations Act requires that investors (and their advisers) are provided with sufficient information to make an informed investment decision in respect of an offer of securities.

ASIC Regulatory Guide 228 offers guidance on the content of a prospectus and provides that a prospectus should include information regarding the following:

- The offer.
- Investment overview.
- An explanation of the business model.
- Risks.

 

- Financial information.
- Directors and key managers, interests, benefits and related party transactions.

Transaction-specific prospectus. Disclosing entities offering quoted securities may use shorter-form transaction-specific prospectuses. Transaction-specific prospectuses have fewer disclosure requirements than a normal prospectus. Frequently, however, they issue cleansing notices instead (*see Question 11, Placements and rights issues*).

OIS. An OIS can be used to raise up to AUD10 million in aggregate (including any earlier fundraising) and has fewer information content requirements. However, these are rare.

## Main publication, regulatory filing or delivery requirements

OFFERlist. Issuers should record summary information about the offer on the electronic OFFERlist database prior to lodgement of the disclosure document. OFFERlist is a database of all disclosure documents for fundraising offers lodged with the ASIC under Chapter 6D of the Corporations Act (for example, a prospectus) and for some disclosure documents required to be lodged under Part 7.9 of the Corporations Act (for example, a PDS).

Lodgement and offer period. Previously, disclosure documents had to be physically lodged with the ASIC, with fees payable and cover forms filled out. On 29 June 2018, ASIC Corporations (Email Lodgement Service) Instrument 2018/0577 came into effect which permits the electronic lodgement of prospectuses (including supplementary and replacement documents) and other disclosure documents. Since 27 July 2020, lodging these documents with the ASIC has been conducted through the ASIC Regulatory Portal. In general, offer periods are longer than in other developed jurisdictions due to significant retail participation in many equity offerings.

No registration system. Unlike in the US, there is no requirement in Australia for an issuer to register securities before they can be traded. There are no “restricted shares” or equivalent concept.

In Australia, an entity applies for securities to be quoted on an exchange and all the relevant securities in that class can be traded once issued.

Electronic delivery. The ASIC permits the use of e-mails or the internet to disseminate offers, electronic disclosure documents and electronic application forms for offers of securities under Chapter 6D of the Corporations Act.

Expiry date. The expiry date for a prospectus is no later than 13 months after the date of the original prospectus. Securities cannot be issued to applicants after the expiry of the prospectus.

 

Advertising and publicity. The Corporations Act seeks to ensure that investors are encouraged to make investment decisions on the basis of a disclosure document rather than on the basis of promotional material or pressure selling. As such, the Corporations Act imposes a general prohibition on the advertising or publicity for offers of securities that require a disclosure document.

The Corporations Act provides certain statutory exceptions which permit very basic information about an offer to be advertised or published.

The ASIC grants relief to the issuer before the lodgement of a disclosure document for:

- Roadshow presentations to investment professionals (with an Australian financial services licence).
- Market research (under certain conditions).
- Offers by subsidiaries of listed bodies.

The ASIC has also granted limited relief from the general prohibition against advertising and publicity for advertisements and other notices relating to foreign securities that are only incidentally circulated or published in Australia.

The ASIC is currently considering granting class relief to allow offer-related communications to employees and securityholders prior to the lodgement of a disclosure document.

## 11. What are the main exemptions from the requirements for publication or delivery of a prospectus (or other main offering document)?

The main exceptions to the requirement for publication or delivery of a prospectus are as follows:

- Offers to professional/sophisticated investors.
- Small scale offerings to persons familiar with the issuer.
- Placements and rights issues.
- Foreign issuer offers in certain circumstances.

 

- Other exceptions.

## Professional/sophisticated investors

The exceptions for professional/sophisticated investors include the following:

- Offers over AUD500,000: where the amount payable on acceptance of the offer for the financial product exceeds AUD500,000, or where the amount payable on acceptance of the offer when added to amounts previously paid by a person for the same class of financial product that is held by that person adds up to at least AUD500,000.
- Sophisticated investors: an offer to an investor whose gross income for each of the previous two financial years was at least AUD250,000, or who has net assets of at least AUD2.5 million, certified by a qualified Australian accountant no more than six months before the offer.
- Professional: offers to other specified sophisticated or institutional investors (including stockbrokers, certain pension and life insurance funds, and persons who control at least AUD10 million for the purpose of investment in securities).

## Small scale offerings to persons familiar with the issuer

There are exceptions available for personal offers to those who may be familiar with the affairs of the entity, which include:

- Small scale offerings (20 issues or sales in 12 months in Australia and for no more than AUD2 million being raised in that 12 months).
- Bonus issues.
- Dividend reinvestment plans.
- Offers of debentures to existing securityholders.

## Placements and rights issues

An offer to current holders of the securities on a pro rata basis (a rights issue) is subject to a disclosure exemption in certain circumstances. The Australian Securities and Investments Commission (ASIC) also provides relief to extend the disclosure exemption to non-traditional rights issues, including accelerated offers to institutional investors, disposal of shortfall and offers to convertible securityholders. Placements can also be undertaken without a prospectus.

 

To avail itself of these exemptions, at the time of the placement or rights issue, an entity must provide a cleansing notice to the relevant market operator (for example, the Australian Securities Exchange) affirming that there is no material information that it is aware of that has not been disclosed to the market under the continuous disclosure rules.

The cleansing notice sets out limited details about the offer and verifies that the issuer has complied with its continuous disclosure and reporting obligations. Even where the initial issuance is exempt from the prospectus or product disclosure statement requirements, on-sale restrictions could apply in the first 12 months following issue in the absence of a cleansing notice.

## Foreign issuer offers

The ASIC will consider providing relief from the requirement to prepare an Australian prospectus or product disclosure statement for foreign issue offers where both:

- A foreign offeror has already complied with a disclosure regime offering similar levels of investor protection to the Australian disclosure requirements.
- Very few offers are made to Australian investors.

The ASIC has published a list of approved foreign markets which includes:

- New York Stock Exchange.
- NASDAQ.
- Hong Kong Stock Exchange.
- London Stock Exchange.
- Toronto Stock Exchange.

No blanket prospectus relief is offered to foreign issuers: relief is considered by the ASIC on a case-by-case basis.

The ASIC has granted conditional relief for:

- Rights issues by foreign companies where the securities are in the same class as those already held by Australian investors.
- Foreign scrip bids and schemes of arrangement.

 

- Foreign entities making 20 or fewer offers in Australia in any 12-month period.

## Other exceptions

Exceptions are also available provided that:

- Other disclosure regimes under the Corporations Act 2001 (Cth) (Corporations Act) apply (that is, schemes of arrangement and takeovers).
- No money or other form of payment is payable for the securities.
- Offers are made to creditors under a deed of company arrangement, if certain conditions are met.
- The offer is made by certain bodies, such as banks (for debentures only), exempt state bodies or public authorities.

12. What are the main content or disclosure requirements for a prospectus (or other main offering document)? What main categories of information are included?

## Content requirements

A prospectus must contain all information that investors and their professional advisers will reasonably require to make an informed assessment of:

- The rights and liabilities attaching to the securities offered.
- The assets and liabilities, financial position and performance, profits and losses and prospects of the entity issuing the securities.

At a minimum, the prospectus should set out:

- An investment overview (as the first substantive section of the prospectus) which highlights and summarises key information about the issuer and offer.
- The business model (that is, how the entity proposes to generate income or capital growth

 

for investors or otherwise achieve its objectives).

- The risks associated with the issuer (including risks of the business model), the security and the offer.
- The entity's financial position, performance and prospects.
- The experience and background of directors and key managers, and any interests and benefits those persons may receive in connection with the issuer or offer as well as any related party arrangements.
- The effect of the offer on the issuer (including the terms and conditions of the offer).
- In some cases, specialist expert reports (for example, a geologist's report in the case of a mining entity) may also be included to help investors to make informed decisions.

## Financial statements

If the issuer has an operating history, the prospectus typically must include an audited statement of its financial position for the most recent financial year together with audited financial information (including income statement and cash flow statement) for the three most recent financial years (at a minimum). An issuer may be able to provide financial information for less than three years in certain circumstances (for example, where there has been a major change in business and so on), but the Australian Securities and Investments Commission (ASIC) will monitor this. If the issuer is a start-up entity or an entity with no operating history, the prospectus must include the most recent audited statement of its financial position and a pro-forma statement of financial position showing the effect of the offer. ASIC Regulatory Guide 228 provides further guidance on these.

It is also market practice for issuers (with operating history) to include prospective financial information (including pro-forma forecasts) at least to the end of the current financial year. In some cases, entities may provide prospective financials for longer periods where there are reasonable grounds for doing so. Forecasts based on hypothetical assumptions are generally considered unreasonable by the Australian Securities and Investments Commission.

Financial information included in a prospectus must usually be prepared in accordance with Australian Accounting Standards or International Financial Reporting Standards.

If the issuer is applying for listing on the Australian Securities Exchange (ASX) under the assets test, the entity must make a statement in the prospectus that it has enough working capital to carry out its stated objectives, or provide that statement to the ASX from an independent expert.

## Other disclosure documents

 

See *Question 10* and *Question 11* for further details on the circumstances in which an issuer can rely on low disclosure documents, such as transaction-specific prospectuses, offer information statements and cleansing notices.

13. How is the prospectus (or other main offering document) prepared? Who is responsible and/or may be liable for its contents?

Prospectuses and product disclosure statements (PDSs) for larger offerings in Australia, unlike in most developed jurisdictions, are principally prepared by the investment bank leading the offering. The document will have significant input from management and the issuer's counsel. However, it will be the investment bank that carries the initial drafts of the document for medium and larger offerings. For smaller offerings, the issuer's counsel is more likely to have carriage of the draft. In both cases, the due diligence committee will ultimately sign off on the document prior to the issuer's board giving final approval.

Civil and criminal liability attaches to both prospectuses and PDSs, although the categories of those liable and the basis for liability differ significantly between the two.

For a prospectus, there are six categories of persons expressly liable under sections 728 and 729 of the Corporations Act 2001 (Cth) (Corporations Act). They include the issuer, directors, experts, underwriters and parties involved in the contravention. In contrast, under sections 1016F, 1021D to 1021N and 1022B of the Corporations Act, the issuer (being the responsible entity) has primary liability for defects in the PDS, although a broader range of persons can also be liable, including directors, persons involved in the preparation of the PDS and certain regulated persons (which will generally include underwriters).

## Marketing equity offerings

14. How are offered equity securities marketed?

 

IPOs in Australia are marketed to a far greater extent to individual investors than in other developed jurisdictions. That is because there is a high level of direct public ownership of securities in Australia. Institutional participation in IPOs remains the most critical element, although individual participation (whether through broker firm offerings or direct public solicitation) can and does drive pricing in larger transactions.

The Corporations Act 2001 (Cth) (Corporations Act) seeks to ensure that investors are encouraged to make investment decisions on the basis of a disclosure document (for example, a prospectus) rather than on the basis of promotional material or pressure selling. The Corporations Act imposes a general prohibition on the advertising or publicity for offers of securities that require a disclosure document.

For secondary offerings, rights issues are far more prevalent than in other parts of the developed world and a large number are conducted in an accelerated format. Placements to institutional investors have become more popular than rights issues during the COVID-19 pandemic (*see Question 6*).

For both IPOs and secondary offerings, details of the capital raising are announced on the Australian Securities Exchange and published to institutional investors through Bloomberg. For secondary offerings, institutional securityholders and institutional investors are provided with an investor presentation regarding the offer, whereas retail securityholders are sent a retail information booklet detailing information on how they can participate in the offer (which in the case of rights issues attaches a copy of the investor presentation).

15. Outline any potential liability for publishing research reports by participating brokers/dealers and ways used to avoid such liability.

Research conducted by participating brokers/dealers in Australia operates similarly to other developed jurisdictions. Pre-deal research reports in IPOs cannot reference the offering due to the restrictions on publicity under section 734 of the Corporations Act 2001 (Cth) (Corporations Act).

The Australian Securities and Investments Commission (ASIC) published Regulatory Guide 264 on sell-side research in December 2017 which covers the ASIC's views on the handling of inside information, managing conflicts in capital raisings and the preparation and distribution of independent sell-side research by investment banks. It focuses on there being a separation between the corporate advisory team and the research team in investment banks during the

 

period when research is being prepared, to prevent the former influencing the latter in its recommendations and valuation.

Research carries potential liability for misleading and deceptive conduct under section 1041H of the Corporations Act, but there is no history of actions being brought against investment banks based on research. Apart from the inclusion of disclaimers there is no way to mitigate that liability, as intention to mislead or deceive is not an element that needs to be proved.

## Bookbuilding

16. Is the bookbuilding procedure used and in what circumstances? How is any related retail offer dealt with? How are orders confirmed?

Bookbuilds are extensively used in IPOs, placements and rights offerings. For IPOs and placements, bookbuilds are used to allocate to institutional investors and (for IPOs) brokers. For rights offerings, they can be used to allocate institutional and retail tranche shortfalls. Orders are confirmed by the investment banks conducting the offering and are the final step in the allocation process followed by a delivery versus payment settlement system.

Any related retail offer is settled by cheque or bank transfer system (known as BPay).

## Underwriting: equity offering

17. How is the underwriting for an equity offering typically structured? What are the key terms of the underwriting agreement and what is a typical underwriting fee and/or commission?

In a typical equity capital raising, a traditional shortfall underwriting structure will normally be used. The issuer will seek to raise a certain amount through the issue of a specified number of new securities to institutional and retail investors. The underwriters will then be obliged to purchase those new securities which are not taken up by investors (that is, the shortfall

 

securities).

In some instances, the equity capital raising will be structured so that the underwriters are only obliged to provide settlement support. This means that the underwriters will only be required to pay or procure payment to the issuer for those new securities that investors agreed to purchase, but do not pay for whatever reason on the settlement date.

The main provisions of a typical underwriting agreement include:

- Conditions precedent to underwriting or managing the offer.
- Offer mechanics regarding the manner in which the raising will be conducted.
- Undertakings by the issuer to do, or not to do, certain things.
- Representations and warranties from the issuer regarding various matters.
- Fees and commissions in favour of the underwriters for conducting the offer.
- Termination events which can be triggered by the underwriters.
- Indemnities in favour of the underwriters in respect of certain matters.

The underwriters are normally entitled to a fee or commission which is equal to 2% to 3% of the total offer proceeds (lower in general than some other sophisticated jurisdictions). This fee or commission is normally divided into two smaller fees (an underwriting fee and a management and arranging fee). A significant portion of the underwriting fee is frequently paid away to sub-underwriters. In some instances, an additional incentive or discretionary fee may also be paid to the underwriters at the absolute discretion of the issuer.

## Timetable: equity offerings

18. What is the timetable for a typical equity offering? Does it differ for an IPO?

### IPO timetable

The timetable for an IPO will vary depending on the issuer, market factors and other variables.

 

However, an IPO process will typically commence six months prior to the expected listing date, and usually follow the timetable below (where "T" is the date of listing):

- T minus 6 months. Appointment of advisers.
- T minus 5 months to T minus 1 month. Preparing the prospectus and undertaking due diligence. The due diligence process is guided by a due diligence committee comprised of representatives of the issuer, its advisers and others who may be liable under the prospectus.
- T minus 1.5 months to T minus 1 month. Institutional marketing programme commences (for example, management roadshows), advertising prior to lodgement of the prospectus with the Australian Securities and Investments Commission (ASIC) is limited to marketing to institutional investors in compliance with section 734 of the Corporations Act 2001 (Cth) (Corporations Act) (*see also Question 15*).
- T minus 1.5 months to T minus 1 month. For certain IPOs, the institutional and broker firm components of the offer will occur prior to lodgement of the prospectus with the ASIC. A pathfinder will be distributed (which is a draft form of the prospectus).
- T minus 1 month. Lodge prospectus with the ASIC. The ASIC then has seven clear days to review the prospectus and provide any comments (known as the "exposure period"): this can be extended to up to 14 days (*see also Question 8*).
- T minus 3 weeks. Once the exposure period has ended, the retail offer period opens.
- T minus 2 business days. Retail offer closes. IPO shares allocated.
- T. Trading commences (on a conditional and deferred basis). Admission to official list of the Australian Securities Exchange (ASX).
- T + 30 calendar days. End of stabilisation (if applicable).

## Secondary offering timetable

The timetable for a secondary offering by way of a rights issue differs significantly from an IPO. A typical traditional rights issue timetable is set out below (where "T" is the date that the offer is announced):

- T. Announcement of rights issue and release of offer materials on the ASX.
- T + 3 business days. Record date to identify securityholders entitled to participate.
- T + 6 business days. Despatch of offer materials to eligible securityholders. Offer opens.
- T + 13 business days. Offer closes.

 

- T + 16 business days. Announcement of results of issue.
- T + 17 business days. Settlement date.
- T + 18 business days. Issue date.
- T + 19 business days. Trading date.

This can be contrasted with a typical accelerated renounceable rights issue timetable, as set out below (where "T" is the date that the offer is announced):

- T. Trading halt begins. Announcement of rights issue and release of offer materials on the ASX. Institutional entitlement offer opens.
- T + 1 business day. Institutional entitlement offer closes. Institutional bookbuild then opens.
- T + 2 business days. Institutional bookbuild closes. Trading halt lifted. Record date to identify securityholders entitled to participate.
- T + 5 business days. Despatch of offer materials to eligible retail securityholders. Last day for retail offer to open.
- T + 7 business days. Settlement of the institutional entitlement offer and institutional bookbuild.
- T + 8 business days. Issue date and trading date for institutional entitlement offer and institutional bookbuild.
- T + 12 business days. Retail entitlement offer closes.
- T + 15 business days. Retail shortfall notification date.
- T + 17 business days. Retail bookbuild opens and closes.
- T + 18 business days. Announcement of results of the retail bookbuild.
- T + 19 business days. Settlement of the retail entitlement offer and retail bookbuild.
- T + 20 business days. Issue date for the retail entitlement offer and retail bookbuild.
- T + 21 business days. Trading date for securities issued under the retail entitlement offer and retail bookbuild. Holding statements dispatched.

In many cases, placements to institutional holders can be conducted either overnight or during a trading day with the benefit of a trading halt. Depending on the type of placement, it can then be settled as quickly as two business days later, unless the issue exceeds 15% of capital, in which case securityholder approval is required (unless ASX's temporary emergency capital raising

 

relief applies, see *Question 1*).

## Stabilisation

19. Are there rules on price stabilisation and market manipulation in connection with an equity offering?

The implementation of stabilisation arrangements is relatively uncommon in Australia. They are generally only used for the largest IPOs and never in the secondary market. The under-use in the Australian market when compared to international jurisdictions is due to the reporting requirements that accompany them. The Australian Securities and Investments Commission (ASIC) (and the Australian Securities Exchange (ASX)) require that all bids/trades by the stabilisation manager (an investment bank involved in the offering) are tagged with a status note indicating that it has been made for stabilisation purposes (that is, rather than being done anonymously) and that the stabilisation manager undertakes daily reporting to the ASX. These reporting requirements have the potential to create opportunistic market activity (that is, they allow sophisticated and professional investors to effectively game it), which undermines the effectiveness of the stabilisation mechanism and therefore investor confidence in the after-market.

Stabilisation has the potential to breach the misleading and deceptive conduct, market manipulation, market rigging and insider trading provisions of the Australian Corporations Act 2001 (Cth) (Corporations Act). However, the ASIC has issued Interim Guidance on Market Stabilisation (*ASIC IR 00/31*, with suggested modifications in *ASIC Consultation Paper 63*). To undertake stabilisation arrangements, the investment banks leading the offering will ordinarily make an application to the ASIC requesting that it issues a no-action letter regarding the application of the provisions.

In addition to these reporting requirements, the ASIC requires that:

- Only prescribed stabilising action is permitted.
- The stabilisation period may run for a maximum of 30 calendar days commencing on the first day of trading of shares in ListCo.
- The over-allotment option may be up to 15% of the offer size (with no “refreshing” of the “shoe”).

 

- Stabilisation bids must only take place within specified price limits.
- Adequate prior disclosure and records of stabilising activities must be maintained by the stabilising manager.

## Tax: equity issues

20. What are the main tax issues when issuing and listing equity securities?

The main tax issues that affect securities offerings in Australia are as follows:

- Capital gains tax on a disposal of securities. Investors (that are not security traders or otherwise hold their equity securities on revenue account) are taxed on capital gains made on the disposal of their securities and may be allowed to carry forward capital losses to offset against current or future capital gains. Australian individual investors and complying Australian superannuation (pension) funds may receive a 50% and 33% discount respectively on capital gains where the relevant securities are held for more than a year, but foreign investors and corporate institutional investors do not.
- Foreign investors should only be subject to Australian capital gains tax on the disposal of Australian securities which constitute "taxable Australian property". In broad terms, this includes shares which are "indirect Australian real property interests" (that is, 10% or more of the shares are held in an Australian entity and more than 50% of the underlying market value of that entity is represented by Australian real property). The "Foreign Resident Capital Gains Withholding Regime" may impose a 12.5% withholding obligation on purchasers of shares that are "indirect Australian real property interests".
- Dividends and franking credits. Investors are taxed on receipt of corporate dividends. However, they have the potential to receive credit for underlying taxes paid by the corporation via the "dividend imputation" system. Where dividends are fully franked with the benefit of underlying taxes, Australian investors can claim a franking offset (up to 30%) against their tax liability (and if the offset exceeds their tax liability, certain Australian investors have the potential to receive tax refunds).
- Trust distributions. Australian investors in trusts generally receive their distributions of income without underlying tax being paid at the trust level and therefore they generally pay

 

tax on the full amount of those distributions at their respective marginal rates.

- Distributions by Australian trusts to foreign investors that are attributable to Australian sourced income are generally subject to a withholding tax payable by the trustee at a rate declared by parliament, which varies depending on the particular type of beneficiary (for example, a company or non-resident individual). Foreign investors may, however, be able to claim a refund to the extent that the tax paid by the trustee exceeds the amount of Australian tax payable by the foreign investor.
- Certain distributions made to foreign investors in "managed investment trusts" (as defined in the income tax legislation) are subject to a final withholding tax at the concessional rate of 15% for foreign resident investors that are resident in a country that has an exchange of information agreement with Australia, or 30% in all other cases.
- Stapled securities. In broad terms, stapled structures generally entail units in a trust being stapled to shares in a company so that those units and shares are traded together. Investors in stapled structures receive both dividends and trust-based distributions. The trust income is usually distributed without being taxed at the trust level, whereas the company pays dividends (which may be franked: see above).
- Stamp duty. Although transfer duty at the 0.6% rate has been abolished on transfers of marketable securities, landholder duty may still arise on dutiable acquisitions in a listed or unlisted corporation or unit trust which has direct or indirect land holdings in Australia. The amount of landholder duty payable is generally in the range of 5% to 6% of the market value of the land holdings or a proportion of that value. In some, but not all, states and territories, a 90% duty discount applies to dutiable acquisitions in listed corporations and unit trusts. A dutiable acquisition may occur or be deemed to occur where an unlisted corporation or unit trust becomes listed.
- Dividend withholding tax. Australia generally imposes a 30% dividend withholding tax on unfranked dividends and distributions that are paid to non-Australian resident shareholders (this rate is generally reduced to 15% for tax residents of jurisdictions with which Australia has a double tax treaty).

As in all jurisdictions, tax is extremely complex and the above is the highest level of summary. There are countless exceptions to these general statements.

## Continuing obligations

21. What are the main areas of continuing obligations applicable to listed

 

companies and the legislation that applies?

In general, listed entities on the Australian Securities Exchange (ASX) must provide financial reports on an annual and half-yearly basis and must audit their full year financial statements (in contrast, half-yearly financial statements can be reviewed or audited). Resources entities must also provide quarterly operational reports in addition to financial reporting.

The Corporations Act 2001 (Cth) (Corporations Act) and the ASX Listing Rules set out the requirements for periodic reporting, including content requirements for the full-year and half-year financial reports, the directors' report, the auditor's report and the quarterly operational reports (as applicable).

The ASX also publishes "best practice" recommendations for the corporate governance of listed entities, which are not mandatory. Instead, the ASX applies a "comply or explain" approach, requiring listed entities to explain in their annual reports why they have not complied with the relevant recommendations.

In addition, all listed entities have continuous disclosure obligations that are extremely unforgiving. In particular, ASX Listing Rule 3.1 requires real-time disclosure of anything materially price-sensitive, with exceptions only for confidential incomplete proposals, management accounts and a handful of other matters.

The other key ASX Listing Rules of note are the requirements for disinterested securityholder approval for:

- Transformative transactions (for example, transactions that involve the listed entity making a significant change to the nature or scale of its activities unless ASX agrees otherwise or disposing of its main assets or business).
- Acquisitions or disposals of substantial assets that have a value exceeding 5% of equity value involving related parties or persons in a position of influence (for example, a shareholder with at least a 10% holding of the listed entity).
- Issues of securities to related parties or other parties in a position of influence (including directors and certain substantial shareholders).

 

22. Do the continuing obligations apply to listed foreign companies and to issuers of depositary receipts?

Foreign entities (including foreign issuers of CHESS Depositary Interests (CDIs)) (*see Question 8*) with a primary listing on the Australian Securities Exchange (ASX) have the same continuing obligations as Australian entities, other than to the extent that bespoke waivers are granted.

By contrast, foreign entities (including foreign issuers of CDIs) whose primary listing is on another major securities exchange with a secondary listing on the ASX (for example, ASX foreign exempt listings) have extremely relaxed continuing obligations. In general, these entities must only comply with the rules under their primary listing and are only subject to minimal requirements under the ASX Listing Rules, including to provide timely announcements to the ASX when making announcements to their primary exchange. ASX Guidance Note 4 provides further details of the ongoing obligations of ASX foreign exempt listings.

Data sharing arrangements between the Australian Securities and Investments Commission (ASIC) and the New Zealand Companies Office (NZCO) allow New Zealand entities with ASX foreign exempt listings to enjoy even more relaxed continuing obligations. For example, New Zealand entities are exempt from the requirement to lodge financial statements with the ASIC provided they are lodged with the NZCO.

23. What are the penalties for breaching the continuing obligations?

The Australian Securities Exchange (ASX) has a range of available measures to enforce the ASX Listing Rules. In addition, section 793C of the Corporations Act 2001 (Cth) (Corporations Act) permits the ASX, the Australian Securities and Investments Commission or an affected party to enforce the ASX Listing Rules.

The ASX has recently introduced amendments to enhance its powers to operate the market and monitor and enforce compliance with the listing rules. The amendments:

 

- Clarify the ASX's power to grant waivers of the listing rules and exercise compliance powers.
- Facilitate the ASX requiring information from listed entities (including under oath) about their compliance with any conditions or requirements imposed under the listing rules and any future compliance.
- Empower the ASX to disclose this information to the market and to censure entities where a breach is egregious.

As part of the ASX's powers, it may require an entity not to enter into or perform an agreement or transaction that would breach the listing rules, or to cancel or reverse it. In doing so, the ASX has said it will take into account the impact its decision will have on innocent third parties.

As in all jurisdictions, the ASX may also determine to suspend or de-list an entity for particularly egregious breaches of the listing rules (*see Question 25*). The ASX is understandably reticent to use those powers, but will do so in the case of unremedied breaches.

## Market abuse and insider dealing

24. What are the restrictions on market abuse and insider dealing?

### Restrictions on market abuse/insider dealing

Insider trading. Australian law prohibits a person in possession of price sensitive, non-public information about certain financial products (including securities, derivatives and managed investment products) from:

- Trading.
- Procuring that another person trades.
- Communicating inside information to another person who is likely to trade.

Unlike the position in some jurisdictions (for example, the US), the test is based on the information the person holds and not their relationship with the entity. Even a person who has

 

absolutely no connection with a trading entity may be restricted. It is no defence that a person did not rely on the inside information in trading.

Exceptions apply for:

- A person having knowledge of their own intention to deal in an entity's financial products.
- Acquisition of securities under an employee incentive scheme.
- Acquisition of securities pursuant to a requirement under the Corporations Act 2001 (Cth) (Corporations Act) or pursuant to a requirement imposed by law.
- A sale of financial products under certain security arrangements.
- Applying for, or acquiring, securities under an underwriting or sub-underwriting agreement or disposing of those securities.

An entity whose securities are traded, but which is not a party to the transaction, may have civil remedies against the insider.

Market manipulation. Market manipulation refers to a person trading in securities to create an artificial price for those securities. In Australia, market manipulation is regulated under the Corporations Act and can attract either criminal or civil penalties.

Continuous disclosure obligations. In Australia, breaches of the continuous disclosure provisions are subject to criminal and civil penalties. Both the Australian Securities and Investments Commission (ASIC) and the Australian Securities Exchange zealously pursue potential breaches and the ASIC has the power to issue informal penalty notices and fines without having to seek court intervention.

False statements to the market/misleading and deceptive conduct. In Australia, a person contravenes the Corporations Act if they make a statement that is false in a material particular or is materially misleading, and is likely to induce someone into buying or selling financial products (the person must not care whether the statement is true or false, or know, or ought reasonably to have known, that the statement or information is false).

Making a false statement is a criminal offence subject to a maximum of 15 years' imprisonment, and/or a fine. Liability also exists for innocent misstatement. However, criminal sanctions do not apply.

Cartel conduct. In Australia, there are civil and criminal prohibitions against cartel conduct which are contained in Part IV of the Competition and Consumer Act 2010 (Cth). Under the legislation, a contract, arrangement or understanding involving the meeting of the minds and a

 

consequential commitment to act between actual or potential competitors is a cartel provision if it has:

- The purpose or likely effect of fixing, controlling or maintaining a price or component of a price.
- The purpose of:
  - limiting production, capacity or supply;
  - allocating actual or potential customers, suppliers or territories; or
  - bid rigging.

Arrangements between issuers and lead managers must not be in breach of these provisions.

## Penalties and prohibitions

The ASIC can pursue an action in the courts to punish a person or entity in response to the misconduct. Penalties include:

- Criminal penalties (for example, terms of imprisonment; fines and community service orders). Matters giving rise to criminal penalties are prosecuted by the Commonwealth Director of Public Prosecutions, except for a number of minor regulatory offences which are prosecuted by the ASIC.
- Civil monetary penalties.

The ASIC can also take administrative action to protect consumers and financial investors. These actions can include:

- Disqualification from managing a corporation.
- A ban on providing financial services or engaging in credit activities.
- Revocation, suspension or variation of the conditions of a licence.
- Public warning notices.

The ASIC can also apply to the court for a disqualification order and can also begin a representative action in the courts to recover damages or property for those who have suffered loss.

 

Australia differs from other jurisdictions in that officers do not have the power to pursue an action for disgorgement in non-criminal proceedings.

# De-listing

25. When can a company be de-listed?

## De-listing

Since 1 January 2020 to 30 June 2020, 77 entities have de-listed from the Australian Securities Exchange (ASX). Some de-listings were due to the entity being wound up, being suspended as a result of a compulsory acquisition or having been suspended from trading for more than three years.

The ASX may at any time de-list an entity if, in the ASX's opinion, any of the following applies:

- The entity is unable or unwilling to comply with, or breaks, an ASX Listing Rule.
- The entity has no quoted securities.
- It is appropriate to do so for some other reason.

Other circumstances in which an entity will be de-listed are:

- If the entity does not pay its annual listing fee.
- If all the quoted securities of an entity have been suspended as a result of a compulsory acquisition following a takeover bid or otherwise in accordance with Part 6A.2 of the Corporations Act 2001 (Cth) (Corporations Act).
- If the entity's securities have been suspended from trading for an unacceptably long period of time (for example, an entity whose securities have been suspended from quotation for a continuous period of two years).

An entity may at any time request the ASX to de-list it. The entity should first discuss this with the ASX Listings Compliance at the earliest opportunity before submitting a formal application.

 

In most cases, ASX Listings Compliance will recommend that the entity apply for in-principle advice on whether the ASX is likely to agree to de-list and what the conditions would be. The ASX's in-principle advice will remain current for a short period of time (for example, three months).

Once it has discussed with the ASX and confirms it is able to comply with the ASX's delisting conditions, the entity should request a trading halt and make a formal request for removal.

Unlike other jurisdictions, holders who hold 75% of the entity's securities do not have an automatic right to force de-listing as, ultimately, the ASX has discretion whether to approve the de-listing or require conditions to be satisfied before it will act on the request for de-listing.

### Suspensions

The ASX may at any time suspend an entity's securities from quotation if, in the ASX's opinion, any of the following applies:

- The entity is unable or unwilling to comply with, or breaks, an ASX Listing Rule.
- The suspension is necessary to prevent a disorderly or uninformed market.
- The ASX rules require the suspension.
- It is appropriate to do so for some other reason.

Other circumstances in which suspensions will take place include:

- If an entity fails to give the ASX certain documents as required under the ASX Listing Rules.
- If an entity fails to pay its annual listing fees.
- In the case of a compulsory acquisition following a takeover or otherwise in accordance with Part 6A.2 of the Corporations Act.

## Reform

26. Are there any proposals for reform of equity capital markets/exchanges? Are these proposals likely to come into force and, if

 

so, when?

Australia has seen significant reform of its equity capital markets and securities exchanges over a long period of time, with this intensifying over the past two years.

The Australian Securities and Investments Commission (ASIC) has been focused on allocations, sell-side research, continuous disclosure, design and distribution obligations in relation to financial products, product intervention powers and relief for certain voluntary escrow arrangements and pre-disclosure document communications to employees and securityholders. Some of these reforms are yet to be implemented.

The Australian Competition and Consumer Commission has been focused on alleged cartel conduct in capital raisings.

On 1 December 2019, the Australian Securities Exchange (ASX) implemented a revised comprehensive set of listing rules and guidance notes.

In response to the COVID-19 pandemic, the ASIC and the ASX implemented temporary emergency capital raising relief measures which have helped facilitate a large number of capital raisings in Australia. The ASIC's relief is set to expire on 2 October 2020 and the ASX's relief is set to expire on 30 November 2020.

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Professional qualifications. Admitted as a solicitor in New South Wales (Australia) and Chartered Tax Adviser, Taxation Institute of Australia

Areas of practice. Income taxation and corporate taxation, including advising on the Australian tax implications of equity capital markets issuances.

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