INITIAL PUBLIC OFFERINGS

Australia

LEXOLOGY
Getting The Deal Through

Consulting editor

Simpson Thacher & Bartlett LLP

Initial Public Offerings

Consulting editors

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Quick reference guide enabling side-by-side comparison of local insights into initial public offerings (IPOs), including market overview (size, issuers and exchanges); rulemaking and enforcement bodies; listing requirements (authorisation process, prospectuses, publicity and marketing, enforcement); timetable and costs; corporate governance (typical requirements, allowances for new issues, takeover rules and anti-takeover devices); foreign issuers (special requirements and selling foreign issues to domestic investors); tax issues; investor claims (fora, class actions, claims, defendants and remedies); and recent trends.

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MARKET OVERVIEW

Size of market

What is the size of the market for initial public offerings (IPOs) in your jurisdiction?

Spurred on by fiscal and monetary stimuli, 2021 was a record-breaking year for IPOs on the Australian Securities Exchange (ASX).

There were 240 new listings, having an aggregate value of over A$52 billion, with IPOs raising over A$13 billion in capital. The number of new listings on ASX was the second-highest number on record (beaten only by the bull market of 2007 just prior to the Global Financial Crisis), and the amount raised through IPOs was the highest in seven years. It was also a record year for billion-dollar IPOs on ASX (nine in total) – across a range of sectors, including financials, industrials and technology.

Law stated - 29 April 2022

Issuers

Who are the issuers in the IPO market? Do domestic companies tend to list at home or overseas? Do overseas companies list in your market?

While ASX has historically comprised domestic issuers, in recent years there has been an increasing admission of foreign-incorporated entities – 23 out of a total of 240 new listings in 2021 were by overseas entities.

ASX is an attractive market for many international businesses as it offers strong access to capital for growth. As a result of the compulsory superannuation system introduced by the federal government in 1992, Australia currently has the fifth-largest (and one of the fastest-growing) pension pools globally. In addition to access to capital, ASX also offers a highly active exchange, a main board listing for earlier-stage growth companies and earlier entry to globally recognised indices.

To facilitate the admission of overseas companies, entities that are already listed on a foreign exchange acceptable to ASX can apply for a secondary listing on ASX under the 'foreign exempt test'. Entities admitted under the foreign exempt test are exempt from complying with the majority of the ASX Listing Rules (Listing Rules), on the basis that the rules of its home exchange will apply. Overseas companies that are not currently listed on a foreign exchange acceptable to ASX (or cannot meet the requisite pre-conditions) are required to apply for admission via a standard ASX listing.

Foreign exempt listings are only applicable for very large foreign companies owing to the high profit and asset tests and spread requirements, although there has been an increase in New Zealand Exchange (NZX)-dual listed companies in recent years since reforms were introduced by ASX to lower the threshold listing requirements and relax certain securities law obligations for NZX-listed companies.

As at the end of 2021, there were 158 foreign entities listed on ASX of approximately 2,299 total listed entities, with 49 of these being foreign exempt listings. Most foreign issuers are from New Zealand, though there are also a number of listings from Bermuda, Canada, Singapore, Hong Kong, Israel, the United Kingdom and the United States.

Law stated - 29 April 2022

Primary exchanges

What are the primary exchanges for IPOs? How do they differ?

The primary exchange for IPOs in Australia is the ASX. ASX has one primary exchange being the Official List, which is owned and operated by ASX Limited, a company that itself is listed on ASX.

There are alternative stock exchanges in Australia, including the National Stock Exchange of Australia, which caters for the listing of small-to-medium enterprises, and Cboe Australia (formerly Chi-X Australia), which facilitates trading of all ASX-listed securities as well as China Board Options Exchange warrants.

ASX is Australia's primary exchange and is the only relevant exchange so far as IPOs of foreign entities are concerned.

Law stated - 29 April 2022

REGULATION

Regulators

Which bodies are responsible for rulemaking and enforcing the rules on IPOs?

The Australian Securities and Investments Commission (ASIC) and the Australian Securities Exchange (ASX) are the key regulators responsible for developing and enforcing the laws, rules and regulations regarding IPOs in Australia.

ASX has discretion about whether to admit an entity for listing and the Listing Rules are the main source of the rules applicable to listing approval. ASX is responsible for making decisions about which entities it admits to quotation on its financial market and it also oversees compliance by listed entities with the Listing Rules. This extends to assessing applications for admission and processing waivers of the Listing Rules.

ASIC is an independent Australian government body that acts as Australia's corporate regulator. ASIC's role is to enforce and regulate company and financial services laws to protect Australian consumers, investors and creditors. ASIC is relevant to IPOs as it regulates disclosure in connection with any offer of securities, including ensuring that prospectuses comply with the law. Upon lodgement of the final prospectus, ASIC will, during the 'exposure period', review and raise any disclosure concerns it has with the prospectus before it can be used for fundraising. However, unlike in other jurisdictions, there is no formal process for ASIC to pre-vet draft prospectuses. Where certain disclosure issues arise, entities may wish to ask ASIC to pre-vet specific sections of the prospectus relevant to those issues. ASIC is also responsible for approving any updates to the ASX Listing Rules that are proposed by ASX.

Law stated - 29 April 2022

Authorisation for listing

Must issuers seek authorisation for a listing? What information must issuers provide to the listing authority and how is it assessed?

Issuers must apply to ASX for admission to the Official List. ASX has the absolute discretion to accept or reject any application for admission and considers, among other things, the reputation, integrity and efficiency of its market in exercising its discretion. As such, it is common practice for applicants to discuss their application with the ASX Listing Compliance admissions team prior to lodgement of an admission application (particularly where there are unusual features regarding the entity's structure, operations, proposed share structure or required Listing Rule waivers).

The Listing Rules set out the pre-requisites for a standard ASX listing that must be satisfied before an entity can be granted admission. The main criteria are:

- Profit test or assets test: the entity must satisfy either the 'profit test' or the 'assets test' (see below).
- Main class of securities: the entity must apply for, and be granted, permission for quotation of all securities in its main class of securities (an entity may only have one class of ordinary securities but different classes of securities such as shares with preferential rights to dividends are permitted). Dual-class voting structures are not a feature of the ASX market.
- Constitution: the entity must have a constitution that is consistent with the Listing Rules and the relevant corporations law in the entity's jurisdiction of incorporation or registration.
- Appropriate structure and operations: in assessing whether this requirement is met, the ASX will have regard to the principles on which the Listing Rules are based.
- Compliance: the ASX must be satisfied that the entity will comply with the Listing Rules.
- Good fame and character: the ASX must be satisfied that each director or proposed director, CEO or proposed CEO, and CFO or proposed CFO of the entity as at the date of listing is of good fame and character. This is satisfied by obtaining and providing to ASX the national criminal history and personal insolvency searches in each jurisdiction that that person has resided in over the past 10 years, accompanied by statutory declarations.
- Prospectus: the entity must issue a prospectus (or, if the entity is undertaking a compliance listing, an information memorandum), which must be lodged with ASIC and provided to ASX.
- Issue price: the issue price per share must be at least A$0.20.
- Free float: the entity must have a 20 per cent minimum 'free float' (being the percentage of the issuer's shares that are not subject to mandatory or voluntary escrow, and are held by 'non-affiliated security holders').
- Minimum shareholding spread: there must be at least 300 'non-affiliated security holders', each holding a parcel of shares having a value of at least A$2,000, excluding securities that are subject to mandatory or voluntary escrow. This condition is not met if the spread is obtained artificially. In April 2022, ASX began a process of consultation with the market on changes to the Listing Rules, and as part of this ASX is proposing to narrow the spread test so that only investors resident in Australia or another jurisdiction acceptable to ASX will count towards there being at least 300 non-affiliated security holders.
- Corporate governance: entities are recommended to comply with the ASX Corporate Governance Principles and Recommendations, which include recommendations about the size and composition of boards and board committees, among other matters. If the company does not comply, the prospectus will need to disclose why not. Some recommendations are mandatory for certain companies.
- ASX liaison officer: the entity must have a person who is responsible for communication with ASX on Listing Rule matters and who is contactable during market hours. Any person appointed to this role on or after 1 July 2020 must have completed an approved Listing Rule compliance course and attained a satisfactory pass mark. This requirement does not apply to foreign exempt listings.

An entity seeking a standard ASX listing must satisfy either the 'profit test' or 'assets test' – the main requirements of each are set out below.

- Profit test:
  - must be a going concern or the successor of a going concern;
  - same main business activity for the last three full financial years; and
  - total operating profit from continuing operations for the last three full financial years of at least A$1 million and at least A$500,000 in the last 12 months to a date no more than two months before the date the listing application is made.
- Assets test:
  - net tangible assets of at least A$4 million after IPO costs or a market capitalisation of at least A$15 million;
  - working capital of at least A$1.5 million;
  - a statement in the prospectus that the entity has enough working capital to carry out its stated objectives; and

- less than half of the entity's total tangible assets (including any IPO proceeds) must be cash or in a form readily convertible to cash. Alternatively, the entity must have commitments consistent with its stated business objectives (as set out in the prospectus) to spend at least half of such assets. As part of its proposed changes to the Listing Rules, ASX proposes to clarify that if an entity has a track record of profitability or revenue acceptable to ASX, it will no longer be required to provide those commitments in its IPO prospectus.

For entities that only meet the assets test and do not have an appropriate profit or revenue history or level of tangible assets, ASX may impose mandatory escrow restrictions (ie, resale restrictions) on securities held by existing shareholders for periods of up to 24 months.

There are different requirements for 'investment entities' applying for admission under the assets test. Investment entities are entities, in ASX's opinion, whose activities or the principal part of its activities consist of investing in listed or unlisted securities or derivatives and its objectives do not include exercising control over or managing any entity in which it invests (ie, cash boxes).

Law stated - 29 April 2022

Prospectus

What information must be made available to prospective investors and how must it be presented?

An entity must issue a prospectus (or, if the entity is undertaking a compliance listing – being a listing where the entity is not undertaking a contemporaneous capital raising, an information memorandum) before it can be listed on ASX. The Corporations Act has both general and specific disclosure requirements.

The general requirement is that a prospectus must contain all the information in relation to the entity that investors and their professional advisers would reasonably require to make an informed assessment of the rights and liabilities attaching to the securities offered and the assets and liabilities, financial position and performance, profits and losses and prospects of the entity, to the extent to which it is reasonable for investors and their professional advisers to expect to find that information in the prospectus. It is useful to look at prospectuses prepared by other entities (particularly entities in the same or a similar industry) to understand what information meets this test. On the other hand, a prospectus must be worded and presented in a clear, concise and effective manner (ASIC Regulatory Guide 228 sets out ASIC's view on how issuers can satisfy this requirement).

ASIC also expects a prospectus to include certain, specific information. One important example is the entity's historical financial information. This will vary from entity to entity (including whether the entity is applying under the 'profit test' or the 'assets test') but in general, a prospectus must contain the following audited financial information for at least the three most recent financial years (or two years of audited information and a half-year of reviewed information, depending on the prospectus date):

- consolidated income statement (showing major revenue and expense items and profit or loss, including EBIT and NPAT);
- consolidated cash-flow statement (at a minimum showing operating and investing cash flows);
- other material information from financials, notes and any other documents attached to the financial reports;
- any modified opinion by the auditor; and
- all events that have had a material effect on the applicant since the date of the most recent financial statements.

The prospectus should also contain a consolidated audited statement of financial position for the most recent financial year (or reviewed statement if an entity has most recently completed a half-year) showing major asset, liability and

equity groups and a corresponding pro-forma statement of financial position showing the effect of the IPO offer and any acquisitions. It is also customary for pro-forma income statements and cash-flow statements to be prepared for inclusion in the prospectus.

Depending on the timing for lodgement of the prospectus, the most recent financial statements for the entity may be its half-year accounts. In that case, because ASIC's regulatory policy requires that prior period comparatives are also included in the prospectus, it will be necessary for an entity to arrange and disclose its half-year accounts for the prior period.

There is no specific legal requirement for a prospectus to include forecast financial information, however, ASIC Regulatory Guide 170 indicates that ASIC expects a forecast to be disclosed in a prospectus if reasonable grounds exist for making such forecasts given the statutory disclosure test requires disclosure of an entity's 'prospects'. Where forecast or prospective financial information is included in a prospectus, there must be reasonable grounds for making that forecast or statement. For operating entities or entities generating revenue, it is customary to include a forecast for up to 18 months that must be reviewed by an external accountant.

Law stated - 29 April 2022

Publicity and marketing

What restrictions on publicity and marketing apply during the IPO process?

Under Australian law, there is a general prohibition against advertising an offer (or intended offer) of securities that requires a prospectus. As a general rule, entities undertaking an IPO are prohibited, before the lodgement of the prospectus, from advertising the IPO or publishing any statement that directly or indirectly refers to the IPO or is reasonably likely to induce people to apply for securities. This is a very broad restriction; however, there are ways to continue ordinary course interactions with the media.

The key exceptions to the general prohibition are:

- Tombstone advertisements: the publication of advertisements that only contain the following statements – who the offeror is and what the securities are; that the prospectus will be made available when the securities are offered; that persons wanting to acquire securities will need to complete an application form accompanying the prospectus; and how to receive a copy of the prospectus.
- Pathfinder documents: the circulation of a draft prospectus to persons who would not require a prospectus by virtue of the sophisticated or professional investors exceptions under the Corporations Act.
- Roadshow presentations: the presentation of material to certain securities licensees, exempt dealers, exempt investment advisers and securities representatives by conducting a roadshow presentation (provided the recipients agree not to relay the information received to retail investors prior to the prospectus being lodged with ASIC).
- Communications to employees and shareholders: while pre-prospectus communications by an issuer to its employees or shareholders regarding a potential IPO are generally restricted by the Corporations Act, in 2020 ASIC issued ASIC Corporations (IPO Communications) Instrument 2020/722 to provide class relief to allow companies to provide current and former employees and shareholders with certain details of the offer prior to lodgement of the prospectus. A company's reliance on the relief is conditional on it having adequate arrangements in place to ensure that any advertisement or statement published in reliance on the relief is kept up to date. This is relevant where a company needs to discuss the terms of an employee offer or employee incentive scheme with employees or sell-down facilities and escrow arrangements with shareholders.

Companies are able to continue their ordinary course advertising activity prior to lodgement of the prospectus, though

they should be cautious not to promote brand recognition insofar as it indirectly refers to an intended offer of securities or is reasonably likely to induce people to apply for securities (even where it makes no reference whatsoever to an intended offer).

Law stated - 29 April 2022

Enforcement

What sanctions can public enforcers impose for breach of IPO rules? On whom?

ASX

ASX is responsible for overseeing compliance by listed entities with the Listing Rules. ASX will not grant admission to an issuer unless it is satisfied that the entity (subject to any waivers) will comply with the Listing Rules.

Upon admission, an entity is contractually bound to comply with the Listing Rules. However, as the Listing Rules are not law, ASX cannot fine or impose any other criminal or civil penalties on a listed entity for breaching the Listing Rules. If a listed entity refuses to comply with its obligations under the Listing Rules, ASX's ultimate sanction is to suspend trading in its securities or, in an extreme case, to terminate its listing. ASX also has the power to formally censure listed entities that have breached the Listing Rules, particularly where such breaches are egregious.

If ASX suspects that a listed entity has committed a significant contravention of the Listing Rules, or that a listed entity or other person (such as a director, secretary or other officer of a listed entity) has committed a significant contravention of the Corporations Act, it is required to give a notice to ASIC with details of the contravention. ASIC will then consider whether it wishes to take criminal or other regulatory action in relation to the breach.

ASIC

ASIC is the key corporate regulator responsible for enforcing the Corporations Act and Listing Rules. In the context of an IPO, ASIC may conduct an investigation or issue a stop order to prevent the offer, issue, sale or transfer of securities under a prospectus where it considers the prospectus to be defective (ie, the prospectus contains a misleading or deceptive statement, omits required information, new circumstances have arisen since its lodgement or the disclosure is not worded and presented in a clear, concise and effective manner).

ASIC also has the power to pursue civil and criminal charges in connection with a defective prospectus, misleading and deceptive conduct during the IPO process and breaches of the advertising restrictions.

Under the Corporations Act, prospectus liability extends to the issuer (and its directors at the time of prospectus lodgement), underwriters, any persons who have consented to being named in the prospectus (such as an expert) and any other person aiding or abetting, or involved in, the contravention. Penalties include fines or imprisonment (or both), subject to various statutory formulas and caps.

Law stated - 29 April 2022

TIMETABLE AND COSTS

Timetable

Describe the timetable of a typical IPO and stock exchange listing in your jurisdiction.

The timetable for an IPO will depend on several factors, including the size and complexity of the issuer and the IPO, the nature of financial information to be prepared, the complexity of due diligence issues and the nature of any pre-IPO restructuring required. Generally, a reasonably simple IPO can be completed in three to four months and a more

complex IPO can take up to six months. Unlike in other jurisdictions, it is relatively common for the IPO offer price to be fixed immediately prior to lodgement of the prospectus after conducting an 'upfront bookbuild' of institutional investors. Where this applies, the period post-lodgement will be about two weeks shorter and is for the purpose of conducting an offer to retail investors.

The following timetable is a high-level indicative example for an IPO with an upfront bookbuild.

Week 1

The issuer appoints an IPO advisory team (typically consisting of lead managers, legal advisers, financial advisers, investigating accountants and other experts) and establishes a due diligence committee (DDC). It is established practice in Australia to form a DDC made up of the various parties with potential liability for the prospectus. The role of the DDC is to ensure that appropriate and adequate due diligence investigations are carried out, that the prospectus does not contain misleading or deceptive statements or omissions and that statutory due diligence defences to prospectus liability are available.

During this initial preparatory stage, the issuer and its advisers will consider whether there is a need to undertake a corporate restructure or implement a sell-down structure for existing shareholders. The issuer will also consider any necessary changes to its capital structure and commence steps to convert to public company (if it is a proprietary company).

Week 2

The issuer and its advisers typically commence the due diligence process including holding the first DDC meeting. Where required, the issuer will apply to the Australian Securities and Investments Commission (ASIC) and the Australian Securities Exchange (ASX) for any modifications of the Corporations Act or waivers of the Listing Rules. Work will commence on the drafting of the prospectus and the issuer and investigating accountant will prepare financials for inclusion in the prospectus (particularly around forecasts).

Weeks 3–8

During this stage, the issuer will look to appoint new independent directors for the post-IPO entity. To the extent required, the issuers will look to establish new employee incentive schemes and determine capital management matters (eg, dividend policy and capital structure). Management of the issuer will typically be preparing for briefings with research analysts of the lead managers who in turn produce pre-deal research reports based on a draft version of the prospectus (referred to as a 'pathfinder prospectus').

By the end of this period, the due diligence process should be well progressed and various advisers will be in the process of finalising due diligence reports and sign-offs for delivery to the DDC. Prior to the research analyst briefings, the prospectus will be largely finalised and the issuer's legal adviser will have coordinated its verification.

If the issuer wishes to utilise ASX's fast-track process it will lodge a draft ASX listing application along with a pathfinder prospectus at this point.

Weeks 9–11

During this period, the management of the issuer will participate in institutional roadshows. This involves giving presentations to institutions and brokers and providing them with copies of the pathfinder prospectus, presentation slides, other marketing material and research analyst reports. Final pricing discussions will take place based on

investor feedback.

Weeks 12–16

A bookbuild is conducted by the lead managers to determine the offer price and allocations and the board of the issuer approves the underwriting agreement. Once this is finalised, the final prospectus is approved by the issuer and lodged with ASIC for their review. At this point, the prospectus is subject to a seven-day 'exposure period' (this can be extended by ASIC for a total of 14 days) during which time the issuer cannot accept applications for shares. Following the ASIC exposure period, the retail offer period will commence.

Within seven days of lodging the prospectus with ASIC, the issuer must lodge its final listing application with ASX along with the prescribed initial and annual listing fees.

Week 17

Once the retail offer period closes, settlement of the funds will occur, and the issuer will issue the shares following bring-down due diligence. If the IPO is underwritten and is not fully subscribed, then the lead managers will be required to subscribe for the balance of the shares.

Upon ASX being satisfied that all of the conditions to listing and quotation have been fulfilled, the issuer will be admitted to the official list and its shares quoted on ASX.

Law stated - 29 April 2022

Costs

What are the usual costs and fees for conducting an IPO?

The costs of conducting an IPO depend on its scale and complexity, with larger IPOs often being in excess of several million dollars. There is significant variability in the costs of various advisers, which are also a product of the nature and complexity of the IPO itself. By way of illustration only, examples of total IPO costs for entities listed in 2021 include (as stated in their IPO prospectuses):

- (market capitalisation of approximately A$100m): A$5.2 million;
- (market capitalisation of approximately A$600m): A$6.7 million; and
- (market capitalisation of more than A$1 billion): A$24.9 million

The underwriting or management fee is typically the largest single IPO cost and is generally calculated as a percentage of the total amount raised. Where the IPO involves a selldown by existing shareholders, those shareholders may often bear some or all of the fees payable on the selldown component. Other costs include brokers' fees to assist with retail distribution (which is generally commission based), legal, accounting, advisory and share registry fees, printing costs and marketing expenses. The fees (and any other interests) paid to professional advisers who are named in the prospectus with their consent are required to be disclosed in the prospectus.

ASX also charges an initial listing fee and an annual listing fee based on the market capitalisation of the issuer. For example, an issuer with a A$500 million capitalisation would currently be required to pay an initial listing fee of A $360,062 (plus GST) and an annual fee of A$64,184 (pro-rata).

Law stated - 29 April 2022

CORPORATE GOVERNANCE

Typical requirements

What corporate governance requirements are typical or required of issuers conducting an IPO and obtaining a stock exchange listing in your jurisdiction?

The Australian Securities Exchange (ASX) Corporate Governance Council publishes and maintains the ASX Corporate Governance Principles and Recommendations (ASX Recommendations), which set out recommended corporate governance practices for listed entities that it believes will promote investor confidence and to help companies meet stakeholder expectations. In particular, the fourth edition of the ASX Recommendations, released in late 2019, particularly encourages listed entities to focus on the organisation's top-down culture of 'acting lawfully, ethically and responsibly'.

The ASX Recommendations are not mandatory, but a set of guidelines. However, under the Listing Rules, an entity is required to disclose the extent to which it has followed the ASX Recommendations. To the extent an entity does not comply with the ASX Recommendations, it must identify the relevant recommendation and give reasons for not following it, along with any alternative governance practice.

For particular entities (eg, entities in the S&P/ASX 300 Index), certain recommendations are mandatory.

The ASX Recommendations include recommendations about the size and composition of boards and board committees, amongst other matters. Some key recommendations include:

- Board independence: that the board comprises a majority of independent directors, and has a chair who is an independent director.
- Board committees: the formation of an audit committee (this is mandatory) and a nomination and remuneration committee. Entities in the S&P/ASX 300 Index must comply with specific ASX Recommendations in relation to the composition, operation and responsibilities of these committees.
- Securities trading policy: having and disclosing a securities trading policy that discloses the 'closed periods' for trading in the entity's securities by its directors and key management personnel (this is mandatory).
- Charters and policies: having and disclosing board and committee charters, policies around diversity, whistle-blowers, anti-bribery and corruption, continuous disclosure and shareholder communications along with the organisation's statement of values and code of conduct.

Law stated - 29 April 2022

New issuers

Are there special allowances for certain types of new issuers?

No. Unlike other listed exchanges, ASX also does not have a specific exchange for smaller or growth companies. The ASX listing requirements are set such that small, growth-focused companies may be admitted.

Law stated - 29 April 2022

Anti-takeover devices

What types of anti-takeover devices are typically implemented by IPO issuers in your jurisdiction? Are there generally applicable rules relevant to takeovers that are relevant?

Takeovers in Australia are regulated by Chapter 6 of the Corporations Act and regulatory policy. A fundamental principle of Australian takeover law is that the acquisition of control takes place in an efficient, competitive and informed market. The Australian Securities and Investments Commission (ASIC) is the primary regulator and the Takeovers Panel is the primary forum for resolving takeover disputes. It has the power to declare circumstances unacceptable (even if they do not involve a breach of law) and to make remedial orders.

Generally speaking, anti-takeover devices are not a common feature in Australia due to the Takeover Panel's frustrating action policy under which target shareholders, rather than directors, should decide on actions that may interfere with the shareholders' opportunity to participate in a control transaction. However, a listed entity that is the target of a takeover (or other control transaction) may elect to undertake a variety of defensive actions where they do not perceive the proposal to be in the best interests of shareholders, including:

- seeking or facilitating better rival proposals;
- publicly critiquing the commercial terms of the proposal (eg, the inadequacy or opportunistic nature of the proposal and conditionality and execution risk);
- appointing an independent expert to undertake a valuation of the company and prepare a report for inclusion in the target's statement, which can be used to support a board recommendation to reject the proposal;
- challenging the legality of the proposed transaction with the various regulatory authorities (eg, if the target believes that the bidder has made misleading statements); and
- pursuing alternative proposals that may be attractive to shareholders such as a demerger or sale of non-core assets with a subsequent capital return, subject to approval by target shareholders.

Target boards need to be careful that any defensive devices or tactics they employ are consistent with their fiduciary duties and do not breach the Takeovers Panel's guidance on frustrating actions. For this reason, certain anti-takeover devices such as US-style shareholder rights plan or 'poison pill', or pre-emptive rights agreements with third parties are unlikely to be acceptable.

Many listed entities have a provision in their constitution that requires shareholder approval for 'proportional bids' (ie, a takeover offer made to all shareholders for a specified proportion of their shares, where the proportion is the same for all shareholders), which provision must be refreshed by shareholders every three years to remain valid. Proportional takeover provisions have the following benefits for shareholders:

- shareholders can act together to avoid coercion of shareholders that might otherwise arise where they believe a partial offer is inadequate, but nonetheless accept the offer through concern that a significant number of other shareholders will accept;
- they may provide shareholders with protection against being coerced into accepting a partial bid at a high premium where the bidder indicates its intention to mount a bid for the remaining shares at a much reduced price;
- if a partial bid is made, the takeover approval provisions may make it more probable that a bidder will set its offer price at a level that will be attractive to at least a majority of shareholders;
- the body of shareholders may more effectively advise and guide the directors' response to a partial bid, and knowing the view of the majority of shareholders may assist individual shareholders to assess the likely outcome of the proportional bid and decide whether or not to accept an offer under the bid; and
- the takeover approval provisions may make it more probable that any takeover offer will be a full bid for the whole shareholding of each shareholder, so that shareholders may have the opportunity of disposing of all their shares rather than only a proportion.

In addition, in the listing of management investment schemes (eg, REITs) it is relatively common for the trustee or responsible entity to have in place a management agreement that, when combined with a significant security holding, may give it influence in any future control transaction.

Law stated - 29 April 2022

FOREIGN ISSUERS

Special requirements

What are the main considerations for foreign issuers looking to list in your jurisdiction? Are there special requirements for foreign issuer IPOs?

Foreign issuers seeking to list on the Australian Securities Exchange (ASX) can either do so via a standard listing or a foreign exempt listing.

A foreign issuer seeking a standard listing will need to satisfy the same admission requirements as an Australian entity. Additional requirements and considerations include:

- that the listed entity must be registered as a foreign company carrying on business in Australia under the Corporations Act;
- if the foreign issuer is established in a jurisdiction whose laws have the effect that its securities cannot be registered or transferred under the operating rules of an approved clearing and settlement facility, the issuer must be approved as a foreign issuer of CHESS Depository Interests (CDIs). CDIs are similar to American Depository Interests in the United States and CREST Depository Interests in the United Kingdom. A CDI represents a unit of beneficial ownership in a financial product of a foreign body where the underlying financial product is registered in the name of a depository nominee (currently CHESS Depositary Nominees Pty Limited is the only depository nominee that has been appointed in relation to CDIs over foreign securities). Under ASX Settlement Operating Rules, all of the economic benefits attaching to the underlying securities accrue to the benefit of the holder of the CDI and the holder also has the right to request the depository nominee to transmute the CDI into the underlying security at any time so that they become the legal holder of the underlying security;
- ensuring that financial statements provided to ASX are prepared in accordance with Australian Accounting Standards (which follow the International Financial Reporting Standards (IFRS)). ASIC's policy is that unless the company is legally required in its place of incorporation to prepare financial accounts in accordance with its local accounting standards, then the company must prepare accounts in accordance with Australian Accounting Standards. This may add lead time;
- appointing local counsel in the foreign issuer's place of incorporation for conducting due diligence in that jurisdiction (including to provide any legal opinion ASX requires to confirm the capacity of the entity to conduct its business in compliance with local regulatory requirements and laws); and
- appointing a person responsible for and available during the Sydney time zone to communicate with ASX regarding continuous disclosure and other Listing Rule matters.

Where a foreign issuer seeking admission to ASX is already listed on an approved foreign exchange, it can seek a foreign exempt listing on ASX without the need to comply with all of the standard admission requirements. Foreign exempt listings are limited to companies listed on a select list of approved foreign exchanges (such as New Zealand's Exchange, the New York Stock Exchange, Nasdaq, the Hong Kong Stock Exchange, Singapore Exchange and the London Stock Exchange).

Law stated - 29 April 2022

Selling foreign issues to domestic investors

Where a foreign issuer is conducting an IPO outside your jurisdiction but not conducting a public offering within your jurisdiction, are there exemptions available to permit sales to investors within your jurisdiction?

Foreign issuers offering securities into Australia will be required to comply with Australian disclosure requirements under the Corporations Act. This largely restricts the offer of securities to Australian investors without a disclosure document unless they are sophisticated or professional investors (as defined in the Corporations Act). There is, however, a mutual recognition scheme in place between Australia and New Zealand that allows entities to offer securities in both jurisdictions using the same disclosure document prepared under the issuer's home jurisdiction.

Law stated - 29 April 2022

TAX

Tax issues

Are there any unique tax issues that are relevant to IPOs in your jurisdiction?

The structure of the IPO (including any pre-IPO restructuring) is likely to have a tax impact on pro forma financial disclosures in the prospectus, as well as actual tax outcomes following the IPO. Appropriate tax planning for the IPO is an important consideration.

Often, the accounting and tax consequences of decisions taken in the IPO process are divergent (for example, in relation to equity-based employee incentives and the recognition and amortisation of goodwill). The interaction between and the relative weights of the legal implications, accounting implications and tax implications will determine the structure ultimately adopted for the IPO.

Tax will also form an important part of the due diligence investigations. An appropriate level of independence should be adopted between the DDC and the issuer's usual tax advisers.

The tax implications for Australian shareholders of foreign companies that raise capital in Australia differs depending on how they structure the capital raising. For shareholders in companies that use CHESS Depository Interests, the shareholders will generally be treated as if they were holding and dealing in shares in the foreign company directly. Other structures (eg, the use of trusts) may have different consequences for shareholders.

Law stated - 29 April 2022

INVESTOR CLAIMS

Fora

In which fora can IPO investors seek redress? Is non-judicial resolution of complaints a possibility?

Investors can seek redress by bringing civil proceedings against an issuer (or other relevant parties) in an Australian court. Investors may also lodge complaints against an issuer or its directors and officers with the Australian Securities and Investments Commission (ASIC) or ASX Limited (the operator of the Australian Securities Exchange (ASX)), which may investigate non-compliance with the Corporations Act and Listing Rules and enforce certain sanctions.

Law stated - 29 April 2022

Class actions

Are class actions possible in IPO-related claims?

Yes, after the United States, Australia most likely has the second most active shareholder class action regime in the world. The prevalence of shareholder class actions in Australia has been driven by the rise of plaintiff law firms, the expansion of third-party litigation funding and the availability of court procedures and rules designed to facilitate representative proceedings.

Since the mid-2000s, there has been a marked increase in shareholder and investor class actions, with these now representing approximately one-third of all filed class actions in Australia. Interestingly, there have only been three shareholder class actions that have proceeded to final judgment, which occurred in late 2019, 2020 and early 2022. None of those emanated from IPO disclosures.

Law stated - 29 April 2022

Claims, defendants and remedies

What are the causes of action? Whom can investors sue? And what remedies may investors seek?

In Australia, the main cause of action underlying securities law litigation is misleading or deceptive conduct in respect of inaccurate or incomplete statements or a breach of an issuer's continuous disclosure obligations. Importantly, neither of these causes of action requires proof of intent to mislead or defraud shareholders.

In the context of an IPO, investors may seek compensation from persons responsible for the prospectus where it is alleged that the prospectus contained misleading or defective disclosure. An investor may allege that, but for the misleading or deceptive disclosure (or omission), it would not have invested in the IPO or would have done so on different terms. The substance of the alleged material information will be specific to the issuer and IPO but may include financial forecasts or material operational matters. Loss is often calculated as the decrease in the entity's share price following the disclosure of the alleged material information to the market.

Law stated - 29 April 2022

UPDATE AND TRENDS

Key developments

Are there any other current developments or emerging trends that should be noted?

There are a number of noteworthy developments and trends in the Australian market, including the following.

The continued popularity of pre-IPO capital raisings

Pre-IPO capital raisings continue to be popular, especially with pre-profit tech companies that need growth capital but are not yet ready to list. These transactions also now frequently include a secondary component allowing existing investors to realise a portion of their investment prior to IPO. The larger investment banks are also taking a greater interest in the area, and the types of investors who tip into these rounds are extending beyond the usual venture capitalist and family office to institutional investors such as pension funds. Unlike an IPO, pre-IPO capital raisings are usually conducted without any formal disclosure document, such as a prospectus.

Improving regulatory sentiment towards crypto-asset related investment products

Following a period of public consultation, in October 2021 the Australian Securities and Investments Commission (ASIC) released guidance stating that licensed exchanges may determine that crypto-assets can be permissible underlying assets for exchange-traded products (ETPs) admitted to their market, provided certain factors were satisfied, including that there be a high level of institutional support and acceptance of the crypto-asset being used for investment purposes and that robust and transparent pricing mechanisms for the crypto-asset are available. As at October 2021, ASIC considered that bitcoin (BTC) and ether (ETH) 'appear likely to satisfy' all the factors, but that it expected this list would expand over time. In November 2021, the Australian Securities Exchange (ASX), which has been hesitant to allow crypto-related businesses on its exchange, admitted its first crypto-focused exchange-traded fund (ETF) (although that ETF did not include any crypto-holdings itself, but rather offered exposure to a number of global companies involved in the cryptocurrency space). As at April 2022, Australia's first bitcoin ETFs are set to debut on Cboe Australia (an alternative exchange in Australia) following the go-ahead from ASX Clear (the clearing house for the Australian market and a wholly owned subsidiary of ASX Limited).

Commencement of DDO regime

On 5 October 2021, the new financial product design and distribution obligations (DDO) regime under Part 7.8A of the Corporations Act commenced. The regime requires issuers and distributors of certain financial products (including hybrid securities) to determine an appropriate ‘target market’ and distribution conditions with a view to ensuring that investors in that target market are receiving products that are likely to be consistent with their likely objectives, financial situation and needs. This regime does not apply to offers of ordinary shares by companies (the most common form of listing in Australia).

ASX's proposed changes to its Listing Rules

ASX is currently consulting on proposed changes to its Listing Rules, some of which, if implemented, will affect how secondary raisings are conducted by placing more constraints on an issuer's allocation policies for their share purchase plans, rights issues and 'material' institutional placements (as well as some additional disclosure requirements). ASX’s clear preference is for pro rata allocations, either based on existing security holdings or on the number of securities applied for in the offer.

Introduction of CCIVs

On 1 July 2022, a new type of funds management vehicle, the corporate collective investment vehicle (CCIV), will be introduced in Australia. The legislative regime will be implemented via amendments to corporate and financial services law (to establish a CCIV as a new type of a company limited by shares used for funds management) and taxation law (to specify the tax treatment for newly established CCIVs). CCIVs share similar characteristics to some other internationally recognised investment structures and are designed to increase the international competitiveness of Australia's managed funds industry. ASX is also consulting on proposed changes to its Listing Rules to facilitate listings of CCIVs on its exchange.

Law stated - 29 April 2022

Jurisdictions

Australia	Gilbert + Tobin
Denmark	Mazanti-Andersen
Finland	Bird & Bird LLP
Greece	Karatzas & Partners Law Firm
Hong Kong	Simpson Thacher & Bartlett LLP
Japan	Nishimura & Asahi
Luxembourg	Arendt & Medernach
Singapore	Rajah & Tann Asia
South Africa	Bowmans
Sweden	Advokatfirman Hammarskiöld
Switzerland	Niederer Kraft Frey
Turkey	Turunç
United Kingdom	Simpson Thacher & Bartlett LLP
USA	Simpson Thacher & Bartlett LLP