Hamilton Locke

The IPO Roadmap

2024

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Part A
Introduction

About this Booklet

This booklet is designed to be a plain-English, high-level roadmap of the listing or initial public offering (**IPO**) process on the Australian Securities Exchange (**ASX**).

This is not a comprehensive guide to the listing process; there are many details which should be included in a deep-dive of the IPO process, such as various issues to consider after listing (for example, your continuous disclosure obligations).

In this booklet, we hope to give private companies (whether based in Australia or overseas) that are considering embarking on the road to an IPO on ASX, a user-friendly map to assist with planning that journey.

This booklet is set out in three parts:

- **Part A** provides some context to the listing process and the state of the market.
- **Part B** delves into five key steps along the IPO journey: choosing your team, preparing to IPO, conducting due diligence and preparing the disclosure document, selling the offer to the public, and the listing.
- **Part C** introduces Hamilton Locke and our credentials.

The Decision to List

The IPO race

The decision to conduct an IPO and list on the ASX is a pivotal event in the lifecycle of a growth company.

Achieving a successful listing is a significant commitment that requires careful preparation, the right support team, and dedication to the desired outcome.

Becoming listed requires more than just the preparation of the listing documentation. Key decisions regarding company structure, float structure, governance, capital raising, sell-down, and executive and employee performance incentive plans must be made with a focus on the long-term success of the business as a listed entity.

While issues critical to the listing process, such as prospectus liability, due diligence and verification, financial forecasting, and independent expert reports, are important, they are ultimately less significant in the long term compared to strategy, governance, management, and reporting systems, which determine success once the company is listed.

The Decision to List

Strategic and tactical decisions

The decision to list should be strategic, while the timing and pricing of the listing should be tactical.

The market is dynamic, with consistent investor interest in businesses that demonstrate strong growth potential. However, the price at which shares can be floated and the subsequent performance in the secondary market will vary over time. This fluctuation depends on factors such as the overall state of the economy, investor sentiment, and the availability of other investment opportunities.

The decision on when to list must consider the state of the IPO market, potential investor interest, and the company's need for capital.

Guidance on the tactical aspects of when to list and how to price the float will be provided by an experienced corporate adviser, as detailed later in this roadmap.

The Decision to List

Opportunities

ACCESS TO CAPITAL
Capital growth opportunities that arise from access to funds

VISIBILITY
Listing exposes the company to a broader audience which can assist expansion efforts, particularly in global markets

LIQUIDITY
Existing stakeholders get an opportunity to realise the value of their investment in the company

ALIGNMENT OF INTERESTS
Listing can align company and employee goals through employee incentives

Challenges

ASX FEES
There are fees for both the initial and annual listing, and fees for quotation of additional securities and ancillary matters

REGULATION
The ASX Listing Rules and the Corporations Act increase periodic reporting, continuous disclosure and corporate governance requirements

CLAIMS & INVESTOR RELATIONS
Shareholder claims over disclosure and governance are more prevalent and management need to spend considerable time communicating with investors

VOLATILITY
After listing, a company's share price is exposed to volatile financial markets, heightened media scrutiny and short sellers

The Australian Landscape

The economy

- Australia has the **12th largest economy in the world in 2024** with a GDP of approximately US$1.8 trillion.
- Australia's real GDP is forecast to grow by around 1.5% in 2024 and to reach around A$2 trillion in 2025.
- Australia is home to just 0.3% of the world's population, but accounts for 1.7% of the global economy.

The market

- ASX has over **2,000 listed entities**, spread across all industry sectors and a range of geographical regions[1].
- ASX is the world's **17th largest stock market** by market capitalisation of listed entities[2].
- **ASX is supported by a robust regulatory environment** and is overseen by the Australian Securities and Investments Commission (**ASIC**).

1. *https://www.asx.com.au/about/market-statistics/historical-market-statistics*
2. *https://www.statista.com/statistics/270126/largest-stock-exchange-operators-by-market-capitalization-of-listed-companies/*

FAQ

What business is suitable for an ASX listing?

The reasons why companies may seek an ASX listing vary depending on the nature of the business and its stage of development. These typically include access to capital, liquidity for shareholders and a structured platform for future fundraising, as well the enhanced visibility and credibility that an ASX listing provides.

What is the minimum size?

ASX requires a business to be a minimum size before it will admit it to its official list. It must either meet the 'profit test' (at least $1 million profit over the last 3 years and at least $500k profit in the last 12 months) **or** the 'assets test' (minimum $4 million net tangible assets or $15 million market capitalisation, and working capital of at least $1.5 million). There are a number of other requirements for listing.

What are the ASX listing fees?

Initial listing fees range from $47,700 to over $619,000 and annual listing fees range from $14,989 to a maximum of $503,500. Both fees are dependent on the value of securities quoted on ASX, as at listing date and 31 May.

How long will it take?

Most companies tend to complete the IPO process in around 4 to 5 months. The length of time to list depends on a number of factors including the size and complexity of the company, any need for pre-float restructuring, the interest received from investors and any complexity arising from the preparation of the financial statements and financial forecasts.

How is the offer price determined?

The company will work with its lead manager to determine demand for its initial offer. Pricing will typically involve a series of market soundings followed by a book build process whereby investor appetite is assessed and commitments obtained. The book build might occur before the general offer opens (a front-end book build) or towards the end of the general offer period (a back-end book build).

Part B

IPO Roadmap

Pathway to IPO

All companies go through the following phases in the IPO process.
Each step will be considered further in this booklet.

CHOOSING YOUR TEAM → PREPARATION → DUE DILIGENCE AND DISCLOSURE → THE OFFER → LISTING

Choosing Your Core Team

Team selection

The process to listing involves a significant amount of work and it is important that you have the right advisers in place to support your management team.

Selecting your core advisers as soon as possible is the most effective way to identify issues early and properly plan the process.

In preparing for an IPO, a company will typically appoint the following advisers:

Choosing Your Core Team

Team selection

CORPORATE ADVISER

The corporate adviser is responsible for managing the timetable, marketing, drafting the bulk of the prospectus and the pricing of the IPO in consultation with the lead manager.

LEGAL ADVISER

The legal advisers are responsible for conducting legal due diligence, drafting agreements relating to the IPO (such as the underwriting agreement), conducting and overseeing the due diligence process and drafting parts of the prospectus.

Based on ASIC Report 484, ASIC will be more comfortable with an IPO that has engaged appropriate professionals and experts to advise the company.

INDEPENDENT GEOLOGIST

A mining and resources company that intends to report material exploration results, mineral resources and/or ore reserves must include an independent geologist's report in the prospectus. This information must be reported in accordance with the JORC Code and ASX Listing Rules, which investors can rely on when making the decision whether to invest in the IPO.

INVESTIGATING ACCOUNTANTS

The investigating accountants are involved in undertaking financial due diligence, review the financial information to be included in the prospectus and provide the investigating accountant's report for inclusion in the prospectus. The investigating accountant will normally produce an independent limited assurance report on the financials (historical and forecast, where relevant) for inclusion in the prospectus and deliver a sign-off on the due diligence process.

Choosing Your Core Team

Team selection

MANAGEMENT

To oversee the process internally, the company will often delegate the responsibilities of running the IPO process to a sub-committee of the board and several key members of management with sufficient seniority. These representatives will often become involved in preparing the prospectus. This is a time consuming task that may take several months.

LEAD MANAGER

The lead manager (who is also often the corporate adviser) markets the shares on offer. The lead manager assesses market demand, assists in pricing and conducts the book build process.

UNDERWRITER

In some instances (typically large IPOs) an underwriter may be appointed to fully or partially underwrite the capital raising. In return for a fee, an underwriter agrees to buy any shares that are not subscribed for by investors in the IPO, providing the company with certainty that it will achieve its targeted capital raising. Ordinarily, the underwriter will also be the lead manager to the offer.

INTELLECTUAL PROPERTY SPECIALIST

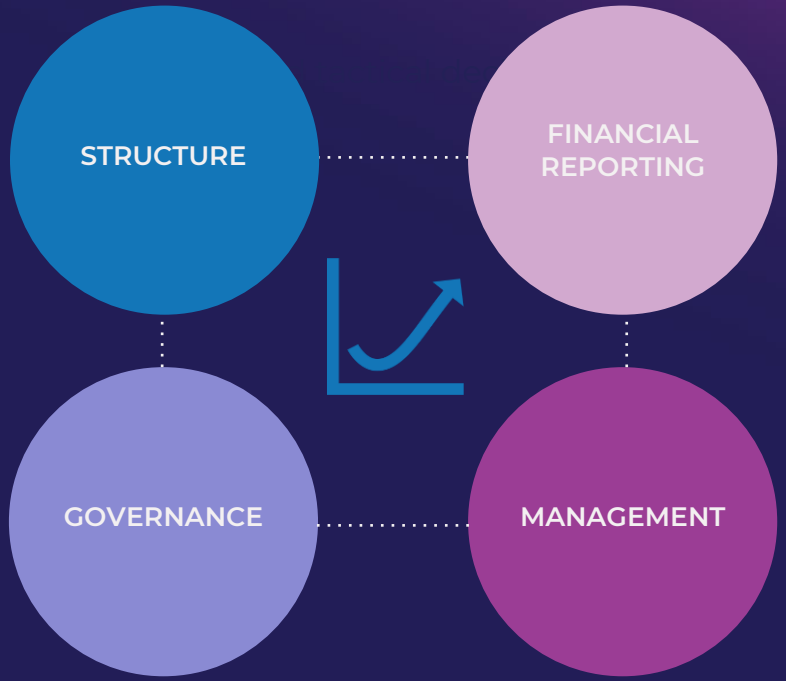
An intellectual property specialist assists a company during the due diligence phase to ascertain what intellectual property (**IP**) it actually owns and what third-party IP it relies on, as well as assisting in identifying any chain of title issues, recorded liens, and any legal or regulatory proceedings that may have been initiated with respect to such IP, especially for disclosure purposes. An IP specialist can also assist a company with brand protection, international trade and IP strategy.

Preparation

Early considerations

There are a number of matters that will require consideration and likely adjustments for a company in transition from a private company to a listed company.

In most cases these are matters of system and process and the earlier these matters are addressed and bedded down the better.



Preparation

Preliminary considerations

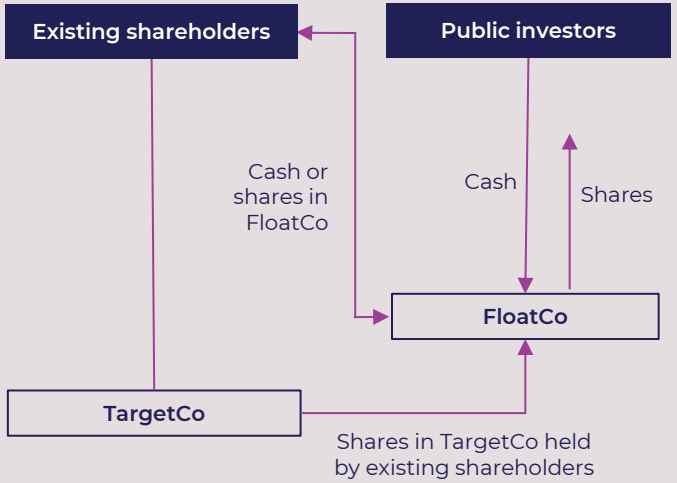
	Overview	Considerations
Structure	A company's structure and operations must be appropriate for a listed company. That often means separating the operations, assets and finances from the existing owners. The simpler the corporate and capital structure the better.	▪ Public company (with an appropriate constitution). ▪ Terminate existing shareholder arrangements. ▪ Appropriate tax structure. ▪ Appropriate form of securities. ▪ Transfer of assets.
Converting to a public company	A proprietary company cannot issue or offer shares to the public or retail shareholders. Therefore, it must convert to a public company before an IPO. Alternatively, a new public company can be established to serve as the IPO vehicle and own the shares of the proprietary company.	If converting from a private company to a public company: ▪ Ensure the Company passes a special resolution. ▪ Lodge a Form 250 *Notification of resolution* and Form 206 *Application for change of company type* with ASIC. ▪ **Timing** – after lodging a Form 250, notice is made in the ASIC Gazette and the conversion comes into effect 1 month thereafter. Companies should allow for 5-6 weeks for the process of converting to a public company. ▪ Issuing securities after conversion from a proprietary company to a public company which results in the giving of a financial benefit to a related party requires approval under Chapter 2E of the Corporations Act (subject to certain exceptions).
Financial reporting	For many companies, an IPO will require an upgrade in systems for financial reporting and planning to comply with the ASX Listing Rules and Australian GAAP accounting practices. Investors will also want to see a history of strong financial reporting and a financial plan, as well as robust forecasting and budgeting capabilities.	▪ Restructure the balance sheet of the company to make it more attractive for potential investors. ▪ Can the company comply with rules for ongoing disclosure and transparency? ▪ Can the company produce accurate and comprehensive information for the board?
Governance	The ASX Listing Rules require listed companies to either adopt the *Corporate Governance Principles and Recommendations* of the ASX Corporate Governance Council or provide an explanation why any of the recommendations were not adopted. This will typically require the implementation of a more robust governance framework.	▪ Adopt corporate governance best practice in policies and procedures to deal with the increased disclosure and governance requirements. ▪ Establish appropriate board structure. ▪ Document material contracts. ▪ Satisfy ASX that each of the directors, CEO and CFO is of good fame and character.
Management	The process of going (and remaining) public is time consuming. The company needs to ensure that the day-to-day operations of the company are not neglected. Additionally, an IPO requires a behavioural change on the part of officers and openness, transparency and reporting are key aspects of the new environment.	▪ Consider any skills gaps at senior management and board level and make new appointments as necessary. ▪ Can the company respond appropriately to shareholder and investor demands? ▪ How will you prioritise the IPO and day-to-day operations?

Preparation

Sell down structures

A FloatCo or 'Top Hat' structure and SaleCo or 'sidecar' structure are typically used to facilitate the sale of shares by existing shareholders in the IPO by ensuring that they are shielded from prospectus liability by not selling shares directly to the public under the IPO.

Top Hat / FloatCo structure

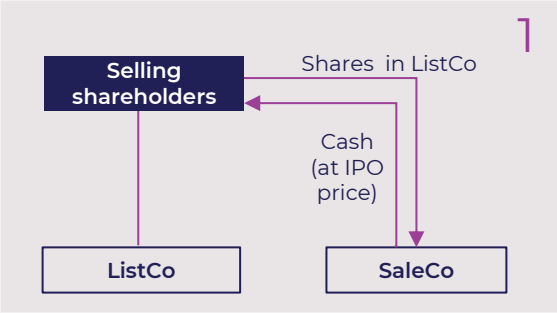


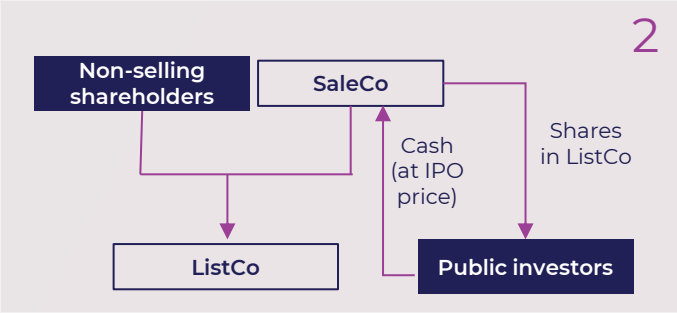
Common steps in a Top Hat sell down	
1	Establish a new company ('**FloatCo**') which lists on ASX and issues shares to the public, subject to completion of the transactions below. The directors of FloatCo are the same directors of TargetCo.
2	The shareholders of TargetCo, which is the company and owns the business that is actually being listed, enter into a Share Purchase Agreement with FloatCo to sell their shares in TargetCo to FloatCo for cash and/or shares in FloatCo.
3	FloatCo buys all the shares in TargetCo from the existing shareholders by: • using funds raised in the IPO to pay cash to shareholders that are selling down; and/or • issuing shares in FloatCo to shareholders who are not selling down.
4	FloatCo owns 100% of TargetCo.
5	The existing shareholders of TargetCo are able to sell down shares in TargetCo into the IPO while being shielded by FloatCo from prospectus liability.

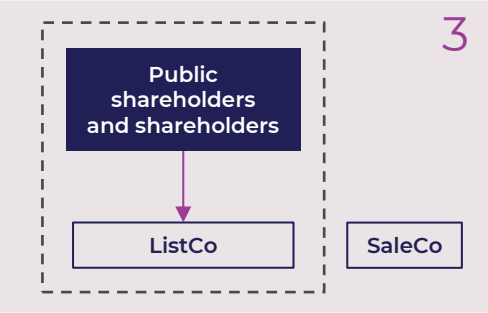
Preparation

Sell down structures

Sidecar / SaleCo structure







Common steps in a sidecar sell down			
1	Establish a special purpose vehicle ('**SaleCo**'). The directors of SaleCo are directors of ListCo, which is the company being listed on ASX.	4	On the IPO, SaleCo buys ListCo shares from the selling shareholders of ListCo at the IPO offer price.
2	SaleCo enters into a Share Purchase Agreement with the selling shareholders of Listco to acquire their shares in ListCo at the IPO offer price.	5	SaleCo then immediately on-sells those shares in ListCo to the public at the same IPO offer price. ListCo is then owned by the public and any existing shareholders who did not sell down.
3	The prospectus for the IPO is jointly issued by ListCo and SaleCo.	6	SaleCo can be wound up.

Preparation

Listing a foreign company

There are two pathways available to a foreign company wishing to list on ASX:

FOREIGN EXEMPT LISTING

A foreign entity that is already listed on another reputable stock exchange can apply to list on ASX as a 'foreign exempt listing' if it satisfies one of the following criteria.

- operating profit before tax for each of the last three financial years of at least A$200 million;
- net tangible assets of at least A$2 billion or a market capitalisation of at least A$2 billion; or
- if it is a qualifying New Zealand entity that has a primary listing on the NZX.

A foreign exempt company is required to comply with the listing rules of recognised overseas exchange, and is not required to comply with most of the ASX Listing Rules.

STANDARD ASX LISTING

A foreign company can apply to list on ASX as its sole listing or as a dual listing by going through the same process and satisfying the same tests and criteria as any Australian company looking to float on ASX as an ASX Listing.

While companies with a foreign exempt listing are only subject to minimal requirements under the ASX Listing Rules, any foreign company with a full ASX listing will be subject to all of the ASX Listing Rules and related disclosure obligations, except to the extent that ASX has waived the application of a particular Listing Rule. ASX will waive the requirement to comply with a particular Listing Rule in certain circumstances where it is confident the rules of another stock exchange which apply to the company are at least as stringent as ASX requirements.

The foreign company must be registered as a foreign company carrying on business in Australia.

In March 2024 there were:

49 foreign companies listed under the **ASX Foreign Exempt Listing** category.

98 foreign companies listed as standard **ASX Listings**.

Source: ASX

Trades on ASX are settled through the electronic CHESS system. However, the shares of some foreign ASX-listed companies cannot be settled through CHESS. To address this problem, depository receipts are issued for trading on ASX. These are CHESS Depository Interests (CDIs) and give the holder a beneficial interest in the underlying shares of that foreign company.

*This pathway is not available to entities looking to list from the Canadian Securities Exchange

Preparation

Key listing criteria

A company must satisfy various criteria under the ASX Listing Rules before it can be listed on ASX. The key criteria include:

Spread	The company must have at least 300 non-affiliated security holders, each of which holds a minimum parcel of shares that are not subject to escrow restrictions with a value of at least $2,000. Note that ASX has discretion to require a certain minimum number of Australian-based shareholders.	
Minimum issue price	Securities issued under the prospectus must have a minimum issue price of 20 cents.	
Free float	The company must have a free float at the time of admission of at least 20% (being securities that are not subject to escrow restrictions and are held by non-affiliated / non-related shareholders).	
Audited accounts	The company will be required to disclose to ASX certain audited accounts based on whether admission is sought under the profit test or assets test, and provision of a reviewed pro forma statement of financial position.	
	PROFIT TEST • Audited accounts of the company for the last 3 full financial years. • Audit or reviewed accounts for the last half year if the last full financial year ended more than six months and 75 days before the listing application date. • If the company acquired (or proposes to acquire as part of its listing) another entity or business in the last 3 years, audited accounts of that entity or business (to the extent these have not been consolidated into the audited accounts of the company) as well as audited or reviewed accounts for the most recent half year. • Pro forma statement of financial position reviewed by auditor or independent accountant.	**ASSETS TEST** • Audited accounts for the last 2 full financial years. • Audited or reviewed for the last half year if the last full financial year ended more than six months and 75 days before the listing application date. • If the company acquired (or proposes to acquire with its listing) another entity or business, that is 'significant' in the context of the company, audited accounts for the last 2 full financial years for that entity or business as well as audited or reviewed accounts for the most recent half year. • Pro forma statement of financial position reviewed by an auditor or independent accountant.

Preparation

Key listing criteria continued

To be admitted to the official list of ASX a company must satisfy either the profit test or the assets test. Both tests require the company to satisfy certain criteria, including the provision of certain audited accounts and a reviewed pro forma statement of financial position.

PROFIT TEST

- The company must have conducted the same main business activity for the last 3 full financial years.
- The company must be a going concern or the successor of a going concern.
- At least $1 million aggregated profit from continuing operations for past 3 full financial years.
- At least $500,000 consolidated profit from continuing operations for the 12 months to a date no more than 2 months before the date of the listing application.
- A statement in the prospectus confirming that the directors have made enquiries and nothing has come to their attention to suggest that the entity is not continuing to earn profit from continuing operations up to the date of the prospectus.

ASSETS TEST

- At least $4 million net tangible assets (after deducting the costs of fund raising); **or**
- A market capitalisation of at least $15 million.
- $1.5 million in working capital (calculated as current assets less current liabilities - as shown in the reviewed pro forma statement of financial position).
- Less than half the company's total tangible assets (after raising any funds) must be in cash or a form readily convertible to cash, or the company must have commitments consistent with its business objectives to spend at least half of its cash and assets readily convertible to cash.
- The prospectus must state:
  - the objectives the entity is seeking to achieve from its listing and any capital raising undertaken; and
  - that the company has sufficient working capital to carry out its stated objectives.

Preparation

Escrow

There may be shares which are subject to escrow (also known as 'restricted securities'), either as a result of a mandatory escrow imposed by ASX in accordance with the Listing Rules or a voluntary escrow required by an underwriter.

MANDATORY ESCROW

If a company is admitted to the official list of ASX through the "assets test", ASX will ordinarily impose an escrow (lock-up) period on certain shareholders which prevents that shareholder disposing of a specified number of escrowed shares for a prescribed period.

- Escrow is designed to prevent founders, promoters, related party and seed shareholders from selling their shares before the market has had the opportunity to fully value the company's securities.
- The parties who are usually subject to ASX imposed escrow are related parties, promoters and their associates, seed capitalists, vendors of "classified assets", and certain professional advisers and consultants. ASX may grant relief to mandatory escrow in certain circumstances.
- Mandatory escrow usually applies for either 24 months or up to 12 months, depending on the shareholders relationship with the company, how they acquired their shares and the price paid for those shares.
- The number of shares to be escrowed is determined by the 'cash formula', which factors in the discount (if any) received by the shareholder to the offer price of the shares under the IPO.

VOLUNTARY ESCROW

A voluntary escrow arrangement is a contractual agreement whereby the holder of securities agrees not to dispose of its securities.

Voluntary escrow may assist the lead manager with marketing the IPO so that it can assure investors that major shareholders, including strategic shareholders, will not sell down immediately after the IPO, which can adversely affect the share price.

ASX COMPLIANCE UPDATE

In the a recent Compliance update (No. 01/24), listing applicants are no longer required to use restriction deeds to give effect to ASX-imposed escrow requirements (unless requested by ASX). Instead, ASX has determined that, in all circumstances where a security holder is subject to ASX-imposed escrow, the listing applicant must give to the holder a restriction notice in the prescribed form.

Mandatory escrow only applies to listings admitted under the 'Assets Test'. There is no mandatory escrow where a company is admitted under the 'Profit Test'.

Preparation

ASX discretion to reject application

Even if an applicant can complete all the preparation work and satisfy the various criteria for listing, it is important to understand that ASX has an **absolute discretion** to reject a listing application if it does not consider that the applicants' structure and operations are appropriate for a listed entity.

ASX Guidance Note 1 *Applying for Admission – ASX Listings* emphasises that ASX has an **absolute discretion** in deciding whether to admit an entity and quote its securities.

ASX has outlined some examples where it may exercise this discretion:

- it has concerns that the applicant's structure, business, financial condition, governance arrangements, board or management may not be suitable for a listed entity; or
- the applicant is established or its main business operations are in an emerging or developing market and ASX has concerns about the regulatory environment or business ethics in that market.

For this reason, it is important to engage with ASX early to introduce the business that is seeking to list.

ASX has used this discretion to reject applicants from listing since 2016, as set out below:

(Source: ASX)

Due Diligence and Disclosure

Disclosure requirements

The Corporations Act requires a company seeking to raise funds through the offer of securities to issue a disclosure document called a prospectus or product disclosure statement which must be lodged with ASIC. The ASX Listing Rules require the prospectus and additional documents to be given to ASX for its consideration in assessing the listing application.

GENERAL INFORMATION REQUIREMENTS

A full prospectus must contain all the information about the company that investors and their professional advisers would reasonably require to make an informed assessment of the:

- assets and liabilities, financial position and performance, profits, losses, and prospects of the company, and
- rights attaching to the securities being offered.

ASIC Regulatory Guide 228 offers guidance on ASIC's expectations regarding the content of prospectuses.

SPECIFIC DISCLOSURE REQUIREMENTS

There is also certain prescribed information which must be included in a prospectus such as:

- terms and conditions of the offer,
- the nature and extent of the interests held by any directors, advisors, promoters or underwriters of the company, and
- the amount of any benefit anyone has given or agreed to pay or give to a director to induce them to become a director of the company, or for services provided by advisors, promoters or underwriters in connection with the offer of the securities.

Due Diligence and Disclosure

Reasonableness, knowledge and public information

The disclosure requirements are qualified to the extent that the prospectus only needs to include information based on the following:

Reasonableness - disclosure is only required to the extent which it is reasonable for investors and their professional advisors to expect to find the information in a prospectus.

Knowledge - the information must only be included if a 'relevant person' (which includes the company, a director, proposed director, underwriter or expert) actually knows the information or in the circumstances, ought reasonably to have obtained the information by making inquiries.

Public Information – in deciding what information should be included, regard must be had to:

- the nature of the securities and the body issuing the securities,
- the matters that likely investors may reasonably be expected to know, and professional advisors.

Due Diligence and Disclosure

Liability

One effect of the disclosure requirements is that each relevant person faces potential liability regarding information actually known, or which ought reasonably to have been obtained by making enquiries.

As the standard includes information that ought reasonably to have been known, wilful ignorance will not be enough for a relevant person to avoid liability. Given this requirement, **it is important to establish a due diligence process** to ensure that reasonable enquires are made.

Due diligence and defences

A person may have a defence to liability under section 728 and 729 of the Corporations Act if it can be established that they:

- made all inquiries that were reasonable in the circumstances, and after doing so, believed on reasonable grounds that the statement was not misleading or deceptive, and that there was no omission from the prospectus in relation to the matter; or
- they can establish they placed reasonable reliance on information given to them by:
  - if the person is a body - someone other than a director, employee or agent of the body, or
  - if the person is an individual - someone other than an employee or agent of the individual.

A properly conducted and documented due diligence process will seek to establish these defences.

However, there are other statutory grounds of both criminal and civil liability that arise from making or publishing false or misleading statements in connection with the securities of a company, many of which do not have statutory defences.

Due Diligence and Disclosure

Contravention of disclosure requirements

The key disclosure obligations in respect of misleading or deceptive statements are stipulated under section 728 of the Corporations Act.

A person must not offer securities under a prospectus if:

- there is a misleading or deceptive statement in the prospectus or in the application form,
- there is an omission from the prospectus of information that must be included, or
- a new circumstance has arisen since the prospectus was lodged that would have been required to be disclosed under the general disclosure.

A person will be taken to make a misleading statement about a future matter if the person did not have reasonable grounds for making the statement (see below on financial forecasts).

Section 729 of the Corporations Act states that a person who suffers loss or damage because of an offer of securities under a disclosure document that contravenes subsection 728(1) may recover the amount of the loss or damage from the person potentially liable to the extent of their liability. This is so even if the person did not commit, and was not involved in, the contravention.

Due Diligence and Disclosure

Who has prospectus liability?

These people...	are liable for loss or damage caused by...
The person making the offer	any contravention of section 728 in relation to the prospectus
Each director of the body making the offer	any contravention of section 728 in relation to the prospectus
A person named in the prospectus with their consent as a proposed director of the body whose securities are being offered	any contravention of section 728 in relation to the prospectus
An underwriter to the issue or same named in the prospectus (with their consent)	any contravention of section 728 in relation to the prospectus
A person named in the disclosure document with their consent as having made a statement: ▪ that is included in the disclosure document, or ▪ on which a statement made in the disclosure document is based	the inclusion of the statement in the prospectus
A person who contravenes, or is involved in the contravention of, subsection 728(1)	that contravention

Liability Regime for Forecasts

Financial forecasts – investigating accountant's report

Depending on the nature of the business, the underwriter or lead manager may advise a company that financial forecasts are necessary in order to generate demand for shares in the institutional market. Without a forecast demonstrating business growth, it may be more difficult to articulate an investment thesis for professional investors around pricing for that growth.

If forward looking financial forecasts are included, market practice is to appoint an investigating accountant to review and opine on the financial forecasts to establish a reasonable basis for making those future statements. The length of the forecast, the predictability of the revenue and costs of the business and the availability of audited numbers will all impact on the timetable for preparation of the investigating accountant's report.

The onus of proof for statements in a prospectus as to future matters is reversed.

Under section 728(2) *"A person is taken to make a misleading statement about a future matter … if they do not have reasonable grounds for making the statement"*

A person commits an offence if the misleading statement is *"materially adverse from the point of view of an investor."* (section 728(3)).

Due Diligence and Disclosure

Objectives of due diligence

To rely on the due diligence defences, an appropriate and focussed due diligence process should be established and rigorously followed. The process should be focussed on the identification of material issues relating to the company and its business, assets and liabilities. The primary objectives of the due diligence are:

- to ensure that the prospectus complies with the disclosure requirements and does not contain a false, misleading or deceptive statement, or omit any information;
- there are reasonable grounds for making statements about future matters (such as forecasts and projections); and
- after lodgement, ensure a process is in place to identify any new matters which arise that would require additional disclosure.

Due Diligence and Disclosure

Process for verification / due diligence

1	**Review and scoping**	**DDC:** Establish a due diligence committee, agree scope, action plan and materiality level for due diligence process and delegate tasks to reporting persons **Board:** Approve due diligence planning memorandum **Legal Advisers:** Develop due diligence checklists, develop directors, senior management and corporate questionnaires and advise on the Australian legal requirements for the prospectus and the due diligence process
2	**Detailed inquiry**	**DDC**: Regularly hold due diligence committee meetings to identify and track material issues, have them adequately investigated, and oversee the recording of the due diligence process in appropriate documentation **Management:** Respond to directors and management questionnaires, make commercial and financial enquiries and provide source information for review by the due diligence committee and experts **Reporting Persons (accountants, legal advisers and experts):** Commence legal, accounting and tax reviews and identify key issues, review and comment on drafts of the prospectus **Corporate Adviser:** Assist with prospectus drafting with input from management, accountants and advisers
3	**Verification & sign-offs**	**DDC**: Oversee verification of prospectus **Management:** Provide sign-offs on identified issues and due diligence process conducted **Reporting Persons**: Provide due diligence report on any investigations it has been required to undertake and provide required sign-offs **Legal Adviser:** Assist in verification of prospectus
4	**Approval & lodgement**	**DDC**: Provide DDC report to the board, and for the benefit of each member and their representative **Board:** Approve prospectus
5	**Continuing due diligence**	**DDC**: Monitor circumstances after lodgement of prospectus and consider need for a supplementary or replacement prospectus and hold final DDC meeting **Reporting Persons:** Provide any additional sign-offs

Due Diligence and Disclosure

Directors requirements

ASIC issued a report in July 2016 (called Report 484) which found that the involvement of directors in many IPO processes is superficial and a 'box ticking' and directors were not turning their mind to the key due diligence issues or taking an active involvement in identifying risks.

ASIC's recommendations on effective due diligence coming out of that report include requirements on directors to ensure that:

- ✓ substance takes precedence over form and the company needs to show documentation that proves the company and its advisers carried out a thorough and investigative due diligence process;
- ✓ directors take responsibility for ensuring a robust due diligence process;
- ✓ apply an independent mind to the due diligence process and directors need to assess the completeness, accuracy and reliability of all statements in the prospectus;
- ✓ directors engage in robust dialogue with management and expert advisers in the due diligence process; and
- ✓ directors need to ensure that all issues that are red-flagged are followed up and resolved.

Download the report here

The Offer

Marketing the offer

The company will, with its lead manager and corporate adviser, devise a strategy for how the IPO will be structured, priced and marketed. The company can make a combination of offers to different types of investors. Common offers include:

Retail offer: An offer to the public generally

Wholesale / institutional offer: An offer to sophisticated or professional investors

Broker offer: An offer through a broker to retail clients

Priority offer: An offer to specific people in priority (for example employees, Chairman's list)

The Offer

Pricing

The lead manager managing the offer will usually provide advice on an appropriate price structure. As an inducement, the offer price is often set at a price that will result in solid performance in the secondary market after the listing. Common pricing structures include:

FIXED PRICE OFFER:
This is a common approach for smaller IPOs, and are often underwritten. Under a fixed price offer, the price is fixed in the prospectus. However, a draft prospectus is sometimes issued to assess demand and provide an indication of an appropriate price. The lead manager may seek to fill the institutional book before the commencement of the offer period to mitigate its risk and enable confidence around the price of the retail component of the offer (called a 'front end book build'). The ASX Listing Rules require that the offer price under an IPO is $0.20 or above.

OPEN PRICE OFFER:
Usually used for larger listings that require a longer period to build institutional support for the offer. Typically the offer period will have two components:

- a retail offer period – which runs for a period (approximately three weeks) and provides a fixed price, and
- an institutional offer period – which runs for up to one week, usually on the basis of a price range specified in the prospectus (called a 'back end book build' process). The institutions provide commitments of the number of shares they are likely to subscribe for, and the price they are prepared to pay.

Advertising

There are strict restrictions on advertising an IPO before the prospectus is lodged with ASIC. This is directed at protecting retail investors, to ensure they have all information contained in the full prospectus. Certain marketing activities can be undertaken to sophisticated and professional investors. Once the prospectus is lodged, the marketing restrictions largely fall away. Typically leading up to the opening of the offer and after the offer opens, management of the company together with the lead manager will engage in road show presentations to key investor groups.

Timetable

Event	Timing
Commence due diligence process · Due diligence committee meeting #1 · Formation of due diligence committee and approval of due diligence planning memorandum (refer to slide [29] for further information regarding the due diligence committee and due diligence planning memorandum)	Week 1
Engage core team of advisers, including (but not limited to): · lead manager; · independent accountant; · independent geologist (if applicable); · intellectual property adviser (if applicable).	Weeks 1-2
ASX Application for in-principle advice · An application is made to the ASX for in-principle advice regarding the suitability of the company's structure and operations for the purposes of Listing Rule 1.1 condition 1 and Listing Rule 1.19. · To the extent necessary, confirmations and/or waiver applications are made to the ASX in respect of particular listing rules.	Week 2-3
Receipt of ASX in-principle approval	Week 5
Due diligence checklist · A due diligence checklist is completed by a nominated person on behalf of the company and is signed off as part of the due diligence process. · The checklist is broad, with the purpose of identifying key risks and matters of a material nature that should be included in the IPO prospectus. **Directors' and officers' questionnaires** ▪ Each director and officer completes a questionnaire which is more specific to the relevant director or officer (as applicable).	Weeks 5-6
Drafting IPO prospectus	Weeks 5-10
Prospectus verification **Receipt of final third party reports**	Week 11
Final due diligence committee meeting **Sign-off due diligence documentation**	Week 12
Prospectus lodgement	Week 13

Listing

Timetable once prospectus has been verified

ASX requires **four to six weeks** to consider a listing application and notify the applicant of its decision on whether or not to admit the applicant, from the time the completed Appendix 1A – *ASX Listing Application*, prospectus and all other required supporting documents are lodged with ASX.

It typically takes **six to nine weeks** from the date of lodging the prospectus to the date of listing.

Prospectus verified

Prospectus lodgement: When the prospectus is finalised, it must be lodged with ASIC via the online ASIC Regulatory Portal before it can be issued to members of the public. See https://asic.gov.au/regulatory-resources/fundraising/lodging-prospectuses-and-other-disclosure-documents/

Listing application: The company must apply to ASX for quotation of its shares within seven days after lodging the prospectus with ASIC. The application must include the prescribed listing fees.

Exposure period

Exposure period: The prospectus is subject to an "exposure period" of at least seven clear days (ASIC can extend this to 14 days).

During the exposure period the company is prohibited from processing applications (but may receive applications).

Offer period

Offer period: The offer period usually begins when the exposure period ends.

The length of the offer period will depend on the type of offer (see section "The offer"). This is usually two to four weeks.

Listing: Subject to the company satisfying the various requirements for listing, ASX will normally grant the company conditional listing by the end of the offer period.

The listing will be conditional on satisfaction of various listing prerequisites (for example, providing a list of shareholders to ASX).

Shortfall: If the offer is underwritten, at the end of the offer period the listing is only partially subscribed, the company will issue a "shortfall notice" to the underwriter who must provide funds for the shares not taken up by investors.

Trading: Once the listing is fully subscribed, the shares are issued to investors and the listing proceeds are released to the company. Trading commences on a T+2 settlement basis.

Backdoor Listing

A backdoor listing in Australia is a way for an unlisted business or company to obtain a listing on the ASX via a disposal of the business or shares in the unlisted company to a pre-existing ASX-listed shell entity, as an alternative to undertaking a conventional IPO.

Ordinarily in a backdoor listing, an unlisted company is larger than the listed shell entity in operational and financial terms, with the result that the merged group will be predominantly comprised of the unlisted company's operations.

ASX will require a company that is proposing to complete a backdoor listing transaction to seek shareholder approval of the transaction under ASX Listing Rule 11.1.2 and to re-comply with ASX's IPO admission requirements in Chapters 1 and 2 of the ASX Listing Rules.

An ASX backdoor listing involves a significant change in the nature and/or scale of the activities of the listed shell company and typically involves:

- the listed company acquiring 100% of the issued shares in the unlisted company or directly acquiring the unlisted company's assets and, in return, the listed company issuing securities to the shareholders of the unlisted company as consideration for the acquisition of the shares or assets (as applicable); and
- a significant change to the composition of the unlisted company's management and board of directors, with representatives of the listed entity being appointed to those positions.

Typical requirements for an ASX backdoor listing in Australia are as follows:

- **Private M&A Transaction**: the listed company conditionally agrees to acquire an unlisted entity's shares or assets under a share purchase agreement or an asset purchase agreement. Completion of the acquisition should be conditional upon shareholder approval of the transaction under ASX Listing Rule 11.1.2 and re-complying with the admission requirements in Chapters 1 and 2 of the ASX Listing Rules.
- **Disclosure obligations and suspension of company's Securities**: ASX will only allow a company's quotation of its securities to resume trading after the announcement of a proposed backdoor listing transaction if the announcement contains sufficient information about the transaction for the company's securities to trade on a reasonably informed basis. The specific information requirements are set out in Appendix A of ASX Guidance Note 12.

Part C

About Hamilton Locke

Who we are

Hamilton Locke is an award-winning team of lawyers advising forward-thinking businesses and innovators on their most pressing challenges.

Courageous thinking. Collaborative structures. Culture at the fore. These are the qualities that enable us to provide today's most innovative companies with practical advice that moves the dial. From complex transactions to industry-first challenges, we strike the right balance of out-of-the-box thinking and accountability to our clients.

Our nimble structure empowers our team to focus wholly on outcomes. With top-tier lawyers operating across multiple jurisdictions, we bring the best people together to solve a problem and deliver creative and cohesive solutions.

We don't sit on the fence. We put people first. And we do the best work of our lives. It's a breath of fresh air that we believe our clients deserve.

Our corporate team has been recognised in:

Chambers AND PARTNERS | The LEGAL 500 | IFLR1000 | Best Lawyers

Great humans (and lawyers).
With over 60 partners and 200 lawyers from all walks of life, we work with authenticity and purpose to deliver efficient and effective advice.

Accessible and practical.
We're here for the long haul. Our advice has your business in mind, so you can easily implement it into your operations.

Local teams, global connection.
We have offices in Sydney, Melbourne, Brisbane, Perth, Newcastle and New Zealand, as well as business networks in the US, UK, and APAC – allowing us to meet your needs, no matter where you are.

Intersection of expertise.
Our teams blend deep sector knowledge with extensive legal experience and an entrepreneurial lens to provide bespoke advice on projects and deals.

Full service, in every sense.
The weight of an award-winning international team, with direct access to top-tier partners. It's the best of both worlds – and how it should be.

Areas of Expertise

Our expertise spans the corporate and commercial legal sphere and for each representation we build a team to best to serve the needs of our client. Our areas of expertise include:

- Capital Markets
- Competition
- Construction and Infrastructure
- Corporate, M&A and Private Equity
- Energy and Resources
- Environmental, Social and Governance (ESG)
- Finance
- Funds and Financial Services
- Intellectual Property and Technology
- Litigation and Dispute Resolution
- Planning and Environment
- Property
- Restructuring and Insolvency
- Tax
- Workplace and Employment

We also have experience in a broad spectrum of industry sectors including agribusiness, financial services, new energy, carbon, real estate, natural resources, technology, and health, care and education.

Best Lawyers rated for Corporate, Distressed Investing and Debt Trading Practice, Private Equity, Venture Capital, Banking and Finance, Occupational Health and Safety and Commercial, Information Technology

Legal 500 rated for Capital Markets: Equity, Corporate and M&A, Restructuring and Insolvency, Energy, Infrastructure Projects and Construction, Labour and Employment, Banking and Finance, Fintech and Financial Services Regulatory and Labour and Employment

Why Hamilton Locke

Vast experience in preparing companies for IPO by:

- conducting due diligence on: corporate registers, material contracts and assets, IP and IT systems, employment (compliance with workplace legislation and contract reviews), property and leasing, litigation, environmental, licences and permits
- conducting pre-IPO restructures, and
- introducing appropriate corporate governance processes.

Experience in advising clients on IPO process including:

- due diligence committee meetings
- prospectus verification process
- review of underwriter agreements
- initial escrow assessment, and
- identifying any material impediments to listing.

Flexible approach such as:

- fixed price costing, and
- phased fee arrangements (where scope of work can be phased and priced separately with only a % of the estimate payable if the transaction does not progress to the next phase).

1

for advising on the highest volume of ECM transactions acting for Issuers.

2

for advising on the highest volume of ECM transactions acting for Lead Managers.

3

globally for advising on the highest volume of ECM transactions.

Source: LSEG H1 2024

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Initiatives

Australian Growth Company Awards

The Australian Growth Company Awards were launched in 2012 by Hamilton Locke's managing partner Nick Humphrey to celebrate excellence of high-growth Australian companies. The awards recognise companies that demonstrate high rates of sustainable growth, as well as innovation, integrity and contribution to community.

The awards are proudly co-sponsored by Hamilton Locke, Source, ASX, Findex, MA Financial Group, Ansarada, 2020 Exchange and Willis Towers Watson, as well as media partner, MergerMarket.

Read More

Technology Scale-up Awards

The Technology Scale-up Awards celebrate disruptive Australian technology businesses that demonstrate high rates of growth and industry-leading innovations, while making a significant impact in their industry sectors. The awards are proudly co-sponsored by Hamilton Locke, Source, Tank Stream Labs, Ansarada and S2S Summit.

Read More

Taste of Australia

Taste of Australia is specifically designed for foreign investors and their advisers, and provides a high-level look at the current issues facing deal makers in Australia.

November 2023 | March 2024 | July 2024

Takeover Roadmap

From the takeover threshold to acquisition structures, pre-bid arrangements and defensive tactics, takeovers in Australia are highly regulated by legislation and by policy guidance from regulators.

If you're planning a takeover, it's critical to be on the front foot to minimise delays and ensure a smooth process for all involved – which is why we've prepared The Takeover Roadmap.

Whether you're embarking on a new acquisition or in the midst of one, this guide is your companion for navigating the complex world of takeovers in 2024.

Read More

Hamilton Locke M&A Deal Data Report

The M&A Deal Data Report is a survey of deal trends in Australia across a range of metrics including warranty caps, earn-outs and purchase price adjustments.

Read More

Hamilton Locke Venture Capital Guide 2024

The Venture Capital Guide is an overview of the venture capital investment process from the entrepreneur's perspective. It is a practical step-by-step guide covering all aspects of venture capital investments from preparing a business plan to negotiating the terms sheet and the legal documents and the exit process.

Read More

Raising Capital Guide

Hamilton Locke's Raising Capital Guide summarises the key components of each of the main secondary capital raising options available in the Australian public market.

This guide is specifically designed to assist market participants and the management team of ASX listed entities to understand the capital raising options available to them, and to set out some of the key considerations for determining the most appropriate capital raising method in a particular circumstance.

Read More

Mergers and Acquisitions

Mergers and Acquisitions, written by Nick Humphrey, is a plain English reference guide mergers and acquisitions and buyouts with step-by-step advice on the key legal, tax and structuring issues when implementing transactions.

This comprehensive text also includes chapters on equity funding, IPOs, distressed buyouts and preparing for exit.

Published by Wolters Kluwer, it can be ordered online:

Order here

Thank you.

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