Baker McKenzie.

LISTED COMPANIES GUIDE

FOR COMPANIES LISTED ON THE AUSTRALIAN SECURITIES EXCHANGE

2023

Listed Companies Guide

In Australia there are a myriad of legal requirements and obligations for directors, secretaries and executives of public listed companies to comply with under the Corporations Act and ASX Listing Rules.

This Guide is intended to help you navigate the requirements for public listed companies in Australia. You can also rely on Baker McKenzie's experienced and commercially pragmatic lawyers to provide assistance.

We hope that this Guide provides you with a broad overview of the applicable rules, regulations and issues applicable to public listed companies. It is not intended, however, to be an exhaustive analysis of all the legal requirements that may be relevant. If you are uncertain about any of the issues raised in this Guide or require further details or assistance, please do not hesitate to contact us.

Key partner contacts

SYDNEY

Cécile Baume
+61 2 8922 5130
cecile.baume@bakermckenzie.com

Tharani Dharmaraj
+61 2 8922 5477
tharani.dharmaraj@bakermckenzie.com

Bill Fuggle
+61 2 8922 5100
bill.fuggle@bakermckenzie.com

Steven Glanz
+61 2 8922 5205
steven.glanz@bakermckenzie.com

Kate Jefferson
+61 2 8922 5302
kate.jefferson@bakermckenzie.com

Ben McLaughlin
+61 2 8922 5342
ben.mclaughlin@bakermckenzie.com

Lawrence Mendes
+61 2 8922 5472
lawrence.mendes@bakermckenzie.com

Antony Rumboll
+61 2 8922 5102
antony.rumboll@bakermckenzie.com

Lance Sacks
+61 2 8922 5210
lance.sacks@bakermckenzie.com

Leo Vellis
+61 2 8922 5745
leo.vellis@bakermckenzie.com

MELBOURNE

Arthur Apos
+61 3 9617 4461
arthur.apos@bakermckenzie.com

Lewis Apostolou
+61 3 9617 4403
lewis.apostolou@bakermckenzie.com

Simon De Young
+61 3 9617 4370
simon.deyoung@bakermckenzie.com

Peter Ickeringill
+61 3 9617 4563
peter.ickeringill@bakermckenzie.com

Andrea Kennedy
+61 3 9617 4423
andrea.kennedy@bakermckenzie.com

Richard Lustig
+61 3 9617 4433
richard.lustig@bakermckenzie.com

Rick Troiano
+61 3 9617 4247
riccardo.troiano@bakermckenzie.com

BRISBANE

Jim Peterson
+61 7 3069 6207
jim.peterson@bakermckenzie.com

Derek Pocock
+61 7 3069 6234
derek.pocock@bakermckenzie.com

Contents

All dollar amounts stated in this Guide are Australian dollars.

The law is stated as at February 2023, unless otherwise indicated.

1 Introduction

1. Introduction

Public listed companies are highly regulated in Australia. The main source of regulation is the Corporations Act 2001 (Cth) (Corporations Act) and Australian Securities Exchange (ASX) Listing Rules (ASX Listing Rules), which are supplemented by Australian Securities and Investments Commission policy (ASIC Policy) and the ASX Corporate Governance Council's Corporate Governance Principles and Recommendations (ASX Corporate Governance Recommendations).

This Guide is designed to assist the directors, secretaries and executives of public companies listed on the ASX with understanding some of the legal requirements and obligations imposed on public listed companies and their officers under the Corporations Act and ASX Listing Rules. These legal requirements and obligations are supplemented by ASIC Policy and the ASX Corporate Governance Recommendations. While neither ASIC Policy nor the ASX Corporate Governance Recommendations are legally binding, they do provide guidance and assistance in the conduct of public listed companies' affairs. Further, under ASX Listing Rule 4.10.3, public listed companies are required in their annual reports to state the extent to which they have followed the ASX Corporate Governance Recommendations, identify any recommendations that have not been followed and give reasons for not following them. This is known as the "if not, why not" approach.

For ease of reference, this Guide only refers to public listed companies. However, it is possible for managed investment schemes to list on the ASX (most commonly in the form of a unit trust). The principles in this Guide generally also apply, with appropriate modifications, to ASX listed trusts. This Guide does not discuss corporate collective investment vehicles.

This Guide discusses the following matters relevant to public listed companies:

- Corporate governance
- Continuous disclosure
- Financial reporting
- Shareholder meetings
- Substantial shareholders and tracing ownership
- Capital raisings
- Major acquisitions and disposals
- Related party transactions
- Takeovers
- Insider trading

We hope that this Guide provides you with a broad overview of the rules, regulations and issues applicable to public companies listed on the ASX. It is not intended, however, to be an exhaustive analysis of all the legal requirements that may be relevant. If you are uncertain about any of the issues raised in this Guide or require further details or assistance, please do not hesitate to contact us.

2 Corporate Governance

2. Corporate Governance

The corporate governance requirements imposed by the Corporations Act and ASX Listing Rules or recommended by the ASX Corporate Governance Recommendations can be quite onerous and often complicated. Corporate governance charters, codes and policies can be useful tools for outlining and managing these requirements.

2.1. Board composition

A public company is required to have at least three directors at all times, two of whom must ordinarily reside in Australia. There is no maximum limit on the number of directors a public company may appoint under the Corporations Act or ASX Listing Rules, although it is common for a company's constitution to set a maximum number.

- s.201A(2) of the Corporations Act
- ASX Corporate Governance Recommendations 1.1, 1.4, 1.5, 2.1 to 2.6

The ASX Corporate Governance Recommendations suggest, in relation to boards of public listed companies, that:

- a majority of the directors should be independent;
- the chair should be an independent director;
- the roles of chair and Chief Executive Officer (CEO) should not be exercised by the same individual;
- the board should establish a nomination committee which has at least three members, a majority of whom are independent directors, and which is chaired by an independent director to, among other things, make recommendations for the appointment and re-election of directors;
- the company should have and disclose a board skills matrix setting out the mix of skills that the board currently has or is looking to achieve in its membership; and
- the company should have a program for inducting new directors and for periodically reviewing whether there is a need for existing directors to undertake professional development to maintain the skills and knowledge needed to perform their role as directors effectively.

The ASX Corporate Governance Council considers that a director of a public listed company should only be characterised and described as an independent director if they are free of any interest, position or relationship that might influence, or reasonably be perceived to influence, in a material respect their capacity to bring an independent judgement to bear on issues before the board and act in the best interests of the company as a whole rather than in the interests of an individual shareholder or other party.

The ASX Corporate Governance Recommendations provide a number of examples of interests, positions and relationships that might raise issues about the independence of a director, namely where the director:

- is, or has been within the last three years, employed in an executive capacity by the company or its controlled entities;
- receives performance-based remuneration (including options or performance rights) from, or participates in an employee incentive scheme of, the company;
- is, or has been within the last three years, in a material business relationship (for example, as a supplier, professional adviser, consultant or customer) with the company or its controlled entities, or is an officer of, or otherwise associated with, someone with such a relationship;

- is, represents, or is or has been within the last three years an officer or employee of, or professional adviser to, a substantial shareholder of the company;
- has close personal ties with any person who falls within any of the categories described above; or
- has been a director of the company for such a period (e.g. 10 years) that their independence from management and substantial shareholders may have been compromised.

Importantly, these examples are not definitive and therefore companies are free to decide that a director is independent despite the existence of such interests, positions or relationships. You should consider whether the above matters are appropriate for your company's circumstances and, in particular, focus on the appropriate level of "materiality" for relationships and contracts that may compromise the independence of a director.

ASX recommends that a public listed company should disclose:

- the names of the directors considered to be independent directors;
- an explanation of why the board is of the opinion that a particular interest, position or relationship does not compromise a director's independence; and
- the length of service of each director.

Checklist of corporate governance charters, codes and policies

Public listed companies typically adopt the following corporate governance charters, codes and policies.

- Board charter
- Nomination and governance committee charter
- Remuneration committee charter
- Audit and risk management committee charter
- Code of conduct
- Share trading policy
- Continuous disclosure policy
- Communications policy
- Diversity policy
- Anti-bribery and corruption policy
- Whistleblower policy

Most importantly, a company's charters, codes and policies should be tailored to suit its circumstances and regularly monitored to ensure compliance. It is worse to adopt charters, codes and policies but not follow them than not to adopt them at all.

ASX also recommends that the company secretary of a public listed company should be accountable directly to the board, through the chair, on all matters to do with the proper functioning of the board.

2.2. Appointment

In Australia, directors are generally appointed by the board. Typically, any such appointment to the board of a public listed company must be confirmed by an ordinary resolution passed at the company's next Annual General Meeting (AGM). A company's constitution can provide for different methods of appointment. However, public listed companies generally cannot entrench a right in their constitution or elsewhere for a particular shareholder, even a controlling shareholder, to maintain a nominee director on the board.

- s.201E of the Corporations Act
- ASX Listing Rule 14.4
- ASX Corporate Governance Recommendations 1.2, 1.3

If two or more directors are proposed to be appointed as directors of a public company at a general meeting, a separate resolution must be passed for each director seeking appointment unless the meeting resolves that the appointments may be voted on together and no votes are cast against that resolution.

ASX recommends that public listed companies:

- undertake appropriate checks before they appoint a director;
- set out the terms of a director's appointment in a formal letter of appointment, which can deal with matters such as attendance at board meetings, participation in board committees, fees, reimbursement of expenses and confidentiality requirements; and
- provide shareholders with all material information in their possession relevant to a decision on a resolution to elect or re-elect a director.

2.3. Rotation, retirement and removal

No director of a public listed company may hold office (without re-election) past the third AGM following the director's appointment or three years, whichever is the longer, and any director appointed to fill a casual vacancy or as an addition to the board must not hold office (without re-election) past the next AGM. These rules do not apply to the managing director of the company (provided there is not more than one).

A public listed company must hold an election of directors at each AGM, even where no director is required to stand for election or re-election (in which case at least one of the existing directors must be selected to stand for re-election).

- ASX Listing Rules 14.4, 14.5
- s.203D, s.203E of the Corporations Act

Public company directors cannot be removed by other directors under Australian law. However, any public company director may be removed by an ordinary resolution of shareholders regardless of any provision in the company's constitution or any other agreement with the director to the contrary.

If your company's CEO is also appointed as a director, you should consider including a clause in their employment contract to the effect that they are deemed to resign as a director of the company if they cease to be CEO.

2.4. Conflicts of interest

Material personal interest in the company's affairs

A director of any company who has a material personal interest in a matter that relates to the affairs of the company must give the other directors notice of the interest unless an exception applies, as below.

Directors of public companies with such material personal interests are also prohibited from being present while the matter is being considered at a board meeting and from voting on the matter unless:

- s.191, s.195, s.196 of the Corporations Act

- the directors who do not have a material personal interest in the matter pass a resolution that the interest should not disqualify the director from voting or being present; or
- the director is entitled to be present and vote under a declaration or order made by ASIC.

The interest must be personal in some way. The fact that a director is an employee or officer of the company or a subsidiary of the company does not of itself constitute a material personal interest in a contract, arrangement or other matter in relation to the company.

If a director does have a material personal interest in a matter being considered at a board meeting, it is prudent practice to record in the minutes of that meeting the time when the director left and re-entered the meeting.

When notice of material personal interests is not required

An interest does not need to be disclosed if it:

- arises because the director is a shareholder of the company and is held in common with the other shareholders of the company;
- arises in relation to the director's remuneration as a director of the company;
- relates to a contract the company is proposing to enter into that is conditional on shareholder approval;
- arises merely because the director is a guarantor or has given an indemnity or security for all or part of a loan to the company, or has a right of subrogation in relation to such a guarantee or indemnity;
- relates to a contract that insures the director against liabilities incurred as an officer of the company (provided the company or a related body corporate is not the insurer);
- relates to any payment by the company or a related body corporate in respect of an indemnity permitted under the Corporations Act or any contract relating to such an indemnity; or
- is in a contract with, or for the benefit of, or on behalf of, a related body corporate and arises merely because the director is a director of the related body corporate.

> ■ s.191 of the Corporations Act

2.5. Share trading by directors

Share trading policy

Public listed companies are required to have a trading policy which complies with a minimum set of restrictions set out in the ASX Listing Rules. The trading policy must apply to all directors, and (at a minimum) to other key management personnel.

> ■ ASX Listing Rules 12.9, 12.12, 19.12
>
> ■ ASX Guidance Note 27

ASX requires that the trading policy specifies "closed periods" during which trading is restricted, although public listed companies have flexibility to determine how those periods are defined and whether any exceptions apply. A common exception may be participation in a dividend reinvestment plan on the same terms as other shareholders.

Disclosure of trading by directors

Public listed companies must disclose the "notifiable interests" of their directors to ASX as at the following times:

- the date that the company is admitted to the Official List;
- the date that a director is appointed to the board;
- the date of any change to a notifiable interest (no matter how small – even buying a single share will trigger the requirement); and
- the date that a director ceases to be a director.

- s.205G of the Corporations Act
- ASX Listing Rules 3.19A, 3.19B, 19.12
- ASX Appendices 3X, 3Y, 3Z
- ASX Guidance Note 22

ASX must be notified within five business days of the relevant date (and in the form of an Appendix 3X, 3Y or 3Z to the ASX Listing Rules, as applicable).

Additional disclosure is required if the trading occurs during a closed period, including whether the director sought and obtained prior written clearance in accordance with the policy.

A "notifiable interest" in relation to a company is defined as:

- any "relevant interest" (which includes direct holdings and a wide range of indirect interests) in securities of the company or a related body corporate; and
- any interests in contracts to which the director is a party or under which the director is entitled to a benefit, and that confer a right to call for or deliver shares in, debentures of, or interests in a managed investment scheme made available by, the company or a related body corporate,

and in relation to a trust is defined as any "relevant interest" in securities of the trust.

The obligation to notify ASX of directors' notifiable interests is imposed on the public listed company itself. Accordingly, the ASX Listing Rules require the company to make such arrangements with a director as are necessary to ensure that the director discloses to the company all the information required by the company to fulfil this disclosure obligation within the time required. If, however, despite the existence of such arrangements, a director fails to disclose the necessary information to the company, then the company will not be in breach of this disclosure obligation (provided the company takes action to ensure directors understand their obligations and make the required disclosure). ASX has issued a pro forma letter agreement between a company and a director to assist companies in implementing the requisite arrangements with directors, but the company is free to negotiate its own arrangements.

A corresponding obligation to disclose directors' notifiable interests to ASX is imposed on the directors themselves under the Corporations Act. However, as the obligation is virtually identical to the one imposed on public listed companies under the ASX Listing Rules, ASIC exempts directors under ASIC Corporations (Disclosure of Directors' Interests) Instrument 2016/881 from the requirement to disclose their notifiable interests under the Corporations Act if the company complies with the corresponding obligation under the ASX Listing Rules.

The rules regarding disclosure of directors' notifiable interests are designed to promote investor confidence by making share trading by "insiders" transparent to the public. Public listed companies' share trading policies typically apply to directors, officers and employees at a minimum but may also extend to any other persons who may possess inside information from time to time (such as advisers and consultants). The usual form of share trading policy permits buying or selling of the company's shares only during specified trading windows, such as a one month period after the release of full-year or half-year financial results.

Further information on the prohibition against insider trading is provided in section 11 below.

2.6. Board meetings

The basic rules for board meetings of public listed companies are the same as those for unlisted proprietary companies. Any director may call a meeting of the board of directors by giving reasonable notice to each other director (subject to any notice period specified in the company's constitution), and the board meeting may be called or held using any technology consented to by all the directors.

- s.248C, s.248D of the Corporations Act
- ASX Corporate Governance Recommendation 1.2

There are no mandatory requirements for the frequency of board meetings or the minimum number of board meetings to be held over any given time. However, ASX expects directors to specifically acknowledge to the company that they will have sufficient time to fulfil their responsibilities as a director.

2.7. Board charter and diversity policy

ASX recommends that a public listed company should have and disclose a board charter setting out the respective roles and responsibilities of its board and management, and those matters reserved to the board and those delegated to management.

ASX also recommends that a public listed company should have and disclose a diversity policy and, through its board or a committee of the board, set measurable objectives for achieving gender diversity in the composition of its board, senior executives and workforce generally.

- ASX Corporate Governance Recommendations 1.1, 1.5

ASX also recommends that a public listed company should disclose in relation to each reporting period the measurable objectives set for that period to achieve gender diversity and its progress towards achieving them, and either:

- "the respective proportions of men and women" on the board, in senior executive positions and across the whole workforce (including how the company has defined "senior executive" for these purposes); or
- if the company is a "relevant employer" under the Workplace Gender Equality Act 2012 (Cth), the company's most recent "Gender Equality Indicators", as defined in and published under that Act.

If a public listed company was in the S&P/ASX 300 Index at the commencement of the reporting period, ASX recommends that the measurable objective for achieving gender diversity in the composition of its board should be to have "not less than 30% of its directors of each gender" within a specified period.

2.8. A lawful, ethical and responsible culture

Shareholders' interests are paramount under Australian law relating to corporate governance. Accordingly, corporate governance mechanisms have traditionally focused on the relationship between management and shareholders, with other stakeholders (such as employees, clients, customers, consumers and the community generally) obtaining benefits and protection, where necessary, through specific legislation (such as insolvency, trade practices, consumer protection and privacy laws, occupational health and safety requirements, and environmental and pollution controls).

There is growing recognition, however, that being a "good corporate citizen" means more than just compliance with strict legal obligations and involves concepts of fairness, ethical behaviour and good reputation. In this environment, boards of public listed companies have the responsibility to "set the tone and standards" of the company and to oversee adherence to such standards.

Statement of values, code of conduct and anti-bribery and corruption policy

In this context, ASX recommends that a public listed company should instil and continually reinforce a culture across the organisation of acting lawfully, ethically and responsibly, and in particular should have and disclose:

- a statement of its values, that is, the guiding principles and norms that define what type of organisation it aspires to be and what it requires from its directors, senior executives and employees to achieve that aspiration;

> ■ ASX Corporate Governance Recommendations 3.1, 3.2, 3.4

- a code of conduct for its directors, senior executives and employees. All employees must receive appropriate training on their obligations under the code, and it must be reinforced by taking appropriate and proportionate disciplinary action against those who breach it; and
- an anti-bribery and corruption policy, which can be a standalone policy or form part of the code of conduct.

ASX has provided suggestions for the content of a code of conduct and anti-bribery and corruption policy to assist companies in developing these documents.

Whistleblower policy

Under the Corporations Act, a public company must have a whistleblower policy which is available to its officers and employees and includes information such as the protections available to whistleblowers, how to make disclosures that qualify for protection, how the company will investigate such disclosures, and how the company will support whistleblowers.

> ■ s.1317AI of the Corporations Act
> ■ ASIC Regulatory Guide 270
> ■ ASX Corporate Governance Recommendation 3.3

ASIC Regulatory Guide 270 provides additional guidance on the matters that must be addressed by a company's whistleblower policy, together with examples of content which companies can adapt to their circumstances and further non-mandatory guidance on establishing, implementing and maintaining a whistleblower policy.

2.9. Communication with shareholders

ASX recommends that a public listed company should provide information about itself and its governance to investors via its website. A public listed company's website should have a "corporate governance" landing page from where all relevant corporate governance information can be accessed.

ASX also recommends that public listed companies:

- give shareholders the option to receive communications from, and send communications to, the company and its share registry electronically;

- have an investor relations program that facilitates effective two-way communication with investors; and
- disclose how they facilitate and encourage participation at meetings of shareholders.

- ASX Corporate Governance Recommendations 6.1, 6.2, 6.3, 6.5

ASX notes that, for smaller companies, an investor relations program may involve little more than actively engaging with shareholders at the AGM, meeting with them upon request and responding to any enquiries they may make from time to time. For larger companies, it is likely to involve a detailed program of scheduled and ad hoc interactions with institutional investors, retail investor groups, analysts, proxy advisers and the financial media.

2.10. Remuneration and performance

The directors' report for a financial year (see section 4 below) must include a remuneration report disclosing certain prescribed details in relation to the remuneration of the key management personnel of the company. For these purposes, "key management personnel" is defined in the accounting standards as those persons having authority and responsibility for planning, directing and controlling the activities of the company, directly or indirectly, including any director (whether executive or otherwise) of that company. A more detailed description of this report is included in the Financial Reports section at the end of this Guide.

- s.250R, s.250U, s.250V, s.300A of the Corporations Act
- ASX Listing Rule 12.8
- ASX Corporate Governance Recommendations 1.6, 1.7, 2.1, 8.1, 8.2, 8.3

A public listed company is also obliged to put a resolution that the remuneration report be adopted by a vote at the company's AGM. However, the vote is advisory only and does not bind the directors or the company. Under the "two strikes" provisions in the Corporations Act, if 25% or more of votes cast on the non-binding resolution are cast against the adoption of the remuneration report at two consecutive AGMs, shareholders will be required to vote at the second of those AGMs on a "spill resolution". The spill resolution puts the question to shareholders of whether another general meeting is to be held (within 90 days) at which all of the company's directors (other than the managing director) must go up for re-election. Key management personnel whose remuneration is included in the remuneration report, and their closely related parties, are restricted from voting on the remuneration report and on the spill resolution.

ASX notes that a public listed company should have a formal, rigorous and transparent process for developing its remuneration policy and for fixing the remuneration packages of its directors and senior executives. To this end, ASX recommends that a public listed company should separately disclose its policies and practices regarding the remuneration of non-executive directors and the remuneration of executive directors and other senior executives.

ASX also recommends that boards of public listed companies establish:

- a nomination committee comprised of at least three members, a majority of whom are independent directors, and which is chaired by an independent director, which has responsibility for, among other things, developing a process for evaluating the performance of the board, its committees and individual directors; and
- a remuneration committee comprised of at least three members, a majority of whom are independent directors, and which is chaired by an independent director, to review and make recommendations on senior executive remuneration packages and incentive schemes. (If the public listed company is

included in the S&P/ASX 300 Index, it is mandatory to have a remuneration committee comprised solely of non-executive directors.)

Public listed companies which have an equity-based remuneration scheme should have and disclose a policy on whether participants are permitted to enter into transactions which limit the economic risk of participating in the scheme.

ASX also recommends that a public listed company should:

- have and disclose a process for periodically evaluating the performance of the board, its committees, and individual directors, and for evaluating the performance of its senior executives at least once every reporting period; and
- disclose, for each reporting period, whether a performance evaluation has been undertaken in accordance with that process during or in respect of that period.

2.11. Audit and risk management

It is part of the board's role to oversee the establishment and implementation of an internal audit and risk management system and to review the effectiveness of that system at least annually.

Audit and risk committee

ASX makes a number of recommendations on audit and risk management for public listed companies, including that:

- the board establish an audit committee which has at least three members, all of whom are non-executive directors and a majority of whom are independent directors, and which is chaired by an independent director who is not the chair of the board;
- the board establish a risk management committee to oversee risk which has at least three members, a majority of whom are independent directors, and which is chaired by an independent director;
- the board or a committee of the board should review the company's risk management framework at least annually to satisfy itself that it continues to be sound and that the company is operating with due regard to the risk appetite set by the board, and disclose, in relation to each reporting period, whether such a review has taken place; and
- the company should disclose, if it has an internal audit function, how the function is structured and what role it performs or, if it does not have an internal audit function, the processes it employs for evaluating and continually improving the effectiveness of its governance, risk management and internal control processes.

> ■ ASX Listing Rules 12.7, 1.1 Condition 17
> ■ ASX Corporate Governance Recommendations 4.1, 7.1 to 7.3

Companies in the S&P All Ordinaries Index must have an audit committee and any company in the S&P/ASX 300 Index must also comply with the ASX Corporate Governance Recommendations (as above) in relation to the composition and operation of the audit committee.

Environmental and social risks

ASX recommends that a public listed company should disclose whether it has any material exposure to environmental or social risks and, if it does, how it manages or intends to manage those risks. If public listed companies believe they do not have any material exposure to such risks, ASX encourages them to consider carefully their basis for that belief and to benchmark their disclosures in this regard against those made by their peers.

- ASX Corporate Governance Recommendation 7.4

In particular, ASX encourages public listed companies to consider whether they have a material exposure to climate change risk by reference to the recommendations of the Financial Stability Board's Task Force on Climate-related Financial Disclosures (TCFD) and, if they do, to consider making the disclosures recommended by the TCFD.

Integrity of corporate reports and audit

CEOs and CFOs of public listed companies are also required under the Corporations Act to give the directors a declaration each year prior to the lodgement of the annual report that:

- the company's financial records for the financial year have been properly maintained as required under the Corporations Act;
- the financial statements and notes for the financial year comply with the accounting standards; and
- the financial statements and notes for the financial year give a true and fair view of the financial position and performance of the company.

- s.250RA, s.250T, s.286, s.295A of the Corporations Act
- ASX Corporate Governance Recommendations 4.2, 4.3

In addition, ASX recommends that the board of a public listed company should receive a similar declaration from the CEO and CFO before the board approves the company's financial statements for any financial period, not just the full year, with an additional declaration from the CEO and CFO that their opinion has been formed on the basis of a sound system of risk management and internal control which is operating effectively.

ASX also recommends that a public listed company should disclose its process to verify the integrity of any periodic corporate report it releases to the market that is not audited or reviewed by an external auditor.

Under the Corporations Act, a public listed company's external auditor must attend its AGM and be available to answer questions from shareholders relevant to the audit.

3 Continuous Disclosure

3. Continuous Disclosure

Immediate disclosure to ASX of price sensitive events and developments is a cornerstone regulatory requirement for public listed companies and a fundamental measure in protecting investors. Accordingly, the consequences of failing to comply with the continuous disclosure regime can be significant.

3.1. The continuous disclosure rule

Public listed companies are required to immediately disclose to ASX information concerning the company that a reasonable person would expect to have a material effect on the price or value of the company's securities as soon as the company is or becomes aware of the information. In this context, "immediately" does not mean instantaneously but rather "promptly and without delay". Accordingly, ASX does not consider it acceptable for the release of such information to be delayed until the release of a company's periodic financial report or until the release of the information has been considered by the board at a regularly scheduled meeting.

- ASX Listing Rules 3.1, 19.12
- ASX Guidance Note 8
- ASX Corporate Governance Recommendation 5.1
- s.674, s.674A of the Corporations Act

A company will be deemed to be "aware" of information if a director or other officer has, or ought reasonably to have, come into possession of the information in the course of the performance of their duties as an officer of the company. The phrase "ought reasonably to have come into possession of" effectively deems a company to be aware of information if it is known by anyone within the company and it is of such significance that it ought reasonably to have been brought to the attention of an officer of the company in the normal course of performing their duties as an officer. Hence public listed companies should establish policies and procedures to ensure that price sensitive information is immediately passed up the chain to directors and executive officers – it will not be sufficient for directors and executives to claim they "didn't know" about the relevant event or development.

ASX recommends that a public listed company should have and disclose a written continuous disclosure policy. ASX suggests that the policy should address:

- the roles and responsibilities of directors, officers and employees in complying with the company's disclosure obligations;
- the company's processes to review and authorise market announcements;
- the importance of safeguarding the confidentiality of corporate information to avoid premature disclosure;
- the company's policy on media contact and comment;
- the potential disclosure issues associated with analyst briefings and responses to shareholder questions; and
- the company's processes for responding to or avoiding the emergence of a false market in its securities.

3.2. Exceptions to disclosure

Public listed companies are not required to disclose price sensitive information if:

- one or more of the following applies:
  - it would be a breach of a law to disclose the information;
  - the information concerns an incomplete proposal or negotiation;
  - the information comprises matters of supposition or is insufficiently definite to warrant disclosure;
  - the information is generated for internal management purposes; or
  - the information is a trade secret;
- the information is confidential and ASX has not formed the view that the information has ceased to be confidential; and
- a reasonable person would not expect the information to be disclosed.

> - ASX Listing Rules 3.1A
> - ASX Guidance Note 8

All three limbs set out above must be satisfied for the exception to apply. If any one limb ceases to be satisfied, the relevant information must be disclosed.

This "confidentiality carve-out" from the continuous disclosure rule highlights the importance of entering into confidentiality agreements when negotiating sensitive commercial deals.

3.3. When and what to disclose

Disclose to ASX first

If a company does publicly disclose price sensitive information, it is important that the information is disclosed to ASX first. If information is disclosed to a foreign stock exchange, it must be disclosed simultaneously to ASX.

Companies can fall into trouble at analyst briefings by disclosing price sensitive information to analysts before disclosing it to the market, and ASX places particular focus on this area in monitoring compliance with the continuous disclosure regime. Companies have been fined by ASIC for giving earnings guidance to analysts before releasing it to ASX. Accordingly, ASX recommends that, if a public listed company gives a new and substantive investor or analyst presentation, the presentation materials should be released to the market before the presentation, regardless of whether the presentation contains new price sensitive information.

> - ASX Listing Rule 15.7
> - ASX Guidance Note 8
> - ASX Corporate Governance Recommendations 5.3, 6.1

It is also good practice to post announcements on the company's website as and when they are made to ASX.

Examples of information requiring disclosure

It can be very difficult to determine when information requires disclosure and it is often a matter of fine judgement as to what precisely should be disclosed. As a general rule, and particularly given the consequences for failing to comply with the continuous disclosure regime (see below), we recommend that public listed companies err on the side of caution and, if in doubt, seek legal advice. Practical examples of events and developments requiring disclosure are set out in the ASX Listing Rules themselves and include:

- a transaction that will lead to a significant change in the nature or scale of activities;
- a material mineral or hydrocarbon discovery;
- a material acquisition or disposal;
- the granting or withdrawal of a material licence;
- the entry into, variation or termination of a material agreement;
- becoming a plaintiff or defendant in a material lawsuit;
- the fact that the company's earnings will be materially different from market expectations (see further discussion below);
- the appointment of a liquidator, administrator or receiver;
- the commission of an event of default under, or other event entitling a financier to terminate, a material financing facility;
- under subscriptions or over subscriptions to an issue of securities;
- giving or receiving a notice of intention to make a takeover; and
- any rating applied by a rating agency to a company or its securities or any change to such a rating.

> - ASX Listing Rules 3.1, 19.12
> - ASX Guidance Note 8

For these purposes, "information" extends beyond pure matters of fact and includes matters of opinion, supposition and intention.

Updating forecasts

If a public listed company has disclosed a forecast in a prospectus, analyst briefing or company announcement, it is under an obligation to update the forecast as and when material changes occur. ASX suggests that companies apply the materiality guidance that formerly appeared in the Australian Accounting Standards, that is (unless there is evidence or convincing argument to the contrary):

- treat an expected variation in earnings compared to its published guidance equal to or greater than 10% as material and presume that its guidance needs updating; and
- treat an expected variation in earnings compared to its published guidance equal to or less than 5% as not being material and presume that its guidance therefore does not need updating.

> - ASX Guidance Note 8

For expected variations between 5% and 10%, the company needs to form a judgement as to whether or not it is material. However, ASX suggests that companies in the ASX 300, or which normally have very stable or predictable earnings, should consider using a 5% materiality threshold.

Further, even where a company has not disclosed earnings guidance, if it becomes aware that its earnings for the current reporting period will differ from market expectations in such a magnitude that a reasonable person would expect it to have a material effect on the price or value of the company's securities (known as a "market sensitive earnings surprise") the company must notify the market of that fact. For a company covered by sell-side analysts, ASX recommends carefully considering notifying the market if the company's forecast earnings differ from market expectations by 15% or more. Market expectations in this context could be informed by sell-side analyst forecasts, earnings results for a prior corresponding period, the company's outlook statements, the company's other disclosures over the reporting period, and market-wide or sector-wide events that can reasonably be expected to affect the company.

Companies should also bear in mind that they are required under ASX Listing Rule 4.3D to tell ASX immediately of circumstances materially affecting information contained in a preliminary final report (see section 4 below).

Approval of ASX announcements

- ASX Guidance Note 8
- ASX Corporate Governance Recommendation 5.2

Announcements regarding significant matters may need to be considered and approved by the company's board of directors before being released to ASX. In light of the requirement that announcements of price sensitive information be issued immediately, ASX suggests that companies have suitable arrangements in place to enable this to occur (which may include having a disclosure committee that can meet on short notice and a template letter for requesting a trading halt).

Whether or not an announcement is approved in advance by the board, ASX recommends that the board should receive copies of all material market announcements promptly after they have been made, to ensure it has timely visibility of the nature, quality and frequency of market disclosures.

3.4. Media rumours and market speculation

In addition to the continuous disclosure rule, public listed companies are required to immediately give ASX any information which ASX asks for in order to correct or prevent what ASX considers to be a false market in the company's securities.

- ASX Listing Rule 3.1B
- ASX Guidance Note 8

A company is required to disclose information under the false market rule even if that information falls within the "confidentiality carve-out" from the continuous disclosure rule. Further, the test under this rule is not objective. Rather, it is simply whether ASX considers that there is or is likely to be a false market. ASX queries are usually triggered by rumours or speculation in the financial press which appear to have had an effect on the company's share price, and it is irrelevant whether the rumour or comment giving rise to the false market is true or false.

There was some concern when this rule was first introduced that it may create scope for "mischief-making" by competitors or journalists. ASX will, however, usually consult with the company about any concern that a false market may exist before taking any action under the rule. Further, if there is an unexpected sharp rise in a company's share price, ASX will issue the company with what is colloquially known as a "speeding ticket", which in essence requires the company to provide further details regarding the rumour or speculation and to confirm whether or not it is accurate. The company's response is disclosed by ASX to the market.

3.5. Trading halts and suspensions

If a public listed company is obliged to disclose price sensitive information but is not able to do so without delay, or is concerned that a preliminary announcement will not be sufficient to properly inform the market, it can ask ASX for a trading halt for up to two days or, if necessary, to suspend trading in its shares. Trading halts are specifically designed to protect companies from premature disclosure where more detailed disclosure is imminent, particularly if there is speculation in the market. Trading halts can also be a useful tool for managing an unexplained price and/or volume change until an announcement can be made.

- ASX Guidance Note 8

3.6. Consequences of failure to comply

ASX's enforcement powers

ASX has a range of enforcement powers it can exercise if a public listed company breaches the continuous disclosure regime, including the power to suspend the company's shares from quotation or, if ASX consider the breach egregious, to terminate the company's listing.

- ASX Listing Rules 17.3, 17.12
- ASX Guidance Note 8

Corporations Act offences

The Corporations Act reinforces the obligation under the ASX Listing Rules to comply with the continuous disclosure regime by creating a criminal offence for a public listed company's failure to comply with that regime where the information required to be disclosed to ASX:

- is not generally available; and
- is information that a reasonable person would expect, if it were generally available, to have a material effect on the price or value of the company's securities.

- s.674 of the Corporations Act
- s.11.2 of the Criminal Code (Cth)

Any other person (such as a director or executive officer) who intentionally aided, abetted, counselled or procured the company's breach may be guilty of the same offence.

Civil penalties

Rather than instituting a criminal prosecution for breach of the Corporations Act, ASIC also has the power to institute a civil suit, seeking a civil penalty, where the information required to be disclosed to ASX:

- is not generally available; and
- the company knows, or is reckless or negligent with respect to whether, the information would, if it were generally available, have a material effect on the price or value of the company's securities.

- s.674A, Part 9.4B of the Corporations Act

Anyone involved in the contravention (such as directors and executive officers) may also face civil liability. The maximum civil penalties which may be imposed for a breach of the continuous disclosure regime are:[1]

- for a company, the greatest of (a) A$13.75 million, (b) three times the benefit derived and detriment avoided because of the breach, or (c) 10% of the company's turnover for the 12 months up to the month of the breach to a maximum of A$687.5 million; and
- for an individual, the greater of A$1.375 million or three times the benefit derived and detriment avoided because of the breach.

In addition, a court may order a company to relinquish an amount equal to the benefit derived and detriment avoided because of the breach, and to compensate other persons for damage suffered as a result of the breach.

Importantly for individuals a due diligence defence to civil liability is available if they can prove that:

- they took all reasonable steps to ensure that the relevant company complied with the continuous disclosure rule; and
- after doing so, they believed on reasonable grounds that the company was in compliance with the continuous disclosure rule.

In addition, a court has discretion to relieve a person from civil liability for a continuous disclosure breach if it appears to the court that the person has acted honestly and ought fairly to be excused.

Hence it has become even more important that public listed companies establish, monitor compliance with, and educate their employees on, an appropriate continuous disclosure program to help ensure that a due diligence defence or other relief is available.

Infringement notices

- Part 9.4AA of the Corporations Act

In addition, ASIC has the power to issue an infringement notice to a public listed company (for up to A$100,000, depending on the size of the company) if ASIC has reasonable grounds to believe that it has breached the continuous disclosure rule. While the company is not obliged to pay the fine, if it does pay it will not be subject to certain further action (excluding, for example, proceedings for compensation). Companies should note, however, that ASIC may publicise the fact that the fine has been paid. If the company does not pay the fine, ASIC may bring civil proceedings in relation to the same alleged contravention seeking civil penalties (as described above) and publish a notice that it is bringing civil proceedings.

Under this infringement notice regime, public listed companies may be forced to make the difficult choice of accepting a penalty for commercial reasons while protesting their innocence. Again, this highlights the need to ensure an effective continuous disclosure program is implemented and monitored.

[1] The monetary amounts in this paragraph will increase due to indexation on 1 July 2023.

3.7. Specific disclosure obligations

The ASX Listing Rules require immediate specific disclosure of a range of particular matters. These include various corporate actions described below:

- ASX Listing Rules, Chapter 3

– details of a proposed issue of securities or an actual issue of securities;

– various other security-related matters such as buy-back details, capital reorganisations, security issues or cessation of securities issued under an employee incentive scheme, conversion of convertible securities, calls on partly paid shares, disclosure document (prospectus) lodgements, forthcoming releases of securities from escrow restrictions, and changes to the terms of options;

– certain matters in relation to a takeover bid for or by the company;

– the outcome of resolutions put to shareholder meetings;

– the contents of any prepared announcement, including any prepared address by the chair or CEO that will be delivered at a shareholder meeting (to be given to ASX no later than the start of the meeting);

– a change of the address, telephone number or fax number of the company's registered office;

– a change of address of the company's share registry or proposal to cease operating a register in Australia;

– a change of chair, director, CEO, CFO, secretary or auditor;

– the material terms of any employment, service or consultancy agreement with the CEO, any director or related party of any of them, and any material variation to such an agreement. Some exceptions apply;

– a copy of any document which the company sends to shareholders;

– any substantial shareholding notice which the company receives from a shareholder;

– details of meetings requisitioned or resolutions proposed by shareholders;

– if the company is listed on an overseas stock exchange, any financial documents given to the overseas stock exchange;

– directors' disclosure of shareholdings at the time a director is appointed, their interest changes or the director ceases;

– when a record date (for a corporate action such as a capital raising) is determined; and

– if the company decides to pay a dividend or distribution, to cancel, defer or reduce an announced dividend or distribution, or not to pay a dividend or distribution in respect of a period if it has announced an intention to do so or has done so in respect of the prior corresponding period.

4 Financial Reporting

4. Financial Reporting

Public listed companies are subject to annual, half-yearly and, in certain circumstances, quarterly reporting requirements under the Corporations Act and ASX Listing Rules which focus on financial results and integrity.

4.1. Periodic reports at a glance

Public listed companies are required to release periodic reports at various times throughout the financial year.

A brief description of the content requirements prescribed under the Corporations Act and ASX Listing Rules for each type of report, as well as a timeline of public listed companies' financial reporting obligations, are included at the end of this Guide.

Periodic reports

- Financial statements (annual and half-yearly)
- Directors' report (annual and half-yearly)
- Auditor's report (annual and half-yearly)
- Preliminary final report
- Annual report, including remuneration report and corporate governance statement
- Half-yearly report
- Quarterly report (only for some types of companies)

4.2. Annual reporting obligations

Public listed companies must:

- prepare financial statements and a directors' report (which includes a remuneration report) in respect of each financial year, have the financial statements audited and obtain an auditor's report;

  - s.292, s.295, s.300A, s.301 of the Corporations Act

- give ASX a preliminary final report, which is essentially the full-year financial statements but which need not have been audited, within two months after the end of the financial year;
- lodge the audited financial statements, directors' report and auditor's report with ASX within three months after the end of the financial year; and

  - ASX Listing Rules 4.3A, 4.3B, 4.5.1, 4.7, 4.10.3
  - ASIC Corporations (Electronic Lodgment of Financial Reports) Instrument 2016/181

- within four months after the end of the financial year, and at least 21 days before the next AGM, send the annual report (which includes the financial statements, directors' and auditor's reports and corporate governance statement) or a concise report to shareholders. The report may be sent to shareholders physically or electronically, or by sending them sufficient information (physically or electronically) to allow them to access the report electronically, or by making the report readily available on a website. Shareholders may elect to receive a physical or electronic report, a full report rather than a concise report, or no report at all.

  - s.314, s.315, s.316, s.319, Division 2 of Part 1.2AA of the Corporations Act

The obligation to prepare each of the reports described above is imposed on the company itself with the exception of the auditor's report. While public listed companies must obtain an auditor's report, the obligation to prepare and satisfy the content requirements of that report is a matter for each company's auditor.

The information to be included in the annual reports required to be prepared by a public listed company and sent to shareholders under the Corporations Act (that is, the financial report and directors' report) overlaps in some respects with the information requirements under the ASX Listing Rules. It is usual to prepare a single report (known simply as the annual report) complying with both the Corporations Act and ASX Listing Rules requirements to reduce compliance costs.

4.3. Half-yearly reporting obligations

Public listed companies must:

- prepare financial statements and a directors' report for the first six months of their financial year (i.e. their half-year), have the half-year financial statements audited or "reviewed" (see below) by the company's auditor and obtain an auditor's report; and
- lodge the half-year financial statements, directors' report and auditor's report with ASX within two months after the end of the half-year.

- ASX Listing Rules 4.2A, 4.2B
- s.302, s.320 of the Corporations Act
- ASIC Corporations (Electronic Lodgment of Financial Reports) Instrument 2016/181

A "review" is less onerous than an audit. An audit requires the auditor to positively state whether a company's financial report is in accordance with the Corporations Act, whereas a review merely requires the auditor to report on whether the auditor became aware of any matter in the course of the review that makes the auditor believe the financial report does not comply with the Corporations Act. Hence a review only provides a "negative", not a positive, assurance as to compliance with the Corporations Act.

There is no requirement to send any of the half-year reports described above to shareholders, although many companies do so under their shareholder communication policies.

4.4. Quarterly reporting obligations

The ASX Listing Rules also require certain public listed companies to prepare quarterly cash flow and activity reports. Essentially this obligation applies to "cash boxes" (that is, a company, other than a listed investment company, with half or more of its assets in cash or in a form readily convertible to cash) and mining and oil and gas exploration companies.

- ASX Listing Rules 4.7B, 4.7C, 5.3 to 5.5

Quarterly cash flow reports must be lodged with ASX within one month after the end of each quarter of the company's financial year. Again, there is no requirement to send quarterly cash flow reports to shareholders.

5 Shareholder Meetings

5. Shareholder Meetings

The AGM is a major event on a public listed company's calendar for the year and provides a key opportunity for shareholders to gain information about the company. Hence it is important for companies to understand the requirements for the calling and conduct of shareholder meetings, including the AGM.

5.1. Shareholder participation

Shareholders of public listed companies do not have any general right to access the company's information. Shareholders can gain access to certain limited information, such as a company's constitution and statutory registers, but these rights do not extend beyond what the general public is entitled to access in any case. Shareholder meetings, particularly AGMs, therefore provide key opportunities for public listed companies to provide information to shareholders about their affairs and companies should consider how to give shareholders a reasonable opportunity for informed and effective participation in such meetings. In particular, ASX encourages companies to:

- disclose how they facilitate and encourage participation at meetings of shareholders, including considering how technology can facilitate participation for those unable to be physically present; and
- consider electronic communication as a means of effectively communicating with shareholders.

- ASX Corporate Governance Recommendations 6.3, 6.4
- s.250PA, s.250S, s.250SA, s.250T of the Corporations Act

The Corporations Act also prescribes certain shareholder participation rights in a public listed company's AGM as follows:

- the chair of the AGM must allow shareholders as a whole a reasonable opportunity to ask questions about or make comments on the management of the company;
- the chair of the AGM must allow shareholders as a whole a reasonable opportunity to ask questions about or make comments on the remuneration report (discussed in section 2.10 above); and
- shareholders may submit written questions to the company's auditor relating to the content of the auditor's report and the conduct of the audit, and the chair of the AGM must allow shareholders as a whole a reasonable opportunity to ask the auditor questions relevant to the conduct of the audit, the preparation and content of the auditor's report, the company's accounting policies and the auditor's independence.

5.2. Hybrid and virtual meetings

- s.249R, s.249S of the Corporations Act

"Hybrid" shareholder meetings, which combine a physical meeting of shareholders at one or more locations with other shareholders participating online, have long been permitted by the Corporations Act, subject to any restrictions in a company's constitution. The legal status of a "virtual" meeting, where all participants attend via technology with no physical meeting place, has previously been unclear due to the Corporations Act requirement for the meeting to be held at a "place".

In addition to hybrid meetings, the Corporations Act now permits wholly virtual shareholder meetings provided they are expressly required or permitted by the company's constitution.

All meetings must allow shareholders as a whole a reasonable opportunity to participate. For hybrid and virtual meetings, this includes allowing shareholders as a whole to exercise orally and in writing their rights to ask questions and make comments.

5.3. AGMs – timing and preparation

A public company must hold an AGM each year, within five months of the end of its financial year (although this may be extended upon application to ASIC, or by ASIC class relief in exceptional circumstances).

- s.250N, s.250P, s.253T of the Corporations Act

Companies should ensure they adequately prepare for their AGMs.

Preparation for AGMs

- Ensure the notice of meeting complies with the relevant requirements (including all content requirements and voting exclusion statements required under the ASX Listing Rules)
- Draft a script for the chair of the meeting
- Draft the speeches to be given by the chair and CEO (which will need to be released to ASX prior to the meeting)
- Prepare a question and answer paper setting out responses to issues that may or will likely arise
- Have the company's share registrar attend the meeting with shareholder details in case a poll needs to be conducted on a resolution

5.4. Calling a shareholder meeting

Shareholder meetings are usually called by the directors. However, they can also be requisitioned, and held at the cost of the company, by shareholders with at least 5% of the votes that may be cast at the meeting. Further, shareholders with at least 5% of the votes that may be cast at the meeting may arrange to hold a shareholder meeting at their own expense.

- s.249CA, s.249D, s.249F of the Corporations Act

5.5. Notices of meeting

At least 28 days' written notice of a meeting must be given to each shareholder entitled to vote at the meeting and each director. The notice must also be sent to ASX.

Notices of meeting must be worded and presented in a clear, concise and effective manner, and must include the following items:

- s.249HA, s.249J, s.249L, s250BA, s.250R of the Corporations Act
- ASX Listing Rules 3.17, 14.2, 14.5, 14.11

- the date, time and place (if any) for the meeting (and sufficient information about any technology to be used in holding the meeting);
- details of the proposed resolutions;
- if the meeting is an AGM, a proposed resolution to adopt the remuneration report and a proposed resolution for the election or re-election of at least one director;
- a proxy form and a statement of the rights of shareholders to appoint a proxy;
- an address for the receipt of proxy appointments and proxy appointment authorities and/or an electronic address or other means of electronic communication for that purpose; and
- a voting exclusion statement if required by the ASX Listing Rules, indicating that a particular person and their associates may not vote in favour of a specified resolution. Generally speaking, the ASX Listing Rules require a voting exclusion statement where a person has an interest in the subject of the resolution (for example, a person who is a party to a transaction to be approved in the meeting).

Notices of meeting may be sent to shareholders physically or electronically, or by sending them sufficient information (physically or electronically) to allow them to access the notice electronically. Shareholders may elect to receive a physical or electronic notice.

- Division 2 of Part 1.2AA of the Corporations Act

5.6. Voting

A public listed company's constitution must comply with the ASX Listing Rules, which reflect the principle of "one share, one vote". This means that public listed companies cannot provide for any maintenance of control by a dominant shareholder, such as the entrenchment of veto powers or super voting rights.

Under the Corporations Act, resolutions of shareholders of public listed companies must be decided on a poll, and not a show of hands, if set out in the notice of meeting or proposed by members. This applies despite anything in the company's constitution. This reinforces ASX's requirement for all Listing Rule resolutions to be decided by a poll, and its recommendation that all other substantive (i.e. non-procedural) resolutions should also be decided on a poll.

- s.250JA, s.250K, s.250L, Part 2G.7 of the Corporations Act
- ASX Listing Rule 6.9
- ASX Guidance Note 35
- ASX Corporate Governance Recommendation 6.4

A poll can also be demanded on any resolution (except any concerning the election of the chair of the meeting or the adjournment of the meeting, if the constitution so provides) by:

- the chair;
- at least five shareholders entitled to vote on the resolution (although the company's constitution can specify a lesser number); or
- shareholders with at least 5% of the votes that may be cast on the resolution (although the company's constitution can specify a lesser percentage).

Shareholders with at least 5% of votes may require a public listed company to appoint an independent person to observe and report on the conduct of a poll.

5.7. Proxies

Shareholders who are entitled to attend and vote at a meeting may appoint a proxy to attend and vote for them. The proxy may be an individual or a company. Where the proxy is a company, it may appoint a representative to exercise the company's power as proxy.

- ASX Listing Rule 14.2
- s.249X, s.250D, s.251AA of the Corporations Act

The proxy form must allow a shareholder to direct their proxy to vote for or against, or abstain from voting on, each resolution. It may also provide for the proxy, in the absence of such direction, to exercise their own discretion. The proxy form may specify a person to be the proxy where the shareholder does not exercise that choice. It is invariably the practice in Australia for this person to be the chair of the meeting, who may vote any undirected proxies. If the proxy form specifies that the chair will be the proxy where the shareholder does not appoint one, the proxy form must also state the chair's voting intentions in respect of any undirected proxies. The minutes of the meeting must record details of how proxy votes were directed and cast.

5.8. Announcing meeting outcomes

- ASX Listing Rule 3.13.2

Immediately after the meeting the company must disclose to ASX the outcome of each resolution put to the meeting, including both the number and a short description of the resolution, whether or not the resolution was passed, whether the resolution was decided on a show of hands or a poll, how proxies were directed to vote on the resolution and, in the case of a poll, the number and percentage of votes for, against and abstaining on the resolution.

6

Substantial Shareholders and Tracing Ownership

6. Substantial Shareholders and Tracing Ownership

Public listed companies can find out detailed information about their shareholders through the substantial shareholding and tracing provisions of the Corporations Act.

6.1. Substantial shareholders

Any person that has a "substantial holding" in a public listed company must disclose to the company and ASX when that shareholding is created, ceases or is increased or decreased by at least 1%.

A person has a "substantial holding" when the person and their associates have a "relevant interest" (which includes direct holdings and a wide range of indirect interests) in voting shares which carry 5% or more of the total number of votes attached to voting shares in the company, or the person has made a takeover bid for voting shares in the company and the bid period has started but not yet ended.

- s.9, s.12, s.608, s.609, s.671B of the Corporations Act
- ASX Listing Rule 3.17

Substantial shareholders must be prepared to disclose all information in connection with their shareholding, including:

- details of their relevant interest in the voting shares and any agreement, arrangement or understanding through which they have that interest;
- the name of each associate who has a relevant interest in voting shares in the company and details of the nature of their association with the associate, the associate's relevant interest and any agreement, arrangement or understanding through which the associate has a relevant interest; and
- a copy of any documented agreement, arrangement or understanding that contributed to the situation giving rise to the shareholder needing to provide the above information.

An "associate" is defined quite widely for these purposes and includes related bodies corporate, anyone with whom the substantial shareholder has, or proposes to enter into, an agreement, arrangement or understanding for the purpose of controlling or influencing the conduct of the company's affairs, and anyone with whom the substantial shareholder is acting, or proposing to act, in concert in relation to the company's affairs.

Public listed companies should monitor substantial shareholder notices to determine whether any shareholder is building a stake in (with a view to a possible takeover of) the company, and then use the tracing provisions to find out further information regarding the relevant shareholding.

6.2. Tracing beneficial ownership of shares

Public listed companies (and ASIC) have the power to direct shareholders to provide:

- full details of their relevant interest in the company's shares and the circumstances giving rise to that interest;
- the name and address of any other person that has a relevant interest in those shares (and full details of the nature and extent of the interest and the circumstances giving rise to the interest); and

- the name and address of any person that has given the shareholder instructions about the acquisition or disposal of the shares, the exercise of any voting or other rights attached to the shares or any other matter relating to the shares (and full details of those instructions).

- Part 6C.2 of the Corporations Act
- ASIC Regulatory Guide 86

These provisions give a public listed company the power to trace the beneficial ownership of its shares. Once a response is provided, the company also has the power to issue a secondary tracing notice to any person named in the response to the initial tracing notice. This allows companies to trace ownership through a chain of nominees or custodians.

The company must maintain a register of any information it receives pursuant to a tracing notice and must allow anyone (including shareholders without charge) to inspect the register.

ASIC is quite proactive in exercising its tracing powers. If shareholders fail to respond to a notice from ASIC, it can and does apply to the court or the Takeovers Panel for an order that they divest their shareholding, even where the laws of another country may prohibit the disclosure of the relevant information. ASIC will frequently issue a secondary tracing notice to people named in response to an initial tracing notice.

7 Capital Raisings

7. Capital Raisings

There are various different ways that a public listed company can raise capital. However, any capital raising will require disclosure to investors unless an exception applies.

7.1. Offers of securities for issue

Requirement for a prospectus

- s.9, s.706, s.708 of the Corporations Act

Section 706 of the Corporations Act prohibits any company from offering securities for issue without preparing and providing a disclosure document (typically a prospectus) to investors, unless an exception applies. The fundamental policy underlying this general prohibition is investor protection, that is, to ensure that investors have sufficient information to be able to make an informed decision whether or not to invest in the relevant securities. The disclosure requirement applies to any offer for issue, such as a placement, a rights issue or an offer to subscribe for securities under a share or option purchase plan.

Exceptions to the prospectus requirement

There are several circumstances in which an offer of securities for issue does not need disclosure, including the following:

- **Small-scale offerings:** where the offer will not result in more than 20 people having been issued securities in the company in any 12 month period and the amount raised from those investors does not exceed A$2 million.
- **Offers to sophisticated investors:** where the amount payable by each investor is at least A$500,000 (or the amount payable, together with amounts previously paid by that investor for securities of the same class, is at least A$500,000) or it appears from a certificate given by a qualified accountant no more than two years before the offer that the investor has net assets of at least A$2.5 million or a gross income for each of the last two financial years of at least A$250,000.
- **Offers to professional investors:** for example, financial services licensees, listed entities and persons that have at least A$10 million in assets under management.
- **Offers to certain associated parties:** namely, a senior manager of the company or a related company, or their spouse, parent, child or sibling (or any company controlled by them).
- **Certain offers to present shareholders:** namely, offers of fully paid shares under a dividend reinvestment or bonus plan.

Employee share schemes

- s.708(12), Division 1A of Part 7.12 of the Corporations Act
- ASIC Corporations (Employee Share Schemes) Instrument 2022/1021

In some circumstances, offers of securities under an employee share scheme are exempt from the disclosure requirement discussed above or subject to streamlined disclosure requirements. These rules, and the tax treatment of employee share schemes, are complex and specialist advice should be sought when implementing such a scheme. Also see section 9.4 below in relation to shareholder approval requirements.

7.2. Secondary trading provisions

The Corporations Act contains "secondary trading" provisions which restrict the ability to sell securities within 12 months of their issue by a company. The secondary trading provisions are designed to prevent the avoidance of the requirement to prepare a prospectus by issuing securities to a person within an exception described above and then that person on-selling the securities in circumstances which would not fall within one of those exceptions.

Secondary trading prohibition

The secondary trading prohibition applies where:

- the sale offer is made within 12 months of the issue of securities;
- the securities subject to the sale offer were issued without a prospectus;
- either:
  - the company issued the securities with the purpose of the person to whom they were issued selling or transferring the securities, or granting, issuing or transferring interests in, or options over, them; or
  - the person to whom the securities were issued acquired them with the purpose of selling or transferring the securities, or granting, issuing or transferring interests in, or options over, them; and
- no relevant exemption applies.

- s.707(3) of the Corporations Act

Importantly, securities will be deemed to be issued or acquired with the purpose referred to above if:

- there are reasonable grounds for concluding that the securities were issued or acquired with that purpose (whether or not there may have been other purposes for the issue or acquisition); or
- any of the securities are subsequently sold, or offered for sale, within 12 months after their issue, unless it is proved that the circumstances of the issue and the subsequent sale or offer are not such as to give rise to reasonable grounds for concluding that the securities were issued or acquired with that purpose.

It is not necessary that the purpose of on-sale be the dominant purpose to be caught by the above provisions. It is sufficient if the purpose is only one of several. The secondary trading prohibition can therefore be problematic for investors, as arguably any investment in listed securities, being a highly liquid form of investment, is made with at least the partial purpose of on-sale.

Cleansing notices and other exemptions

Public listed companies can, however, exempt a sale of securities from the secondary trading prohibition, if (among other conditions):

- the company did not issue the securities with the purpose of on-sale;
- the securities are in a class of securities that have been quoted at all times in the preceding three months;
- trading in that class of securities has not been suspended for more than a total of five days during the shorter of the period for which the class of securities have been quoted, and the period of 12 months before the day on which the relevant securities were issued; and

- s.708A of the Corporations Act

- the company lodges a "cleansing notice" with ASX within five business days after the issue of the securities and before the sale offer is made.

The cleansing notice must:

- state that, as at the date of the notice, the company has complied with the financial reports and audit and continuous disclosure provisions of the Corporations Act; and
- set out any information that has been excluded from disclosure to the market under the confidentiality carve-out to the continuous disclosure rule, that investors and their professional advisers would reasonably require in order to make an informed assessment of the assets and liabilities, financial position and performance, profits and losses and prospects of the company or the rights and liabilities attached to the securities.

This effectively means that a public listed company that wishes to take advantage of this exemption will be forced to disclose any confidential price sensitive information that has been withheld from the market.

The cleansing notice regime is the key exemption relied upon by companies when undertaking an institutional placement of new shares to sophisticated and professional investors.

Exemptions also apply, among other things, for sales of quoted securities issued at or around the time that a prospectus for an offer of securities in the same class is lodged with ASIC and for sales of quoted securities issued to underwriters of offers that are named as an underwriter in a prospectus for the offer.

7.3. Rights issues

- s.9A, s.708AA of the Corporations Act

Another exception from the requirement for a prospectus, and also from the secondary trading provisions described above, applies in the case of a pro rata rights issue to existing shareholders of the company. In order to utilise this exemption, the offer must be a "rights issue" within the meaning of the Corporations Act, which (among other conditions) requires the terms of the offers to all shareholders to be the same. The company must also be able to lodge a "cleansing notice" with ASX on announcement of the rights offer, which must include any confidential price sensitive information that has been withheld from the market (in the same manner as the cleansing notice referred to above for the secondary trading exemption). See section 7.8 below for further details.

7.4. Off-market sales by controllers

- s.707(2), s.707(5), s.708 of the Corporations Act

The Corporations Act also prohibits any offer of securities for sale without disclosure by a person who controls the company where either the securities are not quoted or, if they are quoted, they are not offered for sale in the ordinary course of trading on the ASX and an exception does not apply. Secondary trading provisions as described in section 7.2 above also restrict the ability to on-sell securities within 12 months of sale by a controller.

The same exceptions to the disclosure requirement as those described in section 7.1 above apply to off-market sales by controllers.

7.5. Issues exceeding 15 percent of capital

Public listed companies are prohibited under ASX Listing Rule 7.1 from issuing or agreeing to issue equity securities (which include options) in excess of 15% of their capital without shareholder approval. The 15% threshold is calculated in accordance with a formula set out in ASX Listing Rule 7.1.

The requirement for shareholder approval is subject to a number of exceptions, including:

- ASX Listing Rules 7.1, 7.2, 7.3

– an issue to shareholders under a pro rata issue;

– an issue on conversion of convertible securities where the original issue complied with the rule;

– an issue under a dividend reinvestment plan or share purchase plan, subject to certain conditions;

– an issue under an employee incentive scheme if, within three years before the date of issue, shareholders approved the issue of securities under the scheme as an exception to the prohibition;

– an issue of preference shares which do not have rights of conversion into another class of equity security; or

– an issue of securities as consideration, or to fund the cash consideration, under a takeover bid or merger by way of scheme of arrangement (except for a reverse takeover, where the bidder proposes to issue new securities equal to or greater than its existing securities).

Where shareholder approval is required, the notice of the meeting must include certain matters set out in ASX Listing Rule 7.3, including the names of the proposed subscribers or the basis for identifying them, a summary of the terms of the securities to be issued (if not fully paid ordinary securities), the purpose of the issue and the intended use of the funds to be raised, and a voting exclusion statement indicating that a participant in the issue and any other person who may obtain a material benefit (and their associates) may not vote in favour of its approval.

7.6. Additional placement capacity for small and mid-cap entities

Public listed small and mid-cap companies with a market capitalisation of A$300 million or less and which are not included in the S&P/ASX 300 Index may seek shareholder approval at an AGM (but not any other shareholders' meeting) to have an additional capacity to issue 10% of their capital within 12 months of that approval under ASX Listing Rule 7.1A.

- ASX Listing Rules 7.1A, 19.12
- ASX Guidance Note 21

The additional 10% is calculated in accordance with a formula set out in ASX Listing Rule 7.1A.2. The additional securities must be issued for cash consideration and can only be discounted to a maximum of 25% to market price (which is determined by calculating the 15 trading day volume weighted average price of such securities prior to the date the placement price is agreed, or the date the securities are issued if that is more than 10 trading days later). If a company wishes to issue securities at a greater discount, or for non-cash consideration (e.g. as consideration for an acquisition), it must instead rely on its 15% placement capacity under Listing Rule 7.1 or an exception under Listing Rule 7.2, or obtain shareholder approval.

Public listed small and mid-cap companies proposing to seek shareholder approval for this additional 10% placement capacity should:

– monitor the S&P/ASX 300 Index and provide a draft calculation of market capitalisation to ASX at the time of lodgement of the draft notice of AGM for ASX review; and
– state in the notice of AGM that if the eligibility criteria are not met on the date of the AGM, then the resolution will be withdrawn.

7.7. Types of disclosure documents

There are two main types of disclosure documents used for fundraising purposes:

- s.710, s.712, s.713 of the Corporations Act

– a prospectus, which must be used for any initial public offering undertaken by a company and must disclose all the information that investors and their professional advisers would reasonably require to make an informed assessment of the rights and liabilities attached to the securities offered and the assets and liabilities, financial position and performance, profits and losses and prospects of the company, to the extent it is actually known or ought to be known after making inquiries; and
– a "transaction specific" prospectus, which has a lower standard of disclosure and can be used for any fundraising activity once a company has been listed for at least three months. In essence, companies only have to disclose the effect of the offer on the company and the rights and liabilities attached to the securities offered. Companies do not have to disclose the assets and liabilities, financial position and performance, profits and losses and prospects of the company. A lower standard of disclosure is permitted in these circumstances as any price sensitive information regarding the company should be disclosed to the market under the continuous disclosure rule described in section 3 above. However, companies will have to disclose information withheld under the confidentiality carve-out if that information would be required to make an informed assessment of an investment in the company.

In addition, companies are permitted to incorporate information in a prospectus by lodging the information with ASIC and informing investors in the prospectus of their right to obtain a copy of the information free of charge, rather than setting out the information in full in the prospectus. This is known as a "short form" prospectus.

The main type of disclosure document for a listed managed investment scheme (such as a unit trust) is a product disclosure statement which has a broadly similar, but not identical, disclosure standard as is required under a prospectus.

7.8. Types of capital raisings

Placements

- s.708A of the Corporations Act

A placement is an issue of shares to one or more investors, typically institutional investors, and hence a prospectus is not required because the issue will fall within the exemptions for sophisticated or professional investors outlined in section 7.1 above.

The institutional investor will, however, usually require the company to issue the cleansing notice described in section 7.2 above to ensure that it is not restricted by the secondary trading prohibition from on-selling the shares within 12 months of their issue.

Rights issues

A company can raise funds by way of a rights issue (also called an entitlement offer) offered to its existing shareholders to buy a proportional number of additional shares (for example, one share for every two shares already held) at a given price (usually at a discount to the market price) within a fixed period.

A rights issue can be either renounceable, meaning that the rights to take up new shares are either tradeable on the ASX or transferable, or non-renounceable. For larger capital raisings, companies will often use accelerated structures such as "Jumbos", "RAPIDS", "AREOs" or "PAITREOs" which involve an accelerated institutional offer, relying on the relevant ASIC Corporations Instrument. An institutional placement can also be conducted alongside a rights issue.

- s.9A, s.708AA of the Corporations Act
- ASIC Corporations (Non-Traditional Rights Issues) Instrument 2016/84

As noted in section 7.3 above, a rights issue does not require a prospectus if (among other conditions):

- the class of the securities offered are quoted securities at the time of the rights issue;
- trading in that class of securities has not been suspended for more than a total of five days during the shorter of the period for which the class of securities have been quoted, and the period of 12 months before the rights issue;
- in the 12 months before the offer, the company has not contravened the provisions of the Corporations Act relating to continuous disclosure, accounts and audits, and defective disclosure documents; and
- the company gives ASX a cleansing notice within the 24-hour period before the rights issue offer is made.

If a prospectus is not required, a company will typically issue an ASX announcement, investor presentation and offer booklet in respect of the transaction, along with the cleansing notice.

Dividend reinvestment plans

A dividend reinvestment plan allows shareholders to elect to reinvest their dividends, rather than receiving cash, by subscribing for additional shares. The offer price is usually market price or a small discount to market price.

A specific exemption from the requirement to issue a prospectus exists for shares issued under a dividend reinvestment plan.

- s.708(13) of the Corporations Act

Companies can also arrange for shares to be purchased on-market by a broker and transferred to participants under the plan, rather than issuing new equity (known as "DRP neutralisation").

Share purchase plans

An ASIC Corporations Instrument allows public listed companies to offer existing shareholders the opportunity to purchase small numbers of shares without issuing a prospectus subject to a number of conditions, including that:

- ASIC Corporations (Share and Interest Purchase Plans) Instrument 2019/547
- ASIC Regulatory Guide 125

– the shares are in a class which is quoted on the ASX;

– that class is not suspended from trading and was not suspended for more than a total of 5 days during the shorter of the period during which the class was quoted, and the period of 12 months before the day on which the offer is made;

– the offer is made to each person who holds shares in the relevant class, other than those whose address is in a jurisdiction where it is unlawful or impractical to issue shares to the person;

– each offer is made on the same terms and on a non-renounceable basis;

– the subscription price is less than the market price of the shares;

– a person may not subscribe for more than A$30,000 of shares in any 12 month period;

– the company lodges a cleansing notice with ASX; and

– the company has complied with the financial reports and audit and continuous disclosure provisions of the Corporations Act.

7.9. Further information

For further information regarding the content requirements of disclosure documents and the liability regime under the fundraising provisions of the Corporations Act, please refer to Baker McKenzie's IPO Guide.

8 Major Acquisitions and Disposals

8. Major Acquisitions and Disposals

Major acquisitions and disposals must be notified to ASX and may require shareholder approval in certain circumstances.

8.1. Change to nature or scale of activities

Public listed companies are required under the ASX Listing Rules to tell ASX as soon as practicable if they propose to make a significant change, either directly or indirectly, to the nature or scale of their activities, and must provide full details of the proposed change including its effect on potential earnings. ASX can require the public listed company to obtain shareholder approval for the change and/or re-comply with the criteria for admission to the Official List.

- ASX Listing Rule 11.1
- ASX Guidance Note 12

The requirements that ASX will impose will depend on the circumstances of the transaction, including:

- the extent to which the change is the outcome of growth and development of the company over time; and
- the extent to which the change has been expected and investors have had the opportunity to debate the direction of the company at previous general meetings. ASX will usually require shareholder approval and re-compliance with the admission criteria for "backdoor listings", that is, where an unlisted company effectively obtains listed status by merging with an existing listed company.

8.2. Disposal of the company's main undertaking

- ASX Listing Rule 11.2
- ASX Guidance Note 12

The ASX Listing Rules prevent a public listed company from disposing of its main undertaking without shareholder approval. ASX will do a "before and after" analysis of, among other things, the company's consolidated total assets, annual revenue and annual profit before tax in assessing whether the sale of an asset or business division constitutes the disposal of the company's main undertaking.

Where a company has several business operations and none of them is clearly the predominant business, ASX may apply ASX Listing Rule 11.2 to the disposal of a significant individual business. However, in general ASX Listing Rule 11.2 is primarily directed at situations where the change will result in the company carrying on no significant business or holding no significant assets other than cash.

8.3. Spin-offs

Under the ASX Listing Rules, public listed companies cannot spin-off major assets (including subsidiaries) if they are aware that the person acquiring the asset (or the subsidiary) intends to list on the ASX, unless:

- ASX Listing Rule 11.4

- the securities to be listed are offered pro rata to existing shareholders (or in another way that in ASX's opinion is fair in all the circumstances); or
- shareholders approve the spin-off.

The purpose of this rule is to give shareholders of public listed companies which propose to sell major assets the opportunity to participate in any premium that may arise on the listing of the purchaser.

9 Related Party Transactions

9. Related Party Transactions

Dealings with related parties are strictly regulated under both the Corporations Act and the ASX Listing Rules.

9.1. Providing financial benefits to related parties

The need for shareholder approval

Subject to certain exceptions (see below), the Corporations Act prohibits a public company, or an entity that it controls, from giving a "financial benefit" to a "related party" unless shareholder approval is obtained.

A public company's related parties comprise the following:

- s.208, s.228, s.229 of the Corporations Act

– an entity or person that controls the company;

– a director of the company or of an entity that controls the company;

– a spouse or de facto partner of any person described above;

– a parent or child of any person described above;

– an entity controlled by one of the above related parties (unless that entity is also controlled by the company);

– an entity that was a related party of a kind described above at any time within the previous six months or that believes or has reasonable grounds to believe that it is likely to become a related party of a kind described above at any time in the future; and

– an entity that acts in concert with a related party of the company on the understanding that the related party will receive a financial benefit if the company gives the entity a financial benefit.

The concept of "financial benefit" is intended to operate very broadly and includes virtually any benefit. Further, any consideration that has been or may be given for the benefit is to be disregarded, even if it is adequate.

Exceptions

These are the principal exceptions to the related party transaction prohibition:

- Division 2 of Part 2E.1 of the Corporations Act

– **Benefit on arm's length terms:** the benefit is provided on terms that would be reasonable in the circumstances if the company (or controlled entity) and the related party were dealing at arm's length.

– **Remuneration, reimbursement, indemnities and insurance for officers and employees:** provided it is reasonable in the circumstances for the company (or controlled entity) to pay or provide that remuneration, reimbursement, indemnity or insurance premium.

– **Benefit to shareholders:** provided the benefit is given to the related party in their capacity as shareholder and giving the benefit does not discriminate unfairly against other shareholders of the company.

Shareholder approval process

- Division 3 of Part 2E.1 of the Corporations Act

The Corporations Act sets out the procedure that public companies must follow if shareholder approval of a related party transaction is required, including strict requirements regarding the notice of meeting to be given to shareholders. The notice must include, for example, a detailed explanatory statement setting out the identity of the related party and the nature of the benefit, the recommendations and interests of the directors, and any other information known to the company or any of its directors which is reasonably required by shareholders to decide whether it is in the company's interests to pass the resolution. The related party and its associates cannot vote on the resolution.

All material sent to shareholders must be lodged with ASIC (becoming a matter of public record) and ASIC will scrutinise notices of meetings at which resolutions to approve related party transactions are put forward.

9.2. Acquisitions and disposals of substantial assets from and to related parties and 10% shareholders

The need for shareholder approval

Public listed companies are prohibited under the ASX Listing Rules from directly or indirectly acquiring a "substantial" asset from, or disposing of a substantial asset to, any of the following (or agreeing to do so) without shareholder approval:

- ASX Listing Rules 10.1, 10.2

– a related party (see section 9.1 above);

– a subsidiary or other controlled entity (unless wholly owned);

– a person who has, or had at any time in the previous six months, a substantial holding (see section 6.1 above) of at least 10% in the company;

– an associate of any of the above; or

– any other person whose relationship to the public listed company (or anyone referred to above) is such that, in ASX's opinion, the transaction should be approved by shareholders.

The scope of these parties is much wider than the related parties under the Corporations Act discussed above. An asset is "substantial" if its value, or the consideration paid for it, is 5% or more of the equity interests of the public listed company as set out in its latest accounts lodged with ASX.

Exceptions

The requirement to obtain shareholder approval for the acquisition or disposal of a substantial asset does not apply to:

- ASX Listing Rule 10.3

– an agreement or transaction between the public listed company and a wholly owned subsidiary or other controlled entity;

– an agreement or transaction between wholly owned subsidiaries or controlled entities of the public listed company;

- an agreement or transaction between entities that are part of a stapled group and their controlled entities;
- an issue of or agreement to issue securities by the public listed company for cash;
- an acquisition or disposal under an agreement which the company entered into before it was listed and disclosed in its prospectus or other disclosure document; or
- an agreement or transaction with a person who is a related party only because the person believes or has reasonable grounds to believe that they are likely to become a related party in the future because of the agreement or transaction.

Notice of meeting

Where shareholder approval is required, the notice of the meeting must include certain matters set out in ASX Listing Rule 10.5, including:

- ASX Listing Rule 10.5

- the name of the other party to the transaction and their relationship to the company;
- details of the asset being acquired or disposed of;
- the consideration for the acquisition or disposal and the intended source or use of funds;
- a summary of any other material terms of any agreement for the transaction;
- a voting exclusion statement indicating that the other party to the transaction and any other person who will obtain a material benefit (and their associates) may not vote in favour of the resolution; and
- an independent expert's report on the transaction.

9.3. Issue of equity securities to related parties

The need for shareholder approval

Public listed companies are prohibited under the ASX Listing Rules from issuing or agreeing to issue equity securities (which include options) without shareholder approval to:

- ASX Listing Rule 10.11

- a related party of the company, such as a director (see section 9.1 above);
- a person who has, or had at any time in the previous six months, a substantial holding (see section 6.1 above) of at least 30% in the company;
- a person who has, or had at any time in the previous six months, a substantial holding of at least 10% in the company and who has nominated a director to the board of the company;
- an associate of a person referred to above; or
- a person whose relationship with the company or a person referred to above is such that ASX considers that approval should be obtained.

Exceptions

The requirement for shareholder approval is subject to a number of exceptions which are similar, but not identical, to the exceptions against the prohibition on issues of equity securities exceeding 15% of capital, described in section 7.5 above.

- ASX Listing Rule 10.12

Notice of meeting

Again, where shareholder approval is required, the notice of the meeting must include certain matters set out in ASX Listing Rule 10.13, including:

- ASX Listing Rule 10.13

- the name of the person to whom the securities will be issued and their relationship to the company;
- the number and class of securities to be issued and the price or other consideration the company will receive;
- if the securities are not fully paid ordinary securities, a summary of the material terms of the securities;
- the purpose of the issue, including the intended use of any funds raised;
- if the issue is intended to remunerate or incentivise a director, details of the director's current total remuneration package;
- a summary of any other material terms of any agreement for the issue; and
- a voting exclusion statement indicating that the person receiving the securities and any other person who will obtain a material benefit (and their associates) may not vote in favour of the resolution approving the issue.

9.4. Acquisition of securities under employee incentive schemes

ASX Listing Rule 10.14 requires shareholder approval for the acquisition of securities under an employee incentive scheme by a director of a public listed company, any associate of that director or a person whose relationship with the company, a director or a director's associate is such that, in ASX's opinion, approval should be obtained.

- ASX Listing Rules 10.14, 10.15, 10.16

The securities can be issued, however, at any time within three years of the meeting at which shareholder approval was obtained. This effectively means that public listed companies can implement an ongoing employee share option plan provided that shareholder approval of the plan is refreshed every three years. The notice of meeting will need to set out, among other things, the names of all persons covered by ASX Listing Rule 10.14 that are entitled to participate in the plan.

The prohibition does not apply to securities purchased on-market under the terms of an employee incentive scheme that provides for purchase of securities by or on behalf of employees or directors.

The treatment of employee incentive plans for tax purposes is a complex area and specialist tax advice should be sought, particularly in relation to structuring such plans. Also see section 7.1 above in relation to disclosure requirements.

9.5. Termination benefits

Subject to limited exceptions, public listed companies are prohibited from giving retirement benefits to directors and certain senior executives without shareholder approval where the benefit exceeds that director or executive's average annual base salary (or a lesser pro rata amount if they have been with the company for less than one year).

"Benefit" has a broad interpretation and includes the automatic or accelerated vesting of shares or bonuses, payments in lieu of notice, payments in exchange for a post-employment restriction, superannuation contributions in excess of the statutory amount (excluding salary sacrifice), and amounts paid out as voluntary out of court settlements. "Benefit" does not include genuine benefits accrued under Australian or other law (including statutory leave benefits, statutory notice period and statutory redundancy payments), genuine superannuation payments, and certain redundancy benefits.

- Division 2 of Part 2D.2 of the Corporations Act
- s.2D.2.02, s.2D.2.03 of the Corporations Regulations
- ASX Listing Rules 10.18, 10.19

Retirement benefits paid in contravention of these provisions must be repaid by the recipient and are deemed to be a debt due to the company, recoverable by the company. A breach can also constitute a criminal offence, resulting in fines and/or imprisonment.

Under the ASX Listing Rules a company must ensure that no officer of the company (or its subsidiaries or controlled entities) will be entitled to termination benefits if the value of those benefits together exceeds 5% of the equity interests of the entity as set out in its latest accounts, without shareholder approval.

The ASX Listing Rules also prohibit termination benefits being granted where a change in shareholding or control of the company occurs.

10 Takeovers

10. Takeovers

The aim of takeover regulation in Australia is to ensure fairness between all shareholders in the target by requiring disclosure of all relevant information, an equal opportunity for each target shareholder to participate in the benefits of a change in control proposal, and a reasonable time for target shareholders and directors to consider the proposal.

Although by international standards 20% is relatively low as a level of deemed control, Australian law sets a 20% holding in the target as the level above which acquisitions are regulated.

10.1. The 20 percent limit

The Corporations Act prohibits a person from acquiring a relevant interest in issued voting shares in a public listed company if, because of the transaction, either that person's or someone else's voting power in the target increases:

- from 20% or below to more than 20%; or
- from a starting point that is above 20% and below 90%,

unless the acquisition is made under one of the permitted exceptions (see section 10.3 below).

- s.602, s.606 of the Corporations Act

10.2. Calculation of the 20 percent limit and voting power

The key concept in determining whether an acquisition breaches the 20% limit is the "voting power" which results from the acquisition. "Voting power" is a term which aggregates the "relevant interests" held by a person (which includes direct holdings and a wide range of indirect interests) together with the relevant interests of the person's "associates". The Glossary at the end of this Guide provides more detail on these technical terms.

- s.12, s.608, s.609, s.610 of the Corporations Act

10.3. Permitted acquisitions above the 20 percent limit

Acquisitions of voting shares above the 20% limit are permitted under the Corporations Act in a number of circumstances, including:

- acquisitions made under an off-market takeover bid, for either all or a fixed proportion of each shareholder's shares in the target;
- acquisitions made under an unconditional on-market takeover bid for all of the shares in the target;
- acquisitions made with the prior approval of target company shareholders in general meeting;
- "creeping" acquisitions of up to 3% of the target's shares every six months;
- acquisitions made under a pro rata rights issue;
- certain acquisitions by underwriters; and
- certain downstream acquisitions which are deemed to result from upstream takeovers.

- s.611 of the Corporations Act

10.4. Schemes of arrangement

A common change of control alternative to a takeover bid is a scheme of arrangement. There are numerous differences from a takeover in terms of requirements, process and logistics. However, the ultimate outcome can be the same, namely the acquisition of the shares in a target by a bidder.

10.5. Further information

For further information regarding the takeover regime in Australia, including a detailed description of the types of transactions and their procedures, please refer to Baker McKenzie's Takeovers Guide.

11 Insider Trading

11. Insider Trading

Insider trading laws are seen as necessary to ensure efficient financial markets in which investors can have confidence.

11.1. Prohibited conduct

The Corporations Act prohibits three types of conduct if a person possesses inside information in respect of securities of a public listed company:

- **Trading prohibition:** the insider must not apply for, acquire or dispose of the relevant securities (or enter into an agreement to do so).

▪ s.1043A of the Corporations Act

- **Procuring prohibition:** the insider must not procure another person to apply for, acquire or dispose of the relevant securities (or enter into an agreement to do so).
- **Communicating prohibition:** the insider must not, directly or indirectly, communicate the information (or cause it to be communicated) to another person if the insider knows, or ought reasonably to know, that the other person would be likely to apply for, acquire or dispose of the relevant securities (or would be likely to procure another person to do so).

The prohibitions only apply if the insider knows, or ought reasonably to know, that:

- the information in question is not "generally available"; and
- if the information were generally available, a reasonable person would expect it to have a "material effect" on the price or value of the relevant securities.

▪ s.1042A, s.1042C, s.1042D of the Corporations Act

Information is "generally available" if:

- it consists of readily observable matter;
- it has been made known in a manner that would, or would be likely to, bring it to the attention of persons who commonly invest in securities of the kind in question and, since it was made known, a reasonable period for it to be disseminated among such persons has elapsed; or
- it consists of deductions, conclusions or inferences made or drawn from information referred to above.

As a practical matter, public listed companies should only assume that information is "generally available" if it has been disclosed to ASX.

A reasonable person is taken to expect information to have a "material effect" on the price or value of securities if the information would, or would be likely to, influence persons who commonly acquire securities in deciding whether or not to acquire or dispose of the securities in question. Hence, the materiality threshold is actually quite low.

The concepts involved in the insider trading prohibitions can be difficult to apply in practice and so, as a general rule, we recommend that legal advice is sought before engaging in the relevant conduct if there is any doubt as to whether the prohibitions may apply.

11.2. Exceptions

There are a number of exceptions to the insider trading prohibitions, including exceptions for underwriters in relation to securities the subject of an underwriting agreement, acquisitions pursuant to a requirement imposed by the Corporations Act, the communication of information required by a government or regulatory authority, transactions or agreements entered into by companies or partnerships where appropriate information barriers are in place, where the relevant inside information is merely knowledge of the person's own intentions or activities, and transactions by financial services licensees as agent for another person on that person's specific instructions.

- s.1043C to s.1043K of the Corporations Act

11.3. Defences

There are several defences to the insider trading prohibitions, including if:

– the inside information came into the insider's possession solely as a result of the information having been made known in a manner that would, or would be likely to, bring it to the attention of persons who commonly invest in securities of the kind in question; or

– the other party to the transaction, or the person to whom the inside information was communicated, knew or ought reasonably to have known of the information before entering into the transaction, or before the information was communicated. This is commonly known as the "equal information" defence.

- s.1043M of the Corporations Act

Again, as a practical matter, investors should assume they can only confidently rely on a defence if the relevant information has been disclosed to ASX or, if in doubt as to whether a defence is available, investors should seek legal advice before engaging in the relevant conduct.

11.4. Consequences of contravention

The consequences of a contravention of the insider trading prohibitions include:[2]

– for an individual, imprisonment for 15 years, a fine the greater of A$1,237,500 or three times the benefit derived and detriment avoided, or both;

– for a company, a fine the greatest of A$12.375 million or three times the benefit derived and detriment avoided or 10% of annual turnover; and

– significant civil penalties, relinquishment orders and/or orders to compensate any person who has suffered damage from the contravention, equivalent to those described in section 3.6 above.

[2] The monetary amounts in this paragraph will increase due to indexation on 1 July 2023.

11.5. Minimising the risk of contravention

As discussed in section 2.5 above, it is mandatory for public listed companies to adopt a share trading policy which will typically apply to directors, officers and employees, but may also apply to any other persons who may possess inside information from time to time (such as advisers and consultants). This policy will set out the rules applying to trading in company shares by "insiders" in order to minimise the risk of any breach of the insider trading prohibitions.

As many public listed companies consider it important to prevent not only actual breaches of the insider trading prohibitions, but also any appearance of insider trading, it is common for such companies to adopt trading windows during which time directors, officers and employees (and anyone else to whom the policy applies) are permitted to trade in the company's securities. The trading windows usually apply for a set period following release of half-yearly and/or annual results. Any trading by these "insiders" outside these times is prohibited except in limited circumstances (such as demonstrated financial hardship).

Financial reports at a glance

Financial reports at a glance

Financial report (annual) – for ASX, ASIC and shareholders

A financial report for a financial year is required to be prepared under the Corporations Act and given to ASX and ASIC and made available or provided to shareholders. It comprises:

- the financial statements for the year (that is, a statement of financial position, statement of financial performance and statement of cash flows);
- the notes to the financial statements; and
- the directors' declaration about the statements and notes, being a declaration:
  - whether, in the directors' opinion, there are reasonable grounds to believe that the company will be able to pay its debts as and when they become due and payable;
  - whether, in the directors' opinion, the financial statements and notes are in accordance with the Corporations Act (including whether they comply with the accounting standards and give a true and fair view of the financial position and performance of the company); and
  - that the directors have been given the declarations required by section 295A of the Corporations Act (declarations in relation to the company's financial statements by the CEO and CFO).

Directors' report (annual) – for ASX, ASIC and shareholders

A directors' report for a financial year is required to be prepared under the Corporations Act and given to ASX and ASIC and made available or provided to shareholders. It must include:

- certain general information prescribed by the Corporations Act, including a review of the company's operations, details of any significant changes in the company's state of affairs and details of the company's principal activities and any significant changes in the nature of those activities;
- certain specific information prescribed by the Corporations Act, including details of dividends paid to shareholders, various matters in relation to the company's directors and auditor and details of options granted and shares issued as a result of any options exercised during the year;
- the remuneration report (see below); and
- a copy of the auditor's independence declaration (see below).

Remuneration report (part of directors' report)

The directors' report for a financial year must include a remuneration report disclosing the matters specified in section 300A of the Corporations Act, including:

- a discussion of board policy in relation to the remuneration of the key management personnel of the company and the relationship between that policy and the company's performance;
- if an element of the remuneration of any member of the key management personnel is:
  - dependent on the satisfaction of a performance condition, details of the performance condition; or
  - equity based, details of the performance hurdles, or otherwise why there are none;
- details of the remuneration and service contracts (including termination benefits) of each member of the key management personnel;

- an explanation of any proposed board action if, at the last AGM, comments were made on the remuneration report and at least 25% of votes were cast against the remuneration report resolution; and
- details regarding any remuneration consultants engaged by the company.

Auditor's report (annual) – for ASX, ASIC and shareholders

An auditor who audits a financial report for a financial year must report to shareholders on whether the auditor is of the opinion that the financial report is in accordance with the Corporations Act, including whether it complies with the accounting standards and gives a true and fair view of the financial position and performance of the company. If the auditor is not of that opinion, the auditor's report must state why.

In addition, the auditor must give the directors a declaration that to the best of the auditor's knowledge and belief there have been no contraventions (or otherwise disclose any) of the auditor independence requirements of the Corporations Act or any applicable professional conduct code in relation to the audit (however, an auditor is not required to report inadvertent breaches of the auditor independence requirements provided certain statutory defences apply).

Corporate governance statement (part of annual report)

A corporate governance statement is required to be prepared under ASX Listing Rule 4.10.3 and either included in a company's annual report or made available on its website. It consists of a statement disclosing the extent to which the company has followed the ASX Corporate Governance Recommendations during the reporting period. If the company has not followed all of the recommendations, it must also identify those recommendations that have not been followed and give reasons for not following them.

Preliminary final report – for ASX

A preliminary final report is required to be prepared under the ASX Listing Rules and given to ASX. It must contain the information set out in Appendix 4E of the ASX Listing Rules, which includes information such as:

- the financial statements for the financial year (which need not have been audited yet) and the notes to those statements;
- changes in revenue and profit from the previous year; and
- a commentary on the results for the period.

Annual report – for ASX, ASIC and shareholders

An annual report is required to be prepared under the ASX Listing Rules and given to ASX. It comprises the company's financial statements for the year and certain other information prescribed under ASX Listing Rule 4.10.

Given the information to be included in an annual report overlaps with the information to be included in the various reports required to be prepared under the Corporations Act, a single annual report is prepared which includes:

- the financial report and directors' report (including remuneration report) required to be prepared under the Corporations Act;
- the corporate governance statement required to be prepared under ASX Listing Rule 4.10.3; and
- the auditor's report.

Dual lodgement relief

If a public listed company lodges its annual or half-year financial report, directors' report or auditor's report electronically with ASX, it is not also required to lodge the same report directly with ASIC.

Financial report (half-year) – for ASX and ASIC

A financial report for a half-year is required to be prepared under the Corporations Act and given to ASX and ASIC. It comprises:

- the financial statements for the half-year;
- the notes to the financial statements; and
- the directors' declaration about the statements and notes, being a declaration whether, in the directors' opinion:
  - there are reasonable grounds to believe that the company will be able to pay its debts as and when they become due and payable; and
  - the financial statements and notes are in accordance with the Corporations Act (including whether they comply with the accounting standards and give a true and fair view of the financial position and performance of the company).

Directors' report (half-year) – for ASX and ASIC

A directors' report for a half-year is required to be prepared under the Corporations Act and given to ASX and ASIC. It comprises:

- a review of the company's operations during the half-year and the results of those operations; and
- the name of each person who has been a director of the company at any time during or since the end of the half-year and the period for which they were a director.

It must also include a copy of the auditor's independence declaration (see below).

Auditor's report (half-year) – for ASX and ASIC

An auditor who audits a half-year financial report must prepare a report similar to that required in respect of a financial report for the full financial year, as described above. An auditor may, however, conduct only a review of the half-year financial report, in which case the auditor must report on whether the auditor became aware of any matter in the course of the review that makes the auditor believe the financial report does not comply with the Corporations Act or the applicable accounting standards or otherwise does not give a true and fair view of the company's financial position and performance. In addition, the auditor must give the directors an independence declaration, as described above.

Half-year report – for ASX

At the same time that the half-year financial statements, directors' report and auditor's report are given to ASX, public listed companies must also give ASX the information set out in Appendix 4D of the ASX Listing Rules (known as a "half-year report"). This includes much the same information as is included in a preliminary final report except that it only applies to the half-year, not the full financial year, and is not required to include a commentary on the results for the period.

Quarterly cash flow report – for ASX

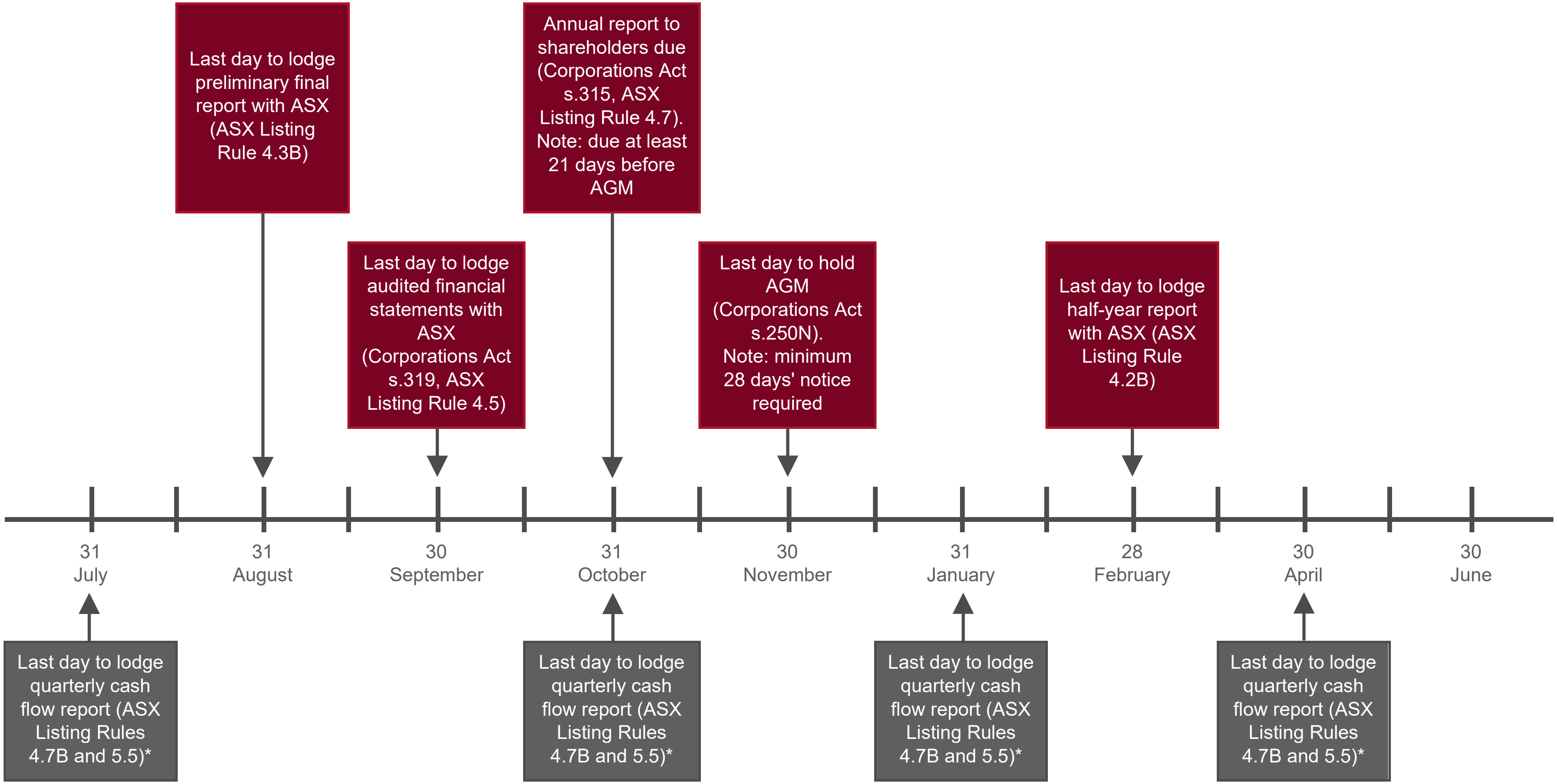
A quarterly cash flow report is required to be prepared by certain companies (namely "cash boxes" other than listed investment companies, and mining and oil and gas exploration companies) under the ASX Listing Rules and given to ASX. It must contain the information set out in Appendix 4C (for "cash boxes") or Appendix 5B (for mining and oil and gas exploration companies) of the ASX Listing Rules, which includes information such as:

- a consolidated statement of cash flows and a cash reconciliation at the end of the quarter;
- details of certain payments made during the quarter; and
- details of financing facilities and estimated cash available for future operating activities.

Financial reporting timeline

Financial reporting timeline

(30 June year-end)



*Quarterly cash flow reporting for some entities only, namely "cash boxes" and mining and oil and gas exploration entities – see ASX Listing Rules 4.7B and 5.5.

Glossary

AGM	Annual general meeting. The AGM is a meeting open to all shareholders of the company at which shareholders vote on the election of directors and other usual matters.
ASIC	The Australian Securities and Investments Commission. This is the regulatory body charged with administering and enforcing the Corporations Act and regulating securities markets in Australia.
ASIC Policy	ASIC regulatory guides, practice notes and information releases. ASIC may also issue instruments which exempt a person or class of persons from a provision of the Corporations Act or modify a provision of the Corporations Act in its application to a person or class of persons. Such instruments are binding on the person(s) affected.
associate	An "associate" of a person includes: – if the person is a body corporate – any related body corporate; and – in any case – anyone with whom the person has, or proposes to enter into, an agreement, arrangement or understanding (whether or not enforceable) to control or influence the composition of the relevant company's board of directors, or the conduct of the company's affairs, and anyone with whom the person is acting, or proposing to act, in concert in relation to the company's affairs. For example, a voting agreement between two shareholders which sets out how they will vote to appoint directors to the board of the relevant company will make those two shareholders associates of one another. A broader meaning applies in the ASX Listing Rules such that two entities (including individuals, partnerships and trusts as well as bodies corporate) are "associates" if one controls the other or both are under the common control of another person or entity. This extends the scope, for example, of all voting exclusions and the prohibitions on certain related party transactions.
ASX	ASX Limited or the Australian Securities Exchange market which it operates, as the context requires.
ASX Corporate Governance Recommendations	The Corporate Governance Principles and Recommendations issued by the ASX Corporate Governance Council and amended from time to time.
ASX Guidance Notes	Guidance notes issued by ASX in relation to the ASX Listing Rules.
ASX Listing Rules	The listing rules of ASX and any other rules of ASX which are applicable while a public listed company is admitted to the Official List. ASX has a broad discretionary power to grant waivers from the ASX Listing Rules in appropriate circumstances.
listed company	See public listed company.
Official List	The official list of entities that ASX has admitted to the ASX and has not removed.

public company	Any company other than a proprietary (or private) company. All listed companies must be public companies.
public listed company	For the purposes of this Guide, a public company admitted to the Official List and the securities of which are quoted on the ASX.
related body corporate	A member of the same corporate group. That is, a subsidiary, a parent company, or a company under common control.
relevant interest	Broadly, a person has a "relevant interest" in shares if the person holds the shares, or has the power to control the exercise of a right to vote attached to the shares, or can control the disposal of the shares. Examples include a direct holding of shares and a pre-emptive right over another person's shares (because this is a form of control over the disposal of those shares). An agreement to do something which will, on its future performance, give rise to a relevant interest is deemed to create an immediate relevant interest. For example, a call option over another person's shares gives rise to a relevant interest even though there is no present holding of or control over the other person's shares. In addition, a person is deemed to have the same relevant interests in shares that are held by a body corporate or managed investment scheme which the person controls, or in which the person's voting power is above 20%. In this way, an indirect holding through subsidiaries, or even through a non-controlling interest of more than 20% in a body corporate or unit trust, can give rise to a deemed relevant interest. Certain situations are excluded from giving rise to a relevant interest, such as shares held by a bare trustee, security over shares given to lenders on ordinary commercial terms, and exchange traded options and futures contracts (but only until an obligation to take delivery of the shares arises).
Takeovers Panel	The Takeovers Panel adjudicates on disputes arising under takeovers in accordance with both the law and commercial principles.
voting power	This is a percentage determined using the formula: $\frac{\text{Person's and associates' votes}}{\text{Total votes in body corporate}} \times 100$ where: – the "person's and associates' votes" is the total number of votes attached to all the voting shares in the body corporate in which the person or an associate has a relevant interest; and – the "total votes" is the total number of votes attached to all voting shares in the body corporate. Given the possibility that the number of votes attached to various classes of voting shares may vary depending on the situation, the number of votes attached to each share is to be counted as follows: – the number that may be cast on the election of a director; or – if the election of directors is not determined by casting votes, the number that may be cast on the amendment of the constitution.

Baker McKenzie delivers integrated solutions to complex challenges.

Complex business challenges require an integrated response across different markets, sectors and areas of law. Baker McKenzie's client solutions provide seamless advice, underpinned by deep practice and sector expertise, as well as first-rate local market knowledge. Across more than 70 offices globally, Baker McKenzie works alongside our clients to deliver solutions for a connected world.

Baker McKenzie.

bakermckenzie.com