

Guide to the key ongoing obligations of a foreign company listed on the ASX

JOHNSON WINTER & SLATTERY

The material contained in this guide is comment of a general nature only and is not and nor is it intended to be advice on any specific professional matter. In that the effectiveness or accuracy of any professional advice depends upon the particular circumstances of each case, neither the firm nor any individual author accepts any responsibility whatsoever for any acts or omissions resulting from reliance upon the content of this guide. Before acting on the basis of any material contained in this publication, we recommend that you consult your professional adviser. Liability limited by a scheme approved under Professional Standards Legislation (Australia-wide except in Tasmania).

Contents

1. Introduction	3
2. ASX Listing Rules	4
3. Corporations Act	5
4. Continuous disclosure obligations – general obligations	6
5. Continuous disclosure obligations – specific obligations	14
6. Periodic reporting	21
7. New issues of securities and reorganisations of capital	24
8. Duties of directors, officers and employees	31
9. Specific obligations of registered foreign companies	32
10. Other issues	34
11. Conclusion	39
12. Further information	40
Schedule 1 - Glossary	43
Schedule 2 - Continuous disclosure flowcharts	44
Schedule 3 – Summary of periodic reporting	47



I. Introduction

This guide outlines the key obligations applicable to companies incorporated outside Australia that are listed on the Australian Securities Exchange (**ASX**) (**Listed Foreign Companies**). Such companies are regulated by the ASX Listing Rules (**Listing Rules**) and certain provisions of the *Corporations Act 2001* (Cth) (**Corporations Act**).

Accordingly, this guide covers the following issues:

- the Listing Rules (see section 2);
- the Corporations Act (see section 3);
- continuous disclosure obligations (see sections 4 and 5);
- periodic disclosures (see section 6);
- fundraising (see section 7);
- duties of officers and employees (see section 8);
- specific obligations of registered foreign companies (see section 9);
- security interests in personal property (see section 10);
- external administration (see section 10);
- other issues (see section 10); and
- conclusion (see section 11).

We deal with these issues in turn below.

This guide is restricted to matters of Australian law only. This guide does not contain a comprehensive explanation of all of the Australian laws and regulations that are applicable to Listed Foreign Companies. It is intended to be a general overview of the key ongoing obligations applying to Listed Foreign Companies under the Corporations Act and Listing Rules and should not be relied on for any other purpose. In particular, this guide does not address all the issues an ASX listed entity must take into account when contemplating a transaction – whether a takeover, share placement or other form of acquisition. Transaction-specific advice must be sought at the appropriate time.

This guide is current as at 26 September 2017.

A glossary of defined terms used in this guide is included in Schedule 1.

2. ASX Listing Rules

2.1 Role of the ASX

Together with ASIC, the ASX supervises the trading of securities by investors and publicly listed entities in Australia. The ASX governs such trading through the Listing Rules, which are enforceable against listed entities and their Associates.¹

An application for a waiver (or partial waiver) of a Listing Rule may be made to the ASX. The ASX determines such waiver applications on a case-by-case basis. Broadly, the ASX may grant a waiver (or partial waiver) of certain Listing Rules where it is satisfied that compliance with comparable obligations imposed by another regulator is sufficient.

2.2 Application of the ASX Listing Rules

Listed Foreign Companies need to comply with all of the Listing Rules as if they were Australian entities, except to the extent a waiver or confirmation has been obtained from the ASX. When acting for foreign companies seeking a listing on ASX, we generally seek a number of waivers and confirmations to manage difficulties that could otherwise arise from the different laws and business customs to which the foreign companies are subject.

The Listing Rules and associated Guidance Notes² are available on the ASX website. Alternatively, a hard copy subscription can be arranged by contacting publisher LexisNexis.

1. Corporations Act s 793C(3).
2. The ASX issues 'guidance notes' to promote certainty and assist participants in the market. They explain the ASX's general position on a particular subject (e.g. Guidance Note 8 provides extensive guidance on continuous disclosure) but should not be considered a definitive statement of the application of a Listing Rule.

3. Corporations Act

3.1 Role of ASIC

The Australian Securities and Investment Commission (**ASIC**) is an independent government body which is established under *Australian Securities and Investments Commission Act 2001* (Cth). It regulates Australian companies, financial markets, financial services organisations and professionals who deal and advise in investments, superannuation, insurance, deposit taking and credit.

The primary legislation under which ASIC performs its function as corporate regulator is the Corporations Act.

3.2 Application of Corporations Act

Listed Foreign Companies are subject to the Corporations Act. The Corporations Act prescribes a broad range of requirements for companies operating in Australia (e.g. in relation to financial reports and directors' obligations). This guide discusses the key reporting obligations under the Corporations Act with which Listed Foreign Companies are required to comply.

Most provisions in the Corporations Act do not apply to Listed Foreign Companies. Some of the key provisions which do apply relate to:

- a) duties of officers and employees and disqualification from managing corporations (Chapter 2D.1, sections 180 to 184 and 186, and Part 2D.6);
- b) external administration (Parts 5.1, 5.2, 5.7, 5.7B, 5.8 and 5.9); and
- c) bodies corporate registered as companies and registrable bodies (Parts 5B.2 and 5B.3).

These matters are described further throughout this document.

4. Continuous disclosure obligations – general obligations

4.1 Summary

There is a general obligation on ASX-listed entities to immediately disclose to the market information concerning them that a reasonable person would expect to have a material effect on the price or value of their securities. However, this obligation does not apply where:

- a) one or more of following applies to the information:
 - i. it would be a breach of law to disclose it;
 - ii. it concerns an incomplete proposal or negotiation;
 - iii. it is insufficiently definite to warrant disclosure;
 - iv. it is generated for internal management purposes; or
 - v. it is a trade secret; and
- b) the information is confidential (and the ASX has not formed a view to the contrary); and
- c) a reasonable person would not expect the information to be disclosed.

The ASX can still require disclosure, despite the above three requirements being satisfied, if it considers it is necessary to avoid a false market.³ This power is most frequently used by the ASX where there has been press comment or speculation which the ASX considers has or is likely to influence the market in the entity's securities. The ASX might require disclosure in this case even if the media report is inaccurate.

Listed Foreign Companies operating in the life sciences industry should also refer to the *Code of Best Practice for Reporting by Life Science Companies (Second Edition)* issued by ASX, which provides guidance on the application of the continuous disclosure rules in the context of industry-specific events, such as clinical trials. (See section 4.10 below for further details.)

Summary flow charts regarding the continuous disclosure obligations are contained in Schedule 2.

3. Listing Rule 3.1B.

4.2 General rule

Listing Rule 3.1 is the cornerstone of the ASX's continuous disclosure regime. The continuous disclosure regime is one of the biggest differences between the Australian and US securities laws.

The general rule is that:⁴

Once an entity is or becomes aware of any information concerning it that a reasonable person would expect to have a material effect on the price or value of the entity's securities, the entity must immediately tell ASX that information.

This is sometimes referred to as the 'disclosure obligation'.

4.3 Scope of the general rule

The extent of the disclosure obligation must be considered in the context of each particular entity.⁵ For example, an A\$5 million legal action may be material if brought against a small entity, but may not be material if brought against a very large entity.

In order to gain an understanding of what is required to be disclosed under the disclosure obligation, it is helpful to explain a number of the key terms used in Listing Rule 3.1:

- a) 'aware' – an entity will be 'aware' of information as soon as an officer⁶ of the entity has, or ought reasonably to have, come into possession of the information in the course of performing their duties;⁷
- b) 'information' – this word is not limited to concrete factual knowledge and it may include matters of opinion⁸ and information obtained by inference.⁹ It may also include matters of supposition and matters relating to the intentions or likely intentions of a person;¹⁰
- c) 'reasonable person' – the ASX considers that the reasonable person in this context is a person who commonly buys and holds securities for a period of time, based on their view of the inherent value of a security, rather than day-traders;¹¹

4. Listing Rule 3.1.

5. *Flavel v Roget* (1990) 8 ACLC 237 at 243-244.

6. Broadly, an 'officer' means a director, secretary or senior manager.

7. Listing Rule 19.12.

8. ASX Guidance Note 8 at section 4.1.

9. *Commissioner for Corporate Affairs v Green* [1978] VR 505 at 511.

10. Listing Rule 19.12.

11. ASX Guidance Note 8 at section 4.2.

- d) 'material effect on price or value' – the reasonable person would expect the information to have a material effect on the price or value of the entity's securities if the information would influence such a person in deciding whether to buy or sell those securities.¹²

If, when information is finally released to the market, it appears that the market price of the entity's securities has moved by 5% or less, the ASX will typically regard that as confirmation that the information was not market sensitive. Conversely, the ASX will generally regard movements of at least 10% as confirmation that the information was market sensitive;¹³

- e) 'immediately' – for the purposes of Listing Rule 3.1, doing something 'immediately' means doing it as quickly as it can be done in the circumstances and not deferring, postponing or putting it off to a later time.¹⁴

This can be interpreted quite strictly. For instance, in 2008 Rio Tinto was issued an infringement notice in circumstances where a proposed transaction leaked (meaning that the exception in Listing Rule 3.1A ceased to apply) and Rio Tinto took approximately 70 minutes to request a trading halt (see below) and a further 20 minutes to issue an announcement about the transaction.

However, the ASX does recognise that a number of factors can influence how quickly an entity can give an announcement, and companies can take a number of steps to manage their continuous disclosure risk – for instance, by establishing clear continuous disclosure processes, and by preparing a draft 'leak' announcement in case a major transaction becomes public before it is finalised.

12. ASX Guidance Note 8 at section 4.2.

13. ASX Guidance Note 8 at section 8.7.

14. ASX Guidance Note 8 at section 4.5.

4.4 Exceptions to the general rule

Listing Rule 3.1A sets out an exception from the general disclosure obligation in Listing Rule 3.1. There are three limbs to this exception, which must all be satisfied for the exception to apply:

- a) **(first limb)** one or more of the following applies:
 - i. it would be a breach of law to disclose the information;
 - ii. the information concerns an incomplete proposal or negotiation;
 - iii. the information comprises matters of supposition or is insufficiently definite to warrant disclosure;
 - iv. the information is generated for the internal management purposes of the entity; or
 - v. the information is a trade secret;
- b) **(second limb)** the information is confidential and the ASX has not formed the view that the information has ceased to be confidential; and
- c) **(third limb)** a reasonable person would not expect the information to be disclosed.

Information will be confidential for the purposes of the second limb of the exception if it is known to only a limited number of people, secondly those people understand that it is to be treated in confidence and is only to be used for permitted purposes, and lastly, those people abide by that understanding.¹⁵

The ASX will generally consider that confidentiality is lost if there is a reasonably specific and reasonably accurate report or rumour about the matter, or if there is a sudden and significant movement in the market price or trading volumes that cannot otherwise be explained.¹⁶

Listed Foreign Companies should ensure that they have appropriate confidentiality mechanisms in place to protect their confidential information. This may involve the use of a carefully drafted confidentiality agreement (it is not sufficient merely to mark a document 'Confidential') or the use of appropriate confidentiality systems. For example, it would be prudent to ensure that those persons who hold confidential information are aware of the confidential nature of such information.

15. ASX Guidance Note 8 at section 5.8.

16. ASX Guidance Note 8 at section 5.8.

The third limb has only a narrow field of operation, because as a general rule, information which satisfies the first and second limbs will satisfy the third limb. Possible exceptions include where information may need to be disclosed in order to prevent a previous announcement from being misleading or deceptive, or where an entity wants to 'cherry-pick' disclosures (i.e. disclose favourable information of a particular type, but refrain from disclosing unfavourable information in reliance upon the exception).¹⁷

4.5 Application of the Corporations Act

Listed Foreign Companies are also required to comply with the continuous disclosure provisions¹⁸ of the Corporations Act. Those provisions reinforce the continuous disclosure obligations arising under Listing Rule 3.1 by imposing civil and criminal penalties for breaches of Listing Rule 3.1, although they do not impose any additional substantive obligations.

4.6 Penalties

If ASIC has reasonable grounds to believe that the continuous disclosure provisions have been breached, and that materially price sensitive information has not been conveyed to the market in a timely fashion, it may issue an infringement notice that requires a monetary fine to be paid. Compliance with an infringement notice is not taken to be an admission of guilt or liability.

A recent example of an infringement notice issued by ASIC was for Sirtex Medical in 2017.

ASIC alleged that by failing to inform the ASX by November 21, 2016 of the lower projected dose sales growth for its radioactive SIR-Spheres, which are used to treat liver cancer, Sirtex was in breach of its continuous disclosure obligations between November 21 and December 8, 2016. Sirtex had announced at its annual meeting in November that it anticipated "double digit dose sales growth will continue" for the balance of the financial year. On December 8 it had issued a major downgrade. Sirtex has agreed to pay a fine of A\$100,000.

In addition to infringement notices, entities and their directors may also face other civil or criminal penalties for a breach of the disclosure obligation. For example, in certain circumstances an investor will be allowed to bring proceedings (or multiple investors to bring a class action) against a director for any loss that they have suffered as a result of the breach of the continuous disclosure provisions.¹⁹ Directors will face heavy penalties if they are 'involved' in the company's contravention, subject to a due diligence defence. A person is involved if they have aided, abetted, counselled, procured or have been knowingly concerned with the breach.²⁰

17. ASX Guidance Note 8 at section 5.9.

18. Corporations Act s 674.

4.7 Use of trading halts and voluntary suspensions

If the market is or will be trading between the time that an entity becomes obliged to give information under Listing Rule 3.1, and the time the entity can do so, it may be appropriate for the entity to request a trading halt from the ASX under Listing Rule 17.1, which may last no more than two business days. A voluntary suspension may be appropriate if longer pauses in trading are required, however voluntary suspensions may sometimes prevent an entity from relying upon the short-form disclosure regime under the Corporations Act if the entity wishes to issue further securities.²¹

Although the granting of a trading halt or voluntary suspension does not suspend the entity's continuous disclosure obligations, they are useful to prevent on-market trading occurring on an uninformed basis, and act as a signal to investors that they should be wary of entering into transactions outside of the ASX which relate to the entity's securities. As a result, trading halts and voluntary suspensions can be useful to reduce the exposure of the entity and its officers if it is ultimately found that they breached their continuous disclosure obligations.

4.8 False market

A false market is a situation where there is material misinformation or materially incomplete information in the market which is compromising proper price discovery. Examples include where an entity has made a false or misleading announcement, or where media reports or speculation have led to a false rumour circulating in the market.²²

If the ASX:

- a) considers that there is or is likely to be a false market in an entity's securities; and
- b) asks the entity to give it information to correct or prevent a false market,

the entity must give the ASX the information needed to correct or prevent the false market.²³

This rule gives the ASX the power to require disclosure of information (including confidential information) despite an exemption under Listing Rule 3.1A otherwise applying.

19. See e.g. *Riley (in his capacity as trustee of the Ker Trust) v Jubilee Mines NL* [2006] WASC 199.

20. Corporations Act ss 79 and 674(2A).

21. The short-form process will not be available where trading in the relevant class of securities was suspended for more than a total of five days in the previous 12 months.

The ASX would usually consult immediately with the entity if it believes that there is a false market. In assessing whether there is a false market, the ASX will consider all of the relevant circumstances. For example, where media reports or speculation relate to significant matters and there is a correlation between such reports and movements in the trading price of the entity, the ASX is likely to take the view that an announcement is required. The ASX also encourages entities to consult with the ASX if the entity considers that a false market may have emerged.

However, the ASX does not expect an entity to respond to every comment media concerning the entity. The ASX has given further guidance about responding to reports and rumours in section 6.5 of ASX Guidance Note 8.

4.9 Other issues

Information that is for release to the market must not be disclosed to anyone until it has first been released to the ASX.²⁴ Announcements are made to the ASX through the Market Announcements Platform, which is the central collection point for market sensitive information.²⁵

Information to be disclosed to the market must be in a suitable form. Generally, this means that the information should be factual and relevant and be expressed in a clear and objective manner. JWS can assist with the preparation of any announcements if you require.

The ASX may also require a Listed Foreign Company to provide any information, documents or explanations necessary to enable the ASX to be satisfied that the Listed Foreign Company is complying with the Listing Rules.²⁶

4.10 Additional information

The ASX's Guidance Note 8 provides extensive additional information about the general continuous disclosure obligations in the ASX Listing Rules, including numerous examples. Guidance Note 8 is available from www.tinyurl.com/ASXGN8.

22. ASX Guidance Note 8 at section 6.1.

23. Listing Rule 3.1B.

24. Listing Rule 15.7.

25. Listing Rule 15.2.1. Further information about the Market Announcements Platform is contained in ASX Guidance Note 14.

The ASX has also issued the *Code of Best Practice for Reporting by Life Science Companies (Second Edition) (Code)*, which provides guidance and suggested practices on the application of the continuous disclosure rules to areas specific to the life science sector, for example, research and development, clinical trials and regulatory and reimbursement matters. The Code is not mandatory, but is a very useful reference tool for 'best practice' reporting by life sciences companies. The Code is available from: www.tinyurl.com/ASXLSReportingCode.

5. Continuous disclosure obligations – specific obligations

The ASX Listing Rules also require disclosure of specific information and events – either immediately or within a defined period. The requirements summarised in this section 5 are in addition to (and do not limit) the general continuous disclosure obligation described in section 4.

5.1 Issues or proposed issues of securities

Entities are required to disclose any issue or proposed issue of securities to the ASX immediately, irrespective of whether the class of securities is quoted.²⁷

If a proposed issue is pro rata (including a bonus issue), the entity must complete an Appendix 3B²⁸ and give it to the ASX at the time of disclosure. If a proposed issue is not a pro rata issue, the entity must give the following information to the ASX at the time it announces the proposed issue:

- a) the class of securities to be issued;
- b) the number of securities to be issued;
- c) the principal terms of the securities to be issued;
- d) the issue price or consideration;
- e) the purpose of the issue;
- f) whether the entity will seek security holder approval in relation to the proposed issue; and
- g) whether the issue will be to a class of security holders.²⁹

5.2 Options

Any change to the exercise price of an option or the number of underlying securities over which the option is exercisable, and the date the change becomes effective, must be disclosed to the ASX at least five business days before the date the change becomes effective.³⁰

Further, if an entity enters into an underwriting agreement for the exercise of options, the entity must disclose to the ASX the name of the underwriter and the fee or commission payable.³¹

27. Listing Rules 3.10.3 and 3.10.5.

28. In this document, a reference to an appendix is a reference to the corresponding appendix to the Listing Rules.

29. Listing Rule 3.10.3.

30. Listing Rule 3.11.2. Note that the Listing Rules prescribe the ways that the terms of an option may change.

31. Listing Rule 3.11.3.

5.3 Escrowed securities

Entities must give the ASX at least ten business days' notice that securities subject to ASX-mandated or voluntary escrow will be released.³²

5.4 Meetings

An entity must tell the ASX:³³

- a) the date of any meeting at which directors are to be elected (at least five days before the closing date for the receipt of nominations);
- b) the outcome in respect of each resolution to be put to a meeting of security holders (immediately after the meeting has been held); and
- c) the contents of any prepared announcement (including any prepared address by the Chairperson) that will be delivered at a meeting of security holders (no later than the start of the meeting).

In addition, Chapter 14 of the Listing Rules also sets out a number of requirements in relation to meetings. Amongst other things, this includes:

- a) that if an entity has CDIs issued over its securities, it must allow CDI holders to attend any meeting of holders of the underlying securities, unless the laws of the jurisdiction in which the entity is established prevent the CDI holders attending the meeting;³⁴
- b) that unless the entity's constitution provides otherwise, the entity must accept nominations for the election of directors up to 35 business days before the date of a general meeting at which directors may be elected; and³⁵
- c) certain rules for election of directors,³⁶

although these requirements will be subject to any waivers or confirmations which the ASX grants to the entity.

32. Listing Rule 3.10A.

33. Listing Rule 3.13.

34. Listing Rule 14.2A.

35. Listing Rule 14.3.

36. Listing Rules 14.4 and 14.5.

5.5 Draft documents

An entity must provide certain draft documents to the ASX's home branch (i.e. not the Market Announcements Platform). These include:³⁷

- a) a proposed amended constitution;
- b) a proposed amended document setting out the terms of debt securities or convertible debt securities;
- c) a document to be sent to persons who are entitled to participate in a new issue under an arrangement or reconstruction (or equivalent foreign concept);
- d) a notice of meeting which contains a resolution for issue of securities;
- e) a document to be sent to a person on whose securities a call is to be made or an instalment is due;
- f) a document to be sent to persons whose quoted options are about to expire; and
- g) a document to be sent to holders of securities in connection with seeking an approval under the Listing Rules.

5.6 Record dates and timetables

An entity must tell the ASX immediately upon it deciding on a proposed (or revised) record date for any security holder entitlement. This must also be at least five business days before the record date.³⁸ (This does not apply to record dates for the purposes of voting at meetings, which must be specified in the notice of meeting.)³⁹

The Listing Rules prescribe specific timetables for certain corporate actions (including dividends, calls on partly paid securities, conversion or expiry of quoted convertible securities, bonus issues, rights issues, reorganisations of capital (including capital returns), buy-backs and security purchase plans),⁴⁰ and a general timetable for corporate actions that do not have a specific timetable.⁴¹

37. Listing Rule 15.1.

38. Listing Rules 3.20.1 and 3.20.2.

39. Corporations Regulations r 7.11.37. (Note also r 7.11.03(1)(b) and ASIC Legislative Instrument 2015/1030.)

40. Appendices 3A.1 to 3A.6, 6A and 7A.

41. Appendix 3A.

5.7 Changes to an entity's officers or contact details

An entity must immediately tell the ASX the following information:

- a) a change of address, telephone number or facsimile number of the entity's registered office or principal administrative office;⁴²
- b) a change to the address of an office at which a register of the entity's securities are kept;⁴³
- c) a proposal to cease operating in Australia a register (or subregister) of the entity's securities (or register of CDIs). The notification must also be at least 20 business days before the date the register (or subregister) will cease to operate;⁴⁴ and
- d) any change to an entity's chairperson, director, CEO, secretary or auditor.⁴⁵

It should be noted that other key staff appointments and departures (including additions and departures from technical advisory boards) may still require disclosure to the market under the general continuous disclosure obligation if it is likely to be a material event.

5.8 Disclosure of directors' and CEO's interests

Listing Rule 3.16.4 requires an entity to disclose to the ASX the material terms (including variations) of any employment, service or consultancy agreement between the entity (or a child entity) and any director, CEO or related party of them, subject to certain exceptions.

The Listing Rules also require disclosure of any 'notifiable interest' of a director. In general, a director holds a 'notifiable interest' if the director:⁴⁶

- is the holder of securities in the company or a related body corporate;
- has the power to exercise, or control, the exercise of, a right to vote attached to securities in the company or a related body corporate;
- has the power to dispose of, or control the exercise of a power to dispose of, the securities in the company or a related body corporate; or

42. Listing Rule 3.14.

43. Listing Rule 3.15.

44. Listing Rule 3.15.

45. Listing Rule 3.16.

46. Listing Rule 19.12; see also Corporations Act s 205G.

- has an interest in a contract:
 - to which the director is a party, or under which the director is entitled to benefit; and
 - which confers a right to call for or deliver shares in, debentures of, or interests of a managed investment scheme made available by, the company or a related body corporate.

The notification must be no more than five business days after the date that:⁴⁷

- a) the company is admitted to the official list of ASX or a director is appointed (Appendix 3X);
- b) there is a change to a notifiable interest of a director (Appendix 3Y); or
- c) the director ceases to be a director (Appendix 3Z).

The ASX can only impose a disclosure obligation on listed entities, and not their directors, as the relevant contractual relationship is between the ASX and the entity, not its directors. The Listing Rules therefore require entities to make such arrangements with their directors as are necessary to ensure that directors disclose to the entity all of the information it requires to be given to the ASX within the five business day deadline. Entities are expected to enforce these arrangements with the Directors.⁴⁸ As a result, it is common for Australian listed entities to include provisions relating to disclosure of directors' interests in securities in director appointment letters or employment agreements.

5.9 Documents sent to shareholders

An entity must immediately give the ASX a copy of any document it sends to security holders generally or in a particular class.⁴⁹

47. Listing Rule 3.19A.

48. Listing Rule 3.19B.

49. Listing Rule 3.17.1.

5.10 Transactions involving an entity's capital

The ASX requires immediate disclosure of various transactions involving an entity's capital, including:⁵⁰

- a) details of a reorganisation to be made to its capital;
- b) details of a call to be made on its securities;
- c) the lodging of any disclosure document (e.g. a prospectus) or product disclosure statement or the issuing of an information memorandum;
- d) details of the exercise by an underwriter of a right to avoid or change the underwriter's obligations;
- e) in the case of convertible securities, that an event has occurred that gives security holders a right of conversion or exercise, and details of the conversion or exercise period; and
- f) that a dividend or distribution plan has been established, amended or deactivated, and a copy of the terms of the plan or any amendment to it.

5.11 Disclosure of substantial holdings in the Listed Foreign Company

The Corporations Act requires public disclosure of substantial holdings in Australian companies listed on the ASX. The disclosure obligation rests with the relevant shareholder who obtains or changes a substantial shareholding, rather than the company.

Although these requirements do not apply to Listed Foreign Companies, ASX typically requires Listed Foreign Companies to undertake to the ASX to disclose new substantial holders and any change to the holdings of substantial holders. Generally, this requirement is to advise the ASX of holders with a Relevant Interest in the Listed Foreign Company's securities of 5% or more and changes to that interest of more than 1%.

5.12 Loans

If an entity includes loans in its assets, the ASX may require the entity to give the ASX such information about the loans as is requested by the ASX.⁵¹

50. Listing Rule 3.10.

51. Listing Rule 3.18.



6. Periodic reporting

In addition to the continuous disclosure obligations described above, entities are subject to a number of periodic disclosure obligations under the Listing Rules. Broadly, Chapter 4 of the Listing Rules sets out the periodic disclosure requirements that a company is required to satisfy in relation to each quarter, half year, and year. Key aspects of these requirements are described below and are summarised in Schedule 3.

In the case of US companies, once the company becomes a registrant under the *Securities Exchange Act of 1934* (US) (as amended) and if it lists on a US securities exchange, it is likely that the ASX will grant the companies a waiver from having to comply with the following financial reporting requirements under the Listing Rules. A condition of such a waiver is likely to be that the company is required to file its periodic SEC financial reports with the ASX in addition to any other US filing requirements.

6.1 Quarterly disclosure

Many Listed Foreign Companies are admitted to the official list of ASX under the 'assets test' in the Listing Rules in circumstances where at least half of their total tangible assets are cash or in a form readily convertible to cash. Such companies are required to complete a report (in the form of an Appendix 4C) concerning each quarter of its financial year and provide this to the ASX as soon as the information is available (and in any event, no later than one month after the end of the quarter).⁵² Such companies are required to do so for at least the first eight quarters after admission (or such longer period as requested by the ASX).

6.2 Half-year disclosure

Listed Foreign Companies must prepare half-yearly accounts, have them audited or reviewed and provide them to the ASX together with the information set out in Appendix 4D. The precise requirements for the accounts will depend on the Listed Foreign Company's financial reporting obligations in the jurisdiction in which it is incorporated; refer to Listing Rule 4.2A for further information.

The half-yearly accounts and information set out in Appendix 4D must be given to the ASX immediately after they are ready to be given to the ASX, no later than the time they are filed with any applicable regulatory authority, and in any event, no later than two months after the end of the Listed Foreign Company's financial half-year.⁵³

52. Listing Rule 4.7B.

53. Listing Rule 4.2B.

6.3 Annual disclosure

Listing Rules

Following the end of its financial year, a Listed Foreign Company is required to give the ASX:

- a) the information specified in Appendix 4E;⁵⁴
- b) an annual report (if required under the law of the place of its incorporation); and
- c) the documents that it lodges with ASIC.

The information specified in Appendix 4E is collectively referred to as the 'preliminary final report'. The Listed Foreign Company must give the preliminary final report immediately after it is ready to be given to the ASX, no later than the time that the accounts upon which the preliminary final report are filed with any applicable regulatory authority, and in any event, no later than two months after the end of the Listed Foreign Company's financial year.⁵⁵

The preliminary final report should be prepared in accordance with the accounting standards applicable to the Listed Foreign Company and using the same accounting policies that it adopts for its other financial accounts.⁵⁶

If the Listed Foreign Company becomes aware of any circumstances which are likely to materially affect the results or other information in the preliminary final report, it must immediately give the ASX an explanation of the circumstances and the effects the circumstances are expected to have on its current or future financial performance or position.⁵⁷

If the Listed Foreign Company changes its annual balance date so that its next annual accounts cover a period that is more than 12 months, it must give the ASX the information set out in Appendix 4F for that 12 month period immediately after it becomes available. The accounts on which the information is based must be audited or subject to review if the ASX or the relevant law so requires.⁵⁸

54. Listing Rule 4.3A.

55. Listing Rule 4.3B.

56. Listing Rule 4.3A.

57. Listing Rule 4.3D.

58. Listing Rule 4.4.A.

If the Listed Foreign Company is required to send an annual report to its securityholders, the annual report must also be given to the ASX at the time of despatch to securityholders.⁵⁹

Listed Foreign Companies are also required to give to the ASX the documents that they lodge with ASIC (see below) when lodged with ASIC, and in any event, no later than three months after the end of their financial year.⁶⁰

Corporations Act

In addition to the reporting requirements under the Listing Rules, a Listed Foreign Company must, at least once in every calendar year and at intervals of not more than 15 months, lodge with ASIC a copy of its:

- a) balance sheet as at the end of its last financial year;
- b) cash flow statement for its last financial year; and
- c) profit and loss statement for its last financial year,

in such form and containing such particulars and including copies of such documents as it is required by US law to prepare, together with a statement in writing in the prescribed form (ASIC Form 405) verifying that the copies are true copies of the documents so required.⁶¹ However, if ASIC considers that the documents do not properly disclose the company's financial position, additional documents may be required to be lodged.⁶²

These documents must be audited and, as noted above, must be given to the ASX when they are lodged with ASIC, and in any event, no later than three months after the end of the Listed Foreign Company's financial year.⁶³

ASIC may extend the period within which these documents are to be lodged.⁶⁴

59. Listing Rule 4.7. See also section 10.5 below regarding the corporate governance disclosures to be included in, or accompany, annual reports.

60. Listing Rule 4.5.2.

61. Corporations Act s 601CK.

62. Corporations Act s 601CK(3).

63. Listing Rule 4.5.2.

64. Corporations Act s 601CK(2).

7. New issues of securities and reorganisations of capital

7.1 Listing Rule 7.1 – 15% placement capacity

In general terms, Listing Rule 7.1 requires that unless the holders of ordinary securities otherwise agree, an entity may not issue (or agree to issue) equity securities that represent more than 15% of the number of fully paid ordinary securities on issue twelve months prior. The number of equity securities available under Listing Rule 7.1 is commonly referred to as an entity's 'placement capacity'.

For the purposes of the Listing Rules, 'equity securities' include shares, options, warrants, performance rights and other convertible securities.⁶⁵

The calculation of an entity's precise placement capacity is quite detailed and is subject to a number of exceptions. Those exceptions include, but are not limited to:⁶⁶

- a) (**pro rata issues**) pro rata issues of equity securities (such as rights issues), including certain issues of equity securities to make up a shortfall on a pro rata issue (e.g. issues of securities to an underwriter, or certain placements of a shortfall). Certain security purchase plans (but not an issue to a plan's underwriters) are also exempted;
- b) (**conversions and other earlier agreements**) an issue of equity securities on the conversion of a convertible security or otherwise in accordance with an earlier agreement (although the original securities or agreement to issue equity securities does not fall within this exception);
- c) (**dividend plans**) an issue of equity securities under certain dividend or distribution plans;
- d) (**employee incentive schemes**) an issue under an employee incentive scheme if within three years before the issue date:
 - i. a summary of the terms of the scheme was set out in a prospectus, product disclosure statement or information memorandum; or
 - ii. holders of ordinary securities have approved the issue of securities under the scheme (subject to certain additional requirements);
- e) (**preference shares**) an issue of preference shares that do not convert into any other class of equity security; and
- f) (**security purchase plans**) subject to certain conditions, an issue of securities to existing security holders (but not underwriters) under a security purchase plan.

65. Listing Rule 19.12.

66. Listing Rule 7.2.

If an entity issues or agrees to issue equity securities with the approval of the holders of its equity securities, those securities will not use up any of its placement capacity.⁶⁷ In addition, an entity can 'refresh' its placement capacity by having the holders of its ordinary securities approve a previous issue of securities.⁶⁸ The procedural requirements for such security holder approvals are quite detailed.⁶⁹

Entities should carefully consider the wording of the Listing Rules when calculating their placement capacity, assessing whether an issue of equity securities falls within a relevant exception, and when seeking security holder approval for an issue or an agreement to issue equity securities. JWS would be happy to assist in relation to any of these matters.

7.2 Listing Rule 7.1A – additional 10% placement capacity

Listing Rule 7.1A permits 'eligible entities' to increase their placement capacity by a further 10% of the number of fully paid ordinary securities on issue twelve months prior, if the entity's holders of ordinary securities pass a special resolution to do so at the entity's annual general meeting. As with Listing Rule 7.1, the calculation of an entity's additional placement capacity under Listing Rule 7.2 is quite detailed. The requirements for the security holder approval are similarly detailed.⁷⁰

An 'eligible entity' is an entity which, at the date of the special resolution:⁷¹

- a) is not included in the S&P/ASX300 Index; and
- b) has a market capitalisation (calculated in accordance with the Listing Rules) equal to or less than a prescribed amount (currently A\$300 million).

67. Listing Rule 7.1.

68. Listing Rule 7.4.

69. Listing Rules 7.3 and 7.5.

70. Listing Rule 7.3A.

71. Listing Rule 19.12.

Unlike Listing Rule 7.1, equity securities issued in reliance upon Listing Rule 7.1A are subject to requirements that:

- a) they be in an existing quoted class of equity securities;⁷²
- b) the issue price of each such security must be at least 75% of a specified VWAMP for securities in that class; and⁷³
- c) certain additional information about the issue be given to the ASX (only some of which is released to the market).⁷⁴

Issues of equity securities under an exception to Listing Rule 7.1 do not use up an entity's additional placement capacity under Listing Rule 7.1A.

7.3 Information to be given to the ASX

Please refer to section 5.1 above regarding the information to be given to the ASX in relation to issues (or proposed issues) of securities.

7.4 Issues of equity securities to related parties

Subject to certain exceptions, an entity may not issue equity securities to its related parties (or anyone else that the ASX may determine) unless the holders of ordinary securities in the entity have approved the issue or certain exceptions apply.⁷⁵

Each of the following is a related party of a Listed Foreign Company for this purpose:⁷⁶

- a) an entity⁷⁷ that comes to control the Listed Foreign Company or certain persons in connection with it. ('Control' meaning the capacity, as a practical matter, to determine the outcome of decisions about the financial and operating policies of the Listed Foreign Company);
- b) the directors of the Listed Foreign Company, their spouses, or their respective parents and children;

72. Listing Rule 7.1A.3.

73. Listing Rule 7.1A.3.

74. Listing Rules 3.10.5A and 7.1A.4.

75. Listing Rule 10.11.

76. Listing Rule 19.12 and Corporations Act s 228.

77. In this section 7.4, an 'entity' includes a natural person.

- c) entities controlled by persons in paragraphs (a) or (b) (other than entities also controlled by the Listed Foreign Company);
- d) an entity that was in the previous six months a person described in paragraphs (a) to (c);
- e) an entity that believes or has reasonable grounds to believe that they will be a person referred to in any of paragraphs (a) to (c) at any time in the future (e.g. a proposed director); and
- f) an entity who acts in concert with a related party of the Listed Foreign Company on the understanding that the related party will receive a financial benefit if the Listed Foreign Company gives the entity a financial benefit.

In addition, an entity must not permit its directors or their Associates from acquiring securities under an employee incentive scheme without shareholder approval.⁷⁸

Other than security holder approval (discussed below), the exceptions include:⁷⁹

- a) (**pro rata issues**) issues under a pro rata issue of equity securities (such as rights issues), including an issue to an underwriter if certain conditions are satisfied;
- b) (**dividend plans**) an issue of equity securities under certain dividend or distribution plans;
- c) (**employee incentive schemes**) either:
 - i. an issue of securities under an employee incentive scheme approved by the holders of ordinary securities in accordance with a procedure set out in Listing Rule 10.14. The issue must be within 12 months after the meeting;
 - ii. subject to certain conditions, a grant of options or other rights to acquire securities under an employee incentive scheme, where the securities to be acquired on the exercise of the options or in satisfaction of the rights are required by the terms of the scheme to be purchased on-market;
- d) (**conversions and other earlier agreements**) an issue of equity securities on the conversion of a convertible security or otherwise in accordance with an earlier agreement (although the original securities or agreement to issue equity securities does not fall within this exception);
- e) (**security purchase plans**) subject to certain conditions, an issue of securities to existing security holders (but not underwriters) under a security purchase plan; and

78. Listing Rule 10.14.

79. Listing Rules 10.12 and 10.15B.

- f) (**newly related parties**) where a Listed Foreign Company and the entity to whom equity securities are proposed to be issued are related parties only by reason of the transaction which is the reason for the issue of the securities, and the related party relationship arises because the Listed Foreign Company believes or has reasonable grounds to believe that the Listed Foreign Company and the related party will become related parties in the future.

If security holder approval is sought for the issue of equity securities to a related party, the notice of meeting must specify certain information.⁸⁰ In addition, the related party and their Associates are excluded from voting on the relevant resolution. In some circumstances (e.g. where the financial benefit to the related party is difficult to value), it may also be appropriate for the entity to obtain an independent valuation and disclose that to security holders.⁸¹

An issue of equity securities to a related party that is approved by shareholders under the Listing Rules is an additional exception to the 15% limit under Listing Rule 7.1 (see section 7.1 above).⁸²

7.5 Corporations Act restrictions on new issues of securities

An offer of securities that is received in Australia will generally require disclosure under a prospectus or similar offer document which complies with the requirements of the Corporations Act, unless a relevant exceptions applies or ASIC relief is available. Commonly used exceptions to the prospectus requirements include offers to 'professional' or 'sophisticated' investors, or for listed entities only, rights issues using a 'cleansing notice' (each of which are discussed below). These exceptions are summarised below.

Sophisticated or professional investors

An offer will be made to a 'sophisticated investor' if the minimum amount payable for the securities (together with any other amounts previously paid by that person for securities in the same class still held by that person) is at least A\$500,000.⁸³ Alternatively, an investor may fall within this exception if they give evidence that they have:⁸⁴

- a) net assets of at least a prescribed amount (currently A\$2.5 million); or
- b) gross income for each of the last two financial years of at least a prescribed amount (currently A\$250,000).

80. Listing Rules 10.13, 10.15 and 10.15A.

81. See generally ASIC Regulatory Guide 76: Related party transactions.

82. Listing Rule 7.2, exception 14.

83. Corporations Act s 708(8)(a) & (b).

84. Corporations Act s 708(8)(c); Corporations Regulations r 6D.2.03(1) and (2).

The term 'professional investor' is used to describe many different types of professional investors. These include, amongst other things, listed entities, financial services licensees and trustees of superannuation funds. The term is also used to describe a person who has or controls gross assets of at least A\$10 million.

Rights issues

Listed entities are permitted to offer a rights issue of quoted securities without a prospectus under the Corporations Act provided certain requirements are met. One of those requirements is that the issuer must lodge a 'cleansing notice' before the rights issue offer is made.

In effect, a 'cleansing notice' is a written confirmation to the market that the issuer has complied with its continuous disclosure and financial reporting obligations, and also sets out any material information that has previously been withheld from disclosure on the basis of an exception to continuous disclosure obligations (see section 4.4 above).

As a practical matter, an 'offer booklet' is generally issued immediately before the cleansing notice. The offer booklet contains the key information about the rights issue and any information that would otherwise need to be disclosed in the cleansing notice. Offer booklets are typically significantly shorter than prospectuses or other disclosure documents under the Corporations Act.

The additional conditions to the rights issue exception include that the securities offered under the rights issue are in a class of quoted securities, and that trading in that class has not been suspended for more than a total of five days during the shorter of the period of quotation, and the previous twelve month period.

7.6 Corporations Act restrictions on on-sales of securities

Where securities are initially issued without disclosure under the Corporations Act (i.e. under an exception from disclosure such as those listed in section 7.5), any secondary sale of those securities within 12 months after their issue will require disclosure if either:⁸⁵

- a) the body issued the securities with the purpose that the person to whom they were issued would sell or transfer the securities, or grant, issue or transfer an interest in, or options over, the securities; or
- b) the person to whom the securities were issued acquired them for such a purpose.

85. Corporations Act s 707(3)(b) and (4).

A sale of securities within 12 months of their issue gives rise to a rebuttable presumption that such grounds existed.

Importantly, disclosure is not required for the secondary sale of securities where the body gives a cleansing notice within five business days after the issue of the securities. Similar to cleansing notices for rights issues (see section 7.5 above):⁸⁶

- a) a cleansing notice for the secondary sale of securities must confirm that the body has complied with its continuous disclosure and financial reporting obligations, and set out any material information that has previously been withheld from disclosure on the basis of an exception to continuous disclosure obligations (see section 4.4 above); and
- b) the exception is subject to certain other conditions, including that the securities the subject of the cleansing notice are in a class of quoted securities (and have been at all times in the last three months), and that trading in that class has not been suspended for more than a total of five days during the shorter of the period of quotation, and the previous twelve month period.

86. Corporations Act s 708A(5)-(8).

8. Duties of directors, officers and employees

8.1 Foreign duties

A Listed Foreign Company's directors, officers⁸⁷ and employees are required to comply with any duties placed on them under the laws of the jurisdiction in which the Listed Foreign Company is incorporated.

8.2 Australian duties

In addition, sections 180 to 184 of the Corporations Act impose duties on directors, officers and in some cases, employees, of Listed Foreign Companies.⁸⁸ In general terms, those duties are:

- a) a duty of care and diligence;⁸⁹
- b) a duty to act in good faith in the best interests of the corporation and for a proper purpose;⁹⁰
- c) a duty not to improperly use the person's position with the Listed Foreign Company;⁹¹ and
- d) a duty not to improperly use information obtained as a result of the person's position with the Listed Foreign Company.⁹²

However, these duties only apply to the extent that the acts or omissions of the director, officer or employee have a connection with Australia.⁹³

Directors face civil liability penalties for breaches of the above duties, but may also commit a criminal offence for breaches of the duties in paragraphs (b) to (d) in cases of recklessness or intentional misconduct.

There are a number of other Australian laws that apply to directors and officers of Listed Foreign Companies, including laws relating to environmental matters, and work health and safety.

It is beyond the scope of this guide to describe all of the obligations which are imposed on the directors and officers of Listed Foreign Companies. Please let us know if you would like advice on a particular aspect or area of the law.

87. Broadly, its directors, secretaries, and other senior managers.

88. Similar obligations arise under the common law (i.e. under court-made law).

89. Corporations Act s 180(1). An exemption to this duty called the 'business judgement rule' is contained in Corporations Act s 180(2).

90. Corporations Act ss 181(1) and 184(1).

91. Corporations Act s 182.

92. Corporations Act s 183.

93. Corporations Act s 186.

9. Specific obligations of registered foreign companies

9.1 Corporations Act requirements

Chapter 5B of the Corporations Act contains the majority of the provisions specific to foreign companies that are registered under the Corporations Act. A number of these provisions are summarised below.

9.2 Display of registered name

A Listed Foreign Company is required to display the following information outside every office and place of business in Australia that is open and accessible to the public:⁹⁴

- a) its name and place of origin;
- b) notice that the liability of its members is limited; and
- c) in the case of its registered office, the expression 'Registered Office'.

This information must be displayed in an obvious position and in clear legible characters.

If the Listed Foreign Company's business at Australia is carried on at places which are not publicly accessible, these obligations will only apply to its registered office.

9.3 Public documents and negotiable instruments

MID will be required to set out the following information on all of its public documents and negotiable instruments published or signed in Australia:⁹⁵

- a) its name;
- b) either:
 - i. the expression 'Australian Registered Body Number' (or the permitted abbreviation 'ARBN') followed by its ARBN (being ARBN 604 398 423); or
 - ii. the words 'Australian Business Number' (or the permitted abbreviation 'ABN') followed by its ABN (being ABN 28 604 398 423);
- c) its place of origin; and
- d) notice that the liability of its members is limited.

94. Corporations Act s 601CW.

95. Corporations Act s 601DE.

9.4 Registered office

Listed Foreign Companies must have a registered office in Australia to which all communications and notices may be addressed.⁹⁶

Unless the Listed Foreign Company notifies ASIC to the contrary, the Australian registered office must be open and accessible to the public each business day from at least 10.00am to 12.00pm and 2.00pm to 4.00pm. A representative from the Listed Foreign Company must be present at all times that the office is open to the public.⁹⁷

9.5 Cessation of business

Foreign entities must provide written notice to ASIC within seven days after ceasing to carry on business in Australia.⁹⁸

96. Corporations Act s 601CT.

97. Corporations Act s 601CT.

98. Corporations Act s 601CL.

10. Other issues

10.1 False and misleading statements

Under section 1308 of the Corporations Act, it is an offence for a corporation to advertise or publish a statement of the amount of its capital that is misleading, or a statement in which the total of all amounts paid and unpaid on its shares is stated, but the amount of paid up capital or the amount of any charge on uncalled capital is not stated. The section also imposes personal criminal liability on individuals who make or authorise the making of a statement to ASIC that is false or misleading in a material particular (e.g. in a form filed with ASIC).

In addition, section 1309 of the Corporations Act makes it an offence for an officer or employee of a Listed Foreign Company to make (or authorise the making of) information available to the Listed Foreign Company's directors, auditors, members or the ASX (amongst others) which the officer or employee knows to be false or misleading in a material particular.

Further, the *Australian Consumer Law* contains a number of provisions⁹⁹ which prohibit Listed Foreign Companies from engaging in conduct that is misleading or deceptive or is likely to mislead or deceive. This legislation covers a broader range of conduct than the Corporations Act. It also prescribes offences for certain forms of misleading or deceptive conduct.¹⁰⁰

10.2 Transaction with a 'person in a position of influence'

Listing Rule 10.1 requires that an entity obtain the approval of holders of its ordinary securities before the entity acquires a substantial asset from, or disposes of a substantial asset to:

- a) a related party¹⁰¹ of the entity;
- b) an entity that is controlled by or is a subsidiary of the listed entity (but which is not directly or indirectly wholly-owned by the entity) – e.g. some joint venture special purpose vehicles;
- c) a substantial holder¹⁰² in the entity, if the substantial holder (and their Associates) have or in the last six months have had a Relevant Interest in securities representing at least 10% of the total votes in the entity;
- d) an Associate of a person listed in paragraphs (a) to (c); and
- e) anyone else that the ASX may determine.

99. Parts 2-1 and 3-1.

100. Division 1 of Part 4-1.

101. Refer to section 7.4 for an explanation of who will be an entity's related parties.

102. Refer to section 5.11 for further information about substantial holdings.

An asset is 'substantial' if its value or the consideration for it is (or the ASX considers is) at least 5% of the 'equity interests'¹⁰³ of the entity as set out in the latest financial accounts given to the ASX.¹⁰⁴

Listing Rule 10.1 does not apply to:

- a) to issues of securities for cash (although Listing Rule 10.11 will apply – see section 7.4 above); or
- b) where the counterparty to the transaction is a related party only by reason of the transaction and the related party relationship arises because the entity believes or has reasonable grounds to believe that the entity and the related party will become related parties in the future.

Notably, there is no exception for transactions which are on arm's-length terms, unlike the related party provisions that also apply to Australian companies under Chapter 2E of the Corporations Act.

Where shareholder approval under Listing Rule 10.1 is required, the entity must disregard any votes cast by certain persons nominated by the ASX,¹⁰⁵ and the notice of meeting must include an independent expert's report (which states whether, in the expert's opinion, the transaction is fair and reasonable to security holders not excluded from voting).

103. The sum of paid up capital, reserves and accumulated profits or losses, subject to certain adjustments set out in Listing Rules 10.2 and 10.2.1.

104. Listing Rule 10.2.

105. Listing Rules 10.10.1 and 14.11.1.

10.3 Termination benefits

The ASX places certain restrictions on the termination benefits that may be promised or given to officers of Listed Foreign Companies.

Termination benefits are payments, property and advantages that are receivable on termination of employment, engagement or office, except those from any superannuation or provident fund and those required by law to be made.

Listing Rule 10.19 establishes a cap on the aggregate termination benefits that a Listed Foreign Company may give to its officers. Shareholder approval is required if the value of the benefits is to exceed 5% of the equity interests of the Listed Foreign Company.

In addition, Listing Rule 10.18 prohibits the officers¹⁰⁶ of a Listed Foreign Company from receiving termination benefits if a change occurs in the shareholding or control of the Listed Foreign Company, even if the benefit would otherwise fall within the 5% cap described above. For example, officers are prevented from holding 'double trigger' options (i.e. options which vest on an accelerated basis if the officer is terminated following a change of control).

10.4 Insider trading

General

The Corporations Act provides that, as a general rule, if:

- a) a person (the **insider**) possesses information:
 - i. that is not generally available¹⁰⁷ and
 - ii. which, if it were generally available, would be information that a reasonable person would expect to have a material effect¹⁰⁸ on the price or value of an entity's securities,¹⁰⁹

(inside information); and

106. Broadly, an 'officer' means a director, secretary or senior manager.

107. In summary, information is generally available if it consists of readily observable matter, it has been publicly available for a reasonable period for the information to be disseminated throughout the market, or it consists of deductions, conclusions or inferences from such matter or information: Corporations Act s 1042C.

108. A reasonable person would expect the information to have a material effect on the price or value of the entity's securities if the information would, or would be likely to, influence persons who commonly acquire securities in deciding whether to acquire or dispose of those securities: Corporations Act s 1042D.

109. For completeness, 'securities' in this context includes CDIs.

- b) the insider knows, or ought reasonably to know, that the information is inside information, the insider must not:
- c) (whether as principal or agent) apply for, acquire or dispose of, the securities, enter into an agreement to do any of those things, or procure another person to do any of those things (commonly known as the 'trading prohibition'); or¹¹⁰
- d) directly or indirectly, communicate the information, or cause the information to be communicated, to another person if the insider knows, or ought reasonably to know, that the other person would or would likely do any of the things referred to in paragraph (c) above (commonly known as the 'tipping prohibition').¹¹¹

Consequences of breach

A contravention of the insider trading provisions can attract a civil penalty of up to A\$200,000 for an individual or A\$1 million for a body corporate.¹¹² In addition, the court may also order a person to compensate another person for damage suffered as a result of the contravention.¹¹³

The maximum criminal penalty for individuals is 10 years' imprisonment and/or a fine of the greater of A\$810,000 and three times the benefits received by those who benefited from the contravention. The maximum criminal penalty for a body corporate is a fine of the greater of A\$8,100,000 and (depending on the circumstances) either three times the benefits received by those who benefited from the contravention or 10% of the body corporate's annual turnover.¹¹⁴

10.5 Corporate Governance

The ASX Corporate Governance Council's *Corporate Governance Principles and Recommendations (Principles and Recommendations)* set out a series of recommendations for ASX-listed entities to establish and maintain a corporate governance framework.

110. Corporations Act s 1043A(1).

111. Corporations Act s 1043A(2).

112. Corporations Act s 1317G(1B).

113. Corporations Act s 1317HA.

114. Corporations Act s 1311(1A).

The Principles and Recommendations do not prescribe mandatory requirements; rather, entities are required to provide at the time of listing, and in each annual report thereafter, a statement which discloses the extent to which it has not complied with the Principles and Recommendations.¹¹⁵ This is known as an 'if not, why not' approach to compliance. Entities are also required to lodge an Appendix 4G at the same time as their annual report, which acts as a 'key' to the corporate governance statement.

However, the Principles and Recommendations refer to an audit committee. If a Listed Foreign Company is included in the S&P All Ordinaries Index at the beginning of its financial year or on admission (as may be the case), it must have an audit committee for that year.¹¹⁶ In addition, if a Listed Foreign Company is part of the S&P/ASX 300 index¹¹⁷ at the start of a financial year, it will in most cases be required to comply with the Principles and Recommendations in relation to the composition of the audit committee for the whole of that financial year.

10.6 Insolvency and external administration

Should a Listed Foreign Company face financial difficulties, aspects of the insolvency and external administration regime under the Corporations Act will apply. Please contact JWS if you would like further information.

10.7 Security interests in personal property

Australia has a statutory system for taking and perfecting security in personal property (to simplify, all property other than real estate). The key legislation is the *Personal Property Securities Act 2009* (Cth).

Suppliers of inventories on a retention of title basis are often required to register security interests over such inventories in order to ensure the priority of the supplier's title to the property in the event that the customer suffers an insolvency-related event.

Please contact JWS if you would like any further information about these matters.

115. Refer to section 6.3 above regarding annual reports. If no annual report is required under the laws under which the Listed Foreign Company is incorporated, it will still need to deliver a corporate governance statement and Appendix 4G to ASX.

116. Listing Rule 1.1 condition 13 and Listing Rule 12.7.

117. The S&P/ASX 300 is an index of the top 300 companies listed on the ASX by market capitalisation whose securities also satisfy a liquidity test.

II. Conclusion

This summary of obligations under the Listing Rules and Corporations Act is not comprehensive. The people responsible for managing a company's disclosure obligations should read and become familiar with the Listing Rules in their entirety and appropriate sections of the Corporations Act. This summary is not a substitute for reading the Listing Rules and related Guidance Notes or Corporations Act, or specific legal advice.

I2. Further information

For further information, please contact:



JAMES ROZSA

Partner

T: +61 2 8274 9541

E: james.rozsa@jws.com.au

James specialises in mergers and acquisitions, private equity transactions and equity capital markets, with a particular focus on technology and life sciences.

James is expert in all aspects of domestic and cross-border M&A deals including public (takeovers and schemes of arrangements) and privately negotiated transactions and ECM deals including cross-border listings on the ASX. James is dual qualified in Australia and New York and has experience across three continents (Australia, the North America and Europe) as a lawyer and investment banker.

James has been recognised by his peers (Best Lawyers) for each of M&A and Private Equity (2010-2017) and ECM (2017) and by his clients (Chambers) as a leading individual for each of Corporate/M&A and Private Equity (2011-2017) and ECM (2016-2017). In Chambers James was described by one source as 'easily the best private equity lawyer we have dealt with, especially on cross-border deals,' whilst more than one interviewee pointed out that 'he doesn't miss the fact that deals have to get done and finds the right balance between their commercial and their legal aspects.'

Recent transactions for US-domiciled and ASX-listed companies include AirXpanders, Inc (ASX:AXP) and Visioneering Technologies, Inc (ASX:VTI) on their respective Australian IPOs and ASX-listings, and follow-on raisings for Sunshine Heart Inc (ASX:SHI), Osprey Medical Inc (ASX:OSP) and AirXpanders.



CLARE BROWN

Partner

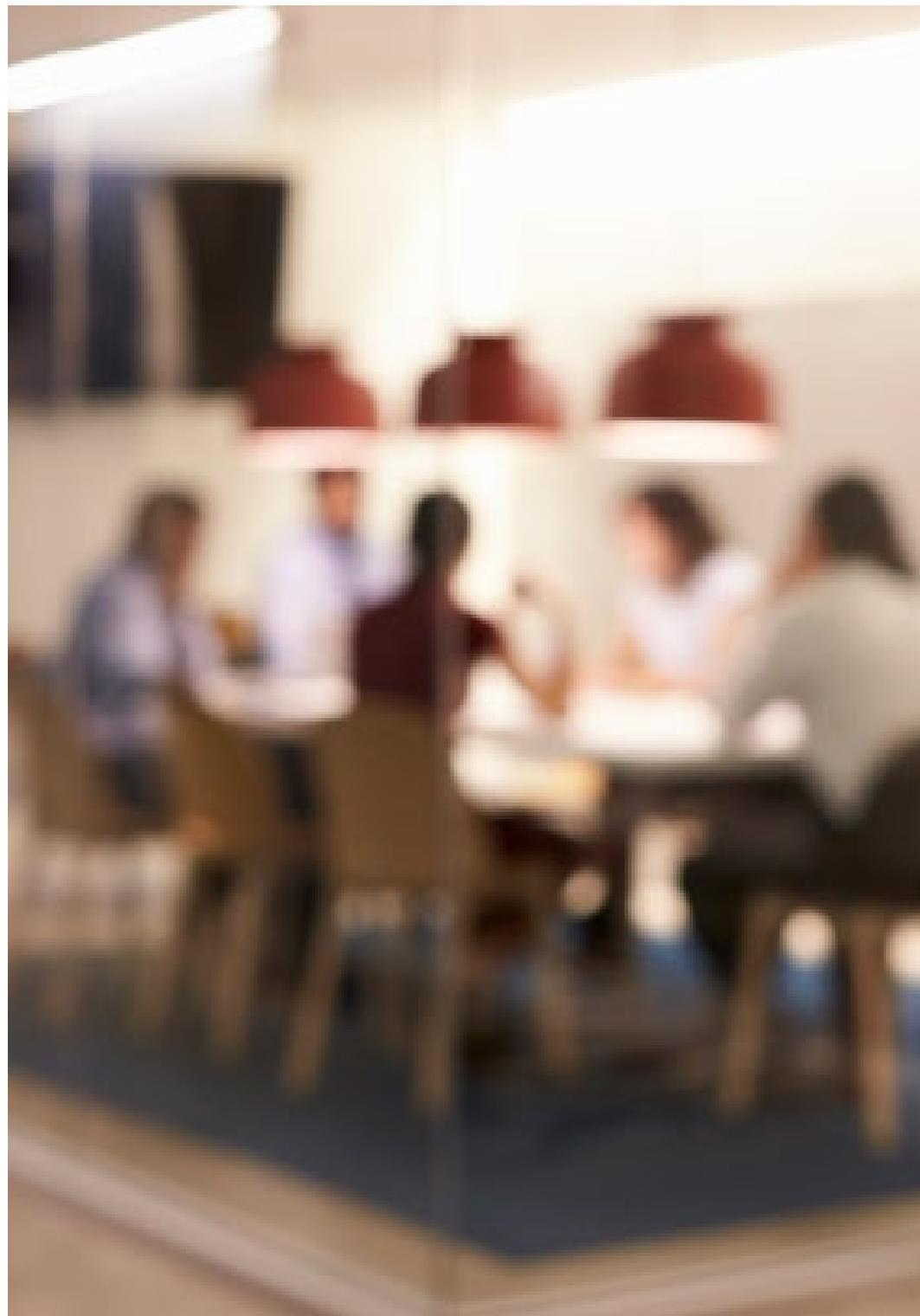
T: +61 2 8247 9643

E: clare.brown@jws.com.au

Clare specialises in corporate and public securities law, with a particular focus on equity capital markets.

Clare has experience in cross-border and domestic corporate transactions including advising on equity and hybrid security fundraisings, joint ventures, regulated and private M&A, business sales and acquisitions, securities regulatory issues, ESOPs and other general corporate matters.

She regularly acts for companies in the healthcare and biotechnology sector, as well as the technology sector more broadly.



Schedule I - Glossary

Associate has the meaning given in the Corporations Act. It is an expansive definition. In general terms, persons are associates in relation to a body if one person controls (or is under common control with) the other, where they are acting in concert in relation to the affairs of the body, or where they have an agreement, arrangement or understanding (including ones which are unwritten, informal or not legally binding) for the purposes of controlling or influencing the composition of the body's board of directors or the conduct of its affairs.

ASIC means the Australian Securities and Investments Commission.

ASX means ASX Limited or the Australian Securities Exchange run by it.

CDI means a CHESS Depository Interest.

Code means the *Code of Best Practice for Reporting by Life Science Companies (Second Edition)* issued by the ASX.

Corporations Act means the *Corporations Act 2001* (Cth).

Corporations Regulations means the *Corporations Regulations 2001* (Cth).

JWS means Johnson Winter & Slattery.

Listed Foreign Company means a company incorporated outside Australia that is listed on the ASX.

Listing Rules means the Listing Rules of the ASX.

Principles and Recommendations means the ASX Corporate Governance Council's *Corporate Governance Principles and Recommendations*.

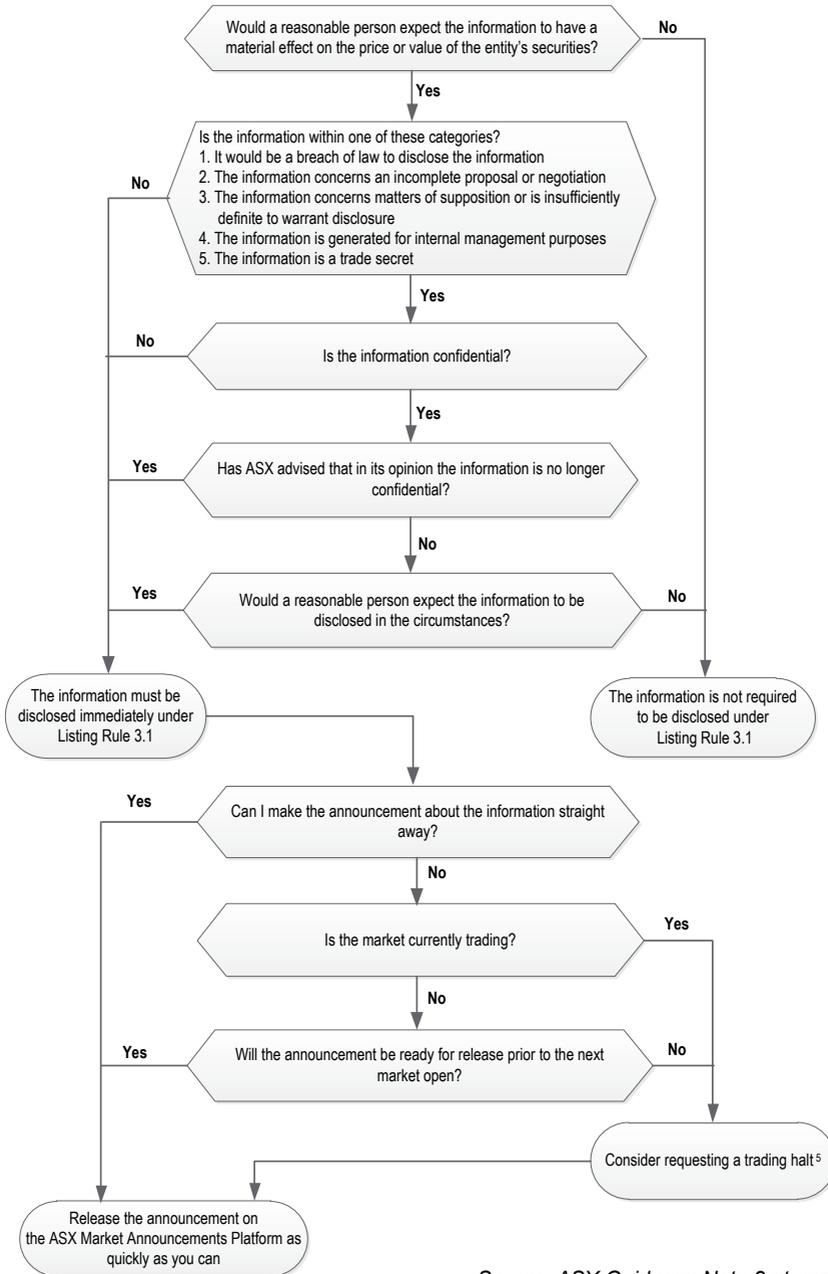
Relevant Interest has the meaning given in the Corporations Act and only relates to existing securities. Broadly, a person has a 'relevant interest' in securities if they have a direct or indirect interest in existing securities, or ability to control the exercise of a right to vote or a power to dispose of the securities. This includes cases where the person would obtain that interest or ability if an agreement, arrangement or understanding (including ones which are unwritten, informal or not legally binding) were performed. For instance, a contractual right to purchase securities already on issue will confer a relevant interest in those securities.

The identification and calculation of Relevant Interests can be complicated and relates not only to disclosure of substantial holdings, but also to the 20% 'takeovers threshold' for widely-held Australian companies. You should obtain legal advice if planning to acquire such rights or powers in an Australian company.

VWAMP means, in relation to particular securities for a particular period, the volume weighted average market price of trading in those securities on the ASX market and Chi-X markets over that period, excluding certain transactions specified in Listing Rule 19.12.

Schedule 2 - Continuous disclosure flowcharts

The following diagram outlines the decision process a listed entity should generally follow, if it becomes aware of information that could have a material effect on the price or value of its securities, to determine whether the information needs to be disclosed under Listing Rules 3.1 and 3.1A and, if it does and the entity is not in a position to issue an announcement straight away, whether it should consider requesting a trading halt.

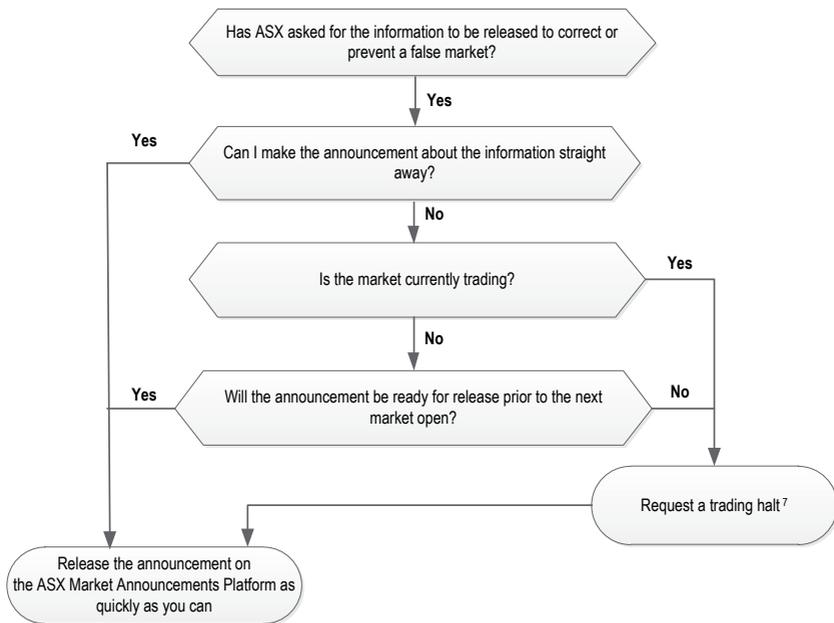


Source: ASX Guidance Note 8 at page 5.

5. Further information is contained in sections 4.6 to 4.8 of ASX Guidance Note 8.

The questions in the second to fifth hexagons in the diagram above go to whether the information falls within the carve-outs to immediate disclosure in Listing Rule 3.1A. These questions may need to be reappraised from time to time as circumstances change (e.g. as a previously incomplete proposal or negotiation approaches completion or if the information has ceased to be confidential).

The diagram below outlines the decision process a listed entity should generally follow if the ASX asks it under Listing Rule 3.1B to disclose information needed to correct or prevent a false market in its securities:



Source: ASX Guidance Note 8 at page 5.

7. See generally '5 Listing Rule 3.1A - the exceptions to immediate disclosure' on page 31 and following.

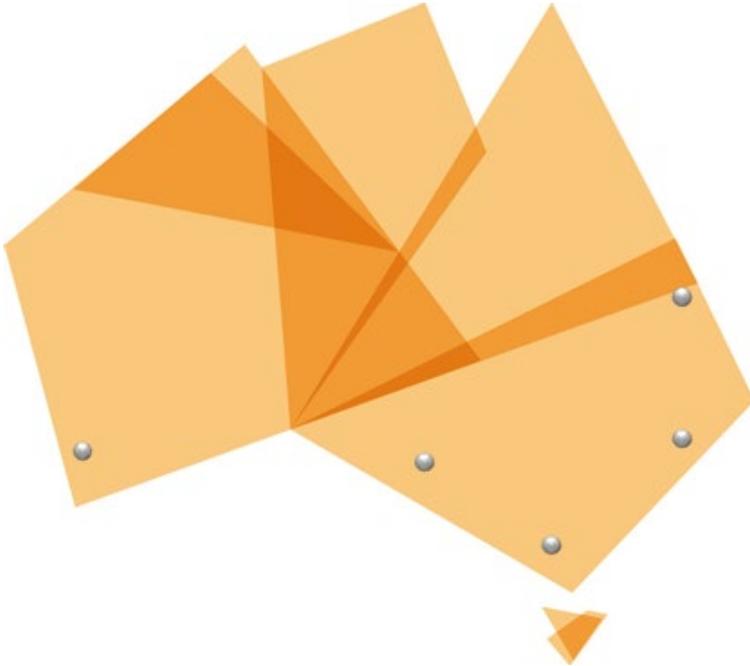
Schedule 3 – Summary of periodic reporting

The following table summarises the periodic reporting requirements described in sections 6 and 10.5 of this guide. Important details have been omitted; please refer to those sections and the sources referred to in those sections for further details.

Disclosure to	Description	Deadline (after end of period)
ASX – each quarter (for first eight quarters, unless extended by ASX)	Appendix 4C (cash flow report)	One month *
ASX – after half-year end	Reviewed half year accounts, auditor's report and Appendix 4D (half year report)	Two months *
ASX – after full-year end	Information in Appendix 4E (preliminary final report)	Two months *
	Annual report (including corporate governance statement) and Appendix 4G (key to corporate governance disclosures)	When required under the jurisdiction of incorporation
	Documents given to ASIC (below)	When given to ASIC (and in any event, within three months)
ASIC	Annual accounts and Form 405	Three months (in effect)

* Obligation is to deliver information as soon as it is available, and in any event, by the date listed.

Contact us



SYDNEY

Level 25
20 Bond Street
SYDNEY NSW 2000

T +61 2 8274 9555

MELBOURNE

Level 34
55 Collins Street
MELBOURNE VIC 3000

T +61 3 8611 1333

ADELAIDE

Level 9
211 Victoria Square
ADELAIDE SA 5000

T +61 8 8239 7111

PERTH

Level 4, Westralia Plaza
167 St Georges Terrace
PERTH WA 6000

T +61 8 6216 7222

BRISBANE

Level 29
111 Eagle Street
BRISBANE QLD 4000

T +61 7 3002 2555

September 2017 • 0917.0020

SYDNEY PERTH MELBOURNE BRISBANE ADELAIDE

jws.com.au