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AUSTRALIA

1. Law and Regulations

The two principal regulatory mechanisms governing the issuing and sale of “securities” are:

The Corporations Act, 2001; and
The Listing Rules of the “securities exchange” that has quoted the corporations securities.

The Corporations Act 2001

The legislation that regulates the raising of equity capital from the public at large, by way of issue or sale of “securities”, is Chapter 7 of the **Corporations Act 2001**.

The central aim of Chapter 7 is to promote:

- (a) confident and informed decision making by consumers of financial products and services while facilitating efficiency, flexibility and innovation in the provision of those products and services;
- (b) fairness, honesty and professionalism by those who provide financial services;
- (c) fair, orderly and transparent markets for financial products; and
- (d) the reduction of systemic risk and the provision of fair and effective services by clearing and settlement facilities. (s. 706A)

The main parts of Chapter 7 can be seen from the table below:

Part-by-Part outline of Chapter 7		
Part		Covers...
1	7.1	definitions of key concepts and of commonly occurring expressions
2	7.2	licensing of financial markets other matters relating to financial markets
3	7.3	licensing of clearing and settlement facilities other matters relating to clearing and settlement facilities
4	7.4	limitation on ownership of certain licensees individuals who are disqualified from being involved in certain licensees
5	7.5	compensation regimes for financial markets
6	7.6	licensing of providers of financial services other related matters (e.g. restrictions on use of terminology; agreements with unlicensed persons relating to provision of financial services)

7	7.7	disclosure requirements for financial services licensees and their authorised representatives disclosure requirements for certain people who are not required to be licensed
8	7.8	other conduct requirements for financial services licensees (e.g. dealing with client money and property; financial records, statements and audit) special provisions relating to insurance
9	7.9	financial product disclosure requirements other requirements relating to issue and sale of financial products
10	7.10	market misconduct and other prohibited conduct relating to financial products and services
11	7.11	Title to, and transfer of, certain securities and other financial products
12	7.12	qualified privilege in certain situations other miscellaneous matters

Chapter 7 does not regulate raising debt capital by way of borrowing, the issue of bills of exchange, or promissory notes.

Listing Rules

Besides corporations having to comply with the requirements of the Corporations Act, for a corporation's securities to be listed on a "securities exchange", the corporation must also voluntarily agree to abide by the self-regulation rules imposed by that "securities exchange" as they are called under the Corporations Act (s. 9) or stock exchanges as they are commonly known as. Each stock exchange requires those who seek admission to have their shares listed to abide by its own "Listing Rules".

Each stock exchange's Listing Rules governs the admission of entities to that exchange's official list, for the quotation of securities, suspension of securities from quotation and removal of entities from their official list.

Listing Rules also govern disclosure and some aspects of a listed entity's conduct.

Compliance with the Listing Rules is both:

a contractual requirement for admission to the official list; and

enforceable against listed entities and their associates (ss 793C and 1101B).

There are currently two stock exchanges upon which corporations can have their shares listed:

Australian Stock Exchange Limited (ASX); and the
Stock Exchange of Newcastle Limited (NSX).



2. Listing Requirements

An entity seeking listing must be admitted to the official list of a stock exchange and then, for trading in its securities to begin, the securities must be granted official quotation. There are prerequisites for both admission to the official list and official quotation. When applying for admission to the official list an entity must provide the prescribed documentation to the stock exchange, demonstrate compliance with its listing rules and pay a listing fee.

As the Listing Rule of each stock exchange is different, each stock exchange is dealt with separately.

Australian Stock Exchange (ASX)

For an entity to have its securities officially quoted on the ASX there are 3 categories of admission to select from:

ASX Listing;

ASX Debt Listing; or

ASX Foreign Exempt Listing (essentially this is an ancillary trading facility for Australian investors to have access to securities of foreign entities).

Most entities are listed under the ASX Listing method. To be granted official quotation the entity must meet:

- ▶ The assets test; or
- ▶ The profit test.

The following table provides an overview of these tests:

Condition Test	Minimum public float and spread of Security holders (2.3)	Minimum Level of satisfying condition (2.1)	Financial Statements (2.2)	Commitments to spend >50% of cash and assets readily convertible to cash	Disclosure Statement
<i>Profit</i>	500 x A\$2000 or 400 x A\$2,000 + 25% held by unrelated parties	A\$1 million over last 3 years +A\$400,000 over last 12 months prior to seeking to be listed + still profitable	Last 3 financial years (audited) + last half year + reviewed pro forma balance sheet	N/A	Prospectus or if ASX agrees, information memorandum

Condition Test	Minimum public float and spread of Security holders (2.3)	Minimum Level of satisfying condition (2.1)	Financial Statements (2.2)	Commitments to spend >50% of cash and assets readily convertible to cash	Disclosure Statement
<i>Net Tangible Assets (also called market capitalization)</i>	<i>500 x A\$2000 or 400 x A\$2,000 + 25% held by unrelated parties</i>	<i>A\$2 million (NTA), or A\$10 million (mkt capitalization)</i>	<i>Last 3 financial years (if any) + last half year (if any) + reviewed pro forma balance sheet</i>	<i>Yes</i>	<i>Prospectus or if ASX agrees, information memorandum</i>

2.5 Requirements of management and ownership prior to listing – There are no requirements regarding ownership of security interests prior to listing.

Newcastle Stock Exchange (NSX)

The listing requirements are as follows:

2.1 Profit Requirement – Must be able to show it has at least a 2 year adequate track record or underwritten by an underwriter acceptable to the NSX.

2.2 Operating History – If not an initial operation, have 2 years trading history.

2.3 Minimum market capitalization at time of listing – A\$500,000.

2.4 Minimum public float and spread of shareholders – 50 x A\$2,000 security holders. With 25% of the issued securities to be in the hands of the public.

2.5 Requirements of management and ownership prior to listing – There are no requirements regarding ownership of security interests prior to listing. As a general rule the NSX likes to see that the ownership of the entity seeking listing was the same as that at least 1 year before listing was applied for. At or upon listing the management must comprise a Sponsoring Participating Organisation, and appoint a Nominated Adviser.

A prospectus is required if the entity is seeking to raise capital at the time of listing. If the entity does not require capital to be raised at the time of listing or within 3 months of being listed, all that is required is an information memorandum.

3. Requirements of Directors and Independent Non-Executive Directors

Director's duties flow primarily from common law with many of the duties reflected in the workings of the Corporations Act 2001. Some duties do, however, arise from numerous other pieces of legislation such as the Crimes Act and the Trade Practices Act.

Despite the law at present, a listed company while being expected to employ good corporate governance practices is not required to have any independent non-executive directors, let alone a specific number of independent non-executive directors. While that is the legal position most listed corporations do have at least one independent director on their board.

4. Special Requirements of PRC companies

Not apply.

5. Procedure and Approval

5.1 Overview of listing procedure

DATE	STEP
Week 1	<ul style="list-style-type: none">• Appoint advisers (legal, financial, investigating accountant)• Establish due diligence committee• Determine offer structure
Week 2	<ul style="list-style-type: none">• Commence due diligence• Commence preparation of prospectus• Audit of financial statements• Commence discussions with STOCK EXCHANGE• Commence negotiation of underwriting agreement
Week 3	<ul style="list-style-type: none">• Continue as per week 2• Circulate 1st draft prospectus• Employee Share and Option Plans• Company Structure
Week 4	<ul style="list-style-type: none">• Continue as per week 3• 2nd etc draft prospectus• Approval of constitution by STOCK EXCHANGE
Week 5	<ul style="list-style-type: none">• Continue due diligence• 3rd etc draft prospectus• Independent accountant's report• Seek STOCK EXCHANGE in principle approval• Institutional marketing/roadshow
Week 6	<ul style="list-style-type: none">• Continue due diligence• Finalise and verify prospectus• Finalise underwriting agreement
Week 7	<ul style="list-style-type: none">• Lodge prospectus with STOCK EXCHANGE (up to 14 days)
Week 8	<ul style="list-style-type: none">• Arrange for printing, distribution and marketing of prospectus
Week 9	<ul style="list-style-type: none">• Issue prospectus• Offer period commences (say 3 weeks)
Week 10	<ul style="list-style-type: none">• Offer period
Week 11	<ul style="list-style-type: none">• Offer period
Week 12	<ul style="list-style-type: none">• Offer period
Week 13	<ul style="list-style-type: none">• Offer closes• Determine oversubscription/shortfall• Allotment of securities
Week 14	<ul style="list-style-type: none">• Listing and quotation of securities on STOCK EXCHANGE

5.2 Application procedure for listing

General Admission to the Official List

For an entity (except an exempt foreign entity or a debt issuer) to be admitted to an official list, the following conditions must be met to the satisfaction of the stock exchange.

1. The entity's structure and operations must be appropriate for a listed entity.
2. The entity's constitution must be consistent with the listing rules.
3. A prospectus (IPO or initial public offer document) must be issued and lodged with (and if required by the Corporations Act, lodged with ASIC). If the stock exchange agrees, an information memorandum that complies with the requirements of the stock exchange will be sufficient instead of a prospectus.
4. If the entity is a foreign entity, it must establish in Australia either an Australian securities register (or subregister), or a register of depositary receipts, or other appropriate facilities for the registration of transfers.
5. If the entity is a trust and its securities are units, no-one must be under an obligation to buy the securities back.
6. The entity must apply for and be granted permission for quotation of all the securities in its main class of securities.
7. There must be the minimum spread of security holders, excluding restricted securities and, if the entity has previously been removed from the official list, excluding securities not acquired by those holders under a recent prospectus. This requirement is not met if the spread is obtained by artificial means.
8. The entity must satisfy either the profit test or the applicable net tangible assets test.
9. If the entity issues restricted securities before it is admitted to the official list, it must comply with the listing rules dealing with restricted securities and give completed restriction agreements to the stock exchange.

Application is made upon lodging and approved form with the necessary documentation and payment of fees to the stock exchange.

5.3 Approvals of any government authorities (if required) and requirements for the approvals.

No government approval is required for an Australian company to be listed.

Foreign companies seeking listing under the ASX Foreign Exempt Listing would also not require any government approvals.

6. Lock-up Periods

6.1 In respect of controlling shareholders

The ASX listing rules sets out the categories of restricted securities and the periods they are to be held in escrow. The delay allows the value of assets or services sold to an entity to become more apparent, and for the market price of the securities to adjust before the vendor, promoter or consultants to these people receive full consideration for the shares they received.

6.2 In respect of listed companies – None.



7. Major Obligations after Listing

7.1 Reporting obligations (quarterly, half-yearly and annual reports)

Annual and half-yearly disclosure is required for all listed entities. Quarterly reports as to financial matters is also required in certain circumstances.

In addition listed entities are required to provide continuous timely disclosure of all information which may affect the value of security holders securities, or influence the investment decisions, and information which security holders, investors and the stock exchange have a legitimate interest in knowing.

Continuous disclosure is a statutory requirement (s. 674) as well as being a requirement of the stock exchanges listing rules. For instance, ASX LR 3.1.

ASX Foreign Exempt entities are relieved from having to provide continuous disclosure.

7.2 Is the disclosure of emoluments of directors required?

There is no requirement to disclose executive directors salaries.

Directors fees (whether for executive or non-executive directors) do not have to be disclosed but once set, they cannot be increased without first obtaining the approval of security holders. In seeking approval to increase fees the maximum amount payable to a director in fees must be notified to the security holders voting on the increase. For instance, ASX LR 10.17.

8. Role of Lawyers

Lawyers have an integral role in the completion of documentation and the preparation of prospectuses when capital is being raised when the company is listed.

Generally, listed companies have a close working relationship with their legal advisors, dealing with meetings, procedural issues, continuous disclosure and advising on capital raising issues.



9. Encouragement of PRC Companies

Neither the ASX or the NSX provide any encouragement to PRC companies to seek listing on their exchanges.

End Notes

¹Directors Duties

A fiduciary relationship exists between a Director and the company. Directors are under a statutory duty to act with loyalty and in good faith when acting on behalf of the Company. The expression “loyalty and in good faith” lends itself to a broad and general definition.

Primarily these duties are also contained in ss.180 through to 184.

Duty to act bona fide in the interests of the company - s.181(1)(a) and Common Law.

An example where this situation might arise is where a director cancels a debt owed to the company by a director.

Duty to use power for proper purposes - s.181(1)(b).

A director cannot use the power conferred upon them “in order to obtain some private advantage or for any purpose foreign to the power”.

The case of *Australian Metropolitan Life Assurance Company Limited v. Ure (1923) 33 CLR 199* established a two step approach to determining whether or not there had been a breach of this particular component of the Directors duty. This two step approach was known as the *legal and actual purpose test*. The test requires that the following be ascertained:

- ▶ The nature of the power and the purposes for which it was conferred (the *legal purpose*).
- ▶ From the circumstances, the actual purpose or reason for which the power was exercised by the directors (the *actual purpose*)

Another situation is where a director seeks to increase their remuneration but the consequence of doing so, is not in the interest of the company as a whole.

Duty to retain discretions -directly from common law.

This duty comprises of two arms:

- (i) the duty to exercise an active discretion;
- (ii) a duty to retain their discretions.

The aim of this aspect of a Director’s duty is to place the decision making process

squarely in the hands of the directors. They are not entitled to divest themselves of, or fetter, their discretion by imposing it on another. Nor are they allowed to implement a discretionary power without having first given it the necessary consideration.

Duty to avoid conflict of interest- arises from common law and ss.182(1) and 183(1).

A conflict of interest may arise from any of the following relationships.

- company/family or personal
- company/other companies in which you may have an interest.

A director is able to limit the risk of breaching this duty by taking the following actions:

- make full and frank disclosure of any potential future conflicts;
- where there is likely to be a conflict with a particular director, that director should abstain from all voting on the matter of conflict once it is disclosed.

If a conflict does arise a director should take the following actions:

- act in the company's best interests;
- disclose the conflict;
- not attempt to influence other board members;
- not attend any meeting where the issue is discussed;
- abstain from voting.

Duty of Care and Diligence -arises from Common Law, specifically under the Law of Tort and in Equity. It is also reflected in Section 180(1).

This Duty requires Directors to exercise the degree of care and diligence which a reasonable person in a like position would exercise given the company's circumstances. The term "reasonable person" means a director's skill must be commensurate with his qualifications and experience.

This duty does allow the Director some scope to delegate their authority in circumstances where the Director is satisfied with the competence of the advice of employees or professional advisers. The advice or information relied upon must be made in good faith and after the Director has made an independent assessment of the information (Section 189(b) of the Corporations Act 2001).

General Statutory duties

Section 183(1) – a director must not make improper use of information acquired by virtue of his or her position as a director.

Section 182(1) – a director must not make improper use of his or her position as a director to gain an advantage for himself or herself or for any other person.

Chapters 2M & 2N – duties in relation to the accounts of the company and duties about statements and reports ie the Directors' statements to accompany the accounts.

Under the *Crimes Act* unauthorised disclosure of information can make the Director's personally liable. The penalties include imprisonment.

Remedies

The remedies available for breach of duty by a Director are severe and wide ranging.

At Etienne Lawyers we believe that personal service is the key to the provision of fast, consistent and expert legal advice, anywhere in the world. To achieve this, we appoint a Key Contact person for you to liaise with. Your Key Contact then uses the resources of Etienne Lawyers to service your legal requirements, queries and concerns.

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- *Corporate and commercial services
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- *Corporations Act
- *Shareholder Agreements
- *Securities regulation
- *Distribution and Supply Agreements
- *General commercial agreements
- *Business and succession planning
- *Banking and finance
- *Litigation & alternative dispute resolution
- *Property and conveyancing
- *Copyright Law (IT & entertainment)
- *Technology and intellectual property
- *Due diligence and internal audits
- *E-commerce Law
- *Foreign Investment Review Board matters
- *Terms and conditions of sale
- *Trade practices issues
- *Personal legal services
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Procter & Gamble Transactions including trade mark work, e-commerce work including software development agreements, web hosting agreements, privacy issues and advertising, the world wide acquisition of Max Factor cosmetics (US\$1.4 billion); Acquisition of Clairol hair care products (US\$1.5 billion); Divestiture of Napisan (amount not for public disclosure); and Divestiture of Milton (amount not for public disclosure). The Australian Egg Corporation Ltd including trade practices advice work Richard E Jacobs Group Inc sale of 9 US shopping centres to Westfield America Trust Ltd for US \$1.5 billion. Various software development and licensing agreements including Australian and English Cricket Boards, Janome, Bernina and Warner Bros.



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