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

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

Globally, Baker & McKenzie serves more than half the world’s largest public companies, based on the Forbes Global 2000. This includes nearly all of the 100 largest and more than 75% of the top 500 companies.

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

Public listed companies are highly regulated in Australia. The main source of regulation is the Corporations Act 2001 (Cth) (Corporations Act) and Australian Securities Exchange (ASX) Listing Rules, which are supplemented by the Australian Securities and Investments Commission (ASIC) policy and the ASX Corporate Governance Council’s Corporate Governance Principles and Recommendations.\(^1\)

This Guide is designed to assist the directors, secretaries and executives of public listed companies with understanding some of the legal requirements and obligations imposed on public listed companies and their officers under the Corporations Act and ASX Listing Rules.\(^2\) These legal requirements and obligations are supplemented by ASIC Policy and the ASX Corporate Governance Council’s Corporate Governance Principles and Recommendations. While neither ASIC Policy nor the ASX Corporate Governance Principles and Recommendations are legally binding, they do provide guidance and assistance in the conduct of public listed companies’ affairs. Further, under Listing Rule 4.10.3, public listed companies are required in their annual reports to state the extent to which they have followed ASX Corporate Governance Recommendations, identify any recommendations that have not been followed and give reasons for not following them. This is known as the “if not, why not” approach.

For ease of reference, this Guide refers to only public listed companies, however it is possible for managed investment schemes to list on the ASX (most commonly in the form of a unit trust). The principles in this Guide apply equally to listed trusts except where noted otherwise.

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

- corporate governance;
- continuous disclosure;
- financial reporting;
- shareholder meetings;
- substantial shareholders and tracing ownership;
- capital raisings;
- major acquisitions and disposals;
- related party transactions;
- takeovers; and
- insider trading.

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1 The ASX Corporate Governance Council initially released its Corporate Governance Principles and Recommendations in March 2003 and issued a revised version in August 2007, which has since been updated and amended.

2 ASX is not the only exchange on which public companies can list in Australia. Others include the Pacific Stock Exchange and the Newcastle Stock Exchange. ASX is, however, the primary exchange in Australia and, accordingly, this Guide only considers the ASX Listing Rules.
We hope that this Guide provides you with a broad overview of the rules, regulations and issues applicable to public listed companies. It is not intended however to be an exhaustive analysis of all the legal requirements that may be relevant. If you are uncertain about any of the issues raised in this Guide or require further details or assistance, please do not hesitate to contact us.
2 Corporate governance

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

2.1 Board composition

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

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

- a majority of the directors should be independent;
- the chair should be an independent director;
- the roles of chair and Chief Executive Officer (CEO) should not be exercised by the same individual; and
- the board should establish a nomination committee to, among other things, make recommendations for the appointment and re-election of directors.

ASX considers that an independent director is a non-executive director who is not a member of management and who is free of any business or other relationship that could materially interfere with, or could reasonably be perceived to materially interfere with, the independent exercise of their judgment.

ASX Corporate Governance Recommendations suggest that when determining the independent status of a director the board should consider whether the director:

- is (or is an officer of, or otherwise associated directly with) a substantial shareholder of the company;
- is employed or has previously been employed in an executive capacity by the company or another group member in the last three years;
- has been a principal or key employee of a material professional adviser or consultant to the company or another group member within the last three years; and
- is (or is an officer of, or otherwise associated directly or indirectly with) a material supplier or customer of, or otherwise has a material contractual relationship with, the company or another group member.

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3 Corporations Act section 201A(2).
4 ASX Corporate Governance Recommendations 2.1 to 2.4.
5 See commentary and guidance accompanying ASX Corporate Governance Recommendation 2.1.
Importantly, these criteria are not definitive therefore companies are free to decide that a director is independent notwithstanding the existence of such relationships, although they should state their reasons in their annual report. You should consider whether the above criteria are appropriate for your company’s circumstances and, in particular, focus on the appropriate level of “materiality” for relationships and contracts that will breach the independence criteria.

Checklist of corporate governance charters, codes and policies

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

✓ Board charter
✓ Nomination and governance committee charter
✓ Remuneration committee charter
✓ Audit and risk management committee charter
✓ Code of conduct
✓ Share trading policy
✓ Continuous disclosure policy
✓ Communications policy
✓ Diversity policy

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

2.2 Appointment

In Australia, directors are generally appointed by the board. Any such appointment to the board of a public listed company must, however, be confirmed by an ordinary resolution passed at the company’s next Annual General Meeting [AGM]. Directors may also be appointed to the board by an ordinary resolution passed in a meeting of shareholders. A company’s constitution can provide for different methods of appointment, however public listed companies generally cannot entrench a right in their constitution or elsewhere for a particular shareholder, even a controlling shareholder, to nominate directors to the board.

6 Corporations Act section 201H(3) and ASX Listing Rule 14.4.
7 Corporations Act section 201G.
If two or more directors are proposed to be appointed as directors of a public company at a general meeting, a separate resolution must be passed for each director seeking appointment unless the meeting resolves that the appointments may be voted on together and no votes are cast against that resolution.8

We generally recommend that the terms of a director’s appointment be set out in a formal letter of appointment, which can deal with matters such as attendance at board meetings, participation in board committees, fees, reimbursement of expenses and confidentiality requirements.

2.3 Rotation, retirement and removal

A public listed company must hold an election of directors each year, which is usually done at the AGM.9 No director of a public listed company may hold office (without re-election) past the third AGM following the director’s appointment or three years, whichever is the longer, and any director appointed to fill a casual vacancy or as an addition to the board must not hold office (without re-election) past the next AGM. These rules do not apply to the managing director of the company (provided there is not more than one).10

Public company directors cannot be removed by other directors under Australian law, however any public company director may be removed by an ordinary resolution of shareholders regardless of any provision in the company’s constitution or any other agreement with the director to the contrary.11

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

2.4 Conflicts of interest

Material personal interest in the company’s affairs

A director of any company who has a material personal interest in a matter that relates to the affairs of the company must give the other directors notice of the interest unless an exception applies, as below.12

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

- the directors who do not have a material personal interest in the matter pass a resolution that the interest should not disqualify the director from voting or being present; or
- the director is entitled to be present and vote under a declaration or order made by ASIC.13

8 Corporations Act section 201E.
9 ASX Listing Rule 14.5.
10 ASX Listing Rule 14.4.
11 Corporations Act sections 203D and 203E.
12 Corporations Act section 191(1).
13 See Corporations Act sections 195 and 196.
The interest must be personal in some way. The fact that a director is an employee or officer of the company or a subsidiary of the company does not of itself constitute a material personal interest in a contract, arrangement or other matter in relation to the company.

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

**When notice of material personal interests is not required**

Material personal interests do not need to be disclosed if the interest:

- arises because the director is a shareholder of the company and is held in common with the other shareholders of the company;
- arises in relation to the director’s remuneration as a director of the company;
- relates to a contract the company is proposing to enter into that is conditional on shareholder approval;
- arises merely because the director is a guarantor or has given an indemnity or security for all or part of a loan to the company, or has a right of subrogation in relation to such a guarantee or indemnity;
- relates to a contract that insures the director against liabilities incurred as an officer of the company [provided the company or a related body corporate is not the insurer];
- relates to any payment by the company or a related body corporate in respect of an indemnity permitted under the Corporations Act or any contract relating to such an indemnity; or
- relates to a contract with, for the benefit of, or on behalf of, a related body corporate and arises merely because the director is a director of the related body corporate.14

### 2.5 Share trading by directors

**Share Trading Policy**

Listed companies are required to have a Trading Policy which complies with a minimum set of restrictions set out in the Listing Rules.15 The Trading Policy must apply to all directors, and (at a minimum) to other key management personnel.

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

**Disclosure of trading by directors**

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

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14 Corporations Act section 191(2)(a).
15 ASX Listing Rule 12.9 and ASX Guidance Note 27.
• the date that the company is admitted to the Official List;
• the date that a director is appointed to the board;
• the date of any change to a notifiable interest (no matter how small – even buying a single share will trigger the requirement); and
• the date that a director ceases to be a director.

ASX has to be notified within five business days of the relevant date (and in the form of Appendix 3X, 3Y or 3Z to the ASX Listing Rules, as applicable).\(^{16}\)

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

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

• any “relevant interest” (a term which widely draws in all direct and indirect holdings) in securities of the company or a related body corporate; and
• any interests in contracts to which the director is a party or under which the director is entitled to a benefit, and that confer a right to call for or deliver shares in, debentures of, or interests in a managed investment scheme made available by, the company or a related body corporate, and in relation to a trust is defined as any “relevant interest” in securities of the trust.\(^{17}\)

The obligation to notify ASX of directors’ notifiable interests is imposed on the public listed company, not its directors. Accordingly, the ASX Listing Rules require the company to make such arrangements with a director as are necessary to ensure that the director discloses to the company all the information required by the company to fulfill this disclosure obligation within the time required. If, however, despite the existence of such arrangements, a director fails to disclose the necessary information to the company, then the company will not be in breach of this duty of disclosure [provided the company takes action to ensure directors understand their obligations].\(^{18}\) ASX has issued a pro forma letter agreement between a company and a director to assist companies in implementing the requisite arrangements with directors, but the company is free to negotiate its own arrangements.

A corresponding obligation to disclose directors’ notifiable interests to ASX is imposed on the directors themselves under the Corporations Act.\(^{19}\) However, as the obligation is virtually identical to the one imposed on public listed companies under the ASX Listing Rules, ASIC exempts directors under Class Order 01/15 from the requirement to disclose their notifiable interests under the Corporations Act if the company complies with the corresponding obligation under the ASX Listing Rules.

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\(^{16}\) ASX Listing Rule 3.19A.
\(^{17}\) ASX Listing Rule 19.12.
\(^{18}\) ASX Listing Rule 3.19B and Guidance Note 22, paragraph 10.
\(^{19}\) Corporations Act section 205G.
The rules regarding disclosure of directors’ notifiable interests are designed to promote investor confidence by making share trading by “insiders” transparent to the public. To further promote this end, ASX recommends that public listed companies also establish and disclose a policy concerning trading in company shares by directors, senior executives and employees. Consequently, it is common for public listed companies to adopt a share trading policy which typically applies to directors, officers and employees at a minimum but may also extend to any other persons who may possess inside information from time to time (such as advisers and consultants). The usual form of share Trading Policy permits buying or selling of the company’s shares only during specified trading windows, such as a one month period after the release of full year or half-year financial results.

Further information regarding the prohibition against insider trading is contained in section 11 of this Guide, below.

2.6 Board meetings

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

There are no mandatory requirements for the frequency of board meetings or the minimum number of board meetings to be held over any given time. However, ASX expects directors to devote the necessary time to fulfilling their tasks and to consider the number and nature of their directorships and calls on their time from other commitments.

2.7 Board charter, code of conduct and diversity policy

ASX recommends that boards of public listed companies adopt a formal statement of the matters reserved to them or a formal board charter that details their functions and responsibilities and a formal statement of the areas of authority delegated to senior executives.

ASX also recommends that public listed companies establish and disclose a code of conduct as to the practices necessary to maintain confidence in the company’s integrity, the practices necessary to take into account their legal obligations and the reasonable expectations of their stakeholders, and the responsibility and accountability of individuals for reporting and investigating reports of unethical practices.

ASX also recommends that publicly listed companies should establish a policy concerning gender diversity, including disclosing objectives and strategies for achieving diversity.

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20 ASX Corporate Governance Recommendation 3.2.
21 Corporations Act sections 248C and 248D.
22 See commentary and guidance accompanying ASX Corporate Governance Recommendation 2.4.
23 See ASX Corporate Governance Recommendation 1.1 and accompanying commentary and guidance.
24 ASX Corporate Governance Recommendation 3.1.
2.8 Communication with shareholders

ASX recommends that public listed companies design and disclose a communications strategy to promote effective communication with shareholders. To that end, we encourage companies to maintain a website (and to use that website to complement the official release of information to the market) and, where appropriate, to communicate with shareholders electronically.

2.9 Remuneration and performance

The directors’ report for a financial year (see section 4 below) must include a remuneration report disclosing certain prescribed details in relation to the remuneration of the key management personnel of the company. A more detailed description of this report is included in the Financial Reports section at the end of this Guide.

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

ASX also recommends that boards of public listed companies establish:

- a nomination committee with responsibility for, among other things, developing a process for evaluating the performance of the board, its committees and individual directors; and
- a remuneration committee to review and make recommendations on senior executive remuneration packages and incentive schemes.

25 ASX Corporate Governance Recommendation 6.1.
26 Corporations Act section 300A. Key management personnel is defined in the accounting standards as those persons having authority and responsibility for planning, directing and controlling the activities of the company, directly or indirectly, including any director (whether executive or otherwise) of that company.
27 Corporations Act sections 250R(2) and 250R(3).
28 Corporations Act sections 250 and 250V.
29 Corporations Act sections 250V and 250W.
30 Corporations Act section 250R(4).
31 See ASX Corporate Governance Recommendation 2.4 and accompanying commentary and guidance.
32 See ASX Corporate Governance Recommendation 8.1 and accompanying commentary and guidance.
Listed entities which are included in the S&P/ASX 300 Index must have a remuneration committee which comprises only non-executive directors. The remuneration committee should be structured so that it consists of a majority of independent directors, is chaired by an independent director and has at least three members.

2.10 Audit and risk management

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

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

- the board establish an audit committee;\(^{34}\)
- the company establish and disclose policies for the oversight and management of material business risks;\(^{35}\) and
- the board
  - require management to design and implement a risk management and internal control system to manage the company’s material business risks and report to it on whether those risks are being managed effectively; and
  - disclose that management has reported to it as to the effectiveness of the company’s management of its material business risks.\(^{36}\)

CEOs and Chief Financial Officers (CFOs) of public listed companies are also required under the Corporations Act\(^{37}\) to give the directors a declaration each year prior to the lodgement of the annual report that:

- the company’s financial records for the financial year have been properly maintained as required under the Corporations Act;\(^{38}\)
- the financial statements and notes for the financial year comply with the accounting standards; and
- the financial statements and notes for the financial year give a true and fair view of the financial position and performance of the company.

Audit committees

In light of the above recommendations, most public listed companies establish an audit committee. Companies in the S&P All Ordinaries Index must have an audit committee and any company in the S&P/ASX 300 Index must also comply with the ASX Corporate Governance Recommendations in relation to the composition, operation and responsibility of the audit committee.\(^{39}\) These stipulate that the audit committee should:

\(^{33}\) ASX Listing Rule 12.8.
\(^{34}\) ASX Corporate Governance Recommendation 4.1.
\(^{35}\) ASX Corporate Governance Recommendation 7.1.
\(^{36}\) ASX Corporate Governance Recommendation 7.2.
\(^{37}\) Corporations Act section 295A.
\(^{38}\) Corporations Act section 286.
\(^{39}\) ASX Listing Rule 1.1, Condition 13 and ASX Listing Rule 12.7.
• comprise:
  − only non-executive directors (all of whom are financially literate);  
  − a majority of independent directors;  
  − an independent chair (who is not chair of the board); and  
  − at least three members;  
• have a formal charter which clearly sets out the audit committee’s role and responsibilities, composition, structure and membership requirements and the procedures for inviting non-committee members to attend meetings;  
• review the integrity of the company’s financial reporting and oversee the independence of the external auditors;  
• meet often enough to undertake its role effectively and keep minutes of its meetings which should ordinarily be included in the papers for the next full board meeting after each audit committee meeting; and  
• report to the board on all matters relevant to the committee’s role and responsibilities.40

2.11 Code of conduct and other stakeholders

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

There is growing recognition, however, that being a “good corporate citizen” means more than just compliance with strict legal obligations and involves concepts of fairness, ethical behaviour and good reputation. In this environment, boards of public listed companies have the responsibility to “set the tone and standards” of the company and to oversee adherence to such standards. ASX recommends that public listed companies do this by establishing a code of conduct which states the values and policies of the company, and it has developed a set of guidelines to assist companies in developing such a code of conduct.41

40 See ASX Corporate Governance Recommendations 4.2 and 4.3 and accompanying commentary and guidance.

41 See ASX Corporate Governance Recommendation 3.1 and accompanying commentary and guidance.
3 Continuous disclosure

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

3.1 The continuous disclosure rule

Public listed companies are required to disclose to ASX information concerning the company that a reasonable person would expect to have a material effect on the price or value of the company’s securities as soon as the company is or becomes aware of the information.\(^42\) ASX does not consider it acceptable for the release of such information to be delayed until the release of a company’s periodic financial report or until the release of the information has been considered by the board.\(^43\)

A company will be deemed to be "aware" of information if a director or executive officer has, or ought reasonably to have, come into possession of the information in the course of the performance of their duties as a director or executive officer of the company.\(^44\) Hence public listed companies should establish policies and procedures to ensure that price sensitive information is immediately passed up the chain to directors and executive officers – it will not be sufficient for directors and executives to claim they “didn’t know” about the relevant event or development. These policies and procedures should address, among other things:\(^45\)

- internal notification and decision-making concerning disclosure obligations;
- the roles and responsibilities of directors, officers and employees in the disclosure context; and
- promoting understanding of, and monitoring compliance with, disclosure obligations.

3.2 Confidentiality carve-out

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

- a reasonable person would not expect the information to be disclosed;
- the information is confidential and ASX has not formed the view that the information has ceased to be confidential; and
- one or more of the following applies:
  - it would be a breach of a law to disclose the information;
  - the information concerns an incomplete proposal or negotiation;

\(^{42}\) ASX Listing Rule 3.1.
\(^{43}\) ASX Companies Update 01/09.
\(^{44}\) ASX Listing Rule 19.12.
\(^{45}\) See commentary and guidance accompanying ASX Corporate Governance Recommendation 5.1.
− the information comprises matters of supposition or is insufficiently definite to warrant disclosure;
− the information is generated for internal management purposes; and
− the information is a trade secret.46

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

The confidentiality carve-out highlights the importance of entering into confidentiality agreements when negotiating sensitive commercial deals.

### 3.3 When and what to disclose

**Disclose to ASX first**

If a company does publicly disclose price sensitive information, it is important that the information is disclosed to ASX first.47 If information is disclosed to a foreign stock exchange, it must be disclosed simultaneously to ASX.48

Companies often fall into trouble at analyst briefings by disclosing price sensitive information to analysts before disclosing it to the market, and ASX places particular focus on this area in monitoring compliance with the continuous disclosure regime.49 Listed companies have been fined by ASIC for giving earnings guidance to analysts before releasing it to ASX.

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

**Examples of information requiring disclosure**

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

- a material change in a company’s financial forecast or expectations;
- a transaction for which the consideration payable or receivable is a significant proportion of the written down value of a company’s consolidated assets (as a general rule, 5% or more will be “significant”);
- a recommendation or declaration of a dividend (or a recommendation or declaration that a dividend will not be declared);
- a material change in a company’s accounting policy;
- a material change to a rating applied by a rating agency to a company; and
- a proposal to change a company’s auditor.

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46 ASX Listing Rule 3.1A.
47 ASX Listing Rule 15.7.
48 ASX Listing Rule 15.7.1.
49 See ASX Guidance Note 8 on Continuous Disclosure, paragraphs 59-62.
Updating forecasts

If a public listed company has disclosed a forecast in a prospectus, analyst briefing or company announcement, it is under an obligation to update the forecast as and when material changes occur. Companies should also disclose likely material differences in current period financial results from the previous corresponding period. ASX suggests as a rule of thumb that a variation in excess of 10% to 15% is "material" for these purposes, but companies should not tie disclosure too rigidly to this range. Materiality is affected by quantitative and qualitative factors and a variation of less than 10% to 15% may still be material in certain circumstances.

Companies should also bear in mind that they are required under ASX Listing Rules 4.3D and 4.5A to tell ASX immediately of circumstances materially affecting information contained in a preliminary final report (see section 4, below) and in any event no later than when the company gives ASX its statutory full year accounts.

3.4 Media rumours and market speculation

In addition to the continuous disclosure rule, public listed companies are required to immediately give ASX any information which ASX asks for in order to correct or prevent what ASX considers to be a false market in the company’s securities.50

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

Public listed companies were concerned when this rule was first introduced in 2003 that it may create scope for "mischief-making" by competitors or journalists. ASX will, however, usually consult with the company about any concern that a false market may exist before taking any action under the rule.51 Officials at ASX read the newspapers every day to monitor for media rumours and market speculation. Further, if there is an unexpected sharp rise in a company’s share price, ASX will issue the company with what is colloquially known as a "speeding ticket", which in essence requires the company to provide further details regarding the rumour or speculation and to confirm whether or not it is accurate. The company’s response is disclosed by ASX to the market.

3.5 Trading halts and suspensions

ASX encourages public listed companies relying on the confidentiality carve-out to nevertheless make some disclosure if possible (provided the disclosure is not so limited as to itself be misleading). For example, the fact that negotiations with a third party are taking place may be able to be disclosed, if not the details of the negotiation.

50 ASX Listing Rule 3.1B.
51 ASX Guidance Note 8 on Continuous Disclosure, paragraph 42.
If, however, public listed companies are not able to even make a preliminary announcement (or are concerned that such an announcement will not be sufficient to properly inform the market), they can ask ASX for a trading halt for up to two days or, if necessary, to suspend trading in their shares. Trading halts are specifically designed to protect companies from premature disclosure where more detailed disclosure is imminent, particularly if there is speculation in the market. Trading halts can also be a useful tool for managing an unexplained price and/or volume change until an announcement can be made.

### 3.6 Consequences of failure to comply

The Corporations Act\(^{52}\) reinforces the obligation under the ASX Listing Rules to comply with the continuous disclosure regime by creating an offence for failure to comply with that regime where the information required to be disclosed to ASX:

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

Rather than instituting a criminal prosecution for breach of the Corporations Act, ASIC also has the power to institute a civil suit, seeking a civil penalty. Anyone involved in the contravention (such as directors and other executive officers) may also face civil liability.\(^{53}\) The maximum civil penalty which may be levied upon a public listed company for a breach of the continuous disclosure rule is $1,000,000. The maximum penalty for individuals is $200,000.

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

- they took all reasonable steps to ensure that the relevant company complied with the continuous disclosure rule; and
- after doing so, they believed on reasonable grounds that the relevant company was in compliance with the continuous disclosure rule.\(^{54}\)

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

In addition, ASIC has the power to issue an infringement notice to a public listed company (for up to $100,000, depending on the size of the company) if ASIC decides that it has breached the continuous disclosure rule. While the company is not obliged to pay the fine, if it does pay, it will not be subject to any further action (although companies should note that ASIC may publicise the fact that the fine has been paid). If the company does

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52 Corporations Act sections 674(1) and 674(2).
53 Corporations Act section 674(2A).
54 Corporations Act section 674(2B).
not pay the fine, ASIC may then bring civil proceedings in relation to the same alleged contravention seeking a penalty of up to $1,000,000 and publish a notice that it is bringing civil proceedings.55

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

55 Corporations Act Part 9.4AA.
4 Financial reporting

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

4.1 Periodic reports at a glance

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

<table>
<thead>
<tr>
<th>Periodic reports</th>
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<tbody>
<tr>
<td>✓ Financial statements (annual and half-yearly)</td>
</tr>
<tr>
<td>✓ Directors’ report (annual and half-yearly)</td>
</tr>
<tr>
<td>✓ Auditor’s report (annual and half-yearly)</td>
</tr>
<tr>
<td>✓ Preliminary final report</td>
</tr>
<tr>
<td>✓ Annual report, including remuneration report and corporate governance report</td>
</tr>
<tr>
<td>✓ Half-yearly report</td>
</tr>
<tr>
<td>✓ Quarterly report (only for some types of companies)</td>
</tr>
</tbody>
</table>

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

4.2 Annual reporting obligations

Public listed companies must:

- prepare financial statements and a directors’ report (which includes a remuneration report) in respect of each financial year, have the financial statements audited and obtain an auditor’s report;\(^{56}\)

- give ASX a preliminary final report, which is essentially the full year financial statements but which need not have been audited, within two months after the end of the financial year;\(^ {57}\)

- lodge the audited financial statements, directors’ report and auditor’s report with ASX and ASIC within three months after the end of the financial year;\(^ {58}\) and

- send the annual report (which includes the financial statements, \(^{56}\) Corporations Act sections 292 and 301.
- \(^{57}\) ASX Listing Rules 4.3A and 4.3B.
- \(^{58}\) Corporations Act section 319 and ASX Listing Rule 4.5.1.
The obligation to prepare each of the reports described above is imposed on the company itself with the exception of the auditor’s report. While public listed companies must obtain an auditor’s report, the obligation to prepare and satisfy the content requirements of that report is a matter for each company’s auditor.

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

4.3 Half-yearly reporting obligations

Public listed companies must:

- prepare financial statements and a directors’ report for the first six months of their financial year (called the “half-year”), have the half-year financial statements audited or “reviewed” (see below) by the company’s auditor and obtain an auditor’s report;\(^\text{60}\) and

- lodge the half-year financial statements, directors’ report and auditor’s report with ASX and ASIC within two months after the end of the half-year.\(^\text{61}\)

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

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

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59 Corporations Act sections 314 and 315 and ASX Listing Rule 4.7. Listed trusts must send their annual report to members within three months after the end of their financial year.

60 Corporations Act section 302.

61 Corporations Act section 320 and ASX Listing Rules 4.2A and 4.2B. Certain additional information as set out in Appendix 4D to the ASX Listing Rules (known as the “half-year report”) must also be provided to ASX at the same time.
4.4 Quarterly reporting obligations

The ASX Listing Rules also require certain public listed companies to prepare quarterly cash flow reports. Essentially this obligation applies to "cash boxes" (that is, a company, other than a listed investment company, with half or more of its assets in cash or in a form readily convertible to cash) and mining exploration companies.62

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

62 See ASX Listing Rules 4.7B and 5.3.
5 Shareholder meetings

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

5.1 Shareholder participation

Shareholders of public listed companies do not have any general right to access the company’s information. Shareholders can gain access to certain limited information, such as a company’s constitution and statutory registers, but these rights do not extend beyond what the general public is entitled to access in any case. Shareholder meetings, particularly AGMs, therefore provide key opportunities for public listed companies to provide information to shareholders about their affairs and companies should consider how to give shareholders a reasonable opportunity for informed and effective participation in such meetings. In particular, ASX encourages companies to consider electronic communication as a means of effectively communicating with shareholders and providing improved access for those unable to be physically present at meetings.63

The Corporations Act also prescribes certain shareholder participation rights in AGMs as follows:

- the chair of the company’s AGM must allow shareholders a reasonable opportunity to ask questions about or make comments on the management of the company;64
- the chair of the company’s AGM must allow shareholders a reasonable opportunity to ask questions about or make comments on the remuneration report (discussed in section 2.8, above);65 and
- shareholders may submit written questions to the company’s auditor relating to the content of the auditor’s report and the conduct of the audit, and the chair of the AGM must allow shareholders a reasonable opportunity to ask the auditor questions relevant to the conduct of the audit, the preparation and content of the auditor’s report, the company’s accounting policies and the auditor’s independence.66

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63 See commentary and guidance accompanying ASX Corporate Governance Recommendation 6.1.
64 Corporations Act section 250S.
65 Corporations Act section 250SA.
66 Corporations Act sections 250PA and 250T. Auditors of public listed companies are required to attend the company’s AGM, see Corporations Act, section 250RA.
5.2 AGMs – timing and preparation

A public company must hold an AGM each year, within five months of the end of its financial year (although this may be extended upon application to ASIC). 67

Companies should ensure they adequately prepare for their AGMs.

### Preparation for AGMs

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

5.3 Calling a shareholder meeting

Shareholder meetings are usually called by the directors. However, they can also be requisitioned, and held at the cost of the company, by shareholders with at least 5% of the votes that may be cast at the meeting or at least 100 shareholders entitled to vote at the meeting. Further, shareholders with at least 5% of the votes that may be cast at the meeting may arrange to hold a shareholder meeting at their own expense. 68

5.4 Notices of meeting

At least 28 days’ written notice of a meeting must be given to each shareholder entitled to vote at the meeting and each director. 69 The notice must also be sent to ASX. 70

Notices of meeting must be worded and presented in a clear, concise and effective manner, and may be given by any electronic means nominated by the relevant shareholder. 71

The following items must be included in a notice of meeting of shareholders:

- the place, date and time for the meeting (and the technology used to facilitate a meeting held in two or more places);
- details of the proposed resolutions;
- if the meeting is an AGM, a proposed resolution to adopt the remuneration report;

67 Corporations Act sections 250N and 250P.
68 Corporations Act sections 249CA, 249D and 249F.
69 Corporations Act sections 249HA and 249J.
70 ASX Listing Rule 3.17.
71 Corporations Act sections 249L(3) and 249J(3).
• a proxy form and a statement of the rights of shareholders to appoint a proxy;

• an address and fax number for the receipt of proxy appointments and proxy appointment authorities (companies may also specify an electronic address or other electronic means of receipt for the same purposes); and

• a voting exclusion statement if required by the ASX Listing Rules, indicating that a particular person and their associates may not vote on a specified resolution. Generally speaking, the ASX Listing Rules require a voting exclusion statement where a person has an interest in the subject of the resolution (for example, a person who is a party to a transaction to be approved in the meeting).72

5.5 Voting

A public listed company’s constitution must comply with the ASX Listing Rules, which are premised on one share, one vote.73 This means that public listed companies cannot provide for any maintenance of control by a dominant shareholder, such as the entrenchment of veto powers or super voting rights.

Voting will typically be done by a show of hands unless a poll is demanded. A poll can be demanded on any resolution (except any concerning the election of the chair or the adjournment of the meeting, if the constitution so provides) by:

• the chair;

• at least five shareholders entitled to vote on the resolution (although the company’s constitution can specify a lesser number); or

• shareholders with at least 5% of the votes that may be cast on the resolution (although the company’s constitution can specify a lesser percentage).74

5.6 Proxies

Shareholders who are entitled to attend and vote at a meeting may appoint a proxy to attend and vote for them. The proxy may be an individual or a company. Where the proxy is a company, it may appoint a representative to exercise the company’s power as proxy.75

The proxy form must allow a shareholder to vote for or against a resolution, and may also provide for the shareholder to abstain from voting or for the proxy to exercise its own discretion.76 The proxy form must also provide for the appointment of a proxy of the shareholder’s choice, and may specify a person to be the proxy where the shareholder does not exercise that choice.77 It is invariably the practice in Australia

72 See Corporations Act, sections 294L and 250BA and ASX Listing Rules 14.2 and 14.11.
73 See ASX Listing Rule 6.9.
74 Corporations Act sections 250K and 250L.
75 Corporations Act sections 249X and 250D.
76 ASX Listing Rule 14.2.1.
77 ASX Listing Rule 14.2.2.
Companies may provide for the appointment of proxies by shareholders through post, by fax or electronically.

for this person to be the chair, who may vote any undirected proxies. If the ASX Listing Rules prohibit the chair from voting on a resolution (because, for example, he or she has an interest in the relevant transaction), and the proxy form specifies that the chair will be the proxy where the shareholder does not appoint one, the proxy form must also state the chair’s voting intentions in respect of any undirected proxies.78

After the meeting the company must disclose to ASX the total number of proxy votes exercisable for each resolution and the total number of proxy votes for, against, abstained and exercisable in the proxy’s discretion for each resolution. Where the resolution is decided on a poll, the announcement must also disclose the total number of votes in favour, against and abstaining on each resolution.79

78 ASX Listing Rules 14.2.3A and 14.2.3B.
79 Corporations Act section 251AA.
6 Substantial shareholders and tracing ownership

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

6.1 Substantial shareholders

Any person that has a “substantial holding” in a public listed company must disclose to the company and ASX when that shareholding is created, ceases or is increased or decreased by at least 1%.80

A person has a “substantial holding” when that person and their associates have a “relevant interest” (a term which widely draws in all direct and indirect holdings) in 5% or more of the total number of votes attached to voting shares in the company or the person has made a takeover bid for the voting shares in the company and the bid period has started but not yet ended.81

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

- details of their relevant interest in the voting shares and any agreement, arrangement or understanding through which they have that interest;
- the name of each associate who has a relevant interest in voting shares in the company and details of the nature of their association with the associate, the associate’s relevant interest and any agreement, arrangement or understanding through which the associate has a relevant interest; and
- a copy of any agreement that contributed to the situation giving rise to the shareholder needing to provide the above information.82

An “associate” is defined quite widely for these purposes and includes anyone with whom the substantial shareholder has, or proposes to enter into, an agreement, arrangement or understanding for the purpose of controlling or influencing the conduct of the company’s affairs or with whom the substantial shareholder is acting, or proposing to act, in concert in relation to the company’s affairs. The Takeovers Panel determined for instance, in relation to Fonterra Foods Pty Limited’s takeover bid for National Foods Limited in 2005, that Sodima SAS and Yoplait SAS were both associates of Fonterra because they were party to a joint venture agreement with respect to a material aspect of National Foods’ business which would commence if the bid were successful.83

The Panel was sympathetic to the view that elements of the joint venture agreement contained highly commercially sensitive information, and accordingly indicated that it was willing to exercise its discretion to decide that failure to lodge the joint venture agreement together with the substantial shareholding notice would not constitute unacceptable

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80 Corporations Act section 671B(1).
81 Corporations Act section 9.
82 Corporations Act sections 671B(3) and 671B(4).
circumstances. The Panel does not, however, have the power to exempt a person from the substantial shareholding provisions of the Corporations Act. Only ASIC has the power to do this and ASIC refused to grant an exemption from those provisions in these circumstances meaning that the entire joint venture agreement had to be disclosed.84

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

6.2 Trace beneficial ownership of shares

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

- full details of their relevant interest in the company’s shares and the circumstances giving rise to that interest;
- the name and address of any other person that has a relevant interest in those shares (and full details of the nature and extent of the interest and the circumstances giving rise to the interest); and
- the name and address of any person that has given the shareholder instructions about the acquisition or disposal of the shares, the exercise of any voting or other rights attached to the shares or any other matter relating to the shares (and full details of those instructions).85

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

The company must maintain a register of any information it receives pursuant to a tracing notice and must allow anyone (including shareholders without charge) to inspect the register.86

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

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84 While the Takeovers Panel has the power to review such a decision by ASIC, a review application submitted by Sodima and Yoplait was ultimately withdrawn when Fonterra’s bid was withdrawn.

85 Corporations Act Part 6C.2.

86 Corporations Act section 672DA.
7 Capital raisings

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

7.1 Offers of securities for issue

Requirement for a prospectus

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

Exceptions to the prospectus requirement

There are several circumstances in which an offer of securities for issue does not need disclosure,87 including the following:

Small-scale offerings: Where the offer will not result in more than 20 people having been issued securities in the company in any 12 month period and the amount raised from those investors does not exceed $2 million.

Offers to sophisticated investors: Where the amount payable by the investor is at least $500,000 (or the amount payable, together with amounts previously paid by the investor for securities of the same class, is at least $500,000) or it appears from a certificate given by a qualified accountant no more than six months before the offer that the investor has net assets of at least $2.5 million or a gross income for each of the last two financial years of at least $250,000.

Offers to professional investors: For example, financial services licensees, listed entities and persons that have more than $10 million in assets under management.88

Offers to certain associated parties: Namely, a director or senior manager of the company or a related company, or their spouse, parent, child or sibling [or any company controlled by them].89

Certain offers to present security holders: Namely, offers of fully paid shares under a dividend reinvestment or bonus plan.

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87 See Corporations Act section 708 for a full list of the exceptions.
88 See the definition in Corporations Act section 9 for the full list of professional investors.
89 This exception is frequently relied on to implement employee share schemes. ASIC has granted relief to extend such schemes to employees other than directors and senior managers, provided certain conditions are met: see ASIC Regulatory Guide 49 and associated Class Orders.
7.2 Secondary trading provisions

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

The secondary trading prohibition applies where:

• the sale offer is made within 12 months of the issue of securities;
• the securities subject to the sale offer were issued without a prospectus;
• either:
  − the company issued the securities with the purpose of the person to whom they were issued selling or transferring the securities, or granting, issuing or transferring interests in, or options over, them; or
  − the person to whom the securities were issued acquired them with the purpose of selling or transferring the securities, or granting, issuing or transferring interests in, or options over, them; and
• no relevant exemption applies.90

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

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

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

Public listed companies can, however, exempt an issue of securities from the secondary trading prohibition, if:

• those securities are in a class of securities that have been quoted at all times for the preceding three months;
• trading in that class of securities has not been suspended for more than a total of five days91 during the shorter of the period for which the class

90 Corporations Act section 707(3).
91 ASIC considers “five days” as five trading days and securities are not considered to be suspended whilst in trading halt. ASIC may also grant case-by-case relief where a company’s securities have been suspended for more than five trading days: see ASIC Regulatory Guide 173 (June 2009).
of securities have been quoted, and the period of 12 months before the day on which the relevant securities were issued; and

- the company did not issue the securities with the purpose of on-sale by lodging a “cleansing notice” with ASX before the date of issue.\textsuperscript{92}

The cleansing notice must:

- state that as at the date of the notice, the company has complied with the financial reports and audit and continuous disclosure provisions of the Corporations Act; and

- set out any information that has been excluded from disclosure to the market under the confidentiality carve-out to the continuous disclosure rule, that investors and their professional advisers would reasonably require in order to make an informed assessment of the assets and liabilities, financial position and performance, profits and losses and prospects of the company or the rights and liabilities attaching to the securities.

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

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

7.3 Off-market sales by controllers

The Corporations Act also prohibits any offer of securities for sale without disclosure by a person who controls the company where either the securities are not quoted or, if they are quoted, they are not offered for sale in the ordinary course of trading on the ASX and an exception does not apply.\textsuperscript{93} Secondary trading provisions as described in section 7.2, above, also exist which restrict the ability to sell securities within 12 months of their date of sale by a controller.

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

7.4 Issues exceeding 15 percent of capital

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

The requirement for shareholder approval is subject to a number of exceptions,\textsuperscript{94} including:

\textsuperscript{92} Corporations Act section 708A.
\textsuperscript{93} Corporations Act section 707(2).
\textsuperscript{94} See ASX Listing Rule 7.2 for a complete list of the exceptions.
• an issue to shareholders under a pro rata issue;
• an issue on conversion of convertible securities where the original issue complied with the rule;
• an issue under a dividend reinvestment plan;
• an issue under an employee incentive scheme if, within three years before the date of issue, one of three events has occurred (which includes shareholders having approved the issue of securities under the scheme as an exception to the prohibition); and
• an issue of preference shares which do not have rights of conversion into another class of equity security.

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

7.5 Types of disclosure documents

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

• a prospectus, which must be used for any initial public offering undertaken by a company and must disclose all the information that investors and their professional advisers would reasonably require to make an informed assessment of the rights and liabilities attached to the securities offered and the assets and liabilities, financial position and performance, profits and losses and prospects of the company, to the extent it is actually known or ought to be known after making inquiries; and
• a “transaction specific” prospectus, which has a lower standard of disclosure and can be used for any fundraising activity once a company has been listed for at least three months. In essence, companies only have to disclose the effect of the offer on the company and the rights and liabilities attached to the securities offered. Companies do not have to disclose the assets and liabilities, financial position and performance, profits and losses and prospects of the company. A lower standard of disclosure is permitted in these circumstances as any price-sensitive information regarding the company should be disclosed to the market under the continuous disclosure rule described in section 3, above, however companies will have to disclose information held back under the confidentiality carve-out if that information would be required to make an informed assessment of an investment in the company.
In addition, companies are permitted to incorporate information in a prospectus by lodging the information with ASIC and informing investors in the prospectus of their right to obtain a copy of the information free of charge, rather than setting out the information in full in the prospectus. This is known as a “short form” prospectus.

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

7.6 Types of capital raisings

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

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

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

A rights issue can be either renounceable, meaning that the rights to take up new shares are tradeable on ASX, or non-renounceable. For larger capital raisings, companies will often use accelerated structures such as “Jumbos” or “RAPIDS”.

A rights issue does not require a prospectus if:

• the class of the securities offered are quoted securities at the time of the rights issue;
• trading in that class of securities has not been suspended for more than a total of five days during the shorter of the period for which the class of securities have been quoted, and the period of 12 months before the rights issue; and
• the company gives ASX a cleansing notice within the 24-hour period before the rights issue offer is made.95

95 Corporations Act section 708AA.
Dividend reinvestment plans
A dividend reinvestment plan allows shareholders to elect to reinvest their dividends, rather than receiving cash, by subscribing for additional shares. The offer price is usually market price or a small discount to market price.

A specific exemption from the requirement to issue a prospectus exists for shares issued under a dividend reinvestment plan.96

Share purchase plans
ASIC Regulatory Guide 125 and associated Class Orders allow public listed companies to offer existing shareholders the opportunity to purchase small numbers of shares without issuing a prospectus subject to a number of conditions, including that:

- the shares be in a class which is quoted on the ASX;
- the offer be made to each person who holds shares in the quoted class, other than those whose address is in a jurisdiction where it is unlawful or impractical to issue shares to the person;
- each offer be made on the same terms and on a non-renounceable basis;
- the subscription price is not more than the market price of the shares;
- a person may not subscribe more than $15,000 in any 12 month period;
- the company lodges a cleansing notice with ASX; and
- in the 12 months before the offer, the company has not contravened the provisions of the Corporations Act relating to continuous disclosure, accounts and audits, and defective disclosure documents.

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

96 Corporations Act section 708(13).
8 Major acquisitions and disposals

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

8.1 Change to nature or scale of activities

Public listed companies are required under Listing Rule 11.1 to tell ASX as soon as practicable if they propose to make a significant change, either directly or indirectly, to the nature or scale of their activities, and must provide full details of the proposed change including its effect on potential earnings. ASX can require the public listed company to obtain shareholder approval for the change and/or confirm that it will still meet the criteria for admission to the Official List after the change.

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

- the extent to which the change is the outcome of growth and development of the company over time; and
- the extent to which the change has been expected and investors have had the opportunity to debate the direction of the company at previous general meetings.

ASX will usually require shareholder approval and confirmation that the admission criteria are satisfied for “backdoor listings”, that is, where an unlisted company effectively obtains listed status by merging with an existing listed company.

8.2 Disposal of the company’s main undertaking

Listing Rule 11.2 prevents a public listed company from disposing of its main undertaking without shareholder approval. ASX will do a “before and after” analysis of, among other things, the company’s:

- total consolidated assets and equity interests; and
- projected annual profits and revenue,

in assessing whether the sale of an asset or business division constitutes the disposal of its main undertaking.

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

8.3 Spin-offs

Under Listing Rule 11.4, public listed companies cannot spin-off major assets (including subsidiaries) if they are aware that the person acquiring the asset (or the subsidiary) intends to list on ASX, unless:
• the securities to be listed are offered pro rata to existing shareholders (or in another way that in ASX’s opinion is fair in all the circumstances); or

• shareholders approve the spin-off.

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

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

9.1 Providing financial benefits to related parties

The need for shareholder approval

Subject to certain exceptions [see below], the Corporations Act prohibits a public company, or an entity that it controls, from giving a “financial benefit” to a “related party” unless shareholder approval is obtained. 97

A public company’s related parties comprise the following: 98

- an entity that controls the company;
- a director of the company or of an entity that controls the company;
- a spouse or de facto spouse of any person described above;
- a parent, son or daughter of any person described above;
- an entity controlled by one of the above related parties (unless that entity is also controlled by the company);
- an entity that was a related party of a kind described above at any time within the previous six months or that believes or has reasonable grounds to believe that it is likely to become a related party of a kind described above at any time in the future; and
- an entity that acts in concert with a related party of the company on the understanding that the related party will receive a financial benefit if the company gives the entity a financial benefit.

The concept of “financial benefit” is intended to operate very broadly and includes virtually any benefit. Further, any consideration that has been or may be given for the benefit is to be disregarded, even if it is adequate. 99

Exceptions

These are the principal exceptions to the related party transaction prohibition. 100

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

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

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

97 Corporations Act section 208.
98 Corporations Act section 228.
99 Corporations Act section 229.
100 See Corporations Act Division 2 of Part 2E.1 for a full list of the applicable exceptions.
Shareholder approval

The Corporations Act sets out the procedure that public companies must follow if shareholder approval of a related-party transaction is required, including strict requirements regarding the notices of meetings to be given to shareholders. The notice must include, for example, a detailed explanatory statement setting out the identity of the related party and the nature of the benefit, the recommendations and interests of the directors, and any other information known to the company or any of its directors which is reasonably required by shareholders to decide whether it is in the company’s interests to pass the resolution. The related party and its associates cannot vote on the resolution.101

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

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

The need for shareholder approval

Public listed companies are prohibited under the ASX Listing Rules102 from, directly or indirectly, acquiring a “substantial” asset from, or disposing of a substantial asset to, any of the following without shareholder approval:

• a related party (as defined in the Corporations Act, see section 9.1, above);
• a subsidiary (other than a wholly-owned subsidiary);
• a 10% direct or indirect shareholder (including any 10% shareholder during a six-month look-back period);
• an associate of any of the above; or
• any other person whose relationship to the public listed company (or anyone referred to above) is such that, in ASX’s opinion, the transaction should be approved by shareholders.

The scope of these provisions is much wider than the related-party transaction provisions under the Corporations Act discussed above. An asset is “substantial” if its value, or the consideration paid for it, is 5% or more of the equity interests of the public listed company as set out in its latest accounts lodged with ASX.103

Exceptions

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

• an issue of securities by the public listed company for cash; or

101 See Corporations Act Division 3 of Part 2E.1.
102 ASX Listing Rule 10.1.
103 ASX Listing Rule 10.2.
• a transaction with a person who is a related party only because of the
application of section 228(6) of the Corporations Act (which deems a
person to be a related party of a public company if that person believes
or has reasonable grounds to believe that they are likely to become a
related party in the future).104

Shareholder approval
Where shareholder approval is required, the notice of the meeting must
include an independent expert’s report on the transaction and a voting
exclusion statement indicating that a party to the transaction and their
associates may not vote in relation to its approval.105

9.3 Issue of equity securities to related parties

The need for shareholder approval
Public listed companies are prohibited under the ASX Listing Rules106
from issuing or agreeing to issue equity securities (which include options)
without shareholder approval to:
• a related party of the company, such as a director; or
• a person whose relationship with the company or a related party is such
  that ASX considers that approval should be obtained.

Exceptions
The requirement for shareholder approval is subject to a number of
exceptions which are similar, but not identical, to the exceptions against
the prohibition on issues of equity securities exceeding 15% of capital,
described in section 7.4, above.107

Shareholder approval
Again, where shareholder approval is required, the notice of the meeting
must include certain matters set out in Listing Rule 10.13, including:
• the name of the person to whom the securities will be issued;
• the maximum number of securities to be issued and the terms of those
  securities;
• the intended use of the funds to be raised; and
• a voting exclusion statement indicating that the person and their
  associates may not vote on the resolution approving the issue.

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

104 See ASX Listing Rule 10.3.
105 ASX Listing Rule 10.10.
106 ASX Listing Rule 10.11.
107 See ASX Listing Rule 10.12 for a complete list of the exceptions.
issued, however, at any time within three years of the meeting at which shareholder approval was obtained. This effectively means that public listed companies can implement an ongoing employee share option plan provided that shareholder approval of the plan is refreshed every three years. The notice of meeting will need to set out, among other things, the names of all persons covered by ASX Listing Rule 10.14 that are entitled to participate in the plan. The prohibition does not apply to securities purchased on-market under the terms of an employee incentive scheme that provides for purchase of securities by or on behalf of employees or directors.

There have been a number of recent changes to the way in which employee incentive plans are treated for tax purposes. This is a very complex area and specialist tax advice should be sought, particularly in relation to structuring these types of plans.

9.5 Termination benefits

Subject to limited exceptions, public listed companies are prohibited from giving retirement benefits to directors and certain senior executives without shareholder approval where the benefit exceeds that director or executive’s one year average annual base salary (or a lesser pro rata amount if they have been with the company for less than one year).108

“Benefits” have a broad interpretation and include the automatic or accelerated vesting of shares or bonuses, payments in lieu of notice, payments in exchange for a release of a post-employment restriction, superannuation contributions in excess of the statutory amount (excluding salary sacrifice), and amounts paid out as voluntary out of court settlements.109 “Benefits” will not include genuine benefits accrued under Australian or other law (including statutory leave benefits, statutory notice period and statutory redundancy payments), genuine superannuation payments, and certain redundancy benefits.

Retirement benefits paid in contravention of these provisions must be repaid by the recipient and are deemed to be a debt due to the entity, recoverable by the entity.110 A breach can also constitute a criminal offence, resulting in fines and/or imprisonment.

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108 Corporations Act section 200B(1). Refer to subsection 200G for specific details regarding calculating this amount.
109 Corporations Act sections 200AB and 200A.
110 Corporations Act section 200J(1).
10 Takeovers

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

10.1 The 20 percent limit

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

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

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

10.2 Calculation of the 20 percent limit and voting power

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

10.3 Permitted acquisitions above the 20 percent limit

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

- acquisitions made under an off–market takeover bid, for either all or a fixed proportion of each shareholder’s shares in the target;
- acquisitions made under an unconditional on–market takeover bid for all of the shares in the target;
- acquisitions made with the prior approval of target company shareholders in general meeting;
- “creeping” acquisitions of up to 3% of the target’s shares every six months;
- acquisitions made under a pro-rata rights issue;

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

111 The prohibition also applies to voting shares in an unlisted Australian company with more than 50 shareholders and voting interests in a listed managed investment scheme (such as a listed unit trust): Corporations Act sections 604(1) and 606(1).

112 See Corporations Act section 611 for a full list of permitted exceptions and various ASIC Class Orders.
• certain acquisitions by underwriters; and
• certain downstream acquisitions which are deemed to result from upstream takeovers.

10.4 Further information

For further information regarding the takeover regime in Australia, including a detailed description of the types of takeover bids and bid procedure, please refer to Baker & McKenzie’s *Takeovers Guide: Buying an Australian listed company*. 
11 Insider trading

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

11.1 Prohibited conduct

The Corporations Act prohibits three types of conduct if a person possesses inside information in respect of securities of a public listed company:113

The trading prohibition: The insider must not apply for, acquire or dispose of the relevant securities (or enter into an agreement to do so).114

The procuring prohibition: The insider must not procure another person to apply for, acquire or dispose of the relevant securities (or enter into an agreement to do so).115

The communicating prohibition: The insider must not, directly or indirectly, communicate the information (or cause it to be communicated) to another person if the insider knows, or ought reasonably to know, that the other person would be likely to apply for, acquire or dispose of the relevant securities (or would be likely to procure another person to do so).116

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

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

Information is "generally available" if:

- it consists of readily observable matter;
- it has been made known in a manner that would, or would be likely to, bring it to the attention of persons who commonly invest in securities of the kind of those in question and, since it was made known, a reasonable period for it to be disseminated among such persons has elapsed; or
- it consists of deductions, conclusions or inferences made or drawn from information referred to above.117

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

A reasonable person is taken to expect information to have a "material effect" on the price or value of securities if the information would, or

113 Investors should note that Australia’s insider trading laws apply to a broad range of financial products, and not simply public listed company securities, provided certain territorial connections with Australia are met.

114 Corporations Act section 1043A(1)(c).

115 Corporations Act section 1043A(1)(d).

116 Corporations Act section 1043A(2). The communicating prohibition only applies if the securities in question are able to be traded on a financial market operated in Australia. The other two prohibitions apply to any securities.

117 Corporations Act section 1042C.
would be likely to, influence persons who commonly acquire securities in deciding whether or not to acquire or dispose of the securities in question.\textsuperscript{118} Hence, the materiality threshold is actually quite low.

The concepts surrounding the insider trading prohibitions are quite nebulous and so, as a general rule, we recommend that legal advice is sought before engaging in the relevant conduct if there is any doubt as to whether the prohibitions may apply.

11.2 Defences

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

\begin{itemize}
    \item the inside information came into the insider’s possession solely as a result of the information having been made known in a manner that would, or would be likely to, bring it to the attention of persons who commonly invest in securities of the kind of those in question;\textsuperscript{119} or
    \item the other party to the transaction or the person to whom the inside information was communicated knew or ought reasonably to have known of the information before entering into the transaction or before the information was communicated.\textsuperscript{120}
\end{itemize}

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

11.3 Consequences of contravention

The consequences of a contravention of the insider trading prohibitions include:

\begin{itemize}
    \item liability to pay a civil penalty (the maximum penalty is $200,000 for an individual and $1,000,000 for a body corporate);
    \item criminal liability (potential fines and/or imprisonment); and
    \item liability to compensate any person who has suffered damage resulting from the contravention.
\end{itemize}

11.4 Minimising the risk of contravention

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

As many public listed companies consider it important to prevent not only actual breaches of the insider trading prohibitions, but also any appearance of insider trading, it is common for such companies to adopt

\begin{flushright}
\textsuperscript{118} Corporations Act section 1042D.
\textsuperscript{119} Corporations Act sections 1043M(2)(a), 1043M(3)(a) and 1043N.
\textsuperscript{120} Corporations Act sections 1043M(2)(b), 1043M(3)(b) and 1043N.
\end{flushright}
trading windows during which time directors, officers and employees (and anyone else to whom the policy applies) are permitted to trade in the company’s securities. The trading windows usually apply for a set period following release of half-yearly and/or annual results. Any trading by these “insiders” outside these times is prohibited except in limited circumstances (such as demonstrated financial hardship).
ASX Corporate Governance Council’s Corporate Governance Principles and Recommendations

1 Lay solid foundations for management and oversight
   1.1 Companies should establish the functions reserved to the board and those delegated to senior executives and disclose those functions.
   1.2 Companies should disclose the process for evaluating the performance of senior executives.
   1.3 Companies should provide the information indicated in the Guide to reporting on Principle 1.

2 Structure the board to add value
   2.1 A majority of the board should be independent directors.
   2.2 The chair should be an independent director.
   2.3 The roles of chair and CEO should not be exercised by the same individual.
   2.4 The board should establish a nomination committee.
   2.5 Companies should disclose the process for evaluating the performance of the board, its committees and individual directors.
   2.6 Companies should provide the information indicated in the Guide to reporting on Principle 2 in the corporate governance section of the annual report.

3 Promote ethical and responsible decision-making
   3.1 Companies should establish a code of conduct and disclose the code or a summary of the code as to:
      - the practices necessary to maintain confidence in the company’s integrity;
      - the practices necessary to take into account their legal obligations and the reasonable expectations of their stakeholders; and
      - the responsibility and accountability of individuals for reporting and investigating reports of unethical practices.
   3.2 Companies should establish a policy concerning diversity and disclose the policy or a summary of that policy. The policy should include measurable objectives for achieving gender diversity and for the board to assess annually both the objectives and progress in attaining them.
   3.3 Companies should disclose in each annual report the measurable objectives for achieving gender diversity set by the board in accordance with the diversity policy and progress towards attaining them.
   3.4 Companies should disclose in each annual report the proportion of women employees in the whole organisation, women in senior executive positions and women on the board.

121 Incorporating the 2010 amendments.
3.5 Companies should provide the information indicated in the Guide to reporting on Principle 3 in the corporate governance section of the annual report.

4 Safeguard integrity in financial reporting
4.1 The board should establish an audit committee.
4.2 The audit committee should be structured so that it:
   - consists only of non-executive directors;
   - consists of a majority of independent directors;
   - is chaired by an independent chair, who is not chair of the board; and
   - has at least three members.
4.3 The audit committee should have a formal charter.
4.4 Companies should provide the information indicated in the Guide to reporting on Principle 4 in the corporate governance section of the annual report.

5 Make timely and balanced disclosure
5.1 Companies should establish written policies designed to ensure compliance with ASX Listing Rule disclosure requirements and to ensure accountability at a senior executive level for that compliance and disclose those policies or a summary of those policies.
5.2 Companies should provide the information indicated in the Guide to reporting on Principle 5 in the corporate governance section of the annual report.

6 Respect the rights of shareholders
6.1 Companies should design a communications policy for promoting effective communication with shareholders and encouraging their participation at general meetings and disclose their policy or a summary of that policy.
6.2 Companies should provide the information indicated in the Guide to reporting on Principle 6 in the corporate governance section of the annual report.

7 Recognise and manage risk
7.1 Companies should establish policies for the oversight and management of material business risks and disclose a summary of those policies.
7.2 The board should require management to design and implement the risk management and internal control system to manage the company's material business risks and report to it on whether those risks are being managed effectively. The board should disclose that management has reported to it as to the effectiveness of the company's management of its material business risks.
7.3 The board should disclose whether it has received assurance from the CEO (or equivalent) and the CFO (or equivalent) that the declaration provided in accordance with section 295A of the Corporations Act is founded on a sound system of risk
management and internal control and that the system is operating effectively in all material respects in relation to financial reporting risks.

7.4 Companies should provide the information indicated in the Guide to reporting on Principle 7 in the corporate governance section of the annual report.

8 Remunerate fairly and responsibly

8.1 The board should establish a remuneration committee.

8.2 The remuneration committee should be structured so that it:

• consists of a majority of independent directors;
• is chaired by an independent director; and
• has at least three members.

8.3 Companies should clearly distinguish the structure of non-executive directors’ remuneration from that of executive directors and senior executives.

8.4 Companies should provide the information indicated in the Guide to reporting on Principle 8.
Financial reporting timeline — 30 June year-end

- Last day for lodgement of preliminary final report with ASX (Listing Rule 4.3B)
- Annual report to shareholders due (Corporations Act s.315, Listing Rule 4.7). Note: must be sent at least 21 days before AGM
- Last day for lodgement of audited financial statements with ASX and ASIC (Corporations Act s.319, Listing Rule 4.5)
- Last day to hold AGM (Corporations Act s.250N). Note: minimum 28 days' notice required
- Last day for lodgement of half-year report with ASX and ASIC (Listing Rule 4.2B)
- Last day for lodgement of quarterly cash flow report (Listing Rules 4.7B and 5.3)*
- Last day for lodgement of quarterly cash flow report (Listing Rules 4.7B and 5.3)*
- Last day for lodgement of quarterly cash flow report (Listing Rules 4.7B and 5.3)*

*Quarterly cashflow reporting for some entities only, namely "cash boxes" and mining exploration entities - see ASX Listing Rules 4.7B and 5.3
Financial reports at a glance

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

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

• the financial statements for the year (that is, a statement of financial position, statement of financial performance and statement of cash flows);

• the notes to the financial statements; and

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

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

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

• the financial statements for the half-year;

• the notes to the financial statements; and

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

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

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

• certain general information prescribed by the Corporations Act, including a review of the company’s operations, details of any significant changes in the company’s state of affairs and details of the company’s principal activities and any significant changes in the nature of those activities;
• certain specific information prescribed by the Corporations Act, including details of dividends paid to shareholders, various matters in relation to the company’s directors and auditor and details of options granted and shares issued as a result of any options exercised during the year;

• the remuneration report (see below); and

• a copy of the auditor’s independence declaration (see below).

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

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

• a review of the company’s operations during the half-year and the results of those operations; and

• the name of each person who has been a director of the company at any time during or since the end of the half-year and the period for which they were a director.

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

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

An auditor who audits a financial report for a financial year must report to shareholders on whether the auditor is of the opinion that the financial report is in accordance with the Corporations Act, including whether it complies with the accounting standards and gives a true and fair view of the financial position and performance of the company. If the auditor is not of that opinion, the auditor’s report must state why. In addition, the auditor must give the company directors a declaration that to the best of their knowledge and belief there have been no contraventions (or otherwise disclose any) of the auditor independence requirements of the Corporations Act or any applicable professional conduct code in relation to the audit (however an auditor is not required to report inadvertent breaches of the auditor independence requirements provided certain statutory defences apply).

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

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

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

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

Annual report – for ASX, ASIC and shareholders

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

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

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

Half-year report – for ASX

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

Quarterly cash flow report – for ASX

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

- a consolidated statement of cash flows and a cash reconciliation at the end of the quarter;
- details of certain payments and loans made during the quarter; and
- details of non-cash financing and investing activities, financing facilities, and acquisitions and disposals of business entities or changes in interests in mining tenements.
Remuneration report (part of directors’ report)

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

• a discussion of board policy in relation to the remuneration of the key management personnel of the company and the relationship between that policy and the company’s performance;

• if an element of the remuneration of any member of the key management personnel is:
  − dependent on the satisfaction of a performance condition, details of the performance condition; and/or
  − equity based, details of the performance hurdles or otherwise why there are none;

• details of the remuneration and service contracts (including termination benefits) of each member of the key management personnel;

• an explanation of any board action if comments were made on the remuneration report at the last AGM, or if at least 25% of votes were cast against the remuneration report resolution at the last AGM; and

• details regarding any remuneration consultants engaged by the company.

Corporate governance report (part of annual report)

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

ASX also recommends that companies disclose their achievement against gender objectives set by their board and the proportion of women on the board, in senior management and throughout the company.
Glossary

AGM
Annual general meeting. The AGM is open to all shareholders of the company at which shareholders vote on the election of directors and other usual matters.

ASIC
The Australian Securities and Investments Commission. This is the regulatory body charged with administering and enforcing the Corporations Act and regulating securities markets in Australia.

ASIC Policy
ASIC regulatory guides, practice notes and information releases. ASIC may also issue instruments and class orders which exempt a person or class of persons from a provision of the Corporations Act or modify a provision of the Corporations Act in its application to a person or class of persons. Such instruments and class orders are binding on the person(s) affected.

associate
An “associate” of a person includes:
- if the person is a body corporate – any related body corporate; and
- in any case – anyone with whom the person has, or proposes to enter into, an agreement, arrangement or understanding (whether or not enforceable) to control or influence the composition of the relevant company’s board of directors, or the conduct of the relevant company’s affairs, or otherwise to act in concert in relation to the company’s affairs.

For example, a voting agreement between two shareholders which sets out how they will vote to appoint directors to the board of the relevant company will make those two shareholders associates of one another.

ASX
ASX Limited or the Australian Securities Exchange market which it operates, as the context requires.

ASX Corporate Governance Recommendations
The Principles of Good Corporate Governance and Best Practice Recommendations were first adopted by the ASX Corporate Governance Council in March 2003 and are amended from time to time. The most recent revisions came into effect on 1 January 2011.

ASX Listing Rules
The listing rules of ASX and any other rules of ASX which are applicable while a public listed company is admitted to the Official List. ASX has a broad discretionary power to grant waivers from the Listing Rules in appropriate circumstances.

Official List
The official list of entities that ASX has admitted to the ASX and have not removed.

public company
Any company other than a proprietary (or private) company. All listed companies must be public companies.

public listed company
For the purposes of this guide, a public company admitted to the Official List and securities of which are quoted on ASX.

related body corporate
A member of the same corporate group. That is, a subsidiary, a parent company, or a company under common control.

relevant interest
Broadly, a person will have a “relevant interest” in shares if the person holds the shares, or has the power to control the exercise of a right to vote attached to the shares, or can control the disposal of the shares. Examples include a direct holding of shares and a pre-emptive right over another person’s shares (because this is a form of control over the disposal of those shares).

In addition, a person will be deemed to have the same relevant interests in shares that are held by a body corporate or managed investment scheme which the person controls, or in which the person’s voting power is above 20%. In this way, an indirect holding through subsidiaries, or even through a non-controlling interest of more than 20% in a body corporate or unit trust, can give rise to a deemed relevant interest.

An agreement to do something which will, on its future performance, give rise to a relevant interest is deemed to create an immediate relevant interest. For example, a call option over another person’s shares gives rise to a relevant interest even though there is no present holding of or control over the other person’s shares.

Certain situations are excluded from giving rise to a relevant interest, such as shares held by a bare trustee, security over shares given to lenders on ordinary commercial terms, and exchange traded options and futures contracts (but only until an obligation to take delivery of the shares arises).
The Takeovers Panel adjudicates on disputes arising under takeovers in accordance with both the law and commercial principles.

Voting Power

This is a percentage determined using the formula:

\[
\frac{\text{Person's and associates' votes}}{\text{Total votes in body corporate}} \times 100
\]

where:

- the “person’s and associates’ votes” is the total number of votes attached to all the voting shares in the body corporate in which the person or an associate has a relevant interest; and
- the “total votes” is the total number of votes attached to all voting shares in the body corporate.

Given the possibility that the number of votes attaching to various classes of voting shares may vary depending on the situation, the number of votes attaching to each share is to be counted as follows:

- the number that may be cast on the election of a director; or
- if no votes are cast for the election of a director, the number that may be cast on the amendment of the constitution.
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