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BACKDOOR LISTINGS IN AUSTRALIA

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BACKDOOR LISTINGS

INTRODUCTION

This guide serves as a general introduction for companies considering a backdoor listing in Australia and provides an overview of some of the key considerations relating to the process.¹

1. WHAT IS A BACKDOOR LISTING?

A backdoor listing is effectively a way for a private business or company (**AssetCo**) to obtain a listing on ASX via a disposal of the business or shares in the company to a pre-existing ASX-listed entity (**ListCo**), as an alternative to undertaking a conventional initial public offering (**IPO**).

ListCo will typically have comparatively small scale operations compared to AssetCo. In many instances, ListCo is a moribund entity without substantive business activities (eg a mining exploration company with a project that has been mothballed) and whose securities are suspended from trading, that is looking for an injection of a new business or assets. A backdoor listing is to be distinguished from a reverse takeover by a smaller listed company of a larger listed company by way of takeover bid or scheme of arrangement regulated by the Corporations Act 2001 (Cth).

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

2. SIGNIFICANT CHANGE IN NATURE AND SCALE OF ACTIVITIES

A backdoor listing involves a significant change in the nature and/or scale of the activities of ListCo and typically involves:

- + ListCo issuing securities to AssetCo or its shareholders as consideration for the acquisition of the assets or shares of AssetCo, resulting in a substantial dilution of ListCo's existing shareholders and AssetCo or its shareholders acquiring control of ListCo; and

- + a significant change to the composition of ListCo's management and board of directors, with representatives of AssetCo being appointed to those positions.

A significant change to the *nature* of ListCo's activities involves a major change in the character of ListCo's business activities, whether as a result of one or a series of transactions. For example, an entity whose main business activity is mining exploration deciding to switch its main business activity to manufacturing consumer goods.

A significant change to the *scale* of ListCo's activities involves a substantial or sizeable change to the size of ListCo's business operations.

ASX has adopted 25% as the benchmark for determining whether or not a business/asset acquisition or disposal transaction involves a significant change to the scale of an entity's activities that requires notification under ASX Listing Rule 11.1, having regard to the impact of the transaction on ListCo's consolidated total assets, total securities on issue (on a fully diluted basis, including vendor consideration, deferred consideration, capital raisings, performance shares and options), consolidated total equity interests, consolidated annual revenue (or in the case of a mining or oil and gas exploration entity which is not earning material revenue from operations, consolidated annual expenditure) and consolidated annual profit before tax and extraordinary items.

Typically, a transaction that does not involve a doubling of one or more of any of these measures will not be regarded as a backdoor listing.

If ListCo proposes to make a significant change, either directly or indirectly, to the nature and/or scale of its activities, it must provide full details to ASX as soon as practicable. ASX recommends early consultation with ASX and that ListCo obtain in-principle advice on the application of Chapter 11 to the proposed transaction before an agreement is entered into and the transaction is announced.

¹This guide is current as at 22 May 2020 and is based on ASX Guidance Note 12 *Significant Change to Activities*, as published on 1 December 2019. Please note that this document provides a general overview. Legal advice should be sought before relying on any information contained in this overview and it is not to be distributed other than to the intended recipient.

BACKDOOR LISTINGS (CONT)

3. KEY ADVANTAGES

The key advantages of a backdoor listing over a conventional IPO include that:

- + AssetCo is usually able to utilise a significant portion of ListCo's share register for the purpose of satisfying the minimum spread requirement imposed by ASX;
- + AssetCo may gain access to any cash sitting on the balance sheet of ListCo for its business;
- + if ListCo is a moribund entity, a backdoor listing transaction will potentially enable shareholders of ListCo to preserve some of the value and the liquidity of their shares, which would otherwise be lost if ListCo were to de-list or be liquidated; and
- + the capital raising undertaken in relation to a backdoor listing may, subject to shareholder approval and an ASX waiver being granted, be undertaken at an issue price of at least \$0.02 rather than the usual \$0.20 minimum, if ListCo's securities have been trading at less than \$0.20 in the lead up to the transaction. This enables ListCo to avoid the dilutionary consequences to existing shareholders of a capital consolidation to bring the price up to \$0.20.

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COMMERCIAL
AND FAST IN
THEIR ADVICE.”**

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4. KEY REQUIREMENTS

The key requirements for a backdoor listing are as follows:

Private M&A transaction: ListCo agrees to conditionally acquire AssetCo's shares or assets under a share purchase agreement or an asset purchase agreement. Completion of the acquisition should be conditional upon shareholder approval of the transaction under ASX Listing Rule 11.1.2 and re-complying with the admission requirements in Chapters 1 and 2 of the ASX Listing Rules. Completion is likely to be subject to additional shareholder approvals as detailed below and if the bidder is foreign, then the transaction may also need to be conditional on the approval of the Foreign Investment Review Board under the Foreign Acquisitions & Takeovers Act 1975 (Cth).

The transaction may be subject to a reasonable break fee in the event ListCo is unable to obtain shareholder approval or satisfy ASX's listing re-compliance requirements, provided the break fee triggers are reasonable and not coercive, for example, due to a competing transaction that successfully completes, a change of ListCo board recommendations or a material condition within ListCo's control not being satisfied.

Disclosure obligations and suspension of ListCo

securities: ASX will only allow ListCo's quotation of its securities to resume trading after the announcement of a proposed backdoor listing transaction if the announcement contains sufficient information about the transaction for ListCo's securities to trade on a reasonably informed basis. The specific information requirements are set out in Appendix A of ASX Guidance Note 12 and includes information about:

- + the parties to and the material terms of the transaction, and any regulatory approvals or waivers required for completion of the transaction;
- + AssetCo's principal activities and business model, including key dependencies and risks;
- + pro forma information showing the impact of the transaction on ListCo's capital and structure and likely effect on ListCo's financial position and performance;

- + any person who will acquire control of, or voting power of 20% or more in, ListCo as a result of the transaction;
- + any proposed changes to ListCo's board or senior management;
- + audited accounts of AssetCo for at least two full financial years;
- + whether ListCo or AssetCo has issued securities in the preceding 6 months, or is proposing to issue securities, and the details of such issues, including the nature of the issue (eg pro rata offer, public offer under a prospectus or a placement to professional and sophisticated investors);
- + confirmation that ListCo has made appropriate enquiries into the assets and liabilities, financial position and performance, profits and losses and prospects of AssetCo for ListCo's board to be satisfied the transaction is in the best interests of ListCo and its securityholders, or an explanation of why it hasn't made those enquiries;
- + a timetable for implementing the transaction; and
- + details of any fees paid or payable by ListCo to any person for finding, arranging or facilitating the transaction.

The practical impact of this requirement is that ListCo will need to front-end some of its diligence in relation to AssetCo and its operations if ListCo wants its securities to continue to trade to the date of the shareholder meeting.

However, if ListCo subsequently announces a material change to the transaction, ListCo's securities are likely to be suspended. Further, trading in ListCo's securities will be suspended from the date shareholder approval is obtained until ListCo re-complies with ASX's admission and quotation requirements.

**“THEY HAVE
MARKET-LEADING
COMMERCIALITY
AND EXPERTISE
AS WELL AS
MARKET-LEADING
CLIENT CARE AND
PROACTIVITY.”**

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BACKDOOR LISTINGS (CONT)

Shareholder approval: the shareholders of ListCo must approve the change in nature or scale of ListCo's activities. Other approvals which may need to be sought include approval for the issue of securities to the public to raise funds for the purposes of the re-listing (including any public fundraising at a price less than \$0.20, if applicable), approval for a consolidation of capital if ListCo's securities have been trading at less than \$0.20 (if applicable), approval to issue the securities in connection with the transaction, approval to issue securities to the vendors of the shares or assets being vended into ListCo and approval to change ListCo's name if it wishes to rebrand in line with the new business.

An independent expert's report on fairness and reasonableness will be required if shareholder approval is also being sought under the takeover provisions of the Corporations Act (item 7 of section 611) because AssetCo or its shareholders will acquire an interest in excess of 20% in ListCo.

A notice of meeting must include such information as will fully and fairly inform shareholders of the matters to be considered at the meeting and enable them to make a properly informed judgment on those matters, including the information set out in Appendix A of ASX Guidance Note 12 set out above.

ASX will generally expect the notice of meeting to include any material information about the transaction that is included in the re-compliance prospectus to the extent that such information is known by ListCo and its directors at the date of dispatch of the notice of meeting, including any audited or reviewed accounts or a reviewed pro forma statement of financial position that it will be lodging to re-comply with ASX's admission requirements.

Before ListCo sends out a notice of meeting that includes a resolution for approval to change the nature or scale of ListCo's activities, it must give ASX a copy of the draft notice for review and should allow 15 business days for ASX to review the notice depending on its complexity.

Any counterparty to the transaction and any other person who will obtain a material benefit as a result of the transaction (such as a professional adviser who will be paid a success fee if the transaction proceeds) will be excluded from voting at the shareholder meeting.

Prospectus and fundraising: ListCo must issue a re-compliance prospectus as part of the re-compliance process, regardless of whether it will be conducting a capital raising to fund various future activities of AssetCo. Any capital raising must be conducted at an issue price of at least \$0.20, unless ListCo obtains shareholder approval and an ASX waiver to raise capital at not less than \$0.02 if the entity's securities have been trading at less than \$0.20 in the lead up to the transaction. The prospectus needs to comply with the requirements of the Corporations Act 2001 (Cth), the ASX Listing Rules, and guidance from ASIC and ASX, and will typically include various expert reports (for example, an investigating accountant's report on financial information and a solicitor's report on ownership of mining tenements).

Re-comply with ASX admission requirements: ListCo will need to re-comply with ASX's admission requirements in Chapters 1 and 2 of the ASX Listing Rules. For an overview of these requirements please refer to G+T's [Initial Public Offerings In Australia](#) guide.

Some key points to note in the context of a backdoor listing are as follows:

- + **Profits test vs assets test:** typically, a company seeking a backdoor listing will do so via the assets test as usually the company is unable to satisfy the requirements of the profits test. However, this will depend on the underlying profits of ListCo and AssetCo.
- + **Historical financial information:** ListCo will generally be required to provide the same audited accounts with respect to AssetCo (and any other significant business or entity it has acquired in the 12 months before applying for admission) that it is required to provide in respect of itself. Typically, this will require at least the last 2 full financial years if re-complying under the assets test and 3 full financial years under the profits test, subject to certain exceptions. Obtaining historical audited accounts for AssetCo (or any businesses or entities that have been acquired in the prior 12 months) can be challenging if the accounts do not already exist, particularly if the business is not a standalone entity but an operating division within a corporate group.

BACKDOOR LISTINGS (CONT)

- + **Pre-emptive raisings and escrow:** ListCo must comply with ASX's escrow regime afresh, unless the escrow provisions have been excluded by ASX (for example, because ListCo is complying via the profits test). ListCo may need to apply for a waiver to permit the vendors of certain assets to be treated as seed capitalists rather than vendors so that they can take advantage of the cash formula to relieve them from escrow on a proportion of their securities equal to the proportion they paid for them as compared to the IPO price.

ASX may also classify any securities which are issued in the lead up to, or following, the announcement of a re-compliance listing as restricted securities for up to 2 years from the re-listing date, particularly if it appears that the securities have been issued to confer a benefit on any related parties, promoters, professional advisers involved in the transaction or their family, friends and associates, as opposed to raising working capital to cover the costs of the transaction

- + **Pre-emptive loans:** If ListCo loans funds to AssetCo in the lead up to, or following, the announcement of a re-compliance listing and associated capital raising, and ASX forms the view that the loan is being used to pass consideration to AssetCo prior to shareholder approval and ListCo's re-compliance, ASX will regard this as a serious breach of the ASX Listing Rules and may take appropriate remedial action in relation to that breach.

5. INDICATIVE TIMELINE

The timeframe for completing a backdoor listing will vary depending on factors such as the nature of the business of AssetCo that is to be acquired by ListCo and whether the financial information of ListCo and AssetCo is audited and in order. Set out below is a highly simplified indicative timetable.

WEEK	ACTION
1	<ul style="list-style-type: none"> + Preparatory work including: <ul style="list-style-type: none"> - ListCo to appoint advisory team and establish due diligence committee (DDC) for re-compliance listing - Engage experts to prepare expert reports for inclusion in Prospectus
2-10	<ul style="list-style-type: none"> + Commence due diligence process, including: <ul style="list-style-type: none"> - due diligence on AssetCo to standard required to satisfy ListCo's disclosure obligations in relation to the transaction at the time of entering into the Acquisition Agreement - Prospectus due diligence committee process + ListCo to consult with ASX and seek in-principle advice as to the application of Chapter 11 to the proposed transaction + ListCo to prepare Notice of Meeting, including: <ul style="list-style-type: none"> - pro forma statement of financial position for Notice of Meeting - AssetCo to have accounts for past 2 financial years and half year audited or reviewed - Independent expert's report if any AssetCo vendor will acquire 20% or more of ListCo's securities + Prepare Prospectus, including: <ul style="list-style-type: none"> - financial information for ListCo and AssetCo - expert reports + Negotiate and finalise Acquisition Agreement + Prepare transaction announcement to standard required by ASX and provide draft to ASX for review
11-13	<ul style="list-style-type: none"> + Announce transaction and execution of Acquisition Agreement + Lodge Notice of Meeting with ASX and ASIC if any AssetCo vendor will acquire 20% or more of ListCo's securities + Finalise Prospectus
14-16	<ul style="list-style-type: none"> + Prospectus to be lodged with ASIC + Listing application to ASX + Dispatch Notice of Meeting + Offer period under Prospectus commences after ASIC exposure period (7 – 14 days)
17-19	<ul style="list-style-type: none"> + Hold general meeting to obtain shareholder approval + ListCo securities suspended from trading + ListCo securities consolidated, if applicable + Offer period under Prospectus closes
20-22	<ul style="list-style-type: none"> + Completion acquisition of AssetCo + Appoint new directors to ListCo board + Satisfy ASX conditions for re-listing + Reinstatement to trading on ASX

G+T EXPERIENCE

BACKDOOR LISTINGS

BABYLON PUMP & POWER LIMITED

on its \$4m backdoor listing and acquisition of Babylon Operations Pty Ltd

AQUIS ENTERTAINMENT GROUP

on its \$32m backdoor listing and acquisition by Discovery Resources Limited and re-listing on ASX

LIVETILES

on its \$57m backdoor listing and acquisition by Modun Resources Limited and re-listing on ASX as LiveTiles Limited

GRAYS

on its \$440m backdoor listing and acquisition by Mnemon Limited and re-listing on ASX to create Grays Ecommerce Group Limited

MARETERRAM LIMITED

on the backdoor listing and acquisition of Nor-West Seafoods and a food services business as well as the \$34m equity and debt raisings and re-listing on the ASX

THE IWEBGATE BOARD

on the \$25m backdoor listing of iWebGate Technology Limited and acquisition by My ATM Holdings Limited

LION ENERGY

on its \$10m re-compliance listing on the ASX



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THE ECM SPACE, AND
KNOWN ESPECIALLY
FOR ITS STRENGTH
IN HANDLING HIGH-
VALUE AND COMPLEX
IPOS, SECONDARY
OFFERINGS AND
BLOCK TRADES.”**

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CONTACTS

Gilbert + Tobin's market leading Equity Capital Markets team is happy to provide advice about these matters should you choose to explore a backdoor listing.

If you would like more information on backdoor listings or other Australian legal issues we would be pleased to assist.

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