HERBERT SMITH FREEHILLS

TURNING TIDES:

THE AUSTRALIAN ECM REVIEW 2023

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Introduction

It gives us great pleasure to present *Turning Tides: The Australian ECM Review 2023*

In this publication we cover:

- the key themes of capital markets in 2023;
- a review of IPO and secondary raising data across the Australian market;
- the emergence of several unique transaction structures;
- a review of activity in the resources sector;
- an analysis of block trade activity in 2023;
- Australian regulatory developments;
- key US securities developments; and
- predictions for 2024.

We trust you will find value in it.

Should you have any questions in relation to capital markets in Australia, please contact our ECM partners who are listed on page 44.

The Herbert Smith Freehills ECM Team

2023: Key themes

2023 in review

2023 was a very quiet year for IPOs, continuing the downturn experienced in 2022 after the post-Covid-19 highs of 2021. There were only 32 IPOs in 2023, less than half the number which took place in 2022, which in turn was less than half the number in 2021. While up on 2022, the total volume of capital raised was much lower than the 2021 highs – $13 billion was raised in IPOs in 2021 but only $3 billion in 2023, and with the vast majority of listings falling below the $50 million market capitalisation mark.

However, there were some bright spots in the year, including the listing of chemicals distributor Redox Limited (which raised $402 million in capital and listed with a market capitalisation of some $1.3 billion), on which Herbert Smith Freehills acted for Redox, and rare earth elements miners Brazilian Rare Earths Limited ($315 million market capitalisation) and VHM Limited ($266 million market capitalisation). These examples illustrate that listings at scale were still possible in 2023, although successful large IPOs were concentrated in the materials/resources and industrials sectors. Although there were only a handful of larger listings, they contributed to the aggregate market capitalisation of new listings increasing from 2022 by more than $2 billion (despite the fall in the number of IPOs).

As we observed last year, in our key themes for 2022, Australian IPO activity continues to be affected by global conditions, including rising inflation, interest rates and market volatility. These factors have led to reduced investor confidence and affected the levels of IPO activity. There is no doubt that companies otherwise considering IPOs are conscious of these factors, and are in many cases awaiting more favourable market conditions, and greater stability around valuations, before launching a transaction. This is particularly the case in non-resources/ materials sectors.

While it may be some time until the market returns to the highs witnessed in 2021, the immediate effects of the Covid-19 pandemic are now well in the rear view mirror. If global economic conditions stabilise, and inflation and interest rates are brought under control, we are cautiously optimistic about the prospects for recovery in 2024, but importantly subject to global geopolitical conditions also stabilising.

Outlook for 2024

With increasing certainty interest rates will level out, there is a level of optimism that the necessary level of certainty to carry out capital market transactions will increase. That said, with higher levels of geopolitical instability and looming significant events including upcoming US elections, we hold no expectation that this will necessarily be the case. In light of the ongoing dynamics of tightening supply of key commodities we expect to see mining sector companies continuing to raise capital and seeking to list and with the ongoing energy transition we further expect to see the sectors tied to renewables to be key in the coming year.

See page 39 for further details of the 2024 outlook.

New area of review: secondary raisings

Readers will have noticed that this year's edition has been titled the *Australian ECM Review*. This is because we have expanded the scope of this year's review to introduce a new and ongoing 'Secondary raisings by the numbers' section.

In this section, we comment on some key trends and developments in relation to secondary raisings of at least $50 million – including rights issues, placements and share purchase plans (**SPP**).

In 2023, the combined placement and SPP was by far the most commonly employed secondary offer structure, comprising 42% of raisings, followed by the combined placement and rights issue, comprising 22% of raisings. Of course, the placement plus SPP structure is constrained by the ASX 15% per annum placement limit, so the fact that many raisings followed this format is to some extent symptomatic of the fact that many raisings were on the smaller side, relative to existing issued capital. The largest secondary raising for the year by far was Orora's $1.35 billion placement and ANREO. This issuer appears to have 'maxed out' placement capacity and raised the remaining funds required (for the acquisition of French-based bottling concern Saverglass SAS) via the ANREO component of the raising.

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The secondary raisings of the past year were mainly undertaken to for non-M&A reasons (80% of all secondary raises surveyed), with issuers indicating various use such as business growth, balance sheet repair and the funding of strategic initiatives. These matters – particularly balance sheet repair – may be reflective of the subdued market and consequently lower M&A activity, as well as a wish by issuers to reduce debt in a higher interest rate environment.

See page 13 for further details of secondary raisings in 2023.

Key regulatory updates

2023 saw a number of regulatory developments in the Australian ECM landscape.

One of these was the introduction of the much-anticipated unfair contract terms (**UCT**) reforms on 9 November 2023. A change attracting much attention is that the definition of a 'small business' has been expanded from a business with <20 employees to one with <100 employees or with <$10 million in annual turnover. The effect of this has been to capture a much wider range of firms able to rely on the UCT regime – including some institutional investors who are parties to contracts in the capital raising context. However, in early February 2024 ASIC published a limited class no-action position in respect of the UCT regime. The no-action position is in respect of certain standard form contracts that are:

- made with an Institutional Investor; or
- made between wholesale clients dealing in a financial market on an Industry Standard Form Contract (which includes the AFMA Master ECM Terms).

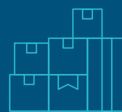
ASIC's no action position does not extend to disclosure documents or secondary equity raising documents (such as security and interest purchase plan booklets, initial public offering disclosure documents and application forms, and entitlement offer booklets).

Further, the Federal Court of Australia in October handed down its decision in connection with ASIC's action against ANZ for allegedly breaching continuous disclosure obligations during its $2.5 billion institutional share placement in 2015. The Court found in favour of ASIC, ordering ANZ to pay a $900,000 civil penalty, which ANZ is appealing. In determining that the allocation of a substantial proportion of the offer (~30%) to ANZ's underwriters to be material information which should have been disclosed to the market, the decision has highlighted the importance of vigilantly considering continuous disclosure during the course of secondary raisings.

Other moves by ASIC included a ramp-up in 'greenwashing' proceedings against companies making representations as to sustainability and carbon emissions reduction, and market surveillance into IPO and post-listing disclosure practices of companies in the mining exploration sector, and rights issue interventions.

The year also saw high volumes of APRA-regulated bank and insurer hybrid raising. In September 2023, APRA released its discussion paper 'Enhancing Bank Resilience', seeking feedback on the effectiveness of such hybrid instruments as a component of the loss-absorbing capital of regulated entities (partly in response to the experience of holders of comparable instruments in Credit Suisse which were written off as part of the rescue acquisition of Credit Suisse by UBS).[1] In doing so, the regulator effectively put the markets on notice of its concern that the securities were not 'operating as originally intended' – with the possibility of those instruments being put 'behind the counter', and away from retail investors. It remains to be seen what direction APRA will ultimately take, but Australia has been an outlier in some respects in allowing retail investors to access these securities (with comparable European markets being largely institutional).

See page 27 for further details of the regulatory developments affecting ECM in 2023.



Continuing block trade activity facilitating completion of IPO exits

While IPO activity in 2023 has been down, blocks of stock retained by vendors in past year IPOs have continued to come out of escrow, leading to healthy block trade activity. A notable example was the successful sale this year of Apollo Funds' and CIMIC's ~65% retained holding in Ventia Services Group (following their 2021 IPO sell-down of 4% and issuance of new shares of 26%) over a series of four tranches, on which Herbert Smith Freehills acted, with each trade occurring at a substantial premium to the IPO price of shares.

See page 24 for further details of block trade activity in 2023.

1. APRA's 31 January 2024 update on its regulatory priorities indicates that it intends to undertake a formal consultation in this area in 1H 2024.

2023: IPOs by the numbers

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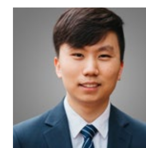

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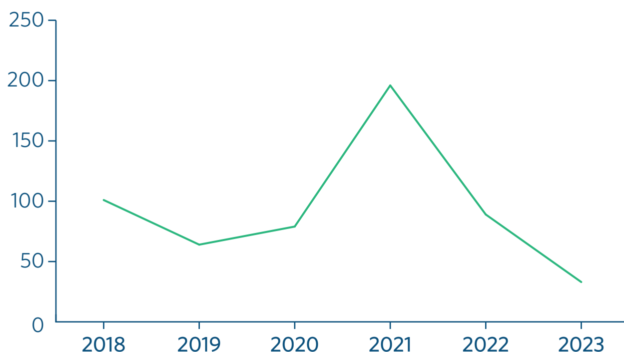
A continuation of 2022 and global trends for IPOs

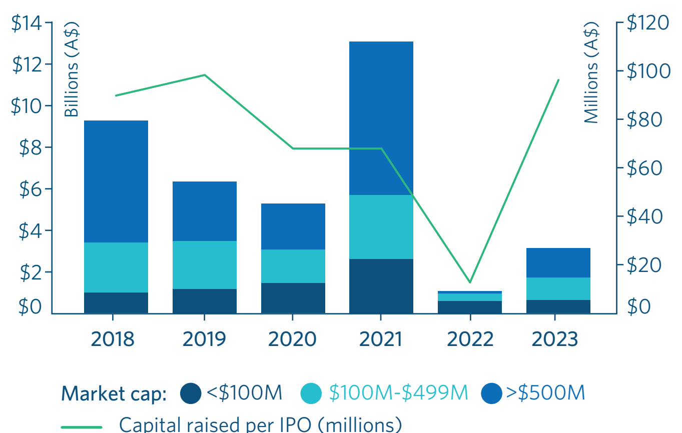
Consistent with trends in global capital markets and continuing on from similar trends in 2022, the Australian IPO market was muted in 2023. The number of IPOs was down for a second year in a row, representing the lowest number of total IPOs in a calendar year since we started collecting IPO data in 2016.

The continuation of this trend demonstrates the headwinds issuers have faced in raising capital since early 2022 with another year of high inflation and rapid increases in interest rates across the globe contributing to uncertainty in global and Australian capital markets.

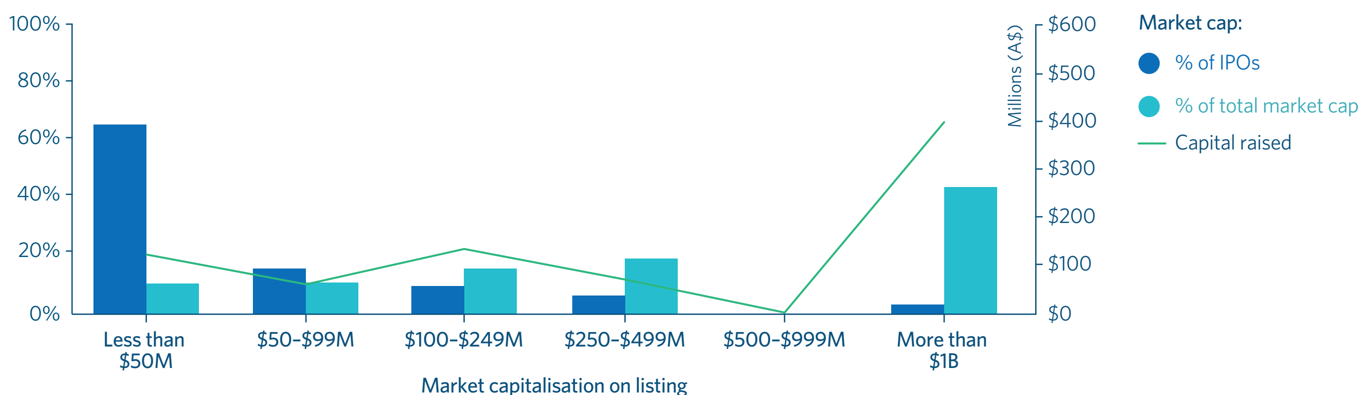
Number of IPOs 2018-2023



Capital raised by market capitalisation and per IPO 2018-2023



Market capitalisation, capital raised and number of IPOs 2023



However, green shoots are emerging. There was a strong uptick in amount of capital raised in the second half of 2023 (380% higher than in the first half). Much of this was attributable to the capital raised by Redox Limited towards the middle of the year.

Further, the aggregate market capitalisation of new listings in 2023 increased from 2022 levels by nearly $2 billion. This was also partly due to the IPO of Redox – the largest IPO since November 2021 and the largest IPO in 2023 by some margin. Redox raised $402 million in primary capital and listed on ASX with a market capitalisation at listing of $1.3 billion, comprising approximately 45% of the total aggregate market capitalisation for IPOs in 2023. Herbert Smith Freehills acted for Redox on this IPO.

Whilst the balance of the IPOs were typically IPOs with a market capitalisation of less than $50 million, the average market capitalisation for an IPO was still significantly higher in 2023 (around 8 times) compared to 2022.

Despite a number of prospective issuers delaying their IPO plans for a second year in a row, we see a path forward for issuers seeking to list on ASX emerging in 2024 given the projected direction of various macro economic settings. As outlined further below, the successful path to an IPO in 2023 typically involved a higher level of underwriting and escrow.

Raising for acquisitions

In 2023, there were three IPOs that raised more than $50 million: Redox Limited, Nido Education Limited and Brazilian Rare Earths Limited.

Of the three IPOs, each adopted the features referenced above in respect of higher levels of underwriting and escrow. In addition, a significant portion of the capital raised by each issuer was raised to fund acquisitions:

- $73 million of the $99 million raised by Nido Education was for the purpose of providing Nido Education with capital to complete the acquisition of a further 24 education centres (to complement its existing 28 centres);
- $12 million of the $50 million raised by Brazilian Rare Earths was for the purpose of providing Brazilian Rare Earths with capital to complete the acquisition of a bauxite exploration tenement; and
- $24 million of the $402 million raised by Redox was raised for the purposes of working capital and growth strategies, which included acquisition opportunities.

Escrow – a push for certainty

Market wide

Reflective of the headwinds for IPOs in 2023, the average number of ordinary securities subject to escrow increased to 45% of total outstanding ordinary securities, whether imposed by the ASX or voluntarily restricted by the issuer. This trend is reflective of the stronger demand we have seen from prospective investors for escrow of investors retaining stakes in issuers on listing. Whilst the market wants to see founders and other pre-IPO investors retain a meaningful interest in the performance of the issuer in the period following listing, we consider the increased level of escrow to also be tied to the market sentiment and the challenges in the current environment so we would expect the current figures to be something of a high water mark, which will fluctuate in years to come depending on the directions of those factors.

Issuers with a market capitalisation of less than $100 million most frequently escrowed 20-40% of their ordinary securities, while issuers with market capitalisations of $100 million or more tended to adopt higher ranges of escrow, from 40-80%. Redox, the largest listing of the year, had approximately 70% of its ordinary securities in escrow. Escrow was typically released in two or three tranches. See below in relation to escrow periods and release.

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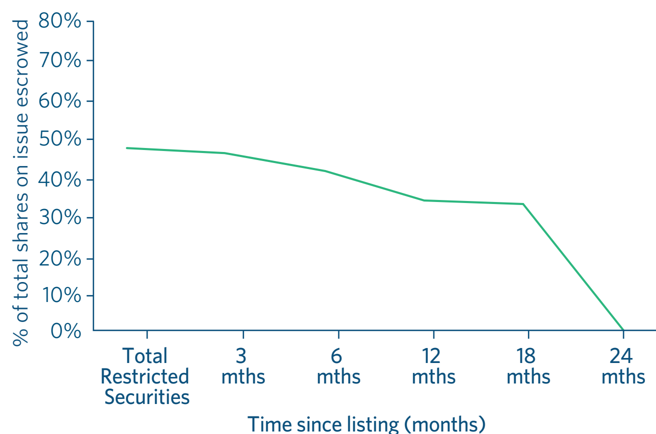
Timing of Escrow Release

Every IPO in this segment scheduled the release of restricted securities in between one to three tranches. Those tranches were most commonly timed from the date of quotation, but in some circumstances expired in line with the release of subsequent financial results. The vast majority of restricted securities were scheduled to become unrestricted within 24 months of the listing date, and escrow for all IPOs in the >$100 million category expired in an 18 or 24 month period. The average release profile of IPOs is set out below.

Average restricted security release profile 2023 IPOs

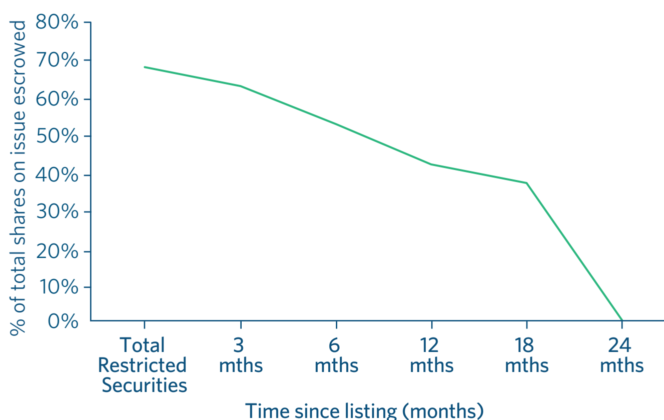


The release of Redox's shares occurred in two tranches – one after 12 months (which represented ~34% of total shares on issue), and another after 24 months (which represented ~36% of shares on issue).

The second largest IPO – Brazilian Rare Earths – released the bulk of its escrowed securities in one large tranche, amounting to ~63% of shares on issue, at 24 months. The Nido Education IPO similarly released 52% of the total shares on issue in one tranche at 24 months. However, this was not necessarily the case across the board for listings exceeding the $100 million category. VHM Limited, the third largest IPO, released a 12% tranche after 6 months, an 18% tranche after 12 months, and a 24% tranche after 24 months.

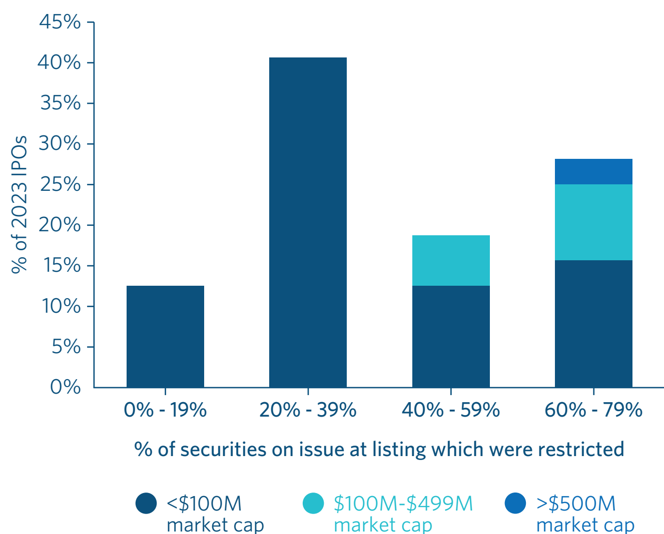
A handful of other IPOs with a market capitalisation of $100 million or more also spread out the release of restricted securities, with one releasing the majority of shares at 3 to 6 months (Acusensus Limited), and another doing so at 24 months (Curvebeam AI Limited). The escrow periods all expired due to timing milestones being met, and there were no examples of early release for performance related reasons in this category (noting there was an early release trigger for at least one issuer in the small-cap category).

Average restricted securities profile >$100 million market cap



Recognising that small-caps comprised the majority of listings for the year and tend to have a lower amount of escrow, around half of all floated entities had less than 40% of their total outstanding securities restricted upon listing.

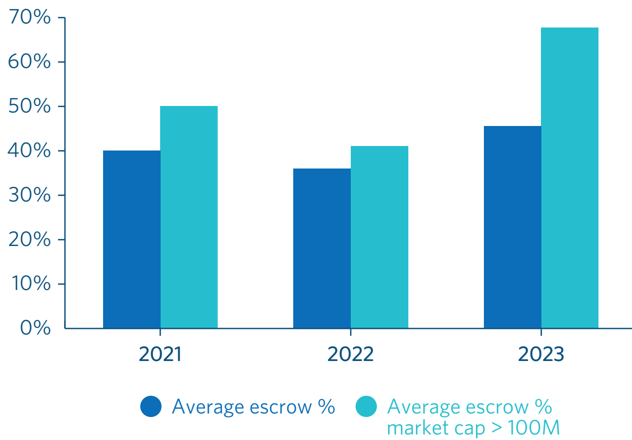
Restricted securities by market capitalisation



Large IPOs

Escrow arrangements featured in all six IPOs with a market capitalisation on listing of over $100 million. Unsurprisingly, these arrangements were predominantly issuer imposed, with only one of the IPOs subject solely to ASX imposed restrictions. The balance adopted voluntary restrictions, two being subject to both mandatory and voluntary restrictions. On average, ~67% of the total outstanding securities of these larger IPOs were restricted as at the listing date.

Average escrow % 2021-2023

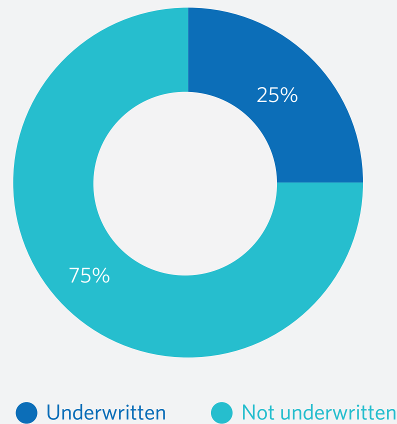


Approximately 65% of the total number of IPOs for the year were subject to mandatory escrow, with another 23% being subject to a mix of mandatory and voluntary. The ASX only imposes mandatory escrows in certain circumstances and usually when the relevant company does not have the requisite track record of profitability or revenue acceptable to ASX. This implies that for a large number of IPOs this year, companies were unable to demonstrate the requisite level of profitability or revenue to satisfy ASX that mandatory escrow did not need to apply. This is likely due to the volume of new early stage companies listing (such as in the mining exploration, life sciences or tech sectors), making it more difficult to satisfy ASX that mandatory escrow should not apply.

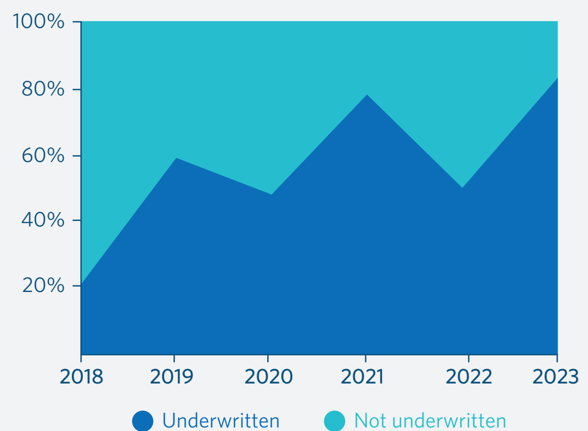
Underwriting – a further push for certainty

As a further push for certainty in the face of IPO headwinds, the percentage of underwritten IPOs increased dramatically in 2023 as compared to 2022, increasing from 7% to 25% of all IPOs, being even more notable for those with market capitalisations over $100 million, increasing from 50% to 75%. As with 2022 and 2021, the majority of the IPOs which were underwritten in 2023 had market capitalisations exceeding the $100 million mark and continued to be reflective of the desire of issuers for greater certainty for valuable listings.

Percentage of all IPOs underwritten 2023



Percentage of underwritten IPOs over $100M market capitalisation 2018-2023



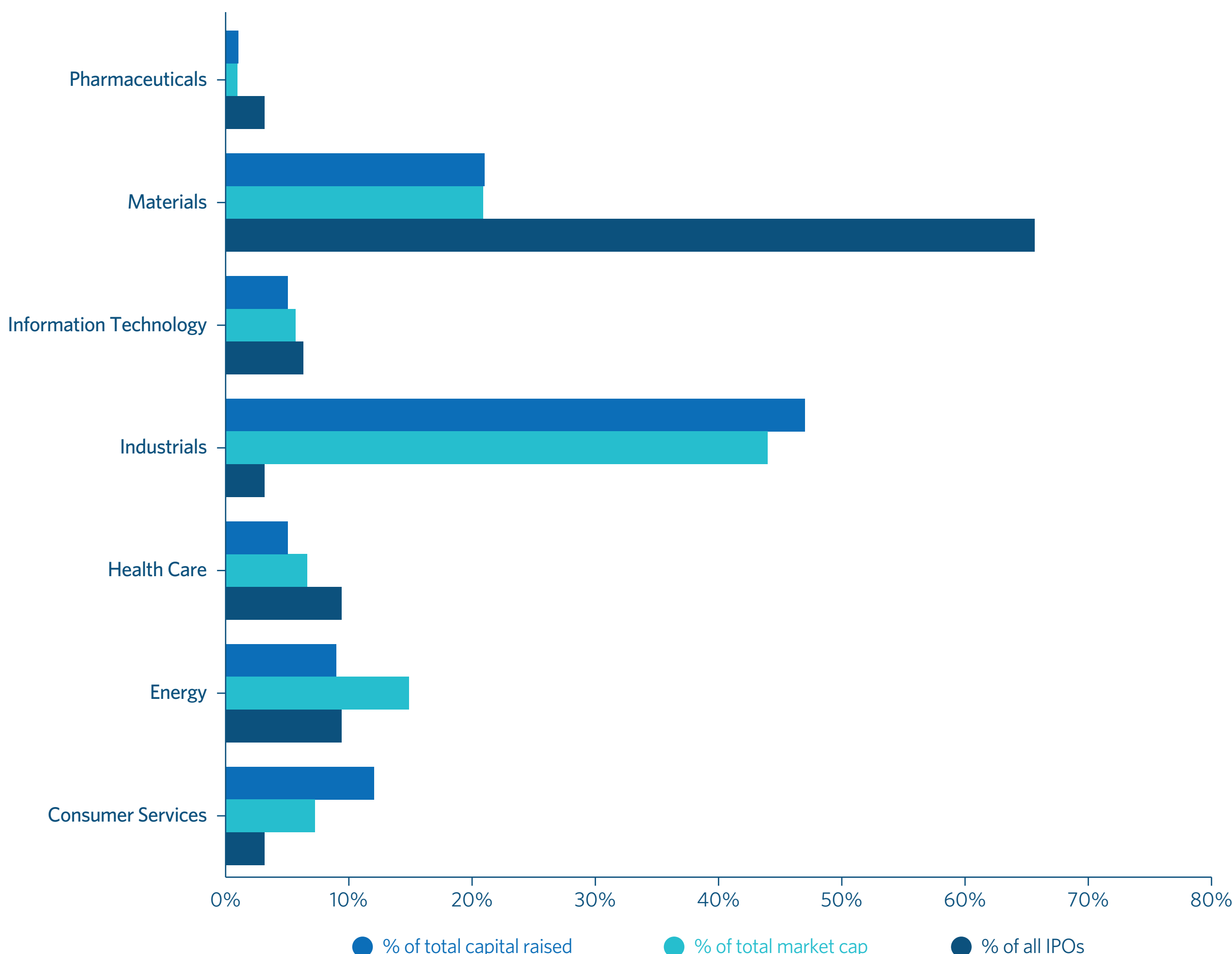
Sector spotlights

Materials and energy resources listings comprised the majority of IPOs in 2023 (~75%), consistent with the larger portion of mid and small market capitalisation IPOs and at similar levels to those recorded in 2022. The nature of these listings have yet again reflected ongoing strength of the ASX in attracting materials and energy resources sector companies to its boards.

Listings relating to health care, biomedical technology and pharmaceuticals comprised the next most represented sector (~15%), perhaps reflective of the strong growth in that sector. These included medical imaging platform company Curvebeam AI, blood test developer Cleo Diagnostics Limited, NDIS provider Freedom Care Group Holdings Limited, health diagnostic data company Enlitic Inc and consumer pharmaceutical company LTR Pharma Limited.

Other non-materials and energy resources IPOs rounding out the balance for the year included Acusensus, a developer of artificial intelligence-enabled road safety solutions and Nido Education, the national owner and operator of early childhood education centres.

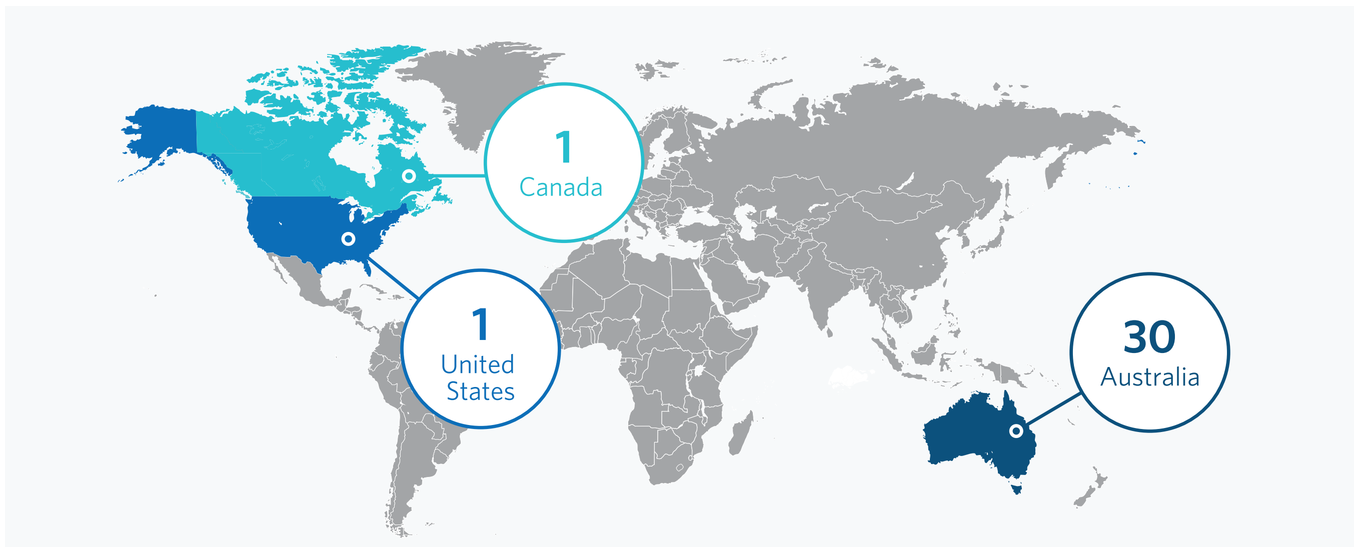
IPOs by sector 2023



Geographic spread

2023 was dominated by Australian-incorporated issuers, with 94% coming from the domestic market. Only Canada and the United States of America represented foreign jurisdictions.

Jurisdiction of issuer incorporation 2023

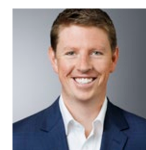


Note: this figure does not include issuers incorporated in Australia which have significant strategic, commercial or investor links outside Australia, in which case the non-Australian component would be higher.

Note on methodology: all data in this '2023: IPOs by the numbers' section excludes ASX Foreign Exempt, AQUA, debt and PDS listings unless otherwise stated. Market capitalisation is based on the issue price of securities multiplied by the total securities on issue on that date.

2023: Secondary raisings by the numbers

Given the expanded scope of this year's Australian ECM Review, we are pleased to introduce a new section – *2023: Secondary raisings by the numbers*. In this section, we comment on some of the key trends and observations relating to secondary raisings by ASX-listed issuers in the past year, focusing on rights issues, placements and share purchase plans (**SPPs**) that raised at least $50 million. In our 2023 data set, approximately $13.3 billion in aggregate was raised.



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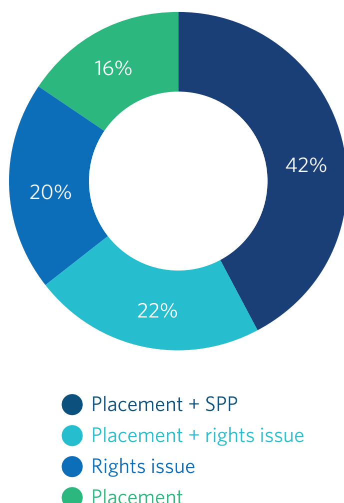
Offer structure

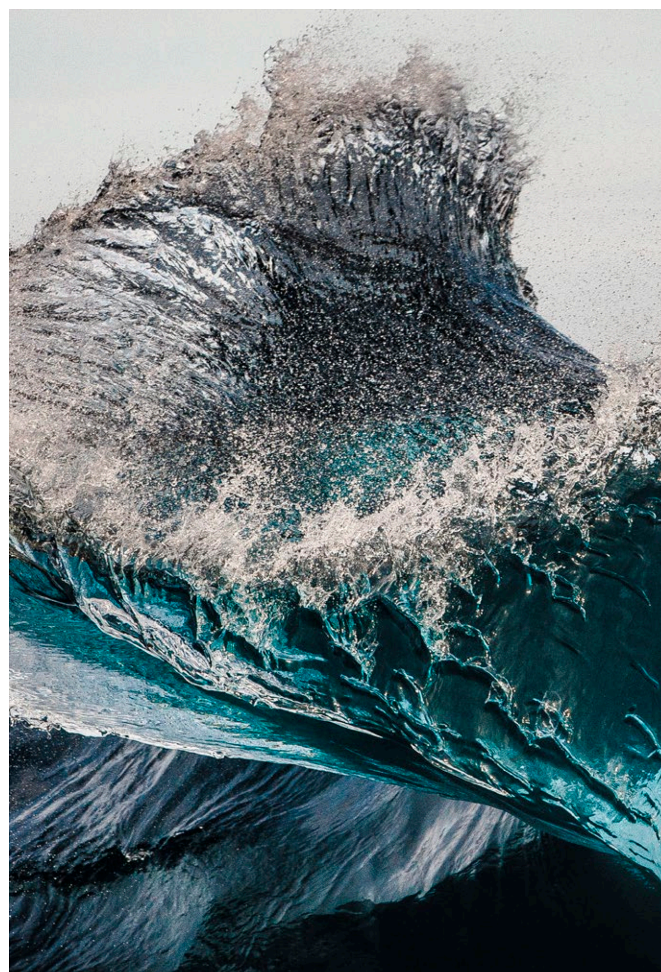
In 2023, the combined placement and SPP was the most popular offer structure (42%), followed by the combined placement and rights issue (22%). This was not surprising given both placements and accelerated rights issues allow issuers to raise a significant portion of the desired capital upfront (in the case of a placement, subject to the issuer's available placement capacity, which can then be supplemented by a rights issue or SPP). As such, these structures are often attractive to issuers seeking to raise capital quickly, and have the benefit of minimising the time institutional investors take market risk (which likely contributes to a tighter discount – see our comments on 'Offer pricing' below). Coupling a placement and rights issue, or a placement and SPP, also enables retail shareholders to participate and, at least in part, addresses fairness issues faced by standalone placements.

By comparison and as expected, standalone rights issues (20%) and standalone placements (16%) were less common in 2023.

Of the standalone rights issues, Treasury Wine Estates' $825 million rights issue and CarSales' $500 million rights issue were the only pro-rata accelerated institutional tradeable retail renounceable entitlement offers (**PAITREOs**), while the other standalone rights issues were all accelerated non-renounceable entitlement offers (**ANREOs**). Herbert Smith Freehills acted for Treasury Wine Estates.

Breakdown by offer type 2023

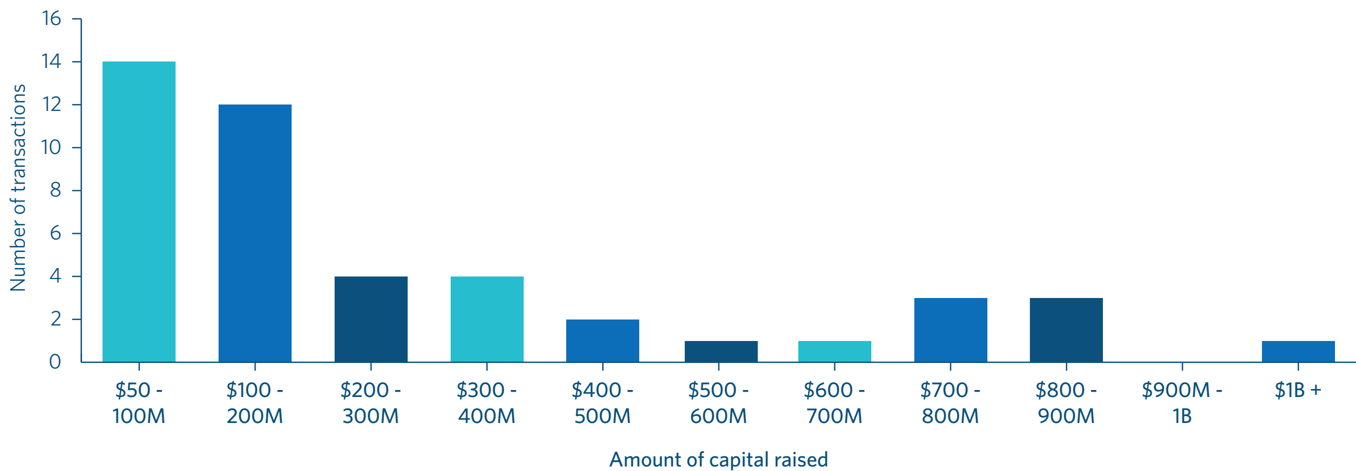




Offer size

The majority of secondary raisings in 2023 that we surveyed had an offer size of between $50 million and $500 million, with only one secondary raising exceeding $1 billion (Orora's $1.35 billion placement and ANREO).

Breakdown by offer size 2023



Offer pricing

In theory, placements tend to have tighter discounts than rights issues (given their relative speed and the broad range of investors that can be targeted in a placement – ie generally companies would target both existing institutional shareholders and new institutional investors, resulting in theoretically greater competition, all else being equal), and non-renounceable rights issues tend to have tighter discounts than renounceable rights issues (given the non-renounceable structure incentivises participation through loss of value for those who do not participate).

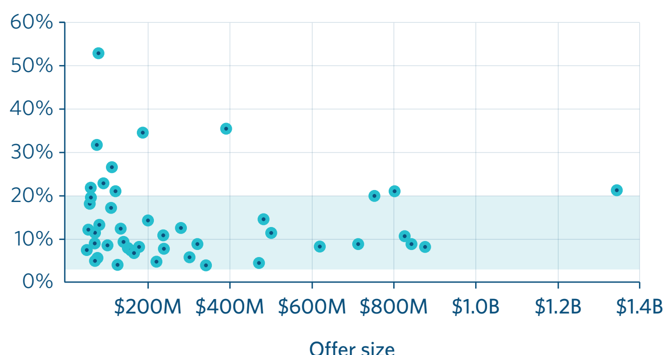
In the data for 2023, the combined placement and ANREO structure had an average discount to last closing price of 18.80%,[1] while the combined placement and SPP structure had an average discount to last closing price of 12.41%, which was similar to standalone placements (12.83%). By comparison, the average discount to last closing for all secondary raisings surveyed was 14.19%.

Discount by offer type 2023

1. This includes the combined placement and ANREO undertaken by Bravura Solutions, which was conducted at a 52.90% discount to last closing price. Excluding this transaction, the average discount for the combined placement and ANREO structure reduces to 15.01%.

When comparing offer pricing relative to offer size, we did not observe any particular correlations, with the range of discounts generally falling between 4% and 20% to the last closing price and between 5% and 15% to the theoretical ex-rights price (**TERP**) for rights issues.

Discount to last closing price



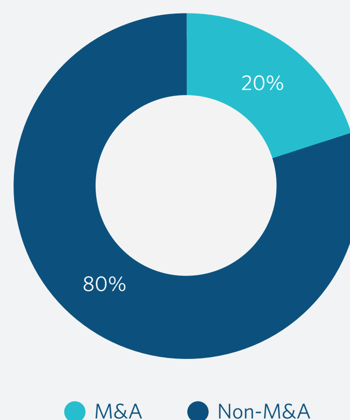
Discount to TERP

Offer purpose

In 2023, secondary raisings were mainly undertaken to support non-M&A purposes (80%), with issuers citing uses such as accelerating business growth, strengthening their balance sheet, increasing financial flexibility and funding strategic initiatives. This may be reflective of the subdued market sentiment and lower M&A activity in light of continuing economic uncertainty.

When comparing the data on offer pricing relative to offer purpose, we observed that, on average, issuers offered a smaller discount to last closing price when seeking to fund an acquisition (10.71%) in contrast to raising for non-acquisition purposes (15.06%).

Offer purpose 2023



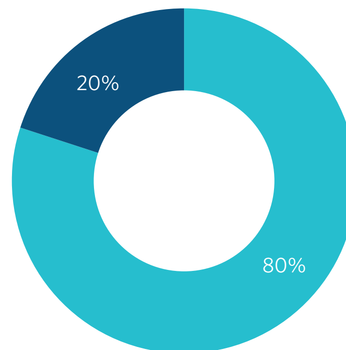
Discount to last closing price: Infratil's placement and SPP was conducted in NZD. For the purposes of our analysis, we have converted the NZD offer price to AUD at the prevailing exchange rate published by the RBA on 6 June 2023, being the date of announcement of that transaction (AUD1=NZD1.10).

Underwriting

A large proportion of secondary raisings in our data set for 2023 had an underwritten component (80%). For combined placements and SPPs, generally only the placement was underwritten, consistent with our observation of usual market practice. This is likely because issuers are usually not particularly reliant on funds raised via SPPs (which are capped at $30,000 per shareholder under relevant law) and due to the enhanced underwriting risk for an SPP (given the length of time an SPP is open and the nature of the investors). Indeed, SPPs are often undertaken alongside a placement primarily to enable retail shareholders to participate in the offer and reduce the impact of dilution, and tend to experience fairly low take-up. Standalone SPPs are not particularly common, as demonstrated by the lack of standalone SPPs raising at least $50 million in 2023.

In contrast, secondary raisings involving a combined placement and rights issue that we observed were all fully underwritten.

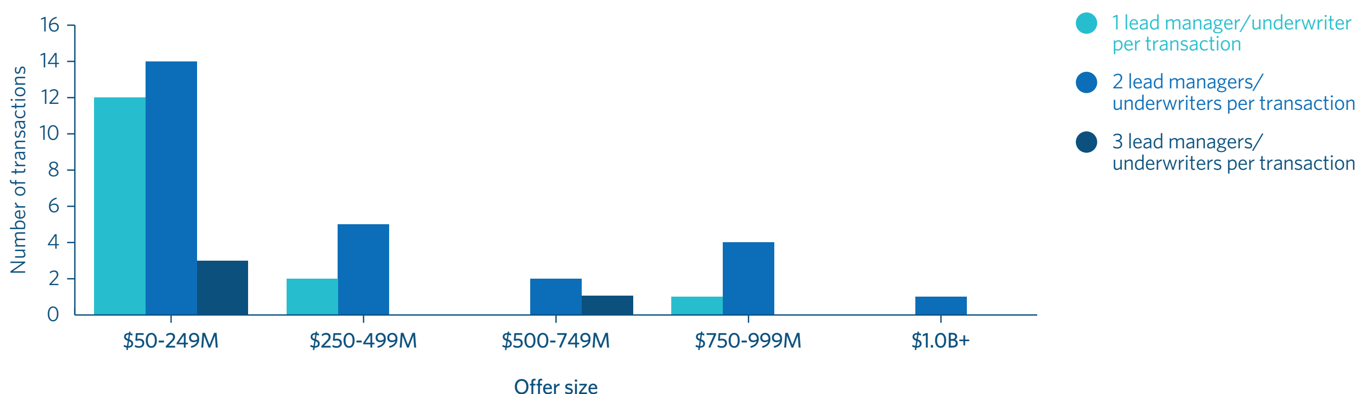
Percentage of secondary raisings underwritten 2023



Underwritten Not underwritten

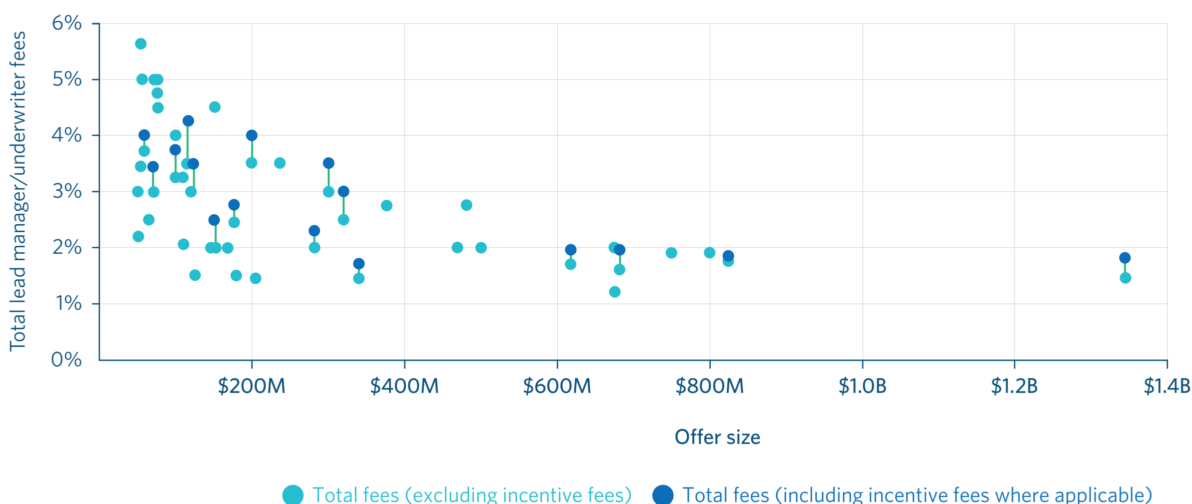
In our data set for 2023, we did not notice any particular correlation between raise size and number of lead managers/underwriters on the transaction.

Number of lead managers/underwriters per transaction relative to offer size 2023



For 2023, we observed a relationship between offer size and the fees paid to lead managers and underwriters, which is usually disclosed as a percentage of offer size. Smaller secondary raisings tended to attract a higher percentage fee for lead managers and underwriters (which may be up to around 5%), while lead managers and underwriters on average accepted a lower percentage fee for larger secondary raisings (around 2-3%). We expect that the lower percentage fees on larger deals reflect the stronger negotiating position of issuers undertaking larger secondary raisings and the fact that the absolute dollar value of the fee still provides sufficient compensation for the lead managers and underwriters. Having said this, we were surprised at the variability of percentage fees across similar offer sizes (we expected a greater inverse correlation between deal size and fee size).

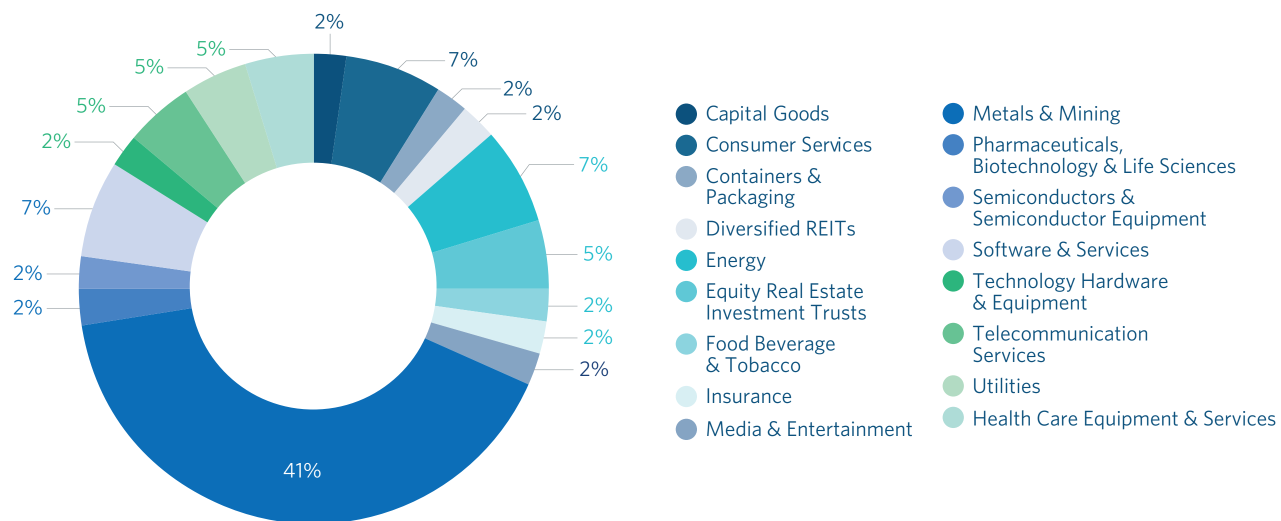
Lead manager/underwriter fees relative to offer size 2023



Sector spotlights

Almost half of the secondary raisings in our data for 2023 were undertaken by mining companies (41%), followed by consumer services companies, energy companies and software and services companies (each 7%). The remaining secondary raisings were then scattered across a broad range of sectors, with no particular standouts.

Secondary raisings by sector 2023

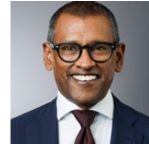


Note on methodology: The transactions considered for the purposes of this section '2023: Secondary raisings by the numbers' were those transactions listed on Connect4 as at 25 January 2024 as having occurred in 2023 using the following search parameters:

- amount raised – at least $50 million; and
- types of secondary raisings – rights issues (including accelerated and non-accelerated issues, and renounceable and non-renounceable issues), placements and SPPs.

We supplemented the Connect4 data with analysis of the relevant transaction announcements. We have not considered non-share/non-CDI secondary raisings and strategic placements. The rights issue undertaken by Energy Resources of Australia has also been excluded from our analysis as it involved some unusual, non-market features.

Alchemy on the ASX: Unorthodox paths to ASX success



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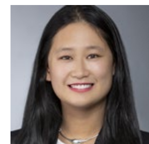

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As outlined earlier in this review, the 2023 Australian IPO market has continued the general trend from 2022 of reduced activity both in terms of the number of IPOs and capital raised. This decline is due to ongoing challenging IPO market conditions in 2023, including because of high inflation, geopolitical risks, global interest rate increases and attendant uncertainties surrounding pricing and valuation of deals. With these factors having created perceived barriers to listing, enterprising issuers have embraced innovative approaches to reach the ASX boards, which also have the benefit of achieving other commercial objectives of the entity in addition to a listing.

Two key case studies are **Chemist Warehouse**'s reverse takeover transaction with ASX-listed Sigma Healthcare and **Light & Wonder**'s foreign exempt listing. HSF is advising Chemist Warehouse on its transaction (which is ongoing) and also advised Light & Wonder.

Chemist Warehouse

Perhaps the most high-profile transaction involving an innovative listing route is Chemist Warehouse's reverse takeover transaction with Sigma Healthcare. In this transaction, Sigma will acquire Chemist Warehouse via a scheme of arrangement in exchange for Sigma scrip and cash. This will result in existing Chemist Warehouse shareholders receiving approximately $700 million in cash and obtaining an 85.75% stake in the merged group. The transaction is expected to unlock significant synergies, and will create a leading healthcare wholesaler, distributor and retail pharmacy franchisor with an indicative market capitalisation of more than $8.8 billion.

What is a reverse takeover?

In short, a reverse takeover (which may also be a 'backdoor listing' if the larger company is not listed) is a transaction where an acquirer makes a scrip offer to acquire shares in a larger company that results in the shareholders in the larger company becoming the majority holders in the acquirer. Where the acquirer is listed and the 'target' is not, this in effect enables the larger, unlisted target to become listed on ASX.

Relative to a burst of activity in 2015-16, in which there were more than 100 reverse takeovers, in recent years the reverse takeover has become a relatively uncommon mechanism to achieve an ASX listing. Part of the reason for this may be that entities have realised that, unless there are other commercial benefits associated with the reverse takeover, the reverse takeover may not be justifiable as a means of listing because the entity still has to follow the usual IPO type listing process (in addition to the listed entity needing to obtain shareholder approval).

The rise in reverse takeovers in 2015-2016 was principally driven by amendments made to ASX Guidance Note 33, which came into effect on 1 January 2014, and clarified that ASX considered a 3 year period of continuous suspension "appropriate" before it would delist a dormant entity under Listing Rule 17.12.[1] This change prompted many shell entities listed on ASX to actively seek out a transaction to avoid being delisted, resulting in a pull forward of reverse takeover activity which would have otherwise occurred in later years.

This change, coupled with other listing rule amendments which made it more difficult to list smaller entities, have subsequently reduced the number of back door listings (which traditionally occur at the smaller end of the market).

The novelty of the Chemist Warehouse transaction

The Chemist Warehouse transaction is novel in that Chemist Warehouse is intending to come to the ASX boards as one of Australia's largest private companies (as compared to smaller companies who usually undertake reverse takeovers) and it is undertaking the transaction with Sigma, a well-known healthcare company which had a market capitalisation of $787 million pre-announcement.

Consistent with their historically small size, reverse takeovers are typically structured as an offer of shares by the acquirer to the shareholders of the target as consideration for the target shares, with a share sale agreement entered into between them. By contrast to the typical targets in these transactions, Chemist Warehouse is an unlisted public company with more than 50 shareholders, with the result being that the transaction requires not only Sigma shareholder approval, but also Chemist Warehouse shareholder approval given the acquisition of Chemist Warehouse shares is regulated by the takeover rules in Chapter 6 of the Corporations Act (the transaction is to occur by way of scheme of arrangement under Part 5.1).

ASX confirmed that the transaction does not require Sigma to re-comply with ASX's admission and quotation requirements pursuant to Listing Rule 11.1.3 (this is normally required in the case of back door listings). This was on the basis of certain conditions being met by Sigma, including Sigma providing sufficient disclosure to the market in relation to the transaction on announcement; Sigma and Chemist Warehouse having in place arrangements under which Chemist Warehouse must, in effect, 'continuously disclose' to Sigma information that Sigma requires to comply with ASX Listing Rule 3.1 (intended to ensure that the market does not trade on an uniformed basis if the market treats Sigma shares as a proxy for the combined Chemist Warehouse/Sigma group shares); and Sigma issuing a prospectus in connection with the transaction. It does, however, mean that Sigma is not required to satisfy the requirements in Chapters 1 and 2 of the Listing Rules as if it was applying for admission to the official list – for example Sigma is not required to re-satisfy ASX that it meets the profits or assets test or that it meets the free float and spread requirements.

Aside from the commercial drivers of undertaking the transaction via a merger with Sigma rather than a standard IPO (such as the significant synergies on offer and complementary operations of the two businesses), there are other benefits that come from the transaction structure for Chemist Warehouse. For example, the presence of the Sigma shareholders on the register assists with obtaining free float for index inclusion.

With the IPO markets difficult in 2023 as discussed above, the overwhelming positive response to the Chemist Warehouse/Sigma transaction (including the success of the Sigma entitlement offer and significant uptick in the Sigma share price post announcement), is a clear indicator that the market is nonetheless enthusiastic for and supportive of high-quality ECM transactions. We are hopeful that the transaction is just the medicine for the market that the doctor ordered!

1. From Monday, 3 February 2020, ASX's policy is to remove entities whose securities have been suspended form quotation for a continuous period of 2 years, as set out in Guidance Note 33.

Light & Wonder

Formally known as Scientific Games, Light & Wonder is a leading cross-platform global games company headquartered in Las Vegas, Nevada, which is currently listed on NASDAQ. Following the acquisition of Crown Resorts by Blackstone in 2022, the ASX was left with reduced large-cap exposure to the gaming industry. Given the familiarity of Australian investors with the industry (in particular as a result of the ASX listing of Aristocrat Leisure) and historically high valuations afforded to gaming businesses on the ASX, Light & Wonder completed a foreign exempt listing of Chess-Depository Interests (**CDIs**) in May 2023, aiming to capitalise on demand from Australian investors and build a presence in one of its key markets.

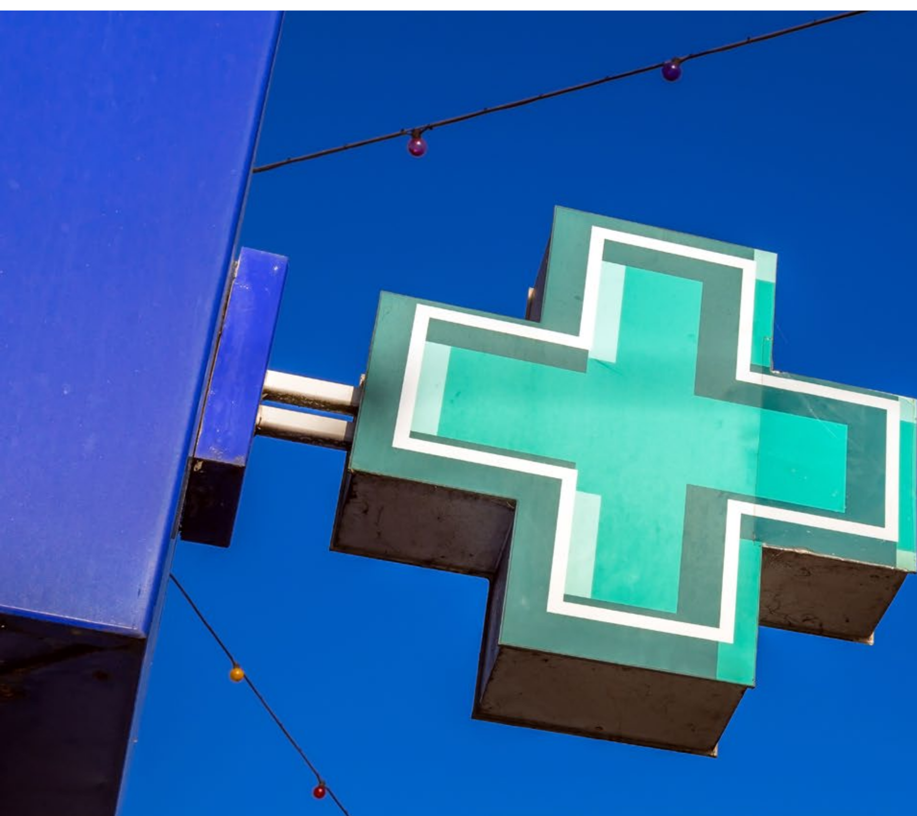
As at the end of December 2023, there were only 48 foreign entities listed on ASX via a foreign exempt listing. However, of these 48 foreign entities, 38 are incorporated in New Zealand and were subject to lower assets/profits test to achieve their foreign exempt listing. While non-NZ foreign exempt listings are very uncommon in and of themselves, Light & Wonder's approach to the Australian market was even more unique in the sense that it was a 'compliance listing' only, and did not involve an issuance of new shares or CDIs. This meant that it hit the ASX boards without needing to prepare or lodge an IPO prospectus, something which was aided by the fact Light & Wonder had not issued shares in the 12 months prior to listing (meaning the 'on-sale' provisions in Chapter 6D of the Corporations Act did not cause issues for the transaction structure).

Whilst Light & Wonder has not raised capital post listing, the possibility of obtaining relief so that it can rely on the 'low doc' regime for conducting a placement or rights issue, similar to relief obtained by other foreign exempt ASX listings where the home listing disclosure rules are sufficiently similar to the ASX's disclosure rules, raises the prospect of companies with foreign exempt listings being able to raise capital on ASX without needing to lodge a prospectus with ASIC, and instead relying on the familiarity the market has with the entity from its listing on its home exchange and ASX.

The transaction has been a significant success for Light & Wonder, which started life on ASX with 1,000,000 CDIs on issue, an average trading volume in the first week of 26,144 CDIs per day, and the first CDI trade at $91 per CDI, to now, 9 months later with 15,538,557 CDIs on issue, an average trading volume of 89,968 CDIs per day in December 2023, and a closing price of $134.37 on 9 February 2024 (being a 47.6% increase in price per CDI since listing). It has achieved this while still retaining its primary NASDAQ listing, enabling it to keep the best of both worlds.

Conclusion

As the Chemist Warehouse and Light & Wonder transactions demonstrate, novel strategies became an option for enterprising management teams and issuers seeking the benefits of an ASX listing in 2023. While the general expectation is for capital markets (and IPOs in particular) to rebound in 2024 (and we hope the success of transactions such as these assist!), the door is firmly open for others to take alternative routes to the ASX in appropriate circumstances.



Resources deals

The resources industry (which for the purposes of this article includes resources and energy companies) continues to play a significant role in Australian equity capital markets. An overwhelming majority of IPOs by number in 2023 were resources companies and secondary raisings of at least $50 million by resources companies also contributed to almost half of the total capital raised.

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Resources continue to play a significant role

IPOs

Whilst the IPO market in 2023 continued to be relatively quiet by historical standards, the Australian Securities Exchange (**ASX**) continues to be an attractive bourse for companies in the resources sector to access public capital markets to progress their projects, with 24 of the 32 IPOs in Australia (75%) being undertaken by companies in the resources sector. Whist accounting for the vast majority of IPO activity in 2024 by number, IPOs by resources companies accounted for only 30% of the total capital raised by IPOs for the year given that over 80% of the resources IPOs were by early stage exploration companies raising $10 million or less.

The market's interest in critical minerals (as also seen in a number of high-profile control transactions) was reflected in the IPO market. A majority of the IPOs involved companies pursuing critical minerals opportunities, with 10 of the IPOs involving companies that include lithium as a focus and 8 companies that include rare earths as a focus. In addition, with strong gold prices, 2023 also saw 5 IPOs from gold focused companies.

Secondary raisings

Looking at secondary raisings in Australia of at least $50 million in 2023, it is unsurprising that almost half of the raisings related to companies in the resources sector given the capital intensity of the industry and the need to raise capital to continue exploration activities prior to project development and realising cash flows. The structure of secondary raisings used by the resources companies were predominately:

- placement and share purchase plan (43%);
- placement (29%); and
- placement and accelerated non-renounceable entitlement offer (19%),

providing the companies with rapid and certain access to funds.

> Whist accounting for the vast majority of IPO activity in 2024 by number, IPOs by resources companies accounted for only 30% of the total capital raised by IPOs for the year.

Generally, the funds raised by the resources companies were used for the following purposes:

- exploration activities and/or production and mining activities such as Azure Minerals Limited, Bowen Coking Coal Ltd, Chalice Mining Limited, De Grey Mining Limited and Wildcat Resources Limited;
- acquisition of assets such as AuTECO Minerals Ltd in relation to its acquisition of the Green Bay copper-gold project in Canada, Genesis Minerals Limited in relation to its acquisition of St Barbara Limited's Leonora assets and Nickel Industries Limited in relation to its acquisition of 10% interests in two producing nickel assets; and
- de-risking, providing liquidity and/or balance sheet repair such as 29Metals Limited, Liontown Resources Limited and Red 5 Limited.

Resources in 2024

Australian capital markets have been a consistent source of capital for resources companies over the years – being accustomed to the cyclical and sometimes volatile nature of the commodity price cycle and being prepared to fund their exploration activities directed at finding the "next big thing". Therefore, despite the recent volatility and in some cases reductions in commodity prices such as lithium and nickel, in 2024 we expect to see continued IPO activity for small cap exploration companies bringing new assets to the public markets across all commodities as well as further capital raisings targeted at a specific purpose by critical minerals focused companies in particular as they race to bring on supply of these minerals to meet expected future demand that will be generated by the global energy transition that is rapidly gaining pace.

Note on methodology: This article uses the same methodology as that used for IPOs (see page 12) and secondary raisings (see page 18).

Block trades: Risk and opportunities

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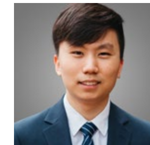

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Eyeing the exit door

While 2023 was a relatively muted year for IPOs, there was a healthy flow of block trades, with a number of residual stakes from past years' IPOs coming out of escrow.

Block trades are transactions in which large parcels of shares in listed companies are sold off market, often following the expiry of escrow restrictions.

For private equity funds, founders and other early stage investors (**Vendors**) seeking to realise an unlisted investment via an IPO and listing, it is increasingly important to think about the transaction in stages. While there is clear attraction in selling a significant proportion of the Vendor holdings up front in the IPO, in terms of helping de-risk overall exit outcomes, and ensuring there is market liquidity in the stock immediately post IPO, IPO investors generally no longer support full Vendor exit on IPO. They want Vendors, particularly private equity funds, founders and management, to retain meaningful 'skin in the game' after the IPO – with a continued significant investment at risk and only able to be sold following delivery of IPO forecasts (or sustained post-IPO share price appreciation).

Exit strategies have adapted to meet these investor requirements. A strong headline price at IPO remains an important objective, but given significant economic exposure will be retained, and only realised via block trades which will often be occurring a year or more down the track, Vendors need to ensure forecasts are delivered, and that there is enough growth remaining in the business to support ultimate exit through one or more successful blocks, hopefully at above the IPO price.

Not every recent block trade has been able to secure a sale price above the IPO price (and in fact a number of non-private equity blocks did not), but interestingly private equity Vendors have in large part managed to calibrate their exits so as to reap greater per-share rewards from post-IPO blocks than from the IPO itself.

Selected Private Equity Block Trade Prices 2020-2023

This trend has broadly kept both IPO investors and private equity Vendors happy.

While private equity Vendors have generally realised fewer shares as a percentage of their initial holdings at the time of IPO than used to be the case, say 10 years ago, they have often realised greater value overall (even after taking into account time value of money) and IPO investors have seen the value of their investments grow.

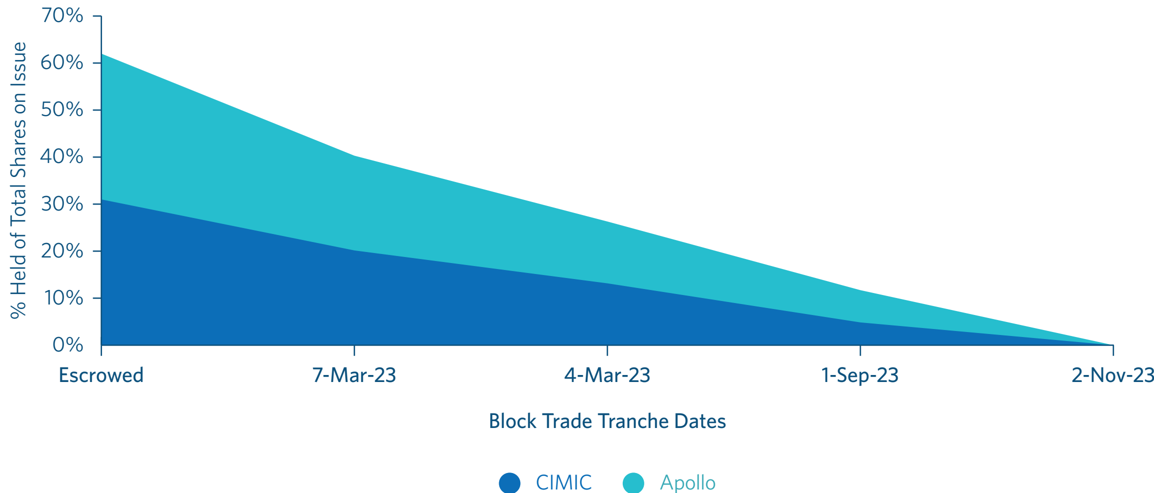
That said, the IPO market's requirement for meaningful retained and escrowed stakes (and consequent staged exit, with prolonged exposure to market and business risk, as well as delay in receipt of funds), combined with the expectation that an IPO stock will list at a premium to the offer price (and the absence of synergies with a buyer), continue to weigh with Vendors when considering the IPO route vs a trade sale as a means of exit.

Execution considerations

With Vendors choosing to, or having to, retain greater holdings post-IPO, it has become increasingly important for them to set themselves up at the outset for successful blocks in the future.

Blocks are far easier to execute than IPOs, with shares typically offered to institutional investors in a short overnight window, without disclosure documentation, and then crossed through the market early the next day. However, this does not mean that disclosure issues do not arise. Vendors are often entities connected to the company (either major shareholders, or sometimes controllers, with Board representation, or founders or entities connected with senior management). Care needs to be taken to ensure any sale takes place at a time the Vendor is 'clean' of inside information (and is seen to be clean – since even if information barriers mean a Vendor is technically separated from the company's Board and information, as a practical and reputational matter, an information 'surprise' from the company following a block would obviously be highly undesirable). Additionally, if a Vendor is a controller, there is a formal Corporations Act requirement for cleansing statements by both the controller and the company in connection with a block. An investment bank selling a block will generally also require warranties that the Vendor does not possess any material non-public information.

Apollo and CIMIC Interests in Ventia



These issues need to be considered and taken into account ahead of an IPO. A relationship agreement will often be put in place between a private equity Vendor and the IPO company (and disclosed in the IPO prospectus) dealing with a number of key matters, including assistance by the company to the extent required with any subsequent blocks (including agreement to provide a company cleansing statement in a controller sale, if relevant). Where there are multiple Vendors, arrangements may also be required up front, at the time of IPO, to ensure competition law issues do not arise in relation to any later coordinated sale.

An important way in which information issues are managed in practice is that block trades often occur shortly after a results announcements (subject to there being no further undisclosed material information at that time). Unsurprisingly, many of the block trades in 2023 occurred not long after the end of the escrow periods imposed after float, the expiry of which was generally pegged to the release of milestone financial year results. It should be noted that the ASX Listing Rule 3.10A requires companies to inform ASX of the impending expiry of voluntary escrow periods.

On escrow's edge

Where retained holdings are large, Vendors may not exit their entire position in one transaction, but instead undertake block trades in multiple tranches. Apollo's and CIMIC's staged exit from Ventia Services Group (on which Herbert Smith Freehills acted), was a highly successful example of a staged exit. The sale occurred over four tranches, following the expiry on 24 February 2023 of escrow restrictions dating from IPO. The IPO was executed at an offer price of $1.70 per share, and the subsequent block prices were $2.15 per share, $2.42 per share, $2.65 per share and $2.71 per share respectively.

In conclusion, block trades will continue to be a key part of the capital markets securities distribution landscape. Any IPO Vendor must, as a matter of course, consider and plan for future block trades when structuring the IPO. While the frequency of floats on ASX may differ from year to year, we can expect to see robust block activity as investments retained in prior floats reach maturity with the expiration of escrow periods.

Regulatory developments

The Australian regulators directed their attention to a number of discrete focus areas in 2023. ASIC ramped up its greenwashing enforcement activities, received a favourable decision from the Federal Court of Australia in its continuous disclosure case against ANZ, intervened in rights issues and conducted market surveillance. ASX concentrated on non-market-standard convertible debt security terms, security purchase plan waivers, securityholder approval for the issue of securities under agreement and at the start of 2024, also made changes to its admission procedures.

The much anticipated unfair contract terms regime reforms took effect on 9 November 2023. These reforms have important implications for industry standard form contracts (such as the AFMA Master ECM Terms) as well as disclosure documents and secondary equity raising documents.

ASIC

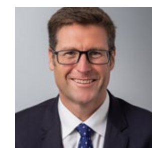
Greenwashing

In the 2021 and 2022 editions of the *Australian IPO Review* we discussed ASIC's focus on disclosure documents that include commitments to achieve "net zero" greenhouse gas emissions, and its overarching focus of "greenwashing", including ASIC's first enforcement actions in the form of infringement notices against ASX-listed entities for alleged greenwashing.

In 2023, ASIC initiated several court actions against companies for alleged greenwashing. The following examples are notable.

- In February 2023, ASIC launched its first court action for alleged greenwashing conduct by Mercer Superannuation for allegedly making false and misleading statements and engaging in conduct that could mislead the public in relation to several of its sustainable investment options. ASIC alleged that the sustainable investment options included investments in companies involved in carbon intensive fossil fuels, alcohol production and gambling despite being marketed online to consumers as excluding these investments.
- In July 2023, ASIC commenced civil penalty proceedings against Vanguard alleging that it had made false and misleading statements and engaged in conduct likely to mislead the public when it represented that all investments by one of Vanguard's funds were screened against certain ESG criteria. Vanguard claimed in product disclosure statements that investments by the fund excluded industries such as those involving fossil fuels; however, ASIC alleged that investments by the fund had ties to fossil fuels, including those with activities linked to oil and gas exploration.
- In August 2023, ASIC commenced civil penalty proceedings against Active Super alleging it had made misleading conduct and misrepresentations to the market relating to claims that it was an ethical and responsible superannuation fund. Active Super made online representations that it did not have investments that posed a risk to the environment and the community (including tobacco manufacturing, oil tar sands, gambling and Russian entities). However, ASIC alleged that Active Super either directly or indirectly had holdings in casinos, betting agencies, tobacco manufacturers, Russian oil entities, and entities involved in the exploration for, development and production of coal, crude oil and natural gas.

At the time of publication, each of these proceedings remains ongoing. As we previously noted, ASIC has stated that it will continue to investigate listed entities' "green credential" claims and we expect to see this played out during 2024 and beyond. One of ASIC's continued points of focus when reviewing disclosure documents will be the extent to which "green" claims have a reasonable basis, are true and are not misleading.



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Federal Court of Australia decision in ANZ case

In October 2023, the Federal Court of Australia found in favour of ASIC in connection with its action against ANZ for allegedly breaching its continuous disclosure obligations during its $2.5 billion institutional share placement in 2015.[1] ANZ was ordered to pay a $900,000 civil penalty, but is appealing the decision.

The Court found that ANZ failed to disclose the following to the market:

- the placement had resulted in a 30% shortfall; and
- the underwriters of the placement had acquired all of that shortfall, which amounted to ~$790 million worth of ANZ shares.

The Court determined that notwithstanding the fact that the placement and the shortfall were small relative to ANZ's then $91 billion market capitalisation, the existence of the shortfall and its issue to the underwriters was material information that should have been disclosed to the market. ASIC argued that this type of disclosure is important to maintain market integrity.

The Court found that if the material information had been disclosed to the market, investors would have held an expectation that the underwriters would promptly dispose of any allocated or acquired shares as part of the placement, which would place downward pressure on ANZ's share price.

ASIC has said it will continue to enforce continuous disclosure obligations so that investors are provided material information to make informed investment decisions, including clear disclosure of shortfall and the acquisition of shares by underwriters or sub-underwriters.

Market surveillance

ASIC undertook market surveillance into the initial public offering (and shortly post-listing) disclosure practices of companies in the mining exploration sector. ASIC observed the following from its surveillance, which it noted is also generally applicable to all entities (across all industries) that are considering listing:

- information released to prospective investors through marketing channels should be prepared with a similar level of care and diligence as regulated disclosure documents and the information presented in marketing materials should not be materially different to what is presented in the relevant disclosure document;
- price-sensitive information should be released to the market promptly and without delay. ASIC cautioned that where listed entities are taking extended periods of time to draft their ASX announcements, this could indicate the entities are not complying with their continuous disclosure obligations; and
- companies that materially change their business or asset strategies after listing should ensure they adopt robust governance procedures to ensure that directors can determine whether changes are in the best interests of the company. This might, for example, include a comprehensive assessment of the merit of such a move after detailed inquiries and planning. ASIC explained that boards should undertake robust due diligence and not solely rely on corporate advisers or follow actions proposed by shareholders.

Where appropriate, ASIC will continue to conduct surveillance and has said it will take regulatory action against companies with inadequate disclosure.

1. *Australian Securities and Investments Commission v Australia and New Zealand Banking Group Limited* (No 2) [2023] FCA 1217.

Rights issue interventions

In 2023, ASIC intervened in several companies' pro rata rights issues where it considered the equity raising structure might have resulted in control of the company passing to a substantial shareholder or related party of the company that was acting as underwriter.

ASIC highlighted that transactions designed to give control to a holder or underwriter that are presented as a rights issue may be contrary to the purposes of Chapter 6 of the *Corporations Act 2001* (**Corporations Act**) as set out in section 602.

ASIC expects issuers to consider reasonable options and take available steps to minimise the potential effect of rights issues on the control of the issuer (including making genuine attempts to procure alternative underwriting arrangements).

ASIC said it will continue to intervene in rights issues, as necessary, in an effort to significantly reduce the control impact those equity raisings may otherwise have. As part of this intervention, ASIC may ask issuers to agree to extend the offer period, procure additional sub-underwriters, provide further disclosure, or obtain approval from shareholders in accordance with item 7 of section 611 of the Corporations Act.

Market integrity

In 2023 ASIC observed increased instances of media reporting prior to the announcement of fundraisings (as well as merger and takeover activities). ASIC has reminded parties to these activities of their obligation to manage the risk of leaks or mishandling of confidential information.

ASIC noted it will continue to monitor trading around significant market announcements, and will look for potential market misconduct, insider trading and continuous disclosure issues. Specifically, ASIC will look for market activities where there is suspicion that confidential information has been leaked to the media.

ASIC noted that sound and effective policies and procedures addressing behaviours and processes for handling confidential information are vital for market participants and corporate advisers, including:

- implementing and maintaining effective information barriers;
- limiting access to information to a 'need-to-know' basis;
- effectively wall-crossing staff who are made aware of confidential information;
- maintaining insider lists;
- having appropriate restrictions on and monitoring personal account dealing; and
- effective oversight by a compliance or control function.

For listed entities involved in fundraising and control transactions, ASIC noted that the entity must proactively manage information about the transaction, including:

- requiring consultants and contractors to enter confidentiality agreements;
- having appropriate arrangements to handle confidential information, including limiting access to a 'need-to-know' basis;
- recording who has been provided with the confidential information and when; and
- actively monitoring and meeting continuous disclosure obligations in relation to fundraising and control transactions.

ASX

Non-market-standard convertible debt security terms

ASX has noted that ordinary securities, preference securities and convertible notes (including convertible debt security) with market-standard terms are unlikely to raise issues under Listing Rule 6.1. Further, it said that a company does not need to seek ASX's advice if the company has obtained legal advice that the terms of the proposed convertible note are market-standard with none of the features outlined in section 5.9 of Guidance Note 21.

However, if the proposed terms are not market standard or do have any of the features outlined in section 5.9 of Guidance Note 21, ASX has advised that the company should request in-principle advice that ASX has no objection to the terms of the convertible debt security under Listing Rule 6.1.

ASX will continue to investigate and take action where it has concerns about whether convertible debt securities (or any other equity-based financing arrangements) comply with the listing rules.

Security purchase plan waivers

ASX reminded listed entities of the need to obtain securityholder approval under Listing Rule 7.1 before undertaking a security purchase plan (**SPP**) if the securities cannot be issued under the company's placement capacity or under Exception 5 of Listing Rule 7.2.

If securityholder approval is required, Listing Rule 7.3.9 requires the company to exclude the votes of securityholders who may participate in the SPP. However, ASX may grant a waiver from Listing Rule 7.3.9 if the company does not know who will participate in the SPP at the time when securityholder approval is sought. ASX said it will not grant a waiver if the SPP offer closes before the securityholder approval is sought, as the identity of the SPP participants will be known before the securityholder vote.

The SPP offer must satisfy the conditions in *ASIC Corporations (Share and Interest Purchase Plans) Instrument 19/547* and the other terms of the standard waiver set out in ASX Guidance Note 17 for the waiver to apply.

Issue of securities under agreement

In 2023, ASX identified instances where notices of meeting containing resolutions to approve agreements to issue securities included a fallback where the issue would go ahead under the company's placement capacity even if the resolution was not approved.

ASX noted that on the date of the agreement, the issue of securities must either:

- come within the company's placement capacity (in which case the correct resolution would be a ratification of the agreement under Listing Rule 7.4); or
- the agreement must have been conditional on securityholder approval being obtained in accordance with exception 17 (in which case the entity must not issue the securities unless approval is first obtained).

If securityholder approval is required, the notice of meeting needs to include the material terms of that agreement. ASX identified occasions where notices of meeting did not include details of the agreement or did not specify the existence of an agreement, which may cause the review period to be reset if ASX requires the company to make changes to the notice of meeting.

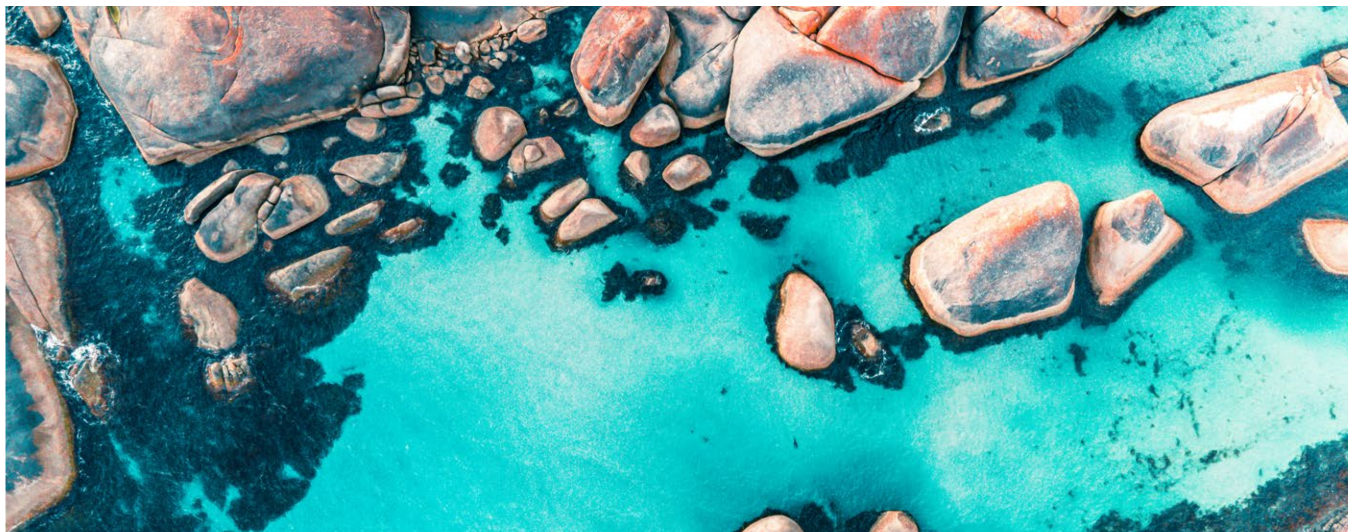
Changes to ASX's admission procedures

In early February 2024, ASX announced changes to its admission procedures. Key changes include:

- **Demonstrating compliance with the spread requirement in Listing Rule 1.1 condition 8:** ASX has developed a spread register template to assist listing applicants to provide information about spread to ASX in a standardised form.

  Further, ASX expects that listing applicants will seek assistance from their legal advisers to ensure compliance with the spread requirement. Listing applicants will need to provide ASX with an attestation regarding spread from a principal of a law firm acting for the applicant.

- **Compliance with escrow requirements:** listing applicants no longer need to use restriction deeds to give effect to ASX-imposed escrow requirements. ASX has determined that listing applicants must instead give a restriction notice to the holder in the form of Appendix 9C in all circumstances where a holder is subject to ASX-imposed escrow.
- **Material contracts:** listing applicants are no longer required to submit copies of all material contracts referenced in an offer document to ASX. Material contracts only need to be submitted when the contract relates to the securities to be quoted on ASX or when completion of the contract is a condition of the offer. ASX reserves the right to request copies of any material contracts.



Unfair contract terms reforms

The much anticipated unfair contract terms (**UCTs**) regime reforms took effect on 9 November 2023. The regime was originally introduced in November 2022 and was designed to increase the focus on protecting consumers and small businesses.

Under the regime, a contract term may be regarded as unfair if the term would cause a significant imbalance in the parties and their obligations under the contract, the term would cause detriment to a party if it were applied or relied on, and it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term.

The key aspects of the 2023 reforms include:

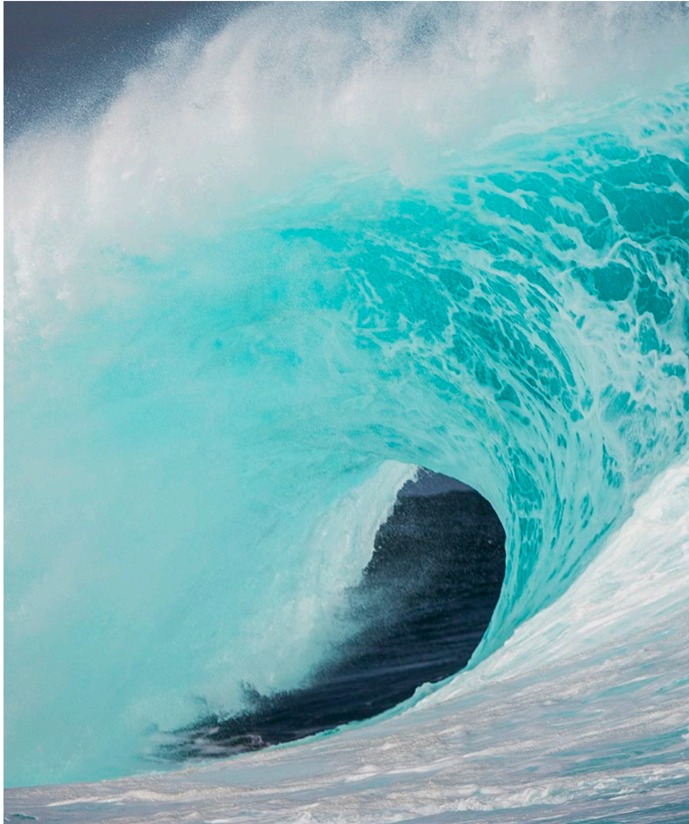
- Persons are prohibited from entering into contracts that contain UCTs and from applying or relying on UCTs. Each UCT is treated as a separate contravention. While under the original regime UCTs were deemed void and unenforceable, the effect of the reforms is that breaches may now attract pecuniary penalties.
- The definition of "small business" has been expanded from a business with <20 employees to one with <100 employees or had <$10 million in annual turnover in the previous income year. This aspect of the reforms has significantly increased the number of businesses protected by the UCT regime.
- Clarifying what constitutes a "standard form contract". In making this determination, courts may determine a contract is a standard form contract even if a party:
  - had the opportunity to negotiate minor changes;
  - had the opportunity to select a term from a range of options; or
  - to another contract was given the opportunity to negotiate its terms.
- Courts now have more powers to make orders in relation to the UCT regime. For example, courts now have the power to stop persons from making future contracts that rely on a UCT or from applying or relying on a UCT in any existing contract. Further, courts can now make orders to address loss or damage caused or to prevent or reduce loss or damage that is likely to be caused by the UCT.

In early February 2024, ASIC published a limited class no-action position (ie it does not intend to take regulatory action) in respect of the UCT regime, a copy of which is available on ASIC's website. The no-action position was in response to an application by the Australian Financial Markets Association (**AFMA**), which was advised by Herbert Smith Freehills. The no-action position is in respect of certain standard form contracts that are:

- made with an institutional investor; or
- made between wholesale clients on an Industry Standard Form Contract (which includes the AFMA Master ECM Terms).

ASIC's no action position does not extend to disclosure documents or secondary equity raising documents (such as security and interest purchase plan booklets, initial public offering disclosure documents and application forms, and entitlement offer booklets). Accordingly, we expect there to be a heightened focus by issuers and advisers on ensuring such documents comply with the UCT regime, including by ensuring the terms on which securities are offered are transparent (readily understandable) having regard to the contract as a whole.

Key US securities developments



ESG from sea to shining sea – expanding disclosure requirements

SEC climate disclosure proposal

Climate-related disclosures stood in the light throughout the course of 2023. On the national stage, the US Securities and Exchange Commission's (**SEC**) 2022 proposal for new climate-related disclosure rules continued to remain a prominent point of discussion. The proposed rule – modelled in part after the Task Force on Climate-Related Financial Disclosures (**TCFD**) framework and the Green House Gas (**GHG**) protocol – controversially requires disclosures of material Scope 3 GHG emissions, with a proposed materiality threshold of a 1% impact on financial statement items. While the comment period ended in November 2022, the final rules have still not been issued despite multiple delays. Since announcing the proposed rules, the SEC has extended the timeline to allow for public comments due to technical errors, as well as postponing the final rule issuance under a cloud of external controversy, including allegations of government overreach and concerns regarding the burden involved in fulfilling reporting obligations. Although the final rule was last expected to be issued during the first half of 2024, SEC officials are reported to have indicated that the rules may be made less extensive.

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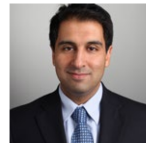

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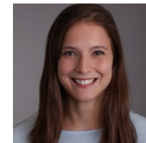

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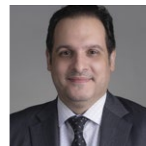

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> Even if the SEC adopts its climate-related disclosure rules as proposed, legal challenges and the upcoming presidential election could threaten the long-term viability of the rules.

California climate disclosure rules

Other US regulators are, however, pushing forward on climate-related disclosures. In 2023, California for example issued a series of extensive statutory climate disclosure laws: State Bills 253 (**SB 253**) and 261 (**SB 261**) and Assembly Bill 1305 (**AB 1305**).

SB 253 applies to private and public US entities "doing business in California" with total annual revenues of over $1 billion in the previous fiscal year and requires annual public disclosure of Scopes 1, 2 and 3 GHG emissions. SB 253 also requires third-party assurances for Scope 1 and 2 emissions, as well as dictating that the state may establish a third-party assurance requirement for Scope 3 emissions in the future. SB 261 applies to private and public US entities with total annual revenues of over $500 million in the previous fiscal year and requires those entities to publish a biannual climate-related financial risk report. To minimise the compliance burden, SB 261 allows this reporting requirement to be fulfilled by using a comparable climate-related financial risk reporting framework (eg, TCFD). Reporting requirements under SB 253 and 261 are expected to take effect in 2026. Many practitioners are awaiting regulatory guidance on certain key questions, such as the extent to which the rules apply to foreign parents with large California subsidiaries, what "doing business in California" means and how the revenue thresholds will be determined (eg gross or net basis).

California has expanded its climate disclosure rules even further with AB 1305. The bill requires companies operating in California to provide substantiating information on their websites regarding voluntary carbon offsets and other climate-related claims. In particular, all entities that make any claims in California that they have achieved "net zero emissions," are "carbon neutral," etc. are required to publish "[a]ll information" documenting (i) how the claim was determined to be accurate or accurately accomplished, (ii) how interim progress is measured and (iii) whether there is independent verification of the company data and claims provided.

Statutorily, AB 1305 took effect from 1 January 2024. However, the author of the bill recently clarified his intention for the bill to become effective in 2025. In early January 2024, The California Assembly's *Daily Journal* published a letter of legislative intent to this effect, with unanimous consent for publication. As such letters may be used by courts as extrinsic aids in determining the intention of the Legislature, this suggests that the initial deadline for making disclosures pursuant to the bill may be extended to 1 January 2025.

Workforce and diversity disclosure rules

Environmental, Social, Governance (**ESG**) regulation in the United States has also expanded beyond "E" to "S" and "G". Proponents of greater transparency for corporate board diversity scored a prominent win in October 2023, as the US Court of Appeals for the Fifth Circuit upheld Nasdaq's board diversity rule. The rule, approved by the SEC in 2021, requires that companies either (i) have at least one director who identifies as a member of at least one of a designated list of underrepresented groups (ie, female, underrepresented racial or ethnic minority or LGBTQ+) or (ii) provide an explanation for why this is not the case. The rule also requires companies to make an annual disclosure regarding how many board members identify as belonging to each underrepresented category. While the petitioners have filed a motion for a rehearing *en banc* of the decision in the Fifth Circuit, the Fifth Circuit's October 2023 decision is still expected to reinforce the SEC's own rulemaking plans, with a proposal on board diversity disclosure expected to be released around April 2024.

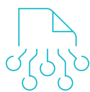
The SEC has also signalled a desire to expand the breadth of its workforce disclosure requirements. In September 2023, the SEC's Investor Advisory Committee unanimously recommended that the SEC propose a rule requiring public companies to provide additional workforce data, including their labour costs, the total number of full-time, part-time, and contingent workers employed by a company, turnover data and more. The underlying rationale for the recommendation is that additional workforce data will enable investors to properly assess the value of a company.

Our Take

We believe progress on ESG initiatives at the federal and state level could bifurcate in 2024. Even if the SEC adopts its climate-related disclosure rules as proposed, legal challenges and the upcoming presidential election could threaten the long-term viability of the rules. In the face of delays at the federal level, we believe California and other US states will continue to bolster their disclosure requirements to address "greenwashing" concerns. For example, New York has already introduced a bill, the climate corporate accountability act (Senate Bill S897A) modelled off California's disclosure regime. We also expect public companies to increase their focus on "S" and "G" credentials in response to investor demand and regulatory scrutiny. As the scope of the ESG agenda continues to expand, public companies will need to effectively integrate ESG in their decision-making systems and controls, governance and disclosure frameworks. On the other hand, growing anti-ESG sentiment may continue to spread amongst states as an increasing number of states adopted anti-ESG legislation in 2023. For example, Texas enacted Senate Bill 833 in 2023 which aims to prohibit insurers operating in Texas from using ESG models, scores, factors, or standards to charge different rates to businesses.

Cybersecurity disclosure rules and the potential impact on global market practice

On 26 July 2023, the SEC adopted rules requiring public companies to disclose material cybersecurity incidents and certain information regarding their cybersecurity risk management, strategy and governance. Under the final rules, foreign private issuers (**FPIs**) are required to furnish on Form 6-K information on material cybersecurity incidents that they disclose or otherwise publicise in a foreign jurisdiction, to any stock exchange or to security holders. They are also required in their annual report on Form 20-F to (i) describe the board of directors' oversight of risks from cybersecurity threats and (ii) describe management's role in assessing and managing material risks from cybersecurity threats. Upcoming annual reports on Form 20-F to be filed in 2024 (for fiscal years ending on or after 15 December 2023) will be required to include the new disclosures.



Disclosure of cybersecurity incidents

The final rules amend Form 6-K to add "material cybersecurity incidents" as a reporting topic. However, consistent with other Form 6-K disclosure items, FPIs are only required to disclose cybersecurity incidents on Form 6-K to the extent that they are required to disclose such incidents in their home jurisdiction or otherwise make the information available to security holders. As a result, existing home-country obligations under market abuse or similar rules will continue to primarily govern the cybersecurity reporting requirements of FPIs. However, the SEC's guidance for what may constitute a "material" cybersecurity incident for a US domestic company under Form 8-K will likely help an FPI assess whether a cybersecurity incident would trigger disclosure in their home market. This may particularly be the case if an FPI's peers or competitors who are US domestic companies report their cybersecurity incidents in accordance with the SEC's new rules under Form 8-K. The amendment to Form 6-K became effective on 18 December 2023.

> While the SEC has traditionally deferred to the home-country disclosure requirements for FPIs, the SEC in recent years has become more comfortable adopting a universal standard for both US domestic and foreign companies.

Disclosure of cybersecurity risk management, strategy and governance

Under the final rules, FPIs are required to make certain disclosures on Form 20-F regarding cybersecurity risk management, strategy and governance. This requirement mirrors the standard set forth under Item 106 of Regulation S-K for US domestic companies.

i. *Risk Management and Strategy.*

   Under Regulation S-K Item 106(b), disclosure is required to describe the company's processes, if any, for assessing, identifying and managing material risks from cybersecurity threats in sufficient detail for a reasonable investor to understand those processes. A company should address, as applicable, (i) whether and how the described cybersecurity processes have been integrated into the company's overall risk management system or processes; (ii) whether the company engages assessors, consultants, auditors, or other third parties in connection with any such processes; and (iii) whether the company has processes to oversee and identify material risks from cybersecurity threats associated with its use of any third-party service provider. A company is also required to describe whether any risks from cybersecurity threats, including as a result of any previous cybersecurity incidents, have materially affected or are reasonably likely to materially affect the company, including its business strategy, results of operations or financial condition and if so, how.

ii. *Governance.*

   Under Regulation S-K Item 106(c)(1), companies are required to describe the board of directors' oversight of risks from cybersecurity threats, and, if applicable, identify any board committee or subcommittee responsible for such oversight and describe the processes by which the board or such committee is informed about such risks. Under Regulation S-K Item 106(c)(2), companies are required to describe management's role in assessing and managing the company's material risks from cybersecurity threats. Item 106(c)(2) provides the following non-exclusive list of potential disclosure items:

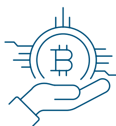
   - Whether and which management positions or committees are responsible for assessing and managing such risks, and the relevant expertise of such persons or members in such detail as necessary to fully describe the nature of the expertise;
   - The processes by which such persons or committees are informed about and monitor the prevention, detection, mitigation, and remediation of cybersecurity incidents; and
   - Whether such persons or committees report information about such risks to the board of directors or a committee or subcommittee of the board of directors.

Practical considerations

Companies should evaluate whether it would be appropriate to implement changes in how they handle cybersecurity matters. For example, companies should consider whether they have employees or consultants with adequate knowledge and experience to determine if there are sufficient safeguards in place, whether they currently have mitigation plans that can be readily implemented, and whether sufficient information is being reported to the board of directors for them to oversee cybersecurity matters. While the SEC asserts that it does not seek to influence whether and how companies manage their cybersecurity risk, the new rules highlight the importance of maintaining a comprehensive cyber risk management program. Companies going through the SEC registration process or review of periodic/current reports should also expect to get staff comments on cybersecurity issues.

Our Take

We believe the SEC's new rules on disclosure of cybersecurity risk management, strategy and governance is part of a broader pattern of alignment between the disclosure standards which US domestic and foreign companies are required to follow. While the SEC has traditionally deferred to the home-country disclosure requirements for FPIs, the SEC in recent years has become more comfortable adopting a universal standard for both US domestic and foreign companies. This trend may also be driven by FPIs (especially in some sectors) that go public only in the US and not in their home countries. Absent a change in administration after the US presidential election, or significant market backlash, we expect this trend to continue in 2024 for those topics, like cybersecurity, which the SEC views as particularly important to investors' capital allocation.



The curious case of crypto control

In 2023, the SEC continued to aggressively pursue bad actors in the cryptocurrency industry. In an apparent strategy of "regulating via enforcement," the SEC brought over twenty civil actions regarding cryptocurrency assets in 2023, addressing issues ranging from massive fraudulent schemes to undisclosed celebrity endorsements.

Following the high-profile charges filed against cryptocurrency exchange FTX in 2022, the SEC continued to implement a broad application of the *Howey* Test. The *Howey* Test is a judicial standard used to determine whether an asset, such as a cryptocurrency token, is considered a security and, as a result, subject to registration and regulation under the US Securities Act of 1933. In 2023, the SEC alleged that five cryptocurrency exchanges sold unregistered securities on their respective platforms, including the operator of the world's largest cryptocurrency asset trading platform. The SEC's charges against the operator resulted in a guilty plea by the company's former CEO and an order to pay a substantial fine of $4 billion. The SEC also charged a cryptocurrency exchange with operating as an unregistered securities exchange, broker and clearing agency, in addition to operating an unregistered offer and sale of securities in connection with their staking-as-a-service program. The charges are currently being litigated, with the classification of tokens as securities in this context remaining at issue.

The SEC also targeted noncompliance in the cryptocurrency asset intermediary space. Cryptocurrency intermediaries commonly provide a combination of securities services that are typically kept separate, such as broker-dealing and custodial and clearing functions. This consolidation introduces conflicts of interest into the market and increases the risk profile for investors. For example, a cryptocurrency asset trading platform acted simultaneously as a broker, exchange and clearing agency without registering any of these functions with the SEC. The SEC alleged that the platform also coordinated with issuers to conceal suspect statements from regulator discovery, in a business model that Gurbir S. Grewal, Director of the SEC's Division of Enforcement, referred to as "combin[ing] multiple market intermediary functions under one roof to maximize profits." The platform agreed to settle the claims and paid a considerable fine of $24 million.

As we enter 2024, regulation of cryptocurrency continues to be a hot topic. However, some optimism has emerged for cryptocurrency players hoping to decelerate the broad classification of cryptocurrencies as securities. Bolstering a positive outlook for cryptocurrency is the recent SEC approval of the first spot bitcoin exchange-traded funds (**ETFs**), with 11 ETFs being approved from sponsors such as Fidelity and Investco. This development is expected to unveil a new stage for bitcoin, as US investors will be able to trade in bitcoin as a regulated product, rather than being only able to do so through unregulated exchanges or ETFs that invest in bitcoin futures. Increased clarity on regulation of cryptocurrency may also come in 2024. A market-structure bill that would define the cryptocurrency oversight roles of both the SEC and the Commodity Futures Trading Commission has been proposed in Congress and has progressed through the initial stages of the legislative process, though a substantial path still exists to it becoming law. Regulatory clarity also may emerge through the judicial process, as Coinbase has filed a December 2023 petition to have a court review the SEC's denial of their request for a specified set of rules for the cryptocurrency sector.

Our Take

Despite the emergence of demands for Congress to step in and develop a new set of rules for the cryptocurrency industry, we believe the current trend of regulation through SEC enforcement will continue in 2024. As the number of enforcement actions increases, we believe the outer bounds of permissible activity for cryptocurrency exchanges, intermediaries and other market participants in the United States will become clearer. However, the development of prescriptive regulations in the UK, Europe and elsewhere could create a gulf between the regulation of cryptocurrency in the US and abroad. Such a gulf would increase the compliance burden and could adversely impact the long-term viability of cryptocurrency as an alternative asset class.

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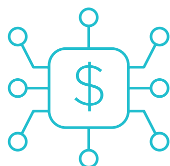


SEC cryptocurrency civil actions on issues ranging from massive fraudulent schemes to undisclosed celebrity endorsements

The development of prescriptive regulations in the UK, Europe and elsewhere **could create a gulf between the regulation of cryptocurrency in the US and abroad**. Such a gulf would increase the compliance burden and could adversely impact the long-term viability of cryptocurrency as an alternative asset class.

Beneficial ownership rules – a refresh for the digital era

In October 2023, the SEC adopted amendments to update the beneficial ownership reporting rules for major shareholders of public companies. Under Regulation 13D – G, market participants who own more than 5% of a voting class of equity securities registered under the US Securities Exchange Act of 1934 (**Exchange Act**) must publicly file a long-form beneficial ownership report on Schedule 13D or a short-form report on Schedule 13G. In adopting the amendments, the SEC intended to have market participants provide more timely information on their shareholding positions to meet the needs of investors in today's fast-paced financial markets.

The most significant rule changes to Regulations 13D and 13G are the accelerated filing deadlines. The SEC shortened the deadlines due to changes in technology and developments in the financial markets which have rendered the old deadlines outdated. For Schedule 13D filers, the initial filing deadline is shortened from 10 days to five business days, while amendments need to be filed within two business days rather than promptly. With respect to Schedule 13G filers, the initial filing deadline for (i) qualified institutional investors and exempt investors is generally shortened from 45 days after the end of a calendar year to 45 days after the end of the calendar quarter in which the investor beneficially owns more than 5% of the covered class; and (ii) passive investors is shortened from 10 days to five business days. Amendments to a Schedule 13G filing needs to be filed 45 days after the calendar quarter in which a material change occurred rather than 45 days after the calendar year in which any change occurred.

Our Take

We believe the SEC's new rules testify to the importance of timely ownership disclosures by major shareholders and the advancement of technology which makes such timely disclosures possible. However, the accelerated filing deadlines could prove more difficult for foreign shareholders which are not otherwise familiar with this disclosure regime. Tighter deadlines will also give the SEC more leeway to pursue enforcement actions against shareholders which fail to comply with the new rules. Nevertheless, we do not expect the SEC to deviate substantially from its current approach to enforcement, which generally focuses on shareholders which have consistently failed to disclose their ownership position in a timely manner or otherwise failed to comply with the rules in a material way.

Relief from Rule 15c2-11 for Rule 144A bonds

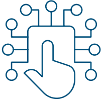
In a welcome move, on 30 October 2023, the SEC granted exemptive relief from Rule 15c2-11 under the Exchange Act for fixed-income securities sold in compliance with Rule 144A.

Rule 15c2-11 sets out certain requirements for US broker-dealers seeking to initiate (or resume) quotations for securities trading in the US over the counter (**OTC**) market, also known as the "pink sheets". Historically the rule applied only to equity securities that trade in the pink sheets. In 2020, however, the SEC amended Rule 15c2-11 to require, among other things, that the documents and information that a broker-dealer reviews to provide or resume quotations generally must be current and publicly available. In December 2021, the SEC staff issued a no-action letter that affirmed the application of Rule 15c2-11 to debt securities but established a compliance regime over three phases to allow for an orderly and good faith transition to compliance. In response to continued concerns raised by market participants, the SEC staff issued another no-action letter in November 2022 delaying implementation of amended Rule 15c2-11 by two years. Without this exemptive relief, the new interpretation would have applied to Rule 144A fixed-income securities from 4 January 2025.

The SEC's grant of exemptive relief allows issuers of Rule 144A fixed-income securities to continue providing relevant information directly to holders and prospective purchasers of those securities, often through password-protected data rooms, rather than making the information publicly available. The relief granted by the SEC should address significant concerns raised by market participants that the application of Rule 15c2-11 to Rule 144A fixed income securities would impair the liquidity and pricing of those securities (and the ability of issuers to raise capital through private placements over time) if private company issuers were not willing to make relevant information publicly available.

Our Take

We believe market participants will embrace the clarity which this exemptive relief provides. By listening to their concerns and permanently setting aside the extension of the Rule 15c2-11 amendments to Rule 144A bonds, we believe the SEC has struck a workable balance between investor protection and robust bond trading in the OTC market.



Adoption of the long-awaited SPAC rules

In March 2022, the SEC proposed rules and amendments which aimed to enhance disclosure and investor protections with regards to US public offerings by SPACs and shell companies, as well as the use of financial projections in those offerings with a major emphasis on de-SPAC transactions – the M&A transaction that follows a SPAC IPO. The SEC adopted the final rules by a 3-2 vote on 24 January 2024. The final rules will become effective 125 days after publication in the Federal Register, which publication is expected to occur promptly.

The final rules, among other things: (i) require additional disclosures about SPAC sponsor compensation, conflicts of interest, dilution, the target company, and other information that is important to investors in SPAC IPOs and de-SPAC transactions; (ii) require the target company in a de-SPAC transaction to be a co-registrant with the SPAC and thus assume statutory liability for the disclosures in the registration statement filed in connection with the de-SPAC transaction; (iii) clarify that a de-SPAC transaction is considered a "distribution of securities" to the SPAC's existing shareholders; and (iv) make the liability safe harbor under the Private Securities Litigation Reform Act of 1995 (PSLRA) for forward-looking statements, such as financial projections, unavailable for de-SPAC transactions.

Notably, the SEC declined to adopt proposed Rule 140a which would have established that anyone who acts as an underwriter in a SPAC IPO and takes steps to facilitate a de-SPAC transaction would be subject to liability as a statutory underwriter. In the adopting release, the SEC instead issued general guidance on the concept of "underwriter" and confirmed there would be an "underwriter" present in a de-SPAC transaction where an entity sells for the issuer or participates in the distribution of securities in the combined company to the SPAC's investors and the broader public. As a result, statutory underwriter liability could apply in a de-SPAC transaction, depending on the facts and circumstances, even where there is no entity accepting securities for the issuer with a view to resell the securities to the public (as is the role of an underwriter in a typical IPO).

The SEC also decided not to adopt proposed Rule 3a-10 which would have provided SPACs with a safe harbor from the definition of "investment company" under the Investment Company Act. Instead, the question of whether a SPAC is an investment company requires a facts and circumstances analysis.

Our Take

Following the announcement of the SEC's proposed rules on SPACs in 2022, and in the context of otherwise diminished market activity, investment banks reassessed their participation in SPAC offerings and de-SPAC mergers between a SPAC and a private target. To protect themselves from a potential expansion of their risk profile, many investment banks increased their due diligence and comfort requirements. The final rules adopted in January 2024 are substantially consistent with the proposed rules although there have been important modifications in response to a very substantial number of comments. We do not expect the adoption of the final rules to result in wholesale changes to the execution practices that banks have adopted globally in the wake of the proposed rules, but practices will no doubt evolve over time.

What's next? Potential amendments to Regulation D, the private placement exemption

In December 2023, the SEC's Fall 2023 Regulatory Agenda was published, which sets out the short- and long-term regulatory actions that the SEC plans to take. Among other topics, the agenda indicates the proposed date for proposed amendments to the private placement exemptions provided under Regulation D of the Securities Act.

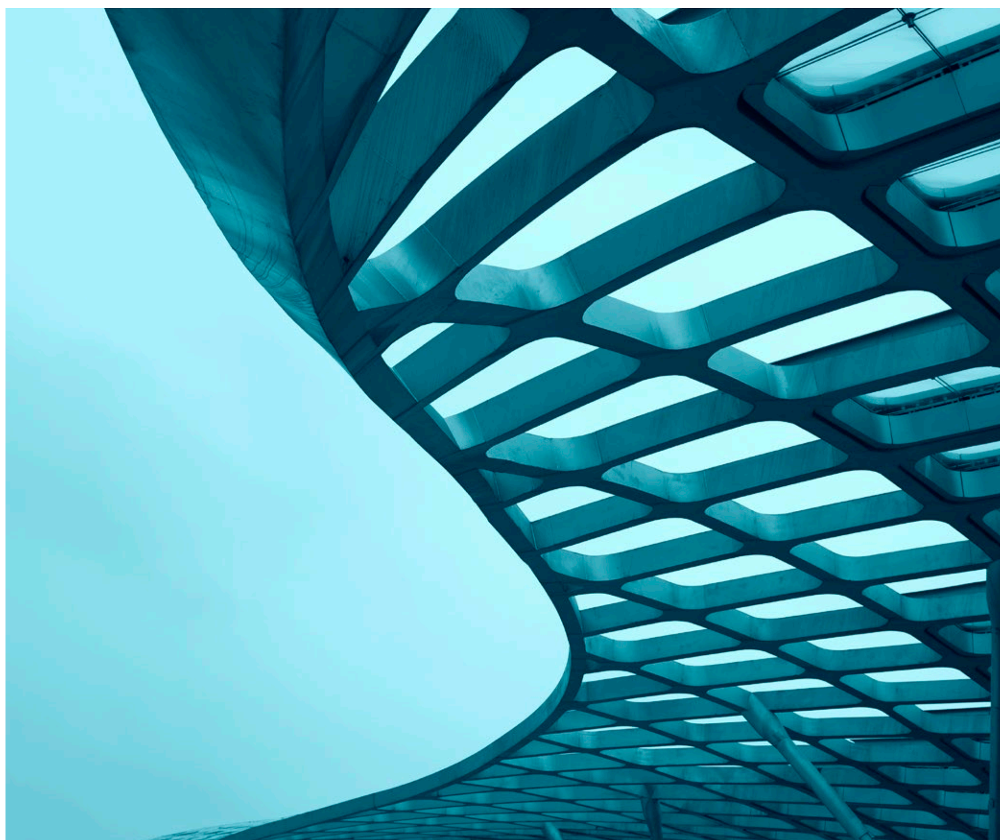
The SEC's proposed amendments to Regulation D will likely include updates to the definition of "accredited investor" and to the information furnished on Form D to improve protections for investors.

SEC Commissioner Caroline Crenshaw's speech in January 2023 provides some insight into possible reforms. One of Crenshaw's key concerns is that, although Regulation D was meant to "facilitate access to capital by small businesses" by having a less intensive disclosure regime, many large issuers have taken advantage of this regime and benefit from insufficient regulatory obligations relative to their size. In response, Crenshaw proposed (i) revising Form D to, among other changes, expand the information required to be reported on the publicly filed form and (ii) making a two-tiered disclosure system that requires more information from more mature private issuers and larger private offerings. The proposed amendments to Regulation D are expected in April 2024.

Our Take

The SEC's decision to amend Regulation D could have a profound effect on the market for US private placements under Regulation D. Any significant increase in the information that issuers are required to provide to investors could encourage such issuers to find alternative ways to raise capital, including via the public markets.

2024: Predictions



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Brief recap of 2023: predictions

Before launching into our predictions for 2024, we want to briefly revisit some of our 2023 predictions:

- while the IPO market did not pick up as much as expected from mid to late 2023, we did see an increase in large secondary raisings in that period with Orora, Infratil, Treasury Wine Estates and APA all undertaking transactions;
- climate change and ESG disclosures not only remained important, they became even more important. See page 27 in relation to ASIC's interventions on greenwashing and pages 32 to 33 in relation to US securities laws' continued ESG focus;
- while large minerals IPOs were not as prominent as expected the materials sector contributed a significant percentage of IPOs by number (see page 11) and as noted on page 23, resources transactions continue to play a significant role in Australian capital markets; and
- pre-IPO rounds did continue to play an important part in private company funding, albeit with a less clear pathway to eventual IPOs, and with more cautious investors meaning that tech companies and growth orientated private companies often had to find alternative funding including from private equity.

2024: Predictions

IPOs

While predicting any market is hard, predicting the IPO market is harder, however, we consider that on the IPO front there is both pent up supply (from vendors and founders) and pent up demand (from investors who want access to new investments). However, our sense is that both sides remain a bit wary, with vendors and founders worried about pricing and market reception, and investors possibly more comfortable with investing in listed stocks which are a known quantity. If the inflation and interest rate cycles start to ease as seems to generally be expected and geopolitical concerns subside, we expect that some of the larger and high profile predicted IPOs of the past few years will be dusted off (in particular given the current general buoyancy of the market). Our feel is that an IPO that is successful (for both investors and the vendor(s)), will likely release the pent up demand discussed above. As we have noted before, this means that IPO companies and their investors should be prepared as the window may open suddenly.

If this occurs, we expect that the window for these IPOs is likely to be the September to November window.

1. Herbert Smith Freehills acted for both Treasury Wine Estates and Metcash.

Secondary markets

Similar for IPOs, if the inflation and interest rate cycles start to ease or at least the perception of that easing within a reasonable time continues, and geopolitical concerns subside we expect to see more activity this year in secondary markets:

- in support of M&A – we see capital raisings to fund M&A such as those by Orora, APA and Treasury Wine Estates in the back half of 2023 and Metcash[1] in early 2024 as the start of a continuing trend for capital markets to be open to support good quality M&A. On the M&A front, we expect that there may be greater opportunities in 2024 for established listed companies to acquire targets that may themselves have been proposed for IPOs or which need funding which is less available from private markets; and
- in support of balance sheets and right sizing capital structures – while many listed company balance sheets are in good condition, debt remains expensive (and this is not likely to be immediately resolved by reduced inflation and interest rates) and shareholders may have a concern about leverage. This means that companies may need to raise capital or look at asset disposals. Some of those companies may prefer to retain their assets and raise capital. Also, there will be some companies where the more difficult economic conditions which are triggering the predicted lower inflationary and interest rate environment mean that they need to raise capital simply to restore the balance sheet.

While the broader resources industries may provide candidates for both categories of capital raising, we expect that these type of secondary raisings will occur across industries.

Private capital

We expect that traditional private equity and the broader universe of private capital (for example, sovereign wealth funds and superannuation funds) will provide opportunities and challenges for public capital market transactions. Both types of private capital may be vendors through an IPO process or if they are not satisfied with an IPO exit may sell their IPO candidates to other private investors. However, they may also sell those assets to listed companies that may need to raise capital to support the acquisition.

Private capital may also be buyers from the public markets, either for the whole of a listed company or some of its assets, which may subdue capital raising transactions.

The continuing growth of private capital in all of its guises is likely to have a significant influence over public market capital transactions.

Attractiveness of ASX to foreign companies

In addition to innovative transactions such as the Chemist Warehouse and Light & Wonder examples considered earlier in this review, we consider that as capital markets and general economic conditions become more stable, the attractiveness of ASX as a regional capital market will continue. The regulatory sophistication and quality of ASX, the depth of capital available in Australia to participate in public markets, the breadth of industries listed on ASX and the ability to quickly and efficiently undertake secondary raisings make ASX an attractive market for foreign companies looking to list. If the IPO market cracks open even a little, we expect that foreign companies should provide a good source of transactions for ASX.

> Similar to IPOs, if the inflation and interest rate cycles start to ease or at least the perception of that easing within a reasonable time continues, and geopolitical concerns subside we expect to see more activity this year in secondary markets.

About Herbert Smith Freehills

Herbert Smith Freehills is recognised as Australia's leading law firm for IPOs and Equity deals by value, and we have acted on more ASX IPOs by number since 1998 than any other top tier law firm (LSEG Refinitiv). In 2023, we were ranked number one legal adviser by value for Equity issuers in Australia (LSEG Refinitiv). Described as "*the best by a very long distance*" and as having "*top-quality assistance available across any area that a transaction may require*" (Chambers Asia Pacific), Herbert Smith Freehills has been awarded the highest possible ranking in the area of Australian Equity Capital Markets by Chambers Global, Asia Pacific Legal 500, IFLR 1000 every year from 2004.

2014 – 2023 Australian IPOs (issuer Australian advisers) by deal value

Herbert Smith Freehills
King & Wood Mallesons
Gilbert + Tobin
Skadden
Allen & Overy
Baker McKenzie
Minter Ellison
Clayton Utz
Kardos Scanlan
Sullivan & Cromwell
Source: LSEG Refinitiv
0 5000 10000 15000 20000
Value (US$M)

2014 – 2023 Australian Equity deals (issuer Australian advisers) by deal value

Herbert Smith Freehills
King & Wood Mallesons
Allens
Gilbert + Tobin
Sullivan & Cromwell
Allen & Overy
Baker McKenzie
Minter Ellison
Clayton Utz
Skadden
Source: LSEG Refinitiv
0 10000 20000 30000 40000 50000 60000 70000
Value (A$M)

Some of the Herbert Smith Freehills team's recent IPOs include advising:

- Redox Limited on its IPO, raising $402 million for a $1.34 billion listing on the ASX
- GQG Partners Inc. on its $1.2 billion IPO and listing with a market capitalisation of $5.9 billion
- Ventia Services Group Limited on its $438 million IPO and listing with a market capitalisation of $1.45 billion
- Step One Clothing Limited on its $81.3 million IPO and listing with a market capitalisation of $283.6 million
- Tulla Resources Plc on its $78.3 million IPO and listing with a market capitalisation of $243.8 million
- Scientific Games Corporation on its proposed IPO and dual track process to dispose of its US$6.05 billion lottery services business
- UBS AG, Australia Branch, Merrill Lynch Equities (Australia) Limited and Credit Suisse (Australia) Limited on their role as underwriters and joint lead managers of the $982.1 million APM Human Services International Limited IPO with a market capitalisation of $3.3 billion
- Barrenjoey Advisory Pty Limited, Citigroup Global Markets Australia Pty Limited, Credit Suisse (Australia) Limited and Goldman Sachs Australia Pty Ltd on their role as underwriters and joint lead managers of the $982.1 million APM Human Services International Limited IPO with a market capitalisation of $3.3 billion
- Credit Suisse (Australia) Limited and UBS AG, Australia Branch on their role as underwriters and joint lead managers of the $376.1 million Vulcan Energy Resources Limited IPO with a market capitalisation of $933 million
- Bell Potter Securities Limited on its role as underwriter and lead manager of the $100 million Touch Ventures Limited IPO with a market capitalisation of $285.3 million
- Macquarie Capital (Australia) Limited, Credit Suisse (Australia) Limited and Morgan Stanley Australia Securities Limited on their role as underwriters and joint lead managers of the $527.8 million 29Metals Limited IPO with a market capitalisation of $960.9 million
- Dalrymple Bay Infrastructure Limited on its $1.286 billion IPO and listing with a market capitalisation of $1.286 billion
- Silk Laser Australia Limited on its $83.5 million IPO and listing with a market capitalisation of $162.5 million
- Booktopia Group Limited on its $43.1 million IPO and listing with a market capitalisation of $315.8 million
- Genmin Limited on its $30 million IPO and listing
- thedocyard Limited, now named Ansarada Group Limited, on its merger with Ansarada NewCo Pty Limited, together with is $45 million capital raising and backdoor listing with a market capitalisation of $131.3 million
- Coronado Global Resources on its $773 million IPO and listing with a market capitalisation of $3.87 billion
- New Energy Solar Fund on its $205 million IPO and listing with a market capitalisation of $489.5 million
- Netwealth Group Limited on its $264 million IPO and listing of $879 million
- Inghams Group Limited on its $596 million IPO and listing with a market capitalisation of $1.2 billion
- Reliance Worldwide Corporation Limited on its $919 million IPO and listing with a market capitalisation of $1.3 billion
- Propertylink Group on its $503.5 million IPO of triple-stapled securities and listing with a market capitalisation of $536 million
- Frontier Digital Ventures Limited on its $30 million IPO and listing with a market capitalisation of $108 million
- Adairs Limited on its $220 million IPO and listing with a market capitalisation of $400 million
- Integral Diagnostics on its $133.7 million IPO and listing with a market capitalisation of $275 million
- Aventus Retail Property Fund on its $303 million IPO and listing with a market capitalisation of $687 million
- The Australian Government on Medibank Private's $5.9 billion IPO

Some of the Herbert Smith Freehills team's recent secondary raisings include advising:

- Treasury Wine Estates on its underwritten pro-rata accelerated renounceable entitlement offer, with retail rights trading to raise $825 million to partly fund the acquisition of DAOU Vineyards
- Metcash Limited on its fully underwritten $300 million institutional placement and its $25 million share purchase plan to fund its acquisitions of Superior Foods, Bianco Construction Supplies and Alpine Truss
- SRG Global Limited on its $46.4 million fully underwritten institutional placement and $5 million share purchase plan to partially fund SRG's acquisition of ALS Asset Care
- Bowen Coking Coal Ltd on its underwritten $33 million pro rata accelerated non-renounceable entitlement offer and a $17 million institutional placement
- 29Metals Limited on its fully underwritten pro-rata accelerated non-renounceable entitlement offer to raise $151 million
- NEXTDC Limited on its pro-rata accelerated non-renounceable entitlement offer to raise approximately $618 million
- Gascoyne Resources Limited on its pro rata accelerated non-renouncable entitlement offer and placement to raise $26.3 million and reinstatement to ASX
- Pro-Pac Packaging Limited on its pro rata accelerated renounceable entitlement offer to raise $30.2 million
- EQT on its accelerated entitlement offer and placement raising $125 million to fund its acquisition of AET from Insignia Financial Limited
- Integral Diagnostics Limited on its pro rata accelerated non-renounceable entitlement offer to raise $90 million to fund its acquisition of Peloton Radiology
- GUD Holdings Limited on its pro rata accelerated non-renounceable entitlement offer and placement to raise $405 million to partially fund its acquisition of AutoPacific Group
- MA Financial Group Limited on its $120 million equity raising and acquisition of Finsure Holding and its subsidiaries
- Top Shelf International Holdings Ltd on its $35 million institutional placement and accelerated non-renounceable entitlement offer
- Demerger of Neometals' Mt Edwards Nickel Project into Widgie Nickel Limited (Widgie Nickel) and Widgie Nickel's subsequent $24 million capital raising by way of a fully underwritten, non-renounceable pro-rata entitlement offer
- MMG Limited on its HK$2,344.75 million (US$302.16 million) placement of new shares on the Hong Kong Stock Exchange
- Coronado Global Resources Inc. on its underwritten accelerated non-renounceable entitlement offer to raise $132 million
- Carbon Revolution Limited on its pro rata accelerated non-renounceable entitlement offer and placement to raise $95 million
- Seven Group Holdings Limited on its $500 million fully underwritten institutional placement and non-underwritten share purchase plan to raise up to $50 million
- Computershare on its underwritten pro-rata accelerated renounceable entitlement offer with retail rights trading, to raise $835 million to fund the acquisition of the assets of Wells Fargo Corporate Trustee Services
- Australian Strategic Materials on its pro rata non-renounceable entitlement offer and institutional placement to raise $106 million
- thedocyard Limited on its 100% acquisition of Ansarada, re-listing on the ASX and $45 million capital raise
- GUD Holdings Limited on its $55 million institutional placement and $15 million share purchase plan to fund GUD's proposed acquisition of Automotive Components and Accessories Division Group
- Tabcorp Holdings Limited on its accelerated renounceable entitlement offer to raise gross proceeds of approximately $600 million
- Challenger Limited on its fully underwritten $270 million institutional placement and non-underwritten share purchase plan to raise up to $30 million
- Alliance Aviation Services Limited on its fully underwritten $91.9 million placement and non-underwritten share purchase plan targeting up to $30 million to invest in growth initiatives
- Australian Finance Group on its fully underwritten accelerated entitlement offer and institutional placement to raise approximately $60 million
- Newcrest Mining Limited on its fully underwritten $1 billion placement and non-underwritten share purchase plan targeting up to $100 million to purchase the Fruta del Norte financing facilities and to fund future growth options
- LendLease Group on its $950 million placement and $260 million share purchase plan
- Metcash Limited on its $300 million institutional placement and $30 million share purchase plan
- Cochlear Limited on its $800 million institutional placement and $50 million share purchase plan
- Orica Limited on its $500 million institutional placement and $100 million share purchase plan to fund Orica's proposed acquisition of Exsa SA

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