HERBERT
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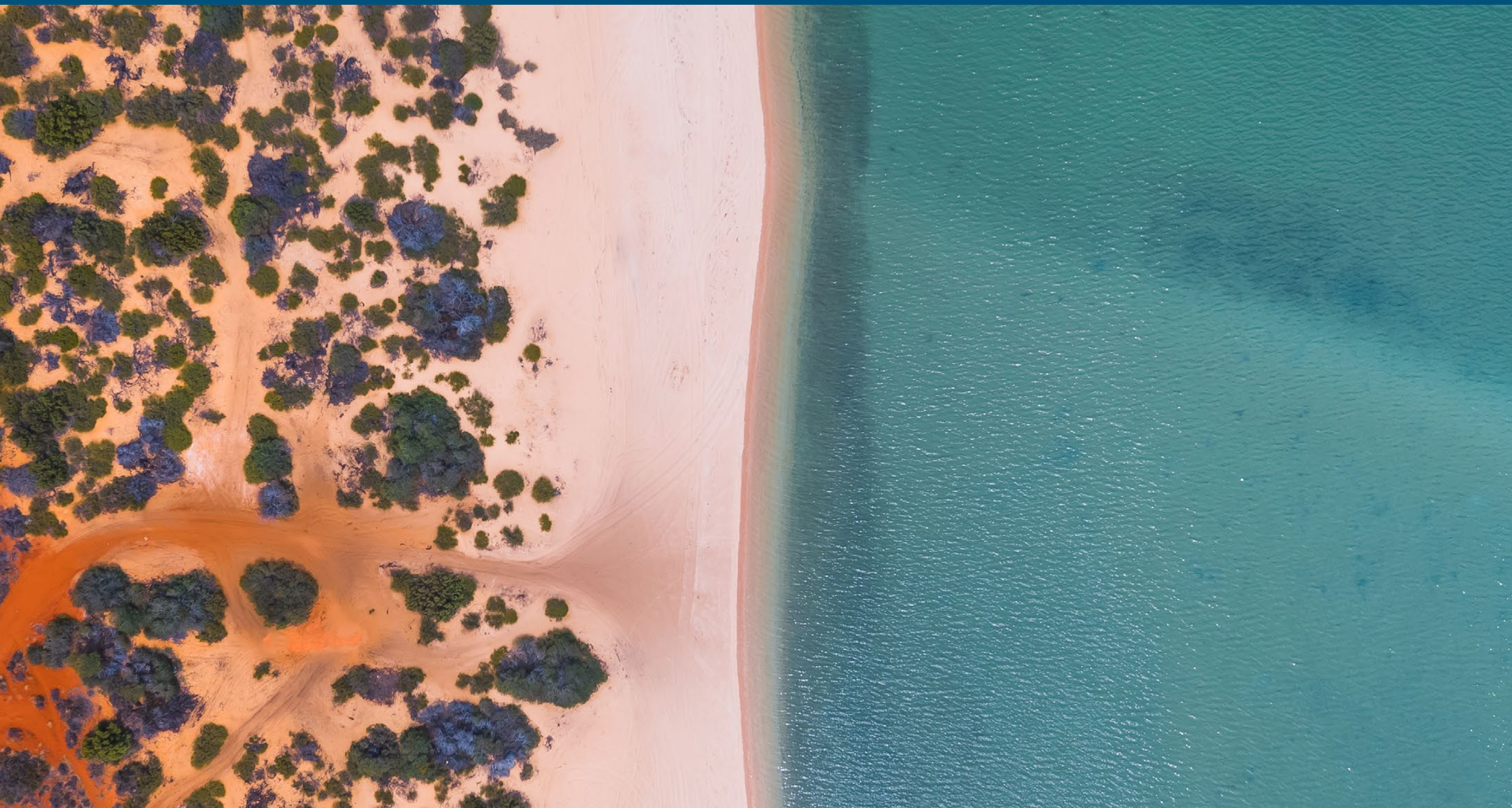
A TALE OF TWO HALVES

THE 2020 AUSTRALIAN IPO REVIEW



Introduction

It gives us great pleasure to present
The Tale of Two Halves: The 2020 Australian IPO Review.

In this publication we cover:

- the key IPO themes of 2020;
- IPO activity across the Australian market;
- marketing in the ESG era;
- Australian regulatory developments;
- key US securities developments; and
- predictions for 2021.

We trust you will find value in it.

Should you have any questions in relation to IPOs in Australia, please contact our ECM partners who are listed on page 27.

The Herbert Smith Freehills ECM Team

2020: Key themes

2020 in review

Market conditions in 2020 were of course impacted by the Covid-19 pandemic, but also by record low interest rates, expansionary fiscal policies put in place by governments across the world, the US elections and ongoing Sino-Australian and Sino-US trade tensions. With the disruption, volatility and uncertainty created by these conditions, unsurprisingly, the volume of capital raised from Australian IPOs in 2020 was at its lowest in recent years.

Despite this, the Australian IPO market demonstrated its resilience and ability to rebound quickly. The second half of the year experienced a strong upturn of IPO activity in Australia and we understand that this trend was a global phenomenon. To put the volume of activity in perspective, the second half of 2020 saw more than five times the number of IPOs in Australia than the first half of 2020. See pages 6 to 9 for further details on the IPO market in Australia in 2020.

The second half listings for 2020 saw IPOs of businesses across a range of sectors and included IPOs for flagship assets like Dalrymple Bay Infrastructure, which listed with a market capitalisation of A$1.286 billion, online book seller Booktopia Group Limited which listed with a market capitalisation of A$315.8 million and Silk Laser Australia, which listed with a market capitalisation of A$162.5 million. Herbert Smith Freehills acted for the issuer in each of these IPOs. We also acted for Australian Unity Limited on the first issue and listing of mutual capital instruments as a debt security on ASX in December 2020 to raise approximately A$100 million. See page 17 for further detail on this new instrument.

Regulatory considerations in a time of Covid-19

In contrast to previous years, regulatory activity in the IPO space has been somewhat subdued, with ASIC and ASX focusing their attention on regulating secondary raisings in the context of Covid-19.

For IPO issuers, Covid-19 has impacted their ability to forecast their financial performance and caused them to adopt varying approaches to the inclusion of financial forecasts in prospectuses (such as opting for a shorter than usual forecast period). In practice, this meant that IPO issuers often engaged with ASIC in relation to their proposed methodologies prior to the lodgement of the prospectus.

Other regulatory updates

ASIC issued conditional class relief in relation to IPO communications and voluntary escrow arrangements, which is a welcome development that will reduce costs for issuers undertaking an IPO. ASIC also released its awaited regulatory guidance in relation to the new financial product design and distribution obligations regime, which should assist issuers, sellers and distributors of financial products to familiarise themselves with the new regime in anticipation of its commencement on 5 October 2021.

IPO candidates and their advisers have been adapting to ASX's listing rule reforms, which have been in effect for just over a year. ASX has also updated its guidance in relation to performance securities, mutual capital instruments and co-operative capital units. IPOs and pre-IPO restructuring going forward will also be affected by significant changes to the foreign investment review regime which were enacted in December 2020 (with effect from 1 January 2021). See pages 12 to 17 for further details of the regulatory developments affecting IPOs in 2020.

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Health tech focus

The number of IPOs in the healthcare sector grew in 2020 and the 2020 cohort was comprised of a number of entities focused on health tech solutions. This may be a continuation of the focus we saw in 2019 but it could also be influenced by the accelerated growth and demand in health tech in response to the Covid-19 pandemic.

Examples of Australian health tech IPOs in 2020 include Cleanspace Holdings (which designs, manufactures and produces respiratory protection equipment used in industrial and healthcare sectors), Doctor Care Anywhere Group (which delivers a range of telehealth services), and Control Bionics (which designs, manufactures and sells wireless wearable electromyography based augmentative and alternative technology).

The pandemic has accelerated the demand for health tech and improved delivery of healthcare services and it is now more widely accepted that digital health will become a mainstream part of the modern healthcare system. We expect to see more IPOs in this and adjacent sectors in 2021 and the coming years.

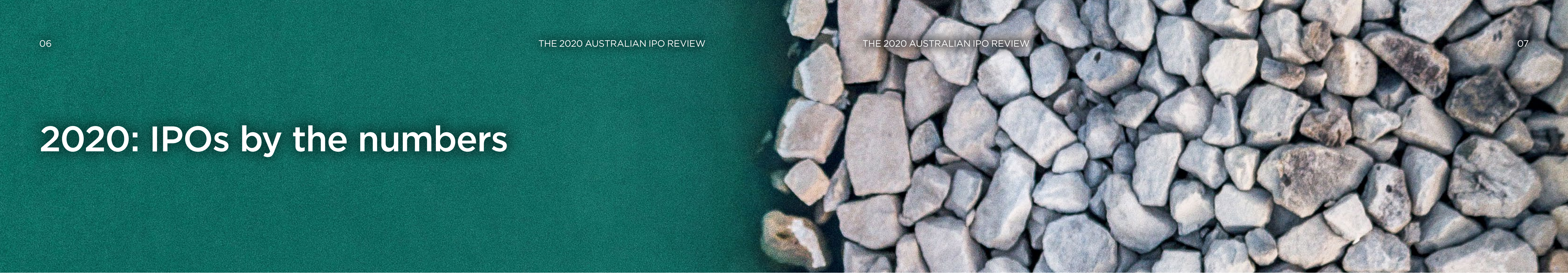
The new normal

The unprecedented circumstances of 2020 exposed a number of inefficiencies with traditional IPO processes and accelerated the adoption and integration of technology as the "new normal".

For example, due to the travel restrictions imposed in response to the Covid-19 pandemic, a majority of IPO roadshows were conducted virtually. The key benefits of virtual roadshows were demonstrated to include reduced travel time and cost involved in the roadshow process and the ability for IPO issuers to reach a wider pool of potential investors as they were no longer constrained by time and cost considerations around physical roadshows. The shorter timeframe in which a roadshow can be conducted also serves to potentially reduce the IPO issuer's exposure to market volatility. Whilst it is unlikely that roadshows will be entirely digital in the future, we expect to see a greater shift towards a hybrid approach, tailored to suit the needs and circumstances of the individual IPO issuer.

Further examples of the integration of technology in the IPO process include the shift towards submitting listing applications to regulators online through special purpose portals, which makes it easier for stakeholders to provide required information and monitor the status of their submissions, and the more widespread adoption of prospectus verification software, which streamlines this traditionally time-consuming and logistically challenging, yet vital, part of the IPO process.

There will inevitably be further logistical and technological issues to navigate, but we are seeing a practical approach being taken and welcome the adoption of the "new normal" to enhance efficiency in the IPO process.



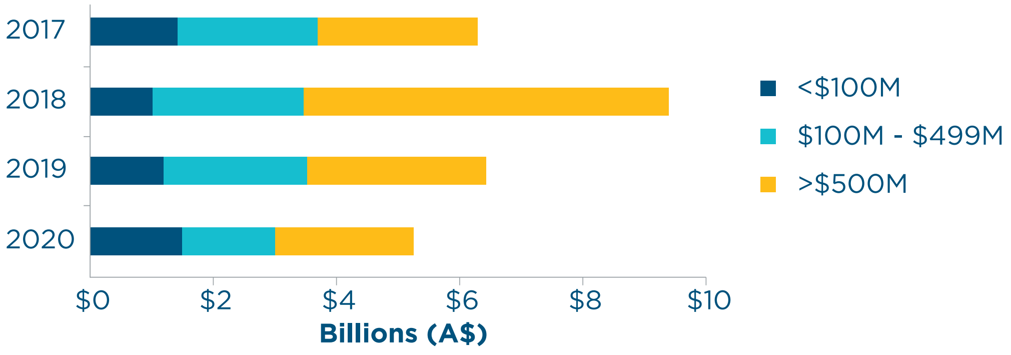
2020: IPOs by the numbers

A challenging year

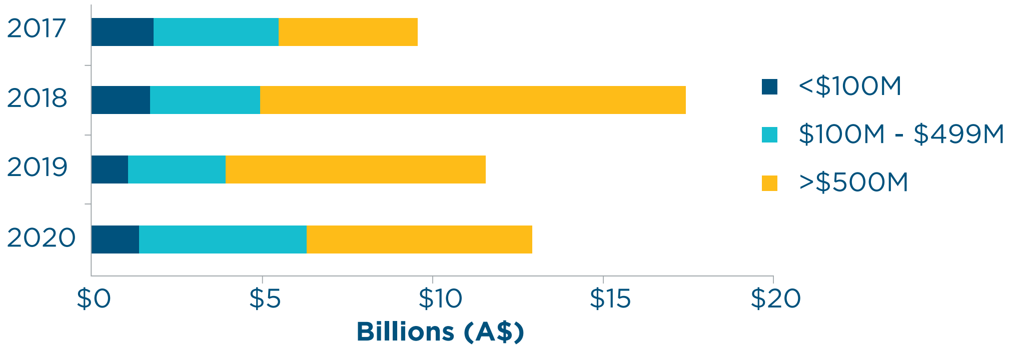
Market conditions in 2020 unfolded like an obstacle course and were significantly impacted by the onset of the Covid-19 pandemic, with a market crash in February, ongoing global trade tensions throughout the year, with bans by China on core Australian exports announced and the US presidential election in November to top it off. Unsurprisingly against this backdrop, the volume of capital raised from IPOs in 2020 was at its lowest in four years.

However, the landscape for IPOs did not turn out to be as dire as predicted at the start of the pandemic. The total market capitalisation of entities listed in 2020 exceeded the total market capitalisation of entities listed in 2019 by just over a billion dollars and there were 15 more listings in 2020 than in 2019.

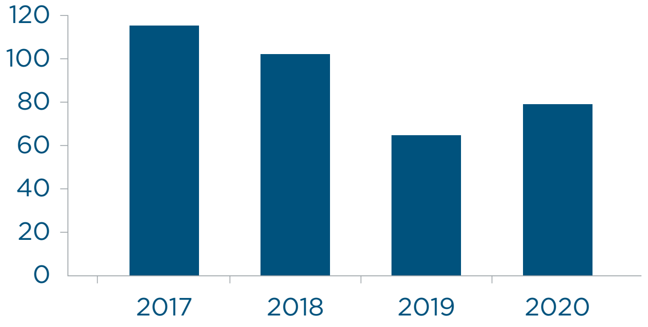
Amount of capital raised on listing 2017 – 2020



Amount of capital raised on listing 2017 – 2020 by market capitalisation of IPO



Number of IPOs from 2017 – 2020



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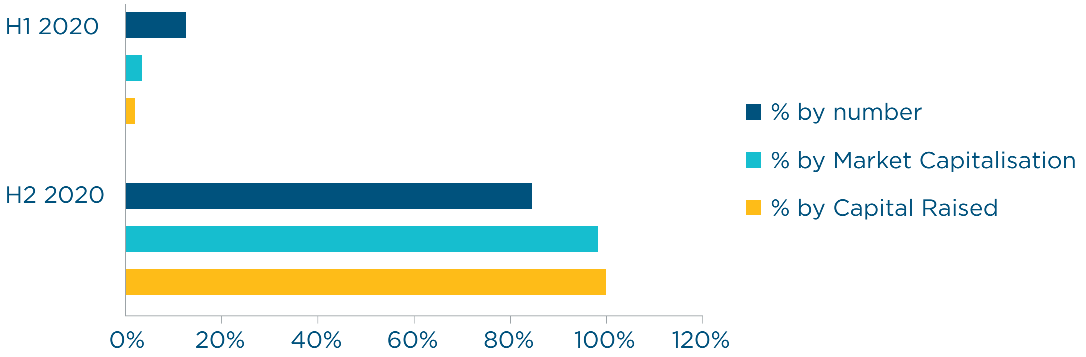
Tale of two halves

2020 was a tale of two halves, with little activity in the first half and almost all of the IPOs for 2020 launching in the second half. The second half listings for 2020 included IPOs for flagship assets like Dalrymple Bay Infrastructure, which listed with a market capitalisation of A$1.286 billion, and businesses responding to the demands of the modern world such as investigative analytics and intelligence software provider, Nuix, which listed with a market capitalisation of A$1.685 billion (on an undiluted basis). To put the volume of activity in perspective, the second half activity for 2020 was more than five times that for the first half of 2020.

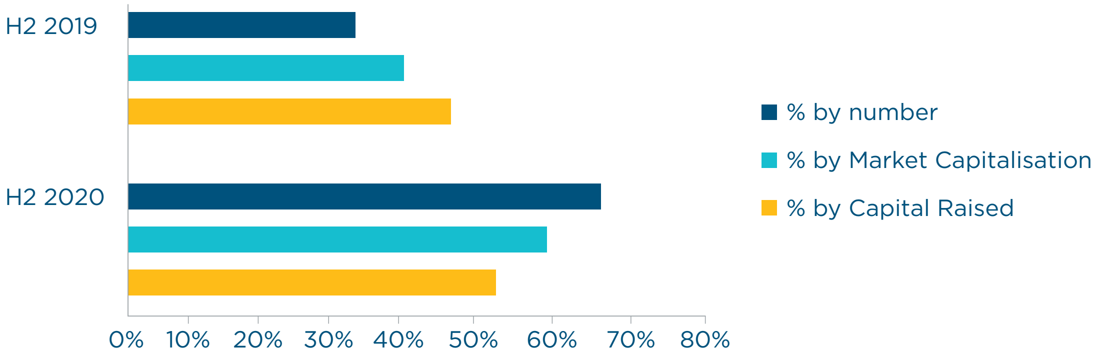
Further, IPOs by number, capital raised and market capitalisation on IPO in the second half of 2020 were all higher than in the second half of 2019.

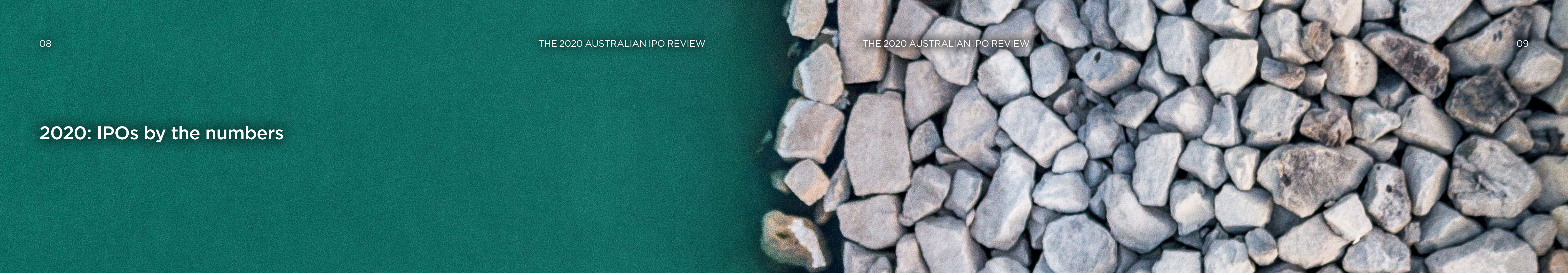
That IPOs became such a popular path for significant exits that might otherwise have been sold via trade sale is probably not something that was on anyone's list of predictions at the start of 2020. However, with the track record for execution of IPOs in 2020 during challenging circumstances (including new found efficiencies from back to back investor presentations by video conferencing), interest rates expected to remain low and optimism based on the enormous vaccine roll-out programs globally, this trend may continue.

IPOs in H1 2020 (1 January 2020 to 30 June 2020) versus H2 2020 (1 July 2020 to 31 December 2020)



IPOs in H2 2019 (1 July 2019 to 31 December 2019) versus H2 2020 (1 July 2020 to 31 December 2020)





2020: IPOs by the numbers

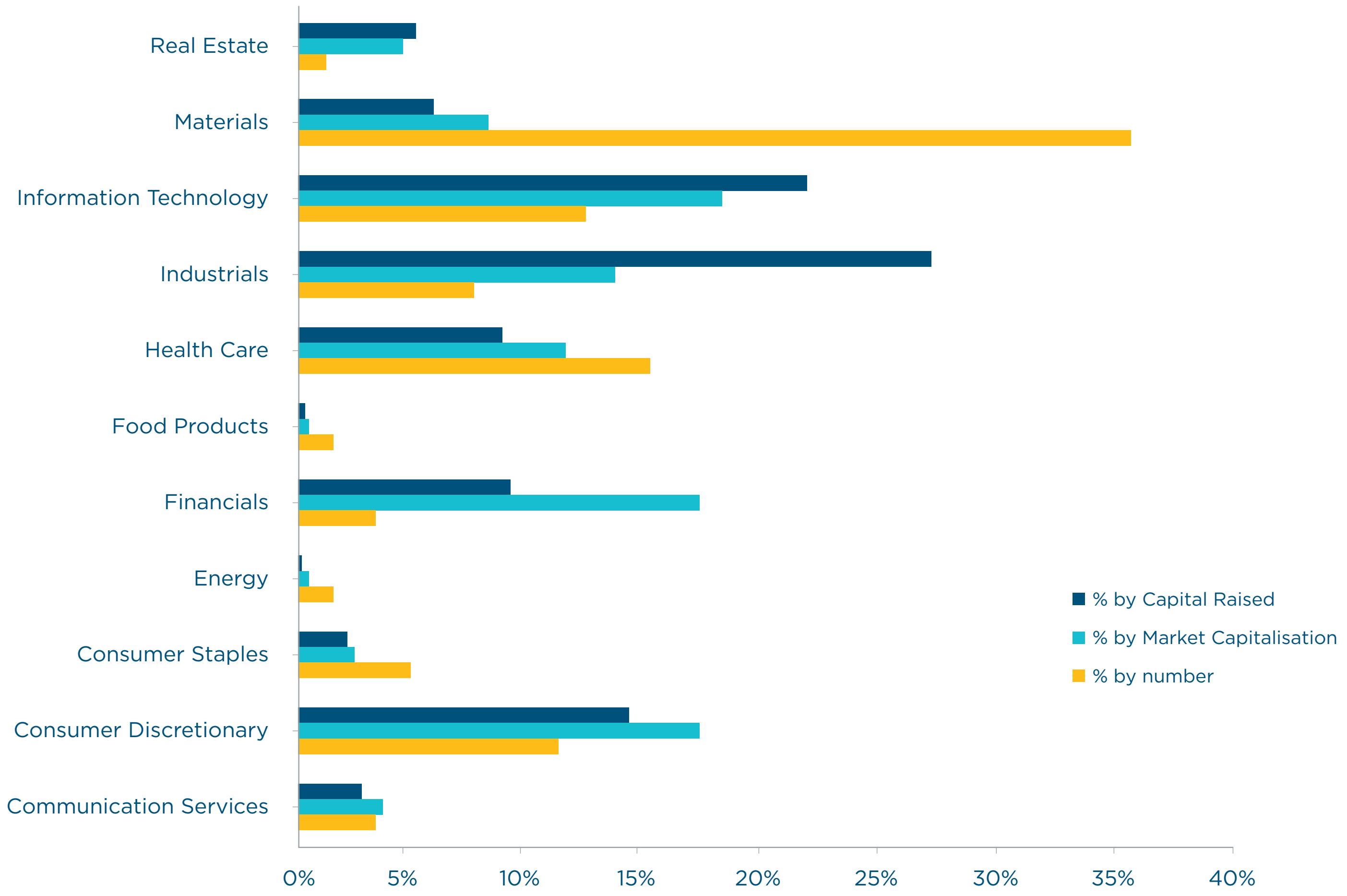
Sector spotlights

There were 30 listings in the materials sector, comprised mostly of small to mid-cap mining exploration and development entities. When matched with the 12 takeovers and schemes for ASX listed mining and exploration entities in 2020, the picture that emerges seems to be largely unaffected by the pandemic. With tightening commodities markets and the Australian coal industry finding new markets there is good reason to expect mining and exploration entities to continue to be attractive IPO candidates.

The sector with the second largest number of listings was the healthcare sector, comprised of a number of entities focused on health tech solutions which arguably reflects the accelerated growth in this sector in response to the Covid-19 pandemic. The healthcare was closely followed by the IT sector. Listings in the IT sector seemed to be generally linked by a theme of process efficiency and/or centralisation. For example, thedocyard (now named Ansarada), a SaaS provider of centralised platforms to assist with corporate transactions, listed with a market capitalisation of A$131.3 million. Herbert Smith Freehills acted on the IPO of thedocyard.

The sectors with the highest levels of capital raised were Industrials and Information Technology respectively. These results are largely reflective of the individual listings of Dalrymple Bay Infrastructure (industrials) and Nuix (information technology) and so are not representative of those sectors as a whole.

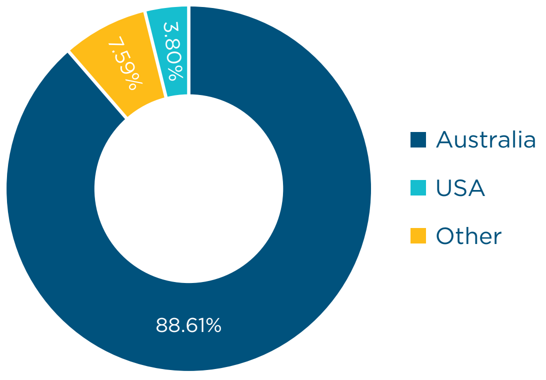
Top industry sectors for IPOs 2020



Geographic spread

The place of incorporation of IPO issuers in 2020 was overwhelmingly Australian, which may be a reflection of the geographic challenges of 2020 resulting from the Covid-19 pandemic.

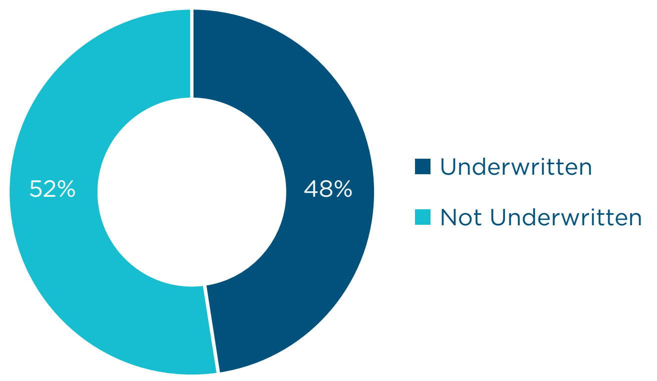
Jurisdiction of issuer incorporation 2020



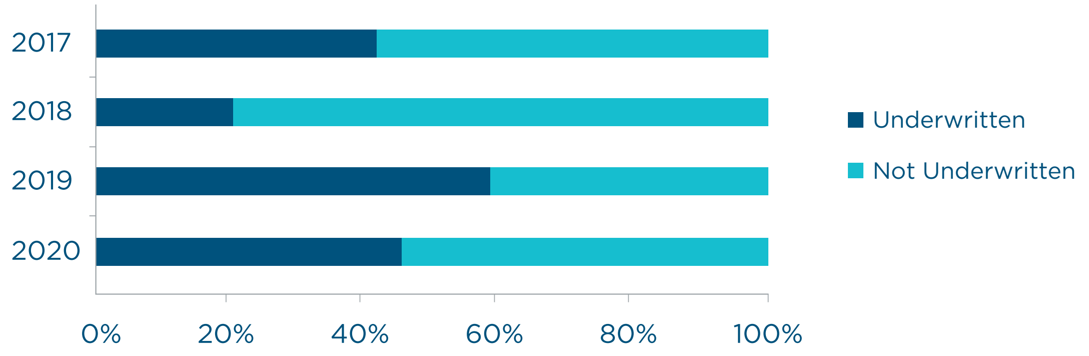
Underwriting

Statistics on underwriting were not markedly different from previous years which in itself is interesting given the market conditions in 2020.

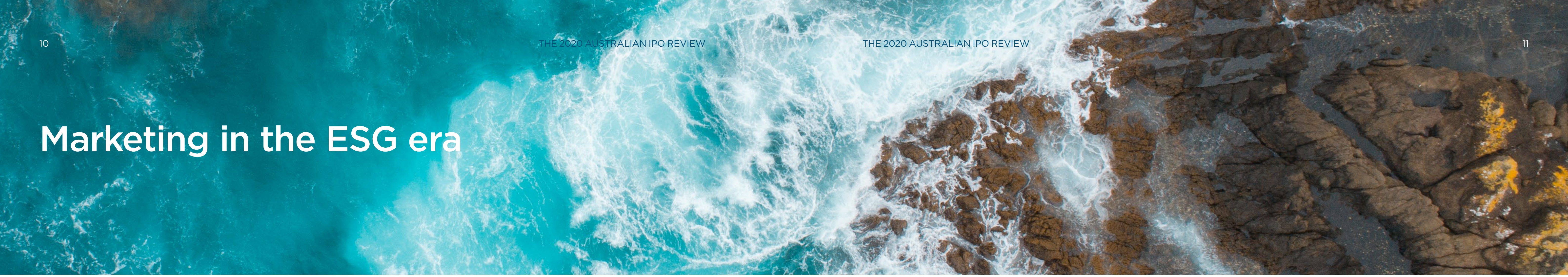
Number of all IPOs underwritten vs not underwritten in 2020



Number of IPOs underwritten vs not underwritten with a market capitalisation of over A$100 million on listing (2017– 2020)



Note on Methodology: All data in this '2020: IPOs by the numbers' section excludes ASX Foreign Exempt Listings, AQUA and debt IPOs unless otherwise stated. Market capitalisation is based on the issue price of securities multiplied by the number of quoted securities.



Marketing in the ESG era

Environmental, social and governance (**ESG**) issues continued to gain traction at both the institutional and retail investor level during 2020, in some cases impacting on the type of ESG information included in prospectuses and other disclosure documents for companies' public offerings.

Historically, it has been relatively common for companies to include high level commitments to corporate social responsibility (**CSR**) in their prospectuses or disclosure documents, along with more granular information regarding compliance with the recommendations of the ASX Corporate Governance Council's Principles and Recommendations (**ASX Principles**).

During 2020, we saw increased expectations regarding ESG matters driving certain companies to enhance marketability by improving the quality and quantity of their ESG disclosure. In some cases this included a more "holistic" consideration of ESG opportunities, risks and governance than would be typical in previous years, and it is a trend we expect to continue and accelerate over the course of 2021.

Growing informational demands regarding ESG

For a number of years, statements from BlackRock and others, have made it clear that institutional investors expect listed companies to proactively consider, manage and disclose ESG risk exposures on issues like climate, human rights and labour practices.

Increasingly, however, it has also become apparent that many institutional investors are themselves under pressure to better integrate ESG considerations into the way they build their portfolios, manage risk and generate returns. Examples include:

- recent European regulation seeking to prevent "greenwashing" by requiring asset managers to disclose the percentage alignment of their portfolio with a taxonomy of "environmentally sustainable" activities; or
- recent proceedings brought against REST Super in relation to its diligence and disclosure of climate risk in its portfolio (settled in December 2020).

Growing appetite for ESG and "sustainable" investments (including at the retail level), has also encouraged greater levels of ESG information being published by portfolio companies to assist with screening, diligence and alignment with investment mandates.

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Enhancing disclosure in an IPO context

The listing requirements of ASX have, over the past decade years, supported the provision of significant information to potential investors on company governance. This information has, however, been centred on the governance charters and policies recommended under the ASX Principles, with relatively little information on companies' broader approach to ESG.

As companies seek to enhance the information they provide to potential investors, we are seeing increased focus in the following areas:

Disclosure of material risks

Many companies' understanding of, and response to, ESG risks is rapidly evolving. In this context, an increased focus on ESG risks may be warranted when formulating disclosure of material risks related to the investment.

Examples could include the risk of "loss of market" due to rapid decarbonisation or reputational risks flowing from human rights practices in the company's supply chain.

Outlining the company's approach to ESG

In the same way companies have historically outlined their approach to governance in IPO documents, companies could include greater disclosure in relation to ESG risk management.

This is likely to extend beyond high level "CSR" statements to provide greater on companies' mechanisms for considering and escalating specific ESG risks in the business (e.g. Board or Committee accountabilities, whistleblowing policies, etc).

ESG policies and processes

The recent Fourth Edition of the ASX Principles included additional recommendations for certain ESG policies, including whistleblowing and anti-bribery and corruption. However, in some cases, where companies have specific ESG risk exposures, we have also seen the adoption of additional targeted policies at listing.

Recent examples have included ESG investment policies, environmental policies and ethical sourcing policies.

Forward thinking on ESG

While carefully considered policies and disclosure on ESG may enhance the marketability of some companies, at this stage it is not a uniform market expectation and practices continue to be varied.

However, having regard to the intensity of many institutional investors focus on ESG – including the effect of "feedback loops" (created by the expectations of their own investors in turn) – it is clear that there is shifting ground in this area and this will continue to change over time.

For this reason, we are also increasingly engaging with private equity and asset owners on ESG diligence and risk management projects, with a view to enhancing the marketability of companies at the exit stage.

Regulatory developments

In 2020, regulatory developments in relation to IPOs have been relatively limited compared to previous years, with ASIC and ASX increasing their focus on regulation of secondary raisings during the Covid-19 pandemic. Nevertheless, the issue of ASIC class relief in relation to IPO communications and voluntary escrow arrangements, along with new regulatory guidance on the product design and distribution obligations, has been welcomed by market participants. ASX has also continued to refine its regulatory guidance, including through the release of updated guidance notes on performance securities and co-operatives and mutuals listing on ASX.

ASIC

Forecast financial information in disclosure documents

Prospectuses and other disclosure documents may include information that is prospective or forward-looking in nature, including forecast financial information. In a pre-Covid-19 world, issuers seeking to list in the first half of the financial year would typically include a financial forecast to the end of that financial year, while issuers seeking to list in the second half of the financial year would typically include a financial forecast for the remainder of that financial year plus the following financial year.

As we have seen with listed companies, Covid-19 has impacted the ability of IPO issuers to forecast their financial performance. In September 2020, ASIC observed that the Covid-19 pandemic has had many negative and positive impacts on companies across industries – the ongoing effect and duration of which is hard to predict. This makes it difficult to compile forecasts that comply with Regulatory Guide 170 Prospective financial information, particularly in demonstrating that assumptions are based on reasonable grounds.

During the second half of 2020, IPO issuers adopted varying approaches to the inclusion of financial forecasts in prospectuses, with some opting not to include forecasts and instead including a trading update (for example for the first quarter of the FY21 financial year), others opting for a shorter forecast period (for example for the period to 31 December 2020) and others opting to include a forecast to 30 June 2021, but with additional detail in relation to the assumptions underlying the forecast and the sensitivity analysis.

ASIC has adopted a proactive approach to the issue of the inclusion of forecasts in the prospectus, engaging with issuers and their advisers to understand how the forecast has been built up, the impact of Covid-19 on the particular business and industry and how changes to the Covid-19 situation may impact the business.

Whether, and if so, the extent to which an issuer is in a position to include forecasts in a prospectus that comply with Regulatory Guide 170 will need to be assessed on a case by case basis. Issuers should ensure that sufficient time and resources are devoted to the compilation of forecast financial information, as this will continue to be a focus for due diligence committees and directors. Issuers and advisers will need to work closely together to understand how the forecast has been built up and how changes to the Covid-19 situation may impact the business and its financial performance. Going forward, we expect that there will be a continued regulatory focus on forecast financial information disclosures in prospectuses, and the reasonableness of the assumptions underlying those financial forecasts and sensitivities. We also expect to see ASIC continuing to engage proactively with issuers and their advisers in relation to forecast financial information disclosure.

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ASIC relief in relation to IPO communications and voluntary escrow arrangements

In August 2020, following public consultation, ASIC issued conditional class relief for two common forms of "minor and technical" relief applications. Specifically:

- *ASIC Corporations (IPO Communications) Instrument 2020/722* allows issuers to communicate with their security holders and current and former employees about their proposed IPO prior to prospectus lodgement; and
- *ASIC Corporations (Amendment) Instrument 2020/721* disregards the relevant interests of an issuer, underwriter or lead manager arising from voluntary escrow arrangements for the purposes of the takeover provisions, but not the substantial holding provisions, under the *Corporations Act 2001* (Cth) (*Corporations Act*).

The conditional class relief is a welcome development that will reduce costs for issuers undertaking an IPO, through both fees payable to ASIC and the time spent preparing individual relief applications. ASIC has also updated its Regulatory Guide 5: Relevant interests and substantial holding notices and Regulatory Guide 254: Offering securities under a disclosure document to further explain this conditional class relief.

IPO communications

The Corporations Act provides that, subject to certain limited exceptions, an issuer must not advertise or publish a statement that refers to an IPO or is reasonably likely to induce applications under the offer prior to prospectus lodgement. However, issuers typically need to communicate with their security holders and current and former employees as part of the IPO process (e.g. communicating information relating to IPO pricing in order to facilitate a sell-down). As a result, issuers have routinely applied to ASIC for specific relief from this prohibition.

Under the conditional class relief, non-promotional IPO communications may be permitted in relation to:

- the IPO timetable, structure and offer period;
- proposed escrow arrangements;
- employee incentive plans, including the treatment of existing securities and option plans and any associated changes;
- sell-down facilities; and
- IPO-related matters that require shareholder approval (e.g. appointment of directors).

However, issuers should continue to ensure that all advertising campaigns, promotional materials and employee/shareholder communications during the IPO process fall within the scope of the relief. In particular, ASIC's relief is only available where no advantages, benefits or merits of the offer are communicated and where companies have adequate arrangements to ensure that any exempted communications given to security holders and current and former employees are kept up to date.

Voluntary escrow arrangements

The takeover provisions in the Corporations Act prohibit the acquisition of a "relevant interest" in voting shares if a person's voting power increases from 20% or below to over 20% (or from a starting point above 20% and below 90%). In the context of an IPO, the issuer, underwriter or lead manager may request existing security holders to enter into voluntary escrow arrangements to promote investor confidence in the IPO. Such voluntary escrow arrangements may give rise to a technical relevant interest in the issuer's own securities (and if such relevant interest would breach the takeover provisions, the issuer would need to apply to ASIC for specific relief).

Under the conditional class relief, the relevant interests of the issuer, underwriter or lead manager pursuant to voluntary escrow arrangements in connection with an IPO may be disregarded for the purpose of the takeover provisions, provided certain conditions are met (e.g. the escrow agreement must restrict disposal but not voting). The relief does not extend to relief from the requirement to lodge substantial holder notices.

New regulatory guide on product design and distribution obligations

In our *2019 Australian IPO Review* we discussed the *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2019* (Cth), which introduced a new financial product design and distribution obligations (**DDO**) regime into the Corporations Act. In particular, we considered the obligations under the new regime to publish an appropriate target market determination (**TMD**) for financial products offered, and the application of DDO to certain IPOs. The DDO regime was scheduled to take effect from 5 April 2021 following a two year transition period. However, the commencement was deferred for six months due to Covid-19 and the regime will now take effect on 5 October 2021.

On 11 December 2020, following extensive consultation, ASIC released new regulatory guidance on the DDO regime as set out in ASIC Regulatory Guide 274: Product design and distribution obligations (**RG 274**). The guidance in RG 274

Regulatory developments

makes it clear that the new obligations are intended to help consumers obtain appropriate financial products, by requiring issuers and distributors to have a "consumer-centric" approach to the design and distribution of such products and consider whether the "choice architecture" of a financial product (features that influence consumer decisions and actions, including the sales process and website design) may impact the likelihood that the product will reach its target market.

The DDO regime does not apply to financial products issued or sold to wholesale clients, to offers of fully paid ordinary shares (unless they are intended to convert into preference shares within 12 months of issue or are shares in an investment company) or to employee share scheme offers.

TMD requirements

If the DDO regime applies, the issuer (or seller in a regulated sale situation) must prepare a TMD for a product if:

(a) a PDS must be prepared (e.g. for interests in a managed investment scheme, general insurance, and interests in a superannuation fund) or a prospectus must be prepared (e.g. for hybrid securities) in relation to the issue or sale;

(b) the product is within the scope of the *Australian Securities and Investments Commission Act 2001* (Cth) (e.g. short term credit facilities) and is issued (or sold under a regulated sale) to a retail client; or

(c) the *Corporations Regulations 2001* (Cth) require a TMD to be prepared (e.g. where the product is exempt from prospectus or PDS disclosure, for example simple corporate bonds and ADI debentures).

A TMD must set out:

(a) the target market for the financial product, being a class of consumers for whom the financial product is likely to be consistent with their likely objectives, financial situation and needs;

(b) conditions and restrictions on distribution of the financial product, intended to make it likely that consumers that acquire the financial product are in the target market;

(c) why these distribution conditions will make it more likely that the consumers who acquire the product are in the target market and sufficient information to reasonably conclude that the product, including its key attributes, is likely to be consistent with the likely objectives, financial situation and needs of consumers in the target market (these are new requirements in RG 274 which were not part of the consultation);

(d) what information the distributors must provide to the TMD issuer and when (e.g. complaints data); and

(e) details of the review triggers and when the TMD will be reviewed.

Issuers and sellers who make a TMD are expected to develop and maintain effective "product governance arrangements" covering each stage of development and distribution of financial products (being product design, product distribution and monitoring/review), and must take reasonable steps that will, or are reasonably likely to, result in products being distributed consistently with the TMD. Such reasonable steps include assessing the likelihood that particular conduct will be inconsistent with the TMD, the nature and degree of harm that may result from dealings that are inconsistent with the TMD, and the practicalities of mitigating or eliminating such risks and harm.

Issuers and sellers who make a TMD must notify ASIC as soon as practicable, and in any case within 10 business days of becoming aware, of a significant dealing in a financial product that is not consistent with the product's TMD. Additionally, issuers must keep complete and accurate records of decisions made in relation to the issuer's TMDs and associated reviews, together with the reasons (and underlying data) for those decisions, for up to seven years. ASIC has broad powers under the DDO regime including with respect to information gathering, providing relief through exemptions and modifications, making stop orders and imposing other penalties.

In anticipation of the DDO regime's implementation, issuers, sellers and distributors of financial products are encouraged to familiarise themselves with the new regime, consider the extent to which they need to update their governance processes to ensure compliance, and commence preparing TMD documentation with respect to the financial products that they issue, sell in a regulated sale or distribute.

Relief applications and documents now lodged via ASIC Regulatory Portal

ASIC has made changes to the way various fundraising and corporate finance documents (e.g. prospectuses) and applications for relief are submitted.

From 27 July 2020, these documents and applications for relief are to be submitted via the ASIC Regulatory Portal, an online platform designed to make it easier for stakeholders to provide ASIC with the required information (via online forms). The portal also allows users to monitor the status of their submissions, correspond with ASIC about their submissions and pay lodgement fees.

ASIC intends that the portal will become a central access point for its growing suite of regulatory services. As such, we expect to see increasing use of the portal on a broader range of transactions in the future.

ASX

Impact of changes to ASX Listing Rules in December 2019

As discussed in our *2019 Australian IPO Review*, ASX made a range of amendments to the ASX Listing Rules, its appendices and Guidance Notes that, with limited exceptions, came into effect on 1 December 2019. As such, these amendments have been in effect for just over a year. Our key observations of the impacts of the changes relevant for companies seeking to undertake an IPO relate to eligibility for listing, deferred settlement trading and escrow requirements.

Eligibility

In our experience, ASX has been considering and applying the eligibility requirements more stringently in recent times. As such, we would encourage IPO candidates and advisers to be mindful of this early in their IPO process. If a listing application does not meet ASX's eligibility requirements, ASX is likely to ask questions and request further information, which may impact the IPO timetable. Ultimately, if the prospective issuer is unable to satisfy ASX's eligibility requirements, ASX may reject the listing application.

In connection with this, at the outset of the IPO process, ASX is encouraging IPO candidates to seek in-principle advice in connection with the entity suitability for listing on ASX under listing rule 1.1 condition 1 and listing rule 1.19. This application is in addition to any other application for in-principle relief that an IPO candidate may make in connection with the application of specific listing rules (for example, ASX's mandatory escrow rules under chapter 9 of the ASX listing rules). There is a prescribed form for this application, which can be accessed from the ASX website, and covers matters such as the experience of the directors and management of the entity, the entity's history, structure, business model and risks, as well as its historical financial performance.

Some practical tips for dealing with ASX's eligibility requirements in the current environment include:

- **having at least one director with ASX listed entity experience** – when assessing if an entity has a structure and operations appropriate for listing, ASX will consider the proposed board composition, including experience with directing or managing another ASX listed entity. To assist with satisfying this requirement, we would recommend that IPO candidates have at least one director on the board with such experience. If this is not the case, IPO candidates should ensure that their company secretary has experience working with ASX listed entities;
- **identifying potential regulatory issues early** – ASX will appreciate advance notice to consider potential regulatory issues. Identifying any such potential issues early in the IPO process should help to minimise "surprises" and allow IPO candidates to meet their desired transaction timetable;
- **making written submissions** – ASX prefers to consider any issues before engaging with prospective issuers and is also unlikely to make any decision without being provided with all the relevant facts; and
- **basing submissions on precedent** – ASX is more likely to grant a listing rule waiver if there is a relevant precedent for it. While it is possible to receive a waiver without precedent, submissions will need to articulate the reasons why the waiver will not infringe the spirit and intention of the relevant listing rule(s). However, even if this is the case, ASX may nevertheless refuse to grant the waiver. This may happen where ASX is concerned about setting an undesirable precedent for others.

Deferred settlement trading

Following the 2019 amendments, deferred settlement trading has generally been limited to IPOs that include a "general public offer" or a conditional market. There are very limited exceptions to this general rule.

Consistent with this new approach, on TPG Telecom's demerger and IPO of Tuas, ASX granted a conditional market in respect of Tuas shares to facilitate the commencement of trading of Tuas shares on the same day as Vodafone shares on the day following the suspension of trading of TPG Telecom shares, but before the transfer of Tuas shares to eligible TPG Telecom shareholders under the demerger. One of the conditions to the conditional market was that Tuas shares were transferred to eligible TPG shareholders under the demerger. Following the satisfaction of the conditions to the conditional market, Tuas shares commenced trading on a normal T+2 basis, rather than having a period of unconditional but deferred settlement trading until the despatch of holding statements. In our experience, ASX would have previously permitted the shares in the demerged entity to trade on a deferred settlement basis (rather than on a conditional basis) for the entire period up to the transfer of the shares under the demerger and issue of new holding statements. This may indicate a potential trend for future demerger IPOs.

Regulatory developments

Mandatory escrow

The market continues to adapt to ASX's updated mandatory escrow regime. Key mandatory escrow issues for IPO advisers to consider include:

- understanding when cash formula relief applies (e.g. cash formula relief does not apply to unexercised options issued under an employee incentive scheme);
- being mindful that spouses, de facto spouses, parents and children of related parties of the company (such as its directors) and any of their respective transferees will be mandatorily escrowed for 24 months and must sign a restriction deed; and
- allowing sufficient time for execution of restriction deeds (where required), particularly in the remote working environment.

Update to ASX Guidance Note 19: Performance Securities

An entity applying to be admitted to the official list of the ASX is required to satisfy ASX that its structure is appropriate for a listed entity. This includes demonstrating that the terms of its equity securities are appropriate and equitable.

ASX has made substantial changes to the way it applies the ASX Listing Rules to performance securities. The changes came into effect on 28 August 2020 via an amendment to Guidance Note 19. The ambit of Guidance Note 19, which previously only applied to performance shares (being shares that convert into ordinary shares when a nominated performance milestone is achieved), has been expanded considerably to now also cover performance options and performance rights, and will generally apply to any "contractual entitlement to receive ordinary shares if a nominated performance milestone is achieved".

Entities applying to be listed which have or propose to have performance securities on issue at the date of admission should expect to provide ASX with more detailed information on these securities than was previously required. This includes the terms of the performance securities and details on how the entity determined the number of performance securities to be issued and why the entity considers that number to be appropriate and equitable. Entities may also need to include detailed disclosure of the terms of the performance securities and other information required by Guidance Note 19 in their disclosure documents (such as a prospectus). ASX has requested this additional information even where the performance securities have or will be issued to directors and management under what are generally regarded as "plain vanilla" remuneration and other incentive arrangements.

Further, entities may need to obtain an independent expert's report to provide an opinion on whether the issue of performance securities is fair and reasonable to non-participating security holders. ASX will require an independent expert's report where the number of ordinary shares into which the relevant performance securities will convert (if the applicable milestone is achieved) is greater than 10% of the number of ordinary shares the entity has on issue at the date of admission (on a fully diluted basis taking into account any ordinary shares that the entity may be issuing in connection with its listing).

ASX may deny an entity's application for admission to the official list of the ASX if the entity does not comply with this regime.

Whilst ASX continues to refine the practical application of this new regime, we recommend discussing with your legal advisers how best to navigate the requirements with ASX, ensuring you have sufficient time to address any issues.

Update to ASX Guidance Note 3: Co-operatives and Mutuals Listing on ASX

On 28 August 2020, ASX updated Guidance Note 3 to include the listing of "mutual capital instruments" (**MCIs**) issued by a mutual entity and "co-operative capital units" (**CCUs**) issued by a co-operative entity. ASX confirmed that if the MCI or CCU has debt-like features, it will be favourably disposed to declaring the security a "debt security" for the purposes of the ASX Listing Rules and admitting the issuer as an "ASX Debt Listing".

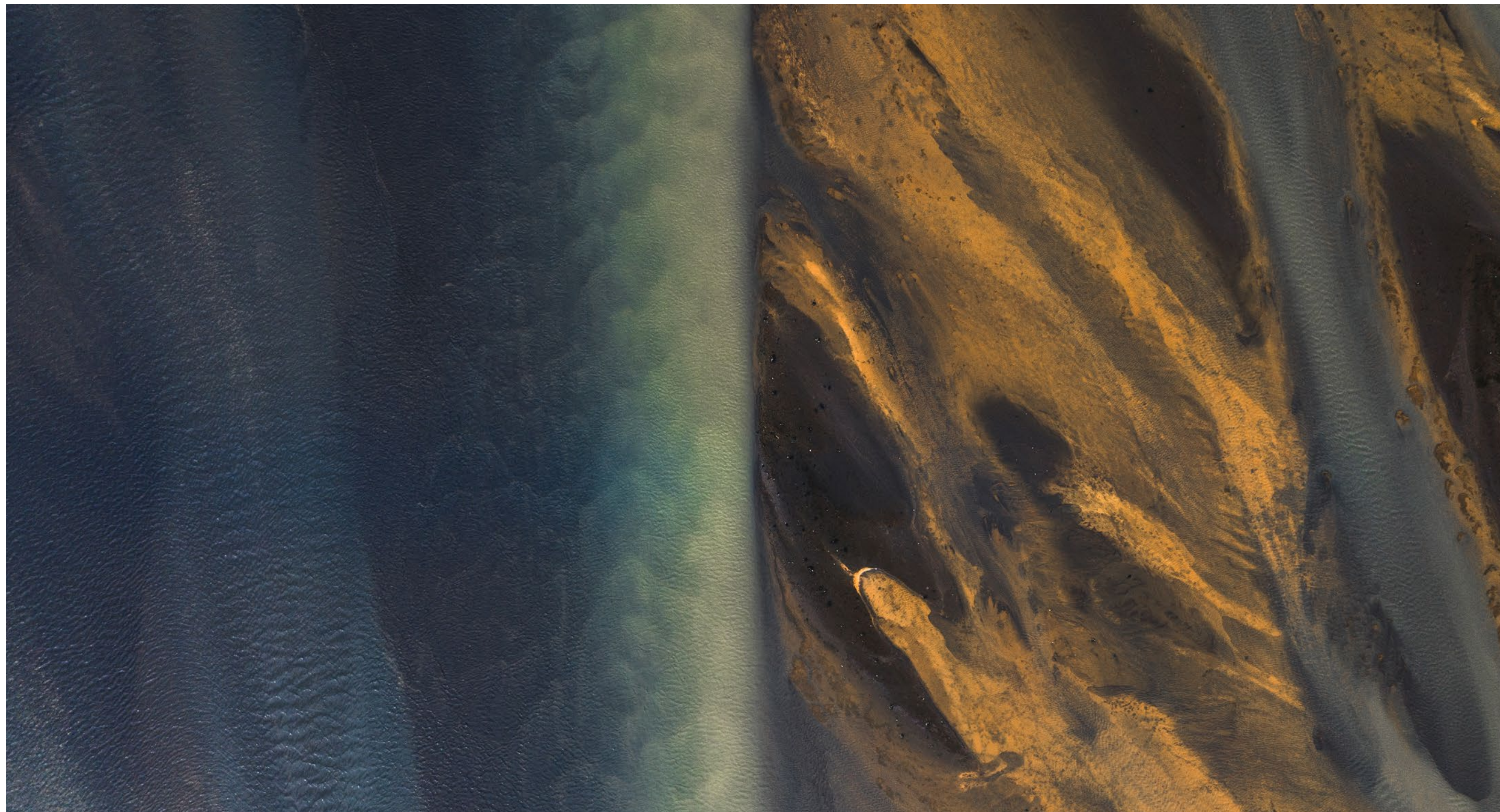
Mutual companies provide a variety of services to their members, such as insurance, banking and investment services. Each member of a mutual company is entitled to no more than one vote at a general meeting for each capacity in which the person is a member. MCIs are a form of permanent, fully-paid capital that can be issued by certain mutual companies, similar to a share. A mutual is able to raise capital through the issue of MCIs, while protecting its mutual status.

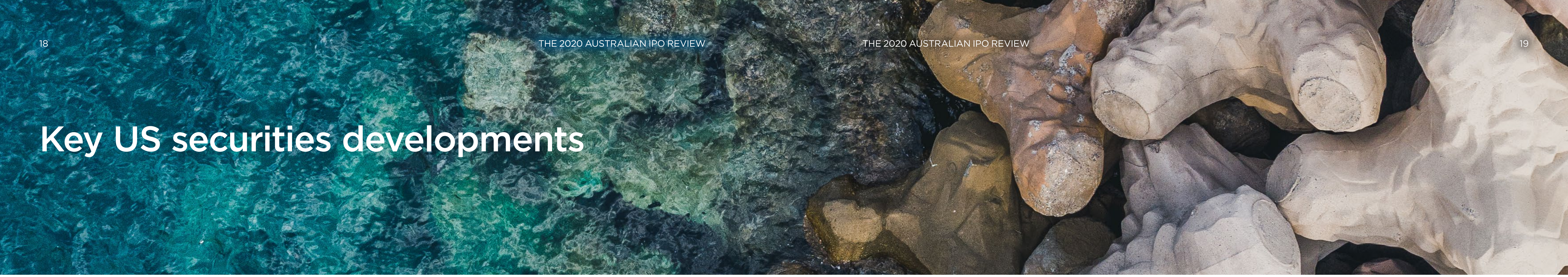
A co-operative is an association whose members co-operate to achieve a benefit for the members, such as agricultural co-operatives or consumer co-operatives. A CCU is an interest issued by a co-operative conferring an interest in the capital (but not the share capital) of the co-operative. The holder of a CCU is not entitled to the rights or entitlements of a member of the co-operative.

In April 2019, the Corporations Act was amended to allow certain mutual entities to raise capital through the issue of MCIs. In contrast to ordinary shares, MCI holders have limited voting rights at a general meeting of members, holding one vote regardless of the number of MCIs held. As a result, MCIs are not subject to the takeover and control provisions of the Corporations Act. Herbert Smith Freehills was significantly involved in the development of the MCI legislation, including commenting on successive drafts of the legislation and attending meetings with the Business Council of Co-operatives and Mutuals, Treasury and ASIC to discuss the proposed legislation.

Herbert Smith Freehills subsequently acted on behalf of Australian Unity Limited (**Australian Unity**) in relation to the first issue and listing of MCIs as a debt security on ASX in December 2020. Australian Unity was already admitted to ASX as a debt listing with three listed debt securities at the time. Given the novelty of the securities, we were able to leverage our engagement in the development of the MCI legislation to effectively engage with ASIC, ASX and the ATO on the nature and terms of Australian Unity's MCIs to guide the listing process. In addition to the listing rules applicable to an ASX Debt Listing set out in listing rule 1.10, ASX agreed to apply a number of additional listing rules to Australian Unity's MCIs, including to allow future issues of fungible MCIs and the ability for Australian Unity to undertake a buy-back or a dividend reinvestment plan. The ATO also provided a class ruling confirming certain Australian income tax consequences for Australian resident MCI holders.

We look forward to seeing what other mutual companies do in this space.





Key US securities developments

Capital markets in a time of Covid-19

In response to the Covid-19 pandemic and the national lockdowns commencing shortly thereafter in March 2020, the SEC issued numerous orders and statements providing conditional regulatory relief and assistance to reporting companies impacted by the pandemic as well as guidance on Covid-19 disclosures.

The staff of the SEC's Division of Corporation Finance issued new Disclosure Guidance Topics No. 9 and 9A in March and June 2020, respectively, providing the SEC's views regarding disclosure that companies should consider with respect to Covid-19 and related business and market disruptions. The guidance suggests that companies should take a closer look at their disclosure obligations in connection with material operational changes made in response to Covid-19, as well as new financing activities to address the adverse financial impact of the pandemic. These operational adjustments might include, for example, increased telework, supply chain and distribution adjustments and changes related to health and safety of employees, contractors and customers, including in connection with transitions back to the workplace. The guidance also emphasizes that disclosure about the risks, management responses and evolving effects of Covid-19 entails a facts-and-circumstances analysis, and any disclosure should be tailored specifically to a company's situation. The SEC has urged companies to proactively revise and update disclosures as facts and circumstances change.

In particular, the SEC has flagged the following key points for issuers' consideration:

- **Due diligence** – queries and disclosure requirements relating to the effects of Covid-19 on issuers' operations and financial statements are expanding, hence issuers should expect more detailed due diligence questions, particularly regarding the effects of Covid-19 on their business. Similarly, the ability of parties wishing to conduct physical due diligence has been limited, and therefore novel arrangements to due diligence have been required (e.g. use of video conferencing).
- **Non-GAAP measures** – the SEC also raises the issue of non-GAAP financial measures and key performance measures in the context of Covid-19. Specifically, the SEC advises that companies using measures or metrics to adjust for or explain the impact of Covid-19 should address why management finds the measure or metric useful and how it helps investors assess the impact of Covid-19 on the company's financial position and results of operations. Companies should also pay particular attention to revenue recognition as an area that may require critical judgments and estimates as many companies may face challenging issues around delays in operating cash flows caused by Covid-19.
- **Disclosure of government assistance** – the SEC advises that companies receiving government financial assistance should consider the short- and long-term impact of that assistance on their financial condition, results of operations, liquidity, and capital resources as well as the related disclosures (e.g. MD&A and financial statements) and critical accounting estimates and assumptions.

Ultimately, companies will need to provide investors with insight regarding their assessment of, and plans for addressing, material risks to their business and operations resulting from Covid-19. Companies should consider making appropriate disclosures and updating previous disclosures, if necessary, to address the Covid-19 pandemic, including, but not limited to, the effect or potential effect of the outbreak on earnings, revenues, operations, supply chains and pending or planned transactions. Companies are also advised to consider disclosing risk management plans in place or in progress as the pandemic evolves.

Our take

Companies will need to conduct an on-going and holistic review of Covid-19 related risks and disclosures as the pandemic continues. In particular, companies should keep an eye on Covid-19 impacts across the totality of their business and operations as there may be less apparent consequences even for companies in sectors that have been relatively unaffected by the pandemic. We are pleased that yet again the SEC has emphasized that what type of disclosure is appropriate will depend on the facts and circumstances and that its guidance remains principles-based and provides flexibility for reporting issuers.

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Evolving SEC guidance for Chinese issuers

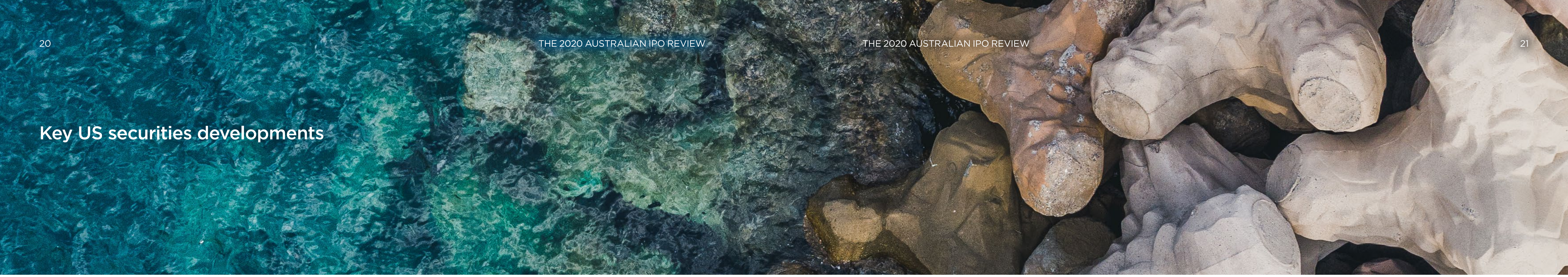
Over the past decade, US investors have increased their exposure to companies based in or with the majority of their operations in China (**China-based Issuers**). As a result, China-based Issuers have drawn significant attention from the SEC, which has taken the position that investors generally will have substantially less access to recourse against China-based Issuers, in comparison to US domestic companies and foreign issuers in other jurisdictions.

In December 2020, the US government enacted the Holding Foreign Companies Accountable Act (**HFCAA**). The law requires that auditors of foreign companies that are SEC registrants allow the Public Company Accounting Oversight Board (**PCAOB**) to inspect the audit work papers for audits of non-US operations as required by the Sarbanes-Oxley Act of 2002. If a company's auditors fail to comply for three consecutive years, then the company's shares would be prohibited from trading in the US In particular, the HFCAA aims to address restrictions China has placed on the PCAOB's ability to inspect or investigate PCAOB-registered public accounting firms in connection with their audits of China-based Issuers that are SEC registrants.

US exchanges have also undertaken actions directed against China-based Issuers. For example, the NYSE announced in January 2021 that it would move forward with delisting three Chinese telecommunications companies targeted by an executive order from former President Trump due to alleged links to the Chinese military. Likewise, Nasdaq removed shares of four Chinese construction and manufacturing companies from indexes it maintains in December 2020 in response to a US order restricting purchase of their shares due to alleged links to the Chinese military.

In particular, the SEC has highlighted the following areas of focus:

- **Risks related to high-quality and reliable financial reporting** – one of the most significant risks by China-based Issuers results from current restrictions on the PCAOB's ability to inspect audit work and practices of PCAOB-registered public accounting firms in China and on the PCAOB's ability to inspect audit work with respect to China-based Issuer audits by PCAOB-registered public accounting firms in Hong Kong.
- **Risks related to access to information and regulatory oversight** – US regulators' access to information and regulators' ability to investigate or pursue remedies with respect to China-based Issuers may be limited under Chinese law. The SEC and other US authorities face substantial challenges in bringing and enforcing actions against China-based Issuers and their officers and directors.
- **Risks related to a company's organizational structure** – current regulations in China limit or prohibit foreign investment in Chinese companies operating in certain industries. To circumvent these restrictions, many China-based Issuers form non-Chinese holding companies



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that enter into contractual arrangements, intended to mimic direct ownership, with Chinese operating companies. These China-based Issuer structures pose unique risks to US investors as the agreements establishing the structures may be found to not comply with Chinese law, which could subject a China-based Issuer to penalties, revocation of business and operating licences, or forfeiture of ownership interests.

- **Risks related to the regulatory environment** – China's legal system is substantially different from the legal system in the US and may raise risks and uncertainties concerning the intent, effect, and enforcement of its laws, rules, and regulations, including those that restrict the inflow and outflow of foreign capital or govern a China-based Issuer's ability to conduct business.

Our take

The growth of Shanghai listings by China-based Issuers that are already US-listed (also known as "home coming" listings) have seen an uptick in recent years as a result of increased scrutiny towards China-based Issuers by the SEC. This trend is likely to continue, particularly in light of the passage of the HFCAA and the continued freeze in U.S.-China relations, presenting competitive opportunities for Shanghai as well as other non-US stock exchanges. Non-China based issuers with extensive Chinese operations and/or subsidiaries relying on the work of Chinese auditors should keep an eye on developments in this space.

Recent trends in the IPO market: SPACs and direct listings

The past year saw a record number of listings by special purpose acquisition companies (**SPACs**). SPAC offerings in the US market numbered 46, 59 and 230, respectively, in 2018, 2019 and 2020. They also represented US$ 9.7 billion, US$ 12.1 billion and US$ 71 billion, respectively, in proceeds during that same time period. Of the SPACs that priced in 2018 and 2019, just under half have completed a merger to date. In the context of Covid-19 and the 2020 US presidential election, which brought increased uncertainty to global markets, SPACs led the way in helping companies meet funding requirements.

SPACs are publicly-traded shell or blank-check companies that have no operations and are formed for the purpose of raising capital in an IPO to acquire an existing private company. SPACs are currently, and have historically been, a US product as a result of key structural aspects in the US that have traditionally made them more attractive to investors. These include:

- **Redemption rights** – in the US, public stockholders voting against the proposed SPAC business combination also have the right to redeem their public shares for a pro rata portion of the proceeds of the IPO. It is also common to see sponsors and directors enter into a letter agreement pursuant to which they agree to waive their redemption rights.
- **Stockholder approval of the acquisition** – US SPAC's initial business combinations must usually be approved by a majority of the votes cast by public stockholders (subject to the stock exchange rules where the SPAC is listed).
- **Private investment in public equity (PIPE)** – given shareholders' ability to redeem their shares in US SPAC IPOs as well as situations where the purchase price of the entity the SPAC is attempting to acquire might exceed the equity in the SPAC, some US SPACs have employed forward purchase agreements with the SPAC founders obliging them to purchase additional units in the event of a capital shortage. Alternatively, many US SPACs undertake a PIPE deal, where additional capital is raised through a private offering to a selected investor or group of investors.

To date, SPAC listings have yet to take-off in other major capital markets, with most SPAC IPO activity outside of the US taking place in the London market, such as the December 2019 IPO of EverArc Holdings Limited and other markets in Europe (e.g. Amsterdam). London-listed SPACs have historically forgone features such as redemption rights, shareholder approval of acquisitions and PIPEs. However, the U.K. Financial Conduct Authority (**FCA**) has been increasingly interested in reforms, such as removal of the London Stock Exchange's share-suspension requirement upon the SPAC's acquisition of a private target, aimed at making London a more attractive destination for SPACs. The SEC has also been keeping a close eye on SPAC disclosures. In December 2020, it released CF Disclosure Guidance No. 11 which sets out a series of questions SPACs should consider when drafting disclosure for their IPOs and business combinations. The guidance is principally concerned with disclosure of conflicts of interest of sponsors, directors, officers, affiliates and the underwriting banks on a SPAC transaction.

Apart from SPACs, direct listings have also been gaining attention as a means for a private company to go public. A direct listing refers to the listing of a privately held company's stock for trading on a national securities exchange (such as the NYSE or Nasdaq) by means of an effective registration statement without conducting an underwritten offering and/or involving any underwriting services. Until recently, direct listings needed to involve the registration of a secondary offering of a company's shares on a registration statement publicly filed with, and declared effective by the SEC, at least 15 days in advance of launch. Companies were not permitted to raise new capital as part of the direct listing process, which made direct listings less attractive than traditional IPOs. Companies such as Spotify and Slack have undertaken direct listings.

On 22 December 2020, however, the SEC issued its final approval of rules proposed by the NYSE that permit a primary offering along with, or in lieu of, a direct secondary listing. Under the NYSE rules, the listing company must have a recent valuation from an independent third party indicating at least US$250 million in aggregate market value of the publicly held shares. The listing company must also certain financial and distribution standards, including having 1.1 million publicly held shares with a minimum initial reference price of US$4.00. In response to the SEC's approval, certain investor protection groups have expressed concern that, because of the absence of traditional underwriters, the primary direct listing process will lack a key gatekeeper present in traditional IPOs that helps prevent less well-managed (or even fraudulent) companies from going public.

Our take

SPACs and direct listings highlight increasing market interest in alternate structures for bringing companies to market without the burden of the traditional IPO valuation process. While traditionally U.S. products, particularly in the case of SPACs, major capital markets such as London are increasingly seeking to embrace these alternate structures. We also expect increased SEC focus on these alternative listing structures going forward as highlighted by the SEC's concern regarding conflicts of interest between SPAC promoters and SPAC investors as well as their extensive deliberations on the approval of the NYSE direct listing rules. SPACs are also having a broader impact on the equity capital markets as purchase by a SPAC is increasingly seen as an alternative to a traditional IPO. We have seen and expect to see more "triple track" exits by sponsors or other sellers-trade sale, IPO or sale to a SPAC.

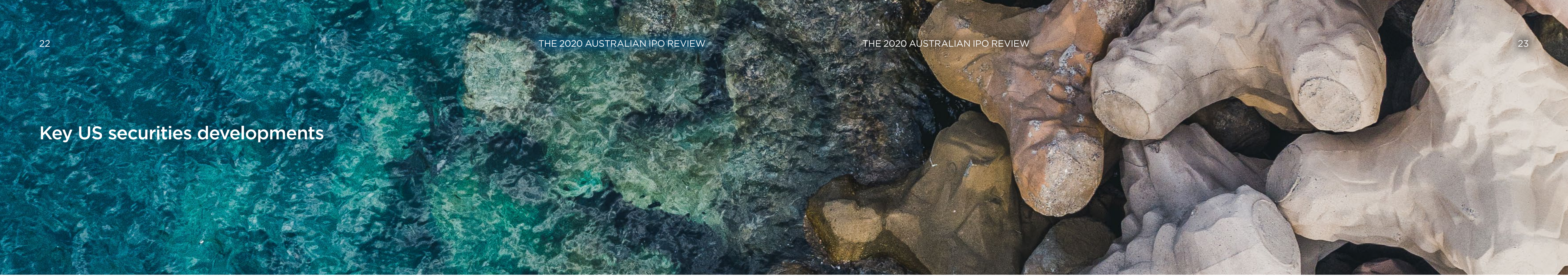
SEC disclosure effectiveness: streamlining S-K and MD&A

On 19 November 2020, the SEC adopted amendments to Regulation S-K, including changes to its MD&A requirements that will make significant and long-overdue improvements. In general, the two key themes are streamlining existing disclosure and taking a more principles based approach. The amendments will become effective in February 2021, at which time advance voluntary compliance is permitted, so long as companies provide disclosure responsive to an amended item in its entirety. Compliance is not mandatory until a company reports on its first fiscal year ending on or after 210 days following publication.

The adopted changes are based in large part on the SEC November 2016 Report on Modernization and Simplification of Regulation S-K, as well as a July 2016 concept release on the business and financial disclosure requirements in Regulation S-K. They are part of a broader "disclosure effectiveness initiative" undertaken by the SEC.

Among the key changes are the following:

- **Elimination of the requirement for 5 years of "selected financial data"** – the amendments eliminate Item 301 of Regulation S-K, which requires most companies to furnish selected financial data in comparative tabular form for each of the company's last five fiscal years. This change simplifies companies' compliance obligations by reducing reporting burdens.
- **Elimination of the contractual obligations table** – the amendments eliminate the requirement for a table of contractual obligations under Item 303(a)(5). Instead of the contractual obligations table, the amendments add a requirement in Item 303(b)(1) to discuss material cash requirements from known contractual and other obligations, including but not limited to commitments for capital expenditures. This change enhances disclosure of capital resources by requiring disclosure of cash requirements that are not necessarily capital expenditures. Although this disclosure is for the most part consistent with existing SEC guidance, companies will need to carefully consider their cash requirements and ensure that the required disclosure is provided.
- **Requirement for critical accounting estimates disclosure** – the amendments add a requirement, in Item 303(b) of Regulation S-K, to disclose critical accounting estimates. The new requirement calls for both qualitative and quantitative information to convey estimation uncertainty and financial impact of the estimate, but in each case only to the extent such information is material and reasonably available. Existing SEC guidance already



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requires that companies disclose critical accounting estimates, therefore these changes will clarify the required disclosures and aid compliance.

- **Elimination of separate section on off-balance sheet arrangements** – the amendments eliminate this requirement, and they add an instruction emphasizing the importance of discussing off-balance-sheet obligations in the broader context of MD&A disclosure when they have or are reasonably likely to have a material current or future effect. This change will incentivise better integration of off-balance sheet arrangements disclosure within the MD&A.

The various changes will also apply, via parallel amendments, to disclosures provided by foreign private issuers in annual reports on Form 20-F.

Our take

While the SEC's focus on more principles based disclosure for the MD&A rather than specific form requirements is a welcome development, some of the new requirements, such as the discussion of cash requirements for known contractual and other obligations, are likely to require additional disclosures and careful analysis from companies in close collaboration with their counsel. We would expect that much of the streamlining of disclosure for U.S. public offerings will make its way into the Rule 144A market before too long.

SEC adopts changes to the AI and QIB definitions

On 26 August 2020, the SEC voted to adopt amendments modernizing and expanding the definition of "accredited investor" (**AI**), which will allow individuals to qualify as AIs based on professional certifications and experience that demonstrate financial sophistication, and expand the scope of covered institutions. The amendments do not change the current US$200,000 individual income and US$1 million net worth thresholds established by the SEC in 1982 or the US$300,000 joint income threshold established in 1988, and the amendments do not index these thresholds to reflect inflation. They do, however, expand qualifying natural persons to those who are able to assess the risks and merits of an investment opportunity based on their professional qualifications. The SEC also made changes to the definition of "qualified institutional buyer" (**QIB**).

As adopted, the amendments will:

- Add a new category of AIs, covering any non-enumerated entity owning investments (as defined under the Investment Company Act) in excess of US$5 million, so long as not formed for the purpose of investing in the offered securities.
- Allow individuals to qualify as AIs based on holding in good standing one or more qualifying professional certifications, designations or credentials.
- Add as AIs (1) "family offices" that have at least US$5 million of assets under management, which were not formed for the specific purpose of acquiring the securities offered, and whose prospective investment is directed by a sufficiently sophisticated person, and (2) "family clients" of such "family offices" if the investment by the "family clients" is directed by the "family office" in accordance with the rule.
- Add LLCs to the list of enumerated entities that qualify as AIs if such entity owns at least US$5 million in assets.
- Treat "knowledgeable employees" (defined under the Investment Company Act) of a private fund as AIs for investments in the fund (and affiliated funds).
- Add the term "spousal equivalent" to the AI definition and related note, so that spousal equivalents may pool their finances for the purpose of qualifying as AIs.
- Add as AIs with no accompanying financial test (1) investment advisers registered under Section 203 of the Advisers Act, investment advisers registered under the laws of the various states and exempt reporting advisers and (2) rural business investment companies (**RBICs**).
- Make changes to Rule 144A to expand the QIB definition to include registered investment advisers, exempt reporting advisers, RBICs, LLCs and institutional AIs not otherwise enumerated in Rule 144A so long as, in each case, Rule 144A's US$100 million threshold for securities owned and invested is satisfied.

Our take

These are welcome changes to help harmonise the AI and QIB definitions and expand the types of U.S. investors that may take part in securities offerings. Nevertheless, approaching AIs who qualify purely based on their sophistication and/or professional certifications may take some time to take hold as the SEC's expansion of the AI and QIB definitions has not impacted existing 10b-5 liability considerations that should be weighed when targeting U.S. investors.

The ESG revolution: looking ahead to the Biden administration and 2021

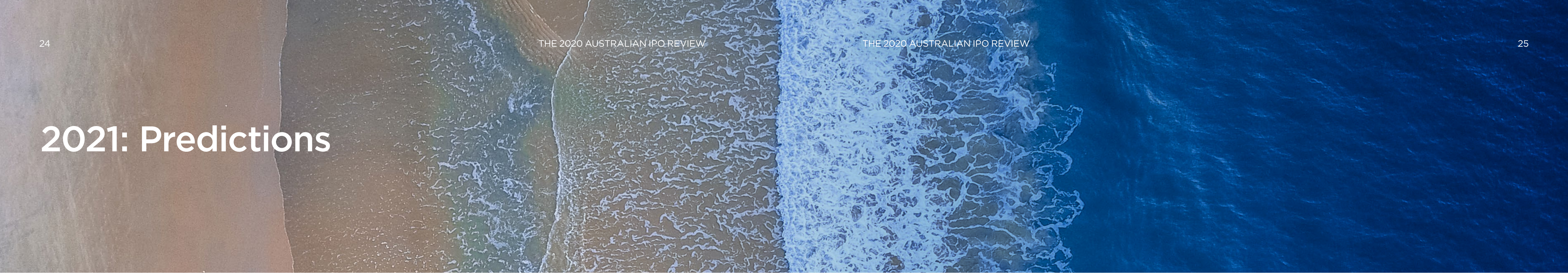
Climate-related disclosure has become one of the most widely discussed issues in capital markets in recent years and this will continue. Many influential institutional investors have called for specific, consistent and reliable disclosures of the risks and opportunities related to climate change to guide investment, lending and underwriting decisions. In his letter to CEOs in January 2020, Larry Fink, Chairman and CEO of BlackRock, emphasized that "climate change has become a defining factor in companies' long-term prospects". Historically, however, the SEC has long held that only "material" matters, including climate-related matters, warrant disclosure. The US Department of Labor also remains skeptical of climate-related disclosures; it is currently considering a proposal to limit when and how pension plan fiduciaries may consider non-pecuniary factors, such as climate-related metrics, when making investment decisions. If adopted, the proposal could have a chilling effect on the demand for "green" investment products, which may in turn reduce the level of enthusiasm for climate-related disclosures among US-based asset managers and asset owners.

However, there are signs that approaches may be changing in the United States. In May 2020, the SEC Investor Advisory Committee endorsed the adoption of a disclosure framework focused on environmental, social and governance (**ESG**) matters, reasoning that such a framework would ensure the flow of capital to US markets, promote the goal of investor protection and level the playing field between issuers. Likewise, the advent of President Biden's administration could signal a shift in the legislative landscape across key policy areas including the adoption of a more prescriptive approach to climate-related risk disclosure in the United States. The Biden administration has already set targets for the US to achieve a 100% clean energy economy and net-zero emissions no later than 2050 along with concrete steps for the US to rejoin the Paris Agreement on Climate Change. Consistent with the SEC's long-standing practice of accommodating foreign private issuers with respect to enhanced disclosure requirements, it is expected that ESG matters will at the very least have more prominent consideration in an SEC led by a chair nominated by President Biden.

Shifts by the SEC towards more prescriptive climate-related disclosure can be expected to mirror changes by regulators across the world. In the United Kingdom, companies are required to disclose global emissions in their annual reports as well as information regarding environmental matters. For example, companies are required to state the annual quantity of emissions in tonnes of CO2 equivalent from activities for which the company is responsible. Changes were also adopted in December 2020 by the FCA to enhance the quality and consistency of climate-related risk and risk management disclosures in public reporting. Premium listed commercial companies (in accordance with the recommendations of the Task Force on Climate-Related Financial Disclosures) on the London Stock Exchange will be required to include climate-related disclosures in their public reporting on a "comply or explain" basis.

Our take

We expect ESG to be a key area of movement for the SEC in the coming years starting this year, particularly in light of the Biden administration's environmental focus and increasing pressure from legislators across the country. While we believe that the principles-based disclosures that have been embraced to date have been an appropriate and flexible framework, prescriptive climate and other ESG-related risk disclosures are likely to be given greater consideration than they have to date, in line with ESG disclosure obligations and trends around the world, such as in the United Kingdom.



2021: Predictions

The IPO pipeline is strong

IPO advisors have not seen such a full IPO pipeline for a while. Covid-19 related concerns have dissipated given how Australia has dealt with the pandemic and investor demand remains strong. The expected positive FY21 half-year reporting season will only add to the confidence in the IPO market. The spate of capital raisings that occurred in the second half of 2020 is expected to continue into 2021.

A tale of two narratives

The IPO narrative will generally be one of two – either that financial performance which has been boosted by Covid-19 will continue unabated once things stabilise post Covid-19 versus that financial performance which has been adversely affected by Covid-19 will recover to at least pre-Covid-19 levels. We suspect that, based on what we have seen in the last few months, the market will find the former narrative more compelling than the latter.

New economy IPOs will continue at pace

Covid-19 has accelerated the speed at which businesses in new economy industries have been able to IPO. These industries include tele-health, technology and e-commerce. This is on the expectation that these industries will benefit from an acceleration or permanent change in "the way we do things" as a result of Covid-19. This positivity in new economy IPOs is expected to continue.

Certain old economy IPOs will make a comeback

Given the confidence in the Australian economy and the IPO market, changes in consumer spending habits (forced especially by a lack of international holiday expenditure) as well as low interest rates, we expect IPOs in old economy industries that have Covid-19 proofed their business models such as those in retail, financial services and property (including healthcare and industrial assets) will make a comeback, especially where those businesses have a history of consistent yields which are attractive given current low interest rates.

More PE exits will hit the boards

These attractive IPO conditions will facilitate PE exits in a range of industries, so expect to see more PE exits.

More overseas businesses will look to list on ASX

We expect more overseas businesses to consider listing on the ASX, especially given the stable economic climate in Australia and the way Australia has dealt with Covid-19.

Pre-IPO rounds and cornerstoning will continue to be popular but dual tracks won't increase

As Covid-19 has accelerated the ability of smaller/mid-sized businesses to IPO, we expect that pre-IPO rounds will remain popular and will finance businesses in the lead up to IPO. These pre-IPO rounds should continue to occur at a discount of 20% to 25% to the IPO price.

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To avoid market volatility impacting the success of the IPO, we expect underwriters to continue to look to create confidence in IPOs by securing cornerstone investors prior to marketing the IPO.

Given the strength of the IPO market, we don't expect to see a marked increase in dual track processes.

Covid-19 related impacts on businesses are becoming manageable

Issuers and regulators are becoming more comfortable with the Covid-19 related impacts on businesses and prospectuses, including related forecasts. So while you will need to continue to think about appropriate Covid-19 related prospectus disclosures and discuss them with the regulators, the form of those prospectus disclosures and the nature of the discussions with the regulators are becoming more settled.

Timely regulatory consultation will be important to the success of an IPO

We expect the regulators to be inundated with prospectuses in 2021. It will be important to provide sufficient time in the IPO timetable for regulatory consultation especially if you wish to rely on the ASX fast track process or there is a prospectus disclosure issue which requires regulatory consultation.

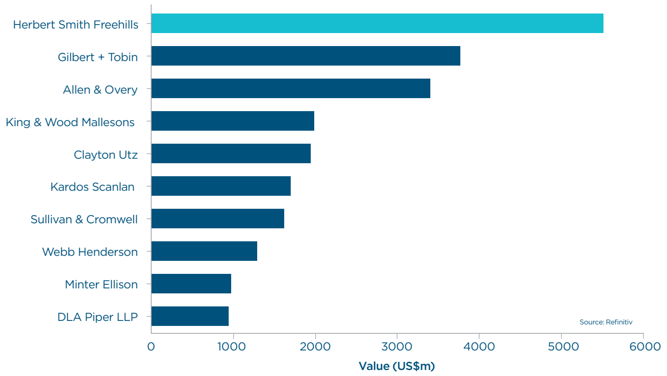
What could stop the music?

Concerns about Covid-19 economic policies not being effective, economic 'bumps' as relief like JobKeeper and bank and lessor payment holidays are wound back, inflation surprising on the upside or concerns about the efficacy of the vaccines (including because of the virus mutating) may impact confidence in the IPO market.

About Herbert Smith Freehills

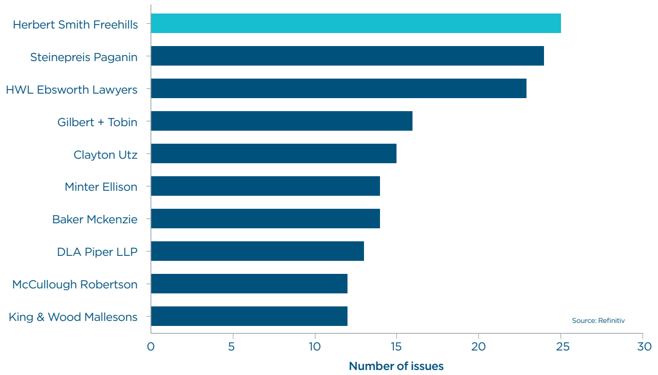
Herbert Smith Freehills is recognised as Australia's leading law firm for IPOs by value, and we have acted on more IPOs by number since 1998 than any other top tier law firm (Refinitiv). In 2020, we were ranked the number one legal adviser by value for IPO issuers in Australia (Refinitiv). Described 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 Equity Capital Markets by Chambers Global, Asia Pacific Legal 500, IFLR 1000 every year from 2004.

2015-2020 Australian IPOs (issuers advisers) by value



Source: Refinitiv

2015-2020 Australian IPOs (issuers advisers) by deal count



Source: Refinitiv

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

- Dalrymple Bay Infrastructure Limited on its A$1.286 billion IPO and listing with a market capitalisation of A$1.286 billion
- Silk Laser Australia Limited on its A$83.5 million IPO and listing with a market capitalisation of A$162.5 million
- Booktopia Group Limited on its A$43.1 million IPO and listing with a market capitalisation of A$315.8 million
- thedocyard Limited, now named Ansarada Group Limited, on its merger with Ansarada NewCo Pty Limited, together with its A$45 million capital raising and backdoor listing with a market capitalisation of A$131.3 million
- Dusk Group Limited on its A$70 million IPO and listing with a market capitalisation of A$124.5 million
- Top Shelf International Holdings Limited on its A$47.2 million IPO and listing with a market capitalisation of A$109.9 million
- Australian Unity Limited on its inaugural offer of mutual capital instruments to raise approximately A$100 million
- Goldman Sachs Australia Pty Limited on its role as underwriter and lead manager of the A$100.4 million hipages Group Holdings Limited IPO with a market capitalisation of A$318.5 million
- Jarden Australia Pty Limited and Ord Minnett Limited on their role as underwriters and joint lead managers of the A$92.5 million Harmoney Corp Limited IPO with a market capitalisation of A$353.2 million
- Prospa Group Limited on its A$109.6 million IPO and listing with a market capitalisation of A$610 million
- Carbon Revolution Limited on its A$90.1 million IPO and listing with a market capitalisation of A$331.1 million
- Nuchev Limited on its A$48.7 million IPO and listing with a market capitalisation of A$117 million
- Bell Potter and EL&C Baillieu on their role as underwriters and joint lead managers of the A$17.4 million Powerwrap Limited IPO with a market capitalisation of A$72 million
- Bell Potter and Evans Dixon on their role as underwriters and joint lead managers of Terragen Holding Limited's A$20 million IPO and listing with a market capitalisation of A$46.7 million
- Bell Potter on its role as underwriter and lead manager of the A$13 million Quickfee Limited IPO with a market capitalisation of A$32.4 million
- Coronado Global Resources on its A$773 million IPO and listing with a market capitalisation of A$3.87 billion
- Macquarie Capital (Australia) Limited and Canaccord Genuity (Australia) Limited as joint lead managers of Marley Spoon AG's A$70 million IPO and listing with a market capitalisation of A$199.5 million
- New Energy Solar Fund on its A$205 million IPO and listing with a market capitalisation of A$489.5 million
- Netwealth Group Limited on its A$264 million IPO and listing with a market capitalisation of A$879 million
- Moelis Australia Limited on its A$59 million IPO and listing with a market capitalisation of A$294 million
- Inghams Group Limited on its A$596 million IPO and listing with a market capitalisation of A$1.2 billion
- Autosports Group Limited on its A$159 million IPO and listing with a market capitalisation of A$482 million
- Reliance Worldwide Corporation Limited on its A$919 million IPO and listing with a market capitalisation of A$1.3 billion
- Propertylink Group on its A$503.5 million IPO of triple-stapled securities and listing with a market capitalisation of A$536 million
- Frontier Digital Ventures Limited on its A$30 million IPO and listing with a market capitalisation of A$108 million

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