HERBERT
SMITH
FREEHILLS

THE 2016 AUSTRALIAN IPO REVIEW

FROM FLOATING TO SURFING

CONTENTS

INTRODUCTION

It gives us great pleasure to present *From Floating to Surfing: The 2016 Australian IPO Review.*

In this publication we cover:

- the key themes of 2016;
- IPO activity across the Australian market;
- Australian regulatory developments;
- key US securities developments; and
- predictions for 2017.

We trust you will find value in it.

Should you have any questions in relation to IPOs in Australia, please contact our ECM partners.

The Herbert Smith Freehills ECM Team

2016: THE KEY THEMES

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TURBULENT TIMES – VOLATILE MARKETS

2016 will be remembered as the year that the markets did not correctly predict the outcome of key world events.

The results of Britain's vote on whether or not to leave the European Union and the US presidential election were a surprise to many in the investing universe. The outcome of the incorrect forecasting was felt in sharp, although transient, market corrections both in Australia and overseas. The year was also punctuated by other events which created market uncertainty, such as the 2016 Australian federal election.

All of this combined to create challenges for raising capital and pursuing new listings in 2016. While many listings proceeded successfully, we worked on a number of IPOs in the second half of 2016 that have been deferred to 2017.

INVESTORS IN SEARCH OF GROWTH

Despite the turbulence, the persistence of near zero interest rates and low growth globally has had many investors searching for higher returns.

This has been good news for capital markets and is reflected in the over one hundred new listings on ASX in 2016, which is on par with previous years. The number of listings is complemented by the over $8 billion in capital raised in 2016 by IPOs through ASX, or over $7 billion if ASX Foreign Exempt Listings are excluded.

ACTIVE REGULATORS

ASX has implemented significant regulatory reform in 2016 through changes to the ASX admission requirements. The changes include an increase to the profits, net tangible assets and market capitalisation required to meet the threshold tests for listing, and changes to spread and minimum free float requirements. The stated purpose of the changes is to address the requirement for appropriate listing standards and to maintain investor confidence in ASX's market. The subtext is that early stage companies will need to be a little further down the development path before listing.

The Australian Securities and Investments Commission has published a number of reports resulting from market surveillance activities and other reviews. It has reported on marketing practises, sell-side research and corporate advisory and allocation practices, and updated its regulatory guidance on disclosure of historical financial information. It has also undertaken detailed surveillance of IPO due diligence practises (in a survey that found 10 of 12 due diligences reviewed deficient), and made a number of recommendations which are being absorbed by the market and will hopefully result in a more consistent and higher market-standard approach across the board.

SOPHISTICATED ESCROW ARRANGEMENTS FOR PRIVATE EQUITY BACKED IPOs

Escrow by private equity vendors has been a feature of the Australian market for some time.

The focus has shifted from the size of the retained holding to the terms on which the escrow period will end.

2016: THE KEY THEMES

Historically, escrow periods have almost always ended after financial results are released for the period forecast in the prospectus. In 2016 this was certainly the case, but additionally in all but one of the Australian private equity backed listings early release from escrow was also permitted after the release of half-year results for a proportion of the retained holding if there was sustained strong share price performance. The share price performance hurdle for early release from escrow in all cases involved a formulation to the effect of the volume weighted average price of the stock exceeding a premium of 20% to the offer price for 10 consecutive days.

NO THEME AT ALL?

In a post resources boom era it is trite to say that Australia must turn its focus to sectors other than the resources industry. However, our survey indicates that this is already the case – a wide spread of industries were represented at all levels of the market in 2016 (and indeed it now also seems possible that the resources sector may experience a comeback, at least at the smaller end, with recovering commodity prices).

The most widely represented industries for companies listing with a market capitalisation of over $100 million* were diversified financials, food and beverage, real estate (although real estate has lost some lustre in the post-Trump anticipation of a higher interest rate environment), software and services and consumer discretionary sector industries such as retail and automobiles.

*ASX Foreign Exempt Listings, listings that did not raise capital, debt IPOs and demergers excluded.

BACK DOOR LISTINGS

The story not told in the IPO data is the prevalence of so called back door listings in 2016 conducted via reverse takeover of an already listed company.

ASX has updated its policy relating to back door listings, as set out in *ASX Guidance Note 12*. An entity announcing a back door listing transaction must comply with the minimum disclosure requirements set out in Annexure A to *Guidance Note 12*. The changes address market integrity concerns and bring the process for back door listings more in line with conventional listings.

RETURN OF THE DUAL TRACK

Another theme of 2016 was the success of dual track processes, in some cases carried right to the end of the sale process.

This was not always a story that led to listings – in StatePlus, where we acted for the vendor, a highly successful trade outcome was obtained via a competitive process that culminated in a choice for the vendor between multiple fully documented trade bids and a fully underwritten IPO bid. Dual tracks for Good Guys and Moly-Cop similarly resulted in trade sales.

We expect to see more dual tracks in 2017, as they offer vendors the assurance that there will always be at least one competing bid even if only one determined trade buyer comes to their party.

2016: IPOs BY THE NUMBERS

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THE STATE OF THE MARKET

2016 has seen a mix of household names and innovative new businesses successfully list on the ASX. In a year when the Australian capital markets were tested by Brexit, the US presidential election, a federal Australian election and other major Australian and international events, it is impressive that ASX has seen over 100 new listings and over $8 billion in capital raised, or over $7 billion if ASX Foreign Exempt Listings are excluded. However, there were also a number of proposed floats that were instead sold by trade sale, withdrawn or postponed to 2017.

IPO SIZE

2016 was characterised by a wide spread of amounts raised and market capitalisations on listing.

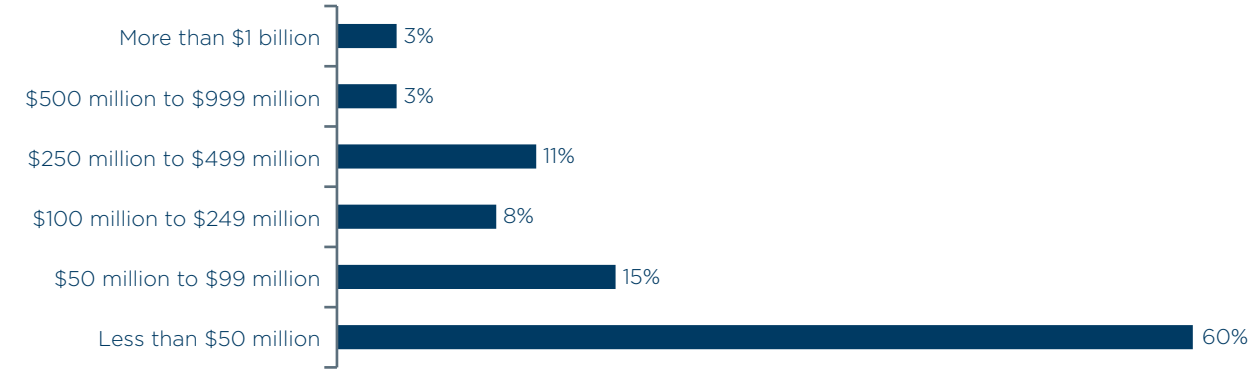
There were few listings approaching or exceeding $1 billion in market capitalisation. The relatively low number of larger listings may be due to the uncertainty created by events such as Brexit and the Australian and US elections, which caused delay or postponement of a number of large IPOs to 2017.

Reliance Worldwide Corporation was the largest ASX IPO of 2016, raising $919 million for a market capitalisation of $1.3 billion, with another of the largest IPOs of 2016 being Inghams Group Limited, raising $596 million for a market capitalisation of $1.2 billion.

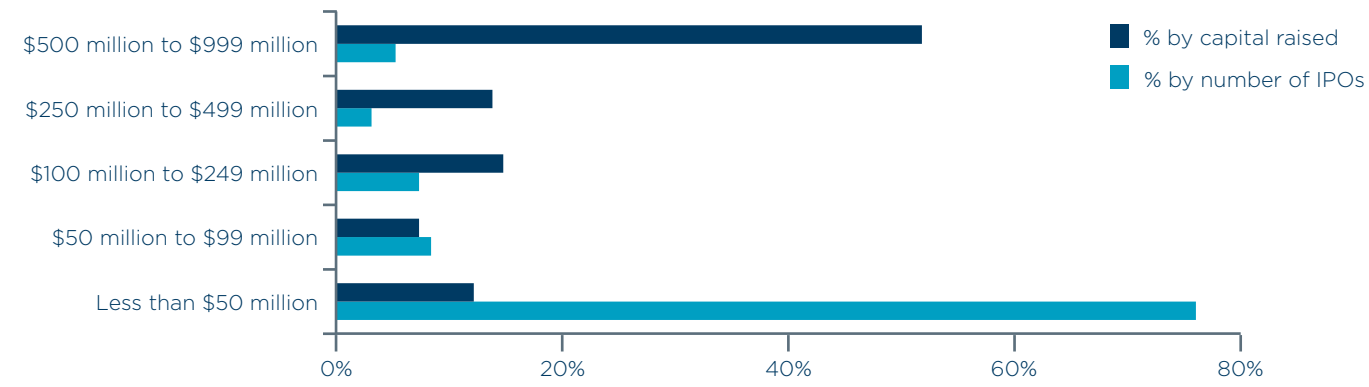
Herbert Smith Freehills acted for Reliance Worldwide Corporation and Inghams Group Limited.

At the other end of the spectrum, there were a large number of mid-market and smaller IPOs. It is unclear whether the higher number of IPOs at the smaller end of the spectrum reflects a number of companies listing before ASX's new admission requirements took effect in December 2016. The changes to ASX's admission requirements are discussed on pages 9-10.

Market capitalisation on listing



Amount of capital raised on listing

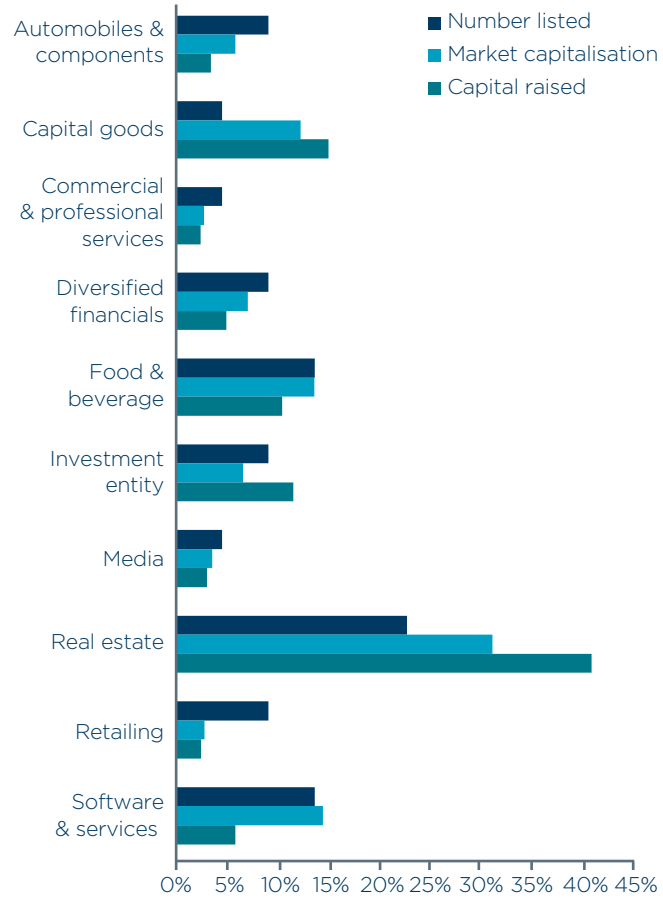


2016: IPOs BY THE NUMBERS

INDUSTRY FOCUS

The listings in 2016 reflected a diverse range of industries. Real estate was the industry winner by market capitalisation and software and services was well in front by number of all 2016 listings. For companies listing with a market capitalisation of over $100 million there were also concentrations of listings in the diversified financials, food and beverage and consumer discretionary (such as retail and automobiles) sectors. A consistent theme across a number of different industries listed in the chart below was that the businesses were focussed on serving consumers in one way or another. However, when all listings irrespective of size are considered, there was otherwise a relatively even spread of a large number of industries represented in addition to those listed above, including numerous listings in the health care equipment and services, investment, materials, metals and mining and pharmaceuticals, biotechnology and life sciences industries.

Top 10 industry sectors for IPOs with a market capitalisation of over $100 million



SECTOR SPOTLIGHTS

REITS

The highest volume of capital raised was for real estate investment trusts (**REITs**). The focus of the REITs ranged from the familiar office assets and industrial properties to service station sites and property developments in China. Viva Energy REIT was the largest raising in the sector and holds a portfolio of service station sites.

FOOD AND BEVERAGE

The listings in the food and beverage sector were mostly for packaged foods and meats. If ASX Foreign Exempt Listings are also taken into account, almost half of 2016's private equity backed listings were represented in this sector. These included the sell-down by TPG of some of its interest in Inghams Group and the Affinity Equity Partners sell-down of some of its interest in Tegel Group Holdings. The other theme in the food and beverage sector was agricultural products companies with a connection to China, such as China Dairy Corporation.

SOFTWARE AND SERVICES

Approximately one in five of all successful IPOs in the 2016 calendar year have been for software and services companies, with by far more listings in this sector than any other. However, the majority of the software listings were for small to mid-cap companies. These companies were primarily involved in payment technologies and platforms, internet security solutions, recruitment services and online retail financial services businesses.

MATERIALS, METALS AND MINING

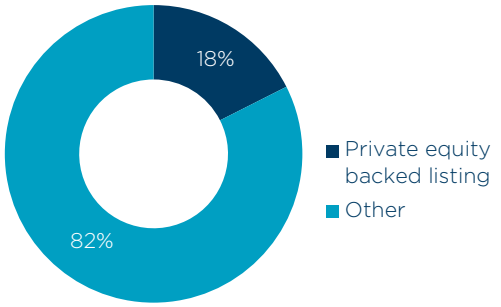
There was a clear connection between the relative size of the floats and the industries represented. IPOs in the materials, metals and mining sectors were the second most prevalent of all IPOs in 2016, but not represented in the top ten industry sectors for IPOs with a market capitalisation of over $100 million. Around two thirds of the materials, metals and mining IPOs were for exploration companies and most of those were for gold exploration projects.

PRIVATE EQUITY BACKED IPOs

The most prominent IPOs involving private equity vendors in 2016 were for Inghams Group Limited (packaged foods), GTN Limited (media), Scottish Pacific Limited (diversified financials), and Bravura Solutions Limited (IT consulting and other software services).

While the number of private equity backed listings for 2016 is low, the value raised is proportionately high – almost 20% of capital raised through IPOs in 2016 was from private equity backed listings.

Proportion of capital raised by private equity backed listings



GEOGRAPHIC SPREAD

A significant number of the 2016 listings were for foreign domiciled companies or companies with overseas operations.

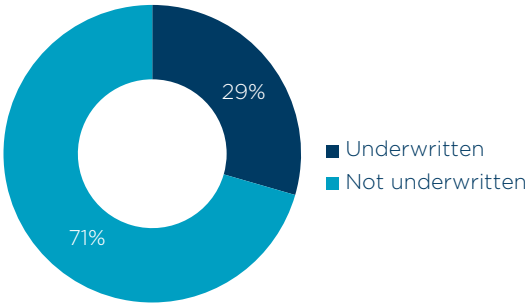
A number of these had Asian focussed operations, such as diversified financials company Ding Sheng Xin Finance Co Limited, agricultural products company China Dairy Corporation Limited, real estate development company Boyuan Holdings Limited, crowdfunding platform Coassets Limited and online classifieds for emerging markets business Frontier Digital Ventures Limited.

UNDERWRITING

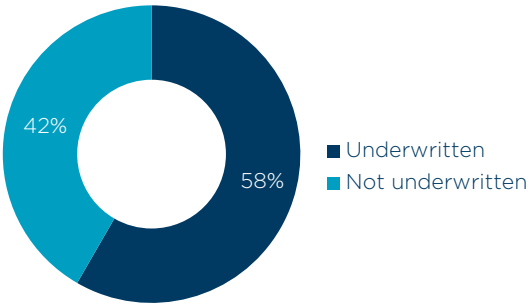
Slightly less than a third of IPOs in 2016 were underwritten. The proportion rises to over half for companies listing with a market capitalisation of over $100 million. The vast majority of underwritten IPOs were fully underwritten.

Where IPOs were not underwritten it was frequently the case that there was a stated minimum amount of funds to be raised before the company would proceed with the IPO.

Number of all IPOs underwritten vs not underwritten



Number of IPOs underwritten vs not underwritten with a market capitalisation of over $100 million on listing



Note on methodology: All data in this '2016: IPOs by the numbers' section excludes ASX Foreign Exempt Listings, listings that did not raise capital, debt IPOs and demergers unless otherwise stated. Market capitalisation is based on the issue price of securities multiplied by the number of quoted securities.

REGULATORY DEVELOPMENTS

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2016 has been another year of regulatory change initiated by Australia's front line market regulators – ASIC and ASX. Whilst ASIC found that "equity market cleanliness", which is an indicator of market integrity, has improved over the last 10 years (see *ASIC Report 487 – Review of Australian Equity Market Cleanliness*, August 2016), there is still room for further improvement, particularly in the areas of IPOs and IPO related activities. Key areas of regulatory focus include improving due diligence practices and disclosure, handling confidential information and conflicts of interest as well as enhancing listing standards and market rules in line with international best practice. We expect that ASIC and ASX will continue to focus on these issues as they seek to encourage further improvements in the quality of the IPOs being brought to the market.

ASIC

During 2016, ASIC continued its proactive approach to investigating and consulting on an array of market integrity issues relating to IPOs and IPO related activities. ASIC's key focuses include improving the quality and rigour of the due diligence processes for IPOs, improving the quality and quantity of disclosure provided to investors, including information provided in prospectuses as well as information provided as part of IPO marketing, and improving the handling of confidential information and conflicts of interests by investment banks and brokers. ASIC's key findings are briefly outlined below.

IPO due diligence practices

The quality and rigour of the due diligence processes and practices employed by issuers and their advisers in connection with IPOs has been a key area of focus for ASIC. In 2016, ASIC reviewed the due diligence processes of 12 IPOs to gain further insight into the due diligence practices employed by issuers in both large scale and small scale IPOs and identified a connection between inadequate due diligence processes and defective prospectus disclosure (see *ASIC Report 484 - Due diligence practices in IPOs*, July 2016).

ASIC found that: larger issuers tend to conduct more thorough due diligence than smaller issuers; some issuers refer to checklists and templates without considering issuer-specific matters; directors often fail to properly participate in the process or to consider the accuracy of statements in the prospectus; the content or quality of foreign advice is often not properly considered; the standard of diligence conducted by legal advisers is less consistent than that of investigating accountants; and issuers that prioritise reducing costs at the expense of the due diligence process are at a greater risk of producing a poor prospectus and attracting consequential liability.

ASIC recommends that issuers (including their directors) and their advisers engage in a dedicated and coordinated due diligence process conducted with rigour and independent mindedness, keep a record of all issues arising during the process and their resolution, verify all material statements in the prospectus and continue due diligence throughout the offer period to ensure the prospectus remains accurate.

Updated RG228 guidance on historical financial information disclosures

The quality and quantity of the disclosure provided to investors in IPO prospectuses has been another key focus for ASIC for a number of years. In recent years, ASIC has had a particular focus on the quality and quantity of the financial disclosure in prospectuses. In 2016, ASIC updated its guidance aimed at improving the quality and quantity of historical financial information disclosure in prospectuses (see updated *ASIC Regulatory Guide 228*, November 2016). Broadly, the updated guidance reflects the positions adopted by ASIC in its review of IPO prospectuses since the re-opening of the IPO window in 2013.

Companies will generally need to disclose consolidated audited financial information (income statement, statement of cash flows etc) for at least the three most recent financial years (or two years of audited financial information and a half year of reviewed information, depending on the date of the prospectus) for the company's business.

Companies should also disclose audited financial information on any significant business (25% of the company's revenue, income, assets or equity) that is acquired in the previous 12 months, will be acquired around lodgement or is contingent on the offer.

Exceptions to this general requirement operate where this information is not relevant to making an informed assessment on the company's financial position, or it would not be reasonable to expect disclosure of such information. For example, where the company's main business has undergone major change, backdoor listings, roll up listings and immaterial acquisitions. In these instances, reviewed financial information, information subject to a modified audit opinion or information in respect of less than 2 and a half years may be acceptable.

IPO marketing practices

In addition to the prospectus, the IPO marketing materials are important documents used by issuers and their advisers to sell an IPO to investors. As such, ASIC's focus on the quality and quantity of information provided to investors has included an investigation of the nature and content of IPO marketing. In 2016, ASIC reviewed the marketing practices and materials of 23 IPOs and released a report containing its observations and recommendations in relation to IPO marketing (see *ASIC Report 494 – Marketing practices in initial public offerings of securities*, September 2016). The focus of this review was marketing to retail investors.

ASIC's key observations and recommendations are: firms should use standardised scripts for phone marketing, and ensure records are kept; marketing should be based on the merits of the particular IPO, not by analogy to previous IPOs; firms and issuers should not give undue weight to forecast information; the content of social media marketing and promotional videos should be accurate, not misleading and consistent with the prospectus; roadshows should be limited to Australian financial services licensees; and information about the offer should not be provided to the media before the prospectus is lodged.

Mishandling of confidential information and conflicts of interest by sell side research and corporate advisory

Another area of focus for ASIC in 2016 has been improving practices and processes implemented by investment banks and brokers in relation to the handling of confidential information and the management of conflicts. An ASIC inquiry into the handling of confidential information and conflicts of interest has found that investment banks and brokers have been inconsistently applying their own internal policies and procedures that are in place for dealing with these risks (see *ASIC Report 486 – Sell-side research and corporate advisory: Confidential information and conflicts*, August 2016).

ASIC found considerable variation in how conflicts of interest are managed, including the level of separation between research and corporate advisory activities, controls to manage staff trading, and arrangements to identify and handle situations where staff members come into possession of confidential information.

ASIC expressed particular interest in practices such as analysts passing on price sensitive information to sales desks, research divisions being cross-subsidised by corporate advisory divisions based on their contribution to revenue and companies placing indirect pressure on firms by incentivising them to produce favourable research coverage.

ASIC has encouraged firms to review their internal controls and the way they are applied and enforced in practice given that inappropriate handling of confidential information and conflicts risk breaches of financial services law, including insider trading, market manipulation, misleading and deceptive conduct and breaches of obligations owed by Australian financial services licensees.

ASX

Consistent with ASIC's approach discussed above, ASX has also introduced changes designed to enhance listing standards as well as to improve the disclosure provided by issuers to the market. Many of the changes introduced by ASX mirror changes introduced by ASIC (for example, enhanced audited accounts requirements). The move to T+2 settlement is aimed at improving market efficiencies and reducing settlement risk in line with international best practice. The key changes are briefly outlined below.

T+2 settlement introduced

As of 7 March 2016, financial products including shares, units, bonds, hybrids, CDIs, exchange-traded products and warrants traded on a securities market in Australia now settle through CHESS one business day earlier on the second business day after the trade ("T+2" settlement).

In conjunction with this move, ASX has also shortened the period between the ex-date and the record date for certain corporate actions including dividends/distributions, entitlement offers and bonus offers. This ensures that trades conducted on a 'cum' basis will settle on or before the record date.

The change was aimed at improving market efficiencies (including capital and margin savings), lowering systemic market risk by reducing counterparty risk, and ensuring Australia remains globally competitive and aligned to best practice. T+2 settlement already operates in major financial markets such as Europe and Hong Kong, with the United States and Canada proposing to transition in 2017. The NZX and Australian Financial Markets Association (for Australian fixed income products) have also moved to T+2 settlement.

ASX updates its admission requirements

In November 2016, ASX released a suite of updates to its admission rules and guidance. These updates came into force on 19 December 2016. The amendments are designed to ensure that the Australian market remains robust, reputable and internationally competitive by maintaining appropriate listing standards. The key changes are:

- **Profits test threshold increase** – entities applying under the profits test are now required to have $500,000 of consolidated profit from continuing operations for the 12 months prior to applying for admission (up from $400,000).
- **Assets test thresholds increase** – entities applying under the assets test are now required to have net tangible assets of at least $4 million (up from $3 million), or a market capitalisation of at least $15 million (up from $10 million). These increases aim to foster investor confidence that the entity has sufficient resources on listing to carry on its business for a reasonable period of time.
- **Assets test historical accounts requirement** – entities applying under the assets test must give ASX audited accounts for the last two full financial years (or two and a half years, depending on the application timing) for the entity itself and for any significant entity or business it has acquired in the last 12 months or that it is proposing to acquire in connection with listing. This change aims to provide sufficient financial information for investors, balanced against the significant time and costs associated with preparing audited historical accounts (see also *ASX Guidance Note 1* and *ASIC Regulatory Guide 228*).
- **Minimum free float requirement** – ASX has formalised the minimum free float requirement that it has been imposing on recent listing candidates by requiring entities to have a minimum free float of 20%. Free float securities are those held by non-affiliated security holders and that are not subject to mandatory or voluntary escrow. The free float requirement is aimed at secondary market liquidity.
- **Single spread test** – there is now a single tier spread test requiring entities to have at least 300 security holders, each holding at least $2,000 of securities. This ensures there is sufficient investor interest to warrant listing and to ensure some level of liquidity at the time of listing. The previous three-tiered test had the dual purpose of ensuring liquidity post-listing, which is now addressed by the new free-float requirement. ASX publicly consulted on a new spread test with a reduced security holder requirement but increased parcel size, but decided against implementing such a proposal following the consultation process.
- **Standardising the $1.5 million working capital requirement for those entities admitted under the assets test** – all entities applying for admission under the assets test must now meet the same working capital requirement. The test must now be met after allowing for the first year's budgeted administration costs and the cost of acquiring certain assets (to the extent those costs are to be met out of working capital) – previously, this limb of the requirement only applied to mining and oil and gas exploration entities. The objective of this requirement is to provide greater certainty to investors as to the minimum level of working capital available to an entity at the time of listing.

ASX has also updated its policy relating to backdoor listings, as set out in *ASX Guidance Note 12*. An entity announcing a backdoor listing transaction must comply with the minimum disclosure requirements set out in Annexure A to *Guidance Note 12*. If those requirements are not met, the entity's securities will be suspended and will only re-commence trading once the entity releases a supplementary announcement that meets the requirements, or the entity re-complies with ASX's admission requirements, or announces that the transaction is no longer proceeding. The changes address market integrity concerns and bring the process for backdoor listings more in line with conventional listings.

KEY US SECURITIES DEVELOPMENTS

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The US capital markets remain an important source of funds for Australian companies and in particular the larger Australian IPOs. Our US securities law practice has allowed us to act on both the Australian and US aspects of a number of IPOs and capital raisings in 2016 to the benefit of both our issuer and underwriter clients.

Access to the US capital markets will continue to be important in 2017. Developments in US securities laws have significant impacts on global execution practices, both on SEC registered offerings and offerings exempt from SEC registration (eg Rule 144A offerings and private placements). This includes Australian companies that access the US capital markets through Australian IPOs open to US institutional investors, exempt secondary equity offerings and offerings of debt and convertible securities, in addition to US listings and SEC registrations.

In 2016 improving disclosure has been one of the key areas of regulatory focus of the US Securities and Exchange Commission (SEC). We expect that the SEC will continue to focus on this area as it seeks to encourage further improvements in the quality of disclosure. The SEC staff have also issued new guidance on the definitions of "foreign private issuer" and "US person" which enables foreign companies that are closely associated with the United States to evaluate with precision their foreign private issuer status. We have also seen circumstances where the Volcker rules create traps for those unwary "covered funds".

KEY US SECURITIES REGULATORY DEVELOPMENTS

WALL STREET LAWYER JAY CLAYTON NOMINATED TO HEAD THE SEC

On 4 January 2017, Donald Trump nominated Jay Clayton as the new chairman of the SEC. Mr Clayton is a partner in a leading Wall Street law firm, whose practice is primarily focussed on public and private mergers and acquisitions transactions and international securities offerings. Mr Clayton's appointment is contingent on a Senate confirmation vote. In addition to Mr Clayton, Mr Trump will have a chance to name two of the other four commissioners of the SEC. During the tenure of current SEC Chair Mary Jo White, the SEC has brought a record number of enforcement actions. In addition, the SEC was involved in significant rule making, including implementing rules mandated by the Dodd-Frank Wall Street reform law and the JOBS Act, a 2012 law designed to help start-ups.

The nomination of Mr Clayton is being seen as a signal that the SEC will try to reduce regulations that critics see as burdensome or hindering corporate growth. Mr Clayton is expected to help usher in a period of deregulation, including rolling back parts of the Dodd-Frank Act, the source of many of the rules restricting bank operations that have generated significant opposition from corners of the financial industry.

Our take

Specific plans under the Trump presidency with respect to financial regulation remain subject to speculation. The focus of the SEC may shift from enforcement to encouraging capital formation and easing fund-raising efforts by companies, including foreign private issuers.

SEC RELEASES NEW GUIDANCE ON NON-GAAP FINANCIAL MEASURES

In May 2016, the SEC staff issued new Compliance & Disclosure Interpretations (C&DIs) that update and re-emphasize staff interpretive guidance when reviewing the use of "non-GAAP" financial measures (eg underlying profit, EBITDA, OIBDA) in registration statements and reports filed with or furnished to the SEC. The European Securities and Markets Authority published corresponding guidelines in July 2016 on what it calls "Alternative Performance Measures" (APMs) in a clear indication that whether non-GAAP financial measures are potentially misleading to investors is moving up the regulatory agenda in several jurisdictions – this has been an issue of note with ASIC for some time. No SEC rules have changed as a result of the updated staff guidance, but the staff are applying the guidance in the C&DIs in a range of comment letters to SEC registrants, including high-profile companies.

Our take

When the original rules on the use of non-GAAP financial measures were enacted at the time of the Sarbanes Oxley Act of 2002, we saw that, although limited by their terms to SEC registrants and SEC-registered offerings, the rules and guidance were quickly integrated into "best" disclosure practices, including in the Rule 144A (unregistered) market. We expect this to be the case with the new guidance too, as the guidance generally focuses on areas where the staff are most concerned about abuse and the potential for disclosure to be misleading. Following the guidance enables users to properly assess the information and it is also less likely to be misleading. We have often seen Australian issuers use non-GAAP measures in their offering documents and results releases. We are encouraging Australian issuers into the US to evaluate their non-GAAP presentations, including descriptions of and language accompanying the non-GAAP financial measures, and consider in light of the updated guidance, whether their non-GAAP presentations should be modified or further elaborated on.

SEC STAFF REPORT ON DISCLOSURE SIMPLIFICATION

In November 2016, the SEC staff issued a report to Congress on its proposed revisions to the US securities disclosure regime as it was mandated to do most recently by the Fixing America's Surface Transportation Act (the overwhelming content of which, as its name implies, had nothing to do with the securities laws). The aim of this effort (ongoing since 2012) is to simplify the disclosure process for companies faced with confusing and often duplicative requirements under Regulation S-K, the main regulation governing the non-financial statement portions of offering documents in registered public offerings by domestic US companies. The proposed changes set forth in the report are currently open for public comment, with proposed rulemaking required to follow within 360 days.

Our take

It's a long way from 1933 - the year the US Securities Act of 1933 was enacted. To date, the approach of many regulators, including the SEC, has been to add new disclosure requirements to the regulatory scheme, but not to hold existing requirements up to scrutiny and cut them back if they are not (or are no longer) fit for purpose. There are many simplifications (eg elimination of duplication, or uninformative and immaterial items) that are welcome but are "evolution, not revolution". More important is whether the disclosure framework can evolve to a "less is more" model, focussing on materiality as the key threshold, with understandable and digestible text from management focussing on strategy and key drivers in the business, and a greater encouragement of the use of forward-looking information. This may mean more senior management and fewer

lawyers involved in the drafting! We expect the simplifications will also impact unregistered offerings by Australian issuers as a Rule 144A offering memorandum generally includes information substantially similar to a prospectus in an underwritten SEC-registered offering.

VOLCKER RULE: TRAPS FOR UNWARY "COVERED FUNDS"

An investment fund that is organised outside the United States and whose securities are offered and sold solely outside the United States will not be a covered fund with respect to a non-US bank. US banks, however, cannot (subject to certain exceptions) sponsor or hold an equity interest in a "covered fund" that would have relied on a 3(c)(1) or 3(c)(7) US Investment Act of 1940 registration exemption if it had raised money from US investors, even if the fund is organised outside the United States and actually only offers its securities in a Regulation S-only deal. US banks may only sponsor or hold an equity interest in such a fund if the fund could avail itself of another exemption from Investment Company Act registration.

A US bank can take an ownership interest in a covered fund in its capacity as an underwriter but must set aside capital and undertake reasonable efforts to sell the underwriting position within a reasonable time.

Our take

This is a trap for the unwary as the United States will rarely feature prominently as a jurisdiction where significant legal issues should be presented in this transaction structure. Early planning is required to ascertain whether other US Investment Company Act exemptions are available or other exemptions to the definition of "covered fund" may be available, particularly the "foreign public fund" exemption under the Volcker Rule in a public offer in the home jurisdiction. Practice is evolving rapidly, including disclosure practices for documented and undocumented offerings, and the rules are not well adapted to the situations where they must be applied.

AMONG PRIVATE ISSUERS, WHO IS FOREIGN AND WHO IS NOT?

The SEC staff have also recently been busy issuing further C&DIs that relate to cross border securities practice. Among other interpretations, the new guidance published on 8 December 2016 gives greater certainty around who constitutes a "foreign private issuer" and a "US person" under US securities laws. It also provides (just in time for Brexit) that the European Union is largely one single country for certain purposes under the securities laws including Regulation S (the securities law exemption for sales of securities outside the United States) offerings.

Companies that qualify as a "foreign private issuer" benefit from many special exemptions under US securities laws. Among other things, foreign private issuers are not required to file quarterly reports, are exempt from beneficial ownership reporting and short swing profit rules, are exempt from the US proxy rules, benefit from relaxed tender offer rules, are not subject to the detailed compensation disclosure rules, can file financial statements prepared in accordance with IFRS as adopted by the International Accounting Standards Board or, if reconciled to US GAAP, local GAAP or non-IASB IFRS, are exempt from Regulation FD, and have a later deadline to file their annual report (on Form 20-F) than US domestic companies. In addition, Regulation S provides greater flexibility in some aspects for foreign private issuers compared to US domestic issuers.

Our take

The interpretations of the foreign private issuer and US person definitions should be particularly helpful. Companies with US owners often face questions as to who constitutes a US resident shareholder, which senior management are US residents, where assets are located and the location from which a business is administered. Interpretations to date have tended to be ad hoc and articulated in various SEC comment letters. Any foreign company that claims foreign private issuer status must be able to support that determination should the staff question that determination. The consequences of getting this wrong are high, as foreign companies might otherwise be subject to the US regulatory regime for domestic companies.

2017 PREDICTIONS

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IMPACT OF BREXIT, US ELECTION AND CHINA ON THE MARKETS

IPO activity is expected to kick off in the first half of 2017 after a slowdown in late 2016. Activity across global markets is expected to pick up amid hopes of substantial fiscal stimulus under the Trump administration and less regulatory intervention. In China, sector-led growth and central government policies to curb slow economic growth is expected to encourage IPO activity in the Asia Pacific.

On the flip side, Britain's exit from the European Union and uncertainty around the new US administration's policies may contribute to a volatile environment for capital raising in 2017.

Confidence in capital raising in Australia, particularly in the larger Australian IPOs, which require overseas funds, will depend on the success of the global capital markets.

We should know the answers by March/April 2017.

BACKED UP 2016 IPOs

A number of IPOs delayed from the second half of 2016 are likely to occur in the first half of 2017. These IPOs should contribute to renewed confidence in the IPO markets. Alinta Energy's $2 billion float is tipped for the first half of this year.

PE EXITS

We are likely to see increasing sophistication in escrow formulations for private-equity backed IPOs in 2017, continuing a trend from 2016.

INCREASED REGULATORY INTEREST

ASIC is expected to continue its proactive approach to investigating and consulting on issues relating to IPOs, with a particular focus on disclosure of historical financial information following the update to the regulatory guide on prospectuses in late 2016 (see page 8). The use of non-IFRS accounting measures by listed companies to explain their performance to the market, which is supported by the accounting industry, will continue to be a point of contention between ASIC and the accounting industry.

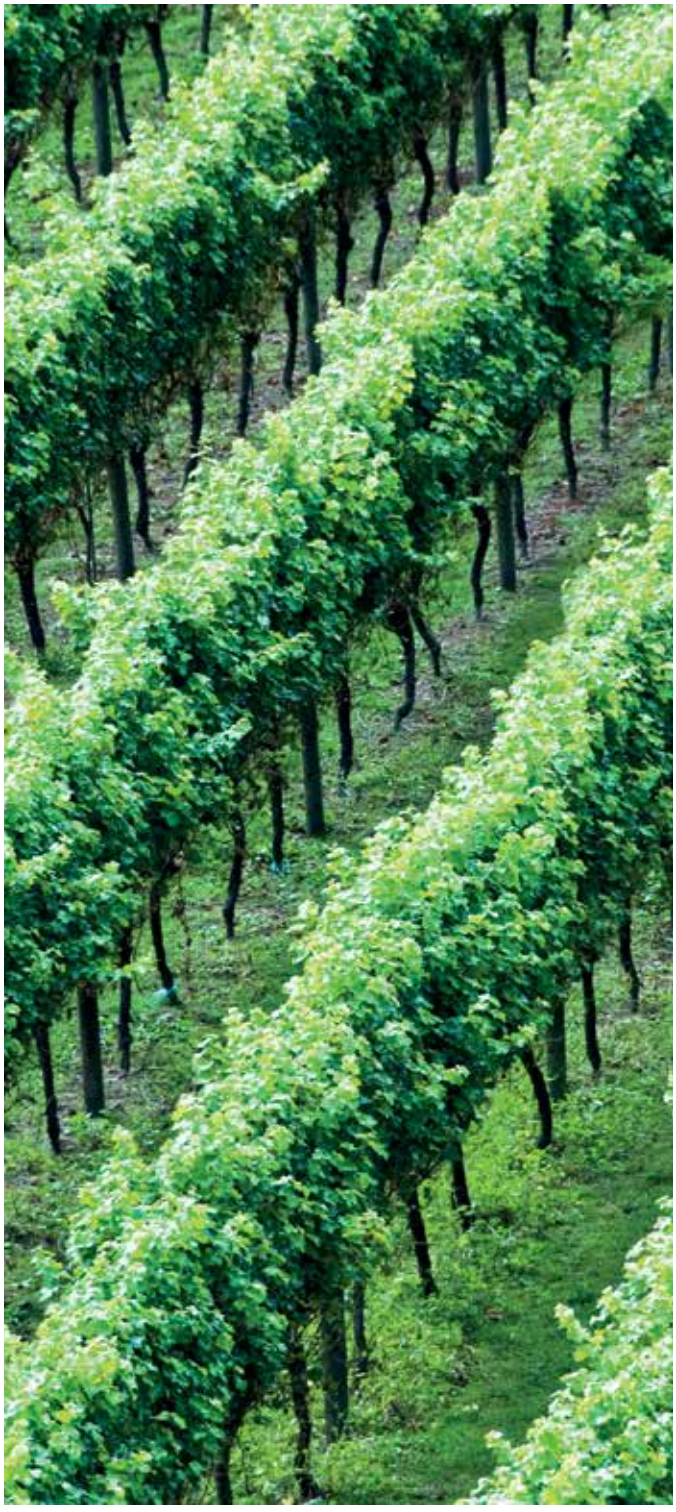
HOT IPO INDUSTRIES

IPOs in technology, diversified financials, healthcare, manufacturing, consumer discretionary, agriculture and food and beverage, as well as corporate divestments are likely to be the main sources of large IPOs in 2017. Floats from these industries are expected to attract broad investor interest due to the solid performances of 2016 ASX debuts WiseTech Global, Afterpay Holdings, Noxopharm, Oneview Healthcare and Abundant Produce.

Infrastructure and larger mining companies are expected to remain relatively quiet in the IPO space.

UPCOMING FLOATS

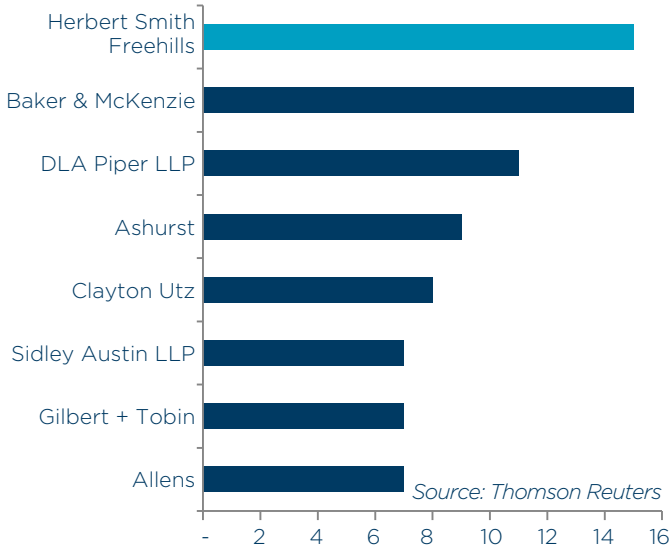
In addition to Alinta Energy's proposed IPO in the first half of 2017, Origin Energy's proposed float of its gas and oil businesses and the sale of Crown Resorts' 49 per cent interest in its Australian hotels business have been confirmed for 2017. Also on the radar is the Western Australian government's proposed sale of its controlling stake in Western Power, which is expected to raise about $11 billion. Latitude Finance, formerly GE Capital's Australian consumer unit, is slated for IPO in 2017, as are private equity-backed companies Zip Industries and Accolade Wines.



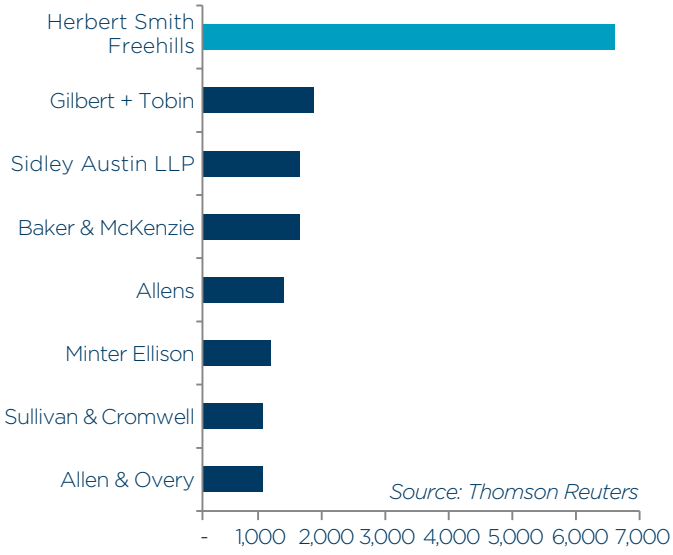
ABOUT HERBERT SMITH FREEHILLS

Herbert Smith Freehills is recognised as Australia's leading law firm for IPOs by value, and we have acted on more IPOs since 1998 than any other top tier law firm (according to Connect 4). In 2016, we were ranked the number one legal adviser for IPO issuers in Australia (Thomson Reuters). Described as 'unmatched in quality as they have a team of giants' (IFLR 1000), 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 and PLC Which Lawyer? every year from 2004. For the 2016 year, Herbert Smith Freehills' capital markets team is Australia's number one equity capital markets team by deal count and deal value (Thomson Reuters 2016 – Equity & equity-related, Issuer Advisors).

2016 Australian Equity (Issuer Advisers) by deal count



2016 Australian Equity (Issuer Advisers) by value



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

- the Australian Government on Medibank Private's $5.9 billion IPO
- Reliance Worldwide Corporation Limited on its $919 million IPO and listing with a market capitalisation of $1.3 billion
- Inghams Group Limited on its $596 million IPO and listing with a market capitalisation of $1.2 billion
- Aventus Retail Property Fund on its $303 million IPO and listing with a market capitalisation of $687 million
- Propertylink Group on its $503.5 million IPO of triple-stapled securities and listing with a market capitalisation of $536 million
- Murray Goulburn on the establishment and listing on ASX of the MG Unit Trust and its $500 million capital raising
- Gateway Lifestyle Group in relation to its pre-IPO restructure and consolidation, and aspects of its $500 million IPO
- Autosports Group Limited on its $159 million IPO and listing with a market capitalisation of $482 million
- Pepper Group Limited on its $145 million IPO and listing with a market capitalisation of $471 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
- Australian Finance Group in connection with the $122 million IPO and listing with a market capitalisation of $258 million
- IVE Group Limited on its $76 million IPO and listing with a market capitalisation of $178 million
- Mitula Group Limited its $27 million IPO and listing with a market capitalisation of $154 million
- Frontier Digital Ventures Limited on its $30 million IPO and listing with a market capitalisation of $108 million
- Shriro Holdings Limited on its $50 million IPO and listing with a market capitalisation of $95 million

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