

# ASIC Digs Deeper into Mining IPOs: New Recommendations for Directors and Lead Managers

## Overview

- ASIC has conducted an investigation into mining company initial public offerings (IPOs) and has found there to be substandard disclosure and conflicts of interest, with the conduct of lead managers and company directors coming under particular scrutiny.
- ASIC has released better practice recommendations, in a recent Report, which apply from pre-IPO stages through to after a company has listed.
- ASIC will be monitoring all companies conducting IPOs for compliance with these recommendations, not just mining companies.
- Companies and their advisors should seek legal advice as early as possible in the IPO process to ensure compliance with ASIC's recommendations.

## Background

The mining and exploration industry in Australia represents over 25% of all ASX-listed entities, with a combined market capitalisation of over \$300 billion. Given its significant contribution to Australia's capital markets, it comes as no surprise that ASIC has focussed on IPO conduct in the mining industry, with ASIC investigating a number of mining IPOs conducted between 2016 and 2018, with a particular focus on transactions raising less than \$20 million.

Following its investigation, ASIC released its Report 641, "*An inside look at mining and exploration initial public offers*", on 5 December 2019 (**Report**). The Report revealed a number of concerns with the conduct of directors, companies, and in particular, their lead managers, throughout each stage of the IPO process. Most of ASIC's concerns stemmed from:

- the level of control that lead managers and corporate advisors seemingly have over the IPO process;
- the lack of disclosure provided to investors generally;
- substandard compliance controls; and
- poor management of conflicts of interest concerning lead managers and corporate advisors.

In response to these concerns, ASIC's Report sets out 'better practice recommendations' to reduce the risks of misconduct and harm to investors.

As many of the concerns revealed in ASIC's Report were not necessarily specific to the mining and exploration industry, ASIC has publicly stated that their focus will not be limited to prospectuses lodged by mining companies, meaning that all companies that are considering an IPO should be familiar with the recommendations in this Report.

## ASIC's concerns and recommendations

ASIC's investigation focussed on conduct at each stage of the mining IPO process: IPO transaction origination, pre-IPO activities, the IPO, and post-IPO activities. A summary of the key findings from the investigation, together with ASIC's better practice recommendations, are set out in the table below.

	Investigation Findings	Recommendations
<b>IPO Transaction Origination</b>	<ul style="list-style-type: none"> <li>• Directors may not be independent and sometimes take on multiple roles (ie as lead manager and corporate advisor)</li> <li>• Speculative nature of an investment in exploration mineral assets means the industry is at higher risk of being targeted by professional advisers seeking to generate a pipeline of fees</li> </ul>	<ul style="list-style-type: none"> <li>• Companies need to implement robust conflict management processes, directors need to be aware of their duties, and the interests of the company need to be kept separate from the interests of promoters</li> <li>• Nature of involvement of lead managers and advisers in transaction origination should be disclosed</li> </ul>
<b>Pre-IPO</b>	<ul style="list-style-type: none"> <li>• Lead manager mandates are often drafted in vague terms and activities can give rise to conflicts</li> <li>• Seed funding can be selectively used as an opportunity for lead managers to increase benefits and returns of the overall IPO process</li> <li>• Promotional materials used are often inconsistent with prospectuses</li> </ul>	<ul style="list-style-type: none"> <li>• Lead manager mandates should clearly identify the lead manager's obligations and responsibilities</li> <li>• Conflicts and aggregate fees of lead managers to be clearly disclosed in their mandate</li> <li>• Directors to carefully review allocations of seed funding</li> <li>• Promotional materials must be consistent with prospectus</li> </ul>
<b>IPO</b>	<ul style="list-style-type: none"> <li>• Lead managers often allocate IPO shares to their networks, with the understanding that those investors will act in accordance with the lead manager's expectations after listing</li> <li>• Lead manager's promotional strategies can result in little exposure of IPO to retail investors, motivating methods to "manufacture" shareholder spread</li> </ul>	<ul style="list-style-type: none"> <li>• Lead managers should ensure share allocation policies are fair and minimise conflicts</li> <li>• Directors should discuss strategy to meet spread with lead managers and understand how commitment process will be managed to ensure fair allocation</li> </ul>
<b>Post-IPO</b>	<ul style="list-style-type: none"> <li>• Short-term perspective of some investors and advisers may affect how exploration programs described in prospectus are delivered</li> </ul>	<ul style="list-style-type: none"> <li>• Directors to clearly communicate share allocation preferences to lead manager</li> <li>• Lead managers to take care to identify investors with long-term investment interests</li> </ul>

### Advice for companies and corporate advisors considering an IPO

ASIC will be actively monitoring companies and their lead managers to ensure that the better practice recommendations are implemented.

Companies and their corporate advisors should carefully review ASIC's Report and ASX Guidance Note 1. They should also obtain legal advice as early as possible in the process to ensure that they adhere to ASIC's and ASX's recommendations.

If you are considering conducting an IPO or a capital raising, or are otherwise seeking advice on the issues that may arise in relation to such a transaction more generally, please don't hesitate to contact [Tom Morgan](#) from our Corporate and Commercial Team.

*The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.*