

Article Information

Authors: James Macdonald, Christopher Lyons, Moustafa Afyouni
Service: Capital Markets & Capital Raisings, Corporate & Commercial

ASIC extends Chapter 6 relief to voluntary escrow arrangements

On 26 August 2020, the Australian Securities and Investments Commission (ASIC) issued ASIC Corporations (Amendment) Instrument 2020/721 to amend ASIC Class Order 13/520.

The amendments provide relief to public companies, professional underwriters and lead managers in connection with voluntary escrow arrangements in IPOs. Previously, voluntary escrow arrangements could result in a company obtaining a relevant interest in its own securities. Where that relevant interest exceeded 20%, listing entities would need to seek individual bespoke relief from ASIC.

Following the amendment to ASIC Class Order 13/520, persons will no longer have a relevant interest in securities merely because those securities are placed in eligible voluntary escrow arrangements.

The amendment follows the release of Consultation Paper 328 *Initial public offers: Relief for voluntary escrow arrangements and pre-prospectus communications (CP 328)* in which ASIC recognised the significant costs and administrative hurdles faced by companies when applying for individual relief to enter into voluntary escrow arrangements with security holders when considering an IPO, to avoid a contravention of section 606 of the *Corporations Act 2001* (Cth).

Relief will be available to public companies, professional underwriters and lead managers where the following two conditions are satisfied:

- the escrow securities are in the same class of securities being offered under the IPO; and
- the escrow arrangement:
 - does not restrict the exercise of voting rights attached to the escrow securities;
 - allows the holder of escrow securities to accept into a successful takeover bid and allows the escrow securities to be transferred or cancelled as part of a merger by way of a compromise or scheme of arrangement;
 - terminates no later than:
 - the first anniversary of the date that the parties enter into the voluntary escrow for an escrow arrangement with an underwriter or lead manager; or
 - the second anniversary of the date that the parties enter into the escrow arrangement with the public company;
 - where the holder of escrow securities is permitted to create a security interest in some or all of those securities, requires that the holder must not create a security interest in favour of a person, unless that person has agreed in writing to acquire the securities subject to the terms of the escrow arrangement; and
 - where the holder of escrow securities is permitted to transfer their interests in the escrow securities to another person, requires that the holder must not transfer the escrow securities if the transfer would result in a change in beneficial ownership of the escrow securities, result in an extension in the period of the escrow agreement or the transferee does not agree to be subject to the same disposal restrictions under the escrow agreement.

Where the requirements in ASIC Class Order 13/520 are not met in relation to a voluntary escrow arrangement, ASIC will continue to consider applications for individual relief on a case-by-case basis.