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2 May 2025

Australian Securities and Investments Commission
GPO Box 9827
Melbourne VIC 3001

Email: markets.consultation@asic.gov.au

Dear Sirs,

RE: Australia's evolving capital markets: A discussion paper on the dynamics between public and private markets (Discussion Paper)

Who we are

A national membership association, Governance Institute of Australia (Governance Institute) advocates for governance and risk management professionals, providing community and support to over 7,500 members.

As an Institute of Higher Education, the Governance Academy provides practical training and expert insights, equipping professionals with the tools to excel in their roles and drive better decision-making in their organisations.

Our members have primary responsibility for developing and implementing governance frameworks in public listed, unlisted, and private companies, as well as the public sector and not-for-profit organisations. They have a thorough working knowledge of the operations of the markets and the needs of investors. We regularly contribute to the formation of public policy through our interactions with Treasury, ASIC, APRA, ACCC, ASX, ACNC, the ATO and the Attorney General's Department. We are a founding member of the ASX Corporate Governance Council. We are also a member of the ASIC Business Advisory Committee, the ASX Business Committee and the ACNC Sector Users Group.

This Submission does not comment on all aspects of the Discussion Paper but focuses on the issues of interest and concern to our members.

Introduction

Our members agree it is critical that Australia remains an attractive place for investment and therefore welcome the Discussion Paper's consideration of important issues and implications arising from Australia's evolving capital markets. As the Discussion Paper notes, Australia needs strong and well-functioning private and public markets. Both markets support one another and are essential to the economy.

Australian private markets have grown more quickly relative to public markets in recent years, reflecting a trend broadly consistent with global markets. However, our members are concerned that the size and relevance of the Australian Securities Exchange (ASX) as a share of global market capitalisation has been in consistent decline, having reduced from 2.1 per cent in 2013 to 1.6 per cent in 2024 and more

companies left the ASX in the past two years than at any similar period since the recession of the early 1990s.[1]

The Discussion Paper suggests that the downturn in the volume of initial public offerings (IPOs) is more likely cyclical than chronic. Our members consider this view may be open to challenge. Report 807 evaluating the state of the Australian public equity market found a reduction in the number of new listings and an increase in the number of de-listings resulting in a modest overall decline in the number of companies listed.[2] Our members consider this decline is more likely the result of domestic policy settings and regulatory creep and complexity that has made it less attractive to list on Australia's public market.

The ASX Listing Rules are part of a broader issue stemming from the unnecessary complexity and lack of coherence of Australia's *Corporations Act 2001*. This impedes the way in which stakeholders interact with companies, including the way in which the ASIC administers the Act and enforces its powers. The shift towards a prescriptive approach to corporate governance from a principles-based approach has driven a compliance first, tick-the-box mindset that is adding significant costs along the chain of capital funding.

The extent of external influences on listed companies may also impact companies' resource allocation, performance and competitiveness for capital. While it is beneficial and imperative that stakeholders hold board directors and companies to account, an imbalance of stakeholder influence on listed company decision-making has had an impact on the way in which listed companies and their directors (officers) and executives govern and allocate finite resources. This has the potential to hinder profitability, competitiveness and therefore the ability to attract capital and direct company investment decisions. The overall regulatory ecosystem governing listed companies must delicately balance:

- A long-term view of economic growth
- Business performance and the interests of shareholders, including with respect to issues not necessarily core to listed company governance; and
- The influence of broader stakeholder groups commensurate with their role and extent of their "skin in the game".

Our members agree with the general proposition that market cleanliness is essential to underpinning confidence in the integrity of Australia's listed capital markets particularly as it encourages investor participation, contributes to liquidity, stimulates more competitive pricing and lowers the overall cost of capital for companies. As the Discussion Paper notes ASIC Report 787 found that Australia's listed equity markets continue to operate with a high level of integrity and Australian listed equity markets have consistently been among the cleanest in the world for M&A deal announcements, with 55 per cent fewer leaks than the group average from 2009 to 2022.[3]

Australian listed companies are subject to a disproportionately higher risk of class actions, relative to their peers in overseas jurisdictions. As noted in previous submissions the class action landscape in Australia is a significant concern for companies and officers seeking to manage their continuous disclosure obligations. The Australian continuous disclosure provisions impose a much higher bar on Australian listed companies, especially in relation to the immediacy of the disclosures required, than in overseas markets.

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[1] https://www.afr.com/markets/equity-markets/the-asx-really-is-shrinking-but-it-s-not-unprecedented-research-finds-20250225-p5leuo

[2] https://asic.gov.au/regulatory-resources/find-a-document/reports/rep-807-evaluating-the-state-of-the-australian-public-equity-market-evidence-from-data-and-academic-literature/rep-807-evaluating-the-state-of-the-australian-public-equity-market-evidence-from-data-and-academic-literature-html-version/

[3] REP 787 Review of Australian equity market cleanliness: 1 November 2018 to 30 April 2024 | ASIC

Overall, the complexity and lack of coherence of the *Corporations Act 2001* and the broader ecosystem governing listed companies, the inconsistent nature of the liability regime, and the state of the Australian class action regime may collectively be driving a 'perfect storm' on Australia's public markets. While our members consider the growth in Australian private markets broadly reflects global trends, they consider that the current opacity of this market may be problematic and that greater transparency in private markets may drive overall confidence in the Australia's financial system.

Approach to regulation of private markets

As the Discussion Paper notes there are a range of reasons for the significant increase in size of private markets. For investors these include the potential for higher returns, increased opportunities for investment, longer term investment horizons and less separation between ownership and control. Our members consulted in connection with this submission report that the key benefits include the reduced regulatory burden, significantly lower disclosure requirements and less complex governance requirements. They also report a greater willingness on the part of individuals to accept appointments as non-executive directors. There are also greater opportunities now available to raise capital without going to the public markets. Our members consider that when evaluating any proposals to increase regulation of private markets it will be critical to preserve what is considered positive about private markets.

Recommendation 1: Any proposals to increase regulation of private markets should preserve the benefits of private markets.

The *Corporations Act 2001* requires holistic reform

A recent review of the *Corporations Act 2001* by the Australian Law Reform Commission (ALRC) found the Act refers to another Commonwealth Act more than 1,543 times and is subject to 303 amendments per year on average.[4] The report finds the Act is obfuscated and riddled with indeterminate concepts creating regulatory risk, lacking overall coherence, a 'legislative porridge' driving cost and uncertainty for participants that engage with it.[5] Governance Institute and other leading business groups and legal academics strongly support better corporate law reform processes that aim to drive down complexity, clarify the liability regime, and drive efficiencies for all who interact with the Act, including civil society, the judiciary, company officers and regulators. Our members consider that the establishment of an independent corporate law reform body may assist the ASIC Simplification Taskforce in canvassing solutions to regulatory accumulation, complexity and the burden placed on those interacting with the Corporations Act.

The size and complexity of the *Corporations Act 2001*, particularly for new entrants and small and medium sized enterprises may be a causal factor behind the decline in new listings and the overall decline in market capitalisation as a percentage of global market capitalisation. Our members report that the costs associated with listing on ASX are not necessarily justified for small and micro-cap companies, particularly if they are not in immediate need of capital.

Recommendation 2: Consider the establishment of an independent corporate law reform body to support ASIC's Simplification Taskforce, to achieve holistic reform to the *Corporations Act 2001*.

Recommendation 3: Consider, either through this or a separate inquiry, the broader private sector investment framework and whether the associated regulation adequately incentivises decision-making that benefits shareholder value and is in keeping with their interests.

[4] https://www.alrc.gov.au/publication/fsl-report-141/
[5] https://www.alrc.gov.au/publication/fsl-report-141/

Regulatory burden and associated opportunity cost associated with ASX Listing Rule requirements

Report 807 notes that Australia has not had any substantial changes to the way public and private markets are regulated in the last two decades.[6] Our members have long-standing concerns over what they perceive as an increased regulatory burden placed on companies listing on ASX. One example of this burden is the Corporate Governance Principles and Recommendations (Principles and Recommendations). Under Listing Rule 4.10.3 listed entities must report on the extent to which they have followed the Principles and Recommendations. Originally conceived as a principles-based framework, over time the Principles and Recommendations have become increasingly prescriptive. As our Submission to the recent review of the Principles and Recommendations pointed out, they 'are becoming an additional 'cost of compliance' for listed companies which risks deterring companies from listing and adds to the already significant costs of being a listed company in Australia'.[7]

While designed as an 'if not, why not framework', large listed companies are reluctant not to follow the Principles and Recommendations due to the high potential that it will be detrimental to how they are perceived and assessed by members of the investment community. Our Submission also referred to the fact smaller companies within the ASX 300 which adopt alternative governance practices because of their board size, the scale of their business or lack of resource are potentially at a disadvantage when raising capital.[8] The Principles and Recommendations (and other regulation) are moving in a direction that prescribes a level of disclosure and red tape that is at times excessive for meeting the objective of ensuring listed companies have appropriate governance structures in place. In our members' experience this is already diverting significant resources and boards' and companies' attention away from creating shared value for stakeholders towards a 'tick-the-box' approach.[9]

Regulatory enforcement of the continuous disclosure regime

A further significant burden on publicly listed companies is the continuous disclosure regime. The 2021 Amendments introducing ss 674A and 675A to the *Corporations Act 2001* amended the continuous disclosure regime so that a disclosing entity or its officers who have contravened their disclosure obligations will not be liable unless it can be proven that the disclosing entity or officer acted with 'knowledge, recklessness, or negligence' (Fault elements). In the recent Government response to the Independent Review of the 2021 Amendments, the Government agreed with four recommendations, notably the removing the requirement for ASIC to prove the requisite Fault elements in civil penalty proceedings.

The removal of the requirement for ASIC to prove the Fault element will enable it to seek civil penalties and other consequences without needing to establish 'fault' on the part of a disclosing entity. The removal of this requirement creates further pressure on listed companies who may be liable for inadvertent, non-egregious non-compliance.

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[6] See ASIC Report 807 Evaluating the state of the Australian public equity market: Evidence from data and academic literature, Dr Carole Comerton-Forde page 33.

[7] 2023 AIRA survey shows: The median cost of being listed for ASX 50 listed entities is A$8.8 million. The median cost of being listed for listed entities in the ASX 51-100 is A$9.8 million. The median cost of being listed for listed entities in the ASX 101-200 is $A6.6 million. The median cost of being listed for ASX 200+ listed entities is A$4.4 million. See also ASX Corporate Governance Council Principles and Recommendations 5th Edition Consultation Draft, Governance Institute of Australia, 6 May 2024, page 2

[8] See ASX Corporate Governance Council Principles and Recommendations 5th Edition Consultation Draft, Governance Institute of Australia, 6 May 2024, page 5.

[9] See also ASIC Report 807 Evaluating the state of the Australian public equity market: Evidence from data and academic literature, Dr Carole Comerton-Forde page 34.

Recommendation 4: Reconsider the merits of removing the requirement for ASIC to prove the requisite fault elements in civil penalty proceedings in relation to contraventions of the disclosure obligations.

The interaction of the continuous disclosure regime and class actions

As noted above the Australian continuous disclosure provisions impose a much higher bar on Australian listed companies, especially in relation to the immediacy of the disclosures required, than in overseas markets. Market reaction to information is unpredictable and determining whether information will have a material impact on the price of securities is not a precise science. While ASX Guidance Note 8 – Continuous Disclosure is comprehensive and helpful, our members' experience indicates that continuous disclosure issues are rarely black and white, and most companies err on the side of over disclosure due to concerns around class actions. At times, this can be commercially damaging, thereby negatively impacting shareholder value. Conversely, if information is not disclosed despite an appropriate assessment being undertaken by a company and its officers and there is subsequently a significant movement in the share price, a significant class action exposure may arise. That exposure has a high likelihood of resulting in a settlement in Australian proceedings, notwithstanding fault may not have been established because of the full consideration of the issues by a court. ASX 200 companies have a one in 10 chance of having a class-action launched against them.[10]

The introduction of climate-related financial disclosures without any adjustment to the continuous disclosure regime potentially creates further liability for listed companies. because of the interaction between periodic climate-related financial disclosures and the continuous-disclosure regime.

Recommendation 5: Consider the interaction between the continuous disclosure and class action regimes.

An informed, pragmatic approach to further transparency in private markets is required

The Discussion Paper acknowledges that Australia's private credit market does not appear to be systemically important in Australia but that opacity, valuation uncertainty and liquidity and leverage in private markets are key risks, particularly for retail investors. The Discussion Paper canvasses whether the collection and publication of more comprehensive and timely data on private market activity would address some of these concerns.

Our members consider that the issue of collection of data needs to be approached pragmatically having considered the costs and benefits of collection. Imposing unnecessarily burdensome data reporting obligations on private equity market participants may potentially drive market activity offshore. Any proposals should be subject to a thorough cost-benefit analysis process covering the costs and merits of collecting data on managed investment schemes, the number and value of assets, investment flows, asset allocations, liquidity, cross-investments, distributions, performance information, including arrears rates for private credit funds, and the use of leverage. Where possible options for greater transparency should be commensurate with practices across international jurisdictions such as the US, Europe and the UK.

[10] https://www.menziesrc.org/news-feed/why-litigation-funding-is-big-business

Recommendation 6: Undertake a thorough cost-benefit analysis to determine the merits of data collection from private equity markets to address the risks associated with valuation uncertainty, liquidity, leverage and overall opacity.

Our members consider the overall decline of Australia's public markets as a percentage of global market capitalisation and the recent contraction in IPO activity is a cause for concern and that this is largely attributable to Australia's complex corporations law framework and the broader regulatory ecosystem governing listed companies, increasing scope of regulatory incidence, the class action regime, and issues associated with the continuous disclosure regime. These issues appear to be heavily skewed towards public market issues, with the current growth in private market activity markets reflective of a broader global trend. Increasing transparency in private markets may assist with alleviating concerns around some of the risks associated with private markets but would need to be subject to a thorough cost-benefit analysis.

If you have any questions, please contact me or [redacted], Senior Policy Manager at [redacted]@governanceinstitute.com.au.

Yours faithfully,

[redacted]

Interim CEO