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By Email

Dear All

Submission – ASIC Discussion Paper – Australia's evolving capital markets: A discussion paper on the dynamics between public and private markets

This submission is made by Herbert Smith Freehills (**HSF**) in relation to the Australian Securities and Investments Commission's (**ASIC**) discussion paper, "*Australia's evolving capital markets: A discussion paper on the dynamics between public and private markets*", released on 26 February 2025 (**Discussion Paper**).

In this submission:

(a) We agree with ASIC's assessment that both public and private markets play an important role in supporting business growth, wealth creation, investment opportunities, and addressing Australia's economic challenges.

(b) We query the conclusion that it is too early to say whether Australia's recent decline in net (and new) listings is cyclical or structural, suggest that this recent decline may be part of a greater (and arguably more concerning) structural change in Australia's public equity markets, and call for further work to be undertaken in relation to understanding this trend.

(c) As a result of the abovementioned concerns regarding Australia's public equity markets, we propose that consideration be given to improving the regulatory settings of Australia's public markets to maintain or improve their attractiveness. We consider that improvements should be made to the listing process and, more importantly, the post-listing regulatory environment (because we consider that this, rather than the initial public offering (**IPO**) process which lasts only months in a company's life, is the more important consideration for companies considering listing).

(d) At a general level, we do not think that improving the attractiveness of Australia's public markets should be achieved by increasing private capital regulation to 'level the playing field' with public markets because:

  (1) private capital regulatory settings are generally appropriate as they are; and

  (2) maintaining Australia as an attractive destination for global capital flows (and to maximise retention of Australian capital on-shore) is very important, and there is a risk that increasing the regulation of private capital in Australia will make Australia less competitive in attracting and retaining capital.

  However, to the extent that ASIC considers it desirable to permit or expand the direct participation of retail investors in private markets (as distinct from participation through, for example, superannuation funds), it may be appropriate

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to review the effectiveness and appropriateness of the current regulatory settings for private markets, but only to the extent they relate to direct retail participation. Our current view is the existing regulatory settings (discussed below) which have been relatively recently supplemented to a significant degree by the new design and distribution obligation laws, are sufficient and appropriate. Furthermore, we anticipate that any proposal to mandate 'more disclosure' to retail client investors may not deliver value to them.

(e) Finally, we caution against the collection of additional data in relation to private markets – actual risks need to be identified and any additional transparency regulation must be necessary and proportionate to understand or address them.

In relation to this, and our comments above calling for caution on other additional regulation, we would point to ASIC's Simplification Consultative Group and the rationale behind it – our starting view is that additional regulation will only add to regulatory complexity, not simplify it.

1 The significance of public and private markets in Australia

We agree with ASIC's view that strong capital markets are imperative to the wellbeing of the Australian economy. Both public and private markets play crucial roles in the economy, and their relative benefits depend on various factors. Public markets provide liquidity, transparency, and access to capital, and an ability for all Australians to directly participate in the growth of our business sector. On the other hand, private markets offer enhanced flexibility, long-term focus, and diversification opportunities, which can drive innovation and sustainable development.

1.1 Existing oversight of Australia's public equity markets

With respect to Australia's public equity markets, Australia has a strong regulatory and governance framework, which we agree is attractive to investors. However, we need to ensure that the framework is not so strong as to be unduly burdensome or impose costs on business that are unnecessary. The framework needs to ensure Australia's public markets remain competitive relative to global public and private markets. By way of example, Australia has some of the best settings for secondary (post-listing) capital raisings in the developed world, allowing speed to market without compromising investor protection.

However, we believe there is a need for greater speed to market for initial public offerings. We also think that aspects of the post-listed regulatory environment can be improved to increase the attractiveness of public markets (including relative to other global markets).

1.2 Existing oversight of Australia's private markets

With respect to Australian private markets, it is obvious that these are strong and have experienced significant growth in the last decade. Our view is that additional regulatory intervention in this area should be approached with caution. There are a number of reasons for this.

An increase in regulation risks stifling the innovation which has resulted in the significant capital flows achieved by this part of the market, and risks making Australia less competitive relative to global markets. In our view, Australia's existing extensive principles-based regulatory framework is flexible and can respond to new risks and activities as markets change. In our view, these existing requirements, key examples of which are referred to below, should be taken into consideration by ASIC and APRA before new regulatory regimes are considered.

(a) Regulation of investors and counterparties in private markets

In considering risks connected with private markets, an important consideration is the extent to which risks in the private market may transfer into the broader

financial system. This is of greatest relevance through exposures as a result of investments by some of our most important financial institutions, such as superannuation funds and insurers and counterparty risks faced by banks.

In this regard, however, the governance, conduct and management of risk of prudentially regulated entities is already subject to significant oversight exercised through APRA (as well as ASIC). For example, all APRA prudentially regulated entities must have systems for identifying, measuring, evaluating, monitoring, reporting, and controlling or mitigating material risks. While not a direct piece of regulation on private markets, this existing oversight of prudentially regulated entities (who as stated above are some of the most important players in Australia's financial system) is a control on risk connected with private markets through the expectations on those participating in the market as investors and counterparties. The regulatory oversight of prudentially regulated entities should be considered when reflecting on the existing regulatory framework that applies to private markets and the risk of problems in private markets expanding into the broader financial market.

We also observe, in relation to private credit markets specifically, that as the Discussion Paper notes, the RBA has recently concluded that direct risks to Australia's financial stability from the private credit market remains low.

(b) Regulation of private market activities

In addition to the regulations applying to key financial market institutions noted above, Australia's existing regulatory framework means that a substantial volume of the *activities* in the private market are not unregulated. For example:

- credit providers must comply with periodic reporting obligations under the *Financial Sector (Collection of Data) Act 2001* (Cth). The data reported under this regime was used as part of the RBA's October 2024 Report, as referenced in the Discussion Paper;
- as the Discussion Paper notes, there are a range of principles-based obligations that apply to holders of an Australian financial services licence (**AFSL**). This includes having adequate arrangements for the management of conflicts of interests, compliance with financial services laws and doing all things necessary to ensure that the financial services covered by the licence are provided efficiently, honestly and fairly;
- Australia's consumer protection regime including under the *Australian Securities and Investments Commission Act 2001* (Cth) has wide and flexible application and in many cases applies outside a "consumer" context. This is also supported by the design and distribution obligation (**DDO**) regime under the *Corporations Act 2001* (Cth) (**Corporations Act**); and
- foreign investment restrictions, which may require the approval of Australia's Foreign Investment Review Board.

2 The health of Australia's public equity markets

The Discussion Paper, and its supporting ASIC-commissioned academic report paper, *REP 807 Evaluating the state of the Australian public equity market:* Evidence from data and academic literature (**Report 807**), tentatively conclude that it is too early to categorise the post-2021 decline in IPO activity and net listings as a cyclical or structural shift, although ASIC does state that "it is concerned". The Discussion Paper and Report 807 also contend that, prior to 2022, Australia's public equity markets were generally outperforming, and were more attractive than, global markets in many metrics.

We are of the view that more in-depth consideration is required in relation to these contentions. In particular, whilst the sharp decline in new listings and net listings in recent years may well be predominantly cyclical (or at least is not demonstrably structural), a longer-term view does seem to reveal a structural decline, or at the least plateau, in new (and net) listings. Both the Discussion Paper and Report 807 do not seem to consider what appears to be a lack of growth in ASX-listed entities that has taken place since around the time of the global financial crisis. Specifically, we refer to:

(a) Figure 2 in the Discussion Paper, which illustrates a steady increase in the number of listed entities on the ASX from 1990 to around the time of the GFC, and a subsequent flatlining (on average) from there onwards.

(b) Figure 4 of the Discussion Paper, where it is evident that, absent the unusual market activity in 2021, listing activity has almost consistently been lower from 2008 onwards when compared to the period from the late 1990s to 2007.

This is despite significant growth in the Australian economy and population over this period. It leads us to query whether the recent decline is due to both structural and cyclical factors.

The decline is also evident in the statistics presented elsewhere in the Discussion Paper and Report 807 which show that Australian market capitalisation has declined as a share of global market capitalisation over the last decade.[1] This is concerning in isolation but bears more consideration when Figure 2 and ASIC's commentary note the structural decline in ASX's global peers. It suggests that net listings may not be the only (or best) indicator of the ASX's success, or that of any other market, over the relevant period.

We also note that while Figure 2 is used in the Discussion Paper to demonstrate the relative outperformance of ASX compared to other countries' exchanges, this graph may overstate ASX's performance given it has compared ASX (which is Australia's primary exchange for all listings, including a significant number of small capitalisation mining and other companies) against the likes of the Toronto Stock Exchange (**TSX**) (to the exclusion of other Canadian exchanges, such as the TSX Venture Exchange (**TSXV**), which caters to smaller companies) and the London Stock Exchange Main Market (**LSE**) (to the exclusion of the London Stock Exchange Alternative Investment Market (**AIM**), which also caters to similarly capitalised companies).

Companies with small market capitalisations represent a relatively large portion of listed entities on the ASX in any given year. For example, as of 2 May 2025, 450 ASX-listed companies had a market capitalisation of less than $10 million and 944 had a market capitalisation of less than $50 million (data available from https://www.asx.com.au/markets/trade-our-cash-market/directory). If Figure 2 of the Discussion Paper were to instead show more equivalent comparisons between countries' public equity markets, it would likely moderate the view on ASX's relative performance in the last 15 years.

The relative 'small cap' nature of the Australian market also translates to Australia's IPO market, with Report 807 (see page 10) stating that 78% of listings between 1999 and 2019 were by entities with market capitalisations of less than $75 million. To take this further, our analysis based on data from Connect4 suggests that a significant proportion of Australia's listing activity is by small entities with a particular focus on entities in the metals & mining sector:

[1] See Figure 7 of Report 807, and the accompanying commentary that says Australia's share of global capitalisation fell from 2.1% in 2013 to only 1.6% at the end of 2023. The ASIC discussion paper states that by the end of 2024 ASX's share of global market capitalisation stood at 1.4%, down from 1.7% in 2014, despite the value of the Australian public equity market being close to a record high on 31 December 2024.

- From January 2005 to present, 67% of IPOs had a market capitalisation on listing of less than $50 million, with entities in the metals & mining sector comprising 54% of these IPOs.
- From January 2015 to present, 61% of IPOs had a market capitalisation on listing of less than $50 million, with entities in the metals & mining sector comprising 51% of these IPOs.
- From January 2020 to present, 67% of IPOs had a market capitalisation on listing of less than $50 million, with entities in the metals & mining sector comprising 74% of these IPOs.

Further to the above and as noted in page 37 of Report 807, the ASX's focus on listings of entities with small market capitalisation and in particular those in the metals and mining sector perhaps explains why ASX listings have not declined to the same extent as in the US or Europe. In fact, it would seem to explain how (subject to the discussion above) ASX has simultaneously outperformed on number of listings but underperformed in a global sense on share of market capitalisation: Australia's maintenance of a relatively higher number of listed entities (subject to our comments above) despite declining global market share would appear to indicate that its average market capitalisation is decreasing relative to the global exchanges. Given ASIC's comments about the concentration of ASX in its Discussion Paper, this heightens concerns for the ASX as a destination of choice, in particular for 'mid market' and larger entities not already listed on ASX, which may be greater drivers of Australia's economy than small capitalisation mining and other stocks.

In light of all this, our concern is that the performance of ASX based on net listings or even growth in market capitalisation may not demonstrate the real picture: net listings have declined but may be influenced by smaller issuers and the nature of the ASX, and market capitalisation growth can be significantly influenced by the share price performance of a handful of large listed entities.

We do however agree with the main contention of the Discussion Paper and Report 807 that Australia's private markets have experienced significant growth. As illustrated on page 11 of the Discussion Paper, private markets have increased on many metrics in the past decade in Australia, whilst the same increase has not been experienced by public markets, leading to the inference that public markets have declined, at least in part, due to the growth in private markets.

As a result of the above, we make two observations:

(a) Further work needs to be undertaken before a conclusion is reached that a decline in Australian public markets is not structural.[2] However, there is a risk Australian public markets have experienced structural declines since roughly 2010 relative to the Australian economy, Australian private markets, and also potentially global markets and in particular the US.[3]

(b) Whilst the 'choice' between regulatory settings supporting public and private markets is one of policy and many factors will be relevant, the reality is that in an increasingly global economy (notwithstanding recent isolated movements to protectionism) any policy changes made or proposed in Australia cannot be

[2] In this regard, we also note that Report 807, which is the basis for many of the tentative conclusions reached in the Discussion Paper, relies heavily on US-based data and academic research with extrapolations made for the purpose of analysing Australia's markets. As noted in Report 807, we would like to emphasise that further research needs to be undertaken in order to confidently understand the dynamics of the Australian markets, and that it is insufficient to draw similarities and distinctions from the US markets for the purpose of understanding Australia's current market trends and causes.

[3] See Figure 5 of the Discussion Paper, which shows the relative growth in United States' global market capitalisation share and the comparative decrease in Australia's global market capitalisation share. Also see ASIC's commentary on page 7 of the Discussion Paper about the United States becoming the jurisdiction of attraction for listing, even for Australian companies.

considered in a national vacuum and need to be considered with a view to attracting global capital flows. Whilst Australian public markets may have declined in part due to the rise in Australian private markets, this is not an issue of itself. Conversely the loss of market share by ASX globally is something that should cause greater concern to ASIC.

Put another way, ASIC's primary focus should be on maximising the attractiveness of Australian public ***and*** private markets. This must involve regulatory settings that are designed to strike an appropriate balance between maintaining market integrity to support market confidence whilst not overburdening entities in either private or public settings.

3 Improving public market regulatory settings in Australia

As noted above, we consider that there are opportunities to improve the attractiveness of public markets in Australia. There are multiple avenues to do this and the first is for regulatory settings relating to public markets to be improved. Regulatory improvements which should be considered by ASIC fall into two categories:

(a) Streamlining the IPO process; and

(b) Reducing the post-IPO regulatory burden.

Our detailed thoughts on these matters are included in the responses to ASIC's questions in Attachment 1 to this submission.

In addition to improving regulatory settings, given ASIC considers public markets to be a 'public good' it is worthwhile considering whether incentives should be provided to investors or entities to participate in public markets, to recognise the positive externalities provided by public markets. This is consistent with approaches being considered internationally, some of which are considered by ASIC in Appendix 2 to the Discussion Paper. We would also draw ASIC's attention to the recent OECD report titled "OECD Capital Market Review of Spain 2024".[4] Our high-level thoughts on these additional approaches to bolstering the attractiveness of public markets are also included in Attachment 1.

4 Private market risks

In its Discussion Paper ASIC states that key risks in private markets are opacity and unfair treatment of investors, management of conflicts of interest, valuation of illiquid assets, vulnerabilities from leverage and investment illiquidity. It might be that these risks are part of the risk/return trade off for investors in private markets and in relation to this, we would suggest that a key question for ASIC should not be in relation to these risks in isolation but whether these risks will increase or pose contagion risks to the broader financial system as private markets evolve and the capital invested increases.

In relation to the need to further regulate these risks, we would note:

(a) Firstly, private markets is a broad term, covering many different investment types, and the extent and nature of the risks faced will differ significantly depending on the type of investment covered (for example, private equity might create significantly different risks to private credit).

(b) Secondly, there is a broad range of investors who can (or may in future) participate in "private markets" and they will have significantly different capability when it comes to understanding, managing and protecting against those risks. Where capital providers are large, sophisticated investors (such as superannuation funds or private equity), we consider that no or minimal additional regulation is appropriate. These investors are extremely

[4] Recognising that the issues faced by Spain's exchange appear to be significantly greater than those faced by the ASX.

sophisticated, well-resourced and well positioned to understand and manage the risks ASIC has referred to.

(c) Finally, regulation is often already present – for example through the regulation of superannuation funds by ASIC and APRA (discussed further above). Many relevant industry participants hold AFSLs and the sector can be actively regulated as expectations for licensees evolve.

These risks do raise issues in relation to retail participation (discussed in more detail immediately below). Whilst the risks may be different, and the ability of investors to manage them is reduced relative to wholesale investors, our current view is that existing regulatory settings which have been relatively recently supplemented to a significant degree by the new DDO laws, are sufficient and appropriate.

5 Retail investor participation in private markets

When discussing risks relating to retail participation in private markets, we agree with the distinction drawn by ASIC in relation to indirect and direct participation by retail investors in private markets. In the case of markets that only provide for indirect retail participation, regulation in these markets should be focused on the intermediary (e.g. superannuation funds), its relationship with retail investors and its capability to undertake its intermediary role, rather than seeking to regulate the underlying private market. This is largely the regulatory position taken today (for example through APRA or the AFSL regime) and in our view this should not change.

Superannuation funds, for instance, are so well-resourced and sophisticated, that it would appear to be paternalistic and overreaching to seek to regulate to protect them. These investors should be entitled to allocate capital in these markets in the context of their own due diligence and risk informed decisions, rather than additional regulations being imposed.

We agree that retail investors require a greater level of protection than do wholesale or sophisticated investors. However, and as noted above, to the extent that there are direct retail investment opportunities in private markets, it may be appropriate to review the effectiveness and appropriateness of the current regulatory settings for private markets, but only to the extent they relate to direct retail participation. As the impact of relatively new changes to the law, including the DDO regime, develop with the passage of time, including in response to ASIC enforcement of these new laws, market behaviour is likely to evolve. Should the current protections be considered insufficient going forwards, we consider that comprehensive consideration of an appropriate regulatory response is appropriate, without defaulting to disclosure given the limitations of disclosure and that mandating more disclosure to retail client investors may not deliver value to them.

6 Transparency in private markets

In its Discussion Paper, ASIC queries the adequacy of Australia's current transparency measures for private markets.

Whilst we understand ASIC's desire to have visibility into the operation of Australia's broader financial system, enhanced transparency in the form of additional reporting obligations will act as a cost and additional 'red tape' faced by those operating in private markets in Australia. It therefore needs to be approached with caution, and by taking into account regulatory settings in global markets, as it may ultimately impact returns to investors, the availability of investment options, and the attractiveness and competitiveness of Australia's capital markets.

We therefore urge ASIC to consider whether the benefits of transparency outweigh their additional costs, and in particular what the purpose of the transparency is (transparency in itself not being a reason for increased regulation).

HERBERT SMITH FREEHILLS

7 Our responses

Against the context of our observations above, our responses to the specific discussion questions contained in the Discussion Paper are set out at in the attachment to this letter.

Contact

HSF would be pleased to discuss any aspect of this submission with ASIC.

Please contact any of the partners listed below if you would like to do so.

Yours sincerely

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Attachment 1

Table of responses to discussion questions

Discussion questions	Comments
Developments in global capital markets and their significance for Australia	
1 What key impacts have global market developments had on Australian capital markets? What key impacts do you anticipate in the future? Please provide examples from your experience.	Our view is that capital flows are becoming increasingly globalised, with both providers and users of capital looking internationally for opportunities, be that Australian entities looking offshore or overseas entities looking to Australia. This presents risks and opportunities for Australian capital markets. Australia should seek to be a market of choice for both private and public capital investment, and ASX in particular needs to remain competitive with its global peers. In relation to public capital markets, anecdotally, we have seen the increasing globalisation through our transaction activity. For example, we have seen in the public space: • an increased tendency for Australian companies to 'tap' overseas markets for equity and debt funding, including: – pharmaceutical/healthcare/lifescience and other technology companies in particular increasingly looking to the US as a source of equity funding, as a result of a perception that the US market better understands, and values, these businesses. The opportunity to list multiple classes of shares (including non-voting shares) also appears to be an important consideration for some potential issuers (although not all). This includes Australian companies looking to the US for dual listings and primary listings rather than list (or remain listed) on ASX; – larger listed companies raising debt through debt capital markets offshore rather than in Australia, with the SGX increasingly being a destination of choice for convertible bonds and US debt markets also being a popular source of capital for Australian companies.

Discussion questions	Comments
	• Increased interest in offshore listed entities dual listing on ASX. This appears to be at least partially sector driven, where the interest in the ASX is as a result of comparable companies having favourable trading multiples or research analyst followings. Regarding key future impacts, from a public markets perspective, we anticipate that the trends noted above will accelerate and global exchanges will continue to compete with each other for listings 'business', with the result that the ASX and broader Australian capital markets ecosystem needs to remain competitive. The Australian market will need to continue to attract Australian issuers who might otherwise look offshore and offshore issuers who may not have a natural exchange or who may otherwise benefit from an ASX listing. In particular, ASX should not be viewed as the default listing venue for Australian based companies, as this would lead only to complacency. It is therefore critical that ASX provides a competitive offering for issuers (and effectively markets this to prospective issuers) and maintains the health of its trading systems, but also that Australian regulatory settings are appropriately balanced to maintain market integrity without imposing undue burdens on listed entities.
2 Do you have any additional insights into the attraction of private markets as an issuer or an investor?	We agree with the factors ASIC has identified as often favouring private markets over public, with the key considerations for our clients appearing to be: • a perception that private capital is a longer term investor and is able to invest for the future without undue focus on short term results or non-financial performance; • a perception that public entities face enhanced regulation which will increase costs and distract from operation of the business; • the ability of companies (and owners) in private markets to maintain relative privacy without market and media commentary on business performance, individual wealth, related party transactions and other issues; and • as a result of the above, reduced risk of liability in private markets relative to public markets (for example due to risk of class actions and greater scrutiny in general increasing the risk of claims against a listed company and its directors). One factor which is not discussed in the ASIC discussion paper or Report 807 and which we think is of importance to certain clients is that private capital may come with benefits that public capital cannot provide. For example, private equity may bring additional relationship benefits to a company other than just pure capital including: experience in growth through acquisitions or geographic expansion, experience of managing

Discussion questions	Comments
	turnaround processes, industry and business insights, access to networks and business experience of the private equity executives involved in an investment. Similarly, some private credit lenders can have a greater degree of oversight of, and input on, the management of a borrower's business than traditional lenders (including through board observer or board appointment rights), which can bring similar benefits to those borrowers.
3 In what ways are public and private markets likely to converge?	N/A
4 What developments in public or private markets require regulatory focus in Australia in the future?	N/A
Healthy public equity markets	
5 What would make public markets in Australia more attractive to entities seeking to raise capital or access liquidity for investors while maintaining appropriate investor protections?	Broadly speaking, we consider that the following would make Australian public markets more attractive to entities seeking to access capital whilst maintaining investor protections: • Regulatory change to streamline the listing process • Regulatory change to reduce the burden on listed entities post listing • Other incentives designed to encourage listing activity We deal with each of these below. These would improve attractiveness of public markets relative to both private markets and global public markets. In our view, the most important of these is to reduce the regulatory burden on listed entities post listing (given the listing process itself is by definition a short period in the life of a listed entity).

Discussion questions	Comments
	Regulatory change to streamline the listing process: • **Reducing the period issuers and underwriters are on risk, including by shortening or removing the exposure period.** In the majority of IPOs of size, the offer structure incorporates a front end bookbuild, where the underwriter underwrites the offer prior to lodgement of the prospectus. The underwriting agreement is entered into on the basis of a bookbuild for shares that occurs shortly before prospectus lodgement, that sets the IPO price and the amount of capital to be raised. Bookbuild participants are required to sign 'confirm letters' which commit them to acquiring a certain volume of shares at the IPO price. The result of this structure is that the underwriters and investors are 'on risk', in the sense that they are committed to purchasing shares, typically around 3 or more weeks in advance of the delivery of those shares, and, for example, are exposed to market movements during that period. This impacts investor appetite for the IPO and may ultimately require the issuing company to 'leave money on the table' to incentivise investor participation in the IPO (i.e., it potentially leads to sub-optimal valuations for the IPO company and its shareholders). As such, ASX and ASIC should focus on solutions to shorten the timetable between lodgement of the prospectus and trading in the shares commencing. This could be achieved by: – **Removing or shortening of the 'exposure period':** In particular we would encourage ASIC to consult on changes to Chapter 6D of the Corporations Act to provide for ASIC's confidential review period to occur prior to formal lodgement rather than following lodgement, and to allow this review to occur when the prospectus is final except as to the IPO price (and resulting metrics/capitalisation information). Whilst the stated rationale for the exposure period is to enable both ASIC and market participants to scrutinise disclosure documents before they are used for fundraising (see for example the discussion in ASIC RG 254), in practice, only ASIC provides comments on prospectus disclosure, so we do not consider this would result in any meaningful reduction in the protections currently provided by the Corporations Act. We consider it likely ASIC would require additional resources to facilitate these approaches, and in our view that would be appropriate and beneficial in light of the benefits of public markets raised in the discussion paper. – **ASX extending its 'fast track' review process beyond its current availability.** The current ASX 'fast track' process utilising a pathfinder prospectus and draft listing application (see section 2.6 of ASX Guidance Note 1) is an extremely important and useful process to reduce the time between lodgement and listing (from approximately 6 weeks to 2 weeks). This process should be available to all entities. Whether or not the process is employed results in ASX having the same amount of time to consider a listing application and as such there is no clear rationale as to why it should only be available based on

Discussion questions	Comments
	size or the lack of securities subject to ASX imposed escrow (which we understand is ASX's current practice even though it is not stated in the relevant guidance note). In a similar vein, ASX should consider its operational requirements which currently dictate the time necessary between close of the offer under the prospectus and trading commencing. Our anecdotal experience is that the requirements of ASX operations team (as stated to us by ASX compliance) have increased the time period necessary over the last decade. • **Allowing classes of ordinary shares in ASX-listed entities with differential voting rights.** Consideration should be given to allowing entities to list on ASX with both voting and non-voting ordinary shares. Such arrangements are allowed in the US and this is often given as one reason why Australian companies seek to list on Nasdaq rather than ASX (albeit other reasons might also be relevant). For example, there has been speculation that this is a reason for Atlassian's choice of the US as a listing venue and anecdotally we have been asked by clients considering listing venues whether this is a possibility in Australia. In our view, provided adequate disclosure is made of the impact of dual classes of shares, investors should be able to make their own choices as to whether or not investing in an entity with dual share classes is problematic. • **Extending the availability of foreign exempt listings.** Currently, the criteria which must be satisfied for foreign exempt listing for an NZ qualifying entity include satisfying the standard profits test ($1m profit in aggregate for the last 3 full financial years and $500,000 of profit in the last 12 months) or assets test ($4 million of net tangible assets of $15 million market capitalisation) whereas for other entities (including for example, US entities listed on NYSE or Nasdaq) the relevant test are (in summary) $200 million of profit for each of the last 3 full financial years (for the profits test) or $2 billion of net tangible assets or market capitalisation (for the assets test). It is unclear why such enormous hurdles have to be satisfied for entities other than NZ entities to have a foreign exempt listing on ASX, when the primary premise of foreign exempt listings is that the 'home exchange' is sufficiently reputable and its listing rules provide appropriate protections. Why should a $1bn US listed entity not be appropriate to list when a $2bn listed entity is, when in both cases the NYSE or Nasdaq listing rules would apply and presumably provide the same protections to Australian investors? In the event that it is considered desirable to increase the attractiveness of foreign exempt listing on ASX, there are other changes that should be made to Australia's legal regime to facilitate this – for example changes to allow the cleansing notice regime in the Corporations Act to facilitate capital raising and other share issuances by foreign exempt entities where they are continuously disclosing and issuing securities in accordance with their home regime. We would be happy to discuss these with ASIC.

Discussion questions	Comments
	• **No need for forecasts.** Whilst we note that the Corporations Act does not require financial forecasts be included in a prospectus and ASIC RG 228 merely notes it is 'common market practice for companies with an operating history to provide prospective financial information at least to the end of the current financial year', it may be beneficial to clarify in RG 228 that section 710 of the Corporations Act does not require (but does permit) financial forecasts. Whilst in most cases established entities are comfortable providing financial forecasts, and forecasts are often important to 'market' the offer to institutional investors and maximise the company's valuation, we have found that foreign (particularly US) issuers are often uncomfortable providing financial forecasts. This arises in particular where the entity is seeking a dual listing, and where provision of a forecast would lead to either differential disclosure between listing venues or potential legal risks in the United States. We note in this regard the proposal in New Zealand noted on page 52 of the ASIC Discussion Paper. • **Lowering the free float requirement.** Consideration should be given to lowering the existing free float requirement from 20% to say 10%. This would provide enhanced flexibility for issuers when structuring their offer and may (for example) attract companies requiring capital but seeking to minimise dilution to existing holders. In the event it is not considered appropriate to do this across the board, consideration should be given to having a test based on either a percentage or dollar value – for example a free float of 20% or $50m (as an example only) is sufficient – recognising that the larger an entity's market capitalisation at listing the smaller a percentage free float needs to be for there to be a meaningful market in its securities. • **Removal of vaguely defined additional ASX listing criteria.** Whilst we are of the view that ASX's 'profits test' and 'assets test' are set at sufficiently low levels as to encourage listings, there are other aspects of ASX's approach to listing which dissuade certain early stage, often technology companies, from seeking an ASX listing and instead choosing to undertake private capital raisings. The first of these is the requirement that an entity have an 'appropriate structure and operations' which introduces significant discretion to ASX. Whilst ASX GN 1 (section 2.1) initially refers to this as being where 'an applicant's structure and operations have *unusual features* that could raise issues…' and later (in section 3.1) states that this includes where 'the applicants proposed business is little more than a concept or idea', our experience has been that in practice ASX uses these provisions to prevent the listing of entities that, whilst early stage, are significantly more than a 'concept or idea' and are of sufficient development to be of interest to a material number of investors, and that the approach taken depends very much on the views of the ASX personnel involved (given the inconsistent approach taken). If Australia is to support emerging technology companies this approach should be reconsidered by ASX. In principle, we think that (subject of course to appropriate prospectus disclosure) investors should be able to make their own investment decision as to whether to invest in high risk 'blue sky' opportunities and ASX does not need to see itself as a gate keeper in this regard.

Discussion questions	Comments
	• **Improving ASX Guidance Note 19.** ASX's Guidance Note 19 has been difficult for practitioners to apply to the IPO context for a number of years, including as a result of inconsistent application by ASX officers over time. In particular, its differing approach to "ordinary course business remuneration securities" to listed companies as compared to companies seeking a listing has created increased uncertainty and complicated the IPO process (in particular with regard to the necessary disclosure requirements). • **Improving RG 264**. We submit that ASIC should obtain industry feedback to improve ASIC RG 264 and consider aligning it with overseas practices, without compromising on research independence. In particular the approach taken in RG264 is overly prescriptive and has impacted meaningful discussions designed to support valuation discovery but which did not offend against the principles which RG 264 seeks to protect (research independence). • **Consider adding a separate board from the ASX main board** with reduced regulatory requirements as a stepping stone to a full listing, where entities have trading windows (e.g. after quarterly reports and release of price sensitive information) rather than continuous trading (similar to the UK's proposed PISCES, although further consideration should be given as to whether any Australian platform would mirror that or have its own characteristics – for example the ability to raise capital. It may be appropriate to observe the UK experiment – should it go ahead – before implementing any similar arrangement here). • **Consistent disclosure framework:** A single disclosure regime for all listed (or to be listed) financial products should apply based on Chapter 6D of the Corporations Act (ie no longer applying Part 7.9 of the Corporations Act in these circumstances). **Regulatory change to reduce the burden on listed entities post listing** Our view is that the post-listing regulatory settings, rather than the IPO process, are the key regulatory factor driving private vs public market decision making. This is because the IPO process is a very short window in a company's life, and in the Australian context there has been very limited cases of liability stemming from prospectus disclosure. In the post listed environment, we believe that matters such as complex continuous disclosure requirements, class action risk, remuneration disclosure and the 2-strikes rule operate as deterrents to listing. Whilst we would not suggest any of these aspects be removed from the regulatory regime faced by listed companies (given their importance to that regime), we submit that the focus of ASIC (and the legislature) should be on addressing issues with these facets of regulation in a manner which encourages Australian companies to choose listed life, while retaining sufficient investor protection. We deal with each of these matters in turn:

Discussion questions	Comments
	• **Continuous disclosure** - potential liability for subjective decision-making (both regulatory liability and class action risk). Following the Federal Government's response to the 2024 Treasury Continuous Disclosure review, issuers are faced with inconsistent standards for civil penalty proceedings brought by ASIC and private litigants, with the former having no fault element. The lack of a fault element is inconsistent with the standards applicable to the most significant securities law mandated disclosure requirements under the Corporations Act in particular where the availability of 'due diligence' or similar defences are considered (for example, prospectuses prepared in accordance with Chapter 6D of the Corporations Act benefit from the due diligence defence in section 731 of the Corporations Act). The absence of a fault element (which also exists in other potentially applicable provisions such as section 1041H of the Corporations Act) is also out of step with corresponding liability regimes in comparative international jurisdictions. Legal proceedings or their treat, including those brought by ASIC, distract attention from operation of the underlying business, involve significant cost and can be damaging to director reputations. In our view it is inconsistent that the liability regime for continuous disclosure, which is an ongoing ever present obligation to immediately disclose material information, is more onerous than the liability regime for prospectus disclosure, which is a one-off, heavily resourced process where months are spent preparing the relevant disclosure. In our submission the Federal Government's response should thus be reconsidered. • **Class Action risk –** while having a large public investor base is part of being a publicly listed company, the potential for class actions by shareholders, compounded by the recent proliferation of class actions, acts as a deterrent to companies wishing to list on public markets. Not only are class actions costly but they also pose a significant distraction for management when they are required to be involved in overseeing such actions. • **Renumeration disclosure, approvals and the 2-strikes rule –** the disclosure requirements in relation to remuneration in Australia for publicly listed entities are highly prescriptive and require a significant amount of time and effort to comply with. Shareholders also have an 'advisory' vote on the company's remuneration report and, through the '2-strikes' rule, shareholders and proxy advisors have significant sway in relation to a publicly listed company's remuneration practices. This is particularly acute for managing directors, where any shares issued as part of their remuneration package require shareholder approval. The high levels of public disclosure and shareholder oversight in relation to remuneration for publicly listed company garners significant attention from shareholders, proxy advisors and the media, and in turn significantly influences (and limits) the ways in which publicly listed companies are able to remunerate key management personnel. Therefore privately held companies enjoy far more flexibly in their ability to remunerate their executives (e.g. they are able to offer bonuses without needing to disclose these to the

Discussion questions	Comments
	public and are able to offer shares to their managing director without needing to obtain shareholder approval). While these mechanisms are positive in encouraging directors and the company to calibrate their approach to remuneration with shareholder feedback, consideration needs to be given to refining the 2-strikes rule for example by raising the 25% threshold, given the well-recognised issues such as: – its impact on remuneration (in particular variable remuneration for KMP and managing directors) which may serve as a disincentive for quality executives to act for listed companies (an issue not faced in the private sector); – the fact it can be used for 'protest votes' which are unrelated to remuneration; and – the significant attention it garners and the resulting resources allocated and diversion to board attention it has created. Finally, we would also observe that as much as possible, where it does not relate to the effective operation of public markets, regulation should be applied equally to listed and non-listed companies based on size. For example, it is entirely appropriate that the new sustainability reporting regime is not confined to listed entities. **Other incentives designed to encourage listing activity** Given ASIC recognises public markets as providing a 'public good' (and in light of economic theory around public goods) another approach to improving attractiveness of public markets is to provide government support to public markets. This might include, for example, offering tax incentives or subsidies for companies that choose to list. Solutions such as this are discussed in Appendix 2 of the discussion paper and the OECD report which we have referred to above. ASIC should consider the steps being taken or suggested in this regard and more broadly in other jurisdictions in more detail. As we have noted in our cover letter, Australian public markets are in competition for issuers and global capital flows and if Australia fails to take similar measures it may mean our public markets lack competitiveness in the listing space.

Discussion questions	Comments
6 Do you agree that a sustained decline in the number, size or sectoral spread of listed entities would negatively impact the Australian economy? If so, can you suggest ways to mitigate any adverse effects that may arise from such changes?	It is difficult for us to fully comment on this query. As much as possible, conclusions such as this (i.e., that there would be a negative impact on the Australian economy) need to be data driven. However, we do consider that healthy public markets provide the opportunity for all Australians to more directly participate in growth of the Australian economy and share in the profitability of Australian businesses. As such, a decline in the strength of public markets may impact fairness and wealth inequality in Australia. Put another way, retail investors (which comprise the bulk of Australian individuals) are largely 'locked out' of private markets (aside from participation through superannuation and the like) so cannot participate to the same extent in the wealth creation that private markets can create.
7 To what extent is any greater expectations of public companies, compared to private companies, the result of Australian regulatory settings or the product of public scrutiny and community expectations of these companies?	This is a valid question to ask, and whilst it is impossible to quantify, we do consider that being listed does attract additional scrutiny and lead to public expectations beyond what is required in a regulatory sense. Our view is that there are a number of drivers of this, such as: • the involvement of proxy advisors in the listed company space, which may seek to impose views on governance and other matters that go beyond regulatory requirements; • greater media reporting on listed companies, probably driven by: – the media having greater access to information on listed companies as a result of continuous disclosure obligations faced by these companies; – a perception (which may well be correct) by the media that there is greater interest in articles on listed companies (particularly large listed companies) given a greater number of the Australian population will have heard of, or invested in, the relevant companies; and • the ability of other activists to use interests in listed companies to further agendas unrelated to financial performance. However, much of the additional scrutiny is a result of the heightened disclosure requirements of publicly listed companies arising directly from the regulatory settings such as periodic disclosure (i.e., annual financial accounts and remuneration report), shareholder approval requirements and continuous disclosure.
Private market risks and market efficiency and confidence	

Discussion questions	Comments
8 Are Australian regulatory settings and oversight fit for purpose to support efficient capital raising and confidence in private markets? If not, what could be improved?	Consistent with our observations in our cover letter, we would caution against additional regulatory intervention into private markets. We consider that Australia's existing regulatory framework means that participation in private markets, and the activities undertaken in private markets, is subject to principles based regulation to address new risks. A gap in these existing regulatory frameworks should be identified before new regulation is considered – we have not identified any such gaps.
9 Have we identified the key risks for investors from private markets? Which issues and risks should ASIC focus on as a priority? Please explain your views.	N/A
10 What role do incentives play in risks, how are these managed in practice by private market participants and are regulatory settings and current practices appropriate?	N/A
Retail investor participation in private markets	
11 What is the size of current and likely future exposures of retail investors to private markets?	N/A

Discussion questions	Comments
12 What additional benefits and risks arise from retail investor participation in private markets?	We have nothing to add beyond the observations in our cover letter.
13 Do current financial services laws provide sufficient protections for retail investors investing in private assets (for example, general licensee obligations, design and distribution obligations, disclosure obligations, prohibitions against misleading or deceptive conduct, and superannuation trustee obligations)?	Consistent with our observations in our cover letter, we are of the view that current financial services law provides sufficient protection for retail investors in investing in private assets and are flexible and able to respond to new activities and risks. We agree that the regulatory regimes identified in this question are sources of regulatory obligations that protect retail (and other investors). As mentioned in our cover letter, we consider the design and distribution obligations is a regulatory regime that has not yet been given time to have full effect. In our view, this is a regime that can adapt and be useful to regulators in ensuring that product issuers and distributors are appropriately engaging with retail clients including when investing in private assets.
Transparency and monitoring of the financial system	
14 What additional transparency measures relating to any aspect of public or private markets would be desirable to support market integrity and better inform investors and/or regulators?	Further to our general comments in our cover letter, we consider that it is only appropriate to implement targeted transparency measures where there is a demonstrable policy "end goal" from the transparency, rather than transparency for its own sake. We consider that the majority of investors in private markets are sufficiently well resourced and sophisticated to inform and protect themselves.
15 In the absence of greater transparency, what other tools are available to support market integrity and the fair treatment of investors in private markets?	Further to our general comments in our cover letter, we consider the majority of investors in private markets are sufficiently well resourced and sophisticated to inform and protect themselves to ensure their fair treatment.