



THE LAW SOCIETY
OF NEW SOUTH WALES

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██████████
Chair
Australian Securities and Investments Commission

By email: markets.consultation@asic.gov.au

Dear ██████████,

AUSTRALIA'S EVOLVING CAPITAL MARKETS: A DISCUSSION PAPER ON THE DYNAMICS BETWEEN PUBLIC AND PRIVATE MARKETS

The Law Society welcomes the release of the Discussion Paper and appreciates the opportunity for engagement on the important issues and implications arising from Australia's evolving capital markets. The Law Society's Business Law Committee contributed to this submission.

In this submission we focus on select discussion questions that broadly consider the dynamics of the public and private markets and make suggestions for reform and the development of guidance that may contribute to revitalising the public market and ensuring greater transparency in private markets. In our view, any adjustments to regulatory settings applicable to private markets should be made with caution and incrementally to ensure they do not disincentivise investors from accessing and using private markets.

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.

2. Do you have any additional insights into the attraction of private markets as an issuer or an investor?

In our members' experience, offshore capital markets generally offer more attractive pricing and flexibility for businesses than is available in Australian markets due to a broader capital base and fewer regulatory impediments.¹ The global growth of private markets has also opened alternative avenues to raise capital, many of which are particularly attractive to smaller businesses that have typically faced difficulty securing

¹ See also House of Representatives Standing Committee on Economics, *Report on the inquiry into impediments to business investment*, for commentary noting a significant portion of private equity and venture capital is sourced from institutional investors based offshore and the need to ensure Australia's foreign investment framework is operating efficiently so that Australia is competitive in attracting capital, April 2019, 5, online https://www.aph.gov.au/-/media/02_Parliamentary_Business/24_Committees/243_Reps_Committees/Economics/45p/Impediments_to_business_investment/BusinessInvestmentReportFINAL.pdf?la=en&hash=2861D1631B5E44870DC451F5416A63B60CA40B16.

funding in public markets.² For example, we understand that the venture capital community has been a major beneficiary from the growth of private capital markets, alleviating the need to seek a public market listing to access capital. Additionally, our members advise that private markets have provided greater opportunities for their clients to access higher returns and to manage volatility risk by portfolio diversifications. Australian superannuation funds have increasingly allocated capital to private credit to improve diversification investment options available to members and to reduce volatility risk within superannuation fund portfolios.³

The development of the private market has simultaneously seen the public market shrink. We note the view outlined in the Discussion Paper that the decline in public market listings is likely cyclical.⁴ While we acknowledge the significant impact on markets by events such as COVID-19, geopolitical tensions and shifts in global trade, our members' experience is that the downturn in initial public offerings (IPOs), and in the willingness of private companies to list on public markets, is largely driven by a desire to avoid the increased complexity, risk and cost exposure of additional regulatory compliance. Perceived regulatory overreach in respect of a number of issues, including compliance burden, recently led to the Australian Stock Exchange (ASX) Corporate Governance Council closing its consultation on its draft Fifth Edition of the *Corporate Governance Principles and Recommendations* due to a lack of consensus on the proposed expansion of reporting obligations.⁵ As observed by Megan Motto, the then CEO, Governance Institute of Australia,

It's important not to underestimate how any inclusion in the document sets an expectation for listed companies, big and small, adding significant cost and complexity to governance practices.⁶

The Discussion Paper cites research findings that regulatory burden is only a small factor in the decline of public listings compared with the changing nature of companies and the rapid growth of private markets.⁷ However, the development of "light touch" regulation has also been an element in private market growth

² Jacob Harris and Emma Chow, "The Private Equity Market in Australia", RBA Bulletin – April 2024, <https://www.rba.gov.au/publications/bulletin/2010/sep/4.html><https://www.rba.gov.au/publications/bulletin/2024/apr/the-private-equity-market-in-australia.html>.

³ ASFA, *Statement responding to ASIC's discussion paper on the dynamics between public and private markets*, Media Release, 26 February 2025, online <https://www.superannuation.asn.au/media-release/statement-responding-to-asic-discussion-paper-on-the-dynamics-between-public-and-private-markets/>.

⁴ ASIC, *Australia's evolving capital markets: A discussion paper on the dynamics between public and private markets*, February 2025, 15, online <https://download.asic.gov.au/media/44hh5ctv/australia-s-evolving-capital-markets-a-discussion-paper-on-the-dynamics-between-public-and-private-markets.pdf>.

⁵ See ASX, *ASX Corporate Governance Council closes consultation on draft Fifth Edition Corporate Governance Principles and Recommendations*, Media Release, 20 February 2025, online, <https://www.asx.com.au/content/dam/asx/about/corporate-governance-council/20-feb-asx-corporate-governance-council-closes-consultation.pdf>. On reports regarding opposition by peak body stakeholders to additional reporting requirements including diversity disclosures, see Paulina Durán, in "Business groups block ASX plan to expand diversity reporting", *Capital Brief*, 19 February 2025, online, <https://www.capitalbrief.com/briefing/business-groups-block-asx-plan-to-expand-diversity-reporting-82a8cb01-a85f-4061-8a8e-884e42f5015b/>. For a summary of the proposed changes, see the Law Council of Australia's submission to the ASX Corporate Governance Council's consultation dated 8 May 2024, 12-16, online, <https://lawcouncil.au/publicassets/7ba0ebb8-a623-ef11-949e-005056be13b5/4537%20-%20S%20-%20ASX%20CGCs%20Corporate%20Governance%20Principles%20and%20Recommendations.pdf>.

⁶ GIA, *Governance Institute of Australia welcomes decision to close consultation on 5th edition of ASX Corporate Governance Principles*, Media Release, 20 February 2025, online, <https://www.governanceinstitute.com.au/app/uploads/2025/02/ASX-Corporate-Governance-Council-MR-1.pdf>

⁷ ASIC n 4, 17.

(discussed further under question 8). In seeking feedback from our members, regulatory burden has been identified as having an impact on public listings.

3. In what ways are public and private markets likely to converge?

Our members have observed a wider range of investors are seeking to tap into the innovation and growth potential of industries such as AI, biotech, climate tech and fintech.⁸ This demand, together with advances in technology that have facilitated entry to all sectors of the market through digital structures,⁹ is powering “democratisation of access”¹⁰ to private capital, an asset class traditionally only available to large institutional investors. The increasing integration of private markets with the broader market ecosystem disproportionately exposes retail investors to risks that have been tolerated by more sophisticated private market investors, including lack of transparency and investment illiquidity.¹¹ This blurring of the demarcation between public and private investments also highlights potential regulatory gaps discussed further under question 8.

4. What developments in public or private markets require regulatory focus in Australia in the future?

Liquidity concerns appear to be emerging as a prominent risk warranting regulatory focus into the future, particularly in respect of investments by superannuation funds. We note past warnings by the International Monetary Fund (IMF)¹² and the Reserve Bank of Australia (RBA)¹³ that financial stability may be undermined in the event of liquidity pressures due to the superannuation sector’s exposure to significant illiquid assets and the ease of member switching. The RBA has recently stated,

liquidity challenges for the broader financial system could arise in the event of large shocks to the superannuation sector; for example, where an unexpected policy change allowing for early withdrawal of superannuation balances occurred alongside capital calls on private asset commitments and a large, sustained decline in the Australian dollar drained liquidity through payments related to foreign exchange hedges.¹⁴

Notably the superannuation industry has itself highlighted the importance of existing regulatory oversight in this area which “ensures that funds are equipped to handle member switching requests without undermining the stability of the broader financial system”.¹⁵ We also note the industry has cautioned against “any increase

⁸ See also Steve Klar, “When Public and Private Markets Converge”, *Milken Institute*, 3 September 2024, online, <https://milkeninstitute.org/content-hub/power-ideas-essays/when-public-and-private-markets-converge>.

⁹ Laurie McAughtry, “Democratised access to private markets is driving a growth explosion”, *EUROMONEY*, 17 March 2025, online, <https://www.euromoney.com/article/2ejeu68nfnalp3wipcmwww/capital-markets/democratised-access-to-private-markets-is-driving-a-growth-explosion>.

¹⁰ Ibid.

¹¹ ASIC, n 4, 36.

¹² IMF, *Global Financial Stability Report*, April 2024, 69-71, online, <https://www.imf.org/media/Files/Publications/GFSR/2024/April/English/text.ashx>.

¹³ Harris and Chow, n 2.

¹⁴ RBA, *Financial Stability Review*, April 2025, 1, online, <https://www.rba.gov.au/publications/fsr/2025/apr/pdf/financial-stability-review-2025-04.pdf>.

¹⁵ Mary Delahunty, ASFA CEO, in Darcy Song and Simon Hoyle, “Super leaders defend system against IMF warnings”, *Investment Magazine*, 23 October 2024, online, [https://www.investmentmagazine.com.au/2024/10/super-leaders-defend-system-against-imf-warnings/#:~:text=Mary%20Delahunty%20\(L\)%20and%20Wayne,spill%20over%20to%20financial%20markets%E2%80%9D](https://www.investmentmagazine.com.au/2024/10/super-leaders-defend-system-against-imf-warnings/#:~:text=Mary%20Delahunty%20(L)%20and%20Wayne,spill%20over%20to%20financial%20markets%E2%80%9D).

in regulatory burden [which] could disincentivise superannuation funds from diversifying out of listed markets...[with] the potential to impact members' retirement funds.¹⁶

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?

The Law Society commends ASIC's commitment to restoring confidence in the ASX¹⁷ and revitalising the public market. We support calls to streamline the ASX Listing Rules and simplify regulation¹⁸ with a view to reducing regulatory obstacles and compliance costs that result in lost opportunity and productivity. We note the ASX is considering whether differential voting rights share structures, also known as "dual-class share" (DCS) structures, should be adopted under the Listing Rules,¹⁹ and are supportive of such a review. DCS structures allow management of founder-led companies to focus on long-term value creation and withstand market pressures during the crucial growth stages of a company.²⁰ In our members' view, relaxation of the current "one share, one vote" rule²¹ may potentially make Australian public markets more attractive to high performing innovation and tech companies which are generally characterised by DCS structures.²²

At the same time, we recognise that DCS structures potentially inhibit shareholder engagement and weaken board accountability.²³ Some jurisdictions that permit DCS structures offset this risk by prescribing a sunset clause that operates to convert the shares from dual-class to single class after the expiry of a specified period of time.²⁴ Another mechanism to promote accountability and good governance is a class-by-class vote disclosure process to provide transparency on voting outcomes.²⁵ We suggest that the adoption of a DCS

¹⁶ ASFA, n 3.

¹⁷ ASIC, *RBA and ASIC act on deep concerns with ASX*, Media Release, 31 March 2025, online, <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2025-releases/25-050mr-rba-and-asic-act-on-deep-concerns-with-asx/>.

¹⁸ ASIC, n 4, 34 and Joe Longo, ASIC Chair, "The times they are a-changin'— but directors' duties aren't", Keynote Speech, Australian Governance Summit, 12 March 2025, online <https://asic.gov.au/about-asic/news-centre/speeches/the-times-they-are-a-changin-but-directors-duties-aren-t/>.

¹⁹ Scott Murdoch, "Australia considers allowing dual-class share listings", *Reuters*, 12 March 2025, online, <https://www.reuters.com/markets/australia-consider-allowing-dual-class-share-listings-first-time-exchange-2025-03-12/#:~:text=%22The%20ASX%20is%20the%20only,won%27t%20necessarily%20like%20it.>

²⁰ These structures typically have two or more classes of shares with differing voting rights. They are favoured by companies seeking to maintain founder control and give a subset of a company's equity owners superior voting rights, see Ignacio Garcia Giner et al, "Shareholder Democracy and the Challenge of Dual Class Share Structures", 11 February 2025, *Harvard Law School Forum on Corporate Governance*, online, <https://corpgov.law.harvard.edu/2025/02/11/shareholder-democracy-and-the-challenge-of-dual-class-share-structures/#22>.

²¹ ASX Listing Rule 6.2 (with exceptions).

²² For example, Alphabet (Google), Alibaba, Apple and Meta (Facebook).

²³ Ignacio Garcia Giner, n 20. See also concerns expressed by fund managers in Scott Murdoch, "ASX to face investor push back on dual-class listing plans – again", *Reuters*, 4 April 2025, online, <https://www.reuters.com/markets/asx-face-investor-push-back-dual-class-listing-plans-again-2025-04-04/>

²⁴ Ignacio Garcia Giner, *ibid*.

²⁵ *Ibid*.

structure with a mechanism to temper a weighted voting arrangement while preserving best corporate practice may assist to make the ASX more competitive.²⁶

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?

As noted in the Discussion Paper, public listings have been in decline in many developed markets over decades.²⁷ Even as the number of listings is falling, the market value of public companies is increasing.²⁸ On this data, it is debatable that a sustained decline in IPOs will necessarily adversely impact the economy. Rather, it could be argued that it merely reflects the natural shift to other investment avenues illustrated by the rise in private markets, and is a sign of “successful adaptation”.²⁹

On the other hand, the Law Society acknowledges that public markets act as “an important pricing and valuation benchmark...and barometer of the economy’s health”.³⁰ If companies choose to remain private over the long term, particularly those that are in high-growth, innovative industries, the overall quality of listings may diminish, potentially impacting public market returns. Fewer listed companies also means reduced price discovery, less competition and more limited access to investment opportunities for retail investors.

As previously discussed, elevating the appeal of public markets to attract private companies is one method to address potentially adverse consequences. Increasing transparency in private markets is another strategy and is further discussed under question 8.

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?

In our view, community expectations of public companies are reflected in regulatory settings designed to encourage maximum transparency and responsible business practices. Public companies build social capital through their commitment to upholding these values so that all investors benefit, including ordinary savers. A sense of ownership in public companies also engenders confidence and certainty in investor decision making and trust that there will be fairness in market participation. In our members’ experience, investors and the broader community similarly expect business in private markets to be conducted in accordance with universal principles of good governance.

²⁶ DCS structures are common in the U.S and growing in multiple other overseas jurisdictions with the ASX currently the only major exchange prohibiting DCS company listings. See Scott Murdoch n 19.

²⁷ ASIC, n 4, 7.

²⁸ Will Heath and Glenda Hanson, “We’d like to see you in public: The numbers behind the narrative on private markets’ rise”, *King & Wood Mallesons*, 12 November 2024, online, <https://www.kwm.com/au/en/insights/latest-thinking/the-numbers-behind-the-narrative-on-private-markets-rise.html#:~:text=In%20absolute%20terms%2C%20ASX%20is,April%202024%2C%20World%20Economic%20Forum>

²⁹ Vijay Govindarajan et al, “Why We Shouldn’t Worry About the Declining Number of Public Companies”, *Harvard Business Review*, 27 August 2018, online, <https://hbr.org/2018/08/why-we-shouldnt-worry-about-the-declining-number-of-public-companies>

³⁰ ASIC, n 4, 7.

Private market risks and market efficiency and confidence

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?

Private markets are required to comply with a suite of existing regulations designed to ensure good corporate conduct.³¹ This framework has also allowed flexibility for innovation while private markets have been the exclusive domain of the large institutional investors. As previously discussed, we support additional, measured regulations to the extent that they address the changing investor demographic and to protect less sophisticated investors.

Feedback provided by our members is that there is general industry support for principles-based guidance to assist entities achieve good governance. The benefits of cultivating business integrity and investor confidence through greater transparency is recognised. We suggest the development of regulatory guidance³² for the implementation of disclosure regimes defining risks for incoming investors would augment existing controls and provide an avenue for reporting without disturbing the intrinsically dynamic nature of private markets. Our members share the RBA's view that, "[a] large, competitive private equity market can contribute to promoting an innovative, efficient and dynamic business sector in Australia" and are concerned to ensure this potential is not stifled.

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?

Incentives potentially increase risks for conflicts of interest, which may be exacerbated by the opacity of private markets. To ensure compliance with statutory conduct provisions³³ it is incumbent on firms to implement robust practices to prioritise clear communication and manage conflicts which typically arise in the areas of fees, performance and valuation of private assets.³⁴ We note periodic reviews by overseas regulators have identified room for improvement in practices to reduce risks and increase transparency and confidence.³⁵ The Law Society reiterates its support for increased guidance to ensure discipline and integrity in the implementation of these practices.

Retail investor participation in private markets

12. What additional benefits and risks arise from retail investor participation in private markets?

Private market growth has created great potential for capital to be deployed quickly into infrastructure, health the environment, and various other sectors that support public and private industries to address societal

³¹ Primarily under provisions regulating the financial services industry contained in Chapter 7 of the *Corporations Act 2001* (Cth).

³² In the nature of ASIC *Regulatory Guide 240 (RG 240): Hedge funds – Improving disclosure*, October 2022, online, <https://download.asic.gov.au/media/pxrbivfc/rq240-published-06-october-2022.pdf>.

³³ *Corporations Act*, n 31.

³⁴ ASIC, n 4, 38-40.

³⁵ For example, the US Securities and Exchange Commission and the UK Financial Conduct Authority. See Greg Norman, et al, "FCA Findings on Private Market Valuations Stress Risk of Conflicts and Need for Independence", *Skadden*, 11 March 2025, online, <https://www.skadden.com/insights/publications/2025/03/fca-findings-on-private-market-valuations>.



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challenges. As public and private markets converge, opportunities are emerging for retail investors and private markets to advance social and environmental solutions that produce returns for investors and the broader community.

Any questions in relation to this letter should be directed in the first instance to [REDACTED], Policy Lawyer, on [REDACTED] or [REDACTED]@lawsociety.com.au.

Yours sincerely,

[REDACTED]

[REDACTED]

President