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Senior Executive Leader
Market Conduct team
Markets Group
Australian Securities and Investments Commission
GPO Box 9827
Melbourne VIC 3001

28 April 2025

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

Dear ██████████,

Discussion Paper: Australia's evolving capital markets

I thank Australian Securities and Investments Commission (**ASIC**) for inviting submissions on ASIC's Discussion Paper on Australia's evolving capital markets.

We are a leading boutique law firm which specializes in funds management. Our practical industry knowledge informs legal and compliance solutions for our clients, including start-ups through to well established industry leaders. A material proportion of our client base is wholesale fund managers and we are considered experts in this field.


King Irving was founded in 2012 to deliver integrated legal and consulting solutions for financial services through our offices located in Sydney, Melbourne, and Brisbane. Our focus is funds management and our purpose is to provide exceptional advice to our clients, meaningful opportunities to our staff and to support the local community.

We are a dynamic and inclusive team of lawyers and financial professionals who are active partners in our clients' success. Our firm prides itself on our collaborative spirit both internally and as an extension of our clients' team.


I am a specialist funds management lawyer in this area with over 22 years' experience, with an additional 15 years spent in funds management line roles including managing director of Westpac owner Advance Asset Management. I have also been an independent director for Netwealth and for the Australian Payments Network Limited.

King Irving is a member of the FSC and AIMA.


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We have addressed the following sections in our attached submission:

- Private market risks and market efficiencies (questions 8 & 10)
- Retail investor participation in private markets (questions 11 to 13)
- Transparency and monitoring of the financial system (questions 14 & 15).

Thank you again for providing the opportunity to provide comment on the Discussion Paper.

Yours sincerely,

[Redacted Signature]

[Redacted Name]

Managing Partner
King Irving

Submission

Australia's evolving capital markets:

A discussion paper on the dynamics between public and private markets

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 credit fills an important gap in Australia's financial market. The demographics of Australia's ageing population are driving greater demand for low observed volatility, high income, long-term fixed income products during retirement. Private credit lenders are not subject to prudential regulation by APRA or the Basel Accord standards.

This reflects that the majority of the capital invested by private credit firms is derived from semi-closed-end funds where there is reduced potential for a structural liquidity mismatch to arise, and liquidity risk management tools can be employed to manage liquidity risks (see section 4.4). In contrast, banks are generally funded through short-term deposits which can be prone to runs.

We believe there are appropriate existing models ASIC can use to inform how it approaches the marketing of products to retail investors; please see the next section.


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?

We believe that any potential misaligned incentives and associated risks are already covered by the overarching regulatory framework for professional investors and asset managers in Australia, as well as by the common market practice among asset managers and investors.


Valuations may be an area for particular consideration given the specific challenges associated with the valuation of illiquid and private assets. However, we would highlight the development of industry and compliance practices around valuation and transparency, including governance, transparency and consistency, which address these issues.

We believe that regulatory frameworks for professional investors address potential risks within private markets through the obligation of AFS Licensees to maintain appropriate risk management registers and policies. There are appropriate existing laws models ASIC can use to inform how it approaches the marketing of products to retail investors; please see the next section.


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Retail investor participation in private markets

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

Access to asset classes and investments otherwise unavailable to retail investors

- Retail investors are provided with access to different investment opportunities they may not otherwise have by investing in listed markets alone.
 - For managed investment schemes, many funds are not suitable for listing or quoting due to the nature of their underlying assets and would be unable to list according to the listing rules.
 - As a result, this would be a high barrier for entry for new fund managers.

Reduction in retail investor's investment risk through asset class diversification

- Retail investors have limited ability to participate in a wide range of assets readily available to wholesale investors, as many asset classes are not suited by their nature to a listed vehicle which requires inter-day pricing. Assets in this category including some real assets (**RA**), private equity (**PE**), venture capital (**VC**) and private credit to name but a few. These assets would not be able to gather sufficient investment to make the asset classes available without private markets, leading to a narrow and crowded public space.
 - Ultimately this would also lead to an increase in retail investor's portfolio risk, as modern portfolio theory dictates that it is the non-correlation of different asset classes which reduces investor risk.
 - As it stands, Australian investors are highly exposed to public markets, in particular to Australian equities. In fact, according to the ASX's most recent Australian Investor Study (2023) states "2023 has seen the highest number of on-exchange investors since 2010. More new investors than ever are entering the share market, many of whom are attracted to the simplicity and low cost of investing in exchange traded funds (ETFs), which makes index inclusion important for larger companies. As an investment instrument, shares remain the most popular investment choice". Further, 58% of investors hold Australian shares and 20% hold ETFs.
 - Potential increased diversification through exposure to private markets can act as natural hedge. We would be concerned if we were not seeing a shift to private markets, given what could be perceived as elevated valuations in public markets, particularly equities. The constant flow of capital in the form of mandated superannuation contributions is a key factor at play, as is the material rise in market share of passive index funds. Value is arguably being distorted in some aspects of public markets. To our mind, capital needs to find a home where value and risk can be appropriately managed.

Promotes growth of small to medium businesses (SME) in Australia

For VC and PE funds, their access to additional pools of investment provide the capital required to generate new SME businesses which are generally not able to access traditional bank finance, which

account for approximately of \$500b of economic activity, accounting for one-third of Australia's GDP (**Source:** *Australian Small Business and Family Enterprise Ombudsman Report June 2023*).

This access promotes growth of the financial services market, Australia's third largest industry (**Source:** *RBA statistics 19 February, 2025*) by enabling private market fund managers to establish, create funds and employ staff within their businesses.

Retail participation increases the pool of available capital to fund the activities of business growth in Australia, through private credit. Private credit's significant growth over the last ten years, is partly attributable to the imposition of stricter lending standards on our traditional banks following the GRC.¹ As a result, private credit is now an important source of funding for Australian SMEs, who don't have sufficient size to be attractive to the syndicated market.

Restricting the access of capital to this asset class will restrict SMEs capacity to respond quickly to business demands. Many borrowers view private credit as a more flexible and attractive market to the traditional bank debt market.

Risks

Any assumption that retail investor risk is reduced by participating through publicly available markets is misplaced. Investor risk is largely determined by the class of assets and the nature of a financial product. How a financial product is made available to a retail investor will have some impact on the risk assessment and liquidity, but is far from determinative, as riskier financial products are available to retail investors in both private and public markets. Arguably, financial products offered through the public markets have been shown repeatedly to be little guarantee of reduced investment risk.

The existing regulatory regime in place to protect retail investors is equally applicable to both the public and private markets. In either case, financial service providers are required to manage investor risk and to ensure that any financial product matches an investors' appetite and their investment mandate. See below for further details on our views on the existing regulatory oversight.

¹ <https://www.yalelawjournal.org/article/the-credit-markets-go-dark>

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)?

Current regulatory framework

Yes, the laws provide for sufficient protection for retail investor.

The relevant laws are contained in a multitude of legislation including the *Corporations Act 2001* (Cth) and related regulations (the **Corporations Act**), the *Australian Securities and Investments Commission Act 2001* (Cth) and other material including legislative instruments and an estimated 50 ASIC Regulatory Guides which together covers the following areas:

- AFS licensing obligations
- Offer documents and marketing material content
- Target Market Determinations
- Financial Service Guides
- Registered constituent documents for managed investment schemes
- Responsible entity and superannuation trustee obligations, including but not limited to risk management and compliance related standards, investment governance and resourcing, to name a few
- Misleading and deceptive and other conduct (e.g. hawking)
- For retail funds, product issuers must develop a compliance plan that is independently audited
- For disclosing entities, fund financial statements are prepared and also independently audited
- ASIC Product Intervention powers.

We observe there appears to be an amplified focus on private credit as an asset class. What is intriguing is that the sophisticated part of the market uses public market vehicles, such as Listed Investment Trusts and Listed Investment Companies, to raise capital that ultimately funds private credit style investments. A number of our members participate in this space. Overlaying the legislative framework with the obligations an issuer must comply with for listed vehicles, such as the ASX Listing rules, continuous disclosure obligations, coupled with the important role the ASX and ASIC play, represents additional layers of governance, over what is already a well regulated market.

The regulatory framework comprised by the above provide a complex and thorough matrix which the Australian Law Reform Commission has the stated task of simplifying¹ with what is anticipated by them to be a 10 year task.

1. Confronting Complexity: Reforming Corporations and Financial Services Legislation (ALRC Report 141)

How do flows work within the regulatory settings?

We know from ASIC's own research and from the experience of our members, that 85% of all retail investment flows come through licensed financial advisors and dealer groups, who have a fiduciary duty to act in their members' best interests. We feel this also plays an important role in the regulatory settings, as it ensures retail investors are aware of their risks and ensure that any investment is consistent with their investment mandate and risk profile.

Throughout the consultation paper, ASIC raises the important question of visibility and data integrity. The Financial Services Data Collection Act (**FSCODA**) requires, amongst other things, issuers and/or credit providers to register and report to APRA where the value of debts due exceeds \$50million report. We note that the application of compliance with FSCODA is varied, as is APRA's interpretation of who should report. It would be of merit to investigate how this act can be more simply and consistently applied as that would provide regulators with a clearer picture of where lending activity is occurring. It would also allow regulators to be more targeted in their reviews.

In practice, the observation of AFSL requirements regarding compliance should be a key focus for ASIC and for AFSL holders in operating their compliance systems. Appropriate related party disclosures are key.

Does the regulatory cost outweigh the benefit?

The increase in size of the private market and corresponding reduction in the size of the public markets is not indicative of wider systemic issues. The Australian position is largely in line with the United States, where there has been a significant reduction in the IPO market. For example, over the course of the 1990s the U.S. saw around 412 IPOs annually, compared to only 248 in the last ten years.² Before considering any regulatory change, it is necessary to fully understand the gap that it is seeking to be addressed. It is not clear to our members that there is any regulatory gap which requires legislative change, which isn't already addressed by the existing regulatory framework.

While our members will support regulatory change which is supported by a factual analysis and a full understanding of any legislative gaps, we do advise caution, as overburdening regulation can overcomplicate compliance without achieving a corresponding benefit to retail investors. This can increase the expense for retail investors without achieving the desired outcome of practically enhanced protection.

An example of this is *Regulatory Guide 97: Disclosing fees and costs in PDSs and periodic statements* (RG 97) which has been revised on several occasions. The complexity involved with ensuring strict compliance with RG 97 and the expense involved in keeping offer documents current to comply with its intricacy, in our opinion, outweighs its benefits in its current form.

Whilst a very good aim of a uniform single fees and expenses disclosure, the complexity involved deviates from the desired clear and precise disclosure for retail investors expressed as a requirement in the Corporations Act.

² <https://www.sec.gov/newsroom/speeches-statements/peirce-remarks-sbcfac-022724>

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?

We believe that additional transparency measures for investors in private credit are unnecessary. Investors already typically receive comprehensive and frequent reporting that includes the information that they need to make informed investment decisions. This includes detailed loan level data about their private credit investments, and generally investors have the ability to access any data they need upon request.

This means that in practice investors in private credit funds often have a higher level of transparency regarding the investments made by the fund compared to many other asset classes. While this may seem counterintuitive it is common for investors to be able to access detailed information about each individual loan made by the fund as well as the overall portfolio composition.

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?

We believe ASIC already possesses significant powers in relation to AFS licensees, and it is expected that private funds will involve an AFS licensee as part of their structure.

Additionally, other regulators have been active in enforcing breaches of equivalent market misconduct requirements, such as instances of misleading or deceptive conduct. Lastly, most investors in private funds are subject to their own reporting obligations, which means that they typically require private funds to provide substantial amounts of information that ultimately feed into the investors' own reporting processes.