Law Council
OF AUSTRALIA

Business Law Section

7 May 2025

[redacted]
Senior Manager
Australian Securities and Investments Commission
GPO Box 9827
Sydney NSW 2000

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

Dear [redacted]

Discussion Paper—Australia's evolving capital markets

This submission is jointly made by the Corporations and Financial Services Committees of the Business Law Section of the Law Council of Australia (the **Committees**). The Committees welcome the opportunity to comment on the Australian Securities and Investments Commission's Discussion Paper *Australia's evolving capital markets: A discussion paper on the dynamics between public and private markets* released on 26 February 2025.

The Committees would be pleased to discuss any aspect of this submission. The key contacts are [redacted] of Ashurst ([redacted]@ashurst.com), Chair of the Corporations Committee [redacted] of Herbert Smith Freehills ([redacted]@hsf.com) and Co-Chair of the Financial Services Committee, [redacted] ([redacted]@gmail.com).

Yours sincerely

[redacted]

Chair
Business Law Section

Australia's evolving capital markets:

Response to ASIC's discussion paper on the dynamics between public and private markets

Law Council OF AUSTRALIA

Business Law Section

Australian Securities and Investments Commission

Dated: 7 May 2025

Telephone +61 2 6246 3737 • *Fax* +61 2 6248 0639
Email Jessica.Morrow@lawcouncil.au
PO Box 5350, Braddon ACT 2612, DX 5719 Canberra
Level 1, MODE3, 24 Lonsdale St Braddon ACT 2612
Law Council of Australia Limited ABN 85 005 260 622
www.lawcouncil.au

Table of Contents

Executive Summary

This submission highlights that the regulatory and transparency burdens on listed entities in Australia are significant factors driving the shift from public to private markets.

There are various drivers for the shift, including the current regulatory settings (for the public markets—on which the post-listing regulatory environment is, in the view of the Committees, a key factor) but also the global shift in direction of capital, driven by large institutional investors seeking long-term investment opportunities. Maintaining healthy public equity markets is crucial for Australia's economy, and the Committees have a number of suggestions as further described in this paper to lift the burden in the post-listed environment and to enable greater speed to market for IPOs.

Private markets do not comprise a single market. They include many sub-categories and tiers, which for the most part have been open to investments from sophisticated and institutional investors (including superannuation funds) that do not require the same level of regulation and transparency as retail investors would—or investments in listed entities may—require.

The Committees caution against over-regulating private markets, which could stifle their flexibility and innovation. The current regulatory framework is fit for purpose. Similarly, any steps to drive greater transparency requires a clear regulatory purpose. The Committees consider that the current regulatory framework can provide for adequate regulatory visibility and caution against imposing additional (and overly burdensome, without commensurate "intelligence value") reporting requirements that could deter investment activity.

Introduction

1. This submission is jointly made by the Corporations and Financial Services Committees of the Business Law Section of the Law Council of Australia (the **Committees**). It responds to *Australia's evolving capital markets: A discussion paper on the dynamics between public and private markets* (**Discussion Paper**) released by the Australian Securities and Investments Commission (**ASIC**) on 26 February 2025.

2. The Committees appreciate the significant work undertaken by ASIC (including the underlying work by Dr Carole Comerton-Forde) in analysing global capital markets developments and initiating a public conversation on these important issues.

3. Our remarks follow the structure of the Discussion Paper and address:

   (a) developments in global capital markets and their significance for Australia;

   (b) healthy public equity markets;

   (c) private market risks and market efficiency and confidence;

   (d) retail investor participation in private markets; and

   (e) transparency and monitoring of the financial system.

4. This submission begins with the Committees' overarching key observations on these themes and then comments on those of ASIC's specific discussion questions which we feel qualified to address.

Developments in global capital markets

5. We note the three hypotheses mentioned on page 17 of the Discussion Paper to explain the shift from public to private markets:

   (a) the decline is attributable to an increase in the regulatory burden and costs associated with being listed;

   (b) the nature of companies has changed, reducing the benefits of being listed; and

   (c) the rapid growth of private markets has made it easier for private companies to access capital.

Regulatory burden and costs

6. We think that Australia has had strong and vibrant public capital markets, with some of the best settings for secondary (post-listing) capital raisings in the developed world. It is regarded as a safe jurisdiction that operates under the rule of law. ASX Limited (**ASX**) as market operator and ASIC have facilitated a regime in the equity capital markets space that allows speed to market for secondary offerings (for example, in the form of 'low doc' and accelerated rights offerings) with no noticeable reduction in market integrity.

7. That said, we do believe that greater speed to market is needed for initial public offerings (**IPOs**) and that regulatory changes can assist with that: see paragraphs 16 and 17.

8. We think the Discussion Paper underestimates the extent to which the regulatory and transparency burden is driving the shift from public to private markets. Of course, the regulatory interventions needed to address the agency problem in widely-held (including listed) entities are more extensive than for an entity that has a small number highly motivated and sophisticated owners—this is the foundational insight of corporate governance theory. **However, an overall thematic of our comments is that Australian regulatory settings in the post-listed environment are a key factor contributing to the public/private imbalance that is concerning ASIC.**

9. We observe that the following settings that apply post-listing, taken together, weigh heavily on listed entities and their officers, discouraging a choice to list:

    (a) **Continuous disclosure liability**—the potential liability (both regulatory and class action) for decisions about disclosure that involve the exercise of commercial judgement and are time-critical. While a fault element has now been included in the liability settings, issuers continue to be faced with class action and regulatory risks, with mandatory "immediate" disclosure decisions called into question after the event, with the inevitable hindsight risk;

    (b) **Director liability—**particularly, ASIC's "stepping stone" enforcement of the officers' duty of care in s 180(1) of the Corporations Act 2001 (Cth) (**Corporations Act**) against officers for negligence, aimed primarily at public company directors, in connection with corporate compliance or disclosure failures (to which the business judgment rule does not apply);

    (c) **Remuneration disclosure**—which in Australia imposes greater disclosure burdens on listed companies compared to other jurisdictions and operates as a constraint on effective remuneration design, and effectively constrains reward for corporate outperformance;

    (d) **2-strikes rule**—directors and officers may be reluctant to expose themselves to a mechanism that allows shareholders to indicate publicly their dissatisfaction with management or its approach to particular issues under the guise of a vote on remuneration policy; and

    (e) **Compliance costs—**listed entities can face additional reporting and compliance costs, include ongoing costs associated with maintaining listing and complying with the Listing Rules and corporate law rules (including s 300A of the Corporations Act) that apply only to listed entities, not all of which are consistent with each other. There is also an expectation that listed companies will provide more transparency on sustainability which may lead to higher voluntary reporting costs.

10. We have provided some suggestions to address these disincentives in the Attachment to this submission.

Changing nature of companies

11. There are aspects of the Australian economy—including the disproportionate contribution of the resources sector and the low (for an OECD economy) investment in research and development—that may influence the balance between public and private markets here. That said, it may be that some sectors (including in energy and resources) will become less attractive to the public market as sentiment around sustainability issues shifts and the need for long-term capital to manage transition risks increases.

Rapid growth in private markets

12. In Australia, we observe that the growth in APRA-regulated superannuation funds and very large local and international institutional investors (including Vanguard and Fidelity) has meant that issuers are able to raise an increasing proportion of equity (and debt) from a class of investors in private markets who are on a constant search for investment opportunities with longer term investment horizons. These investors are themselves highly sophisticated, with large and professional investment teams, and are therefore well positioned to protect their own (and their clients') interests.

13. The critical thing to observe in this dynamic is that these investors are not seeking the kinds of (expensive) regulation and transparency that are needed to address the agency problem found in widely-held entities. They are looking for a base level of corporate accountability through the legal regime, but not at the level that applies in the listed sector. This includes constraints on commercial and business model considerations—including constraints on remuneration design—that are now apparent in public markets.

14. We are strongly in favour of the maintenance of market integrity rules and the dynamic enforcement of those rules. However, the data set compiled by ASIC and Dr Comerton-Forde on major global markets (Figure 2 on page 13 of the Discussion Paper) is clear. Major investors globally have been reluctantly accepting investments in "alternative assets" without concern about the associated regulatory settings, notwithstanding the lack of liquidity (and it is the liquidity issue, not the regulatory settings, that in our view is the source of the reluctance). It is often precisely those investors who value liquidity the most, because it enables them to move in and out of investments swiftly to pursue dynamic investment strategies and because at key times—that they cannot anticipate—they may face redemptions which they cannot facilitate from unlisted positions.[1] This may require the investors to apply a higher level of direct and expensive monitoring and engagement with management to address the agency problem.

Healthy public equity markets

15. In the context of a clearly slowing environment for new listings, we fully support ASIC's concern and its focus on potential reform in respect of listed markets. We agree that the health of both public and private markets is crucial for Australia's economy and overall prosperity. While it is true that Australia's regulatory settings have been

[1] We accept, of course, that the need to mark investments to market can make some level of investment in private capital attractive to that investment class, but based on our discussions with a number of representatives of those investors, they would strongly prefer to have a lower exposure to illiquid assets than they have, but it is the illiquidity, not the regulatory settings, that is making them uncomfortable.

relatively attractive and conducive to raising equity capital in public markets over time, the recent decline in the number of IPOs is of concern and indicates that the regulatory settings in this area may need to be revisited.

IPO processes

16. In that context, we welcome reflection on the listing pathway, the IPO process and "speed to market". In particular, the Committees consider that moves to:

    (a) reduce the prospectus exposure period in s 727(3) of the Corporations Act (and increase the timeliness of issuers having certainty around whether ASIC will review a prospectus after lodgement);

    (b) relatedly, reduce the period between prospectus lodgement and IPO completion (particularly where a front-end bookbuild structure has been adopted);

    (c) consider greater flexibility in capital structures including additional classes of ordinary shares with differing rights;

    (d) allow voluntary escrow in favour of underwriters which does not give rise to a substantial holding reporting requirement for the underwriters under s 671B of the Corporations Act;

    (e) expand the jurisdictions eligible for the lower ASX Foreign Exempt Entity Listing thresholds and requirements available to qualifying New Zealand (NZ) entities;

    (f) align the sell-side research requirements (ASIC RG 264) with overseas practices, without compromising on research independence (e.g. remove the prescription concerning pre-deal research content (including as it relates to forecast and valuation information) and the artificial stages of engagement of pre-solicitation, pitching, post- appointment),

    as well as measures either under consideration by, or implemented in, other jurisdictions (such as those set out in Appendix 2 of the Discussion Paper) should be considered with a view to promoting listings in Australia. We have set out further details on these, and other, suggestions in the Attachment to this submission.

17. There is also public debate about the use of financial forecasts in Australian IPO prospectuses. The Committees note that the debate does highlight key themes in this submission, including that concerns around the use of forecasts are compounded by the onerous disclosure liability regime, both generally and specifically in relation to forward-looking statements. IPO forecasts immediately become market guidance for a newly listed entity, with significant distraction for management and boards (given the liability regime for directors and the market's unforgiving response to forecast 'misses'). This is an area of inconsistency with comparable global financial markets (including, for example, the US), and it merits further consideration, including with a view to potentially provide for greater flexibility in legislative and regulatory settings to ensure there are no obstacles to maintaining the existing levels of foreign investment in Australian offers, nor to encouraging greater levels of that investment (including through more dual listings).

Restrictions on listed entities

18. Consideration could be given to whether either or both of the Corporations Act and ASX Listing Rules should be amended (to the extent necessary and applicable) to allow for founders to have additional rights (such as super-voting shares and similar). This suggestion is made in the context of the market for listings being an increasingly global one. Australian companies (particularly in the technology sector) increasingly look further afield (including to the NASDAQ) for the optimal listing venue, while international exchanges seek to liberalise their regimes in order to attract more listings (including from abroad). Indeed, the global dip in listings noted in the Discussion Paper has rendered the latter a focus for offshore exchanges, and changes made by offshore exchanges to attract more listings will increase the level of international competition experienced by ASX. We recognise the steps taken by ASX to address and adapt to investor expectations (for instance ASX's letter dated 27 April 2025 in relation to a review of the Listing Rules, including Listing Rules 11.1.2 and 11.1.3).

19. Of course, an entity's decision on where to list is a complicated matter and involves the consideration of many factors, such as the depth of the relevant capital market, the knowledge of the entity's industry among investors in that market, the degree to which the exchanges host comparable companies and so on. However, an important factor is the 'friendliness' and flexibility of the regulatory regime applicable to entities listed on a particular exchange. The experience of members of the Committees is that Australian IPO candidates increasingly give greater consideration to offshore exchanges for reasons which include greater flexibility of listing and other applicable rules (for example, the additional rights permitted to be retained by founder shareholders on exchanges like the NASDAQ). In an environment where other exchanges are liberalising their rules, ASIC and ASX should consider matching aspects of the rules applicable to listed entities on major, reputable global exchanges.

20. As noted in the Discussion Paper, while the regulatory settings for secondary capital raising have not been raised as a key concern for the health of Australia's public equity markets (as Australia continues to have a strong secondary equity capital raising market), the Committees consider that exploration by ASIC and ASX of refinements in this area would also be welcome.

21. The Committees note that secondary capital raising settings that are more attractive to issuers (while maintaining appropriate investor protections) might assist in arresting the decline in IPOs (since the ease with which capital can be accessed later is a key reason for listing). Examples of possible changes include:

    (a) narrowing the scope of persons defined to be 'persons of influence' in ASX listing rule 10.1 (e.g. removing ASX Listing Rule 10.11.3), so that there are fewer restrictions on parties who can participate in a placement without shareholder approval;

    (b) further simplifying the regime which applies to listed interests in managed investment schemes, and aligning it to that which applies to listed shares—e.g. applying Chapter 6D (rather than Pt 7.9) of the Corporations Act to offers of listed and stapled entities, conforming the wording of corresponding legislative provisions and disapplying equal treatment requirements;

(c) conforming (to the extent appropriate and possible) cleansing notice regimes (so that one form of cleansing notice can be used for placements and for entitlement offers), and otherwise streamlining the regime applicable to listed entities (including ensuring that the same rules apply to both companies and managed investment schemes);

(d) the introduction of a trading plan regime similar to US Rule 10b5-1 designed to allow sponsors, corporates, officers and executives greater flexibility in transacting in securities and other financial products (building on the recommendation contained in the second interim report dated April 2021 of the Senate Select Committee on Australia as a Technology and Financial Centre); and

(e) aligning market-making programs (such as greenshoes) or liquidity support schemes with the equivalent regimes in the US and UK.

22. We have set out further details in the Attachment to this submission. Consistent with the point made above that post-IPO regulatory settings are relevant to the decision to pursue an IPO, the Committees believe that matters such as compliance costs, potential exposure to class actions and continuous disclosure regulatory settings contribute to an issuer's decision not to list. Accordingly, the Committees submit that the focus of ASIC (and the legislature) should be on addressing these issues in a manner which facilitates and improves the performance of the financial system, while ensuring informed investor participation in it.

Private market risks

23. There are two distinct issues raised in this part of the Discussion Paper. They are:

(a) whether the investment governance practices of institutional investors are adequate to protect their own interests and those of their underlying retail investors, such as members of superannuation funds; and

(b) whether retail investors who choose to invest in private equity or private debt through collective investments (such as registered managed investment schemes, corporate collective investment vehicles (**CCIVs**) or listed investment companies (**LICs**)) that are not prudentially regulated are adequately protected.

24. It is notable that ASIC has not sought to define "private markets" in the Discussion Paper with any specificity but instead defining it as anything that is not a public market. This leaves the question open as to what is meant by "private markets". It is important to acknowledge that "private markets" cover a broad spectrum of investment types. They are by no means homogenous—to the contrary, the market at a minimum captures private equity, venture capital, wholesale funds (investing in various asset classes, including property, infrastructure and across the range of asset classes) and private credit. Similarly, within the broader category of "private credit", further distinctions can be made between hybrid, infrastructure, commercial real estate and direct and syndicated lending activity.

25. Further, "private markets" cover a broad range of activity by different types of investors. For example, they cover private market transactions funded through an institutional investor's balance sheet as well as transactions involving private capital

funds which are open to retail investors. The risks identified in the Discussion Paper are presumably most relevant in the context of private capital funds. Even then, where capital is provided by sophisticated or institutional investors, those risks are generally well understood and managed. This includes investments made by superannuation funds which are regulated by ASIC and APRA. We would caution against extrapolating the risks which may arise in a particular context (i.e. retail participation in private capital funds) across the whole spectrum of private market activity in assessing the need for further regulation (whether in respect of market participants, corporate advisors or other intermediaries).

26. Private markets are playing an increasingly important role in the intermediation of capital in the Australian economy. By way of example, private credit is often available when bank lending is not. Private credit can be more flexible, with a wide range of risk adjusted return products, more sophisticated and patient (e.g., may be used in the context of a “work-out” or restructuring scenario) and may be deployed quickly to facilitate and support investments (e.g., dynamic sponsor M&A activity). It is important to the Australian economy that private markets maintain the flexibility to support a range of financing tasks (particularly those alternative and structured financing tasks that public markets are not well placed to support).

27. Overall, with this backdrop in mind, and in the context of private market investments made by sophisticated or institutional investors, we query the need for additional regulation which can stifle this flexibility and innovation. By their nature, private market investments are different to public market investments—including in terms of the risk/return profile, capital requirements, liquidity and investment horizon. As such, we also query whether seeking greater harmonisation in the regulation of public and private markets is a desirable regulatory objective. A broad-brushed approach in particular is unlikely to be helpful to ASIC or the market and the unique characteristics of the different aspects of the private market should be recognised in assessing whether any further regulation is needed.

Investment governance

28. The first of the two issues is whether institutional investors (including APRA regulated superannuation funds) appropriately manage risks such as opacity and unfair treatment of investors, management of conflicts of interest, valuation of illiquid assets and vulnerabilities from leverage and investment illiquidity, which are cited as key risks of investments in private capital funds.

29. We make no comment on whether APRA’s regulation of investment governance by superannuation funds is adequate—that is outside our expertise. However, we note that superannuation funds are amongst the most sophisticated and well-resourced investors in Australia and able to make appropriate inquiries into the affairs of private market funds including in respect of valuations, asset allocations, liquidity and performance, and those private market funds are incentivised to be transparent to the superannuation funds to secure their capital. We are not aware of any bargaining failure in this market.[2]

[2] In the US context, we note there has been some recent work, in response to the US Securities and Exchange Commission's private fund proposal in 2022 (resulting in the introduction of rules which were overturned by the US Court of Appeals for the Fifth Circuit), on the academic theories of the causes of bargaining failure in US private markets: see e.g. William W Clayton “High-End Securities Regulation” (2024) 14 Harvard Business Law Review 71.

30. Some investments and assets will be inherently more illiquid and more challenging to price. We consider that it is the role of the market to allocate capital into these kinds of asset classes and, in the context of indirect retail investment, not something that needs to be addressed through further regulation. Against this backdrop, we would urge caution in considering additional regulation mandating prescribed disclosures to the regulator or to the public.

31. In non-APRA regulated financial intermediaries (such as fund managers) that invest client money in private markets, clients' interests are protected by the Australian financial services (AFS) licensing regime and the legal duties that apply to fund operators. ASIC is required to satisfy itself, through the AFS licensing process, that the intermediary has the skills and resources to discharge its investment governance responsibilities.

Direct retail participation

32. In respect of the second issue, the Discussion Paper observes that many other jurisdictions are exploring ways to facilitate retail investor access to private markets, and that in Australia retail investors predominantly gain access by either holding an interest in a managed investment scheme or being a member of an APRA-regulated superannuation fund.

33. We think it is important to distinguish between exposure to private market investments through an APRA-regulated superannuation fund, and the offer of private market investments to retail investors through collective investment schemes that operate under the AFS licensing regime.

34. For these *direct* retail investment opportunities, the Committees consider that democratising the accessibility of private markets is conceptually a worthwhile pursuit but is not without its own limitations. On this point, we make the following observations:

    (a) retail participation necessitates a greater level of investor protection—this is a reality that is clear and accepted. However, the question is one of what level of protection should be afforded and what the appropriate mechanisms to achieve that level of protection are;

    (b) modern regulatory theory both in Australia and abroad has recognised that disclosure—and indeed mandating more detailed disclosure may not be the best protection for retail investors. In this regard, ASIC's Report 632 "Disclosure: Why it shouldn't be the default" provides poignant case studies on not only when more fulsome disclosure is not sufficient but also when it may perversely result in worse outcomes; and

    (c) as the Discussion Paper points out, the disclosure regime is supported by other regulatory mechanisms such as the fact that responsible entities of registered schemes are subject to best interest duties, DDO and various general conduct obligations imposed on AFS licensees.

35. The Committees have commented previously on the financial services laws that apply to the issue and distribution of retail financial products and the operation of retail collective investment schemes (that is, registered managed investment schemes, retail CCIVs and LICs), including as part of the recent Australian Law Reform

Commission (**ALRC**) review of the legislative framework for corporations and financial services regulation (2020–23), the Treasury review of the regulatory framework for managed investment schemes (2023), and the Joint Parliamentary Committee on Corporations and Financial Services (**PJC**) inquiry into the wholesale investor and wholesale client tests (2024). We do not repeat our comments here.

36. We share the view of the ALRC that:

> *The existing legislative framework is unnecessarily complex, and the tools used to build and maintain the framework—such as notional amendments, conditional exemptions, and proliferating legislative instruments—often create more problems than they aim to solve. Much legislation is unclear and incoherent, and the objective of an adaptive, efficient, and navigable legislative framework remains unrealised. These problems also combine significantly to undermine the substantive content and quality of the law. The ALRC's findings underscore those of the Financial Services Royal Commission: fundamental norms of behaviour are unclear, and the law should be simplified so that its intent can be met.*[3]

37. Subject to that significant caveat, the Committees consider there is no apparent need for further laws to protect retail investors who choose to acquire interests in collective investments that invest or lend in private markets, with one exception. We think that the definition of 'liquid scheme' in s 601GA and 'liquid fund' in s 1230H of the Corporations Act should be re-examined, to avoid a repeat of the frozen funds problem that occurred in 2008–09. We understand that ASIC wrote to Treasury advising on the need for this change in 2011.

38. Therefore, on the issue of direct retail participation, the Committees in summary consider that Australia has a robust regulatory framework that in many respects goes beyond what exists in other jurisdictions. We consider that it is fit for purpose for addressing the risks posed in relation to retail investment and that, at present, there is no apparent need for further laws. If, contrary to this view, ASIC intends to seek further laws and regulation to govern private markets, the Committees urge that ASIC adopts a measured approach, consulting openly and broadly on any proposals. The Committees recognise the important role that ASIC has to play in overseeing retail investor participation in private markets to address the efficacy of, and compliance with, existing laws designed to protect retail investors.

Transparency and monitoring of the financial system

39. The Discussion Paper raises questions on the appropriateness of additional transparency measures and, alternatively, the availability of tools in relation to private markets. While these questions are undoubtedly important ones to ask, any answers must be consistent with the pursuit of robust and competitive markets. In particular, we urge caution and consider that it is imperative that the imposition of additional measures is consistent with the promotion of Australian public and private markets as a competitive and attractive destination for capital investment (both Australian and foreign).

40. We understand that ASIC's specific questions under this theme are focussed on private markets—we have therefore focussed our observations on private markets.

[3] Confronting Complexity: Reforming Corporations and Financial Services Legislation (ALRC Report 141), Australian Law Reform Commission, 18 January 2024, at paragraph 2.2.

We also understand the question to be directed at whether financial regulators need more, and more timely, information about private market investments to protect systemic stability—in other words, it is not directed at protecting or informing investors who directly or indirectly hold those investments.

41. The Discussion Paper states at page 44 that '[d]ata transparency helps regulators supervise conduct to support market integrity and confidence' and suggests that private capital funds are one way for regulators to gain insight. The suggestion appears to be that the existing mechanisms are insufficient and the paper notes ASIC's recommendation for 'introducing a legislative framework for the recurrent collection of data on managed investment schemes'.

42. We are aware of proposals in other jurisdictions along these lines. It seems to us that this raises similar issues as the transparency of transactions in the shadow banking system after the Global Financial Crisis.

43. The Committees agree in principle that the introduction of specific statutory obligations in this regard would increase transparency, but note that the imposition of any framework inherently will result in impacted entities incurring implementation and ongoing costs which are likely to be passed on to investors by way of lower returns, and will serve as a barrier to entry. Accordingly, the question needs to be asked as to what any additional transparency is intended to achieve.

44. If there is an identifiable historical or emerging risk arising from a lack of transparency, then appropriately targeted mechanisms should be considered and implemented. However, the broad transparency measures contemplated by the Discussion Paper do not appear to be seeking to address any identifiable risks and we consider a lack of public transparency (in and of itself) is not a risk that needs to be addressed for its own sake. It should also be kept in mind that these compliance costs will ultimately be borne by investors and have the potential to detrimentally affect Australia's position as an attractive destination for capital investment.[4]

45. In respect of any general proposition that greater transparency of the private markets will assist with the promotion of financial stability or the assessment of risks in the financial system, we would observe that these are matters which fall within the domain of the RBA (as the financial stability regulator) or APRA (as the prudential regulator) (and we also note, in one area (as does the Discussion Paper), that the RBA has recently concluded that direct risks to Australia's financial stability from the private credit market remains low).

46. We also note that the Discussion Paper compares the regulatory reporting obligations for private funds in Australia and other jurisdictions such as the United States (**US**) and the European Union (**EU**). While measures that seek to align Australian and international practice are in principle less likely to be contentious than new laws or regulation that are inconsistent with international market practice, the measures adopted in international jurisdictions should be assessed to ensure they are appropriate and balanced in the Australian private markets context, that is, provide

[4] To provide an example, enhancements to regulatory reporting of 'reportable situations' for AFS licensees has resulted in ASIC granting relief and, more recently, proposing additional relief while acknowledging that some reports (which are costly and place burdens on licensees) 'have very little intelligence value'. In a similar way, we consider that imposing far-reaching regulatory reporting on private funds (particularly funds available only to wholesale investors) that is not tailored to specific and identifiable risks has a real prospect of resulting in high compliance costs without yielding information that has commensurate 'intelligence value'.

real enhancement in terms of market protection without eroding the flexibility and attractiveness of private markets in Australia. Appropriate consideration needs to be given to the fact that measures that may not stifle activity in a market as deep and liquid as the United States market might do so in the smaller Australian market (where there is less practical compulsion for investors to participate).

47. Transparency and regulation should not be sought for their own sake, lest additional requirements stifle the competitiveness of Australian private markets and stymie innovation.

48. Having said this, the Committees recognise that government and regulatory bodies need appropriate data to help provide better insights to facilitate the early detection of systemic risks that could pose a threat to the stability of the financial system. In doing so, it is important that overly burdensome reporting obligations are not imposed on participants in private markets. In addition, any such obligations should not expose participants to public disclosure and further liability. In this respect, before introducing a further regulatory burden, opportunities to use and/or enhance existing reporting mechanisms such as the *Financial Sector (Collection of Data) Act 2001* (Cth) should be explored. If additional reporting is explored, it would be sensible to have regard to the obligations imposed on participants in other international markets to seek to achieve a level of comity (albeit, having regard to the caution urged in paragraph 46 (above)), consistent with the approach that has recently been adopted with respect to derivative transaction reporting.

49. The Committees' responses to the specific discussion questions contained in the Discussion Paper are set out at in the Attachment.

Corporations Committee and Financial Services Committee

5 May 2025

About the Business Law Section

The Law Council of Australia represents the legal profession at the national level; speaks on behalf of its Constituent Bodies on federal, national, and international issues; and promotes the administration of justice, access to justice, and general improvement of the law.

The Business Law Section of the Law Council furthers the objects of the Law Council on matters pertaining to business law.

The Section provides a forum through which lawyers and others interested in law affecting business can discuss current issues, debate and contribute to the process of law reform in Australia, and enhance their professional skills.

The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Law Society of the Australian Capital Territory
- New South Wales Bar Association
- Law Society of New South Wales
- Northern Territory Bar Association
- Law Society Northern Territory
- Bar Association of Queensland
- Queensland Law Society
- South Australian Bar Association
- Law Society of South Australia
- Tasmanian Bar
- Law Society of Tasmania
- The Victorian Bar Incorporated
- Law Institute of Victoria
- Western Australian Bar Association
- Law Society of Western Australia
- Law Firms Australia

The Business Law Section has approximately 1000 members. It currently has 14 specialist committees and working groups:

- Competition & Consumer Law Committee
- Construction & Infrastructure Law Committee
- Corporations Law Committee
- Customs & International Transactions Committee
- Digital Commerce Committee
- Financial Services Committee
- Foreign Corrupt Practices Working Group
- Foreign Investment Committee
- Insolvency & Reconstruction Law Committee
- Intellectual Property Committee

- Media & Communications Committee
- Privacy Law Committee
- SME Business Law Committee
- Taxation Law Committee

The Section has an Executive Committee of 12 members drawn from different states and territories and fields of practice. The Executive Committees meet quarterly to set objectives, policy and priorities for the Section.

The members of the Section Executive are:

- [redacted], Chair
- [redacted], Deputy Chair
- [redacted], Treasurer
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]

The Section's administration team serves the Section nationally and is part of the Law Council's Secretariat in Canberra.

The Law Council's website is www.lawcouncil.au.

The Section's website is www.lawcouncil.au/business-law.

Attachment—Table of responses to discussion questions

Law Council
OF AUSTRALIA
Business Law Section

Discussion questions	Comments
Developments in global capital markets and their significance for Australia	
Q1. 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.	Global market developments have had and will continue to have significant impacts on Australian capital markets. Australia's economy has become increasingly integrated with global capital markets, with both gross foreign assets and liabilities growing significantly. As the APRA Chair ([redacted]) remarked in his recent address at the *Australian Financial Review* Banking Summit, '*what happens in the world's biggest economy has implications for the world, and therefore for Australia*'. It is inevitable that globalisation, geopolitical issues, economic and trade relationships, climate change challenges and the uncertainty of artificial intelligence (**AI**) developments will all impact how capital is invested in Australia. Equally, international practices such as the rise of sovereign wealth funds and superannuation funds seeking international and diversified investment and the rise of shareholder activism, proxy advisers, passive investment and litigation funders promoting class actions, all impact capital markets and influence the financial system. Australian entities, including banks, tap into international capital to obtain funding at favourable costs and to access a wider investor base with a substantial portion of the ASX 200 held by international investors. This exposes the Australian capital markets to global practices and

Telephone [redacted] • ***Email*** [redacted]@lawcouncil.au
PO Box 5350, Braddon ACT 2612 • Level 1, MODE3, 24 Lonsdale St, Braddon ACT 2612
Law Council of Australia Limited ABN 85 005 260 622
www.lawcouncil.au

Discussion questions	Comments
	volatility, such as those we are currently seeing as a consequence of the Trump tariffs on US imports. The worldwide liberalisation (or, at the moment, potential tariff-led protectionism) of trade exposes Australian issuers to advantages and disadvantages, requiring a flexible and competitive regulatory framework to allow businesses to adapt to major international challenges and market movements at short notice.
Q2. Do you have any additional insights into the attraction of private markets as an issuer or an investor?	When evaluating the pros and cons of the public markets and the private markets from an economic perspective, we expect investors to consider the unique advantages and challenges of each. Both markets play crucial roles in the economy, and their relative benefits depend on various factors. Public markets provide liquidity, transparency, and access to capital, which are essential for large-scale economic growth and stability. On the other hand, private markets offer flexibility, long-term focus, and diversification opportunities, which can drive innovation and sustainable development. Ultimately, both public and private markets play an important role and can yield positive economic outcomes for Australian investors, both institutional and retail. Encouraging a diverse range of investment opportunities across both market types can enhance economic resilience and foster sustained growth in Australia.
Q3. In what ways are public and private markets likely to converge?	Please refer to our opening comments above regarding the current status of the public markets and private markets.

Discussion questions	Comments
Q4. What developments in public or private markets require regulatory focus in Australia in the future?	As discussed below, we strongly urge caution against the trend towards overregulation of markets.
Healthy public equity markets	
Q5. 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?	Public markets are subject to international geopolitical, geoeconomic, climate and technological developments, which cannot be controlled. However, public markets may be made more attractive for issuers by removing some of the impediments to listing that are within the control of government and regulators, such as overly prescriptive regulatory requirements specific to listed entities, their directors and officers and by implementing targeted reforms. Such considered strategies would benefit issuers, may encourage more companies to go public, and enhance market vibrancy, investor opportunities and make Australia a more competitive listing environment and a more robust financial market. <u>Key Strategies</u> 1. Change the liability environment for listed entities and their directors The Committees would be very pleased to have discussions and work with ASIC and Treasury (and other relevant stakeholders) on how to make the liability regime for listed entities and their directors consistent and clearer. To this end, the Committees recommend considering codifying the existing liability provisions under one regime that aligns with international fault/negligence-based liability regimes in public markets. We understand that recent amendments to the Corporations Act and related legislation were intended to achieve something close to this result, but we believe it would be sensible to further clarify the provisions.

Discussion questions	Comments
	This is particularly relevant with forward looking statements where the onus is effectively reversed and “a person is taken to have made a misleading statement about a future matter … if they do not have reasonable grounds for making the statement” (section 728(2) of the Corporations Act). 2. Streamline regulatory requirements Excessive regulatory burdens can deter companies from going public. The “Byzantine complexity” of the legislation governing corporations and listings is not conducive to compliance. It is almost impenetrable for managed investment schemes under Part 7.9 of the Corporations Act, the Corporations Regulations, ASIC regulatory guides and legislative instruments and the ASX Listing Rules. Compliance with legal requirements in capital markets is made more challenging when the laws are too complex to access and understand, and potentially overly burdensome—see our comments at paragraph 9 of the body of the submission. In his final report on the Banking Royal Commission, Justice Kenneth Hayne identified six fundamental norms of conduct for financial institutions, emphasising the importance of obeying the law, acting fairly, and providing services with care and skill, highlighting that the current laws were not being obeyed and enforced effectively. Accordingly, simplifying the relevant legal and regulatory requirements would be a very positive strategy to facilitate public listings. This could extend to taking practical steps to ensure disclosure documents are shorter and are clear, concise and effective. Initiatives such as the NZ PDS regime with a cap on the number of pages and the number of words in a disclosure document would be a starting point worth considering.

Discussion questions	Comments
	In addition, it is worth noting that Appendix 2 of the Discussion Paper sets out the steps being taken by a number of other jurisdictions to attract issuers to those foreign exchanges. We consider that each of these international initiatives should be considered by ASIC for incorporation in the Australian regime, where possible. If Australia fails to take similar measures it will not be competitive in the listing space and lose opportunities to grow the market. 3. Enhance Market Liquidity Improving market liquidity can make public markets more appealing. For example, implementing measures to help market participants facilitate sufficient liquidity in the market, such as market-making programs (greenshoes) or liquidity provision schemes, are important and are used in other jurisdictions. The RBA provides liquidity facilities to eligible counterparties, including exceptional liquidity assistance. Similarly, in February 2025, the Monetary Authority of Singapore introduced a S$5bn Equity Market Development Program (**EQDP**) to enhance the competitiveness of Singapore's equities markets by partnering with select fund managers to invest in Singapore stocks. Liquidity support assists issuers to raise capital more efficiently and investors can enter and exit positions with greater ease. The above examples from other jurisdictions demonstrate active steps being taken to attract issuers to those foreign exchanges, and while direct government/regulatory measures may involve risks that would need to be carefully assessed, altering regulatory settings to facilitate the provision of liquidity by market participants would be positive. In relation to greenshoes, the Committees feel that the ability to stabilise the immediate after-market in an IPO is a very significant measure that makes going public more attractive. Greenshoes have stalled in Australia. ASIC awaited an SEC analysis that lost momentum (approximately 13 years ago), before changing real-time reporting requirements at the request of potential issuers and creating a regime that would not need individual relief. Since that time, there have been very few greenshoes utilised in Australia (and there were not many before).

Discussion questions	Comments
	The ones currently in place in Australia facilitate short-selling and arbitrage fund activity and are, in the Committees' view, not fit for purpose. The Committees advocate a simple fix in this area—adopt identical reporting requirements to those in place in either the US or UK (with only contextual changes) as a 2 year trial with a review at the end of that period. 4. Provide Incentives for IPOs Offering incentives such as tax breaks, grants or subsidies for companies that choose to go public could stimulate interest in public listings and assist with regulatory compliance, although it is acknowledged that the budgetary cost (and risks in terms of distorting allocation of resources) of these would need to be carefully considered. For instance, Singapore's 2025 Budget included tax incentives for more companies and fund managers to list on the Singapore Exchange. Other possible regulatory incentives, without direct budgetary cost (and which would also, in many cases, enhance economic efficiency) include: • reducing the period issuers and underwriters are on risk by shortening the prospectus exposure period. This may also be assisted by some degree of early review of the disclosure document by ASIC (please refer to KWM's earlier submission on this point); • adopting consistent laws and regulations for all listed financial products and housing all relevant requirements under Chapter 6D of the Corporations Act (e.g. remove or harmonise the regulation of listed trusts and managed investment schemes in Part 7.9 of the Corporations Act) and have one disclosure regime for all listed products; • further to this, adopting a consistent approach to pre-IPO advertising (eg ASIC to consider a legislative instrument based on the PDS requirements which are less stringent than the prospectus requirements);

Discussion questions	Comments
	• as suggested above, considering methods to make market-making programs (such as greenshoes) easier to implement and align the position in Australia with overseas jurisdictions; • the introduction of a trading plan regime similar to US Rule 10b5-1 designed to allow sponsors, corporates, officers and executives greater flexibility in transacting in securities and other financial products. This would build on Recommendation 10 of the Senate Select Committee on Australia as a Technology and Financial Centre (**Senate Select Committee**), where at paragraph 7.43 of the second interim report dated April 2021 the Senate Select Committee recommended that the Australian Government provide for an Australian scheme based on US Rule 10b5-1 as an option for start-up companies, subject to appropriate integrity measures to avoid any gaming which may arise from trading plan modification; • considering aligning the sell-side research requirements (ASIC RG 264) with overseas practices, without compromising on research independence (e.g. remove the prescription in terms of pre-deal research content (including as it relates to forecast and valuation information) and the artificial stages of engagement of Pre-Solicitation, Pitching, Post-Appointment); and • for the ASX: a. considering introducing dual class shares for founders, as is permitted on other exchanges (this is especially relevant in the IT sector); and b. introducing incentives for foreign issuers to list on ASX (e.g. consider extending the Foreign Exempt listing regime so that it would apply to other major exchanges such as LSE, NYSE, NASDAQ, HKSE and SGX at reduced financial thresholds like those applying to the NZX Foreign Exempt listings). Other helpful initiatives would be to encourage capable directors to undertake roles on listed boards by:

Discussion questions	Comments
	• adopting a more reasonable approach to director remuneration and address the inconsistencies in the "two strike rule" (Div 9 of Part 2G.2 of the Corporations Act); • as suggested above, seeking to reduce the risks associated with continuous disclosure; • addressing the expansion of 'stepping stone' liability; • addressing the challenges of obtaining adequate and affordable insurances; • taking steps to limit the expansion of class action threats promoted by litigation funders and the expansion of the civil penalty regime; and • considering simplifying or deferring some of the more onerous aspects of the new sustainability reporting regime (e.g. by reducing the number of entities to which the requirements apply, making it possible to know, at the beginning of a financial year, whether an entity will be caught by the requirements or not, and removing Scope 3 emissions from climate related financial disclosure requirements). 5. Fault-based liability regime The liability regime for breach of disclosure requirements should be fair and be fault/negligence-based (as it is in other jurisdictions). As noted above, the Committees would be very pleased to have discussions and work with ASIC and Treasury (and other relevant stakeholders) on how to make the liability regime for listed entities and their directors consistent and clearer. The rise in class actions promoted by litigation funders and the costs and time associated with raising a defence pose material burdens for corporates. This is exacerbated by the increasing costs of insurances, including Directors & Officers and Side C insurances. Finding practical solutions for these disincentives would encourage more listings. Please refer further to point 3 above.

Discussion questions	Comments
	6. Develop a Robust Secondary Market A strong secondary market is crucial for the success of public markets. Ensuring that there are efficient mechanisms for share issuances post-IPO can enhance the attractiveness of public markets. The "low doc" regime introduced with ASIC's support immediately prior to the global financial crisis (**GFC**) was a unique and outstanding means for Australian issuers to raise money and recapitalise in the secondary market in an efficient and effective manner, that saved many from insolvency and supported the Australian economy through a very challenging economic period. Enhanced placement capacity, as introduced during COVID, could also be considered (although the benefits in terms of speed to market would need to be balanced against considerations of shareholder equity). Additionally, an increase in share purchase plan capacity above $30,000 would support the use of the institutional placement structure which has been the most effective method for companies to raise capital in times of elevated volatility. 7. Reduce On-going Disclosure and Filing Requirements Simplifying reporting format and content including by allowing digital submission, would help to reduce the administrative burden for companies. Other strategies include: streamlining the process for reporting material events) by: • providing a standardised digital platform for submissions and filing, including for corporate actions; • revising the continuous disclosure liability regime to make it consistent and clearer, including in relation to ASIC (as discussed at a number of points above); and • working towards harmonising financial reporting standards with international

Discussion questions	Comments
	standards to reduce complexity for companies operating in multiple jurisdictions. 8. Enhance Technological Infrastructure Investing in advanced technological infrastructure can streamline the public listing process and trading activities. Implementing digital platforms for regulatory filings, investor communications, and trading can reduce costs and improve efficiency for issuers. As flagged above, implementing digital platforms for regulatory filings and approvals would reduce paperwork and costs and speed up the process. This includes: • filings for mergers and acquisitions, capital raisings, and other corporate actions; • use of automation and AI to review and process regulatory filings, reducing the time and effort required for manual reviews; • encouraging the use of digital communication channels for investor relations, including electronic delivery of annual reports, proxy statements, and other communications; and • simplifying the proxy voting process by implementing digital voting platforms and reducing the complexity of proxy statements. The Committees acknowledge that, to the extent the above measures might involve automated regulatory decision making, supporting legislative change may be required. In addition, there is benefit in creating regulatory sandboxes where companies can test new business models and technologies in a controlled environment with relaxed regulations (e.g. ASIC Innovation Hub and the UK FCA Regulatory Sandbox).

Discussion questions	Comments
Q6. 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?	Yes, a sustained decline in the number, size or sectoral spread of listed entities can have significant negative impacts on the Australian economy including reduced market liquidity, decreased investment opportunities, lower economic growth and reduction in economic activity and job and wealth creation. However, by implementing the suggestions and mitigation strategies set out above, we can create regulatory settings that promote the attractiveness of Australia's public markets, encourage more domestic companies to go public and entice international companies to list here, and ensure a vibrant, competitive and diversified market that supports Australia's economic growth, stability and productivity.
Q7. 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?	Refer to our comments above. We consider that the listed environment, and in particular, the way in which continuous disclosure laws operate to create liability even in situations where the parties have acted in good faith at the time, as well as the significant compliance burdens attaching to listing, and the way in which the remuneration disclosure and two strikes regimes facilitate activist attacks on boards, are very significant disincentives to listing. It is obviously also the case that being listed involves a greater level of public scrutiny, and therefore reputational risk, but if it were not for the regulatory settings, the consequences of a slip in compliance (and in particular a breach of continuous disclosure requirements) would be far less serious (and the level of public 'pillorying' of those involved could also be expected to be less).
Private market risks and market efficiency and confidence	

Discussion questions	Comments
Q8. 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?	The Committees believe that the Australian regulatory settings are, generally, fit for purpose. There have been initiatives to further develop the regulatory settings for retail investors—for instance the DDO regime—which are well intended but have become formulaic and perhaps excessive, relative to the regulatory objective. The Committees note that for the law and regulation to be effective, there needs to be appropriate regulatory monitoring and oversight. Historically, ASIC has focussed its attention on the surveillance of public markets, but this appears to be changing with ASIC's stated shift in focus given the growth in private markets. ASIC identifies the increase in surveillance of private markets activity on page 31 of the Discussion Paper, particularly as it relates to retail investor participation. The Committees appreciate ASIC's efforts in seeking to better understand the market, both in terms of facilitating greater information access (to ASIC), as well as providing an opportunity to provide the market with guidance as to ASIC's conduct expectations. Beyond this however, the Committees do not believe there is an apparent need for further regulation of the private markets (especially in the form legislative or regulatory reform).
Q9. 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.	The Committees agree that ASIC has identified the commonly cited risks for investors in private markets. However as noted above, the Committees believe it is important to differentiate the various investment types within the private markets and the different types of risk that arise across them—i.e. not all risks apply to all aspects of the private markets. Furthermore, the Committees do not believe there is an apparent need for further regulation of the private markets.
Q10. What role do incentives play in risks, how are these managed in	The Committees consider that, as a general matter, incentives can shape behaviour including, in some cases, greater levels of risk-taking. However, the same can be said in respect of both

Discussion questions	Comments
practice by private market participants and are regulatory settings and current practices appropriate?	public and private markets, and incentives (including performance fees for fund managers) can also be helpful tools in maintaining an alignment of interests between managers and investors. We do not believe this is a matter for further regulation and should instead be left to market participants who are able to protect their own interests (in the case of sophisticated or wholesale investors) or who have the benefit of protections under existing laws (in the case of retail investors).
Retail investor participation in private markets	
Q11. What is the size of current and likely future exposures of retail investors to private markets?	The Committees are not in a position to provide statistical information on the size of the current listed and unlisted managed fund offerings to retail investors, including offerings that invest primarily in private credit, but members have observed growth in that part of the market in recent times. Some details of a sample of such funds is set out in Annexure 1. The availability of private credit investments to retail clients may continue to grow, potentially driven by economic factors and regulatory policy. Following the 2008 GFC, prudential regulation for Australian banks such as tightened capital requirements and lending restrictions have de-risked the banks and made them safer, but transferred a share of business lending opportunities and the associated risk to private market participants.[5] These private lenders have naturally sought to raise the funds to lend from both wholesale and retail sources, including via registered managed investment schemes in various forms. APRA's announcement in December 2024 that it would be winding down Australia's $43 billion hybrids market could add to this trend, as investors looking for a debt-style investment that is considered to be lower risk than equity but which offers a higher return than bank deposits may

[5] The Productivity Commission has reported loans to businesses fell from 55% of banks' lending in 1990 to 32% by 2020. Over 60% of loans by value are now for housing, reportedly because this is relatively low risk for the banks.

Discussion questions	Comments
	turn to private debt funds. The recent extreme volatility in equity markets may also drive retail investors to select products that are perceived to have greater stability of value or priority of claim, characteristics traditionally more associated with debt than equity.
Q12. What additional benefits and risks arise from retail investor participation in private markets?	Per our overarching comments, we would urge caution against grouping all 'retail investors' and all 'private markets' as providing an overall 'benefit' or giving rise to 'risk', given the different nature of private markets (both in terms of asset class, and also in terms of the regulation that currently apply to products within 'private markets'). We think protective regulation is relevant (and that current settings are, broadly speaking, appropriate) where retail participation is sought in unlisted investments. Far less protective regulation is required where only institutional participation is sought (even if that institutional participation is from superannuation funds or other funds that may intermediate retail money—in that case, the protections should apply at the point at which those institutions raise retail funds, not the point at which they invest them). <u>Potential benefits</u> Well-managed debt funds may provide a less volatile investment for retail clients than equity funds, although the investment strategy and quality of management in implementing it are obviously major factors in the outcome, along with a range of factors that managers cannot control in the Australian and global economy and in the individual businesses to which loans are made. There does not seem to be any reason to restrict retail clients from investing in registered schemes that invest in private debt, so long as all the regulatory requirements are met (see response to question 13). Indeed, it may be detrimental to investors who do not qualify as wholesale clients to deprive them of this type of investment. All other things being equal, reducing access to investments that have a higher risk/return profile may increase the wealth

Discussion questions	Comments
	divide in Australia. In its report on the wholesale client test, the PJC[6] noted the potential disadvantage for specific groups of investors who do not have access to wholesale-only investments, including women, minority groups, people in regional areas and younger people. Accessing investments that produce a return above inflation is one way for working Australians to grow their individual wealth and standard of living. <u>Risks</u> The key risks for retail clients investing in private credit through a registered scheme include the illiquid nature of long term loans to businesses, the risk of default by borrowers and potential inaccuracy in the valuation of assets in a fund for the purpose of pricing applications and redemptions if (for example) the responsible entity is slow in recognising bad loans. These risks can be ameliorated by a credit fund having a diversified portfolio as to borrower and maturity of the debt, rigorous lending standards and adequate valuation policies. As in all investment sectors, retail clients are dependent on the quality of the investment manager and compliance by the responsible entity, so there is no inherent need to regard these products as problematic when offered by large reputable managers. Similar to real estate and infrastructure investments, unlisted fund offerings should have withdrawal terms that adequately match the withdrawal terms with the nature and liquidity of fund assets. These risk factors are, to an extent, easier to control in the case of an ASX-listed credit fund, due to the potential for investors to be able to sell their investment on market even if the underlying assets are illiquid, the additional obligations to maintain continuous disclosure on the ASX platform and general public scrutiny. A difficulty in recent years for listed investment trusts has been that investor sentiment and other factors have caused some funds to trade on the market at a significant discount to the underlying value of the assets, making them

[6] Report of the Parliamentary Joint Committee on Corporations and Financial Services, wholesale investor and wholesale client tests, February 2025.

Discussion questions	Comments
	unattractive investments. ASIC has recently assisted a listed trust issuer of a private debt fund to address this problem by providing relief to facilitate regular buy-backs of units at a net asset value-based price with the payment made out of fund assets.[7]
Q13. 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)?	The existing protections for retail clients investing in registered schemes as listed in the question are the same as for other investment products that range from low to high risk, and there does not appear to be any specific need to add to them. Indeed, it would be contrary to ASIC's stated intention of simplification of regulation of financial services to introduce any rules specific to private debt funds. The Committees would be happy to further discuss with ASIC any particular areas of concern regarding the operation of Chapter 7 of the Corporations Act.
Transparency and monitoring of the financial system	
Q14. 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?	The Committees do not believe that there is a strong justification to introduce regulation for increased investor transparency. The Committees consider that government and regulatory bodies need appropriate data to help provide insight to facilitate the early detection of systemic risks that could pose a threat to the stability of the financial system. However, in pursuing this objective, it is important that overly burdensome reporting obligations are not imposed on participants in private markets. In addition, such obligations (if any) should not expose participants to public disclosure and further liability. In this respect, before introducing a further regulatory burden, opportunities to use and/or enhance existing reporting mechanisms such as the *Financial Sector (Collection of Data)*

[7] ASIC Instrument 24-0256 for the Pengana Global Private Credit Trust (ASX:PCX)

Discussion questions	Comments
	Act 2001 (Cth) should be explored. If and to the extent that any additional reporting is contemplated, it would be sensible to have regard to the obligations imposed on participants in other international markets to seek to achieve a level of comity, consistent with the approach that has recently been adopted with respect to derivative transaction reporting.
Q15. In the absence of greater transparency, what other tools are available to support market integrity and the fair treatment of investors in private markets?	Please refer to the second paragraph of the response to question 14 above.

Annexure 1—Examples of private credit funds

Name of Fund	Structure	Date of PDS	Features
Pengana Global Private Credit Trust (ASX:PCX)	Listed investment trust	April 2024	Offers buy-backs from fund assets in addition to trading on market
MA Credit Income Trust (ASX:MA1)	Listed investment trust	January 2025	Trading on market; may do buy-backs from time to time
Dominion Income Trust 1 (ASX: DN1)	Listed investment trust	January 2025	Trading on market. Invests in floating rate notes issued by Dominion Investment Trust.
Vaneck Global Listed Private Credit (AUD hedged) ETF	ETF quoted for trading on ASX's AQUA market	January 2024	Trading on market—the listed nature of the underlying assets means this product is able to comply with AQUA disclosure rules
Latrobe US Private Credit Fund	Unlisted, open to retail	June 2024	Quarterly redemption process, but limited to 5% per quarter and can reject or delay
Remara Private Credit Income Fund	Unlisted, open to retail	May 2024	Best endeavours to allow quarterly redemptions. Investments include asset and mortgage backed securities.

We note also the launch in February 2025 in the United States of the State Street SPDR SSGA Apollo IG Public & Private Credit ETF (PRIV) which has some ground-breaking features that have drawn attention from the SEC.