7 May 2025

Mr Andrew Templer
Senior Executive Leader, Market Conduct
Markets Group
Australian Securities & Investments Commission

By email

Dear Mr Templer

Australia's evolving capital markets:
A discussion paper on the dynamics between public and private markets

AFMA welcomes the opportunity to provide feedback to ASIC's Discussion Paper *Australia's evolving capital markets: A discussion paper on the dynamics between public and private markets.* AFMA supports ASIC's undertaking of a thematic review of the dynamics between public and private markets, and more generally in relation to the health of the public markets. We agree that private markets are growing, and it is important to assess the risks in this market, as well as its regulation, to help foster a strong Australian economy. We also believe that public markets will continue to play an important role in the Australian economy, providing avenues for investment and capital formation, and that it would not be in the national interest if public markets were to (further) decline as a percentage of GDP.

AFMA members are major participants in both public and private capital markets. While we are a strong supporter of public markets, at the same time we recognise the important roles that private capital can play in the economy, oftentimes in ways that support and are complementary to public markets.

We welcome ASIC Report 807 and its literature and statistical reviews. We hope that our contributions are used to complement this work based on the insights available from our membership. Our comments are from those on the front lines advising clients, helping to intermediate capital and making principal investments in both public and private markets.

Please refer to our answers to the Discussion Paper in the section that follows. Broadly, the consensus view of our membership is that there is a mix of cyclical and structural drivers in the growth in private capital markets. A summary of our feedback is as follows:

- *Public markets*: We see substantial scope for increasing the attractiveness of public markets through adjustments to laws, regulations and regulatory stances by ASIC, many of which could be readily implemented. The specific measures are outlined in our answers to the questions below.

- *Private markets:* Private markets fulfil a different function to public markets, and we do not believe that the two necessarily need to align. Private markets cover a diverse range of asset classes and products and offerings by many different types of firms and structures. Caution needs to be exercised in imposing additional law and regulation on private markets. Any proposal to do so needs to be done incrementally, involving broad and open consultation.

  The private markets comprise direct wholesale participants and facilitate intermediated retail participation. They have not been designed to be accessed directly by retail investors like public markets. To the extent that retail investor participation is occurring, it is intermediated through sophisticated participants, such as superannuation funds and listed investment vehicles, that are capable of negotiating appropriate outcomes. The participants in this market have the capacity and capability to evaluate investments in these markets and protect their own interests and those of the beneficiaries they represent.

AFMA is a strong supporter of the wholesale and retail distinction in capital markets. ASIC recognises that private markets are not systemic in Australia and largely invested in by sophisticated wholesale participants. Accordingly, it would be premature to introduce new laws and regulations to regulate these markets at this stage. ASIC already has access to a suite of laws and regulations that allow it to regulate private markets, and we do not believe that there are fundamental weaknesses in these laws or regulations.

We think it is important for ASIC to continue working to deepen its understanding of private markets before taking steps to further regulate them. In developing this understanding, we believe that ASIC should seek to ensure that it does not impose burdensome reporting on participants in these markets (and in any event, should not put Australia at a competitive disadvantage with respect to other foreign markets with more established private markets).

Overall, we believe that ASIC's efforts should be focussed on reducing the regulatory burden and related risks that have built up around public market participation rather than starting to apply similar or new regulatory methodologies concerning private markets. Private markets fulfil a critical role in Australia's economy, acting as a relief valve to help capital flow in the economy and supporting some of the more innovative and structured transactions. It is important that this function is not impeded.

To the extent that ASIC believes that there is conduct in private markets that requires addressing, then we urge ASIC to consult with the industry on these specific topics in an open and transparent manner. We encourage ASIC to avoids approaches where it releases a report to the market that sets out its expectations without first consulting with industry, or where it leads with enforcement, in favour of working with industry to improve standards.

Yours sincerely

Brett E. Harper

Brett Harper

CEO AFMA

AFMA Responses to Discussion Paper Questions

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.

The interactions between global market developments and Australian capital markets are complex and challenging to meaningfully summarise in a short submission. With this in mind, we have listed a number of thematic developments below, but note that these need to be put into a broader context of the types of factors listed in the Discussion Paper (including, for example, market consolidation and geopolitical risk):

- Globally, traditional private equity firms are acquiring and evolving into diversified asset managers.
- The rise of superannuation (and pension) funds globally allows retail investors to pool resources to make an indirect investment in private markets, which is likely to result in a decrease in demand for investment in public markets.
- Australia has been fortunate to develop a significant venture capital industry over the last 15 years. This increases the potential for innovation and the development of local firms and tends to delay early listings on public markets.
- Private capital often proves attractive to those companies that might find bank or equity funding challenging.
- Internationally, there is competition between exchanges seeking to attract new capital. Similarly, in Australia, there is an important role for government and regulators in ensuring that Australia's public markets remain competitive and attractive. There are clear downside risks for the economy if we do not compete successfully with foreign jurisdictions. In this respect, we believe that some of the regulatory settings, such as for example (and without limitation), those set out in Regulatory Guide 264: Sell-side research ("**RG 264**") and ASIC's position with respect to market stabilisation, impose requirements that extend beyond those in other major markets.
- While there are a range of views, AFMA members generally believe that there is both a structural and cyclical element to the growth in private markets globally and in the Australian context. The cyclical element is associated mainly with the credit cycle. The structural elements relate to the increased size and maturity of larger private capital providers, and to the increased regulatory risks, costs, burdens and reputational risks associated with public markets. Further details are outlined in our response to questions 5 and 6 below.
- Anecdotally, AFMA members consider that investors globally and in Australia are likely to increase participation in private markets over time. This is anticipated to be driven by the attractive risk-adjusted returns, favourable cost/benefit metrics and the increased diversification available.

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

AFMA members are of the view that private markets are increasingly attractive due to several factors. This includes the greater ease with which private capital can be accessed because of the lower regulatory burden and liability risk, as well as the increasing depth of the market and the sophistication of participants. The regulatory burdens of public markets have also increased over time creating a substantial disincentive to listing (as well as to remaining listed, when going private is an option).

Certainly, in the Australian context, the increasing regulatory burden is a major factor in the relative decline in attractiveness of the public markets.

ASIC notes in the Discussion Paper that 'The literature indicates that the regulatory burden is only a small contributor to the decline.' This does not accord with the direct and clear feedback from industry, and specifically those charged with determining whether to take companies public or raise capital through private channels. Members report that increases in regulatory risk for publicly listed companies, particularly the burden and lack of defences associated with continuous disclosure and the onerous obligations and liabilities that apply to directors of publicly listed entities, has increased the relative attractiveness of private capital. In private capital, the reduced reporting requirements and more focussed investor pool allow private entities to undertake longer term structural changes and to do so with reduced pressures around profits, frequency of disclosures, guidance and dividends, and of course the risk of class actions.

Investors find private markets attractive as the tenor can be a good match for long-term interests, and there are premia paid for lower liquidity, less frequent information, term and other perceived risks. The risk reward ratio when managed properly can be an important contributor to the alpha in an investment portfolio with private assets aiding risk diversification. The stable returns offered by some private market investments can also be attractive for funds seeking annuity style returns. Private markets are also nimble, and can respond quickly to opportunities, such as M&A transactions.

Some other reasons why private markets are likely to prove attractive, include:

- Private debt/credit can present as a stickier, if higher cost, source of capital when markets are dislocated, and this can be attractive for investors with matching risk appetites and investment horizons.
- Sophisticated investors value the lower volatility of private credit investments even where valuations are less transparent but are calculated regularly and on an arms-length basis.
- Current geopolitical volatility does not appear to destabilise private markets to the same degree as public markets and this is perceived as a strength. More generally, a lower correlation with public markets means investing in private markets can provide diversification benefits which can enhance the overall portfolio resilience.

AFMA notes that the risks that interest ASIC in the private markets space such as those associated with conflicts management and transparency are far smaller in scale than the inherent investment risks that must be managed by investors.

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

It is not clear how these markets will likely converge. However, in the context of law and regulation, we believe that public and private markets serve different purposes and need not necessarily converge. We do not believe that regulatory initiatives ought to promote such an outcome. It is important for the Australian economy that private capital continues to flow and that it is not regulated to the same extent as the public markets, as such an outcome would remove an important safety valve and systemic stabiliser for capital flows and detract from the efficiency and potential of the financial economy.

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

The risk of overregulation of both public and private markets poses a threat to the attractiveness for participants. We welcome ASIC's simplification program with respect to public markets and encourage ASIC to look at ways to reduce the regulatory burden for issuers and market participants.

In terms of private markets, they are still developing. It would be premature to impose additional legal and regulatory obligations. Given the nature of private markets, including the high degree of participation of sophisticated wholesale investors, AFMA is of the view that participants have the skills and means to protect their own interests with the benefit of existing laws and regulations. As the market grows, we are also likely to witness the development of market conventions. The industry self-development pathway has proven to produce outcomes that are more attuned to the business needs and are more flexible to evolution than regulatory initiatives. ASIC should look to work with industry to encourage and support good practices. We caution against an enforcement led approach as this is inefficient and costly, and likely to drive business to less burdensome jurisdictions.

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?

General

Over the past two decades directors' inclination to use public markets as the primary source of capital has declined substantially at least in part due to the liability, costs and reputational risks that they, as individuals, and their businesses incur with public listing.

This decline in attractiveness has been driven by an increasingly complex interplay of issues including many related to regulations and the stance of regulators including ASIC. Some actions exist within the power of industry, regulators, and particularly ASIC, to rebuild the attractiveness of public company directorships and public listing for companies.

ASIC should seek to wind back unwarranted risks and costs for directors and companies. Primarily this requires ASIC prioritising the growth of Australia as a financial centre. From a comparative perspective, MAS has such a priority in its enabling legislation *Monetary*

Authority of Singapore Act 1970 s.4 1(d) as one of its four principal objects. This type of priority is necessary to be competitive.

There is no inherent reason why a directorship of a public company should be less attractive than that of a private company.

The structures around public companies are not optimised for professional directors and may not be striking the optimum balance between the interests of individual shareholders and the interests of the shareholders as a whole.

Members advise us that the liability settings are more "no-fault" than was intended by the original drafters, and key recommendations and views from the membership include:

- reintroducing a fault element for liability, in line with the arrangements in international peer jurisdictions, such as the United States;
- re-introducing the due diligence defence, which has been removed in a number of situations and replaced with strict liability where there is a reversal of the onus of proof in relation to inherently challenging financial forecasts; and
- although public markets facilitate access to capital in efficient ways, and are a public good, the costs and risks of this access for directors personally and professionally and the companies themselves are higher than those that exist for private capital.

The membership believes that the regulatory settings pose unnecessary, excessive and challenging risks for participants in public markets. In fact, over the last two decades, the desirability of public directorships has reduced in prestige and greatly increased in risks with liability and disproportionate penalties, assigned in ways inconsistent with the approach that is taken in the private sector and in foreign jurisdictions.

Potential Equity Capital Market Efficiencies

In response to the Discussion Paper's request for actionable ideas, AFMA notes there are multiple ways in which the regulation of equity capital markets could be amended and reduced for greater efficiency and increased market attractiveness. Set out below are some examples of actionable ideas that could support this objective.

(a) Disclosure Documents – Prospectuses and Product Disclosure Statements

AFMA sees the potential for a unified disclosure regime for all listed financial products in Ch 6D. This would remove listed units and stapled securities from Part 7.9 and have them regulated under Ch 6D. We also recommend a reduction in the length and complexity of disclosure documents, with a view to producing clear, concise and effective disclosure for retail investors. To this end, we note the New Zealand PDS regime, which places limits on PDS length and number of words.

(b) Greater regulatory consistency across listed securities

Further to the above point, AFMA considers that increased consistency where appropriate reduces costs and complexity. Accordingly, AFMA recommends greater alignment of regulatory requirements for all listed securities. In addition to creating consistency for all disclosure requirements, AFMA recommends that the best of each regime be adopted for example:

- Adopt Part 7.9 requirements in relation to pre-IPO advertising to all IPOs and all Disclosure Documents.
- Permit early retail participation with institutional investors on all accelerated rights offers as a means of making the public markets more attractive to all investors.

(c) <u>More efficient exposure periods</u>

Exposure periods, while important should be no longer than needed and be reflective of the faster speed of information dissemination that is now available. During exposure periods issuers and banks are on-risk and this adds to capital raising costs.

The 2-3 weeks between completing an IPO frontend bookbuild and allocating to investors and the listing date is not efficient. Having such a long period where investors don't have liquidity is detrimental to accessing broad based demand, particularly for global investors as this is unusual in other jurisdictions like the US and Hong Kong. Most notable the ASIC exposure period creates a "dead week" where the deal cannot progress. In a front end bookbuild this dead week is after participants commit investors and underwrite the deal. We would recommend that the ASIC exposure period is shortened, or at a minimum limited to 7 days with the ability for retail applications to be processed during the ASIC exposure period.

ASIC's support for shorter exposure periods would improve IPO timetable certainty with the potential to reduce the cost of raising capital in public markets and thereby support their competitiveness. AFMA also notes earlier submissions from KWM on this point.

(d) <u>Post-offer market stabilisation</u>

Post-offer market stabilisation, known colloquially as 'Greenshoe', can be an important part of reducing listing risk and making a public listing more attractive. The benefits of such arrangements accrue to listing companies, companies considering listing and early-stage investors.

Greenshoe support recognises that some initial volatility can occur for reasons unconnected with the soundness of the underlying company and these practical realities should be recognised through a more general granting of this type of support.

This is common practice offshore, such as in the United States, and would attract more international investors if implemented. It could also reduce volatility around listing day and possibly help to improve the performance of IPOs in Australia by removing "panic selling" if the IPO dips below the offer price.

ASIC should look to make Greenshoe authorisations easier to obtain and make the conditions less stringent. For example, ASIC should consider adopting the approach taken in certain other jurisdictions which do not require public tagging of the greenshoe securities and permit multiple refreshing of the greenshoe to occur, as required. This could be done via a class order rather than requiring individual applications for each IPO.

(e) <u>Reform of the Sell-Side Research Guidance RG 264</u>

ASIC's guidance on sell-side research, while intended to support the integrity of research, is overly prescriptive when compared with the existing regimes in other leading jurisdictions which allow for the preparation and distribution of Pre-Deal Investor Education ("PDIE"). This creates challenges for firms operating in the Australian market as they endeavour to fit within the more stringent regulatory guidance.

ASIC should rework its sell-side research guidance in RG 264 to be aligned with more standard overseas practices. Some of the concerns raised by our members include: (i) the arbitrary nature of the key stages of a capital raising mandate where research may be involved (pre-solicitation, pitching and post-appointment) which do not align with the expectations of other jurisdictions; (ii) limiting interaction between the syndicate analyst and the issuing company management to the single general and financial briefing(s) (and not allowing further discussions appropriately chaperoned by compliance); (iii) not allowing corporate advisory deal teams to participate in factual reviews of draft reports (redacted for valuation and forward looking financials) before they are published, and (iv) restricting the ability for research analysts to participate in 'vetting' potential future IPO candidates without concern of being restricted from being involved in drafting PDIE reports.

AFMA has also previously expressed concerns around restrictions on the manner and timing of analyst interactions with investment banking underwriting (or similar) committees prior to the release of IER and the resulting negative effect on Australia's public markets. Allowing research analysts to provide input into these committees allows licensees to consider IPO candidates with more rigour and thus improve the quality of candidates that proceed to IPO, without compromising research independence.

Good quality PDIE content benefits the overall quality of the IPO process. However, wall crossed research analysts have a limited period to conduct due diligence, build models and draft PDIE, which would benefit from greater access to the issuer and corporate advisory deal teams (such as by permitting a facts-based review of research reports). Use of dedicated compliance chaperones to manage risks to research independence is common practice in other jurisdictions, such as Singapore and Hong Kong, and may be a better solution.

(f) *<u>Placement restrictions</u>*

The COVID exemptions for capital raising were a successful temporary adjustment of some of the regulatory barriers to raising capital in public markets to respond to the global market uncertainty caused by the pandemic. AFMA would support a permanent increased placement capacity to 25% and increased share purchase plan capacity above $30,000. We consider that these incentives should be made permanent to provide greater flexibility for listed entities to address external risks, such as – for example – the current uncertainty caused by the US tariffs, and to more effectively support the public markets as a source of capital.

(g) *<u>Rule 10b5-1 equivalent trading plans</u>*

There is no equivalent of 10b5-1 trading plans in Australia. These plans allow corporates, executives, sponsors, founders and other investors to manage insider trading risks. The pre-determination of trading activity facilitated by these plans would allow for greater flexibility of those involved in publicly listed entities. In April 2021, in its second interim report, the Senate Select Committee on Australia as a Technology and Financial Centre recommended the introduction of an equivalent regime in Australia, subject to appropriate market integrity safeguards. It was recognized that such a mechanism may encourage companies to maintain their operations in Australia and encourage listing on the local exchange.

(h) <u>Scope 3 emissions disclosures</u>

Similarly, Scope 3 emissions' disclosures create extremely challenging tasks and risks for companies and their directors. The ISSB has recently released an exposure draft proposing amendments to IFRS S2 that would provide relief to ease application of requirements related to the disclosure of GHG emissions. The proposed amendments relate to the application of GHG emissions disclosure requirements in IFRS S2, including relief from measuring and disclosing Scope 3 Category GHG emissions associated with derivatives and some financial activities. Given international recognition of the difficulties with Scope 3 reporting it is sensible to not proceed with these requirements. This would also deal with the current anomaly of having to disclose Scope 3 emissions even where doing so may be without a "reasonable basis" for such forward looking statements, which is required under the Corporations Act.

(i) <u>Consistent fault/negligence liability regime for issuers and directors</u>

The various liability laws applying to directors and issuers relating to Disclosure Documents, continuous disclosure, forward looking statements, market breaches are confusing, inconsistent and often not fault based. AFMA considers that these laws should be reworked into standard fault-based test. We refer ASIC to the wording in s1308 of the Corporations Act and the need for companies/directors to "take reasonable steps" to ensure compliance with the various laws.

This would also align with international standards and good legal practice in public markets and the US concept of 'scienter' for breaches of the law. In doing so, it would make acting as a director of a public company more attractive for good candidates and thereby strengthen public markets in Australia.

(j) <u>Continuous disclosure laws</u>

Continuous disclosure is a key difference between private and public markets. While we recognise this is an important aspect of public market regulation in Australia, we understand that the current framework can be a source of frustration for some companies, and act as a deterrent to public listing in Australia.

While the introduction of a 'fault' standard in continuous disclosure laws post COVID and its permanent adoption post 2021 for private litigants to reduce the potential for opportunistic class actions is a welcome improvement, the reversion to a 'no fault' standard for actions pursued by ASIC presents an unwarranted risk to listed companies and their directors that have made appropriate efforts at compliance.

This is particularly relevant with the recent introduction of the climate reporting regime. The climate reporting regime currently has a transitional 'safe harbour' period in recognition of the challenges of building the required data infrastructure. However, the risk of future litigation once this period lapses is a concern given the strict liability offenses for certain actions.

Requiring a fault element for continuous disclosure breaches is equitable, reasonable and in the interests of promoting the attractiveness of Australian markets, without comprising market integrity.

(k) *Forward looking statements*

In Australia, the liability regime for forward looking statements is inherently challenging, and it risks inequitable application of the processes of justice and creates unfair risks for businesses and directors where standard fault requirements for breaches are not applied.

Under various provisions of the Corporations Act, statements about future matters must be based on "reasonable grounds" at the date they are made or will be taken to be misleading. We argue that forward looking statements should not have a reversed onus of proof. Conversely, a 'reasonable steps' defence is more appropriate and should be employed for forward looking statements.

For early-stage listing companies more flexible requirements would benefit IPO candidates similar to the UK listing rules approach that require only a 3-year revenue earning track. Also, for early-stage companies, ASIC should clarify its expectations on whether forecasts are required, or alternatively, provide some concession to this expectation. Greater flexibility to determine whether to include forecasts in an IPO prospectus would also facilitate better cross-border engagement, particularly where other jurisdictions do not require an IPO forecast (and whether the inclusion of one may impose excessive liability risk).

(l) *Remove the 'Two strike rule'*

The Government should consider removing the "two strike rule" (Div 9 of part 2G.2 of the Corporations Act) and adopt an approach to director remuneration that is consistent with peer jurisdictions, to support the competitiveness of Australia in attracting leadership talent.

The two-strike rule puts listed companies and directors at risk of unwarranted reputational damage, can be misused and makes public listing less attractive.

(m) *Stepping stone liability*

The Government and ASIC should address the expansion of 'stepping stone' liability.

This is a key risk for directors and puts them at significant personal risk for 'failing to prevent' the breaches of the company. Failing to prevent is inconsistent with the norms of legal liability and while expedient for regulatory enforcement it does not strike the correct balance for supporting the success of Australia as a financial centre.

The need to assume such significant personal risk for the potential failings of a company can be inherently unfair given the nature and complexity of many large businesses.

The erosion of the business judgement rule and inability to provide adequate insurances, are also relevant here and should be addressed.

(n) Class action threats

The growth in class action threats faced by companies via litigation funders and others should be curbed. These create distracting and costly matters for companies that discourage public listing. They contribute to the growth of a litigation culture which is antithetical to the business environment and ultimately to Australia's interests. Revising the liability regime to be fault based and also introducing appropriate due diligence defences should help address this issue.

(o) Compete with regional jurisdictions for business

Australia's regional competitor jurisdictions compete aggressively for listings. We note, for example that Singapore's 2025 Budget included tax incentives for more companies and fund managers to list on the Singapore Exchange and the Monetary Authority of Singapore's S$5 billion Equity Market Development Program (EQDP) which is designed to enhance the competitiveness of Singapore's equities markets by partnering with select fund managers to invest in Singapore stocks.

While beyond ASIC's remit, we note the Government should consider tax breaks, grants or subsidies for companies that choose to go public, to be competitive. While perhaps not doctrinally pure, this is a regional commercial reality.

(p) Improve Regulatory Operational Interfaces and Practices

Reductions in the costs of using public markets could be made by regulators including ASIC simplifying and standardising their interfaces with firms and their agents. Members suggest these changes could include:

- Providing a standardized digital platform for submissions and filings including for corporate actions;
- Harmonizing financial reporting standards with international standards to reduce complexity for companies operating in multiple jurisdictions;
- Adopting a risk-based approach to compliance audits and inspections, focusing on high-risk areas and reducing the frequency and intensity of audits for low-risk companies and perhaps allowing companies to conduct self-audits and submit compliance reports;
- Where risks are low, reducing the frequency and proportionality of external audits;
- Using automation and AI to review and process regulatory filings to improve response times;
- Supporting the sole use of digital communication channels for investor relations, including electronic delivery of annual reports, proxy statements, and other communications;
- Simplifying the proxy voting process via digital voting platforms and reducing the complexity of proxy statements; and

- Exploring more 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.

(q) *Index inclusion*

It would be beneficial to public markets to allow companies to be immediately eligible for index inclusion. This has the potential to drive, in significant respects, more demand at IPO, particularly where we continue to see significant passive money investing.

(r) *Relaxing ASX Listing Rule minimum requirements*

In certain instances, the minimum 20% free float can be a major challenge for large companies wanting to list on the Australian exchanges, as absolute size does come into play. There have been limited successful IPOs greater than A$2bn in Australia. For "mega cap" companies, this could prevent them from being able to list in Australia. Similarly, the minimum 30% free float requirement for index inclusion is also very restrictive for large companies and there should be consideration to reduce these thresholds in certain circumstances. By way of comparison, in the United States it is common for IPOs size to be 10-20% of Initial Capital.

(s) IPO Forecasts

Whilst members believe it's beneficial to have IPO forecasts as it allows pricing to be off forward earnings, in some cases it is difficult to accurately forecast a business and hence we encourage consideration of more flexibility around forecast inclusions.

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?

We agree that a sustained decline in number of listed entities relative to GDP could negatively impact the Australian economy. In addition to an overall decline in listings, AFMA notes that a limited sectoral spread of listed entities is a separate issue. Ideally investors would have a wide range of investment options with Australia's public markets supporting a wide range of companies.

AFMA members believe that thematic reviews can be helpful for understanding broad trends. It is also recommended that that large individual delistings are also tracked to ensure avoidable idiosyncratic drivers are identified and addressed where possible.

AFMA believes that the adverse effects of a sustained decline in listings is difficult to mitigate and a decline in listings is best avoided. In this respect, we refer to our responses above on ways to strengthen and improve the public markets. To stay competitive, markets must evolve quickly and try new products and approaches. AFMA sees benefit in ASIC accelerating its response times for changes in line with regional competitors. See our suggestions in response to question 5.

We also recommend ASIC support for the adoption of:

- Dual class shares to encourage founder IT companies listing on Australian exchanges;
- A form of mutual recognition for established exchanges such as HKSE, SGX, NYSE, NASDAQ, LSE and TSX. This could be based on the rules for NZ Mutual Recognition;
- Lower thresholds for Foreign Exempt Listings for entities listed on HKSE, SGX, NYSE, NASDAQ, LSE and TSX. This could be based on the rules for NZ Foreign Exempt Listings;
- Voluntary escrow in favour of underwriters which does not give rise to a substantial holding reporting requirement for the underwriters under section 671B of the Corporations Act.

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?

Our comments in response to the above questions provide examples of the Australian regulatory settings that make public listings in Australia less attractive.

We also highlight that there can be a complex interplay between the more intensive regulatory requirements, public scrutiny and community expectations around public companies This is also likely to be driven by the fact that public companies tend to have higher profiles, and more widely distributed ownership, including direct participation by retail investors. The topics reported on by the media can be varied, such as, for example, the remuneration of directors (including the two-strikes rule) attracting both member attention and media commentary. In certain respects, the regulatory settings (and obligations based on them), such as the two-strikes rule, may drive this media reporting, which can also create unrealistic community expectations about the achievement of outcomes, as opposed to just good conduct and process.

This media reporting may also prompt pressure for further regulatory scrutiny or reform. In circumstances where there is media and other pressure being placed on particular issues, we recommend that ASIC continues to adopt an objective stance in deciding whether and how to address the issues or allegations made in these reports. Using director remuneration as an example, there is a rationale for competitive remuneration being paid to attract qualified individuals and to compensate them for accepting the demanding and high-risk role on a publicly listed board. AFMA members believe that it is important, in assessing regulatory action, to have appropriate regard to those companies and directors who are taking reasonable efforts to comply with relevant legal and regulatory requirements.

When new regulation is necessary, Australian regulators should ensure that the laws and regulations are balanced and proportionate and are not so onerous as to make Australian companies less competitive internationally. While importing more stringent regimes from large jurisdictions is risk reducing for regulators, these are not always a good fit for a smaller market like Australia and may have unintended anti-competitive consequences, detrimental to the economy. It is important to evaluate the application of these laws to the Australian market and doing so with a view to promoting international comity.

This international comity is important in helping to prevent the fragmentation of markets. AFMA recommends that Australian regulators seek less novelty and more alignment with international practices where this makes sense, including in the design and implementation of regulation and guidance. This does not mean selecting the most onerous obligations of each jurisdiction and packaging them into a new piece of regulation in the Australian market. There are real costs with making Australian laws and regulations an outlier. This includes impeding cross border capital flow and making our public markets less attractive. In these circumstances, more prescriptive regulation may not justify the additional benefits regulators may anticipate by adopting bespoke or differentiated law or regulation applicable to the Australian market.

Separately, we note ASIC's ongoing interest on the extent to which the mishandling of confidential information may impact market integrity. We agree that the public markets are not assisted by media speculation in advance of potential fundraising activity.

Moreover, our members are aware of the global investor sentiment that the Australian public markets have capacity for improvement in this area with current leakage levels acting as a disincentive for prospective issuers. We welcome ASIC's recognition of this issue and would support further re-emphasis of the need for confidentiality and improvements by all market participants, corporate advisers and issuers ahead of announced or concluded offerings.

<u>Private market risks and market efficiency and confidence</u>

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?

AFMA is not aware of any *fundamental* problems with the regulatory settings and oversight in relation to private markets. We consider the current regulatory settings are appropriate and do not negatively affect capital raising and confidence in private markets in general. In this context, it is relevant to note that ASIC highlights in the discussion paper that private markets in Australia are not at a stage where they would be considered systemically important. At this time, we believe greater regulatory interventions in private capital would not assist the private markets and their potential for capital raisings but rather may stifle growth, flexibility and have the potential to significantly increase regulatory costs and negatively impact their efficient capital raisings.

As a broader proposition, AFMA is confident in the effectiveness of the 'wholesale' construct as a robust and an appropriate way to protect retail clients. We do not support and believe it incorrect to 'look through' these structures to the retail investors underneath and to disregard the fact that retail investors can generally only access private markets if receiving financial product advice intermediated via their professional financial advisers. The great majority of investment funds in capital markets that ultimately belong to retail investors are done so on a pooled basis involving structures that allow them to access a greater range of investments and have funds managed by skilled professionals.

In the case of superannuation funds, the larger funds are prudentially regulated by APRA, must hold and comply with an Australian Financial Services License issued by ASIC and comply with the Corporations Act and the Superannuation Industry (Supervision) Act as wholesale entities. This legislation is substantial, imposing a sophisticated regulatory infrastructure, enhanced by stress tests and monitored by APRA and ASIC (including the dually administered Financial Accountability Regime and the ASIC Product Design and Distribution regime). We believe that the regulatory settings are appropriate, and they are functioning well. Other entities, such as listed funds and self-managed superannuation funds, are also regulated by ASIC and are also subject to a wide range of regulatory duties and obligations. While AFMA does not support any increase in ASIC's regulatory activities in private markets, we note that we expect private markets to continue to evolve and mature. In this regards we see the potential for the following developments:

1. *Common Data Standards*
   We see potential for the industry to continue to develop common data standards and private sector repositories to improve transparency and data sharing among market participants. This will improve clarity around valuation approaches and make valuations comparisons more consistent within assets classes and increase investor understanding of why assets are held at a particular valuation. It will also help investors to navigate more intricate structures, and such restrictions to information, pre-emptive rights, and tax structures, that can add complexity to valuations. We note in this regard the new independent risk assessment product for private credit investments that is offered by MSCI Inc. and Moody's Corporation designed to provide independent risk assessments for private credit investments at scale.

2. *Secondary Market Development*
   We see potential for the development of secondary markets or trading platforms to enhance liquidity and provide more market-driven valuation data, which may allow a premium charge for illiquidity (by way of a pricing discount) which is similar in the approach to how public equity capital is raised (that is, at a discount to the last traded price).

3. *Valuation Methodology Standardisation*
   We see potential for industry bodies to establish guidelines and standards for best practice valuing private infrastructure assets, with a view to ensuring greater consistency and reliability. This may include length of model period, terminal value and business plan assumptions (i.e. inflation).

4. *Best Practice Macroeconomic Factors*
   Valuations are sensitive to macroeconomic variables like interest rates and inflation. We see the potential for industry bodies to develop best practice scenario analysis and stress testing in valuation models to assess the impact of these factors and seek private valuations to have an increasingly consistent set of economic assumptions for assets that have not transacted for a period of time (market tested).

5. *Standardised Asset Structures*
   We see potential for the industry to develop and promote the use of standardised asset structures to aid in transparency and liquidity.

6. *Benchmarking and Performance Assessment*
   We see potential for industry to develop more customized benchmarks that account for the specific attributes of these assets by various sub sectors. These would ensure, for example, that GDP linked assets would be valued against GDP scenarios rather than against macro sensitive assets (for example a utility distribution network) in order to reflect different returns across the asset cycle.

7. *Mark-to-market Valuation:*
   We see potential for industry standardisation of practices where if a fund is seeking to buy assets at (higher) return, it should consider the implications on the existing portfolio with a view to revaluing the portfolio (lower).

Finally, balancing the needs of the Australian markets with the cross-border nature of private markets/capital, ASIC should ensure its approach does not inhibit local investors investing into offshore private markets either directly or via Australian vehicles nor discourage offshore investment into the Australian markets. If requirements are burdensome, it may undermine the attractiveness of the Australian markets for foreign private capital and for Australian investors to invest in offshore private markets.

9. Have we identified the key risks for investors from private markets? Which issues and risks should ASIC focus on as a priority? Please explain your views.

ASIC appears to have identified the key risks in the discussion paper. However, AFMA believes that it is important to think about these risks carefully. Certain risks apply when retail investors that are given direct exposure through professional advisers and intermediate exposure (see question 11 below for further detail). The risks are likely to apply differently depending on the manner in which retail gains exposure to private markets, as well as the type of product involved. AFMA again cautions that it would be premature to prioritise regulation to address any particular focus area. Instead, ASIC would benefit from continuing to engage with participants in the market to better understand the various risks and exposures before designating any such focus area.

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 the regulatory settings are appropriate for their wholesale context. Please refer to our earlier responses.

<u>Retail investor participation in private markets</u>

11. What is the size of current and likely future exposures of retail investors to private markets?

It is important to distinguish between direct exposure of retail investors to private markets mainly acquired through professional advisers and ultimate exposure of retail investors via wholesale intermediaries who aggregate the funds of many retail investors.

These two types of exposure are very different and present entirely different risk profiles.

In terms of numbers, we expect the direct exposure of retail investors to private markets, for example through privately arranged loans to businesses, is low. Without intermediation private market investments are typically difficult for retail investors to access, given they are restricted to sophisticated / wholesale/ professional/ institutional investors. In the rare cases where there are direct retail investors suitable disclosures and, where appropriate, education by regulators and others should assist these investors understand the associated risks.

Retail exposure to private markets via wholesale intermediaries is however, significant and growing, mainly due to the allocations of prudentially regulated superannuation funds to these markets. Listed investment vehicles, and exposure via the activities of other companies also provide some exposure. However, ASIC has recognised in the discussion paper that private markets are not yet systemically important and we do not believe that the growth of this retail exposure should be of regulatory concern because of the legal and regulatory rules to which already apply. In particular, we have already identified the laws and regulation governing superannuation funds. These funds are sophisticated, managed professionally, and in many cases, have their own expert internal financial advisers. This affords members a high degree of protection.

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

Private markets provide investment diversification and the potential for retail investors to access investments, such as high growth start-ups, which would otherwise not be available to them. This diversification benefits retail investors and permits them to participate in various premia that are less available on public markets. The risk / reward ratio must of course be considered and balanced against benefits. Decisions on whether risk adjusted returns are appropriate are best made by suitably qualified investment managers that intermediate retail investments.

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)?

There is little direct investment in private assets by retail investors. In our view, the great majority is intermediated. Please refer above.

AFMA is not aware of any significant shortcoming of the current financial services laws in relation to retail investors in private assets particularly given their limited involvement in this part of the market. Furthermore, AFMA notes the risks of overregulating private capital deployment could detract from a key advantage Australia enjoys for companies with its large professionally managed superannuation system.

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?

ASIC and other regulators could benefit from access to data to help them receive better insights into private markets. AFMA is supportive of initiatives that allows regulators to make informed decisions. However, this data is not cost-free and, in public markets, has created substantial and ongoing costs for public companies and public market participants. The disclosure regime for companies and the reportable situation regime for market participants are high-cost regulatory burdens. Many of the benefits of private markets come directly from not having to incur the costs associated with the mandated reporting, disclosure, and transparency that public markets demand, that is from being private. These costs must be understood before being incurred.

In terms of gaining access to this data, ASIC and other regulators should explore the ability to rely on existing legislation and regulation, such as the Financial Sector (Collection of Data) Act. ASIC may also consider support increased data sharing amongst market participants where private market participants find a net benefit. This could be done through a regulatory framework that supports private data repositories. In all cases, regard should be had to the obligations imposed on participants in other major markets, so that any data reporting obligation is not inconsistent with those markets.

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?

The great majority of investors in private markets are wholesale investors. Wholesale investors are well-placed to make an informed investment decision and to pursue their rights through the courts and pursuing any relevant persons for breach of duties owed to them.

We caution that well-intentioned interventions by regulators, including, for example, with respect to fees and investment costs, can result in unanticipated adverse consequences and create perverse incentives for investors to underspend on the most important elements of their investment decisions.