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TO Australian Securities and Investments Commission
Level 5, 100 Market Street
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By email: markets.consultation@asic.gov.au

5 MAY 2025

Dear Sir / Madam

KWM's submissions on ASIC's public consultation on Australia's evolving capital markets

We refer to the Australian Securities and Investments Commission's ("**ASIC**") public consultation on Australia's evolving capital markets dated 26 February 2025 ("**Discussion Paper**").

King & Wood Mallesons ("**KWM**") welcomes the opportunity to comment on the issues raised by ASIC in the Discussion Paper. In our view and based on our analysis and gathering of inputs, ASIC raises many good points for consideration regarding the important issues and implications arising from evolving changes in, and the health of, Australia's public and private capital markets. We applaud ASIC for making this a priority and for the release of the Discussion Paper and as a result, we have spent considerable time working through the issues to assist ASIC's consideration of these matters.

In summary:

- **Public markets:** we propose a range of reforms in areas such as director liability and remuneration for directors of listed entities, which we believe would have a significantly positive impact on restoring balance between the public and private markets. We have developed actionable ideas to address these issues.
- **Net listings**: we also have actionable ideas aimed at enhancing the initial public offering process and public markets, which we believe would support the goal of improving net listings on the Australian Securities Exchange.
- **Private markets regulation**: we do not believe that introducing new regulation for private markets is required based on anything we see today or we can foresee in the future. Where ASIC determines following its thorough analysis that certain parts of Australia's markets are operating in ways that are sub-optimal from a regulatory risk / investor protection perspective, we encourage it to use the powers and tools already available to it to address those particular issues (in the relevant verticals within our private markets).
- **Data**: We acknowledge ASIC (and the other key Australian regulators) do not have the same level of data clarity on our private markets as they possess on our public markets. We agree that it makes sense for ASIC to continue its efforts to obtain a better understanding of how Australia's private markets are operating and which parts of those markets may require enhanced regulatory "line of sight" before it determines what further information collection obligations it will impose, if any.

Where we do make a submission on an actionable idea, we have sought to address the idea in a way that ensures there is no reduction in market integrity.

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These submissions are included in the attachment in further detail in the form of a document which sets out ASIC's questions and our responses. It omits any questions that we did not have comments on. Our submission is split into **Attachment 1** (and relevant annexures) which addresses **public markets**, and **Attachment 2** which addresses questions related to **private markets**. We have taken into account ASIC's objectives of maintaining, facilitating and improving the performance of the financial system and the entities within it, and promoting confident and informed investor and consumer participation in the financial system, when preparing our submissions.

The maintenance of high standards of conduct in markets is critical to the integrity of Australian commerce. Our responses seek to advance those high standards while at the same time removing or tempering regulatory settings which have unintentionally created an imbalance between public and private markets.

We would be happy to discuss if you have any questions in relation to our submissions.

Please contact any of one of us if you would like to discuss.

Yours sincerely

King & Wood Mallesons

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ATTACHMENT 1: PUBLIC MARKETS

1 Actionable ideas to facilitate an increase in "net listings" in Australia

The Discussion Paper calls for "actionable ideas" to redress the recent decline in "net listings" in Australia. This attachment – and more particularly its annexures - set out King & Wood Mallesons' ("**KWM**") submissions on question 5 of the Discussion Paper. Question 5 asks:

> *"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?"*

No single idea is in our opinion capable of making a demonstrable difference to the attractiveness of public markets in Australia. However, taken together, the ideas that we as a firm would like to put forward, should have a positive impact.

Set out in the table below is a list of those ideas. We have divided these into equity capital market ideas (primarily to smooth the initial public offering ("**IPO**") process) and corporate governance ideas (so that being public is more attractive). It is logical to list the ideas out in that order, but the corporate governance ideas are in our opinion the most important. A more detailed explanation of the ideas is included in the corresponding annexure (except where marked "N/A").

We would be happy to discuss any questions in relation to our submissions.

Capitalised terms used but not defined in this Attachment have the meaning given to them in our cover letter.

#	REFORM OPPORTUNITY	ANNEXURE
	Equity capital markets	
1	**Facilitate after-market stabilisation arrangements better:** this advocates amending the no-action letter conditions related to greenshoe tagging and daily reporting requirements, when stabilisation bids can be made and the frequency, and the ability to refresh the greenshoe.	A (pg 5)
2	**Smooth the rigidity of sell-side research**: this advocates re-visiting Regulatory Guide 264 ("Sell-side research") to make it less prescriptive in some aspects.	B (pg 42)
3	**Ease pre-prospectus advertising and publicity restrictions**: this advocates modifying aspects of the pre-prospectus advertising and publicity restrictions so that they align with the existing regime for product disclosure statements ("**PDS**").	C (pg 49)
4	**Simplify the liability regime for misleading and deceptive conduct in capital raising disclosure**: this advocates streamlining the content and liability standard in the Corporations Act 2001 (Cth) ("**Corporations Act**") for capital raising participants in connection with the issuance of fundraising documents.	D (pg 55)

#	REFORM OPPORTUNITY	ANNEXURE
5	**Change the liability regime for forward-looking information in capital raising disclosure**: this advocates modifying the liability regime applicable to forward-looking statements included in prospectuses and PDSs under sections 728(2) and 769C(1) of the Corporations Act so that they align with the "reasonable steps" approach for misleading statements as set out in sections 1309(2) and (7) and (10) of the Corporations Act.	E (pg 65)
6	**Streamline the IPO path for listed trusts**: this advocates modifying elements of the regulation applicable to certain listed trusts (being trusts that are listed or to be listed, and invest in real property or infrastructure assets or are part of a stapled structure with a listed or to be listed company) to remove pain points, including in respect of fees and costs disclosure, design and distribution obligations, obtaining an Australian financial services license and seeking standard ASIC relief.	F (pg 70)
7	**Trial a PISCES equivalent:** this advocates introducing a regime in Australia equivalent to the Private Intermittent Securities and Capital Exchange System ("**PISCES**") recently introduced by Britain's Financial Conduct Authority.	G (pg 74)
8	**Provide certainty on the exposure period**: in the interests of only addressing new ideas, we have not included anything in this submission on possible changes to the IPO prospectus / PDS exposure period.	N/A
	Corporate governance	
9	**Reconsider the approach on stepping stones liability**: this advocates making changes to the use of 'stepping stones' liability in relation to provisions of the Corporations Act that already have their own regimes of liability and defences (e.g. continuous disclosure cases).	H (pg 75)
10	**Fix the overlap in obligations relating to listed company reporting**: this advocates making changes to the listed company reporting obligations, where case law has confirmed directors cannot avail themselves of reasonable reliance or reasonable delegation as safe harbours.	H (pg 75)
11	**Tone down remuneration reporting and remove the two-strikes rule**: this advocates ASIC supporting legislative change to remuneration reporting and the removal of the two-strikes rule.	I (pg 80)
12	**Allow private rather than public disclosure of officer information**: we would ask ASIC and Treasury to consider whether information regarding a company officer's date and place of birth and residential address should be available through public searches, given safety issues, the potential for identity theft and for aggrieved parties to contact those officers outside of the office.[1]	N/A

[1] See sections 205B (notice of name and address of directors and secretaries to ASIC), 205D (address for officers) and 1274(1) to (2) (requirement for ASIC to keep such registers as it considers necessary and rights of persons in relation to those registers) of the Corporations Act in particular.

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ANNEXURE A – MARKET STABILISATION ARRANGEMENTS

1 Overview

Further to the Discussion Paper's request for actionable ideas, set out below is a formal proposal for modifying certain of the no-action letter conditions set out in ASIC's "Interim Guidance on Market Stabilisation" dated 13 September 2000 ("**IR 00/31**") in order to better facilitate the use of market stabilisation arrangements for Australian IPOs.

An important measure to re-enliven the IPO market in Australia is to create steps which make it more likely that investors in IPOs will not see market declines in the immediate aftermarket. A large number of Australian IPOs in the last 10 years have seen declines in the immediate aftermarket which often takes years to recover from and this has in our experience influenced the willingness of those involved in company formation to prefer private markets where the immediate price / value transparency differs.

One of the most successful mechanisms for protecting the aftermarket in sophisticated jurisdictions is the "greenshoe" over-allotment option on which we elaborate below. It is less popular in Australia largely due to regulatory settings that create a level of transparency that market arbitrage participants exploit. The underutilisation of the greenshoe deters investors (particularly international investors, who expect there to be stabilisation in the aftermarket which is market standard for large IPOs offshore) from investing in Australian IPOs and instead creates a "wait and see" approach. This in turn reduces the demand in the IPO, which impacts size, executability and pricing.

This proposal advocates amending the IR 00/31 no-action letter conditions related to greenshoe tagging and daily reporting requirements, when stabilisation bids can be made and the frequency, and the ability to refresh the greenshoe.

The purpose of these changes is to remove key impediments to the successful utilisation of market stabilisation arrangements, which in turn will facilitate offerors using those arrangements in future IPOs to create a more orderly secondary market through reducing "panic selling" that is not based on fundamentals but rather on minimising loss, and therefore help with building a more attractive IPO process in Australia.

This submission sets out an overview of how market stabilisation arrangements work in Australia and the current regulatory approach. It then details potential areas that would benefit from regulatory reform and the reasons in support of those changes. Throughout the submission, reference is made to how market stabilisation arrangements operate in international jurisdictions, including Hong Kong, the United Kingdom and the United States.

This proposal, if acceptable, could be introduced by ASIC issuing an updated set of conditions that it will generally impose on no-action letters it grants in relation to market stabilisation arrangements. An example of what those amended IR 00/31 conditions would look like is included in Schedule 4 for ASIC's consideration. If ASIC is more minded to use the draft conditions set out in ASIC Consultation Paper 63 ("Market Stabilisation") dated March 2005 ("**CP 63**") as the starting point, then we have also provided a mark-up of that in Schedule 5 for ASIC's consideration.

Capitalised terms used but not defined in this Annexure have the meaning given to them in Attachment 1 ("Public Markets").

2 Overview of Australian market stabilisation arrangements

2.1 Description, purpose and benefit of market stabilisation arrangements

As noted in CP 63, market stabilisation is the purchase of, or the offer to purchase, securities for the purpose of preventing, or slowing, any fall in the market price of those securities following an offer of those securities.[1]

The reason for these arrangements is that an offer of securities often leads to a fall in the price of those securities because of the sudden increase in supply and / or imperfections in the pricing and allocation process. To counter this effect, the underwriter / lead manager of the offer may attempt to stabilise the price of the securities by purchasing, or offering to purchase, the securities for a period after the issue or sale of the securities.[2]

As noted by ASIC in CP 63:

> *"market stabilisation aims to achieve a more orderly secondary market for securities following an initial issue or sale. This enhances confidence in the market for new issues or sales of securities and thereby facilitates corporate fundraising. In particular, market stabilisation increases investor confidence; investors know there will probably be a market for the security at a price that is not artificially deflated by the sudden increase in supply or other factors. Companies are also more likely to raise funds through the issue or sale of securities if they know there will be some initial support for the price of those securities…Permitting market stabilisation in Australia facilitates simultaneous offers of securities in Australia and those other jurisdictions and is more likely to allow for an orderly cross-border market in the securities".*[3]

2.2 How market stabilisation arrangements work in practice

As ASIC is aware, aftermarket stabilisation utilising a "greenshoe" mechanism is a common strategy to encourage IPOs and large secondary securities offerings in major sophisticated jurisdictions.

After the first use in one of the Federal government's Telstra sell-downs, it gained some traction in Australia but has been barely used now for several years. When it *was* used in Australia, market stabilisation arrangements in the IPO context generally involved the following:

(a) **grant of Over-Allocation Option ("greenshoe") -** the IPO entity ("**ListCo**") granting to the underwriters / lead managers a call option that gives them the right to acquire up to an additional 15% of the total IPO offer securities ("**Offer Shares**") at the offer price at any time up to 30 calendar days after listing of ListCo ("**Stabilisation Period**") ("**Over-Allocation Option**" – also known as the greenshoe option). In many cases, the Over-Allocation Option is granted by some or all of the existing securityholders rather than ListCo itself, but that is a complication that is not needed for this analysis.

(b) **appointment of Stabilisation Manager:** ListCo appointing one of the underwriters / lead managers as the stabilisation manager ("**Stabilisation Manager**"), who:

(i) will be responsible for managing and coordinating the market stabilisation;

(ii) will ensure compliance with the conditions imposed in the no-action letter from ASIC; and

(iii) is an existing ASX participant to enable ASX to monitor compliance with the stabilisation conditions,

(in accordance with CP 63).

[1] As noted in paragraph 2 on page 3 of CP 63.

[2] As noted in paragraph 3 on page 3 of CP 63.

[3] As noted in paragraphs 2 and 3 on page 6 of CP 63.

(c) **over-allocation:** as part of the IPO offer ("**Offer**"), the underwriters / lead managers will over-allocate a number of Offer Shares to investors (up to 15% of the total Offer) ("**Over-Allocated Shares**"). This is effectively overselling or creating a short position in the stock.

(d) **proceeds:** the Stabilisation Manager will apply the settlement proceeds from the Over-Allocated Shares to fund the acquisition of ordinary securities in ListCo ("**Shares**") on-market through stabilisation trades ("**Stabilisation Trades**") or to exercise the Over-Allocation Option, or a combination of both (see below). The proceeds will be kept in a special purpose account (noting that the Stabilisation Manager is an Australian financial services license holder).

(e) **securities loan:** in order to facilitate settlement of the Over-Allocated Shares, the Stabilisation Manager will usually borrow the equivalent number of Shares from the existing securityholders or institutional investors participating in the Offer ("**Counterparties**") ("**Stock Loan**") or by agreeing with certain large IPO investors for delayed delivery of their respective Offer Shares. This means that the Stabilisation Manager will owe the Counterparties that number of Shares.

To close this out, the Stock Loan will provide that the Stabilisation Manager re-delivers an equivalent number of Shares to the Counterparties before the end of the Stabilisation Period. This re-delivery obligation will be met by the Stabilisation Manager acquiring Shares through Stabilisation Trades or by exercising the Over-Allocation Option (see below).

(f) **Share trading:** If the Shares are trading:

(i) **Stabilisation Trades:** *below* the Offer Price during the Stabilisation Period, then the Stabilisation Manager will undertake to acquire Shares on market through Stabilisation Trades funded by the additional proceeds (held in the special purpose account) received from investors in respect of the Over-Allocated Shares – this enables the Stabilisation Manager to stabilise the fluctuating Share price by decreasing the supply of Shares available. This also assists in covering the short positions on the Over-Allocated Shares; or

(ii) **Over-Allocation Option:** *at or above* the Offer Price during the Stabilisation Period, then no Stabilisation Trades will be made and the Stabilisation Manager will exercise the Over-Allocation Option in full using the additional proceeds received from the Over-Allocated Shares.

As observed earlier, it may be a combination of both.

2.3 Reason for a no-action letter

As noted by ASIC, market stabilisation may contravene Part 7.10 of the Corporations Act. In particular, persons who engage in market stabilisation may breach sections 1041A (market manipulation), 1041B to 1041C (false trading and market rigging), 1041H (misleading and deceptive conduct) and 1043A (insider trading) of the Corporations Act.[4]

ASIC has made clear that it will give a no-action letter stating that it does not intend to take action against those involved in a particular market stabilisation, if it is of the view that it would not advance the policy of the legislation to take enforcement action on that conduct. ASIC will take that view where it is satisfied that the market stabilisation will facilitate the offer of securities and the risk of a false, misled or uninformed market being created is mitigated by certain constraints and conditions.[5]

The no-action letter will be subject to certain conditions prescribed by ASIC that are generally in line with those set out in IR 00/31 (or otherwise in line with the draft conditions set out by ASIC in CP 63).

[4] Paragraph 1 of page 6 of CP 63.

[5] Paragraph 4 of pages 6 and 7 of CP 63.

3 Regulatory approach to market stabilisation arrangements

There was more focus on market stabilisation arrangements in the early 2000s.

ASIC released IR 00/31 on 13 September 2000. Under IR 00/31, ASIC confirmed that it would grant no-action letters in relation to market stabilisation arrangements for an IPO subject to certain conditions.

In 2005, ASIC released CP 63, where it proposed revising certain aspects of the conditions set out in IR 00/31 and invited interested parties to comment. We contributed to a formal submission on this at the time.

However, ASIC's consideration of these issues was put on hold in 2005 while it waited for the U.S. Securities and Exchange Commission ("**SEC**") to take action on proposed amendments to the U.S. rules on market stabilisation and related activities under Regulation M of the U.S. Securities Exchange Act of 1934 ("**U.S. Exchange Act**" and "**Regulation M**"). Under Regulation M, a consistent and clear distinction is drawn between *traditional stabilising bids* (which are for the purpose of pegging, fixing or maintaining the price of a security), on the one hand, and *other syndicate activities, including syndicate covering transactions* (which serve other purposes but may nonetheless have some stabilising effect), on the other – it is the equivalent of syndicate covering transactions which are seen in Australia.

Syndicate covering transactions typically involve an over-allotment of securities by the joint lead managers and subsequent activities to cover the short position created by the over-allotment, including on-market purchases, the exercise of an over-allotment option from the issuer, or a combination of both.

Traditional stabilising bids (which do not occur in Australia) may only be used for the purpose of preventing or retarding a price decline. Traditional stabilising bids are regulated by the SEC in a manner generally consistent with IR 00/31, and are *infrequently* employed in U.S. offerings. Stabilising bids help to stabilise the price of the security before the offering is completed (an underwriter participating in a "distribution" of securities subject to Regulation M cannot deem its participation in the distribution complete until its participation has been distributed, including all other securities of the same class that are acquired in connection with the distribution, and any stabilisation arrangements and trading restrictions in connection with the distribution have been terminated).

By way of contrast, syndicate covering transactions are for the purpose of reducing a syndicate short position created in connection with an offering and generally occur after the offering is completed. While the SEC recognises that overallotments and syndicate covering transactions are frequently employed and may have the effect of stabilising the price for the security in the immediate aftermarket, the SEC draws a distinction between the 2 activities and continues to regulate them differently.

Part of the SEC's proposal to amend Regulation M included extending notification and disclosure requirements applicable to traditional stabilising bids to syndicate covering transactions. After a period of extensive consultation in the United States involving a range of market participants, the proposed amendments were not adopted by the SEC. In abandoning its proposed reform of Regulation M in relation to syndicate covering transactions, the SEC stepped away from regulation in the manner applicable to greenshoes under IR 00/31 and as proposed by CP 63.

Since 2005, there has not been an occasion for renewed comprehensive consideration of the issues presented in CP 63 in light of market conditions and practices. A comparative analysis of the approaches to greenshoe regulation in Hong Kong, the United Kingdom and the United States shows that the current Australian approach is out of step with the international standard. Further details are set out in paragraph 4 and Schedule 3.

4 Submissions for amendment to no-action letter conditions

4.1 Overview of amendments sought

In order to facilitate the use of market stabilisation arrangements for Australian IPOs in a more effective way, we submit that certain amendments be made to the conditions in IR 00/31 as marked in Schedule 4. If ASIC is more minded to use the draft conditions set out in CP 63 as the starting point, then we have also provided a mark-up of that in Schedule 5. Further details in relation to each are set out below.

4.2 Key changes – tagging and daily reporting

The key changes that we request concern the detailed nature of the publicly available information surrounding the greenshoe once exercised, which we submit undermines the effectiveness of the stabilisation mechanism and therefore investor confidence in the aftermarket.

Currently, ASIC (and ASX) requires that all bids/trades by the Stabilisation Manager (either directly or through the stabilisation broker) are tagged with a status note (i.e. rather than the trade / bid being anonymous, it is tagged with a status note showing that it is made by the Stabilisation Manager or stabilisation broker for market stabilisation purposes)[6] and that the Stabilisation Manager undertakes daily reporting to ASX[7]. These have the potential to create opportunistic market activity. This daily reporting would include the Stabilisation Manager disclosing to ASX and ASIC (on the request of ASX where applicable, as per conditions 2, 3 and 17 of IR 00/31, as proposed to be modified by condition 3 of CP 63):

- all information which it would need to disclose to a securities exchange under Regulation M (to the extent that Regulation M can be applied to market stabilisation arrangements) at the times that Regulation M would have required (see below for further details); and
- each trading day for public disclosure on ASX:
  - the number of ListCo shares purchased on the previous trading day;
  - the total of all ListCo shares purchased to date; and
  - the total number of ListCo shares purchased under the market stabilisation arrangements.

Disclosure of this level of specificity and bidding / trading with this lack of anonymity is a gift to the most sophisticated and professional investors who have the skill, knowledge and expertise as well as the resources effectively to game the greenshoe. This has the potential to undermine the rationale of the arrangements in the first place. In particular:

- **opportunistic trading:** sophisticated / professional investors will be able to deduce how much of the greenshoe remains to be used (as the IPO offer size and over-allotment option size will be publicly available information) and how best to exploit this through opportunistic trading, which in turn has a destabilising effect on the market for the IPO securities. Specifically, extensive short-selling, followed by cover-buying, is likely to occur as the greenshoe nears utilisation (see below);
- **downward momentum:** as tagging reveals the extent of the stabilisation activity, a perceived large volume of stabilisation trades may lead to the impression (which may not be accurate) that the price of the security will fall. In turn, these expectations may become self-fulfilling (as securities are shorted or sold) and therefore the actual price of the security may drop. This may lead to copycat behaviour in the market, which may further depress the market price. In these cases, the fall in price reflects the impact of tagging rather than the intrinsic value of the security;

[6] Conditions 7 and 8 of IR 00/31 and condition 11 of CP 63.

[7] Conditions 2, 3 and 17 of IR 00/31 and conditions 3 and 16 of CP 63.

- **speculative trading:** tagging may encourage speculative trading in the securities which may not otherwise occur (i.e. short term speculative traders may deliberately target tagged securities because of the information provided by tagging together with the expectation that this will result in price volatility in the tagged security). This means that the Stabilisation Manager and stabilisation broker will be competing against short term speculative traders, with the tagging making it an uneven playing field. As with the downward momentum analysis, it is the impact of tagging which is reflected in the price of the security rather than its intrinsic value; and
- **expiration of the greenshoe:** tagging may also lead to, or exacerbate, any potential fall in the price of the security once the greenshoe is exhausted. Since the tagging of stabilisation trades allows the market to identify the extent of the stabilisation activity, where the perception is generated that the price of the security is largely being supported by stabilisation trades (which may not be accurate), there is likely to be a sell off just prior to the expiration of the greenshoe. This would have a resulting, although temporary, downward effect on the price of the security.

In addition to undermining the objective of the market stabilisation arrangements, revealing the identity of the party making the bid / trade is out of step with ASX's policy of anonymity with respect to broker identification codes. This change was introduced in 2005 in response to concerns that select parties in the market were gaining access to valuable market intelligence at the expense of retail investors (e.g. those using transaction-only broker firms, straight-through processing or online access to ASX) who either had no access to that information or did not know how to use it to their advantage. Tagging stabilisation bids / trades brings trading back to the pre-2005 period and advantages the most sophisticated/professional investors who are able to absorb and react to this information most effectively. We submit that stabilisation bids / trades should be treated the same as all other bids/trades for the securities.

4.3 International comparison

Since September 2000, when IR 00/31 was first released, only 3 of the largest IPOs (greater than A$1 billion) have incorporated a greenshoe (Promina Group in May 2003, Telstra 3 in October 2006 and QR National in November 2010 – see Schedule 1). The most recent example of a greenshoe actually being used to stabilise the market post-IPO that we are aware of was Spotless Group Holdings' $987 million IPO in March 2014.

By way of contrast, market stabilisation arrangements are very popular in comparable jurisdictions (see Schedule 2).

We submit that the underutilisation of greenshoes in the Australian market in comparison to other jurisdictions (see above and also Schedules 1 and 2) is a reflection on the restrictive nature of the conditions to which market stabilisation arrangements are subject. The conditions set out in IR 00/31 were prepared 25 years ago (with only partial modifications being suggested in CP 63) and their nature reflects the state of Australia's macro economy at that time. Back in the mid-1990s to 2007, the Australian economic environment was relatively benign and characterised by low volatility. The current economic climate is very different. To illustrate the point, since 2010, 44% of IPOs above A$70 million have traded down in the first 30 days post first trade.

Tagging is also out of step with international practice – no other jurisdiction that we are aware of requires that bids / trades by the Stabilisation Manager or stabilisation broker are tagged. Relevant examples include:

- **Hong Kong:** the Hong Kong Securities and Futures Commission ("**SFC**") in its "Consultation Conclusions on the draft Securities and Futures (Price Stabilising) Rules" dated June 2002 ("**HK Consultation Conclusion**"), considered whether to impose the tagging requirement. In paragraph 59 of the SFC's Consultation Conclusion, it was provided that:

> *"To strike a balance between market transparency and the potentially damaging effects of flagging [being the US requirement to inform the market of a stabilizing bid on a real-time basis] on the stabilizing efforts, the SFC is of the view that limited post-stabilization disclosure will be appropriate."*

The SFC concluded that the tagging would not be necessary and instead required limited post-stabilisation disclosures.

In coming to this conclusion, the SFC made reference to comments it had received from commentators on the Consultation Paper on The Draft Securities and Futures (Price Stabilizing) Rules dated February 2002 ("**HK Consultation Paper**"). Submissions made to the SFC were generally critical of simultaneous tagging, citing the potential for causing further downward pressure on the share price due to the negative message to the market as to the performance of the offer and that this would defeat the purposes of the stabilising bid. Furthermore, it was also noted by commentators that at that point in time there was no similar requirement under the UK Price Stabilisation Rules (on which the Securities and Futures (Price Stabilising) Rules[8] (the "**HK Rules**") were based).[9]

Although the SFC noted that simultaneous disclosure may increase transparency and flagging was implemented by the U.S. rules for stabilising bids at that time,[10] the SFC eventually pursued a compromise by rejecting tagging but requiring post-stabilisation disclosure in section 9 of the HK Rules so as to make stabilising bids more transparent (see below for further details);

- **United Kingdom:** during the stabilisation period, the London Stock Exchange ("**LSE**") attaches a marker "S" (for "**Stabilisation**") to the company's shares to indicate that stabilisation is operating in the shares (i.e. that they may be subject to stabilisation transactions). However, no "marker" or "tag" is attached either by the LSE or the person placing the bid or executing the trade to an individual bid or trade that is placed or executed for stabilisation purposes; nor is there any other requirement that would enable an investor to identify in real-time that a particular bid or trade is related to stabilisation. In addition, to our knowledge, there are no rules that prevent a stabilisation manager making multiple bids at the same time, either at the same price or different prices (see paragraph 4.6 below). Where stabilisation trades are carried out off-exchange, they are very unlikely to be identifiable as such, and no restrictions on making multiple bids are likely to apply; and
- **United States:** there is no requirement for bids relating to syndicate covering transactions to be tagged or otherwise identified to the market by the stabilisation manager or stabilisation broker. Although traditional stabilising bids are required to be tagged and identified under Regulation M, as noted above, market participants rarely engage in traditional stabilisation activities.

The reporting obligations[11] are also out of step with international practice. In particular:

- **Hong Kong:** the HK Rules do not impose similar daily reporting obligations as those required by ASIC. The stabilisation manager is required to keep a record on a register of details of each offer to which the HK Rules apply and to update that register immediately or on a daily basis.[12] However, that register is only available for inspection by the issuer within 3 months after the end of the stabilising period (after receipt of written notification) and by the SFC at any time.[13] The register must contain the following information:

[8] Chapter 571W, The Laws of Hong Kong.

[9] Page 2 of the HK Consultation Paper.

[10] Ibid, paragraph 38.

[11] Conditions 2 and 3 of IR 00/31 and conditions 3, 16 and 18 of CP 63.

[12] Section 13 of the HK Rules.

[13] Section 14(1) of the HK Rules.

- type of securities traded;
- unit price;
- quantity or total value of securities;
- date and time of the transaction; and
- details of the counterparty to the transaction.[14]

Public announcements are required to be made in the following instances:

- where applicable, from the first public announcement date, adequate disclosure should be made in relevant communications of the fact that stabilising action may take place.[15] Schedule 1 to the HK Rules sets out what will be regarded as adequate disclosure of proposed stabilising activity for different types of communication and also provides suggested wording for detailed disclosure and prior warnings to be given in the prospectus or other offer document;
- as soon as reasonably practicable following the purchasing (or agreeing to purchase) of or subscribing (or agreeing to subscribe) for the relevant securities pursuant to the exercise of the over-allotment option from the issuer (for the purpose of closing out the position established in any previous price stabilisation activities), stating the number of the relevant securities purchased or subscribed for (or which have been agreed to be purchased or subscribed for);[16] and
- within 7 days after the end of the stabilising period, disclosing (A) the ending date of the stabilising period, (B) whether or not any stabilising action was taken, (C) the price range between which purchases were made (where there were more than one purchase in the course of any stabilising action), (D) the date of the last purchase in the course of any stabilising action and the price at which it was made, and (E) the extent to which any over-allotment option was exercised;[17]

- **United Kingdom:** the UK rules also do not impose daily reporting obligations like those required by ASIC:
  - **public disclosure**:
    - **pre-stabilisation notice**: before the stabilisation period commences (which is usually when conditional dealings in the shares on the LSE commence), the issuer or stabilising manager must make an announcement (often called a "Pre-stabilisation notice") disclosing:
      a) the fact that stabilisation may not necessarily occur and that it may cease at any time;
      b) the fact that stabilisation transactions aim at supporting the market price of the securities during the stabilisation period;
      c) the beginning and the end of the stabilisation period;
      d) the identity of the bank or broker that may undertake stabilisation activities;

[14] Section 14 of the HK Rules.
[15] Section 8(1) of the HK Rules.
[16] Section 9(1) of the HK Rules.
[17] Section 9(2) and Schedule 3 of the HK Rules.

e) the existence of any overallotment facility or greenshoe option and the maximum number of securities covered by that facility or option, the period during which the greenshoe option may be exercised and any conditions for the use of the overallotment facility or exercise of the greenshoe option; and

f) the place where the stabilisation may be undertaken including, where relevant, the name of the trading venue(s);

- **mid-stabilisation notices**: during the stabilisation period, the stabilisation manager must announce details of all stabilisation trades within 7 days of the date of their execution. In practice, mid-stabilisation notices are usually published on a weekly basis during the stabilisation period;

- **post-stabilisation notice**: within one week of the end of the stabilisation period, the stabilisation manager must disclose:

  a) whether or not stabilisation was undertaken;

  b) the date on which stabilisation started;

  c) the date on which stabilisation last occurred;

  d) the price range within which stabilisation was carried out, for each of the dates during which stabilisation transactions were carried out; and

  e) the trading venue(s) on which the stabilisation transactions were carried out, where applicable; and

- **exercise of over-allotment option**: the exercise of the greenshoe option must be announced "promptly", including details of the date of exercise and the number of shares involved. In practice, if the greenshoe option is exercised at the end of the stabilisation period, this disclosure can be included in the post-stabilisation notice;

- **recording stabilisation trades and reporting them to the FCA**: all banks and brokers undertaking stabilisation trades must record certain details of each stabilisation order or transaction and notify them to the Financial Conduct Authority ("**FCA**") within 7 days of execution of the transaction. Those notifications do not have to be made public. Although there is no specific regulatory requirement for the stabilising manager also to notify details of each stabilisation trade to the issuer, in practice they will usually provide regular reports to the issuer; and

- **notification to LSE**: before the start of the stabilisation period, the stabilising manager must provide certain information to the LSE, including the stabilisation period, the offer price of the shares and details of the greenshoe.

- **United States:** syndicate covering transactions and penalty bids (explained below) must be reported to the self-regulatory organisation (e.g. Financial Industry Regulation Authority, known as "**FINRA**"[18]) with direct authority over the market on which that transaction takes place. However, no public disclosure to the SEC or the market is necessary for syndicate covering transactions (penalty bids on the other hand, may be disclosed to the market under certain circumstances). Notice of the exercise of any over-allotment option is not required (even though in practice, we understand that many issuers do simply disclose to the market, if applicable, that they have exercised the over-allotment option in whole or in part).

[18] FINRA is a non-governmental, industry organisation with independent regulatory authority over member brokerage firms and exchange markets (e.g. NASDAQ and NYSE).

The stabilisation manager is required to keep a record of a register of certain information relating to any security that has been stabilised or any security in which a syndicate covering transaction has been effected or a penalty bid imposed, and make that information available to the other joint lead managers. The register is not required to be disclosed to the issuer, the securities exchange or any self-regulatory organisation (but the SEC as well as the self-regulatory organisations of which the broker-dealers are members, have the right to inspect the broker-dealers' books and records).

A "penalty bid" is where an investor is invited by a broker to participate in an IPO on the basis that if they sell any IPO stock within a specified period of time, the relevant broker will be penalised (e.g. by paying part of their commission back to the offeror). The broker may choose to pass that penalty on to the investor (either by charging them a fee or by excluding them from future IPOs). This operates as a disincentive to investors from selling shortly after an IPO, which in turn helps promote a stable aftermarket for the newly issued stock by encouraging long term investment.

4.4 Proposed key amendments to conditions

We submit that the problems associated with gaming the market and the subsequent potential for increased volatility can be overcome by stipulating that the required publicly available information be more general, which would place all investors on a more equal footing. The simplest way to achieve this is by requiring that:

- **all stock tagged:** all of ListCo shares would be tagged as "subject to stabilisation", rather than just those bids / trades made by the Stabilisation Manager or stabilisation broker – this general form of tagging would apply for the length of the stabilisation period (up to 30 calendar days commencing on the first day of trading), and would prevent individual trades from being identified and therefore exploited. This form of tagging mirrors the approach taken when a stock is tagged as "CD" for "cum dividend" or "XD" for "ex dividend". This is consistent with the approach taken in Hong Kong whereby public disclosure is required to be made from the first announcement date, stating that stabilising action may take place in relation to the offer;[19]

- **ASX announcement:** an announcement is made to ASX just before the exercise of the greenshoe foreshadowing the possibility of stabilisation activities (see Schedule 6 for an example of the type of notice that could be used) – this is in addition to the disclosure that would be contained in the prospectus or product disclosure statement ("**Offer Document**"). This proposed requirement is similar to the Hong Kong position whereby disclosure of the possibility of the stabilising action is one of the prerequisites for undertaking any stabilising action[20] and the U.S. position whereby disclosure of the possibility of traditional stabilising bids, syndicate covering transactions or other stabilising actions is required in the prospectus for the offering;[21]

- **records:** the records of the stabilisation measures undertaken by the Stabilisation Manager and stabilisation broker would be kept, and disclosed to ListCo on a daily basis, but not to the market. The records would also be available to ASIC. This is a relatively more stringent requirement than the United States and would bring the ASIC requirements more closely into line with the Hong Kong and UK requirements; and

- **confidential notification of greenshoe utilisation:** the Stabilisation Manager would provide full details of stabilisation activities to both ASIC and ASX daily (in accordance with conditions 3 and 17 of IR 00/31 or conditions 3 and 18 of CP 63), but this would be a confidential filing. This is in addition to the information that the Stabilisation Manager would disclose to ASX and ASIC (for regulatory purposes) in accordance with condition 4 of IR 00/31 or condition 17 of CP 63 (in each case modified so that the information is provided confidentially on a daily

[19] Section 8(1)(a) of the HK Rules.

[20] Section 8(1)(a) of the HK Rules.

[21] Regulation M under the U.S. Exchange Act.

basis), which includes all information reasonably required concerning the activities of the Stabilisation Manager and stabilisation broker in relation to all trades executed in Australia and the aggregate short positions and the net-overallocation in connection with the market stabilisation arrangements. Both of these measures would work together to facilitate regulation by ASX and ASIC, without the risk of sophisticated investors manipulating this information to their advantage and gaming the shoe to the detriment of ListCo, retail and other institutional investors. This is a more stringent requirement than what is required in Hong Kong, the United Kingdom and the United States.

We submit that this approach best balances the competing demands of keeping the market informed and allowing the market stabilisation arrangements to facilitate an orderly after-market which is to the benefit of investors as a whole. In particular, there would be minimal impact on retail investors for the following reasons:

- **limited retail participation:** retail investors are less likely than their institutional counterparts to participate in the market (in particular a falling market) during the stabilisation period (first 30 days post-listing – although when they do, it can often be part of "panic selling" that is not based on fundamentals but rather on minimising loss and so market stabilisation arrangements would help reduce that;

- **adequate protection:** the interests of retail investors who are contemplating purchasing stabilised securities on-market during the stabilisation period are adequately protected by disclosure (e.g. ASX announcement, general tagging of the stock) that informs them of the fact that stabilisation may occur;

- **limited practical value:** when compared to sophisticated or professional investors, retail investors are relatively unlikely to have the means or expertise to use the information provided by tagging or daily reporting. On that basis, it is questionable whether tagging provides any additional information that retail investors will use when compared to other forms of disclosure (e.g. ASX announcement); and

- **upward bias of stabilisation:** an effective stabilisation is in the interests of retail investors because it should stabilise the price of the ListCo shares. On the other hand, the opportunistic trading that may result from tagging/daily reporting may have a downward effect on the price of the ListCo shares (e.g. by creating expectations of a price decrease or encourage speculative trading).

4.5 Secondary changes – timing of bids

We also submit that ASIC allows the Stabilisation Manager and stabilisation broker to place bids at any time during the stabilisation period.

Currently, ASIC will only allow the Stabilisation Manager and stabilisation broker to purchase securities during Normal Trading Hours and the Closing Phase[22] on ASX's automated trading system.[23] This prevents the Stabilisation Manager and stabilisation broker from making pre-open bids. As bids are processed on ASX's automated trading system on a priority basis according to the price / time the bids are placed, other market participants can stack bids into the system before the Stabilisation Manager or stabilisation broker can (because the Stabilisation Manager and stabilisation broker are effectively shut out of early trading), meaning that the stock can open with a dramatic fall, with the Stabilisation Manager's and stabilisation broker's hands being tied. This is particularly problematic when the greenshoe is near exhaustion, as opportunistic market participants have an incentive to push the price down so that they can re-buy ListCo shares at a low price and then sell them at a higher price once the market rebalances, making a profit out of their exploitation at the expense of other, potentially less-informed or less-sophisticated, investors.

[22] We assume this refers to 4.00pm to 4.12pm (Sydney time) on ASX trading days, being the Pre-CSPA and Closing Single Price Auction phases.

[23] Condition 9 of IR 00/31 and similar to condition 14 in CP 63.

We ask that ASIC modify its conditions to allow the Stabilisation Manager and stabilisation broker to place bids at any time, whether during the Pre-Opening Phase, Normal Trading Hours or the Closing Phase[24] on ASX's automated trading system (or otherwise), in order to allow the Stabilisation Manager and stabilisation broker to compete on an even-footing and to minimise the risk of exploitation of the greenshoe by opportunistic market participants.

4.6 Secondary changes – multiple bids

We also submit that ASIC permits the Stabilisation Manager and the stabilisation broker to make bids to the same extent as other ASX market participants (e.g. same or different prices).

Currently, ASIC restricts when multiple bids are permitted (e.g. there may be no more than 2 stabilisation bids in the market at once – see condition 15 in IR 00/31 and condition 12 in CP 63). The effectiveness of stabilisation is best ensured by minimising the instances in which the Stabilisation Manager and stabilisation broker are treated differently to other brokers. We submit that the Stabilisation Manager and the stabilisation broker should be permitted to make multiple bids to the same extent as other market participants and in the manner they believe will have the most effect. Layering bids at different prices or even the same price will increase the effectiveness of stabilisation activities, particularly if the Stabilisation Manager and stabilisation broker are required to tag each bid / trade.

4.7 Secondary changes - refreshing

We also submit that ASIC permits limited refreshing of the greenshoe in certain circumstances, in line with condition 21 of Attachment A of CP 63, being:

> *"The stabilisation broker may sell [insert name of issuer] securities that have been previously purchased under the market stabilisation. However, this does not increase the net number of securities that the stabilisation broker can acquire under the market stabilisation. The stabilisation broker can only acquire securities under the market stabilisation up to the size of the over-allotment. If the stabilisation broker sells shares purchased under the market stabilisation, the stabilisation manager may need to exercise its over-allotment option to cover the shortfall.*[25]

"Refreshing" of this limited kind refers to the process whereby the Stabilisation Manager (either directly or through the stabilisation broker), after engaging in market stabilisation (buying ListCo shares on-market), re-creates the short position by subsequently selling those securities on-market.

Under IR 00/13, ASIC generally prohibits refreshing. It did, however, in Telstra 3 and QR National, permit the subsequent re-sale of stabilisation instalment receipts and shares (respectively) bought on-market (a total refresh of greenshoe capacity was not granted and is not sought here).

We submit that ASIC allow refreshing in the same way by amending IR 00/13 (see proposed amendments to condition 5 in IR 00/13), as this would have no negative market impact yet would reduce the likelihood of the greenshoe being partially or wholly unexercised, in turn reducing the risk of a major shareholder(s) being left with residual greenshoe securities. This is consistent with the position in the US and HK.

4.8 Secondary changes – compliance

We submit that ASIC amends condition 14 of IR 00/31 or condition 7 of CP 63 to remove the reference to *"manipulative"* and therefore better reflect what is practically occurring under the market stabilisation arrangements.

Currently, condition 14 of IR 00/31 and condition 7 of CP 63 include the wording *"fraudulent, deceptive or manipulative"*. The market stabilisation arrangements, by their very nature, run the risk of being regarded as *"manipulative"*, therefore, as a practical matter, the Stabilisation Manager and the stabilisation broker would have great difficulty complying with this part of the

[24] As above.

[25] See page 31 of CP 63.

condition. We submit that condition 14 of IR 00/31 or condition 7 of CP 63 be amended so that "*manipulative*" does not form part of the condition.

5 Modification of conditions

5.1 Modifications sought

Further to the Discussion Paper's request for actionable ideas, we request that the above modifications be made to the conditions in IR 00/31 or alternatively to the conditions in CP 63 in order to better facilitate the use of market stabilisation arrangements for Australian IPOs.

5.2 Reasons in support of modifications - ASIC policy

In line with ASIC's approach to market stabilisation arrangements outlined in CP 63 (see also paragraph 2), we submit that the proposed amendments to the conditions will not lead to a false, misled or uninformed market for ListCo shares. This is because:

- the Offer Document will clearly set out that the IPO incorporates market stabilisation arrangements – this places all investors on an even footing prior to listing;
- an announcement in the form of Schedule 6 would be made to ASX prior to trading on the first day of listing – this would set out the key facts regarding the market stabilisation facility and serve as a reminder to IPO investors and as a direct communication to investors in the aftermarket;
- all of the ListCo shares would be tagged as "subject to stabilisation", which would serve as yet another reminder that stabilisation arrangements may be in play;
- bids / trades by the Stabilisation Manager and the stabilisation broker would not be tagged and therefore would be treated the same as any other bid/trade – this, combined with no daily reporting to the market (daily reporting would be made to ListCo, ASX and ASIC on a confidential basis), would greatly hamper the ability of sophisticated investors to game the shoe, which is to the benefit of all other investors in the securities;
- the Stabilisation Manager and the stabilisation broker would be able to make bids at any time and therefore not be shut out of the bidding process, meaning they could participate on an even-footing with other investors without leading to a false, misled or uninformed market;
- the Stabilisation Manager and the stabilisation broker would be able to re-sell shares that they had purchased, which enhances the effectiveness of stabilisation without comprising the integrity of the market;
- the Stabilisation Manager would keep ListCo, ASX and ASIC updated on the progress of the stabilisation measures on a daily basis (confidentially, not as a public filing) and records would be kept for their review – this is in addition to the information already required to be given to ASX and ASIC under condition 4 of IR 00/31 and condition 17 of CP 63 (namely all information reasonably required concerning the activities of the Stabilisation Manager and the stabilisation broker in relation to all trades executed in Australia and the aggregate short positions and the net-over-allocation in connection with the market stabilisation arrangements); and
- the Stabilisation Manager and the stabilisation broker would be required in accordance with the conditions not, directly or indirectly, to effect any stabilising transaction at a price that they know or suspect, or have reason to know or suspect, is a result of activity that is fraudulent or deceptive under any relevant securities laws.

In addition to the safeguards described above, the proposed changes to the conditions in IR 00/31 or alternatively to the conditions in CP 63 would be in line with ASIC's pro-active approach to regulation in volatile markets. Examples include:

- the extension of the "low doc" regime to non-traditional rights issues in May 2008 – this enabled Australian corporates to raise funds quickly and easily in a difficult market (originally ASIC Class Order 08/35 and now ASIC Corporations (Non-Traditional Rights Issues) Instrument 2016/84);

- the introduction of measures in September 2008 to prohibit covered short selling of all securities, managed investment products and stapled securities, subject to certain exceptions (ASIC Class Order 08/751 – revoked 11 December 2009); and

- temporary relief to enable certain "low doc" offers (including rights offers, placements and share purchase plans) to be made to investors even if they did not meet all the normal requirements, in order to assist companies that needed to raise funds from investors urgently because of the impact of COVID-19 (e.g. ASIC Corporations (Trading Suspension Relief) Instrument 2020/289 and ASIC Corporations (Amendment) Instrument 2020/290 etc, all since revoked),

each of which played a key role in helping Australia weather the global financial crisis and COVID-19 economic crisis (as applicable) more successfully than other countries.

5.3 Reasons in support of modifications - commercial considerations

Currently, greenshoes are under-used in the Australian market when compared to international jurisdictions, meaning that issuers, sellers and investors are missing out on the benefits that those arrangements could provide. In particular, greenshoes can help achieve a more orderly aftermarket and smooth price volatility, which in turn increases investor confidence. Market stabilisation arrangements are more likely to be used if the regulatory conditions work towards providing stability.

The underutilisation of greenshoes in Australia is a deterrent to investors (particularly international investors, who expect there to be stabilisation in the aftermarket as this is market standard for large IPOs offshores) from investing at the time of the IPO. Instead, it creates a "wait and see" approach, which therefore reduces demand in the IPO which impacts size, executability and pricing.

We submit that the proposed amendments to the conditions set out in IR 00/31 or alternatively to the conditions in CP 63 will allow the market stabilisation arrangements to better achieve their purpose in smoothing price volatility in the after-market (e.g. because it reduces "panic selling" that is not based on fundamentals but rather on minimising loss) and improving confidence, both for newly listed entities and the wider Australian market. This in turn will help with building a more attractive IPO process in Australia.

Schedule 1 – Australian IPOs

Australian IPOs >A$1 billion since September 2000 (when IR 00/31 released)[26]

OFFER DATE	ISSUER	OFFER SIZE (A$M)	GREENSHOE?	GREENSHOE SIZE (%)
Oct-06	Telstra 3	15,475	Yes	13.6%
Mar-14	Medibank Private Ltd	5,679	No	-
Mar-10	QR National Ltd	4,043	Yes	16.0%
Jun-18	Viva Energy Group Ltd	2,650	No	-
Mar-07	Boart Longyear Ltd	2,348	No	-
May-14	Healthscope Ltd	2,255	No	-
Nov-05	Goodman Fielder Ltd	2,120	No	-
Nov-10	Westfield Retail Trust	2,052	No	-
Sep-09	Myer Holdings Ltd	2,044	No	-
Nov-24	DigiCo Infrastructure REIT	1,996	No	-
Mar-03	Promina Group Ltd	1,876	Yes	14.9%
Feb-13	Meridian Energy Ltd	1,650	No	-
Nov-05	Spark Infrastructure Group	1,636	No	-

[26] Dealogic. Data current as of 22 April 2025.

OFFER DATE	ISSUER	OFFER SIZE (A$M)	GREENSHOE?	GREENSHOE SIZE (%)
Nov-05	SP AusNet	1,415	No	-
Jan-12	Mighty River Power Ltd	1,403	No	-
Mar-04	Pacific Brands Ltd	1,258	No	-
Oct-21	GQG Partners Inc	1,187	No	-
Oct-03	Multiplex Construction	1,184	No	-
May-21	PEXA Ltd	1,175	No	-
May-08	BrisConnections Unit Trusts	1,171	No	-
Oct-04	ConnectEast Group	1,092	No	-
Mar-06	Dyno Nobel Ltd	1,071	No	-
Mar-02	Macquarie Airports - MAP	1,000	No	-
Dec-04	Babcock & Brown Capital Ltd	1,000	No	-

Schedule 2 – International IPOs

International IPOs late 2023 – 2025YTD, >US$1 billion[27]

OFFER DATE	ISSUER	COUNTRY OF LISTING	STOCK EXCHANGE	OFFER SIZE (US$BN)	GREENSHOE?	GREENSHOE SIZE (%)
Mar-25	Asker Healthcare Group AB	Sweden	Stockholm	1,019	Yes	15%
Mar-25	CoreWeave Inc	United States	NASDAQ-US	1,570	Yes	15%
Feb-25	JX Advanced Metals Corp	Japan	TSE - Prime	2,979	Yes	15%
Jan-25	SailPoint Inc	United States	NASDAQ-US	1,380	Yes	15%
Dec-24	Venture Global Inc	United States	New York Stock Exchange-NYSE	1,750	Yes	15%
Nov-24	Talabat Holding plc	United Arab Emirates	Dubai Financial Market	2,029	No	-
Oct-24	Lulu Retail Holdings PLC	United Arab Emirates	Abu Dhabi Securities Exchange	1,721	No	-

[27] Dealogic. Data current as of 22 April 2025.

OFFER DATE	ISSUER	COUNTRY OF LISTING	STOCK EXCHANGE	OFFER SIZE (US$BN)	GREENSHOE?	GREENSHOE SIZE (%)
Sep-24	Swiggy	India	Bombay Stock Exchange-BSE National Stock Exchange of India	1,343	No	-
Sep-24	Zabka Polska	Poland	Warsaw Stock Exchange-Main Market	1,640	Yes	15%
Sep-24	Tokyo Metro Co Ltd	Japan	TSE - Prime	2,334	No	-
Sep-24	NTPC Green Energy Ltd	India	Bombay Stock Exchange-BSE National Stock Exchange of India	1,186	No	-
Sep-24	OQEP	Oman	Muscat Securities Market	2,026	No	-
Sep-24	StandardAero Inc	United States	New York Stock Exchange-NYSE	1,656	Yes	15%
Sep-24	Hexaware Technologies Ltd	India	Bombay Stock Exchange-BSE National Stock Exchange of India	1,010	No	-

OFFER DATE	ISSUER	COUNTRY OF LISTING	STOCK EXCHANGE	OFFER SIZE (US$BN)	GREENSHOE?	GREENSHOE SIZE (%)
Jun-24	Lineage Inc	United States	NASDAQ-US	5,102	Yes	15%
Jun-24	Hyundai Motor India Ltd	India	Bombay Stock Exchange-BSE National Stock Exchange of India	3,316	No	-
Apr-24	Midea Group Co Ltd	Hong Kong (China)	Hong Kong Exchange-Main Board	4,573	Yes	15%
Apr-24	CVC Capital Partners plc	Netherlands	Amsterdam	2,451	Yes	13%
Apr-24	Puig Brands SA	Spain	Madrid Stock Exchange	2,936	Yes	15%
Apr-24	Viking Cruises	United States	New York Stock Exchange-NYSE	1,768	Yes	15%
Mar-24	Galderma Group AG	Switzerland	SIX Swiss Exchange	2,561	Yes	15%
Jan-24	Amer Sports Inc	United States	New York Stock Exchange-NYSE	1,570	Yes	15%

OFFER DATE	ISSUER	COUNTRY OF LISTING	STOCK EXCHANGE	OFFER SIZE (US$BN)	GREENSHOE?	GREENSHOE SIZE (%)
Dec-23	Kaspi.kz JSC	United States	NASDAQ-US	1,040	Yes	15%
Nov-23	UL Solutions Inc	United States	New York Stock Exchange-NYSE	1,088	Yes	15%
Oct-23	Waystar Holding Corp	United States	NASDAQ-US	1,076	Yes	15%

Schedule 3 – International Comparison

#	DESCRIPTION	AUSTRALIA	HONG KONG	UNITED KINGDOM	UNITED STATES
1	**Usage**	Extremely rare.	Very common.	Common, especially on larger IPOs.	Common.
2	**Size of over-allotment option**	No greater than 15% of securities available under the offer. Stabilisation manager may only acquire securities under the market stabilisation up to the size of the over-allotment option.	No greater than 15% of securities available under the offer.	No greater than 15% of securities available under the offer. A position not covered by the greenshoe (a naked short) may not exceed 5% of the original offer – total short position cannot exceed 20% of the offer.	Per FINRA Rule 5110, over-allotment options in public offerings may be no greater than 15% of securities available under the offer (excluding the over-allotment option) and are only available in firm commitment underwritings (not best efforts/agency offerings).
3	**Over-allotment option mechanism**	Option granted by the issuer or seller of securities (or more unusually, a third party) to the stabilisation manager to acquire additional securities at the issue or sale price under the offer document. The stabilisation manager may only over allot the issue by the number of shares the	Purchase of securities from secondary market categorised as primary stabilising actions. Stabilisation manager, in connection with primary stabilising actions, permitted to take the following actions which are categorised as ancillary stabilising actions: • over-allocate (up to the number of shares as may	Over-allotment can only occur during the subscription period (when shares are allocated to IPO investors) and the over-allotted shares must be sold at the offer price. Over-allotment option (greenshoe) can be exercised by stabilisation manager at any time during the stabilisation period, either fully or in part.	Managing underwriter(s) have the right to exercise the option at their discretion (in whole or from time to time in part) at any time within 30 days of the offering date.

#	DESCRIPTION	AUSTRALIA	HONG KONG	UNITED KINGDOM	UNITED STATES
		subject of the over-allotment option.	be issued on a full exercise of an over-allotment option); • subscribe for shares on an exercise of an over-allotment option; or • sell shares so as to liquidate any long position created as a result of primary stabilising actions.		
4	**Disclosure in offer materials / market**	The nature and anticipated effect of the market stabilisation must be disclosed. Notification each day to the issuer (or selling shareholder in the case of a secondary sale) and ASX of: • the number of securities purchased by the stabilisation manager on the previous trading day under the market stabilisation; and	The nature and anticipated effect of the market stabilisation must be disclosed in the prospectus and upon first announcement. Upon exercise of the over-allotment option public announcement is required stating the number of the relevant securities purchased pursuant to such exercise. Within 7 days after the end of the stabilising period the stabilisation manager must announce:	Must disclose prior to stabilising action: • that stabilising action may occur; • that stabilisation transactions are aimed to support the market price; • the stabilisation period; • the identity of the stabilisation manager; and • the existence and maximum size of any over-allotment facility; and	Regulation M distinguishes between "stabilisation", which is placing a bid or effecting a purchase for the purpose of maintaining the price of a security, and "syndicate covering transactions" which are bids or purchases on behalf of the underwriting syndicate to reduce a syndicate short position. Any person displaying or transmitting a stabilising bid must provide prior notice to the market (see item 5 below) and must also disclose its purpose to the person with whom the bid is entered.

#	DESCRIPTION	AUSTRALIA	HONG KONG	UNITED KINGDOM	UNITED STATES
		• the total number of securities purchased under the market stabilisation.	• the end of the stabilising period; • whether stabilising action was undertaken; • the price range for stabilising purchases; • the date and price of the last stabilising purchase; and • where applicable, the extent to which any over-allotment option was exercised. There is no obligation under the rules to publicly disclose the daily volume of stabilising purchases undertaken.	• any conditions for the use of the over-allotment facility. During stabilisation period, must disclose details of all stabilisation trades within 7 days of the date of their execution. Within 1 week of the end of the stabilisation period, must disclose: • whether or not stabilisation was undertaken; • when stabilisation started; • when stabilisation last occurred; • the price range within which stabilisation was carried out; and • the trading venue(s) on which the stabilisation transactions were carried out.	Any person effecting a syndicate covering transaction must provide prior notice to the self-regulatory organisation with direct authority over the principal market. In addition, if stabilisation or syndicate covering transactions may be undertaken in connection with a distribution, Rule 104(h)(3) under Regulation M requires sellers to deliver to purchasers an offering document that contains disclosure similar to that required by Item 508(l) of Regulation S-K. Item 508(l) of Regulation S-K under the U.S. Exchange Act requires the offering document to briefly describe any transaction that the underwriter intends to conduct during the offering that stabilises, maintains, or otherwise affects the market price of the securities, including information on stabilising transactions, syndicate covering transactions, penalty bids, or any other transaction that affects the security's price.

#	DESCRIPTION	AUSTRALIA	HONG KONG	UNITED KINGDOM	UNITED STATES
				Promptly if and when the over-allotment option is exercised, must disclose when exercise occurred and the number of shares involved.	
5	**Tagging**	All bids in connection with the market stabilisation must be identifiable as stabilisation bids on ASX's automated trading system.	No requirement. Only limited post-stabilisation disclosures are required.	During the stabilisation period, the LSE attaches a marker to the company's shares to indicate they may be subject to stabilisation transactions; but individual bids or trades that are placed or executed for stabilisation purposes are not tagged or otherwise identified as such.	Pursuant to Rule 104(h)(1) of Regulation M and the rules of the individual US securities exchanges, stabilising bids are tagged/identified as that on the relevant market in which they are entered (e.g. NASDAQ Equity Rule 2, Section 6). Although not mandated by Regulation M, penalty bids may also be tagged/identified on the relevant market (e.g. NASDAQ Equity Rule 15). By contrast, syndicate covering bids are not subject to "on-market" identification/tagging. In 2004, however, the SEC proposed a series of amendments to Regulation M that would have, among other things, required market notification of syndicate covering transactions to the same extent required under Rule 104 for stabilising bids. These amendments were not adopted and tagging is not

#	DESCRIPTION	AUSTRALIA	HONG KONG	UNITED KINGDOM	UNITED STATES
					required for syndicate covering transactions.
6	**Maximum price of bids**	Stabilisation bids must be the lower of: • the highest current independent bid on ASX's automated trading system; and • the lowest price payable for securities by institutions under the offer (final price). If, after opening of trading on the first day of quotation, no trades are executed and there are no independent bids, the stabilisation bid must be no higher than the final price. If, at any time after trades have been executed, there are no independent bids, a stabilisation bid may be placed at a price no higher than the lower of the price of the last automatically	In the course of any primary stabilising action: • maximum price for initial stabilising action must be the offer price; • after the initial stabilising action, if there has been deal done (or transaction effected) on the Hong Kong Stock Exchange by a party other than the stabilisation manager for share at a price which is higher than the stabilising price, the maximum stabilising price should be the lower of the offer price, or the price at which that deal was done (or at which that transaction was effected); and • after the initial stabilising action, if there has been no such deal done (or transaction effected), the maximum	In relation to shares or equivalents to shares, cannot be executed above the offer price. In relation to debt which is convertible or exchangeable into shares, cannot be executed above the market price of the underlying shares at the time of the public disclosure of the final terms of the offer.	Rule 104 stabilising bids are subject to detailed pricing limitations. Further details are set out at the end of this Schedule.

#	DESCRIPTION	AUSTRALIA	HONG KONG	UNITED KINGDOM	UNITED STATES
		executed trade and the final price.	stabilising price will be the lower of the offer price, or the initial stabilising price. These pricing restrictions do not apply to any ancillary stabilising actions.		
7	**How bids must be made**	The issuer (or selling shareholder) and stabilisation manager must apply for, and each must comply with, a stabilisation agreement letter from ASX setting out the terms upon which ASX will issue an automated trading system stabilisation privilege (Stabilisation Agreement). Stabilisation bids may only be made for the security being stabilised - not derivatives of, or convertible into, the security	The stabilisation manager may effect purchases of securities for the sole purpose of preventing or minimising any reduction in the market price of those securities. The stabilisation manager is prohibited from taking stabilising action where, at the time when the offer price was determined, the market price was (or could reasonably be expected to be) an artificial price, and the stabilisation manager knew (or ought reasonably to have known) artificiality was attributable to market misconduct.	No specific rules are in place governing the conduct of any bids. Stabilising manager is usually permitted to execute stabilising trades on the LSE or in over-the-counter markets or other trading venues (such as Turquoise, BATS or Chi-X).	**Priority of independent bids.** To the extent permitted or required by the market where stabilising occurs, any person stabilising will grant priority to any independent bid at the same price irrespective of the size of that independent bid at the time it is entered (Rule 104(c)). No sole distributor or syndicate or group stabilising the price of relevant securities will maintain more than 1 stabilising bid in any 1 market at the same price at the same time (Rule 104(d)). See prior row and end note regarding pricing limitations on bids, as well as conditions relating to maintaining, carrying over and increasing / decreasing stabilising

#	DESCRIPTION	AUSTRALIA	HONG KONG	UNITED KINGDOM	UNITED STATES
					bids, as well as resumption of stabilising. **Prohibited stabilisation.** Stabilising bids are prohibited in at-the-market offerings (Rule 104(e)) and for OTC Equity Securities (FINRA Rule 6435(a)(2)).
8	**Preventing insider trading**	Information barriers must be set up within the stabilisation manager to prevent information passing between the stabilisation manager and any other person who deals in securities.	The SFC indicates that it expects the stabilisation manager to properly separate its activities as stabilisation manager and its other trading activities, including proprietary trading, in order to avoid committing market misconduct. The stabilisation manager is prohibited from entering into any dealing in the relevant securities as principal with any agent whom it has appointed to act on its behalf to carry out stabilising actions.	Information barriers must be set up within the stabilisation manager's organisation to prevent information passing between the stabilisation manager and any other person in the organisation who deals in securities.	Information barriers must be set up within the stabilisation manager to prevent information passing between the stabilisation manager and any other person who deals in securities.
9	**Reporting and record keeping**	ASX must be notified in advance of stabilisation.	In addition to the disclosure requirements above, the stabilisation manager must record on a register details of each offer to which the stabilisation rules apply, and	Before the start of the stabilisation period, the stabilising manager must provide certain information to the LSE, including the stabilisation period, the offer	Pursuant to Rule 104 of Regulation M and the relevant self-regulatory organization rules (e.g. FINRA and NYSE Rules 5190; NASDAQ Equity Rule 2), the relevant self-regulatory organisation must be notified in

#	DESCRIPTION	AUSTRALIA	HONG KONG	UNITED KINGDOM	UNITED STATES
		Stabilisation manager must respond to ASX's requests for information. The stabilisation manager must make available certain information to ASX and provide records to ASIC and ASX of details of stabilising trades.	the stabilisation manager will ensure that the register is updated immediately or on a daily basis. Register to be available for inspection by the SFC and issuer within 3 months after the end of the stabilising period.	price of the shares and details of the greenshoe. Banks and brokers undertaking stabilisation trades must record details of each stabilisation order or transaction and notify them to the FCA within 7 days of execution of the transaction. Such notifications do not have to be made public.	advance of stabilisation, syndicate covering transactions and/or penalty bid activity. Rule 104(i) of Regulation M also requires persons effecting stabilising bids or syndicate covering transactions to maintain records as required under Rule 17a-2 of the U.S. Exchange Act. Each managing underwriter or stabilisation manager must notify each member of the underwriting syndicate of the date and time of any stabilising purchases. See also FINRA Rule 5131(c) regarding practices and recordkeeping with respect to penalty bids in the context of new issues
10	**Stabilisation Period**	Maximum of 30 calendar days commencing on the first day of trading of shares.	Primary stabilising actions – needs to be carried out during the stabilising period. This is the period from the commencement of trading after the issue of the offer document. It ends 30 days after the date on which the	IPO – maximum of 30 calendar days after date of commencement of trading. There are also prescribed stabilisation periods for offers of bonds and securitised debt.	Neither FINRA Rule 5110 nor Regulation M require that the over-allotment option be exercised within 30 days of the offering date. In practice, however, the over-allotment option must typically be exercised within 30 days, and the SEC's Division of Corporation

#	DESCRIPTION	AUSTRALIA	HONG KONG	UNITED KINGDOM	UNITED STATES
			public offer application lists closed. Ancillary stabilising actions do not need to be carried out within the stabilising period. However, SFC has indicated that they should be carried out as soon as possible after the stabilising period. Net long positions should not be held for an unduly long period of time.		Finance takes the position that over-allotment options with terms of more than 45 days will trigger the shelf registration provisions of Rule 415 under the Securities Act of 1933. In contrast, Rule 104 stabilising activity must cease no later than when the lead manager declares the distribution complete (which typically, absent a sticky deal, will be the night of pricing and well in advance of when the greenshoe option expires). An underwriter may not deem its participation in a distribution complete until, among other things, any *"stabilization arrangements and trading restrictions in connection with the distribution have been terminated."*
11	**Refreshing**	No refreshing.	No limitations.	The safe harbour provisions in the UK Market Abuse Regulation (and its European Union equivalent) that generally applies to stabilisation activities does not apply to re-sales of shares that have been purchased by the stabilising	Exercising the over-allotment option for securities in excess of the amount necessary to cover the syndicate short position could constitute a violation of Rule 101 of Regulation M and, therefore, is not permissible in the context of

#	DESCRIPTION	AUSTRALIA	HONG KONG	UNITED KINGDOM	UNITED STATES
				manager in the market or any further purchases made after such re-sales. However, such transactions may nevertheless not constitute market abuse; and public disclosures usually state that such transactions *may* occur.	distributions subject to a Rule 101 "restricted period".

END NOTE:
Rule 104 stabilising bids are subject to detailed pricing limitations. In particular:

Maximum bid
Notwithstanding any other provision of the rule, under no circumstances may stabilising be done at a price exceeding the lower of: (i) the offering price; *or* (ii) the stabilising bid for the security in the principal market (or, if the principal market is closed, the stabilising bid in the principal market at its previous close) (Rule 104(f)(1)).

Initiating stabilising
The price at which stabilising may be initiated will depend upon whether the principal market is open or closed, or whether there is no market for the security or if the offering price has not yet been determined (Rule 104(f)(2)).

When the principal market is open.
After the opening of quotation in the principal market, stabilising may be initiated in any market:

- *If the security has traded in the principal market on the day stabilising is initiated or on the most recent prior day of trading in the principal market, and the current asked price in the principal market is equal to or greater than the last independent transaction price*, stabilising may be initiated at a price no higher than the last independent transaction price for the security in the principal market.
- *If all of these conditions are not satisfied*, stabilising may be initiated at a price no higher than the highest current independent bid for the security in the principal market.

When the principal market is closed

- *If before the opening of quotations for the security in the market where stabilising will be initiated*, stabilising may be initiated at a price no higher than the lower of:
  - The price at which stabilising could have been initiated in the principal market for the security at its previous close; or
  - The most recent price at which an independent transaction in the security has been effected in any market since the close of the principal market, *if the person stabilising knows or has reason to know of that transaction*.

- *If after the opening of quotations for the security in the market where stabilising will be initiated,* stabilising may be initiated at a price no higher than the lower of:
  - The price at which stabilisation could have been initiated in the principal market for the security at its previous close; or
  - The bid may be initiated at: (a) If the security has traded in that market on the day stabilising is initiated or on the last preceding business day and the current asked price in that market is equal to or greater than the last independent transaction price, the last independent transaction price for the security in that market; or (b) if the conditions of (a) are not satisfied, at a price no higher than the highest current independent bid for the security in that market.

When there is no market for the security

If no bona fide market for the security being distributed exists at the time stabilising is initiated, no stabilising may be initiated at a price in excess of the offering price.

When stabilising is initiated before the offering price is determined

It must be initiated in accordance with the other conditions set out above and then, after the offering price is determined, may be continued after determination of the offering price at the price at which stabilising could then be initiated.

Maintaining or carrying over a stabilising bid
A stabilising bid initiated in accordance with the provisions set out above, and which has not been discontinued, may be maintained or carried over into another market, irrespective of changes in the independent bids or transaction prices for the security (Rule 104(f)(3)).

Increasing a stabilising bid (Rule 104(f)(4))

- *If the principal market is open*, a stabilising bid may be increased to a price no higher than the highest current independent bid for the security in the principal market.
- *If the principal market is closed*, a stabilising bid may be increased to a price no higher than the highest independent bid in the principal market at the previous close.

Reducing a stabilising bid
A stabilising bid may be reduced, or carried over into another market a reduced price, irrespective of changes in the independent bids or transaction prices for the security (Rule 104(f)(4)).

Resumption of stabilising after discontinued

If stabilising is discontinued, it may not be resumed at a price higher than the price at which stabilising could then be initiated (Rule 104(f)(4)).

The price limitations described above do not apply to syndicate covering transactions and only apply to traditional stabilising bids under Regulation M.

Schedule 4 - proposed amendments to the conditions in IR 00/31

ATTACHMENT A

ASIC CONDITIONS FOR MARKET STABILISATION ARRANGEMENTS

1. The issuer must disclose clearly the nature and anticipated effect of the market stabilisation arrangements in the disclosure document in a way that provides meaningful information to prospective investors regarding these stabilisation arrangements.

2. The underwriter must notify ASX in advance of its intention to engage in market stabilisation arrangements, and must submit to ASX privately information at such times and in such form as ASX requests~~, making it clear at the time whether the information has been provided to ASX for regulatory reporting or public disclosure purposes~~.

3. The underwriter must establish and maintain the following records which it must provide to ASX and ASIC privately on a daily basis ~~upon request~~:

   - the name of the entity the shares of which were subject to market stabilisation and the class of any share stabilised;
   - the price, date and time at which each stabilising purchase was effected;
   - the names and addresses of the underwriter and stabilisation broker and their respective commitments. ***[KWM note: We assume any refreshed version of the conditions would capture stapled securities and units in Real Asset Trusts (as defined in Annexure F) in addition to shares.]***

4. The underwriter must make available to ASX and ASIC privately in their ~~its~~ regulatory capacity all information reasonably required by ASX or ASIC concerning the activities of the underwriter and the stabilisation broker in relation to all trades in Australia and the aggregate short positions and the net over-allocation of shares in connection with the market stabilisation arrangements. This information will be provided to ASX and ASIC on a daily basis during the stabilisation period. ***[KWM note: ASIC to advise if this should be refreshed given that ASIC now supervises market conduct.]***

5. The stabilisation broker may only enter bids for shares on ASX Trade ~~the Stock Exchange Automated Trading System (SEATS)~~. These are known as "stabilisation bids". The stabilisation broker may ~~not offer to~~ sell shares that have been previously purchased in connection with the market stabilisation arrangements. However, this does not increase the net number of shares that the stabilisation broker can acquire under the market stabilisation. The stabilisation broker can only acquire securities under the market stabilisation up to the size of the overallotment. If the stabilisation broker sells shares purchased under the market stabilisation, the stabilisation manager may need to exercise its over-allotment option to cover the shortfall. ~~In other words, the stabilisation broker is unable to refresh the green shoe option.~~

6. The issuer or the stabilisation manager or the stabilisation broker must apply for, and comply with, a stabilisation agreement letter from ASX setting out the terms upon which ASX will issue the ASX Trade ~~SEATS~~ stabilisation privilege to the stabilisation broker.

7. The issuer must release an announcement to ASX foreshadowing the possibility of stabilisation activities taking place. ~~Stabilisation bids must identify the price and quantity and no undisclosed bids may be made.~~

8. All of the issuer's shares must be tagged as "subject to stabilisation" ~~stabilisation bids by the stabilisation broker in connection with the market stabilisation arrangements must be identifiable as such~~ on ASX Trade during the stabilisation period~~SEATS~~, in line with the requirements of ASX.

9. The stabilisation broker may purchase shares during Pre-Open, Opening Phase, Normal Trading, Pre CSPA, ~~and~~ Closing Single Price Auction, Adjust and Adjust On Phases on ASX Trade ~~SEATS, but must not purchase shares during Pre-Opening Phase, After Hours Adjust or the Enquire Phase~~.

10. The stabilisation broker may trade other orders against stabilisation bids, provided the stabilisation bids comply with the purchase price constraints contained in paragraphs 11 to 14 inclusive.

11. Stabilisation bids entered on ASX Trade ~~SEATS~~ must be the lower of the highest current independent bid on ASX Trade ~~SEATS~~ and the final price. This means, in practical terms, that stabilisation bids must not be entered into ASX Trade ~~SEATS~~ such that they have priority on the bid side or are executed directly against sellers. It also means that stabilisation bids at priority must not be amended to increase quantity if there are no other bids at that price.

12. If, after the opening of trading on ASX on the first day of quotation of the shares, there have been no trades executed and there are no independent bids on ASX Trade ~~SEATS~~, the stabilisation bid must be no higher than the final price.

13. If, at any time after trades have been executed, there are no independent bids on ASX Trade ~~SEATS~~, a stabilisation bid may be placed on ASX Trade ~~SEATS~~ at a price no higher than the lower of the price of the last automatically executed ASX Trade ~~SEATS~~ trade in the shares and the final price.

14. The underwriters and stabilisation broker must not, directly or indirectly, effect any stabilising transaction at a price that the person stabilising knows or suspects, or has reason to know or suspect, is a result of activity that is fraudulent~~,~~ or deceptive ~~or manipulative~~ under any relevant securities laws.

15. Multiple bids are permitted on the following conditions:

    - the stabilisation broker may only use multiple bids if the market conditions are such that multiple bids are required; and
    - multiple bids must not be used in a way which causes, or may cause, a false, misled or uninformed market developing in the relevant shares on ASX~~; and~~
    - ~~there may be no more than two stabilisation bids in the market at once~~.

16. The stabilisation broker must demonstrate to the satisfaction of ASX that adequate Chinese walls and other procedures are in place to prevent information regarding the market stabilisation arrangements or the shares the subject of those arrangements passing between the stabilisation broker and any other broker, or between the designated trading representatives nominated by the stabilisation broker in connection with the stabilisation bids and any other brokers, dealers or other employees of the stabilisation broker who are engaged in its securities dealing business.

17. The underwriter or the stabilisation broker acting for the underwriter must notify the relevant entity, ASIC and ASX privately each day before trading commences:

    - of the number of shares purchased on behalf of the issuer by the stabilisation broker in connection with the market stabilisation arrangements on the previous trading day; and
    - of the total number of all shares purchased under the market stabilisation arrangements.

18. The underwriter and the stabilisation broker may operate market stabilisation arrangements for a maximum of 30 calendar days commencing on the first day of trading of shares in the offering.

If stabilisation bids are made, ASIC may request the issuer and/or underwriter to appoint an independent market analyst to prepare a report on the effectiveness of the market stabilisation conditions imposed by ASIC and the effect of the market stabilisation arrangements on the market for the relevant shares. A copy of this report - including whether there has been compliance with any specific conditions imposed by ASIC or ASX - must be provided to ASIC privately within the stipulated time.

Applications for no-action letters may be [lodged during business hours at any ASIC Regional Office – contact details available from the **ASIC web site** at **www.asic.gov.au** or the **ASIC Infoline 1300 300 630**].

Schedule 5 - proposed amendments to the conditions in CP 63

Disclosure of stabilisation

1 [*Insert name of issuer*] must disclose the nature and anticipated effect of the market stabilisation in the disclosure document for the offer.

2 All of [*insert name of issuer*]'s securities must be tagged as "subject to stabilisation" ~~bids to purchase [*insert name of issuer*] securities by the stabilisation broker in connection with the market stabilisation (**stabilisation bids**) must be identifiable as such~~ on the automated trading system of Australian ~~Stock~~ Securities Exchange ~~Limited~~ (**ASX**) during the stabilisation period.

3 Each day before trading commences, the stabilisation manager or the stabilisation broker must notify [*insert name of issuer*] and ASX privately of:

> **(a)** the number of securities purchased by the stabilisation broker on the previous trading day under the market stabilisation; and
>
> **(b)** the total number of all [*insert name of issuer*] securities purchased under the market stabilisation.

Price of bids

4 Stabilisation bids must be the lower of:

> **(a)** the highest current independent bid on ASX's automated trading system; and
>
> **(b)** the lowest price payable for securities by institutions under the offer (the **final price**).

5 If, after the opening of trading on ASX on the first day of quotation of the [*insert name of issuer*] securities, there have been no trades executed and there are no independent bids on ASX's automated trading system, stabilisation bids must be no higher in price than the final price.

6 If, at any time after trades in [*insert name of issuer*] securities have been executed, there are no independent bids on ASX's automated trading system, stabilisation bids may be placed on ASX's automated trading system at a price no higher than the lower of the price of the last automatically executed trade in [*insert name of issuer*] securities and the final price.

7 The stabilisation manager and the stabilisation broker must not, directly or indirectly, effect any stabilising purchase at a price that the person stabilising knows or suspects, or has reason to know or suspect, is a result of activity that is fraudulent~~,~~ or deceptive ~~or manipulative~~.

Mechanics of bidding

8 The stabilisation broker (in its capacity as stabilisation broker for the stabilisation manager) may only enter stabilisation bids on ASX's automated trading system.

9 One of [*insert name of issuer*], the stabilisation manager or the stabilisation broker must apply for (and each must comply with) a stabilisation agreement letter from ASX setting out the terms upon which ASX will issue the automated trading system stabilisation privilege to the stabilisation manager.

10 Stabilisation bids may only be made for the security being stabilised. That is, market stabilisation may not be pursued through offers to purchase securities that are derivatives of, or convertible into, the security being stabilised.

11 The [*insert name of issuer*] must release an announcement to ASX foreshadowing the possibility of stabilisation activities taking place ~~stabilisation broker must identify the price and quantity of stabilisation bids and no undisclosed bids may be made~~.

12 Multiple bids are only permitted on the following conditions:

> ~~**(a)** there may be no more than two stabilisation bids in the market at one time;~~
>
> (a~~b~~) the stabilisation broker may only use multiple ~~two~~ bids if the market conditions are such that multiple ~~two~~ bids are required; and
>
> (b~~c~~) multiple bids must not be used in a way which causes, or may cause, a false, misled or uninformed market developing in the relevant securities.

13 The stabilisation broker may trade other orders against stabilisation bids, provided the stabilisation bids comply with the price constraints in paragraphs 4–7 inclusive.

14 The stabilisation broker (in its capacity as stabilisation broker for the stabilisation manager) may only make stabilisation bids or purchase [*insert name of issuer*] securities during pre-opening, opening, normal trading, ~~and the~~ closing and the adjustment phases on ASX's automated trading system.

Preventing insider trading

15 The stabilisation broker must satisfy ASX that it has adequate information barriers (also known as 'Chinese walls') and other procedures to prevent information on the market stabilisation or the relevant securities passing:

> **(a)** between the stabilisation broker and any other broker; or
>
> **(b)** between the designated trading representatives nominated by the stabilisation broker for the stabilisation bids and any other brokers, dealers or other employees of the stabilisation broker who are engaged in its securities dealing business.

Reporting and record-keeping

16 The stabilisation manager (itself or through the stabilisation broker) must notify ASX in advance of its intention to engage in market stabilisation and must submit to ASX privately information at such times and in such form as ASX requests~~, making it clear at the time whether the information has been provided to ASX for regulatory reporting or public disclosure purposes~~.

17 The stabilisation manager (itself or through the stabilisation broker) must make available to ASX and ASIC privately in their ~~its~~ regulatory capacity all information reasonably required by ASX or ASIC about the activities of the stabilisation Manager and the stabilisation broker and the aggregate short positions and the net over-allocation of [*insert name of issuer*] securities under the market stabilisation. This information will be provided to ASX and ASIC privately on a daily basis during the stabilisation period. ***[KWM note: ASIC to advise if this should be refreshed given that ASIC now supervises market conduct.]***

18 The stabilisation manager (itself or through the stabilisation broker) must establish and maintain the following records which it must provide to ASX and ASIC privately on a daily basis ~~upon request~~:

(a) the name of the entity whose securities were subject to market stabilisation and the class of any security stabilised;

(b) the price, date and time at which each stabilising purchase was effected;

(c) the size of each stabilising purchase;

(d) information on independent trades for the purpose of determining a maximum price for stabilisation;

(e) details of counterparties;

(f) the names and addresses of the stabilisation manager and the stabilisation broker; and

(g) all agreements relating to the market stabilisation.

19 ASIC may ask the issuer or the stabilisation manager to appoint an independent market analyst to prepare a report at the issuer's cost on:

(a) the effect of the market stabilisation on the market for the relevant securities; and

(b) the effectiveness of the conditions imposed by ASIC on the market stabilisation.

ASIC may also ask that the report cover additional specific issues. The report must be provided to ASIC privately within 30 days of the end of the stabilisation period, for the purpose of conducting a review of the process.

Period of stabilisation

20 The stabilisation manager and the stabilisation broker may purchase securities under the market stabilisation for a maximum of 30 calendar days commencing on the first day of trading of [*insert name of issuer*] securities on a financial market conducted by ASX.

Refreshing the over-allotment option

21 The stabilisation broker may sell [*insert name of issuer*] securities that have been previously purchased under the market stabilisation. However, this does not increase the net number of securities that the stabilisation broker can acquire under the market stabilisation. The stabilisation broker can only acquire securities under the market stabilisation up to the size of the over-allotment. If the stabilisation broker sells shares purchased under the market stabilisation, the stabilisation manager may need to exercise its over-allotment option to cover the shortfall.

Schedule 6 - Draft ASX announcement

FOR IMMEDIATE RELEASE TO MARKET

ListCo Initial Public Offering – Market Stabilisation Facility

[insert issuer name and ABN] ("**ListCo**") has completed its initial public offering of securities ("**IPO**") and trading in those securities on the Australian Securities Exchange ("**ASX**") will commence today.

As contemplated in the [prospectus / product disclosure statement] dated [insert date] ("**Offer Document**"), the [lead manager / joint lead managers] [insert names and ABNs] ("**JLMs**") had the ability to over-allocate up to [insert] securities so as to establish a facility for potential market stabilisation in the first 30 days of trading. Details of that facility are described in section [insert] of the Offer Document.

Under the facility, the JLMs may trade ListCo securities during that 30 day period with a view to stabilising, maintaining or otherwise affecting the market price of those securities. In doing so, however, ListCo and the JLMs have agreed to comply with guidelines set by the Australian Securities and Investments Commission and ASX. This includes an obligation that any purchases under the facility may only take place at or below $[insert], being the [institutional] price under the IPO, and other constraints on both price and operation of the facility.

Trading under the facility is completely discretionary and may be discontinued at any time. If trading under the facility takes place, it may cause the secondary market price for securities of ListCo to be higher than would otherwise be the case. However, there can be no assurance that the secondary market price of the ListCo securities will not fall below that level.

Securities in Listco will be marked with the symbol "[insert]" until the end of the facility period (which may be no longer than 30 days post-listing).

Applications for securities under the IPO have now closed. A copy of the Offer Document can be obtained at www.asx.com.au (Code: [insert]).

5 MAY 2025

ANNEXURE B – SELL-SIDE RESEARCH

1 Overview

Further to the Discussion Paper's request for actionable ideas, set out below is a formal proposal for revisiting ASIC's approach to sell-side research that is set out in ASIC Regulatory Guide 264 ("Sell-side research") ("**RG 264**").

In particular, this proposal advocates that RG 264 is too prescriptive in certain aspects, which potentially undermines the utility of the research in the pre-IPO process, and therefore would be worthy of reconsideration by ASIC. The proposal seeks to do this without undermining market integrity in any way.

While research provided by an underwriter or lead manager has its drawbacks, it does play an important role in IPOs in every sophisticated equity capital market in the world. That is precisely because of the "repeat player" aspect of underwriter[1] interaction with institutional investors. In our experience, these investors want the underwriters' top-rated analysists to put their professional reputations on the line in assessing the valuation for the stock and in recommending an investment in the entity being brought to market.

Since the issue of RG 264, issuing companies and investment banks have been required to adopt some unique practices for sell-side research for Australian IPOs that are not typically seen in other jurisdictions. Our understanding is that analyst input into transaction selection and approval at underwriting or commitments committee level, key areas of due diligence enquiry and industry disclosure have been curtailed in ways that could be restored with appropriate protocols.

This submission sets out an overview of RG 264 and some examples of where it is confusing and too prescriptive and / or not fit-for-purpose. It then goes on to suggest how RG 264 could be revised in order to improve the quality and utility of sell-side research, which we believe will be one important step towards re-enlivening the Australian IPO market.

We note that this proposal, if acceptable, could be dealt with by ASIC issuing an updated version of RG 264 which is less prescriptive in nature. No Treasury involvement or amendments of the Corporations Act are required.

Capitalised terms used but not defined in this Annexure have the meaning given to them in Attachment 1 ("Public Markets").

2 Overview of Australian sell-side research

2.1 Regulatory approach to sell-side research

ASIC notes that sell-side research is general financial advice prepared and distributed by a licensee to its clients (or potential clients) to help them make investment decisions about financial products.[2] This can be in the form of sell-side research reports.

ASIC defines "research reports" fairly broadly to include general advice in writing or another format that includes an express or implicit opinion or recommendation about a (or class of) financial product(s) that is intended to be, or could reasonably be regarded as being intended to be, distributed (whether directly or indirectly) to clients or potential clients.[3] For the purposes of this

[1] The term *"underwriter"* in this Annexure is used to capture both underwriters of underwritten IPO offers as well as lead managers of non-underwritten IPO offers.

[2] Part B of RG 264.

[3] RG 264.24.

submission, we are focused on sell-side research reports prepared for IPOs however many of our comments will also be relevant to other types of research reports.

Research reports are intended to play an important role in educating potential IPO investors on the issuing entity prior to the marketing process commencing. This is often referred to as "investor education" and involves the analyst participating in a non-deal roadshow with investors in relevant jurisdictions.

In August 2016, ASIC released Report 486 ("Sell-side research and corporate advisory: Confidential information and conflicts") ("**Report 486**"). ASIC noted that the report set out its key observations from its review of how inside information and conflicts are managed in the context of sell-side (or broker) research and corporate advisory activities. The report found, among other things, a lack of appropriate arrangements and inconsistent practices by some licensees.[4]

Helpfully, Report 486 set out in Appendix 3 an overview of international regulatory practices. In that section, ASIC noted that:

> *"ASIC operates under a principles-based approach to financial services regulation…The principles-based approach is supplemented, where appropriate, by regulatory guidance…The approach taken in Australia can be contrasted with the prescriptive approach taken by jurisdictions such as the United States. The prescriptive approach is particularly evident in how the United States regulates research."*[5]

In December 2017, ASIC released RG 264. ASIC noted that:

> *"licensees involved in providing research would benefit from detailed guidance on managing conflicts of interest and inside information…this guidance supplements RG 79 in its application to sell-side research…A key focus of this guide is on how conflicts of interest are managed and, where necessary, avoided so as to ensure research has credibility and integrity and can reasonably be relied on…by investors…".*[6]

RG 264 provides detailed guidance on (among other things):

(a) the control and management of inside information;

(b) the management of research conflicts during capital raising processes, and how this differs depending on the stage of the process;

(c) the preparation and handling of draft and final investor education reports; and

(d) the handling of interactions between various stakeholders in the research preparation and distribution process (including the management of research teams).

In addition to the guidance in RG 264, Regulatory Guide 79 ("Research report providers: Improving the quality of investment research") and Report 486, Australian financial services licensees involved in providing sell-side research must comply with:

(e) the general licensing obligations set out in section 912A of the Corporations Act;

(f) the provisions regarding market misconduct and other prohibited conduct (e.g. sections 1041A, 1041B, 1041E, 1041G, 1041F(1)(a) and (b), 1041H, 1042 and 1043A of the Corporations Act); and

(g) certain other prohibitions in relation to financial services (sections 12DA, 13B and 12DF of the Australian Securities and Investments Commission Act 2001 (Cth)).[7]

[4] RG 264.17 to 19.

[5] Report 486.128 to 130.

[6] RG 264.21 to 22.

[7] RG 264.12 to 15.

3 Submissions for amendments

3.1 Overview of amendments sought

As mentioned, in Report 486 (which was released in August 2016), ASIC noted that Australia operates under a principles-based approach supplemented, where appropriate, by regulatory guidance, and that this can be contrasted with the prescriptive approach taken by other jurisdictions (including in how the United States regulates research).

We submit that in seeking to provide detailed guidance on managing conflicts of interest and information in IPO sell-side research in RG 264 (which was released in December 2017), ASIC has inadvertently been too prescriptive. In our experience since the release of RG 264, this has hampered the utility of sell-side research and the benefits it can provide to the IPO process. We understand that it also leaves Australia as an outlier in international IPOs, where licensees have to adjust the global sell-side research processes for the deal to reflect the more stringent Australian regulatory guidance. This in turn reduces the attractiveness of extending deals into Australia.

While we appreciate that other international jurisdictions may be more prescriptive in certain aspects of sell-side research, we believe there are some friction points in RG 264 that could be amended without compromising on ASIC's objectives. Some examples of where we believe RG 264 is too prescriptive include:

#	ISSUE	COMMENTARY
1	**Key stages of the capital raising process** RG 264 divides the key stages of a capital raising mandate into pre-solicitation, transaction pitching and post-appointment.[8] There are restrictions as to what sell-side research process participants can do during the various stages.	In our experience, the key stages (including what falls within them and the various restrictions) are fairly arbitrary. In particular, the "pre-solicitation" and "transaction pitching" phases potentially overlap and are not reflective of commercial realities. See also rows 2 and 3.
2	**Restrictions during pre-solicitation stage** During the pre-solicitation stage, a research analyst may attend a meeting with the corporate advisory team and an issuing company (e.g. at a time where the research analyst has been wall crossed on the potential capital raising transaction but the licensee has not made a decision to pitch for the capital raising transaction, or 7 days before a pitch presentation to the issuing company, whichever is earlier).	This is quite restrictive and not reflective of how opportunities to pitch for a transaction role may arise unexpectedly. The criteria to determine whether one is in pre-solicitation or pitch mode is far too arbitrary and very challenging. For example, if the issuing company were to ask for a formal transaction pitch during or after that meeting, the corporate advisory team would be prevented from providing that pitch for 7 days (or the research analyst would otherwise be restricted from preparing research until the end of the transaction) without any obvious benefit to the integrity of the research process.[9] In our view, the 7 days test should be removed from the criteria of determining the transaction phase and research analysts

[8] RG 264 Table 1.

[9] RG 264.79 to 90.

#	ISSUE	COMMENTARY
		should be able to participate in these discussions during the pre-solicitation phase without these time-based restrictions, so long as the analyst is wall crossed and appropriate restrictions are in place which comply with the licensee's compliance or other control function policies. For example, protocols could specify that research is an independent function in the investment bank and that there can be no discussion of, or any commitment to, whether research will be produced on the issuing company.
3	**Restrictions during transaction pitching stage** During the transaction pitching stage, research analysts cannot communicate with or discuss the issuing company or the potential transaction with the licensee's corporate advisory team or the issuing company itself unless the research analyst has been wall-crossed and does not produce research in relation to the issuing company or transaction until the transaction has been completed.[10] ASIC notes that these restrictions are in place because research analyst involvement could risk the objectivity and independence of their research.[11]	This is extremely restrictive, particularly for licensees who only have small research teams (e.g. 1 analyst covering a particular industry or sector). This means that the corporate advisory team does not have the benefit of the research analyst's insights on the sector / industry at a time when the transaction is in a very preliminary stage (and when the licensee has not yet been appointed). This ultimately undermines the due diligence process because the individual(s) who is best placed to ask initial searching questions of the issuing company is taken out of the play. It also prevents the research analyst from getting a better understanding of the issuing company and its management team. In our view, research analysts should be able to participate in these discussions during the transaction pitching stage provided they are wall crossed, and it may lead to more realistic valuations being submitted to the issuing company. This is because the analyst will have a better assessment of valuation in the market than the corporate advisory team. Appropriate protocols, as set out above, could be implemented to preserve analyst independence.
4	**Briefing of research analysts** A research analyst may attend a single briefing with the issuing company after the licensee has been appointed to the transaction. ASIC notes that the briefing allows the research analyst to obtain	The requirement to have only one briefing is arbitrary, results in very long sessions and often results in research analysts having to rely heavily on the pathfinder disclosure when preparing their research reports without a real opportunity to test it.

[10] RG D3(a) and D4(a).

[11] RG 264.88 and 89.

#	ISSUE	COMMENTARY
	information about the issuing company's business and operations.[12] Research analyst requests for additional information (and the responses) provided outside the briefing should be undertaken by compliance or another control function.[13]	Research analysts would be able to understand an issuing company better if they were able to spend more time with the management team over a couple of weeks or months and not be restricted to an often very long, one-off briefing session. Protocols could be in place which guide what is off-limits for discussion.
5	**Valuation information** RG 264 notes that to minimise the risk of communicating inside information, valuation information in an investor education report ("**IER**") should be expressed as an enterprise or total value for the issuing company, and any valuation information or assumptions in the IER should be based on the financial information to be contained in the prospectus.[14]	As noted by the AFR in July 2018, *"…fund managers went straight to the bottom of the first page to read what values the brokers were putting on the business. All they found was a lot of words and only very few numbers. So they flicked to the valuation section; only to find a whole lot more words and still few numbers. Welcome to IPOs under ASIC's new regulatory guide 264. Analysts can no longer compare a business to listed peers, run a discounted cash flow or sum of the parts valuation, subtract debt and put a simple equity value on the business. Under ASIC's guidelines, analysts can only publish an enterprise or total value for the company…What was missing was the headline grabbing numbers, which have traditionally set the tone from the float on day one of marketing. Fundies will have to do their own calculations - which isn't hard - to decide the equity value."*[15] In our experience, ASIC's guidance on the presentation of valuations is too prescriptive. Brokers and institutional investors benefit from being able to see a research analyst's independent assessment of the valuation of the issuing company using the metrics / tools that the analyst believes are most appropriate in light of the nature of the relevant business. It should be manageable for research analysts and their respective compliance teams, in conjunction with the issuing company where appropriate, to take steps to check that the valuation information that is proposed to be included in an IER does not contain inside information. This could be done (in a

[12] RG D7(a).

[13] RG D7(b).

[14] RG D5(a) and (d).

[15] www.afr.com/street-talk/latitude-the-litmus-test-for-asic-20180725-h134vw

#	ISSUE	COMMENTARY
		redacted manner) as part of the review of the draft IER.
6	**Timing gap between release of IER and pathfinder** ASIC notes that while an IER may provide early information and valuable analyst insight on an issuing company to wholesale investors, it is important that the key role of the prospectus (or PDS) is not undermined. This may occur if the pathfinder is not released in a timely manner following the release of the IER.[16]	In our view, the key role of the prospectus (or PDS) is not undermined in circumstances where there is a gap between the release of the IER and the pathfinder (irrespective of whether the gap is planned or unplanned). Research reports are distributed to institutional investors and brokers rather than to retail investors. Those institutional investors and brokers will not be asked to commit to participate in the IPO until they have received a copy of the pathfinder (or the prospectus / PDS). This means that they will be able to base their investment decision on the content of the pathfinder (or the prospectus / PDS) and not the IER, making any gap in release (whether it be weeks or months) of less relevance. Noting the above, it would be preferable for RG 264 not to indicate a preference for release in a "timely manner" but instead leave it to the issuing company and lead managers to decide as part of formulating the IPO timetable.
7	**Internal diligence and underwriting processes** RG 264 notes that any research analyst participation in the due diligence of the issuing company may only occur after the IER has been widely distributed to investors.[17] Research analysts can provide input to internal underwriting approval processes to determine whether a licensee will underwrite a potential transaction (commonly referred to as the underwriting or commitments committee). This input can occur after the IER has been widely distributed to potential investors or as soon as practicable before any final underwriting decision is made (e.g. a day or two before).[18]	The IER is usually distributed quite late in the IPO process. By this time, the issuing entity is heavily reliant on, and has devoted significant time, cost and energy on the corporate advisory team of the licensee. Being able to hear a research analyst's views is an important element of an investment bank's due diligence framework and so it would be better for Australian capital markets if this was allowed to occur earlier in the process. If a research analyst wants to raise an issue with an internal due diligence committee or an underwriting or commitments committee (including if in relation to diligence matters) in accordance with this RG 264 timing restriction, it would be very late to withdraw from a possible transaction or get extra assurances from an issuing company, before proceeding.

[16] RG 264.87.
[17] RG D9(e).
[18] RG 264.93.

#	ISSUE	COMMENTARY
		Licensees should be able to find a way to manage this without creating conflict of interest issues (e.g. by privately briefing the internal due diligence committee or underwriting or commitments committee in accordance with pre-established protocols as to what can and cannot be discussed, with members of the corporate advisory team not participating in that discussion etc). We are not aware of any other jurisdiction that imposes this requirement, so we would ask a change on this point.

We note that in ASIC's Corporate Plan 2024-25, it states that ASIC:

> *"provide[s] guidance to industry about how we plan to administer and enforce the law, especially in relation to new legal requirements. We also provide guidance on what we consider to be good practice, where appropriate. Our guidance aims to assist businesses to comply with the law with minimum compliance costs…".*[19]

We appreciate that in being prescriptive, ASIC was seeking to assist licensees and other parties in undertaking sell-side research matters in a compliant manner. However, in our view RG 264 is too prescriptive in parts and has made the sell-side research process one of form over substance and challenging to adhere to. We would ask ASIC to consider making amendments to RG 264 to reflect the above, which we believe will be one step towards re-enlivening the Australian IPO market without compromising on investor protection.

[19] Page 9 of the ASIC Corporate Plan 2024-25 dated 22 August 2024.

ANNEXURE C – ADVERTISING AND PUBLICITY RESTRICTIONS

1 Overview

Further to the Discussion Paper's request for actionable ideas, set out below is a formal proposal for modifying certain aspects of the advertising and publicity restrictions applicable to prospectuses so that they align with the existing regime for product disclosure statements (**"PDS")**.

In particular, this proposal advocates amending section 734(5)(b) of the Corporations Act so that it is more closely aligned with section 1018A(2) of the Corporations Act.

The purpose of these changes is to streamline the pre-prospectus advertising and publicity restrictions with the PDS equivalent so as not to disadvantage companies seeking to undertake an IPO and listing on ASX.

The proposed changes recognise that the existing pre-prospectus publicity provisions are too broad in the modern context. While these restrictions made sense when they were first introduced, the bombardment of information available to investors online (including through platforms like Reddit and X) mean that the pre-prospectus publicity provisions are now outdated and limiting. It is preferable for potential investors to hear information about an offer or intended offer from the offerors (where those offerors can more readily be held to account for misleading or deceptive statements) rather than anonymous persons online (who are unlikely ever to be held accountable).

This submission sets out an overview of how the advertising and publicity restrictions apply in Australia in the IPO prospectus and PDS contexts, and in the private markets context. Consideration is then given to the approach in New Zealand. The submission then details how the pre-prospectus publicity restrictions would benefit from regulatory reform and the reasons in support of those changes.

This proposal, if acceptable, could be dealt with by way of a class instrument. A new draft class instrument to align the regimes is included in Schedule 1 for ASIC's consideration.

Capitalised terms used but not defined in this Annexure have the meaning given to them in Attachment 1 ("Public Markets").

2 Overview of Australian advertising and publicity restrictions

2.1 Prospectus advertising and publicity restrictions for IPOs

As noted in ASIC Regulatory Guide 254 ("Offering securities under a disclosure document") (**"RG 254**"), section 734(2) of the Corporations Act imposes a general prohibition on the advertising or publicity for offers of securities that require a disclosure document (e.g. a prospectus). If an offer or intended offer of securities needs a disclosure document, a person must not:

(a) advertise the offer or intended offer; or

(b) publish a statement that directly or indirectly refers to the offer or intended offer, or is reasonably likely to induce people to apply for the securities.[1]

ASIC states that these restrictions are in place in order to:

(c) prevent drip-feeding of selective information to the market;

(d) discourage inadequate analysis of disclosure documents by individual investors and the market generally; and

[1] As noted by ASIC in RG 254.260.

(e) discourage investment decisions being made on the basis of an advertising campaign and other publicity rather than on the basis of the disclosure document.[2]

These drivers are consistent with the drivers for securities laws in other sophisticated jurisdictions which regulate pre-disclosure document publicity.

The Corporations Act provides very limited statutory exceptions to these restrictions.[3] This includes that:

(f) pre-prospectus lodgement, an advertisement or publication for unquoted securities may only include very limited prescribed information.[4] The Explanatory Memorandum for Corporate Law Economic Reform Bill 1998 notes that these rules were designed to minimise the potential for persons seeking to raise funds to generate expectations among potential investors about the desirability of a proposed offer before all relevant information reaches the market and investors are able to make an informed decision;[5] and

(g) a draft disclosure document for securities (i.e. pathfinder) may be sent to a person if they are a sophisticated investor for the purposes of section 708(8) of the Corporations Act or a professional investor for the purposes of section 708(11) of the Corporations Act[6].

ASIC has also separately granted class order relief from the prohibitions before the lodgement of a disclosure document for roadshow presentations[7], market research[8] and unlisted bodies giving exempted communications to employees and securityholders about an IPO[9] in certain circumstances.

ASIC notes in RG 254 that:

> *"We have granted [the class instrument relief above] because we recognise that an absolute prohibition on advertising of offers under a disclosure document could impose unreasonable and uncommercial restraints on issuers. This policy tries to balance the need for investors and potential investors to be protected from issuers attempting to induce them into investing in proposed offers of securities without adequate disclosure being made, and the commercial need for issuers to be able to conduct ordinary and necessary preparatory work of a company before an offer of securities. In the interests of promoting the efficient operation of capital markets, issuers should be able to carry out the ordinary preparatory work associated with a proposed offer of securities, such as roadshow presentations and market research.*
>
> *When preparing for an IPO, issuers often need to communicate in a timely manner with their employees and security holders about changes implemented throughout the business and organisation. In the interests of preventing misinformation, issuers should be able to give their employees and security holders general and non-promotional information on the progress of a planned IPO without being unreasonably constrained.*
>
> *These activities and communications, however, should not be conducted in a way that may encourage retail investors to make investment decisions without the benefit of a disclosure document."*[10]

[2] As noted by ASIC in RG 254.261.

[3] Sections 734(5), (6), (7) and (9) of the Corporations Act; RG 254.262.

[4] Section 734(5)(b) of the Corporations Act.

[5] Section 9.9 of the Explanatory Memorandum to the Corporate Law Economic Reform Bill 1998.

[6] Section 734(9) of the Corporations Act.

[7] ASIC Corporations (Market Research and Roadshows) Instrument 2016/79.

[8] As above.

[9] ASIC Corporations (IPO Communications) Instrument 2020/722.

[10] RG 254.270 to 272.

2.2 PDS advertising and publicity restrictions for IPOs

By way of contrast, the PDS publicity provisions provide that a person must only advertise the product, or publish a statement that is reasonably likely to induce people to acquire the product, if the advertisement or statement includes certain prescribed wording. This is the case whether the PDS has been published or not.[11]

The Explanatory Memorandum for the Financial Services Reform Bill 2001 states that this is because (with reference to the image advertising restrictions in section 734(3) of the Corporations Act) *"there is generally a distinction between the issuing of securities in a company and the core business of the company, [whereas] for the wider range of financial products covered under proposed section 1018A the issuing of financial products is in fact the core business of the issuer"*.[12]

We note that this is not necessarily the case in respect of all entities that issue financial products. However, we are not aware of differences in the level of pre-disclosure document publicity in the market between corporate issuers and issuers of the type of financial products that are frequently quoted on a securities exchange such as unit trust interests.

The Corporations Act provides limited statutory exceptions to these requirements.[13] ASIC has also separately granted relief from these provisions for roadshow presentations and market research[14].

2.3 Private markets

Importantly, there is no limit on pre-private market capital raising publicity. This creates a clear imbalance with the pre-prospectus publicity regime, and is an incentive to raise capital privately.

We are not in any way advocating that publicity restrictions be introduced into private markets, but rather that the pre-prospectus publicity restrictions be relaxed to align with the existing pre-PDS publicity provisions.

3 New Zealand's approach

New Zealand dispensed of its equivalent pre-prospectus publicity restrictions in 2013.

Previously, the provisions provided that only certain prescribed information about an offer, or an intended offer, could be published prior to the lodgement of the PDS with the New Zealand Registrar of Financial Services Providers (similar to the current section 734(5)(b) of the Corporations Act).

Now, section 91 of the Financial Markets Conduct Act 2013 (NZ) ("**FMCA**") provides that before the PDS is lodged, an advertisement does not contravene the advertising restrictions in section 89:

> *"if it includes, in relation to the offer or intended offer, a statement –*
>
> *(a) that no money is currently being sought; and*
>
> *(b) that financial products cannot currently be applied for or acquired under the offer or intended offer; and*
>
> *(c) that, if the offer is made, the offer will be made in accordance with [the FMCA]; and*
>
> *(d) if the offeror wishes, that specifies that the offeror is seeking preliminary indications of interest and, in that case, also specifies –*
>
> *(i) how indications of interest may be made; and*

[11] Sections 1018A(1) and (2) of the Corporations Act.

[12] Paragraph 14.160 of the Explanatory Memorandum for the Financial Services Reform Bill 2001.

[13] Section 1018A(4) of the Corporations Act.

[14] ASIC Corporations (Market Research and Roadshows) Instrument 2016/79.

(ii) *that no indication of interest will involve an obligation or a commitment to acquire the financial products."*

A statement required under sections 92(1)(a) to (c) and (d)(ii) must be reasonably prominent (section 91(2) of the FMCA).

These changes mean that prior to the lodgement of the PDS, issuers can publish statements in relation to the offer or intended offer so long as those statements are not misleading or deceptive and they do not accept any applications or take any money from retail investors.

These changes recognise the reality of all sources of modern information, including the internet. In other words, that it no longer makes sense to restrain an issuer from providing information about an offer or intended offer to the market when less informed (and less accountable) persons can.

4 Submissions for amendments

4.1 Overview of amendments sought

In order to ensure more consistency between the prospectus and PDS regimes, and so as to not disadvantage companies against registered managed investment schemes or private markets, we submit that certain amendments be made to the pre-prospectus advertising and publicity restrictions in the context of unquoted securities. This would also bring the Australian regime closer in to line with the New Zealand regime.

A draft ASIC instrument which provides for this is set out in Schedule 1 for ASIC's consideration. This draft ASIC instrument could be issued on a class basis.

We note the following:

(a) **need to modernise:** the proposed changes recognise that the existing pre-prospectus publicity provisions are too broad in the modern context for the reasons set out in paragraph 1 and that it is preferable for potential investors to hear information about an offer or intended offer from the offerors rather than anonymous persons online.

(b) **unreasonable and uncommercial restraint:** there is no clear reason why a different approach is taken to the advertising and publicity provisions for securities in a class that is not already quoted that will be offered under a prospectus[15] as against financial products that are not yet available that will be offered under a PDS[16]. This is particularly so given PDSs often offer more complex financial products than prospectuses. We are not aware of any material abuse of these provisions in the PDS context and so submit that the prospectus regime be aligned with the prospectus one.

We also submit that it is an unreasonable and commercial restraint for a company to be unable to undertake the same pre-offer document advertising and publicity as a registered managed investment scheme when both entities can extend the IPO offer to the same retail investors. It also does not make sense where there is a combined prospectus / PDS for a stapled security, and the more restrictive pre-prospectus publicity restrictions need to be followed.

(c) **practical reasons:** any pre-prospectus advertising / publicity would not be designed with the intent of drip-feeding of selective information or encouraging retail investors to invest on the basis of materials other than the prospectus itself. Instead, it would give non-institutional investors the opportunity to consider:

(i) whether this is a company that it wants to learn more about or follow and, if they are not already a private client of a retail broker, time to get onboarded so that they can

[15] Section 734(2) of the Corporations Act.

[16] Section 1018A(2) of the Corporations Act.

participate in the IPO at the appropriate time with the benefit of the full prospectus; and

(ii) what IPOs are in the pipeline and the potential timing, so they do not decide to invest in the first one before they know another one will become available that may have been a better alternative for them.

It would also allow the offerors to address any false statements made by third parties on the internet about the offer or the intended offer, which is for the benefit of potential investors.

An additional benefit would be that it would facilitate alerting potential whistleblowers of an upcoming IPO should they wish to reach out to ASIC on it to raise a concern. This would complement any initiatives that ASIC undertakes which effectively shorten the IPO offer period.

Importantly, no retail investors would be able to apply to participate in an IPO offer until they had received or been given access to a copy of the lodged prospectus. Any pre-prospectus advertising or publicity would need to include the statement that *"a person should consider the disclosure document in deciding whether to acquire the securities"* (as set out in Schedule 1). In addition, prospectuses ordinarily include wording to the effect that it should be read in its entirety and that investment decisions should be based on its content only. In other words, no retail investors will be encouraged to make an investment decision based on pre-prospectus advertising / publicity, nor will they be able to apply until they have received or been given access to the lodged prospectus.

It should also be noted that no IPO securities will actually be issued or transferred to retail investors until after the expiry of the prospectus exposure period under section 727(3) of the Corporations Act.

Schedule 1 Alignment of regimes – proposed legislative instrument

Part 1 – Preliminary

1 Name of legislative instrument

This instrument is ASIC Corporations (Alignment of restrictions on advertising and publicity) Instrument XXXX/XX.

2 Commencement

This instrument commences on the day after it is registered on the Federal Register of Legislation.

3 Authority

This instrument is made under section 741 of the *Corporations Act 2001*.

4 Definitions

In this instrument:

Act means the *Corporations Act 2001*.

Part 2 – Exemptions

5 Advertising and publicity before the disclosure document is lodged

(1) Chapter 6D of the Act applies to all persons as if subsection 734(5)(b) of the Act were omitted and substituted with:

"(b) in any other case – includes ~~contains the following but nothing more~~:

(i) a statement that identifies the offeror and the securities;

(ii) a statement that a disclosure document for the offer will be made available when the securities are offered;

(iii) a statement that a person should consider the disclosure document in deciding whether to acquire the securities;

(iv~~iii~~) a statement that anyone who wants to acquire the securities will need to complete the application form that will be in or will accompany the disclosure document;

(~~i~~v) a statement of how to arrange to receive a copy of the disclosure document.

To satisfy paragraph (b), the advertisement or publication must include all of the statements referred to in subparagraphs (i), (ii), ~~and~~ (iii) and (iv). It may include the statement referred to in subparagraph (~~i~~v)."

5 MAY 2025

ANNEXURE D - LIABILITY REGIME FOR MISLEADING AND DECEPTIVE CONDUCT IN CAPITAL RAISING DISCLOSURE

1 Overview

Further to the Discussion Paper's request for actionable ideas, set out below is a formal proposal for streamlining the content and liability standard in the Corporations Act for capital raising participants in connection with the issuance of fundraising documents.

This submission includes our proposal that the only content and liability standard that should apply to a prospectus or a PDS for a functionally equivalent product (i.e. units issued by trusts that are listed or to be listed, and that invest in real property or infrastructure assets or are part of a stapled structure with a listed company ("**Real Asset Trusts**"))[1], should be sections 728 and 1022A of the Corporations Act.

To achieve this, we propose that the Corporations Act be amended so that:

(a) for functionally equivalent products regulated by the PDS regime, the due diligence and reasonable reliance defences (as more fully set out in paragraph 2.1(a) of this submission) apply in the same way as they apply for a prospectus; and

(b) no other provisions create primary liability for the issuer, their directors or others with articulated liability, in relation to a prospectus or PDS for a functionally equivalent security, apart from sections 728 and 1022A of the Corporations Act in relation to the issuance of those categories of capital raising documents.

The purpose of these changes is to ensure greater consistency across the Corporations Act provisions and to provide clarity for directors and other persons with articulated liability involved in prospectus / PDS capital raisings on the content and liability standards that apply and the availability of relevant defences to minimise the risk of personal liability.

This submission sets out an overview of the relevant provisions (including the historical context, where applicable). It then details the proposed amendments and the benefits of these to Australian public markets.

These proposals, if acceptable, could be dealt with through engagement by ASIC with Treasury. As previously stated, we would be happy to work with ASIC in its engagement with Treasury if that would be helpful.

Capitalised terms used but not defined in this Annexure have the meaning given to them in Attachment 1 ("Public Markets"). All references to sections, Parts and Chapters in this Annexure are to sections in the Corporations Act unless the context requires otherwise.

2 Sources of liability and available defences under the Corporations Act for prospectuses and PDSs

2.1 Sources of liability

The Corporations Act includes provisions imposing criminal and civil liability for persons in relation to the issue of a prospectus and a PDS that contains a misleading or deceptive statement (or

[1] Annexure F includes our submission as to why the Corporations Act provisions relevant to Real Asset Trusts should be modified so that they are aligned with the requirements applicable to listed companies. Whilst this annexure does not seek to repeat the substance of the submissions in Annexure F, this annexure uses the term "functionally equivalent product" throughout to signify the intended alignment.

relevant omission) and also in relation to conduct outside of the prospectus and PDS. This submission does not seek to outline in detail the entire civil and criminal liability regime relevant to prospectuses and PDSs as set out in the Corporations Act. Instead, it will touch on those sources of liability for which we submit that there exists a clear argument for uniformity across the content and liability provisions (including in relation to the availability of defences).

(a) Sections 728 and 729 – liability and available defences

Section 728(1) of the Corporations Act prohibits a person from offering shares under a prospectus if there is:

(a) a misleading or deceptive statement in the prospectus;

(b) an omission from the prospectus of material required by sections 710 or 711; or

(c) a new circumstance that has arisen since the prospectus was lodged that would have been required to be included in the prospectus if it had arisen before the prospectus was lodged (and which has not been included in a lodged supplementary or replacement prospectus).

Sections 728 and 729 of the Corporations Act imposes civil and criminal liability on a person for a contravention of Section 728(1).[2]

Sections 731 and 733 of the Corporations Act provide a due diligence defence and a reasonable reliance defence respectively, to civil and criminal liability imposed by sections 728(3) and 729 for misleading or deceptive statements in, or omissions of required material from, a prospectus.

The "**Due Diligence Defence**" in section 731 of the Corporations Act requires a person to prove that they:

(a) made all enquiries (if any) that were reasonable in the circumstances; and

(b) after doing so, believed on reasonable grounds that the statement was not misleading or deceptive or that there was no omission from the prospectus in relation to that matter.[3]

The "**Reasonable Reliance Defence**" in section 733 of the Corporations Act requires a person to prove that they placed reasonable reliance on information supplied by another person, other than:

(a) if the original person is a company: a director, employee or an agent of that company; or

(b) if the original person is an individual: an employee or agent of that individual,[4]

(for example, a company cannot rely on its own employees but a director can rely on the company's employees).

For the purposes of this submission, the Due Diligence Defence and the Reasonable Reliance Defence are referred to as the "**Prospectus Defences**".

(b) Section 1021E and 1022B – liability and defences

Potential civil and criminal liability may arise in connection with the preparation of a PDS. Section 1021E of the Corporations Act provides that a person commits an offence or contravenes the section if they give a PDS to another person and the person:

(a) gives a defective PDS without knowledge that it is defective;

[2] Civil and criminal liability is imposed by section 729(3) and 729 of the Corporations Act. Section 728(4) of the Corporations Act is a civil penalty provision.

[3] Section 731 of the Corporations Act does not provide a defence to liability under section 728(4) which is a civil liability provision.

[4] Section 733 of the Corporations Act does not provide a defence to liability under section 728(4) which is a civil liability provision.

(b) gives, or makes available to another person, a defective PDS, being reckless as to whether the other person will or may rely on the information in it; or

(c) makes available a defective PDS to another person, being reckless as to whether the other person, or someone else, will or may give it, or make it available, to another person.[5]

A PDS is defective if:

(i) it contains a misleading or deceptive statement;

(ii) there is an omission of material required by the Corporations Act to be included in the PDS; or

(iii) there is an omission of correcting material from a supplementary PDS.[6]

"Reasonable Steps" defence

There is no equivalent to the Prospectus Defences under the PDS provisions in the Corporations Act for civil and criminal liability for a defective PDS. Rather, there is a "reasonable steps" defence to civil and criminal liability for a defective PDS.[7]

For the purposes of establishing this defence, the onus is on the person who is potentially liable to prove that (on the balance of probabilities) they took reasonable steps to ensure that the PDS would not be defective. The term "reasonable steps" is not defined in the Corporations Act, nor was it explained in the explanatory memorandum to the Financial Services Reform Bill 2001 (Cth) which introduced section 1021E.[8]

This defence is not available if a person knowingly gives or makes available a defective PDS.

(c) Market practice - due diligence enquiries

The Australian market has adopted a unique set of practices and procedures (known as "due diligence") in response to the enactment of the Corporations Law prospectus provisions and the introduction of the Prospectus Defences, the purpose being (primarily) to enable those involved with the issuing of the prospectus to establish and rely on the defences included in the Corporations Act. The due diligence process customarily involves the formation of a due diligence committee, the undertaking of due diligence enquiries and formalised verification procedures. Persons with potential liability under the Corporations Act (including directors, advisers, underwriters and senior executives of the issuer) participate in these formal processes which are undertaken during the course of the preparation of the offering documents (including the prospectus) and run through the offer period through to the final issuance of securities.

Despite the fact that the "reasonable steps" language in the PDS provisions differs to the Due Diligence Defence and there is no equivalent Reasonable Reliance Defence under the PDS regime, a similar due diligence process is undertaken by participants in the preparation of a PDS in order to establish the "reasonable steps" defence/obligation in relation to a PDS.

The differences in the available defences as between the prospectus and PDS regimes gives rise to a degree of uncertainty as to whether the undertaking of due diligence enquiries would likely satisfy the "reasonable steps" defence to liability under a PDS. Given that uncertainty, consistency and clarity across both the PDS and prospectus provisions relating to the nature of available defences to liability would be welcomed by market participants.

[5] See sections 1021E(1) to (2) and (8) of the Corporations Act.

[6] See section 1022B(1) of the Corporations Act.

[7] See sections 1021E(3) and 1022B(7) of the Corporations Act.

[8] Financial Services Reform Bill 2001 (Cth), explanatory memorandum, 14.197.

(d) Section 1308 – liability for false or misleading documents

An additional source of civil and criminal liability in connection with the offering of securities under a prospectus or PDS is found in section 1308 of the Corporations Act. Section 1308(4) of the Corporations Act provides that a person commits an offence or contravenes the section if they make or authorise a statement in a document lodged with ASIC, or omit or authorise the omission of any matter or thing from a document lodged with ASIC, and:

(i) the person knows that, or is reckless as to whether, the document is materially false or misleading because of the statement or omission;[9] or

(ii) the document is materially false or misleading because of the statement or omission, and the person did not take all reasonable steps to ensure the document was not materially false or misleading because of the statement or omission.[10]

Section 1308 of the Corporations Act applies to documents published in the context of a capital raising, including prospectuses and PDSs.

Liability under sections 1308(1) and (4) of the Corporations Act requires an element of culpability and recklessness and is outside the scope of this submission.

Section 1308(3) of the Corporations Act is a strict liability offence. In the context of a capital raising, the question of whether the prospectus or PDS is materially false or misleading and whether a person took reasonable steps are to be objectively determined without having regard to a fault element. The prospectus or PDS will be materially false or misleading if:

(i) it includes a statement that is false in a material particular or materially misleading, or is based on information that is false in a material particular or materially misleading, or has omitted from it a matter or thing the omission of which renders the document materially misleading; or

(ii) a matter or thing is omitted from the document and, without the matter or thing, the document is false in a material particular or materially misleading.[11]

Section 1308(5) of the Corporations Act is also a civil penalty provision.

"Reasonable Steps" defence

A person with potential civil or criminal liability under section 1308 of the Corporations Act would be required to rely on the "reasonable steps" defence as set out in sections 1308(3)(d) and 1308(5)(d). For the purpose of establishing this defence, the onus is on the person who is potentially liable to prove that (on the balance of probabilities) they took reasonable steps to ensure that the prospectus or PDS would not be defective. In contrast, criminal liability under sections 1308 of the Corporations Act only arises if the prosecution proves (beyond reasonable doubt) that the defendant failed to take reasonable steps.

Section 1308 of the Corporations Act no longer includes certain "deeming provisions" outlined in paragraph 2.1(e) of this submission. These provisions were removed from section 1308 of the Corporations Act in 2020.[12] Their removal means that a court may take into account all facts and circumstances in determining whether a person has taken all reasonable steps for the purposes of criminal liability under section 1308(3) of the Corporations Act. Section 1308(3) of the Corporations Act is also now a strict liability offence such that a person will be liable unless they are under a mistaken but reasonable belief of fact. The removal of these provisions is discussed further in paragraph 3.3(a) of this submission.

[9] Section 1308(1) and (4) of the Corporations Act. Section 1308(3) of the Corporations Act is a strict liability offence.

[10] Section 1308(5) of the Corporations Act.

[11] Section 1308(6) of the Corporations Act.

[12] This is discussed in more detail in section 3.2 of this submission.

(e) Section 1309 – liability for false information

A related source of civil and criminal liability in connection with the offering of securities under a prospectus or PDS is found in section 1309 of the Corporations Act. Section 1309 of the Corporations Act creates 2 offences which may be committed by an officer of a corporation.

Section 1309(1) of the Corporations Act provides that a person commits an offence if:

(i) they furnish information, or authorise it to be furnished to a director, auditor, member, debenture holder or trustee for debenture holders, or to the auditor of the corporation's controlling corporation, or to a securities exchange in Australia or elsewhere;

(ii) the information relates to the affairs of the corporation and to the knowledge of the officer; and

(iii) it is materially misleading or there is an omission which renders the information materially misleading.

"Information" is defined broadly and includes the state of knowledge of the officer concerned.[13] Information would therefore include both a prospectus and a PDS.

Section 1309(2) of the Corporations Act then creates a second offence, inserting a positive obligation to take "reasonable steps". The section provides that even if a director does not know that the information is materially misleading or that there is an omission which makes the information materially misleading, the officer may nevertheless commit an offence if he or she has not taken reasonable steps to ensure that the information was not materially misleading or did not have such an omission.

A contravention of section 1309 of the Corporations Act may give rise to a criminal offence, a strict liability offence or a civil penalty liability.[14]

"Reasonable Steps" defence

A person with potential civil or criminal liability under section 1309 of the Corporations Act would be required to rely on the "reasonable steps" defence similar to that explained above under section 1308.

Unlike section 1308 of the Corporations Act, section 1309 still includes "deeming provisions" regarding "reasonable steps" so that if the person proves that:

(a) the person made all enquiries (if any) that were reasonable in the circumstances; and

(b) after doing so, the person believed on reasonable grounds that:

(i) the information was not misleading or deceptive in a material particular; or

(ii) there was no omission which would render the information misleading in a material respect;

or the person proves that:

(c) they relied on information given to them by:

(i) if the person is a body – someone other than a director, employee or agent of the body; or

(ii) if the person is an individual – someone other than an employee or agent of the individual; and

[13] See section 1309(3) of the Corporations Act.

[14] See section 1309(12) of the Corporations Act.

(d) the reliance placed on that information by the person was reasonable in all the circumstances.

This language is considered to provide a statutory defence to liability under section 1309 of the Corporations Act and to operate in a functionally equivalent manner to the Prospectus Defences.

(f) Sections 1041E to I (the "Alphabet Provisions")

Potential civil and criminal liability arises for persons involved in an offer of securities for:

(i) making statements which are false in a material particular or materially misleading – section 1041E;

(ii) inducing a person to subscribe for shares by knowingly or recklessly making misleading, false or deceptive statements, promises or forecasts or dishonestly concealing material facts – section 1041F;

(iii) dishonest conduct in relation to the offer of securities – section 1041G; and

(iv) misleading and deceptive conduct in relation to the offer of securities – section 1041H.

These provisions also apply to the issuance of a prospectus or PDS, advertisements and other publicity such as press releases, analysts' and advisers' briefings and publications such as broker packs relating to an offering of securities.

There is no statutory due diligence defence available for a potential breach of sections 1041E, 1041F, 1041G or 1041H of the Corporations Act. The same applies to provisions such as section 12DA of the Australian Securities and Investments Commission Act 2001 (Cth) ("**ASIC Act**"), which contains a materially equivalent "false or misleading representation" standard to that of the "misleading or deceptive conduct" standard in section 1041H, and which also contains no necessary element of knowledge or dishonesty.[15]

However, in relation to 1041H of the Corporations Act only, section 1041H(3) provides that if a person engages in conduct that contravenes sections 728 or 1022A that conduct does not also contravene section 1041H. A similar carveout exists under section 12DA(1A) of the ASIC Act.

(g) Overlap

By contrast to section 1041(3) of the Corporations Act (and section 12DA(1A) of the ASIC Act), there is no equivalent exclusion of the operation of sections 728 and 1022A of the Corporations Act in sections 1308/1309, any of the other Alphabet Provisions or the equivalent provisions in the ASIC Act. The effect is that there is overlapping liability between all of those provisions (other than section 1041H of the Corporations Act) and potential liability in section 728 and 1022A of the Corporations Act.

3 Historical background and market practice

3.1 Prospectus Defences

As outlined in paragraph 2.1(a) of this submission, sections 731 and 733 of the Corporations Act provide a Due Diligence Defence and Reasonable Reliance Defence respectively, to sections 728(3) and 729. These sections were introduced into the Corporations Act by the Corporate Law Economic Reform Bill 1998 ("**CLERP 1998**"). Prior to these reforms, a person could have liability for the content of prospectuses under both the former Corporations Law and the former Trade Practices Act 1974 (Cth), with different requirements applying under each regime.

[15] Austin & Black's Annotations to the Corporations Act, Division 2 – The prohibited conduct (other than insider trading prohibitions, [7.1041H], '*When conduct is misleading or deceptive*'.

In its policy document "Corporate Law Economic Reform Program – Policy Reforms", Treasury noted that a key feature of the reforms was to provide a "uniform defence" to liability for misleading statements in all disclosure documents in the financial sector and stated:

> *"The Government will clarify the potential liability of these parties for prospectus content by providing that their liability will be governed solely under the Corporations Law. Due diligence defences will be made available in all cases of fundraising in the financial sector where there is a positive duty to disclose information."*[16]

The explanatory memorandum to CLERP 1998 further noted that:

> *"The Law currently contains a complex set of defences for people who are liable in connection with a prospectus. These defences have been criticised as lacking coherence and a clear underlying policy. Furthermore, substantially similar concepts are expressed in different ways.*[17]
>
> *The Bill will make it easier for a person to determine whether defences are available by providing a uniform defence to all persons who are potentially liable in relation to disclosure documents. For disclosure under a prospectus, a person will not be liable if they made such inquiries as were reasonable and they believed on reasonable grounds that the prospectus did not contain any materially misleading or deceptive statements or omit any material matter (proposed section 731).*[18]
>
> …
>
> *Because all aspects of a disclosure document will not necessarily be within the expertise of all persons who may be potentially liable, a person who places reasonable reliance on information provided by someone else will also have a defence to any liability that arises from statements or omissions in relation to that information.*[19]"

The outcome of CLERP 1998 and the amendments to the Corporations Act was intended to be uniformity of defences for both civil and criminal liability – as this had not been the case prior to enactment of CLERP 1998.[20]

Other defences

The Prospectus Defences were introduced into law by CLERP 1998 together with certain other defences to civil and criminal liability imposed by sections 728(3) and 729 of the Corporations Act because of a misleading or deceptive statement in, or an omission of required material from a prospectus, including withdrawal of consent (section 733(3)) and new circumstances / lack of awareness (section 733(4)).

This submission does not seek to address these additional defences and notes them for completeness only.

3.2 The Alphabet Provisions

The Alphabet Provisions were introduced into the Corporations Act as part of a broader reform package to address market misconduct. Section 1041H of the Corporations Act was introduced as a general prohibition on misleading and deceptive conduct to replace section 995. The explanatory memorandum to the *Financial Services Reform Bill 2001,* which introduced section 1041H of the Corporations Act, states that the new provision was not to apply to a range of things including "*fundraising documents or disclosure documents or statements*".[21] This carveout was included

[16] Corporate Law Economic Reform Program, 2019, page 1 (link).

[17] At paragraph 8.27.

[18] At paragraph 8.28.

[19] At paragraph 8.30.

[20] G Golding (2021) "The Reform of Misstatement Liability in Australia's Prospectus Laws", Doctoral Dissertation, The University of Sydney, page 153.

[21] *Financial Services Reform Bill 2001,* explanatory memorandum, 15.8-15.10.

because Chapters 6B and 6D together with Parts 7.7 and 7.9 of the Corporations Act provided self-contained liability regimes for those types of documents. The concern was that the general prohibition in 1041H of the Corporations Act would "*defeat the specific defences included in these regimes*".[22]

There appears to have been no consideration in the explanatory memorandum of whether similar carve outs should apply to the other Alphabet Provisions or even other sections dealing generally with misleading and deceptive statements such as sections 1308 and 1309 of the Corporations Act and the provisions of the ASIC Act, or how defences under the identified sections might otherwise be "defeated" by the Alphabet Provisions.

It has been suggested by commentators that section 1041H of the Corporations Act may still capture the conduct of issuing or distributing the disclosure document or being involved in the offer without actually making it and therefore that the carve out does not effectively address all liability under section 1041H.[23] This ambiguity has been acknowledged but considered to be an "unduly narrow statutory interpretation" of the provision.[24] Nevertheless, the existence of ambiguity gives rise to uncertainty in the capital raising context.

3.3 Section 1308

Section 1308 of the Corporations Act was updated in 2020 as part of an initial package of changes to the Corporations Act enacted in response to the Hayne Royal Commission, and to align with the National Consumer Credit Protection Act 2009 (Cth) ("***Credit Act***"). Among other changes, the amendments introduced a strict liability regime for section 1308 of the Corporations Act and removed the previously applicable statutory defences that were available to both prospectuses and PDSs, which are still available under section 1309.

The changes were broadly designed to strengthen the liability provisions in the Corporations Act relating to misleading and deceptive conduct more generally and to provide ASIC with a broader range of enforcement tools to prosecute for non-compliance, including through the introduction of civil liability (as well as criminal liability) offences under section 1308 of the Corporations Act.

(a) Removal of specific defences

Prior to the amendments made by the Financial Sector Reform (Hayne Royal Commission Response – Stronger Regulators (2019 Measures)) Act 2020, section 1308 of the Corporations Act included certain deeming language that was considered to act in a manner similar to the Due Diligence Defence and Reasonable Reliance Defence. As outlined in paragraph 2.1(b) of this submission, these defences to liability under section 1308 of the Corporations Act would have applied to both prospectuses and PDSs.

The explanatory memorandum to the Financial Sector Reform (Hayne Royal Commission Response—Stronger Regulators (2019 Measures)) Bill 2019 noted as follows with respect to the removal of these specific defences:

> *"The amendments do not replicate the offence-specific defences that were previously contained in subsections 1308(10) to (13) of the Corporations Act 2001. These defences set out particular circumstances that a person could prove in order to demonstrate that they had taken reasonable steps to ensure that a document was not false or misleading. The defences essentially acted as safe-harbours that could apply even where a person had not objectively taken all reasonable steps. Their removal enables the Court to take into account all facts and circumstances in determining whether a person has taken all reasonable steps. The removal of these defences ensures greater*

[22] *Financial Services Reform Bill 2001,* explanatory memorandum, 15.8-15.10.

[23] Ford, Austin & Ramsay's Principles of Corporations Law, Consequences of contravention of Chapter 6D, [22.451.3].

[24] G Golding (2021) "The Reform of Misstatement Liability in Australia's Prospectus Laws", Doctoral Dissertation, The University of Sydney, page 193.

> *consistency between the provisions of the Corporations Act 2001 and the equivalent provisions of the Credit Act, which do not contain equivalent defences."*[25]

There is no discussion in the explanatory memorandum as to the impact of these changes to potential liability in connection with the issuance of a prospectus or PDS. There is also no express consideration of this section in the interim or final reports of the Hayne Royal Commission on which this amendment is being predicated.[26] The recommendation from the Hayne Royal Commission which may have formed the basis of this amendment is a general statement that:

> *"As far as possible, exceptions and qualifications to generally applicable norms of conduct in legislation governing financial services entities should be eliminated…"*[27]

The new section 1308 of the Corporations Act has not yet been tested in the context of liability under a prospectus or PDS and therefore the impact on liability and the availability of defences is uncertain.

4 Submissions for amendments

We have identified the following 2 areas where legislative amendments would reduce existing uncertainty, thereby ensuring that the only content and liability standard that applies to a prospectus or a PDS prepared for a functionally equivalent product would be sections 728 and 1022A of the Corporations Act.

4.1 Section 1022A – from 'reasonable steps' to Due Diligence Defence and Reasonable Reliance Defence

Our first actionable idea is that, for functionally equivalent products regulated by the PDS regime, the Prospectus Defences should apply in the same was as they apply to the preparation and issue of a prospectus.

When the Prospectus Defences were introduced into law by CLERP 1998, the legislature expressed a clear desire for uniformity of defences across fundraising documents. In the case of a PDS prepared for functionally equivalent listed or to-be-listed products, there is no compelling reason as to why the defence regime applicable to the products issued under that PDS should not be the same as that afforded by the Prospectus Defences. Additionally, the current "reasonable steps" defence lacks the clarity afforded by the Prospectus Defences, for which a "tried and tested" due diligence regime has been established by the market.

This actionable idea could be achieved by legislative amendments to sections 1021E(3) and 1022B(7) of the Corporations Act to include language mirroring sections 731 and 733.

4.2 Sections 1041 and 1308-9 and the ASIC Act – ensuring primacy of sections 728 and 1022A

Our second actionable idea is to make crystal clear through legislative change that no other provision should create primary liability for the issuer, their directors or others with articulated liability, in relation to a prospectus or PDS for a functionally equivalent product, apart from sections 728 and 1022A of the Corporations Act. Once implemented together with our first actionable idea, market participants would benefit from a clearly articulated single source of liability and a consistent application of applicable defences to that liability.

This actionable idea could be achieved by amending the Alphabet Provisions (other than section 1041H), sections 1308 and 1309 of the Corporations Act and any other related provisions (such as under the ASIC Act) to expressly provide that conduct with respect to prospectuses and PDSs for functionally equivalent products that contravenes section 728 or 1022A does not contravene any of

[25] At page 55, para 4.130.

[26] Royal Commissions, The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, Final Report, 4 February 2019.

[27] Royal Commissions, The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, Final Report Volume 1, 4 February 2019, Recommendation 7.3, page 42.

the Alphabet Provisions, sections 1308, 1309 or the ASIC Act (in a similar way that this carve out already exists for section 1041H).

4.3 Benefits of amendments

The amendments to the Corporations Act as detailed above:

(a) would ensure consistency in the legislative approach in relation to the content and liability standard applicable to a prospectus or PDS for a functionally equivalent product (including Real Asset Trusts) and uniformity of available defences;

(b) would provide clarity for directors and other persons involved in capital raisings for prospectuses or PDSs for a functionally equivalent product (including Real Asset Trusts) on the steps that they can take to minimise the risk of personal liability (and in the case of directors, reduce the impact on D&O insurance and the available talent pool) – for example, participating in a due diligence process and making all enquiries that were reasonable in the circumstances etc; and

(c) would not diminish the protection of securityholders or the market more generally as directors and other persons with articulated liability would still be accountable for misleading statements where they could not rely on a fairly available defence (e.g. a contravention would still result in an offence and / or a civil penalty).

5 MAY 2025

ANNEXURE E – LIABILITY REGIME FOR FORWARD-LOOKING INFORMATION IN CAPITAL RAISING DISCLOSURE

1 Overview

Further to the Discussion Paper's request for actionable ideas, set out below is a formal proposal for modifying the liability regime applicable to forward-looking statements included in prospectuses and product disclosure statements ("**PDS**") under sections 728(2) and 769C(1) of the Corporations Act respectively so that they align with the "reasonable steps" approach for misleading statements as set out in sections 1309(2) and (7) to (10) of the Corporations Act.

The purpose of these changes is to ensure greater consistency across the Corporations Act provisions and to provide clarity for directors and other persons involved in prospectus / PDS capital raisings on the steps that they can take to minimise the risk of personal liability.

This submission sets out an overview of the relevant provisions (including the historical context, where applicable). It then details the proposed amendments and the benefits of these to Australian public markets.

These proposals, if acceptable, could be dealt with through engagement by ASIC with Treasury. We would be happy to work with ASIC in its engagement with Treasury if that would be helpful.

Capitalised terms used but not defined in this Annexure have the meaning given to them in Attachment 1 ("Public Markets").

1.1 Historical and current approach - Forward-looking financial information

A forward-looking statement is a statement about a future matter and is not just a statement about a company's present intention.[1]

Historically, sections 765(1) and (2) of the Corporations Act 1989 (Cth) (which were predecessor provisions to the current section 728(2) of the Corporations Act) provided the following:

> *"(1) When a person makes a representation with respect to any future matter (including the doing of, or the refusing to do, any act) and the person does not have reasonable grounds for making the representation, the representation shall be taken to be misleading.*
>
> *(2) For the purposes of the application of subsection (1) in relation to a proceeding concerning a representation made by a person with respect to any future matter, the person shall, unless the person adduces evidence to the contrary, be deemed not to have had reasonable grounds for making the representation…"*

These provisions were in place until 31 December 1999, after which the amendments in the Corporate Law Economic Reform Bill 1998 (Cth) ("**CLERP 1998**") took effect. The Explanatory Memorandum to CLERP 1998 noted that:

> *"A provision to the effect of subsection 765(1) is included in the Bill. However the current reverse onus of proof for representations about future matters has been removed…This will encourage the inclusion of material of potential use to investors without exposing issuers to liability for legitimate forecasting. The provision also ensures that forecasts are made where there is a reasonable basis for them and not made on the basis of genuine but unreasonable beliefs of issuers."*

[1] www.asic.gov.au/regulatory-resources/takeovers/mining-and-resources-forward-looking-statements/

The current section 728(2) of the Corporations Act provides that:

> *"A person is taken to make a misleading statement about a future matter (including the doing of, or refusing to do, an act) if they do not have reasonable grounds for making the statement. This subsection does not limit the meaning of a reference to a misleading statement or a statement that is misleading in a material particular."*[2]

Ford notes that:

> *"This may be contrasted with…former s 765…which went on to say that the person making the statement was deemed not to have reasonable grounds for making it unless the person adduced evidence to the contrary…This reversal of onus has been abandoned, in order to encourage offerors to disclose potentially useful information without exposing themselves to liability for legitimate forecasting…".*[3]

Section 769C(1) of the Corporations Act, which was inserted by the Financial Services Reform Bill 2001 (Cth), provides that:

> *"For the purposes of this Chapter, or of a proceeding under this Chapter, if:*
>
> *(a) a person makes a representation with respect to any future matter (including the doing of, or refusing to do, any act); and*
>
> *(b) the person does not have reasonable grounds for making the representation;*
>
> *the representation is taken to be misleading."*[4]

Robson notes that:

> *"…s 769C does not reverse the evidential burden by deeming the person making the representation not to have had reasonable grounds for making it unless that person adduces evidence to the contrary: Kumova v Davison (No 2) [2023] FCA 1 at [195]…"*[5]

As can be seen in the current sections 728(2) and 769C(1) of the Corporations Act, the test for reasonable grounds is an objective one and depends on the facts of each case. If a person does not have reasonable grounds for a forward-looking statement, cautionary language, qualifications or disclaimers are not sufficient to prevent it from being misleading.[6]

In RG 170, ASIC states that in order to demonstrate reasonable grounds, the issuer must be able to point to:

(a) some facts or circumstances;

(b) existing at the time of publication of the information in the disclosure document or PDS;

(c) on which the issuer in fact relies;

(d) which are objectively reasonable; and

(e) which support the information.[7]

The onus is therefore on the issuer to prove that they had "reasonable grounds" to make the statement, and what constitutes "reasonable grounds" is something to be judged objectively

[2] There are similar provisions in sections 670A(2) (takeovers, compulsory acquisitions and buy-out documents) and 769C (financial services including a PDS) of the Corporations Act and section 12BB(1) of the Australian Securities and Investments Commission Act 2001 (Cth).

[3] Section 22.330 of Ford, Austin & Ramsay's Principles of Corporations Law (last updated February 2025).

[4] The reference to *"Chapter"* is a reference to Chapter 7 of the Corporations Act.

[5] Section 769C.10 of Robson's Annotated Corporations Legislation (last reviewed 12 April 2024).

[6] Sections 670A(2), 728(2) and 769C of the Corporations Act; www.asic.gov.au/regulatory-resources/takeovers/mining-and-resources-forward-looking-statements/

[7] See *Sykes v Reserve Bank of Australia* (1999) ATPR 41-699, Heerey J at 42-902 as referenced in RG 170.24.

according to the facts and circumstances of each case and the requirements of the Corporations Act. In other words, the CLERP 1998 amendment did not effectively make the change it intended.

If a person is found to be in breach of section 728(2) of the Corporations Act and the contravention is materially adverse from the point of view of an investor, it will be an offence and a civil penalty for the purposes of sections 728(3) and 728(4) of the Corporations Act.

1.2 Contrasting approach in sections 1309(2) and (7) to (10) of the Corporations Act

By way of contrast, a different approach is taken under section 1309 of the Corporations Act. Under section 1309(2) of the Corporations Act:

> *"An officer or employee of a corporation who makes available or gives information, or authorises or permits the making available or giving of information, to…*
>
> *(a) a director, auditor, member….;*
>
> *…*
>
> *(c) [ASX]….,*
>
> *being information, whether in documentary or any other form, relating to the affairs of the corporation that:*
>
> *(d) is false or misleading in a material particular; or*
>
> *(e) has omitted from it a matter or thing the omission of which renders the information misleading in a material respect;*
>
> *without having taken reasonable steps to ensure that the information:*
>
> *(f) was not false or misleading in a material particular; and*
>
> *(g) did not have omitted from it a matter or thing the omission of which rendered the information misleading in a material respect;*
>
> *contravenes this subsection.*

Section 1309(7) of the Corporations Act provides that for the purposes of section 1309(2):

> *"…a person is taken to have taken reasonable steps to ensure that information was not false or misleading in a material particular if the person proves that:*
>
> *(a) the person made all inquiries (if any) that were reasonable in the circumstances; and*
>
> *(b) after doing so, the person believed on reasonable grounds that the information was not misleading or deceptive in a material particular."*

Reasonable steps defences (include for reasonable reliance) are also set out in sections 1309(8), (9) and (10) of the Corporations Act.

If a person is found to be in breach, it will be an offence and a civil penalty for the purposes of sections 1309(11) and (12) of the Corporations Act – see also our submissions on section 1309 of the Corporations Act in Annexure D.

1.3 UK comparison

As the Commission is aware, in the UK it has never been common to provide financial forecasts in prospectuses (even though the Australian content requirement under section 710 of the Corporations Act was modelled on a UK equivalent and the identical reference to "prospects" has customarily involved a brief narrative in the UK).

Recommendations were made as part of the UK Listings Review chaired by Lord Hill (UK Listings Review - GOV.UK) in 2021 to relax the standard of care applicable to forward-looking statements. This has culminated in recommendations to adopt a recklessness standard for liability in relation to

specified categories of forward-looking statements in prospectuses (which include financial forecasts of the issuer).

The UK Financial Conduct Authority issued an engagement paper on the topic in May 2023 (Engagement Paper 3: Protected forward-looking statements) and a consultation paper in July 2024 (CP24-12: Consultation on the new Public Trading Offers and Admissions to the Trading Regulations regime (POATRs)) – see pages 58 to 66 of that paper and also the very well set-out table at the end of the engagement paper.

In substance, a recklessness standard is consistent with or possibly more relaxed than the position under section 1309 of the Corporations Act (i.e. a requirement to take reasonable steps to ensure the veracity of forward-looking information).

2 Submission for amendments

2.1 Overview of and reasons for amendments sought

Even if the CLERP 1998 intention is carried through, it still impacts those involved in IPO promotion when it comes to the need to include disclosure in a prospectus / PDS on the "prospects" of the entity or undertaking involved. In our experience, potential liability for forward-looking information – specifically the financial forecasts in a prospectus / PDS – is one of the very first things that promoters consider when deciding whether to go public.

As mentioned in Annexures D and H of our main submission, persons such as directors are subject to overlapping liability regimes with inconsistent penalties and defences. In the director context, this has flow on effects for affordability of D&O insurance, and the available talent pool, for listed entities.

The amendment of sections 728(2) and 769C(1) of the Corporations Act to adopt the "reasonable steps" standard (for both inquiries and reliance) provided in sections 1309(2) and (7) to (10) of the Corporations Act:

(a) would ensure consistency in the legislative approach to the inclusion of forward-looking statements in prospectuses and PDSs respectively;

(b) would provide clarity for directors and other persons involved in capital raisings utilising prospectuses or PDSs on the steps that they can take to minimise the risk of personal liability (and in the case of directors, reduce the impact on D&O insurance and the available talent pool) – for example, participating in a due diligence process and making all inquiries that were reasonable in the circumstances etc;

(c) is sufficient to govern the care needed for the preparation of forward-looking information, including financial forecasts in prospectuses or PDSs;

(d) would not diminish the protection of securityholders or the market more generally as directors and other persons with articulated liability would still be accountable for misleading forward-looking statements where they could not demonstrate that they had taken reasonable steps (e.g. a material contravention would still result in an offence and a civil penalty); and

(e) is consistent with the direction that the UK is moving on forward-looking statements in prospectuses.

We note that the reasonable steps obligation in section 1309 of the Corporations Act is identical in substance to the due diligence defence in section 731 of the Corporations Act, with the sole difference being that the former obliges due diligence whereas the latter is a defence to liability. We do not seek any amendments to section 731 of the Corporations Act and request that it remain available for forward-looking statements in its current form.

These provisions can be contrasted with section 733 of the Corporations Act, which is an independent defence. We also do not seek any amendments to this provision and request that it remain available for forward-looking statements in its current form.

2.2 Clarification amendments

As a technical matter it will be necessary to clarify in sections 728(1) of the Corporations Act and the equivalent provisions in the PDS regime (e.g. sections 1021B and 1022A(1) of the Corporations Act) that the veracity of forward-looking statements are to be assessed by reference to this reasonable steps defence. This will make it clear that there is no alternative way of attacking a forecast or other statement about a future matter (which by their nature cannot – and should not – be assessed on a misleading statement / omission basis alone).

However, it is important that the requirement in sections 728(1)(c) and 1016E(1)(c)[8] of the Corporations Act be preserved (i.e. the requirement to update any forward-looking statement by reference to a new circumstance that arises). Our recommendation on that issue would be to require reasonable steps to extend to keeping the disclosure of forward-looking information materially current during the application period for all equity raisings.

[8] Section 1012J of the Corporations Act is also relevant, as it requires that a PDS be up to date at the time it is given.

5 MAY 2025

ANNEXURE F – ISSUES FOR LISTED TRUSTS

1 Overview

Further to the Discussion Paper's request for actionable ideas, set out below is a proposal for modifying elements of regulation applicable to certain listed trusts. The changes we propose are intended to apply only to trusts that are listed or to be listed, and that invest in real property or infrastructure assets or are part of a stapled structure with a listed company ("**Real Asset Trusts**"), for reasons set out below. We believe that these ideas would assist in smoothing the path to listing for these entities, and that they are actionable because they can all be achieved through ASIC legislative instruments or changes in ASIC's administrative practice. They could be incorporated into ASIC's plans for reform through its current simplification initiative.

We request that in the longer term legislative change be considered to embed the overarching principle we suggest, that Real Asset Trusts should have similar regulatory treatment and outcomes to listed companies. A significant part[1] of this equivalent treatment could be achieved by amending the Corporations Act to allow listed or to-be-listed trusts in those categories to elect to have their units treated as shares in a company, at least for the purposes of Chapter 6D and Parts 7.8A and 7.9 of the Corporations Act.

Capitalised terms used but not defined in this Annexure have the meaning given to them in Attachment 1 ("Public Markets").

2 What do we propose, and why?

We have suggested in Annexure C that the pre-disclosure document advertising rules for an offer of interests in a trust via a product disclosure statement (**"PDS"**) would be preferable to the existing requirements for advertising securities under a prospectus.

This part of our response also proposes that the better of the 2 regimes should apply to both companies and trusts, but this time noting that certain requirements that currently apply to Real Asset Trusts and not to listed companies should be modified on the basis that they do not provide a meaningful benefit to investors or the market.

Changes to align trusts with companies on these points would facilitate a greater number of those types of structures joining the listed market. Once again, the tenor of our overall submission is that no single reform suggestion is likely to have a dramatic impact on "net listings". However, taken together they ought to have a material positive impact on the willingness of potential promoters to bring entities to the public markets.

Many listed entities which have or include a trust structure operate businesses similar to listed companies. Where they have a significant part of their assets in land and/or infrastructure, they adopt a trust form to provide flow-through tax treatment for passive rental or use income from the assets. Other listed trusts operate as public trading trusts, taxed as if they were companies. Many have a stapled structure with units in a flow-through trust stapled to securities in a company or a trust taxed as a company which owns the business assets. Bringing a stapled structure comprising a company and a trust to market is particularly complex because both the PDS and prospectus rules apply. Those regimes have many similarities, but also some noticeable differences.

The reforms to deal with certain regulatory "pain points" for Real Asset Trusts that we suggest in this Annexure are not intended to apply to listed investment trusts (LITs) or exchange traded funds (ETFs). Those structures are more like unlisted or AQUA market-traded managed funds, whereas

[1] This would not address the licensing issue for responsible entities noted at paragraph 3 below

listed property and infrastructure funds typically have at least a component of enterprise (which may be through a stapled company or active trust) and a need to raise capital for significant acquisitions or projects, and so are more like listed companies. A similar "line in the sand" between listed property and infrastructure, and managed funds, is drawn in Corporations Regulation 7.7A.12B which allows stamping fees to be paid for a capital raising only for listed property and infrastructure.

3 Harmonise rules applicable to listed property and infrastructure trusts with listed company requirements

3.1 Fees and costs

Section 1013D(1)(d) of the Corporations Act and Schedule 10 of the Corporations Regulations as substantially modified by ASIC Corporations (Disclosure of Fees and Costs) Instrument 2019/1070 ("**ASIC Instrument 2019/1070**") prescribe disclosure requirements for fees and costs of a registered managed investment scheme ("**MIS**"). A listed trust must take the form of a registered MIS and, for an initial public offer ("**IPO**"), must prepare a PDS that includes several pages of fees and costs disclosure in a rigidly prescribed format. By contrast, a prospectus must include information about assets and liabilities, financial position and performance, profits and losses and the prospects of the proposed listed company. This would include information reasonably required for an informed assessment of the company's potential future performance, so the disclosure on costs (including amounts payable to related parties) can be disclosed in a way that is useful and relevant to investors.

The fee section in a PDS, on the other hand, prescribes statements that may be confusing to investors, and can potentially be misleading because they are not relevant. For example, fee disclosure for a listed stapled internally managed structure[2] is not meaningful for investors. In a structure of this kind, the same investors own each component of the stapled securities in the same proportions, so any fees and costs that come out of the trust are paid to the company (or other trust in the staple) which they also own.

Another example is that on an ongoing basis, a listed trust is required to provide investors with an annual statement, and exit statements when they sell, that give similar fees and costs numbers to a PDS (section 1017D of the Corporations Act and ASIC Instrument 2019/1070). Again, this information has limited utility for investors, particularly in the case of an exit statement after they have sold the securities. Annual and continuous disclosure requirements are considered sufficient for reporting on financial matters such as expenses of listed companies.

So our first actionable idea is that Real Asset Trusts should be treated in the same way as companies in relation to fee disclosure, so these requirements do not apply. ASIC has the power to exempt a class of persons from the fee disclosure requirements under section 1020F(1) of the Corporations Act.

3.2 Design and distribution obligations

Where a PDS is required for an offer of interests in a trust, such as for an IPO or a non-pro rata capital raising that includes retail clients, section 994B of the Corporations Act requires the product issuer to prepare a target market determination ("**TMD**") under the design and distribution obligations ("**DDO**"). The TMD essentially matches the features of the offer with a "target market" of retail clients for whom it is considered suitable. Section 994E of the Corporations Act requires the issuer to take reasonable steps that are likely to result in only retail clients who are within the target market taking up units under the offer.

We submit that the TMD and related distribution requirements do not have their intended effect for interests in trusts that are to be listed (whether stand-alone or as a stapled group) because as soon as the trust or group lists, all retail clients will be able to buy the units on market, whether they are

[2] Entities with this structure include Scentre Group, Dexus and Stockland

within the designated target market or not. It follows that the burden of compliance with TMD and other DDO requirements should not continue to be imposed on Real Asset Trusts. A further reason in support of removing the requirement is that ASX makes a determination in relation to every IPO aspirant that the entity is suitable for listing – in other words, that tradeable interests in that entity are suitable for retail investment.

Also, the requirement for a TMD is particularly ineffective where a PDS is prepared for a stapling or trust merger, where the transaction mandates issue of units to each person in proportion to their existing holding and cannot discriminate among investors. Finally, the PDS disclosure requirements themselves mean that for any trust interest to be listed, there needs to be disclosure sufficient to provide the basis on which the addressable market for those interests can make investment decisions.

Our second actionable idea in this area is therefore to remove the application of the TMD and distribution requirements for listed or to-be-listed Real Asset Trusts so that they have the same exemption as listed trading companies. Section 994L(2) of the Corporations Act gives ASIC power to exempt a specified class of persons from all or specified provisions of the relevant Part of the Corporations Act.

4 Licensing

Our third actionable idea in this area is to reduce considerably the time needed to obtain licensing where a trust seeks listing.

A part of the process of bringing a trust to market is to ensure that the new registered MIS has an appropriate company as responsible entity. For example, if a property or infrastructure manager has assets on balance sheet or otherwise "warehoused" or identified ready to bring to market it will either need to identify a company in its group that already holds an Australian financial services licence ("**AFSL**") authorising it to operate a registered scheme of that kind, or establish a new company and apply for a licence. As far as we are aware, ASIC's standard time for processing applications for grant or variation of an AFSL is currently 5 to 8 months (and has been for some time). That does not include the preparation time for an AFSL application, which is itself considerable.

This is a disincentive to listing, where the assets to establish the fund and investor appetite is present at a certain time, but the manager will only be in a position to bring it to market many months later. The result of this difficulty is that funding may be found instead from private sources, resulting in fewer trusts coming to market, or the use of a responsible entity company that does not have a board with expertise appropriate to the assets or is an external provider of responsible entity services (which introduces cost and potential inefficiency).

We appreciate that it is not easy for ASIC to speed up licensing processes in general without devoting substantial additional resources to the task, which may not be available. At least for corporate groups with existing licences authorising the operation of registered schemes, the issue could be addressed by a policy of streamlined or near-automatic licensing for a new company in the same group that is seeking to be responsible entity of a listed trust. Again, this does not require legislation and could be implemented through ASIC's internal practices.

5 Standard ASIC relief

Finally, another step in bringing a proposed listed trust to market is identifying and applying for various heads of "standard" ASIC relief. This is time consuming and costly. It can also create uncertainty, as the need for relief gives ASIC discretion to delay or prevent the offering, even when the relief applied for has been granted in the same circumstances on many previous occasions, and so may be regarded as "standard".

For example, listing transactions can require the following types of relief:

- modification of the rules relating to holding application money[3];
- voting for a demerger transaction where all existing members would technically be excluded[4]; and
- stapling relief in relation to responsible entity duties and distribution reinvestment plans[5].

ASIC is likely aware of other examples and heads of relief that have been sought for implementation of listing transactions. The remedy for this regulatory pain point would be for ASIC to identify relief it routinely grants and issue "class" instruments, allowing issuers to rely on the relief so long as its conditions are met. This would remove the uncertainty, time and cost of this step, which is one of the disincentives to go to a listing as opposed to private funding.

6 Longer term

As mentioned in the second paragraph of this Annexure, we are strong advocates for aligning (in fact, combining) the regime for listed and to-be-listed Real Asset Trusts with the regime applicable to listed companies. This would not change the MIS or AFSL duties of the responsible entity of those vehicles, just the disclosure standard and mechanical provisions applying to shares and units.

We feel that this could be achieved without any derogation in investor protection or market integrity. It would reduce costs and simplify the IPO process of those vehicles/structures.

[3] For example, for HMC Digital Infrastructure Trust, Instrument 24-0884 granting relief from section 1017E

[4] For example, for Abacus Storage King, Instrument 23-0496 granting relief from section 253E

[5] For example, Charter Hall Prime Industrial Fund, Instrument 2023-0831 granting relief from section 601FC

5 MAY 2025

ANNEXURE G – PISCES EQUIVALENT

1 Overview

One actionable idea that comes directly from the UK is the introduction of a regime in Australia equivalent to PISCES – the Private Intermittent Securities and Capital Exchange System (“**PISCES**”) recently introduced by Britain’s Financial Conduct Authority (“**FCA**”).

The reason for this recommendation is that it provides a path to listing that has the potential to see an increase in net listings in Australia. This is achieved through enabling trading of securities issued by private companies in limited windows by company employees and wholesale investors.

The objective is to get these early-stage companies comfortable with and used to a level of reporting to facilitate trading in a way that would make the ultimate step to full listing less of a jump.

Capitalised terms used but not defined in this Annexure have the meaning given to them in Attachment 1 (“Public Markets”).

2 Overview of PISCES

PISCES is a regulated trading platform designed to facilitate the intermittent trading of existing shares in private companies. Trading would take place through a platform host, such as an established securities exchange or a bespoke trading platform. The idea has been modelled on Nasdaq Private Markets, where blocks of shares in private US companies can be traded.

The UK’s FCA has taken the concept to a point of development where it is expected to go live this year. It issued a consultation paper in December 2024 and is likely to finalise the key design features that have been subject to consultation later this month.[1]

Key features are that there would be windows in which trading could occur on platforms authorised by the FCA (presumably half yearly around the time that financial results are prepared) and that there would be a relaxed disclosure expectation and liability regime for honest misstatements.

The UK has a concept of a “sandbox”, which is a trial for a new mechanism for a limited time. Continuation of the mechanism beyond that time depends on a review undertaken in the final year of the trial. The sandbox for PISCES is a 5 year one.

3 Actionable idea

3.1 Adopt a PISCES equivalent in Australia

We see benefits in the adoption of a similar system in Australia. We would expect it to have a positive impact on net listings.

3.2 Trial period

Like the UK, we recommend introducing it for a trial period of 5 years with a scheduled review near the end of that period on whether to continue on a permanent basis or to extend the trial.

We do think it will take that period of time to determine whether it does have a net positive impact on net listings.

[1] FCE consults new private stock market.

5 MAY 2025

ANNEXURE H – DIRECTOR LIABILITY (LISTED ENTITIES)

1 Overview

Further to the Discussion Paper's request for actionable ideas, set out below is a submission in support of lightening the potential liability that is currently on listed company directors.

We appreciate that the submission is controversial, but make it earnestly. Not in a way that would reduce compliance or market integrity, but in a way that would create an environment of neutrality between being a listed company director and a director of, for example, a portfolio company of a private equity firm.

Listed company directors are subject to overlapping liability regimes with inconsistent penalties and defences. This has flow on effects for affordability of D&O insurance, and the available talent pool, for listed companies in 2 key areas: (i) the use of 'stepping stones' liability in relation to continuous disclosure cases, and (ii) listed company reporting obligations, where case law has confirmed directors cannot avail themselves of reasonable reliance or reasonable delegation as safe harbours.

The following changes would provide clarity for directors on the steps they can take to avoid personal liability, reducing the impact on D&O insurance and available talent pool, while preserving existing shareholder protections:

- excluding liability under section 180(1) of the Corporations Act in relation to continuous disclosure breaches, so that the bespoke liability regime under sections 674 and 674A would apply to the exclusion of the duty of care and diligence under section 180(1);
- recognising that certain decisions relating to continuous disclosure are business judgments, including any decision concerning disclosure of or updates to guidance or consensus on future performance; and
- extending the application of sections 189 (reasonable reliance) and 190 (reasonable delegation) of the Corporations Act so that they are available as safe harbours against liability under section 344 (requirement on directors to take reasonable steps to comply with reporting obligations) in the same manner as sections 189 and 190 apply as safe harbours from the basic duty of care and diligence under section 180(1).

Capitalised terms used but not defined in this Annexure have the meaning given to them in Attachment 1 ("Public Markets").

2 Stepping stones

Listed company directors are much more likely to be subjected to ASIC's 'stepping stones' approach to enforcement of directors' duties. That approach involves ASIC taking action against directors for a breach of duty, especially the duty of care and diligence under section 180(1) of the Corporations Act, if the company has contravened a provision of the Corporations Act and the directors have failed to take steps to prevent the contravention after being put on notice of the contravention or potential contravention (i.e. after a "red flag" has been raised).

In this way, ASIC may take action against directors for breach of duty in relation to a corporate breach, notwithstanding that the provision that the corporation has breached includes a bespoke liability regime and defences for directors, which directors have been found on the same facts not to have contravened. This "end run" around specific liability regimes for directors is most common for listed company directors in continuous disclosure matters, but can also arise in relation to prospectus liability and liability for product disclosure statements. Included in paragraph 4 are

excerpts from an article by Professor Pamela Hanrahan and Tim Bednall (Partner, King & Wood Mallesons) that provide more detail on the 'stepping stones' approach, as well as a summary of the analysis in that article of key criticisms that have been raised in relation to the use of the approach.

Based on successful cases in the last ~3 years, ASIC appears to use the 'stepping stones' approach 5 times more often against listed company directors than against unlisted company directors.

We are not suggesting that ASIC should ease up on listed company directors in any way under the specific laws relevant to any proscribed conduct, but this stepping stones approach has flow on effects for affordability of D&O insurance, and the available talent pool, for listed companies.

The issue is partly legislative, and will only be fully solved if Australian directors cease to be exposed to civil penalties for mere negligence. The liability regime for Australian directors is probably the strictest in the world on this point, especially coupled with hair trigger continuous disclosure obligations for listed entities. This issue is exacerbated by the absence of the availability of the business judgment rule in cases of corporate failure to comply with regulatory obligations, including continuous disclosure obligations. The reality is that, for example, any decision concerning disclosure of or updates to guidance or consensus on future performance is a business judgment. Those types of decisions are analogous to the decisions the subject of the recent Federal Court case of *Pacific Current v Fitzpatrick,*[1] which were found to be business judgments.

While we appreciate that removing civil penalties for a breach of section 180(1) of the Corporations Act is highly unlikely to happen, a half-way house to addressing this issue for listed company directors would be to exclude liability under section 180(1) in relation to continuous disclosure breaches, so that the bespoke liability regime under sections 674 and 674A would apply to the exclusion of section 180(1). There are too many stepping stones cases against listed company directors in which a contravention of the former section 674 or the current section 674A of the Corporations Act (which set out explicitly how directors are to be liable for their entity's continuous disclosure breaches and provide a reasonable steps defence) has not been proven, but there has been success under section 180 on the same facts where there is no reasonable steps defence. Recent amendments to sections 674 and 674A of the Corporations Act demonstrate that this change could be achievable.

3 Overlap in obligations relating to listed company reporting

Listed company directors are subject to an obligation to take reasonable steps to comply with, or secure compliance with, various entity reporting requirements that apply only to listed entities or disclosing entities under section 344 of the Corporations Act which is a civil penalty provision.

There is a clear overlap between this requirement and other directors' duties. Directors are already required by their statutory and common law duties to act with due care, skill and diligence, including in relation to compliance by the company with the law.

The issue with section 344 of the Corporations Act is twofold:

- First, the *Centro* decision confirmed that directors cannot delegate or rely on others to assure them that the company has complied with its reporting obligations: delegation or reliance does not amount to reasonable steps.
- Second, the reporting requirements for listed entities under applicable accounting standards for financial reporting, remuneration reporting, and now sustainability reporting, are so complex that inexpert part-time non-executive directors cannot possibly be sure, without some form of expert assurance, that the entity's reports comply. Section 344 of the Corporations Act sets an impossible standard: inexpert directors can still be liable for errors in reports that have been reviewed and certified as compliant by the entity's CEO, CFO and auditors.

[1] *Pacific Current Group Ltd v Fitzpatrick* [2024] FCA 1480.

This problem would be addressed to some extent if section 189 (reasonable reliance) and section 190 (reasonable delegation) of the Corporations Act were available as safe harbours against liability under section 344 in the same manner as those sections apply as safe harbours from the basic duty of care and diligence under section 180(1).

4 Summary of article

Set out below are extracts from an article by Professor Pamela Hanrahan and Tim Bednall[2] describing the stepping stones approach, as well as a summary of the criticisms of the approach analysed in that article.

4.1 Extracts

'In the absence of a positive duty on corporate officers to take reasonable steps to ensure their corporation conducts its affairs in accordance with all or specified regulatory requirements,[3] the Australian Securities and Investments Commission ('ASIC') has adopted a civil enforcement strategy-commonly referred to as 'stepping-stones'[4] – that utilises s 180(1) of the Corporations Act 2001 (Cth) ('Corporations Act') in this context.'

'Section 180(1) of the Corporations Act imposes a statutory duty of care and diligence on corporate officers,[5] the content of which overlaps with their duties of care owed to the corporation in contract, equity and tort. It is a civil penalty provision … [with] consequences [that] can be ordered by a court even when the corporation itself may have no compensable claim against the officer for breach of duty, for example, because the corporation has ratified the officer's conduct or has not suffered any actual loss or damage as a result of the officer's negligence.[6]

In devoting scarce public resources to running stepping-stones cases, it is likely that ASIC is seeking to protect or vindicate the public interest in the proper management of corporations, rather than to safeguard the private interests of an individual corporation and its shareholders and creditors.[7] … Where the stepping-stones strategy is used in connection with disclosure failures, including contraventions of the continuous disclosure requirement contained in s 674 of the Corporations Act, ASIC's regulatory interest is in protecting market efficiency, transparency and integrity.[8] Where the strategy is used in connection with regulatory failures … ASIC's interest is likely to be in improving compliance by regulated corporations, for the benefit of both the stakeholders whose interests are protected by the particular regulatory regime … and of the broader community in ensuring corporations comply with the law.[9]

From a regulatory perspective, why use stepping-stones? As real but artificial entities, corporations do not necessarily respond to the coercive force of law in the same way as natural

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[2] (2021) '*From Stepping-Stones to Throwing Stones: Officer's Liability for Corporate Compliance Failures after* Cassimatis', Federal Law Review, 49(3), 380-409.

[3] Cf. *Corporations Act 2001* (Cth) ss 344 and 601FD ('*Corporations Act*').

[4] That is, bringing civil penalty proceedings against individual officers for breach of their statutory duty of care where it is alleged that their negligence caused or contributed to their corporation contravening the law. The stepping-stones strategy is described in Part 2 of the article; see generally Abe Herzberg and Helen Anderson, 'Stepping Stones; From Corporate Fault to Directors' Personal Civil Liability' (2012) 40(2) *Federal Law Review* 181.

[5] Defined in *Corporations Act* s 9. See *Australian Securities and Investments Commission v King* (2020) 376 ALR 1 ('*King*').

[6] '[Section] 181(1) does not require any proof of actual loss to the company': *Australian Securities and Investments Commission v Cassimatis [No 8]* (2016) 336 ALR 209 ('*Cassimatis [No 8]*'), 301 [481] (Edelman J).

[7] This is suggested by ASIC's stated priority of '[h]igh deterrence enforcement', but not stated explicitly: Australian Securities and Investments Commission, *ASIC Corporate Plan 2020-24* (Report, August 2020) 26.

[8] For a detailed discussion of stepping-stones in disclosure cases, See Tim Bednall and Pamela Hanrahan, 'Officers' Liability for Mandatory Corporate Disclosure: Two Paths, Two Destinations?' (2013) 31(8) *Company and Securities Law Journal* 474.

[9] See generally, Pamela Hanrahan, 'Companies, Corporate Office and Public Interests: Are We at a Legal Tipping Point?' (2019) 36(8) *Companies and Securities Law Journal* 665.

(that is, human) legal persons.[10] Therefore, identifying the individual officers within corporations who control or influence decisions that impact on corporate compliance, and then guiding (through the development of legal precedent) and incentivising (through general deterrence) those individuals to approach compliance-related issues with greater care, skill and diligence, might be a credible strategy for a regulator interested in improving overall levels of corporate compliance with regulation in the public interest. Secondly, stepping-stones as an enforcement strategy provides a legal pathway for holding individuals publicly to account in connection with corporate compliance failures when there is media and political pressure on the regulator to do so, despite that individual's involvement falling short of that required to establish accessorial liability.[11]

For a regulator, stepping-stones may be a cogent strategy. But it is a problematic one. In his dissenting opinion in Cassimatis v Australian Securities and Investments Commission,[12] Rares J criticised ASIC for employing s 180(1) of the Corporations Act in an 'arcane and backdoor fashion'.[13] This is an important criticism…

More broadly, there are concerns in the business community that stepping-stones is predicated on a misunderstanding of the role of the board and senior management in compliance and, in its application, is acutely vulnerable to hindsight bias of the kind identified by Hayne J in Vairy v Wyong Shire Council ('Vairy').[14] These concerns are compounded by three factors. The first is the conceptual difficulty that arises in applying the calculus from Wyong Shire Council v Shirt ('Shirt') to compliance or conduct (as distinct from financial or operational) risks.[15] The Shirt calculus, a cornerstone of the law of negligence, is so named after the comments of Mason J in Shirt;[16] it involves the balancing by the tribunal of fact in negligence cases of 'the magnitude of the risk and the degree of the probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have' in determining what a reasonable defendant would have done in the circumstances.[17] The second is the excision by courts of decisions about design and resourcing of the corporate compliance function from the business judgment safe harbour in s 180(2) of the Corporations Act, and the third is the absence (to date) of a clearly articulated collective board duty of oversight from the Australian jurisprudence. Underlying the unease about stepping-stones are deeper disquiet about the fairness and proportionality of engaging the civil penalty regime for individual negligence and the distorting impact of potential public enforcement actions (as distinct form private claims) on director behaviour.'

4.2 Summary of criticisms

The article goes on to analyse criticisms of the 'stepping stones' approach,[18] including:

(a) **that it rests on an arcane theory of liability** – the approach has been described as 'arcane' because it requires proving a duty to prevent not just contraventions of the law, but also to guard against the regulatory consequences of those contraventions. The approach is criticized for its circularity, as it relies on the hypothetical assertion that ASIC would have taken enforcement action, which is not always proven;

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[10] John C Coffee Jr, '"No Soul to Damn, No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment' (1981) 79(3) *Michigan Law Review* 386.

[11] Including under *Corporations Act* s 79 and its statutory analogues.

[12] (2020) 275 FCR 533 ('*Cassimatis Appeal*').

[13] *Cassimatis Appeal* 597 [286].

[14] (2005) 223 CLR 422, 462 [128] ('*Vairy*').

[15] (1980) 146 CLR 40 ('*Shirt*').

[16] Ibid 47-8.

[17] For a useful discussion of the *Shirt* calculus and its difficulties as a forensic tool, see Justice Margaret McMurdo, 'developments in the Law of Negligence: Have Plaintiffs Lost their *Shirt*?' (Speech, Australian Lawyers Alliance Queensland State Conference, 13 February 2015).

[18] At pages 397-406.

(b) **that it is used as a backdoor method for imposing accessorial liability** – the approach has been described as a backdoor way of imposing liability on directors as accessories to corporate contraventions, even when they may not meet the criteria for accessorial liability under the law. This raises concerns about imposing penalties on directors for corporate compliance failures without direct involvement;

(c) **that it is contributing to a widening expectation gap** over the role of the board – there is a perceived gap between what the community expects from corporate directors and what is practically achievable. The business community criticises the stepping-stones approach for contributing to unrealistic expectations about directors' roles in ensuring corporate compliance, leading to confusion and increased pressure on directors;

(d) **that the cases miss an important step in applying the principles of negligence** – the application of negligence principles in stepping-stones cases is criticized for conflating foreseeability with negligence. The concern is that courts may assume that because a risk was foreseeable, it was negligent not to take precautions, without properly applying the Shirt calculus to assess the reasonableness of the director's actions; and

(e) **that the prospect of civil penalties for negligence is influencing officer behaviour in a way that impacts detrimentally on corporate governance and management** – section 180(1) of the Corporations Act is a civil penalty provision, subjecting directors to state sanctions for negligence, which is uncommon in other fields. This is potentially unfair and may not effectively improve corporate governance. Critics argue that it contributes to a risk-averse culture among directors, impacting their decision-making and willingness to serve on boards.

4.3 Conclusion

'…Australian corporate law has struggled to articulate the proper basis upon which directors and other corporate officers ought to be exposed to civil penalties and other state sanctions when their action or inaction risks the corporation contravening the law. Section 180(1) of the Corporations Act has provided a fortuitous but imperfect means by which the regulator and the courts can satisfy the public appetite for individual accountability for corporate compliance failures by imposing penalties on individual directors and officers in these circumstances. However, the lack of clear judicial guidance on the nature and extent of a board's collective duty of oversight[19] *arising out of, and consistent with, the general negligence standard limits the effectiveness of stepping-stones as a principle to guide board behaviour ex ante. Section 180(1) of the Corporations Act was not devised to address the public interest in corporate compliance, and the longstanding issues discussed in [the] article demonstrate its shortcomings.'*[20]

[19] For example, of the kind provided in US corporate law by *Re Caremark International inc Derivative Litigation* 698 A 2d 959 (Del Ch, 1996), see discussion in Pamela Hanrahan and Rachel Yates, 'Directors' Duties of Oversight: Insights for Australia from Recent Developments in Delaware's Caremark Jurisprudence' (2018) 33(2) *Australian Journal of Corporate Law* 185, 212.

[20] (2021) '*From Stepping-Stones to Throwing Stones: Officer's Liability for Corporate Compliance Failures after* Cassimatis', Federal Law Review, 49(3), 409.

5 MAY 2025

ANNEXURE I – REMUNERATION REPORTING & THE TWO-STRIKES RULE

1 Overview

Further to the Discussion Paper's request for actionable ideas, set out below is an emphatic recommendation for ASIC to support legislative change to remuneration reporting and removal of the two-strikes rule.

We need to commence with a societal observation. Australia is very different from the United States – a country that generally rewards and admires success and achievement. There is no "tall poppies" equivalent in the US. To the contrary. Reward for performance is very much part of the fabric of its society.

One indisputable reason for the drift from public to private markets in Australia is that talented and successful executives have the potential to share in enterprise success in a greater way in private companies than they do in public ones.

While that is true in many sophisticated jurisdictions, it is particularly true in Australia because of the very bright spotlight that shines on remuneration issues for public company executives here.

The scaffolding for that spotlight is a direct result of the elaborate requirements in Australia on remuneration reporting and the two-strikes rule. These 2 elements make it extremely difficult for listed companies to reward executives across the board at anywhere near the levels that private companies can. In the case of remuneration reporting, this is because the rules require reporting on a maximum possible benefits basis that encourages a headline grab that can bear no correlation to actual / ultimate compensation. When the tokenistic impact of a company getting a strike because of those headlines is taken into account, listed company boards become gun shy in the way they approach executive reward.

We begin the submission in this Annexure by looking at the cost burden of the current regime but then move into the way in which a toning-down of the reporting requirements and removal of the two-strikes rule can achieve a re-balance of private to public attractiveness. On the two-strikes rule we also look at how it has been used for ulterior purposes.

Capitalised terms used but not defined in this Annexure have the meaning given to them in Attachment 1 ("Public Markets").

2 Remuneration constraints

One hypothesis for the decline in public markets is the increasing regulatory burdens and costs associated with being listed. This explanation is particularly convincing when having regard to the requirement for Australian listed companies to prepare a remuneration report (with onerous and detailed reporting requirements) and to comply with the 'two-strikes' rule. The significant costs and consequences of these requirements, are, in our view, a contributing factor as to why companies see a benefit in becoming or remaining a private company.

2.1 Corporations Act

The Corporations Act requires a listed company to prepare a remuneration report (as part of the directors' report) to be voted on by shareholders (as a non-binding resolution) at each AGM, which must include an extensive range of prescribed disclosures (including the amount of remuneration paid to key management personnel, such as directors and the CEO / MD, and a discussion of the

board policy for determining the amount and nature of remuneration).[1] While we understand that remuneration reports are intended to increase transparency and accountability, the usefulness of these reports is often diminished by their length, detail and complexity.

The Australian Accounting Standards Board ("**AASB**") published a '*Review of Executive Remuneration Disclosure Requirements*' in September 2021 which compared executive remuneration disclosure requirements for listed entities from the following international jurisdictions: Canada, Germany, Hong Kong, New Zealand, Singapore, South Africa, the United Kingdom and the United States.[2] The AASB concluded that:[3]

> "*The benchmarking results indicate that a large number of similarities exist across the jurisdictions, as well as a number of significant differences in the breadth and depth of the information required to be disclosed. The majority of the disclosure requirements are embedded in company law or securities law, are legally enforceable, and are generally located outside the financial statements. However, only two jurisdictions (Australia and Germany) currently require the disclosed remuneration information to be audited, and there are significant differences in the level of detail required to be disclosed. Few countries require as much information about their executive remuneration as Australia, and only two countries (Australia and South Africa) require the remuneration information presented outside financial statements to be measured in accordance with the relevant accounting standards.*"

In the AASB's view, "*Australia sits at the top end of the disclosure requirements in terms of the level of detail that must be disclosed*".[4] This indicates that there are certainly opportunities for cutting red tape and simplifying our remuneration disclosure regime to be in line with similar jurisdictions.

2.2 CPS 511 and the Gender Equality Act

A number of additional remuneration disclosure obligations will (or already do) apply to listed entities, including under the Australian Prudential Regulation Authority's ("**APRA**") prudential standard CPS 511 Remuneration ("**CPS 511**") and the Workplace Gender Equality Act 2012 (Cth) ("**Gender Equality Act**"). CPS 511 will apply to APRA regulated banks and insurers and the Gender Equality Act applies to all employers with greater than 100 employees, with enhanced requirements for employers with greater than 500 employees. Many listed entities will therefore be faced with having to comply these additional remuneration disclosure regimes on top of the strenuous requirements imposed on listed companies by the Corporations Act. We anticipate that these overlapping regimes will create significant practical issues for listed companies, particularly in relation to the timing of disclosure and the onerous nature of gathering the information required by each regime.

	CORPORATIONS ACT	CPS 511	GENDER EQUALITY ACT
Where	Annual remuneration report	Standalone document online (later APRA)	To the regulator and publicly
Who	Covers key management personnel	Specified role persons	All employees, enhanced obligations for employers with 500 employees

[1] Section 300A of the Corporations Act; Reg 2M.3.03 Corporations Regulations 2001 (Cth).

[2] Australian Accounting Standards Board, 'AASB Staff Paper: Review of Executive Remuneration Disclosure Requirements' (September 2021.

[3] Ibid page 3.

[4] Ibid page 4.

	CORPORATIONS ACT	CPS 511	GENDER EQUALITY ACT
When	Within 3 months after the end of each financial year	Within 6 months after the end of each financial year	By 31 May each year
What	Mostly quantitative remuneration information	Extensive qualitative and quantitative remuneration information	Gender pay gap remuneration information and gender targets

2.3 The United Kingdom – Rewinding the Overreach

The UK's director remuneration reporting regime currently has similar issues in being overly complex and prescriptive. However, the tides seem to be changing. For example:

- in October 2024 the Investment Association ("**IA**"), whose members include many institutional investors in UK listed companies, updated its (non-binding) Principles of Remuneration ("**IA Principles**"). Generally, the IA signalled that its members are more willing to accept that companies sometimes need to offer more generous remuneration packages in order to attract and retain talent from a global pool. More specifically, the IA Principles now recognise that "hybrid" Long-Term Incentive Plans – which consist of (i) a performance share component and (ii) a restricted share component, which is subject to ongoing service but not stretching performance conditions - may be suitable for certain companies, in particular those which have a significant US footprint and/or compete for global executive talent.
- from 11 May 2025, the draft Companies (Directors' Remuneration and Audit) (Amendment) Regulations 2025 ("**UK Regulations**") will reduce some of the information about directors' remuneration that a listed company must include in its remuneration report. For example, it will no longer be necessary to include a comparison of the annual change in each director's salary (or fees), benefits and bonus to that of the company's employees over a 5-year period – a requirement that had driven companies to include tables of information that were unwieldy and of little commercial value to shareholders. (However, companies must continue to disclose a comparison of CEO pay to wider employee pay.)
- in November 2023, the influential Capital Markets Industry Taskforce published an open letter arguing that the provision in the UK Corporate Governance Code requiring a company that receives 20% or more votes against a resolution to explain what actions it intends to take to consult shareholders should be removed, and that the IA's public register of resolutions that have received 20% or more votes against should be discontinued. Currently, the prospect of being put on the IA register can deter boards from proposing resolutions on remuneration or other matters that proxy advisers or certain investors would baulk at, even if the resolution would likely be supported by the majority of shareholders overall.
- more generally, the UK Government recognises the need to reduce the burden of non-financial reporting for companies of all sizes. It has already taken steps to remove some duplicative requirements, and it is currently processing responses to its 2024 Call for Evidence and consulting with stakeholders on certain proposals – for example, to simplify the strategic report. A consultation paper is expected to be published in November 2025.

We strongly believe that Australia should follow the UK's lead in simplifying the current remuneration reporting regime for listed companies. Having to comply with overlapping and onerous remuneration reporting regimes, and expending significant internal and external costs and resources to comply with these regimes, is detrimental to the public market and incentivises private companies to remain private. Further, having overly prescriptive reporting regimes does little to benefit shareholders, as it results in long and confusing reports. In fact, research in Canada and the UK concluded that increasing disclosure has actually contributed to increased executive

remuneration levels.[5] That is by reference to other public companies, not by reference to both public and private companies.

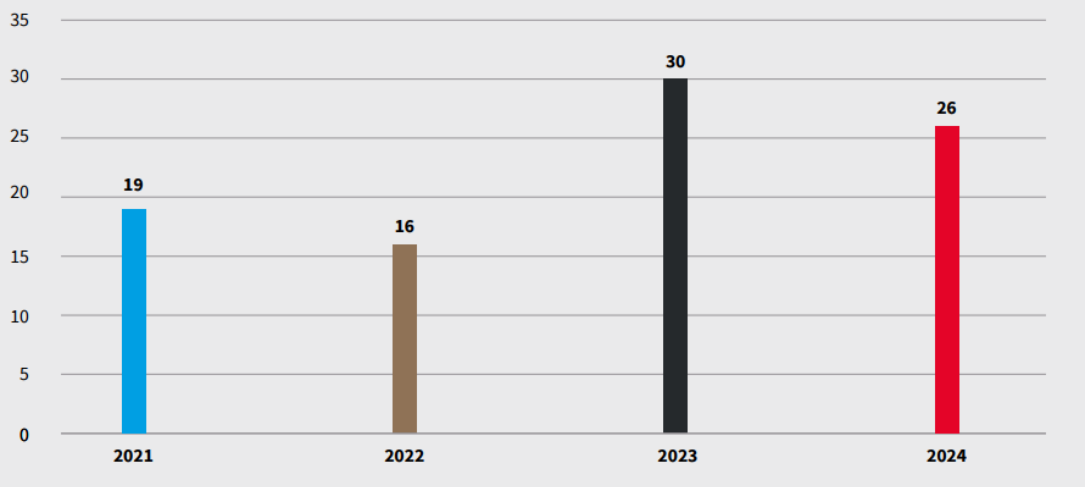
3 The two-strikes rule

3.1 Misuse of the two-strikes rule

Another burdensome regime listed companies have to comply with is the controversial 'two-strikes' rule. The rule was introduced in the context of the global financial crisis and aimed to address the concern that executive pay had "got out of hand".[6] However, the two-strikes rule is not being used for its intended purpose, being "*to empower shareholders to hold directors accountable for their decisions **on executive remuneration***".[7] Rather, we are too often seeing votes being misused for reasons unrelated to remuneration (for example, ESG initiatives, share price volatility, company performance, leadership changes, reputation damage and governance issues).[8] This is perhaps because it is easier for shareholders to express their views against a remuneration report (which only has a 25% threshold)[9] rather than passing a resolution to remove a director (which has a 50% threshold) or not approving a resolution in relation to the CEO's performance rights or options.[10] Also, many shareholders only have limited resources to support engagement and to do a careful analysis of company explanations, and so may resort to herd mentality and vote in accordance with the recommendations of others who have a non-remuneration-related agenda.

This is particularly concerning given a dramatic increase in the number of strikes over the past two years. In 2023, there were 30 remuneration report strikes, representing 16% of ASX200 companies that presented a remuneration report at an AGM.[11] This was double the 8% strike rate in 2022.[12] While there was a slight decrease in 2024, with 26 companies in the ASX200 receiving strikes on their remuneration reports, the strike rate remains significantly above 2021 / 2022 levels.[13] This is concerning, as it reflects a trend in activist shareholders using the two-strikes rule as a Trojan Horse to push non-remuneration related agendas.

Number of companies receiving remuneration strikes



[5] Australian Accounting Standards Board, 'AASB Research Report 8 – Literature Review, Remuneration Reporting' (2019) at page 4.

[6] Productivity Commission Inquiry Report, 'Executive Remuneration in Australia' (19 December 2019) at xv.

[7] Explanatory Memorandum to the *Corporations Amendment (Improving Accountability on Director and Executive Remuneration) Bill 2011*

[8] https://www.kwm.com/content/dam/kwm/insights/download-publication/australia/2024/03/Deep-dive-into-ASX200-AGMS-in-2023.pdf

[9] Section 250U of the Corporations Act.

[10] Section 203D of the Corporations Act.

[11] https://www.kwm.com/au/en/insights/latest-thinking/publication/deep-dive-into-asx200-agms-in-2023.html.

[12] Ibid.

[13] https://www.kwm.com/au/en/insights/latest-thinking/publication/deep-dive-into-asx200-agms-in-2024.html.

3.2 Shareholder engagement

While we understand that the two-strikes rule was intended to increase shareholder engagement by strengthening the previous non-binding, advisory vote mechanism,[14] in practice, the reforms have given shareholders an inappropriate level of influence over listed companies. This has led to justified concerns that the two-strikes rule has driven a homogenised approach to remuneration practices in Australia.[15] The scales need to be balanced to allow for boards to maintain their discretion to determine remuneration arrangements that reflect and align the company's interests. As observed earlier, it has also given shareholders a very low threshold protest that is tokenistic rather than substantive.

3.3 Generally unsuccessful spill attempts

A critical reason why the two-strikes rule should be removed is that a spill vote is almost never successful in Australia. All 7 of the two-strikes spill motions in 2024 for ASX200 companies were incredibly unsuccessful.[16] Even where spills are successful, spilled directors are often re-elected. This demonstrates that, in practice, the two-strikes rule has led to a significant waste of time and money with very little benefit for shareholders and in a scenario where the motions are being passed for reasons wholly unrelated to remuneration.

3.4 International comparison

Australia's two-strikes rule stands as an outlier globally, as no other comparable jurisdiction granting shareholders such extensive and disproportionate power over executive remuneration. While South Africa recently introduced a rule similar to Australia's two strike rule, it has a few key differences which make it less onerous to the Australian rule. In particular, the South African rule requires an ordinary resolution (over 50% of the votes cast by shareholders) against the remuneration report to trigger a 'strike',[17] whereas Australia's threshold is significantly lower, at 25%.[18] This increased threshold for a strike significantly limits the ability of minority shareholders to abuse the two-strikes rule and is far more proportionate than the Australian rule. If the two-strikes rule is to remain, we should consider following the South African approach and increase the threshold to at least 50%. But we really do not advocate continuance.

3.5 Two-strikes (and you're out)

For these reasons, we submit that the two-strikes rule is a significant burden on listed companies and dissuades private companies from going public. In light of its limited impact and significant waste of time and compliance costs, we strongly recommend reconsidering the rule. We recommend reinstating a non-binding, advisory vote similar to the predecessor to the two-strikes rule. This would put us in line with similar jurisdictions like the United States, which grants shareholders a non-binding advisory vote on executive compensation. As noted in the Productivity Commission report which recommended introducing the two-strikes rule, most boards were responsive to the non-binding vote and many amended executive remuneration in anticipation or in response.[19] While we recognise that shareholders should be provided a mechanism to express their views on executive remuneration, this mechanism needs to be proportionate and properly targeted and limited to remuneration issues and take into account factors such as effectiveness, compliance costs, time and resources.

[14] Explanatory Memorandum to the *Corporations Amendment (Improving Accountability on Director and Executive Remuneration) Bill 2021* at page 5.

[15] https://www.kwm.com/au/en/insights/latest-thinking/publication/deep-dive-into-asx200-agms-in-2023.html.

[16] 5 of the spill motions found less than 5% support. Two other motions found less than 15% support.

[17] *Companies Amendment Act 16 of 2024 (South Africa)* s 30B(4).

[18] Section 250U of the Corporations Act.

[19] Productivity Commission Inquiry Report, 'Executive Remuneration in Australia' (19 December 2019) page xxxi.

5 MAY 2025

ATTACHMENT 2: PRIVATE MARKETS

1 Setting the scene

Australia has seen a significant expansion of its economy over the last 40 years following deregulation of the financial markets in the mid-1980s and resulting productivity growth.

That period of prolonged economic growth also resulted in a significant accumulation of wealth by Australians. While there are many contributors to that wealth accumulation (including house price growth), the introduction of the compulsory superannuation system has provided a large proportion of the Australian population with exposure to public and, more recently, private, investment opportunities (both at home and abroad) that may otherwise have not been accessible to them.

As Australia's economy and savings pool has grown, so too have our public and private markets. In our view, the principal drivers of private market growth in Australia include:

- a stable political system with 2 main parties governing along essentially centrist policy lines;
- strong institutions and regulatory bodies, a robust legal system and independent judiciary;
- an independent monetary policy setting authority;
- a growing economy and population (including via skilled immigration) able to take advantage of growth domestically and abroad (including in high growth markets in the Asia Pacific);
- the steady growth of large investable pools of capital (particularly in superannuation); and
- a regulatory system that has generally not stifled risk taking - its focus largely leaning towards disclosure and conduct risks on the basis that, if suitably regulated, assessment of performance risk is best left for investors to manage.

Those drivers, and the resulting level of relative transparency of our markets, have been a magnet for foreign capital. With certain exceptions (including in the private infrastructure markets where offshore institutional investors were already commonplace), since the early to mid-2000s our private markets have seen the growth of offshore institutional investors looking to deploy their significant resources across a range of private market verticals – real estate, private equity, infrastructure and private credit. Although we understand those foreign institutional investors do not generally have a specific investment allocation for Australia, they have nonetheless determined that the Australian markets (both public and private) are attractive for investment relative to other investment destinations within their chosen investment geographies. Both domestic and offshore sponsors and promoters have also looked to the wealth held by Australians (predominantly via the superannuation system) for investment in their funds.

Viewed entirely dispassionately, Australian markets (and Australians) have had a remarkable economic run over the last 40 years built on strong fundamentals and sound, and relatively moderate and predictable, policy and regulatory settings.

With that background, we commend ASIC for initiating this discussion on Australia's public and private markets and asking for market input on the ways that those markets can be improved into the future. As we approach the second quarter of the twenty-first century and continue our evolution to a more digitised economy, it is important that all our markets continue to function in a way that is confidence inducing and attractive for investment (retail and institutional, domestic and foreign).

ASIC's recognition that Australia's private markets (and private pools of capital) have, in more recent times, grown comparatively strongly against our public markets is one that we do not seek to debate. As a law firm that has had a robust private capital focus for many decades, we have seen this play out in our own business and the clients that engage us. We do however want to caution against drawing correlation between growth and dysfunction (or otherwise equating growth with dysfunction). The growth in private markets has been fundamentally a good thing for Australia and Australians and their continued economic prosperity. This "relative" growth is not something that is unique to Australia – it is a remarkably similar picture in many of the advanced economies around the world. As we look forward, we see Australia's public and private markets having a symbiotic reliance – both attractive for investment and functioning efficiently and fairly for all those who seek to participate in and across them. Our clients (both public-side and private-side) benefit when both markets are functioning efficiently, and this facilitates the efficient deployment of capital into our economy.

We provide our responses to your specific private market questions below. Before doing so we would like to advance some overarching views on Australia's private markets and what we consider will (and will not) enhance their prospects for sustainable growth, broad access and participation, and meaningful wealth creation in the future:

- **Test first**: Australia should not assume that its continued economic success is guaranteed because of its strong performance over the last 40 years. Today's capital can be deployed into and out of different markets and geographies very efficiently and no nation's continued economic success is guaranteed if it seeks to make investing or participation too hard or risky, when assessed on a relative basis against competing nations. While many factors can contribute to this assessment, imposing additional regulation on an otherwise efficient market or its participants is unlikely to be viewed favourably (and may not fix the issue(s) the regulator is trying to address). There are many examples of where well-intentioned regulation in advanced economies (intended to protect an investment constituency or "better regulate" the operation of an area of investment activity) have become stories of "overreach" and ended up unduly stifling capital flows and economic activity or imposing reporting (and other compliance) obligations that are disproportionate in cost relative to benefit. Most recently we have seen this in the UK where HM Treasury has recently published a consultation to overhaul the regulation of Alternative Investment Fund Managers ("**AIFMs**"). Essentially, the underlying theme of the UK consultation is a proposal to simplify AIFM regulation so as to have a more graduated, less burdensome and proportionate approach. We encourage ASIC to consider carefully whether:

    - it has a complete understanding of the way Australia's private markets are operating and the very significant differences that exist within the various verticals (and sub-markets within those verticals). We encourage ASIC to take further time to understand how Australia's private markets operate, how different types of private capital funds operate and the important nuances between them (particularly retail v institutional). We are confident that many of the key investors and managers in our private markets would be happy to invest further time with ASIC in pursuit of this objective.

      As a corollary of the above, we hope that regulation of Australia's private markets is not pursued as if the risks and participants are all homogenous – they are not. We see those markets in which institutional investors (including those investing on behalf of retail investors) and managers are operating as being very efficient with standards and procedures which are well calibrated over many years of relationship building, negotiation and market development (here and abroad). This can be contrasted with investment activity focused on the "direct to retail investor" where the impact of a bad actor can undoubtedly be felt more acutely and there may arguably be room for improvement.

    - it (and other market regulators e.g. the Australian Prudential Regulation Authority) already have the regulatory tools available to them to manage areas of risk which are

causing concern. We consider they do. Where areas of unacceptable risk are identified, adjustments that can be made through more active and prominent monitoring and enforcement, better disclosure and / or increased levels of regulatory guidance (based on a comprehensive understanding of the way Australia's private markets operate) are, in our view, far preferable responses over more intrusive regulatory change or proscription.

- **Incremental and risk-based approach:** We do not think our private markets are yet at a point of true maturity (in terms of participation) to understand the best long term regulatory settings. While we have seen investment failures in our private markets (and those should be expected in the same way that we expect them in public markets), we do not see anything to suggest that there is a systemic issue existing or on the horizon. In some cases, those failures have clear correlation with the unique and unusual conditions resulting from recent geopolitical and macro-economic events rather than systemic flaws or failings. While ASIC is right to highlight the relatively recent arrival of retail investors in some parts of the Australian private market landscape, the data points around the overall picture for that cohort are limited. That of course does not mean we are suggesting that ASIC should not act until it clearly has a full-blown systemic issue on the proverbial "doorstep". Rather, we think it favours an approach at this time which seeks to understand the risks better and a regulatory mindset which leans (at least in the short to medium term) towards informed and incremental, and real-risk based, adjustments over any radical overhaul.
- **Harmonise and recognise, where possible**: Australia has relied on (and will continue to rely on) foreign sources of capital to meet its capital demands. That is not a bad thing - it has, in our view, been a great source of returns not only for foreign investors but also for Australia and its economy. Many of those foreign investors who are attracted to invest into Australia are large institutions that are already regulated in their own home markets and are complying with reporting and other regulatory obligations that are sophisticated and internationally recognised. We do not see that it is in Australia's interests to impose new regulation or reporting requirements on Australia's private markets or its participants which are incompatible, inconsistent or out-of-step with those of other internationally recognised standards. As noted above, we do not favour new regulation as a solution for issues that may be perceived to exist, but if ASIC is minded to follow such a path, we would strongly encourage it to try and align its standards/requirements with other countries that have substantial and more mature private markets. We would also encourage ASIC to give regulatory and reporting recognition to those foreign investors who are complying in their home markets and not seek to impose additional Australian regulatory burdens on them (beyond similar local filings).
- **Retail participation**: Retail investors have been participating for many years in Australia's private markets, albeit often intermediated via their superannuation fund(s). In our view, retail participation in Australia's private markets is a good thing. This democratisation of the private markets (and the vast assets in those markets) allows retail investors to access, and diversify their investment portfolios across, a wider spectrum of the investable financial products and thereby manage investment risk in a way that best suits their objectives. More recently we have seen private market sponsors actively promoting private market funds and products in more direct ways to Australia's retail investor base (often via licensed financial advisers). Where that more direct engagement is occurring, those retail investors should, under our current system, have the benefit of product disclosure statements ("**PDS**"), design and distribution obligations and access to professional financial advice to inform and guide them on their investment decision. While we consider that our retail disclosure and licensing system is operating effectively at this time, we can see pockets of activity emerging that may benefit from more active and prominent monitoring and enforcement, better disclosure and / or increased levels of regulatory guidance. As noted above, we believe ASIC has tools already available to it to address issues it may be concerned about and should be deploying those ahead of any other regulatory response.

- **Information gathering**: We acknowledge ASIC (and the other key Australian regulators) do not have the same level of data clarity on our private markets as they possess on our public markets. We agree that it makes sense for ASIC to continue its efforts to obtain a better understanding of how Australia's private markets are operating and which parts of those markets warrant enhanced regulatory "line of sight" before it determines what further information collection obligations it will impose, if any. When that point is reached, the challenge will then be calibrating that information disclosure in a way that achieves its regulatory purpose but does not corrode the essential "private" quality of Australia's private markets. It is also important that the collection and any reporting of such information does not become so burdensome or intrusive for key participants that they choose to deploy their capital elsewhere. The costs of additional information reporting (and related compliance) should also be well understood, noting that those costs ultimately get passed onto investors in the form of additional fees and charges or reduced returns.
- **Overall regulatory burden**: It is our observation that many participants in our private markets are clearly feeling the quite substantial burden of new regulation in Australia (including around industrial relations, foreign investment (including surcharges and taxes) and prospective competition clearance changes). Leaving aside the merits of that new regulation (and what additional economic costs it may or may not impose), further increasing that burden through additional regulation of Australia's private markets (which may not be justified and / or suitably calibrated) is likely to reduce the attraction of Australia's private markets relative to other investable markets in Asia and elsewhere. In saying this we are not advancing the position that warranted new regulation must always wait "until the time is right". However, we do not believe that ASIC or government should ever be blinded to the realities of the moment and, at this current time, we would ask them to take into consideration what else is currently being "digested" by the business and investment community in Australia.

2 Does private credit itself warrant special attention from regulators?

Given the discussion in ASIC's paper on this topic, we thought it may be helpful to share our views on (a) private credit as a subcategory of private capital and (b) leveraged loans.

ASIC has correctly observed that private credit as a subset of private capital has grown significantly in recent years. This is not restricted to Australia but is a global phenomenon as fund managers seek to provide investors with a variety of investment product.

We do not view the structuring of private capital investment as debt (compared to equity) creates a special systemic risk in the same way that bank lending does. The approaches that we are suggesting in relation to private equity investments (i.e. regulators utilising existing regulatory tools available to them to manage risks in relation to opacity, conflicts, disclosure and valuation uncertainty) apply equally where private capital elects to invest in the form of a debt instrument.

We also do not see any material distinction between "private" and "public debt". Merely because a debt instrument is publicly listed is not materially better than the fact it is unlisted – other than there is potentially a price set for this. Downside protection is not guaranteed as not every loan lent by a private credit fund will be a success, but the same applies to bank lending - not every loan lent by a bank will be performing. Failures by certain borrowers to repay will inevitably occur and people will lose money – just as they would investing in listed equities.

There is a direct correlation between private credit's expansion and increasing prudential regulation of banks which has led banks to withdraw from certain types of lending. Private credit therefore has played an important part in funding Australian businesses including the real estate development sector without which the housing crisis could have been much worse and lending to small and medium sized-enterprises ("**SMEs**") and startups who often find it extremely difficult to

source any form of bank funding. That this funding has taken the form of debt (versus equity) is simply shaped by investor demand for different risk / return hurdles.

The Australian regulatory framework on lending has been structured around banks (who are prudentially regulated) and individuals (e.g. Consumer Credit Code), with other regulatory interventions like the Unfair Contract Terms regime for SMEs around standard form contracts. It has not been necessary (and in our view remains unnecessary) for regulators to prescribe or regulate how and the terms on which private credit lenders should lend to corporate borrowers.

There is also a section in ASIC's paper which discusses leveraged loans. In this market, leveraged loans are loans where debt as a multiple of earnings is relatively higher than in certain other contexts (e.g. borrowings by an investment grade listed corporate). Leveraged loans are lent both by banks and private credit to private capital sponsors / their portfolio companies. Leveraged loans are simply a type of loan. Generally speaking, borrowers (owned by private capital sponsors) and lenders of leveraged loans are extremely sophisticated players in the market who are well-placed to negotiate terms of the loan as between themselves and allocate risk between themselves in an economically efficient manner.

For completeness, we also wanted to address debt capital markets. In short, we consider that Australia's wholesale debt capital market continues to operate effectively and efficiently with an increasing volume of issuance indicating a greater maturation and sophistication of that market which continues to provide issuers and investors with robust opportunities for capital markets debt funding. With respect to the retail debt market, we maintain our position articulated in our submission to The House of Representatives Standing Committee on Tax and Revenue dated 28 May 2020 as part of their Inquiry into the Development of the Australian Corporate Bond Market. We remain extremely supportive of measures that can be taken to encourage further development of the retail corporate bond marked in Australia as set out in that paper.

3 Response to questions

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?

Overall, we consider that the regulatory settings and oversight in Australian private markets are fit for purpose and that, subject to 2 matters which we elaborate on below, ASIC and other regulators already possess the necessary tools available to effectively regulate Australia's private markets.

- First, while we accept that regulatory settings are fit for purpose, we also see opportunities for greater use of regulatory guidance and enforcement in certain areas. As we note in our response to Question 9 below, the "direct to retail" private investment market is one where there is an opportunity for more active and prominent use of tools already available to ASIC.
- Second, although we do not favour any additional information gathering regulation until ASIC has a more complete understanding of Australia's private markets, once that point is reached, we can see sound arguments in favour of focused collection of data. Collection and analysis of further data would provide a better foundation for any future analysis of the need for any change to regulation and a better understanding of the roles and benefits of private capital in the Australian economy. The challenge however is calibrating any new data disclosure in a way that achieves its regulatory purpose but does not corrode the essential "private" quality of Australia's private markets. It would also be important to ensure that the collation and reporting of such data does not become so burdensome or intrusive for key participants that they choose to deploy their capital elsewhere. In particular, the cost burden of additional information compliance should be fully understood noting that those costs ultimately get passed onto investors in the form of additional fees and charges or reduced returns.

If ASIC is ultimately minded to pursue some level of enhanced reporting for private market participants, we would strongly encourage it to consider:

- the comparable information that is gathered in other countries with more advanced private markets – focusing on more macro aspects such as funds raised and invested, sectors of activity etc;
- keeping reporting to a sensible cadence having regard to its purpose;
- allow the information to be aggregated for fund managers and sponsors with protection from public disclosure; and
- giving due recognition to reporting that foreign fund managers and sponsors are complying with in their home markets and not requiring them to go beyond that reporting (outside of local filing obligations) or requiring them to report on a cadence that might otherwise conflict with any other reporting timing they may already need to observe (particularly those foreign fund managers and sponsors who are listed on recognised stock exchanges offshore).

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.

Yes. An important distinction does however need to be made between institutional investors and retail investors (when investing directly into private market opportunities).

In our view, institutional investors (such as large superannuation funds) are well placed to assess the risks of their participation in private capital, and it is not obvious to us that additional regulation would assist. In particular, in our experience, institutional investors undertake extensive due diligence (including operational due diligence) and negotiate the terms of their participation in private market transactions with the assistance of specialist professionals. Both the terms of economic participation and risk-related matters form the basis of those negotiations. Overregulation of private capital risks disrupting Australia's ability to import capital and Australia's large institutional capital base from efficiently participating in international investment opportunities.

Retail investors are, as a general statement, likely to be less well placed to negotiate the terms of their participation in private market transactions. In our anecdotal observation, the overwhelming majority of Australians have most of their exposure to private markets through their superannuation fund, and in most of those cases, their superannuation fund (as an institutional investor) is very well placed to invest in private markets. We would expect a much smaller number of retail investors to have exposure to private markets through unlisted managed investment schemes. For those retail investors that do have such exposure, we expect that to be a minor component of their overall wealth. However, there will always be some retail investors who place too much of their investable capital in one investment (whether via an investment in a single private market asset or a public market investment in a speculative listed asset). We consider that the combination of disclosure obligations, design and distribution obligations, together with overall licensee obligations of both issuers and intermediaries to act efficiently, honestly, and fairly in the provision of financial services mean that the retail market is adequately protected. In addition, we consider ASIC has the appropriate regulatory tools to take action against those market participants who are not observing the relevant regulatory requirements.

In our view, it is very important for market integrity that ASIC continues to be active and prominent in its monitoring and enforcement of instances where there is real and obvious market abuse whether in public or private markets. This helps with maintaining market confidence.

10. What role do incentives play in risks, how are these managed in practice by private market participants and are regulatory settings and current practices appropriate?

Incentives are at the heart of behavioural economics. In our experience, there is active and sophisticated negotiation in private markets between well-advised institutional investors and private capital managers around the terms (economic and governance) of participation in private market transactions or funds. Those negotiations (which are extensive) seek to achieve the alignment of managers to produce economic outcomes that are focused on generating sensible risk-adjusted returns. In addition, institutional investors will almost always look for a manager to invest a material amount of its own capital in a private market fund or investment to ensure that any "carry" incentive is appropriately balanced by the manager's own capital also being at risk (i.e. having "*skin in the game*"). Reputational risk also plays an important role for managers - being able to demonstrate a successful history of risk-adjusted returns in a fund (or series of funds) is significant from a reputational perspective, but so is being able to demonstrate high standards of governance and quality disclosure to investors.

While incorrectly aligned incentives can lead to excessive risk-taking or a failure or abandonment of a fund (where asset performance takes away all prospect of earning an incentive), there is no clear "right way" to ensure incentives are correctly calibrated to produce the best outcomes for all participants. We do not view being prescriptive on fees or incentives or setting a minimum capital exposure for a manager to be an appropriate regulatory response, as the regulator and the legislature do not have the right information or expertise to determine those matters (and understandably will never have that expertise). Those matters are always best left to the market to determine. Likewise, setting maximums also risks the market coalescing around those maximums in a way that might be economically disadvantageous.

At an anecdotal level, we see less ability for retail investors entering a private market fund or transaction (in an un-intermediated way) to negotiate the terms of their participation in the same way as a well-advised institutional investor. The current regulatory settings for retail investors around disclosure, design and distribution and conflicts (and the licensing and fiduciary obligations of relevant promoters and advisers including "EHF" and "best interest" obligations) means that there are, in our view, the requisite "guardrails" to protect the less sophisticated and resourced retail investor. While these guardrails will not necessarily protect the retail investor who does not heed advice or warnings given to them (including around over allocation of capital to a single investment), we do not consider that the alternative of being proscriptive or prescriptive around whether and, if so, how much a retail investor can invest in a private market opportunity will ever be the right setting in a free market economy such as Australia's.

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

As an anecdotal matter, as a firm we have seen many new products come to market over the last 5 years that seek to provide retail investors exposure to private markets. Beyond seeing relatively more products with a retail focus, we are not in a position to comment on the current and likely future exposures of retail investors to Australia's private markets.

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

Benefits include the following:

- private markets offer retail investors the opportunity to diversify their risk across markets.
- private markets can offer expanded forms of risk-adjusted returns.
- private markets can offer a longer-dated investment profile which may suit certain types of retail investors.

Risks include the following:

- reduced liquidity.
- a reduced level of transparency (in certain cases) - private market investments are not publicly priced or valued in real time as they are in public markets. That said, it would be fanciful to think that public markets are always pricing investments perfectly – they clearly do not. Many private equity sponsors and managers in the institutional private markets comply with ILPA[1] (or other negotiated) standards of reporting and valuation and provide regular reporting and (independent) valuations to their investors – in such cases, transparency is high and substantive. In contrast, there are non-institutional parts of the Australian private market where transparency levels are far lower. Reduced transparency is therefore not a risk that we necessarily see as a market-wide issue for private investors, but rather one that is more often seen where there is a non-institutional investor base and/or there are no regular reporting or valuation standards.
- higher fees (relative to public markets).

We do not consider that the risks described above are ones that should result in a regulatory stance that effectively disqualifies or seeks to "dull" participation by retail investors – that would, in our view, be an entirely retrograde outcome which would ultimately discriminate in favour of such wealth creation opportunities only being offered to those that have large and more sophisticated pools of capital to invest. Rather, the positioning and importance of: (i) high quality disclosure; (ii) professional, unconflicted, financial advice; and (iii) design and distribution obligations, are the foundation stones of sensible retail participation in Australia's private markets. These elements when taken together bridge "the additional risk gap" for retail investors looking to invest directly by helping them better understand whether the opportunity on offer is appropriate for them or not.

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)?

Yes, for the reasons explained in our earlier answers, see our responses to questions 8 and 9.

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?

In the private market context, we consider the following areas are ones that it would be worth regulators considering:

- better and more specific guidance around disclosure expectations for promoters and advisers of private market opportunities that are marketed to retail investors. We do not consider that the more "principle-based" descriptions of disclosure standards are necessarily that effective when it comes to the quality of key disclosures that should be expected when private market opportunities are being marketed directly to retail investors. By way of example, ASIC could consider giving more specific guidance, and placing a heavier focus, on the prominence and clarity given in disclosures around key risk / transparency areas including: (i) liquidity risks, including whether something is truly "liquid" in the sense that the ordinary investor would understand that term; (ii) whether something is genuinely "secured"; (iii) valuation principles and conflict management; (iv) fees and costs payable; (v) whether and if so, how much, "hard dollar" capital will be invested by the manager/sponsor of the fund/transaction; and (vi) related party arrangements. In this regard, we consider Regulatory Guide 168 ("Disclosure: Product Disclosure Statements (and other disclosure obligations)") provides a strong foundation from which to expand and give more specific

[1] Institutional Limited Partners Association.

disclosure guidance for PDSs and Statements Of Advice where activity in certain parts of Australia's private markets warrant it.

- in the non-institutional parts of the market which are often intermediated via licensed financial advisers, ensuring that advice given to retail investors is unconflicted and suitably tailored having regard to known risks. Monitoring compliance with design and distribution obligations for private market opportunities (particularly the more complicated ones) and therefore understanding the compliance within distribution channels, and monitoring the quality of financial advice in those channels, should be a priority for ASIC.
- even more active and prominent monitoring and enforcement by ASIC. It is preferable if bad actors are seen to be caught (ideally early) and the administration of any judicial or quasi-judicial process to levy a "consequence" for their acts or omissions is relatively proximate to the events. It can be deeply disheartening and corrosive to investors (of all types) if it takes several years before any substantive finding or penalty is rendered (appreciating that this can be out of ASIC's control).

15. In the absence of greater transparency, what other tools are available to support market integrity and the fair treatment of investors in private markets?

We consider the regulatory settings already exist to support market integrity and fair treatment of investors. For example:

- AFSL holders are obliged to provide financial services efficiently, honestly and fairly.
- Part 7.10 of the Corporations Act, together with Part 2 of the ASIC Act, provide strong prohibitions against market misconduct.

In our view, ASIC has the necessary regulatory tools to support market integrity in the private markets and should not be hesitant to use those tools when market abuse occurs.