CP 390 Proposed reform to the pre-lodgement advertising and publicity regime

ASIC

Submitter:

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I welcome the opportunity to comment on Consultation Paper 390 concerning ASIC's proposal to substantially expand the advertising and publicity permitted before a disclosure document for an offer of unquoted securities has been lodged. I do not support the proposed instrument in its present form because ASIC has identified commercial inconvenience, differences from other fundraising regimes and claimed competitive benefits, but has not demonstrated a sufficiently strong public purpose for replacing a comparatively clear preventive investor protection with broader promotional permission requiring greater reliance upon warnings, investor judgement, surveillance and enforcement.

The existing restriction is not an arbitrary administrative barrier because ASIC itself explains that section 734 is intended to prevent selective information being progressively supplied to the market, discourage inadequate analysis of disclosure documents and discourage investment decisions being made on the basis of advertising or publicity rather than the disclosure document. Those risks have not disappeared, yet ASIC proposes to permit substantially more communication during the period in which the disclosure document investors are ultimately told to consider is not yet available to them.

Although initial public offerings are a central policy context for CP 390, the proposed instrument applies more broadly to offers or intended offers of unquoted securities requiring a disclosure document. The assessment should therefore address the regulatory principle across the proposed relief rather than assume that every affected

fundraising has the visibility, professional intermediation or scrutiny associated with a major Initial Public Offering (IPO).

I accept that the existing regime may be unnecessarily rigid in particular circumstances and do not oppose reform merely because it involves regulatory relief. Where factual communications, correction of misinformation, market research or other narrowly identified communications can occur without materially weakening investor protection, ASIC should facilitate them through targeted relief directed at demonstrated problems rather than create a broad pre-lodgement advertising permission whose net public benefit has not been established.

The first principles test

The first principles question is not whether businesses communicate differently from businesses when section 734 was enacted, because that is plainly true. The relevant questions are why Parliament restricted communications before disclosure, whether the risk being controlled remains material, which particular restrictions now impose unnecessary burdens, and whether those burdens can be removed while preserving the protective function.

The existing architecture creates an ex-ante boundary under which substantial promotion generally waits until the disclosure document is available. The proposed architecture would allow materially more promotion before lodgement and place greater weight upon subsequent judgments about whether communications were misleading, insufficiently balanced, inadequately qualified, inconsistent with later disclosure or otherwise unlawful.

ASIC describes the proposal in part as modernisation, but modernisation is not a regulatory objective capable of answering those questions. A regime does not become better because it is newer, more permissive or more closely aligned with contemporary commercial practice, and the relevant inquiry is what the proposed change actually does, what risk it removes or transfers, who benefits, who bears the residual risk and whether the resulting architecture better serves the public.

The proposal does not eliminate regulatory risk but redistributes it. The present architecture places more of the burden upon the issuer before communication occurs, while the proposed architecture places more of the burden upon investors interpreting promotional material, issuers complying with broader behavioural obligations and ASIC identifying and responding to problematic conduct after the communication has entered the information environment.

ASIC should therefore demonstrate that the existing preventive protection imposes costs greater than the protective value it provides and that the proposed replacement

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controls the material risks at lower total social cost. CP 390 does not presently provide sufficient evidence to establish either proposition.

The good public purpose must be identified before the private benefit

ASIC says the proposal would simplify regulation, improve information quality, increase retail investor engagement, align Australia more closely with international markets and reduce competitive disadvantages affecting public capital raising. Those matters may be relevant, but none establishes a public benefit merely by being asserted, while CP 390 does not quantify the extent to which section 734 has caused Australian companies not to list, materially increased capital raising costs, prevented productive investment or otherwise imposed a significant national economic cost.

The appropriate public purpose is a capital market in which economically useful investment can occur efficiently while investors receive reliable and appropriately balanced information, disclosure documents retain practical primacy and unnecessary regulatory resources are not consumed. A particular restriction should be removed where ASIC can demonstrate that it imposes substantial cost without corresponding protective value, but making a capital raising easier to promote is not itself evidence that Australian welfare or productive capacity has increased.

The immediate private benefits are considerably easier to identify because issuers obtain greater freedom to promote prospective offerings, transaction advisers obtain greater flexibility in preparing and marketing transactions, and advertising, public relations, media and other promotional intermediaries may obtain additional work. The claimed wider benefits depend upon further propositions that earlier publicity will improve information, produce worthwhile additional listings or fundraising, increase beneficial investor participation and do so without transferring comparable or greater costs elsewhere.

The distinction is important because regulatory policy should not count a transfer of advantage to the regulated party as a public benefit without asking what is surrendered in exchange. Commercial convenience is relevant evidence of regulatory burden, but it is not the public interest test.

Follow the money and distinguish capital formation from promotional competition

Capital markets perform useful functions by financing enterprises, distributing ownership and risk, supporting price discovery and allowing investors to participate in productive businesses. It does not follow that every activity surrounding capital raising produces equivalent social value because substantial resources can also be devoted to capturing investor attention and changing the distribution of investment between issuers without increasing the economy's underlying productive capability.

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Pre-lodgement advertising creates a particular risk of this kind because issuers may compete through investment banks, advertising agencies, public relations advisers, media strategies and digital promotion to establish familiarity and favourable expectations before investors can compare those claims against the regulated disclosure document. Those activities use skilled labour and other real resources, while part of their private return may arise from obtaining investor attention at the expense of competing issuers rather than creating additional productive capacity.

This does not justify characterising every advertisement, IPO or capital market intermediary as rent seeking. It does justify ASIC examining whether broader pre-lodgement promotion would encourage expenditure whose private return exceeds its public value, particularly where well-resourced issuers can purchase greater visibility and the resulting volume of promotional material creates additional monitoring and enforcement work.

The Impact Analysis should therefore count both sides of the transaction because reduced legal uncertainty and fewer individual relief applications may save resources, while additional advertising preparation, compliance review, substantiation, monitoring, corrective communications, complaints, surveillance and enforcement also consume them. A cost disappearing from an issuer's compliance budget is not a productivity gain where an equivalent or greater cost reappears elsewhere in the regulatory or investment system.

Private capital should not be mistaken for the national constraint

ASIC's broader concern about competition for listings and the growth of private capital should not lead to an assumption that attracting private financial capital is itself a sufficient public purpose for weakening investor protection. The Commonwealth issues the Australian dollar and is not financially constrained in Australian dollars in the manner of a private company, while Australia's ultimate productive constraints arise from available labour, skills, technology, energy, infrastructure, materials, natural resources, ecological capacity and access to capabilities that must be obtained from abroad.

That does not make private capital markets unnecessary because private companies cannot issue Australian dollars and capital markets perform legitimate financing, ownership, price discovery and risk allocation functions. It does mean that making private fundraising easier should not automatically be recorded as an increase in Australian productive capacity, because ASIC should identify what additional economically useful activity the proposed relief is expected to enable rather than treat greater access to investor funds or stronger competition for listings as self-proving public benefits.

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This point is confined to ASIC's economic justification and does not require CP 390 to become a debate about fiscal policy or public investment. If section 734 materially prevents worthwhile productive enterprises from obtaining finance, ASIC should identify the evidence demonstrating that connection, whereas if the principal effect of the reform is to increase competition for investor attention, that is a different economic proposition requiring a different public interest assessment.

The central contradiction is prospectus primacy versus pre-prospectus persuasion

ASIC maintains the importance of the disclosure document to the investment decision while proposing to permit substantially more issuer-generated communication before that document is available. The prescribed statements would tell investors that a disclosure document will become available and should be considered, but those statements cannot return an investor to the informational position occupied before publicity established expectations about the issuer, its management, business model, technology, growth prospects, market opportunity or prospective value.

ASIC's own advertising guidance demonstrates why the distinction matters because RG 234 emphasises the overall impression created by advertising, the need for balanced presentation, substantiation of claims and appropriate prominence for risk information and qualifications. The guidance also recognises that directing a consumer to a Product Disclosure Statement, prospectus or other document does not necessarily cure a misleading headline or initial impression.

That principle creates a direct tension within CP 390 because the proposed safeguard relies heavily upon prescribed statements directing the investor towards a disclosure document that is not yet available. If later disclosure cannot necessarily cure an earlier misleading impression, the existence of a future prospectus cannot by itself establish that materially broader pre-prospectus promotion is adequately controlled.

The problem is not confined to demonstrably false statements because a promotional campaign can consist of individually defensible statements while collectively producing an excessively favourable impression through selection, sequencing, emphasis, framing and omission. The regulatory architecture must therefore address the overall impression created before the disclosure document becomes available rather than assume that prohibitions against expressly false statements capture the complete risk.

The information quality argument supports targeted relief rather than general promotion

ASIC argues that issuers currently have limited mechanisms to respond to unofficial or inaccurate information and that greater communication could improve the accuracy and reliability of information available to investors. That is a legitimate problem, but the

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existence of misinformation does not establish that broad promotional permission is the necessary or proportionate solution.

If inaccurate third-party information is the problem, ASIC can permit issuers to correct material inaccuracies, identify themselves, provide specified factual information or make other tightly defined communications needed to restore an accurate information environment. The existing Market Research and Roadshows Instrument and IPO Communications Instrument demonstrate that ASIC can design relief around particular communications rather than remove a wider preventive boundary.

The distinction matters because correcting a false public statement and promoting an investment are not equivalent regulatory activities. ASIC should explain why narrower mechanisms cannot solve the information problem before treating the existence of misinformation as a reason to permit materially broader promotion unrelated to correcting it.

Incentives matter even where everybody intends to comply

An issuer and its advisers have a direct financial interest in the success of a proposed fundraising, creating an unavoidable incentive difference between the party designing the communication and the prospective investor receiving it. That does not imply dishonesty, but regulation should be designed around predictable commercial incentives rather than assume that misconduct must be intentional before a safeguard becomes necessary.

Statements about growth opportunities, management experience, technological capability, customer demand or market size may each be defensible while risks, uncertainty, dependence upon assumptions and adverse information receive materially less prominence. A communication regime concerned only with whether ASIC can later prove an individual sentence false would therefore fail to address selective truth and overall impression.

The risk is especially important for retail investors because the ability to test assumptions, recognise omitted information and distinguish corporate promotion from balanced investment disclosure is not evenly distributed. ASIC should not infer from the sophistication of investment banks, institutional investors or professional advisers that a communication regime capable of reaching ordinary retail investors carries the same risk profile.

The regulatory grid shows where the benefit and residual risk move

Parliament established section 734 as part of the statutory fundraising architecture, while ASIC now proposes to exercise its delegated power under subsection 741(1) so that Chapter 6D operates as though subsection 734(5) contained a materially broader

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exception. The proposal is therefore not merely guidance concerning existing obligations, but delegated legislation altering the practical operation of a statutory investor protection until the proposed instrument sunsets on 1 October 2031.

Issuers and sellers receive the clearest immediate regulatory benefit because their communications become less constrained, while corporate advisers, underwriters, advertising agencies, public relations firms, media businesses, digital platforms and other promotional intermediaries may benefit from increased activity surrounding offers. Investors may benefit from useful earlier information, but they also carry the risk of premature persuasion, selective information and expectations created before complete regulated disclosure is available.

ASIC may benefit from fewer applications for individual relief but assumes a corresponding exposure to a larger and more varied universe of communications requiring surveillance and potential investigation. Investors, courts and dispute resolution systems may carry further costs where problematic communications are detected only after expectations have formed or an eventual investment has been made.

The regulatory assessment should therefore identify the obligation being relaxed, the parties receiving the benefit, the protective function displaced, the substitute protection, the residual risk, the party carrying that risk and the resources required to supervise the replacement architecture. That regulatory grid is more informative than measuring the proposal solely through the reduction in private compliance costs.

Greater promotional freedom may increase ASIC's policing burden

The present prohibition creates a comparatively clear boundary because substantial pre-lodgement promotion is generally restricted. A broader exception moves more conduct into the permitted field and makes regulatory outcomes increasingly dependent upon qualitative assessments of accuracy, balance, omissions, context, substantiation, prominence, consistency and changed circumstances.

ASIC may consequently need to determine what was communicated, what the issuer knew at the time, what assumptions supported the communication, how risks and qualifications were presented, whether later information changed the position, how the communication compared with the eventual prospectus and whether a correction was required. Those inquiries can be considerably more resource intensive than administering a clearer preventive boundary.

CP 390 suggests that broader communication could provide earlier regulatory visibility because market participants and whistleblowers may alert ASIC to problematic offers. Earlier visibility can be useful, but information visible to ASIC is not self-policing

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because somebody must receive it, assess it, determine its significance and act where necessary.

The proposal should therefore not depend upon an unstated assumption that additional surveillance capacity is costless or already available. If preserving equivalent investor protection under the new architecture requires materially more ASIC surveillance, investigation or enforcement resources, those resources form part of the cost of the reform and should be expressly included in the Impact Analysis.

International alignment should include safeguards as well as permissions

International comparison can identify unnecessary Australian divergence, but alignment is not a sufficient reason to remove an Australian protection without examining the complete foreign regulatory architecture. ASIC itself notes that comparable overseas regimes generally contain controls concerning misleading information and consistency with disclosure documents, so international alignment cannot properly be reduced to the observation that another jurisdiction permits greater advertising.

New Zealand provides a useful comparator because its pre-disclosure advertising regime requires reasonably prominent statements that no money is currently being sought, that the financial products cannot currently be applied for or acquired and, where preliminary indications of interest are sought, that such an indication creates no obligation or commitment. Those requirements address the immediate practical impression created by pre-offer promotion and go beyond the prescribed wording presently proposed by ASIC.

The United Kingdom also provides a relevant comparator because its prospectus rules contain substantive controls directed at consistency between information released before the prospectus and the information contained in the prospectus or supplementary prospectus. That approach regulates the relationship between the promotional communication and the subsequent regulated disclosure rather than relying principally upon a warning that another document will later become available.

ASIC should therefore avoid regulatory cherry picking in which Australia imports the commercially attractive permission from another jurisdiction without examining the safeguards that accompany it. If international alignment forms part of the case for reform, ASIC should publish a provision-by-provision comparison identifying both the additional freedom and the corresponding investor protection.

The proposed prescribed statements are insufficient

The draft instrument requires identification of the relevant issuer and seller, notification that a disclosure document will become available, an indication of when and where it is

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expected to be available, a statement that the document should be considered and notification that an application form will ultimately be required. Those statements provide useful procedural information, but they do little by themselves to constrain the substance, tone, prominence or cumulative effect of the promotional material surrounding them.

ASIC's own advertising principles demonstrate why formal inclusion is insufficient because an overall impression can remain misleading even though a qualification technically appears somewhere in the advertisement. The regulatory test should therefore be whether the prescribed information is practically communicated to the investor rather than merely whether the required words can be found.

If ASIC proceeds, the prescribed statements should make clear that no money is presently being sought, that the securities cannot presently be applied for or acquired and that any expression of interest is non-binding and creates no commitment. Those statements should receive prominence commensurate with the principal promotional claims and should not be materially less prominent through type size, placement, duration, volume, speed, visual treatment or any other presentational device.

A qualification should also be communicated at the time and through the medium in which the relevant promotional impression is created rather than being relegated to fine print, a fleeting final frame, reduced volume or rapidly spoken language that an ordinary investor cannot reasonably absorb. A prominent promotional claim should not be allowed to create an immediate favourable impression while a legally significant qualification is technically disclosed but practically obscured.

The standard should therefore be practical communication rather than formal inclusion because a prescribed statement that an ordinary recipient cannot readily see or hear, understand and retain has not performed its regulatory function. The New Zealand requirements provide an established comparator from which ASIC can strengthen the present draft.

Any broader relief should be hardened against selective promotion and changed circumstances

If ASIC nevertheless proceeds with broader relief, every material factual or promotional claim should be capable of substantiation when made and the issuer should retain records supporting it. Material benefits and risks should be presented with appropriate balance, while pre-lodgement communications should not contradict information known to the issuer that would be material to the disclosure ultimately required in the prospectus or other disclosure document.

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The regime should also contain an express correction mechanism because a fundraising can change materially between initial publicity and lodgement. Where an earlier statement becomes materially inaccurate or misleading, a material assumption changes, or the eventual disclosure document reveals information that makes the earlier communication materially incomplete or inconsistent, the issuer should be required to correct the communication promptly through channels and with prominence reasonably comparable to the original communication.

ASIC should require an auditable archive of material pre-lodgement communications, including the communication itself, its date, medium, intended audience, responsible entity and the substantiation supporting material claims. Such records would reduce the regulatory cost of reconstructing what investors were told if subsequent disclosure, complaints or surveillance identify a material inconsistency.

The regime should operate according to substance rather than labels because promotional content should not obtain different treatment merely by being described as corporate communication, market education, an interview, media engagement or general publicity. Where the purpose or reasonably foreseeable effect of a communication is to promote the intended offer, the applicable safeguards should follow that function.

A narrower alternative better matches the problems ASIC has identified

ASIC should first consider extending the existing exceptions in targeted ways rather than substituting a broad permission for the present narrow pre-lodgement architecture. Such relief could permit genuine correction of inaccurate public information, factual identification of a forthcoming offer, appropriately controlled market testing and other specifically demonstrated communications while retaining the general preventive boundary before the disclosure document becomes available.

A targeted approach would allow ASIC to remove requirements that no longer perform useful protective work without creating a much larger field of promotional communication requiring qualitative supervision. It would also allow evidence to accumulate before ASIC determines whether further liberalisation produces a genuine net public benefit rather than using a five-year legislative instrument as a broad experiment involving retail investor exposure.

Where industry identifies a communication presently prevented by section 734, ASIC should require the problem to be stated precisely, including what communication cannot occur, what economic or informational harm results from that restriction and what safeguard would remain if relief were granted. Regulatory relief should follow demonstrated regulatory problems rather than a general preference for flexibility, competitiveness or a supposedly more modern regulatory setting.

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Revocation of Instrument 2020/722 should follow proof of equivalence

ASIC proposes to repeal the IPO Communications Instrument 2020/722 because it considers the proposed instrument would subsume the narrower existing relief concerning communications with employees, former employees and security holders. That conclusion is justified only if the final replacement preserves every material communication pathway and safeguard presently performing a useful function.

If Proposal B1 does not proceed, Instrument 2020/722 should remain unless ASIC independently demonstrates that it is unnecessary. If ASIC instead adopts a materially narrower and properly hardened replacement, repeal may be reasonable once ASIC has mapped the existing instrument against the replacement and established that no useful protection or legitimate communication pathway disappears.

Administrative simplification is desirable where two instruments genuinely perform the same regulatory function. It should not become a justification for replacing targeted relief with materially broader relief merely because one instrument is administratively easier to maintain.

ASIC should publish the evidence needed for the Impact Analysis

Before making the instrument, ASIC should publish or incorporate into its Impact Analysis evidence concerning the number and nature of individual relief applications under the existing framework, the principal communications for which relief has been sought, the cost and delay attributable to the existing restrictions, and any evidence that Australian capital raisings have been abandoned, materially impaired or moved offshore because of those restrictions. ASIC should also draw upon its practical experience administering the existing class relief and any relevant individual relief rather than relying principally upon assertions about international competitiveness or contemporary market practice.

The assessment should examine the other side of the ledger by considering additional promotional expenditure, investor comprehension and behavioural effects, compliance review, corrective communications, complaints, surveillance and enforcement costs. Evidence from more permissive jurisdictions should address investor outcomes and regulatory experience rather than merely establish that the relevant conduct is legally permitted.

The absence of demonstrated failure in a permissive regime does not itself prove safety, just as the absence of public controversy under the current Australian prohibition does not prove that every element of that prohibition remains necessary. The proper comparison is between complete regulatory architectures and the evidence showing

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which one preserves necessary investor protection and market integrity at the lowest total real-resource cost.

Response to B1Q1

I do not agree with Proposal B1 in its present form because ASIC has not demonstrated that broad pre-lodgement advertising permission produces a net public benefit or that the proposed prescribed statements adequately replace the preventive protection presently supplied by section 734. The proposal should not proceed merely because the current regime is older, more restrictive than some foreign regimes or inconvenient for transaction participants.

I would support targeted reform where ASIC identifies particular communications that are presently prevented without corresponding protective benefit and designs proportionate relief around those demonstrated problems. The burden should remain upon ASIC and the beneficiaries of the relief to establish why each material relaxation is required, what public benefit it produces and what equally effective protection replaces the protection being displaced.

Response to B1Q2

ASIC should replace the broad proposal with narrower purpose-specific relief or, if broader relief is retained, substantially harden the instrument through requirements concerning balance, substantiation, prominence, consistency, record keeping and correction. Pre-lodgement communications should remain subordinate in substance as well as form to the disclosure document Parliament requires investors ultimately to receive.

The resulting architecture should also be subject to an earlier evidence-based public review rather than simply remain untouched until 2031. That review should examine communications made under the relief, corrections, complaints, surveillance and enforcement outcomes, investor experience, regulatory resource use and whether the claimed informational, competition or capital raising benefits actually materialised.

Response to B1Q3

The proposed prescribed statements are insufficient because they principally direct the investor towards a future disclosure document without adequately controlling the promotional impression created before that document is available. ASIC's own advertising principles recognise that reference to a prospectus does not necessarily cure a misleading initial impression, so the design of this instrument should address practical prominence and overall effect rather than formal inclusion alone.

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At minimum, the statements should explain that no money is presently being sought, that the securities cannot presently be applied for or acquired and that any indication of interest creates no obligation or commitment. They should receive prominence commensurate with the principal promotional claims and should not be diminished through fine print, placement, duration, volume, speed or presentation, while substantive claims should remain appropriately balanced, substantiated and consistent with the regulated disclosure that ultimately follows.

The regulatory standard should be practical communication rather than technical compliance because a required statement that an ordinary recipient cannot readily see or hear, understand and retain has not performed its protective function. A promotional claim and the qualification necessary to understand it should be encountered as part of the same practical communication rather than at opposite ends of the advertisement.

Response to B2Q1

I do not support automatic revocation of Instrument 2020/722 merely because ASIC proposes a broader replacement. Revocation should occur only after the final replacement has been adopted and ASIC has demonstrated that the existing relief has been completely and safely subsumed without weakening any material safeguard.

If Proposal B1 does not proceed or is materially redesigned, ASIC should reassess Proposal B2 against the final architecture rather than treat repeal as predetermined. Simplification is useful where duplication has genuinely been established, but it is not an independent public purpose capable of justifying materially broader substantive relief.

Response to B2Q2

ASIC should publish a short equivalence assessment mapping the functions and safeguards of Instrument 2020/722 against the final replacement before repeal. Any protection or legitimate communication pathway not reproduced should either be retained expressly or ASIC should explain why it no longer serves a useful purpose.

The transition should also prevent uncertainty concerning communications already made or processes commenced under the existing instrument. That is a manageable transitional issue and does not justify retaining duplicate instruments once substantive equivalence has actually been established.

Conclusion

ASIC has identified a legitimate question about whether particular aspects of Australia's pre-lodgement publicity rules impose unnecessary restrictions, but it has not established that the appropriate response is substantially broader pre-disclosure

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advertising. The existing prohibition controls a continuing risk identified by ASIC itself, while the proposed instrument redistributes more of that risk from prevention towards investor interpretation, issuer compliance, ASIC surveillance and after-the-event enforcement.

The private incentives favouring reform are readily identifiable because issuers and transaction and promotional intermediaries obtain greater freedom to compete for investor attention. The wider public benefit is considerably less certain because CP 390 does not demonstrate that section 734 materially constrains productive investment, that greater pre-lodgement advertising materially increases economically beneficial capital raising, that retail investors make better decisions after greater promotional exposure, or that the resulting supervisory burden can be absorbed at lower total social cost.

Australia should not equate easier private fundraising with increased productive capacity, while international competitiveness, regulatory simplification and modernisation should not substitute for demonstrated public benefit. Private capital markets perform legitimate functions, but those functions do not establish a public interest in weakening preventive investor protection merely to increase the ability of private actors to market financial claims.

ASIC should therefore not make the draft instrument in its present form and should instead retain the preventive baseline while developing targeted relief for demonstrated problems. If ASIC nevertheless proceeds with broader relief, it should require materially stronger safeguards concerning prominence, balance, substantiation, consistency, correction, record keeping and regulatory visibility so that the period before regulated disclosure does not become a promotional contest whose immediate benefits are privately captured while its residual risks and policing costs are transferred to investors and the public.

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