Submission to the Australian Securities and Investments Commission on Australia's Evolving Capital Markets: A Discussion Paper on the Dynamics Between Public and Private Markets

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Thank you for the opportunity to provide our views on ASIC's Discussion Paper on Australia's Evolving Capital Markets. This submission primarily addresses Discussion Question 5: **What would make public markets in Australia more attractive to entities seeking to raise capital or access liquidity for investors while maintaining appropriate investor protections?**

In our view, there are two key points that underpin a discussion of the attractiveness of Australia's evolving capital markets. First, as Larry Fink recently highlighted in the United States context, promoting efficient and effective private capital markets is vital to economic growth and development given long-standing limitations of public capital markets and private debt markets in funding important projects.[3] Second, as the Discussion Paper, and associated materials, highlight, expanding the opportunities for private capital market investment is important for investors looking to enhance and diversify their investment portfolios, for corporations seeking to raise funds, and for society in general, which will benefit from the increased availability of capital. However, this expansion raises important risks, including, as ASIC has outlined in the Discussion Paper, risks associated with the reduced transparency of private capital and risks to retail investors with limited investment experience.

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[3] Larry Fink, 'The Democratization of Investing: Expanding Prosperity in More Places, for More People' (Harvard Law School Forum on Corporate Governance, 14 April, 2025) https://corpgov.law.harvard.edu/2025/04/14/the-democratization-of-investing-expanding-prosperity-in-more-places-for-more-people/.

1. The Current Public-Private Distinction in Australia

Comerton-Forde highlights a key distinction between kinds of corporations in Australia: the legal classification of corporations as either 'public' or 'private' ('proprietary').[4] The distinction has important implications for those engaging with the corporate sector as well as for the governance of economic activity in society. Perhaps most significantly, companies that are registered as public companies in Australia have the ability to raise capital from the public, including by offering their shares publicly by listing on a stock exchange. In contrast, companies that are registered as proprietary companies in Australia are not allowed to raise capital from the public except in very limited circumstances, and are not allowed to list on a stock exchange. Traditionally, raising capital from the public has been viewed as a significant mechanism through which corporations grow and, as a consequence, provide economic benefits to society. However, the privilege of access to public funds also raises regulatory obligations and costs that are intended to protect public investors and enhance the efficiency of public markets. In Australia, key regulatory requirements involved with 'going public' include:

- Public companies are required to have at least three directors, with at least two ordinarily resident in Australia;[5]
- Public companies must appoint at least one company secretary who ordinarily resides in Australia;[6]
- Public companies must prepare and lodge financial reports and directors' reports annually;[7]
- Public companies must appoint an auditor within one month of registration;[8]
- Public companies must hold an Annual General Meeting within five months after the end of the financial year;[9]
- Public companies must issue the appropriate disclosure document (usually a prospectus) whenever they issue securities to the public, unless an exception applies;[10] and

[4] See Carole Comerton-Forde, *Evaluating the State of the Australian Public Equity Market: Evidence from Data and Academic Literature* (2025), 35.
[5] *Corporations Act 2001* (Cth) s 201A(2).
[6] *Corporations Act 2001* (Cth) s 204A(2).
[7] *Corporations Act 2001* (Cth) s 292(1).
[8] *Corporations Act 2001* (Cth) s 327A(1).
[9] *Corporations Act 2001* (Cth) s 250N.
[10] *Corporations Act 2001* (Cth) s 706.

- Listed public companies must comply with continuous disclosure obligations.[11]

Each of these regulator obligations involves associated costs, which can be significant. In addition, a public company that wants to list on a stock exchange is subject to a range of further costs, which include:

- ASX listing fees based on market capitalisation; these include both initial and ongoing listing fees;
- Fees for listing a prospectus with ASIC;
- Legal and accounting costs for preparing disclosure documents and undertaking due diligence; and
- Underwriting costs, noting that underwriters are particularly vital for initial public offerings.

For those corporations not seeking to raise funds from the public, or for corporations not willing to comply with the additional oversight and costs associated with this legal classification, the Australian corporate law regime provides the 'proprietary' classification. In order to be a proprietary company in Australia, a company must be registered as such with ASIC, and must have no more than 50 non-employee shareholders (although an exception to this shareholder limitation has been created for those companies wishing to raise funds through the 'crowdsourced funding' provisions).[12] Proprietary companies that exceed this limit must convert to being public companies. This means that the point of distinction between a public and a proprietary company is not their size, but rather how 'widely-held' by the public they are. Proprietary companies benefit from a range of regulatory concessions that make them cheaper and easier to operate than public companies. The Australian Government provides these concessions because it recognises that cost and regulatory barriers may otherwise deter the formation of new companies/business that can contribute positively to the Australian economy.

The Australian Government does not, however, provide blanket regulatory concessions for all proprietary companies. Instead, it takes a size-based approach, providing greater regulatory concessions to 'small' proprietary companies and less generous concessions to 'large' proprietary companies. Section 45A of the *Corporations Act 2001* (Cth) and reg 1.0.02B of the

[11] *Corporations Act 2001* (Cth) s 674.
[12] *Corporations Act 2001* (Cth) ss 45A, 113. The Crowd-sourced funding regime is set out in Part 6D.3A of the *Corporations Act 2001* (Cth).

Corporations Regulations 2001 (Cth) set out the thresholds for small versus large proprietary companies. In order to qualify as small, a proprietary company must satisfy two of the following three criteria:

- Consolidated gross operating revenue is less than $50m for the financial year;
- Value of consolidated assets is less than $25m; or
- The company (and the entities it controls) has fewer than 100 employees.[13]

Section 45A(3) provides that any proprietary company that does not satisfy the criteria set out in s 45A(2) will be classified a large private company, and will therefore be subject to more onerous regulatory oversight, particularly in the context of financial and sustainability reporting.[14] Specifically, large proprietary companies must:

- Prepare financial reports and directors' reports each year;[15]
- Have their annual financial report audited;[16] and
- Lodge their financial reports with ASIC.[17]

Small proprietary companies, on the other hand, are generally not required to prepare these reports,[18] nor are they generally required to have their financial reports audited.[19] Finally, small proprietary companies generally do not need to lodge their financial reports with ASIC, meaning that they can be kept private.[20]

Because proprietary companies in Australia receive regulatory concessions in comparison with public companies - even when they are large proprietary companies - there may be a disparity in how two companies that are otherwise the same size are treated. As Comerton-Forde notes, corporations that are essentially the same size and influence may be subject to different regulatory oversight simply because of their legal status as either public or private.[21] The fact that proprietary companies are not required to have an auditor, and that they may have only one director, rather than three, for example, provides significant cost savings for these

[13] Section 45A(2) of the *Corporations Act 2001* (Cth) sets out monetary thresholds but provides that these may be changed by the regulations. Regulation 1.0.02B of the Corporations Regulations 2001 has increased the figures set out in the legislation.
[14] See *Corporations Act 2001* (Cth) Part 2M.3.
[15] *Corporations Act 2001* (Cth) ss 292(1), 298.
[16] *Corporations Act 2001* (Cth) s 301.
[17] *Corporations Act 2001* (Cth) s 319(1).
[18] *Corporations Act 2001* (Cth) ss 292(2), 293, 294, 298.
[19] Corporations Act 2001 (Cth) s 301(2).
[20] Corporations Act 2001 (Cth) s 319(2).
[21] Carole Comerton-Forde, *Evaluating the State of the Australian Public Equity Market: Evidence from Data and Academic Literature* (2025), 51.

companies.[22] The distinction in regulatory treatment between large private companies and public companies is somewhat anachronistic, reflecting a regulatory ethos that has historically treated investor disclosure as the only form of governance necessary (or even permissible) in a corporate setting. This is not consistent with modern corporate governance practices that recognise the broader societal significance of corporate activity and the importance of effective regulatory oversight in promoting a fair, safe, and innovative corporate and capital environment beyond the need for investor disclosure rules. For instance, it is unclear why corporations that are essentially the same in size and complexity should not have to comply with good corporate governance practices outlined in the ASX Corporate Governance Principles (save for the provisions that outline best practice relating to investor-specific disclosures where a company is not raising capital from the public).

In light of these factors, while it may be appropriate that small private companies should receive regulatory concessions that reduce the costs of doing business (as this is an important driver of the formation of new companies and businesses), it is not necessarily appropriate that large private companies should receive regulatory concessions that distinguish them from public companies. As discussed below, if there were no regulatory/cost benefits to being a large private company as opposed to a public company, it is possible that more companies would choose to operate as public companies, which would, in turn, give them the option of listing publicly.

2. Reforming the Australian Framework to Promote Efficient and Effective Capital Markets

In order to bring the treatment of large proprietary companies and public companies better into alignment, we set out two potential options for reform:

1. The regulatory concessions for large proprietary companies could be tapered or removed so that proprietary companies over a certain size threshold receive the same regulatory treatment as public companies. This would be appropriate as large and successful proprietary companies would have the necessary resources to comply with higher regulatory burdens, while small, nascent proprietary companies would be unaffected by the change. It is arguably appropriate for large proprietary companies to comply with higher regulatory burdens. Indeed, recent regulatory reforms regarding

[22] See *Corporations Act 2001* (Cth) s 325, c.f. s 327A.

climate-related risk disclosures and individual executive accountability in the financial sector have extended regulatory obligations to both public and private companies,[23] which supports the proposition that it would be appropriate to move to a more even oversight footing for large private companies and public companies. It is suggested that treating large proprietary companies in the same way as public companies would, as noted above, reduce the relative attractiveness of remaining private. If more companies were to operate as public companies, more may in turn consider listing on public markets.

2. Going one step further, the legal distinction between proprietary and public companies could be removed entirely, as was done in New Zealand in 1993. If this approach were to be adopted in Australia, there would then be only one class of companies. In order to preserve the regulatory benefits for small, nascent companies, so as not to discourage the formation of new companies, it is suggested that a similar approach to New Zealand could be adopted in allowing regulatory concessions for companies below certain size thresholds (as is currently done for Australia's small proprietary companies). Removing the distinction between proprietary and public companies would reduce the barriers to listing publicly, as companies would not first need to convert to being public companies before making the decision to list. This approach would also simplify Australia's corporate regulation, remove the disparities between large proprietary companies and public companies mentioned above, and harmonise Australia's approach with that of New Zealand's consistent with the goals of the *Australia-New Zealand Closer Economic Relations Trade Agreement* (1983) and the *Protocol on Investment to the Australia - New Zealand Closer Economic Relations Trade Agreement* (2013). It is also worth noting that the introduction of crowd-sourced equity funding laws for proprietary companies in 2018 has already gone some way to breaking down the barriers between public and proprietary companies by allowing proprietary companies to raise capital from the public where they do so through a crowd-sourced funding offer.

In our view, the adoption of either of these approaches would improve the attraction of Australia's public markets, essentially by reducing the comparative advantages currently afforded to large proprietary companies. It would also ensure that, consistent with modern corporate governance practices, significant companies that are now operating as proprietary

[23] See Treasury Laws Amendment (Financial Market Infrastructure and Other Measures) Bill 2024; Financial Accountability Regime Act 2023 (Cth).

will be subject to the same transparency and accountability measures as equivalent companies that operate as public.

3. Maintaining Appropriate Investor Protections

The suggestions presented above have the potential to make Australia's public markets more attractive by reducing the comparative regulatory benefits provided to large proprietary companies. In other words, this approach essentially seeks to reduce the attraction of a company remaining private, rather than proactively taking steps to increase the attraction of a company being public. The key reason that we think this approach is appropriate is that it has the capacity to shift Australia's capital markets back towards the public side without reducing any of the investor protection mechanisms currently in place. Imposing greater regulatory burdens on large companies prioritises investor protection while simultaneously promoting a governance framework that encourages compliance with broader regulatory goals such as environment, social and governance issues.

Although removing the distinction between proprietary and public companies would facilitate public capital raising by all companies, this capital raising would still need to comply with the disclosure obligations set out in Chapter 6D of the *Corporations Act 2001*. It is therefore not envisaged that there would be any negative investor protection consequences for retail or other investors through the implementation of either of the suggestions outlined above.

Nevertheless, the protection of retail investors continues to be an important regulatory objective, as recognised by ASIC. We suggest that, quite apart from the discussions above, there may be a need to create bespoke regulatory provisions for investor protection based on factors such as the nature of the company being invested in, the perceived need for additional protections offered to certain investors based on their level of investment expertise and knowledge, and the relevant sector. This would provide a more nuanced and appropriate form of regulatory intervention to protect retail investor interests while opening up avenues for fundraising. Further, the approach would allow for the introduction of regulations regarding 'tokenisation' that do not have to deal with outdated notions of 'private' versus 'public' status of a corporation.