



21 May 2024

Committee Secretary  
Parliamentary Joint Committee on Corporations and Financial Services  
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Canberra ACT 2600

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## ASX SUBMISSION TO INQUIRY INTO WHOLESALE INVESTOR AND WHOLESALE CLIENT TESTS

ASX appreciates the opportunity to provide input to the Parliamentary Joint Committee on Corporations and Financial Services' (**Committee**) inquiry into the sophisticated investor test for offers of securities (section 708 of Chapter 6D of the *Corporations Act 2001* (**Corporations Act**)) and the wholesale client test for financial products and services (sections 761G and 761GA of Chapter 7 of the *Corporations Act*).

In October 2023, ASX made a submission to Treasury's Consultation Paper *Review of the Regulatory Framework for Managed Investment Schemes*, which noted that the distinction between retail and wholesale clients is foundational for a range of matters under the *Corporations Act* and that any amendments to the existing thresholds would have far reaching legal, regulatory and compliance implications for the financial services industry as a whole. ASX expressed support for a standalone consultation on the wholesale investor and client thresholds that considered those tests holistically and sought feedback from a range of stakeholders.

The Committee's inquiry is an important step in assessing the appropriateness of the current settings and thresholds for the tests. ASX understands that the primary motivation for introducing a distinction between retail and wholesale investors in 2001 was to ensure regulatory protection for retail investors and to allow certain individuals to participate in more complex wholesale products if they have the expertise and capacity to do so.<sup>1</sup> With significant changes in household income and wealth since the introduction of the tests, it is appropriate to revisit the tests and applicable thresholds to ensure they continue to serve the purpose for which they were introduced.

ASX supports the delineation of wholesale and retail investors in a way which appropriately protects retail investors while reducing the regulatory burden in relation to products and services targeting investors who are well placed to assess complex products. Any recalibration of the tests in a way which balances these needs will both support retail investor confidence in financial products and services and also reduce the costs associated with raising capital. Striking the right balance also supports investment and economic growth.

In assessing any proposals for change, ASX submits there are a number of factors in addition to regulatory protection which the Committee should consider. In particular, any change which reduces the population of wholesale investors risks reducing a source of capital upon which many issuers rely, while also reducing the range of investment options for investors who fall outside of the definition as a result of any change. These potential impacts on the market more broadly mean that any change should be carefully considered and that the specific proposals for change should be subject to detailed consultation.

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<sup>1</sup> Treasury Options Paper: Wholesale and Retail Clients Future of Financial Advice, January 2011, at para 2.1.

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ASX submits that the broad range of direct and consequential impacts on a range of markets and sectors requires careful and balanced consideration as part of this inquiry and that the specific proposals for change should be subject to their own consultation once those specific proposals have been identified.

## **Background**

ASX is an integrated exchange offering listings, trading, clearing, settlement, technical and information services, as well as technology, data and other post-trade services. ASX operates markets for a wide range of asset classes including equities, fixed income, commodities and energy. As an integrated exchange, ASX's activities span primary and secondary market services, including the raising, allocation and hedging of capital flows, trading and price discovery, central counterparty risk transfer and securities settlement for both the equities and fixed income markets. In FY23, issuers raised more than \$1 billion in primary capital and more than \$41 billion in secondary capital through ASX. In the same year, ASX executed more than 360 million trades in our cash equity market, and more than 7.7 million Australians held investments tradeable on-exchange.

ASX-listed issuers source capital from both retail and wholesale investors. In order to list on the ASX, issuers must meet significant disclosure and other requirements. When an offer of new securities is made to Australian retail investors, a prospectus must be issued to those investors. Section 708 of the Corporations Act allows certain offers of securities without providing certain disclosure documents, including in circumstances when the offers are made to specified people who are presumed not to need disclosure because of their wholesale status. As a result of the cost-benefit trade-offs associated with preparing the necessary disclosure material to issue securities to retail clients, many small- and mid-cap companies rely on capital raised from wholesale investors.

Wholesale investors still have protections under the general law, the Market Integrity Rules and other provisions of the Corporations Act such as the obligation to provide financial services efficiently, honestly and fairly. Listed entities are subject to a continuous disclosure regime that is rigorously monitored and enforced. Some stakeholders argue that this robust framework creates a compelling case for the ability to issue capital to retail investors, provided the issuer is listed and in compliance with its continuous disclosure obligations. The Committee may be interested to consider New Zealand's model in relation to this point.

## **Potential impacts on companies raising capital**

In considering any changes to the wholesale investor and wholesale client tests, the potential impact on capital raising that could result from a reduction in the potential pool of wholesale investors should be considered.

Allowing the provision of certain products to wholesale investors can lead to efficiencies in the provision of financial products and services to investors capable of accurately assessing the risks. Many ASX-listed issuers make use of placements, offered only to institutional, sophisticated or professional investors, to raise capital quickly or for specific purposes. As compared with other equity-capital raising options, placements can be an efficient option for companies without the need to prepare and lodge a prospectus.<sup>2</sup> The ASX Listing Rules include requirements relating to an entity's placement capacity,<sup>3</sup> which impose an aggregate limit on the number of equity securities an entity can issue over any 12 month period without security holder approval broadly equivalent to 15 per cent of its fully paid ordinary issued capital. The limit seeks to balance the interests of an entity in being able to raise capital flexibly and the interests of its security holders in not being unfairly diluted.

Such efficiencies can be particularly useful for smaller and/or early stage issuers, who may face constraints in their ability to bear the compliance costs necessary to raise secondary capital from retail investors. For example, in the case of a company looking to raise a smaller amount of capital for a specific purpose, the cost of accessing retail investors may outweigh the benefits, meaning that the supply of capital for these companies will be limited solely to wholesale investors. In recalibrating the tests, specific regard should be given to the potential impact any proposal would have on the way in which issuers raise capital, particularly for small- and mid-cap issuers.

ASX is also aware of concerns about the fairness of preventing access by retail shareholders to these types of share issues, which are typically conducted at a discount.

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<sup>2</sup> A cleansing notice must be released to ASX for the securities to be freely on sold in the 12 months following the issue without the need for a prospectus.

<sup>3</sup> ASX Listing Rule 7.1.

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## Potential impacts on investors

ASX operated markets include significant retail client participation. ASX fully supports a robust regulatory protection framework for retail investors which enhances confidence in dealing with financial markets, products and services.

Any modifications to the tests will require careful balancing of a range of interests, as guided by clear legislative and policy objectives. In recalibrating the tests, it is expected the Committee will explore proposals that seek to minimise the risk of products and services being acquired by investors without the protections to ensure they are in a position to understand them. However, this may also cause some investors who are currently eligible to access particular products or services to cease to have access to those products or services. If not balanced properly, there is a risk that changes could adversely impact product diversification options for investors, which in turn may have unintended risk consequences and could make Australian capital markets less attractive relative to other markets. Striking the appropriate balance between providing regulatory protection to those who need it and allowing access to product divestment options will continue to support strong retail participation in Australian financial markets.

## Corporate bonds

ASX also notes that the product value threshold limb of the wholesale investor test is structured into the operation of the wholesale financial markets in many areas, for example in relation to corporate bond issues. Most corporate bonds are issued with a minimum parcel size of \$500,000 to facilitate purchases only by wholesale investors and to allow for the relevant disclosure documentation to be an Investment Memorandum rather than a more onerous and costly prospectus. Such an investment size already makes sufficient portfolio diversification challenging for all but the wealthiest of wholesale investors. The Committee should consider any impacts on such markets when considering changes to this test.

## ASX trading participants

ASX also reiterates comments made to the Australian Law Reform Commission's (ALRC) *Review of Financial Services Legislation and Financial Services Interim Report A* in February 2022. In its submission, ASX submitted that the Corporations Act should clarify that ASX trading participants are recognised as wholesale clients, professional investors and sophisticated investors as these entities must meet stringent ASX admission criteria, noting that this clarification would have no impact on investor protection.

In addition, in the interests of regulatory certainty, ASX submitted that the definitions should expressly clarify that financial products available on a licensed derivatives market are taken to be provided to wholesale or sophisticated investors/clients, regardless of the price or face value.

## Further consultation

Given the wide ranging potential impacts of any change to the thresholds, ASX submits that further consultation by Government on a particular proposal for changing the thresholds is warranted. Nevertheless, the Committee's inquiry is an important step in examining the appropriateness of the tests and identifying the issues that should be considered when recalibrating the thresholds.

ASX welcomes the opportunity to discuss the issues raised in this submission further. If you have any questions, please contact Shelby Brinkley, Senior Policy Adviser ( [REDACTED] ) or myself on the details below.

Kind regards

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**Diane Lewis**  
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