

10 May 2024

Senator Deborah O'Neill  
Chair of the Parliamentary Joint Committee on Corporations and Financial Services  
Parliamentary Joint Committee on Corporations and Financial Services  
PO Box 6100  
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Canberra ACT 2600

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## **RE: INQUIRY INTO THE WHOLESALE INVESTOR AND WHOLESALE CLIENT TESTS**

Dear Senator O'Neill and members of the Committee,

I welcome the opportunity to provide a response to the consultation on the proposed changes to the wholesale investor and wholesale client tests (the sophisticated investor test).

I am an individual investor, as well as having a Self-Managed Superannuation Fund (**SMSF**). The investments I, my Family Trust and SMSF hold are predominantly in ASX listed shares / Exchange Traded Funds. I have been investing for approximately twenty-five (25) years. I am deeply passionate about advocating for the fair and equitable treatment of retail shareholders. I also attach a copy of my personal profile for ease of reference as **Annexure "A"**.

For too long the current landscape has enabled ASX companies to raise additional funds via share purchase plans or placements that are only accessible to wholesale or sophisticated investors (such as large industry superannuation funds, private fund managers and family groups). Retail investors are typically excluded from such share purchase plans and as such miss out on the opportunity to take up additional holdings at a notable discount to the trading price at the time of the announcement to raise funds.

This **"lock-out"** to retail shareholders puts them at an unfair and significant financial disadvantage when quite often they have been a loyal and strong supporter of the ASX listed entity. It also enables "non-retail" shareholders to make "easy money" and look good to their members and other stakeholders.

Interestingly, investors who are considered "unsophisticated" are **"locked out"** of certain capital raisings but can buy these same shares on the market the very next day, usually at the detriment to them and the advantage of the so-called "sophisticated" shareholders. How is this fair?

The Corporations Act 2001 regulations regarding corporate disclosure, the issuance of new securities, and the sophisticated investor test are perpetuating the unequal treatment of retail shareholders and allowing the wealthy to profit at the expense of small investors.

At a time when the number of ASX listed entities is at best stagnant and perhaps projected to decrease as more ASX listed entities seek to delist, the current status and proposed changes will likely push retail investors / shareholders offshore and / or choose other investment classes. Given the increasing amount of superannuation monies now available for investment, enabling retail investors to participate on the same terms as "non-retail" investors ought to be a key aspect of changes to the present system.

A recent experience I have experienced regarding the above relates to the raising by Macquarie Technology Group Ltd (ASX code: MAQ). The key points here are as follows:

- On 16 April 2024, MAQ announced an equity raising for \$100million as part of acquiring land and buildings in order to further enhance the data warehouse business of the company;
- Such raising consists of to (2) tranches:
  - Tranche 1: \$29.4million under ASX LR 7.1;
  - Tranche 2: 70.6million subject to shareholder approval at the upcoming AGM in late May which will be offered to wholesale and sophisticated investors; and
  - There is a placement price of \$72.50 representing a discount of 6.1% from the share price as at 15 April 2024.
- It should be noted that since the announcement, the share price has increased to \$92.46 (closing price as at 9 May 2024). This is an increase of almost 28% from the proposed placement price. And retail shareholders have been "locked out" of participating in same. How is this fair?
- What is particularly interesting is that since the announcement the founding shareholders have very recently sold down further equity they have in the company.

I urge and unequivocally support regulatory changes that could help level the playing field between large and small investors which include:

1. *Replacing the sophisticated investor test that discriminates between investors according to their wealth with a new test of financial literacy; and*
2. *Abolish the wholesale investor test completely for listed companies allowing all shareholders to participate in placement equity raisings by ASX-listed companies, ensuring fairness to small shareholders. Recognising the effectiveness of the ASX continuous disclosure rules and encouraging companies to value equity from all shareholders versus unfairly excluding smaller retail shareholders.*

### **Sophisticated investor rules are not equitable**

I understand the definition of 'sophisticated investor' is now under review by the government and I thank the committee for undertaking a thorough analysis of the potential consequences prior to enacting any changes.

The distinction between retail and wholesale investors is a part of the laws governing corporate disclosure set out in s708 of the Corporations Act and accompanying regulations and ASIC instruments.

Companies are required to issue shares under a prospectus unless the issue falls within a specific exemption. One exemption is when companies issue shares to wholesale investors – a class that includes sophisticated investors, professional investors, and financial services licensees.

Investors that are not sophisticated, professional, or licensees are defined as retail investors, and can only access certain new share issuances when a company issues a prospectus.

The underlying policy rationale is that an investor sophisticated enough to be able to assess the risks and merits of an investment does not need the protection of a disclosure document.



Current regulations define a sophisticated investor as having assets of \$2.5 million or annual income of \$250,000. ASIC has recommended raising these thresholds in line with inflation, potentially to as high as \$4.5 million or \$450,000.

The use of wealth as a crude tool to judge investment sophistication is an anachronism in modern Australia and the proposal from ASIC would unfairly exclude a large number of educated individuals from being able to participate in capital raisings in its current form.

### **Unequal treatment of small shareholders**

The arbitrary division of investors according to their wealth is also perpetuating the unfair treatment of retail investors.

Section 708 of the Corporations Act permits companies to make share issues without disclosure if they limit access to sophisticated and other wholesale investors. The ASX allows companies to issue up to 15 per cent of new equity via a share placement on a non-pro rata basis each year.

Predictably, companies have flocked to take advantage of these exemptions to avoid the enormous cost and effort of preparing a prospectus. Instead, capital raisings are commonly conducted exclusively for wholesale and sophisticated investors, "locking out" retail shareholders from participating.

As capital raisings are typically conducted at a discount to prevailing market prices, retail shareholders are significantly disadvantaged when their sophisticated and wholesale counterparts get the chance to buy more shares at a price lower than the market rate. See the example I have given earlier.

Offering wealthier shareholders discounted shares is patently unfair to all Australians. It is also completely at odds with the adage – "give everyone a fair go".

Critically when retail shareholders are excluded from a capital raise, their percentage of ownership in a company decreases, meaning they end up with fewer votes and are entitled to a smaller share of the company's future dividends because their stake has been diluted. This has recently happened to me in MAQ as noted above. So, in effect, they get his twice. Again, how is this fair?

According to UBS statistics:

*In the past 4 years, over 500 ASX-listed companies have raised over \$160 billion at significant discounts to market prices. During this time in Australia, 822 placements took place raising a total of \$144.7bn at an average discount of 12.4% or representing a discount of \$15.7bn in value that was given to 'sophisticated investors' vs being available to all shareholders, including retail. The weighted average discount was 11.3%.*

Based on the above, those who have the education and experience to invest were put at a disadvantage because of their wealth. This is not fair.

### **Reframing the sophisticated investor test to be fair to all**

I and my SMSF are shareholders in WAM Microcap which is managed by Wilson Asset Management. They are classified as a wholesale investor and thus benefit from the existing (and proposed) rules. However, they have at least also suggested that the playing field needs to be levelled.

It is completely inappropriate to believe that wealth is a sensible proxy for financial literacy, or that an individual that inherits money or sells a business becomes sophisticated enough to understand investment risk.

There are some simple reforms the government can make to level the playing field fair for all Australians.

Replacing the wealth requirement with a financial literacy test would allow regulators to better distinguish between investors experienced enough to understand investment risk and those who should continue to benefit from safeguards.

Screening investors by knowledge and experience would help avoid wealthy, but inexperienced, people undertaking investments without a full understanding of potential risks. It would also allow experienced investors of lesser means to participate in wholesale investment schemes.

Finally, excluding the family home from the asset test and only including investment properties would provide a fairer judgement of an individual's investment capabilities.

### **Allowing fair access to ASX capital raisings**

All investors should be allowed to access capital raisings conducted via the placement of securities by ASX-listed companies.

The argument for restricting retail shareholders' access to such capital raisings is founded on a belief that a higher standard of disclosure provides a degree of protection when assessing whether to invest. The risk is limited when a company is listed on the ASX.

The Corporations Act requires listed companies to disclose material price sensitive information on a timely basis. The ASX has detailed and well-enforced rules on disclosure that require companies to immediately notify "any information ... that a reasonable person would expect to have a material effect on the price or value of the entity's securities".<sup>2</sup>

Australia's robust continuous disclosure regime is already acknowledged in s708AA of the Corporations Act which allows companies to conduct rights issues to all shareholders without having to prepare a prospectus. Rights issues are a form of capital raising in which existing shareholders are given the right, but not the obligation, to purchase additional shares from a company at a specified price. ASIC also acknowledges the efficacy of continuous disclosure in class order relief that allows companies to offer \$30,000 worth of shares per shareholder per year without disclosure.

The policy reasoning behind this is that the continuous disclosure regime ensures all relevant information is available to all investors.

### **New Zealand reforms offer a model for Australia to follow**

New Zealand has long enshrined in law the right for all shareholders to participate in any offer of securities in a class already traded on the New Zealand Stock Exchange without requiring a prospectus to be issued.

The basis for that reform was NZ's strong continuous disclosure rules that mean new disclosure documents are redundant.

The same holds true in Australia – the ASX is a world-leading securities exchange with equally robust continuous disclosure obligations.

### **Conclusion**



I believe we should test Australian investors on financial literacy instead of wealth by reforming the sophisticated investor test that currently uses wealth as a proxy for financial literacy allowing millions of Australians to inadvertently qualify for accreditation. Regulators should develop a financial literacy test that can accurately assess an investor's capability to understand and engage with financial opportunities, thereby protecting those truly at risk while not arbitrarily excluding others based on wealth alone.

All shareholders should be treated fairly – regardless of their wealth.

Reforming laws governing capital raisings and refining exemptions for sophisticated investors is critically important to levelling the playing field for all Australians.

We should consider a sophisticated investor test to allow us to mark people on their knowledge, not on their perceived wealth.

If you have any questions regarding my submission, please call me on [REDACTED] or email





## Bruce Gleeson

FIRM PRINCIPAL

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### EXPERIENCE

Bruce has been a Director and Owner in the Firm since 2007.

Bruce holds a Bachelor of Commerce Degree from the Western Sydney University, NSW. He has also completed a Diploma of Financial Planning with the Financial Planning Association of Australia ("FPA"). Bruce is a Fellow of the Chartered Accountants Australia & New Zealand ("CAANZ"), CPA Australia and the Australian Restructuring Insolvency & Turnaround Association ("ARITA").

He is a Registered Liquidator, Registered Trustee in Bankruptcy, and a Justice of the Peace (NSW).

Bruce has in excess of twenty (25) years' experience in corporate insolvency, restructuring, crisis management, exit planning and bankruptcy. Bruce has also held roles in commerce with several Top 100 Companies (James Hardie and AMP) to further add to his professional skills in areas such as compliance and project management.

Bruce actively encourages business owners (particularly those in family businesses) and individuals to seek the right professional assistance at the earliest possible stage rather than trying to work it out themselves. He is keen to help stressed people make better financial decisions. Seeking the right professional assistance enables the business owner or individual to focus on what they are good at and set up a framework to regain control, as opposed to going it alone.

#### Specific areas of experience

- Aged Care
- Agriculture
- Commercial & Residential Property [including appointments under Section 66G of the NSW Conveyancing Act 1919 and Section 80(1)(e) of the Family Law Act]
- Building and Construction (Residential Home Builders)
- Financial / Professional Services
- Hospitality
- Ponzi Schemes

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## Bruce Gleeson

FIRM PRINCIPAL

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### Significant Appointments

In 2009 Bruce was appointed Voluntary Administrator to one of the largest residential home builders in NSW, Wincrest Homes Pty Ltd ("Wincrest"). The external administration of Wincrest resulted in an arrangement put in place with its creditors whereby it remains successfully trading today.

In late 2020 Bruce was appointed as Provisional Liquidator to Maliver Pty Ltd and Receiver & Manager to Melissa Caddick. These appointments were made on the application of ASIC to the Federal Court of Australia. The Caddick appointment has required comprehensive forensic and reconstruction analysis to be undertaken into the "ponzi scheme" run by Ms Caddick. Bruce has been appointed to several matters involving "ponzi schemes" and this is a specific interest area he has.

### Qualifications/Memberships

- Bachelor of Commerce, Western Sydney University: accounting major, law sub-major
- Diploma of Financial Planning – FPA Australia
- Fellow of ARITA
- Fellow of CAANZ
- Fellow of CPA Australia
- Registered Liquidator – since 2002
- Registered Trustee in Bankruptcy – since 2003

### Board / Council / Committee Involvement

- NSW State Council of CAANZ: 2007 – 2011
- Part-time Board Member of Companies, Auditors and Liquidators Disciplinary Board ("CALDB"): 2010 – 2017
- Current Board Member of ARITA: 2019 onwards
- Current NSW/ACT Divisional Committee Member of ARITA: 2015, 2017 onwards
- Current Member of CAANZ Insolvency Management Committee

### Interests

Outside of work Bruce is a Parramatta Eels tragic, enjoys a good glass of wine, his veggie garden and is a keen follower of equity markets.



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