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Committee Secretary
Parliamentary Joint Committee on
Corporations and Financial Services
PO Box 6100
Parliament House
Canberra ACT 2600

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By electronic submission

Dear Committee Secretary

Submission – Inquiry into the wholesale investor and wholesale client tests

A. Introduction

This submission is made by Herbert Smith Freehills (**HSF**) in response to the call for submissions on the parliamentary inquiry into the wholesale investor test for offers of securities (section 708 of Chapter 6D of the *Corporations Act 2001* (Cth) (the **Act**)[1]) and the wholesale client test for financial products and services (sections 761G and 761GA of Chapter 7 of the Act) (referred to collectively as the **wholesale investor/client tests**) (the **Inquiry**).

HSF is an international law firm with 23 offices located around the globe and which specialises in, amongst other things, equity capital markets, private equity, superannuation, asset and wealth management and financial services regulation. We regularly advise in relation to a wide range of issues concerning wholesale investors and clients in Chapters 6D and 7 of the Act, including the topics addressed in the Inquiry.

We have structured this submission following the terms of reference set out by the Inquiry. Where relevant, we also refer to the following submissions made by HSF:

- most relevantly, our submission in response to the August 2023 'Review of the regulatory framework for managed investment schemes (**MIS**)' consultation paper (the **Treasury Consultation Paper**), submitted to Treasury and dated 29 September 2023 (the **Treasury Submission**); and
- for completeness, our earlier submission in response to the Australian Law Reform Commission (**ALRC**) report, *Financial Services Legislation: Interim Report A (Report 137, 2021)* (**ALRC Interim Report A**), dated 25 February 2022 (the **ALRC Submission**).

B. Submissions on the terms of reference

1 Review of the current wholesale investor/client tests, including: legal requirements, identification of all contexts in which the tests are relevant, the consequences of an investor/client meeting the relevant test, and the application of the tests in practice

We refer to the Treasury Consultation Paper and the ALRC Interim Report A, which each outline the existing tests for wholesale investors and/or clients. In particular, the following

[1] These provisions were introduced into the law by the *Corporate Law Economic Reform Program Act 1999* (Cth) on 13 March 2000.

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sections of each document summarise the definitions under section 761G and 761GA of the Act:

- Part 1.3 of the Treasury Consultation Paper; and
- paragraphs [12.21] – [12.25] of the ALRC Interim Report A.

2 The historical development in Australia of the wholesale investor/client tests and consideration of any previous reviews and inquiries

We refer to the Treasury Consultation Paper and the ALRC Interim Report A, which each consider previous reviews and inquiries into the retail and wholesale client distinction. In particular, paragraphs [12.15] – [12.20] of the ALRC Interim Report A summarise previous reviews of the distinction between retail and wholesale clients.

3 Comparison with comparable overseas jurisdictions, including any proposed or recent changes to tests used in similar contexts

We refer the Committee Secretary to Part 1.3 (page 17) of the Treasury Consultation Paper, which summarises the wholesale client tests used in the United States and the United Kingdom.

4 Consideration of any proposals to change the wholesale investor/client tests, including: any evidence to support such proposals, the possible consequences (both intended and unintended) of any change to the wholesale investor/client tests, the costs and benefits of any change, the impact of any change on different cohorts of investor/client and other stakeholders

We have considered the most appropriate methods to change the wholesale investor/client tests, to bring them in line with the legislative intention contained in the *Financial Services Reform Bill 2001* (Cth) (**FSR Bill**), in the Treasury Submission and the ALRC Submission. We refer the inquiry to our previous submissions.

These submissions addressed the following considerations in relation to the retail/wholesale client distinction:

(a) retaining, but updating, the existing quantum-based exemptions;

(b) how consent requirements could operate if introduced for the wholesale client tests;

(c) making minor amendments to the sophisticated investor tests; and

(d) reducing limitations to the exclusions under the wholesale client test.

Our previous submissions on these issues are outlined in more detail below, under corresponding headings.

(a) <u>Proposed changes to quanta-based tests</u>

Concerns were raised in the Treasury and ALRC inquiries that that the quantum of each of the product value and the assets/income exceptions have not been updated over time and are now considered to be too low. In our respective submissions, we noted that it would be sensible for these quanta to be reviewed and where relevant increased periodically and to provide for a method to do this. In our view such an approach is to be preferred to removing those exemptions altogether. It is our understanding that a number of financial services providers (**FSPs**) rely on these exemptions and that a number of investors who fall within this category are able to access a wider range of products because of these exceptions. To remove those exceptions, resulting in such investors being classified as retail clients, might, theoretically, result in those clients being afforded more protections. It is also quite possible that FSPs will simply stop offering such products to them, limiting the range of products available to such persons and reducing investors' choices.

As we noted in the ALRC Submission, this outcome would not be in line with the rationale underpinning the FSR Bill. Those exceptions were available because it was considered that wholesale clients are better informed and better able to assess the risks involved in financial transactions.

We considered each of the quanta-based tests separately in the Treasury Submission, as set out below.

Product value exception/test

As set out in paragraph [6.27] of the Explanatory Memorandum to the FSR Bill, one rationale for including the product value exception was that those investing more money are presumed to have the expertise and/or access to professional advice to justify their being treated as wholesale. We understand that this policy remains sound, that the product value test remains relevant today and that this test is particularly valuable to industry participants because it is easy to administer and is a binary test which can quickly and objectively confirm whether a person is (or is not) a "wholesale client".

We do acknowledge that the financial threshold for the product value test has remained constant since its inception over 20 years ago, with the consequence that significantly more Australians are now able to qualify as wholesale clients than were able to in 2000.[2] We support modest ongoing increases to the uplifted financial threshold incrementally from time to time, for example in line with CPI. We would propose a mechanism to increase the financial threshold, ideally every four or five years, so that the inefficiency, disruption and repapering that would be required by annual updates to the threshold can be avoided.

We note that any failure to satisfy an increased financial threshold (both the initial uplift and any subsequent increase) would have serious consequences for both investors and financial service providers. Financial services providers will need to ensure that, pursuant to the authorisations under their Australian financial services licence (**AFSL**), they are legally able to continue to provide financial services to their clients. This is particularly problematic where the AFSL holder is not authorised to provide services to retail clients under its AFSL and it may not have the experience to be able to seek a variation of its AFSL, assuming that it has the time to apply for an AFSL variation. This would also result in negative consequences for certain financial services and products – for example, if an managed investment scheme (**MIS**) trustee was not authorised to provide financial services to retail clients and could not forcibly exit its retail investors, it might need to wind up the MIS, forcing all investors to exit the investment and potentially crystallising losses on an early termination of the MIS.

In our view investors who have qualified as wholesale clients prior to any legislative change to the definitions should be 'grandfathered' as wholesale clients for the purposes of the investments that they hold at the effective date of any changes to the wholesale client test, so that the impact of the changes applies to new investments, after the date of that change, but is not disruptive to existing investors and their investments. Well informed or advised investors should not now be barred from or forced to divest products that they are familiar with or in which they have invested for years.

Asset/income test and definition of control

We consider that the qualified accountant's certificate (**QAC**) net assets and gross income tests remain justified by the policy reasons underpinning the FSR Bill. As with the product value test, we would support an increase to the financial threshold for the net assets test in line with CPI since 2000 or some other appropriate measure. We would

[2] As noted in footnote 1, these thresholds took effect from 13 March 2000.

caution against any significant increases to the financial threshold for the gross income tests, noting that $250,000 per annum remains a high wage in Australia.[3]

As with the product value test, we consider that there should be grandfathering to smooth the impact of these financial threshold changes and mitigate the disruption and inefficiency that would arise if existing investors were re-categorised as retail clients.

One proposal regarding the asset/income test, which is used in other jurisdictions, is not including a person's residential home when calculating their net assets. Given the level of home ownership in Australia, which is significantly higher than other jurisdictions, particularly Europe, and that for many Australian investors, their residential home may be their primary or main asset, if an Australian investor wanted to leverage the value of their home for the purposes of diversifying their investments then we would propose a two-fold test, to be applied in the discretion of the qualified accountant of:

(a) a lower net assets threshold if the residential home is excluded (such as $1 million, this number is suggested for illustrative purposes only); and

(b) a higher net assets threshold if the residential home is included, (such as $3.5 million, again suggested for illustrative purposes only).

Issues with the definition of control

We note that there is currently some confusion in the market as to:

(a) how (if at all) the net assets and gross income tests should be applied to trustees; and

(b) the meaning of control, particularly in the context of section 50AA of the Act.

We consider that this is an ideal opportunity to clarify both positions.

'Control' is relevant for two reasons, namely determining whether:

(a) the net income or gross assets of controlled trusts or companies can be included in a person's QAC;[4] and

(b) a trust or company *controlled* by the holder of a QAC can be classified as a wholesale client for the purposes of receiving a financial service.[5]

'Control' is defined in section 50AA of the Act as follows:

> *(1)….an entity controls a second entity if the first entity has the capacity to determine the outcome of decisions about the second entity's financial and operating policies.*
>
> *(2) In determining whether the first entity has this capacity:*
>
> > *(a) the practical influence the first entity can exert (rather than the rights it can enforce) is the issue to be considered; and*
> >
> > *(b) any practice or pattern of behaviour affecting the second entity's financial or operating policies is to be taken into account (even if it involves a breach of an agreement or a breach of trust).*

[3] According to the Australian Financial Review's analysis of data released by the Australian Taxation Office, someone with a taxable income of more than $377,553 in 2020-21 was in the top 1% of taxpayers (https://www.afr.com/politics/federal/top-earners-shoulder-more-of-the-tax-burden-20230608-p5df2g#:~:text=Thursday's%20figures%20show%20that%20to,2023%20due%20to%20bracket%20creep).

[4] *Corporations Regulations 2001* (Cth) reg 7.6.02AC.

[5] *Corporations Regulations 2001* (Cth) reg 7.6.02AB.

(3) The first entity does not control the second entity merely because the first entity and a third entity jointly have the capacity to determine the outcome of decisions about the second entity's financial and operating policies.

(4) If the first entity:

(a) has the capacity to influence decisions about the second entity's financial and operating policies; and

(b) is under a legal obligation to exercise that capacity for the benefit of someone other than the first entity's members;

the first entity is taken not to control the second entity.

The above highlighted wording means that a trustee may not technically control the relevant trust because the trustee has fiduciary duties to the trust beneficiaries.

As a general rule:

- this difficulty should not apply where the trustee is a natural person because the 'controller' (the trustee) has no 'members' and therefore section 50AA(4) should not apply;
- where the trustee is a company and the shareholders are the same persons as the trust/SMSF beneficiaries, the control test should be capable of application to a trust/SMSF notwithstanding the different capacities that apply to the shareholders and beneficiaries; and
- where the trustee is a company and the shareholders are not the same persons as the trust/SMSF beneficiaries, the trustee will not technically control the trust for the purposes of section 50AA.

We believe this unusual outcome was not necessarily intended when the regulations were introduced to add the 'control extensions' to the QAC test.

The section 50AA definition of 'control' is primarily used in the Act for determining when a company is a subsidiary or holding company of another company. The 'fiduciary carveout' in section 50AA(4) exists so that shares held by a shareholder in trust for beneficiaries should not form part of the same ownership group. This principle does not have a clear purpose or meaning in the context of determining whether a person *actually* controls a trust or company, which is the appropriate issue in the context of a QAC.

We would recommend that the concept of control for the purposes of the two extensions to the QAC test is modified to remove the fiduciary carveout and rely instead on the practical control factors already embedded in section 50AA.

Trustees – personal assets or trust assets?

There is no guidance in the Act as to which assets may be included in a QAC, for example, should they include the person's:

- personal assets;
- assets held by the person as trustee of the trust to which the financial service will be provided; and/or
- assets held by the person as trustee of other trusts.

On one view, if a person is expressly and clearly entering into an arrangement or a transaction to acquire or dispose of financial products in its capacity as trustee of a particular trust (including an SMSF), the QAC should cover:

- the assets or income of the relevant trust; and
- not the trustee's own personal assets or assets of other trusts.

However, on a literal reading of the QAC provisions in the Act, the QAC simply needs to address the person's assets or income. On the face of the Act, this will extend to all assets legally or beneficially owned by the person.

We are aware of significantly varied practices adopted by industry participants in this regard and would welcome legislative clarification about what is intended. Our preference would be for all assets held by the person (other than as nominee or custodian) to be capable of inclusion in the QAC.

SMSF versus other types of trusts

Since the introduction of Chapter 7 of the Act, there has been considerable industry and regulatory debate about whether superannuation fund trustees can be treated as wholesale clients on a basis of a QAC.

It is clear that the provision (ie. Issue) of a superannuation product (such as a superannuation wrap account) to a person means that the client must always be treated as a retail client for that issue.[6]

It is also clear that the provision of other types of financial product (such as an IDPS account) can be provided to the trustee of a superannuation fund on the basis of a QAC.[7]

The more challenging question is whether financial services, such as advice and dealing, about, or in respect of, the relevant superannuation fund's investments, can be provided to the trustee as a wholesale client on the basis of a QAC. This is because the legislation effectively provides that when:

- a financial service (other than the provision of a financial product) is provided to a person (other than a trustee of a superannuation fund with at least $10 million in net assets); and
- the service 'relates to a superannuation product', the service is taken to be provided to the person as a retail client.[8]

In our view, investment services do not 'relate' to the 'superannuation product' (i.e. the interest of the beneficiaries in the superannuation fund). Instead, those investment services relate to the *assets* of the superannuation fund itself.

In QFS 150, ASIC adopted a conservative approach to this provision by indicating that such services would be provided on a retail client only basis. However, ASIC revised its position[9] in 2014 by withdrawing QFS 150 and stating it would not take action if the person providing the financial service determined that the trustee is a wholesale client based on the QAC test. While this is helpful, we believe it would provide certainty to industry participants if this revised view could be codified.

Certification of control

As noted above, 'control' is relevant for relevant for two reasons, namely determining whether:

- the net income or gross assets of controlled trusts or companies can be included in a person's QAC (**Extended QAC**);[10] and

[6] Section 761G(6)(a) of the Act.

[7] Section 761G(6)(b) of the Act, in particular the words '(other than the provision of a financial product)'.

[8] Section 761G(6)(c) of the Act.

[9] ASIC Media Release (14-191MR) https://asic.gov.au/about-asic/news-centre/find-a-media-release/2014-releases/14-191mr-statement-on-wholesale-and-retail-investors-and-smsfs/.

[10] *Corporations Regulation 2001* (Cth) reg 7.6.02AC.

- a trust or company controlled by the holder of a QAC can be the relevant wholesale client that receives a financial service (**Controlled Entity**).[11]

In the Extended QAC scenario, the relevant regulation extends the type of assets and income that can be included in the QAC. If the accountant certifies the trust or company as controlled by the QAC holder, then those assets or income may be included without the need for the service provider to 'second guess' whether the trust or company are in fact controlled. This is an effective 'safe harbour' for the recipient of the QAC.

In contrast, the Controlled Entity scenario relates to whether the controlled trust or company can itself qualify as a wholesale client. The regulation in this case refers to control in an objective (and not certified) sense – the question of control does not form part of the certificate for the purposes of the Controlled Entity scenario and therefore does not set up a safe harbour for the recipient of the QAC. This is a curious outcome given that the accountant has already certified control for the purposes of the Extended QAC.

We believe it would be appropriate to align the two relevant regulations so that the relevant accountant's certification of control can also be relied on for the Controlled Entity scenario.

(b) Proposed consent requirements for the wholesale client test

In the Treasury Submission, we expressed the view that consent requirements for wholesale clients could be particularly useful when used in conjunction with the product value and the qualified accountant's certificate tests. We consider that relevant consent requirements could include acknowledgements and consents in relation to some of the matters contained in the Quality of Advice Review, and other aspects of wholesale client status, such as:

(a) having received warnings that retail client regulatory and legal protections will not apply to them;

(b) not receiving a product disclosure statement (**PDS**);

(c) not having recourse to the Australian Financial Complaints Authority;

(d) not having the benefit of the design and distribution obligations (**DDO**) and understanding that the financial product issuer is not required to consider the suitability of the financial product for the investor; and

(e) they understand that the value of an investment can go down as well as up, that past performance is not a guarantee of future performance and that there is no guarantee that the investor will be able to recover the amount they invested.

We reiterate the proposal made in the Treasury Submission that any such consent requirements should not apply to professional investors given their businesses and their level of sophistication and investment experience. Of course, introducing a requirement for wholesale client consents could give rise to administrative burdens and more paperwork for both financial product issuers and their clients so we suggest that the consent forms are as user-friendly as possible including:

(a) combined with the financial product application form, so that an additional form is not needed; and

(b) capable of being signed in the same way as the application form, which may be by electronic signature.

[11] *Corporations Regulation 2001* (Cth) reg 7.6.02AB.

(c) Proposed changes to the sophisticated investor test

We note that the current sophisticated investor test in section 761GA involves an assessment by an AFSL holder that the client has such previous experience in using financial services, and investing in financial products, that allows it to assess the key aspects and risks of the service or product being offered. As we noted in the ALRC Submission and the Treasury Submission, in our experience the sophisticated investor test has not been heavily utilised due to its subjectivity. However, we consider that the sophisticated investor test may continue to provide some utility and to serve a purpose to cover a situation where a person is clearly knowledgeable about financial products (e.g. an industry professional) but does not satisfy the financial threshold or have a qualified accountant's certificate.

In our submissions we queried whether the subjective element of the test could be replaced by:

(a) a prescribed, objective list of factors and attributes that an AFSL holder is required to run through with the client, which could be prescribed by an industry standard checklist and tailored for certain categories of products or services; and

(b) a list of attributes, qualifications, experience or characteristics of an investor which tend to suggest that person is a sophisticated investor.

A key concern is where clients invest in products that are clearly not suited to them, with concern that inappropriately identifying clients as wholesale clients avoids that client being offered the protections afforded to retail clients. These protections include the provision of prospectuses or PDSs and the new DDOs, which are designed to promote the provision of suitable products to consumers. The objective checklist could include details on the differences between the rights of wholesale clients and retail clients in order to better inform clients as to their position. The checklist could also provide examples of scenarios where clients have been disadvantaged by being inappropriately treated as a wholesale client, in order to illustrate the importance of this distinction.

We recognise that producing a standard form checklist to contain these lists (which could then be tailored for certain categories of financial product or service) would require a substantial investment of time by ASIC and the AFSL community and that the benefit of undertaking this work would need to be weighed up in light of the likely take up rate.

We are aware of conflict management concerns raised in relation to the use of the sophisticated investor test by product issuers. While all AFSL holders are required to have adequate arrangements to manage conflicts, we would not object if the Inquiry proposed to limit the use of the sophisticated investor test to use by AFSL holders who are independent of the product issuer.

Separately, we submit that section 761G could be made even simpler through including a sophisticated investor limb in the professional investor definition, rather than having both terms operating separately.

(d) Reducing limitations to the exclusions under the wholesale investor/client tests

In the ALRC Submission, we expressed the view that the limitations for certain types of financial products add an unnecessary extra level of complexity to the wholesale investor/client tests. We submitted that, in a general sense, not incorporating a product-by-product level of classification into the definitions would make the exemptions less complex, whilst still ensuring that an individual (unless that individual is wealthy enough to qualify as a professional investor) will be treated as a retail client for these products.

We also submitted that there are two exceptions to this proposal:

(a) The approach to general insurance products should be kept the same as current law, except to remove the small business element of the current test, as

noted in our ALRC Submission. The current law prescribes a limited number of general insurance products that are deemed to be provided to retail clients. This reflects the reality of the commercial insurance market wherein businesses purchase insurance as wholesale clients, with the extremely rare and few exceptions of products purchased by businesses which are deemed to be provided to retail clients. The approach to remove this and have all general insurance products deemed to be provided to retail clients unless that person is acquiring the product as a (non-small) business certainly reduces complexity, but would represent a fundamental shift in the current commercial industry, rendering all general insurance products potentially made available to retail clients and therefore enliven the significant compliance and other obligations which current providers of commercial general insurance products are simply incapable of complying with (given their current operating models which do not include the provision of products currently deemed to be provided to retail clients at all). This could also have adverse and arbitrary consequences, as outlined in our ALRC Submission. We propose removing the small business element of the current test, so that a general insurance product will only be deemed to be acquired by a retail client where it is:

(1) a product of the type prescribed by the current regulations; and

(2) acquired by an individual for personal, domestic or household use. In our view, this would simplify the provision and would avoid the arbitrary outcomes outlined above.

(b) Life insurance products can be sold to corporations as well as individuals. When sold to corporations, they are often designed to provide insurance benefits to employees (for example, salary continuance), thereby facilitating individuals obtaining cover under the group policy arranged by the employer. Group life insurance arrangements are also commonly held by superannuation trustees for the benefit of members. When sold to individuals, directly or via a financial adviser, the policyowner is typically, but not always, the life insured. Sometimes an individual may acquire life insurance in respect of the life of another person. Increasingly, new income stream products are being sold by life companies to individual retirees. When sold to individuals who are also the lives insured, there are grounds to treat such individuals as retail clients, similarly to the treatment of superannuation. When contemplating simplification of the definitions of retail and wholesale clients, we submit that care should be taken not to inadvertently capture life insurance products that are currently outside the regime, and are regulated entirely separately.

5 Any potential adjustments to proposals to change the wholesale investor/client tests to address the concerns of stakeholders

We refer to section 4 above.

6 The process to be adopted prior to settling any change to the wholesale investor/client tests, including any additional Government consultation process necessary to ensure full and proper consultation prior to implementing any change

The wholesale investor/client tests are an important component of Australian financial services regulation and any changes to them would have significant implications for the financial services sector in Australia and for international financial services providers who provide financial services and products to Australian based clients.

The wholesale investor/client tests have a wide application across a range of financial services sub-sectors including superannuation, insurance and managed investment schemes and it will be important to give stakeholders in all relevant sectors the opportunity to consider and provide feedback in relation to the proposals.

While consultation in relation to the principles underlying any changes is welcome we believe that consideration of the detail of any proposed changes will also be very important and we anticipate that the financial services sector generally would welcome an opportunity to review and comment upon exposure draft legislation as part of the consultation process.

7 Any related matters

(a) Threshold in section 708(1) of the Act must also be increased

If the financial thresholds for wholesale investors are going to be increased, it must follow that the threshold for the small scale offerings exemption in section 708(1) of the Act should also be increased. This exemption is very important to small businesses.

In short, section 708(1) provides an exemption from the requirement to prepare a disclosure document, allowing entities to raise up to $2 million by making offers of up to 20 people in any rolling 12 month period (the **Small Scale Offering Exemption**).

Subsection 708(1) was introduced into the Act by the *Corporate Law Economic Reform Act 1999* (Cth) on 13 March 2000. In introducing this exemption, Parliament stressed the positive impact that it would have on small businesses:

> *"Access to capital has been a concern for SMEs, as they may find that the cost of preparing and lodging a prospectus can be excessive having regard to the amount of capital which is sought to be raised. The provisions will facilitate fundraising by SMEs in a number of ways.*
>
> *A disclosure document will not be required if a person makes an unlimited number of personal offers of securities that result in securities being issued to 20 or fewer persons in a rolling 1 year period with no more than $2 million being raised (proposed subsections 708(1) — (7)). This will reduce the costs for small business when making small scale offerings and will free them from constraints in fundraising without exposing investors to unnecessary risks.*
>
> *The 20 issue exclusion will facilitate fundraising by SMEs […]".*[12]

In summary, given that the $2 million threshold in the Small Scale Offering Exemption was set almost 25 years ago, this should, at a minimum, be increased in the same way as the proposed increases to the monetary thresholds for the wholesale client exemptions.

(b) Important new exemption to facilitate fundraising by small businesses in line with other jurisdictions

We submit that the Committee Secretary has an opportunity under this Inquiry to assist the Government to address an issue affecting small businesses and demonstrate its support for small businesses, particularly those impacted by increasing cost-of-living pressures and needing to undertake a small level of fundraising.

The significant cost of preparing a prospectus is often too much for such small businesses to bear and is a real limitation on their ability to access equity funding.

To facilitate access to equity funding by small businesses, and to bring Australia's fundraising rules into line with the position in certain other sophisticated jurisdictions, a new separate exemption could be introduced to allow offers to up to 50 persons in any rolling 12-month period, without being subject to any dollar threshold (the **50 Person Exemption**). We propose that this new exemption would exist alongside, but separate to, the Small Scale Offering Exemption.

[12] Explanatory Memorandum to the *Corporate Law Economic Reform Program Bill 1998* (Cth), at [8.1]-[8.3] – click here.

The following table summarises the equivalent exemption to the proposed 50 Person Exemption in certain other sophisticated jurisdictions and shows that Australia's prospectus exemptions are currently out of step with its international peers:

Country	Number of offers permitted without a prospectus being required	Any maximum monetary amount that can be raised under this exemption?
European Union[13]	150	No
Hong Kong[14]	50	No
Singapore[15]	50	No
United Kingdom[16]	150	No

(c) Clarifying the meaning of "amount raised" and "amount payable"

In calculating the relevant monetary thresholds, section 708(1) refers to the "amount raised" and section 708(8) refers to the "amount payable". These terms are defined (non-exhaustively) in section 708(7) and section 708(9) respectively.

There is some uncertainty as to whether non-cash consideration is to be included in either of these calculations.

By way of example, if someone is doing a share-for-share exchange (i.e. exchanging shares in one company for newly issued shares in another company), it should be clear that the value of the consideration provided should be included in the calculation of the "amount raised" or "amount payable" (as the case may be) even though no cash was paid by the person to whom the new shares are issued.

This uncertainty could easily be clarified by including, in section 708(7) and section 708(9), drafting to the effect that if the consideration provided does not include a cash sum, the value of the consideration is to be included in the calculation.[17]

[13] Regulation (EU) No 2017/1129, art 1(4)(b).

[14] *Companies (Winding Up and Miscellaneous Provisions) Ordinance* (Hong Kong), seventeenth schedule, part 1, paras 2–3.

[15] *Securities and Futures Act 2001* (Singapore) s 302C.

[16] Prospectus Regulation (UK) r 1.2.3.

[17] By way of illustration, see the wording used in section 621(4) of the Act. Although this is used in a different context (i.e. determining the minimum bid price under a takeover), the drafting of section 621(4) illustrates the type of wording that we had in mind.

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Yours sincerely

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