



**Property Council of Australia** ABN 13 00847 4422  
**A** Level 7, 50 Carrington Street, Sydney NSW 2000  
**T** +61 2 9033 1900  
**E** info@propertycouncil.com.au  
**W** propertycouncil.com.au  
**T** @propertycouncil

15 May 2024

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

By email only: corporations.joint@aph.gov.au

To Whom It May Concern

## **Submission to wholesale investor and wholesale client tests inquiry**

The Property Council of Australia (the Property Council) welcomes the opportunity to respond to the Parliamentary Joint Committee on Corporations and Financial Services inquiry into the wholesale investor test for securities and the wholesale client test for financial products and services (the wholesale investor/client tests).

The Property Council is the peak body for owners and investors in Australia's \$670 billion property industry. We represent owners, fund managers, superannuation trusts, developers, and investors across all four quadrants of property investments: debt, equity, public and private.

The Property Council acknowledges the important role regulation plays in protecting investors, whether they are retail investors or wholesale investors as defined by the *Corporations Act 2001*.

Retail investors have been protected by a number of relatively new regulatory tools provided to the Australian Securities and Investment Commission (ASIC), namely through the *Treasury Laws Amendments (Design and Distribution Obligations and Product Intervention Powers) Act 2019*. These design and distribution obligations (DDOs) and product intervention powers (PIPs) are evidence that ASIC is well equipped to deal with a broad range of investments available to retail investors.

However, wholesale clients (as defined by the *Corporations Act 2001*) are not without regulatory protection. For example, ASIC's market misconduct rules apply to those offering wholesale investments, and they are also subject to the general obligations of section 912A of the *Corporations Act 2001*, not limited to acting "...honestly and fairly", ensuring they comply with financial services laws and are appropriately trained and competent.<sup>1</sup>

At the heart of this inquiry is the question of whether some investors, able to be classified as wholesale investors under the wholesale investor/client tests, namely the individual wealth test, are suffering because of differing obligations and protections afforded to wholesale investors by

---

<sup>1</sup> *Corporations Act 2001*(Cth)

financial services legislation and whether – in order to protect investors – we should limit access to the individual wealth test to a wealthier cohort.

The Property Council submits that there is currently limited evidence of broader harm or market failure in relation to wholesale investments, to the contrary they – on average – experience higher risk-adjusted returns for investors than retail schemes. In general, investors are aware of the differing rights and obligations on Australian Financial Services (AFS) licensees and invest accordingly.

Further, many of the managed investment schemes or financial failures resulting in material investor harm that have been identified in Treasury's review were either related to registered managed investment schemes (i.e. they were retail schemes with the applicable protections) or involved instances of fraud which is unrelated to the wholesale investor tests and individual thresholds.

Without evidence of harm or market failure, the Property Council believes no case has been made to increase the thresholds to artificially limit the number of investors who qualify under the wholesale client tests, namely the individual wealth and product value tests.

In order to address concerns surrounding capabilities of investors, the Property Council has recommended the investigation of a number of alternative approaches. These approaches are explained in greater detail later in this submission, and include investigating reforming the sophisticated investor test and implementing an ongoing statutory review of the tests every five years to ensure they are fit-for-purpose.

### **Background on the wholesale investor/client tests**

The *Corporations Act 2001* prescribes four objective eligibility tests to be considered a wholesale investor, namely the product value test, individual wealth test, small business test or the professional investor test.

In establishing these tests, it was suggested that – in particular for the individual wealth test or the product value test – that a minimum sum of gross income or personal assets, gave individual investors assumed knowledge or experience to understand the nature of the investment they were making – the risks, their rights and obligations under law.

This argument is incredibly flawed. For example, in the property industry, many clients choose to invest in unlisted direct property funds, in part because of their superior risk-adjusted potential returns. Investors in these funds may be eligible to participate as wholesale clients should they meet the individual wealth test of a gross annual income of \$250,000 over two years or \$2.5 million in assets.

Whilst these investors are eligible, the investment/fund managers who manage their investment day-to-day would likely not be eligible – not meeting the product value or individual wealth tests required to participate as an investor in their own fund even though they are professionally qualified and experienced investment managers.

This illustrates a simple point: some investors do not meet the current thresholds but are sophisticated such that they should have access to wholesale products.

Further to these four objective tests, the *Corporations Legislation Amendment (Simpler Regulatory System) Act 2007* introduced a fifth test, an alternative subjective test known as the

sophisticated investor test. Rather than the static thresholds of the product value and individual wealth tests, this test allowed funds to assess a client's appropriateness to engage with a wholesale investment, whether that is through professional experience or training, who might not meet the strict requirements for income or personal assets.

The subjective nature of this test, where the client must satisfy the AFS licensee on 'reasonable grounds' their capacity to understand and engage with the product appropriately, is fundamentally flawed and has no doubt led to the overreliance by fund managers on other tests to satisfy the requirements of a wholesale client.

It has been put to the Property Council that the subjectiveness of the test, and the reliance on a declaration from the client as to their suitability, has meant the uptake and engagement of this alternative test has been low – the potential liability associated with a subjective test of this nature is deemed too risky to undertake.

As part of its recommendation, the Property Council suggests reform to the broader sophisticated investor test outlined later in this submission.

### **Review of the current wholesale investor/client tests**

In reviewing the current wholesale investor/client tests, and in consultation with other industry associations and stakeholders, we have assessed the evidence of harm or market failure as a result of the current wholesale investor/client tests.

The Stockbrokers and Investment Advisers Association's (SIAA) discussion paper *'Does the wholesale investor test need to change?'* outlines in detail the (lack of) evidence of harm to investors or of a market failure.<sup>2</sup>

In its own engagement with its members on this inquiry, the Property Council has been unable to connect a supposed deficiency with the wholesale investor tests – all of which is reported as a perception or anecdotes by certain unnamed stakeholders – with any systemic problems with the tests causing significant or widespread impacts on investors.

The Property Council echoes the sentiments expressed in the SIAA's discussion paper, that is "...calls for change to the wholesale investor test appear to be a solution looking for a problem."

There is a fundamental misunderstanding between who is *eligible* for a wholesale investment, by virtue of for example their gross income or personal assets, and what types of investors are actually engaging with these financial products, and how the test is applied in practice.

This disconnect must be central to the committee's inquiry and deliberations when it is considering potential changes to the wholesale investor/client tests, and it must undertake detailed research and relevant examples within case studies in order to justify any proposed changes.

---

<sup>2</sup> Stockbrokers and Investment Advisers Association. (2022). *Does the wholesale investor test need to change?*. <https://www.stockbrokers.org.au/wp-content/uploads/SIAA-DiscussionPaper-WholesaleInvestorTest-220323.pdf>

## Review of proposals to change the test

There have been a number of proposals over recent years that have canvassed changes to the wholesale investor/client tests. For example, the *Future of Financial Advice* (FOFA) reforms undertaken by government in 2012 explored a number of options such as increasing the product value threshold from \$500,000 to \$1m or introducing the sophisticated investor test as the sole way to distinguish between wholesale and retail clients.

Recently, the Financial Services Council (FSC) has proposed an amendment to the individual wealth test, namely the net asset test, as well as proposing a safe harbour provision for AFS licensees using the sophisticated investor test due to its high degree of subjectivity.<sup>3</sup>

The Property Council has reviewed three common proposals, namely proposals to increase the individual wealth test, either the net asset test or indexing the existing thresholds, or proposing legislative amendments to implement a statutory review of the provisions every few years. These proposals however are not exhaustive and the committee should consider all proposals against the issues raised in this section.

### Proposals to increase the net asset test

The Property Council is opposed to proposals which seek to amend the individual wealth test by increasing the net asset test. Recent examples include the FSC's proposal to increase the thresholds from \$2.5m to \$5m, including the family home.

These proposals seek to arbitrarily limit the number of investors eligible to qualify as wholesale investors, in part because of a perception that investors between these thresholds should not qualify as wholesale clients due to a perceived lack of financial literacy, capability or understanding. The Property Council has not seen any evidence to back up this claim.

The Property Council does not agree that investors in this net asset band should be divested of their choice in engaging in either retail or wholesale investments, in part because (as previously expressed) there is limited evidence to suggest that the existing thresholds have led to poorer outcome for investors, as a cohort.

Property Council members, including fund managers, have expressed significant concern regarding their own business's viability and the financial best interests of their clients if the individual wealth test was increased arbitrarily, say for example to \$5 million.

Firstly, clarity would be required concerning the forced redemption of investors who had invested in a fund under a previous (i.e. lower) threshold, and whether they would be able to undertake the full spectrum of investment including in new capital raisings.

Further to this, clarity is required regarding individual funds or products themselves – if a product has been operating legally, taking wholesale clients at a particular threshold, they should be able to continue to do so.

If the FSC's proposal was to be adopted, the theoretical number of potential investors under the individual wealth test would fall from 11.7% to 3.1%. This would have a severe impact on individual

---

<sup>3</sup> PricewaterhouseCoopers. (2023). *Assessing Options for Modernising the Wholesale Investor Test*. <https://fsc.org.au/resources/2700-assessing-options-for-modernising-the-wholesale-investor-test/file>

funds, including reducing the funds under management (FUM), potentially forcing redemptions which will cause funds to exit and sell properties (heavily discounted at this time in the economic cycle), and investors would also incur a forced capital gains tax event.

Without grandfathering provisions for existing investors and funds there exists a real and significant concern that – in the pursuit of supposed yet-articulated better outcomes for investors – that a substantial and avoidable outcome would take place.

Even with grandfathered provisions however, increasing the thresholds would stifle new competition into the market, thereby reducing choice and competitive tension, leading to poorer outcomes for consumers. New competitors into the market, having to engage with a smaller pool of investors than older, grandfathered funds, would be at a further disadvantage.

These outcomes are avoidable by not increasing the net asset test threshold.

### **Proposals to index the existing thresholds**

The Property Council is opposed to proposals to index the existing thresholds, namely for the individual wealth test and the product value test.

Further to the Property Council's position on increasing the net asset test threshold, there has been limited evidence to support reinforcing the existing arbitrary figure, as identified by PwC at 11.7% in 2022.

Choice, competition, and a variety of financial products for consumers should be considered more important than maintaining arbitrary parity with either inflation or another index. The FSC, in their proposal, rely on the Consumer Price Index (CPI) to inform what thresholds could look like in forecasted future years.

Besides the debate about whether CPI would be the most appropriate measure of inflation to use, the same issue would arise concerning the fact that inflation is forecasted – and therefore would add uncertainty and distort investment decisions, increasing complexity for consumers without an articulated benefit to them.

The committee must consider in its inquiry why we should arbitrarily limit the number of investors in wholesale investments – who consent to the arrangements and subscribe to the product understanding the risk and returns thresholds of funds they are investing in.

Proposed changes would limit investment to a smaller, wealthier cohort which, as we have established, there is limited evidence to show they are by definition more sophisticated, knowledgeable, or capable investors.

### **Ongoing statutory reviews of the tests**

The Property Council would support a proposal which included provisions for a statutory review of the wholesale investor/client tests, which would include a formal consultation and engagement with industry and stakeholders.

These periodic reviews, such as every three, five or 10 years, could be appropriate at reviewing whether the existing regime is fit-for-purpose and whether any regulatory intervention by government was required. However, for the reasons outlined previously, these reviews must not be focused simply on the thresholds imposed by either the individual wealth test or the product value test.

Instead, they should focus on the broader wholesale client test regime, whether it is as a whole achieving appropriate outcomes for investors, as well as whether further amendments to the sophisticated investor test is required to encourage greater application by industry.

### Property Council recommendation

The Property Council has identified four recommendations for the committee to consider:

#### **1. No increases or indexing of the individual wealth test or product value test**

As outlined previously, the Property Council does not support an increase or indexing of the existing wholesale investor/client test thresholds.

Increases to the threshold would damage industry and ultimately harm investors, not limited to:

- Forcing redemptions which may require funds to exit the market and sell assets (heavily discounted at this time of the economic/property cycle)
- These forced redemptions may incur a capital gains tax event for investors
- Stifle new competition in the market, reducing competitive tension and leading to poorer outcomes for consumers
- Restricting access to wholesale investments to existing asset-wealthy investors, reducing choice for consumers who seek higher risk-adjusted returns.

As previously stated, there is currently limited evidence to suggest that the existing thresholds have led to poorer outcome for investors, as a cohort.

#### **2. No changes to the small business or professional investor tests**

The Property Council has not been presented a case to amend either the small business test or the professional investor test. These tests serve an important function to facilitate investment from businesses and professional investors as defined by the *Corporations Act*.

Modifications to these tests should be considered comprehensively as part of the entire wholesale investor/client test regime.

#### **3. Investigate reforming the sophisticated investor test**

In lieu of increases to the individual wealth and product value tests, the Property Council supports an investigation into reforming the sophisticated investor test, including:

- New objective assessments such as a training or education component,
- Creating a best practice framework, and
- Safe harbour provisions in order to provide AFS licensees with protection from liability if certain conditions are met (such as through new objective assessments or a best practice framework).

Reforming this test with new protections for AFS licensees, alongside institutional support for the adoption of the test as best practice, will address many of the concerns outlined by stakeholders.

#### **4. Ongoing statutory review every five years**

As outlined previously, the Property Council would support ongoing statutory reviews of the wholesale investor/client tests, to ensure they are fit-for-purpose and are best serving industry and consumers.

To reiterate, the reviews should focus on the broader wholesale client test regime, whether it is as a whole achieving appropriate outcomes for investors, instead of focusing only on thresholds for individual tests.

### Further consultation

If the committee recommends any changes to the wholesale investor/client tests, including any amendments to the thresholds, it must recommend that the government first consult with industry and stakeholders to quantify the impacts of proposed changes to AFS licensees and investors as outlined in this submission.

Within this consultation, it must include detailed investigation and engagement with industry on two matters:

- Grandfathering provisions, and
- Phased implementation.

As outlined previously, grandfathering provisions must be central to any investigation of amending the individual wealth test and product value test thresholds. Clients and funds must be grandfathered to ensure forced redemptions do not lead to a market-wide failure and severe outcomes for investors.

Further to this, a phased implementation for any changes must be undertaken, preferably over a period of at least five years. Phasing in amendments provides industry much needed certainty, allows AFS licensees to manage the transition particularly if there are changes to their business model, and allows longer term planning which will facilitate market stability and risk mitigation.

The Property Council would welcome the opportunity to discuss this submission in more detail. Please reach out to Dan Rubenach, Policy Manager at [drubenach@propertycouncil.com.au](mailto:drubenach@propertycouncil.com.au) to arrange a meeting.

Yours sincerely



Antony Knep  
**Executive Director – Capital Markets**  
**Property Council of Australia**



**Property Council of Australia** ABN 13 00847 4422  
**A** Level 7, 50 Carrington Street, Sydney NSW 2000  
**T** +61 2 9033 1900  
**E** info@propertycouncil.com.au  
**W** propertycouncil.com.au  
**TW** @propertycouncil

### Appendix – jurisdiction comparison

Jurisdiction	Income test	Assets Test	Sophisticated investor test
United States of America	<ul style="list-style-type: none"> <li>US\$200,000 (currently equivalent to A\$310,000) in each of the two most recent calendar years</li> <li>Joint income with a spouse or spousal equivalent exceeding US\$300,000 (currently equivalent to A\$465,000) for those years and a reasonable expectation of the same income level in the current year</li> </ul>	<ul style="list-style-type: none"> <li>Net worth of at least US\$1 million (currently equivalent to A\$1.55 million),</li> <li>Can be joint net worth with a spouse or spousal equivalent</li> <li>Excludes value of primary residence</li> </ul>	<ul style="list-style-type: none"> <li>An entity of a type not otherwise qualifying as accredited that own investments in excess of US\$5 million (currently equivalent to A\$7.75 million)</li> <li>An individual holding in good standing any of the general securities representative license (Series 7), the investment adviser representative license (Series 65), or the private securities offerings representative license (Series 82)</li> <li>A knowledgeable employee of the issuer of securities where that issuer is a private fund</li> <li>A family office and its family clients if the family office has assets under management in excess of US\$5 million (currently equivalent to A\$7.75 million) and whose prospective investments are directed by a person who has such knowledge and experience in financial and business</li> </ul>



Jurisdiction	Income test	Assets Test	Sophisticated investor test
			matters that such family office is capable of evaluating the merits and risks of the prospective investment
United Kingdom	<ul style="list-style-type: none"> <li>Signed statement within the past 12 months confirming they have an annual income of at least £100,000 (currently equivalent to A\$190,000).</li> </ul>	<ul style="list-style-type: none"> <li>Net assets of at least £250,000 (currently equivalent to A\$480,000) (excluding their primary residence, rights under a qualifying contract of insurance, or pensions), and that they accept the risks of this classification.</li> </ul>	<p>Individuals can be classified as elective professional clients based on the following conditions:</p> <ul style="list-style-type: none"> <li>individuals must request and receive a statement acknowledging they have been assessed by a firm as having the expertise, experience, and knowledge to be capable of making their own investment decisions and understand the risks involved.</li> <li>firms covered by the Markets in Financial Instruments Directive (MiFID) must be satisfied that the client satisfies additional criteria including measures of professional experience and knowledge in financial services, and size of financial investment portfolio.</li> </ul>
European Union	<ul style="list-style-type: none"> <li>N/A</li> </ul>	<p>An individual qualifies as an Elective Professional Client must satisfy all of the following:</p> <ul style="list-style-type: none"> <li>The 'Qualitative Test': The firm undertakes an adequate assessment of the expertise, experience and knowledge of the client that gives reasonable</li> </ul>	<ul style="list-style-type: none"> <li>See assets test as there is an assessment aspect.</li> </ul>

Jurisdiction	Income test	Assets Test	Sophisticated investor test
		<p>assurance that the client is capable of making their own investment decisions;</p> <ul style="list-style-type: none"> <li>• The 'Quantitative Test': Client meets at least two of the following: <ul style="list-style-type: none"> <li>○ has carried out transactions of significant size on the relevant market at an average frequency of 10 per quarter over the previous four quarters.</li> <li>○ has financial instrument portfolio exceeding EUR 500,000 (currently equivalent to A\$825,000).</li> <li>○ works or has worked in the financial sector for at least one year;</li> <li>○ state in writing that it wishes to be treated as a professional client, the firm must give the clear warning of the</li> </ul> </li> </ul>	

Jurisdiction	Income test	Assets Test	Sophisticated investor test
		<p>protections that client may lose and the individual must state in writing, in a separate document from the contract, that they are aware of the consequences of losing such protections.</p>	
Hong Kong	<ul style="list-style-type: none"> <li>N/A</li> </ul>	<p>A portfolio of at least HK\$8 million (currently equivalent to A\$1.58 million) (or its foreign currency equivalent). The portfolio (including a share of a portfolio) of an individual is ascertained by reference to one or more of the following documents issued or submitted within 12 months before the relevant date:</p> <ul style="list-style-type: none"> <li>a statement of account or a certificate issued by a custodian</li> </ul>	<ul style="list-style-type: none"> <li>N/A</li> </ul>

Jurisdiction	Income test	Assets Test	Sophisticated investor test
		<ul style="list-style-type: none"> <li>a certificate issued by an auditor or a certified public accountant, or</li> <li>a public filing submitted by or on behalf the individual.</li> </ul>	
Singapore	<ul style="list-style-type: none"> <li>Income in the preceding 12 months is not less than SGD300,000 (currently equivalent to A\$340,000)</li> <li>The investor must also consent to being classified as an Accredited Investor. This requirement requires: <ul style="list-style-type: none"> <li>that the investor is provided with certain statements and a clear explanation in plain language of the effect of consenting to being treated as an Accredited Investor in sufficient detail to enable the investor to make an informed decision; and</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>Net personal assets exceeding SGD2 million (currently equivalent to A\$2.28 million) in value, of which the net value of the investor's primary place of residence can only contribute up to SGD1 million (currently equivalent to A\$1.14 million);</li> <li>Net Financial Assets exceeding SGD1 million (currently equivalent to A\$1.14 million) in value.</li> </ul> <p>Joint accounts can also qualify for Accredited Investor status if at least one joint account holder qualifies as an Accredited Investor and all other holders must opt in for Accredited Investor status for the joint account.</p>	<ul style="list-style-type: none"> <li>N/A</li> </ul>

Jurisdiction	Income test	Assets Test	Sophisticated investor test
	<ul style="list-style-type: none"> <li>○ a written statement from the relevant investor that:</li> <li>○ the investor knows and understands the consequences of being treated as an Accredited Investor;</li> <li>• the investor consents to being treated as an Accredited Investor; and</li> <li>• the investor knows that they may at any time withdraw their consent.</li> </ul>	<p>The consent requirement also applies to the assets test.</p>	
Canada	<ul style="list-style-type: none"> <li>• Net income before taxes exceeded C\$200,000 (currently equivalent to A\$226,000) in both of the last two years and who expects to maintain at least the same level of income this year</li> <li>• CAD\$300,000 (currently equivalent to A\$340,000) in joint income with a spouse</li> </ul>	<ul style="list-style-type: none"> <li>• Financial assets worth more than C\$1 million (currently equivalent to A\$1.13 million) (alone or with spouse) before taxes but net of related liabilities</li> <li>• Net assets of at least C\$5.0 million (currently equivalent to AUD\$5.65 million)(alone or with spouse)</li> </ul>	<ul style="list-style-type: none"> <li>• An individual who currently is, or once was, a registered adviser or dealer, other than a limited market dealer.</li> </ul>