



## **HALSEY LEGAL SERVICES AND LICENSEE SOLUTIONS ARTICLE**

### **Sophisticated and Wholesale Investors – Accountant's Certificates and AFS Licensee's Statements**

#### **1. Introduction**

There are fundamental differences in the obligations of service providers to retail and wholesale clients. However, there are many common misunderstandings of the relevant provisions involved in identifying and classifying investors as retail, wholesale or sophisticated. Accountants are regularly asked to provide sophisticated or wholesale investor certificates, however there is little guidance available in what can be a difficult area. Australian financial services licensees ("AFSLs") may also be asked to provide a statement that the investor has sufficient experience to be classified as wholesale or sophisticated.

#### **2. Broad summary of the legislation relating to certificates for sophisticated or wholesale investors**

The section directly below gives a broad outline of the Corporations Act 2001 provisions relating to certificates and statements for sophisticated or wholesale investors.

Chapter 6D relates specifically to fund raising and the issue of securities only. Chapter 6D contains no reference to the concept of "wholesale clients" or "wholesale investors". The heading of the relevant provision in section 708 includes the phrase "Sophisticated investors".

The provisions in relation to the status of clients are much broader in Chapter 7 than in Chapter 6D. The Chapter 7 provisions cover the financial services area more comprehensively, and also cover the full range of financial products – not just the issue of securities as part of fund raising.

#### **Chapter 6D**

The Corporations Act permits offers of a corporate body's securities to be made to persons defined as "sophisticated investors" without a disclosure document.<sup>[i]</sup> One of the subsets of such persons defined as sophisticated investors includes persons in respect of whom a "qualified accountant" has certified has net assets of at least \$2.5 million (this includes the net assets of a company or trust controlled by the person) or a gross income (this includes the income from a company or trust controlled by the person) of at least \$250,000 p.a. for each of the 2 previous financial years [Section 708(8)(c)(i) or (ii) and Regulation 6D.2.03].

Legislative amendments in 2007 permit the net assets or gross income of a company or trust controlled by the person to be included in determining this criteria [section 708(8)(d); section 708(9B)-(9C)].

The legislation contains a "Note 2" to that subparagraph which issues a warning to AFSLs about the risk that ASIC has the power under section 915C to suspend or revoke their AFS licence if they contravene the section. This reflects the Government's concern about the potential abuse and the gravity of a breach of this provision.



Section 708(8)(d) provides that an offer of the body's securities does not need disclosure to investors under Part 6D.2 (relating to prospectuses) where it is made to a company or trust controlled by a person who meets the requirements of subsection 708(8)(c)(i) or (ii) – i.e. the wealth test or the income test.

Section 708(10) effectively provides that an investor may be classified as sophisticated if an AFSL gives a suitable statement, and certain other steps are taken. This is discussed in more detail below. Section 708(10) does not require an accountant's certificate.

Sections 761G and 761GA are very similar to section 708. However, there are differences, and these are outlined below in relation to the practical issues.

**Chapter 7**

Section 761G(7) of the Corporations Act 2001 provides that a financial product, or a financial service, which does not relate to a general insurance product, superannuation product or RSA product, and is not for use in connection with a business,<sup>[iii]</sup> is provided to a person as a "retail client" unless certain matters are satisfied.

**3. Use of different phrases and exclusions**

The table directly below shows the use of the different phrases.<sup>[iii]</sup>

<b>Corporations Act 2001 Section</b>	<b>Features of investor</b>	<b>Word used to describe</b>	<b>Exclusions</b>
708(8)(c)	The investor has a certificate from a qualifying accountant that the investor has \$250,000 gross income p.a. for each of the last 2 financial years or \$2.5M in net assets.	Sophisticated investor	Nil
708(8)(d)	The investor is a company or trust controlled by a person meeting the requirements in 708(8)(c).	Sophisticated investor	Nil
708(10)	The investor has a statement from an AFSL that the investor has sufficient experience to assess features of the offer, and satisfies other administrative requirements.	Possibly described as sophisticated investor	Nil



708(11)	The investor is an AFSL, controls assets of at least \$10 million, is a listed entity, or similar.	Professional investor	Nil
761G(7)(c)	The investor has a certificate from a qualifying accountant that the investor has \$250,000 gross income p.a. for each of the last 2 financial years or \$2.5M in net assets.	Wholesale client	Does not apply to general insurance (most), RSA or superannuation products <sup>[iv]</sup> . The product is not provided for use in connection with a business.
761G(7)(d)	The investor is an AFSL, controls assets of at least \$10 million, is a listed entity, or similar.	Professional investor	Does not apply to general insurance (most), RSA or superannuation products.
761GA	The investor has a statement from an AFSL that the investor has sufficient experience to assess features of the offer, and satisfies other administrative requirements.	Sophisticated investor	Does not apply to general insurance (most), RSA or superannuation products.

Please note – the table above is a summary, as it is not possible to include the detail of the legislation within this table. There are more details and footnotes below.<sup>[v]</sup>

**4. Accountant's Certificate – who can provide this?**

Sections 708(8)(c) and 761G(7)(c) state that the certificate may only be given by a "qualified accountant."<sup>[vi]</sup> Qualified accountants are accountants who are particular categories of members of the Chartered Accountants Australia and New Zealand, CPA Australia and the Institute of Public Accountants, who are subject to the relevant body's Continuing Professional Education (CPE) requirements, and has confirmed in writing to the relevant body that they comply with the body's CPE requirements<sup>[vii]</sup>.

Certain foreign accountants may also provide certificates, but only if providing a certificate to a person who is resident in the same country (other than Australia) as the accountant. The foreign accountant must also have 3 years' practical experience in accounting or auditing.<sup>[viii]</sup>

**5. Time frame for the certificate, and use of the certificate**

Sections 708(8)(c) and 761G(7)(c) refer to the certificate having been provided within the previous 6 months, however this period has been extended in each case by regulation to 2 years.<sup>[ix]</sup>



A question may also arise as to the time when an investor is classified as wholesale, especially under section 761G where there may be some delay between the time when advice is given, and the product is acquired. In *ASIC v Cassimatis*<sup>[x]</sup> (more generally known as the Storm Case), Edelman J in the Federal Court held that if an investor was a wholesale investor at the time that the advice was given, then that was adequate for the purpose of determining if the investor was wholesale or retail.<sup>[xi]</sup> In that case it was held that it does not matter if at the time that the investment was made, the investor is no longer wholesale.<sup>[xii]</sup>

## **6. The form of the certificate**

ASIC has issued a template certificate, which is available at <http://asic.gov.au/regulatory-resources/financial-services/financial-product-disclosure/certificates-issued-by-a-qualified-accountant/>. The certificate has not been updated for some years, and we recommend that you carefully consider the issues raised in this article.

It is a very common error that the certificate is issued under the wrong chapter of the Corporations Act. For example, a certificate may be wrongly issued under Chapter 6D for financial products to which Chapter 7 relates.

## **7. How are assets and income measured?**

The wording in respect of assets and income of the actual investor is very similar between sections 708 and 761G. The dollar value of income and assets has not been changed since 2001.

Income measured is "gross income". There is no definition of gross income in the Act or Regulations, and ASIC has stated that it has chosen not to provide further guidance on this as it considers this is a professional question for the relevant accountant. Likewise, there is no definition of "net assets". It seems likely therefore if a potential investor owns a property which is negatively geared, when considering the gross income of the investor, the cost of interest is ignored when determining income, but the value of a mortgage is included when determining assets.

Difficulties in interpretation arise when considering assets owned jointly, assets owned by entities associated with the investor, and assets to be acquired jointly.

## **8. Value of assets owned jointly**

When assets are owned as joint tenants, it is well known that each owner is taken to own an undivided interest in the whole asset. This is conceptually a difficult issue. On one hand, one could argue that the more sensible approach seems to be to consider the value of the interest of each joint tenant, on the basis that the value which they currently hold entitles them to a proportionate value equal to their proportionate shares. For example, Mary and John hold land as joint tenants, so they would each be deemed to hold a value of land equal to 50% of the value.

However, on the other hand, ownership as joint tenants is not the same as ownership as tenants in common. If two joint tenants own property together, and one joint tenant dies, the other joint tenant immediately becomes the owner of the whole asset. This alone must mean that the value of a joint tenancy is not exactly the same as a tenant in common. In situations where a Court divides the value of assets (for example, personal partnership disputes), the Court does not generally proceed on the basis that the value of each partner's interest in a piece of property is the value of the whole asset (that would be a nonsense).



The principles of valuation generally proceed on the basis that the value of an asset held as joint tenants should start from the principle of a proportional value, although this may be affected by other criteria.<sup>[xiii]</sup> It might also seem strange if a different approach was taken to income and assets. So, if two investors own an asset that produces income as joint tenants, it would appear inconsistent if the value of the capital asset is that of the whole undivided asset, but the income for each individual was only their individual income.<sup>[xiv]</sup>

The approach taken in *ASIC v Cassimatis*, while not directly on point, was that where a couple acquired an investment as joint tenants, the value of the investment which each was taken to have acquired was half of the value of the overall investment.<sup>[xv]</sup> ASIC submitted that "where a couple has invested jointly (such that each individual owns a 50% share of the investment) then the price or value of the financial products acquired is the price or value of each individual's 50% share in the relevant financial product". Edelman J said "The premise of ASIC's submission is incorrect. When a couple invests jointly, each person owns, and is entitled to, 100% of the investment unless the joint ownership is severed. Joint ownership is ownership of the entirety of the investment for each joint owner."<sup>[xvi]</sup> However, in that case, a different aspect of the legislation was at issue, and Edelman J was able to find that each individual was only held to have paid for half the investment.

Example – Mr and Mrs Smith own their family home as joint tenants. The home is worth \$3 million, and there are no borrowings. If Mr and Mrs Smith are each taken to have an interest worth \$3 million, both will be classified as sophisticated and wholesale investors. It is the writer's view that the Courts may well strive for a position where each would only be treated as having an asset worth \$1.5 million.<sup>[xvii]</sup>

The position is much clearer if two people own an asset as tenants in common.

Example - Penny and her brother Nigel own a rental property valued at \$3 million, which they own as tenants in common. There is no mortgage over the property (the property was bequeathed to them by their aunt). Neither Penny nor Nigel have any other substantive assets, and their individual gross incomes do not exceed \$100,000. Penny and Nigel each have an interest in the property worth \$1.5 million. Neither Penny nor Nigel have sufficient assets to be classified as a sophisticated or wholesale investor.

Given the importance of the distinction between retail and wholesale investors, there is very little case law relating to the relevant provisions. Virtually all case law relates to the question of whether the \$500,000 investment threshold has been met (this is a different way an investor can be classified as wholesale or sophisticated, this method of classification is not being considered in this paper).

## **9. Joint acquisition**

An investor cannot acquire assets in a situation where those assets are only available to a sophisticated or wholesale investor by purchasing those assets jointly with a person who is sophisticated or wholesale.

Example – Mr Smith wishes to acquire shares in an IPO as a joint owner of those shares with Mrs Smith. Mrs Smith has neither the income nor the assets to be classified as a sophisticated investor. Accordingly, Mr and Mrs Smith may not jointly acquire shares as sophisticated or wholesale investors.



Additionally, if advice is given by an AFSL to them jointly, the provision of that advice would almost certainly require that the Smiths be treated as retail investors (i.e. provided with an FSG, SOA, PDS, or prospectus, dependent on the product).

#### **10. Value of assets owned by entities associated with the investor**

Each of sections 708 and 761 allow that the assets of a trust or company controlled by the investor may be included in the assets "owned" by an investor for the purposes of the certificate. The test of "control" has particular issues and these are discussed below.

#### **11. Measuring income**

The income to be measured is gross income, and may also include the income of any companies or trusts that the investor controls. The question of "control" is discussed further below.

Example – Peter runs an accounting business in his own name. His turnover is \$400,000, and his expenses are \$250,000. Peter can include that gross income of \$400,000 in his income, and he may be classified as a sophisticated and wholesale investor.

#### **12. Control**

There are two different ways that "control" is important.

Firstly, as noted above, both sections 708 and 761 allow the net assets and gross income of a company or trust controlled by the investor to be included when calculating the assets and income of an investor.<sup>[xviii]</sup>

Example - Mrs Smith has \$1 million of assets in her own name, and is the sole director of Company A which has assets of more than \$2.5 million. Company A's assets may be counted towards the measurement of Mrs Smith being a sophisticated or wholesale investor.

Secondly, companies or trusts controlled by persons who are wholesale clients, because they meet the wealth test and/or income test, are also considered wholesale clients<sup>[xix]</sup>.

Example - Mrs Smith has assets in her own name worth more than \$2.5 million, and is the sole director of Company B which has assets of \$1 million. Mrs Smith's assets may be counted towards Company B being a sophisticated or wholesale investors.

"Control" is defined in section 50AA of the Corporations Act 2001 to include the capacity of one entity to determine the outcome of decisions about another entity's financial and operating policies. "Capacity", in turn, is defined in section 50AA with reference to the ability to exert *practical influence* rather than the enforcement of rights.

Particular issues arise when there is more than one person who potentially has "control".

Section 50AA(3) provides that an entity does not have control over a second entity just because the first entity and a third entity jointly have the capacity to determine the outcome of decisions about the second entities financial and operating policies. So, in the examples above involving Mrs Smith, if there were two directors, the results might be entirely different and no director might be found to have control. The effect of this would be that:



- a. the assets of the companies could not be included when determining if Mrs Smith is a wholesale or sophisticated investor; and
- b. the assets of Mrs Smith could not be included when determining if either of the companies is a wholesale or sophisticated investor.

The position is questionable in relation to fixed (unit) trusts with an individual trustee, discretionary trusts, and charitable trusts.

This is because if the "controlling" entity 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 classification of SMSFs as wholesale investors under section 761G is one of the most difficult aspects of the rules, and there are comments below.

### **13. SMSFs**

Once the SMSF is established, advice to the trustee is regulated as outlined in the section below. It is uncertain whether the promotion of the SMSF to clients involves the provision of advice to a retail client due to section 761G(1) and (6). The determination of whether an investor who is the trustee of an SMSF (i.e. for an investment by the trustee on behalf of the SMSF) is sophisticated or wholesale is an especially difficult area. In 2014, ASIC acknowledged this difficulty, and issued media release 14-191MR, which is partly reproduced below.

*Where the financial service relates to a superannuation product, a trustee of a SMSF will be classified as a retail client under the Corporations Act unless the fund holds net assets of at least \$10 million at the time the service is provided.*

*If a financial service does not relate to a superannuation product, the general test for determining whether the trustee is a retail or wholesale client applies under the Corporations Act. Under the general test the circumstances in which the trustee will be a wholesale client include if the trustee has a certificate from a qualified accountant stating they have net assets of \$2.5 million or if the value of the investment is at least \$500,000.*

This represented a significant change in ASIC's interpretation. Previously ASIC's view<sup>[xx]</sup> had been that the trustee of a super fund would be classified as a retail client unless it had \$10 million net assets.<sup>[xxi]</sup>

A significant difficulty however is that 14-191MR also states that while ASIC will not take action (i.e. on the basis that the trustee of a SMSF is a retail client unless it has net assets of at least \$10 million), this "will not affect any private rights of action that may be available to third parties. Persons providing financial services to trustees of SMSFs need to make their own commercial decisions after considering the legal risks". In practice, this means that while ASIC will not take action against an AFSL in this situation, this does not mean that an aggrieved SMSF trustee cannot complain that they were not in fact a wholesale client. (The difficulty which arises is due to the wording of section 761G(6) which can only be described as labyrinthine, and refers to "relates to a superannuation product". This leads to an argument that a superannuation fund is only wholesale if it has net assets of at least \$10 million, which was ASIC's earlier view. The written law remains unchanged, which means that the law is such that the national regulator has been able to take different views on the meaning of the law at different times. This naturally leads to a concern that a Court could take either view.)



It is rare that a financial services client complaint does not allege some aspect of incorrect investor classification. In most cases, this takes the form of a client complaining that they were classified as having a much higher risk profile than they should have been. However, there is no reason why an investor could not complain that they were wrongly classified as a wholesale investor, and if they had been properly classified, would have been entitled to much greater disclosure (for example a full SOA, FSG and greater disclosure generally), and hence would not have made the investments in question. The investor might then claim at least a portion of a claimed loss against the accountant who provided the certificate, or an AFSL could join the accountant to an action commenced by the investor.)

#### **14. Experienced investors**

A completely different section of investors may be classified as "sophisticated investors", who are thought to have sufficient experience and in respect of whom an AFSL is prepared to give a statement to that effect.

Although the wording is slightly different between section 708(10) and 761GA, in general terms:

- An AFSL must be satisfied on reasonable grounds that the investor has previous experience that allows them to assess the merits of the product or service, value of the product or service, risks associated with holding the product, their own information needs, and the adequacy of the information given by the person making the offer;
- the AFSL must give the investor a written statement of the AFSL's reasons for being satisfied as to those matters; and
- the investor must sign a written acknowledgement that the AFSL has not given the investor documents which would generally be given to a retail client. In practice, this can often be impossible because advisers often commence their communications with clients by providing an FSG to clients prior to considering their retail, sophisticated or wholesale status. (Some financial advisers have a practice of sending FSGs to clients prior to an initial meeting.)

The "experience" which the investor must have varies a little. Under section 708(10) the investor must have experience investing in securities. In section 761GA, the investor must have experience in using financial services and investing in financial products.

In practice, there seems to be relatively little use of section 708(10) and section 761GA by mainstream advisers, probably because of the risk which is transferred to the AFSL. These "experienced" investors are described as "sophisticated investors" for the purpose of 761GA, and make up part of the subset of sophisticated investors for the whole of section 708. Most AFSL's seem to prefer to rely on accountant's certificates.

It is crucially important that the administrative requirements of the sections are satisfied. Section 708(10)(d) requires that the investor must not have received a disclosure document. Section 761GA is more demanding, and requires that the AFSL must not have given the client a PDS, nor any other document that would be required for a retail client (for example an SOA or FSG). (Clearly it would be very difficult to convert a client who had once been retail to wholesale.)

Any offeror AFSL who is involved in using or providing 708(10) or 761GA statements should have a well-documented high-quality procedure, and excellent record keeping to ensure the requirements are satisfied, and it can be proved later that the requirements have been satisfied.



**15. Other issues arising**

**What are the advantages and disadvantages of treating an individual as a wholesale investor?**

A retail investor has:

- (1) the right to receive a FSG: Division 2 of Part 7.7;
- (2) the right to receive a SOA and for that advice to have a reasonable basis (where personal advice is given): Division 3 of Part 7.7;
- (3) the right to receive a PDS: Division 2 of Part 7.9; and
- (4) the right to compensation and complaint handling arrangements: Part 7.5; s 912A and s 1017G.

These statutory rights are not available to a wholesale investor.

The Courts have clearly taken the view that sophisticated investors are expected to have a greater level of knowledge, which could well mean that they are expected to be able to look after their own interests to a greater extent. For example, in *ASIC v Drake (No 2)*, Edelman J said, "*The terms of the investment were such that any sophisticated investor would reasonably have formed the view that there was substantial risk involved in the investment*".<sup>[xxii]</sup> It is not known if Edelman J would have taken the same view in relation to wholesale investors (the case apparently involved both sophisticated and wholesale investors), however the comments in relation to experience and knowledge only refer to sophisticated investors. (This "sophisticated investor" is the term used in relation to section 761GA, and not the term used in Chapter 6D.)

An investor who is classified as sophisticated within the meaning of section 761GA by an AFSL may well later argue that the classification was wrong, and that the investor should not have been classified as sophisticated.

**Duty**

There is a mistaken view that a duty of care or a fiduciary duty only relates to retail investors. This is clearly not the case. If advice is provided to a wholesale or sophisticated investor, the general law duties apply. In tort law generally, the Courts have been prepared to find that the duty of advice owed to persons who were experienced in the relevant area is not as high as to inexperienced people. However, that does not mean that no duty is owed.

An obvious issue which arises to anyone involved in providing certificates is that a person can be classified as having \$2.5 million in net assets through ownership of an expensive residence. Such ownership may have been achieved through inheritance or marriage, and the owner may actually have very little or no experience with securities or financial products. It seems unlikely that a Court would find that just because a person had ownership of such a residence, that the duty owed to them by a financial adviser was greatly diminished (other than the statutory duties such as the obligation to give a FSG, PDS or SOA).

When considering the duty owed to a client, even a client who is sophisticated or wholesale, one should consider that the client may bring an action for breach of statutory duty (for example the Corporations Act), breach of the common law (for example, the tort of negligence), breach of contract, breach of fiduciary duty and so on.



## Approach of clients

Some clients react positively to being classified as wholesale or sophisticated investors, believing that this is a compliment. Others believe that they will have access to a larger range of more profitable investments.

## Potential exposure of accountants who wrongly provide certificates

In July 2017, ASIC expressed its concern about accountants inappropriately providing sophisticated investor certificates.<sup>[xxiii]</sup> This was centred around the use of entity structures.

There is no reason why a suitably skilful financial services lawyer might not bring an action against an accountant who has wrongly provided a wholesale or sophisticated investor certificate. Likewise, an action might well be brought against the AFSL who has made a statement that the client has sufficient experience to be classified as a sophisticated or wholesale investor.

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29 January 2018

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<sup>[i]</sup> Section 708

<sup>[ii]</sup> The exception to circumstances where the product or financial service is not provided for use "in connection with a business" could have application to share traders. It may require a person who would otherwise fall within this exception to be treated as a "retail client" if their acquisition of financial products or financial services is such that it is regarded as a "business", or is connected with that business in the sense that the person regularly buys or sells financial products such that their trading in them could be said to be a "trading business". Naturally, this will not impact on persons and entities that have the status of a "Professional Investors" because they have a separate exemption under section 761G(7)(d). However, it may still adversely impact on some individuals and their entities who, because of their trading activities, are treated as share traders, but who are not large enough to be treated as Professional Investors.

<sup>[iii]</sup> The words "investor" or "client" are used in different places throughout the legislation, and in one section, both terms are used. In this article, the main reference is to "investor", although in some places where the legislation specifically refers to "client", that word has been used.

<sup>[iv]</sup> Certain products are excluded, so that a certificate does not apply to allow the client to be treated as wholesale. These include general insurance products, superannuation and RSA products. Superannuation products will generally be included within section 761G(6) instead.

<sup>[v]</sup> This article does not refer to investors who are classified as sophisticated or wholesale because they acquire product with a value of at least \$500,000, which is a different and additional way of qualifying an individual as sophisticated or wholesale.

<sup>[vi]</sup> Section 9, then refers to section 88B, then refers to declaration in place by ASIC.

<sup>[vii]</sup> Corporations (Qualified Accountant) Instrument 2016/786.

<sup>[viii]</sup> These bodies are set out in Corporations (Qualified Accountant) Instrument 2016/786. Also see ASIC's declaration <http://asic.gov.au/regulatory-resources/financial-services/financial-product-disclosure/certificates-issued-by-a-qualified-accountant/>

<sup>[ix]</sup> Section 708(8)(c) was extended by regulation 6D.5.02, and Section 761G(7) was extended by regulation 7.6.02AF.

<sup>[x]</sup> *ASIC v Cassimatis (No 8)* [2016] FCA 1023

<sup>[xi]</sup> *ASIC v Cassimatis (No 8)* [2016] FCA 1023, at paragraph 578

<sup>[xii]</sup> One of the difficulties with considering principles in *ASIC v Cassimatis* and attempting to extrapolate those principles to other situations is that investors in that case were classified as wholesale as a result of obtaining advice in respect of product valued at \$500,000 or more.

<sup>[xiii]</sup> <http://anzvps.api.org.au/8-7-vgn.php>



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<sup>[xiv]</sup> On the other hand, the legislators were content with "gross" income and "net" assets.  
<sup>[xv]</sup> In *ASIC v Cassimatis*, Edelman J focus in respect of wholesale investors was in relation to the \$500,000 investment aspect. It is impossible to know if his comments would apply to the certificate exemption.  
<sup>[xvi]</sup> *ASIC v Cassimatis* paragraph 596  
<sup>[xvii]</sup> This example also shows one of the problems with the test which allows a person to be classified as wholesale or sophisticated just because they hold an interest in an expensive residence.  
<sup>[xviii]</sup> Section 708(9B) and section 761G(7A) and (7B). Note that although the usual forms of the Corporations Act show that s.708 has these provisions in 708(9B) and (9C), those provisions are within the regulations for section 761G, which introduced 761G(7A) and (7B), and do not appear in the standard wording of the Act.  
<sup>[xix]</sup> Sections 761G(7)(ca) (inserted by regulation 7.6.02AB) and 708(8)(d).  
<sup>[xx]</sup> QFS 150 issued by ASIC in 2004  
<sup>[xxi]</sup> If ASIC takes this approach, then there seems no reason why the general provisions relating to control outlined above would not apply equally.  
<sup>[xxii]</sup> [2016] FCA 1552, at paragraph 424  
<sup>[xxiii]</sup> 17-228MR

### **FURTHER INFORMATION**

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