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Consultation on Relief to Foreign Financial Service Providers

The Australian Financial Markets Association (AFMA) welcomes the opportunity to comment on the Relief to Foreign Financial Service Providers consultation paper (Consultation Paper). AFMA is a member-driven and policy focused industry body that represents participants in Australia's financial markets and providers of wholesale banking services. AFMA's membership reflects the spectrum of industry participants including banks, brokers, market makers, energy traders, market infrastructure providers and treasury corporations. The businesses of many AFMA members are directly affected by the issues raised in the consultation.

Key Points

1. ***Law reform is necessary to avoid Australian law having extra-territorial overreach and deterring business being done from Australia.***
2. ***AFMA proposes building on existing arrangements for professional investors to freely access from Australia the services they need from foreign providers in other jurisdictions to address the problem of extra-territorial overreach by establishing a proper boundary for licensing requirements. This would complement the licensing arrangements for services to other wholesale investors with regard to financial services provided into Australia.***
3. ***Adjustments to Option 3 are suggested so that providers dealing with wholesale investors not in the class of professional investor have the same practical outcomes that they had under ASIC's pre-March 2020 relief arrangements.***
4. ***Sufficient equivalence recognition needs to be broader and agile in line with IOSCO principles on cross-border harmonisation.***

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5. ***Licensing arrangements for wholesale financial services being provided into Australia from foreign providers need to balance local accountability to ASIC with the need to avoid redundant duplication of oversight where the home regulator already has equivalent regulation.***

1. Statutory reform welcomed

The Government announcement in the 2021-22 Budget, that it will consult on options to restore the previously well-established regulatory relief provided for Foreign Financial Service Providers (FFSPs) who are licensed and regulated in jurisdictions with comparable financial service rules and obligations is an important development. The Government also announced that it would consult on options to create a fast-track licensing process for FFSPs who wish to establish more permanent operations in Australia.

AFMA supports the Government decision to put the law affecting foreign financial service providers on a proper statutory footing. The provisions governing the licensing of financial service providers were drafted in such a way that they could have extra-territorial effect if not properly bounded. It is time to make this boundary clear and certain.

It was never the intention of the legislators passing the *Financial Services Reform Act 2001* (FSR Act) to oblige ASIC to regulate and be responsible for the activities of businesses providing financial services in other countries. The intention of the law was to allow ASIC to regulate financial services being provided into Australia from overseas with a particular focus on retail investor protection, at a time when technology enabling remote delivery such as the Internet was still in an early formative stage. The exemptions that ASIC put in place regarding foreign financial service providers were practical fixes at the time of rapid implementation of the FSR Act when its operation in the real world was not fully understood. It was not expected that these arrangements made under ASIC administrative discretions would still be in place twenty years later. The revisions that ASIC put in place in March 2020 reflected an attempt by it to update the licensing rules within the constraints of existing law. Unfortunately, these constraints were too great and were regrettably a difficult practical fit with the way the world works.

The cross-border provision of financial services is an integral part of an advanced economy and the defining feature of an international financial centre. Australia's competitiveness suffered a setback in this regard in March 2020, when ASIC introduced a new, high cost licensing regime for FFSPs.

2. Corporations Act extra-territorial reach needs boundary

Key Point 1

Law reform is necessary to avoid Australian law having extra-territorial overreach and deterring business being done from Australia.

AFMA's concern is about the application of the licensing requirements to firms that have no business presence or operations in Australia and that deal only with wholesale clients but are deemed to be 'in Australia' for *Corporations Act 2001* (Corporations Act) purposes.

The issue arises because of the broad interpretation given to the word 'induce' in section 911D of the Corporations Act. The requirement that the service provider not engage in

conduct intended to induce people in this jurisdiction to use the service, or conduct likely to have that effect, reflects the requirements of section 911D of the Corporations Act, which describes when a person will be considered to be conducting a financial services business in this jurisdiction. Conduct which might be considered to be intended to induce people in this jurisdiction to use financial services, or conduct likely to have that effect (which is the 'test' set out in subsection 911D(1) of the Act to determine whether a person is carrying on a financial services business in this jurisdiction) may not constitute active solicitation. Section 911D of the Corporations Act states that a person is considered to be carrying on a financial services business in this jurisdiction if, in the course of the person carrying on the business, the person engages in conduct that is:

a) intended to induce people in this jurisdiction to use the financial services the person provides; or

b) likely to have that effect, whether or not the conduct is intended, or is likely, to have that effect in other places as well. ASIC Regulatory Guide 121 provides further guidance on what activities constitute 'inducing' people in Australia to use a financial service. Under RG 121.52, conduct that amounts to inducing includes attempts to persuade, influence or encourage a particular person to become a client.

Put another way, the conduct described in subsection 911D(1) is broader than that contemplated by active solicitation. This gives rise to the view that the Corporations Act in this regard has quite a far-reaching extra-territorial effect, well beyond that of the law in other jurisdictions.

Given its view on the interpretation of subsection 911D(1) ASIC issued a Class Order [CO 03/824] *Licensing relief for financial services providers with limited connection to Australia dealing with wholesale clients* to provide relief from the requirement to hold an AFS licence where the person providing the financial services is:

a) not in this jurisdiction;

b) dealing only with wholesale clients; and

c) carrying on a financial services business only by engaging in conduct that is intended to induce people in this jurisdiction to use the financial services it provides, or is likely to have that effect (see s911D(1)).

This was known as known as 'limited connection relief'.

The purpose of the Class Order was to ensure an FFSP transacting with wholesale clients in Australia would not require an AFS licence when there is a limited connection between the overseas financial services provider and Australia. The Class Order was made to address concerns that overseas counterparties may be engaging in 'inducing' activities under s911D when dealing with wholesale clients in Australia.

Subsection 911A(2E) of the Corporations Act disapplies from the licensing requirements in respect of the provision of a financial service by a financial service provider who is not in this jurisdiction, where the person to whom the service is provided is a professional investor (as defined in section 9 of the Corporations Act), and the service consists of any

or all of the following – dealing in, advising on, or making a market in, derivatives or foreign exchange contracts.

3. Why reform is needed

The issues addressed in the Consultation Paper matter because, as a developed open economy whose financial markets are integrated with global markets. Businesses based in Australia will want to deal with financial entities located overseas. Doing so provides diversification in investment and funding, access to better prices in the most competitive markets, new business opportunities and better integrated services for firms in Australia that have significant global operations.

It is a legally complex and costly task for overseas providers to obtain and maintain an FFSP licence, this will result in affected services becoming more expensive or being reduced, and in some cases completely withdrawn from Australian wholesale entities. This would have harmful economic impacts and feed a growing perception that Australia is not an easy place to do business with.

Institutional markets are globally integrated and are easily the largest and most competitive segment of international financial markets. For instance, Australian financial institutions and corporates raise substantial funding on the overseas markets, while Australian superannuation and managed funds are large net equity investors in foreign companies. Similarly, foreign investors hold a large part of Australian government debt and are significant shareholders in many ASX listed companies.

To be successful as a financial centre, Australia must be able to attract and retain the businesses that operate in this segment. The problem was that ASIC's new FFSP licensing regime introduced a significant barrier to the conduct of cross-border business between Australian wholesale clients (including large companies and financial institutions) and financial service providers based overseas. As noted, it is a legally complex and expensive task for overseas providers to scale the regulatory wall placed between them and Australian wholesale clients. Many global banks provide financial services to Australian clients from a range of offshore locations. Some of the entities, for example, in Japan, Italy and India, are not located in one of the 'sufficient equivalence' jurisdictions. Thus, the exemptions available will not in some cases be sufficiently broad to enable the ongoing provision of the full range of services to Australian clients. AFMA's members have advised that examples of activities that are at risk include:

- Dealing in securities, derivatives and futures contracts by group entities not located in a sufficiently equivalent jurisdiction.
- Advising in securities, derivatives and futures contracts by group entities not located in a sufficiently equivalent jurisdiction.
- Research analysts providing follow up communications and onshore marketing of previously published views on equities and non-equites Research by group entities not located in a sufficiently equivalent jurisdiction.
- Making a market in securities by group entities not located in a sufficiently equivalent jurisdiction.

Further complementary Professional Investor option

Key Point 2

AFMA proposes building on existing arrangements for professional investors to freely access from Australia the services they need from foreign providers in other jurisdictions to address the problem of extra-territorial overreach by establishing a proper boundary for licensing requirements.

This would complement the licensing arrangements for services to other wholesale investors with regard to financial services provided into Australia.

Details are set out in response to Question 4

AFMA has advocated for some time that we should build on existing successful arrangements for institutional investors that allows them to access financial services in respect of foreign exchange and derivatives amongst other product categories. It has long been anomalous that securities underlying derivatives cannot be accessed as freely. This can be done by exempting financial service providers dealing with 'professional investors' in certain product categories from licensing requirements, as noted above in Section 2.

At this point, it is important to be clear that the defined term 'professional investor' in section 9 the Corporations Act, which is cited in the Consultation Paper, was created to identify what is often referred to by industry as institutional investors. There is strong evidence professional investors are more than able to protect their own commercial legal rights, through contract and other laws protecting their rights in whatever jurisdiction they are obtaining a service. Examples of this are ISDA Master Agreements governing derivatives transactions.

The professional investor definition puts a wide gap between the retail investor protection regulatory space and the institutional markets. It avoids issues around where the boundary between retail and wholesale should be and consideration relating to 'sophisticated investors'. We will expand on this topic further in response to Question 4.

Adding the option for a professional investor provision that has broader coverage of financial products, especially for securities, is a simple and sensible proposal. It is also entirely consistent in our view with the Government's May announcement, which specifically referred to professional investors.

Overall, the objective is to return the law to the common sense way it was supposed to apply in industry's mind post the 2005 amendments referred to elsewhere in this submission. In our view this is a 'clearing the barnacles' exercise in law reform to address a well recognised long standing problem.

4. Responses to consultation questions

Q1. What are the impacts or other considerations that may affect implementing each option?

Key Point 3

Adjustments to Option 3 are suggested so that providers dealing with wholesale investors not in the class of professional investor have the same practical outcomes that they had under ASIC's pre-March 2020 relief arrangements.

Option 1A: Restore sufficient equivalence and limited connection relief

As noted in the introductory comments ASIC's previous sufficient equivalence relief and limited connection relief were developed between 2003 and 2004 as the FSR Act was implemented. They suffered from some uncertainties, illogical outcomes, inconsistencies. While industry had learned to live with them it is felt that the law should be made more transparent and certain in a sensible way. After twenty years that these administrative measures which sought to make the law in a reasonable

A permanent administrative exemption is a demonstration of shortcomings with the law. The law should be modified so that it works well from a practical point of view based on experience without such exemptions which detract from the public policy objectives of transparency, consistency and certainty. A relief instrument also may imply to the public that there is lenient special treatment for a particular group when the opposite is the case.

The dependency of the relief relying on the listing of a limited number of 'sufficient equivalence' jurisdictions is a constricting and limits opportunities to nimbly take up economic opportunities for business based in Australia. For example, in the asset management space, the 'sufficient equivalence' relief may not cover certain funds that are established in a sufficiently equivalent jurisdiction (e.g. Ireland, Cayman Islands, Luxembourg, where funds may be commonly established) but are dealing in securities by offering fund interests to Australian wholesale clients.

After so many years it is not reasonable from an industry standpoint that such obvious jurisdictions as Japan, Canada and many European Union countries are not recognised as sufficiently equivalent. Also the fact that the European Union has taken on more direct financial services regulation responsibilities in recent years is not recognised by ASIC for this purpose.

Furthermore, the whole process for establishing a jurisdiction as 'sufficiently equivalent' is flawed as it puts the onus on individual applicants to develop an application demonstrating the equivalence. This is a slow and very costly process and hard to justify with regard to the small amount of business activity that may be generated in the near term to justify the time and cost. It should be the responsibility of a regulator to proactively determine which jurisdictions at least from a national interest perspective merit a determination process. ASIC has the expertise and the network, either direct or through IOSCO to do this, not industry.

The sufficient equivalence relief also introduces variation in the types of services and products that can be provided as between the relevant jurisdiction in which the FFSP is primarily regulated.

There is also a lack of clarity around certain obligations under the relief (for example, the obligation to provide financial services to Australian wholesale clients in a manner which would comply, so far as is possible, with home regulatory requirement).

In regard to the limited connection relief members have found the drafting to be unclear in some aspects because of the way it is drafted in the negative. It is, however, as we explained before an important control on the unbounded extra-territorial reach of the Corporations Act under section 911D.

There is also the question of whether ASIC's administrative requirements, particularly the March 2002 rules are fully consistent with subsection 911A(2A) of the Corporations Act. This provision was made in 2005 in an attempt to clarify the extra-territorial reach of the law. It says that the provision of a financial service to an Australian citizen or resident does not, of itself, mean that the provider of the service needs to be licensed under the Corporations Act. If the service is provided from outside of this jurisdiction to an Australian citizen or a person resident in Australia, by a financial service provider who is outside of the jurisdiction, and the service provider does not engage in conduct which is intended to induce people in this jurisdiction to use the service, or conduct which is likely to have that effect, then provision of the service does not attract the licensing requirements of the legislation, regardless of where the Australian citizen or resident is located. The broad interpretation of 'induce' by ASIC has diminished the effectiveness of this provision.

Option 1B – Restore sufficient equivalence relief and funds management relief

The comments in respect Option 1A apply to Option 1B.

In relation to the funds management relief, this relief only relates to one segment of the market, and does not cover other types of services that Australian wholesale clients would want to access from FFSPs, such as derivatives, research, markets and investment banking services. It is therefore not a replacement for the limited connection relief.

The funds management relief only applies to "Eligible Australian Users", which could be problematic in these instances:

1) it may not cover institutional clients investing via Special Purpose Vehicles (SPVs) or certain large corporates;
2) while it covers responsible entities and trustees, it does not extend to external managers.

In addition, the conditions that have been sought to be imposed in relation to the funds management relief create a barrier to entry for FFSPs looking to engage Australian clients. Accordingly, cost/benefit ramification considerations must be worked through by an FFSP prior to relying on this relief – even where, for example, it is approached by an Australian Professional Investor on a reverse solicitation basis for access to its products or services.

Option 2 - Relief for certain services to wholesale clients

In our view Option 2 in its current form is quite problematic and would need considerable modification to be useful. As it stands AFMA does not support this option.

A key problem is the fixed list of jurisdictions allowed for sufficient equivalence. As noted in respect of Option 1A the list of jurisdictions is limited and additions are difficult. If fixed into law as proposed the sufficient equivalence arrangements would become more inflexible and have glaring omissions. It is strange for example that Japan is not considered a sufficiently equivalent jurisdiction and New Zealand regulated entities are not included regulated financial institutions. The list of sufficient equivalence regulators also raises the points about whether all categories of regulated entities are intended to be included (e.g. CFTC regulated swap dealers; SEC security-based swap dealers) as the previous class order relief was limited to only certain categories of CFTC and SEC regulated financial institutions. A mechanism would be needed to add other jurisdictions. Financial institutions regulated by other sufficiently equivalent regulators (such as IOSCO MOU signatories), including Japanese Financial Services Authority without a highly cumbersome process.

The Option 2 also does not take account of the existing professional investor provision in section 911A(2E).

The proposed conditions in paragraph 34 are also much more extensive than the current sufficient equivalence relief. In fact, in our view, the level of conditions will get FFSPs to a position not dissimilar to ASIC's March 2020 but now rejected foreign AFSL regime, with all the attendant problems.

Option 3 - Relief for all services provided to wholesale clients

On a comparative basis Option 3 is better than Option 2 as it simplifies the coverage of services. However, it largely overlaps Option 2 and therefore shares its problem.

A significantly modified Option 3 for the general class of wholesale investors who are not professional investors would complement our proposed Additional Option described in response to Question 4.

Overall, AFMA recommends that, consistent with the Government's May 2021 announcement, licensing arrangements should be put in place through amendments to the Corporations Act with supporting regulations addressing subordinate details which have the practical effect of restoring the outcomes provided by the ASIC pre-March 2020 relief. This would permit an offshore entity to offer offshore products to wholesale clients in general. The rules should not create barriers for an existing market, which has not been experienced any adverse issues for a long period.

Q2. Which of the proposed options would be most effective in providing relief to FFSPs and why?

AFMA considers that the Additional Option put forward in response to Question 4 regarding FFSPs dealing with 'professional investors' would best meet the purpose and the policy objective of the Government complementing revised Option 3. The adjusted Option 3 arrangements put in place through amendments to the Corporations Act with supporting regulations addressing subordinate details should have the practical effect of restoring the outcomes provided by the ASIC pre-March 2020 relief. As part of the streamlined licensing arrangements for FFSPs dealing with the general class of wholesale

investors, we propose improved sufficient equivalence recognition so that it is broader and agile in line with IOSCO principles on cross-border harmonisation.

Q3. Is there a specific need for the limited connection relief if option 2 or 3 is adopted?

Yes. The additional option set out in response to Question 4 and canvassed in Section 3 above for a broader professional investor provision could be complemented by a revised Option 3 in respect of the general wholesale space.

Q4. Are there other options for FFSP relief that should be considered?

We are proposing an arrangement where we build on the existing successful law relating to providers dealing with professional investors under subsection 911A(2E). This would be complementary to the requirements settled on in respect of financial services provided to other (ie non-professional) wholesale investors out of the consultation.

There is a need to allow outbound investment activity by professional investors to be unhindered by regulation which adds nothing to the economy. This is about the efficient international operation of financial markets where professional investors are involved. These markets are predominantly centred in well-regulated jurisdictions such as those covered by the sufficient equivalence recognitions but also places such as Japan and many European jurisdictions, such as Spain and Italy. Big corporate clients need their businesses serviced at a global level. They gravitate to those financial service providers with the international networks and access that allows their bespoke needs to be met across many jurisdictions. We see them accessing those services through local AFSL holders who can make connections to necessary local expertise through affiliates. Such financial service providers are operating and providing services in their own regulated jurisdictions and corporate clients as well as funds managers are able to look after their own commercial interests in the case of a dispute over a financial service.

Equities and brokerage services often involve offshore brokers providing execution services to Australian clients without direct solicitation in the country. In many jurisdictions, trades on a stock market must be arranged through a broker in the local jurisdiction.

For example, an Australian fund manager contacts the Australian unit of a global investment bank (licensed by ASIC) with which it has a global servicing arrangement to arrange the acquisition of shares listed on the Tokyo Stock Exchange. The share transaction must be booked by a broker based in Japan to satisfy local regulatory requirements.

If the Japanese broker was required to be licensed by ASIC to deliver a service in Japan regulated under its securities law, it is facing a high marginal cost and compliance burden. If this business is incidental to the Japanese broker's business, then it will not be willing to incur the licensing and other compliance costs of having its business regulated by ASIC. The broker would quite sensibly avoid servicing Australian based clients. This is a detriment to Australian investors and not in the national interest. Additionally, some jurisdictions do not permit entities regulated by them for delivery of services in their country, such as securities brokers, to be licensed in other jurisdictions.

The way to address this issue in a manner that is consistent with the Government's announcement, and well accepted long standing law, is to extend existing law.

Extension for financial services provided to professional investors through s 911A(2E).

This extension can be drafted based on existing section 911A(2E) of the Corporations Act to provide coverage of other financial products, most importantly 'securities'.

As defined in section of the Corporations Act a '***professional investor***' is a person who:

a) is an AFSL holder;
b) is a body regulated by APRA;
c) is a registered entity within the meaning of the Financial Sector (Collection of Data) Act 2001;
d) is a trustee within the meaning of the Superannuation Industry (Supervision) Act 1993 and the fund, trust or scheme has assets of at least $10 million;
e) controls at least $10 million in assets;
f) is a listed entity or a related body corporate of a listed entity;
g) is an exempt public authority;
h) is a body corporate or unincorporated body that carries on a business of investment in financial products or invests funds received following an offer or invitation to the public; or
i) is a foreign entity, either established or incorporated in Australia, and is covered by one of the previous items.

Q5. Is there any other FFSP relief offered in other jurisdictions that could serve as a model for Australia?

The relief provided by other jurisdictions needs to be assessed in the context of the jurisdictional nexus provisions in their law, which are typically not as broad as those in Australia. For example, jurisdictions like Switzerland have quite open regimes for cross-border wholesale business, New Zealand offers safe harbours, and Hong Kong provides a higher threshold test based on active marketing to trigger a licensing requirement. Japan has a registration exemption for foreign securities firms if they take orders without solicitation or take orders through a traditional securities company.

It is also noted that industry bodies from the UK and New Zealand have identified shortcomings in ASIC's understanding of their domestic regimes that underestimate the extent of relief available[1].

Hong Kong

In relation to asset management in Hong Kong, provided that marketing is done from offshore without any *"active marketing"* (which would include, for example (according to the SFC's FAQ) services that are extensively advertised via marketing means, marketing

[1] City of London June 2020: UK cross-border trade in services with Australia - An analysis of market access for financial services firm p 2 ff.

conducted in a concerted manner, etc.), offshore funds may be offered to 'Professional Investors' which is close to the Australian wholesale client definition under Australian law.

Switzerland

Switzerland's *Financial Services Act* of June 15, 2018 (FINSA) regulates foreign financial service providers in a way which is considered sensible by a number of our members familiar with the regime. It has been in force since 1 January 2020. It is noted that the Swiss rules also cover what we would consider to be retail clients so does have different coverage concerns to those concerned purely with the wholesale part of the market. For financial service providers with an OECD home country supervisor, the home country rules override the rules set out in the FINSA.

Singapore

Singapore's arrangements are important to be aware of as it directly competes with Australia as a location for foreign financial service providers. Their approach is instructive bearing in mind that its foreign financial service provider approval requirements never had the extra-territorial reach of Australia's law. Singapore's regime is too distinct as a direct model it reflects a clear state of mind that it is information they need from offshore entities and they desire to facilitate cross-border activity out of Singapore.

Singapore has broad based exemptions for 'Institutional Clients' and relatively limited product registration requirements for offering of collective investment scheme products to 'Accredited Investors. In addition, Singapore offers a 'Paragraph 9 and 11 exemptions' for offshore (non-Singaporean) affiliates of locally licensed entities to be able to provide financial services to Singapore residents provided certain Monetary Authority of Singapore (MAS) pre-approvals are granted and there is relevant oversight of the locally licensed entity.

Where a foreign person conducts any regulated activity wholly outside Singapore, they are required to be licensed in Singapore only when the activity has a substantial and reasonably foreseeable effect in Singapore. MAS is currently streamlining its exemption framework for business arrangements between local financial institutions and their foreign related corporations. This situation is matter of importance in Australia as well. In March 2021, Singapore's MAS released a Consultation Paper[2] seeking to build upon a December 2018 policy consultation by proposing to establish an ex-post notification framework for cross-border business arrangements between two branches of the same legal entity.

United Kingdom

The United Kingdom is currently reviewing its rules around the provision of cross-border financial services in order to improve its international competitiveness as a place to do business. The developments occurring there are an important benchmark to look to as Australia works on its policy reform in this area.

[2] Monetary Authority of Singapore, March 2021 Consultation Paper: Proposed Exemption Framework for Cross-Border Business Arrangements of Capital Markets Intermediaries Involving Foreign Offices, https://www.mas.gov.sg/-/media/MAS/News-and-Publications/Consultation-Papers/2021-03-Consultation-Paper-P001-2021/CP-on-proposed-exemption-framework-for-cross-border-biz-of-CMIs-involving-foreign-offices.PDF

Q6. What aspects of the sufficient equivalence relief, limited connection relief and funds management relief were effective and ineffective in providing relief to FFSPs and why?

The limited connection relief addressed areas where the sufficient equivalence relief did not address all of the activity that could potentially need to be covered given the broad definition of 'financial product advice' and section 911D of the Corporations Act. An example of this would have been where an offshore investment vehicle relying on the limited connection relief issues shares to an Australian superannuation trustee. While it is possible that the issue of these shares might be covered by the exemption in Corporations Regulation 7.6 02AG(2D), there is the risk that this may not be the case. Many offshore investment vehicles engage a manager as an agent of the investment vehicle to manage and promote the vehicle. When the manager is promoting the investment vehicle, it is doing so in its capacity as agent and, therefore, it is the principal (ie the investment vehicle) that is engaging in the activity through its agent, which raise questions as to whether the shares are issued following an application by or inquiry from the person (and, thus, whether the exemption in Corporation Regulation 7.6.02AG(2D would apply (in particular taking into account paragraph (d) of that Regulation).

Q7. Are there other overseas regulatory authorities that should be considered for addition to the list under options 2 or 3?

Key Point 4

Sufficient equivalence recognition needs to be broader and agile in line with IOSCO principles on cross-border harmonisation.

As we stated in response to Question 1, it is anomalous that such obvious jurisdictions as Japan, New Zealand and the European Union are not considered to be sufficiently equivalent by ASIC. There are simple means for recognising other sufficiently equivalent regulators (such as IOSCO MOU signatories) without a highly cumbersome process. This would include Japanese Financial Services Authority, for example.

ASIC should administer rules around FFSPs in line with the IOSCO recommendations on cross-border regulation. In 2015, IOSCO released a *Final Report from its Task Force on Cross Border Regulation*[3], which included a toolkit of three broad types of approaches for cross-border regulation:

- National treatment, which aims to create a level playing field between domestic and foreign firms within one jurisdiction and provides direct oversight to the host regulator. Within this context, jurisdictions may make use of exemptions from their regulatory framework or use substituted compliance to mitigate the duplication of rules a foreign entity is required to follow.
- Recognition, which is based on a jurisdiction's assessment of a foreign regime as equivalent to its own and, therefore, minimizes duplicative regulations for firms doing cross-border business.

[3] IOSCO 2015 Final Report Task Force on Cross Border Regulation, https://www.iosco.org/library/pubdocs/pdf/IOSCOPD507.pdf

- Passporting, where one common set of rules is applicable to jurisdictions covered by the passporting arrangements and provides a single point of entry for firms wishing to operate within these jurisdictions.

In a 2019 report[4] IOSCO stated that numerous authorities have implemented deference processes that allow them to rely on one another to regulate and supervise wholesale market participants. ASIC should be well capable of operating effectively within this framework.

Q8. Which conditions in paragraph 34 should not be attached to FFSP relief and why?

Key Point 5

Licensing arrangements for financial services being provided into Australia from foreign providers need to balance local accountability to ASIC with the need to avoid redundant duplication of oversight where the home regulator already has equivalent regulation.

The conditions set out in the Consultation Paper only have relevance to a provider which would be licensed. These are not relevant to providers dealing with professional investors.

a) notifying ASIC when the FFSP is relying on the relief or ceases to use the relief;	This is a reasonable condition. It meets one of ASIC's key objectives which is to be aware of how and when providers are providing services into Australia.
b) applying to ASIC for approval to use the relief;	We support the proposed notification process in (a) as opposed to an application for approval, which is more akin to a licensing requirement (with attendant cost and delay), as opposed to a form of relief.
c) consenting to information sharing between ASIC and the FFSP's home jurisdiction regulator;	This is a reasonable condition. It fits with the model of international regulatory cooperation which we support.
d) assisting ASIC in any supervision or investigation matters;	This is a reasonable condition, subject to the normal protection of rights of a body under investigation under Australian law.
e) complying with directions from ASIC;	This is a reasonable condition, although we would have concerns that this could be used by ASIC

[4] IOSCO 2019 Market Fragmentation & Cross-border Regulation Report, https://www.iosco.org/library/pubdocs/pdf/IOSCOPD629.pdf

	over time to increase the compliance burden on FFSPs.
f) complying with information requests from ASIC within the specified time;	This is a reasonable condition, subject to time limits being reasonable particularly in regard to the timing issues relating to an entity being offshore.
g) not dealing with unauthorised or unlicensed entities;	The rationale behind this is unclear. Would this prohibit a provider from dealing with a corporate client, as they would not be authorised or licensed despite being a wholesale investor for example? In such case we are opposed to it.
h) notifying ASIC of any changes to the FFSP or the home jurisdiction regulator that affect their eligibility for relief;	This could be a clearer obligation – e.g. changes to license, changes to shareholdings. Further review is required to determine that this is not redundant based on better cross-border collaboration between regulators.
i) submitting to the jurisdiction of Australian courts;	In principle, this should be limited to instances of matters arising with a direct connection with an ASIC regulatory matter for an Australian client. Further review is required to determine that this is not redundant under broader Australian legal rules.
j) comply with any orders of an Australian court;	This should be limited to instances of matters arising with a direct connection with an ASIC regulatory matter for an Australian client Further review is required to determine that this is not redundant under broader Australian legal rules.
k) complying with auditing and reporting requirements;	This duplicative of home jurisdiction requirements. Condition should be that their home accounts are audited in accordance with applicable laws.

l) ensuring that financial services are provided efficiently, honestly and fairly;	Home jurisdiction requirement should be the standard. This proposed condition should not be necessary given the proposed relief would be limited to entities that are regulated by a sufficiently equivalent jurisdiction.
m) applying protections for dealing with client's money and property;	Home jurisdiction requirement should be the standard. This condition should not be necessary given the proposed relief would be limited to entities that are regulated by a sufficiently equivalent jurisdiction.
n) having adequate conflict of interest arrangements in place;	Home jurisdiction requirement should be the standard. This condition should not be necessary given the proposed relief would be limited to entities that are regulated by a sufficiently equivalent jurisdiction.
o) having adequate risk management systems in place;	Home jurisdiction requirement should be the standard. This condition should not be necessary given the proposed relief would be limited to entities that are regulated by a sufficiently equivalent jurisdiction.
p) notifying clients when the FFSP is relying on the relief;	This is a reasonable condition.
q) appointing a local agent for the FFSP;	The local agent should not be subject to an additional compliance obligation in its own right because of its agency role.
r) ensuring representatives are appropriated trained;	Home jurisdiction requirement should be the standard. This condition should not be necessary given the proposed relief would be limited to entities that are regulated by a sufficiently equivalent jurisdiction.

s) providing periodical information to ASIC including (i) to (xv)	The proposed information set is very detailed and quite onerous. The information under (s)(v)-(vi) and (s)(xiii) would be reasonable The proposed information under (s)(i)-(iv), (s)(vii)-(xii) and (s)(xiv)-(xv) should not be necessary given the proposed relief would be limited to entities that are regulated by a sufficiently equivalent jurisdiction.
t) breach reporting obligations, similar to that of AFSL holders;	The breach reporting obligation would impose an unreasonable burden on FFSPs if it applied to their entire global activities. This condition should be limited to breaches which have a material impact on Australian clients.
u) maintaining the relevant authorisation in the FFSP's home jurisdiction to provide the financial service they are providing in Australia;	This is a reasonable condition.
v) providing each of the financial services in Australia in a manner which would comply, so far as is possible, with the home jurisdiction regulatory requirements if the financial service were provided in the home jurisdiction under like circumstances;	Although this is a current obligation under the sufficient equivalence relief, it has always been one which is unclear in its application.
w) a condition that ASIC can notify the FFSP of any additional conditions it believes are necessary to address any concerns ASIC may have; and	This is a grant of additional administrative power without boundaries. We do not support it.

x) a condition that ASIC can exclude FFSPs from relying on the relief where it has concerns the FFSP is not fit to provide services to Australian clients, or where a provider is using relief in a manner the relief is not intended to be used.	The first limb of "not fit and proper is a reasonable condition. However, we challenge the second limb "where a provider is using relief in a manner the relief in a manner the relief is not intended to be used" is appropriate. This introduces vagueness and uncertainty. As long as the terms of the relief are being adhered to, then this should be satisfactory.

Q9. Should there be other consequences to a breach of relief conditions other than the FFSP relief no longer being available?

We do not consider additional consequences are required. Providing financial services without an AFSL or relief is already an offence.

Q10. What are the regulatory costs and benefits of each option proposed?

If Option 2 and 3 have excessively onerous conditions, and overly duplicate home jurisdiction requirements this will deter firms offering the full range of services to Australian clients.

Institutional markets are globally integrated and are easily the largest and most competitive segment of international financial markets. For instance, Australian financial institutions and corporates raise substantial funding on the overseas markets, while Australian superannuation and managed funds are large net equity investors in foreign companies. Similarly, foreign investors hold a large part of Australian government debt and are significant shareholders in many ASX listed companies. To be successful as a financial centre, Australia must be able to attract and retain the businesses that operate in this segment.

FFSP licensing regime introduces a significant barrier to the conduct of cross-border business between Australian wholesale clients (including large companies and financial institutions) and financial service providers based overseas. As noted, it is a legally complex and expensive task for overseas providers to scale the regulatory wall placed between them and Australian wholesale clients and it will result in some overseas services being reduced or completely withdrawn.

Many global banks provide financial services to Australian clients from a range of offshore locations. Some of the entities, for example, in Japan and India, are not located in one of the six jurisdictions that are deemed to be sufficiently equivalent.

AFMA's members have advised that examples of activities that are at risk include:

- Dealing in securities, derivatives and futures contracts by group entities not located in a sufficiently equivalent jurisdiction.
- Advising in securities, derivatives and futures contracts by group entities not located in a sufficiently equivalent jurisdiction.
- Making a market in securities by group entities not located in a sufficiently equivalent jurisdiction.

These issues matter because, as a developed open economy whose financial markets are integrated with global markets, businesses based in Australia will want to deal with financial entities located overseas. Doing so provides diversification in investment and funding, access to better prices in the most competitive markets, new business opportunities and better integrated services for firms in Australia that have significant global operations.

For example, Australian superannuation funds seek to diversify their investments offshore and this has been observed as one of the reasons why Australia is a net investor of equity overseas since 2012.

The importance of efficient and cost-effective access to foreign markets is important to an open economy, with a growing pool of superannuation assets that must find a home overseas to achieve desirable portfolio diversification. Australian investment funds must be able to transact with stockbrokers in foreign jurisdictions without difficulty so they can get efficient, low cost access to overseas markets.

Unnecessarily restrictive and high cost regulation, such as that created by a restrictive FFSP regime, harms Australia's competitiveness as a location for the conduct of financial services business. Financial services firms that use Australia as a base for the conduct of their regional or global business may require the local Australian entity to serve as conduit for the services of their firm.

Q11. If the conditions listed in paragraph 34 apply to FFSP relief under options 2 or 3, what would be the financial and regulatory impacts on FFSPs?

To the extent that they might result in the same burdens and restrictive outcomes of the March 2020 ASIC licensing rules, the same impacts would be felt.

Q12. Other than the fit and proper test, are there other requirements that may require amendments to fast-track the licensing process; what barriers to entry does these requirements pose?

The issues for foreign financial service providers in obtaining a license parallel those of all licensees in general. The licensing process overall is considered to be too slow with an average time of nine months but with members reporting applications for major organisations that have taken well over a year to process, or simply being put on hold for an extended period.

Q13. As requested in paragraph 42, please provide a list of provisions that should be exempted under a modified licensing regime and explain the basis for the exemption.

In response to Question 8, we have noted which conditions in paragraph 34 of the Consultation Paper are relevant. Generally, the approach on requirements in respect of an FFSP license should be based on what conditions are really needed for an FFSP, given that it is already regulated in its home jurisdiction.

Q14. Should any additional conditions be required for an FFSP to apply for an automatic licence?

No see discussion above

Q15. Are there other ways licences for FFSPs could be fast-tracked?

If an entity is already authorised in its sufficiently equivalent jurisdiction, there should be default assumption that it should be licensed locally.

Q16. Are there licensing processes used by other jurisdictions that could serve as a model for Australia?

Registration with notification rather than licensing could be considered. Also, the concept of authorisation rather than licensing is another way to think about how to deal with FFSPs. It is a common approach in other jurisdictions as well as here. For example, under the *Banking Act*, authorised deposit-taking institutions (ADIs) are 'authorised' rather than licensed. The change in language might be useful in distinguishing for the regulator that dealing with FFSPs needs to be thought of in a different way to just being an extension of local entity licensing, which has been the hallmark of ASIC's previous approach with exemptions and its March 2020 licensing regime.

The arrangements in other jurisdictions needs to be assessed in the context of the jurisdictional nexus provisions in their law, which are typically not as broad as those in Australia. For example, jurisdictions like Switzerland have quite open regimes for cross-border wholesale business, New Zealand offers safe harbours, and Hong Kong provides a higher threshold test based on active marketing to trigger a licensing requirement. Japan has a registration exemption for foreign securities firms if they take orders without solicitation or take orders through a traditional securities company.

Q17. What are the financial costs and regulatory impacts of complying with all the AFSL obligations under option 3?

AFMA refers the Treasury to the RIS cost impact analysis that ASIC provided in respect of its March 2020 licensing requirements. It assumed a large reduction in FFSP providers competing to services Australian clients by anticipating that:

- the number of entities relying on the sufficient equivalence test will fall by 12.5% to 700; and
- the number of entities relying on the limited connection test will fall by 50% to 200.

The ASIC analysis points to material adverse impact to competition. In AFMA's view this assessment may be conservative because it assumes a much lower cost of applying for an FFSP licence application, and also for its ongoing maintenance, than is the experience of industry participants.

5. Conclusion

AFMA recommends that consistent with the Government's May announcement that we build on existing arrangements for professional investors to freely access from Australia the services they need from foreign providers in other jurisdictions. This should be complemented by licensing arrangements put in place through amendments to the Corporations Act with supporting regulations addressing subordinate details which have the practical effect of restoring the outcomes provided by the ASIC pre-March 2020 relief. As part of the streamlined licensing arrangements for non-professional wholesale investors, we propose improved sufficient equivalence recognition so that it is broader and agile in line with IOSCO principles on cross-border harmonisation.

The Consultation Paper and AFMA comments are at the strategic policy level with the objective of producing the best out outcome from a national economic perspective. The details on how the reforms will work in practice are very important to members. AFMA looks forward to working with Treasury on the details, so that the new rules work in a sensible and fair way in achieving the underlying policy objectives.

Please contact David Love either on [redacted] in regard to this letter.

Yours sincerely

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