MinterEllison

30 July 2021

Regulatory Powers and Accountability Unit
Financial System Division
The Treasury
Langton Crescent
PARKES ACT 2600

Email: FFSP@treasury.gov.au

Dear Sir/Madam

Relief to Foreign Financial Service Providers – Consultation Paper

We appreciate the opportunity to respond to the Treasury's Relief to Foreign Financial Services Providers consultation paper (**Consultation Paper**).

MinterEllison is a leading Australian law firm. We advise major financial institutions, including banks, insurance companies and superannuation funds, as well as specialist fund managers, platform operators, financial advice firms, stockbrokers, and other financial intermediaries in Australia and overseas.

We have elicited feedback from some of our clients in relation to the Consultation Paper. They generally understand the need for a regulatory regime that achieves the right balance between appropriate levels of oversight and encouraging foreign financial services providers (**FFSPs**) to offer their financial products and services in Australia. We therefore support the proposal to provide relief to FFSPs in a form similar to that which was in place before 31 March 2020 in order to reduce duplication of regulation and barriers for FFSPs entering the Australian market.

At a minimum, we believe Option 1A should be adopted. Nevertheless, we believe there is considerable opportunity to improve that regime which we have identified in detail below. In summary, we consider that it would be appropriate to make the following adjustments to the previous relief (which partly draw from elements in options 2 and 3):

1. expand the jurisdictions for which the sufficient equivalence exemptions are available to include at the minimum those listed for the purposes of Option 2 – we also believe consideration should be given to a broader list of regulators as discussed in paragraphs 1.3 and 1.4 below;

2. expand the financial services and products to at least include those identified in Option 2.

We have also provided comments on some of the existing conditions of the sufficient equivalence exemptions in paragraphs 1.5 and 1.7 below and on the additional conditions identified in paragraph 34 of the Consultation Paper in section 8 below,

We also strongly support the continuation of the limited connection relief. We do not believe the funds management relief is a suitable alternative for the reasons discussed in paragraphs 3.2 to 3.4 below.

We have identified some alternative approaches in our submission, including:

(a) an expansion of exemptions available for FFSPs who wish to provide financial services from offshore to professional investors only (as discussed in paragraph 4.1);

(b) providing a safe harbour based on the number of Australian clients and/or visits to Australia (as discussed in paragraph 4.3).

We also support the fast-tracking options discussed in the Consultation Paper. However, we believe that the obligations of FFSP licensees should be limited having regard to their overseas regulated status.

In the meantime, we request that the equivalence exemptions are reopened so that FFSPs who had not lodged documents with ASIC prior to 31 March 2020 can do so now and can therefore start providing financial services to Australian wholesale clients.

We have responded to the consultation questions from the Consultation Paper below. Where appropriate, we have indicated where our comments are based on feedback from our clients.

Options in establishing a framework for FFSPs

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

Option 1: restore the previous relief

Equivalence exemptions

1.1 The option of restoring the previous relief is the preferred option for all of our clients who responded to our survey. It has the advantage of simplicity, it is well understood and it is cost effective to comply with. While we and our clients question the need for some of the requirements in the sufficient equivalence regime exemptions[1] (**equivalence exemptions**), it is a tried and tested regime which we believe provides an appropriate balance between identifying FFSPs who are or wish to service Australian wholesale clients and not imposing too great a burden for those who hold a licence from a recognised regulator.

1.2 There is no doubt that the regulators recognised by ASIC in the equivalence exemptions are some of the major global financial services regulators. However, we note that ASIC has already assessed the additional regulators identified in Option 2[2] as having sufficiently equivalent regulatory regimes to the Australian financial services (**AFS**) licensing regime. We therefore submit that it would be appropriate to extend the equivalence exemptions at least to those additional regulators.

1.3 A major difficulty with the equivalence exemptions is the need to undertake a detailed and costly exercise to demonstrate equivalence of regulatory regimes to obtain ASIC's agreement to extend the regime to other regulators. We submit that this burden needs to be lifted to meet the Government's goals of diversifying investment opportunities for Australian investors, attracting additional investment and liquidity to Australian markets, reducing barriers to entering the Australian market and encouraging high yield international business and exceptional talent to relocate to Australia.[3] This could be done by recognising a wide range of regulators, such as ASIC has done in its funds management relief[4] which extended to all regulators which are signatories of the IOSCO Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information. We submit that if it was appropriate for the funds management relief to extend to all such regulators, there is no reason for the equivalence exemptions not to have such a broad application given they only apply to financial services provided to wholesale clients.

1.4 An alternative would be to extend the equivalence exemptions to overseas regulators that are IOSCO Board members as proposed in the Consultation Paper.[5] However, we note that this is a much more restrictive list and does not extend to some of the regulators ASIC has already assessed as having a sufficiently equivalent regulatory regime. It would therefore seem appropriate to extend the exemptions beyond the regulators identified in the equivalence exemptions. At the minimum, we submit that the equivalence exemptions should extend to all EU, EEA and Swiss financial services regulators in addition to the existing regulators and those recognised by ASIC in its foreign licensing regime.[6]

[1] ASIC Class Orders 03/1099, 03/1100, 03/1101, 03/1102, 03/1103, 04/829, 04/1313 and ASIC Instrument 2016/1109 as extended by ASIC Instruments 2016/396 and 2021/510.
[2] Danish Financial Supervisory Authority, French Autorité des marchés financiers, French Autorité de contrôle prudentiel et de resolution, Ontario Securities Commission and Swedish Finansinspektionen.
[3] Consultation Paper, paras 3, 4 and 36.
[4] ASIC Instrument 2020/199.
[5] Para 44.
[6] ASIC Instrument 2020/198.

1.5 Some FFSPs were required to obtained special instruments of relief, typically because the licensed entity was formed in a different jurisdiction to the jurisdiction in which they obtained their licence. We submit that there is no need to continue the requirement[7] for an entity which is relying on one of the equivalence exemptions to be formed in the same jurisdiction in which they are licensed. This would be particularly problematic for a Canadian FFSP formed in a different province to Ontario but which is registered with the Ontario Securities Commission. However, it is equally problematic for an entity formed in a different country to the one in which they hold a licence. We submit that if the regulator that ASIC has assessed as having an equivalent regulatory regime is willing to issue a licence to an entity, it should not matter where the entity was formed and this is reflected in ASIC's practice of issuing special instruments of relief in these circumstances.

1.6 We do question the need for some of the requirements of the equivalence exemptions. We note that the funds management relief imposed very few requirements on fund managers. We submit that a similar approach could be extended to the equivalence exemptions.

1.7 The following requirements in the current equivalent exemptions raise concerns for FFSPs (we have also included references to the conditions identified in paragraph 34 of the Consultation Paper where relevant):

(a) the FFSP must submit to the non-exclusive jurisdiction of the Australian courts in legal proceedings relating to Australian financial services laws and must comply with any order of an Australian court in respect of any matter relating to the provision of the financial services – also conditions 34(i) and (j) of the Consultation Paper;

While the these requirements may appear reasonable from an Australian regulatory perspective, we note that they pose a significant risk for FFSPs who may only have a limited connection with Australia and would have to go to considerable expense to defend proceedings in a jurisdiction where they do not have any presence. It is therefore inconsistent with the Government's objective to reduce barriers to entry.

We submit that this requirement should only apply where the FFSP has an office in Australia. Where it does not, then the FFSP should be required to submit to the jurisdiction of the courts in its home jurisdiction in relation to financial services provided to Australian clients as if it is subject to the requirements of its home jurisdiction in respect of those clients despite being located in Australia. We believe this is appropriate given the exemptions are only available in respect of wholesale clients who are able to look after their own interests.

(b) the FFSP is required to have a local agent in Australia who can accept service of process on behalf of the FFSP – also condition 34(q) of the Consultation Paper;

Our clients have questioned the need for this requirement. In our internet connected world, it is very easy to contact FFSPs and for the reasons noted above, we do not believe it is appropriate to impose these types of jurisdictional requirements on FFSPs if Australia wishes to maximise the openness of its investment market. The requirement to have a local agent simply adds cost for little benefit.

(c) the FFSP must make written disclosure to Australian clients of its reliance on the equivalence exemption – also condition 34(p) of the Consultation Paper;

We question the need for this requirement. Provided an FFSP does not represent that it holds an AFS licence, it is a matter for its wholesale clients to determine what information they require about the FFSP's regulatory status. The difficulty with this type of requirement is determining exactly when it applies which then typically means that it needs to be included on all communications creating compliance risks and additional costs for little or no benefit.

(d) the FFSP has notified ASIC that it will not rely on the equivalence exemption – also condition 34(a) of the Consultation Paper;

While this requirement seems reasonable, it is our experience that ASIC has interpreted and applied it such that FFSPs who had relied on the equivalence exemption but

[7] See for example condition (aa) of Schedule A of ASIC Class Order 03/1099 – UK regulated financial service providers.

previously notified ASIC of their intention to cease reliance could no longer 'reinstate' reliance on the exemption. This meant that a FFSP which legitimately ceased reliance on an equivalence exemption for practical reasons such as it no longer servicing Australian clients could not subsequently rely on the exemption. We submit that it should be possible for an FFSP to rely on an equivalence exemption after notifying ASIC of its intention to cease relying on it by lodging the relevant documents with ASIC again.

(e) the FFSP must provide financial services in Australia in a manner which would comply, so far as is possible, with the home jurisdiction regulatory requirements – also condition 34(v) of the Consultation Paper.

Although not an inherently unreasonable, this requirement can raise problems. For example, where the home jurisdiction requires FFSP representatives to be licensed or registered but only residents can be so authorised licensed or registered. While the limitation of 'so far as possible' is intended to address this, it imposes a high bar. We recommend it be replaced with 'where possible'.

Limited connection relief

1.8 We strongly support the continuation of this exemption. It operates simply and has the effect of ensuring that the jurisdictional extension in section 911D of the Corporations Act only applies to retail clients, which we believe is appropriate.

1.9 The funds management relief is too narrow and is not a reasonable substitute for the limited connection relief. The important aspect of the limited connection relief is that any kind of FFSP can deal with wholesale clients in Australia without being concerned about tripping Australian regulatory requirements where it does not engage in any conduct in Australia. We submit that this is appropriate. FFSPs should be able to conduct their business in their home jurisdiction without being concerned about the possible application of Australian regulatory requirements if their only business is with wholesale clients. We understand that this approach is consistent with global regulatory norms.

Option 2: extend previous relief to additional jurisdictions for specified financial services
Option 3: extend previous relief to additional jurisdictions and all financial services

1.10 For the reasons set out in paragraph 1.2 above, we support these options. However, we have concerns regarding many of the proposed conditions – see paragraph 1.7 above and paragraph 8.1 below. Subject to our comments in paragraph 1.7 above, we submit that the conditions that apply under these options should not extend beyond those applying to the current equivalence exemptions.

1.11 We note that option 2 would extend the relief to deposit products (both Australian and foreign) and non-cash payment facilities which is consistent with some but not all of the current equivalence exemptions. Given the simple nature of these types of products, we believe that it is appropriate to extend all equivalence exemptions to these financial products.

1.12 These options exclude FFSPs who are not in the jurisdictions in paragraph 34 of the Consultation Paper from providing any financial services to any clients in Australia. If either of these options is adopted, it will be important to continue the limited connection relief for other FFSPs in the current form or an adjusted form. See our comments in section 3 of this submission.

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

2.1 We strongly support the reinstatement of the equivalence exemptions and the limited connection relief along with the ability to apply for individual relief (**relief regime**). We believe that this relief should be reinstated (with the inclusion of additional regimes as discussed in paragraphs 1.2 – 1.4 and the other adjustments as discussed in section 1 of this submission above) for the reasons set out above and the following reasons:

(a) The relief regime includes important exemptions which reduce barriers to trade in services, facilitate competition for financial services in Australia and enable Australia's financial service market to operate in the same manner as other wholesale markets by permitting overseas providers to engage with Australian financial institutions and other wholesale client without unnecessary layers of regulation.

(b) ASIC's current regime has affected the decisions of FFSPs to commit resources to enter into or increase their investment in the Australian market, which can only have a negative impact on competition in the Australian market and we understand that some FFSPs have been considering withdrawing from the Australian market.

(c) The foreign AFS licensing regime is disproportionately burdensome for FFSPs who had previously relied on an equivalence exemption, given the exemptions applied to firms which are already authorised in a jurisdiction which ASIC has determined has a regulatory regime which is sufficiently equivalent to the Australian regulatory regime.

(d) Under the relief regime, we are not aware of any widespread or significant non-compliance and there is no evidence to suggest a negative impact of the relief regime on:

(i) decision making by consumers of financial products and services in Australia;

(ii) efficiency, flexibility and innovation in the provision of financial products or services;

(iii) fairness, honesty and professionalism by those who provide financial services;

(iv) fair, orderly and transparent markets for financial products;

(v) systemic risk; or

(vi) the provision of fair and effective services by clearing and settlement facilities.

These are the objects of Chapter 7 of the Corporations Act (section 760A). Rather than being inconsistent with these objects, we believe that the previous relief regime facilitates them. Noting that the previous relief regime was confined to the wholesale market, it facilitated these objects by making it easier for participants in the Australian financial services sector to access the skills, services and capabilities of the global market. We therefore believe that resumption of the previous relief regime enhances the financial services and financial products able to be delivered to retail clients in Australia through Australian licensed financial service providers.

(e) We understand that most overseas jurisdictions do not require foreign providers who do not carry on business in the jurisdiction to hold a licence if financial services are only provided to wholesale or institutional clients. For example, we understand that:

(i) The UK has a specific exclusion which enables overseas firms which do not have a place of business in the UK to provide services to certain wholesale clients in the UK and to meet with them in the UK without needing a UK licence.

(ii) In Singapore, foreign entities are not regulated for providing services to a person regulated in Singapore.

(iii) In Hong Kong, a licence is generally only required where the provider actively markets to the Hong Kong public.

(f) We note that when explaining the original rationale for the equivalence exemptions, ASIC stated:

(i) 'ASIC will recognise overseas regulatory regimes to promote the global provision of financial services…in order to remain at the forefront of global financial services regulation, ASIC must produce sensible and facilitative policy that reflects the globalisation of financial services'. (IR 03-22)

(ii) 'The relief has been provided in response to [concerns regarding]…the degree of duplication of obligations under the [financial services reform] regime where a service provider is sufficiently regulated in another jurisdiction.' (IR 03-28)

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

3.1 The limited connection relief is important for many FFSPs who only provide financial services from offshore and who may not have access to equivalence exemptions (for example they are regulated but not in a regime assessed for equivalence, exempt from being regulated in their

home jurisdiction or they are regulated in a sufficient equivalence regime but not incorporated in a regime assessed by ASIC as sufficiently equivalent) or have such a limited connection with Australia that it does not occur to them that they may require an AFS licence.

3.2 The funds management relief, now scheduled to commence on 1 April 2023, is too limited as it only assists investment managers and foreign funds which provide specified services to a very limited range of clients. At the minimum, this exemption should be extended to all professional investors. However, we submit that there is no reason not to extend it to all wholesale clients, which is the category of clients which Parliament has determined do not need additional consumer protections.

3.3 However, this would not resolve all of the concerns regarding the funds management relief. Even in the case of investment managers, the funds management relief only applied to financial product advice given under a portfolio management agreement. As most such agreements do not contemplate advice being given, this is not a particularly useful element of the exemption. Furthermore, the relief does not appear to extend to any financial product advice given in the course of promoting the investment manager's services to prospective Australian clients making it difficult for foreign managers to rely on it.

3.4 Finally, there are many FFSPs who are not investment managers or foreign funds who provide financial services to Australian wholesale clients from outside Australia. We submit that they should not be required to hold an AFS licence where they do not engage in any conduct in Australia. Regulatory regimes globally and in Australia generally only apply to business that carry on business within the relevant jurisdiction. Not only would most FFSPs not expect to be caught by Australian regulation in these circumstances, many may not wish to subject themselves to even the limited requirements the equivalence exemptions (which would of course be even more likely to be the case if additional conditions are imposed as contemplated by paragraph 34 of the Consultation Paper).

3.5 We therefore strongly support the reinstatement of the limited connection relief alongside options 2 and 3 if they are adopted.

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

4.1 One possibility would be to extend the existing exemption in section 911A(2E) (as inserted by Regulation 7.6.02AG) to all financial services and products. This exemption currently permits FFSPs to provide financial services relating to derivatives and foreign exchange contracts to professional investors. It is not clear why this exemption is limited to derivatives and foreign exchange contracts and does not extend to other financial products and services.

4.2 We believe that outbound investment activity by professional investors should not be hindered by regulation to promote efficient and competitive outcomes for the Australian market and indirectly Australian consumers.

4.3 Another option would be to provide a safe harbour for FFSPs to have a number of wholesale Australian clients without being required to hold an AFS licence. One of the major uncertainties of the Australian licensing regime is determining when an FFSP 'carries on a financial services business'. This concept is based on the definition of carrying a business in Division 3 of Part 1.2 of the Corporations Act which does not provide precise guidance on when a business is carrying on a business in Australia. Providing FFSPs with clear and specific rules on the extent to which they can engage with Australian wholesale clients without needing a licence would significantly reduce cost and uncertainty for FFSPs. For example, the exemption could permit:

(a) a specific number of Australian wholesale clients (including their associates); and/or

(b) a specific number of visits to, and/or length of stays in, Australia.

4.4 Although not an alternative option, we would also request that ASIC maintains a register of entities relying on the equivalence exemptions and information such as who is their local agent. At the moment, this is not publicly available information.

5. Is there any other FFSP offered in other jurisdiction that could serve as a model for Australia?

5.1 It has been suggested to us that in Singapore a financial adviser can advise up to 30 'accredited investors' without needing to be licensed which could serve as a useful alternative – see our comments in paragraph 4.3 above.

5.2 We also refer to the examples of other jurisdictions provided in 2.1(e) above.

6. 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?

6.1 Feedback from our clients indicates that the equivalence exemptions and the limited connection relief were useful because they were easy to manage and did not require the expenditure of significant resources to implement or in ongoing compliance. They often worked well in combination – for example, where an entity relying on sufficient equivalence relief marketed products of associated entities to wholesale clients in Australia and the relevant issuers were able to rely on the limited connection relief.

6.2 Please also refer to the following parts of our submission:

(a) paragraphs 1.2 to 1.7 in relation to the equivalence exemptions; and

(b) paragraphs 3.2 to 3.4 above in relation to the funds management relief.

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

7.1 Please refer to our submissions in paragraphs 1.31.4 above. At the minimum, we submit that the equivalence exemptions should extend to all EU, EEA and Swiss financial services regulators in addition to the existing regulators and those recognised by ASIC in its foreign licensing regime.

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

8.1 We have provided our comments on conditions applying to the equivalence exemptions which can cause difficulties for FFSPs in paragraph 1.7 above. These comments equally apply to the conditions identified in paragraph 34 of the Consultation Paper, i.e. conditions 34(a), (i), (j), (p), (q) and (v), and we have not restated them here.

8.2 We make the following submissions in relation to the other conditions in paragraph 34 of the Consultation Paper.

	Proposed condition	Submissions
a)	notifying ASIC when relying on the relief or ceases to use the relief	In addition to our comment in paragraph 1.7(d) above, we note that this condition does not find much favour with our clients who would prefer to rely on an automatic licensing regime such as that proposed in paragraph 44 of the Consultation Paper.
b)	applying to ASIC for approval to use the relief	We don't believe that an application to ASIC for approval to use the relief is efficient or assists in the aims of Government to diversify investment opportunities for Australian investors and attract additional investment and liquidity into Australian markets. Ideally, the FFSP regime would provide for automatic licensing as proposed in paragraph 44 of the Consultation Paper. Failing that, we submit that the regime should simply require notification to ASIC of the intention to rely on the exemption as is the case in the equivalence exemptions.
d)	assisting ASIC in any supervision or investigation matters	While different levels of concerns are expressed by our clients in relation to this proposed condition, most clients were concerned about what this would entail and the additional compliance costs that may be incurred.

	Proposed condition	Submissions
e)	complying with directions from ASIC	Our comments in relation to proposed condition (d) equally apply to this condition. In any case, we submit that any directions made by ASIC should be required to be 'reasonable' and the types of directions ASIC would instruct should be specified upfront as the condition in its current form is vague. There would also need to be a carve out for any directions from ASIC that may conflict with the FFSP's obligations under its home jurisdiction.
g)	not dealing with unauthorised or unlicensed entities	This prohibition does not apply to AFS licensees and we submit it is not appropriate to apply it to FFSPs who will not have as good an understand of Australia's licensing requirements. Any restriction on the ability of FFSPs to provide financial services to Australian clients should be limited to the restriction that they can only be provided to wholesale clients.
k)	complying with auditing and reporting requirements	This proposed condition was strongly opposed by our clients on the basis that they are subject to auditing and reporting obligations under their home regulatory regime which ASIC has assessed as being sufficiently equivalent to Australia's. It is duplicative and onerous to subject FFSPs to additional requirements in Australia. This condition in particular would pose a barrier to entry and is likely to have an effect on the willingness of FFSPs to engage with the Australian market.
l)	ensuring that financial services are provided efficiently, honestly and fairly	We submit that it is not appropriate to impose conditions (l), (m), (n), (o) or (r) on FFSPs. They are subject to appropriate conduct and governance requirements under their home regulatory regime and imposing these obligations would be inconsistent with a determination that that regime is sufficiently equivalent to Australia's.
m)	applying protections for dealing with client's money and property	
n)	having adequate conflict of interest arrangements in place	
o)	having adequate risk management systems in place	
r)	ensuring representatives are appropriated trained	
s)	providing periodical obligations to ASIC	Our clients are concerned about the additional burden that reporting to ASIC would involve. In our experience, reporting obligations is a factor that FFSPs take into account when determining whether to operate in the Australian market. Any reporting obligations should be kept to a minimum, have a clear purpose and based on necessary regulatory oversight requirements. Many of the reporting obligations are intrusive and involve the disclosure of commercially sensitive information and are more onerous than reporting obligations applying to AFS licensees and should not therefore be imposed on FFSPs. If ASIC requires some basic information about the nature of an FFSP's business then this should only be required to be provided when the FFSP first relies on the relief. There should only be a requirement to report further to ASIC if there is a significant change to the information previously provided to ASIC.'

	Proposed condition	Submissions
		We therefore generally oppose the proposed information requirements in condition 34(s) with the possible exception of the information referred to in condition 34(s)(i) (the FFSP's fund or business type) on the basis referred to in the paragraph above. We note in relation to annual compliance attestations that there was a similar requirement in the equivalence exemptions a number of years ago. In that case, six monthly reporting was required. That requirement was removed by ASIC and we expect that was because it simply lead to ASIC having to deal with numerous 'nil' reports and having to deal with inadvertent non-compliance with this requirement by FFSPs when that occurred which simply used its valuable resources for no particular benefit. A confirmation of compliance will not stop bad actors.
t)	breach reporting obligations, similar to that of AFSL holders	Our clients are concerned about being subject to additional breach reporting obligations to applying under their home regulatory regime. It is always challenging to be subject to dual / multiple reporting obligations where the test for reporting may be different. It would be very problematic for an FFSP to be required to report a breach to ASIC which it was not required to report it to its home regulator and equally ASIC may have concerns about breaches not reported to it which are reported to the home regulator. The difficulties in having dual breach reporting obligations is recognised in Australia through the effective exemption from reporting breaches to ASIC which are reported to APRA.[8] FFSPs may also be subject to restrictions on what that can disclose to third parties in connection with breaches reported to their home regulator. We therefore submit that it is not appropriate to impose breach reporting obligations on.
w)	a condition that ASIC can notify the FFSP of any additional conditions it believes are necessary to address any concerns ASIC may have	We are concerned about the open-ended nature of this condition. It does not provide FFSPs with any certainty as to the basis on which they can provide financial services to Australian clients. At any rate, FFSPs should have an opportunity to be heard before any condition is imposed.
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	Similarly to the previous condition, this provision has the potential to increase uncertainty for FFSPs and in any case , FFSPs should have an opportunity to be heard before ASIC exercises the power.

8.4 Our clients are also very concerned about the suggestions in paragraph 35 of the Consultation Paper that ASIC could apply to court for an injunction or negotiate enforceable undertakings with FFSPs or that civil penalties could apply to breaches of the conditions. Again, the more onerous the regime, the greater the risk that FFSPs will decide against entering the Australian market. FFSPs risk becoming subject to overlapping and inconsistent enforcement actions by multiple regulators. The purpose of recognising a regime as being equivalent should be to streamline outcomes for FFSPs and to rely on the home regulator taking appropriate enforcement action against the FFSP.

[8] Section 912D(1C) of the Corporations Act.

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

9.1 We submit that any breach of the relief conditions should be managed in a proportionate way. For example, minor breaches such as a delay in sending information should not be unduly penalised. Where possible, the body committing the breach should be allowed a reasonable opportunity to remedy the breach before a harsher penalty is imposed.

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

10.1 The costs of Option 1A would be negligible, however it is difficult to say what the costs of Option 2 or 3 would be. Considerable restructuring of current arrangements would be required if the limited connection relief is not available and some participants are likely to need to exit the Australian market.

10.2 Although Australia is an important market to many FFSPs, our jurisdiction is often competing with much larger and less crowded jurisdictions and markets. As such, the licensing regime needs to be proportionate and take into account that deeper/less crowded markets may be more attractive marketing propositions for FFSPs with limited budgets and compliance headcount constraints.

10.3 It is a legally complex and costly task for overseas providers to obtain and maintain additional licences in foreign jurisdictions. It results in financial services becoming more expensive or being reduced, and in some cases completely withdrawn. We believe that imposing additional conditions will have harmful economic impacts with the potential to fuel a perception that Australia is a difficult jurisdiction to carry on a financial services business.

11. 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?

11.1 It is difficult to assess the actual costs of many of the conditions proposed. In part, this is because of the lack of detail. However, it is also a time consuming and costly exercise to assess the likely cost of possible future regulation.

11.2 One of our clients has given the following example of a likely cost of the conditions. The requirement to provide a description of business activity to ASIC would require CEO, CFO, Marketing, Compliance and Legal time to prepare. They would then need external counsel review their submission. In their view, there would be no change from A$5,000 to do this, taking into account both internal and external costs. This is the cost for only one of the conditions and others could involve significantly higher costs.

11.3 We have however received indications from our clients that if some of the more onerous conditions identified in paragraph 34 of the Consultation Paper are imposed that they would have to seriously reconsider their commitment to the Australian market and may well consider scaling back their engagement by 50% to 75% or withdrawing from the market entirely.

Fast-tracking the licensing process for FFSPs

Option 1: Amend the fit and proper test to allow ASIC with discretion to determine requirements

Option 2: Modified licensing regime for FFSPs dealing wholesale clients

Option 3: Provide automatic licensing relying on an overseas licence held by the FFSP dealing with wholesale clients

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

12.1 We strongly support amending the fit and proper test for FFSPs as it creates significant difficulties for FFSPs. As they are subject to an equivalent regulatory regime, it should not be necessary for ASIC to consider whether anyone associated with the FFSP is fit and proper with the possible

exception of the person or person identified by the FFSP as being responsible for the business conducted with Australian wholesale clients.

12.2 We suggest minimal requirements apply and streamlining be available for FFSPs who are subject to an equivalent regulatory regime. We note that some of the proofs required by ASIC are very detailed and time consuming to prepare. One example is the C4 Proof – Derivatives Risk Management Statement.

13. **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.**

13.1 We submit that FFSPs who are regulated by an overseas regulatory authority that is a signatory to the IOSCO multilateral MOU should only be subject to minimal obligations. The organisational obligations in section 912A of the Corporations Act should not apply on the basis that FFSPs are required to comply with their home regulatory requirements when dealing with Australian clients. Additional financial obligations, including relating to financial records and reporting, should not be imposed on FFSPs. Rather, they could be required to lodge with ASIC a copy of the financial statements they are required to prepare and lodge with their home regulator. FFSPs should only be required to report matters to ASIC if they are required to report them to their home regulator and only if they relate to financial services provided to Australian clients and they are not prohibited by their home regulatory regime from reporting the matter to ASIC.

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

14.1 We do not believe additional conditions should be imposed.

15. **Are there any other ways licences for FFSPs could be fast-tracked?**

15.1 Imposing a statutory time period within which licence applications need to be assessed by ASIC would significantly improve the process and experience for FFSPs seeking an AFS licence and would boost Australia's reputation as an easy place to establish a presence which would further the Government's goals in relation to the FFSP regime. We submit that a timeframe of 3 months would be appropriate for this purpose.

15.2 We note that the automatic licensing regime would not seem to apply to all regulators recognised by ASIC as having an equivalent regulatory regime. We recommend it be available in respect of at least those regulators as well.

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

16.1 Our clients have indicated that the regimes of Denmark and South Korea are easy for FFSPs to operate within.

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

17.1 Requiring FFSPs to comply with all obligations applying to standard AFS licensees will impose a significant burden on FFSPs both in terms of cost and time. It is likely to be a significant barrier to entry and a major deterrent to seeking an Australian licence.

Interim regime

We and our clients are very appreciative of the extension by ASIC of the equivalence exemptions and the limited connection relief to 31 March 2023 pending the outcome of the Government's consultation.

However, we do request that the equivalence exemptions are reopened so that FFSPs who had not lodged documents with ASIC prior to 31 March 2020 are not denied the ability to provide financial services to Australian wholesale clients relying on those exemptions pending achieving a resolution of the matters raised in the Consultation Paper. Currently, this is not permitted as the extension of the equivalence exemptions only applies to those who were already relying on them when ASIC's new regime was introduced.

We look forward to continuing to engage with Treasury in the development of the new FFSP regime and to participating in a consultation process on the proposed regime before it is introduced.

Please contact us if you have any questions about any aspect of our submission. We would be very happy to participate in any discussions on proposals for FFSP relief.

Yours faithfully
MinterEllison

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Partner

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