

11 September 2023

Financial System Division
Treasury
Langton Crescent
PARKES ACT 2600

EMAIL: FFSP@treasury.gov.au

Dear Sir/Madam

Exposure draft legislation: Licensing exemptions for foreign financial service providers (FFSPs)

We appreciate the opportunity to make a submission on the Exposure Draft on the Treasury Laws Amendment (Measures for Future Bills) Bill 2023: Licensing exemptions for foreign financial service providers released by Treasury on 7 August 2023 (**Exposure Draft**).

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. The comments in this submission reflect our views and should not be considered to be representative of the views of our clients.

We generally support the FFSP regime proposed in the Exposure Draft as a significant step to restoring certainty for FFSPs.

In particular, we support the following:

- (a) the retention of a version of the ASIC's current 'sufficient equivalence' relief, referred to in the Exposure Draft as the 'comparable regulator' exemption;
- (b) the extension of the 'comparable regulator' exemption to the additional regulators recognised by ASIC in its revised FFSP regime as indicated in the Exposure Draft Explanatory Memorandum (**EM**);
- (c) providing an exemption for FFSPs who provide financial services to professional investors; and
- (d) providing an exemption from the fit and proper person requirement for FFSPs regulated by a 'comparable regulator'.

However, we do have some concerns regarding the Exposure Draft which are set out in the remainder of this submission.

1. Comparable regulator exemption

- 1.1 We strongly support the Exposure Draft's proposal to retain the existing 'sufficient equivalence' relief, which will be referred to as the 'comparable regulator' exemption.
- 1.2 However, we query the need to require FFSPs relying on the comparable regulatory exemption to provide financial services from Australia or from the 'comparable jurisdiction', as would be required by section 911A(2)(ep)(v). This requirement may prove unduly restrictive where a regulated FFSP has staff located in another jurisdiction whether as part of a flexible working arrangement or while the staff are travelling.
- 1.3 We submit that this requirement should be replaced with a requirement that the FFSP ensure that to the financial services are provided to Australian clients in a manner that would comply as far as possible with the requirements of the comparable jurisdiction if the financial services were

provided in the comparable jurisdiction. This is consistent with the requirements of the current sufficient equivalence exemptions.

2. Professional investor exemption

- 2.1 We also strongly support the continued availability of a form of the current 'limited connection' relief for FFSPs.

ASIC notification requirement

- 2.2 However, we remained concerned that requiring FFSPs to notify ASIC when they are relying on the professional investor exemption as proposed by section 911A(2)(eo) imposes an unnecessary constraint on the availability of the professional investor exemption. We understand that key comparable foreign financial service regimes, such as those in the UK, Singapore and Hong Kong, do not impose notification obligations on foreign providers who provide services to wholesale clients in their market. The approach taken in these jurisdictions is consistent with a competitive market for wholesale financial services. We therefore believe that the proposed notification requirement would impose an unnecessary burden in the institutional market, reducing the availability of services to the detriment of the Australian economy and ultimately consumers.
- 2.3 We are also concerned that FFSPs which only have limited engagement with Australia will not expect to need to notify an Australian regulator of their activities when they are only engaging with institutional clients and do not have any presence in Australia. Given the professional investor exemption is limited to institutional clients, we submit that any regulatory benefit of the notification requirement is outweighed by the compliance burden and risk it creates. ASIC has the power to require Australian companies and regulated financial services businesses to provide information about FFSPs they use and we submit this is sufficient.

Dealing in products tradeable on licensed markets

- 2.4 Proposed section 911F would exclude a dealing in a financial product in circumstances prescribed in the regulations relating to financial products able to be traded on a licensed market. The EM explains that this proposal is intended to protect licensed markets with significant retail investor participation. The result would be that FFSPs that engage in any dealing in relation to such financial products would need to obtain an Australian financial services (AFS) licence.
- 2.5 It is not clear to us why this protection is required. The Exposure Draft proposes that FFSPs relying on the professional investor exemption will be required to do all things necessary to ensure that they provide financial services efficiently, honestly and fairly. Furthermore, the key market misconduct prohibitions in Part 7.10 of the Corporations Act apply to overseas conduct.¹
- 2.6 We are concerned that this proposal would unduly limit the conduct of FFSPs relying on the professional investor exemption given it extends beyond trading on the market to giving instructions to market participants or custodians to engaging in dealings and arranging for such dealings to occur. In our view, if this limitation is required, it should not apply in those situations and should be limited to engaging in trading activities on the relevant licensed market.

Marketing visits

- 2.7 We very much welcome the proposal to enable FFSPs relying on the professional investor exemption to make marketing visits to Australia.
- 2.8 There is only one aspect of the proposed marketing visit exemption which we have concerns about which is the requirement to count days when no time is spent with clients. This will create complexity and confusion where a representative combines a marketing visit with a personal holiday or a visit to relatives in Australia, an activity which benefits the Australian economy and should be encouraged rather than penalised. This requirement also does not recognise the significant distances involved in travelling around Australia and practically penalises FFSPs who wish to combine visits of clients or prospective clients in Perth and the east coast.
- 2.9 We submit that the proposed requirement in section 911E(3)(b) be replaced with a requirement to only count as a day of the visit a day on which time is spent with a client or prospective client. We

¹ For example, the prohibition of market manipulation applies to conduct whether in Australia 'or elsewhere': s1041A.

do not believe that this should result in a change to the 28 day limit for marketing visits which we believe is appropriate based on the number of days spent with a client or prospective client.

3. Market maker exemption

- 3.1 We welcome the new proposal to provide a licensing exemption for market makers. This will help ensure liquidity in relevant markets.
- 3.2 However, we query why the exemption should be restricted to derivative markets as indicated in the EM. There is no reason in our view to limit the exemption in this way.

4. Client notification

- 4.1 Section 911L of the Exposure Draft proposes to require FFSPs relying on the professional investor and comparable regulator exemptions to notify Australian clients that they are relying on the relevant exemption.
- 4.2 We submit that imposing such a notification requirement on FFSPs is unnecessarily onerous given the exemptions only relate to services provided to professional investors or wholesale clients respectively. Wholesale clients in general and professional investors in particular are sophisticated purchasers of financial services perfectly capable of making their own inquiries about the regulatory status of financial service providers. This requirement is therefore unnecessary and merely creates an additional compliance burden and risk for FFSPs offering their services into the Australian market. We believe a public register of FFSPs relying on relevant exemptions would a better approach.

5. FFSP register

- 5.1 Where notice is required to be given to ASIC of reliance on an FFSP exemption (currently proposed to as a requirement for all three FFSP licensing exemptions, but as noted above we do not believe it should be required for the professional investor exemption), we believe that ASIC should be required to maintain a public register of the entities relying on the exemptions so clients and providers can easily confirm their status which is not currently possible.
- 5.2 The FFSP register should include basic details of the FFSP, when they commenced and ceased (see below) relying on an FFSP exemption, the FFSP exemption(s) relied on and the identity of their local agent where applicable (see our submissions on this requirement below). The register should be free and publicly searchable.

6. Voluntary cancellation of reliance

- 6.1 While the Exposure Draft contains detailed provisions relating to ASIC's power to cancel the availability of the exemptions, there is no express ability for an FFSP to cancel its reliance on an FFSP the exemption. While the EM states that FFSPs can make a voluntary notification to ASIC that they no longer intend to rely on the comparable regulator exemption, this should be reflected in the statute. Not only would this be consistent with the FFSP register we have proposed in the previous section, it will also give FFSPs the ability to terminate their obligations under the relevant FFSP exemption.
- 6.2 The statute should also make it clear that cancellation of reliance on an exemption by an FFSP in these circumstances should not preclude the FFSP from relying on one of the exemptions at a future date by complying with the requirements at that time, for example by notifying ASIC of reliance once again.

7. Compliance with foreign laws

- 7.1 The proposed legislation provides that it will be a requirement of the professional investor exemption and the market maker exemption that the FFSP reasonably believes that providing the service does not contravene any law applying where the service is provided from, where the FFSP's head office is located or where the FFSP's principal place of business is. However, given the service will be provided to an Australian client, it is quite likely that such laws would not apply to the service in any case. We therefore suggest replacing sections 911A(2)(eo)(v) and 911A(2)(eq)(iv) with the following:

'the person reasonably believes that providing the same or substantially the same financial service would ~~not contravene any law~~ comply with the laws applying in each of the places referred to in subparagraph [(iii) or (iv) / (ii) or (iii)] if the financial service was provided in each of those places other than any obligation which it is not reasonably practical to comply with because the service is provided in Australia or to an Australian client;'

7.2 The qualification is needed because some legal obligations in distinct jurisdictions may not be possible to comply with for an Australian client, for example if the home jurisdiction required the FFSP to obtain a certain form of document from the client that is not available in Australia.

8. Efficiently, honestly and fairly

8.1 Section 911N proposes to require FFSPs relying on one of the exemptions to 'do all things necessary to ensure that the financial services are provided efficiently, honestly and fairly' (**EHF duty**). We are concerned that the imposition of this duty will have negative implications for the willingness of FFSPs to provide financial services into the wholesale or institutional market in Australia, reducing competition which is ultimately detrimental to the market as a whole. The duty is by no means simple in its application. Historically, the courts have applied the duty compendiously, that is, 'efficiently having regard to the dictates of honesty and fairness, honestly having regard to the dictates of efficiency and fairness, and fairly having regard to the dictates of efficiency and honesty'.² However, this has come into question in recent times³ and reforms have been proposed.⁴ We submit that the imposition of such an uncertain and complex obligation on FFSPs, who would have only limited knowledge of the AFS regime, would be highly problematic.

8.2 In any case, we believe the rationale underpinning the proposal to impose licensing duties on FFSPs is misconceived. This is particularly the case in relation to the EHF duty for the professional investor and comparable regulator exemptions.

8.3 Professional investors represent a sophisticated subset of wholesale clients. They are well placed to protect their own interests in dealing with financial service providers, including foreign providers. While some oversight may be viewed as being needed, imposing one of the most complex duties on FFSPs is excessively burdensome.

8.4 FFSPs providing services under the comparable regulator exemption would already be subject to their own ethical duties. It is contradictory for the Minister to on the one hand approve a jurisdiction as appropriately similar to Australia, and on the other hand for the statute to impose additional duties on FFSPs operating out of such jurisdictions. If a Minister is to approve a foreign regime as 'comparable', this will not doubt take into account the suite of obligations of regulated entities operating under that regime.

8.5 In our view, rather than imposing additional obligations on FFSPs which carry penalties for non-compliance, it is sufficient for ASIC to be able to cancel an exemption if it forms a reasonable belief that the FFSP is not providing financial services efficiently, honestly and fairly, as proposed under section 911S.

9. Breach reporting

9.1 Proposed section 911R introduces a framework for FFSPs to report contraventions of the conditions of the exemptions to ASIC. We support the simplified approach adopted by the proposed legislation. However, we query why the proposed legislation introduces a 15 business day reporting window, while domestic entities are afforded 30 days to report breaches.

9.2 Furthermore, we submit that any breach reporting obligation should be subject to a significance or materiality test. Minor or technical breaches should not be required to be reported. It should also be clear that this obligation should be subject to any contrary legal obligation in relation to disclosing the matter arising under the FFSP's home jurisdiction law, similar to proposed section 911P(6).

² *Story v National Companies and Securities Commission* (1988) 13 NSWLR 661, Young J.

³ Compare the judgements in *ASIC v Westpac* [2018] FCA 2078; *ASIC v AGM Markets* [2020] FCA 1499; *ASIC v RI Advice Group* [2022] FCA 496. See also discussion in Australian Law Reform Commission, *Interim Report A: Financial Services Legislation*, Report No 137 (2021) [13.43].

⁴ Australian Law Reform Commission, as above, Proposal A20.

10. Other conditions

10.1 We have the following comments in relation to the other conditions that will apply to the exemptions.

Proposed-section	Description	Submissions
911J(3) and (4)	assisting ASIC	<p>We submit that the requirement to show books or other information to ASIC and to notify ASIC should be subject to:</p> <ul style="list-style-type: none"> any overriding secrecy obligations applying to the FFSP (similar to the restriction in proposed section 911P(6)); and a specific qualification that the FFSP is only required to show ASIC books that are or are reasonably likely to be relevant to any financial services provided to Australian clients.
911J(5)(c)	submitting to Australian courts	<p>We submit that the requirement to comply with an Australian court order should be subject not only to any contrary court order in the FFSP's home jurisdiction, but also should not apply if the Australian court order is contrary to any legal obligation of the FFSP in their home jurisdiction.</p>
Various	approved forms	<p>We submit that ASIC should not have an unfettered power to require FFSPs to provide information when determining the form of notices or information given to ASIC. The requirements should be kept to a minimum so as not to be a barrier to entry and should be specified in the legislation.</p>
911Q(2)	agent	<p>Proposed section 911Q(2) requires an FFSP relying on the comparable regulator exemption to have an 'agent' in Australia. It is not stated what the role of this agent is to be or why it is required.</p> <p>The reference to the local agent provisions in Division 2 of Part 5B.2 of the Corporations Act and tangentially to Corporations Regulation 7.6.03B (via an obscure reference to section 911A(1)(j)) indicates that the intent is that the role of the agent is to accept service of process and notices on the FFSP's behalf.</p> <p>In our view the requirement for a local agent is an outdated concept in today's internet connected world. However, if there is perceived to be a need to have a person in Australia who is authorised to accept service of legal process in Australia on behalf of the FFSP, then this should be stated explicitly as the requirement.</p> <p>The reference to Division 2 of Part 5B.2 of the Corporations Act implies that foreign companies are required to be registered as foreign companies under the Corporations Act to rely on one of the FFSP exemptions, whether or not they carry on business in Australia. Not only would this be inconsistent with section 601CD(1), it may also cause tax difficulties for FFSPs that do not otherwise have a permanent establishment in Australia.</p>

11. 'Fit and proper person' exemption

11.1 The exemption from the fit and proper person requirements for foreign licensees is welcome. However, we note that it only applies to the foreign licensee itself. Given most foreign licensees which seek a licence in Australia are more likely to set up an Australian subsidiary for this purpose, we recommend that this exemption be extended to related bodies corporate of foreign licensees to make it more useful.

12. Transitional period

12.1 We note that the transitional relief will be available until 31 March 2025, while the legislation is proposed to commence on 1 April 2024. While this will create a one year transition period, it relies on ASIC not repealing the existing relief prematurely. We believe it is important to give FFSPs certainty and confidence in the new regime for both the Government and ASIC to state that the existing relief will continue in operation for one year after the new regime commences.

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

Richard Batten
Partner

Contact: Richard Batten T: +61 2 9921 4712
M +61 402 098 068
richard.batten@minterellison.com