

Question No: 1

Topic: Law reform – authorised unlicensed markets:

ASIC informed the committee on 17 January 2017 that it has advised the Australian Government of the desirability of law reform that would allow authorised unlicensed markets to become licenced financial markets subject to more detailed regulatory oversight by ASIC.

o When did ASIC provide advice to the government regarding this?

o Can ASIC provide the committee with a copy of the advice provided to the government regarding this?

o What action has been taken following ASIC's advice?

Answer:

ASIC has discussed the need for market licensing reform with Treasury and various Ministers on many occasions dating back (at least) to 2009. Treasury consulted on reforming the market licensing regime and ultimately landed on the amendments in the Corporations Amendment (Crowd-sourced Funding) Act 2017. The amendments provide the ability to exempt market licensees from certain provisions of the Act, which will facilitate more proportionate regulation for emerging and specialised markets and better align the Australian regime internationally.

Please see attachment A – Letter granting exemptions to Part 7.2 of the Corporations Act 2002 from former Minister for Financial Services, Superannuation and Corporate Law, the Hon Chris Bowen MP

Question No: 2
Topic: Market Cleanliness

The ASIC 2015-16 annual report mentions on page 3 a new measure of equity market cleanliness. ASIC informed the committee on 17 January 2017 that the equity market cleanliness measure could be developed due to the data available. ASIC noted a similar measure of cleanliness may not be able to be developed for other sectors due to the level of data available for such sectors.

1. Is there data available for ASIC to develop a cleanliness measure for derivative and related markets?

Answer:

There is a growing body of data available for derivatives and related markets. An important development in the provision of this data occurred as part of the global post-GFC reforms to require the reporting of OTC derivative data to licensed trade repositories. Most G20 countries have embarked on this reform, and Australia introduced the last element of mandatory trade reporting for Interest Rate Swaps in July 2016.

ASIC continues to analyse this data and works closely with other agencies such as the RBA, in this endeavour. To date while our work continues to generate insights beyond those available prior to the data being provided, we have also identified limitations on the data due largely to issues around consistency and standardisation. These issues are ones that regulators around the globe continue to explore and ASIC continues to work closely with other regulators in an effort to resolve these challenges. The next important milestone will be the provision of technical guidance by a joint working group of CPMI-IOSCO on the harmonisation of data elements to facilitate the aggregation of data by authorities, to be published in three tranches in 2017 and 2018.

Addressing the standardisation and consistency of this data will be important prerequisites to undertaking the development of market cleanliness measures that we have advanced in the equities market. By illustration, the data we receive for the equities market and which we used in ASIC's *Report 487: Review of Australian equity market cleanliness*, is provided in well-established, standardised form. ASIC sees the development of market cleanliness measures in derivatives and related markets as an important goal. Our global and domestic efforts at improving data consistency and standards in these products are directed towards making analysis of this type possible at a future point.

Question No: 3

Topic: Asia Region Funds Passport:

Page 47 of the ASIC 2015-16 annual report notes that during the reporting period ASIC continued to provide technical assistance to the Treasury on the development of the Asia Region Funds Passport. The annual report stated that ASIC is assisting Treasury to implement the domestic arrangements for the project to ensure Australia is in a position to take advantage of this initiative.

o Can ASIC provide an update on this project?

o Is there currently any marketing of managed funds across Australian borders in either direction?

o What differences are there in regulatory market supervision for cross border marketing of managed funds compared to funds based in Australia?

Answer:

The Asia Region Funds Passport (ARFP), through a framework of equivalence assessment, provides market access for managed funds in participating economies in the Asian region. The ARFP provides for streamlined admission processes to foreign (host) economies and measures to reduce regulatory duplication.

To be able to join the ARFP as a participant, an economy must be an International Organization of Securities Commission (IOSCO) signatory. This means the regulatory framework of each participating economy must have implemented, and adhere to, IOSCO standards of regulation, oversight and enforcement. Before signing the memorandum of co-operation for the ARFP, each participating economy is subjected to an equivalence assessment. Under this equivalence assessment, the regulatory regimes are compared and an assessment is made as to whether each regime is sufficiently equivalent. The regulatory regimes of all current participating economies in the ARFP have been assessed as being sufficiently equivalent.

All participating economies have agreed to Passport Rules. The Passport Rules are a separate set of rules applicable to all passport funds (regardless of where they are established or where they are offered) which are implemented in each passport economy in a form that achieves substantially equivalent outcomes. The Passport Rules supplement those in the home economy and in some instances establish a higher standard of conduct than the home economy rules provide. While the Passport Rules provide an agreed set of rules that apply regardless of where the passport fund is domiciled, they also provide sufficient flexibility to accommodate the different regulatory processes established in each participating economy. Each participating economy typically has arrangements for licensing, oversight, surveillance and enforcement.

The Passport Rules set out requirements in relation to eligibility to be a passport fund operator, requirements to become, and remain, a passport fund, ongoing conduct requirements applying to passport funds, and deregistration and winding up of passport funds.

Host economies can choose to apply host economy rules and regulations in relation to:

- restrictions on labelling;
- point of sale disclosure;
- annual and periodic reporting to investors;
- Advertising;
- distribution of offers through a licensed distributor;
- investor complaints;
- anti-money laundering and counter-terrorism;
- appointment of local agents; and
- information gathering, surveillance, enforcement or administrative powers.

The home economy regulator (for Australia – ASIC) will be principally responsible for assessing and monitoring compliance with home economy rules, and the host regulator will be principally responsible for assessing and monitoring compliance with the host economy rules and regulations.

The earliest date both Australian and foreign funds can be registered to passport under the ARFP is 30 December 2017. ASIC is not aware of any marketing occurring in either direction yet. However, we are aware that some Australian and foreign operators have begun to prepare to register to passport funds when the ARFP becomes operational.

We note foreign operators can market and offer interests in foreign funds to Australian investors already without utilising the ARFP using a variety of methods, none of which have been well utilised. These methods include:

- complying with the regulatory requirements that would apply in Australia to market and offer interests, as well as their home jurisdiction. However, this would mean that the operator and fund would be subject to duplicated regulatory costs and requirements, which means it is not an attractive option;
- meeting the conditions to apply for, and be granted, ASIC relief for foreign financial service providers or foreign collective investment schemes. Both of these types of relief are only available where ASIC considers that the regulatory regime of home jurisdiction of the operator is sufficiently equivalent and the operator complies with strict conditions; and
- for New Zealand operators, marketing and making offers under the Trans-Tasman mutual recognition scheme. This scheme allows an issuer to use one disclosure document prepared under regulations in New Zealand, provided that they comply with some minimal entry and ongoing requirements in Australia.

ASIC has been working closely with Australian Treasury to prepare for implementing the ARFP. Much of this work has been to provide feedback and assistance in the drafting of the ARFP legislation.

ASIC also represents Australia on the ARFP's Joint Committee, which is responsible for the implementation ARFP.

ASIC is now focusing on developing guidance to industry and internal and registry processes to facilitate use of the ARFP's use. This will include developing registers of passport funds that will operate under the ARFP regime and new IT infrastructure for passport funds. Australian and foreign operators will be able to register or notify passport funds to ASIC through an online portal using a digital form.



**The Hon Chris Bowen MP
Minister for Human Services**

Minister for Financial Services, Superannuation and Corporate Law

28 AUG 2009

**Mr Tony D'Aloisio
Chairman
Australian Securities and Investments Commission
GPO Box 9827
Sydney NSW 2001**

Dear Mr D'Aloisio

I write to you concerning my authority to grant exemptions to Part 7.2 of the *Corporations Act 2001* (the Act), and specifically ASIC's role in advising me on these exemptions.

It has been practice for markets seeking an exemption from the licensing provisions under the Act to make an application to ASIC. ASIC will subsequently provide me with advice on the matter, and I will then decide whether to grant an exemption.

In recent times the exemption power in the Act has been used to authorise the operation of specialised trading facilities in circumstances where there is no public benefit in regulating the market under Part 7.2 of the Act.

I would like to record that I am satisfied with the way the exemption power has been used in the past and appreciate the advice ASIC has provided. In particular, I appreciate the consideration ASIC has been giving to enunciating a consistent policy in this area and the discussions it has had with Treasury officials on this topic.

The proliferation of new types of trading platforms and recent developments in global financial markets means that it would be timely that I now give additional consideration to the regulation of financial markets.

In the future I ask that, when ASIC prepares advice to me on a market licence exemption application from a specialised professional market, ASIC consider and advise me on certain factors in relation to that market. My choice of these factors has been developed following discussions between ASIC and Treasury officials, and reflects ASIC's valuable experience in this area.

Factors to be considered when advising the Minister

When advising me on whether to grant an exemption to Part 7.2 of the Act to a specialised professional market, I would like ASIC to consider the following matters:

- The characteristics of the market including the number of market users, the likely size and volume of trading on the facility, and the nature of the financial products traded on the facility.
- The types of participants on the market, including whether participants on these markets are professional investors who do not expect the market operator to provide extensive product information.
- Whether the operator has rules and procedures to ensure fair and orderly trading, including the arrangements adopted to ensure reliable contract formation between market users, and the nature of the contractual framework between market users and the operator.
- The extent Australian market users will use the facility.
- The arrangements for ensuring that market users do not participate in the market on behalf of retail investors.
- The arrangements for the operator to monitor compliance by market users with user agreements and trading obligations, and the action the operator will take in the event of non-compliance.
- If relevant, how the facility is regulated outside this jurisdiction.
- Whether users of the facility would expect the facility to be regulated under the Australian market licence regime.
- The likely impact of the operation of the market on the fair, orderly and transparent operation of other financial markets operated in Australia.
- The likely impact of the failure of the market on the reputation of the Australian financial system generally.
- Whether the operator holds an Australian financial services licence (AFSL) that covers the financial services associated with the operation of the market. Where a foreign operator is exempt from the requirement to hold an AFSL, whether the operator is sufficiently regulated by an overseas regulator.
- Whether the market has suitable systems, controls and risk management procedures in place.
- The clearing and settlement arrangements for the facility, if any.

I would also like information on whether the operator is willing to submit to conditions on its exemption, and specifically, whether the operator is willing to:

- limit participation on the markets to professional investors acting on their own behalf or that of another professional investor;
- establish and maintain arrangements to manage any conflicts of interest that arise in relation to activities undertaken by the operator in relation to the market;
- provide ASIC with an annual report;

- provide ASIC with certain information, including details of certain events involving Australian participants and certain events involving the market operator, its director or secretary; and
- give assistance to ASIC and enter into a written co-operation arrangement with ASIC to facilitate co-operation and information sharing.

Consideration of the above factors will help ensure that all of Australia's financial markets continue to operate in a fair, orderly and transparent manner.

Finally, I believe the following factors would benefit from consultation with stakeholders on whether it would be appropriate to include these factors as a condition on an exemption granted to a specialised professional market:

- Whether there should be a condition on operators to retain records relating to the terms under which participants use the market and the orders and transactions effected on the market. This would include whether such records should remain accessible for a period of time.
- Whether there should be a condition relating to transparency, including whether operators should make transaction information available to the market.
- Whether a condition should be imposed on operators to have rules and procedures to ensure fair and orderly trading.
- Whether operators should be obliged to report to ASIC disorderly trading conditions and any conduct that constitutes, or may constitute, misconduct within the meaning of Part 7.10 of the Act.
- Whether it is necessary to impose a condition requiring operators or submit to an Australian court in any action brought against the operator in this jurisdiction.
- Whether it is still appropriate to impose a condition requiring market operators (and associated entities) to not operate a clearing and settlement facility for the market.
- Whether any such conditions should be applied to all existing professional exempt markets.

You have advised that ASIC proposes to issue a consultation paper on the regulation of professional exempt markets. I would appreciate it if these factors could be reflected in that paper.

Review of market licensing regime

I note that there have been benefits in using the exemption power in the Act to make the operation of the market licensing regime more flexible and adaptive to changes in types of trading and platforms. I am concerned, however, not to step beyond what is contemplated by the legislation. Accordingly, I propose to have Treasury review the current licensing regime to see, among other things, if there should be statutory changes to specifically provide for some system akin to current agreements for professional exempt markets. I wish to see if there is a case for establishing a statutory regime that would be more tailored than the current market licensing regime, and more suited to some of the

new forms of professional markets and trading platforms that are becoming increasingly common.

I would encourage ASIC to work with Treasury in relation to this review, once it gets underway.

Yours ~~sincerely,~~

CHRIS BOWEN