



15 September 2023

Mr Tim Baird
Assistant Secretary
Capital Markets and Financial Regulators Branch
Financial System Division
The Treasury
Langton Crescent
Parkes ACT 2600

By email: FFSP@treasury.gov.au

Dear Mr Baird

Licensing exemptions for foreign financial service providers (FFSPs)

1. The Financial Services Committee and the Corporations Committee of the Business Law Section of the Law Council of Australia (collectively, the **Committees**) thank Treasury for the opportunity to comment on the exposure draft Treasury Laws Amendment (Measures for Future Bills) Bill 2023: Licensing exemptions for foreign financial services providers (the **Bill**) and its accompanying Explanatory Memorandum (the **EM**), which were released for consultation on 7 August 2023.

Background

2. The Bill seeks to amend the *Corporations Act 2001* (Cth) (the **Corporations Act**) to introduce:
 - (a) a comparable regulator exemption;
 - (b) a professional investor exemption;
 - (c) a market maker exemption; and
 - (d) an exemption from the fit-and-proper person assessment to fast-track the licensing process for FFSPs which are authorised to provide financial services in a comparable regulatory regime.
3. If the Bill was to become law, certain exemptions which the Australian Securities and Investments Commission (**ASIC**) has provided to certain FFSPs from the obligation to hold an Australian financial services licence (**AFSL**) in specified circumstances would cease to have effect.

Preliminary observations

4. The Committees note that the future shape of regulation of FFSPs (and whether or not they need to hold an AFSL) has been uncertain since 2016, when ASIC sought to depart from its long established policy by making ASIC Corporations (Repeal and Transitional) Instrument 2016/396 (with the effect that a number of ASIC legislative instruments would ultimately cease).
5. Since 2016, ASIC has on a number of occasions extended the expiry date of existing legislative instruments on an interim basis without announcing what the final position would be. The previous federal Treasurer canvassed that consultation on a potential legislative solution would take place as part of the Federal Budget announcements made in May 2021. In 2023, this has finally occurred.
6. In light of the long and drawn out history of this matter, the Committees welcome progress towards a resolution for the current uncertainty about the ongoing availability of relief from the requirement to hold an AFSL for those FFSPs that only provide financial services to non-retail clients in Australia.
7. The Committees consider the delay in resolving the uncertainty which has subsisted since 2016, and the inconsistency in approaches between ASIC and the Federal Government, to be sub-optimal. The Committees sincerely hope that there will not be further significant delay in developing a permanent solution that will allow eligible FFSPs to service non-retail clients in Australia with confidence that they can understand the extent to which Australian law applies to them and comply with relevant Australian law obligations on an ongoing basis.
8. The Committees note that the Bill does not seek to replicate the ASIC limited connection relief for FFSPs. This will mean that FFSPs which have historically been able to deal on a limited or occasional basis with genuinely wholesale client entities will no longer have the benefit of an AFSL exemption to service clients which do not fall within the 'professional investor' definition. The Committees consider that this is an undesirable outcome.
9. The Committees also note that FFSPs which have commenced to provide financial services in Australia since March 2020 have had to obtain individual ASIC relief of similar effect to existing ASIC legislative instruments (which have continued in force but have been unavailable to new entrants to the Australian market after March 2020). The preparation of an additional ASIC relief application, together with payment of several thousands of dollars in relief application fees, has meant the costs of obtaining exemption from the AFSL requirement have been greater than they would have been if ASIC had allowed these FFSPs to rely on the existing legislative instruments.
10. The Committees consider it important that the proposed future legislative regime is fair, well-designed and appropriately balanced. With this in mind, the Committees have set out their comments and observations relating to specific elements of the proposed new FFSP AFSL exemption framework below.

Proposed comparable regulator exemption

11. Proposed new paragraph 911A(2)(ep) of the Corporations Act would allow persons that are regulated by comparable regulators to provide financial services to wholesale clients without an AFSL. Any FFSP seeking to rely on this exemption would also need to meet the requirements of proposed new sections 911H, 911J, 911K, 911L, 911M, 911N, 911P, 911Q and 911R. ASIC could also take actions which could impact the FFSP's ability to benefit from the exemption under proposed new sections 911S, 911T, 911U and 911V.
12. The Committees welcome the proposed comparable regulator exemption and consider it to be more principles based and potentially flexible than the current regime of regulator-specific ASIC legislative instruments. However, the Committees believe some refinements may be necessary, for the reasons outlined below.
13. First, proposed new section 911P of the Corporations Act would require the FFSP to notify ASIC of significant investigations taking place in another jurisdiction. The Committees submit that the FFSP should only be required to do this if such disclosure to ASIC would be lawful in the relevant foreign jurisdiction.
14. Secondly, the Committees note that some FFSPs may operate from a number of locations in multiple jurisdictions. The Committees submit that the exemption should be sufficiently flexible to cover the provision of financial services in any location where the FFSP is subject to the comparable regulator's supervision (irrespective of whether the relevant conduct takes place in the jurisdiction of the comparable regulator itself or another jurisdiction where it is nonetheless subject to the comparable regulator's supervision).
15. Finally, the Committees question whether the description of the position under the current law on page 13 of the EM is entirely accurate, noting that there is some complexity in the current ASIC legislative instruments regime.

Proposed professional investor exemption

The proposed new paragraph 911A(2)(eo) of the Corporations Act would permit the provision of financial services from outside Australia (except during limited marketing visits) to professional investors without an AFSL. Any FFSP relying on this exemption would also need to meet the requirements of proposed new sections 911E, 911H, 911J, 911K, 911L, 911M, 911N and 911R. An FFSP could be prevented from making use of the exemption by regulations that could be made in the future under proposed new section 911F or 911G. ASIC could also take actions which could impact the FFSP's ability to benefit from the exemption under proposed new sections 911S, 911T, 911U and 911V.

16. First, the Committees note that currently regulation 7.6.02AG of the *Corporations Regulations 2001* (Cth) (the **Corporations Regulations**) introduces notional subsection 911A(2E) into the Corporations Act, which allows an FFSP to provide certain specified kinds of financial services relating to certain specified kinds of financial products to professional investors in Australia. The EM indicates that the proposed new professional investor exemption would "replace" this exemption.

17. The Committees therefore assume that, if the Bill was to be passed, then regulation 7.6.02AG of the Corporations Regulations would be amended to remove notional subsection 911A(2E) from the Corporations Act. It is important that, as part of the ongoing maintenance of Treasury portfolio laws, loose ends of this nature are tied up so that future confusion is avoided.
18. Secondly, the Committees note that the proposed new professional investor exemption is more complex and onerous than the current notional subsection 911A(2E) (which is not subject to conditions or potential ASIC intervention). Therefore, FFSPs which currently rely on notional subsection 911A(2E) would need to make changes to their existing compliance arrangements in order to continue to lawfully provide the same financial services to wholesale clients in Australia. Therefore, the Committees submit that a transitional continuation of subsection 911A(2E), as notionally inserted by regulation 7.6.02AG of the Corporations Regulations, may be appropriate.
19. Thirdly, the Committees note that there are FFSPs which currently rely on the ASIC limited connection relief in respect of **wholesale** clients, and will need to adapt their compliance arrangements to fit within the proposed new professional investor exemption, to the extent that it is possible for them to do so (noting that some of their existing clients may fall into a category of wholesale client other than the professional investor category). Table 1.1 on page 11 of the EM does not appear to take this into account.
20. Fourthly, the Committees note that proposed new section 911F of the Corporations Act would not permit the professional investor exemption to be used if the FFSP deals in a particular financial product able to be traded on a particular licensed financial market which has been prescribed by regulations. The Committees note that the EM does not seek to explain the rationale for this provision, and nor does it provide any examples of situations which might trigger the making of such regulations. The Committees consider that an explanation and/or provision of hypothetical examples would be helpful to provide some context.
21. The Committees note that paragraph 1.53 of the EM states:

“The new professional investor exemption does not apply to foreign financial services providers when their dealings involve a trade in certain financial products (largely equity market products) on certain licensed markets. This is to ensure adequate regulatory supervision, maintain domestic market integrity and protect retail investors from potential harm in prescribed domestic licensed markets that trade prescribed financial products”.
22. The proposed new professional investor exemption would only permit the FFSP to provide financial services to professional investors. Consequently, the FFSP would not be allowed to provide any financial services to retail clients in Australia without an AFSL. The Committees are therefore puzzled by the reference to the protection of retail investors in paragraph 1.53 of the EM.
23. Finally, the Committees consider that the limit imposed by proposed new section 911E of the Corporations Act of 28 days per calendar year for “marketing visits”, which would include weekends and public holidays, ought to be revisited for the following reasons.

24. The Committees consider that the 28 calendar day test is too restrictive, and that it would be more appropriate if the relevant restriction was that the FFSP must not have business premises in Australia or any staff members working from within Australia on a permanent basis.
25. A practical difficulty with the proposed 28 calendar day limit is that an FFSP may have planned marketing visits of 28 calendar days or less in aggregate for its representatives in a calendar year. However, due to circumstances beyond its control, outbound flights could be cancelled at short notice, which could cause affected individual representatives to unintentionally remain in Australia for a total of more than 28 calendar days. The FFSP would then be in breach of section 911E despite the careful steps it took to adhere to its legislative obligation.
26. The Committees further question how the 28 calendar day limit could be effectively policed by ASIC at a practical level, and whether it is appropriate for this kind of restriction to be imposed and administered separately from the immigration department.
27. If, in spite of the Committee's concerns expressed above, the 28 calendar day limit was to be retained, the Committees submit that:
 - (a) weekends and public holidays ought to be excluded, because marketing activities are unlikely to occur on those days; and
 - (b) it should be 28 days in any rolling 12 month period rather than 28 days per calendar year.

Proposed market maker exemption

28. Proposed new paragraph 911A(2)(eq) of the Corporations Act would exempt FFSPs from any jurisdiction from the obligation to hold an AFSL where the FFSP is making a market for derivatives that are traded on a licensed market prescribed by the regulations. The FFSP would also need to meet the requirements of proposed new sections 911H, 911J, 911K, 911M, 911N and 911R of the Corporations Act. ASIC could also take actions which could impact the FFSP's ability to benefit from the exemption under proposed new sections 911S, 911T, 911U and 911V.
29. The Committees note that there is currently no similar exemption under the current regulatory framework, and consider that the rationale for proposing this new exemption ought to be clearly articulated.
30. Given that this proposed exemption would permit the provision of market making services without an AFSL to retail, as well as wholesale, clients, the Committees are of the view that it would be appropriate to carefully consider whether (and if so, how) the interests of Australian retail client consumers could be adequately protected if this proposed exemption were to be introduced. For example, if it is expected that FFSPs would be required to make any minimum standard of disclosure documents available to relevant clients, it would be of assistance if the EM included a description of them and the source of any relevant legal obligation.

Proposed exemption from the fit-and-proper person assessment to fast-track the licensing process for FFSPs authorised to provide financial services in a comparable regulatory regime

31. The Bill contains proposed amendments to sections 913B and 914B of the Corporations Act which would mean that a foreign company or partnership formed outside Australia which:
 - (a) is authorised, registered or licensed (as necessary) to legally provide the same or substantially the same financial services by a comparable regulator; and
 - (b) only seeks to provide financial services to wholesale clients in Australia,would not be required to satisfy the “fit and proper person” test when making an application to obtain or vary an AFSL.
32. The Committees support measures to fast-track the licensing process for FFSPs which are authorised to provide financial services in a comparable regulatory regime.
33. However, the Committees anticipate that it may not always be the case that the FFSP which applies for the AFSL is itself regulated overseas by a comparable regulator. It may be the case that an Australian subsidiary entity is formed for the purpose of providing financial services in Australia, in which case that entity will be the AFSL applicant. The Committees consider that it would be useful for the exemption from the “fit and proper person” test to extend to circumstances where the FFSP applicant seeking the AFSL is a related entity of an FFSP that is regulated by a comparable regulator.
34. The Committees would also welcome a pragmatic and streamlined approach from ASIC in assessing AFSL applications from those FFSPs which are subject to comparable regulation.

Transition

35. The Committees note that ASIC’s legislative instruments are currently due to expire at the end of March 2025, which is 12 months from the anticipated commencement of the Bill. Even if the Bill is passed within this proposed timeframe, the Committees consider that a 12-month transition period may be insufficient, and that a 24-month transition period would be more reasonable and appropriate to allow affected FFSPs to adapt their compliance arrangements and, where necessary, apply to ASIC for an AFSL and have their application assessed with an appropriate level of scrutiny and diligence.
36. The Committees also submit that FFSPs which have existing clients in Australia and have relied on exemptions which will cease to be available on the same terms once the Bill commences should be permitted to continue to service those existing clients in Australia without needing to hold an AFSL if:
 - (a) they are not seeking to provide any new kinds of financial services in Australia; and
 - (b) they are not seeking to offer any financial services to new clients,after the commencement of the Bill.

This would avoid potential disruption to Australian wholesale clients which have relationships with FFSPs for whom the provision of financial services in Australia after the commencement of the Bill is non-viable from a commercial perspective (due to the increased regulatory burden).

37. The Committees strongly encourage Treasury to consult with ASIC about the logistics of transitional arrangements to ensure that any transitional provisions are drafted appropriately so that they have their intended effect, and that unintended adverse consequences are avoided.

Further general observations

Drafting related matters

38. The Committees consider that the proposed new paragraphs in subsection 911A(2) and additional provisions in Division 2 of Part 7.6 which the Bill would introduce into the Corporations Act are not easy to comprehend or navigate. The Committees would prefer to see a drafting approach which is more aligned to the recommendations made by the Australian Law Reform Commission in its interim reports of its Review of the Legislative Framework for Corporations and Financial Services Legislation.
39. In particular, the Committees note that:
 - (a) it is necessary to cross-refer to a number of separate sections in order to fully comprehend the operation of the AFSL exemptions contained in proposed new paragraphs 911A(2)(eo), (ep) and (eq) of the Corporations Act; and
 - (b) this is not apparent when reading the paragraphs which provide for the relevant exemptions.
40. While Table 1.2 in the EM provides a more intelligible overview of the operation of the proposed new statutory AFSL exemptions, the Committee submits that a user of the legislation should not be required to consult extrinsic materials in order to readily comprehend the operation of a provision.
41. The Committees also question whether the drafting of proposed section 911S is in keeping with the usual parliamentary drafting conventions. That provision describes ASIC as “cancelling” a legislative provision from applying to a person. The Committees query whether it might be more in keeping with established drafting conventions to give ASIC the power to declare that the relevant AFSL exemption does not apply to a particular person in defined situations.

ASIC notification requirements

42. The Committees note that the proposed new exemptions in paragraphs 911A(2)(eo), (ep) and (eq) of the Corporations Act require the FFSP to notify ASIC of their reliance on an exemption within 15 business days of commencing to provide financial services in Australia. Logistically, the Committees consider that it may be preferable if FFSPs are required to notify ASIC of their intention to rely on an exemption before commencing to provide financial services in Australia, and that they be permitted to rely on the relevant exemption if ASIC does not take steps to prevent them from doing so within a specified period of time. This would avoid a potentially undesirable situation where an FFSP begins to provide financial services to one or more wholesale clients in Australia and is then later prevented by ASIC from relying on an exemption—

which could place the FFSP and clients with whom they may have transacted in an awkward situation.

43. The proposed new section 911R of the Corporations Act would require an FFSP who has failed to comply with a term of the relevant exemption they rely on to notify ASIC within 15 business days. The Committees consider that proposed new section 911R ought to be made more consistent with the AFSL reportable situations regime under Subdivision B of Division 3 of Part 7.6 of the Corporations Act, which could be achieved through:
- (a) making the notification period 30 days rather than 15 business days; and
 - (b) imposing a materiality threshold of similar effect to the “reportable situation” threshold. On this note, the Committee considers it somewhat incongruous to require an FFSP to report something to ASIC which would not be of sufficient significance, were it done by an AFSL holder, to be a “reportable situation”.

Efficiently, honestly and fairly obligation

44. The Committees query whether proposed section 911N of the Corporations Act, which would require the FFSP to “do all things necessary to ensure that the financial services are provided efficiently, honestly and fairly”, is needed. The Committees consider that it may be difficult and confusing for FFSPs to anticipate what “efficiently, honestly and fairly” means for their particular business arrangements and relationships with Australian clients.
45. The Committees note that:
- (a) Australian case law dealing with the “efficiently, honestly and fairly” obligation to date has involved conduct which impacted retail clients in Australia; and
 - (b) neither the professional investor exemption nor the comparable regulator exemption permits the provision of financial services to retail clients in Australia.
46. Further, in the case of the comparable regulator exemption, if a foreign regulatory regime to which the FFSP is subject has already been assessed as “comparable” to the Australian regime, the Committees question whether it is necessary to then super-impose an Australian law obligation on that FFSP in addition to their existing obligations under the “comparable” regime.

Civil penalties

47. The Committees question whether proposed new subsection 911A(5B) is necessary or appropriate. The Law Council of Australia’s Business Law Section has concerns with the civil penalty regime and is generally opposed to any expansion of the provisions which can be the subject of a civil penalty. The Section’s views on civil penalties have been consistently expressed to Treasury on a number of occasions. Copies of previous submissions on the subject can be made available on request.

Further consultation

48. The Committees would welcome further engagement with Treasury in the development of this important and long overdue law reform to ensure that the end result is practically workable and achieves the desired outcomes.
49. If Treasury has any questions or would like to further discuss any matters raised in this submission with the Committee, please do not hesitate to contact Pip Bell, Chair of the Financial Services Committee ([REDACTED]) or Robert Sultan, Chair of the Corporations Committee ([REDACTED]).

Yours faithfully



Philip Argy
Chairman
Business Law Section