Australian Government

The Treasury

ASIC

Australian Securities & Investments Commission

JOINT CONSULTATION PAPER

Cross border recognition

Facilitating access to overseas markets and financial services

June 2008

Document history

This paper was issued on 16 June 2008 and is based on the Corporations Act as at June 2008.

For ASIC purposes, this is ASIC Consultation Paper 98.

Disclaimer

The proposals, explanations and examples in this paper do not constitute legal advice. They are also at a preliminary stage only. ASIC or the Treasury's conclusions and views may change as a result of the comments we receive or as other circumstances change.

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Contents

The consultation process

You are invited to comment on the proposals in this paper. The proposals are only an indication of the approach we may take and are not our final policy.

As well as responding to the specific proposals and questions, we also ask you to describe any alternative approaches you think would achieve our objectives.

We are keen to fully understand and assess the financial and other impacts of our proposals and any alternative approaches. Therefore, we ask you to comment on:

- the likely compliance costs;
- the likely effect on competition; and
- other impacts, costs and benefits.

Where possible, we are seeking both quantitative and qualitative information. We are also keen to hear from you on any other issues you consider important.

Your comments will help us develop our proposals to refine and develop our policies on cross border recognition. In particular, any information about compliance costs, impacts on competition and other impacts, costs and benefits will be taken into account if we prepare a Business Cost Calculator Report and/or a Regulation Impact Statement: see Section H Regulatory and financial impact, p. 56.

The Treasury and ASIC plan to issue a statement after consideration of the comments about next steps of work that relate to the subject of cross border recognition.

Making a submission

We will not treat your submission as confidential unless you specifically request that we treat the whole or part of it (such as any financial information) as confidential.

Comments should be sent by 25 July 2008 to:

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For the avoidance of doubt, although this is a joint consultation, there is only one point of lodgement for submissions.

What will happen next?

Stage 1	June 2008	Joint Treasury and ASIC consultation paper released
Stage 2	July 2008	Comments due on the consultation paper
Stage 3	August 2008	Update by Treasury and ASIC of proposed next steps

A Background to proposals

Key points

This joint consultation paper prepared by ASIC and Treasury explores possible policy approaches to improve recognition of foreign regulation of financial markets, financial products and services to deliver economic benefits to Australian industry and investors.

The concept of mutual recognition has emerged as a result of trends in international financial flows and regulatory developments.

What this joint consultation paper is about

1 This is a joint consultation paper prepared by the Treasury and ASIC exploring possible approaches for the recognition of foreign regulatory regimes to produce benefits to markets, market intermediaries and investors. This consultation paper covers both corporations and financial services policy, which is the responsibility of Treasury, and matters relating to the administration of the *Corporations Act 2001* (Corporations Act), which are the responsibility of ASIC.

Unilateral recognition

2 The current general approach of the Australian Government and ASIC to recognising foreign regulation of financial markets and financial services providers is based on unilateral recognition of the foreign jurisdiction. However, the recently introduced Chapter 8 of the Corporations Act provides a possible new means to implement the mutual recognition of securities offerings.

3 Recognition means that an entity operating both in Australian and the foreign jurisdiction will only need to comply with the foreign regulatory regime and not all the Australian regulatory requirements. This unilateral approach is reflected in ASIC's current policies for overseas markets and financial services. The policy produces the benefits of access to markets and financial services for Australian investors without duplication of regulation. For example, under the unilateral approach there are over 200 foreign entities providing financial services to wholesale clients without an AFSL which benefits Australia with competitive financial services and clients by access to services that might not otherwise be provided.

4 ASIC may recognise the foreign jurisdiction for certain financial services and financial products either on its own initiative or following application by a foreign entity or foreign regulator. ASIC will consider recognising a

foreign jurisdiction where it is satisfied about the regulatory equivalence of the other jurisdiction and the adequacy of co-operation arrangements with the relevant foreign regulator.

5 Under the existing unilateral approach, it is not expected that the relevant foreign jurisdiction will recognise Australian regulation, nor that the Australian Government or the relevant foreign government will be involved in the recognition arrangements. Section C includes a discussion of Australia's current approach to unilateral recognition.

6 The purpose of this consultation paper is to explore possible policy approaches to enhance the effectiveness and flexibility in Australia's framework for the recognition of foreign regulation of financial markets and services. In order to achieve this, a mutual recognition of securities regulation framework is proposed along with refinements to ASIC Regulatory Guide 54 *Principles for cross border financial services regulation: Making the regulatory regime work in a cross border environment.*

Mutual recognition

7 The concept of mutual recognition has emerged as a result of trends in international financial flows and international regulatory developments: see Section B. These include recent initiatives by the United States Securities and Exchange Commission and the recent Australian-New Zealand economic cooperation arrangements designed to reduce the regulatory burden of companies that operate both in Australia and New Zealand.

8 Mutual recognition enables entities from a foreign jurisdiction to operate in a host jurisdiction on the basis of compliance with the single substantive regulatory framework in the foreign jurisdiction. It also allows entities from the host jurisdiction to operate in the foreign jurisdiction. For example, the Australian-New Zealand economic cooperation arrangements will provide opportunities for the flow of capital between the two countries without the burden of compliance with two substantially equivalent regulatory regimes. Similarly, mutual recognition arrangements with the United States has the potential to deepen the liquidity of our secondary markets in equities and to provide more efficient access to US markets for Australian investors.

9 Section C includes discussion of Australia's recently introduced framework for the mutual recognition of securities offerings.

10 For mutual recognition, the regulatory framework of each jurisdiction must be substantially equivalent. This involves significant commitment and cooperation between governments and regulators from different jurisdictions.

Summary of proposals

11 This paper seeks your comments on two sets of proposals:

(a) Section D covers proposed refinements to unilateral recognition policy as reflected in ASIC Regulatory Guide 54 *Principles for cross border financial services regulation: Making the regulatory regime work in a cross border environment* (RG 54); and

(b) Section E covers proposals for a possible mutual recognition framework for financial markets and financial services.

12 The joint consultation paper also sets out in Sections F and G some case studies that illustrate how the proposals for mutual recognition might operate for financial markets and for financial services providers.

Next steps

13 After the consultation period, Treasury and ASIC will review the submissions and issue a statement mid year about how the proposals will be taken forward.

B Trends in international financial flows and international regulatory developments

Key points

As financial markets become more international, there is greater need for the recognition of foreign markets.

Significant economic net benefits may arise from improving access between Australian markets and foreign markets and participants on those markets.

Financial markets are international

14 Since 1980, international financial markets have become increasingly integrated. This has been driven by technology providing communications infrastructure to support international financial transactions and by investors seeking to access foreign markets to find investments that more closely match their appetites for risk and reward.

15 In addition to technological and investor preferences, legislative reform has played a role in encouraging closer financial integration. This has been through removing barriers to the flow of capital by, for example:

(a) the abolition of exchange controls;

(b) an extensive program of liberalising foreign investment restrictions; and

(c) the opening up of banking systems to foreign banks.

16 As a result of these trends, flows of international capital have almost trebled in the past decade. They amounted to more than six and a half trillion US dollars, or 18% of world GDP, in 2006: see Figure 1. The sum of foreign assets and liabilities as a proportion of GDP is one indicator of cross border financial flows. This ratio has increased fivefold in industrialised countries since 1980: see Figure 2.

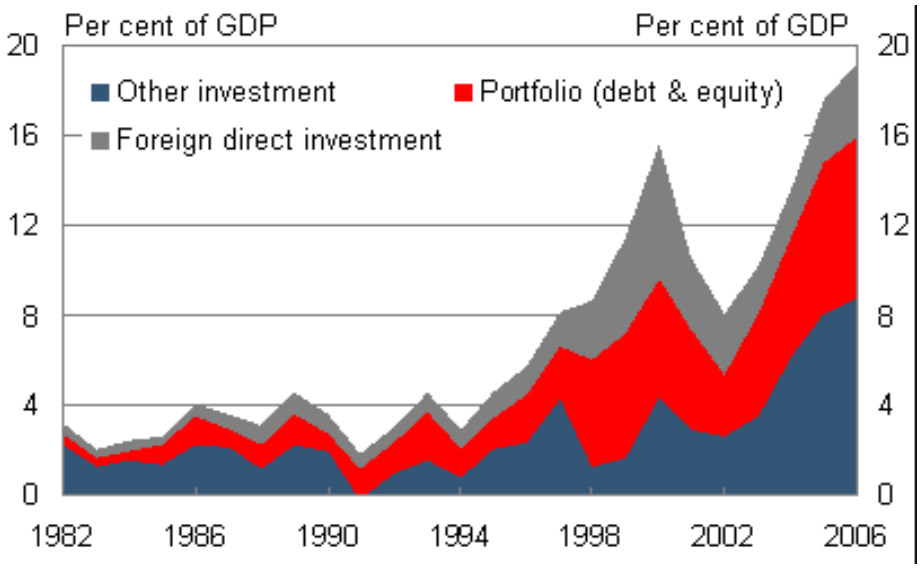
17 In line with this trend, foreign investment into and from Australia is increasing. The stock of foreign investment in Australia at 30 June 2007 was $1,568.7 billion. This represents an increase of $247.9 billion (18.8%) over the level at 30 June 2006.[1] The leading investor country at 31 December 2006 was the United States of America, investing $362.8 billion or 25%of the total at that date.[2]

[1] Source: ABS Catalogue No. 5302.0 Balance of Payments and International Investment Position, Australia, Sep Qtr 2007.
[2] Source: ABS Catalogue No. 5352.0 International Investment Position, Australia: Supplementary Statistics, 2006.

18 The stock of Australian investment abroad at 30 June 2007 was $920.9 billion. This represents an increase of $152.7 billion (19.9%) over the stock at 30 June 2006.[3] The leading destination country at 31 December 2006 was the United States of America, receiving $320.8 billion or 38% of the total at that date.[4]

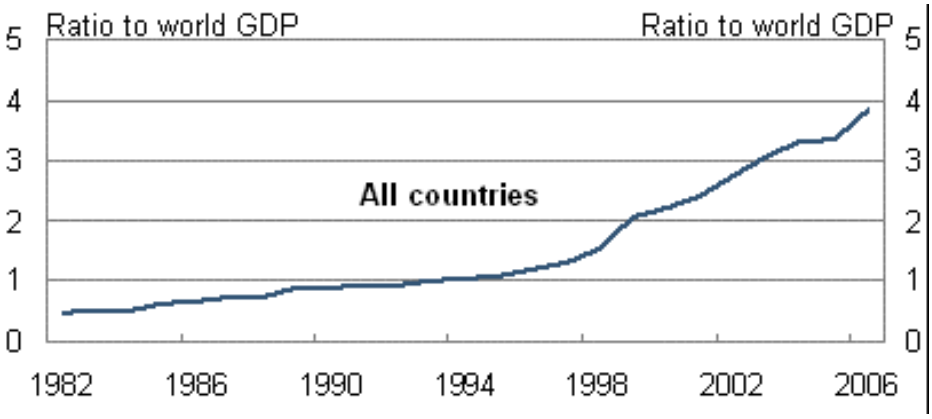
19 As the populations in developed countries age, and as their savings grow, there will be increased pressure from people in those countries to invest their savings in countries with higher growth and return potential. The trend towards financial integration can be expected to continue.

Figure 1: Gross international capital movements



Source: IMF and RBA.

Figure 2: Global financial integration (Ratio of foreign assets plus liabilities to GDP)



Source: IMF.

[3] Source: ABS Catalogue No. 5302.0 Balance of Payments and International Investment Position, Australia, Sep Qtr 2007.
[4] Source: ABS Catalogue No. 5352.0 International Investment Position, Australia: Supplementary Statistics, 2006.

Developments with exchanges

20 While the increase in cross border financial flows is a longer-term trend, there have been significant changes affecting the operation of exchanges. These trends are accelerating the need for the regulation of foreign markets operating outside their home jurisdiction.

21 The demutualisation of exchanges, with the associated merger of exchanges and formation of alliances, joint ventures and cooperative arrangements, have all added impetus for the recognition of foreign markets outside an exchange's home jurisdiction. Related to the recognition of exchanges is the recognition of the foreign participants on those markets.

22 Advances in internet-based communications technology have enhanced the feasibility of cross border market access and trading. There has been a recent round of consolidation across global financial market operators, including:

(a) the merger of Chicago Mercantile Exchange and the Chicago Board of Trade;

(b) the merger of the New York Stock Exchange and Euronext;[5]

(c) the takeover of Nordic exchange operator OMX by NASDAQ;

(d) the large investments made by Borse Dubai in both the London Stock Exchange and NASDAQ.

23 We have seen interest, particularly from overseas derivatives exchanges to operate markets in Australia. To date six markets have obtained ministerial approval to operate their facilities in Australia. In addition, with globalisation making risk management more diversified there appears to be greater drivers on derivatives markets to grow.

Opportunities from cross border financial flows

24 Financial markets are a key mechanism for investing money and raising capital. Open and efficient markets allow businesses to access capital as cheaply as possible and allocate it to businesses in the most efficient ways. By leading to efficient capital formation, they encourage efficient businesses, fund development and benefit the economy as a whole. At the same time, they allow investors to get the best returns on their capital in relation to the risk involved. They allow all sectors of the economy to operate efficiently: to save, borrow, and manage their risks, while helping channel investment to the most rewarding and productive opportunities.

[5] In January 2007 the SEC and the College of Euronext Regulators form comprehensive framework to facilitate cooperation in market oversight in view of the combination between the NYSE Group and Euronext NV into the NYSE Euronext.

25 Other things being equal, the larger the pool that investors can access, and the more capital available to businesses, the more liquid the market will be and the more efficiently returns will be allocated to investors and businesses. There will be more choice for investors and businesses and more competition, leading to a drive for further efficiencies.

26 A country's regulation should:

(a) protect investors and give them access to favourable investment opportunities;

(b) give issuers access to the most efficient and transparent markets in the world where the greatest liquidity and the cheapest capital can be found; and

(c) foster efficient markets within that country.

27 Since national markets in different countries are now interconnected, recognising foreign markets can help to achieve the goals outlined in Table 1.

Table 1: Opportunities arising from recognising foreign markets

Increasing market efficiency	From an efficiency perspective, minimising regulatory compliance costs and inefficiencies has direct benefits for both business and investors. If a business or an investor has to comply with two comparable but different sets of regulations, they incur twice the compliance costs for little, if any, benefit. This is a significant barrier to entry into foreign markets. The end result is that business and investors must pay more to access foreign capital markets. Either they will pay the additional costs or they may be deterred from accessing the markets that would have given them a better and more efficient allocation of funds. Either outcome is inefficient and suboptimal for businesses and the investors.
Maintaining the economy	If a country does not accommodate international financial transactions, business and investors may turn to other markets and its share of global capital will shrink. The fact that its markets lose international business may adversely affect the economy of the whole country.
Increasing competition	Allowing markets to compete without unnecessary international cost barriers is important if they are to remain competitive in an increasingly global financial environment.
Spreading risk	The fallout from any financial difficulties in a major market is unlikely to be confined to a single country. Encouraging the flow of capital investment between markets can help to spread and dampen such risks.
Maintaining standards	By cooperating, like-minded foreign regulators have a better chance of setting the rules in a way that ensures rigorous standards are maintained. They can set benchmarks for sound regulation. Countries cooperating with each other are better placed to influence the rest of the world's markets and their regulators.
Enhancing law enforcement	Increased cooperation between regulators will enhance law enforcement and help to reduce criminal cross market and cross national transactions.

International regulatory developments

28 While international capital flows offer opportunities they also create many challenges, especially for regulators accustomed to dealing with policy and enforcement issues from a national perspective.

29 These challenges principally stem from ensuring investor protection, the integrity of markets and the general application of regulatory safeguards that are necessary to ensure well functioning financial markets.

30 In response to these challenges, regulators from around the globe are seeking to use bilateral and multilateral approaches to ensure investor protection and the integrity of markets.

International Organization of Securities Commission

31 The International Organization of Securities Commissions (IOSCO) is the key multilateral institution for securities regulation. It has 120 regulatory authority members in 109 jurisdictions.[6] More than 90% of the world's securities markets are regulated by IOSCO members.[7]

32 IOSCO's members have resolved, through its permanent structures to:

(a) cooperate to promote high standards of regulation in order to maintain just, efficient and sound markets;

(b) exchange information on their respective experiences in order to promote the development of domestic markets;

(c) unite their efforts to establish standards and effective surveillance of international securities transactions;

(d) provide mutual assistance to promote the integrity of the markets by a rigorous application of the standards and by effective enforcement against offences.[8]

33 The IOSCO Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information (IOSCO MMOU) is a keystone document underpinning information sharing in the context of enforcement and inspection by regulators around the globe, including ASIC.

34 IOSCO plays a key role in improving the quality of regulation of global securities markets.

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[6] See www.seccom.govt.nz/speeches/2007/jds151007.shtml (accessed 18 December 2007).
[7] See www.seccom.govt.nz/speeches/2007/jds151007.shtml (accessed 18 December 2007).
[8] See www.iosco.org/about/ (accessed on 3 January 2008).

US Securities and Exchange Commission approach to mutual recognition

35 In early 2007 a journal article[9] outlined an approach that the SEC might take in regulating foreign financial markets and foreign broker dealers that wanted to conduct their activities in the United States. This discussion is founded on mutual recognition of regulation of financial markets and broker dealers who are located outside the US.

36 An independent body established by the US Chamber of Commerce, the Commission on the Regulation of US Capital Markets in the 21st Century made recommendations, in its report of March 2007, designed to strengthen the US's competitive position in relation to the rest of the world.[10] One of these recommendations was

> *that the SEC improve the cross-border access of (i) US investors to foreign securities and (ii) US issuers to foreign capital. To achieve this goal, the Commission recommends that the SEC give serious consideration to a form of 'substantial compliance'.*

The rationale for this approach is that investors and issuers would both benefit from more open markets, better integrated with foreign markets.

37 On 12 June 2007, the SEC sponsored a public roundtable on the mutual recognition of securities regulation, which considered three main topics:

(a) the effect on US market participants of increased access to foreign markets;

(b) the impact on US market participants abroad from the increased access to US investors by overseas securities firms; and

(c) how best to define and measure the equivalence of regulatory regimes.

38 On 24 March 2008, the SEC announced the actions that it intended to take to further implement the concept of mutual recognition for high quality regulatory regimes in other countries. The SEC indicated the following steps: [11]

(a) to explore 'initial agreements with one or more foreign regulatory counterparts, which would be based upon a comparability assessment by the SEC and by the foreign authority of one another's regulatory regimes';

(b) to consider 'adoption of a formal process for engaging other national regulators on the subject of mutual recognition. This process could be accomplished through rulemaking or other appropriate mechanisms, possibly informed by one or more initial agreements with other regulators';

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[9] Ethiopis Tafara & Robert J Peterson 'A blueprint for cross border access to US', 48 *Harvard International Law Journal*, 31 (Winter 2007).
[10] This is an industry-led review independent of the US Government and the SEC. The US Chamber of Commerce is an industry organisation that represents more than 3 million businesses of all sizes, sectors, and regions.
[11] See www.sec.gov/news/press/2008/2008-49.htm (accessed 3 April 2008).

(c) to develop a 'framework for mutual recognition discussions with jurisdictions comprising multiple securities regulators tied together by a common legal framework, including Canada (which has no national securities regulator, but rather provincial regulators) and the European Union (whose national securities regulators are subject to supranational legislation and directives)'; and

(d) to propose 'reforms to Rule 15a-6 in order to improve the process by which US investors have access to foreign broker-dealers'.

39 On 29 March 2008, the SEC Chairman Christopher Cox and the Prime Minister, the Hon Kevin Rudd MP announced that the SEC, the Treasury and ASIC have formally begun discussions to develop a mutual recognition arrangement for the two countries' securities markets.[12] This is the first announcement of its kind made by the SEC under its new mutual recognition policy.

40 The Prime Minister stated that:

> *"Australia has a long history of recognising foreign regulation of securities markets and welcomes this opportunity to be included in a pilot mutual recognition arrangement with the SEC. We look forward to more bilateral arrangements with the SEC and other financial market regulators. Identifying and eliminating impediments to cross-border trading will mean easier and less costly access to well-regulated investment and will improve transparency and liquidity in our markets. This is a good economic and regulatory outcome."*[13]

41 The Minister for Superannuation and Corporate Law, Senator the Hon Nick Sherry stated that:

> *"The quality of Australia's financial system and the strength of our economy make us an attractive place to invest. We will continue to play a direct role in furthering cross-border financial flows for the benefit of the economy and investors.*
>
> *Given these important developments with the US, I would also like to indicate Australia's willingness to enter into mutual recognition arrangements with countries that have similar quality regulatory frameworks to those operating in Australia."*

[12] See www.sec.gov/news/press/2008/2008-52.htm (accessed 3 April 2008).
[13] Media Release: SEC Chairman Cox, Prime Minister Rudd Meet Amid U.S. – Australia Mutual Recognition Talks, Washington, D.C.29 March 2008, see http://www.pm.gov.au/media/Release/2008/media_release_0150.cfm.

European and US financial markets regulatory dialogue

42 Over the past five years there has been a dialogue between policy makers of the United States and Europe about enhancing cooperation between the EU and the US looking at issues relating to the harmonisation of securities laws. Part of this dialogue has focused on mutual recognition concepts.[14] Some of these developments include:

(a) US–EU initiatives following agreement between the US and the EU in April 2007 including the establishment of the Transatlantic Economic Council (TEC) to facilitate the framework of economic integration between the US and the EU;

(b) SEC hosted discussions focusing on the possible future use of International Financial Reporting Standards by US companies;

(c) in the EU, the development of the Markets in Financial Instruments Directive 2004 (MiFID) applies a single European rulebook to wholesale and retail transactions in financial instruments and to the full range of investment services. MiFID is a cornerstone of the EU's Financial Services Action Plan (1999) and seeks to address the challenges of regulatory and market integration; and

(d) the EU and US SEC in 2008 have emphasised the need to work further on development of mutual recognition arrangements.

Australia and international engagement

Improving capital flows is a priority for Australia

43 Australia is an active participant in promoting and protecting market integrity and investor protection in the context of cross border financial flows. Australia's commitment to ensuring well-regulated financial cross border capital flows is embodied in the Corporations Act, the emerging mutual recognition approach and demonstrated in the existing consultation and cooperation arrangements that ASIC undertakes with international organisations and through arrangements with foreign regulators.

44 On 30 May 2007 the Chairman of ASIC, Mr Tony D'Aloisio, indicated to the Senate[15] ASIC's priorities. Priority 5 is stated as

> *'to improve what [ASIC] can do to facilitate inward and outward investment in [Australia's] capital markets. As an importer of capital and*

[14] *Challenges and Opportunities in the Transatlantic Financial Marketplace*, European Parliamentary Financial Services, EU–US Financial Market Dialogue Briefing Paper (11 April 2007) See www.epfsf.org/meetings/2007/briefings/briefing_11apr2007_more.htm.
[15] Opening Statement on ASIC's Priorities for the Next 12 Months, to the Senate Standing Committee on Economics by Mr Tony D'Aloisio, Chairman 30 May 2007.

> *now with more of [Australia's] investments going overseas, it is important to ensure there are only the necessary minimum roadblocks to investment flows, commensurate with adequate protection. This should facilitate both more liquid Australian markets and better access to offshore investment opportunities for Australia's investment pool, generating more competition, diversification and better overall returns for Australian investors'.*

45 In terms of multilateral arrangements, ASIC is an active member of IOSCO. The Chairman of ASIC, Mr Tony D'Aloisio, is a member of the IOSCO Executive Committee, the President's Committee[16] and he is also a member of the IOSCO Technical Committee.[17] ASIC is a signatory of the IOSCO MMOU. To date there are 47 signatories.

Cooperation in regulatory matters

46 To date, ASIC has currently signed 37 Memoranda of Understanding (MOUs) with foreign regulators in 30 countries, including an MOU with the United States Commodities Futures Trading Commission and US SEC.

47 Collectively these 37 MOUs outline the relationship between the signing parties with regard to assistance and the exchange of information for the purpose of enforcing and securing compliance with the respective laws and regulations of the signing authorities to combat misconduct that can sometimes accompany international financial flows.

48 Under certain circumstances, ASIC can provide information to other foreign regulators who have not yet entered into a MOU or other multilateral or bilateral agreement with ASIC. This flexibility helps it get on with the job of combating corporate and financial misconduct and assisting other regulators to do likewise.

49 Since 2000, the number of international issues requiring ASIC's involvement has risen from 210 to 549 in 2005–06 and during the same period, ASIC increased the number of requests it has made for assistance from foreign regulators from 84 to 146.[18] This increase in cross border regulatory activity is no surprise, given the rise in international capital flows.

Australian–New Zealand economic cooperation

50 Australia and New Zealand have recently introduced measures to reduce duplication of the regulation of companies that operate both in Australian and New Zealand. The *Corporations (NZ Closer Economic Relations) and OtherLegislation Amendment Act 2007* (Cth) has effect for New Zealand

[16] See www.iosco.org/lists/display_committees.cfm?cmtid=1 (accessed on 3 January 2008).
[17] See www.iosco.org/lists/display_committees.cfm?cmtid=3 (accessed on 3 January 2008).
[18] Australian Securities and Investments Commission, ASIC, *Annual Reports – various additions 2000-01 to 2005-06.*

companies operating as foreign companies in Australia. Treasury and ASIC have been developing this policy with our New Zealand counterparts.

51 The Australian legislation also introduces a scheme in Chapter 8 of the Corporations Act to enable the mutual recognition of offer documents for offers of securities (including interests in managed investment schemes) across the Tasman (e.g. a NZ prospectus will be able to be used to make offers of securities in Australia). Similar provisions are in place in New Zealand. The Australia – New Zealand scheme is to come into operation in June 2008.

52 See Section C for a discussion of the new Chapter 8 provisions of the Corporations Act.

Mutual Recognition Agreement and Trans-Tasman Mutual Recognition Arrangement

53 The Productivity Commission is currently undertaking a review of the Mutual Recognition Agreement (MRA) and the Trans-Tasman Mutual Recognition Arrangement (TTMRA). The MRA and the TTMRA are Government initiatives to facilitate greater integration and competitiveness of the Australian and New Zealand economies on a broad scope of topics. The Productivity Commission's review is separate to the present consultation.[19]

[19] See http://www.pc.gov.au/study/mutualrecognition (accessed 18 April 2008)

C Australia's current approach to recognition of overseas regulation

Key points

In regulating overseas markets and foreign financial services, the Australian Government and ASIC ordinarily take a 'unilateral' approach to recognising overseas regulation (i.e. we do not require that the overseas jurisdiction will also recognise Australian regulation). The Australian Government has recently introduced a new means to implement the mutual recognition of securities offerings. The regime will initially apply to New Zealand issuers but may be extended to other countries if we reach suitable arrangements with them.

Treasury has policy oversight of cross border capital flow policy while ASIC has day to day administrative responsibility for the relevant provisions of the Corporations Act.

ASIC has principles for the way in which it will deal with the day to day operation of activities across borders.

A significant number of foreign financial services providers have sought relief for activities that they conduct in Australia with wholesale clients.

Legislative and regulatory framework

Unilateral recognition

54 The Financial System Inquiry (FSI), also known as the Wallis Inquiry, and the Corporate Law Economic Reform Program Paper (No 6) provided the impetus for the *Financial Services Reform Act 2001* (FSR Act). The FSR Act amended the Corporations Act, including inserting provisions about the unilateral recognition of foreign regulated entities operating in Australia.

55 The amended Corporations Act provides the legislative framework for unilateral recognition of the regulation of financial services providers, foreign collective investment schemes (FCIS) and foreign prospectuses in Australia, as well as foreign markets.

56 ASIC has prime responsibility for administrating the Corporations Act. How ASIC applies this legislative framework is set out in the following regulatory guides:

(a) RG 54, which outlines ASIC's overall approach to cross border recognition;

(b) Regulatory Guide 177 *Australian market licences: overseas operators* (RG 177) for foreign markets operating in Australia;

(c) Regulatory Guide 176 *Licensing: Discretionary powers—wholesale foreign financial services providers* (RG 176);

(d) Regulatory Guide 178 *Foreign collective investment schemes* (RG 178); and

(e) Regulatory Guide 72 *Foreign securities prospectus relief* (RG 72).

Mutual recognition

57 Australia has also undertaken its first mutual recognition agreement with New Zealand on securities offerings.

58 The mutual recognition regime in Chapter 8 implements a treaty agreed between Australia and New Zealand on 22 February 2006 known as the *Agreement between the Government of Australia and the Government of New Zealand in relation to Mutual Recognition of Securities Offerings.*

59 The mutual recognition regime allows issuers to offer securities in both Australia and New Zealand, using the same offer documents and offer structure, with minimal additional obligations.

60 The regime applies to offers of shares, debentures, interests in management investment schemes and certain derivatives over these financial products. It does not apply to financial advice, given by the offeror or others.

61 The regime will promote investment between Australia and New Zealand, enhance competition in capital markets, reduce costs for business and increase investor choice.

62 While Chapter 8 allows implementation of the agreement between Australia and New Zealand about mutual recognition, these provisions are drafted in general terms. If arrangements comparable to those between Australia and New Zealand are reached between Australia and another country, those arrangements may be implemented through Chapter 8.

Cross border recognition principles (RG 54)

63 In RG 54, ASIC sets out 10 principles for cross border recognition, which are intended to help access to the Australian market places for foreign providers and to foster closer relations between ASIC and foreign regulators. These principles are summarised in Table 2.

Table 2: Principles for financial services regulation

Principle 1	ASIC recognises foreign regulatory regimes that are sufficiently equivalent to the Australian regulatory regime, in relation to the degree of investor protection, market integrity and reduction of systemic risk that they achieve.
Principle 2	ASIC gives the fullest possible recognition to sufficiently equivalent foreign regulatory regimes.
Principle 3	ASIC must have effective cooperation arrangements with the home regulators of foreign facilities, services and products available in Australia.
Principle 4	ASIC must be able to enforce the Australian laws that apply to foreign facilities, services or products in Australia.
Principle 5	Adequate rights and remedies must be practically available to Australian investors who access foreign facilities, services or products in Australia.
Principle 6	Adequate disclosure must be made of information that Australian investors may reasonably require to make an informed assessment of the consequences of any significant differences between the regulation of the foreign facilities, services or products and the regulation of comparable Australian facilities, services and products.
Principle 7	An equivalent regime is clear, transparent and certain.
Principle 8	An equivalent regulatory regime is consistent with the IOSCO Objectives and Principles of Securities Regulation.
Principle 9	An equivalent regulatory regime is adequately enforced in the home jurisdiction.
Principle 10	An equivalent regulatory regime achieves equivalent outcomes to the Australian regulatory regime.

64 The principles are aimed at:

(a) facilitating the availability and provision of foreign facilities, services and products in Australia, in order to:

(i) enhance competition and innovation in the financial services industry; and

(ii) increase Australian investors' access to financial facilities, services and products;

(b) ensuring that Australian investors who access foreign facilities, services and products are adequately protected;

(c) ensuring that foreign facilities, services and products do not adversely affect the integrity of Australian markets;

(d) ensuring that foreign facilities, services and products do not create systemic risks in the Australian financial system; and

(e) dealing consistently with the regulatory issues that arise from the availability and provision of foreign facilities, services and products in Australia.

65 The principles guide ASIC's policy and decision making about whether ASIC should:

(a) exercise a specific statutory discretion to recognise a foreign regulatory regime or regulator;

(b) advise the Minister to exercise a specific statutory discretion to recognise a foreign regulatory regime or regulator;

(c) grant discretionary relief to a foreign provider to enable it to provide a foreign facility, service or product in Australia without being subject to:

(i) Australian regulatory requirements that are inconsistent with its home regulatory regime; or

(ii) unnecessary regulatory duplication,

and, if so, what relief ASIC should give;

(d) enter into bi- or multilateral recognition arrangements with foreign regulators.

66 In RG 54 ASIC says that

the basis of Principle 1 is that recognition of a foreign regulatory regime is largely dependent on the nature of the foreign regulatory regime and, in particular, its equivalence to the Australian regulatory regime. It is not dependent on reciprocal recognition of the Australian regulatory regime by the foreign jurisdiction. However, [ASIC] will encourage and facilitate such reciprocal recognition.

Australian market licences

Corporations Act

67 A person needs an Australian market licence (AML) if they:

(a) operate a financial market in Australia; and

(b) have not been exempted from the operation of market provisions in Part 7.2 of the Corporations Act.

68 An operator of a foreign financial market may apply for a market licence under s795B(2) of the Corporations Act. Under s795B(2), where an applicant operates a foreign market the Minister may grant the applicant an AML authorising the applicant to operate the same market in Australia. The Minister must be satisfied about certain things in order to do so.

69 ASIC can advise the Minister to grant an overseas market licence under s795B(2) only if ASIC considers that all the criteria in s795B(2) are met. However, ASIC does not make the decision to issue the licence—this is the Minister's decision. RG 177 outlines ASIC's approach to providing advice to the Minister regarding an application for an AML from a foreign market operator.

70 The licensing of an overseas market operator means that they are not required to comply with some aspects of Part 7.2 of the Corporations Act:

(a) the obligation to include specific matters in the operating and written procedures for the market;

(b) the obligation to submit changes to the operating rules to disallowance by the responsible Minister; and

(c) the obligations, where any of the participants in the overseas market provide financial services to retail clients to have compensation arrangements that comply with Part 7.5 of the Corporations Act.

Requirements

71 To successfully apply for an overseas market licence, the foreign market operator must be subject to obligations and supervision in its home country that are sufficiently equivalent to the obligations and supervision that local financial market operators are subject to under the Corporations Act.

72 The overseas market licence requires that the operator of the financial market must also be authorised to operate in the home country the same financial market that they propose to operate in Australia.

73 In RG 177 ASIC indicates that it will use the following criteria to assess whether an overseas market operator is subject to sufficiently equivalent regulation in the home regulatory regime:

(a) whether the regulatory regime is clear, transparent and certain;

(b) whether the regulatory requirements are consistent with IOSCO Objectives and Principles of Securities Regulation;

(c) whether the regulatory requirements are adequately enforced in the home jurisdiction; and

(d) whether the regulatory regime achieves the investor protection and market integrity outcomes that are achieved under the market provisions of the Corporations Act.

Note: This equivalence test is also adopted in RG 176 and RG 178.

74 If the applicant is a foreign body corporate, the applicant must be registered with ASIC under Div 2 of Part 5B.2 of the Act as a foreign company.

75 Six overseas markets have been issued an AML under s795B(2) of the Corporations Act. None of those markets currently trade securities.

Foreign financial services providers

Corporations Act

76 Section 911A(1) of the Corporations Act requires a person who carries on a financial services business in Australia to hold an Australian financial services (AFS) licence.

77 ASIC is responsible for assessing applications for an AFS licence and determining if an exemption to hold an AFS licence should be granted: s913A.

78 Section 911A(2)(h) of the Corporations Act lists a range of exemptions that exist to the general requirement to hold an AFS licence. These include regulation by an overseas regulator and that the financial services on offer are already prescribed as being suitable for an exemption.

79 In 2003, ASIC issued Policy Statement 176 *Licensing: Discretionary powers—Wholesale foreign financial services providers* (now RG 176).

Requirements

80 As set out in RG 176, ASIC will use its exemption powers so that a foreign financial services provider can provide particular financial services in Australia without an AFS licence only if:

(a) the particular financial services are provided in Australia only to wholesale clients …

(b) the particular financial services are regulated by a foreign regulator …

(c) regulation by the foreign regulator is sufficiently equivalent to regulation by ASIC …

(d) there are effective cooperation arrangements between the foreign regulator and ASIC … and

(e) the foreign financial services provider meets all the requirements of the relevant exemption.

81 Table 3 gives an overview of the financial services providers providing financial services to wholesale clients in Australia.

Table 3: Foreign financial services providers relying on RG 176

Home country	Home regulator	No of entities
United States of America	Securities and Exchange Commission	145
	Commodity Futures Trading Commission	5
	Federal Reserve System	6
	Office of the Comptroller of the Currency	4
	New York State Banking Department	1
	Federal Reserve System and Office of the Comptroller of the Currency	3
	Total US entities	**164**
United Kingdom	FSA	125
Hong Kong	Securities and Futures Commission	29
Singapore	Monetary Authority of Singapore	22
Germany	Bundesanstalt für Finanzdienstleistungsaufsicht (BaFin)	11
France	Three regulators	3
New Zealand	Securities Commission	1

Source: ASIC, 9 April 2008

Foreign collective investment schemes

Corporations Act

82 Chapter 5C of the Corporations Act contains a general requirement for managed investment schemes offered to retail clients to be registered (s601EB). A foreign collective investment scheme (FCIS) whose interests are offered to Australian residents who are retail clients would be required to be registered and comply with Ch 5C of the Corporations Act. The foreign operator of the scheme must be an Australian public company and hold an AFS licence (s601FA).

83 In 1993 the Australian Securities Commission (ASC)[20] issued Policy Statement 65 *Foreign collective investment schemes* (PS 65). This policy statement set out what relief the ASC was prepared to provide regulated foreign collective investment schemes. Following the financial services reforms in 2002, ASIC reviewed PS 65 and reissued the policy in PS 178 (now RG 178) in 2004. RG 178 has been amended to reflect the cross border principles in RG 54.

Requirements

84 In RG 178 ASIC currently indicates that exemptions are available for offerings of foreign collective investment schemes to Australian investors where we recognise the foreign regulatory requirements applying to the scheme.

85 ASIC will exempt the operator of an FCIS from the requirement to hold an AFS licence, register a collective investment scheme and providing Australian investors with a product disclosure statements where ASIC is satisfied that:

(a) the home regulatory regime is sufficiently equivalent to the Australian regulatory regime for registered managed investment schemes, or for the disclosure relief, the disclosure regulatory regime is sufficiently equivalent to the Australian disclosure regulatory regime;

(b) ASIC has effective cooperation arrangements with the FCIS operator's home regulator; and

(c) adequate rights and remedies are practically available to investors resident in Australia if the operator of the FCIS breaches the relevant provisions of the home regulatory regime.

86 ASIC has provided relief to the operators of foreign collective investment schemes in the following countries:

(a) United States;

(b) New Zealand;

(c) Jersey; and

(d) Singapore.

Australian-New Zealand mutual recognition

87 As outlined earlier in paragraphs 57 to 62, Chapter 8 of the Corporations Act allows for the mutual recognition of securities offerings, including offers of interests in managed investment schemes. Regulations are required before the Chapter 8 regime is fully operational.

[20] The ASC was the predecessor to ASIC.

88 While Chapter 8 will give effect to the agreement between Australia and New Zealand, the provisions of the chapter are generic and provide a possible framework for the recognition of managed investment schemes of other jurisdictions.

89 ASIC will reconsider the application of RG 178 to New Zealand prior to the commencement of the Chapter 8 regime for the recognition of New Zealand.

Comparison of RG 176 and RG 178

Common requirements

90 The requirements imposed in all relevant exemptions that are made in accordance with RG 176 and RG 178 are generally designed to ensure that:

(a) ASIC is provided with enough information to assess whether the foreign financial services provider or collective investment scheme operator is complying with the conditions of its authorisation and other aspects of the home regulatory regime and to take appropriate action to remove relief from a foreign financial services provider or a foreign collective investment scheme operator when there is material non-compliance with the home regulatory regime;

(b) investors resident in Australia are assisted in enforcing their legal rights; and

(c) ASIC is assisted in enforcing the law and its conditions of relief, both under its own powers and in cooperation with the foreign financial services provider's or the FCIS operator's home regulator.

For more details about the requirements common to RG 176 and RG 178, see Table 11.

Additional investor protection requirements in RG 178

91 As RG 178 contemplates the offer of interests in an FCIS to retail clients in Australia, ASIC imposes additional investor protection conditions on the FCIS operator including as follows:

(a) the operator must maintain in Australia (disclosed to Australian investors) a register of investors resident in Australia;

(b) the operators must not principally target investors in Australia or source more than 30 per cent of the value of investments in the scheme or company from Australian residents;

(c) the operator must have internal dispute resolution systems in place and be a member of an external dispute resolution system;

(d) the operator must show prominently in any disclosure document or Product Disclosure Statement (PDS) given to Australian retail investors:

(i) that the FCIS and its operator are regulated by the laws of a foreign jurisdiction that are different to the regulatory regime of Australia, that the rights and remedies available to investors may differ to those available to investors of Australian schemes;

(ii) the rights and remedies available to Australian investors under the relevant foreign regulatory regime and how they may be accessed;

(iii) the nature of any special risks associated with cross-border investing (e.g. risks arising from foreign taxation requirements);

(iv) the nature and consequences of significant differences in the regulatory regime;

(e) the operator must provide written disclosure containing prominent statements to the effect of paragraph (d)(i)–(iv) to all wholesale members of the scheme resident in Australia; and

(f) the operator must make available on request to investors resident in Australia any publicly available information about the FCIS.

Foreign securities prospectuses

Corporations Act

92 Under Chapter 6D of the Corporations Act, an offer of securities in Australia must be accompanied by the relevant disclosure document, principally a prospectus.

93 Foreign companies that offer securities in Australia must comply with the prospectus provisions of in Chapter 6D which generally means that the prospectus must be registered with ASIC.

Relief under RG 72

94 Before the principles for cross border regulation in RG 54 were developed, ASIC issued RG 72 setting out its approach to the recognition of foreign prospectuses. RG 72 recognises that the disclosure requirements of some other countries can be sufficient to allow Australian investors to make an informed decision whether to participate in offerings without an Australian prospectus or without the foreign company complying with the Australian prospectus regime.

95 Relief from the requirements of Chapter 6D is provided in limited circumstances, in particular, where:

(a) the offer or issue to Australian investors is incidental to the foreign offer or issue for transactions;

(b) the costs of compliance with Australian prospectus provisions would be disproportionate to the regulatory benefits flowing from that compliance.

96 The relief applies to:

(a) rights issues in foreign companies;

(b) foreign takeovers and schemes of arrangement;

(c) foreign companies making 20 or fewer offers in Australia in 12 months; and

(d) advertising and publicity of offers to Australians—to authors and publishers of notices and reports in relation to securities printed and circulated outside Australia to prevent inadvertently contravening the Corporations Act when that material is circulated in Australia.

97 This relief enables Australian investors to participate in offers of securities that might not otherwise be extended to them because of the costs involved in foreign companies complying with the regulatory requirements of multiple jurisdictions.

Mutual recognition – new Chapter 8 framework

98 The recognition arrangements under Chapter 8 of the Corporations Act allow an issuer to extend an offer that is being lawfully made in one country (the home jurisdiction) to investors in the other country (the host jurisdiction) without being required to comply with most of the substantive requirements of the host jurisdiction's fundraising laws that apply to domestic offers.

99 Once the regulations are made, offer documents for shares, debentures and managed investment schemes will be able to be mutually recognised in both Australia and New Zealand.

100 The Chapter 8 mutual recognition scheme allows similar arrangements to be entered into with other countries, where there are equivalent regulatory outcomes. However, there are no mutual recognition arrangements involving other countries proposed under Chapter 8 at this time.

Core conditions for Chapter 8 mutual recognition

101 The Chapter 8 mutual recognition scheme sets out the regulatory framework for the recognition of the offer documents for shares, debentures, interests in managed investment schemes and certain derivatives over those financial products, including the requirements in respect of:

(a) making recognised offers;

(b) entry requirements for recognised offers;

(c) advantages of a recognised offer;

(d) ongoing conditions for recognised offers;

(e) remedies and enforcement; and

(f) outward offers.

102 Table 4 sets out the details of the core conditions for Chapter 8 mutual recognition.

Table 4: Core conditions for Chapter 8 mutual recognition

(a) When an offer is a recognised offer	If, on the day the offer is first made in this jurisdiction, the conditions in section 1200C are met, the offer is a recognised offer. A recognised offer must be from a recognised jurisdiction. Regulations will specify New Zealand as a recognised jurisdiction.
(b) Entry requirements	The entry requirements are as follows: • the offeror meets the criteria in subsection 1200C(2)— for example, the offeror is incorporated, or a natural person resident, in a recognised jurisdiction; • the offeror is not banned by ASIC under section 1200P; • the offer is of a kind prescribed by the regulations in relation to the recognised jurisdiction (subsection 1200C(4)); • the offeror has lodged the documents and information required by section 1200D with ASIC at least 14 days before the offer is first made in this jurisdiction; • the documents and information required by section 1200D must be up to date; and • offer documents must include a warning statement dealing with the status and details of the offer as a recognised offer and the laws that regulate the offer (section 1200E). The Regulations include the statements and details required in the warning statement.
(c) Advantages of a recognised offer	The advantages of a recognised offer are as follows: • certain rules in the Corporations Act do not apply in relation to a recognised offer— see section 1200F; and • the remainder will apply, according to their terms — for example, continuous disclosure (as modified by section 1200K and pre-offer advertising as modified by section 1200L).

(d) Ongoing conditions for recognised offers	Ongoing conditions include as follows: • the offer must comply with the laws of the recognised jurisdiction (subsection 1200G(5); • the offer must be made in the recognised jurisdiction as well as in Australia (subsection 1200G(2); • there must be no person concerned in the management of the offeror who is disqualified from managing corporations or in the recognised jurisdiction, banned or the subject of a court order in Australia (subsection 1200G(6); • notifying change of address for service — see section 1200H; • if the offer relates to interests in a managed investment scheme, having dispute resolution processes — see section 1200J.
(e) Remedies and enforcement	Remedies under Chapter 8 include: • ASIC has stop order powers (section 1200N) and the power to ban a person from using the scheme if they have contravened a relevant provision (section 1200P); • offence provisions (sections 1200N(7) and (8), sections 1200Q, Schedule 3); • other routes are available under the existing Australian corporations legislation — for example, section 1101B of the Corporations Act and action under Part 2, Division 2 of the *Australian Securities and Investments Commission Act 2001* (ASIC Act); and • action by the home jurisdiction regulator and civil action under the home jurisdiction law.
(f) Outward offers	For outward offers, in addition to compliance with relevant Australian law generally, the offeror is subject to the following provisions of Chapter 8: • opt-in notice to be given to ASIC (section 1200S); • the Corporations Act is extended to the recognised jurisdiction in relation to these offers (section 1200T); and • ASIC has stop order power for advertising in a recognised jurisdiction (section 1200U).

D Proposals for refining Australia's framework of unilateral recognition

Key points

The Treasury and ASIC seek views on refining the unilateral recognition arrangements in addition to the proposed mutual recognition arrangements.

103 Although we are proposing that there be an alternative approach to the regulation of foreign financial services providers where mutual recognition arrangements are in place we also are proposing that the current unilateral arrangements in RG 176 and RG 178 also be available.

104 ASIC's regulatory guides about foreign participation in Australian financial markets have been in operation for some time.[21] These documents have facilitated the administration of the Corporation Act's various provisions that allow unilateral recognition of markets, foreign financial services providers and FCIS.

105 This consultation paper provides a useful platform to consider how compliance with, and the administration of, these regulatory guides could be improved to lead to an improvement in the unilateral regulation framework. The Treasury will also consider the relevance of any comments for the operation of the regime for overseas financial markets in Part 7.2 of the Corporations Act.

106 As a result, the consultation proposes that there be some refinements to the obligations imposed in RG 176 and RG 178 on the basis that these changes will facilitate more efficient administration of the relief. This is based on ASIC's experience of reviewing the relevant reports and information which are provided periodically to ASIC under the terms of relief.

107 The suggested refinements are set out below and are compared against the current requirements of RG 176. The proposed changes do not undermine the effective regulatory safeguards to investor protection and market integrity afforded by unilateral recognition.

[21] RG 54 was issued in November 2002; RG 176 was reissued in May 2005 and replaced Superseded Policy Statement 176 [SPS 176]; RG 177 was issued in October 2003; and, RG 178 was issued in May 2004.

Table 5: Comparison of the exemption for foreign financial services providers and proposals for changes to relief, where there is unilateral recognition

Current exemptions under s911A(2)(h) for foreign financial services providers (see RG 176 and RG 178)	Proposal for foreign financial service provider based on refined unilateral recognition
1. General policy	
ASIC's general policy is to recognise the regulatory regime of foreign jurisdictions under RG 178 on a unilateral basis.	ASIC proposes to continue to apply its current approach to unilateral recognition. However, it intends to refine this approach as proposed in this paper. The policy will continue to be applied against a background of trying to maximise opportunities for mutual recognition (see Principle 3 in RG 54).
2. Process	
ASIC does not seek public comment on its proposed extensions of relief under RG 176 (or RG 178) on a class order basis.	ASIC proposes providing an opportunity for public comment on its proposed extension of relief under RG 176 (or RG 178) on a class order basis. The public will be asked: Is there any reason to believe ASIC would be misguided in concluding the proposed jurisdiction has a regulatory regime that is substantially equivalent to Australia's regulatory regime.
3. Conduct and status requirements	
See Table 11, for this element.	Requirements in RG 176 (and RG 178) are maintained.
4. Notifications	
The foreign financial service provider must notify us as soon as practicable of each significant change to the authorisation of the foreign financial services provider relevant to the financial services it provides or intends to provide in Australia, including: • any termination of part or all of the foreign financial services provider authorisation; • each significant exemption or other relief the foreign financial service provider may obtain from the relevant overseas regulatory regime; and • half yearly reports of about significant regulatory regime changes and each enforcement or disciplinary action taken by the relevant overseas regulatory or any other overseas regulator against the foreign financial service provider.	Requirements in RG 176 (and RG 178) are maintained, but there is only a requirement for yearly notification of matters relating to the operation of the regime and relevant enforcement or disciplinary action is being taken.
5. Disclosure	
See Table 11, for this element.	Requirements in RG 176 (and RG 178) are maintained.

Current exemptions under s911A(2)(h) for foreign financial services providers (see RG 176 and RG 178)	Proposal for foreign financial service provider based on refined unilateral recognition
6. Effective cooperation for information, supervision, investigation and enforcement	
ASIC grants exemptions only if there are effective cooperation arrangements between the relevant overseas regulator and ASIC. This is a matter for ASIC to decide, in consultation with the overseas regulator. Effective cooperation arrangements ensure: • prompt sharing of information; and • effective cooperation on: – supervision and investigation; and – enforcement. Effective cooperation arrangements usually take the form of an MOU or some other documented understanding. Generally, effective cooperation arrangements are not possible unless the overseas regulator has power under its regulatory regime to cooperate with ASIC. When deciding whether ASIC has effective cooperation arrangements with an overseas regulatory authority, ASIC takes into account whether the overseas regulator is a signatory of the IOSCO MMOU.	ASIC proposes clarification of guidance already provided in RG 176 (and RG 178) with respect to effective cooperation arrangements. When deciding whether ASIC has effective cooperation arrangements with the overseas regulator, ASIC will: • consider IOSCO MMOU Appendix A signatory status as the best indicator; • consider IOSCO MMOU Appendix B signatory status as an indicator but will also consider the particular circumstances of the overseas regulator. Where an overseas regulator is not a member of IOSCO, ASIC will consider bilateral agreements and the overseas regulator's experience with reference to the terms of the IOSCO MMOU Appendix A and Appendix B.
7. Enforcement actions	
See Table 11 for this element.	Requirements in RG 176 (ad RG 178) are maintained.

Your feedback

D1Q1 Do you agree with the proposed changes to ASIC arrangements for unilateral recognition outlined above? If not, why?

D1Q2 If the mutual recognition framework (as proposed in Section E of this paper) were adopted, should ASIC no longer apply unilateral arrangements in relation to foreign financial services providers and foreign collective investment services? If yes, what would be the status of the entities currently relying on relief under RG 176 or RG 178?

D1Q3 Should ASIC require applications from the same class of applicants for the extension of ASIC's relief under RG 176 or RG 178 to new jurisdictions to be made public? If so, should ASIC seek public comment on these applications or should any public comment only be sought if ASIC was proposing to extend its relief?

D1Q4 If you answered 'yes' to Question D1Q3, do you accept certain aspects of the application may need to be confidential at the request of the applicant? For example, discussion of cooperation arrangements as between the regulators and matters related to specific entities? If not, what would you accept could be kept confidential as between the regulators?

D1Q5 If unilateral arrangements in RG 176 and RG 178 are kept under proposals in this paper, are there any other changes that you think should be made to the existing approach to unilateral recognition? Please explain why you think the suggested change is necessary.

E Mutual recognition proposals

Key points

This section outlines:

- The principle of mutual recognition as well as the key elements of mutual recognition.
- Australia's proposed approach and the three preconditions for mutual recognition.
- The expected outcomes of applying proposals for a mutual recognition regime to foreign markets and foreign financial services providers.

108 Consultation on a mutual recognition framework for securities regulation is a significant development for the regulation of Australia's financial industry. If a mutual recognition framework is adopted it should improve the flexibility of regulatory arrangements for Australian investors and those that invest in Australia or provide financial services to Australians.

109 To maintain the flexibility of Australia's financial regulatory framework it is appropriate that consideration be given to developing and determining how such a policy might be administered by the Minister and ASIC, depending on the relevant circumstance.

110 A flexible recognition framework that incorporates unilateral and multilateral recognition should allow opportunities to maximise the gains from cross border capital flows.

Mutual recognition

111 Mutual recognition enables entities from a foreign jurisdiction to operate in a host jurisdiction on the basis of compliance with the single substantive regulatory framework in the foreign jurisdiction. Both regulatory frameworks must be substantially equivalent. In the context of cross border financial flows this ensures investor protection and market integrity irrespective of the location of the investor, financial product, financial adviser or market on which the financial product is traded.

112 Unlike unilateral recognition, mutual recognition involves a joint commitment between the governments and regulators of each jurisdiction to:

(a) the implementation of recognition between two jurisdictions and

(b) a more enhanced ongoing level of cooperation between the regulators of each jurisdiction.

Mutual recognition involves a host country regulator (e.g. ASIC) ceding some of its regulatory authority to a foreign regulator and regulatory framework because it is the foreign regulatory framework that safeguards investors in the foreign products and protects the integrity of foreign market in the host country.

113 As the mutual recognition arrangements we are proposing would go further in granting relief from host country regulatory requirements than unilateral recognition, the process for determining whether mutual recognition should be granted and the levels of ongoing cooperation is more intensive.

Benefits of mutual recognition

114 The demanding nature of the process to establish, and ongoing commitment to maintain, mutual recognition does imply that it is more costly. However, the outcome is a more robust framework to facilitate the safe involvement in financial markets and use of financial services by Australian residents.

115 As mutual recognition involves greater reliance on the home country's regulator, the compliance costs associated with operating in a foreign market are lower than those associated with unilateral recognition (which entails some compliance with host country laws).

Your feedback

E1Q1 Do you think that mutual recognition should be included as an option for recognition of foreign markets and foreign financial services providers and offer documents? Please briefly explain the reasons for your answer.

Australia's proposed approach to mutual recognition

116 We propose to maximise the recognition of the foreign regulation where there is mutual recognition between Australia and a foreign jurisdiction.

117 Maximising the recognition will have different implications:

(a) For a foreign financial market it might mean that the market operator would be subject to fewer of the obligations that would ordinarily apply to a licensed foreign market in Part 7.2 of the Corporations Act.

(b) For financial services providers it might mean the operator would be subject to fewer requirements associated with the exemption from being licensed or registered (as discussed in Section C, above), particularly as

to notifying ASIC about the ongoing regulation of the entity in the foreign jurisdiction.

118 A fundamental aspect of mutual recognition is reliance on the foreign jurisdiction's laws and supervisory framework. Table 6 sets out the practical implications of this reliance.

Table 6: Practical implications of mutual recognition for foreign provider in Australia and Australian investors

Foreign regulation of foreign provider	The foreign provider is subject to its foreign laws and supervision by its foreign regulator.
ASIC still prosecutes breaches of misconduct provisions	ASIC retains a residual jurisdiction to enforce suspected breaches of Australian misconduct prohibitions by the foreign provider
Australian investors are informed of foreign regulation	Australian investors are informed about the different regulatory regime for the foreign provider.
Australian investors have dispute resolution rights	Australian investors have dispute resolution rights against the foreign provider equivalent to those for investors in the foreign provider's home jurisdiction.
Australian investors have access to Australian courts	Australian investors have access to Australian courts to take action against the foreign provider for breaches of the relevant foreign law by the foreign provider. This is likely to require the foreign provider to establish a presence in Australia for the purposes of enabling Australian investors to take action against them in Australia. Australian investors would also have the option of taking action against the foreign provider in its home jurisdiction.

Preconditions for mutual recognition

119 Mutual recognition is intended to achieve the following outcomes in the context of cross border markets, securities and financial products:

(a) effective regulatory compliance and enforcement;

(b) market integrity;

(c) investor protection;

(d) reduced regulatory requirements through removing the requirement to comply with unnecessary regulatory obligations; and

(e) encouraging the growth of Australia's domestic finance industry.

120 We consider that mutual recognition between Australia and a foreign jurisdiction for foreign markets, financial services and financial products must be founded on:

(a) joint commitment of the relevant governments and regulators to recognising the regulatory arrangements from the other country;

(b) substantial regulatory equivalence between Australian regulation and the relevant foreign regulation; and

(c) enhanced cooperation between ASIC and the relevant overseas regulator.

121 Each of these conditions must be met before mutual recognition may occur between ASIC and the foreign regulator. These conditions also need to be satisfied on an ongoing basis if mutual recognition between the regulators is to be maintained.

Joint commitment of government and regulators to mutual recognition

122 We consider that joint commitment must involve recognition and acceptance of the ongoing conditions of mutual recognition.

123 Mutual recognition is based on reliance on the regulation of another country, so it is essential that there be a mutual ongoing commitment by all those that may shape or influence the ongoing regulation of the entity or activity in either jurisdiction. Without this mutuality the potential for the regulatory arrangements to be ineffective is significant and this would leave Australian investors exposed to significant risks that we think they should not potentially have to carry.

124 Table 7 below provides an overview of the proposed condition of joint commitment for mutual recognition.

Table 7: Elements of joint commitment required for mutual recognition

1. Agreement between the governments and regulators	There must be agreement between the governments and regulators that there is a preliminary basis for pursuing a mutual recognition agreement for certain aspects of financial markets and financial services regulation. Foreign governments (and if necessary their regulators) should agree with the Australian Government and ASIC that under the mutual recognition arrangements for financial markets and financial services providers they will maximise as much as possible the recognition of Australia's regulatory regime. This will mean the foreign government and regulators will rely upon the application of the Australian regulatory requirements and ASIC's supervision and enforcement of those requirements in relation to conduct in Australia. For Australian markets and financial services providers operating in a foreign jurisdiction, the Australian regulator would regulate and supervise those entities. This agreement will keep the dual regulation of recognised markets and foreign financial services providers to an absolute minimum beyond that contemplated under ASIC's implementation of the principles stated in RG 54.
2. Timely and effective cooperation between governments and regulators	There must be timely and effective cooperation between governments and regulators (as necessary) through the negotiation and regulatory assessment process of each other's regulatory regime.

3. An expectation and preparedness to enter into agreements between regulators	Governments and regulators must expect and be prepared to enter into agreements that supplement and enhance the IOSCO MMOU obligations about: • access to relevant information and staff from the other regulator; • the timely and complete sharing of information between regulators; • specific contact between the relevant regulators in the other jurisdiction; • taking specific regulatory action relating to the conduct of an overseas regulated person that may affect an Australian user of the facility or the financial service or an Australian investor. The relevant regulators of the foreign jurisdiction agree with ASIC under the mutual recognition arrangements for financial markets and financial services providers to enter into MOUs that enhance the supervisory and enforcement cooperation arrangements covered by the IOSCO MMOU. This will mean that the level of contact, sharing of information and cooperation between the foreign regulators and ASIC are beyond that contemplated under the IOSCO MMOU.

Regulatory equivalence

125 Another necessary condition for mutual recognition is that there must be regulatory equivalence. By regulatory equivalence in this context we mean the definitions of equivalence adopted in RG 54 and applied in RG 176, RG 177 and RG 178.

126 Regulatory equivalence will be considered in an issue specific manner focussing on regulatory objectives rather than the detail of specific provisions. These principles will guide the assessment of whether a market, financial services provider, FCIS or in the context of whether prospectus relief should be granted.

127 Table 8 below provides in summary the requirements of the proposed equivalence test.

Table 8: Elements of regulatory equivalence required for mutual recognition

1. Regulation in foreign jurisdiction is sufficiently equivalent, complements Australian regulation and is undertaken by comparable regulator	The regulation in the foreign jurisdiction: • is sufficiently equivalent to the Australian regime, applying the relevant criteria for determining regulatory equivalence from RG 54, RG 176, 177, or 178 (as the case may be); • complements Australian regulation of financial markets, financial services providers or collective investment scheme operators; • is undertaken by relevant regulators in the overseas jurisdiction with at least similar capacity, competency and capabilities as ASIC.
1(1) General regulatory objectives	The general regulatory objectives for the purposes of making an equivalence assessment may be as follows: • the overall regulatory regime is clear, transparent and certain (including being subject to a reputable rule of law); • the regulator has effective cooperation and information sharing arrangements

	with relevant overseas regulators. This may include the ability to undertake joint or parallel surveillances; • adequate rights and remedies are practically available to foreign investors who access financial services and securities or investment products n the jurisdiction; • the regulator must be able to enforce the local laws that apply to the foreign market operator or financial services provider; • there are disclosure requirements that are intended to achieve the following objectives: – investors (and their advisors) have the information they need to make a confident and informed decision whether to invest in an offer of securities or investment products by an issuer; and – investors (and their advisors) have the information they need to make a confident and informed decision whether to hold, dispose or acquire securities or investment products of an issuer in the secondary market.
1(2) Proposed regulatory objectives for financial markets	The key securities market regulatory objectives may be as follows: • the operator of a securities exchange (the market operator) is authorised against objective criteria before starting business (e.g. fit and proper standards apply); • the market operator is subject to ongoing regulatory supervision (e.g. there is active and timely supervision of the market operator by the regulator); • market users use the market on an informed basis (e.g. listed entities are subject to price sensitive disclosure obligations; pre and post trading information is made available on a timely basis); • market users are confident that the market as a whole operates fairly and that they are treated fairly (e.g. trading occurs on an open and fair basis); • market users are confident about the participants they deal with (e.g. participants are subject to obligations to comply with the market's trading rules and to protect their client's interests; there is a compensation scheme for clients who suffer loss arising from fraud); • the operation of the market is supervised so that misconduct is detected and the law and operating rules are enforced (e.g. participants/users are not disadvantaged by breaches of the operating rules; market supervision is not compromised by conflicts of interest held by the market operator); • the market operates reliably and is not at risk of failing (e.g. the market operator has adequate resources to operate the market); • transactions entered into on the market are cleared and settled promptly, fairly and effectively (e.g. arrangements are in place to minimise default risk).
1(3) Proposed regulatory objectives for foreign financial services providers	The key regulatory objectives for intermediaries may be: • the intermediary is authorised against objective criteria before starting business; • clients are confident dealing with the intermediaries as they are subject to adequate conduct of business obligations and misconduct prohibitions; • intermediaries are supervised so that misconduct is detected and the law is enforced; • intermediaries have adequate resources to operate in compliance with the law; • intermediaries have adequate risk management arrangements/internal controls/compliance arrangements to act fairly and reliably; • intermediaries are competent to provide fair and quality financial services;

	• clients have access to the information they need to make confident and informed decisions about the use of intermediary services; and • clients have access to adequate dispute resolution and compensation arrangements to deal with losses arising from intermediary services.
1(4) Proposed regulatory objectives for foreign collective investment schemes	Same as those stated in RG 178 at paragraphs RG 178.12 – RG 178.37.
1(5) Proposed regulatory objectives for foreign securities and other investment products.	The key objective is to promote confident and informed decisions by investors by ensuring that investors are provided with all information they reasonably require to make an informed decision about whether to: • buy a foreign security or other investment product; and • in appropriate circumstances, sell or hold a foreign security or other investment product. Note 1: The amount of information that must be provided to an investor to allow the investor to make an informed decision will depend on whether the investor is a wholesale or retail investor. Note 2: Australian continuous disclosure laws benefit both investors and market integrity. This outcome does not relate solely to retail investor protection. We will also be guided by the IOSCO Objectives and Principles of Securities Regulation and the experience of developing and implementing the NZ mutual recognition framework for securities offer documents.
2. Simultaneous recognition	Recognition in Australia and the foreign jurisdiction happens at the same time.
3. Regulatory gaps may be filled with conditions in licence or exemption	If there are regulatory gaps, duplication or ambiguities between Australian regulation and the relevant foreign regulation ASIC or the Minister (as the case may be) may impose or ASIC may recommend conditions in an exemption or licence (where such an exemption or licence is required) to address the gap, duplication or ambiguity.
4. Conditions of relief only in limited circumstances	ASIC would only impose a condition in an exemption or licence or recommend that the Minister impose a condition where ASIC considers that a condition: • is necessary or important to address matters that are not fundamental or integral to the regulatory equivalence between the two sources of regulation; • facilitates effective regulation, including the enforcement of rights and remedies for users of the facility or the financial service or those acquiring or disposing the financial product; • promotes the confident and informed participation or use of the facility or financial service by Australian users or the acquisition or disposal of the financial product by an Australian investor; or • minimises procedural requirements for the operator of the facility, the financial service provider, the product issuer or the regulators.

Enhanced cooperation between regulators

128 We consider that enhanced cooperation must involve a proactive approach by each regulator to assist the other, particularly in relation to the surveillance of, and enforcement against, foreign market operators, financial

services providers, product issuers and collective investment scheme operators. Enhanced cooperation must also involve a commitment by both regulators to act quickly in providing necessary assistance to the other.

129 Table 9 below details some requirements that we think are relevant in deciding whether enhanced cooperation between the regulators exists. It is expected that the regulators will enter into enhanced bilateral MOU(s) that build on the relationship established under the IOSCO MMOU.

Table 9: Elements of enhanced cooperation between regulators required for mutual recognition

1. Regulators are parties to IOSCO MMOU	ASIC and the foreign regulator are both parties to the IOSCO MMOU.
2. Assistance with information and supervision	ASIC and the foreign regulator will assist each other by among other things: • providing information to the other relevant regulator, where requested, about the regulator's oversight of the operations or activities of the facility, financial service provider or the product issuer; and • informing the other regulator of pending regulatory changes that may have a significant impact on the operations, activities or reputation of the facility, the financial service provider or product issuer; and • with inspections, visits and other surveillance activities of the facility, the foreign financial service provider or product issuer, where requested by the other regulator.
3. Notification of change	The regulator will directly notify the other regulator as soon as possible of changes after they take effect (unless it has previously notified the other regulator) about the regulation and supervision of the relevant facility, financial service provider or financial product that may affect: • the assessment of regulatory equivalence with the other relevant regulation; and • the specific cooperation arrangements agreed to between the two regulators (e.g. change of key personnel involved in the cooperation arrangements).
4. Notification of action	The regulator will directly notify the other regulator as soon as possible of any action that is taken by the regulator about a reliable facility, financial service provider or product issuer.
5. Obtaining information or documents requested	The regulator will obtain information or documents from third parties in the regulator's jurisdiction requested by the other regulator.
6. Providing information without request	The regulator will use its best efforts to provide, without request, the other regulator with any information considered of assistance to the other regulator in securing compliance with the laws and regulations of its jurisdiction.

Your feedback

E1Q2 Are there any particular subject areas that you consider a mutual recognition framework could be usefully applied to? Further, to which particular foreign jurisdictions do you think mutual recognition should or could be applied?

E1Q3 Are the draft conditions of mutual recognition that have been identified sufficient for recognising another regulatory regime? If not, what principles would you include in deciding whether mutual recognition arrangements should apply between Australia and a foreign jurisdiction?

E1Q4 If the principles of mutual recognition identified in this CP were adopted, are the elements that have been identified in Table 6, 7 and 8 for each condition appropriate? If not, what elements would you amend, delete or add?

E1Q5 The proposed mutual recognition arrangements are premised on the Australian investor having equivalent dispute resolution rights against the recognised foreign entity and the ability to take action against the foreign entity in an Australian court for breaches of the relevant foreign law. This requires the presence of the foreign entity in Australia, for example by means of registration under Div 2 of Part 5B.2 of the Corporations Act. Do you think these requirements provide sufficient rights of recourse for an Australian investor against a recognised foreign entity? Please briefly explain your answer.

130 Assuming that the three conditions are met and the Government decides to grant mutual recognition, then what would it mean in practical terms? This issue is explored in the next section of the consultation paper.

F Case study: Overseas markets

Key points

This section explains how the proposed mutual recognition arrangements could apply to an overseas market seeking to access Australia.

131 We propose that if a financial market operates in a foreign jurisdiction as well as operating in Australia and mutual recognition arrangements are in place, the market operator may be subject to fewer of the obligations that would ordinarily apply to a licensed foreign market operator under the current system of unilateral recognition. Implementation of these adjusted requirements may be by regulations modifying the market licensing regime or conditional market licence exemption granted by the Minister.

132 It is fundamental to the mutual recognition arrangements for a foreign market that the market maintains at all times its regulatory approval or authorisation in the foreign country and that there are no impediments to access to the overseas market by Australian market users.

133 Table 10 compares the current unilateral recognition conditions with those proposed for mutual recognition of foreign markets wanting to operate in Australia under mutual recognition.

Table 10: Comparison between current unilateral recognition approach to licensing overseas market and mutual recognition approach

Entity with a AML under s795B(2)—unilateral recognition (See RG 177)	Proposal for regulation of markets based on mutual recognition
1. Licensing	
Apply for market licence under s795B(2).	No market licence required if authorised to operate in home jurisdiction.
2. Regulation sufficiently equivalent	
Regulation of the market is sufficiently equivalent as required in s795B(2)(c) if (as described in RG 177) it is: • clear, transparent and certain; • is consistent with the *IOSCO Objectives and Principles of Securities Regulation*; • is adequately enforced in the home jurisdiction; and • achieves the investor protection and market	Apply same test of sufficient equivalence.

Entity with a AML under s795B(2)—unilateral recognition (See RG 177)	Proposal for regulation of markets based on mutual recognition
integrity outcomes that are achieved by the Australian regulatory regime for comparable domestic markets.	
3. Changes to rules	
Market operator must lodge details of any rule change with ASIC as soon as possible after a rule change occurs: 793D(3).	No requirement to notify ASIC of rule changes, rely on foreign regulator to notify ASIC of significant rule changes.
4. Annual report by market operator	
Market operator required to prepare an annual report about compliance with the obligations under Part 7.2: s792F.	No requirement to prepare annual report for ASIC, rely on the supervision by the overseas regulators.
5. Enforcing operating rules	
ASIC or market operator may enforce the operating rules: s793C.	No power for ASIC to enforce any operating rules of the market.
6. Annual assessment of compliance	
ASIC required to undertake at least annual assessment of the market operator's compliance with its statutory obligations in Part 7.2.	Exempt from requirement to undertake an annual assessment, relying on foreign regulator's oversight of the market.
7. Cooperation of market operator and regulator	
Adequate cooperation arrangements with the market operator involve an overseas market operator providing information about the operation of the financial market under s792D.	The market operator agrees to provide reasonable assistance to the regulator, where the regulator requests reasonable assistance in relation to the performance of regulatory functions relating to the operation of the facility.
8. Cooperation between regulators	
Adequate cooperation arrangements between ASIC and the home regulator provide for: • timely sharing of information about the overseas market; and • timely cooperation in: – supervising and investigating activities in the overseas market; and – taking enforcement action involving the overseas market.	(1) In addition to the regulators being parties to the IOSCO MMOU, ASIC and the foreign regulator have entered into specific cooperation arrangements: • for access to relevant information and staff between the regulators; • the timely and complete sharing of information between regulators; • specific contact between the relevant regulators in the other jurisdiction; • for taking specific regulatory action relating to the conduct of the overseas person that may affect an Australian user of the facility. (2) ASIC and the foreign regulator will assist each other by among other things:

Entity with a AML under s795B(2)—unilateral recognition (See RG 177)	Proposal for regulation of markets based on mutual recognition
	• providing information to the other relevant regulator, where requested, about the regulator's oversight of the operations or activities of the facility; and • informing the other regulator of pending regulatory changes that may have a significant impact on the operations, activities or reputation of the facility of the operator; and • with inspections, visits and other surveillance activities of the facility or the operator, where requested by the other regulator. (3) ASIC and the foreign regulator will consult on matters relating to the oversight of the facility and share experiences and knowledge relevant to the oversight of the facility, including informal contact between staff of ASIC and the foreign regulator. (4) The foreign regulator to take the primary role in the supervision of, and enforcement action against (in the foreign jurisdiction), the market operator with ASIC reserving its supervisory and enforcement role. (5) The market operator consents to the disclosure of any information held by one regulator to the other regulator.
9. ASIC's jurisdiction relating to market misconduct	
ASIC has jurisdiction to enforce its market misconduct provisions.	ASIC would retain jurisdiction to enforce the misleading or deceptive and the dishonesty prohibitions.
10. Registration as foreign company	
Registration of foreign company is needed to carry on business in this jurisdiction: s795B(3)(a) (requirement of foreign market operators to be registered under Div 2 Part 5B.2 of the Corporations Act).	This requirement would be retained.
11. Information sharing	
Foreign market operator cooperates with ASIC by sharing information and in other appropriate ways: s795B(2)(d) of the Corporations Act.	This requirement would be retained in a varied form. The foreign operator would be required on written request to provide consent and take all practicable steps to enable and assist the foreign regulator to disclose to ASIC any information or document the foreign regulator has that relates to the operator.

Illustrative example: Overseas market operating in Australia

A market operator of a financial market carrying on business in country X wants to locate its trading screens in the offices of AFS licence holders in Australia. The Australian AFS licence holders will become participants in that

financial market. Australian retail and wholesale clients of the Australian AFS licence holders will be able to trade on the market by placing orders with the Australian participants of the market operating in country X.

How the proposal may apply

If ASIC considers that the regulation of country X markets is equivalent to Australian regulation in accordance with the test for equivalence outlined in this consultation paper, the market operator may obtain an exemption issued by the Minister from the requirement to hold an AML under s791C of the Corporations Act. The Australian AFS licence holders may also be regulated under country X law when trading on the financial market. The question of whether to apply the law of country X will be determined by the jurisdictional reach of the law of country X.

Your feedback

F1Q1 Is the proposed approach to regulation of a foreign financial market under mutual recognition adequate? If not, what proposed requirements should be amended, deleted or added? Why?

F1Q2 Should ASIC retain the option of taking enforcement action over a wide range of market misconduct occurring in a foreign market? If so, what misconduct and why?

F1Q3 Should any disqualification requirements be applied to executive officers of the foreign financial market similar to that under Div 2 Part 7.4 of the Corporations Act? If so, why?

G Case study: Foreign financial services providers

Key points

This section explains how the proposed mutual recognition arrangements could apply to a foreign financial services provider seeking to access Australia.

134 If mutual recognition arrangements are in place, we propose that foreign financial services providers would be able to operate in Australia on a similar basis to that under RG 176 but with two key differences.

135 The two key differences proposed to the existing policy are:

(a) an extension of ASIC's power to grant relief to financial services under RG 176 to retail clients; and

(b) the removal of certain notification requirements on recognised foreign financial services providers.

136 Table 11 below provides a summary analysis of the approach ASIC may take under a mutual recognition framework measured against the approach ASIC currently employs by applying RG 176.

Retail investors

137 Under ASIC's current policy as stated in RG 176, it is a condition of relief that the foreign financial service provider only provide the relevant exempted financial services to wholesale clients. Under mutual recognition, ASIC may extend relief to the provision of financial services to retail clients. This would be similar to the approach taken in ASIC's policy as stated in RG 178. As with RG 178, retail clients of foreign financial services providers would need to rely on the application of the consumer protections under the foreign regime.

Notifications

138 Under a mutual recognition framework, the notification requirements as outlined in RG 176 and RG 178 would be substantially reduced. We consider minimising notification requirements to be appropriate in the context of mutual recognition because under a mutual recognition

framework both the home regulator and ASIC would take a proactive approach to communication of regulatory issues between themselves.

Table 11: Comparison between current unilateral recognition approach to the regulation of foreign financial services providers and the mutual recognition approach

Requirements for exemptions under s911(2)(h) for foreign financial services providers—unilateral approach (See RG 176)	Approach for foreign financial services provider based on a mutual recognition framework
1. Regulation sufficiently equivalent	
The home regulatory regime of the foreign financial services provider must be sufficiently equivalent to the Australian regime. It will be considered sufficiently equivalent if it is: • clear, transparent and certain; • consistent with the *IOSCO Objectives and Principles of Securities regulation*; • adequately enforced in the home jurisdiction; and • achieves sufficiently equivalent outcomes as the Australia regime for the regulation of wholesale financial services.	(1) ASIC would apply same test of sufficient equivalence as ASIC applies it under RG 176, but ASIC would adapt it to apply to both wholesale and retail clients of the foreign financial service provider. (2) The regulation should provide sufficiently equivalent outcomes as the Australian regulation of retail financial services, for example, access to compensation arrangements for Australian clients and access to adequate dispute resolution mechanisms for Australian clients.
2. Regulation adequately enforced	
ASIC considers that the home regulatory regime is adequately enforced if the home regulatory authority: • has sufficient powers of investigation and enforcement, including that the market operator has submitted to the non-exclusive jurisdiction of the Australian courts in actions brought by ASIC in relation to the market; • has sufficient resources to use those powers; • uses those powers and resources to promote compliance with the regulatory regime; • operates within a legal framework that is independent and has a reputation for integrity.	In addition to the adequate enforcement arrangements described in RG 176, enforcement is undertaken by relevant regulators in the foreign jurisdiction with at least similar capacity, competency and capabilities as ASIC has in relation to a holder of an AFS licence providing similar financial services.
3. Cooperation between regulators	
Adequate cooperation arrangements between ASIC and the home regulator provide for: • prompt sharing of information by the relevant foreign regulator; and • effective cooperation in: – supervising and investigating activities in the overseas market; and – taking enforcement action involving the overseas market.	(1) In addition to the IOSCO MMOU, ASIC and the foreign regulator would enter into specific cooperation arrangements: • for access to relevant information and staff with the other regulator; • timely and complete sharing of information between regulators; • specific contact arrangements between the relevant regulators in the other jurisdiction; • arrangements for taking specific regulatory action relating to the conduct of the overseas person that

Requirements for exemptions under s911(2)(h) for foreign financial services providers—unilateral approach (See RG 176)	Approach for foreign financial services provider based on a mutual recognition framework
	may affect an Australian user of the services of the foreign financial service provider. (2) ASIC and the foreign regulator will assist each other by among other things: • providing information to the other relevant regulator, where requested, about the regulator's oversight of the operations or activities of the facility; and • informing the other regulator of pending regulatory changes that may have a significant impact on the operations, activities or reputation of the facility of the operator; and • with inspections, visits and other surveillance activities of the foreign financial services provider where requested by the other regulator. (3) ASIC and the foreign regulator will consult on matters relating to the oversight of the foreign financial service provider and share experiences and knowledge relevant to the oversight of the foreign financial service provider, including informal contact between staff of ASIC and the foreign regulator. (4) The foreign regulator to take the primary role in the supervision of, and enforcement action against (in the foreign jurisdiction), the financial services provider with ASIC reserving its supervisory and enforcement role.
4. Conduct and status requirements	
• The financial services must be provided in Australia only to wholesale clients. • The financial services provided in Australia must comply with the requirements of the foreign financial service provider's overseas regulatory regime. • The foreign financial services provider must be authorised under the relevant overseas regulatory regime. • The relevant overseas regulatory regime must continue to be sufficiently equivalent.	The conduct and status requirements under RG 176 should apply and in addition relief should also be available to financial services providers providing services to retail clients who are using an overseas market that ASIC has recognised under its principles of cross border regulation.
5. Notifications	
The foreign financial services provider must notify ASIC as soon as practicable of each significant change to the authorisation of the foreign financial services provider relevant to the financial services it provides or intends to provide in Australia, including: • any termination of part or all of the authorisation; • each significant exemption or other relief the foreign	The notification requirements may be removed from the foreign financial service provider on the basis that the ongoing relationship between ASIC and the overseas regulator will provide an alternative mechanism for providing information to ASIC about the regulation of the foreign financial service provider.

Requirements for exemptions under s911(2)(h) for foreign financial services providers—unilateral approach (See RG 176)	Approach for foreign financial services provider based on a mutual recognition framework
financial service provider may obtain from the relevant overseas regulatory regime; and • half yearly reports about significant regulatory regime changes and each enforcement or disciplinary action taken by the relevant overseas regulatory or any other overseas regulator against the foreign financial service provider.	
6. Disclosure	
The foreign financial service provider must disclose to any person to whom financial service are provided that: • the foreign financial service provider is exempt from the obligation to hold an AFS licence for the financial services; and • the foreign financial service provider is regulated under the relevant overseas regulatory regime and this regulatory regime differs from the Australian regime; and • disclosure by the foreign financial services provider needs only to be made once to each person to whom financial services are provided under the exemption. Disclosure must be given before the financial services are first provided.	Where relief is extended to financial services to retail investors, we may require certain additional disclosure to retail clients (similar to those under RG 178) including as follows: ASIC may require all recognised foreign financial services providers exempted to disclose to any person to whom financial services are provided with the benefit of the exemption that: • the foreign financial services provider is exempt from the obligation to hold an AFS licence for the financial services; and • the foreign financial services provider is regulated under the relevant overseas regulatory regime and this regulatory regime differs from the Australian regulatory regime; and • if the foreign financial services provider offers advisory or dealing services in relation to securities traded on a recognised foreign securities market: – the overseas market is primarily regulated by the home regulatory regime; – the rights and remedies available in relation to the overseas market may differ from those in comparable domestic markets; – the general nature of the rights and remedies available in relation to the overseas market, and how those rights and remedies can be assessed by Australian users; – any special risks associated with the overseas market, such as: A. any special features of the market; B. the effect of time zone differences; C. currency risks; D. foreign taxation requirements; and E. the arrangements for clearing and settlement of transactions effected through the overseas market by Australian users, and where applicable, for custody of financial products

Requirements for exemptions under s911(2)(h) for foreign financial services providers—unilateral approach (See RG 176)	Approach for foreign financial services provider based on a mutual recognition framework
	held for or attributable to Australian users. Disclosure by the recognised foreign financial services provider needs only to be made once to each person to whom financial services are provided under the exemption. Disclosure must be given before the financial services are first provided.
7. Dispute resolution	
Under RG 176, there are no requirements for internal and external dispute resolution.	Where relief is extended to dealings with retail clients, recognised foreign financial services providers will be required to have adequate internal and external dispute resolution systems to serve the needs of Australian retail clients. Recognised foreign financial services providers could satisfy the external dispute resolution requirement in either of the following two ways. They could either: • join an ASIC-approved Australian external dispute resolution scheme (EDRS); or • be a member of a foreign EDRS that, from the point of view of Australian retail clients, offers equivalent access and redress to an ASIC-approved Australian EDRS (an equivalent foreign EDRS). In particular, ASIC considers that an equivalent foreign EDRS must: – be easily accessible to clients from Australia (e.g. offer internet access or call centre availability during Australian business hours); – be able to communicate with investors in English; – be no more costly to access than an ASIC-approved Australian EDRS; and – have jurisdiction (e.g. in terms of eligible complaints and monetary claims limits) and powers that are comparable to the appropriate ASIC-approved Australian EDRS.
8. Compensation	
Under RG 176, there are no requirements for compensation arrangements.	Where relief is extended to retail clients, foreign financial services providers will be required to have adequate compensation arrangements that are available to Australian retail clients on a similar basis to that for retail clients in the provider's own jurisdiction.
9. Enforcing market misconduct provisions	
ASIC has jurisdiction to enforce its market misconduct provisions.	ASIC retains jurisdiction to enforce the misleading or deceptive and the dishonesty prohibitions.

Requirements for exemptions under s911(2)(h) for foreign financial services providers—unilateral approach (See RG 176)	Approach for foreign financial services provider based on a mutual recognition framework
10. Enforcement actions	
The foreign financial service provider must execute a deed which is irrevocable except with the consent of ASIC and which provides that: • it submits to the non-exclusive jurisdiction of the Australian courts in legal proceedings conducted by ASIC; and • the foreign financial services provider will comply with any order of an Australian court for a matter relating to the provision of financial services; and • if the foreign financial services provider is not registered under Div 2 of Part 5B.2 relevant papers can be served on the financial service provider's local agent; and • the foreign financial service provider will on written request provide consent and take all other practicable steps to enable and assist the relevant overseas regulator to disclose to ASIC (and ASIC to disclose to the relevant overseas regulator) any information or document that the relevant overseas regulator or ASIC has that relates to the financial service provider.	Adopt similar requirements to those in RG 176. Disclosure requirements should be such as to inform retail investors of the particular risks in terms of the rights and remedies available to them, and retail investors may be able to approach the relevant foreign regulator directly in pursuit of legal remedies. Where the proposal is to apply to wholesale clients, the foreign financial services provider would need to employ a registered local agent on whom relevant papers can be served (i.e. the same as required under RG 176). Where the proposal is to apply to retail clients, it is proposed that the foreign financial services provider must be registered under Div 2 of Part 5B.2 as a foreign company.

Illustrative example: Australian clients accessing services from a foreign financial services provider

A broker dealer conducting its business in country X is proposing to provide broker dealer's services to Australian residents. Australian residents will be able to trade on financial markets that only operate in country X. The financial market operating in country X will not have any trading screens located in Australia.

How the proposal may apply

If ASIC considers that the regulation of the broker dealers of country X is equivalent to Australian regulation in accordance with the test for equivalence outlined in this CP, the broker dealer of country X will not need to hold an AFS licence to provide services to the Australian residents in Australia. The broker dealer of country X will need to apply to ASIC for an exemption from the Australian licensing requirements in Part 7.6 of the Corporations Act. The broker dealer will need to comply with all the requirements of country X imposed on broker-dealers. The Australian clients of the broker dealer of country X should be able to access the compensation arrangements and the dispute resolution mechanisms that the broker dealer of country X is responsible for organising.

Illustrative example: Australian AFS licence holder providing services to overseas clients in country Y

An Australian financial service provider that holds an AFS licence is proposing to provide financial services to residents of country Y in that country.

How the proposal may apply

If ASIC considers that the regulation of the financial services providers of country Y is equivalent to Australian regulation in accordance with the test for equivalence outlined in this CP, the Australian AFS licence holder will not need to comply with the legislative requirements of country Y for the activities that it conducts in country Y. The Australian AFS licence holder will need to comply at all times with the Australian law and in particular will need to provide access to adequate dispute resolution mechanisms and compensation arrangements for the clients in country Y.

Your feedback

G1Q1 Should the proposed relief for foreign financial services providers under mutual recognition apply only to certain kinds of services? If so, what kinds of services and why?

G1Q2 Should the proposed relief for foreign financial services providers not be extended to services to retail clients? If so, why?

G1Q3 Would the application of any additional consumer protections change your view on Question G1Q2?

G1Q4 If so, what additional consumer protections would change your view and why?

G1Q5 Should ASIC retain a reserve jurisdiction over a wider range of misconduct prohibitions? If so, what prohibitions and why?

G1Q6 Should retail clients of a foreign financial services provider be able to bring action in Australian courts for breaches of the misleading or deceptive prohibitions under Australian law?

H Regulatory and financial impact analysis

139 Before settling on a final policy, we will comply with the requirements of the Office of Best Practice regulation (OBPR) by:

(a) considering all feasible options;

(b) if regulatory options are under consideration, undertaking a preliminary assessment of the impacts of the options on business and individuals and the economy;

(c) if our proposed options has more than low impact on business and individuals or the economy, consulting with OBPR to determine the appropriate level of regulatory analysis; and

(d) conducting the appropriate level of regulatory analysis – that is, if required, completing a Business Cost Calculator report (BCC report) and/or a Regulation Impact Statement (RIS).

140 To ensure that we are in a position to properly complete the preliminary assessment and any required BCC report or RIS, we ask you to provide us with as much information as you can about the following aspects of our proposals (or any alternative approaches):

(a) the likely compliance costs;

(b) the likely effect on competition; and

(c) other impacts, costs and benefits.

141 See 'The consultation process' page 4.

Your feedback

H1Q1 If ASIC adopts the proposals in this paper, what do you anticipate will be effect on:

(a) Australian markets?

(b) Australian financial services providers?

Key terms

Term	Meaning in this document
ASIC	Australian Securities and Investments Commission
Corporations Act	The Corporations Act 2001 (Cth) including any regulations made for the purposes of the Act
foreign facilities, services and products	Market and clearing and settlement facilities, financial services and financial products originating in and regulated in Australia under Australian law
foreign providers	Providers of foreign facilities, services and products
home jurisdiction	The jurisdiction in which the relevant foreign facility, service or product originates and is regulated
home regulator	The relevant regulator of the facility, service or product in the home jurisdiction
IOSCO	International Organisation of Securities Commissions
IOSCO MMOU	IOSCO Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and Exchange of Information
IOSCO Objectives and Principles of Securities Regulation	The *Objectives and Principles of Securities Regulation,* originally adopted by IOSCO in September 1998, as amended from time to time
mutual recognition	Involves the recognition at the same time of Australian regulation under parts of the Corporations Act and regulation in a foreign jurisdiction by the regulators and the Governments in both Australia and the foreign jurisdiction, where it is that the two regulatory regimes are sufficiently equivalent: see Section E of this consultation paper
principles	The general and equivalence principles in RG 54
regulatory regime	The rules that govern a financial facility, service or product and include legislation, the rules, policies and practices of a regulator, and the rules, policies and practices of a self-regulatory organisation, such as a financial market operator.
unilateral recognition	Involves ASIC recognising the regulation of a foreign jurisdiction in relation to parts of the Corporations Act, where ASIC is satisfied that the Australian regulatory regime and the foreign regulatory regime are sufficiently equivalent: see Section C of this paper

