ASIC

Australian Securities & Investments Commission

CONSULTATION PAPER 38

Australian market licences: Overseas operators

November 2002

Your comments

You are invited to comment on the proposals and issues for consideration in this paper. All submissions will be treated as public documents unless you specifically request that we treat the whole or part of your submission as confidential.

Comments are due by Friday, 28 February 2003 and should be sent to:

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You can also contact the ASIC Infoline on 1300 300 630 for information and assistance.

What this policy proposal is about

1 This policy proposal paper outlines ASIC's proposed approach to the regulation of financial markets that are authorised overseas, and whose operators apply to be, or are, licensed under the criteria set out in s795B(2) of the *Corporations Act 2001* ("Corporations Act"). In this policy proposal paper, we refer to these markets as "overseas markets".

2 This policy proposal paper sets out:

(a) who is eligible to apply for a licence under s795B(2) (**Section A**);

(b) our approach to and guidance on the obligations of overseas market licensees (**Section B**);

(c) how to get an overseas market licence (**Section C**); and

(d) our approach to and guidance on how we will assess whether there is sufficient equivalence between the overseas regulatory regime and the Australian regulatory regime to satisfy the test in s795B(2)(c) (**Section D**).

3 The **Schedule** sets out questions about the home regulatory regime for an overseas market. The answers to these questions will assist us in assessing its equivalence to the Australian regulatory regime.

4 Our approach in this policy proposal paper is guided by:

(a) Policy Statement 172 *Australian market licences: Australian operators* [PS 172], which outlines our role in and approach to financial market regulation generally under the Corporations Act; and

(b) our *Principles for cross border financial services regulation*, which deal with our approach to all aspects of cross border financial services regulation.

Note: To obtain a copy of our *Principles for cross border financial services regulation*, see "Related papers".

5 This policy proposal paper must be read in conjunction with [PS 172]. [PS 172] applies to domestic markets and, in most respects, to overseas markets. Only issues specific to overseas market operators are dealt with in this policy proposal paper.

Note: To obtain a copy of [PS 172], see our website at www.asic.gov.au or contact ASIC Infoline on 1300 300 630.

Important note: The proposals in this paper do not constitute legal advice. Potential market licensees should seek their own legal advice. The policy and examples in this paper are at a preliminary stage only. There may be changes as a result of the comments we receive. This paper should be treated as an indication of how we are thinking at this stage.

Contents

Policy proposals

In this paper, there are four groups of policy proposals for overseas markets. For each group, we set out the proposals and identify issues we would like you to comment on. When necessary, we have also included explanations of our proposals.

Special note: There may be other issues that you consider important. *We are keen to hear from you on our general approach, and what other issues you consider important, as well as your answers to the specific questions below.*

A Are you eligible to apply for a licence under s795B(2)?

Policy proposal

Note: The following policy proposals set out our interpretation of key terms in s795B(2). For a summary of s795B(2), see paragraph 2 of the Explanation in this section.

What does "authorised" mean?

A1 We interpret the requirement in s795B(2), that an applicant be "authorised" to operate a financial market in the foreign country in which its principal place of business is located ("home country"), as requiring the applicant to:

(a) have undergone an active process of obtaining permission from the relevant home regulator to conduct the facility that the applicant proposes to operate in Australia; and

(b) be subject to continuing regulatory oversight by the home regulator in relation to the way that facility is conducted.

A2 The facility that the applicant is authorised to operate in the home country need not be operating at the time of an application under s795B(2).

Note: If the facility is not already operating in the home country, the applicant may need to provide additional material to demonstrate the matters in s795B(2): see Section C.

Your feedback

A1Q1 Are there any reasons why we should not interpret s795B(2) this way? If so, what are they?

Policy proposal	Your feedback
What does "financial market" mean?	
A3 Provided that a facility falls within the definition of a financial market in s767A, the facility that the applicant is authorised to operate in its home country need not be: **(a)** described as a financial market in the home country; or **(b)** authorised specifically as a market in the home country.	**A3Q1** Should we require the facility that the applicant is authorised to operate in the home country to be regulated as a financial market in that country? If so, why?
What does "same market" mean?	
A4 We will regard the facility that the applicant proposes to operate in Australia as the "same market" that the applicant is authorised to operate in its home country if, at a minimum: **(a)** the financial products to be traded through the facility in Australia are, or will be, the same as or a subset of the products traded on the facility in the home country; **(b)** the same operating rules will govern trading of those products, whether trading originates from Australia or the home country; and **(c)** offers and invitations will be dealt with according to the same trading mechanism, whether the offers and invitations originate from Australia or the home country.	**A4Q1** Are these criteria sufficient to establish that the financial market is the same, or should additional criteria apply? If additional criteria should apply, what should those criteria be?

Explanation

1 A person requires an Australian market licence (either a domestic market licence or an overseas market licence) if:

(a) they operate a *financial market* (see [PS 172.15]–[PS 172.36]);

(b) they operate that financial market *in Australia* (see [PS 172.37]–[PS 172.48]); and

(c) they have not been exempted from the operation of Part 7.2 (see [PS 172.49]–[PS 172.67]).

2 A person may apply under s795B(2) for an overseas market licence if they:

(a) have their principal place of business in a foreign country ("home country"); and

(b) are authorised, in the home country, to operate the same financial market that they propose to operate in Australia.

Note: Alternatively, a person who satisfies these conditions may apply under s795B(1) for a domestic market licence: see s795B(3)(b). See also [PS 172.125]–[PS 172.172] about how to get a domestic market licence.

What does "authorised" mean?

3 Under s795B(2), an applicant must be "authorised" to operate the financial market in the home country. We think this means that:

(a) an active process of appraisal of the applicant and the market has occurred in the home country; and

(b) the form of authorisation means that the applicant and the operation of the market are subject to ongoing requirements and supervision in the home country.

We think authorisation means more than legally conducting the particular market in the home country. We do not consider that a person is "authorised" to operate a financial market in the home country merely because the home regulatory regime does not require the person to hold a licence or other formal regulatory permission in order to conduct the financial market. However, we may consider that a person is "authorised" to operate a financial market in the home country if, under the home regulatory regime, the person has been permitted, subject to conditions, to operate the financial market without the need to hold a particular licence. Our view will be affected by the nature and extent of the conditions. If an overseas market operator is not authorised to operate the market in the home country, an application for an Australian market licence will need to be made under s795B(1).

4 We expect that, for most applications under s795B(2), the financial market will already be operating in the home country at the time of the application, but we do not interpret s795B(2) as requiring this. It is possible that an applicant under s795B(2) may wish to commence operating the facility in several countries, including Australia and its home country, at the same time. However, it may be more difficult for an applicant that is not already operating the facility in its home country to demonstrate certain matters, such as that it will comply with the Australian obligations that will apply if an overseas market licence is granted. In this situation, the applicant may need to provide additional information to adequately demonstrate these matters: see also Section B and policy proposal paragraph C1.

What does "financial market" mean?

5 An applicant under s795B(2) must be authorised to operate in its home country a facility that falls within the Australian definition of financial market: see s767A. However, we do not think the facility must be described or regulated as a market in the home country, provided that the activities involved in operating the facility, and that would be regulated under Australian regulation of financial markets, are regulated in the home country. A facility that is a financial market under s767A may have a different form of authorisation in the home country. For example, the facility may be authorised in the home country as an alternative trading system, or the operation of the facility may be covered by the home country authorisation of the applicant as a broker or dealer.

What does "same market" mean?

6 Section 795B(2) requires the financial market that the applicant proposes to operate in Australia to be the "same market" as the applicant is authorised to operate in its home country. We do not think "same market" necessarily means that all the financial products traded through the facility in the home country must be available to investors in Australia. However, the financial products that are available through the facility in Australia must be traded in the same way and by the same mechanism as those products are traded in the home country. If the market is not the "same market", an application for an Australian market licence will need to be made under s795B(1).

B What are the obligations of overseas market licensees?

Policy proposal	Your feedback
B1 Under the Corporations Act, overseas market licensees must comply with: **(a)** obligations that apply to both domestic and overseas market licensees (see policy proposal paragraphs B2–B3); and **(b)** obligations that apply only to overseas market licensees (see policy proposal paragraphs B4–B8).	
Basic obligations	
B2 The following obligations apply to both domestic and overseas market licensees and therefore our policy in [PS 172] on these obligations applies also to overseas market licensees: **(a)** the obligation to do all things necessary to ensure that the market is fair, orderly and transparent (s792A(a), see [PS 172.81]–[PS 172.85]); **(b)** the obligation to have adequate arrangements for supervising the market (s792A(c), see [PS 172.86]–[PS 172.101]); **(c)** the obligation to have sufficient resources (s792A(d), see [PS 172.102]–[PS 172.106]); and **(d)** the obligation to provide us with an annual report (s792F, see [PS 172.114]–[PS 172.115]). Note: See also paragraph 1 of the Explanation in this section.	**B2Q1** Will overseas market licensees encounter any special difficulties under our policy in [PS 172] on these obligations? If so, please explain the difficulties and how they might be addressed.

Policy proposal

B3 Overseas market licensees are not required to comply with the following obligations that apply to domestic market licensees and therefore our policy in [PS 172] on these obligations does not apply to overseas market licensees:

(a) the obligation to include specific matters in its operating rules and written procedures (s793A(3), see [PS 172.151]–[PS 172.155]);

(b) the obligation to submit changes to its operating rules to disallowance by the responsible Minister in the Australian Federal Government (s793E(1), see [PS 172.153]); and

(c) the obligation to have Australian compensation arrangements under Part 7.5 of the Corporations Act (see s792A(e), 880A, see [PS 172.107]–[PS 172.113]).

Additional obligations

B4 An overseas market licensee must comply with the following additional obligations:

(a) the obligation to be registered in Australia as a foreign company under Division 2 of Part 5B.2 (s792A(f));

Note: This obligation also applies to a foreign body corporate that is licensed under s795B(1).

(b) the obligation to remain authorised in the home country and not change the home country without the Minister's prior approval (s792A(g));

(c) the obligation to notify us as soon as practicable if it ceases to be authorised to operate the financial market in the home country (s792B(4)(a));

(d) the obligation to notify us as soon as

Your feedback

Policy proposal	Your feedback
practicable if there is a significant change to the home regulatory regime applying to the market (s792B(4)(b), see policy proposal paragraphs B5–B6); **(e)** the obligation to lodge with us written notice of all changes to the market's operating rules as soon as practicable after the change is made (s793D(3)), even though those changes are not subject to Ministerial disallowance; and **(f)** the obligation to comply with a determination made by us under s793A(4) about written procedures (see policy proposal paragraphs B7–B8).	
What is a "significant change"?	
B5 We think a change is significant under s792B(4)(b) if it may affect the previous assessment that the home regulatory regime meets the equivalence test in s795B(2)(c). Note: See paragraph 7 of the Explanation in this section for some examples of changes that we think are significant. For discussion of the equivalence test in s795B(2)(c), see Section D.	**B5Q1** Should we provide further guidance on what constitutes a significant change? If so, please indicate what that guidance should be.
B6 We expect to be notified of all changes to the home regulatory regime except technical or minor changes, because it may be difficult for an overseas market licensee to know if a particular change is relevant to the previous assessment of regulatory equivalence. Note: See paragraph 8 of the Explanation in this section for some examples of changes that we think are technical or minor.	**B6Q1** Will overseas market licensees encounter any practical difficulties with our expectation of what we should be notified about? If so, please explain the difficulties and how they might be addressed.
Written procedures	
B7 We do not propose, at this stage, to issue guidance on when we would exercise our discretion under s793A(4) to require an overseas market licensee to have written	

Policy proposal	Your feedback
procedures about specified matters. We will assess on a case-by-case basis whether written procedures are required.	
B8 We may require written procedures in order to deal with matters affecting Australian market users that cannot be appropriately dealt with in licence conditions.	**B8Q1** Are there other circumstances in which we should require an overseas market licensee to have written procedures about specified matters? If so, what are they?
What should overseas market licensees do to ensure compliance?	
B9 We consider that in order to ensure compliance with its Australian obligations, an overseas market licensee should plan for, monitor and assess its compliance in accordance with our policy in [PS 172.71]–[PS 172.75].	**B9Q1** Will overseas market licensees encounter any practical difficulties complying with the policy in [PS 172.71]–[PS 172.75]? If so, please explain the difficulties and how they might be addressed.
How will we assess compliance?	
B10 We will assess an overseas market licensee's compliance with its Australian obligations in accordance with our policy in [PS 172.76]–[PS 172.80].	**B10Q1** Is our policy in [PS 172.76]–[PS 172.80] appropriate for the assessment of compliance by overseas market licensees? If not, please explain why, and how we should assess compliance by overseas market licensees.

Policy proposal

B11 When assessing an overseas market licensee's compliance with its Australian obligations we will consider, in addition to the things referred to in [PS 172.76]:

(a) any self-assessment provided to us by the overseas market licensee of its compliance with its obligations under the home regulatory regime;

(b) any other information provided to us by the overseas market licensee under the co-operation arrangements between the overseas market licensee and us (see policy proposal paragraphs C14–C15);

(c) any assessment made available to us by the home regulator of the overseas market licensee's compliance with its obligations under the home regulatory regime; and

(d) any other information provided to us by the home regulator under the co-operation arrangements between the home regulator and us (see policy proposal paragraphs C16–C19).

Your feedback

B11Q1 Should we take all these matters into account? If not, why not?

B11Q2 Are there any other matters that we should take into account? If so, what are they and why should we take them into account?

Explanation

Basic obligations

1 Overseas market licensees must comply with most of the obligations that are imposed on domestic market licensees. Our policy and guidance in [PS 172] on the obligations in policy proposal paragraph B2 applies to overseas market licensees, as well as to domestic market licensees, because under the Corporations Act these obligations apply to both overseas and domestic market licensees.

> Note: As stated in [PS 172.70], we do not discuss in [PS 172] every obligation of an Australian market licensee. Similarly, we do not discuss in this policy proposal paper every obligation that is common to both domestic and overseas market licensees, for example, under s792B-E and s792G.

2 In particular, we think our policy in [PS 172.97]–[PS 172.100] applies to the monitoring of participant conduct by an overseas market licensee. The references in those paragraphs to reg 7.2.07 (content of licensed market's operating rules) are supportive of our interpretation of s792A(c)(ii) and (iii), and do not detract from the application of our policy to overseas market licensees.

3 Under the Corporations Act, an overseas market licensee is not required to comply with the obligations referred to in policy proposal paragraph B3. However, an overseas market licensee is likely to be subject to comparable requirements in the home country. Paragraph 7.104 of the Explanatory Memorandum states that, in not imposing these Australian requirements on overseas market licensees, reliance is placed on the overall equivalence of the home regulatory regime and the Australian regulatory regime.

> Note: The relevant overseas requirements will have been considered at the time of application when determining whether the home regulatory regime met the equivalence test in s795B(2)(c): see paragraphs 5 and 6 of this Explanation, policy proposal paragraph C13(b) and Section D.

4 Even though an overseas market licensee is not required to comply with reg 7.2.07 and 7.2.08 about the content of its operating rules and written procedures, s793D(3) makes it clear that there must be operating rules for the market. We expect that the operating rules for a licensed overseas market will generally deal with the same kind of matters as set out in reg 7.2.07, because those matters are fundamental to the operation of a fair, orderly and transparent market and an overseas market licensee must comply with the Australian obligation to do all things necessary to ensure that the

market is fair, orderly and transparent: see policy proposal paragraph B2.

> Note: Section 793D(3) says that an overseas market licensee must notify ASIC of any change to the market's operating rules. Regulation 7.2.07 says that operating rules must deal with matters such as the criteria for access to the market, ongoing requirements for participants, the classes of financial products dealt with on the market, and execution of orders. Regulation 7.2.08 says that written procedures must exist in respect of matters such as exchange of information with ASIC and with operators of other markets and clearing and settlement facilities, arrangements for monitoring participant conduct, and providing information about market processes.

5 Even though an overseas market licensee is not required to have Australian compensation arrangements under Part 7.5, a number of countries have arrangements of some kind for providing compensation to retail clients for loss caused by participants in markets operating in their country.

Additional obligations

What is a "significant change"?

6 The purpose of the obligation in s792B(4)(b) to notify us of a significant change to the home regulatory regime is to ensure that we are aware of any changes that may mean that the home regulatory regime is no longer sufficiently equivalent to the Australian regulatory regime as required under s795B(2)(c). If a change to the home regulatory regime does result in the loss of sufficient equivalence, then under s797B(d)(ii), the Minister may suspend or cancel the licence.

7 Examples of changes that we consider significant include:

(a) a change to the regulatory structure in the home country;

(b) a change to the supervisory arrangements for the overseas market as it operates in the home country;

(c) a change in the home country to the obligations imposed on the overseas market licensee;

(d) a change in the home country to the way that amendments to the overseas market licensee's operating rules are made or approved; and

(e) a change in the compensation regime that exists in the home country for retail clients of participants in the overseas market.

This list is not exhaustive.

8 In order to ensure that this important obligation is not breached, we think that an overseas market licensee should notify us of all changes to the home regulatory regime except technical or minor changes. Examples of technical or minor changes include:

(a) amendments to legislation to correct typographical or superficial drafting errors; and

(b) amendments to cross-references or section numbers made necessary by changes to other legislation.

Written procedures

9 We have a discretion to determine that an overseas market licensee must have written procedures about specified matters: s793A(4). If we exercise this discretion, the overseas market licensee must comply with our determination. We do not propose at this stage to issue guidance on when we would exercise this discretion. We will consider issuing guidance about our exercise of this discretion once we have more experience in dealing with a range of applications under s795B(2).

How will we assess compliance?

10 When we assess under s794C an overseas market licensee's compliance with its Australian obligations, we will consider, in addition to the items listed in [PS 172.76], information about how the overseas market licensee complies with its obligations under its home regulatory regime. Compliance by an overseas market licensee with its obligations in the home country will be highly relevant to compliance with its Australian obligations, because of the equivalence between the Australian and the home regulatory regimes.

C How do you get an overseas market licence?

Policy proposal	Your feedback
What must you include with your application?	
C1 An applicant must provide information and documents that positively demonstrate that it satisfies the criteria in s795B(2). In particular, it must provide information and documents: **(a)** required by reg 7.2.14 and 7.2.15 (see s795B(2)(a)); Note: Where reg 7.2.14 requires "details" of matters to be provided, the information needs to give us a complete understanding of the relevant matter. **(b)** that demonstrate that it will comply with each of its Australian obligations from the time the market commences operating in Australia, and on a continuing basis (see s795B(2)(b), and policy proposal paragraph C4); **(c)** that demonstrate the requirements and supervision to which the overseas market is subject in the home country (see s795B(2)(c), reg 7.2.15(b), and policy proposal paragraph C5); and **(d)** that will assist us in advising the Minister about the application (see policy proposal paragraph C6).	**C1Q1** Should we deal with applications where the facility is *not* already operating in the home country in a different way from applications where the facility is already operating? Please explain your answer.
C2 All information and documents provided with the application must be in English.	
C3 We expect the application to include a declaration signed by each of the applicant's directors (or equivalent persons responsible for the applicant) that, to the best of the director's knowledge and after making	**C3Q1** Are there any other means that we should adopt to ensure the completeness and accuracy of the application? Please

Policy proposal	Your feedback
proper inquiries: **(a)** the applicant meets the criteria in s795B(2); and **(b)** the information and documents provided in support of the application are true, correct and complete.	explain your answer.
Demonstrating compliance with Australian obligations	
C4 Examples of information and documents that demonstrate whether an applicant has the expertise, resources and procedures to satisfy each of its Australian obligations include: **(a)** if the applicant is already operating the facility in its home country or elsewhere, evidence as to how the applicant meets its obligations under those regulatory regimes, especially if those obligations are similar to the obligations in s792A–792H; **(b)** a description of the systems, structures, processes and resources (including financial resources) that the applicant will use to comply with its Australian obligations, especially as those systems, structures, processes and resources relate to and impact on the operation of the facility in Australia and to supervision of Australian participants in the facility; **(c)** evidence of testing of the facility's systems and processes for the operation of the market in Australia; **(e)** a copy of the applicant's operating rules and written procedures in relation to the facility; **(f)** an explanation of how the applicant supervises the facility (including the conduct of participants) and enforces its	**C4Q1** Is an applicant likely to have any practical problems in providing us with any of these documents or information? Please explain your answer. **C4Q2** Is there other information or another means by which we can satisfy ourselves about the ability of the applicant to comply with its Australian obligations if a licence is granted? Please explain your answer. **C4Q3** If an applicant is *not* already operating the facility in the home country, what additional material should we require in order to be satisfied that the applicant will comply with all its Australian obligations if a licence is granted? Please explain your answer.

Policy proposal	Your feedback
operating rules; **(g)** a description of the mechanisms for clearing and settlement of market transactions (see reg 7.2.14(e)); **(h)** a copy of the relevant rules of the clearing and settlement mechanism, where the mechanism is operated by the applicant; and **(i)** any existing information sharing or other co-operation arrangements between the applicant and Australian operators of markets or clearing and settlement facilities.	
Demonstrating the nature of the home regulatory regime	
C5 Examples of information and documents that demonstrate the requirements and supervision to which the facility is, or will be, subject in the home country include: **(a)** a description and explanation of each of the matters listed in s798A(3)(a)–(c) relating to authorisation in the home country; **(b)** a description of the regulatory regime applying generally in the home country to facilities such as the applicant's facility, including the laws, rules and relevant regulatory bodies; **(c)** a description of the minimum requirements in the home country for the content of the facility's operating rules and written procedures, and of the processes for changing those operating rules and procedures; **(d)** a description of the requirements imposed in the home country on the applicant to supervise the facility (including the conduct of participants in	**C5Q1** Is an applicant likely to have any practical problems in providing us with any of these documents or information? Please explain your answer. **C5Q2** Is there other information or another means by which we can satisfy ourselves about the requirements and supervision to which the facility is subject? Please explain your answer. **C5Q3** If the facility is *not* already operating in the home country, what additional material should we require in order to be satisfied that the home regulatory regime as it applies to the facility in the home country meets

Policy proposal	Your feedback
the facility), and to enforce the facility's operating rules; **(e)** an explanation of compensation mechanisms in the home country for retail clients in the event of misconduct by, or insolvency of, a participant in the applicant's facility and how these will apply in relation to an Australian participant in the facility; **(f)** an explanation of why the applicant thinks the home regulatory regime meets the equivalence test in s795B(2)(c); Note: See Section D for guidance on what we think "sufficiently equivalent" in s795B(2)(c) means. **(g)** a copy of the home country authorisation to operate the facility, including any conditions on the authorisation (see reg 7.2.15(a)); **(h)** a copy of or relevant extracts of the regulatory laws, rules and procedures applying in the home country to the applicant's facility; **(i)** a description or copy of the information sharing or other co-operation arrangements between the applicant and the home regulator/s; and **(j)** a description or copy of any information sharing or other co-operation arrangements between the applicant and other market operators, clearing houses or investor compensation schemes in the home country. Note: See also paragraph 5 of the Explanation in this section, and the Schedule.	the equivalence test (see Section D)? Please explain your answer.

Policy proposal	Your feedback
Other information	
C6 We expect an applicant to provide us with other information and documents that will assist us in advising the Minister about the application, including: **(a)** a copy of current authorisations to operate the facility in jurisdictions other than the home country, including any conditions on those authorisations; **(b)** details of applications for authorisation to operate the facility in jurisdictions other than the home country that did not result in authorisation; **(c)** a description or copy of any information sharing or other co-operation arrangements between the applicant and foreign regulators, other than the home regulator; and **(d)** a description or copy of any information sharing or other co-operation arrangements between the applicant and other market operators, clearing houses or investor compensation schemes in other foreign countries.	**C6Q1** Are the information and documents referred to in policy proposal paragraph C6 relevant to the assessment of an application? If not, why not? **C6Q2** Are there any reasons why we should not be given the information and documents referred to in policy proposal paragraph C6? If so, what are those reasons? **C6Q3** Is there any other information that we should use to assist us to advise on an application? Please explain your answer.
How will we deal with your application?	
C7 We aim to provide the Minister with advice about an application for an overseas market licence within 16 weeks of receiving *all* the information and documents required. We will not count the time during which we are waiting for a response to a request for clarification or verification: see policy proposal paragraphs C10 and C11. **C8** It may take us longer to deal with your application if: **(a)** the application is particularly complex;	**C7Q1** Should applications for overseas market licences and domestic market licences be dealt with within the same time frame: see [PS 172.137]? Please explain your answer.

Policy proposal	Your feedback
(b) we have not previously assessed the equivalence of the home regulatory regime for facilities such as the applicant's facility and the Australian regulatory regime for financial markets; **(c)** we have to negotiate co-operation arrangements with the home regulator; or **(d)** the application requires public consultation (see policy proposal paragraph C12).	
C9 We will return any application that does not contain the information and documents required by s795B(2)(a) and reg 7.2.14 and 7.2.15.	
C10 We may require an applicant to clarify information or documents it has provided.	
C11 We may require independent verification by a suitably qualified third party of: **(a)** the applicant's information about the home regulatory regime; or **(b)** the applicant's proposed systems and resources for operating or supervising the market as it will operate in Australia; or **(c)** any other matter relating to the market's operation. Note: See paragraphs 7–9 of the Explanation in this section and [PS 172.141].	**C11Q1** Who is the appropriate person to provide independent verification of each of these matters? Please explain your answer.
C12 We will decide whether an application requires public consultation on a case-by-case basis. The factors we will consider when making this decision include: **(a)** the features of the market, including: **(i)** the existing and potential size of the market; and	**C12Q1** What other factors, if any, should we take into account when deciding whether to conduct public consultation? Please explain your answer.

Policy proposal

(ii) the existing and potential market users;

(b) the impact the market may have on existing Australian markets;

(c) the impact the market may have on Australian investors; and

(d) the impact the market may have on the reputation of Australia as a financial centre.

What will we consider when advising the Minister about your application?

Our general approach

C13 When framing our advice to the Minister about granting a licence, we will consider:

(a) the law and regulations, particularly the matters in s795B and s798A;

(b) whether the operation of the market in the home country is subject to requirements and supervision that are sufficiently equivalent, in relation to the degree of investor protection and market integrity they achieve, to the requirements and supervision to which financial markets are subject under the Corporations Act (the "equivalence test", see Section D);

(c) whether co-operation arrangements between ASIC and both the applicant and its home regulator are adequate (see policy proposal paragraphs C14–C19); and

(d) what conditions might need to be imposed on an overseas market licence (see policy proposal paragraphs C20–C22).

Your feedback

Policy proposal	Your feedback
Co-operation arrangements with the overseas market operator	
C14 We will require applicants to enter into documented co-operation arrangements with us (see s795B(2)(d)), but the form and content of the arrangements will vary according to the circumstances of the applicant.	
C15 At a minimum, the arrangements with us will deal with how the market operator will: **(a)** demonstrate to ASIC that the market operator is satisfying each of its Australian obligations on a continuing basis; **(b)** notify ASIC of any of the matters required by law to be notified to us, including: **(i)** any changes to the market's operating rules and procedures; **(ii)** cessation of authorisation in the home country; and **(ii)** significant changes to the home regulatory regime; **(c)** notify ASIC of any changes to the market's clearing and settlement arrangements, if applicable; **(d)** supervise the conduct of Australian participants in the overseas market; **(e)** notify ASIC of events in the home country leading to: **(i)** suspension or cessation of trading in a particular product on the overseas market or the delisting of an entity as a result of action by the market operator or home regulator for an actual or potential breach of the operating rules; or	**C15Q1** Are there other matters that should be covered by the co-operation arrangements? Please explain your answer.

Policy proposal	Your feedback
(ii) disciplinary or enforcement action by the market operator or home regulator against a participant in the market;	
(f) notify ASIC of any intention to change the range of financial products traded on the market in Australia or in the home country;	
(g) ensure that the market operator can require information to be provided to it and to ASIC by any person to whom the market operator outsources performance of any aspect of the market's operation or performance of any part of the market operator's Australian obligations; and	
(h) formally communicate with ASIC on other matters.	
Co-operation arrangements with the home regulator	
C16 We do not expect to advise the Minister to grant an overseas market licence unless we have adequate co-operation arrangements with the home regulator responsible for supervising the applicant and its market (see s798A(3)(d)).	**C16Q1** Are there any circumstances when this approach may not be appropriate? What are they?
C17 Adequate co-operation arrangements will generally be in the form of a Memorandum of Understanding or some other documented arrangement. They may, however, be supplemented by more informal arrangements and relationships.	
C18 Adequate co-operation arrangements will cover each of the areas of supervision, investigation and enforcement, and will provide for:	**C18Q1** Are there any other matters that the arrangements should cover, for example, regulatory changes? Please explain your answer.
(a) timely sharing of information about the overseas market; and	

Policy proposal

(b) timely co-operation in relation to:

(i) supervising and investigating activities in relation to the overseas market; and

(ii) enforcement actions involving the overseas market.

C19 In particular, we think adequate co-operation arrangements will ensure that the home regulator will, if requested by us, take appropriate action in relation to the overseas market to protect Australian investors and the integrity of Australian markets. That action should be capable of being as effective as actions the home regulator would take in similar circumstances to protect investors in the home country or the integrity of markets in the home country.

Licence conditions

C20 In our advice to the Minister about an application for an overseas market licence, we will adopt the approach to licence conditions in [PS 172.143]–[PS 172.145].

C21 We may advise the Minister to impose supplementary conditions on an overseas market licence if we think that the home regulatory regime as it applies to the overseas market achieves the key outcomes in policy proposal paragraph D4, but that:

(a) additional measures are appropriate to protect the interests of potential Australian users of the overseas market or the integrity of domestic markets; and

(b) those measures can be satisfactorily implemented by limited conditions.

Note: See paragraphs 18–22 of the Explanation in this section, and Section D.

Your feedback

C20Q1 Should ASIC adopt a different approach for overseas markets? If so, why?

C21Q1 Are there any circumstances where it would not be appropriate to use licence conditions in this way? Please explain your answer.

Policy proposal

C22 Examples of the supplementary conditions we will generally advise the Minister to impose on an overseas market licence include:

(a) submission to the non-exclusive jurisdiction of the Australian courts in actions brought by us or Australian market users in relation to the overseas market;

(b) disclosure to Australian market users and potential market users that the overseas market is primarily regulated by the home regulatory regime;

(c) disclosure to Australian market users and potential market users that the rights and remedies available to them in relation to the overseas market may differ from their rights and remedies in relation to comparable domestic markets;

(d) disclosure to Australian market users and potential market users of the general nature of the rights and remedies available to them in relation to the overseas market, and how those rights and remedies can be accessed; and

(e) disclosure to Australian market users and potential market users of any special risks for them associated with the overseas market, such as:

(i) the effect of time zone differences; and

(ii) currency risks.

This list is not exhaustive.

Note: In relation to these disclosures, see paragraph 22 of the Explanation in this section.

Your feedback

C22Q1 Are these supplementary conditions appropriate? Are there other conditions that should be imposed on overseas market licences? Please explain your answer.

C22Q2 Should any of these proposed conditions be required only for overseas markets where potential Australian market users are retail clients? Please explain your answer.

Explanation

What must you include with your application?

1 There is no prescribed application form for an Australian market licence. An applicant must provide us with information and documents that are necessary to establish that the applicant satisfies the criteria in s795B(2) and, in particular, the requirements in s795B(2)(a)–(c). Certain information and documents may be relevant to more than one of those requirements and, therefore, to more than one of subparagraphs (a)–(c) of policy proposal paragraph C1.

Demonstrating compliance with Australian obligations

2 To a large extent, an overseas market applicant may be able to demonstrate that it will comply with the Australian obligations that will apply if the licence is granted by demonstrating how it meets its obligations under its home regulatory regime. We will also consider evidence as to how the applicant complies with obligations under the regulatory regime of any other countries in which the applicant's market operates.

> Note: If the facility is not already operating, this evidence will not be available and the applicant will need to demonstrate in other ways that it will comply with all its Australian obligations. The information contained in the application to the home regulator for regulatory approval may be of particular relevance.

3 However, we will not be able to rely solely on evidence of compliance with the home or other regulatory regimes. The applicant will have to provide information and documents on how its systems, structures, processes and resources relate to and impact on the proposed operation of the market in Australia.

Demonstrating the nature of the home regulatory regime

4 In order to advise the Minister whether the equivalence test in s795B(2)(c) is satisfied, we will need detailed information about the home regulatory regime. Policy proposal paragraph C5 indicates the type of information and documents we will normally require.

5 In the Schedule to this policy proposal paper, we have set out a number of questions relevant to an application for an overseas market licence. These questions are not intended to limit the

information and documents that an applicant should provide. They are principally intended to assist an applicant to provide us with sufficiently detailed information and documents about the applicant's home regulatory regime for us to assess the extent of the equivalence with the Australian regulatory regime. In general, we think that if an applicant answers the questions in the Schedule, it will have provided most of the information referred to in sub-paragraphs (a)–(f) of policy proposal paragraph C5.

How will we deal with your application?

6 The time it will take us to deal with an application will depend on a number of factors, including the complexity of the application and the difficulty of assessing the equivalence of the home regulatory regime for the applicant's facility, and the Australian regulatory regime for financial markets. We aim to provide the Minister with advice about an application within 16 weeks of receiving all the information and documents required.

7 We may require independent verification of information provided by an applicant. The applicant must provide the verification at its own cost. The person verifying must have no interest in the outcome of the review.

8 We will generally require independent verification of the applicant's description of the home regulatory regime as it applies to the applicant's facility in the home country. If we receive a number of applications under s795B(2)(c) from applicants in the same home country, we may develop a degree of familiarity with requirements under that overseas regulatory regime. However, we will still need to assess equivalence on a case-by-case basis, because each market is different and the regulatory regime may apply differently to each market.

9 We will also generally require independent verification of the adequacy of an applicant's technological and financial resources, especially as they relate to and impact on the operation of the market in Australia. However, we may not require such verification if, in light of the overseas market's history of operation and technological development, we are satisfied that it has the internal expertise to verify to us the adequacy of its systems and resources.

What will we consider when advising the Minister about your application?

10 The Minister must take ASIC's advice into account when deciding whether to grant a licence: s798A(2)(h). When advising the Minister about the application, we will consider the matters outlined in policy proposal paragraph C13.

Co-operation arrangements with the overseas market operator

11 Under s795B(2)(d), the Minister may only grant an overseas licence if the Minister is satisfied that the applicant undertakes to co-operate with ASIC by sharing information, and in other appropriate ways. We will require an applicant to enter into a formal arrangement with us for co-operation generally and information sharing in particular. The form and content of the arrangement will vary according to the circumstances of the applicant, but in the past we have used a variety of formal arrangements, including Memoranda of Understanding, letters of arrangement and enforceable deeds.

12 An important function of the co-operation arrangements will be to enable the overseas market operator to demonstrate to us that it is meeting its Australian obligations including those created by any licence conditions imposed by the Minister. An overseas market operator may, to a large extent, meet an Australian obligation by satisfying a parallel obligation under its home regulatory regime. The co-operation arrangement will therefore deal with notification of matters relating to the market's continuing authorisation in its home country. However, the overseas market operator will still need to demonstrate to us that it is complying with its Australian obligations.

Co-operation arrangements with the home regulator

13 Under s798A(3)(d), when making licensing decisions about overseas markets, the Minister must have regard to whether there are adequate co-operation arrangements between ASIC and the relevant home regulator. Licensing of overseas markets in Australia raises a number of regulatory issues that do not arise with domestic markets. One major issue is the respective regulatory responsibilities of ASIC and the home regulator. A high degree of co-operation and information sharing will be needed between the

relevant regulators to ensure that both duplicative regulation and regulatory gaps are minimised as much as possible.

14 Our approach to co-operation arrangements with the home regulator has been influenced by our *Principles for cross border financial services regulation*: see "Related papers". We do not envisage that we will advise the Minister to grant a licence to the operator of an overseas market unless we have adequate co-operation arrangements with the home regulator. This is because, in order to protect Australian investors and the integrity of domestic markets, we may need to:

(a) access information about the overseas market that is only available from the home regulator; or

(b) ask the home regulator to:

  (i) supervise or investigate activities relating to the overseas market; and

  (ii) take enforcement action in relation to the overseas market.

15 We consider that, particularly in the area of supervision of the overseas market, adequate co-operation arrangements will mean that we have access to direct and continuing contact with the relevant officers of the home regulator, so as to enable prompt exchanges of information and effective co-operation.

Licence conditions

16 The Corporations Act enables the Minister to impose, vary or revoke conditions on both domestic market licences and overseas market licences. Section 796A(4) requires a number of conditions to be imposed on Australian market licences. These mandatory conditions will specify:

(a) the particular market that the licensee is authorised to operate;

(b) the class or classes of financial products that can be dealt with on the market; and

(c) if applicable to that licensee, the clearing and settlement arrangements for transactions effected through the market.

17 In our advice to the Minister about supplementary licence conditions, we will adopt a consistent approach for both domestic market licenses and overseas market licenses. We will consider the matters set out in [PS 172.143]–[PS 172.145] when dealing with domestic and overseas market licence applications.

18 However, there are conditions that we may advise the Minister to impose on an overseas market licence that are not necessary for domestic market licences. This arises out of the fact that:

(a) overseas market operators do not have their principal place of business in Australia;

(b) overseas market operators are subject to regulatory requirements in the home country that may differ from the requirements to which domestic market licensees are subject; and

(c) overseas markets may involve risks for Australian market users, particularly those that are retail clients, that do not affect market users in the relevant home country.

19 The equivalence test in s795B(2)(c) compares regulatory outcomes and not regulatory mechanisms: see Section D. Differences in the particular regulatory mechanisms used in Australia and in the home country may mean that even though the Australian and the home regulatory regimes may be considered to be sufficiently equivalent, additional measures are appropriate to protect the interests of potential Australian users of the overseas market or the integrity of Australian markets. In such situations, we may advise the Minister to impose limited supplementary licence conditions.

Disclosures

20 We think conditions are appropriate to ensure that Australian market users and potential market users of an overseas market are aware that the regulation of the overseas market differs from that of domestic markets. They should be alerted to any differences between the rights and remedies they have when using domestic markets and the rights and remedies they have when using the overseas market. They should also be informed of how they can access their rights and remedies in relation to using the overseas market.

21 Australian market users and potential market users of an overseas market may be exposed to risks that are not relevant to market users in the home country, or to Australian investors who use domestic markets, such as the effects of time zone differences and currency fluctuations. We think licence conditions are an appropriate way to ensure that there is disclosure of these risks. Information about such risks enables Australian investors to make an informed choice about whether to use the overseas market.

22 The way that the information in subparagraphs (b)–(e) of policy proposal paragraph C22 is disclosed will depend on the nature of the overseas market. If the overseas market is purely screen based, it may be appropriate for the disclosures to be made electronically. In other cases, it may be necessary for the overseas market operator to impose specific obligations on Australian participants in the overseas market to disclose the information to Australian clients, particularly retail clients.

Participant supervision and client compensation

23 We envisage that it may be appropriate in some cases to impose licence conditions relating to the supervision of Australian participants in the overseas market, or to arrangements for compensating Australian retail clients for loss caused by participants in the overseas market.

24 For example, in relation to supervision, the home regulatory regime may not require the market operator to directly supervise its participants. We may therefore advise the Minister to impose a condition that supports the performance by ASIC of specific limited supervisory functions. In relation to compensation, a home regulatory regime may not have compensation arrangements that would be accessible by Australian retail clients of participants in the overseas market. If potential Australian retail clients would also not have access to a compensation mechanism in Australia in relation to the participants in the overseas market that they will deal with, we may advise the Minister to impose a condition that would protect those clients in the event of defalcation or fraudulent misuse by a participant in the overseas market of the client's money, property or authority over property.

> Note: The Commonwealth Department of the Treasury recently published an issues paper on compensation arrangements in the financial services industry: see *Compensation for Loss in the Financial Services Sector - Issues and Options,* Treasury, 2002. Our approach to conditions about compensation will be reviewed after we know the Government's final views on compensation arrangements in the financial services sector.

D What does "sufficiently equivalent" mean in s795B(2)(c)?

Policy proposal	Your feedback
The equivalence test	
D1 We will assess the home regulatory regime as it applies to the overseas market as satisfying s795B(2)(c) if it: **(a)** meets the minimum requirements set out in policy proposal paragraph D2; and **(b)** achieves the investor protection and market integrity outcomes that are achieved by the Australian regulatory regime for comparable domestic markets (see policy proposal paragraphs D3–D5).	**D1Q1** Are these the appropriate criteria for assessing whether s795B(2)(c) is satisfied? Are there other criteria that should be assessed? Please explain your answer.
Minimum requirements	
D2 We think s795B(2)(c) will not be satisfied unless at a minimum the home regulatory regime is: **(a)** clear, transparent and certain; **(b)** consistent with the IOSCO Objectives and Principles of Securities Regulation; and **(c)** adequately enforced in the home country.	**D2Q1** Are there any limitations in applying the IOSCO Objectives and Principles to markets for financial products other than securities? Please explain your answer.
Same outcomes	
D3 We consider that the home regulatory regime as it applies to the overseas market will not be sufficiently equivalent to the Australian regulatory regime unless it achieves each of the relevant key outcomes of the Australian regulatory regime for comparable markets. Note: The key outcomes achieved by the Australian	

Policy proposal	Your feedback
regulatory regime are set out in Table A "Regulatory outcomes and mechanisms in financial markets" in [PS 172.12]. The key outcomes that are relevant may vary according to the features of the overseas market: see [PS 172.11].	
Comparing outcomes	
D4 When comparing the outcomes achieved by the two regulatory regimes, we will consider whether the home regulatory regime as it applies to the overseas market achieves, or will achieve when the market commences operating, the following key investor protection and market integrity outcomes that are relevant to the overseas market: **(a)** market users use the overseas market on an informed basis; **(b)** market users are confident that the overseas market as a whole operates fairly and that they will be treated fairly; **(c)** market users are confident about the participants in the overseas market that they deal with; **(d)** supervision of the overseas market is effective, and listed entities, participants and market users that breach the law or the overseas market's rules are likely to be detected and disciplined; **(e)** the overseas market operates reliably and is not at risk of failing; **(f)** price formation processes in the overseas market operate reliably; and **(g)** transactions entered into on the overseas market are cleared and settled promptly, fairly and effectively. Note: These outcomes are derived from Table A in [PS 172.12].	**D4Q1** Are there any additional outcomes that should be achieved by overseas markets? Please explain your answer.

Policy proposal	Your feedback
D5 When we consider whether the home regulatory regime achieves the key outcomes in policy proposal paragraph D4, we will focus on whether those outcomes are achieved from the perspective of Australian users of the market and the integrity of Australian markets.	**D5Q1** Is this approach to considering the outcomes of the home regulatory regime appropriate? How else might we undertake a comparison of outcomes?

Explanation

The equivalence test

1 Section 795B(2)(c) requires that the home regulatory regime as it applies to the operation of the facility in the home country be *sufficiently equivalent* (in relation to the degree of investor protection and market integrity it achieves) to the Australian regulatory regime for domestic markets. Our interpretation of this requirement has been influenced by:

(a) the purpose of the alternative route for seeking an Australian market licence in s795B(2). As set out in the Explanatory Memorandum at paragraph 7.100, the purpose of the alternative route is "to facilitate competition and avoid duplicated regulation, while paying due regard to investor protection and market integrity". We think that, in this context, "competition" means facilitating the entry of new market operators to Australia and expanding the opportunities for Australian investors to participate in international markets; and

(b) our *Principles for cross border financial services regulation*. These principles have been adopted by ASIC to ensure that our policy and decision-making in relation to cross border financial services activity generally are both soundly based and consistent.

Minimum requirements

2 The aspects of the home regulatory regime that deal specifically with the overseas market need to be considered in the context of the whole regulatory regime because their effectiveness will be affected by that context. Therefore, in policy proposal paragraph D2, we state that the home regulatory regime will not satisfy the equivalence test unless it is:

(a) clear, transparent and certain (see paragraphs 3–4 of this Explanation);

(b) consistent with the IOSCO Objectives and Principles of Securities Regulation (see paragraphs 5–6 of this Explanation); and

(c) adequately enforced in the home country (see paragraphs 7–9 of this Explanation).

Clear, transparent and certain

3 A "clear" regulatory regime is one that is clearly articulated and can be easily understood by Australians. A "transparent" regulatory regime is one whose rules, policies and practices are readily available to and known by all relevant persons. A "certain" regulatory regime is one that is consistently applied and not subject to capricious change. At a minimum, this principle means that the relevant parts of the home regulatory regime must be in written form, available in English and not subject to arbitrary discretions.

4 We consider that the home regulatory regime for an overseas market that does not meet these minimum conditions will not be sufficiently equivalent to the Australian regulatory regime because:

(a) the home regulatory regime will not be consistently or reliably applied or enforced;

(b) Australian investors will not be able to understand their rights and remedies under the home regulatory regime; or

(c) we will not be able to obtain sufficient knowledge of how the home regulatory regime works in practice to assess the regime.

Consistent with IOSCO Objectives and Principles

5 A regulatory regime is consistent with the IOSCO Objectives and Principles of Securities Regulation if the relevant regulator:

(a) assesses its regulatory regime against those objectives and principles; and

(b) reasonably determines that its regulatory regime is broadly compliant with those objectives and principles.

6 The aims, purposes and outcomes of the Australian regulatory regime for financial markets are consistent with the IOSCO Objectives and Principles of Securities Regulation. Therefore, consistency by the home regulatory regime with the IOSCO Objectives and Principles of Securities Regulation indicates that the Australian and home regulatory regimes:

(a) share a similar regulatory philosophy; and

(b) are, at a high level, equivalent.

Adequately enforced

7 A regulatory regime is adequately enforced if the regulator (or other responsible body):

(a) has sufficient powers of investigation and enforcement;

(b) has sufficient resources to use those powers; and

(c) uses those powers and resources to promote compliance with the regulatory regime.

Additionally, the legal system within which the regulatory regime operates should be independent and have a reputation for integrity.

8 In making our assessment of whether the home regulatory regime is adequately enforced we will rely on matters such as:

(a) the international reputation of that regulatory regime;

(b) self-assessments by the home regulator; and

(c) assessments by international financial institutions and other international organisations.

9 A regulatory regime that is inadequately enforced in its home country will not be sufficiently equivalent to the Australian regulatory regime because it is likely to be frequently ignored and, consequently, it will not reliably achieve its intended regulatory outcomes.

Same outcomes

10 Section 795B(2)(c) requires a comparison of the outcomes achieved by the home regulatory regime as it applies to the overseas market in the home country, and the outcomes achieved by the Australian regulatory regime as it applies to domestic markets. This is clear from the use of the word "achieves" in s795B(2)(c). The equivalence test does not require the regulatory mechanisms used in each country to be the same. Comparing regulatory outcomes involves assessing the effectiveness of the regulatory mechanisms in terms of investor protection and market integrity. It is a better way to measure equivalence than comparing regulatory mechanisms, which does not take into account whether the regulatory mechanisms are effectively implemented.

11 We think that the home regulatory regime as it applies to the overseas market will not be sufficiently equivalent to the Australian regulatory regime unless it achieves each of the relevant key outcomes achieved by the Australian regulatory regime for comparable markets. This involves an assessment of the "total

regulatory requirements" of the home country: see paragraph 7.104, Explanatory Memorandum. It also involves consideration of the features of the overseas market, because the relevant key outcomes under the Australian regulatory regime for a comparable domestic market may vary according to these features (see [PS 172.11]).

Comparing outcomes

12 In determining the outcomes to be achieved by the home regulatory regime, we have been influenced by:

(a) the regulatory outcomes and mechanisms in Australian financial markets (see Table A "Regulatory outcomes and mechanisms in financial markets" in [PS 172.12]); and

(b) the purpose of the alternative route for seeking an Australian market licence for overseas markets (see subparagraph (a) in paragraph 1 of this Explanation).

Home regulatory mechanisms are relevant but not determinative

13 In order to assess whether the home regulatory regime achieves the key outcomes set out in policy proposal paragraph D4, we will need to consider and understand the regulatory mechanisms by which those outcomes may be achieved, especially if those mechanisms are not the same as the Australian regulatory mechanisms. This is why we need the information referred to in policy proposal paragraph C5 and in the Schedule.

Schedule: Questions about the home regulatory regime

The questions in this Schedule relate to policy proposal paragraph C5.

Your feedback

SQ1 What other questions should we ask to assist an applicant for an overseas market licence to demonstrate the requirements and supervision to which the facility is subject in the home country? Please explain your answer.

1 Operating rules	Q1.1	What must the operating rules for the market contain, particularly in relation to the products traded, conduct of participants and activities of entities whose products are traded on the market?
	Q1.2	Are there any obligations to have written procedures in relation to the market and if so, what must they contain?
	Q1.3	Who must comply with the operating rules?
	Q1.4	Who monitors compliance with the operating rules?
	Q1.5	Who can enforce the operating rules and what is the process?
	Q1.6	What is the process for amending the market's operating rules?
2 Compensation	Q2.1	Are there any obligations or arrangements in the home country for compensation for loss to be provided to retail clients of the participants in the market?
	Q2.2	What aspects of the home regulatory regime impose those obligations or arrangements?
	Q2.3	Who is responsible for operating or providing the compensation arrangements?
	Q2.4	What is the nature of the compensation arrangements and how do they operate, in particular: (a) in what circumstances can claims be made? Do the compensation arrangements provide a right to claim for loss in respect of defalcation or the fraudulent misuse of a client's money or property? Is there a right to claim compensation in circumstances other than the insolvency of the relevant participant? (b) who can make claims and what are the limits on claims or payments? (c) do the arrangements relate to conduct only by participants in the market or also by participants in a clearing and settlement facility for transactions done through the market?
	Q2.5	In what circumstances will Australian retail clients be able to access the compensation arrangements, and what is the process? Will the compensation arrangements cover conduct by an Australian participant in the market?
	Q2.6	What role does any relevant home regulator perform in relation to the compensation arrangements?

3 Information disclosure/ market information	Q3.1	What are the regulatory requirements for information about the market operator, market trading processes, participants, market products and any listed entities in terms of its: (a) provision; (b) content; (c) accuracy; (d) timing; and (e) completeness?
	Q3.2	What are the sources of the requirements referred to in Q3.1?
	Q3.3	Who must comply with these regulatory requirements?
	Q3.4	Who monitors compliance with these requirements and what is the process?
	Q3.5	Who enforces these requirements and what is the process?
	Q3.6	What role does the market operator perform in regulating information disclosure?
	Q3.7	What role does the home regulator perform in regulating information disclosure?
4 Trading	Q4.1	How does the regime ensure that the matching process occurs in a fair, orderly and transparent way?
	Q4.2	What does "off market" trading mean in the case of this market?
	Q4.3	What restrictions are there about off market trading in the financial products that are traded on the market? How are off market transactions regulated?
	Q4.4	What regulatory controls cover price manipulation and other market abuse practices?
	Q4.5	Who is responsible for the controls identified in Q4.4?
	Q4.6	What role does the market operator perform in monitoring the trading of financial products?
	Q4.7	What role does the home regulator perform in monitoring the trading of financial products?
	Q4.8	Who enforces the rules about trading and what is the process?
5 Participants	Q5.1	What are the obligations of market participants under the home regulatory regime for: (a) complying with instructions from a client; (b) obtaining the best available price for a client; (c) providing clients with pre trade and post trade information;

		(d) completing transactions; (e) dealing with conflicts of interests; (f) handling client money and other client property; (g) record keeping; (h) financial resources; (i) dispute resolution arrangements with clients; (j) acting efficiently, honestly and fairly; and (k) complying with the market's operating rules and with the relevant law in the home country?
	Q5.2	What are the sources of the obligations identified in Q5.1?
	Q5.3	Which people within the market participant are legally responsible for compliance by a market participant with the obligations identified in Q5.1?
	Q5.4	Who monitors compliance by market participants with these obligations and what is the process?
	Q5.5	Who enforces the obligations of market participants and what is the process?
	Q5.6	What role does the market operator perform in monitoring conduct by market participants?
	Q5.7	What role does the home regulator perform in monitoring conduct by market participants?
6 Market supervision	Q6.1	How does the home regulatory regime ensure that market participants and market users are treated fairly and equally in the market?
	Q6.2	Who is responsible for supervising the market?
	Q6.3	If more than one person is responsible for supervising the market, what are their respective roles?
	Q6.4	Who is responsible for enforcing obligations imposed by the home regulatory regime on: (a) the market operator; (b) participants; and (c) market users that are not participants?
	Q6.5	How does the home regulatory regime address potential conflicts between the commercial interests of a market operator and the need to ensure that the market is fair, orderly and transparent?

	Q6.6	What measures exist in the home regulatory regime to ensure that: (a) only fit and proper people are involved in the management of the market operator; and (b) the market operator has sufficient resources to operate the market properly and perform all its functions?
	Q6.7	Who monitors and enforces compliance with the measures in Q6.6 and what is the process?
7 Clearing and settlement	Q7.1	How are transactions on the market cleared and settled?
	Q7.2	If market transactions are cleared and settled through a central facility, does the person who operates that facility have to be approved or licensed by a regulator in the home country?
	Q7.3	If there is an approval or licensing process, what does it involve?
	Q7.4	What are the obligations under the home regulatory regime on a person operating a clearing and settlement facility?
	Q7.5	Who monitors compliance by the clearing and settlement facility operator with its obligations and what is the process?
	Q7.6	Who enforces compliance by the clearing and settlement facility operator with its obligations and what is the process?
	Q7.7	Who are the participants in the clearing and settlement facility? Are the market participants also participants in the clearing and settlement facility?
	Q7.8	What role does the market operator or the clearing and settlement facility operator perform in monitoring conduct by the participants in the clearing and settlement facility?
	Q7.9	What role does the home regulator perform in monitoring conduct by the participants in the clearing and settlement facility?

Development of policy proposal

We have developed this policy proposal paper by considering:

(a) the intention of the FSR Act as indicated in the Revised Explanatory Memorandum and the Second Reading Speech in the House of Representatives;

(b) the Report on the Financial Services Reform Bill by the Parliamentary Joint Committee on Corporations and Securities issued in August 2000;

(c) the Government's response to the Report, issued on 29 March 2001;

(d) relevant comparisons with current legislative requirements for the regulation of financial services activity under the law;

(e) a review of existing ASIC policies and practices relevant to the regulation of financial services activity under the law;

(f) a review of public submissions on the Exposure Draft Bill issued by the Government in February 2000;

(g) our policy in Policy Statement 172 *Australian market licences: Australian operators* [PS 172] (March 2002); and

(h) our *Principles for cross border financial services regulation*: see "Related papers".

Compliance measures

In developing the policy and guidance on monitoring and supervision, we have drawn on our experience in licensing and compliance across a range of industries and industry participants. We have also had regard to Australian Standard 3806–1998 on Compliance Programs, which sets out the essential structural, operational and maintenance elements of an effective compliance program.

Risk

In developing our approach to outcomes we have given consideration to approaches to risk management. We have considered numerous domestic and international approaches to risk when developing these policy proposals, including:

(a) the Australian/New Zealand Standard on Risk Management;

(b) the Financial Services Authority (UK) approach;

(c) the International Organisation of Securities Commissions approach; and

(d) processes developed as part of the managed investment implementation program.

Key terms

In this policy proposal paper:

"ASIC" means the Australian Securities and Investments Commission

"Australian market licence" means a licence under s795B(1) or (2) that authorises a person to operate a financial market in Australia

"Australian obligations" means the obligations of a market licensee as set out in Division 3 of Part 7.2 of the Corporations Act

"Australian regulatory regime" means the regulatory regime applying to a domestic market licensee

"Corporations Act" means the *Corporations Act 2001* and includes regulations made for the purposes of that Act

"domestic market" means a financial market licensed or applying to be licensed under s795B(1)

"domestic market licensee" means a person who holds an Australian market licence granted under s795B(1)

"Explanatory Memorandum" means the revised explanatory memorandum to the *Financial Services Reform Bill 2001* that takes into account amendments by the House of Representatives made on 28 June 2001 to the Bill as introduced

"financial product" has the meaning given by Division 3 of Part 7.1 of the Corporations Act

Note: This is a definition contained in s761A of the Corporations Act.

"home country" means the country outside Australia in which the operator of a financial market has its principal place of business

"home regulator" means the regulator/s of an overseas market licensee in its home country

"home regulatory regime" means the regulatory regime in the home country

"IOSCO Objectives and Principles of Securities Regulation" means the *Objectives and Principles of Securities Regulation*, originally adopted by the International Organization of Securities Commissions in September 1998, and as amended from time to time

"market users" means investors who acquire or dispose of financial products through the financial market in question. Investors may be participants dealing for themselves or, where participants act as agent for other persons as clients, the clients of the participants

"overseas market" means a financial market licensed or applying to be licensed under s795B(2)

"overseas market licensee" means a person who holds an Australian market licence granted under s795B(2)

"participant" means a person who is allowed to directly participate in the market under the market's operating rules

Note: This is a definition contained in s761A of the Corporations Act.

"Principles for cross border financial services regulation" means our paper *Principles for cross border financial services regulation: Making the regulatory regime work in a cross border environment* (November 2002): see "Related papers"

"[PS 172]" (for example) means an ASIC policy statement (in this example numbered 172)

"reg 7.2.10" (for example) means a regulation in the *Corporations Amendment Regulations 2001 (No 4)* (in this example numbered 7.2.10)

"regulatory outcomes" means the outcomes identified in Table A of Policy Statement 172 *Australian market licences: Australian operators* [PS 172]

"regulatory regime" means the all the laws, rules and procedures comprising the requirements and supervision to which the financial market is subject, and includes the structures and procedures for administering the laws

"retail client" has the meaning given by s761G

Note: This is a definition contained in s761A of the Corporations Act.

"s782" (for example) refers to a provision of the Corporations Act (in this example numbered 782).

What will happen next?

Stage 1

21 November 2002	ASIC policy proposal paper released

Stage 2

December 2002-February 2003	Consultation period on the contents of this policy proposal paper
28 February 2003	Comments due on the policy proposals
March 2003	Drafting of policy statement

Stage 3

April-May 2003	Policy statement released

Your comments

You are invited to comment on the proposals and issues for consideration in this paper. All submissions will be treated as public documents unless you specifically request that we treat the whole or part of your submission as confidential.

Comments are due by Friday, 28 February 2003 and should be sent to:

Erica Gray
Regulatory Policy Branch
Australian Securities & Investments Commission
GPO Box 9827
Sydney NSW 2001
email: erica.gray@asic.gov.au

You can also contact the ASIC Infoline on 1300 300 630 for information and assistance.

Related papers

Policy Statement 172 *Australian market licences: Australian operators* [PS 172]

Principles for cross border financial services regulation: Making the regulatory regime work in a cross border environment (November 2002)

Copies of papers

Download them from the ASIC home page:
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