

MinterEllison

5 December 2016

Mr Alan Worsley
Senior Specialist, Strategic Policy
Australian Securities and Investments Commission
Level 5, 100 Market Street, Sydney 2000

Email: policy.submissions@asic.gov.au

Dear Sir

Submission on ASIC Consultation Paper 268: Licensing relief for foreign financial services providers with a limited connection to Australia (CP 268)

We appreciate the opportunity of commenting on ASIC's proposals in CP 268. In this submission, we have commented on the proposal to repeal ASIC Class Order 03/824 (**CO 03/824**). We have also made some observations ASIC's current relief for foreign financial service providers (**FFSPs**), although we acknowledge that ASIC is yet to engage in consultation on this topic.

MinterEllison is a full service commercial law firm. We advise major financial institutions, including banks, insurance companies and superannuation funds, as well as specialist fund managers, financial advice firms, stockbrokers and other financial intermediaries in Australia and overseas.

We note however that the views expressed in our submission are ours alone and do not necessarily reflect the views of our clients.

1. Summary of our submission

- 1.1 We strongly support the continued need for both CO 03/824 and the FFSP relief. We believe that ASIC should continue both forms of relief in their current form.
- 1.2 CO 03/824 is an important exemption which reduces barriers to trade in services, facilitates competition for financial services in Australia and enables Australia's financial service market to operate in the same manner as other wholesale markets by permitting overseas providers to engage with Australian financial institutions and other wholesale clients without unnecessary layers of regulation.
- 1.3 The FFSP relief also plays an important role in reducing the barriers to competition and trade in Australia and facilitating access for Australian financial institutions and other wholesale clients to efficient and innovative financial service providers who are subject to an equivalent level of regulation to Australian licensed financial service providers.
- 1.4 We note that the announcement of the review of the FFSP relief with a two year extension of the relief while ASIC undertakes a review of it has caused considerable uncertainty among FFSPs relying on the FFSP relief. There is a perception that Australia is now subject to regulatory risk which is likely to affect the decisions of FFSPs to commit resources to enter into or increase their investment in the Australian market, which can only have a negative impact on competition in the Australian market in the short to medium term. We would therefore encourage ASIC to clarify its position on the continuation of the FFSP relief after the two year extension period and to undertake its review of the relief as soon as possible.



2. CO 03/824

2.1 CO 03/824 plays an important role for many FFSPs which do not have any presence in Australia and for whom none of the existing regulatory exemptions applies and none of the existing class order relief is available. It enables them to provide financial services to Australian financial institutions and other wholesale clients without needing to obtain an Australian Financial Services Licence (AFSL). This has a significant impact on the competitiveness, efficiency and innovation of the Australian financial system and markets.

2.2 We note that ASIC states that:

'[CO 03/824] should be repealed because the major types of financial services that it applies to are now substantially covered by the AFS licensing exemption for those financial services contained in s911A(2E).' (CP 268.12)

'the exemption in s911A(2E) applies to the major types of financial services involving those financial products where we understand the relief is most needed, such as dealings with overseas counterparties in derivatives.' (CP 268.14)

2.3 As ASIC acknowledges section 911A(2E) as inserted by regulation 7.6.02AG only applies to:

- '(i) dealing in derivatives or foreign exchange contracts;*
- (ii) providing advice on derivatives or foreign exchange contracts;*
- (iii) making a market in derivatives or foreign exchange contracts.'*

2.4 CO 03/824 is however relied on in a much wider range of circumstances, including:

- (a) foreign banks providing banking services to Australian wholesale clients;
- (b) foreign funds with Australian wholesale investors;
- (c) foreign fund managers with Australian wholesale clients; and
- (d) derivative and foreign exchange providers promoting their services to Australian wholesale clients, which may involve the provision of financial product advice,

where the FFSP does not have any presence in Australia and representatives of the FFSP do not visit Australia (or if they do, they do not engage in any conduct which could amount to the provision of a financial service or otherwise involve carrying on business in Australia).

2.5 The purpose of CO 03/824 was to remove the effect of section 911D for wholesale clients, recognising that it was only appropriate to extend the reach of Australia's financial services regime to overseas providers when they induce **retail** clients to use their services.

2.6 The problem with section 911D when applied to the wholesale market is that it means that any activity of a FFSP could result in it being required to hold an AFSL if it could be seen as encouraging prospective or current Australian wholesale clients to use or continue to use the FFSP's services. Consequently, an FFSP could be caught by Australia's regime even a wholesale client approaches the FFSP without any inducement by the FFSP because in the course of any ongoing provision of services by the FFSP there is likely to be some inducement by the FFSP for the wholesale client to continue to use the FFSP's services.

2.7 We therefore submit that ASIC should renew CO 03/824 in its current form as it forms an important part of Australia's financial services regime and protects and enhances Australia's position as a competitive global financial services market.

Transition period

2.8 We also submit that in light of the extensive reliance on CO 03/824 by foreign providers a one year transition period would not be sufficient to enable providers to re-arrange their affairs if CO 03/824 is repealed. Foreign providers affected by the repeal of CO 03/824 typically only have a very limited engagement with the Australian market, reflecting their reliance on the class order. It will take time for them to recognise the significance of any repeal of the class order and to determine an appropriate course of action, which may include seeking an AFSL or entering into arrangements with local providers both of which take time to implement.

- 2.9 We therefore submit that any transition period should be at least two years long.
- 2.10 Furthermore, we submit that there should be grandfathering relief for providers currently relying on CO 03/824 to ensure that they are not required to obtain an AFSL for any financial services provided to clients who had received any financial service from the provider prior to the date of repeal of the class order.
- Notifying reliance on CO 03/824*
- 2.11 The difficulty with imposing a notification requirement on CO 03/824 is that it undermines the purpose of the relief. As noted above, the purpose of CO 03/824 is to remove the effect of section 911D for wholesale service providers to enable foreign providers to induce wholesale clients to use their financial services without needing to obtain an AFSL or take any other action, provided the foreign provider would not otherwise be carrying on a business in Australia.
- 2.12 A notification requirement would impose a positive obligation on FFSPs in these circumstances which would not otherwise apply and increases compliance risk and therefore regulatory burden for FFSPs. We submit that a notification requirement would be inconsistent with the purpose of CO 03/824 to address the unintended consequence of the application of section 911D to all clients and should not therefore be imposed.
- 2.13 However, if a notification requirement is imposed, it should be confined to notifying ASIC when a FFSP first relies on CO 03/824. FFSPs should not be required to notify ASIC each time they rely on the class order as this could result in multiple notifications for each client and require an FFSP to identify each time they do or may be seen to be inducing an Australian wholesale client to use the FFSP's services.

3. FFSP relief

- 3.1 We submit that the FFSP relief continues to achieve its original goals of 'attract[ing] additional investment and liquidity to Australian markets by addressing the duplicated regulatory burden arising from compliance with Australia's regulatory regime where FFSPs were already subject to sufficiently equivalent regimes in their home jurisdictions' (CP 168.21). We submit that the FFSP relief also performs a significant role of facilitating competition in the wholesale financial services market which ultimately benefits consumers by providing access, through retail financial institutions using the services of FFSPs relying on the relief, to a greater range of services and innovation. The FFSP also removes trade barriers and enhances Australia's position as a global financial centre.
- 3.2 We believe that the FFSP relief appropriately balances competition benefits with the need for appropriately regulatory oversight of financial service providers by requiring FFSPs to be subject to equivalent regulatory oversight as that applying to AFSL holders. It also provides certainty to FFSPs by recognising specific regulatory regimes which ASIC has identified as being sufficiently equivalent to Australia. (It would however be useful if ASIC could proactively consider whether regimes of key financial service jurisdictions in our region and globally meet ASIC's equivalence requirements and welcome ASIC's recent extension of the FFSP regime to Luxembourg: Statutory Instrument 2016/1109.)
- 3.3 We therefore submit that the current FFSP regime should be continued and extended on its current terms.
- 3.4 We also submit that it is important for ASIC to clarify the purpose and intent of its review of the FFSP relief to address the uncertainty that has been created by its announcement of the review. ASIC should state that it remains committed to providing licensing relief for FFSPs who are subject to equivalent regulation and that the review will be confined to considering whether it should be extended more broadly and whether the terms of the relief remain appropriate.

Please call me on 02 9921 4712 if you would like to discuss any aspect of our submission.

Yours faithfully
MinterEllison

A handwritten signature in black ink, appearing to read 'R Batten', with a long, sweeping horizontal line extending to the right from the bottom of the signature.

Richard Batten
Partner

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