



ASIC

Australian Securities & Investments Commission

CONSULTATION PAPER 293

Revising the market licence regime for domestic and overseas operators

July 2017

About this paper

This consultation paper seeks industry feedback on our proposals to implement a tiered market licence regime under amendments introduced through recent legislative reform.

About ASIC regulatory documents

In administering legislation ASIC issues the following types of regulatory documents.

Consultation papers: seek feedback from stakeholders on matters ASIC is considering, such as proposed relief or proposed regulatory guidance.

Regulatory guides: give guidance to regulated entities by:

- explaining when and how ASIC will exercise specific powers under legislation (primarily the Corporations Act)
- explaining how ASIC interprets the law
- describing the principles underlying ASIC's approach
- giving practical guidance (e.g. describing the steps of a process such as applying for a licence or giving practical examples of how regulated entities may decide to meet their obligations).

Information sheets: provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

Reports: describe ASIC compliance or relief activity or the results of a research project.

Document history

This paper was issued on 20 July 2017 and is based on the Corporations Act as at the date of issue.

Disclaimer

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

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The consultation process

You are invited to comment on the proposals in this paper, which 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 policy on licensing of financial markets. 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 regulation impact statement: see Section E, 'Regulatory and financial impact'.

Making a submission

You may choose to remain anonymous or use an alias when making a submission. However, if you do remain anonymous we will not be able to contact you to discuss your submission should we need to.

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

Please refer to our privacy policy at www.asic.gov.au/privacy for more information about how we handle personal information, your rights to seek access to and correct personal information, and your right to complain about breaches of privacy by ASIC.

Comments should be sent by 31 August 2017 to:

Rhonda Luo
Senior Specialist
Market Infrastructure
Australian Securities and Investments Commission
Level 5, 100 Market Street
Sydney NSW 2000
email: financial.markets@asic.gov.au

What will happen next?

Stage 1	20 July 2017	ASIC consultation paper released
Stage 2	31 August 2017	Comments due on the consultation paper
Stage 3	October 2017	Updated regulatory guide released

A Context

Key points

This consultation paper seeks your feedback on our proposal to revise and update how we administer the market licence regime in Pt 7.2 of the *Corporations Act 2001* (Corporations Act), including our approach to licence applications.

Introduction: Market licensing in context

- 1 [Regulatory Guide 172](#) *Australian market licences: Australian operators* (RG 172) was issued in 2002. It was accompanied in 2003 by [Regulatory Guide 177](#) *Australian market licences: Overseas operators* (RG 177).
- 2 Since RG 172 and RG 177 were issued in 2002 and 2003, we have seen significant changes in the role of financial markets. These include disruptive developments in market structure and business models affecting traditional exchanges and a range of non-exchange trading venues (together, ‘market venues’). In 2010, the supervision of licensed exchanges was also transferred from those exchanges to ASIC, and we were provided with an accompanying power to make market integrity rules.
- 3 Despite these extensive developments, the market licence regime in Australia remained unchanged until the passage of the *Corporations Amendment (Crowd-sourced Funding) Act 2017* (CSF Act). The CSF Act amended those parts of Ch 7 of the Corporations Act relating to the market licence regime and the regime for clearing and settlement facilities. The Act received royal assent on 28 March 2017 and these amendments took effect on 29 March 2017.

Note: This paper does not deal with any changes to the Australian clearing and settlement facilities regime.
- 4 We propose to issue an updated regulatory guide to implement the changes made to the market licence regime by the CSF Act. The updated regulatory guide will also reflect the significant developments in market venues since 2002.
- 5 In keeping with the ongoing globalisation of financial markets, the updated guidance will consolidate RG 172 and RG 177 which currently deal separately with domestic and overseas market venues. It will also supersede our longstanding position on the exemption of certain professional markets from the market licence regime.

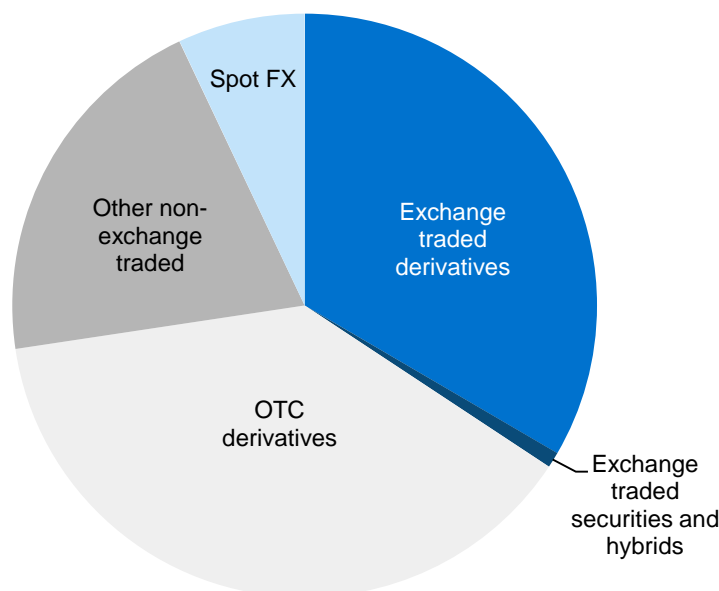
Note: The professional markets exemption was a by-product of the previous market licence regime, where the costs for these types of markets of complying with that rigid and inflexible regime were assessed as outweighing the benefits.

Recent developments and challenges

6 Since 2002, market developments have included:

- (a) the proliferation of alternative market venues:
 - (i) some offer services once exclusively provided by exchanges (such as capital raising);
 - (ii) others provide the commercial efficiencies of organised trading for an increasing range of non-exchange products. These include OTC derivatives, spot FX, fixed income and other products (see Figure 1);
- (b) increased complexity in the technology used by market venues;
- (c) the use of social media or other technologies to create new forms of market venue-like platforms;
- (d) cross-border market venue access; and
- (e) exchange group consolidation.

Figure 1: Exchange-traded and non-exchange traded financial products in Australia



Note: See the appendix for an accessible version of this figure.

7 These changes affect the way investors—predominantly professional but increasingly retail investors—use market venues to meet their investing, capital raising and risk mitigation objectives.

- 8 These developments also highlight limitations in the market licence regime prior to the amendments made under the CSF Act. Previously, the regime only allowed a trading venue operator to be licensed subject to:
- (a) *all* of the obligations under the regime, or
 - (b) to exempt the operator from licensing *altogether*.
- 9 If some licence obligations that were more directed to regulating exchange markets venues were not appropriate to alternative market venues, there was no ability to provide an exemption from those *specific* obligations.
- 10 In the context of this inflexible regime, we have for some time been prepared to support an exemption from all of Pt 7.2 of the Corporations Act for certain market venues, where that exemption was subject to a number of targeted conditions. This allowed certain classes of non-exchange market venues to operate in Australia without the need for a market licence subject to all of the obligations imposed by Pt 7.2 of the Corporations Act, where these obligations would have created costs assessed as outweighing the benefits.
- 11 This approach has provided some regulatory oversight, but regulation through exemption was only intended to be an interim approach to deal with the inflexibility of the existing market licence regime in the near term.
- 12 The exemption power in the Corporations Act was not intended to provide systematic regulation of alternative market venues. The broad application of the exemption power also meant that Australia's licensing arrangements, particularly the approach of exempting trading venues, became out of step with international approaches (see paragraphs 13–16 below).

Overseas approaches to market licensing

- 13 By comparison, overseas governments and regulators have adapted their regulatory regimes to accommodate the kinds of market developments we have seen in Australia
- Note: Many initially established new licences to facilitate competition with equity exchanges (e.g. the United States, Canada and Europe) and subsequently developed regimes to regulate trading in non-exchange derivatives products and other products used by professional participants.
- 14 Some jurisdictions have established different regulatory regimes for equities and derivatives products, and within each product set there are different licences for exchanges and other market venues. See Example 1.
- 15 Other jurisdictions have created licences for exchange and classes of non-exchange market venues. The licence categories are predominantly defined by reference to the features of the market venue rather than the products traded. See Example 2.

Example 1

In the United States, licensing is divided between the Securities and Exchange Commission for securities and securities-based swaps, and the Commodity Futures Trading Commission (CFTC) for swaps. For securities, market operators have the choice of exchange regulation or as a broker dealer with additional 'alternative trading system' obligations. For derivatives and swaps, an operator is either an exchange or a swap execution facility based on specific definitions of these activities.

Example 2

In Europe, for multilateral, non-discretionary markets, there is the choice between being regulated as an exchange or as an investment firm with additional 'multilateral trading facility' obligations. For markets where the operator has some discretion over client orders, there are broker crossing systems and systematic internalisers for securities. A new class of venue is being introduced as part of [Markets in Financial Instruments Directive II](#) (MiFID II) – organised trading facilities – for venues with discretion in non-securities.

- 16 Most recently, specialised markets platforms, including crowdfunding platforms, are becoming an alternative source of funding for seed stage businesses. In response, some jurisdictions have implemented or are exploring changes in capital raising rules to facilitate these avenues. In cases such as the Securities Exchange Commission in the United States, the changes would also facilitate secondary trading for crowd-sourced equity.

Administering the CSF Act amendments

- 17 The CSF Act amended Pt 7.2 of the Corporations Act to allow an exemption for a market or class of market from *specified* obligations in the Corporations Act. This, in turn, better supports the ability to appropriately tailor obligations to create a scalable level of regulation.
- 18 The explanatory memorandum to the CSF Act highlighted the need for the Australian market licence regime to be adaptable and facilitate innovation. In summary, the explanatory memorandum stated that:
- (a) the regulatory regime for operators of market venues was designed to address risks associated with the operation of traditional exchanges such as the Australian Securities Exchange Limited (ASX) or other significant markets which may not be appropriate for operators of emerging and specialised market venues;
 - (b) amending the market licence framework to provide the power to exempt certain market venue operators from some licence obligations will ensure that regulatory requirements can be tailored to particular market venues and facilitate their development.

- 19 Reflecting this policy intention and also to bring Australia into line with the approach adopted in most developed market economies, we propose to support the use of the amended exemption provision to create a tiered licence regime. This will involve certain markets being licensed on the basis that they are required to comply with only a subset of the obligations in Pt 7.2 of the Corporations Act. This is explained in further detail in the draft updated regulatory guide: see Attachment 1.
- 20 Taking a tiered approach will enable a range of trading venues—not just traditional exchanges—to be licensed, and will ensure they are given adequate and tailored oversight.

B Proposals to refine and update how we administer the market licence regime

Key points

We propose to administer the amended licence regime by creating a two-tiered framework. Tier 1 market venues will include the exchanges and a small number of important professional trading venues.

The determination of whether a market venue should be a tier 1 or tier 2 venue will be determined on a risk-based assessment that we will conduct.

We also propose to take this opportunity to update other parts of the regulatory guide, including to reflect the transfer of market supervision to ASIC, and to consolidate documents previously published by ASIC about compliance with market licence obligations.

These changes will apply to both domestic and overseas licensees under Pt 7.2 of the Corporations Act.

Two-tiered licence regime

Proposal

B1 We propose to establish two tiers within the market licence regime, with the second tier capable of being used for specialised and emerging market venues. This will apply to domestic and overseas licensees (see proposals B8–B9 for details relating to overseas licensees).

Your feedback

- B1Q1 Do you agree with the proposed two-tiered approach?
- B1Q2 Do you have an alternative proposal for facilitating specialised and emerging market venues with proportionate regulation?

Rationale

- 21 We propose to administer the amended market licence regime using a two-tiered framework. This approach will allow us to create a more flexible model which will:
- (a) facilitate oversight of traditional market models and significant non-exchanges (tier 1), and
 - (b) appropriately tailor regulatory obligations for a broad range of specialised and emerging market venues (tier 2).

- 22 To achieve a balance between flexibility and certainty, we propose to:
- (a) adopt a consistent approach to determining when a type of market venue will be required to become a tier 1 venue or be permitted to be a tier 2 venue. We propose to take a risk-based approach instead of a prescriptive and rigid approach solely based on products traded or specific market features. This is explained at proposals B2–B3 (draft RG 172.54–RG 172.55).
 - (b) set out the licensing requirements that, as a starting point, all tier 2 licensees will be required to comply with. We will retain the flexibility to impose conditions or provide exemptions from additional obligations under Pt 7.2 of the Corporations Act where it is appropriate to do so within the tier 2 licensing framework. This is explained in proposals B4–B5 (draft RG 172.64–RG 172.66).
- 23 Importantly, we consider this approach allows ASIC to implement the policy intent of Sch 3 of the CSF Act, by making the licence regime more adaptable to the different types of trading venues that may emerge.

Risk-based approach to tiers

Proposal

B2 We propose to differentiate between tiers based on a risk assessment of the market or class of market:

- (a) tier 1 market venues will include those that are or are expected to become significant to the Australian economy, as well as venues that are or are expected to become significant to the efficiency and integrity of, and investor confidence in, the financial system;

Note: This tier will include exchanges and a small number of non-exchange venues. A small retail exchange would be expected to be, or become, significant to investor confidence in the financial system, and would therefore be a tier 1 venue.

- (b) tier 2 would apply to most other market venues, including a broad range of specialised and emerging venues that do not meet the risk-based criteria.

Your feedback

B2Q1 Is the risk-based approach to market licence tiers sufficiently clear?

B2Q2 Do you have comments on the proposed criteria?

B3 We propose that the distinction between the tiers of licences, including differences in regulatory oversight, should be clear to current and potential users of the market venues. Therefore:

- (a) we propose to adopt naming conventions for tiers of licences based on naming conventions adopted in other major jurisdictions:

- (i) tier 1 venues would be 'Designated Markets' (for exchanges) or 'Designated Specialised Markets' (for significant non-exchanges); and
 - (ii) tier 2 venues would be 'Specialised Markets';
- (b) we also propose that tier 2 venues would not be permitted to use 'exchange', 'stock/securities/futures market' in their title or in other documentation, including marketing material.

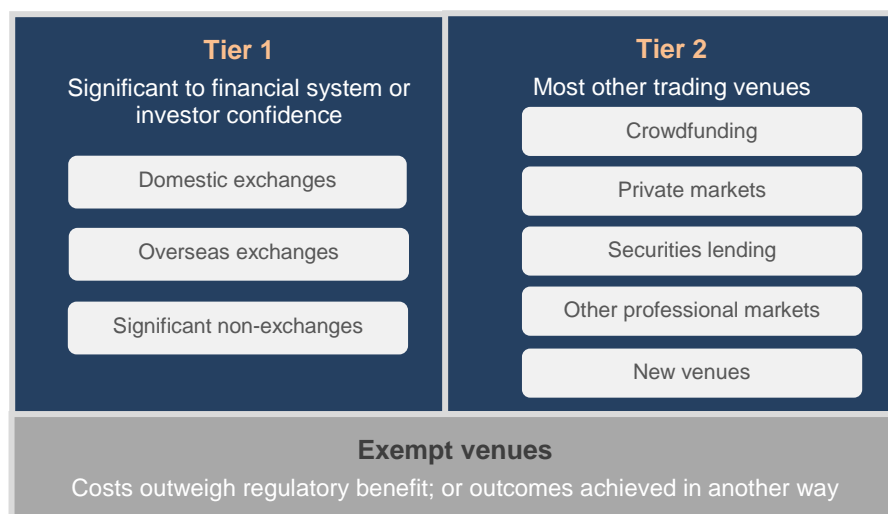
Your feedback

B3Q1 Do you have comments on the proposal for identifying or branding tiers?

B3Q2 Do you have other proposals for distinguishing between tiers?

Rationale

- 24 The differences in oversight between tier 1 and tier 2 licences will be based on a risk assessment. This will result in reduced regulatory oversight and a reduced regulatory burden for lower risk financial markets. This approach is in line with the policy objective of Sch 3 of the CSF Act.
- 25 We prefer a risk-based approach because the licence regime will be more adaptable to the risks presented by different types of market venues that may emerge, including new forms of specialised and emerging venues. We favour this approach, particularly given the challenges we have observed in some jurisdictions where more prescriptive and rigid approaches have presented ongoing difficulties in adapting to market developments.
- 26 At the same time, we will apply a consistent set of criteria to determining when a market venue must be regulated as a tier 1 venue. This will provide consistent treatment of like venues, as well as certainty for current and prospective licensees.
- 27 Figure 2 sets out the proposed licensing tiers.

Figure 2: Market licence tiers

Note: See the appendix for an accessible version of this figure.

28 Under this approach, we expect that all current retail exchanges will be required to be tier 1 markets and will continue to be subject to the full set of applicable licence requirements under Pt 7.2 of the Corporations Act. Some important non-exchange trading venues will also be required to be tier 1 where, for example, they are, or are expected to become, significant to the Australian economy. A wide range of other trading venues are expected to be tier 2.

29 We expect the following exchanges and trading venues currently licensed in Australia to be tier 1:

- (a) ASX;
- (b) ASX 24;
- (c) Chi-X;
- (d) SSX;
- (e) NSXA;
- (f) IR Plus;
- (g) FEX;
- (h) Yieldbroker;
- (i) Eurex;
- (j) ICE Futures Europe;
- (k) London Metals Exchange;
- (l) Eurex Frankfurt AG;
- (m) Chicago Mercantile Exchange (CME); and
- (n) Board of Trade of the City of Chicago (CBOT).

Tier 2 markets: Exemptions from licence obligations

Proposal

- B4** We propose to licence tier 2 market venues on the basis that the licensees comply with a specified subset of core licence obligations but are exempt from other licence obligations.

Note: The list of proposed licence obligations for tier 2 licensees is set out in Section D of the draft updated regulatory guide.

Your feedback

- B4Q1 Do you agree with the proposal for tier 2 licensees to be required to comply with a specified subset of licence obligations, as a starting point?

- B5** We propose that, if we identify a regulatory risk for a specific venue, we will seek to address that risk through a licence condition or otherwise consider the appropriateness of giving a particular exemption. This would necessarily be determined on a case-by-case basis.

Your feedback

- B5Q1 Do you have comments to address risks identified for specific venues on a case-by-case basis?
B5Q2 Do you have alternative or other proposals?

Rationale

- 30 The proposed regulatory guidance sets out a list of the licence obligations from which tier 2 market venues can generally be exempt: see Table 1 in the draft updated regulatory guide.
- 31 These obligations from which tier 2 market venues may typically be exempt are primarily relevant for exchanges. In establishing this approach, we have also taken into account the licence obligations that apply under overseas licence regimes (where applicable). See Examples 3–5 below for details. Where a proposed market licensee raises specific regulatory risks, we may tailor the obligations to address the specific risks.
- 32 Our long-standing position has been to support an exemption from the market licence regime where the costs of being licensed outweigh the regulatory benefits. Given the additional flexibility that the CSF Act has provided, we propose, in general, to use a tailored market licence to address questions of regulatory cost, rather than a complete exemption from the market licence regime.
- 33 This means we would only be likely to support complete exemptions from Pt 7.2 of the Corporations Act in rare and exceptional circumstances as described in Section F of the draft updated regulatory guide.

Example 3**Requirement to have operating rules and procedures**

The Corporations Act requires licensees to have operating rules and procedures. Operating rules form a legislative contract between operators and participants, and between every participant: see s793B of the Corporations Act.

While tier 2 venues will be required to have rules that support the interaction of users on their platform, these venues will be exempt from certain content requirements for their rules.

Tier 2 venues will also be exempt from the obligation to maintain operating procedures: see s793A(2) of the Corporations Act and reg 7.2.08 of the Corporations Regulations 2001 (Corporations Regulations). This means the venue would not be required to have procedures dealing with 'exchange-like' matters such as monitoring listing entities for compliance.

Example 4**Disallowance of operating rules**

Domestic licensees are required to notify ASIC of changes to the operating rules after making the changes, and the Minister (or the Minister's delegate) may disallow the changes within 28 days.

Tier 2 licensees will be exempt from the obligation to notify ASIC of rule changes after they occur, and will also be exempt from the associated rule disallowance regime. This is consistent with the approach taken in a number of international markets for these types of market venues.

Instead, we propose that tier 2 licensees be required to notify ASIC of proposed rule changes within a reasonable time before the changes are made. Again, this is similar to international approaches.

Example 5**Requirement to notify ASIC of certain matters**

Tier 2 markets will be exempt from a range of obligations to notify ASIC of certain matters as soon as practicable (for example, the requirement to notify ASIC when providing a new class of financial service that is incidental to operating the trading venue).

These exemptions will help to reduce the burden of ad hoc notifications. In some cases, we also believe we can obtain the information through other means.

Updated explanations for other matters

Proposal

B6 We propose to:

- (a) update the explanations about licensee's obligations to supervise participant conduct to reflect the changes made at the time of the transfer of market supervision to ASIC (see draft RG 172.106–RG 172.113);
- (b) consolidate into the draft updated regulatory guide our public statements about how licensees may comply with licence obligations. These include:
 - (i) adequate financial resources (see draft RG 172.77–RG 172.83);
 - (ii) adequate human resources (see draft RG 172.85–RG 172.93);
 - (iii) use of outsourcing arrangements to comply with licence obligations (see draft RG 172.114–RG 172.122); and
 - (iv) listing principles (see Appendix 1 of the draft updated regulatory guide);
- (c) clarify:
 - (i) when we may recommend that the Minister consider the suspension or revocation of a licence or an exemption (see draft RG 172.207–RG 172.209); and
 - (ii) how we would assess a change of control in an operator (see draft RG 172.210).

Your feedback

B6Q1 Do you agree with the proposal to update and clarify the explanations in the draft guidance?

B6Q2 Do you have comments about other areas of the law that could be clarified?

Rationale

- 34 We propose to update the explanations about licensees' supervisory obligations because the current explanation was issued before the transfer of market supervision to ASIC in 2010. The revised explanation focuses on how licensees can meet their obligation to monitor for compliance with the market operating rules.
- 35 We propose to consolidate into the draft updated regulatory guide our public statements or expectations about compliance with licence obligations so that our interpretation of the law is clear and transparent for all current and prospective licensees. Specifically:
- (a) our expectations relating to adequate financial resources have been set out in a number of licence conditions. The requirement for all operators

to have financial resources equal to six months of operating expenses is also consistent with the capital requirements of a number of overseas market licence regimes;

- (b) our expectations relating to adequate human resources, and our specific expectations relating to the suitability of persons of influence, have been applied to a number of existing licensees. Reflecting the two-tiered approach, our explanation draws a distinction between tier 1 and tier 2 licensees;
- (c) our expectations of how licensees may consider the risks of outsourcing arrangements have also been set out previously with licensees;
- (d) our expectations of how licensees with a listing function would carry out that function has been set out in recent assessment reports.

36 Lastly, we propose to clarify two matters:

- (a) *When we would support the suspension or revocation of a licence or exemption* (so that our considerations are clear and transparent to all licensed and exempt operators): Our proposals are consistent with the requirements under overseas regimes, such as the CFTC's swap execution facility regime. We propose to do so after an existing market has been dormant for six months, or a new market has failed to commence within 12 months. In each case, a decision of this type would be subject to a formal administrative process, which would include an opportunity for the operator to provide submissions.
- (b) *How we would assess a change of control in a tier 1 market operator:* As a change in control can lead to changes in the strategic direction, resource commitment and business plan of a market, we will assess whether the licensee is likely to continue to meet its obligations under the new or proposed new control arrangements.

Guidance for market licensee systems and controls

37 Over the past five years international regulatory agencies have introduced measures to address risks that have arisen from the technological developments in financial markets. Many jurisdictions have introduced specific regulatory requirements around market operators' systems and controls so as to ensure operational resilience and business continuity in the event of disruption.

38 Our regulatory settings relevant to a market operator's management of the increased risks posed by these developments are based on their general obligations in s792A(a), (c) and (d) of the Corporations Act which require a market operator to operate a fair, orderly and transparent market, to have

adequate arrangements for operating the market, and to have sufficient technological resources to operate its market properly.

- 39 We issued guidance on these in the addendum to RG 172 in 2013, which we propose to continue in Appendix 2 of the draft updated regulatory guide. Ongoing developments in outsourcing have also prompted us to set out our expectations of how licensees may consider the risks of outsourcing arrangements where relevant to their systems and controls.

Proposal

- B7** We propose to maintain our guidance in the addendum to RG 172 in Appendix 2 and update our guidance to market licensees on outsourcing arrangements as described in proposal B6(b)(iii).

Your feedback

- B7Q1 Do you think there are further key risk areas that should be addressed in Appendix 2 'Market licensee systems and controls'?
- B7Q2 Should we consider giving guidance on other aspects of a licensee's obligation to have adequate technology resources?

Rationale

- 40 We propose to provide additional guidance on outsourcing as noted in proposal B6(b)(iii) that builds on the key areas set out in the addendum to RG 172. As outsourcing arrangements are not just specific to a market licensee's systems and controls we have embedded this guidance at draft RG 172.114–RG 172.122.
- 41 We will continue to engage with market operators and monitor the regulatory settings relevant to market licensee systems and controls to ensure that these settings are appropriate for the pace of technological innovation and technological dependencies within the markets.

Overseas licensees

Proposal

- B8** We propose that the two-tiered licence will be applied to overseas operators, also based on the risk-based approach. In addition to the criteria set out in proposals B3–B5, we propose to consider whether the trading venue is regulated as an exchange (or similar) in its home jurisdiction.

Your feedback

B8Q1 Do you agree with the proposal to apply the two-tiered approach to overseas operators, based on the risk-based tiered approach, as well as by taking into account how the trading venue is regulated in its home jurisdiction?

B9 We propose to repeal RG 177 and consolidate the information contained in RG 177 into the draft updated RG 172.

Your feedback

B9Q1 Do you agree with the proposed consolidation?

Rationale

- 42 Where the overseas operator is regulated in another jurisdiction (normally its home jurisdiction) for the same market, it may be eligible to seek an overseas licence under s795B(2). We also propose to apply the same two-tiered approach to applicants for an overseas licence.
- 43 When reviewing an application, we are required to assess whether the applicant's home regime is sufficiently equivalent to the Australian licence regime. In doing so, we propose to consider the obligations that are applicable to the relevant tier of licence. If you are an exchange, we would normally expect to assess your home regulation against the obligations that apply to tier 1 licensees.
- 44 As part of updating RG 177 and in recognition of the continuing globalisation of financial markets, we also propose to consolidate RG 177 into the draft updated RG 172. This will help to explain how the tiered licence will apply to overseas licensees. It will also help to reduce repetition between the two existing regulatory guides.

C Secondary trading of shares issued by eligible crowd-sourced funding companies

Key points

A market licence is required for operators of a market that facilitates secondary trading of shares in eligible crowd-sourced funding (CSF) companies. Since most eligible CSF companies will not be subject to the continuous disclosure regime in the Corporations Act, we seek feedback on what disclosure requirements should apply to facilitate informed trading on the secondary market.

Investors participating in CSF offers may not be able to on-sell their shares within 12 months of their issue in certain circumstances under the on-sale provisions in the Corporations Act. We seek comments on whether there are circumstances in which on-sales within the 12-month period to retail investors should be permitted.

Secondary trading of shares by CSF companies

- 45 The CSF Act will allow unlisted public companies that meet certain eligibility requirements to raise funds from a large number of investors.
- 46 It enables eligible companies to make offers of their shares through a licensed intermediary's (CSF intermediary) platform.
- Note: See [Consultation Paper 289](#) *Crowd-sourced funding: Guide for public companies* (CP 289) for information on the requirements for offers of shares, including disclosure obligations, under the CSF regime in Pt 6D.3A of the Corporations Act.
- 47 In certain circumstances, investors participating in CSF offers may not be able to on-sell shares within 12 months of their issue under a CSF offer, as a result of the on-sale provisions in s707(3)–(4) of the Corporations Act (e.g. sales to retail investors without a prospectus).
- Note: See [Regulatory Guide 173](#): *Disclosure for on-sale of securities and other financial products* (RG 173) for the circumstances where on-sale of shares may be restricted.
- 48 If shareholders of an eligible CSF company wish to on-sell their shares within 12 months of a CSF offer, it may be necessary for the company to seek relief from the on-sale provisions. We seek comments on whether there are circumstances when on-sales of shares should be permitted within 12 months of a CSF offer.
- 49 While CSF intermediaries may not require a market licence for the primary issuance of shares in eligible CSF companies, CSF intermediaries or other entities seeking to operate a secondary market in shares of eligible CSF companies would be required to hold a market licence.

- 50 Most eligible CSF companies will not be ‘disclosing entities’ and therefore will not be subject to the continuous disclosure regime in the Corporations Act. As a result, we are seeking comments on what disclosure requirements should apply to facilitate informed secondary trading. For example:
- (a) what information should be disclosed to facilitate informed trading (e.g. all material price-sensitive information or all information included in the offer document for the CSF offer);
 - (b) the timing requirements for disclosure (e.g. if secondary trading occurs periodically, should disclosure be required a certain period of time before each trading window);
 - (c) whether any other investor protection obligations should apply.
- 51 We also seek comments on whether there are circumstances when secondary trading of shares issued under CSF offers involving retail investors should not be permitted at all (e.g. where a company ceases to be an eligible CSF company or does not comply with its reporting or corporate governance obligations).

Your feedback

- C1Q1 Are there circumstances when on-sales to retail investors within 12 months of shares being issued under CSF offers should be permitted?
- C1Q2 Since continuous disclosure does not apply, what disclosure requirements should apply to secondary trading of shares in eligible CSF companies to facilitate informed trading? Please elaborate. For example:
- (a) what information should be disclosed to facilitate informed trading?
 - (b) what timing requirements for disclosure should apply, for example if secondary trading occurs periodically?
 - (c) are there other investor protection obligations that should apply?
- C1Q3 Are there any circumstances when secondary trading of shares in eligible CSF companies should not be permitted?

Background

- 52 The on-sale provisions in s707(3)–(4) of the Corporations Act may apply to certain sales by investors of shares in eligible CSF companies within 12 months after the issue. This means investors may not be able to sell their CSF shares within 12 months of the issue without a prospectus, unless an exemption in s708 of the Corporations Act applies.
- 53 Companies making CSF offers are not likely to be subject to the continuous disclosure regime in Ch 6CA of the Corporations Act, unless the company is already, or becomes, a disclosing entity. Consequently, a secondary market for those shares will not be fully informed in the absence of other appropriate disclosure obligations or investor protections.

D Implementation and transitional matters

Key points

We will review the legal status of exempt professional markets after the draft updated regulatory guide is settled. However, if we receive an application from a similar trading venue, we will consider whether to process the application under the proposed tiered licence in order to facilitate innovation and market development.

We propose to seek the repeal of reg 10.15.02 which exempts four professional trading venues from ASIC supervision, as this will become an anomaly under the proposed approach to licensing.

Exempt professional markets

Proposal

- D1 We will review the legal status of each exempt operator after the draft updated regulatory guide has been finalised. Professional market operators that currently have the benefit of an exemption will be asked to transition to a licence under a streamlined and expedited arrangement.

Your feedback

D1Q1 Do you agree with the proposed way forward for existing exempt professional markets?

- D2 If we receive a new application for a similar trading venue before the draft updated regulatory guide is finalised, we will consider and discuss with the applicant whether to process the application based on the approach set out in this paper and the draft updated regulatory guide.

Your feedback

D2Q1 Do you agree with the proposed approach for new applications?

Rationale

- 54 We propose to review the legal status of each exempt operator because the CSF Act amendments to the licence regime are likely to have removed the policy rationale for our approach that professional markets be given exemptions from all licence obligations. The policy rationale was that, under the historically inflexible market licensing framework, the costs of requiring those market venues to obtain a market licence outweighed the benefits. With the flexibility provided by the CSF Act amendments, that is no longer the case.

- 55 Instead, for similar new applicants, we are likely to recommend that the Minister issue a licence with exemptions from specific licence obligations, as described at proposals B4–B5.
- 56 In this context, we expect to take the view that exempt operators should transition to being licensed for reasons of consistency and certainty. If we proceed with this, we will seek to ensure the transition is expedited and streamlined as much as possible.
- 57 Holding a licence, rather than an exemption, can provide advantages. For example, the product authorisations provided under exemptions are typically narrower in scope than under licences. In practical terms, being licensed may not represent a substantive increase in regulatory requirements, particularly where the operator is regulated under a sufficiently equivalent overseas regime for the same trading venue.
- 58 We may receive new licence applications before the draft updated regulatory guide is finalised. In such cases, we will consider and discuss with the applicant whether to process the application based on the approach set out in this paper and the draft updated regulatory guide. We will consider whether doing so would help to facilitate specialised and innovative market developments.

Supervision under Pt 7.2A

- 59 Under Pt 7.2A of the Corporations Act, we have the function of supervising domestic licensees. This includes the ability to make market integrity rules for domestic licensees.
- 60 However, reg 10.15.02 of the Corporations Regulations exempts four licensees from the operations of Pt 7.2A. This regulation was intended to be a transitional measure when market supervision was transferred to ASIC.

Proposal

- D3 We propose to discuss with Treasury whether reg 10.15.02 should be repealed to provide for consistent treatment of like trading venues. If Treasury agrees, this would be the subject of a separate consultation.

Your feedback

- D3Q1 Do you have preliminary feedback on this proposal (noting that separate consultation is likely to be undertaken before any changes are made to the regulations)?

Rationale

- 61 Regulation 10.15.02 only provides exemptions to four existing licensees that are predominantly professional trading venues. If the regulation remains, the

exemption provided for these trading venues will become increasingly anomalous as additional trading venues (including other venues for similar products and participants) become licensed and supervised by ASIC.

- 62 Repealing the regulation will clarify that the four trading venues are subject to ASIC supervision. We will also have the ability to write MIRs for these (and other) venues. However, we do not propose to write exchange-like MIRs for these trading venues.

Integration of Regulatory Guide 223 guidance for market operators

- 63 We are in the process of consolidating 13 market integrity rule books into four. These rule books relate to the activities and conduct on seven licensed financial markets. We are also consolidating the regulatory guides that set out our guidance for these rule books.
- 64 One of these guides is [Regulatory Guide 223](#) *Guidance on ASIC market integrity rules for competition in exchange markets* (RG 223). Examples of the market operator matters that RG 223 deals with are controls for extreme price movements, pre-trade and post-trade transparency and the consolidation of this information, regulatory data and market operator cooperation when dealing in the same securities.
- 65 In order to reduce the number of ASIC regulatory guides that market operators need to refer to, we will integrate the guidance for market operators currently in RG 223 into RG 172. This process will not change the substance of the guidance or its scope. We will integrate the guidance before releasing the final version of RG 172 after this consultation process.

E Regulatory and financial impact

66 In developing the proposals in this paper, we have carefully considered their regulatory and financial impact. On the information currently available to us we think they will strike an appropriate balance between:

- (a) maintaining fair, orderly and transparent markets; and
- (b) facilitating a range of market venues.

67 Before settling on a final policy, we will comply with the Australian Government's regulatory impact analysis (RIA) requirements by:

- (a) considering all feasible options, including examining the likely impacts of the range of alternative options which could meet our policy objectives;
- (b) if regulatory options are under consideration, notifying the Office of Best Practice Regulation (OBPR); and
- (c) if our proposed option has more than minor or machinery impact on business or the not-for-profit sector, preparing a regulation impact statement (RIS).

68 All RISs are submitted to the OBPR for approval before we make any final decision. Without an approved RIS, ASIC is unable to give relief or make any other form of regulation, including issuing a regulatory guide that contains regulation.

69 To ensure that we are in a position to properly complete any required RIS, please give us as much information as you can about our proposals or any alternative approaches, including:

- (a) the likely compliance costs;
- (b) the likely effect on competition; and
- (c) other impacts, costs and benefits.

See 'The consultation process', p. 4.

Appendix

70 This appendix is for people with visual or other impairments. It provides accessible table data for Figures 1 and 2.

Table 1: Exchange traded and non-exchange traded financial products in Australia

Exchange traded	Products include: <ul style="list-style-type: none"> • exchange-traded securities and hybrids • exchange-traded derivatives
Non-exchange traded	Products include: <ul style="list-style-type: none"> • spot FX • OTC derivatives • other fixed income • other non-exchange traded products

Note: This is the information contained in Figure 1.

Table 2: Market licence tiers

Tier 1	Significant to the financial system or investor confidence. For example: <ul style="list-style-type: none"> • domestic exchanges • overseas exchanges • significant non-exchanges
Tier 2	Most other trading venues. For example: <ul style="list-style-type: none"> • crowdfunding • private markets • securities lending • other professional market • new venues
Exempt venues	Costs outweigh regulatory benefit, or outcomes achieved in another way

Note: This is the information contained in Figure 2.

Key terms

Term	Meaning in this document
ASIC	Australian Securities and Investments Commission
ASX	ASX Limited or the exchange market operated by ASX Limited
Australian market licence	Australian market licence under s795B of the Corporations Act that authorises a person to operate a financial market
CFTC	US Commodity Futures Trading Commission
Ch 7 (for example)	A chapter of the Corporations Act (in this example numbered 7), unless otherwise specified
Corporations Act	<i>Corporations Act 2001</i> , including regulations made for the purposes of that Act
Corporations Regulations	Corporations Regulations 2001
CP 289 (for example)	An ASIC consultation paper (in this example numbered 289)
CSF	Crowd-sourced funding
CSF Act	<i>The Corporations Amendment (Crowd-sourced Funding) Act 2017</i>
financial market	As defined in s767A of the Corporations Act, a facility through which offers to acquire or dispose of financial products are regularly made or accepted
financial product	A product as defined in Div 3 of Part 7.1 of the Corporations Act
market integrity rules	Rules made by ASIC, under s798G of the Corporations Act, for trading on domestic licensed markets
market participant	As defined in s761A of the Corporations Act
MiFID II	Markets in Financial Instruments Directive II
operating rules	As defined in s761A of the Corporations Act
Pt 7.2 (for example)	A part of the Corporations Act (in this example numbered 7.2), unless otherwise specified
reg 10.15.02 (for example)	A regulation of the Corporations Regulations (in this example numbered 10.15.02), unless otherwise specified
RG 172 (for example)	An ASIC regulatory guide (in this example numbered 172)
s708 (for example)	A section of the Corporations Act (in this example numbered 708), unless otherwise specified

List of proposals and questions

Proposal	Your feedback
<p>B1 We propose to establish two tiers within the market licence regime, with the second tier capable of being used for specialised and emerging market venues. This will apply to domestic and overseas licensees (see proposals B8–B9 for details relating to overseas licensees).</p>	<p>B1Q1 Do you agree with the proposed two-tiered approach?</p> <p>B1Q2 Do you have an alternative proposal for facilitating specialised and emerging market venues with proportionate regulation?</p>
<p>B2 We propose to differentiate between tiers based on a risk assessment of the market or class of market:</p> <p>(a) tier 1 market venues will include those that are or are expected to become significant to the Australian economy, as well as venues that are or are expected to become significant to the efficiency and integrity of, and investor confidence in, the financial system;</p> <p>Note: This tier will include exchanges and a small number of non-exchange venues. A small retail exchange would be expected to be, or become, significant to investor confidence in the financial system, and would therefore be a tier 1 venue.</p> <p>(b) tier 2 would apply to most other market venues, including a broad range of specialised and emerging venues that do not meet the risk-based criteria.</p>	<p>B2Q1 Is the risk-based approach to market licence tiers sufficiently clear?</p> <p>B2Q2 Do you have comments on the proposed criteria?</p>

Proposal	Your feedback
<p>B3 We propose that the distinction between the tiers of licences, including differences in regulatory oversight, should be clear to current and potential users of the market venues. Therefore:</p> <p>(a) we propose to adopt naming conventions for tiers of licences based on naming conventions adopted in other major jurisdictions:</p> <p>(i) tier 1 venues would be 'Designated Markets' (for exchanges) or 'Designated Specialised Markets' (for significant non-exchanges); and</p> <p>(ii) tier 2 venues would be 'Specialised Markets';</p> <p>(b) we also propose that tier 2 venues would not be permitted to use 'exchange', 'stock/securities/futures market' in their title or in other documentation, including marketing material.</p>	<p>B3Q1 Do you have comments on the proposal for identifying or branding tiers?</p> <p>B3Q2 Do you have other proposals for distinguishing between tiers?</p>
<p>B4 We propose to licence tier 2 market venues on the basis that the licensees comply with a specified subset of core licence obligations but are exempt from other licence obligations.</p> <p>Note: The list of proposed licence obligations for tier 2 licensees is set out in Section D of the draft updated regulatory guide.</p>	<p>B4Q1 Do you agree with the proposal for tier 2 licensees to be required to comply with a specified subset of licence obligations, as a starting point?</p>
<p>B5 We propose that, if we identify a regulatory risk for a specific venue, we will seek to address that risk through a licence condition or otherwise consider the appropriateness of giving a particular exemption. This would necessarily be determined on a case-by-case basis.</p>	<p>B5Q1 Do you have comments to address risks identified for specific venues on a case-by-case basis?</p> <p>B5Q2 Do you have alternative or other proposals?</p>

Proposal	Your feedback
<p>B6 We propose to:</p> <p>(a) update the explanations about licensee's obligations to supervise participant conduct to reflect the changes made at the time of the transfer of market supervision to ASIC (see draft RG 172.106–RG 172.113);</p> <p>(b) consolidate into the draft updated regulatory guide our public statements about how licensees may comply with licence obligations. These include:</p> <p>(i) adequate financial resources (see draft RG 172.77–RG 172.83);</p> <p>(ii) adequate human resources (see draft RG 172.85–RG 172.93);</p> <p>(iii) use of outsourcing arrangements to comply with licence obligations (see draft RG 172.114–RG 172.122); and</p> <p>(iv) listing principles (see Appendix 1 of the draft updated regulatory guide);</p> <p>(c) clarify:</p> <p>(i) when we may recommend that the Minister consider the suspension or revocation of a licence or an exemption (see draft RG 172.207–RG 172.209); and</p> <p>(ii) how we would assess a change of control in an operator (see draft RG 172.210).</p>	<p>B6Q1 Do you agree with the proposal to update and clarify the explanations in the draft guidance?</p> <p>B6Q2 Do you have comments about other areas of the law that could be clarified?</p>
<p>B7 We propose to maintain our guidance in the addendum to RG 172 in Appendix 2 and update our guidance to market licensees on outsourcing arrangements as described in proposal B6(b)(iii).</p>	<p>B7Q1 Do you think there are further key risk areas that should be addressed in Appendix 2 'Market licensee systems and controls'?</p> <p>B7Q2 Should we consider giving guidance on other aspects of a licensee's obligation to have adequate technology resources?</p>
<p>B8 We propose that the two-tiered licence will be applied to overseas operators, also based on the risk-based approach. In addition to the criteria set out in proposals B3–B5, we propose to consider whether the trading venue is regulated as an exchange (or similar) in its home jurisdiction.</p>	<p>B8Q1 Do you agree with the proposal to apply the two-tiered approach to overseas operators, based on the risk-based tiered approach, as well as by taking into account how the trading venue is regulated in its home jurisdiction?</p>

Proposal	Your feedback
B9 We propose to repeal RG 177 and consolidate the information contained in RG 177 into the draft updated RG 172.	B9Q1 Do you agree with the proposed consolidation?
C1 See paragraphs 45–51 for commentary on questions C1Q1 and C1Q2.	<p>C1Q1 Are there circumstances when on-sales to retail investors within 12 months of shares being issued under CSF offers should be permitted?</p> <p>C1Q2 Since continuous disclosure does not apply, what disclosure requirements should apply to secondary trading of shares in eligible CSF companies to facilitate informed trading? Please elaborate. For example:</p> <p>(a) what information should be disclosed to facilitate informed trading?</p> <p>(b) what timing requirements for disclosure should apply, for example if secondary trading occurs periodically?</p> <p>(c) are there other investor protection obligations that should apply?</p> <p>C1Q3 Are there any circumstances when secondary trading of shares in eligible CSF companies should not be permitted?</p>
D1 We will review the legal status of each exempt operator after the draft updated regulatory guide has been finalised. Professional market operators that currently have the benefit of an exemption will be asked to transition to a licence under a streamlined and expedited arrangement.	D1Q1 Do you agree with the proposed way forward for existing exempt professional markets?
D2 If we receive a new application for a similar trading venue before the draft updated regulatory guide is finalised, we will consider and discuss with the applicant whether to process the application based on the approach set out in this paper and the draft updated regulatory guide.	D2Q1 Do you agree with the proposed approach for new applications?
D3 We propose to discuss with Treasury whether reg 10.15.02 should be repealed to provide for consistent treatment of like trading venues. If Treasury agrees, this would be the subject of a separate consultation.	D3Q1 Do you have preliminary feedback on this proposal (noting that separate consultation is likely to be undertaken before any changes are made to the regulations)?