



ASIC

Australian Securities & Investments Commission

REPORT 572

Response to submissions on CP 293 Revising the market licence regime: Domestic and overseas operators

May 2018

About this report

This report highlights the key issues that arose out of the submissions received on [Consultation Paper 293](#) *Revising the market licence regime for domestic and overseas operators* and sets out our responses to those issues.

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.

Disclaimer

This report does not constitute legal advice. We encourage you to seek your own professional advice to find out how the Corporations Act and other applicable laws apply to you, as it is your responsibility to determine your obligations.

This report does not contain ASIC policy. Please see [Regulatory Guide 172](#) *Financial markets: Domestic and overseas operators*.

Contents

| | | |
|----------|---|-----------|
| A | Overview/Consultation process | 4 |
| B | Application of a tiered licensing regime and international consistency | 5 |
| | Application to classes of financial markets | 5 |
| | Application to specific services | 6 |
| | Additional licence conditions..... | 7 |
| | Name of tiers | 7 |
| | Supervision of licensees and market integrity rules | 8 |
| | International consistency and equivalence decisions..... | 9 |
| | Treatment of certain overseas markets | 9 |
| C | Listing and considerations of competition | 10 |
| | Central listing authority | 10 |
| | Benefits to the economy and enhancement of competition..... | 10 |
| | Provision of critical services..... | 11 |
| | Reliance on other market operators or regulators | 12 |
| D | Secondary trading of crowd-sourced equity | 13 |
| | Crowd-sourced equity funding | 13 |
| | Appendix: List of non-confidential respondents | 14 |

A Overview/Consultation process

- 1 In [Consultation Paper 293](#) *Revising the market licence regime for domestic and overseas operators* (CP 293), we consulted on proposals to revise the Australian market licensing regime to implement a more flexible regime by revising Regulatory Guide 172 *Australian market licences: Australian operators* (RG 172). Regulatory Guide 177 *Australian market licences: Overseas operators* (RG 177) will be superseded by revised [Regulatory Guide 172](#) *Financial markets: Domestic and overseas operators* (revised RG 172).
- 2 CP 293 proposed to implement the amendments made by the *Corporations Amendment (Crowd-sourced Funding) Act 2017* by creating a two-tiered framework using a risk-based assessment.
- 3 CP 293 also proposed to take the opportunity to update other parts of RG 172 and to consolidate documents previously published by ASIC about compliance with market licence obligations.
- 4 This report highlights the key issues that arose out of the submissions received on CP 293 and our responses to those issues.
- 5 This report is not meant to be a comprehensive summary of all responses received. It is also not meant to be a detailed report on every question from CP 293. We have limited this report to the key issues.
- 6 We received four confidential and five non-confidential responses to CP 293. We are grateful to respondents for taking the time to send us their comments.
- 7 For a list of the non-confidential respondents to CP 293, see the appendix. Copies of these submissions are currently on the ASIC website under [CP 293](#).

Responses to consultation

- 8 The main issues raised by respondents related to:
 - (a) the detail and application of a tiered licensing regime, including the international consistency of the regime;
 - (b) whether we should assess the case for a central listing authority;
 - (c) considerations relating to competition; and
 - (d) secondary trading of crowd-sourced equity.

B Application of a tiered licensing regime and international consistency

Key points

This section outlines the feedback received on the detail and application of a tiered licensing regime, specifically:

- the classes of financial markets that will be assessed as tier 1 markets;
- whether specific services can only be provided by tier 1 markets;
- when additional licence conditions would be imposed;
- supervision of licensees and market integrity rules;
- review of decisions relating to the tiered regime;
- whether only tier 1 markets would be able to benefit from certain equivalence or substituted compliance decisions; and
- the treatment of certain overseas markets.

Application to classes of financial markets

- 9 We proposed to establish two tiers within the market licensing regime, based on a risk-based assessment that we would conduct. Tier 1 markets would 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. Tier 2 markets would be capable of accommodating a range of specialised and emerging markets.

Stakeholder feedback

- 10 We received submissions seeking more clarity on which risks would be taken into account when we undertake the risk-based assessment. Some stakeholders specifically sought more clarity on the application of the tiered licensing regime to small exchanges. One stakeholder commented that the treatment of domestic and overseas professional markets under a tiered regime differed and was not clear.

ASIC's response

The draft regulatory guide provides some guidance about the risks and features of a market that we would take into account when undertaking a risk-based assessment.

We have now specified in the revised regulatory guide that we would generally expect prescribed financial markets to be tier 1 markets.

However, the regime is intended to be capable of being applied to a range of markets and business models. As such, we do not propose to prescribe a 'checklist' of risks that would be considered in every case.

To provide more clarity and consistency in the application of the tiered licensing regime to domestic and overseas professional markets, we have made it clear in the revised regulatory guide that certain types of professional markets (such as multilateral trading facilities and swap execution facilities) could also expect to be tier 1 markets.

Application to specific services

- 11 In CP 293 we proposed that the licensing regime would be a risk-based one. We considered that this approach would facilitate oversight of traditional market models and significant non-exchanges, and appropriately tailor regulatory obligations for a broad range of specialised and emerging markets.

Stakeholder feedback

- 12 We received feedback seeking clarification about whether specific types of services could only be offered by tier 1 markets. One stakeholder suggested that a market operator that is licensed to operate a tier 1 market should be permitted to offer tier 2 services. Another stakeholder argued that the manner in which products are cleared and/or settled on the market should be considered in the risk-based assessment.

ASIC's response

We do not consider it would be appropriate to require that specific types of services only be offered by tier 1 markets. This approach would not be consistent with overseas regulatory regimes, which generally do not restrict trading of certain financial products (such as securities) to regulated exchanges.

However, we have clarified that we would consider imposing licence conditions to address specific risks or products (e.g. product admission and disclosure requirements where a market seeks to trade certain equity market products).

The tiered licensing regime would permit a market operator to offer a range of services. If a service (such as secondary trading of crowd-sourced equity) is provided within a tier 1 market, it would be subject to the market's licensing obligations. If the

service is provided from a separate market, this market may be assessed to be a tier 2 market and supervised accordingly.

Finally, we do not consider that the types of clearing and settlement arrangements used are relevant to the market licensing regime. While exchanges may have integrated clearing and settlement arrangements, most professional trading platforms do not, and both types of markets could be assessed as tier 1 markets.

Additional licence conditions

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

Stakeholder feedback

- 14 One stakeholder requested further detail about when we would seek to impose additional licence obligations.

ASIC's response

We have provided additional examples, such as licence conditions relating to product admission and disclosure requirements where a market seeks to trade certain equity market products.

However, we do not propose to prescribe all the circumstances in which we would consider imposing additional licence obligations. This is because we believe the tiered licensing regime needs to remain flexible to address a range of current and new risks, and new business models.

Name of tiers

- 15 We proposed 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. To this end, we proposed to adopt naming conventions within the market licensing regime.

Stakeholder feedback

- 16 One stakeholder commented that the proposed naming conventions could be confusing. The same stakeholder also emphasised the need to ensure investors are not misled.

ASIC's response

We continue to believe adopting a naming convention would help to distinguish between the tiers of markets. We will consider further the best way to implement a naming convention as part of the implementation of the revised policy.

Supervision of licensees and market integrity rules

- 17 We proposed that, under a tiered licensing regime, the differences in oversight between tier 1 and tier 2 licences would be based on a risk assessment.

Stakeholder feedback

- 18 We received feedback from one stakeholder who queried whether ASIC would also apply a risk-based approach to supervising market operators within the same tier in order to account for the differences between some market operators. Another stakeholder sought to confirm whether there would be ongoing supervision and review of whether a licensee is in the appropriate tier. One respondent asked whether there would be market integrity rules for all licensees.

ASIC's response

Overall, there will be a difference between the oversight of tier 1 and tier 2 licensees. However, we intend to supervise each market operator based on its features, products and risks, and will not be applying a 'one size fits all' approach within each tier.

We confirm that the tiered licensing regime will provide scope to review whether a licensee is within the appropriate tier, and to work with a licensee to move between tiers where appropriate.

We can only make market integrity rules for domestic licensees. We will consider the merits of making market integrity rules on specific issues for other domestic licensees, but this is beyond the scope of this review and would require separate consultation.

International consistency and equivalence decisions

- 19 We stated in CP 293 that we intend to take an internationally consistent approach to the administration of the market licensing regime.

Stakeholder feedback

- 20 Some stakeholders sought confirmation that the benefits of being a tier 1 market would be clear, including whether only tier 1 markets would be able to benefit from certain equivalence or substituted compliance decisions from overseas regulators.

ASIC's response

We consider that only tier 1 markets would be subject to regulation and oversight that would be equivalent to key overseas regulatory regimes.

Relevant regimes include the regulated markets regime and multilateral trading facility regime in the European Union, or the designated contract market or swap execution facility regime administered by the US Commodity Futures Trading Commission.

We have and will continue to put forward this view for foreign regulators. This means that a domestic market operator that wishes to benefit from certain equivalence or substituted compliance decisions would need to be licensed and operate a tier 1 market.

Treatment of certain overseas markets

- 21 In CP 293 we stated that we intend to take an internationally consistent approach to the administration of the market licensing regime.

Stakeholder feedback

- 22 Some stakeholders queried whether overseas professional trading platforms that are similar to some domestic tier 1 markets would be licensed as tier 1 or tier 2 markets.

ASIC's response

We have further reviewed the consistency of our proposed tiered licensing regime and consider that other overseas venues that are not considered exchanges in their home jurisdiction (e.g. swap execution facilities or multilateral trading facilities) may also expect to be a tier 1 market venue.

Where this is the case, we would still consider the scope to exercise regulatory deference to a sufficiently equivalent overseas regime and apply an appropriate level of oversight.

C Listing and considerations of competition

Key points

This section outlines the feedback received about other aspects of market operator obligations, specifically:

- the proposal to establish a central listing authority;
- whether we should consider the benefits to the wider economy and, particularly, enhancing competition when administering the licensing regime;
- whether specific regulation should apply when a market operator provides critical services to other market operators; and
- whether market operators and regulators should be able to place greater reliance on each other's supervision of participants and performance of other functions.

Central listing authority

- 23 While we proposed incorporating certain listing principles into the revised RG 172, we did not propose making other changes in relation to market licensees' obligations in relation to listing.

Stakeholder feedback

- 24 One stakeholder queried why there has not been a cost/benefit analysis of the case to establish a central listing authority, similar to the model in the United Kingdom.

ASIC's response

We believe a proposal to establish a central listing authority is out of scope for this consultation, as implementing such a proposal may require legislative reform and may not be appropriate to implement under guidance. We are separately considering the merits of centralising certain listing functions. However, there is no current proposal to introduce this model, and any consideration of it would have a long lead time.

Benefits to the economy and enhancement of competition

- 25 We proposed to take a risk-based approach to a tiered licensing regime and to administer the regime to achieve a range of market operator regulatory outcomes as set out in the draft RG 172.

Stakeholder feedback

- 26 One stakeholder proposed that the market regulator outcomes should specifically:
- (a) enhance competition between providers; and
 - (b) consider the wider benefits to the Australian economy, for example, from facilitating or enhancing competition in specific products or areas.

ASIC's response

We consider that we can advise the Minister or the delegate of the Minister on competition-related issues. This is because the Minister must take into account whether it is in the public interest to make specific decisions including granting a licence, varying or imposing additional conditions on the licence, suspending or cancelling a licence, or disallowing a change to operating rules.

Subject to passage through the Parliament of the Treasury Laws Amendment (Enhancing ASIC's Capabilities) Bill 2018, we would be able to specifically consider competition in our decision-making processes.

Provision of critical services

- 27 While we proposed to take a risk-based approach to a tiered licensing regime, we did not specifically propose how we would consider particular types of services that may be provided by a market operator.

Stakeholder feedback

- 28 One stakeholder proposed that we provide more guidance on market operators' obligations towards each other, particularly where one market operator operates systems or provides services which, if disrupted, could affect other market operators that rely on those systems or services.

ASIC's response

Currently we do not consider it would be appropriate to prescribe requirements for all cases where critical services are being provided by another market operator. Such guidance may need to be service-specific and would require further consultation.

We also consider that the guidance relating to sufficient resources and outsourcing is relevant for market operators that rely on another entity to provide critical services.

Reliance on other market operators or regulators

- 29 While we updated the guidance in relation to market operators' obligations to supervise participant conduct and market activity, we did not propose additional material changes to the existing guidance.

Stakeholder feedback

- 30 One stakeholder proposed that market operators and regulators should take a more collegial approach to supervising market participants and product issuers so that, specifically, monitoring of both issuers and participants would not be subject to duplication.

ASIC's response

We have stated in the revised RG 172 that we expect market operators to cooperate with each other where appropriate. We have also stated that we are open to market operators meeting their obligations in different ways, including through new types of services. Where outsourced services are used, our guidance on outsourcing would apply.

However, we do not consider it appropriate to specify that a market operator may, in effect, delegate its obligations to supervise its participants to another operator.

This is because each market may provide services for different types of products or have other circumstances that need to be considered by the market operator. Each market's operating rules might also differ and require specific issues to be considered. Finally, each market operator may need to determine the most appropriate action to take if a participant is in financial difficulties or raises specific risks.

D Secondary trading of crowd-sourced equity

Key points

This section outlines the feedback received in relation to secondary trading of crowd-sourced equity.

Crowd-sourced equity funding

- 31 We explained that, in certain circumstances, investors participating in crowd-sourced funding (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. We sought feedback on whether there may be circumstances when on-selling should be permitted.

Stakeholder feedback

- 32 One stakeholder proposed that on-selling of CSF securities within 12 months should be permitted if there is robust disclosure, such as those required under the standards of the Australian Small Scale Offerings Board. The stakeholder also proposed, as an alternative, that on-selling may be permitted only to wholesale investors.

ASIC's response

We do not intend to prescribe specific requirements or exceptions to the on-selling restriction at this time. We intend to review what business models develop in relation to CSF and provide guidance accordingly.

Appendix: List of non-confidential respondents

-
- ASX Limited
 - Australian Small Scale Offerings Board
 - Chi-X Australia Pty Ltd
 - Craig Capital Pty Limited
 - National Stock Exchange Limited
-