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

By email:
policy.submissions@asic.gov.au

Dear Mr. Worsley

Consultation Paper 301: Foreign financial services providers (CP 301 and FFSPs respectively)

The Financial Services Council (**FSC**) has over 100 members and represents Australia's retail and wholesale funds management businesses, superannuation funds, life insurers, financial advisory networks and licensed trustee companies. The industry is responsible for investing more than $2.7 trillion on behalf of 13 million Australians. The pool of funds under management is larger than Australia's GDP and the capitalisation of the Australian Securities Exchange and is the third largest pool of managed funds in the world. The FSC promotes best practice for the financial services industry by setting mandatory Standards for its members and providing Guidance Notes to assist in operational efficiency.

We refer to CP 301 and the proposals set out there. Thank you for this opportunity to provide submissions on the topic.

General

1. In summary, we note that CP 301 proposes that:

(a) the current sufficient equivalence relief described in CP 301 be repealed on 30 September 2019 and that FFSPs be allowed to apply for a 'foreign AFS licence';
(b) the current limited connection relief described in CP 301 be repealed on 30 September 2019 and that FFSPs be allowed to apply for a foreign AFS licence;
(c) there be a further 12-month transitional period—from 30 September 2019 to 30 September 2020—for FFSPs to comply with the requirements of the proposed modified AFS licensing regime for FFSPs.

2. In the result, CP 301 proposes that a modified AFS licensing regime be introduced for FFSPs. This would enable FFSPs to apply for and maintain a modified form of AFSL (**foreign AFS licence**).

Consultation Paper 301: Foreign financial services providers (CP 301 and FFSPs respectively): FSC Submission 31 July 2018

General Observations

3. In this part of our submission, we will make some general observations and provide a summary of our position. We then will address the specific questions raised in CP 301.

4. We recognise the increasingly globalised markets and the challenges it presents for financial services regulation. The FSC and its members support a regulatory framework for foreign financial service providers (**FFSP**) that will facilitate FFSPs' providing financial services to Australian professional investors. Enabling these offshore asset managers to manage these assets is very important as it has a number of potential benefits to Australians with compulsory superannuation savings, including:

a. Greater selection and diversity of investment strategies and managers;
b. Access to world class investment management capabilities; and
c. Greater competition among fund managers which drives multiple outcomes including amelioration of fees borne by superannuation fund members and innovation and efficiency of management operations.

Consequently, it is important that these benefits are retained and that any proposed changed, either by modification or repeal, do not adversely impact FFSP such as in terms of accessibility, cost etc.

5. We note and acknowledge ASIC's concerns in relation to the matters raised in CP 301 concerning visibility, oversight and access to FFSP information. At a high level, we believe that the proposal to introduce a foreign AFS licensing regime is disproportionate for FFSPs who currently operate under a class order exemption on the basis that these exemptions are granted to firms who are already authorised in a jurisdiction which ASIC has deemed as "sufficiently equivalent" as well as in certain circumstances "limited connection relief". We do not accept that FFSPs acting only as institutional asset managers to *Professional Investors* (as defined by the *Corporations Act*) require licensing, even under a limited AFSL regime. Such clients are equipped to undertake the risk assessment and due diligence on FFSPs that the client considers appropriate and negotiate the protections they require if they are to proceed to use the FFSP. In this regard, we have described below a "safe harbour" approach which could be adopted and would have the benefit of addressing any of the concerns which have been raised as to the proper regulation of FFSPs.

6. We do accept that AFSL licencing is appropriate for FFSPs conducting or providing other financial services in Australia. In our view however, for an offshore-regulated institutional asset

manager with no permanent establishment in Australia, providing only the safe harbour activities described below, the existing documented agreement with ASIC which evidences the sufficient equivalence relief is an appropriate regulatory mechanism.

7. Nevertheless, it seems to us that if there are regulatory concerns as to the appropriateness of the sufficient equivalence relief then it would be possible for ASIC to raise the level of its requirements without moving towards a licensing regime for such entities. Generally our members' experience of these entities and the sufficient equivalence relief is that there is a documented arrangement with ASIC, under which the entity is obliged to advise ASIC of certain matters and events, respond to ASIC enquiries and lodge, on a confidential basis, certain financial statements.

8. Our members' experience is that **generally** such entities are not required to be licensed in jurisdictions, other than the domicile of origin. One of our members has provided the example of an FFSP, which is SEC-regulated. The entity is required to be licensed in the United States of America, Canada and China. In all other jurisdictions in which it operates (it serves clients in Europe, the Middle East, Asia, Oceania, North and South America) the entity does not require a licence. The entity may have a form of registration or provide filings (either in its own name or in respect of specific products – this depends on the relevant jurisdiction). It may have to provide undertakings in those 'other" jurisdictions; but it is not required to be licensed. There may be other regulatory requirements in other jurisdictions. For example, certain products require registration and periodic filing under AIFMD in the European Union; however, this is distinct from a requirement that a licence be issued to the manager.

9. Another Member has noted that in relation to its UK wholesale funds management operation, the FFSP's it deals with, including Australian firms, are not required in the UK to be separately licenced but rather rely on outsourcing arrangements[1]. In this context, the focus is not on the FFSP reporting directly to the regulator but on the licenced UK funds manager:

a. retaining primary responsibility for the outsourced services;
b. ensuring it can effectively monitor (and has the necessary resources and expertise to monitor) the relevant activities being outsourced so that both the scheme and best interests of the end investors are maintained; and

[1] Please refer to the Financial Conduct Authority ("**FCA**") rules applicable to investment managers, specifically COLL6.6.15A, SUP 15.8.6 and SYSC 8.1 (details of which can be found at www.handbook.fca.org.uk

c. establishing that the person/firm carrying out such functions are qualified and capable of undertaking such.

10. Thus, it is not clear to us that the proposals set out in CP 301 are consistent with international practice. From Member feedback, although it can vary, other jurisdictions allow exemptions similar to ASICs current relief system but may have more reporting requirements.

11. In relation to "safe harbour" activities, which would not require an FFSP to be registered as such, we would envisage the following inclusory examples:

a. "Prospecting" for clients, limited to institutional investors and government agencies that meet the Professional Investor test;
b. Visiting Australia several times per year in order to meet with prospective and current clients and to provide financial and economic information (general and personal) in respect of their own investment management offering and economic and financial matters generally;
c. Being appointed under an Investment Management Agreement to manage the assets of the clients (while those assets stay in the custody of the client's own custodian);
d. Recommending to clients that they invest in pooled investment vehicles (domiciled either in Australia or in other jurisdictions) over which the IM FFSP has been appointed as the manager (if an Australian managed Investment Scheme or similar) or equivalent role in other jurisdictions;
e. Providing administrative, customer service and related functions in respect of IMA accounts or pooled investment vehicle accounts; and
f. The provision of reporting, statements, compliance certification, due diligence reporting and other similar services.

Any residual ASIC 's concerns could be addressed by adopting the strategies which are used overseas such as undertakings or robust outsourcing arrangements as outlined above.

12. In our view, it may well be more appropriate for other FFSPs who have more extensive dealings with those in the jurisdiction to be subject to a modified form of AFSL as proposed. Such entities might include, by way of example, investment banks, foreign exchange counterparties, stockbrokers, derivative counterparties and investment managers dealing with retail and wholesale clients generally.

Specific Comments

13. In this part of our submission, we will address some of the questions which are asked in CP 301. As is apparent from our

comments above, we think there is a place for a *sufficient equivalence* form of relief, particularly when coupled with our "safe harbour" test along the lines we have outlined. Thus, we will not respond specifically to the questions in those regards in CP 301. Also, in certain circumstances we believe the *limited connection* relief should be retained as outlined below.

What will the impact be on your business if the exemption is removed? (Including dollar figure impact)

14. Members have indicated that if the existing exemptions were removed entirely, and not replaced, then the impact on their respective businesses would be dramatic and negative. However, if the exemptions were replaced by the proposed foreign AFSL, then member feedback has indicated that the potential initial impact domestically for it is likely to be variable. One member has indicated that its estimated increase in expenditure in assisting its offshore FFSP fund manager or managers in complying with their obligations is likely to be in the order of $50,000 per annum. However, this would be a best-case scenario and with the uncertainty of the proposed regime, potentially there could be some significant impact for certain types of business and activities. Also, it is necessary to take into account the reverse side to this proposal however, i.e., from the perspective of the FFSP. This will have a flow on effect for our members' domestic operations. Thus, one of our members has estimated that the compliance costs for an FFSP doing business in Australia are likely to increase by something in the order of $250, 000 per annum. It is anticipated that these costs would largely be expenses relating to the implementation and maintenance of an effective compliance plan and framework to ensure that such a framework meet any specific foreign AFSL obligations. The FFSP would seek to recover these increased costs from its domestic Australian clients, who in turn would need to pass the costs through to investors (whether by way of decreased returns or otherwise).

    General feedback received noted that in addition to costs that the removal of the exemption would result in the significant increase in regulatory requirements resulting in the foreseeable risk of turning away FFSPs from the Australian market altogether. In particular, our Members have noted that the proposal to remove the exemption would have this adverse impact on foreign market makers in the Exchange Traded Fund (**ETF**) trading system. Foreign market makers are important to ETFs and consumers as flagged in the recent ASIC report (Report 583) outlining the concentration risk with the limited number of market makers in the Australian market.

What level of FUM is relying on this exemption within your business?

- *How many managers and who are they?*
- *Why do you use these managers? (i.e. arguments for why they use the relief)*

15. This varies of course amongst our membership, as do the reasons for utilising FFSPs. However, to provide you with an example, which may not be typical of our membership, one of our members invests with a United States based asset manager, which has $US5.5 billion assets under management. The Australian component of that amount would be less than 5%. This particular manager is **not** part of a larger, broadly based financial services organisation and has no other types of financial service businesses. Our member uses this manager exclusively as there are no Australian providers with an equivalent service or strategy. This member has noted that there is quite significant demand amongst Australian superannuation entities and Governments for this particular financial service given its unique nature. The member has noted further that in the past it had a similar arrangement with a United Kingdom-regulated FFSP. The product of this manager was not unique; however, having regard to our member's selection criteria, the FFSP's capability and services competed with, but was superior to other domestic and ex-Australian suppliers. In that case, the product represented less than 1% of the FFSP's assets under management.

16. The reason this member (and other members) uses such a manager is that it does not have the necessary expertise, resources or intellectual property to perform the functions performed by the FFSP and, the member wishes to offer a product which does provide for portfolio diversification which would be difficult to obtain in the absence of engaging the FFSP.

Should ASIC undertake a universal approach across financial services or should requirements be different for fund managers/wholesale fund managers etc.? If they should be different, we need compelling reasons why so.

- *E.g. requirements should be different for wholesale fund managers but with additional conditions imposed by ASIC*
- *How could ASIC get more visibility of their activities?*

17. In our view, FFSPs who offer a limited range of services to a limited range of investors and which are regulated in their home jurisdictions by strong regulators with whom ASIC has established relationships do not merit the same regulatory approach as other forms of FSSP. In particular:

- FFSPs who deal exclusively with *Professional Investors* merit a lighter touch than those who deal with wholesale investors more generally.
- One of our members for example, limits its investors to entities who invest in excess of $10 million per account and where all investors are regulated by ASIC, APRA, or as Statutory Authorities. This member has made a conscious decision to withdraw from supplying services to individuals, SMSFs, unregulated corporations, sophisticated investors or retail investors. The average account balance in the member's fund is over $100million.

18. Another member's view is that in its experience of other jurisdictions is that there is often a differentiation between accessing institutional as opposed to retail clients and within the institutional space there can be differentiation between different types of investors. Certainly, one of the lessons of the financial crisis here has been to see MiFID II increasing the protections which are offered to certain types of investors who were previously classed as institutional. But are now treated as retail. Also, the same member suggests that an option to increase visibility of FFSP's would be to require directly or indirectly (through outsourcing arrangements) annual disclosure of AUM being manage in the jurisdiction.

19. For completeness, we also note that the provision of investment management services as part of a "Separately Managed Account" is arguably not a financial service but rather the appointment by the principal (an asset owner) of a contractual agent.

20. We also note the general position in this context that investors either:
(a) Invest into a regulated fund (either an Australian MIS or an offshore regulated vehicle), over which the FFSP fund manager has been appointed as investment manager; or
(b) Appoint the manager with authority to buy and sell the assets of the investor which are held with the investor's custodian.

In neither of these cases, case does the FFSP take custody of client moneys or act as principal counterparty to the investor. These two activities (taking custody of client money and acting as a principal counterparty to client transactions) in our view do merit higher regulatory oversight than acting as an investment manager (either as agent of the client or as the manager of a trust into which the client has invested). Some of our Members noted that in their experience Australian Professional Investors appoint AFSL and generally ADI regulated professional Custodians to hold and administer the assets over which Investment Manager FFSPs have investment and transactional authority. It is already the requirement that these higher

risk activities be offered solely under the auspices of an AFSL that meets full licence conditions.

21. As we have mentioned, an FFSP to one of our members has existing relief which accords with the provision of key components of the matters highlighted in CP 301 (such as breaches, material changes, financial statements etc). It seems to us that it would be more effective for ASIC to expand on these existing conditions without introducing new forms of licence such as the foreign AFSL. The activities performed in Australia or in respect for Australian clients under those arrangements include:

    - The absence of a permanent establishment (**PE**) in Australia
    - Periodic short visits to:
        - Conduct sales and marketing activities to professional investors
        - Provide financial and product advice to professional investors
        - Provide customer service and deliver research and insight to existing professional investor clients

    The activities of the FFSP in the United States and under the U.S. Securities and Exchange Commission (**SEC**) regulation are to:

    - Invest money, held by the investor's custodian, pursuant to an Investment Management Agreement;
    - Act as investment manager, (appointed by the RE or nearest equivalent entity) of funds into which investors have invested money; and
    - Provide remote customer service, client reporting, research and advice.

22. It seems to us that these are low risk activities and ASIC's oversight and accountability objectives could be met using the existing conditions attached to the existing relief, plus any further specific conditions required by ASIC. It may be appropriate to designate these activities as a form of "fund management safe harbour" which does not give rise to an obligation to apply for a licence so long as the terms of the relief are met. We would expect that such FFSPs would conform to any ASIC requirement to periodically report on their compliance with the terms of the safe harbour, particularly if this was a term of their sufficient equivalence agreement with ASIC.

Do you agree with the limited AFSL conditions ASIC is proposing? Please provide arguments for or against.

23. Not necessarily-as we have mentioned above, a number do not apply to the relevant fund manager activities and for that reason in those circumstances, we consider that the licensing obligation should not apply.

How would superannuation funds activities change without this relief? Would there be less global asset exposure?

24. We do anticipate that fund activities would alter if the proposals were implemented, with a slightly higher cost base applied to their assets when dealing with FFSPs who choose to be licenced. However, regardless of whether regulatory change were made trustees would continue to deal with licenced and unlicensed managers (so long as they met their existing regulatory due diligence obligations and are properly regulated in their home markets). We do not expect any change to the quantum of global asset exposure.

Pricing and competition issues

25. Our members anticipate that it is likely there would be a marginal increase to the costs of FFSPs who chose to be compliant, which would be passed on to Australian clients. FFSP fund managers who chose not to obtain an AFSL thus would obtain a small pricing advantage, as it is unlikely that professional investors would distinguish between licenced and unlicensed FFSP fund managers.

26. To the extent to which it is relevant, we note that in many instances, the relevant contract is executed in an offshore jurisdiction and expressed to be subject to the laws of that jurisdiction. Correctly or incorrectly, in our experience, the FFSP may take the view in these instances that the domestic Australian law cannot apply to these arrangements.

Issues regarding Australia's mutual recognition with other regulators

27. The responses we have received from our members indicate that the level of ASIC supervision in this specific area generally is higher than the level of supervision in other well-regulated jurisdictions. We are told the FFSPs offering these services in other jurisdictions are comparatively lightly regulated and it is very rare that they are required to obtain a licence (for the "safe harbour" activities we have mentioned). In the EU There are additional product registration and reporting obligations that the

manager attends to, but this is distinct from licencing itself. Thus, if the proposals were implemented, the ASIC rules would thus be more restrictive than many countries (other than China and Canada).

Outline any tax issues in Australia as to why Australian managers cannot get relief in other markets.

28. We are not aware of anything in this regard, which would be relevant. However, we do note that if the proposals were implemented as suggested, and in the absence of a safe harbour of the kind we have mentioned, there may well be potentially adverse tax implications for and FFSP in their home jurisdiction. This is because under the proposals, appointment of an agent may give rise to a PE for double taxation agreement (**DTA**) purposes. In addition, it may also give rise to an obligation to register as a foreign company under the provisions of the *Corporations Act*, which, in itself would give rise to arguments that the FFSP has a PE in Australia. These issues do need to be considered further.

Any other issue you wish to raise – please provide compelling arguments and/or data. `

29. At present under the sufficient equivalence relief, many FFSPs provide ASIC with financial statements on a confidential basis. We anticipate that most FFSPs would oppose strongly any requirement to make that information part of the public domain. This is so particularly when the nexus with Australia is quite remote and public disclosure serves no real benefit. We note that the Professional Investors have robust due diligence procedures and adequate commercial power to both define and meet their own due diligence requirements in the selection and monitoring of FFSPs.

List of Proposals and Questions

C1Q1 Do you agree with our proposal to repeal the sufficient equivalence relief and individual relief for FFSPs? If not, why not? Please be specific in your response.

30. We do not agree with the complete repeal of the sufficient equivalence relief. Our members have indicated that they think the current regulatory approach is sufficient and seems to be working effectively and they are not aware of any person having

suffered any loss due to any FFSP, engaged by members, relying on an exemption available from the FFSP Class Orders relating to sufficient equivalence.[2] We believe that the sufficient equivalence relief is appropriate to continue for FFSPs with no permanent presence in Australia whose activities fall within the safe harbor described above and the normal and related activities of an Investment Manager FFSP dealing exclusively with Professional Investors. ASIC's concerns could be addressed by increasing its reporting requirements and maintaining a register of those relying upon the relief.

C2Q1 Do you agree with our proposal to implement a modified AFS licensing regime by modifying the application of certain legislative requirements to sufficient equivalence FFSPs? If not, why not? Please be specific in your response.

31. We do not support the proposal to implement an AFSL requirement for FFSPs fund managers who either currently have a sufficient equivalence arrangement with ASIC or could establish one if the regime remained. This is because the risk profile is lower and the existing conditions address many of ASIC's concerns, and can be added to under the existing framework to the extent that they do not.
32. Subject to our general position set out above, we support the implementation of a modified AFS licencing regime on the basis that this regime will require FFSPs to complete an online application (similar to the existing one for AFSL applicants) and the only supporting documentation that will be required is a proof similar to the A5 proof. Foreign AFS licensee applicants should not be required to submit the B1 people proofs or B5 financial resources proofs. We assume this will be the case given ASIC's proposal to exempt foreign AFS licensees from the requirement to have adequate resources (including financial, technological and human resources3).
33. We also think it is important that the modified AFS licensing regime applicable to foreign AFS licensees not require FFSPs to file financial statements with ASIC that could be made available to the public. CP 301 states that Corporations Regulation 7.6.03A would continue to apply to foreign AFS licensees. This Regulation requires a foreign entity that is not a foreign company to appoint a local agent in Australia. We think that a similar requirements should be imposed on foreign companies that are FFSPs and that

[2] CO 03/1099] UK FSA regulated financial service providers; [CO 03/1100] US SEC regulated financial service providers; [CO 03/1101] US Federal Reserve and OCC regulated financial service providers; [CO 03/1102] Singapore MAS regulated financial service providers; [CO 03/1103] Hong Kong SFC regulated financial service providers; [CO 04/829] US CFTC regulated financial services providers; [CO1313] German BaFin regulated financial service providers; and ASIC Corporations (CSSF-Regulated Financial Services Providers) Instrument 2016/1109

[3] We understand that the basis for this exemption is that foreign AFS licensees must satisfy equivalent requirements in their home jurisdiction.

they not be required to register in Australia as a foreign company. The FSC understands that many FFSPs structure their activities in Australia so that they are not carrying on business in Australia (and therefore need not register in Australia under Part 5B.2 of the Corporations Act), even though they may be deemed to be carrying on a financial services business in Australia pursuant to section 911D of the Corporations Act. If an FFSP must register in Australia as a foreign company, it will be obliged to lodge annual financial statements with ASIC that are available to the public. This would be inconsistent with ASIC's proposal to exempt foreign AFS licensees from the application of section 989B of the Corporations Act (and related provisions), being the obligation to lodge financial statements with ASIC.

Many FFSPs are not required to make their financial statements publicly available; they keep them strictly confidential. One of the policy reasons underlying the requirement for foreign companies to file annual financial statements is so that members of the public, who may be transacting with the foreign company, are able to have information about the financial viability of the company. To the extent this policy rationale exists for FFSPs, it does not need to be satisfied by the FFSP making their financial statements publicly available. The proposed exemption only permits the FFSP to provide services to professional investors, and they can (and do, we understand) ask to see an FFSPs financial statements and other documents when making an assessment whether to engage the services of the FFSP. Often when these disclosures are made, it is on the basis that the wholesale client may view the financial statements and not take copies of them. If the new foreign AFS licensing regime were to require an FFSP to file its annual financial statements and they were going to be available to the public, this is likely to deter FFSPs from applying for a foreign AFS licensee. Whilst it is possible that some FFSPs may establish an Australian company and apply for an AFSL, it will almost certainly be the case that other FFSPs will decide not to provide financial services in Australia, thus denying Australia access to the services of these FFSPs.

34. For the sake of completeness, we acknowledge and understand that ASIC proposes to require foreign AFS licensees to give its financial statements to ASIC upon request. We do not object to this, on the basis that ASIC will not make them public, unless it does so in the course of pursuing administrative action against the particular FFSP.

C2Q2 If you are a sufficient equivalence FFSP, what would be the impact of introducing this modified AFS licensing regime on your business activities in Australia? Please be specific in your response, and include an itemised breakdown of:

(a) projected costs (per annum) for applying for and maintaining an ordinary AFS licence;
(b) projected costs (per annum) for applying for and maintaining the proposed foreign AFS licence; and
(c) any relevant costs at the entity-specific level.

35. Projected costs for applying will vary for each FFSP, but a primary consideration will be the extent of the requirements imposed by ASIC. However, we envisage that where there is a well-regulated and resourced FFSP with a strong compliance and control culture costs are likely to be moderate. We understand that the regulatory cost of complying with the proposed modified AFS licensing regime will be higher than the regime that currently applies to FFSPs, but it would be less than if the FFSP were to hold an AFSL. One member noted an estimate of costs of $300k up-front and $250k pa, although other FFSPs may not conduct this work to the same quality as our FFSP and may thus have lower expenses. Costs would be related to legal advice on the process and application, internal costs associated with amending compliance and control plans to meet specific obligations and specific reporting requirements, and periodic review/assurance.

C2Q3 If you are a sufficient equivalence FFSP, how does your entity conduct its cross-border activities in other jurisdictions? Does your entity hold licences in jurisdictions other than your home jurisdiction? Please be specific in your response.

36. As we have indicated and subject to a few exceptions, in most jurisdictions a manager does not need to be licenced to conduct the FFSP activities outlined above. A number of our members have indicated that they are part of global financial services groups that have entities that are regulated in various jurisdictions, and some of these entities rely on the exemptions in one or more of the FFSP Class Orders.

C2Q4 If you are a domestic AFS licensee, what would be the impact of introducing this modified AFS licensing regime on your business activities in Australia? Please be specific in your response and include an itemised breakdown of costs and/or savings.

37. It is unlikely there would be any relevant savings and most domestic entities are likely to expend amounts estimated to be in

the order of at least $50,000 per annum per FFSP in assisting them in maintaining effective compliance frameworks to ensure that the existing compliance frameworks met the letter and spirit of Australian requirements. One Member noted that it did not foresee any cost savings and would expect that compliance costs of $250k pa would be passed on either to the Member in the form of reduced revenue or its clients in the form of reduced return, or possibly a blend of the two. Also, there would be non-monetary impacts to this, including some firms would exit the Australian market and not seek the limited licence as it is quite onerous. This would be a bad outcome for investors

C2Q5 If you are a wholesale client of a sufficient equivalence FFSP in Australia, what impact would the repeal of the relief have on your business? Please give reasons for your preference

38. Members have indicated that fees paid to the FFSP would increase a little, and/ or that members would need to incur slightly higher travel and due diligence expenses.
39. However, if this change resulted in the worst-case scenario of the FFSP ceasing to provide its services in Australia, then it would be very detrimental. For this reason, it is important that the foreign AFS licensing regime not impose requirements that would be unduly burdensome and administratively costly or impose requirements that are likely to result in an FFSP ceasing to provide financial services in Australia (such as requiring an FFSP to make its financial statements publicly available). Any new regime should allow a foreign AFS licence to be obtained with a relative ease and without undue delay

C3Q1Do you agree with our proposal that general obligations under s912A(1)(a)–(ca) and (h) should apply to sufficient equivalence FFSPs applying for a foreign AFS licence? If not, why not? Please be specific in your response

40. We agree that some general obligations should apply to sufficient equivalence FFSPs except that we query whether foreign AFS licensees should be exempt from having to comply with Australian Anti-Money Laundering (**AML**) legislative requirements (which would be captured by virtue of section 912A(1)(c) of the Corporations Act). However, they should not be required to apply for a licence in order to achieve this position. To the extent that they are important to ASIC and its ability to regulate activities, it is appropriate to add them to the existing sufficient equivalence registration requirements.

Consultation Paper 301: Foreign financial services providers (CP 301 and FFSPs respectively): FSC Submission 31 July 2018

C4Q1 Do you agree with our proposal to exempt sufficient equivalence FFSPs from the general obligations in s912A (1)(d)–(f) and (j)? If not, why not? Please be specific in your response.

41. Our members broadly accept the exemptions but do not agree that the licencing itself is required in the case of an FFSP that acts only as a fund manager to professional investors. To the extent any of these obligations are important to a particular professional investor, they can require the foreign AFS licensee to comply with them under the individual contract. Many professional investors already do this insofar as their contracts with FFSPs require the FFSP to have particular named key personnel responsible for providing the financial services to the professional investor and if the personnel cease to perform this function, the professional investor has certain rights (including the right stop using the services of the FFSP)

C5Q1 Do you agree with our proposal to exempt sufficient equivalence FFSPs from the application of certain provisions of the Corporations Act and Corporations Regulations where the overseas regulatory regime achieves similar regulatory outcomes to the Corporations Act? Please be specific in your response.

42. We agree with ASIC's proposal to minimise the duplication of regulation.

C6Q1Do you agree with the considerations we should have regard to when determining which Corporations Act and Corporations Regulations provisions should not apply to sufficient equivalence FFSPs? If not, why not? Please be specific in your response

43. Agree These considerations appear to be uncontroversial

C6Q2 Do you think we should include any other considerations when determining which provisions should not apply to sufficient equivalence FFSPs? Please specify which other considerations in your response.

44. No comment

C6Q3 Do you think there are other Australian requirements that should be included in Appendix 1 (i.e. requirements that should not apply to foreign AFS licensees)? If so, why should those additional requirements not apply to foreign AFS licensees? Please be specific in your response.

45. Whilst we haven't conducted an exhausted examination of all legislative provisions, Appendix 1 appears to have covered most of the requirements. As noted above, we question whether the costs associated with a foreign AFS licensee having to comply with Australian AML legislation is not outweighed by the corresponding benefit.

C6Q4 Do you think there are provisions in the Corporations Act or Corporations Regulations that we have included in Appendix 1 that should apply to foreign AFS licensees? If so, why should those requirements apply to foreign AFS licensees? Please be specific in your response

46. No

C7Q1 Do you agree with our proposal and the proposed conditions of exemption? If not, why not?

47. Yes, the proposal to require foreign AFS licensees to comply with client money rules seems sensible and reasonable if similar requirements in the foreign AFS licensee's home jurisdiction would not apply to a wholesale client's money in Australia.

C7Q2 Are there any provisions of Divs 2 and 3 of Pt 7.8 from which you consider an FFSP should not be exempted? If so, please be specific in your response.

48. The conditional relief from these provisions appears to be reasonable.

C7Q3 Are there any sufficiently equivalent jurisdictions in relation to which proposal C7 should not apply? Please be specific in your response.

49. No comment

C8Q1 Do you agree with the conditions we are proposing to impose on foreign AFS licensees? If not, why not? Please be specific in your response

50. In our view, in respect of an FSSP, there is no need to appoint any representatives. Full time staff of the FFSP would conduct their activities under the direction and supervision of the FSSP in their capacity as employees and do not require separate appointment as authorized representatives. Appointment of representatives in Australia also raises the registration as a foreign company and DTA issues we have mentioned.

C8Q2 Would you prefer to have the option of allowing sufficient equivalence FFSPs to appoint any person as a representative? Note that in this case the general obligation under s912A(1)(f) of the Corporations Act would apply to the foreign AFS licensee.

51. No. Persons domiciled in Australia should not be able to circumvent the more onerous AFSL regulatory regime by becoming a representative of a foreign AFS licensee

C8Q3 Are there any other conditions that you think we should impose on foreign AFS licensees, and why? Please be specific in your response

52. No

C9Q1 Do you agree with our proposal that core and additional proofs must be provided to support an application for a foreign AFS licence?

53. As noted above, we submit that foreign AFS licensee applicants should not be required to submit the B1 people proofs or B5 financial resources proofs given that ASIC is proposing to exempt foreign AFS licensees from the requirement to have adequate resources (including financial, technological and human resources) and these proofs are only relevant to these requirements.

54. Given that ASIC proposes not to exempt foreign AFS licensees from section 912A(1)(aa) – obligation in relation to managing conflicts of interest – we assume that ASIC is not satisfied that other jurisdictions impose sufficiently similar requirements in relation to managing conflicts of interests, and on this basis, it would be understandable if ASIC required an applicant for a foreign AFS licence to submit a proof detailing how it manages conflicts of interests.

C9Q2 In addition to the requirements specified in RGs 1–3, what information do you believe you can and should provide to us to demonstrate that you are not likely to contravene the obligation under s912A(1)(c) to comply with the additional conditions on a foreign AFS licensee (see proposal C8)? Please be specific in your response

55. Foreign AFS licence applicants will presumably need to satisfy ASIC that they are aware of the financial services laws. This could be demonstrated by the applicant providing a documented compliance overview such as a matrix of obligations and how in broad terms they would be monitored and managed, and a description of the overall compliance framework covering the financial services laws that would apply to the applicant, taking into account the authorisations on its foreign AFS licence.

C9Q3 In addition to the requirements specified in RGs 1–3, what information do you believe you can and should provide to us to demonstrate that you are not likely to contravene the obligation under s912A(1)(c) to comply with financial services laws subject to the modifications proposed in proposal C5? Please be specific in your response

56. Foreign AFS licensee applicants from jurisdictions that ASIC currently recognises have sufficiently equivalent regulatory requirements should not be required to submit any additional information. To the extent there are changes to the regulatory requirements in the foreign jurisdiction, the foreign AFS licensee

could be required, as a condition imposed on its foreign AFS licence, to notify ASIC of the change.

57. For other jurisdictions that are not currently recognised by ASIC, it seems more reasonable that these applicants would need to provide ASIC with documents to establish the regulatory equivalence between their home jurisdiction and Australia.

D1Q1 Do you agree with our proposal to repeal the limited connection relief? If not, why not? Please be specific in your response.

58. *[*Feedback received has included some support for retaining the limited connection relief for certain circumstances. For example, for firms relying on it where they are dealing in derivatives and foreign exchange contracts in countries that have not been deemed equivalent and foreign funds with professional investors.

59. Also, members have raised high level concerns with the proposal to repeal the limited connection relief. In this regard, it is noted that there have been the addition of a number of exemptions included in the Corporations Regulations since ASIC Class Order 03/824 was introduced in 2003, and in particular, those in Corporations Regulation 7.6 02AG. However, there is concern that these exemptions do not address all of the activity that could potentially need to be covered by an AFS licence in order for it to be lawfully done, taking into account the broad definition of "financial product advice" and section 911D of the Corporations Act. An example is the situation where an unlicensed, offshore investment vehicle issues shares to an Australian superannuation trustee. Whilst it is possible that the issue of these shares may be covered by the exemption in Corporations Regulation 7.6 02AG(2D), this may not be the case. Many offshore investment vehicles engage a manager as an agent of the investment vehicle to manage and promote the vehicle. When the manager is promoting the investment vehicle, it is doing so in its capacity as agent and therefore it is the principal (ie the investment vehicle) that is engaging in the activity through its agent, which raises questions as to whether the shares are issued following an application by or inquiry from the person (and thus whether the exemption in Corporation Regulation 7.6.02AG(2D would apply (in particular taking into account paragraph (d) of that Regulation). Given the breadth of section 911D of the Corporations Act and the breath of the definition of financial product advice, we consider that there is utility with little corresponding detriment to maintaining the limited connection relief.

60. However, if it were decided to repeal the limited connection relief, we received strong member feedback that this could be only so long as the sufficient equivalence relief is not repealed. That is, in respect of FFSPs dealing solely with Professional Investors and any FFSP activities requiring limited connection relief which do not come under the existing sufficient equivalence relief do so in future. In which case there would need to be future consultation to make this workable and practicable.

D1Q2 If we repeal the limited connection relief, what would be the compliance costs associated with applying for an ordinary AFS licence, or a foreign AFS licence, and maintaining your entity's compliance with the Corporations Act?

61. It is difficult to provide a definitive answer given the uncertainty of the new regime and the impact on different businesses will vary but it would likely to be at least moderate. One member indicated that if the FFSP with which it engages were to do this, they would do it to a high standard which (from a different jurisdiction) is expensive and it is anticipated that there would be "up-front" costs of $300k and ongoing costs of $250k pa. This cost increase would be expected to be reflected in either reduced revenue to our Australian business or reduced returns to investor – resulting in a decrease in investor return.

D1Q3 We understand from the limited engagement by service providers with CP 268 that a number of wholesale fund operators rely on the limited connection relief. If we repeal the limited connection relief:
(a) What would be the impact on your business or your client's business?
(b) How does your entity address this issue with respect to activities that you conduct in jurisdictions other than your home jurisdiction?

62. In the circumstances we have mentioned, we suggest that the sufficient equivalence relief continues. As we have said, many FFSPs operate in a number of jurisdictions where they are not required to be licensed, apart from the home jurisdiction, for example, the USA and in certain other jurisdictions- China and Canada (separately in each province). Other than this, generally no licenses are required. We note that in some cases (especially the European Union) specific products require registration under AIFMD. This registration includes registration of the offer document and the provision of periodic product level reporting, but there is no obligation to be licensed.

D1Q4 If you rely on our limited connection relief, do you rely on licences or exemptions relating to your activities that affect places other than your home jurisdiction? Please be specific in your response.

63. Many of our members have advised that relevant FFSPs rely on Australian sufficient equivalence relief.

D1Q5 If you disagree with our proposal to repeal the limited connection relief, what (if any) enhanced conditions should be introduced..?

64. Feedback received included the suggestion that there be appropriate disclosure such as one-time notification to ASIC to provide information sufficient to give ASIC comfort that it has the information it needs to oversee this activity and to keep a Register of those relying on this relief.

D1Q6 If we repeal the limited connection relief, do you expect to apply to rely on another exemption to continue to provide financial services? If not, why not?

65. Members have indicated that generally they would expect FFSPs would prefer to continue to rely on sufficient equivalence relief where the FFSP has an agreement with ASIC in place.

E1Q1If we repeal the sufficient equivalence relief and individual relief, do you think that a 12-month transitional period gives sufficient time to comply with the applicable Corporations Act requirements and foreign AFS licence conditions?

66. Our members do not think the transitional period should be any shorter than 12 months. Whether it is sufficiently long, however, may depend on the other regulatory developments that require the FFSP's attention at that time and how quickly foreign AFS licence applications are processed. The FSC would favour the form of any relief to be on the basis that the transition period could be extended if it became necessary; especially if there are delays in processing and approving these applications and to ensure continuity of provision of FFSP services over this time of transition. In this regard, there has been support for the transition period being no less than a 24-month transition period to ensure an orderly transition.

E2Q1 Do you agree with our approach? Please give reasons for your view

67. Our members agree, at least in respect of FFSPs who deal with Professional Investors.

E3Q1 Do you agree with the proposed transitional period? If not, do you think it should be longer or shorter?

- In principle, yes. In terms of the length of the period, please refer to our response to question E1Q1 above.

The perceived need for a longer transition period arises from concern in relation to turnaround time for applications, particularly with the potentially large volume of expected applications if the new regime is introduced.

E4Q1Do you agree with ASIC's approach? Please give reasons for your view

68. To the extent to which a new regime is implemented, we acknowledge that ASIC will need the capacity to issue an AFSL subject to specific conditions, if it is unable to assess a foreign jurisdiction in the timeframe.

E4Q2 Do you think that the proposed 12-month transitional period is sufficient for FFSPs to engage with ASIC for us to undertake a sufficient equivalence assessment of their home regulatory regime and apply for a foreign AFS licence?

The timing depends on how long, as a practical matter, you require to review a country and then to actually assess the jurisdiction, which will presumably depend, to a large extent, on familiarity with each jurisdiction, ASIC's staffing levels, its personnel processing these applications and the other demands placed on them during the 12-month period.

E5Q1 Do you agree with ASIC's proposal of a scaled-back assessment of sufficient equivalence for the new foreign AFS licensing regime? Please give reasons for your view.

69. The FSC supports a scaled-back assessment. Having a scaled back assessment seems to be consistent with having enlarged regulatory powers over FFSPs (which results from the diminished scope of the current relief). It should also have the effect of enabling more FFSPs to provide financial services to Australian professional investors, increasing benefits, some of which are identified above, without unduly exposing these clients to risks that could come with an absence of regulation.

E5Q2 Do you think other questions should be excluded on the scaled-back assessment? Please be specific in your response.

70. No comment

E5Q3 Are there any measures relevant to ASIC's assessment of sufficient equivalence that you think we could adopt to assist FFSPs to obtain such an assessment without creating significant burdens for them arising from such an assessment? Please be specific in your response.

71. No comment

Should you have any questions please do not hesitate to contact us.

Yours Sincerely

PG Callaghan

General Counsel