

14 August 2018

To

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

From

Paul Atmore

By Email

policy.submissions@asic.gov.au

Dear Alan

ASIC Consultation Paper 301 – Foreign financial service providers

1. Thank you for the opportunity to provide feedback on ASIC Consultation Paper 301 – Foreign financial service providers ("**Consultation Paper**").
2. The New Zealand Financial Markets Association ("**NZFMA**") is the professional body for wholesale institutional banking in New Zealand. The NZFMA promotes the efficient operation of the over-the-counter markets, advocating high professional standards for financial markets organisations and their staff, and represents the interests of members in advocating sensible and proportionate regulation of the wholesale financial markets. Its membership includes New Zealand's five largest registered banks – four of which are subsidiaries of the largest four Australian banks.
3. The purpose of the NZFMA's submission on the Consultation Paper, is to:
 - (a) to provide additional feedback on the Consultation Paper from a New Zealand industry perspective and in that context highlight the particularly close relationship between our markets and the commitment that both governments have to improving the business environment through regulatory co-ordination; and
 - (b) endorse the Australian Financial Markets Association's ("**AFMA**") submission, dated 3 August 2018.
4. Like the AFMA, the NZFMA believes that ASIC should retain both the sufficient equivalence relief and the limited connection relief for foreign financial services providers ("**FFSPs**"). However for the New Zealand market it is only the limited connection relief that is relevant and hence this submission focusses on the proposal to remove that exemption. While the NZFMA agrees that market regulation and investor protection are important objectives, this should not come at the expense of having open and efficient financial markets. Any regulation needs to be proportionate to the problem and risks it seeks to

mitigate. As we are not aware of any issues with the behaviour of New Zealand financial institutions in the Australian wholesale markets, the NZFMA suggests that it is questionable whether a case for change can be made (with respect to New Zealand at least).

Paragraphs 64 and 65 of the Consultation Paper

5. At the outset the NZFMA wishes to clarify one matter – it believes that the comments in paragraphs 64 and 65 of the Consultation Paper are misleading with respect to New Zealand. There is no licensing relief in New Zealand for foreign financial service providers that offer wholesale client services in New Zealand, simply because there is no need for a licence in the first place. As stated in the AFMA Submission,¹ foreign financial service providers are able to offer wholesale client services in New Zealand without a licence. The NZFMA is not asking for treatment for its members in Australia that financial institutions from Australia don't already enjoy in New Zealand.
6. Furthermore, where Australian entities are subject to New Zealand financial markets regulation (for example, an Australian entity that offers financial products or financial advice services to New Zealand retail clients), there are a number of Australian-specific exemption regulations in place that provide material relief from the New Zealand regimes.² Broadly speaking, this relief is largely premised on the Australian entity being subject to sufficient regulation and oversight under Australian law.

The issue

7. In the time available we have only been able to identify the issue for our members at a conceptual level. More time would be needed to canvas our members in order to quantify the nature and extent to which the removal of the limited connection relief would impact the existing activities of our members.
8. As you will be aware, the New Zealand and Australian financial markets are very closely linked with a large number of the participants in the financial markets operating in both countries. For the New Zealand banks (and potentially other of our members) this will mean that they will have both:
 - (a) large financial institutions, global and Australasian, who may be customers on both sides of the Tasman. In a number of cases these financial institutions may not have a physical presence in New Zealand but may transact their New Zealand operations from Australia (typically Sydney or Melbourne). Deutsche Bank is an example of such a customer; and
 - (b) large wholesale customers who operate on a Trans-Tasman basis - which for New Zealand banks will typically include corporates with their head office in New Zealand but with substantial operations in Australia.
9. For the most part the New Zealand banks' operations with Australian based counterparties are confined to dealing in derivatives with those counterparties and would generally be

¹ AFMA Submission, page 18 (response to question C2Q3).

² See for example, the Financial Advisers (Australian Licensees) Exemption Notice 2011.

exempted by the application of section 911A(2) of the Corporations Act. However, as the AFMA point out in its submission, the increased globalisation of the markets and improvements in technologies have broadened the number of products which are of a global nature beyond that of derivatives. Relying on the derivative exemption by the New Zealand banks is likely to prove increasingly problematic as the range of products demanded by its customers and counterparties increase.

10. However, the NZFMA's members are predominantly concerned about the very broad wording of section 911D of the Corporations Act which captures anything which is done with the intention (or even if it does not have the intention) is likely to have the effect of getting someone to use a financial service. In practice, a number of New Zealand banks will likely be regularly communicating with counterparties and customers who are located in Australia as either as part of their global financial markets business or as part of their relationship management for wholesale customers. It is entirely possible that these communications could include the provision of research or information about other wholesale products provided by the bank (or other financial institution). These would be provided as part of the general wholesale banking relationship with the counterparty or customer. Even if there was not necessarily an intention to promote financial services to Australian based wholesale customers, the fact that communications could have this affect may mean a number of New Zealand institutions who have counterparties or customers in Australia register as an FFSP out of precaution.

Impact of registration

11. The NZFMA has not separately considered in any detail the impact of registration as an FFSP on its members. However, it does note that the AFMA has considered this issue and its members would be particularly concerned about:
 - (a) the substantial up front cost and difficulty of obtaining a licence in Australia;
 - (b) probably more significantly, the compliance issues of having to deal with two separate legal regimes – including compliance with certain provisions of the Corporations Act and terms which might be imposed on the licence as well as similar but potentially subtly different rules in New Zealand; and
 - (c) the potential risk for those of the NZFMA members who are banks that this may also force them to obtain a banking licence from APRA in Australia.
12. Ultimately, the NZFMA believes it is very unlikely that the cost and ongoing compliance impact of registration as an FFSP in Australia is proportionate to the risk involved in permitting New Zealand based financial institutions to conduct wholesale activities in Australia under the current limited connection relief.
13. New Zealand banks are, we believe, well regulated in New Zealand in a regulatory structure which is broadly equivalent to that of Australia by the following regulators:
 - (a) the Financial Markets Authority ("**FMA**") in relation to conduct and licensing issues;

- (b) the Reserve Bank of New Zealand in respect of the registration and prudential supervision of banks, non-bank deposit takers and insurance companies; and
- (c) the Commerce Commission in relation to competition laws and consumer protection legislation.

We believe that ASIC should be able to take comfort from that.

- 14. In addition, to the extent New Zealand banks are subsidiaries of Australian banks, Australian regulators do have some reach into those banks through the regulation of their parents. We suspect this is very different from entities based in other countries which rely on the limited connection regime.

Closer economic relations

- 15. While New Zealand is not a member of the G20 and therefore its financial institutions do not seem to be able to rely on the equivalence regime there is nevertheless a very close connection between Australia and New Zealand and in particular the financial markets in both countries. Approximately 85% of New Zealand's banking system is provided by the subsidiaries of the four largest Australian banks – a position unique in the world.
- 16. In addition, the Australian and New Zealand governments have for nearly 50 years been working on building closer economic relations. This includes a commitment to a process called the Single Economic Market agenda. Two key priorities under that agenda are:
 - improving the business environment through regulatory coordination; and
 - improving regulatory effectiveness.
- 17. We believe the impact of the removal of the limited connection relief needs to be examined against those principles and there are likely to be easier and much more cost effective ways of addressing any concerns about New Zealand financial institutions operating without wholesale licences in Australia.
- 18. ASIC itself has a memorandum of understanding³ with the New Zealand FMA which, amongst other things, recognises "*the increased international activity in the financial markets, and the corresponding need for cooperation between national authorities*". There is also an agreement in place between Australia and New Zealand which mutually recognise financial product offerings between Australia and New Zealand.⁴ Further, as we mention in paragraph 6 above, Australia entities that are subject to New Zealand financial markets regulation, do have the benefit of certain Australian-specific exemptions. The removal of the limited connection exemption for New Zealand entities would seem to run contrary to the principles between our respective governments about making Trans-Tasman business easier.

³ Memorandum of Understanding between ASIC and New Zealand FMA dated 28 August 2012.

⁴ See the document entitled "*Regulatory Guide 190: Offering financial products in New Zealand and Australia under mutual recognition, July 2017*" published by ASIC and the FMA.

19. We expect that ASIC may have consulted with the FMA in relation to these proposals and the NZFMA is interested in any feedback that you have received from the FMA in relation to your proposal.

Alternatives

20. We note the AFMA's submission acknowledges some limitations and concerns relating to the limited connection exemption and outlines some potential modifications.
21. While the NZFMA's preference would be to retain the limited connection regime without modifications, the NZFMA would accept conditions being applied to the limited connection relief including those suggested by AFMA such as notification of use, express information gathering powers for ASIC, and powers for ASIC to monitor and take action concerning activities conducted under the relief.

Conclusion

22. The NZFMA is grateful for the opportunity to make this submission and for the extension of time granted.
23. The NZFMA does believe that the proposals may have unintended consequences for its members and it urges ASIC to reconsider the removal of the limited connection relief, even if just for New Zealand based financial institutions.

Yours faithfully

A handwritten signature in blue ink, appearing to read "Paul Atmore", is written over a light blue rectangular background.

Paul Atmore
Chief Executive Officer