Law Council
OF AUSTRALIA

Business Law Section

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Australian Securities and Investments Commission
Level 5, 100 Market Street
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By email: policy.submissions@asic.gov.au

Dear Mr Worsley

ASIC Consultation Paper 301 *Foreign financial service providers*

The Financial Services Committee of the Business Law Section of the Law Council (**Committee**) welcomes the opportunity to provide a submission in relation to Australian Securities and Investments Commission (**ASIC**) Consultation Paper 301 *Foreign financial service providers* (**CP 301**) and appreciates the opportunity to be involved in the consultation process.

1. Summary of our position

(a) We are supportive of ASIC's overarching regulatory objective to ensure that the regulation of foreign financial service providers (**FFSPs**) providing financial services to wholesale clients in Australia strikes the appropriate balance between investment facilitation, market integrity and investor protection.

(b) We do not agree with the level of regulation of FFSPs that is proposed in CP 301. We would prefer to maintain the status quo, which would involve ASIC continuing to make the "limited connection" and the "sufficient equivalence" class order relief available.

(c) To the extent that ASIC has concerns about the way the class orders currently work, we submit that those concerns could be addressed by introducing additional requirements into the existing class orders, and that this would be more cost-effective than requiring the FFSPs which are currently eligible for class order relief to obtain an Australian financial services licence (**AFSL**).

(d) While we disagree with the approach that ASIC proposes to take, in the event that ASIC does proceed to introduce an AFSL requirement, we submit that the regime would operate more fairly and efficiently if ASIC were to:

(i) allow for a transition period of at least 24 months rather than the 12 months proposed, and provide a cut-off date for lodging AFSL applications (a deadline within FFSPs' control) rather than a date to obtain an AFSL application (a deadline that ASIC rather than the FFSPs control);

(ii) only insist upon compliance with Australian regulatory obligations by FFSPs if it produces a clear an demonstrable regulatory benefit which cannot be achieved through other means;

(iii) allow grandfathering to allow FFSPs that currently provide financial services in reliance on the class orders to continue to do so, and only impose the new AFSL related obligations on new entrants to the Australian market and FFSPs providing new financial services to wholesale clients in Australia after the relevant transition date; and

(iv) introducing a materiality threshold, such as a minimum annual Australian sourced revenue threshold, which would need to be exceeded before the requirement to obtain an AFSL was triggered. Otherwise Australian regulatory compliance costs could become so disproportionate that a number of FFSPs currently servicing wholesale clients in Australia would be likely to seek to exit the Australian market because their activities here would be too unprofitable.

2. Our response to the specific questions posed in CP 301

(a) We have **attached** a table setting out our response to each specific question posed by ASIC in CP 301;

(b) Where we disagree with an ASIC proposal, we have explained the basis for our views – for example, the potential reduction in competition in the provision of certain financial services to wholesale clients in Australia as a result of the imposition of barriers to entry which may prove prohibitive to some FFSPs;

(c) Even where we disagree with a proposal ASIC has put forward, we have made constructive suggestions as to how ASIC might best implement the relevant proposal, should it choose to proceed;

(d) The table also has an **Appendix** which comments on specific Australian obligations under the *Corporations Act 2001* (Cth) that ASIC proposes to impose on FFSPs; and

(e) We hope that ASIC will be prepared to take on board our feedback and that it will prove useful in determining the most appropriate policy outcome.

If you wish to discuss or have any questions or comments on this submission, please do not hesitate to contact committee members Henrietta Thomas, henriettacthomas@gmail.com (Committee Chair) or Pip Bell, PMC Legal, Committee Member on pbell@pmclegal-australia.com . We would be happy to meet to discuss any of these points and to assist in helping to develop an appropriate policy outcome.

Yours sincerely

Rebecca Maslen-Stannage
Chair, Business Law Section

Attachment – Table of responses to specific questions from ASIC

ASIC Question	Response
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.	We do not agree with the proposal (or the timing). We consider that there will be significant compliance costs and limited regulatory benefit associated with requiring FFSPs that are currently able to access the sufficient equivalence relief to hold an AFSL in order to continue to provide the services that they currently provide in Australia to wholesale clients without an AFSL. Each impacted FFSP will need to assess the costs of complying with the Australian regulatory requirements against their current and potential Australian sourced revenue. We anticipate that, for some FFSPs, the costs of compliance will exceed the Australian sourced revenue, and such FFSPs may make a commercial decision to withdraw their services from the Australian market. Even for those FSSPs who have a presence through a locally licensed entity, it may mean that they no longer provide the full range of services and products that are, or may otherwise have been, offered. We submit that ASIC should have regard to the impact of its proposal on the level of competition among financial service providers in the Australian market. Increasing barriers to entry for FFSPs could reduce competition in the Australian market for the provision of financial services to wholesale clients, as it may cease to be economically viable for some FFSPs to service Australian wholesale clients. We believe that Australian institutional investors are likely to lose opportunities they may otherwise have had access to, leaving them with a reduced pool of investment prospects, or increased costs of access, for example, through a requirement to acquire the services through some other form of structuring, like creating off-shore special purpose vehicles. We believe that access limitations to global products and services will ultimately be detrimental to capital markets in Australia.
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?	We do not agree with the proposal to require FFSPs to hold an AFSL in circumstances where they are currently eligible for ASIC class order relief and we would prefer to maintain the status quo. We understand ASIC's desire to be in a position to better regulate FFSPs but in our view this may be achieved by modifying the existing relief – in particular, by enhancing ASIC's enforcement powers over FFSPs. This may involve including express provisions requiring FFSPs to respond to

ASIC Question	Response
Please be specific in your response.	notices to produce information and audit and reporting requirements in the class orders. However, if ASIC decides that FFSPs are required to hold an AFSL, then at a conceptual level we support an approach that avoids unnecessary duplication between the Australian requirements and the requirements imposed in the FFSP's home jurisdiction. We submit that ASIC should begin with an intended set of specific regulatory outcomes, assess the extent to which those regulatory outcomes can be achieved through existing foreign laws and only require compliance with Australian laws and additional AFSL conditions where it is necessary to achieve the desired regulatory outcomes. We believe it would be appropriate for ASIC to consider the requirements FFSPs are subject to in their home jurisdiction in greater detail, to get a more informed perspective on equivalence, and that ASIC should only require compliance with Corporations Act obligations, impose AFSL conditions and require documentation to be submitted to ASIC where there are clear gaps and material inconsistencies between the Australian regulatory treatment and the regulatory treatment in the FFSPs' home jurisdiction that could materially and adversely impact Australian wholesale clients. The broad-brush approach that ASIC proposes to apply is likely to lead to a significant increase in regulatory costs for FFSPs in terms of compliance without a corresponding demonstrable regulatory benefit. ASIC should seek to better understand overseas regulatory requirements and properly assess whether there are genuine substantive differences in approach which warrant subjecting FFSPs to Australian obligations in addition to those they face in their home jurisdiction before insisting that they meet Australian regulatory requirements.
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	In the absence of a finalised framework, it is difficult to accurately assess the potential business impact. However, we have discussed this matter with a large global full service financial institution who has noted a number of possible detrimental implications: 1. Business impacts: Institutions may need to re-execute contracts with existing clients, and/or plan for and begin building infrastructure and technology on-shore. Furthermore, there may be changes to the way in which clients are serviced, for example, changes to relationship managers, and potential

ASIC Question	Response
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.**	reductions in the scope and level of services that can be offered to clients. 2. Cost impacts: In external fees alone, for a global entity with eight entities relying on the existing class order relief, they estimate fees (not including a fully costed internal allocation model) may be in the range of A$300,000 - A$600,000 per entity, depending on the licensing authorisations required for that entity, the proofs which ASIC Licensing require to be submitted, and the length of time the application process takes with ASIC (based on two – three reviews). We are informed that these estimates were based on an external spend for licence variation applications made by local Australian licensed entities (which in one case took 18 months to complete for a single variation). In addition, the ongoing costs with respect to maintaining a foreign licence will in large part depend on the specific licensing requirements and obligations, reporting obligations and conduct standards. For a global organisation that seeks to standardise processes globally where possible in order to reduce risks, incremental regulatory obligations can require significant allocation of resources for implementation, training and institutionalisation. Costs associated with such implementation, training and institutionalisation are difficult to gauge, but we are informed that ongoing costs could be in the realm of A$600,000 to A$1,200,000 per annum per entity (potentially for eight entities). The reason for this is that we expect there would need to be: • an onshore compliance presence for each entity (at least one head count); • maintenance of responsible managers for each entity (which could number several for each entity depending on the licence authorisations applied for); • associated training for those persons locally and internationally for anyone with responsibility for functions performed by the entity; • procedures put in place for each entity in relation to breach reporting;

ASIC Question	Response
	• continual monitoring processes for regulatory reform that may impact the entity; and • gap analyses against the foreign licence requirement versus the relevant current international licensing regime the entity operates under. These ongoing costs would include internal and external legal costs, financial compliance monitoring costs, incremental audit costs associated with Australian licensing compared to international licensing, and some internal costs relating to the same. As noted above, these costs may cause product issuers and service providers to stop offering certain services to Australian institutional clients, or charge more for access to the products or services in order to cover the additional costs associated with compliance. This is likely to have a negative impact, particularly for products and services that are only currently manufactured or supported from outside Australia and cannot be replicated by local Australian licensees in Australia. We believe that loss of opportunity to Australian institutional clients of these products and services could ultimately result in them receiving lower returns and less access to international services.
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.	We are instructed that there are a broad ranges of regulatory approaches in different jurisdictions. An FFSP may provide the same financial service to wholesale clients in multiple jurisdictions. In one jurisdiction, they may need to be licensed, in another, they may have the benefit of a licensing exemption while in another jurisdiction the law may not regulate the relevant activity in the first place. FFSPs generally will not be licensed in jurisdictions where there are no licensing requirements for their activities or they are able to rely on exemptions. Where there is a requirement to be licensed in a jurisdiction, FFSPs need to understand the regulatory regime and associated costs and weigh that up against the expected volume of business and revenue from their proposed activities in that jurisdiction before committing to do business there and become licensed. In terms of some specific examples, China, Hong Kong, Indonesia, India, Japan, Singapore, South Korea, Taiwan and Thailand all permit various levels of cross-border engagement to an institutional client base within those

ASIC Question	Response
	jurisdictions without the need for a specific and detailed equivalent of an AFSL.
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.	The proposal does not directly impact the regulation of purely domestic AFS licensees. However, for global institutions who maintain entities with domestic AFS licences, the implications could be significant. It may mean that certain services that are not core to the domestic offering, but ancillary to international product offerings, such as certain custodial arrangements, may cease to be provided to Australian institutional clients because of the additional compliance costs, and/or increased risk to the domestic licensee triggered by a need to provide such ancillary services through a domestic licensee (so that the FFSP will not need to obtain an AFSL). Furthermore, for reasons explained elsewhere in this submission, the withdrawal of FFSPs from the Australian market may reduce the number of service providers and therefore the level of competition in the market for providing financial services to wholesale clients located in Australia. Less competition may ultimately mean that wholesale clients pay higher fees and have less choice and quality as consumers of financial services. This may benefit domestic AFS licensees to the detriment of wholesale client customers.
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.	We understand that, in some cases, Australian wholesale clients rely on FFSPs to provide financial services which domestic AFS licensees do not, and are not able to, offer. The provision of these services to the Australian market could potentially disappear if the ASIC proposal is implemented and the AFSL compliance costs result in the provision of such services in Australia ceasing to be economically viable. We do not consider that this would be an optimal outcome for Australian wholesale clients. By way of example, if FFSPs decide not to apply for an AFSL given the additional regulatory burden and cost, it may limit the ability of the domestic institutions to secure offshore funding through fixed income products. This funding is typically sought outside of Australia given the deep and liquid offshore markets, for example, in the United States and Europe.
C3Q1 Do you agree with our proposal that general obligations under s912A(1)(a)–(ca) and (h) should apply to	Please note that we do not agree with the proposal to require sufficient equivalence FFSPs to obtain an AFSL if they only wish to provide financial services to wholesale clients in Australia.

ASIC Question	Response
sufficient equivalence FFSPs applying for a foreign AFS licence? If not, why not? Please be specific in your response.	Should ASIC determine that additional Australian regulatory requirements should be imposed on FFSPs (e.g., having "adequate" arrangements for management of conflicts and risk management systems), we submit that an appropriate level of regulation could be achieved by a combination of foreign equivalent regulatory oversight and specific additional class order conditions relating to such additional requirements. However, if ASIC decides to proceed down this path, before ASIC imposes these obligations, we consider that ASIC should conduct a more proper and thorough matching exercise between Australian financial services laws and the laws of other "sufficiently equivalent" jurisdictions to identify where there are genuine substantive differences such that the foreign jurisdiction produces a regulatory outcome that is less optimal than the Australian position. Where there is an adverse difference in outcome, it may be appropriate for ASIC to insist on compliance with the relevant Australian obligation with regard to the FFSP's dealings with clients in Australia. We submit that where there are no substantive differences in regulatory treatment, then it should be sufficient for the FFSP to comply with the relevant foreign laws in their dealings with Australian wholesale client customers. We also submit that it would be beneficial for ASIC and foreign regulators to publish their views on where they have agreed that particular provisions of their respective laws produce equivalent outcomes. This would provide certainty to dual-regulated entities that if they meet a particular obligation in their home jurisdiction, they know that they will also have satisfied the corresponding Australian obligation. It would also be helpful for ASIC to clarify the extent of application of the Australian laws to the FFSP's activities and we submit that Australian laws should only apply to financial services provided to wholesale clients located *in Australia*.
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.	Please note that we do not agree with the proposal to require sufficient equivalence FFSPs to obtain an AFSL if they only wish to provide financial services to wholesale clients in Australia. However, should ASIC choose to proceed down this path, then we are supportive of proposals which seek to reduce unnecessary regulatory duplication, and we consider that it is reasonable for ASIC to rely on foreign regulatory regime requirements and foreign regulators to enforce them.

ASIC Question	Response
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.	Please note that we do not agree with the proposal to require sufficient equivalence FFSPs to obtain an AFSL if they only wish to provide financial services to wholesale clients in Australia. We submit that an appropriate level of regulation could be achieved by a combination of foreign equivalent regulatory oversight and specific class order conditions relating to any additional Australian regulatory requirement. However, should ASIC nonetheless choose to proceed down this path, we submit that FFSPs should only be subjected to Australian regulatory requirements if the corresponding foreign laws produce a significantly less optimal regulatory outcome. The decision whether or not to subject an FFSP to a particular Australian regulatory requirement should be based on a rigorous and proper assessment of the corresponding foreign laws that apply to the FFSP and an additional compliance burden should only be imposed there is a clear and demonstrable regulatory benefit.
C6Q1 Do 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.	In principle we agree that, in deciding whether and how much to regulate FFSPs, ASIC should weigh up regulatory and commercial outcomes, risk and customer impact. Please refer to the enclosed **Appendix** for our comments on the Corporations Act and Corporations Regulations provisions. We have identified specific provisions which ASIC would be seeking to impose on FFSPs and provided our reasons why we disagree with ASIC's proposed approach.
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.	Please refer to the submissions we have made above. In our view, ASIC should seek to minimise costs, duplication and disruption to FFSPs and only pursue substantive regulatory outcomes which cannot otherwise be achieved through existing foreign laws and cooperative arrangements with foreign regulators.
C6Q3 Do you think there are other Australian requirements that should be included in	Please refer to the submissions we have made above and to the **Appendix** to this submission. In our view, ASIC should seek to minimise costs, duplication and disruption to FFSPs and only pursue substantive regulatory outcomes

ASIC Question	Response
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.	which cannot otherwise be achieved through existing foreign laws and cooperative arrangements with foreign regulators.
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.	No, we agree that the provisions in Appendix 1 of the consultation paper should not apply to the FFSPs.
C7Q1 Do you agree with our proposal and the proposed conditions of exemption? If not, why not?	Yes. The Corporations Act client money provisions are very Australian centric (e.g. requirement to have money held in an Authorised Deposit-taking Institution (**ADI**'s) trust account). A requirement to comply with these may cause substantial implementation costs, and result in inefficient flows of money. In the wholesale client context when dealing with large amounts of money, this can be financially detrimental to both the client and to the financial services provider, and in fact increase risks associated with client money flows by increasing the number of accounts/touchpoints required in a transaction flow.
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.	No

ASIC Question	Response
C7Q3 Are there any sufficiently equivalent jurisdictions in relation to which proposal C7 should not apply? Please be specific in your response.	No
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.	Re (a): We consider this to be unnecessarily narrow and restrictive and it will significantly restrict the manner in which FFSPs are able to deliver financial services as compared with domestic AFS licensees. The structure of financial services businesses and conglomerate groups is complex and is often shaped by tax considerations. Employees and directors are therefore not necessarily housed within wholly owned subsidiaries of licensees. In some cases a related body corporate (not necessarily a subsidiary) may employ staff, and at a minimum representatives licensed FFSPs should be permitted to have representatives who are housed within the licensee's related bodies corporate. We also note that FFSPs may not necessarily have a body corporate structure. For example, they could have a trust or a limited partnership structure, in which case the concepts of wholly owned subsidiary or related body corporate will not necessarily translate. We note that for some of the sufficient equivalence class orders, the relief is available to both bodies corporate and partnerships. ASIC should bear this in mind in determining who can be representatives of licensed FFSPs/ We also submit that if ASIC is concerned about being able to adequately monitor offshore representatives, then any restrictions on who can be a representative should only apply to representatives who are *not* located in Australia. The ability of licensed FFSPs to appoint representatives located within Australia should not be different to domestic AFS licensees. FFSPs should not be placed at an unnecessary competitive disadvantage as compared with domestic AFS licensees. Re (b): We are comfortable with these conditions being imposed on FFSPs who are currently relying on the sufficient equivalence class orders, as this replicates their existing obligation. However, we note that ASIC may receive notifications about regulatory changes or exemptions which have no relevance

ASIC Question	Response
	to financial services that an FFSP provides in Australia, and to this end it may be appropriate to require the notifications to be given only where the FFSP reasonably considers that the relevant event could have a material impact on its provision of financial services in Australia. Re (c): We note that this corresponds to an existing class order obligation for FFSPs relying on the sufficient equivalence class orders and have no objection to it being imposed on licensed FFSPs.
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.	Please see our comments above in response to the preceding question.
C8Q3 Are there any other conditions that you think we should impose on foreign AFS licensees, and why? Please be specific in your response.	No
C9 We propose to require similar core and additional supporting proof documents to support an FFSP's application for a foreign AFS licence as that required for an ordinary AFS licence. ***Your feedback*** **C9Q1 Do you agree with our proposal that core and additional proofs must be provided to support an application**	In determining what core proofs are required, ASIC should have regard to the modified regulatory regime that applies to FFSPs and the content of the core proofs should be tailored accordingly. ASIC should not be asking FFSPs to demonstrate how they will comply with obligations that they will be exempt from. The ASIC Form FS01 and Form FS03 will need to be adapted so that they seek only the information that ASIC needs from the FFSPs. This will require the allocation of dedicated ASIC information technology resources.

ASIC Question	Response
for a foreign AFS licence?	
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.	As per our response to the question above, FFSPs should not be forced to waste time responding to questions on forms or preparing documents that are not relevant to their situation and do not assist ASIC in carrying out its regulatory functions. We have noted that the ASIC Form FS01 and FS03 would need to be tailored so that they are fit for this purpose. ASIC should otherwise adopt an approach to seeking information from FFSPs that is broadly consistent with how it obtains information from applicants who are based in Australia. We also note that ASIC is currently reviewing the licensing process for applications from domestic applicants and any expansion of the licensing regime to FFSPs will need to be incorporated into the review.
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.	Please refer to our response to the above question.
D1Q1 Do you agree with our proposal to repeal the limited connection relief? If not, why not? Please be specific in your response.	We do not agree with the proposal or the timing. There are some unique aspects to the financial services laws under the Corporations Act as they apply to financial services providers who have limited connection with Australia or Australian wholesale clients. These unique aspects create anomalies that are not always covered by exemptions currently contained in the Corporation Act and Regulations. For example, there are fund structures that include a general partner (typically a special purpose Cayman Islands

ASIC Question	Response
	entity which is ultimately owned by a FFSP) to Cayman Islands limited partnerships (managed investment schemes) which offer interests in the limited partnership to professional/institutional type investors globally. The limited partnership will typically appoint an external (third party) custodian. Where one single investor in the limited partnership is an Australian domiciled professional/institutional entity (these products are not available to retail or high net worth individual clients), Australian licensing requirements could be triggered. Because the fund is structured as a limited partnership, under Australian law, there is a risk that (1) the custodian could be "inducing" Australian clients (the Australian limited partners); and (2) the general partner is 'arranging' custodial services to be provided to each limited partner by the custodian. Where the custodian is not licensed or exempt from Australian licensing requirements, then the "arranging" of these custody services through the general partner may attract a licensing requirement. Without the limited connection relief, it may not be possible for the general partner to rely on any exemption in relation to the general partner "arranging" for the provision of the custodian services to the Australian client (the Australian limited partners). In relation to section 911D of the Corporations Act, we note that this view may be a conservative one about what behaviour may amount to "inducing" Australian clients. Nevertheless, in our view, the service of arranging for a third party custodian – often for a single Australian professional investor in a product sold to many investors – with no Australian touch point other than a single Australian investor in the product, should not attract a requirement to be licensed in Australia, particularly as in many instances the general partner will be a single purpose entity. We do not believe this is an uncommon situation in relation to offerings of Cayman Islands limited partnership interests. An additional example of where the limited connection relief may need to be relied on concerns the definition of "dealing" in subsection 766C(5). A body corporate or an unincorporated body is not seen as conducting a dealing activity (issuing a financial product) under subsection 766C(4) where it issues interests in itself. However the effect of subsection 766C(5) is that entities carrying on business in investment in securities, interests in land, or other investments, an issue of equity in a principal capacity will be a dealing activity requiring an AFSL. Listed investment companies (**LICs**) are often caught in this – and an issue of shares in the LIC to an Australian institutional investor, will, without some form of relief trigger an AFS

ASIC Question	Response
	licensing requirement for the LIC. This is particularly difficult to structure around without triggering an AFSL requirement, considering the breadth of scope of section 911D. We also submit that the concept of "inducing" continues to get broader, and capture unintended situations as technology advances. Seventeen years ago, when the concept was introduced, inducing people in Australia typically involved some need and/or positive act to set up some infrastructure within Australia, or at least with Australian investors in mind. In 2018 it is very difficult to block a person from Australia from viewing materials which are accessible online, even with the use the jurisdictional blocking technology. Accordingly we see that there is an increasing need to provide some form of relief to entities that are accidentally or tangentially providing a product or service to an Australian client in a non-systemic and non-targeted manner – because the FFSP cannot categorically say that it did not conduct an activity that was not likely to induce an Australian client to request the product or service. In fact, this may be something that Treasury should be invited to consider. Without some form of relief, it is likely that financial services such as offers of Cayman Islands limited partnership interests and transactions involving LICs could in future be restricted to non-Australian investors. This may adversely impact the investment strategies and portfolios of some of the largest Australian wholesale clients (which include statutory bodies), and restrict access to foreign markets and services unnecessarily. However, having put forward these examples and rationale for why the relief should be maintained, if it is repealed, we would recommend a longer transition period. We would recommend and prefer at least a two year transition period to mirror the two years that the domestic regulated population was given from the date of commencement of Chapter 7 of the Corporations Act. Also, FFSPs will have control over how quickly they can submit their AFSL application but they will not have control over ASIC's timing. Therefore we would prefer any hard deadline to be the date for lodgment of the AFSL application (which FFSPs can control) rather than the date of the AFSL being granted by ASIC (which is outside FFSPs' control). We note the continued deterioration in service level charter standards and processing times in ASIC Licensing over the

ASIC Question	Response
	past 12-18 months and the lack of priority of resource allocation afforded to this important gatekeeper function. We envisage that ASIC would need to significantly increase its current Licensing team headcount in order to process all FFSP AFSLs within a 12 month period. As well as a longer transition period, we would also welcome and recommend the availability of grandfathering, so that existing activities carried out in reliance on class order relief could continue (with the same conditions as current class order terms) for services that FFSPs have been providing to wholesale clients in Australia up until a transition date of say 30 September 2019. Under this model, the newer and more strict regime would only be applied to financial services that FFSPs commenced to provide after the transition date. FFSPs could continue their current activities under current regulatory arrangements and would only need to obtain an AFSL if they engaged in new business activities (for example, servicing new clients in Australia or providing additional financial services not previously provided to existing clients in Australia). This would help avoid the situation we have raised elsewhere – where an FFSP is doing a small amount of business with existing Australian clients, they don't wish to expand their Australian activities and compliance with Australian AFSL related obligations would make their Australian business unprofitable and force their exist from the Australian markets to their clients' detriment. Another potential approach ASIC could adopt is to introduce a monetary Australian revenue threshold (for example, $10 million per annum) that would determine whether or not an FFSP would need to obtain an AFSL. That way ASIC could focus its regulatory attention on FFSPs whose activities in Australia are more significant.
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? Please provide an itemised breakdown of:	Please refer to our response at C2Q2 above.

ASIC Question	Response
(a) your entity's projected costs to apply for and maintain an ordinary AFS licence; **(b) your entity's projected costs to apply for and maintain the proposed foreign AFS licence; and** **(c) any other relevant costs.**	
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? Please provide data on the types of activities for which you rely on the relief, and the volume and value of business you conduct under the relief.** **(b) How does your entity address this issue with respect to activities that you conduct in jurisdictions other than your home jurisdiction? Please be specific in your response.**	As referred to in our response to D1Q1 above, the unique aspects to the financial services laws promulgated under the Corporations Act create anomalies that are not always covered by exemptions currently contained in the Corporations Act and Corporations Regulations. Accordingly we see that there is an increasing need to provide some form of relief to entities that are accidentally or tangentially providing a product or service to an Australian client in a non-systemic and non-targeted manner – but which is unable to categorically say that it did not conduct an activity that was not likely to induce an Australian client to request the product or service. We believe that the limited connection relief is instrumental in fulfilling this purpose.
D1Q4 If you rely on our limited connection relief, do you rely on licences or exemptions relating to your activities that	We are instructed that there are a broad range of regulatory approaches in different jurisdictions. An FFSP may provide the same financial service to wholesale clients in multiple jurisdictions. In one

ASIC Question	Response
affect places other than your home jurisdiction? Please be specific in your response.	jurisdiction, they may need to be licensed, in another, they may have the benefit of a licensing exemption while in another jurisdiction the law may not regulate the relevant activity in the first place.
D1Q5 If you disagree with our proposal to repeal the limited connection relief, what (if any) enhanced conditions should be introduced to better facilitate supervision by ASIC? For example, what would be your view on the introduction of: **(a) a requirement on FFSPs to notify ASIC of reliance on the limited connection relief at the outset and a further notification when the FFSP ceases to rely on that relief (the notification would be through an online form requesting a detailed description of the intended business activity (i.e. account of specific transaction procedures, intended market presence in Australia and client groups targeted), a copy of the FFSP's constitution or articles of association, and an executed agreement with an Australian local agent);** **(b) an express information-gathering power for ASIC; and** **(c) a mechanism for ASIC to monitor and**	We do not support the repeal of the limited connection relief. We note that different regulatory regimes have different thresholds as to when a licence is required in the relevant jurisdiction. Some jurisdictions do not have the equivalent of section 911D and therefore some international providers of international financial services may not be aware that the Australian concept of carrying on a financial services business captures activities from offshore intended to induce clients in Australia to use their financial services where there is no onshore Australian presence. To this end the current form of the limited connection relief protects FFSPs who would otherwise inadvertently be carrying on a financial services business in Australia because of section 911D of the Corporations Act (which is not necessarily replicated in other jurisdictions) and therefore may not even consider the potential application of Australian laws to the services they provide to clients in Australia. If the relief is repealed or modified to include conditions, there is a risk of some inadvertent non-compliance due to a lack of familiarity with the difference of approach taken in the Australian regulatory requirements. That said, we consider that the proposed enhanced conditions would be a more measured and appropriate regulatory response for limited connection FFSPs than the outright repeal of the longstanding class order relief. If ASIC were to begin with the notification requirement proposed in (a) as a condition, over time ASIC could consider whether the additional powers and monitoring proposed in (b) and (c) were necessary to achieve the desired regulatory outcome. Also, to the extent that ASIC has concerns about the breadth of interpretation of the limited connection relief, we consider that ASIC could seek to address those concerns by publishing its views, together with some examples of situations where ASIC considers that the relief would be, or would not be, available. Clear guidance would thus avoid differences of opinion and unintended outcomes.

ASIC Question	Response
take action in relation to your activities?	
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? Please be specific in your response.	We note that the limited connection class order relief has a different focus to other exemptions for the provision of financial services to wholesale clients that may be available to FFSPs. We note that regulation 7.6.02AG of the Corporations Regulations was made subsequent to the limited connection class order relief. It deals with very specific sets of circumstances which we would not expect all FFSPs who currently rely on the limited connection relief to be able to fit within. In addition, as noted in our response to D1Q1 and D1Q3 above, the unique aspects to the financial services laws under the Corporations Act create anomalies that are not always covered by exemptions currently contained in the Corporations Act and Corporations Regulations.
E1Q1 If 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? Please give reasons for your view.	As we have already stated, we do not agree with the repeal of the relief. The comments we have made above in response to D1 regarding the limited connection relief apply equally to the sufficient equivalence relief. We do note two particular aspects which would lead us to think that 12 months would not be a sufficient time-frame and that a longer transition period (say 24 months) would be more appropriate: • it is particularly difficult for global organisations to map every financial service they provide globally, and to determine whether there is any Australian touch point for that service, and then which category of licensing that may fall under (particularly given the complexity of the regulation); and • we are aware of two recent experiences with applications for AFSL variations for a single variation that have taken 10 months, and 18 months respectively to be approved. It seemed in these instances that ASIC resourcing may have been an issue, and therefore we submit that adequate time for processing should be factored in to any transitional period.
E2Q1 Do you agree with our approach? Please	Please refer to our responses elsewhere in this submission. We consider that if ASIC is going to make the effort to fully regulate FFSPs who service wholesale clients in Australia,

ASIC Question	Response
give reasons for your view.	ASIC should be more fully informed as to what their overseas regulatory obligations are in order to ensure that ASIC does not unnecessarily impose additional regulatory obligations on FFSPs that are of negligible regulatory benefit.
E3Q1 Do you agree with the proposed transitional period? If not, do you think it should be longer or shorter?	Similar to our comments above, we would not consider a 12-month transition period to be adequate and would recommend the transition period be at least 24 months. Imposing a cut-off date for making AFSL applications rather than obtaining an AFSL would be more reasonable for the affected FFSPs, who have no control over ASIC's decision timing. This, however, assumes that ASIC provides fair and reasonable notice about the documents and information that must be submitted by FFSPs seeking an AFSL. We submit that at least six months notice should be given by ASIC for this purpose. We would also encourage ASIC to consider the options of grandfathering financial services that were provided before the ASIC policy changed and/or imposing a minimum Australian sourced annual revenue figure before the AFSL obligation applied. Such measures would help limit the extent of withdrawal of services from the Australian wholesale client market by FFSPs (which, as we have stated, could adversely impact the level of competition in the market for the provision of financial services to wholesale clients in Australia).
E4Q1 Do you agree with our approach? Please give reasons for your view	We agree that ASIC should be open to considering whether any foreign jurisdiction is sufficiently equivalent and focus its regulatory attention on addressing gaps between regimes to prevent materially adverse regulatory outcomes that might otherwise compromise the protection or interests of Australian wholesale clients.
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? If not, do you think it should be longer or	We do not agree that the 12-month transition period will be sufficient and strongly recommend a longer period (at least 24 months), with flexibility for ASIC to extend it if necessary. We believe that it is important to recognise that more time may be needed than expected, as unexpected events that require scarce ASIC resources to be reallocated to higher priority matters could occur.

ASIC Question	Response
shorter? Please give reasons for your view.	
E5Q1 Do you agree with our proposal of a scaled-back assessment of sufficient equivalence for the new foreign AFS licensing regime? Please give reasons for your view.	We submit that ASIC should seek to obtain a thorough understanding of foreign regulatory requirements in the relevant jurisdictions to make a genuine and informed assessment of the degree to which regulatory outcomes converge or diverge, as the case may be. Our concern is that a scaled-back assessment may fail to detect similarities between Australian and foreign regulatory requirements, which could result in ASIC insisting on compliance with Australian regulatory requirements in circumstances where this does not produce a clear and demonstrable regulatory benefit.
E5Q2 Do you think other questions should be excluded on the scaled-back assessment? Please be specific in your response.	As we have already commented in this submission, ASIC should focus on assessing whether there are any gaps between Australian and foreign laws whereby foreign laws produce a regulatory outcome that is materially different and adverse to clients as compared with the corresponding Australian laws. This would ensure that Australian regulatory obligations were only imposed where there was an associated clear and demonstrable regulatory benefit.
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.	We submit that it should be ASIC's responsibility to cooperate with foreign regulators and make the assessment. As we have stated, ASIC should focus on whether the foreign regime produces any regulatory outcomes that are materially different and adverse to clients compared with the corresponding Australian requirements. This will ensure that additional compliance burdens are not imposed at an unnecessary cost to FFSPs.

Appendix – Comments on application of specific Australian regulatory obligations to FFSPs

Provision	Obligation	ASIC's reason for applying the obligation	Comments
CORPORATIONS ACT			
Part 7.6, Division 3	**Obligations of providers of financial services**		
s912C	Direction to provide a statement	This is a key supervisory provision that is necessary for the protection of wholesale clients in Australia	We submit that similar provisions could be applied to the existing sufficient equivalence class orders, which may address ASIC's enforcement concerns, rather than necessarily though a full licensing regime.
s912CA	Regulations may require information to be provided	This is a key supervisory provision that is necessary for the protection of wholesale clients in Australia	We would submit that similar provisions could be applied to the existing sufficient equivalence class orders, which may address ASIC's enforcement concerns, rather than necessarily though a full licensing regime.
s912D	Obligation to notify ASIC of certain matters	This is a key enforcement provision that is necessary to enable ASIC to address possible misconduct by foreign AFS licensees	In relation to breach reporting, we submit that the ASIC reporting element should be limited to significant breaches or likely breaches where the infraction has an impact or is likely to have an impact on the Australian related financial services/activities of the foreign regulated entity. To require all significant breaches [or likely breaches] to be reported may result in unnecessary over-reporting, particularly in jurisdictions where regulations require reporting of all breaches to the relevant regulators (i.e. without a materiality threshold). This could bifurcate reporting requirements creating multiple tests for a single licensee across jurisdictions, decreasing efficiency, and increasing resourcing and costs.
Part 7.6, Division 4	**AFS licenses**		
s913A–916	Licence applications, conditions, variations, suspensions or cancellations	These provisions would directly relate to the foreign AFS licence	We submit that any AFSL applications and variations be streamlined, in order to save costs and to help shorten time frames for approvals, where the foreign

Provision	Obligation	ASIC's reason for applying the obligation	Comments
			entity is already approved and regulated by an equivalent foreign regulator.
Part 7.6, Division 5	**Authorised representatives**		
s916A–917	Obligations and authorisations of an authorised representative	These provisions are necessary for the protection of wholesale clients in Australia	To the extent offshore providers are actually able to appoint authorised representatives, then this would seem appropriate.
Part 7.6, Division 8	**Banning or disqualification of persons from providing financial services**		
s920A–922	ASIC's power to make a banning order	These enforcement provisions are necessary to enable ASIC to address misconduct by foreign AFS licensees	We submit that similar provisions could be applied to the existing sufficient equivalence class orders, which may address ASIC's enforcement concerns, rather than necessarily though a full licensing regime.
Part 7.6, Division 10	**Restrictions on use of terminology**		
s923A	Restrictions on use of certain words or expressions	This provision is necessary for the protection of wholesale clients in Australia	We do not believe that these provisions would be required to protect wholesale investors. Their level of sophistication should be sufficient for a client to be able to understand the relevant terms. This adds an additional layer of complexity and cost (processes, compliance, monitoring), particularly where offshore providers are providing standardised services / marketing / products into numerous different jurisdictions at once.
Part 7.7A, Division 5	**Other banned remuneration**		
s964A	Platform operator must not accept volume-based shelf-space fees	This provision is necessary for the protection of wholesale clients in Australia	We submit that appropriate product disclosure is a better protection for investors; having to specifically structure products to meet regulatory requirements for an Australian market will add an additional layer of costs and

Provision	Obligation	ASIC's reason for applying the obligation	Comments
			complexity to selling standardised products into Australia.
Part 8.8, Division 7	**Other rules about conduct**		
s991A	Licensee not to engage in unconscionable conduct	This provision is necessary for the protection of wholesale clients in Australia	We submit that requiring compliance with sections 991A – 991D is not necessary, and that reliance should instead be placed on the foreign regulatory regime that governs the FFSP, rather than implementing these Australian specific provisions.
s991B	Licensee to give priority to clients' orders	This provision is necessary for the protection of wholesale clients in Australia	See above.
s991C	Regulations may deal with various matters relating to instructions to deal through licensed markets	This provision is necessary for the protection of wholesale clients in Australia	See above.
s991D	Regulations may require records to be kept in relation to instructions to deal on licensed markets and foreign markets	This provision is necessary for the protection of wholesale clients in Australia	See above.
Part 7.9, Division 5A	**Unsolicited offers to purchse financial products off-market**		
s1019C–1019K	Disclosure obligations relating to unsolicited offers to purchase financial products off-market	These provisions are necessary for the protection of wholesale clients in Australia	We note that regulation 7.9.97 when read with section 1019D(1)(d)(viii) has the effect of disapplying the requirements in Division 5A in relation to unsolicited offers made to professional investors and a very similar class of investors to a wholesale investor. Given that FFSPs are currently only providing services to wholesale and professional investors under the sufficient equivalence class orders, applying this provision to FFSPs would seem incongruous with intentions of treasury as currently legislated, and would result in an unequal"'playing field"

Provision	Obligation	ASIC's reason for applying the obligation	Comments
			in favour of Australian domiciled AFS licensees.
CORPORATIONS REGULATIONS			
Part 7.6	**Licensing of providers of financial services**		
reg 7.6.02A	Obligation to notify ASIC of certain matters	This is a key enforcement provision that is necessary to enable ASIC to address possible misconduct by foreign AFS licensees	*As for section 912D.*
reg 7.6.03A	Requirements for a foreign entity to appoint local agent	This is a key enforcement provision that is necessary for the protection of wholesale clients in Australia	This and regulation 7.6.03B should be considered carefully in light of Australian and registration concerns – we submit that a provider of services from overseas should not be required to register in Australia unless required under the Corporations Act, and any regulations should not widen requirements beyond that.