



Law Council  
OF AUSTRALIA

*Business Law Section*

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Financial System Division  
The Treasury  
Langton Crescent  
PARKES ACT 2600

By email: [FFSP@treasury.gov.au](mailto:FFSP@treasury.gov.au)

### **Relief for Foreign Financial Service Providers (FFSPs)**

The Financial Services Committee and the Corporations Committee of the Business Law Section of the Law Council of Australia (the **Committees**) appreciate the opportunity to be involved in this consultation process and the extension granted to make this submission.

The Committees refer to the Exposure Draft Legislation and Explanatory Memorandum released for consultation on 20 December 2021<sup>1</sup>, which proposes certain changes to the *Corporations Act 2001* (Cth) (**Corporations Act**) to provide relief for FFSPs who provide financial services to wholesale clients in Australia.

The Committees made submissions on the Consultation Paper released by Treasury on 9 July 2021, which canvassed some different options for FFSP relief. The Committees are pleased that feedback which we provided, along with other stakeholders, has been taken on board in preparing these Exposure Draft materials to produce what we consider to be a reasonable outcome overall.

The Committees are very supportive of Treasury's proposed reforms. Our comments on the key components of these reforms below should be viewed in this context.

#### **Professional investor exemption**

The Committees support the introduction of the proposed new paragraph 911A(2)(eo) of the Corporations Act. This would allow financial services to be provided from outside Australia to clients in Australia who are professional investors (as defined in section 9 of the Corporations Act) by a FFSP that does not hold an Australian financial services licence (**AFSL**).

The Committees also support, subject to our comments below, the imposition of the conditions set out in proposed subsections 911G(2), (3) and (5) and sections 911H, 911J and 911K on FFSPs who seek to rely on this exemption. The Committees agree that it is clearer to set these out in the legislation itself rather than in legislative instruments issued by the Australian Securities and Investments Commission (**ASIC**), which sunset after 10 years and need to be remade in order to continue.

Our comments on this proposal set out below are technical in nature.

The Explanatory Memorandum (paragraph 1.8) makes reference to an existing "regulation 7.6.02AG(2E)" of the *Corporations Regulations 2001* (Cth) (**Corporations Regulations**). There is no regulation numbered 7.6.02AG(2E) in the Corporations Regulations. The Committees believe this is meant to be a reference to subsection 911A(2E) which is inserted into the Corporations Act by regulation 7.6.02AG of the Corporations Regulations (which

<sup>1</sup> <https://treasury.gov.au/consultation/c2021-231877>

has been made using the regulation making power under paragraph 926B(1)(c) of the Corporations Act), which relevantly provides:

#### **‘7.6.02AG Modification of section 911A of the Act**

For paragraph 926B(1)(c) of the Act, Part 7.6 of the Act applies as if section 911A of the Act were modified by inserting after subsection 911A(2) the following subsections:

....

“(2E) Also, a person (*person 1*) is exempt from the requirement to hold an Australian financial services licence for a financial service they provide to a person (*person 2*) in the following circumstances:

- (a) person 1 is not in this jurisdiction;
- (b) person 2 is a professional investor;
- (c) the service consists of any or all of the following:
  - (i) dealing in derivatives, foreign exchange contracts, carbon units, Australian carbon credit units or eligible international emissions units;
  - (ii) providing advice on derivatives, foreign exchange contracts, carbon units, Australian carbon credit units or eligible international emissions units;
  - (iii) making a market in derivatives, foreign exchange contracts, carbon units, Australian carbon credit units or eligible international emissions units.”’

This incorrect reference to “regulation 7.6.02AG(2E)” is also made in paragraph 1.27 of the Explanatory Memorandum, which says that the exemption outlined above is to be “replaced”. The Committees assume that this means regulation 7.6.02AG of the Corporations Regulations will be amended in due course so that subsection 911A(2E) is no longer inserted into the Corporations Act.

Under proposed section 911E of the Corporations Act, regulations may be made to exclude the availability of the professional investor exemption for certain kinds of financial services, financial products and/or professional investors. It would be preferable if a decision about any such exclusion were to be made before the reforms commence. It could be problematic and disruptive if a FFSP begins to provide a financial service to professional investors in Australia in reliance on this exemption, and then find that regulations are made which effectively take the relief away and prevent the FFSP from being able to lawfully provide the relevant financial service in Australia in those circumstances without an AFSL. It could also undermine the objective of the reform, by adding regulatory complexity, which increases barriers to entry and detracts from FFSP engagement in the Australian market. The Committees strongly recommend that this type of outcome be avoided and, accordingly, that section 911E is removed from the reform package.

The Committees also note that there may be FFSPs currently providing financial services to wholesale clients in Australia who are not professional investors in reliance on *ASIC Corporations (Foreign Financial Services Providers – Limited Connection) Instrument 2017/182 (Limited Connection Relief)*, which is currently due to sunset on 31 March 2023. They will not be able to rely on the professional investor exemption. The Committees recommend that ASIC’s Limited Connection Relief remain in place until 31 March 2023 to allow for an appropriate transition, so as to minimise disruption to Australian clients of the affected FFSPs and allow time for affected FFSPs to make alternative arrangements.

The Committees also observed some additional full stops that seem to be unintentionally included in proposed paragraphs 911H(3)(c)(iii) and (v).

## **Comparable regulator exemption**

The Committees support the introduction of the AFSL exemption under proposed paragraph 911A(2)(ep) of the Corporations Act, which would allow FFSPs regulated in foreign jurisdictions, under regimes which have been assessed as comparable, to provide financial services to wholesale clients in Australia without holding an AFSL.

The Committees also support, subject to our comments below, the imposition of the conditions on FFSPs seeking to rely on this exemption which are set out in proposed subsections 911G(2), (3) and (5), sections 911H, 911J and 911K and subsections 911L(2), (3), (5) and (6). For reasons outlined above, we agree that it is clearer to set these out in the legislation itself rather than in ASIC legislative instruments.

The Committees note that, unlike paragraph 911A(2)(eo) which applies to a “person”, paragraph 911A(2)(ep) requires that the person is a “foreign company”. While the definition in section 9 of the Corporations Act does make it clear that the definition of a foreign company includes unincorporated bodies formed outside Australia, we think it would be beneficial if the exemption was available to foreign entities, regardless of the corporate structure. The main requirement that the foreign entity should be able to establish is that it is a vehicle (in its particular form) regulated as such by a regulator in the comparable jurisdiction.

The industry would appreciate some indication of timing as to when the Minister will make the determination of which regulators are comparable under proposed section 911T. The Committees note that existing ASIC legislative instruments for FFSPs regulated by comparable regulators are currently due to expire on 31 March 2023. The Committees would not want to see a situation where the ASIC relief had expired and the Minister had not made a determination, which would disrupt the ongoing provision of financial services by FFSPs who currently rely on ASIC legislative instruments.

## **Conditions imposed on professional investor exemption and comparable regulator exemption**

FFSPs that seek to rely on the professional investor exemption or the comparable regulator exemption need to comply with certain conditions and in this section we comment on those conditions.

Proposed subsection 911G(2) is relevant to both the professional investor exemption and the comparable regulator exemption and it requires the FFSP to notify ASIC that they intend to rely on the relevant exemption “as soon as practicable, and before the 15<sup>th</sup> business day, after the first time (the **start time**) after the commencement of this section that the person starts to provide the financial service” by giving ASIC a form of notice. Due to the presence of the comma immediately after “15<sup>th</sup> business day”, this could be read as requiring the FFSP to notify ASIC after they commence to provide financial services in Australia and not allowing them to notify ASIC before they commence to do so – which we do not believe is the intention. If this comma was deleted, then we believe it would be clearer that the notification can be made by FFSPs before they commence to provide financial services in Australia in reliance on the exemption. These comments also apply to the description of the obligation in section 1.85 of the Explanatory Memorandum which states that the FFSP “must notify ASIC as soon as practicable (but before 15 days) after the first time that the person starts to provide the financial service under the exemption” – we consider that there should be a comma after “as soon as practicable” and that the parentheses around “but before 15 days” should be removed.

Proposed subsection 911G(3) requires the FFSP to give the assistance reasonably requested by ASIC or a person authorised by ASIC “in relation to the performance of ASIC’s functions or the exercise of ASIC’s powers”. The Committees consider that the exercise of ASIC’s powers is a matter purely for ASIC in which third parties ought not to intervene. The Committees consider that it would be preferable to use language more closely resembling

subsection 912E(1) of the Corporations Act (which requires a licensee and its representatives to give assistance reasonably requested by ASIC or a person authorised by ASIC “in relation to whether the licensee and its representatives are complying with the financial services laws, and in relation to the performance of ASIC’s other functions”).

The Committees also consider that proposed subsections 911G(3) and (4) and section 911H (which gives ASIC the power to give directions to FFSPs who are relying on the professional investor exemption or the comparable regulator exemption) potentially have broad application well beyond providing assistance to ASIC for activities that have an Australian investor or client nexus. The Committees recommend that these provisions instead be drafted to focus more directly on the activities which have such a nexus.

Proposed subsection 911L(5) is relevant only to the comparable regulator exemption and it requires the FFSP to have an “agent in this jurisdiction”. It is our understanding, having read paragraph 1.117 of the Explanatory Memorandum, that the “agent” can be, but does not have to be, a local agent appointed by a foreign company under section 601CF of the Corporations Act. If this is the case, then the sub-heading above paragraph 1.115 of the Explanatory Memorandum should read “Agent” rather than “Local agent”. The description of the role of the agent for this purpose is more clearly defined in the ASIC legislative instruments in the following terms:

“**Agent** means a natural person resident in this jurisdiction or a company, whose name and address were last notified to ASIC by the body for the purposes of this instrument, and who is authorised to accept on the body’s behalf, service of process from ASIC and, in relation to proceedings relating to a financial services law, from any person referred to in subsection 659B(1) of the Act;”

The Committees recommend that this definition of “agent” be used for the purposes of subsection 911L(5) to ensure that there is sufficient clarity.

The Committees have also identified a typographical error with the inclusion of a superfluous definite article in the second sentence of paragraph 1.117 of the Explanatory Memorandum, which provides:

‘Where it is appropriate to do so, an agent appointed for the purposes of registering a foreign company under section 601CF of the Corporations Act may also act the as the agent for the purposes of the comparable regulator exemption.’

The Committees consider that proposed subsection 911L(6) (which is relevant to the comparable regulator exemption) has the potential to detract from the reforms’ objective of recognising comparable regulation of foreign entities and financial services. Given the breadth of the definition of “financial services laws” (see section 761A of the Corporations Act) and the definition of “representatives” (see section 910A of the Corporations Act), the foreign entity may need to introduce a specific compliance framework and training program to address the obligations set out in this subsection. The Committees believe that, to be consistent with the rationale behind the reforms, “representatives” should be limited to specified persons who are located within Australia and “financial services laws” should be a reference to the laws of the relevant comparable jurisdiction. If Treasury is of the view that it is important for FFSPs to expressly comply with Australian general conduct obligations, such as the prohibition against misleading and deceptive conduct, then this should be particularised.

The Committees also wish to comment on the drafting of subsection 911L(6) in its current form, and to this end we note that proposed paragraph 911L(6)(a) says that the FFSP must “maintain sufficient oversight” over its representatives. Paragraph 1.121 of the Explanatory Memorandum states that this “includes ensuring that [the FFSP’s] representatives are appropriately trained and supervised to provide the financial services”. The Committees submit that there should be clarity within the legislation itself and, where possible, consistency with existing provisions of the Corporations Act.

The Committees note that subsection 912A(1) of the Corporations Act, which imposes obligations on AFSL holders, contains a specific obligation for a licensee to ensure that representatives are adequately trained and are competent to provide financial services (paragraph 912A(1)(f)). If this is the intention of paragraph 911L(6)(a), then the obligation with respect to training should be explicitly described in paragraph 911L(6)(a) for consistency with paragraph 912A(1)(f) rather than introducing a separate concept of “sufficient oversight”.

The term “sufficient oversight” is not used in subsection 912A(1) and if, as suggested above, the training obligation is expressly spelt out, then we are not sure that “sufficient oversight” adds anything to the obligation in proposed paragraph 911L(6)(b), to “take reasonable steps to ensure that [the FFSP’s] representatives comply with the financial services in relation to providing the financial services” (which we note is consistent with an AFSL holder’s obligations under paragraph 912A(1)(ca)).

#### **Exemption from the fit and proper person test**

The Committees support the proposed amendments to sections 913B and 914B so that FFSPs who apply for an AFSL to provide financial services only to wholesale clients in Australia do not need to satisfy the fit and proper person test if they are already regulated in a foreign jurisdiction which has been determined to be comparable.

However, we submit that the relief afforded to FFSPs who are subject to comparable regulation should be more extensive in circumstances where they apply for an AFSL. In particular, we would like to see greater recognition of the foreign regimes’ comparability by relying on requirements of the foreign regimes where they achieve substantially the same outcome as corresponding Australian laws. Imposing all of the Australian laws on these FFSPs will increase their compliance costs as they will need to be across all differences between Australian laws and those in their home jurisdiction.

This is a departure from the approach taken by ASIC in ASIC Corporations (Foreign Financial Services Providers – Foreign AFS Licensees) Instrument 2020/198, which grants exemptions from certain conduct obligations to FFSPs who are only licensed to provide financial services to wholesale clients in Australia. There are FFSPs who have made applications for an AFSL (and incurred significant costs in doing so) on the basis that the relief under this ASIC instrument would apply to their Australian activities. The Committees submit that those FFSPs who obtained their AFSLs from ASIC while this instrument was in force should continue to be able to rely on the relief that this instrument provides, as the availability of this relief could have been material to their decision to obtain, and the ongoing viability of maintaining, an AFSL. Changing the regulatory regime at this juncture would be unduly burdensome and unfair to affected FFSPs.

#### **Other observations**

The Committees anticipate that ASIC would issue some guidance for the benefit of FFSPs on how to comply with proposed subsection 911G(2) and on how ASIC would seek to exercise the powers conferred on it by proposed sections 911M to 911S with respect to cancelling and imposing conditions on exemptions.

It also seems that there will be limited time for ASIC to conduct any consultation for this purpose if the legislation is going to commence the day after it receives Royal Assent. In this context, we believe that Treasury should provide additional transitional relief to allow FFSPs to continue to provide financial services to professional investors and wholesale clients while the transition is made. Not only will this give ASIC time to conduct a relevant consultation process, but it will also allow FFSPs time to prepare for and make the relevant ASIC notifications (proposed subsection 911G(2)), as well as notify clients about their reliance on the relevant exemption (proposed subsection 911J(2)).

If you have any questions, please do not hesitate to contact Pip Bell ([pbell@pmclegal-australia.com](mailto:pbell@pmclegal-australia.com)) or Jeremy Williams ([jeremy.williams@gs.com](mailto:jeremy.williams@gs.com)).

Yours faithfully

A handwritten signature in black ink, appearing to read 'P. Argy', with a long, sweeping flourish extending to the right.

**Philip Argy**  
**Chairman, Business Law Section**