COMMENTARY

JUNE 2018

Australian Regulator Proposes Changes to Licensing of Foreign Financial Services Providers

IN SHORT

The Situation: Many foreign financial services providers ("FFSPs") currently rely on one of two types of relief from broadly defined provisions of the *Corporations Act 2001* that would otherwise require them to obtain and hold an Australian Financial Services Licence ("AFSL"). AFSL holders are subject to Australian financial services laws and regulation by the Australian Securities and Investments Commission ("ASIC").

The Development: ASIC recently released Consultation Paper 301. In it, ASIC seeks feedback on its proposals to repeal the two forms of relief, with a 12-month transition period, and to create a modified AFSL for FFSPs ("foreign AFSL").

Looking Ahead: Feedback on the Consultation Paper is due on 31 July 2018. Under the current timetable, the two existing forms of relief will be repealed on 30 September 2019, with a proposed 12-month transition period to 30 September 2020. Under the current proposed regime, FFSPs would then need to apply for a foreign AFSL, a regular AFSL or individual relief from ASIC, unless exempt.

Background

The Australian *Corporations Act 2001* requires a person who carries on a financial services business in Australia to hold an AFSL, unless exempt. A financial services business is taken to be carried out in Australia by a person not present in Australia if there is conduct that is "intended to induce people [in Australia] to use the financial services the person provides" or "is likely to have that effect". Once issued, holders of an AFSL must comply with Australian financial services laws, including minimum standards of service and adequacy of resources, and are subject to notification obligations to, and surveillance by, ASIC.

While there are many exemptions built into the *Corporations Act 2001*, their narrow scope has led to many FFSPs, which might otherwise be captured by the broad "inducement" test, relying on two types of relief:

- "sufficient equivalence relief", under which an FFSP that is subject to "sufficiently equivalent" overseas regulatory regime (i.e. subject to regulation by identified foreign financial services regulators) may enter into an arrangement with ASIC exempting it from the requirement to hold an AFSL subject to certain conditions, including submission to the jurisdiction of Australian courts; and
- "limited connection relief", under which an FFSP is not required to hold an AFSL if the only reason it would otherwise be required is because of the "inducement" provision, and it provides its services only to "wholesale clients" in Australia.

> “ While there are many exemptions built into the Corporations Act 2001, their narrow scope has led to many foreign financial services providers, which might otherwise be captured by the broad 'inducement' test, relying on two types of relief. In its Consultation Paper, ASIC proposes to end these forms of relief. ”

Proposed Reforms and Issues

In its Consultation Paper, ASIC proposes to end these forms of relief. The Paper gives ASIC's reasons for this as being:

- perceived regulatory gaps for FFSPs, which are effectively operating in Australia without ASIC's oversight (and not regulated in that respect by their home regulators); and
- regulatory practice in other jurisdictions.

In its place, ASIC proposes to introduce a foreign AFSL. In its proposed form, an FFSP would need to apply for a foreign AFSL in a manner similar to a regular AFSL and nominate a local agent for service of documents. The holder of a foreign AFSL would also be subject to many of the same obligations as the holder of a regular AFSL, including complying with Australian financial services laws and having adequate systems for managing risk and conflicts of interest. However, they would not be subject to certain other obligations to which the holder of a regular AFSL would be subject, primarily regarding adequacy of resources and competence.

However, not all FFSPs would be entitled to apply for a foreign AFSL. During the transition period, ASIC proposes to conduct a review of jurisdictions not currently on its list for the "sufficient equivalence relief". Any FFSPs from jurisdictions not on this expanded list would be required to obtain a regular AFSL, unless some other exemption applies to them. However, ASIC also maintains that it will continue to issue individual relief on a case-by-case basis, impliedly on a similar basis to the "limited connection relief".

There are some obvious issues with the proposed reforms. For example, the "regulatory gap" may be overstated, given overseas regimes may not employ an "inducement" test (an issue that is acknowledged by ASIC, but not substantively addressed, in the Paper itself). Further, the scale of the regulatory burden being taken on by ASIC is possibly very large. ASIC by its own account does not know how many FFSPs currently rely on the "limited connection relief", and it proposes to undertake an assessment of every regulatory regime from which a foreign AFSL applicant is based, except for those jurisdictions which already qualify for the "sufficient equivalence relief".

TWO KEY TAKEAWAYS

1. FFSPs with any exposure to Australian clients should review Consultation Paper 301 and consider whether they wish to make a submission. Submissions are due 31 July 2018.

2. FFSPs should also consider if any other exemptions from holding an AFSL apply to them and if not approaching ASIC for individual relief, if the two forms of broader relief are repealed on 30 September 2019 (with a 12-month transition period to follow). Otherwise, a foreign AFSL may be required by the end of the transition period.


Mark B. Crean
Sydney


Robert Speed
Sydney


Joshua Kang
Sydney

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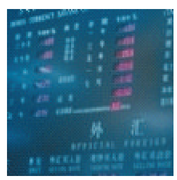

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