

ASIC WILL EXTINGUISH FFSP RELIEF ... UNLESS CONVINCED OTHERWISE

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Legal Briefings - By **Fiona Smedley and Aaron Jones**

The Australian Securities & Investments Commission (**ASIC**) is proposing to:

- repeal the conditional Australian financial services licence (**AFSL**) relief currently available to foreign financial services providers (**FFSPs**) providing financial services to wholesale clients in Australia; and
- introduce a new 'foreign AFSL' regime, to be used by FFSPs instead of the AFSL relief.

WHAT'S HAPPENED?

ASIC is consulting on the repeal of two ASIC instruments which currently provide conditional relief to FFSPs providing financial services to wholesale clients in Australia and which are due to expire (or 'sunset') in September 2018.

Today, ASIC has released *Consultation Paper 301: Foreign financial services providers* ([CP 301](#)) proposing to repeal:

- [ASIC Corporations \(Repeal and Transitional\) Instrument 2016/396](#) (**Instrument 2016/396**) which is often referred to as the '*passporting exemption*', used by FFSPs who are subject to regulation in their home jurisdiction which is sufficiently equivalent to an AFSL; and
- [ASIC Corporations \(Foreign Financial Services Providers - Limited Connection\) Instrument 2017/182](#) (**Instrument 2017/182**) which is often referred to as the '*limited connection exemption*', used by FFSPs physically located outside Australia

(together, the **FFSP Relief**); and

- implement a modified licensing regime, a 'foreign AFSL', for certain FFSPs providing financial services to wholesale clients in Australia.

WHAT IS THE PASSPORTING EXEMPTION (INSTRUMENT 2016/396)?

The 'passporting relief' provides relief to FFSPs who are regulated to provide financial services in certain foreign countries, to 'passport' their existing overseas licence or permission, in order to provide the same financial services in Australia to wholesale clients, subject to certain conditions.

The 'passporting relief' was previously offered under eight Class Orders ([CO 03/1099](#), [CO 03/1100](#), [CO 03/1101](#), [CO 03/1102](#), [CO 03/1103](#), [CO 04/829](#), [CO 04/1313](#) and [CO 16/1109](#)) (**Class Orders**) before the relief under the Class Orders was extended to September 2018 under Instrument 2016/396. More information is provided in our article of [September 2016](#).

WHAT IS THE LIMITED CONNECTION EXEMPTION (INSTRUMENT 2017/182)?

In addition, the 'limited connection' exemption provides relief to FFSPs with a limited connection in Australia and which do not (through a physical presence in Australia) carry on a financial services business in Australia. This exemption is widely used and does not require any application or notification to ASIC.

The relief was previously provided in Class Order [[CO 03/824](#)], and was extended to September 2018 by Instrument 2017/182. More information is provided in our article of [March 2017](#).

PROPOSAL TO REPEAL THE FFSP RELIEF

ASIC is proposing to extend the FFSP relief until 30 September 2019 and then repeal it (with a transitional period of 12 months, to 30 September 2020).

ASIC considers that the FFSP Relief 'no longer strikes the appropriate balance between cross-border investment facilitation, market integrity and investor protection envisaged' by ASIC when the FFSP Relief was introduced. ASIC's explanations for the proposed repeal include that:

- ASIC's policy review of the passporting relief identified supervisory and enforcement concerns with the activities of FFSPs in Australia that may not be meeting ASIC principles by which ASIC seeks to:
 - have 'effective cooperation arrangements' with foreign regulators; and
 - enforce Australian laws that apply to FFSPs.
- ASIC is concerned that the reliance by FFSPs on the limited connection exemption does not involve any assessment of the regulatory regime in the jurisdiction in which the FFSP operates and that ASIC continues to have little visibility on the FFSPs relying on this relief. FFSPs are not required to notify ASIC of their reliance on Instrument 2017/182 and as a result ASIC is not aware of who is relying on the relief and where the FFSP is located, which impedes ASIC's ability to supervise the FFSP's activities involving wholesale clients in Australia.
- ASIC's inquiries suggest that ASIC's approach to the FFSP Relief may be broader than that of foreign regulators and that it then follows that the FFSP Relief may be lowering compliance costs for FFSPs without AFSL holders in Australia obtaining a comparative reduction in compliance costs for the provision of financial services of these AFSL holders in other jurisdictions.
- ASIC is concerned that supervisory and enforcement issues arising in Australia in relation

to the FFSP Relief and IOSCO's recent emphasis on addressing misconduct in wholesale markets suggest that reform is required to ensure ASIC's regulatory approach to FFSPs in Australia remains consistent with IOSCO's guidance on minimising risks in wholesale markets.

PROPOSED FOREIGN AFSL LICENSING REGIME

ASIC is proposing to implement a modified Australian financial services licensing regime for certain FFSPs to apply for and maintain a modified AFSL (**foreign AFSL**). The foreign AFSL licensees will be:

- required, amongst other things, to comply with certain (but not all) general obligations under section 912A(1) of the *Corporations Act 2001* (Cth) (the **Act**). These obligations include obligations to:
 - act efficiently, honestly and fairly;
 - have in place adequate arrangements to manage conflicts of interest; and
 - have adequate risk management systems; and
- exempt from the application of certain provisions of Chapter 7 of the Act where ASIC considers the foreign regulatory requirements to which the FFSP is bound achieve similar regulatory outcomes to the full AFSL regime requirements.

ASIC considers that repealing the FFSP Relief and inviting FFSPs to apply for a foreign AFSL provides ASIC with a 'fuller range of supervisory and enforcement tools to address misconduct by FFSPs' as FFSPs holding a foreign AFSL would be subject to:

- ASIC's directions power;
- breach reporting requirements;

- the obligation to provide reasonable assistance during surveillance checks; and
- the usual range of remedies available in relation to AFSL holders, including the power to impose AFSL conditions and suspend or cancel an AFSL.

PREVIOUS CONSULTATION BY ASIC

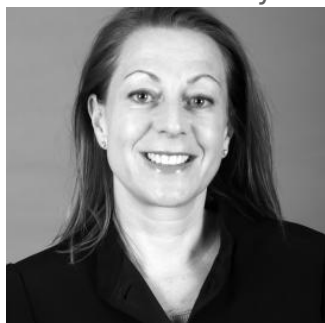
ASIC previously consulted on the FFSP Relief in 2016 in Consultation Paper 268 ([CP 268](#)) and summarised its findings following the consultation in [Report 519](#).

SUBMISSIONS ON CP 301

Comments and submissions in response to CP 301 are due by 31 July 2018.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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