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By email submission

Dear Treasury

**Submission – Treasury Laws Amendment (Measures for Future Bills) Bill 2023:  
Licensing exemptions for foreign financial services providers**

**1 Introduction**

This submission is made by Herbert Smith Freehills (**HSF**) in response to exposure draft legislation published on 7 August 2023 by Treasury titled *Treasury Laws Amendment (Measures for Future Bills) Bill 2023: Licensing exemptions for foreign financial service providers (Bill)* and the accompanying explanatory memorandum (**EM**).

Broadly, Treasury seeks feedback on the following proposed options for regulatory relief for foreign financial services providers (**FFSPs**):

- (a) the professional investor exemption, which exempts FFSPs that provide financial services generally from outside Australia to professional investors in Australia from the requirement to be licensed in Australia (**Professional Investor Exemption**);
- (b) the comparable regulator exemption, which exempts FFSPs authorised to provide financial services in a comparable regulatory regime from the requirement to be licensed when providing services to wholesale clients in Australia (**Comparable Regulator Exemption**);
- (c) the market maker exemption, which exempts FFSPs that make a market for derivatives that are traded on a licensed market from outside Australia from the requirement to be licensed in Australia (**Market Making Exemption**); and
- (d) an exemption from the fit and proper person assessment to fast track the licensing process for FFSPs authorised to provide financial services in a comparable regulatory regime (**Fit and Proper Person Test Exemption**).

HSF is an international law firm with 24 offices located around the globe and which specialises in, amongst other things, financial services and financial services regulation. We regularly advise:

- (a) FFSPs who provide a range of financial products and financial services to their Australian based wholesale clients including superannuation trustees; and
- (b) Australian based wholesale clients including institutions and superannuation trustees in relation to the financial services they acquire from FFSPs.

We provide our comments in respect of Treasury's proposals in this submission.

## 2 General observation

For several years, FFSPs and their Australian clients have been concerned about the uncertainty that has arisen in relation to the availability of the FFSP exemptions and whether FFSPs will be legally and commercially able to continue to provide their financial services to the Australian wholesale market.

The consultation on this Bill is a welcome development which we hope will bring this period of uncertainty to an end.

We would be very happy to discuss any aspect of our submission and any proposed changes to the drafting of the Bill with Treasury with a view to finalising the Bill so that it may be considered by Parliament as soon as reasonably practicable, noting that the current FFSP exemptions will expire 31 March 2025 and that FFSPs will need a reasonable lead time to transition to the new exemptions under the Bill.

## 3 Transitional arrangements

### 3.1 Existing foreign AFSL holders and applicants

The Bill and EM address the Professional Investor Exemption and the Comparable Regulator Exemption which, in effect, will replace the passporting exemptions and limited connection exemption to the requirement to hold an Australian financial services licence (AFSL) but do not address the foreign AFSL regime which was originally introduced to replace the passporting exemptions and limited connection exemption.

As the Australian regulatory options for FFSPs still include applying for a foreign AFSL, it would be helpful for FFSPs making decisions about the Professional Investor Exemption and the Comparable Regulator Exemption in the coming months to understand what future is intended for the foreign AFSL regime.

This is particularly relevant for FFSPs that already hold a foreign AFSL, for FFSPs that have already made an application for a foreign AFSL which has not yet been fully processed and approved, and for those FFSPs that are considering whether to apply for a foreign AFSL.

- (a) Is it intended that the foreign AFSL regime will continue to operate in parallel with the Professional Investor Exemption and the Comparable Regulator Exemption?
- (b) If so, is it expected that the foreign AFSL regime will be reviewed or terminated at any time in the future?
- (c) Will foreign AFSL holders or applicants for a foreign AFSL need to transition to the Professional Investor Exemption, the Comparable Regulator Exemption or a full AFSL?

We would invite Treasury to consider addressing in the EM the intended future of the foreign AFSL regime.

### 3.2 Notice of reliance

Section 911J(2) of the Bill provides that an entity must notify ASIC that it intends to rely on the Professional Investor Exemption, the Market Making Exemption or the Comparable Regulator Exemption, and that the notification must meet certain prescribed content requirements. Section 911J(2)(b)(i) of the Bill requires the entity to give 'ASIC the notice in a written form that is approved by ASIC...'.

We understand that FFSPs would like to understand whether it is intended that ASIC's role in this case is limited to the content requirements for the notice or whether ASIC will have a broader approval function (for example, a discretion to reject a notification even though it meets the informational requirements in the prescribed form).

Will regulations prescribe parameters (for example, limiting ASIC discretions) in relation to the form and content of the notification?

It would be helpful:

- to confirm that as the notification takes effect on lodgement, there will not be a need for or an opportunity for ASIC to conduct a review of the documentation lodged. For example, we assume that it is not intended that ASIC will have the ability to vet notifications and have a discretion to reject them?; and
- for ASIC to release for consultation, before the Bill is expected to be passed, a draft of the notification that needs to be lodged so that FFSPs can provide practical feedback on its use and fully understand the form the notification will take.

The form of notification should not impose additional conditions or restrictions on FFSPs over and above those already contained in the Bill or accompanying regulations. We mention this because when a FFSP applied for a foreign AFSL, it had to use ASIC Form FS01 and, in order to do so, needed to have an ABN or an ARBN. In order to obtain an ARBN, the FFSP had to register as a foreign company under Part 5B.2 of the *Corporations Act 2001 (Cth)* (**Corporations Act**) even if it was not in fact carrying on a business in Australia, and only needed the foreign AFSL because its offshore activities deemed it to be carrying on a business in Australia under section 911D of the Corporations Act.

We submit that a FFSP should only be required to register under Part 5B.2 of the Corporations Act when it is in fact carrying on a business in Australia. Registration should not be imposed upon an FFSP by virtue of making an ASIC notification. Please also see our commentary on registration as a foreign company in paragraph 5.4.

We would be very happy to work with ASIC in its consultation on the form of notification.

### 3.3 Notice regarding submission to Australian courts' jurisdiction

Under sections 911J(5) and (6) of the Bill, a FFSP using the Professional Investor Exemption, the Comparable Regulator Exemption or the Market Making Exemption must provide to ASIC a written notice that the FFSP agrees to submit to the non-exclusive jurisdiction of Australian courts.

- Whilst this appears to derive from a condition in the existing passporting exemptions, the language of the existing passporting exemptions is for FFSPs to submit to Australian law and its courts in legal proceedings *conducted by ASIC and other government bodies* (see, for example, paragraph 2(c) of Schedule B to Class Order [03/1100]).
- Such limitation, however, has not been replicated in section 911J of the Bill, which applies to *any proceedings*, which will include any proceedings with the clients of the FFSP.

We note that contracts pursuant to which FFSPs provide financial services to Australian clients will generally always be expressed as subject to the laws of, and to the jurisdiction of the courts of, their home jurisdiction, or another foreign jurisdiction determined by that FFSP (for example, the laws and the courts of England and Wales).

As currently drafted, section 911J would cause all such contractual arrangements to be in direct conflict with section 911J and to require amendment and re-papering. That would impose a significant burden on FFSPs as a condition for using the exemptions which we consider would undermine the utility and commerciality of using the exemptions.

We expect that FFSPs would have to carefully assess the costs and legal implications of changing the governing law and jurisdiction clauses in their contracts and whether:

- they are able to accept those costs and legal implications in order to continue to operate in Australia; or
- they need to withdraw from the Australian market, which would limit the opportunities for Australian institutions and wholesale clients to access 'best of breed' asset and fund managers overseas, particularly those providing specialist offshore market services which may not be available in Australia to Australian institutions seeking to diversify their portfolios to include securities in those offshore markets.

We note that section 911J(7) provides an exemption from the requirement in section 911J(5)(c) to comply with an order of the Australian courts where doing so would conflict with a court order in the relevant offshore jurisdiction. In practice, however, we consider that this exemption will have little effect because it will only be in the rarest cases that a court order relating to the *same proceedings* will exist in any other jurisdiction.

If, in fact, Treasury intended for ASIC to receive a notification in a form similar to the irrevocable deeds of undertaking that were required to be lodged under the passporting exemptions, we submit that section 911J should be amended to make clear that FFSPs only need to submit to Australian law and its courts in legal proceedings *conducted by ASIC and other government bodies*.

Separately, to the extent that a FFSP has in the past provided an irrevocable deed to ASIC in connection with a passporting exemption application, what will be the status of that deed?

- Would ASIC give notice that it will not rely on or enforce the old deed if a new notification is provided in connection with the Professional Investor Exemption, the Market Making Exemption or the Comparable Regulator Exemption?
- To the extent that section 911J is intended to operate in a similar way to the irrevocable deeds under the existing passporting exemption, would Treasury consider allowing FFSPs approved to use the passporting exemption to be exempted from this new notice requirement, allowing ASIC to rely on their existing deeds which are expressed to be irrevocable, to reduce paperwork and red tape?

As set above in paragraph 3.2 in relation to the form of the notification, we suggest that:

- it is clarified whether the submission to jurisdiction in the notification takes effect on lodgement or if ASIC has a discretion to vet and reject notifications; and
- it would be helpful for ASIC to release for consultation a draft of the submission to jurisdiction, before the Bill is expected to be passed, so that FFSPs can provide practical feedback on it and fully understand its implications. Again, we would be very happy to work with ASIC in its consultation.

## **4 Professional Investor Exemption**

### **4.1 Marketing trips**

We welcome the certainty in section 911E(2) permitting marketing visits to Australia during the financial year for up to 28 days. We understand that you may receive a submission from another body that this period should be limited to working days and exclude holidays as it is common for travellers to add some holiday time into a business trip. If Treasury were minded to adopt that submission we would not have a concern with that.

### **4.2 Dealing in certain financial products on certain markets**

We note the new section 911F of the Bill provides that the Professional Investor Exemption is not available for certain dealings in financial products of the kind prescribed by the regulations which are able to be traded on a prescribed licensed market.

We note from paragraph 1.53 of the EM that this is intended to cover dealings in large equity market products and is intended to ensure adequate regulatory supervision of the FFSPs, maintain domestic market integrity and protect retail investors from potential harm in prescribed domestic licensed markets that trade prescribed financial products.

We would welcome more clarity as to the types of financial products and dealings Treasury is seeking to cover by this exception and the harm that this limitation is intended to prevent.

We would also like to understand why existing protections, such as market misconduct prohibitions in Part 7.10 of the Corporations Act, market integrity rules or short selling reporting obligations are not already sufficient, or could not be expanded to cover FFSPs undertaking equivalent dealings.

## **5 Comparable Regulator Exemption**

### **5.1 List of comparable regulators**

We would appreciate more information on the list of comparable regulators, which we assume will be based on the list of comparable regulators who have been determined to have sufficient equivalence for the purposes of the passporting exemptions and eligibility for a foreign AFSL (see *ASIC Corporations (Foreign Financial Services Providers—Foreign AFS Licensees) Instrument 2020/198*).

We note the criteria to which the Minister must have regard to when determining whether to approve an overseas regulator as a comparable regulator (as set out in section 911X(2) of the Bill). As a practical matter, who (if anyone) will be able to request that the Minister consider the suitability of additional overseas regulators from time to time? Will there be a process for making such a request?

Please also consider whether it needs to be clarified in the Bill what factors (other than an absence of those listed in section 911X(2)) might cause the Minister to determine that an overseas regulator is no longer qualified as a comparable regulator. In such cases, will FFSPs be afforded special standing to challenge such decisions (noting that overseas persons generally lack standing for administrative law challenges)?

### **5.2 Where financial services are provided from**

We note that the key elements, pursuant to section 911A(2)(ep) of the Comparable Regulator Exemption are that:

- the financial service is provided to wholesale clients;
- the FFSP is a foreign company or partnership formed outside Australia;
- the FFSP maintains all authorisations necessary to undertake substantially the same financial services from a place outside Australia (the comparable jurisdiction);
- the regulator has been approved by the Minister as being a “comparable regulator”; and
- the person provides the financial services from Australia or from the comparable jurisdiction.

We consider that this last requirement, that the financial services must be provided from Australia or the comparable jurisdiction, is potentially quite problematic for FFSPs whose comparable regulator is located in a jurisdiction whose time zone is significantly different to Australia (e.g. the US or the UK).

In our experience, many of those FFSPs have, under the limited connection or passporting exemptions, sought to service Australia-based clients from offices in their regional hubs, such as Hong Kong or Singapore, where their staff are working in a time zone which is close to the time zones applicable to their Australia-based clients.

For example, a UK or US regulated FFSP may have representatives based in the Asia-Pacific region who provide financial services to Australia-based clients under the regulatory framework of the UK or US regulator and under the FFSP's UK or US regulatory compliance system, even though those representatives are not physically located in the UK or US.

We submit that, having regard to the policy perspective of protecting Australian investors in relation to FFSPs using the Comparable Regulator Exemption:

- the location of the representatives when providing the financial services is not relevant, as long as the FFSP is in fact regulated by a comparable regulator and will be providing financial services to the relevant comparable standard; and
- the requirement in section 911A(2)(ep)(v) should be amended to provide that the comparable regulated person may provide the financial services *from any jurisdiction* (and potentially also, *provided that the provision of the relevant financial services from that jurisdiction does not contravene the laws of that jurisdiction*).

If this amendment was not made, then we expect that comparably regulated FFSPs in jurisdictions far from Australia would have to consider whether the following are practical and commercially viable in order for them to use the Comparable Regulator Exemption:

- (a) requiring staff to work night shifts in order to provide the relevant financial services to Australian clients from the comparable jurisdiction during Australian business hours; or
- (b) relocate the personnel providing such financial services to Australian clients to Australia.

We consider that the requirement in section 911A(2)(ep)(v), if not amended, has the potential for certain FFSPs to withdraw from servicing Australian clients, which would restrict Australian investors' access to international blue chip managers and reduce competition for specialist financial services.

### 5.3 Notice to recipients

We note that the notice provisions in section 911J of the Bill have been drafted so that they apply in relation to "a financial service" and are capable of being interpreted as requiring that a notice should be provided on the provision of each service. The current passporting exemptions simply require a FFSP to provide a notice upfront before initially providing financial services to a client.

Given that the Note at the foot of section 911J(2) of the Bill provides that a notice only needs to be given once to each recipient, we assume that it is not Treasury's intention to require a FFSP to provide a notice in relation to each service. If our assumption is correct, we would ask Treasury to consider clarifying this in the drafting of sections 911J(1) and (2) of the Bill, to make it clear in the operative provisions that a notice to a client is only required on the first occasion of using the Professional Investor Exemption or the Comparable Regulator Exemption (as applicable).

An alternative approach would be for ASIC to maintain a public register of FFSPs who have notified ASIC that they are using the Comparable Regulator Exemption or the Professional Investor Exemption (similar to the public register for AFSL holders and authorised representatives), which would obviate the need for FFSPs to notify each client individually.

### 5.4 Requirement to appoint a local agent

Under section 911Q(2) of the Bill, a FFSP relying on the Comparable Regulator Exemption must appoint a local agent.

Whilst we have no objections to the requirement for such FFSPs to appoint a local agent, the language used in section 911Q(3) implies that FFSPs will always need to be registered as a foreign company. We suggest that the drafting should recognise that the FFSP may not need to be registered as a foreign company and submit that section 911Q(3) should be redrafted to provide for a person's agent to be appointed under Division 2 of Part 5B.2 as its local agent "as if the FFSP was required to be registered as a foreign company under that Part of the Act".

Whilst we acknowledge that many FFSPs who carry on a financial services business in Australia may need to register as a foreign company under Part 5B.2, whether registration is required is a question of fact. It is common, for example, for an FFSP to only be caught by the AFSL regime by virtue of being deemed to be carrying on a financial services business in Australia pursuant to section 911D.

### 5.5 Access to FFSPs books

Most FFSPs carry on substantial international business and significant portions of their books have no connection to Australia.

We would invite Treasury to revisit whether the requirement to provide access to the FFSP's books pursuant to section 911J(4) of the Bill may be limited to those books *which relate to the provision of financial services to clients located in Australia*.

We consider that that would be a reasonable limitation which would allow ASIC to access books it legitimately would have an interest in, while preserving the confidentiality of books that are outside ASIC's remit.

## 6 Providing financial services efficiently, honestly and fairly

We note the new condition (in section 911N) for each of the Professional Investor Exemption, the Market Making Exemption and the Comparable Regulator Exemption, that FFSPs must ensure that the financial services are provided efficiently, honestly and fairly.

We note from the EM that the rationale for including this condition is to ensure consistency with the overarching and fundamental obligation that applies to Australian financial services licensees.

We note, however, that the requirement to act "efficiently, honestly and fairly" is a uniquely Australian requirement and has been interpreted in different ways by courts in recent years and is subject to a degree of uncertainty which has not yet been addressed in law reform in Australia.<sup>1</sup>

Given that the requirement to act "efficiently, honestly and fairly" is far from a clear concept for Australian licensees, let alone for FFSPs coming to the Australian market, imposing this requirement on FFSPs will increase the costs of compliance for FFSPs, which could have implications for them continuing to service the Australian market. As noted earlier, if FFSPs withdraw from the Australian market, that will restrict Australian investors' access to international managers and the international diversification that those managers provide.

We would prefer that the requirement to act "efficiently, honestly and fairly" does not apply at all to FFSPs but if Treasury considers that it is needed to an extent then we suggest that it is imposed on FFSPs using the Professional Investor Exemption or the Market Making Exemption only and that FFSPs using the Comparable Regulator Exemption are not subject to this requirement (which we submit is unnecessary for FFSPs which are regulated by a Comparable Regulator). We presume that, in determining an overseas regulator to be comparable, the Minister will have regard to the

<sup>1</sup> See for example the HSF articles <https://hsfnotes.com/fsraustralia/tag/efficiently-honestly-and-fairly/>, <https://hsfnotes.com/fsraustralia/2022/03/01/alrc-fsr-review-hsf-makes-submission-on-efficiently-honestly-and-fairly-reform/> and <https://hsfnotes.com/fsraustralia/2020/06/18/regulatory-rinkles-efficiently-honestly-and-fairly-part-2/>

relevant and comparable obligations on FFSPs in that jurisdiction. If the Minister is satisfied that such obligations are sufficiently comparable, we do not see a justification to impose this additional Australian obligation on those FFSPs.

In section 911N(3), we note the exemption for certain financial services relating to:

- (a) a product that is able to be traded on a financial market not operated under section 795B. As noted above, our preference would be for the requirement to act “efficiently, honestly and fairly” should not apply to FFSPs. However, if that view is not accepted, we consider that it should be clarified whether this exemption applies to Australian ‘exempt markets’ under section 791C; and
- (b) a derivative that has consideration or value that is ultimately determined, derived from or varied by reference to the value or amount of something else that is located outside Australia. Given that the exemption in section 911N(3)(a) does not extend to Australian licensed markets, we consider that there could be confusion as to whether an FFSP is required to act “efficiently, honestly and fairly” in relation to advising, dealing or making a market in exchange-traded derivatives on an Australian licensed market. If the requirement to act “efficiently, honestly and fairly” is retained, we suggest that Treasury considers whether all derivatives traded on an Australian-licensed market should be covered by the requirement to act “efficiently, honestly and fairly”, irrespective of where the underlying asset, index or other thing is located.

## 7 Requirement to monitor and train representatives

Proposed section 911Q(4) of the Bill requires FFSPs that use the Comparable Regulator Exemption to:

- (a) maintain adequate oversight over its representatives who provide each of those financial services in reliance on the exemption; and
- (b) ensure that its representatives who provide each of those kinds of financial service in reliance on the exemption are adequately trained, and are competent, to provide that kind of financial service.

We note that foreign AFSL holders are not required currently to ensure that their representatives are adequately trained.

We do not understand why such a requirement should apply to FFSPs using the Comparable Regulator Exemption and the justification for a higher standard to be imposed on them compared to the lower standard imposed on foreign AFSL holders.

In particular, given that the Comparable Regulator Exemption is only available to FFSPs from jurisdictions whose regulatory framework the Minister has deemed to be comparable to Australia’s, the laws of that FFSP’s home jurisdiction should adequately cover supervision and training of its representatives.<sup>2</sup> To then subject the FFSP to additional Australian laws appears to us to undermine the rationale for the exemption.

For the reasons set out above, we submit that this section should be deleted from the Bill.

## 8 Fit and Proper Person Test Exemption

Proposed section 914B(2A) of the Bill will exempt AFSL applicants from the fit and proper person test if they are already comparably regulated in their home jurisdiction.

In our view, most of the day-to-day difficulties posed by the test occur in relation to applicants who are subsidiaries of, or controlled, by an internationally regulated entity. In practical terms the proposed exemption will likely only assist applicants for a foreign

<sup>2</sup> See, for example, the UK Financial Conduct Authority’s requirements in [SYSC 5.1](#), which forms part of the FCA Handbook.



AFSL. Given the proposed exemptions under the Bill, we would expect future foreign AFSL exemptions to be limited.

We would invite Treasury to extend the scope of the Fit and Proper Person Test Exemption so that it applies to either an AFSL applicant that:

- (a) is comparably regulated and eligible to use the Comparable Regulator Exemption; or
- (b) is controlled or owned by an entity that is eligible to use the Comparable Regulator Exemption.

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Thank you for providing us the opportunity to comment on the Bill. If you would like to discuss the matters raised in this submission, please contact any of us at the details below.

Yours sincerely



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