

30 July 2021

Regulatory Powers and Accountability Unit  
Financial System Division  
The Treasury  
Langton Crescent  
Parkes ACT 2600

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

Dear Sir/Madam,

### **Consultation – Relief to Foreign Financial Service Providers**

The Australian Investment Council welcomes the opportunity to contribute to the Treasury's consultation on proposed changes to *Relief to Foreign Financial Service Providers*.

As a net importer of capital, Australia's economy relies on a dependable and steady flow of foreign capital to drive economic growth and job creation. At this critical juncture in our national response to the COVID-19 pandemic, it is vitally important for our economic recovery, and Australian jobs, that businesses can quickly and efficiently access capital from domestic as well as offshore investors to support the growth and expansion of existing businesses as well as the development of the new businesses and industries that underpin Australia's innovation ecosystem.

A strong investment regime anchored by policies that are commensurate with other jurisdictions is important for maintaining a stable and transparent investment framework that is attractive for domestic and foreign financial services providers to ensure that investment flows remain open, transparent and stable, thereby enabling our investment industry to continue to support portfolio companies during this time of heightened uncertainty.

The private capital industry's key recommendations for this consultation are set out in the submission below:

- licensing relief for Foreign Financial Services Providers (FFSPs) should be made to be competitive with other, similar jurisdictions so domestic investors with access to a competitive range of investment opportunities.
- The FFSP regime should provide a level playing field for domestic and foreign Australian Financial Services (AFS) licence holders so Australian licensees are not disadvantaged by the relief provisions available to FFSPs.
- The relief provisions should be structured to provide opportunities for domestic license holders to compete for outbound investment opportunities in other, similar jurisdictions.
- More clarity is needed on the FFSP framework so businesses have a clear understanding of when they need an AFSL or when they can apply for relief.

We look forward to participating in any future discussions on this consultation, or in any other area of policy that we can provide helpful support. Please do not hesitate to contact either Robyn Tolhurst via email at [robyn.tolhurst@aic.co](mailto:robyn.tolhurst@aic.co) or me at [ceo@aic.co](mailto:ceo@aic.co)

Yours sincerely



Yasser El-Ansary  
Chief Executive



## Overview

The Australian Investment Council is the voice of private capital in Australia. Private capital investment has played a central role in the growth and expansion of thousands of businesses and represents a multi-billion-dollar contribution to the Australian economy. Our members are the standard-bearers of professional investment and include: private equity (**PE**), venture capital (**VC**), corporate venture capital (**CVC**) and private credit (**PC**) funds, alongside family offices and institutional investors such as superannuation and sovereign wealth funds, as well as leading financial, legal and operational advisers.

Private capital fund managers invest billions of dollars into Australian companies every year. Funds under management of Australian-based private capital funds topped \$37 billion in 2020,<sup>1</sup> testament to the growth in available capital to support investment into businesses across every industry sector of the economy. Private capital investment offers smart, patient capital to privately backed companies along with expert guidance and strategic support.

More and more businesses are choosing to raise capital from private investors, rather than through public markets, because of the benefits of partnering with venture, private equity and private credit firms. Private capital investors can help unlock the growth and expansion opportunities of businesses through active asset management in a way that public markets simply cannot. This is evidenced by the fact that private capital-backed Australian businesses generate 1 in 9 new Australian jobs and contribute 2.6 per cent of Australia's GDP.<sup>2</sup>

Efficient access to foreign capital is a vitally important for enabling billions of dollars of investment capital to flow into Australian businesses. The industry's ongoing capacity to continue to invest greater amounts of capital into Australian businesses, leading to the creation of new high-value Australian jobs, cannot be assumed – policy must support must enable and encourage capital investment into the domestic market. While the private capital industry currently has more than \$13 billion in available capital to support current portfolio companies, the sector's ability to fund new investments, now and over the coming years, will be increasingly dependent on inbound capital from offshore investors. There are four main drivers underpinning the flow of private capital investment into the medium-term:

- 1) History shows investment into innovation and research falls after a crisis, despite being a key economic driver;
- 2) Early evidence of 'capital rationing' and some risk aversion materialising;
- 3) Constraints on access to institutional investment from superannuation funds due to a heightened focus on maintaining liquid positions and uncertainty in relation to future valuations; and
- 4) COVID-19 restrictions hampering the ability of fund managers to connect with (potential) investee businesses and institutional investors. This is particularly acute for new funds that do not have established relationships.

Uncertainty or perceived instability in policy structure around the relief provisions in the FFSP regime risks additional pressure in the already challenging current environment. The potential impact of this drag on investment and growth should not be downplayed. Nor should the impact on dampening collaboration and cross-pollination within Australia's economy. In considering the relief provisions for FFSPs, it is imperative that Treasury carefully balance the current and future needs of Australia businesses against need to maintain confidence in the system from domestic and FFSPs.

A number of recommendations relating to specific aspects of the consultation are included in the submission below. These recommendations are largely aimed at reducing uncertainty around the regime, creating a level-playing field for domestic and FFSPs, developing an investment framework that is competitive with other, sufficiently similar

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<sup>1</sup> [Preqin & Australian Investment Yearbook 2021](#)

<sup>2</sup> [Private Equity: Growth & Innovation](#), Deloitte 2018



jurisdictions, and facilitating access domestic AFS licensees to a competitive range of inbound and outbound investment opportunities.

### **1. Options in establishing a framework for FFSPs**

With \$3 trillion in superannuation assets, a well-established private capital market and rapidly growing high net wealth investors, Australia is an attractive market for inbound investment. Restoring an investment framework with the right balance of accredited jurisdictions and regulatory oversight is imperative for maintaining the important flow of inbound and domestic capital to the Australian market.

To this extent, the Council's view is that Option 2 would best meet these criteria with some modifications.

One such area is the list of jurisdictions which have previously been excluded from the "sufficiently equivalent" measure such as Japan, New Zealand, Ireland and Switzerland should be included on an expanded list of eligible "sufficiently equivalent" jurisdictions. This could also be extended to include IOSCO members with relevant regulatory oversight.

#### **Recommendation 1**

Expand the list of jurisdictions on the "sufficiently equivalent" list to include Japan, New Zealand, Ireland and Switzerland and include IOSCO members with relevant regulatory oversight.

### **2. Limited Connection Relief**

While the Council understands there has been some concern on the application of 'limited connection' relief, there will be circumstances that warrant this provision. To maintain the intent of the 'limited connection' relief and the integrity of the investment framework, certain measures could be implemented to tighten the previous conditions.

This could be achieved by mandating that the FFSP notifies ASIC in writing that it intends to rely on the relief in addition to the requirements under 'funds management relief' in the *Corporations Act (2001)*.

Consistent with the objective that this relief should only apply where financial services are provided to institutional investors, it would be prudent to limit this relief to 'professional investors' as the recipients of the financial services provided.

#### **Recommendation 2**

Strengthen the requirements of the 'limited connections' relief to require the FFSP to notify ASIC in writing of its intent to use the provision and make the relief only applicable to 'professional investors'.

### **3. Create a level playing-field**

While an appropriate test of the actual skills and authorisations held in the foreign countries needs to be applied, the Council's view is that this should include measures to ensure FFSPs are competing on a level playing field with domestic AFS licensees.

In the absence of a collective investment vehicle, Australia has an opportunity to develop an AFS framework that attracts inbound investment, and is also conducive to providing reciprocal rights to invest into countries with sufficiently equivalent frameworks. Australia should ensure any Free Trade Agreements include conditions that allow investment into the relevant country without licensing conditions.

Foreign managers who are able to rely on the sufficient equivalence relief should be required to genuinely establish that they have in their domestic jurisdictions the real equivalent authorisations. With no such test currently applied, foreign managers are in a more favourable position than domestic managers.



One solution would be to subject foreign managers to the same Net Tangible Asset tests applied to domestic managers. Another would be only to grant exemptions where Australian Managers are given equal exemptions in the foreign jurisdiction.

### **Recommendation 3**

Ensure the FFSP relief provisions are not impacting the ability of domestic managers by applying the same NTA tests to FFSPs as domestic AFS licensees.

### **Recommendation 4**

Capitalise on Australia's attractiveness as an investment destination by thorough agreements with countries with sufficiently equivalent frameworks for Australia to have reciprocal rights for inbound investment and fundraising. Ensure future Free Trade Agreements include conditions that:

- a) Allow investment by Australian AFS holders into the relevant country without licensing conditions, and
- b) allow Australian AFS licence holders to access investor capital from equivalent categories of professional investors in the foreign jurisdiction, without licensing conditions.

## **4. Conditions in Paragraph 34**

The Council's view is that the FFSP relief provisions need to provide a balance of regulatory oversight that is consistent with sufficiently similar jurisdictions but does not duplicate measures which the FFSPs have already met under their home regulators.

In this context, the following conditions for Option 2, could be omitted where FFSPs meet the sufficient equivalence criteria.

### **b): applying to ASIC for approval to use the relief**

The ASIC notification and lodgement process under the previous sufficient equivalence regime worked efficiently and would be the Council's preferred option to a new 'application process' which could be a deterrent for some FFSPs.

### **g): not dealing with unauthorised or unlicensed entities**

This clause may have unintended consequences if it is intended to include offshore entities. The council recommends this clause is deleted or clarified.

### **k): complying with auditing and reporting requirements**

If the FFSP is from a sufficiently equivalent jurisdiction, this may result in the duplication of auditing and reporting obligations. As an alternative option, the FFSP could be required to provide evidence of auditing and reporting on an annual basis.

### **l): ensuring that financial services are provided efficiently, honestly and fairly**

This should not apply to FFSPs with sufficiently equivalent status.

### **m): applying protections for dealing with client's money and property**

This should not apply to FFSPs with sufficiently equivalent status.

### **r): ensuring representatives are appropriately trained**

This should not apply if the FFSP has the appropriate training in their domestic regulatory environment.

### **s): providing certain periodic information to ASIC**



The FFSP should not be required to provide this information in an Australian format, but where relevant, provide the information in the format of their home jurisdiction. For example, financial statements. Other items in this section which require further detail on the purpose and context of the request are:

- name of foreign legal entity adviser promoting fund(s) in Australia, including name of onshore Australian licensee (where relevant)
- annual compliance attestation (xiii); and
- fund liquidity (xiv) and (xv).

**t): breach reporting obligations, similar to that of AFS licensees**

The obligation under the previous sufficient equivalence relief to notify ASIC of any significant enforcement or disciplinary action or significant investigation taken against the FFSP by the relevant regulatory authority in the FFSP's home jurisdiction should be retained.

**5. More clarity needed on what constitutes "carrying on a financial services business"**

The definition of "carrying on a financial services business in Australia" is one aspect of Australia's AFS licensing regime that has created uncertainty, has been the subject of legal action, and has been widely interpreted and applied. This is a grey area of law and can lead to costly and time-consuming analysis, for example, where the FFSP has regular contact with Australian investors or manages a global portfolio where a small proportion may include Australian investments.

Clarification of circumstances when an entity is "Carrying on a financial services business" through an updated definition in the *Corporations Act (2001)* and supporting regulatory guidance, would lead to more consistent and efficient industry practices.

**Recommendation 6**

Revise the definition of "carrying on a financial services business in Australia" in the *Corporations Act (2001)* to clarify circumstances of when an FFSP will or will not be carrying on a financial services business in Australia for AFS licensing purposes.

**6. Fast-tracked applications**

Many FFSPs have transitioned to the FFSP regime that was finalised by ASIC in June 2020. We understand that ASIC is continuing to process Foreign AFS licence applications and 'sufficient equivalence relief' applications from FFSPs, including for new entrants who are otherwise unable to rely on the current transitional relief.

FFSPs that have acted promptly to comply with the previously announced reforms would effectively be penalised for doing so if they are, once again, required to apply for any new form of licence or relief following Treasury's current consultation process. To the extent that any new forms of licence or relief are introduced following Treasury's current consultation process, we think it would be appropriate to provide for a more streamlined (or automatic) transition process for those FFSPs who have been issued with a Foreign AFS licence or sufficient equivalence relief since March 2020.