

2023

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

TREASURY LAWS AMENDMENT (MEASURES FOR FUTURE BILLS) BILL
2023: LICENSING EXEMPTIONS FOR FOREIGN FINANCIAL SERVICES
PROVIDERS

EXPOSURE DRAFT EXPLANATORY MEMORANDUM

Glossary

This Explanatory Memorandum uses the following abbreviations and acronyms.

| <i>Abbreviation</i> | <i>Definition</i> |
|----------------------------|---|
| ASIC | Australian Securities Investment Commission |
| Corporations Act | <i>Corporations Act 2001</i> |
| the regulations | <i>Corporations Regulations 2001</i> |

Outline of chapter

- 1.1 The Bill amends the Corporations Act to facilitate cross-border financial services while balancing the need to ensure regulatory oversight of foreign financial services provider activity in Australian financial markets by:
- providing an exemption from the requirement to hold an Australian financial services licence for persons that provide financial services from outside Australia to professional investors (the **professional investor exemption**);
 - providing an exemption from the requirement to hold an Australian financial services licence for persons regulated by comparable regulators and that provide financial services to wholesale clients (the **comparable regulator exemption**);
 - providing an exemption from the requirement to hold an Australian financial services licence for persons that provide financial services that involve making a market for derivatives that are able to be traded on a specified licensed market (the **market maker exemption**); and
 - fast-tracking the licensing process for persons seeking to establish more permanent operations in Australia by providing an exemption for persons regulated by comparable regulators from the fit and proper person test when applying for an Australian financial services licence to provide financial services to wholesale clients (the **fit and proper person test exemption**).

Context of amendments

- 1.2 Foreign financial services providers are overseas providers of financial services, including (but not limited to) banking, investment funding, wealth management, market making, and financial advisory services. Foreign financial services providers provide investors with access to global investment opportunities and increase competition in the Australian market. In particular, access to foreign financial services providers enables Australia's superannuation industry to diversify investment of Australia's significant retirement savings.

Current law

Need for an Australian financial service licence

- 1.3 In accordance with subsection 911A(1) of the Corporations Act, a person who carries on a financial services business in Australia must hold an Australian financial services licence covering the provision of the financial services. Unless exempt, the provision of a financial service in Australia without a licence is a contravention of a civil penalty provision under subsection 911A(5B) of the Corporations Act.

Exemption for financial services provided to professional investors

- 1.4 Subsection 911A(2) of the Corporations Act sets out a number of exemptions in which the requirement to hold an Australian financial services licence does not apply.
- 1.5 The existing professional investor exemption is located in subsection 911A(2E) of the Corporations Act (as inserted by regulation 7.6.02AG of the regulations). Regulation 7.6.02AG is made using the regulation-making power in paragraph 926B(1)(c) of the Corporations Act.
- 1.6 The existing professional investor exemption provides that a person is not required to hold an Australian financial services licence if the person:
- is not in this jurisdiction;
 - provides financial services to a professional investor (as defined in section 9 of the Corporations Act); and
 - deals in, advises on, or makes a market in, derivatives, foreign exchange contracts, carbon units, Australian carbon credit units or eligible international emission units.

ASIC relief for foreign financial services providers

- 1.7 Since 2003, ASIC has provided other types of licensing relief for foreign financial services providers, including ‘sufficient equivalence’ relief and ‘limited connection’ relief for the provision of financial services to wholesale clients. Both of these forms of relief allow foreign financial services providers to carry on a financial services business in Australia without an Australian financial services licence.

Sufficient equivalence relief

- 1.8 The purpose of the sufficient equivalence relief was to attract additional investment and liquidity to Australian financial markets by addressing the duplicated regulatory burden arising from compliance with Australia’s regulatory regime where foreign financial services providers were already subject to equivalent regimes in their home jurisdictions.
- 1.9 The sufficient equivalence relief applied in the following circumstances:
- the financial services were only provided to wholesale clients;
 - the financial services provided by the foreign company (which included a body corporate incorporated outside the jurisdiction and a partnership formed outside Australia) were regulated by an overseas regulatory authority;
 - the regulatory regime overseen by the overseas regulatory authority was deemed by ASIC as being sufficiently equivalent to Australia’s regulatory regime;
 - there was an effective cooperation arrangement in place between the overseas regulatory authority and ASIC; and
 - the foreign company met all of the relevant conditions for using the relief.
- 1.10 The sufficient equivalence relief was provided via ASIC Class Orders made by ASIC using its power under section 926A of the Corporations Act to grant relief from the requirements in Part 7.6 of the Corporations Act. The sufficient equivalence relief applied to foreign companies regulated by the following overseas regulatory authorities:
- US Securities and Exchange Commission;
 - US Federal Reserve and Office of the Comptroller of the Currency;
 - US Commodity Futures Trading Commission;

- Monetary Authority of Singapore;
- Hong Kong Securities and Futures Commission;
- Bundesanstalt für Finanzdienstleistungsaufsicht of Germany;
- Luxembourg Commission de Surveillance du Secteur Financier; and
- UK Financial Conduct Authority or Prudential Regulatory Authority.

- 1.11 On 31 March 2020, ASIC replaced the sufficient equivalence relief with a foreign financial services licensing regime, set out in the *ASIC Corporations (Foreign Financial Services Providers—Foreign AFS Licence) Instrument 2020/198*.
- 1.12 Since 1 April 2020, foreign companies that were no longer able to rely on the sufficient equivalence relief have been required to obtain an Australian financial services licence to carry on a financial services business in Australia.
- 1.13 Under transitional arrangements, foreign companies that were able to rely on the sufficient equivalence relief as at 31 March 2020 have until 31 March 2024 to obtain an Australian financial services licence, unless they are eligible for another type of relief or exemption.

Limited connection relief

- 1.14 ASIC’s limited connection relief was provided via a legislative instrument made under section 926A of the Corporations Act. The limited connection relief granted an exemption from the requirement for foreign companies to hold an Australian financial services licence for the provision of financial services and applied in the following circumstances:
- the person providing the financial services was not in Australia;
 - the financial services were only provided to wholesale clients;
 - the person was only taken to be carrying on a financial services business because the person engaged in conduct that was:
 - intended to induce people in Australia to use the financial services the person provided; or
 - was likely to have that effect.
- 1.15 ASIC replaced the limited connection relief with a narrower funds management relief, which commences on 1 April 2024.
- 1.16 Under transitional arrangements, the limited connection relief continues to apply until 31 March 2024. From 1 April 2024, persons that engage in conduct that is intended to, or likely to, induce Australian consumers to use the

financial services provided by the person, need to hold an Australian financial services licence if they are not eligible for another type of relief or exemption.

Fit and proper person test

1.17 Section 913B of the Corporations Act provides that if a person applies to ASIC for an Australian financial services licence under section 913A of the Corporations Act, ASIC must grant the licence if (and must not grant a licence unless):

- the application was made in accordance with the relevant requirements;
- ASIC has no reason to believe that the applicant is likely to contravene the general obligations that apply to a financial services licensee under section 912A of the Corporations Act, if the licence was to be granted;
- the fit and proper person test in section 913BA of the Corporations Act is satisfied in relation to the applicant and the licence applied for; and
- the applicant meets any other requirements prescribed by regulations.

1.18 Similarly, if a person makes an application for the imposition, variation or revocation of conditions on an existing licence under section 914A of the Corporations Act, ASIC may refuse the application if the fit and proper person test in section 913BA of the Corporations Act is not satisfied in relation to the applicant and the licence that is proposed to be varied.

1.19 In accordance with section 913BA of the Corporations Act, the fit and proper person test requires ASIC to be satisfied that there is no reason to believe that any of the following persons are not fit and proper to provide the financial services covered by the licence:

- the applicant;
- if the applicant is a body corporate— an officer of the applicant; or
- if the applicant is a partnership or the multiple trustees of a trust - the partners, the trustees or the senior managers of the partnership or the trust; and
- if the applicant is controlled by another person:
 - the controller;
 - if the controller is a body corporate—an officer of the controller;or

- if the controller is a partnership or the multiple trustees of a trust - the partners, the trustees or the senior managers of the partnership or the trust.
- 1.20 In determining whether a person is a fit and proper person under section 913BA of the Corporations Act, ASIC must have regard to the matters in section 913BB of the Corporations Act.

Summary of new law

- 1.21 The objective of the Bill is to allow Australian professional and wholesale investors to diversify their investment opportunities by reducing barriers to entry for foreign financial services providers in the Australian market, while ensuring appropriate regulatory oversight to maintain domestic market integrity and investor protection. This is intended to provide Australian investors with access to global financial markets and attract additional investment and liquidity to Australian markets.
- 1.22 The Bill achieves this objective by amending the Corporations Act to provide four licensing exemptions for foreign financial services providers. The intention is that the licensing exemptions in the Bill will replace the existing licensing relief for foreign financial services providers to implement a clear and comprehensive licensing exemption regime for foreign financial services providers.

Professional investor exemption

- 1.23 The new professional investor exemption provides an exemption from the requirement to hold an Australian financial services licence for persons that provide financial services from outside Australia (except during limited marketing visits) to professional investors.
- 1.24 This exemption replaces the existing professional investor exemption, which is located in subsection 911A(2E) of the Corporations Act (as inserted by regulation 7.6.02AG of the regulations).
- 1.25 The new professional investor exemption is available in the following circumstances:
- the financial service is provided only to professional investors;
 - the financial service does not involve a dealing in certain financial products tradeable on certain licensed markets;
 - the person provides the financial service from a place outside this jurisdiction (except during limited marketing visits);

- the person’s head office and principal place of business are located at one or more places outside this jurisdiction; and
 - the person reasonably believes that providing the same or substantially the same financial service would not contravene any law applying in the person’s principal place of business, head office or the place from where the financial services are provided.
- 1.26 Foreign financial services providers that trade in financial products that may have significant retail investor participation on licensed markets will remain subject to the requirement to obtain an Australian financial services licence. The narrowing of this exemption is intended to protect markets that may have retail investor involvement against potential impacts from activity by entities that are not subject to financial services licensing under the Corporations Act.
- 1.27 The Bill provides that regulations can be made to prescribe particular kinds of financial products, financial services, financial markets or professional investors to which the professional investor exemption does not apply. This allows for the exemption to be narrowed to address any future risks relating to market integrity or investor protection.
- 1.28 A person who uses the professional investor exemption to provide financial services to professional investors must comply with certain conditions. These conditions include (but are not limited to) doing all things necessary to ensure that financial services are provided efficiently, honestly, and fairly, notifying ASIC of the person’s intention to rely on the exemption, submitting to the non-exclusive jurisdiction of the Australian courts and complying with reasonable requests for assistance from ASIC.
- 1.29 If a person fails to comply with a condition, ASIC may take any of the following actions:
- apply to the court for a civil penalty and a pecuniary penalty order; or
 - after taking reasonable steps to give the person a notice of the proposed decision and a reasonable opportunity to appear (or be represented) at a private hearing and make submissions, either:
 - cancel a person’s exemption for the provision of some or all kinds of financial services; or
 - impose additional conditions on the person’s future use of an exemption.

Comparable regulator exemption

- 1.30 The comparable regulator exemption, which replaces the sufficient equivalence relief, provides an exemption from the requirement to hold an Australian financial services licence for foreign companies and partnerships formed outside Australia that provide financial services to wholesale clients.
- 1.31 The comparable regulator exemption is only available where the person is authorised, registered or licensed (as necessary) by a comparable regulator to legally provide the same or substantially the same financial service in a place outside Australia (the *comparable jurisdiction*).
- 1.32 A financial service provided under the comparable regulator exemption may be provided from within Australia or from the comparable jurisdiction.
- 1.33 A person that uses the comparable regulator exemption must comply with certain conditions. In addition to the conditions applicable to the professional investor exemption, a person is also required to comply with the following conditions:
- consent to information sharing between ASIC and each comparable regulator;
 - notify ASIC of any significant enforcement action, disciplinary action or investigation undertaken against the person by any regulator, government authority, or relevant financial market operator in any place outside Australia;
 - have an agent in Australia; and
 - maintain adequate oversight over its representatives and take reasonable steps to ensure that its representatives are adequately trained and competent to provide the financial services.
- 1.34 As with the professional investor exemption, a failure to comply with one or more of these conditions may result in ASIC applying to the court for a civil penalty and pecuniary penalty order, cancelling the person's exemption or imposing additional conditions on the person's future use of the exemption.

Market maker exemption

- 1.35 The market maker exemption provides an exemption from the requirement to hold an Australian financial services licence for a person making a market for derivatives that are able to be traded on prescribed licensed markets.

- 1.36 The new market makers exemption is only available in the following circumstances:
- the person is making a market for derivatives that are able to be traded on a licensed market prescribed by the regulations;
 - the person provides the financial service from a place outside this jurisdiction;
 - the person's head office and principal place of business are located at one or more places outside this jurisdiction; and
 - the person reasonably believes that providing the same or substantially the same financial service would not contravene any law applying in any of the places referred to in the above dot points.
- 1.37 A person that uses the market maker exemption must comply with the conditions also applicable to the professional investor exemption. These conditions include (but are not limited to) notifying ASIC of the person's intention to rely on the exemption, submitting to the non-exclusive jurisdiction of the Australian courts, complying with reasonable requests for assistance from ASIC and doing all things necessary to ensure that financial services are provided efficiently, honestly and fairly.
- 1.38 A failure to comply with one or more of these conditions may result in ASIC applying to the court for a civil penalty and pecuniary penalty order, cancelling the person's exemption or imposing additional conditions on the person's future use of the exemption.

Fit and proper person test exemption

- 1.39 Foreign companies or partnerships formed outside Australia that are authorised, registered or licensed (as necessary) to legally provide the same or substantially the same financial services by a comparable regulator and that only provide financial services to wholesale clients are exempt from the requirement to satisfy the fit and proper person test when applying for an Australian financial services licence under section 913A of the Corporations Act.
- 1.40 The fit and proper person test exemption also applies when a foreign company, or partnership formed outside Australia makes an application to impose, vary or revoke a condition on an existing Australian financial services licence under section 914A of the Corporations Act.

Minister's power to determine comparable regulators

- 1.41 The Bill provides that the Minister may, by legislative instrument, determine regulators that administer broadly comparable regulatory regimes. The comparable regulators determined by the Minister are applicable to both the comparable regulator exemption and the fit and proper person test exemption.
- 1.42 In making such a determination, the Minister must have regard to certain matters, and may also have regard to any other matter the Minister considers relevant.

Comparison of key features of new law and current law

Table 1.1 Comparison of new law and current law

| <i>New law</i> | <i>Current law</i> |
|--|--|
| <i>Professional investor exemption</i> | |
| <p>The new professional investor exemption applies in the following circumstances:</p> <ul style="list-style-type: none"> • the financial service is provided only to professional investors; • the financial service does not involve a dealing in certain financial products tradeable on certain licensed markets; • the person provides the financial service from a place outside this jurisdiction (except during limited marketing visits); • the person’s head office and principal place of business are located at one or more places outside this jurisdiction; and • the person reasonably believes that providing the same or substantially the same financial service would not contravene any law applying in the person’s principal place of business, head office or the place from where the financial services are provided. <p>The regulations may also prescribe that the exemption does not apply in relation to particular kinds of financial products, financial services or professional investors (if any).</p> | <p>The existing professional investor exemption applies in the following circumstances:</p> <ul style="list-style-type: none"> • the person is not in this jurisdiction; • the financial service is provided to a professional investor; and <p>the financial service involves dealing in, advising on, or making a market in, derivatives, foreign exchange contracts, carbon units, Australian carbon credit units or eligible international emission units.</p> |
| <p>A person relying on the new professional investor exemption must comply with specified conditions, including a condition to do all things necessary to ensure financial services are provided efficiently, honestly and fairly.</p> | <p>No conditions are specified</p> |

Licensing exemptions for foreign financial services providers

| <i>New law</i> | <i>Current law</i> |
|--|---------------------------|
| A failure to comply with one or more conditions may result in: <ul style="list-style-type: none">• the exemption being cancelled in relation to the provision of some or all financial services;• additional conditions being imposed on the person’s future use of the exemption; or• ASIC applying to the court for a civil penalty and a pecuniary penalty order. | |
| <i>Comparable regulator exemption</i> | |

| <i>New law</i> | <i>Current law</i> |
|---|---|
| <p>The comparable regulator exemption applies in the following circumstances:</p> <ul style="list-style-type: none"> • the financial service is provided only to wholesale clients; • the person is a foreign company or is a partnership formed outside this jurisdiction; • the person has and maintains any authorisations, registrations or licences necessary to legally provide the same or substantially the same financial service in a place outside this jurisdiction; • the regulator administering those authorisations, registrations or licences for the comparable jurisdiction is a regulator determined by the Minister; and • the person provides the financial service from this jurisdiction or from the comparable jurisdiction. <p>Persons using this exemption must comply with specified conditions. A failure to comply with one or more conditions may result in the exemption being cancelled, additional conditions being imposed on the future use of the exemption, or ASIC applying to the court for a civil penalty.</p> | <p>The sufficient equivalence relief provides for foreign companies regulated under sufficiently equivalent regulatory regimes to provide specified financial products and services to wholesale clients.</p> <p>Foreign financial services providers using this exemption must comply with specified conditions.</p> |

| <i>New law</i> | <i>Current law</i> |
|---|---|
| <i>Market maker exemption</i> | |
| <p>The new market maker exemption applies in the following circumstances:</p> <ul style="list-style-type: none"> • the financial service involves making a market for derivatives that are able to be traded on a licensed market prescribed by the regulations; • the person provides the financial service from a place outside this jurisdiction; • the person’s head office and principal place of business are located at one or more places outside this jurisdiction; and • the person reasonably believes that providing the same or substantially the same financial service would not contravene any law applying in the person’s principal place of business, head office or the place from where the financial services are provided. | <p>No exemption is specified</p> |
| <p>Persons using this exemption must comply with specified conditions. A failure to comply with one or more conditions may result in the exemption being cancelled, additional conditions being imposed on the future use of the exemption, or ASIC applying to the court for a civil penalty.</p> | <p>No conditions are specified</p> |
| <i>Fit and proper test exemption</i> | |
| <p>A foreign company or partnership formed outside of Australia that is regulated by a comparable regulator and provides financial services only to wholesale clients is exempt from the fit and proper person test when making an application for:</p> <ul style="list-style-type: none"> • an Australian financial services licence; or • the imposition, variation or revocation of conditions on an existing licence. | <p>A person who makes an application for an Australian financial services licence (or for the imposition, variation or revocation of conditions on an existing licence) must satisfy the fit and proper person test in relation to the applicant and the licence.</p> |

Detailed explanation of new law

- 1.43 The Bill amends the Corporations Act to facilitate cross-border financial services while balancing the need to ensure regulatory oversight of foreign financial services provider activity in Australian financial markets by:
- providing an exemption from the requirement to hold an Australian financial services licence for persons that provide financial services from outside Australia to professional investors (the ***professional investor exemption***);
 - providing an exemption from the requirement to hold an Australian financial services licence for persons regulated by comparable regulators that provide financial services to wholesale clients (the ***comparable regulator exemption***);
 - providing an exemption from the requirement to hold an Australian financial services licence for persons making a market for derivatives that are able to be traded on specified licensed financial markets (the ***market maker exemption***); and
 - fast-tracking the licensing process for persons seeking to establish more permanent operations in Australia by providing an exemption from the fit and proper person test for persons regulated by comparable regulators when applying for an Australian financial services licence for the provision of financial services to wholesale clients (the ***fit and proper person test exemption***).

Professional investor exemption

- 1.44 The Bill replaces the existing professional investor exemption, which is located in subsection 911A(2E) of the Corporations Act (as inserted by regulation 7.6.02AG of the regulations).
- 1.45 The new professional investor exemption replaces the existing exemption and is different to the existing exemption in the following ways:
- clarifies the requirements relating to the person's location when using the exemption;
 - allows financial services to be provided from within Australia during limited marketing visits;
 - provides that the exemption does not apply to dealings which involve a trade in certain financial products on certain licensed markets;

- provides for regulations to be made prescribing particular kinds of financial services, financial products or professional investors in relation to which the exemption does not apply;
- requires the person to reasonably believe that the provision of financial services would not contravene the laws of any relevant place; and
- imposes conditions on the use of the exemption.

1.46 A person that uses the new professional investor exemption must comply with specified conditions. These conditions are intended to ensure that ASIC has access to the necessary information to monitor the use of the exemption and promptly respond to conduct that may impact the integrity of Australian financial markets.

Who is eligible to use the professional investor exemption?

1.47 The new professional investor exemption provides that a person is exempt from the requirement to hold an Australian financial services licence under subsection 911A(1) of the Corporations Act, if the person satisfies all of the following requirements:

- the financial service is provided only to professional investors;
- the financial service does not involve a dealing in certain financial products tradeable on certain licensed markets;
- the person provides the financial service from a place outside this jurisdiction (except during limited marketing visits);
- the person's head office and principal place of business are located at one or more places outside this jurisdiction; and
- the person reasonably believes that providing the same or substantially the same financial service would not contravene any law applying in the person's principal place of business, head office or the place from where the financial services are provided.

[Schedule #, item 3, paragraph 911A(2)(eo) of the Corporations Act]

1.48 A person who relies on the professional investor exemption to provide financial services, but who does not satisfy the requirements to use this exemption, contravenes a civil penalty provision under subsection 911A(5B) of the Corporations Act. This civil penalty provision applies to persons who carry on a financial services business in Australia without an Australian financial services licence covering the provision of the financial service.

1.49 Subject to satisfying the relevant requirements, a person who uses the professional investor exemption may also use the comparable regulator exemption.

Professional investor

1.50 The new professional investor exemption adopts the existing definition of ‘professional investor’ in section 9 of the Corporations Act (as modified by regulation 7.6.02AE of the regulations).

[Schedule #, item 3, subparagraph 911A(2)(eo)(i) of the Corporations Act]

1.51 This definition provides that a professional investor:

- is an Australian financial services licence-holder;
- is a body regulated by the Australian Prudential Regulatory Authority (other than a trustee within the meaning of the *Superannuation Industry (Supervision) Act 1993*);
 - This category generally includes banks, general insurance companies and credit unions etc.
- is a registered entity within the meaning of the *Financial Sector (Collection of Data) Act 2001*;
- is a trustee of certain superannuation trusts or schemes within the meaning of the *Superannuation Industry (Supervision) Act 1993* that have assets of at least \$10 million;
- has or controls gross assets of at least \$10 million (including any assets held by an associate or under a trust that the person manages);
- is a listed entity or a related body corporate of a listed entity;
- is an exempt public authority;
- is an investment company that is a body corporate or unincorporated body that carries on a business of investment in financial products, interests in land or other investments or invests funds received following an offer or invitation to the public; or
- is a foreign entity that, if established or incorporated in Australia, would be covered by one of these categories.

1.52 While, in accordance with subsection 761G(7) of the Corporations Act, a professional investor is a type of wholesale client, the professional investor exemption does not apply more broadly to wholesale clients who are not professional investors.

Does not involve a dealing in certain financial products on certain markets

- 1.53 The new professional investor exemption does not apply to foreign financial services providers when their dealings involve a trade in certain financial products (largely equity market products) on certain licensed markets. This is to ensure adequate regulatory supervision, maintain domestic market integrity and protect retail investors from potential harm in prescribed domestic licensed markets that trade prescribed financial products.
- 1.54 The professional investor exemption does not apply where the person is involved in dealing in a financial product and all the following apply:
- the financial product is of a kind prescribed by the regulations and is able to be traded on a licensed market prescribed by the regulations;
 - the dealing involves one or more trades in relation to the specified financial product on the specified licensed market.

[Schedule #, items 3 and 4, subparagraph 911A(2)(eo)(ii) and section 911F of the Corporations Act]

- 1.55 The above applies whether or not the financial product is also able to be traded on another financial market.
- 1.56 The financial products and licensed markets will be prescribed by the regulations. It is appropriate to prescribe these matters in the regulations because it relates to technical detail to support the effective operation of the exemption and does not otherwise modify the operation of the exemption. In accordance with the *Legislation Act 2003*, regulations made under this power would be subject to disallowance and would therefore be subject to appropriate parliamentary scrutiny.

Outside this jurisdiction

- 1.57 The professional investor exemption only applies where the person provides the financial service from a place outside this jurisdiction (except during limited marketing visits).
- [Schedule #, item 3, subparagraph 911A(2)(eo)(iii) of the Corporations Act]***
- 1.58 In accordance with section 5 of the Corporations Act, ‘this jurisdiction’ means:
- each referring State (including its coastal sea); and
 - each Territory (including its coastal sea, if any); and
 - for the purposes of a provision of Chapter 7 of the Corporations Act — any external Territory prescribed in a regulation.

- 1.59 In accordance with subsection 102B(2) of the Corporations Act, ‘outside this jurisdiction’ includes places outside Australia.

Limited marketing visits

- 1.60 The Bill provides an exception to the requirement that the financial service be provided from a place outside this jurisdiction. This exception applies where the financial service is provided during one or more marketing visits to Australia undertaken by one or more representatives of the person.
[Schedule #, item 4, section 911E of the Corporations Act]
- 1.61 In accordance with section 910A of the Corporations Act, ‘representative’ of a person means:
- an employee or director of the person;
 - an employee or director of a related body corporate of the person; or
 - any other person acting on behalf of the person.
- 1.62 There is no restriction on the types of financial services that may be provided during a marketing visit. However, if regulations are made excluding particular kinds of financial products, financial services or professional investors from the professional investor exemption, then financial services involving these exempt financial products, financial services or professional investors must also not be provided during marketing visits.
- 1.63 For the purposes of this exception, the total length of marketing visits that the person may make in any financial year is no more than 28 calendar days. This includes public holidays and weekends.
[Schedule #, item 4, subsection 911E(2) of the Corporations Act]
- 1.64 ‘Financial year’ has the same meaning as in section 323D of the Corporations Act.
- 1.65 To ensure flexibility, marketing visits are not required to be undertaken in a single visit or by a single representative of the foreign financial services provider. Instead, marketing visits can be undertaken in one or more visits, and by one or more representatives of the person.
- 1.66 The 28 day limit for marketing visits includes each full or partial day on which the person is in Australia for a marketing visit, whether or not a financial service is provided on that day.
[Schedule #, item 4, subsection 911E(3) of the Corporations Act]
- 1.67 This allowance of 28 calendar days for marketing applies regardless of the number of representatives of the foreign financial services provider that are in Australia at the same time. Where two or more representatives of the person

are in Australia for a marketing visit on the same day, each day that the representatives are in Australia still only counts as a single day.

- 1.68 If, during a marketing visit, the person provides financial services from within Australia for more than 28 days in any given financial year, any financial services provided after the 28th day of that financial year are not in compliance with the professional investor exemption and may be in contravention of the civil penalty provision in subsection 911A(5B) of the Corporations Act (unless another exemption applies, or the person holds an Australian financial services licence, which covers the provision of that financial service).
- 1.69 There is no restriction on who may represent a person during a marketing visit, so long as the definition of ‘representative’ under section 910A of the Corporations Act is met. However, acting in this capacity beyond 28 days would require an Australian financial services licence.

Example 1.1 – Marketing visits – separate marketing visits

International Finance Ltd, is a foreign financial services provider whose head office and principal place of business are located in Japan. International Finance Ltd provides financial services from Tokyo.

In August 2024, Haru, the marketing manager at International Finance Ltd, travels to Australia to meet with various Australian superannuation funds. Haru’s marketing visit is for 14 days.

In November 2024, Sarah, another representative of International Finance Ltd. makes a follow up marketing visit to Australia. Sarah’s marketing trip is for a total of 21 days.

The combined length of marketing visits for International Finance Ltd in the 2024/25 financial year is 35 days.

If Sarah engages in any marketing activities during the final week of her trip (i.e. after the 28th day), International Finance Ltd may be in contravention of the civil penalty provision in subsection 911A(5B) of the Corporations Act for carrying on a financial services business in this jurisdiction without an Australian financial services licence.

Example 1.2 Marketing visits – two or more representatives

Global Investments Limited, is a foreign financial services provider whose head office and principal place of business is located in Malaysia. Global Investments Limited provides financial services from Kuala Lumpur.

On 1 September 2024, Helen and Cynthia, directors of the investments division at Global Investments Limited, arrive in Australia for a joint marketing visit. Helen and Cynthia's marketing visit ends on 28 September 2024.

Following Helen and Cynthia's visit, Global Investments Limited has exhausted its permitted allowance for marketing visits for the 2024/25 financial year.

Principle place of business and head office

- 1.70 The professional investor exemption requires the person's head office and principal place of business to be located at one or more places outside this jurisdiction.
[Schedule #, item 3, subparagraph 911A(2)(eo)(iv) of the Corporations Act]
- 1.71 This requirement is intended to ensure that the professional investor exemption is only used by persons genuinely operating from outside Australia.
- 1.72 If the location of the person's head office is not also the location of the person's principal place of business, then both of these locations must be in a place outside Australia.

Compliance with foreign laws

- 1.73 Finally, the person providing the financial service must reasonably believe that providing the same or substantially the same financial service would not contravene any law applying in any of the following places:
- the place where the person's head office is located; and
 - the place where the person's principal place of business is located; and
 - the place from where the person provides the financial service.
- [Schedule #, item 3, subparagraph 911A(2)(eo)(v) of the Corporations Act]*
- 1.74 This may require the person to form a reasonable belief that the provision of the financial service would not contravene the laws of up to three different jurisdictions.
- 1.75 For the purposes of this requirement, a person would be taken to contravene a law of a relevant place if the person fails to comply with a duty imposed under the law of a foreign jurisdiction, even if the provision imposing the duty is not itself an offence provision or a civil penalty provision (or equivalent).
- 1.76 However, this requirement does not restrict the provision of financial services that are permitted, but not otherwise regulated, in any of the relevant places.

- 1.77 For example, if the provision of a financial service to professional investors is not regulated in a relevant foreign jurisdiction, the person may provide the financial service, as long as the provision of the service is not in contravention of any law in that (or any other relevant) jurisdiction.
- 1.78 The requirement for a person to ‘reasonably believe’ requires the existence of facts sufficient to create such a belief in a reasonable person in the person’s position. This requires the person to rely on objective facts, rather than just mere suspicion.

Exceptions to the professional investor exemption

- 1.79 To address potential market risks as and when they may emerge, the Bill also provides for regulations to be made prescribing that the professional investor exemption does not apply for:
- a particular kind of financial service;
 - a particular kind of financial service in relation to a particular kind of financial product;
 - a particular kind of financial product; or
 - a particular kind of professional investor.

[Schedule #, item 4, section 911G of the Corporations Act]

- 1.80 In regard to professional investors, the regulations may be used to exclude a particular type or class of professional investor but may not be used to exclude a specific professional investor.
- 1.81 Regulations prescribing exceptions to the professional investor exemption are only intended to be made in exceptional circumstances where the application of the professional investor exemption to a particular kind of financial product, financial service, financial market, or professional investor is considered to pose a risk to investors, the regulatory regime, or the market.
- 1.82 Given that the professional investor exemption would not apply to excluded financial products or services, the provision of these types of financial products or services without an Australian financial services licence would be a contravention of the existing civil penalty provision in subsection 911A(5B) of the Corporations Act (unless the person is able to rely on another exemption covering the provision of these services).
- 1.83 Similarly, if regulations are made prescribing a kind of professional investor, the provision of financial services to this type of professional investor would require the person to hold an Australian financial services licence.
- 1.84 The regulation-making power to exclude particular kinds of financial products, financial services, financial markets, or professional investors from the

professional investor exemption is intended to provide the Government with the necessary flexibility to ensure the effective operation of the professional investor exemption and to respond to emerging risks and changes in global financial markets. In accordance with the *Legislation Act 2003*, regulations made under this power would be subject to disallowance and would therefore be subject to appropriate parliamentary scrutiny.

Comparable regulator exemption

- 1.85 The Bill provides an exemption from the requirement to hold an Australian financial services licence for persons that are regulated by comparable regulators and that only provide financial services to wholesale clients.
- 1.86 A person that relies on the comparable regulator exemption must comply with certain conditions.
- 1.87 Subject to satisfying the relevant requirements, a person who uses the comparable regulator exemption may also use the professional investor exemption to provide financial services.

Who is eligible to use the comparable regulator exemption

- 1.88 Under the comparable regulator exemption, a person is exempt from the requirement to hold an Australian financial services licence if the person satisfies all of the following requirements:
- the financial service is provided only to wholesale clients;
 - the person is a foreign company or is a partnership formed outside this jurisdiction;
 - the person has and maintains any authorisations, registrations or licences (however described) necessary to legally provide the same or substantially the same financial service in a place that is outside this jurisdiction (the *comparable jurisdiction*);
 - the regulator administering those authorisations, registrations or licences for the comparable jurisdiction is a regulator determined by the Minister (the *comparable regulator*); and
 - the person provides the financial service from this jurisdiction or from the comparable jurisdiction.

[Schedule #, items 1 and 3, section 9 and paragraph 911A(2)(ep) of the Corporations Act]

- 1.89 A person that relies on the comparable regulator exemption to provide financial services, but that does not satisfy the requirements to use this exemption, contravenes a civil penalty provision under subsection 911A(5B) of the Corporations Act.

Wholesale clients

- 1.90 The comparable regulator exemption may be used when the financial service is provided only to wholesale clients.

[Schedule #, item 3, subparagraph 911A(2)(ep)(i) of the Corporations Act]

- 1.91 In accordance with the existing definition of ‘wholesale client’ in sections 761G and 761GA of the Corporations Act (and regulations made for the purposes of these provisions), a person is a wholesale client if:
- the price for the provision of the financial product, or the value of the financial product to which the financial service relates, is equal to, or greater than, \$500,000;
 - the financial product or service, is provided for use in connection with a business that is not a small business;
 - A "small business" is defined as a business that has less than 20 employees, or, if it is a manufacturing business, has less than 100 employees;
 - the financial product or service is not provided for use in connection with a business, and the person acquiring the financial product or service provides a certificate from a qualified accountant that the person:
 - has net assets of at least \$2.5 million; or
 - has a gross income for each of the past two financial years of at least \$250,000;
 - the investor is a "professional investor" or a "sophisticated investor; or
 - ‘Professional investor’ is defined in section 9 of the Corporations Act.
 - ‘Sophisticated investor’ is described in section 761GA of the Corporations Act.
 - the person is controlled by a person who is a wholesale client.
- 1.92 Section 761G of the Corporations Act provides that a financial product or service is provided to, or acquired by, a wholesale client, if it is not provided to, or acquired by a retail client. The provision of financial products or services to retail clients is not covered by the comparable regulator exemption. This means that persons who provide financial services to retail clients must obtain

an Australian financial services licence covering the provision of those financial services under section 911A of the Corporations Act. This reflects the stronger consumer protections in place for retail clients under Part 7.6 of the Corporations Act.

Foreign company or partnership formed outside Australia

- 1.93 The comparable regulator exemption only applies to foreign companies or partnerships formed outside Australia.
[Schedule #, item 3, subparagraph 911A(2)(ep)(ii) of the Corporations Act]
- 1.94 ‘Foreign company’ is defined in section 9 of the Corporations Act as either:
- a body corporate incorporated in an external territory, or outside Australia and the external territories, and is not a corporation sole, or an exempt public authority; or
 - an unincorporated body that is formed in an external territory or outside Australia and the external territories and may sue or be sued or may hold property in the name of its secretary or of an appointed officer of the body and does not have its head office or principal place of business in Australia.
- 1.95 The application of the comparable regulator exemption to partnerships formed outside Australia is intended to include partnerships that are not otherwise captured within the definition of ‘foreign company’. For example, this could include a foreign partnership that may sue, or be sued, in the name of the partnership itself (rather than in the name of its secretary or an appointed officer of the body).
- 1.96 The requirement to be a foreign company or a partnership formed outside this jurisdiction is consistent with the application of the existing sufficient equivalence relief.

Authorisation in the comparable jurisdiction

- 1.97 To be eligible to use the comparable regulator exemption, a person must have and maintain any authorisations, registrations or licences (however described) necessary to legally provide the same or substantially the same financial service in the comparable jurisdiction.
[Schedule #, item 3, subparagraph 911A(2)(ep)(iii) of the Corporations Act]
- 1.98 The comparable jurisdiction is a place outside Australia where a regulator, that has been determined by the Minister as a comparable regulator, administers those authorisations, registrations or licences, as required to provide those financial services.

- 1.99 The requirement to hold any authorisations, registrations or licences only applies where there is a specific requirement to hold an authorisation, registration or licence to provide the same or substantially the same financial service in the comparable jurisdiction. If no such requirement applies, this requirement is taken to have been satisfied as it would otherwise be legal to provide that financial service in the comparable jurisdiction.
- 1.100 If, for example, dealings involving foreign exchange contracts are permitted but are not subject to regulation in a comparable jurisdiction, the person is taken to have satisfied the requirement to have and maintain any authorisation, registration or licence necessary to provide that kind of financial service in the comparable jurisdiction.
- 1.101 Where there is a requirement for a person to hold an authorisation, registration or licence to provide a particular kind of financial service in a comparable jurisdiction, the person must not only hold, but also maintain that relevant authorisation, registration or licence in the comparable jurisdiction while the provider relies on the exemption.
- 1.102 In this case, if the person loses (or gives up) this authorisation, the person will no longer be able to rely on the comparable regulator exemption to provide the financial service. In these circumstances, while notification is not required to be given to ASIC, the person may make a voluntary notification to ASIC that they no longer intend to rely on the comparable regulator exemption to provide that (or any) financial service.
- 1.103 If the person ceases to maintain the necessary authorisation to provide a financial service but intends to continue providing that financial service, the person would either need to rely on another exemption (if applicable), or apply for, and be granted, an Australian financial services licence covering the provision of that financial service. If neither applies, the person would be in contravention of the civil penalty provision under subsection 911A(5B) of the Corporations Act for carrying on a financial services business in Australia without an Australian financial services licence.

Comparable regulator

- 1.104 The comparable regulator exemption also requires that the person's authorisation, registration, or licence be administered by a regulator that is determined by the Minister as a comparable regulator.
[Schedule #, items 1 and 3, section 9 and subparagraph 911A(2)(ep)(iv) of the Corporations Act]
- 1.105 The Minister's power to determine a regulator for the purposes of the comparable regulator exemption is described below (*see paragraphs 1.2231.223 to 1.2291.229*).

- 1.106 A person using the comparable regulator exemption may be regulated by more than one comparable regulator, in more than one comparable jurisdiction. In any given situation, the relevant comparable regulator is to be determined in relation to the specific financial service provided to the recipient.

Financial service to be provided from Australia or comparable jurisdiction

- 1.107 Finally, the person must provide the financial service from within Australia or the comparable jurisdiction.
Schedule #, item 3, subparagraph 911A(2)(ep)(v) of the Corporations Act]
- 1.108 For example, if a person provides a financial service for which the comparable regulator is the UK Financial Conduct Authority, the person may only provide that financial service from either the United Kingdom or from Australia. Financial services provided from any other place would not satisfy the requirements for using the comparable regulator exemption and would require the person to hold an Australian financial services licence, or to rely on another exemption (if applicable).

Market maker exemption

- 1.109 The Bill provides an exemption from the requirement to hold an Australian financial services licence for foreign financial services providers from any jurisdiction making a market for derivatives that are traded on a licensed market prescribed by the regulations.
- 1.110 This exemption ensures that market makers can provide their services in relation to derivative products traded on anonymised markets.

Who is eligible to use the market maker exemption?

- 1.111 Under the market maker exemption, a person is exempt from the requirement to hold an Australian financial services licence if the person satisfies all of the following requirements:
- the financial service involves making a market for derivatives that are able to be traded on a licensed market prescribed by the regulations;
 - the person provides the financial service from a place outside this jurisdiction;
 - the person's head office and principal place of business are located at one or more places outside this jurisdiction; and

- the person reasonably believes that providing the same or substantially the same financial services would not contravene any law applying in any of the places referred to in the above dot points.

[Schedule #, item 3, paragraph 911A(2)(eq) of the Corporations Act]

Making a market for derivatives that are able to be traded on certain licensed markets

1.112 This market maker exemption only applies to a person making a market for derivatives that are able to be traded on certain markets.

[Schedule #, item 3, subparagraph 911A(2)(eq)(i) of the Corporations Act]

1.113 The reference to market making under the market maker exemption has the same meaning as ‘makes a market’ in section 766D of the Corporations Act. A person makes a market for a financial product if:

- either through a facility, at a place or otherwise, the person regularly states the prices at which they propose to acquire or dispose of financial products on their own behalf, unless the person is the issuer of the products and the products are:
 - superannuation products; or
 - managed investment products; or
 - financial products referred to in paragraph 764A(1)(ba) of the Corporations Act; or
 - foreign passport funds.
- other persons have a reasonable expectation that they will be able to regularly effect transactions at the stated prices; and
- the actions of the person do not, or would not if they happened through a facility or at a place, constitute operating a financial market because of the effect of paragraph 767A(2)(a).

1.114 This market maker exemption only applies to a person making a market for derivatives, which has the same meaning as ‘derivative’ in section 761D of the Corporations Act.

1.115 The exemption only applies to derivatives that are able to be traded on a licensed market prescribed by the regulations. The intention is for this exemption to apply to exchange traded futures and therefore the relevant licensed markets for these financial products will be specified in the regulations.

1.116 It is appropriate to prescribe the licensed markets in the regulations because it relates to technical detail which supports the effective operation of the exemption and does not otherwise modify the operation of the exemption. In

accordance with the *Legislation Act 2003*, regulations made under this power would be subject to disallowance and would therefore be subject to appropriate parliamentary scrutiny.

Outside this jurisdiction

- 1.117 The market maker exemption only applies where the person provides the financial service from a place outside this jurisdiction.
[Schedule #, item 3, subparagraph 911A(2)(eq)(ii) of the Corporations Act]
- 1.118 ‘This jurisdiction’ is defined in section 9 of the Corporations Act as meaning the geographical area that consists of:
- each referring State (including its coastal sea); and
 - each Territory (including its coastal sea, if any); and
 - for the purposes of a provision of Chapter 7 of the Corporations Act — any external Territory prescribed in a regulation.
- 1.119 In accordance with subsection 102B(2) of the Corporations Act, ‘outside this jurisdiction’ includes places outside Australia.

Principle place of business and head office

- 1.120 The market maker exemption requires the person’s head office and principal place of business to be located at one or more places outside this jurisdiction.
[Schedule #, item 3, subparagraph 911A(2)(eq)(iii) of the Corporations Act]
- 1.121 This requirement is intended to ensure that the market maker exemption is only used by persons operating from outside Australia.
- 1.122 If the location of the person’s head office is not also the location of the person’s principal place of business, then both of these locations must be in a place outside Australia.

Compliance with foreign laws

- 1.123 Finally, the person making a market must reasonably believe that providing the same or substantially the same financial service would not contravene any law applying in any of the following places:
- the place where the person’s head office is located; and
 - the place where the person’s principal place of business is located; and
 - the place from where the person provides the financial service.
- [Schedule #, item 3, subparagraph 911A(2)(eq)(iv) of the Corporations Act]*

- 1.124 This may require the person to form a reasonable belief that the provision of the financial service would not contravene the laws of up to three different jurisdictions.
- 1.125 For the purposes of this requirement, a person would be taken to contravene a law of a relevant place if the person fails to comply with a duty imposed under the law of a foreign jurisdiction, even if the provision imposing the duty is not itself an offence provision or a civil penalty provision (or equivalent).
- 1.126 However, this requirement does not restrict the provision of market making that is permitted, but not otherwise regulated, in any of the relevant places.
- 1.127 The requirement for a person to ‘reasonably believe’ requires the existence of facts sufficient to create such a belief in a reasonable person in the person’s position. This requires the person to rely on objective facts, rather than just mere suspicion.

Conditions – professional investor, market maker and comparable regulator exemptions

- 1.128 A person that uses, or intends to use, either the professional investor exemption, market maker exemption or the comparable regulator exemption must comply with certain conditions.
- 1.129 Many (but not all) of the conditions apply to all exemptions. The application of these conditions to the professional investor exemption, market maker exemption and the comparable regulator exemption are set out in the table below.

Table 1.2 Conditions for the professional investor, market maker and comparable regulator exemptions

| Provision | Condition | Professional investor exemption | Market maker exemption | Comparable regulator exemption |
|--------------------|---|--|-------------------------------|---------------------------------------|
| Subsection 911J(2) | Notify ASIC that the person has provided, or intends to provide, one or more kinds of financial services in reliance on the exemption | Applies | Applies | Applies |
| Subsection 911J(3) | Give ASIC reasonable assistance in relation to the performance and | Applies | Applies | Applies |

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

| Provision | Condition | Professional investor exemption | Market maker exemption | Comparable regulator exemption |
|--------------------|--|--|-------------------------------|---------------------------------------|
| | exercise of ASIC's functions and powers (which may include giving ASIC a copy of the person's books) | | | |
| Subsection 911J(5) | <p>Notify ASIC that the person agrees:</p> <ul style="list-style-type: none"> • to legal proceedings being brought in an Australian court for the provision of financial services in reliance on an exemption; • that such proceedings are to be determined in accordance with the law in force in Australia; and • to comply with any order of a court from such proceedings, unless it conflicts with an order made by a court in a specified place | Applies | Applies | Applies |
| Section 911K | Comply with a direction given by ASIC to provide information about the person's provision of financial services, or relevant financial service business | Applies | Applies | Applies |

Licensing exemptions for foreign financial services providers

| Provision | Condition | Professional investor exemption | Market maker exemption | Comparable regulator exemption |
|--------------------|---|--|-------------------------------|---------------------------------------|
| Section 911L | <p>Give each recipient of a financial service a notice, which states that:</p> <ul style="list-style-type: none"> • the person is exempt from the requirement to hold an Australian financial services licence covering the provision of that kind of financial service; and • identifies the exemption that the person is relying on to provide that financial service | Applies | Does not apply | Applies |
| Section 911M | Notify ASIC of any changes to the person's contact details as soon as practicable after the change happens | Applies | Applies | Applies |
| Subsection 911N(2) | Do all things necessary to ensure that the financial services are provided efficiently, honestly and fairly | Applies | Applies | Applies |
| Subsection 911P(2) | Notify ASIC that the person consents to ASIC and each comparable regulator sharing information about the person | Does not apply | Does not apply | Applies |
| Subsection 911P(4) | Notify ASIC of any significant enforcement action, disciplinary action or investigation | Does not apply | Does not apply | Applies |

| Provision | Condition | Professional investor exemption | Market maker exemption | Comparable regulator exemption |
|--------------------|--|--|-------------------------------|---------------------------------------|
| | undertaken against the person by a regulator, government authority, or relevant financial market operator in any place outside Australia | | | |
| Subsection 911Q(2) | Have an agent in Australia | Does not apply | Does not apply | Applies |
| Subsection 911Q(4) | The person must: <ul style="list-style-type: none"> • maintain adequate oversight over representatives providing financial services in reliance on the exemption; and • take reasonable steps to ensure that their representatives are adequately trained and competent to provide those kinds of financial services | Does not apply | Does not apply | Applies |

Notice to ASIC of reliance on exemption

1.130 A person that uses the professional investor exemption, the market maker exemption and/or the comparable regulator exemption must notify ASIC during the notification period that the person has provided, or intends to provide, one or more kinds of financial service in reliance on the specified exemption.

[Schedule #, item 4, subsections 911J(1) and (2) of the Corporations Act]

1.131 The notification period is the period:

- that begins 15 business days before the person starts to provide a financial service for the first time under the exemption after the commencement of this provision (on 1 April 2024); and

- that ends within 15 business days after the person starts to provide a financial service for the first time after 1 April 2024.

[Schedule #, item 4, subsection 911J(2) of the Corporations Act]

1.132 This notice must:

- specify which exemption the person has relied on, or intends to rely on, to provide one or more kinds of financial services;
- include a description of each kind of financial service that the person provides, or intends to provide, in reliance on the exemption; and
 - To reduce regulatory burden, a person may notify ASIC of more than one kind of financial service in a single notice.
 - However, additional notices may need to be given to ASIC if the kinds of financial services that the person provides, or intends to provide, changes after the initial notice is given.
- be given in writing and in a form that is approved by ASIC.
- include the person’s contact details, and any information, statements, explanations, or other matters required, and be accompanied by any other material specified.
 - The manner in which the notice is given may be specified by ASIC and may include submission in electronic form.

[Schedule #, item 4, subsection 911J(2) of the Corporations Act]

1.133 To ensure ASIC has full oversight of the use of the exemptions, this notice requirement also applies to persons who have previously, prior to the commencement of the Bill, given ASIC notice of its use of an existing relief (e.g. the sufficient equivalence relief).

Give ASIC reasonable assistance

1.134 ASIC may require a person to provide it with assistance, as reasonably requested, in relation to the performance and exercise of its functions and powers.

[Schedule #, item 4, subsection 911J(3) of the Corporations Act]

1.135 Assistance may, among other things, require the person to show ASIC the person’s books, give ASIC a copy of the person’s books, or give ASIC other information relevant to the performance and exercise of ASIC’s functions and powers.

[Schedule #, item 4, subsection 911J(4) of the Corporations Act]

Consent to the non-exclusive jurisdiction of the Australian courts

1.136 A person must give a notice to ASIC during the notification period that the person agrees:

- to legal proceedings relating to the provision of each of the kinds of financial service that it provides, or intends to provide, in reliance on the exemption, being brought in a court in Australia;
- that such proceedings would be subject to the law applicable to the provision of those kinds of financial services that is in force in Australia; and
- to comply with any court order from such proceedings to the extent that the order does not conflict with an order made by a court in a specified place.

[Schedule #, item 4, subsection 911J(5) of the Corporations Act]

1.137 For the purpose of identifying whether a court order conflicts with an order of a court in another place, a specified place is:

- professional investor exemption – any of the following places for the financial service:
 - the location of the person’s head office;
 - the location of the person’s principal place of business; or
 - the place from where the financial service is provided;
- comparable regulator exemption – the comparable jurisdiction for the financial service.

[Schedule #, item 4, subsection 911J(7) of the Corporations Act]

1.138 The notification period for this requirement is the same as for the notice to ASIC of reliance on an exemption.

1.139 A single notice may provide consent in relation to more than one kind of financial service. However, additional notices may be required to be given to ASIC if the kinds of financial services that the person provides, or intends to provide, changes after the initial notice is given.

1.140 This notice is required to be given in writing, in a form that is approved by ASIC and include any information, statements, explanations, or other matters required, and be accompanied by any other material specified. The manner in which the notice is given may be specified by ASIC and may include submission in electronic form.

[Schedule #, item 4, subsection 911J(6) of the Corporations Act]

Comply with an ASIC direction

1.141 ASIC may, at any time, give a person a written direction to provide it with a statement containing specified information on:

- any financial service, or kind of financial service, that the person provides in reliance on the exemption; or
- the person's financial services business of which that financial service is a part.

[Schedule #, item 4, subsections 911K(1) and (2) of the Corporations Act]

1.142 ASIC may also require specific information to be provided on a periodic basis, or each time a particular event or circumstance takes place, without having to give a separate direction on each occasion.

[Schedule #, item 4, subsection 911K(3) of the Corporations Act]

1.143 ASIC may only use this condition to give directions that relate to the financial service(s) provided under the exemption.

1.144 A person who receives a written direction from ASIC must comply with the direction within the time specified in the direction (if that is a reasonable time) or otherwise within a reasonable time. If required, ASIC may also extend the time within which the person must comply with the direction by giving the person a written notice to this effect.

[Schedule #, item 4, subsection 911K(4) of the Corporations Act]

1.145 In response to a written direction given by ASIC, the person must provide ASIC with a statement in a written form that is approved by ASIC. This response must include any information, statements, explanations, or other matters required, and be accompanied by any other material specified. The manner in which the notice is given may be specified by ASIC and may be in electronic form.

[Schedule #, item 4, subsection 911K(3) of the Corporations Act]

Notice to recipients

1.146 From 1 April 2024, before providing a financial service using either the professional investor exemption or the comparable regulator exemption, the person must give each recipient of a kind of financial service a written notice including a statement that:

- the person is exempt from the requirement to hold an Australian financial services licence covering the provision of that kind of financial service; and

- identifies which exemption (the professional investor exemption or the comparable regulator exemption) the person is relying on to provide the financial service.

[Schedule #, item 4, section 911L of the Corporations Act]

- 1.147 A recipient of a kind of financial service for the purposes of this obligation is either a professional investor or a wholesale client.
- 1.148 If it is not practicable to give the notice before providing the financial service, then the notice must be given to the recipient of the financial service as soon as practicable after the financial service is provided to that recipient.
- [Schedule #, item 4, paragraph 911L(2)(b) of the Corporations Act]***
- 1.149 Only a single notice is required to be given to each recipient for each kind of financial service provided in reliance on the exemption. To reduce regulatory burden, a notice may cover more than one kind of financial service that the person has provided, or intends to provide, the recipient under that exemption. This is intended to achieve a balance between ensuring that clients are adequately informed and reducing regulatory burden for foreign financial services providers.

Notify ASIC of changes to contact details

- 1.150 A person relying on the professional investor exemption or the comparable regulator exemption must also notify ASIC of any change to the person's contact details as soon as practicable after the change.
- [Schedule #, item 4, section 911M of the Corporations Act]***
- 1.151 As with the other notice requirements in the Bill, this notice must be provided in writing, be in the manner and form (including electronic form) specified by ASIC and include any information, statements, explanations, other matters or accompanying material specified by ASIC.
- [Schedule #, item 4, subsection 911M(2) of the Corporations Act]***
- 1.152 This notice is essential to enable ASIC to perform and exercise its functions and powers efficiently and effectively, including the requirement for ASIC to give foreign financial services providers notice of proposed decisions prior to an exemption being cancelled or additional conditions being imposed.

Ensure financial services are provided efficiently, honestly and fairly

- 1.153 A person that uses the professional investor exemption, the market maker exemption and/or the comparable regulator exemption must do all things necessary to ensure that financial services are provided efficiently, honestly and fairly.
- [Schedule #, item 4, section 911N of the Corporations Act]***

- 1.154 This condition is consistent with the overarching and fundamental obligation that applies to Australian financial services licensees. This condition imposes a standard of conduct on foreign financial services providers when relying on licensing exemptions and will ensure that ASIC can protect market integrity in a timely manner if it reasonably believes noncompliance with the condition.
- 1.155 The condition does not apply to the extent that:
- the financial services involve providing financial product advice, dealing in a financial product or making a market for a financial product:
 - where the financial product is not operated under an Australian market licence; or
 - the financial product is a derivative having a consideration or value that is ultimately determined, derived from or varied by reference to the value or amount of something else located outside Australia
 - the financial services are custodial or depository services involving holding financial products, or beneficial interests in financial products if:
 - the financial products were issued outside this jurisdiction; and
 - the financial products, or the beneficial interest, are being held outside this jurisdiction.

[Schedule #, item 4, subsection 911N(3) of the Corporations Act]

- 1.156 It is intended that the condition to act efficiently, honestly and fairly applies to financial services in relation to activity in Australian financial markets. This will ensure regulatory intervention is limited to situations of noncompliance which may impact domestic market integrity.
- 1.157 To address additional situations as and when they may emerge, the Bill also provides for regulations to be made prescribing any other circumstance where the efficiently, honestly and fairly condition may not apply. This regulation-making power is intended to ensure the effective operation of the condition and to respond to emerging risks and changes in global financial markets. In accordance with the *Legislation Act 2003*, regulations made under this power would be subject to disallowance and would therefore be subject to appropriate parliamentary scrutiny.

Other conditions – comparable regulator exemption only

- 1.158 A person that uses the comparable regulator exemption must also comply with the following additional conditions. These conditions do not apply to persons that only rely on the professional investor exemption or market maker

exemption to provide financial services.

[Schedule #, item 4, sections 911P and 911Q of the Corporations Act]

Consent to information sharing

1.159 During the notification period, a person who uses, or intends to use, the comparable regulator exemption must notify ASIC that the person consents to ASIC and the comparable regulator for each kind of financial service that the person provides in reliance on the exemption sharing information about the person.

[Schedule #, item 4, subsection 911P(2) of the Corporations Act]

1.160 The notification period is the same as the period during which a notice of reliance on the exemption must be given, and is the period:

- that begins 15 business days before the person starts to provide a financial service for the first time after the commencement of this provision (on 1 April 2024); and
- that ends within 15 business days after the person starts to provide a financial service for the first time after 1 April 2024.

1.161 A notice is only required to be given to ASIC once for each kind of financial service that the person provides, or intends to provide, in reliance on the exemption. To reduce regulatory burden, the notice may cover more than one kind of financial service that the person has provided, or intends to provide, under that exemption. However, additional notices may need to be given to ASIC if:

- the kinds of financial services that the person provides, or intends to provide, changes after the initial notice is given; or
- the comparable regulators for the provision of those kinds of financial services change (e.g. the person expands their business into other jurisdictions and is authorised by additional comparable regulators to provide financial services).

1.162 Appropriate information sharing arrangements between ASIC and each of the person's comparable regulators is necessary to enable timely and effective communication between the regulators about the foreign financial services provider.

1.163 As with the other notice requirements, this notice is required to be given in writing, be in a manner and form (including electronic form) approved by ASIC and include the information, explanation, statements, other matters and accompanying material specified by ASIC.

[Schedule #, item 4, subsection 911P(3) of the Corporations Act]

Notifying ASIC of significant enforcement actions, disciplinary actions and investigations in other jurisdictions

1.164 A person that uses the comparable regulator exemption must notify ASIC of any significant enforcement action, disciplinary action or investigation undertaken against the person by:

- any regulator in any place outside this jurisdiction;
- any government authority in any place outside this jurisdiction; or
- any operator of a financial market (that the person is a participant of) in any place outside this jurisdiction.

[Schedule #, item 4, subsection 911P(4) of the Corporations Act]

1.165 However, this requirement does not apply if giving such a notice would be contrary to a law in force in another jurisdiction (such as a secrecy provision prohibiting the sharing of this information).

[Schedule #, item 4, subsection 911P(6) of the Corporations Act]

1.166 This condition is not limited to notification about significant enforcement actions, disciplinary actions or investigations undertaken by a person's comparable regulator(s). Rather, the person must notify ASIC of each significant enforcement action, disciplinary action or investigation taken against the person by any foreign regulator, government authority or relevant financial market operator outside Australia.

1.167 In determining whether an enforcement action, disciplinary action or investigation is 'significant', the person may consider a number of factors including (but not limited to):

- whether the action relates to the provision of the financial service under the comparable regulator exemption;
- the extent to which the relevant conduct indicates that the foreign company's arrangements to ensure compliance with their obligations under the financial services laws are inadequate;
- the number and frequency of breaches;
- whether the person's actions have resulted in material loss or damage to a client(s);
- the size (severity) of the penalty (if applicable).

1.168 If such an action has been taken against a person, the person must notify ASIC as soon as practicable, and before 15 business days, after the day on which the person becomes aware (or would reasonably be expected to have become aware) of such an action.

[Schedule #, item 4, paragraph 911P(5)(a) of the Corporations Act]

- 1.169 The circumstances under which a person may reasonably be expected to have become aware of an action may vary on a case by case basis. However, one such circumstance could include when the person is given notice of an enforcement action, disciplinary action or investigation against them.
- 1.170 In the case of a significant investigation being undertaken against the person, the person is required to notify ASIC as soon as practicable, or before 15 business days after the day the person becomes aware (or would reasonably be expected to have become aware) of the investigation. In many cases, this notification may need to be given before the investigation has concluded and is required regardless of whether the investigation results in any enforcement action being taken against the person for the matter that was under investigation.
- 1.171 As with the other notice requirements in the Bill, this notice is required to be given in writing, be in a manner and form (including electronic form) approved by ASIC and include the information, explanation, statements, other matters and accompanying material specified by ASIC.
[Schedule #, item 4, paragraph 911P(5)(b) of the Corporations Act]

Local agent

- 1.172 A person must not provide financial services in reliance on the comparable regulator exemption for a period of more than nine consecutive business days without an agent.
[Schedule #, item 4, subsection 911Q(2) of the Corporations Act]
- 1.173 An agent is required to be:
- a natural person or a company;
 - resident in Australia; and
 - authorised to accept on the foreign company or partnership's behalf service of process and notices.
- 1.174 An agent must be appointed in accordance with the following requirements:
- if the person is a foreign company - Division 2 of Part 5B.2 of the Corporations Act; or
 - if the person is partnership formed outside this jurisdiction (other than a foreign company) – regulation 7.6.03B of the Corporations Regulations, which is made under paragraph 912A(1)(j) of the Corporations Act.
- [Schedule #, item 4, subsection 911Q(3) of the Corporations Act]*

1.175 This is intended to streamline the requirements for foreign financial services providers by relying on existing requirements under the Corporations Act, rather than introducing new requirements.

Adequate oversight over representatives

1.176 Finally, a person who uses the comparable regulator exemption must:

- maintain adequate oversight over its representatives that provide financial services in reliance on the exemption; and
- take reasonable steps to ensure that those representatives are adequately trained and competent to provide those kinds of financial services.

[Schedule #, item 4, subsection 911Q(4) of the Corporations Act]

1.177 This condition requires foreign financial services providers to put in place appropriate systems and processes to ensure that its representatives are adequately supervised, trained and competent to provide financial services in reliance on the comparable regulator exemption. Financial services provided by representatives, which are not provided in reliance on this exemption, are not within scope of this condition.

Consequences of failing to comply with a condition

1.178 A failure to comply with a condition under the professional investor exemption, the market maker exemption or the comparable regulator exemption does not result in automatic cancellation of an exemption. However, it may result in ASIC taking any of the following actions:

- applying to the court for a declaration of contravention of a civil penalty provision and a pecuniary penalty order; or
- after taking reasonable steps to give the person a notice of the proposed decision and giving the person a reasonable opportunity to appear (or be represented) at a private hearing before ASIC and to make submissions, ASIC may:
 - completely cancel a person’s exemption (in relation to the provision of any financial service under the exemption);
 - partially cancel a person’s exemption (in relation to one or more specified kinds of financial service); or
 - impose additional conditions on the person’s future use of an exemption in relation to some or all of the kinds of financial services provided under the exemption.

[Schedule #, item 4, subsection 911H(4) and sections 911S and 911V of the Corporations Act]

Cancelling an exemption

1.179 ASIC may cancel the exemption of a person who uses the professional investor exemption, the market maker exemption or the comparable regulator exemption in the following circumstances:

- the person fails to comply with one or more conditions for using the exemption;
 - A cancellation may be partial (apply to one or more specified kinds of financial service) or complete (apply to any financial service);
- ASIC reasonably believes that the person has contravened the condition to do all things necessary to provide financial services efficiently, honestly and fairly;
- ASIC reasonably believes that a person mentioned in section 913BA of the Corporations Act, is not a fit and proper person to provide the financial services.
 - In all cases, this cancellation would be complete and apply to the provision of all financial service provided under the exemption;
 - The fit and proper person test applies to the foreign financial services provider, the controller of the provider (if applicable), and an officer, partner, trustee or senior manager of the provider or the controller of the provider;
 - In determining whether a relevant person is a fit and proper person, ASIC must have regard to the matters specified in section 913BB of the Corporations Act; or
- the person fails to comply with an additional condition imposed by ASIC.

[Schedule #, item 4, sections 911S and 911T of the Corporations Act]

1.180 In the case of a contravention of a condition, ASIC may use its discretion to decide whether the cancellation of a person's exemption should be partial or complete. This is necessary to ensure that ASIC has an appropriate range of enforcement tools and allows ASIC to assess the surrounding circumstances underpinning the non-compliance to determine the appropriate action to take in any given situation.

- 1.181 However, such a discretion does not apply where ASIC reasonably believes that the person, or someone related to the person, is not a fit and proper to provide the financial service. In each such instance, ASIC must completely cancel the person's exemption.
- 1.182 Before cancelling a person's exemption (partially or completely), ASIC must take reasonable steps to give the person a written notice of the proposed cancellation along with the reasons for it.
[Schedule #, item 4, subparagraph 911U(1)(a)(i) of the Corporations Act]
- 1.183 ASIC must also give the person a reasonable opportunity to appear (or be represented) at a private hearing before ASIC and to make submissions to ASIC on the matter.
[Schedule #, item 4, subparagraph 911U(1)(a)(ii) of the Corporations Act]
- 1.184 If a hearing is held or submissions are made, ASIC must take into account any information given to it at the hearing or in the submissions.
[Schedule #, item 4, paragraph 911U(1)(b) of the Corporations Act]
- 1.185 To optimise flexibility, hearings are not required to be held in person, or to be held in a single location.
- 1.186 The purpose of a hearing is to provide a person with an opportunity to provide information or an explanation of events, which may assist ASIC to decide whether or not to cancel the exemption, and whether the cancellation should be partial or complete (where applicable). While a person is not required to appear at a hearing or make a submission, having the opportunity to do so ensures that foreign financial services providers have access to adequate procedural safeguards.
- 1.187 Following a hearing or consideration of submissions, if ASIC decides to cancel a person's exemption (partially or completely), ASIC must take reasonable steps to provide the person with a written notice of the cancellation and its reasons for the decision.
[Schedule #, item 4, paragraph 911U(2)(a) of the Corporations Act]
- 1.188 The cancellation notice must also include the date from which the cancellation is to take effect, which must not be before the day the notice is given to the person.
[Schedule #, item 4, paragraph 911U(2)(b) of the Corporations Act]
- 1.189 The cancellation of an exemption by ASIC is not a legislative instrument within the meaning of a legislative instrument in section 8(1) of the *Legislation Act 2003*. Cancellations are administrative in character as they do not determine or alter the law, but rather they apply the law to specific persons.
- 1.190 If ASIC takes reasonable steps but is unable to notify the person of its proposed and final decision to cancel the person's exemption, for example, because the person has failed to keep their contact details up-to-date, ASIC's

decision to cancel the person's exemption is still valid. This requirement for ASIC to take reasonable steps to give notices to the person is intended to achieve a balance between the need for legislative and administrative certainty and the need to maintain adequate procedural safeguards for the person.

- 1.191 A person may apply to the Administrative Appeals Tribunal for a merits review of ASIC's decision to cancel a person's exemption.
- 1.192 If the person's exemption is cancelled by ASIC, the person may not carry on a financial services business in Australia without an Australian financial services licence (unless eligible to rely on another exemption or relief). The provision of a financial service without an Australian financial services licence in these circumstances would be a contravention of the civil penalty provision in subsection 911A(5B) of the Corporations Act.

Additional conditions

- 1.193 ASIC may impose additional conditions on a person's future use of an exemption in the following circumstances:
- as an alternative to cancelling a person's exemption if a person fails to comply with:
 - a condition under either the professional investor exemption, the market maker exemption or the comparable regulator exemption;
 - an additional condition imposed on a person's use of the exemption for a previous contravention of a condition; or
 - if a person contravenes a condition for using an exemption and fails to provide ASIC with full particulars of the contravention.

[Schedule #, item 4, paragraphs 911H(1)(b), 911H(2)(b) and 911H(3)(b) and sections 911R and 911V of the Corporations Act]

- 1.194 The additional conditions may apply to:
- one or more specified kinds of financial service provided in reliance on the exemption; or
 - any kind of financial service provided in reliance on the exemption.

[Schedule #, item 4, subsection 911V(1) of the Corporations Act]

- 1.195 If a person contravenes a condition for using the professional investor exemption, the market maker exemption or the comparable regulator exemption, the person must give ASIC a notice with full particulars of the contravention. This notice is required to be given to ASIC as soon as practical, and before the 15th business day, after the day on which person becomes aware,

or would reasonably be expected to have become aware of the contravention.
[Schedule #, item 4, section 911R of the Corporations Act]

- 1.196 The circumstances in which a person would become aware, or reasonably be expected to become aware, of a contravention may vary but would reflect the actions of a reasonable person in the position of the foreign financial services provider.
- 1.197 If a person fails to give ASIC details of a contravention of a condition, ASIC may only impose additional conditions on the person's use of the exemptions (in relation to one or more specified kinds of financial service). Unlike for contraventions of a condition, ASIC does not have the power to cancel the person's exemption or apply to the court for a civil penalty order.
- 1.198 Examples of possible additional conditions that ASIC could impose include strengthening disclosure obligations to recipients of the financial service, requiring the person to provide regular reports (e.g. quarterly) to ASIC on the financial services provided under the exemption or limiting the types of financial products or services that may be provided under the exemption. The additional condition imposed on the person is intended to be determined on a case by case basis at the discretion of ASIC.
- 1.199 Providing ASIC with the power to impose additional conditions is appropriate to ensure that ASIC is able to take appropriate and effective action to promote compliance with the regulatory regime, without unnecessarily disrupting the provision of financial products and services by cancelling a person's exemption.
- 1.200 As with the procedure for cancelling a person's exemption, before ASIC can impose one or more additional conditions, ASIC must take reasonable steps to give the person a written notice of its proposed decision to impose additional conditions, the reasons for this proposed decision and provide the person with a reasonable opportunity to appear (or be represented) at a private hearing before ASIC and to make submissions to ASIC on that matter.
[Schedule #, item 4, paragraph 911W(2)(a) of the Corporations Act]
- 1.201 If a hearing is held or submissions are made, ASIC must take into account any information given to ASIC at the hearing or in the submissions.
[Schedule #, item 4, paragraph 911W(2)(b) of the Corporations Act]
- 1.202 If ASIC decides to impose additional conditions, ASIC must take reasonable steps to notify the person in writing of the decision and the reasons for it and to specify the date on which this decision takes effect (which must not be before the day the notice is given to the person).
[Schedule #, item 4, subsection 911W(3) of the Corporations Act]
- 1.203 ASIC's decision to impose one or more additional conditions on the person's future use of an exemption is a reviewable decision. A person may apply to the Administrative Appeals Tribunal for a merits review of this decision.

- 1.204 If ASIC imposes one or more additional conditions on a person, ASIC may vary or revoke those additional conditions either on application by the person or on its own initiative.
[Schedule #, item 4, subsection 911V(2) of the Corporations Act]
- 1.205 An application to vary or revoke an additional condition must be in writing, be in a manner and form (including electronic form) specified by ASIC and include the information, statements, explanation, other matters and accompanying material specified by ASIC.
[Schedule #, item 4, subsection 911V(3) of the Corporations Act]
- 1.206 If ASIC proposes to make one of the following decisions, it must take reasonable steps to give the person a notice of its proposed decision, and an opportunity to appear (or be represented) at a hearing and make submissions:
- vary an additional condition on ASIC’s own initiative; or
 - refuse to grant a person’s application to vary or revoke an additional condition.
- [Schedule #, item 4, subsections 911W(1) and (2) of the Corporations Act]*
- 1.207 If ASIC makes the proposed decision, it must take reasonable steps to provide the person with notice of its decision, and the reasons for it, the day that the decision is to take effect.
[Schedule #, item 4, subsection 911W(3) of the Corporations Act]
- 1.208 Decisions by ASIC to vary a condition on its own initiative, or to refuse an application to vary or revoke a condition, are reviewable decisions and subject to merits review by the Administrative Appeals Tribunal.

Civil penalty

- 1.209 If a person fails to comply with a condition for using the professional investor exemption, the market maker exemption or the comparable regulator exemption, ASIC may apply to the court for a declaration of contravention of a civil penalty provision.
[Schedule #, items 4 and 9, subsection 911H(4) and 1317E(3) of the Corporations Act]
- 1.210 If ASIC makes an application to the court, and the court is satisfied that the person has contravened a civil penalty provision for failing to comply with one or more conditions, the court must make a declaration of contravention and may order the person to pay a financial sanction, known as a pecuniary penalty order.

- 1.211 Section 1317G of the Corporations Act sets out the maximum pecuniary penalty that the court may order for a contravention of a civil penalty provision by an individual or by a body corporate.
- 1.212 The value of a penalty unit is prescribed in the *Crimes Act 1914*.
- 1.213 The process and penalty for contravening the civil penalty provision are the same as for existing civil penalty provisions under the Corporations Act.
- 1.214 The civil penalty provision is considered necessary and proportionate to promote compliance and strengthen integrity measures for the new professional investor, market maker and comparable regulator exemptions. Further, the civil penalty provides an alternative to cancelling a person's exemption, and thereby provides another means by which to promote compliance without disrupting the provision of financial services.
- 1.215 In accordance with subsection 5(4) of the Corporations Act, the civil penalty provision applies in relation to acts and omissions outside this jurisdiction. There is a general presumption against the extraterritorial application of laws. However, in this case the extraterritorial application of the civil penalty provision is considered appropriate given that:
- there is a sufficiently close connection between Australia and the civil penalty provision given that a civil penalty is only triggered where a foreign financial services provider would, but for the exemptions, have required an Australian financial services licence;
 - Australia has a legitimate interest in ensuring that persons carrying on a financial services business in Australia are subject to appropriate regulation, including where the relevant conduct occurs outside this jurisdiction; and
 - the exercise of jurisdiction is balanced with other interests, including whether the provision captures conduct already captured by laws of other countries. In this case, the civil penalty provision does not apply to conduct regulated by other jurisdictions, and only applies in relation to conduct that would, but for the exemptions, have required the person to hold an Australian financial services licence.

Fit and proper person test exemption

- 1.216 The Bill provides an exemption from the requirement to satisfy the fit and proper person test in section 913BA of the Corporations Act when applying to ASIC for:
- an Australian financial services licence under section 913A of the Corporations Act, that if granted, would be limited to the provision of services to wholesale clients only; or

- the imposition of conditions, or additional conditions, on the licence, or the variation of revocation of conditions imposed on the licence under section 914A of the Corporations Act.
- 1.217 This exemption applies to a foreign company or partnership formed outside Australia and that is regulated by a comparable regulator.
- 1.218 The purpose of the fit and proper person test exemption is to fast-track the licensing process and reduce the administrative burden for persons that hold any authorisation, registration, or licence (as necessary) to provide the same or substantially the same financial service by a comparable regulator determined by the Minister.

Application of the fit and proper person test exemption

- 1.219 The fit and proper person test exemption for applications for an Australian financial services licences made under section 913A of the Corporations Act applies to applications made on or after the commencement of the Bill (on 1 April 2024).
[Schedule #, item 10, subsection 1695A(1) of the Corporations Act]
- 1.220 The fit and proper person test exemption for applications to impose, vary or revoke a condition on an existing licence made under section 914A of the Corporations Act applies to applications made on or after the commencement of the Bill. The exemption applies whether the licence was granted before, on, or after the commencement of the Bill.
[Schedule #, item 10, subsection 1695A(2) of the Corporations Act]
- 1.221 The fit and proper person test exemption only applies at the time an application is made under sections 913A or 914A of the Corporations Act. At all other times, ASIC may take appropriate enforcement action against an Australian financial services licence holder, such as by suspending or cancelling the licence, if ASIC has reason to believe that a relevant person (i.e. the licensee, an officer, partner, trustee or senior manager of the licensee or the controller of the licensee) is not a fit and proper person to provide the financial services covered by the licence.

Who is eligible for the fit and proper test exemption?

- 1.222 The fit and proper person test exemption is only available if an applicant (under section 913A or section 914A of the Corporations Act) meets all of the following requirements:
- the applicant is a foreign company or a partnership formed outside Australia;

- The requirement to be a foreign company or a partnership formed outside Australia ensures that entities formed or incorporated in Australia, but which are also regulated overseas, are not exempt from the fit and proper person test to be granted an Australian financial services licence.
- the licence, if granted, would be restricted to the provision of financial services to wholesale clients; and
 - ‘Wholesale client’ is defined in sections 761G and 761GA of the Corporations Act and regulations made for the purposes of these provisions.
- the applicant holds any authorisations, registrations, or licences (however described) necessary to legally provide the same or substantially the same financial service by a comparable regulator determined by the Minister.
 - The regulators determined by the Minister for the purposes of the fit and proper person test exemption are the same as the regulators determined for the purposes of the comparable regulator exemption.
 - If a comparable regulator permits, but does not regulate, the provision of a kind of financial service – this is taken to have satisfied the requirement to have any authorisation, registration or licence.

[Schedule #, items 5 to 8, subsections 913B(1), 913B(2A), 914B(2) and 914B(2A) of the Corporations Act]

Minister’s power to determine regulators – comparable regulator and fit and proper person test exemption

1.223 The Bill provides that the Minister may, by legislative instrument, determine regulators for the purpose of the comparable regulator exemption and the fit and proper person test exemption.

[Schedule #, item 4, subsection 911X(1) of the Corporations Act]

1.224 In making such a determination, the Minister must have regard to whether the regulatory regime that the regulator administers produces broadly comparable outcomes to Australia’s regulatory regime in regulating and improving the performance of the relevant financial services system and the financial services providers in that system.

[Schedule #, item 4, paragraph 911X(2)(a) of the Corporations Act]

1.225 The Minister must have regard to:

- whether the regulatory regime is clear, transparent, certain, and adequately enforced;
- whether the regulatory regime is broadly consistent with the Objectives and Principles of Securities Regulation, developed by the International Organization of Securities Commissions, as in force from time to time;
 - In assessing whether a regulatory regime is broadly consistent with these principles, the Minister may consider whether the regulator of that regime (or another international organisation) has assessed the regulatory regime against the principles and reasonably determined that the regulatory regime broadly complies with them;
 - The requirement that the regulatory regime be broadly consistent with the principles as in force from time to time is necessary to ensure that the requirement is flexible and responsive to changes in international standards and requirements;
 - A copy of the latest principles (published in May 2017) is available from:
<https://www.iosco.org/library/pubdocs/pdf/IOSCOPD561.pdf>;
- whether the regulator is either a signatory to the Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information, developed by the International Organization of Securities Commissions or is otherwise a party to any other effective cooperation arrangement with ASIC;
- any relevant submissions received from the regulator or from any entity in relation to the regulator or that regulatory regime;
 - ‘Entity’ is defined in section 64A of the Corporations Act as including a natural person, a body corporate (other than an exempt public authority), a partnership or a trust. In this case, entity would include a foreign financial services provider;
- any relevant advice (or assessment) received from ASIC;
 - ASIC may, on its own initiative or upon request from the Minister, give the Minister advice and/or an assessment on whether a foreign regulatory regime satisfies the requirements to be determined as administering a comparable regulatory regime;

- any other matters prescribed by the regulations for the purposes of this paragraph; and
- any other matter that the Minister considers relevant.

[Schedule #, item 4, subsections 911X(2) and (3) of the Corporations Act]

- 1.226 The requirement for the Minister to have regard to these factors is intended to provide assurance that the foreign financial services providers regulated by these foreign regulatory regimes are subject to similar regulatory oversight as Australian financial services licensees.
- 1.227 Once the Minister makes a determination that a regulator is a comparable regulator, foreign financial services providers regulated by these regulators are eligible to use the comparable regulator exemption and/or the fit and proper person test exemption, subject to satisfying the other requirements for each of these exemptions.
- 1.228 The Minister’s power to make a legislative instrument determining comparable regulators is considered appropriate and necessary as it relates to technical detail to support the effective operation of the legislation and ensures the list of regulators can be updated over time, as and when a regulator is determined as administering a broadly comparable regulatory regime to the regulatory regime administered by ASIC. In accordance with the *Legislation Act 2003*, a legislative instrument made by the Minister is disallowable and subject to sunseting and will therefore be subject to appropriate parliamentary scrutiny and periodic review.
- 1.229 The regulation-making power to prescribe other matters to which the Minister must have regard is also appropriate and necessary to be flexible and responsive to changes in global financial systems, regulatory regimes and international standards. The regulations are subject to disallowance and therefore subject to appropriate parliamentary scrutiny.

Application and transitional provisions

- 1.230 The professional investor exemption, market maker exemption and the comparable regulator exemption apply in relation to financial services provided on and after the day the Bill commences.
[Schedule #, item 10, section 1695 of the Corporations Act]
- 1.231 The Bill commences on 1 April 2024, which aligns with the end of the transitional arrangements for the existing ASIC relief instruments (sufficient equivalence relief and limited connection relief).
- 1.232 The fit and proper person test exemption for an application for an Australian financial services licence made under section 913A of the Corporations Act

applies to applications made on, or after, the commencement of the Bill.
[Schedule #, item 10, subsection 1695A(1) of the Corporations Act]

1.233 Applications for an Australian financial services licence made prior to commencement of the Bill, including applications that remain on foot (which have yet to be decided as at commencement), remain subject to the existing requirements and must satisfy the fit and proper person test in accordance with the requirements in section 913BA of the Corporations Act.

1.234 The fit and proper person test exemption for an application to impose, vary or revoke a condition on an existing licence made under section 914A of the Corporations Act apply to applications made on or after the commencement of the Bill. The exemption applies whether the licence was granted before, on, or after the commencement of this Schedule.
[Schedule #, item 10, subsection 1695A(2) of the Corporations Act]

1.235 Applications to impose, vary or revoke licence condition that are on foot at the time the Bill commences are subject to the requirements that were in force at the time the application was made.

1.236 The Bill provides that the Minister may, by legislative instrument, determine regulators that administer broadly comparable regulatory regimes for the purposes of the comparable regulator exemption and the fit and proper person test exemption.

1.237 For administrative efficiency, regulators that have already been assessed by ASIC as having comparable regulatory regimes by a similar process, prior to the commencement of the Bill, will be taken to be comparable regulators for the purposes of the first legislative instrument made under subsection 911X(1) of the Corporations Act, if the Minister is satisfied that:

- the regulator can be identified from a legislative instrument made by ASIC and in force immediately before the commencement of this section;
- the regulator is responsible for regulating the provision of financial services by providers in a place outside this jurisdiction; and
- the legislative instrument exempted those providers from certain provisions of Part 7.6 in relation to the provision of financial services.

[Schedule #, item 10, section 1695B of the Corporations Act]

1.238 Subject to the Minister's decision, this may result in the following regulatory authorities, which are specified in the *ASIC Corporations (Foreign Financial Services Providers—Foreign AFS Licensees) Instrument 2020/198*, being taken to be comparable regulators for the purposes of the first legislative instrument to be made by the Minister:

- US Securities and Exchange Commission (US SEC);
- US Federal Reserve and Office of the Comptroller of the Currency (OCC);
- US Commodity Futures Trading Commission (US CFTC);
- Monetary Authority of Singapore (Singapore MAS);
- Hong Kong Securities and Futures Commission (Hong Kong SFC);
- Bundesanstalt für Finanzdienstleistungsaufsicht of Germany (German BaFin);
- Luxembourg Commission de Surveillance du Secteur Financier (CSSF);
- UK Financial Conduct Authority or Prudential Regulatory Authority (UK FCA or PRA);
- Danish Financial Supervisory Authority (Danish FSA);
- Finansinspektionen (Swedish FI);
- Autorité des Marchés Financiers of France (French AMF);
- Autorité de contrôle prudentiel et de resolution of France (French ACPR); and
- Ontario Securities Commission (Ontario OSC).

1.239 Subject to the Minister’s decision, it is expected that these regulators will be deemed comparable regulators at the commencement of the Bill on 1 April 2024.

1.240 However, this is not intended to limit the Minister’s power to determine regulators. The Minister will be able to determine regulators that have not previously been determined as administering comparable regulatory regimes by ASIC following an assessment process.