UK cross-border trade in services with Australia

An analysis of market access for financial services firms

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Executive Summary

Against the backdrop of the UK pursuing an independent trade policy, there is enhanced focus on the UK-Australia trading relationship – a partnership that has always been important and goes well beyond economic considerations. Its pertinence is further amplified in a post Covid-19 world where the UK, along with its partner markets worldwide will seek to implement changes to aid economic recovery to mutual benefit.

This report identifies policy areas where joint focus, either through free trade agreement (FTA) negotiations or other trade tools such as mutual recognition agreements and regulatory dialogue, could address some of these common goals. The report does so by seeking to understand the implications for UK based firms of the recent changes to the Australian licensing regime for foreign financial services providers (FFSPs). It also analyses the experiences of UK based firms doing business, or seeking to do business in Australia, in the fields of asset management, banking and payments. Finally, the report addresses some cross-cutting issues that have arisen out of our interviews and which affect firms across a range of sectors.

Key findings and recommendations:

Licensing

- The Australian Securities and Investments Commission (ASIC) have repealed the Sufficient Equivalence Relief which allowed UK financial services firms to service wholesale clients in Australia on the basis that they were regulated by the Financial Conduct Authority (FCA). The new licensing regime will significantly increase the cost of providing financial services through imposing new compliance burdens on UK based firms going forward.

- The UK government could seek an exemption to this new regime as part of wider trade negotiations. In the absence of this opportunity, the UK should seek the effective operationalization of this new regime for UK based firms.

Asset Management

- Foreign Investment Review Board (FIRB) approvals are required for some investments which fall above a certain threshold. Approvals can take up to forty days and seeking these can delay the acquisition process and make firms uncompetitive. Some jurisdictions operate under higher thresholds that have been negotiated as part of trade agreements. As the UK pursues an FTA with Australia it should seek to secure these higher thresholds for UK based firms.

- Marketing foreign funds to investors in Australia is limited to the wholesale market. For the retail market, firms have launched Australian domiciled funds which essentially duplicate the investment strategy of the offshore fund. To mitigate the associated costs of this, some form of mutual recognition of funds should be explored.

Banking

- For historical reasons UK banks are limited in the services they can provide in comparison to their counterparts in other jurisdictions. An extension of the UK licence to bring it in line with the licence coverage of other jurisdictions would be of benefit to UK based firms.

- A certain degree of ambiguity exists around the booking of transactions facilitated by Australian entities of UK banks between non-Australian companies and clients. Firms have highlighted the differing registration rules as well as the lack of clarity makes booking these transactions difficult. Greater clarity, especially within the new licensing framework would be welcomed by firms.

- UK firms in Australia are subject to an interest withholding tax (IWT). This is a tax paid by UK banks on the interest they generate when they lend capital to Australian banks. Although there has been consensus around the removal of this tax, perhaps an FTA, and the changing regulatory landscape post Covid-19, will provide the impetus needed to achieve this.

Payments

- The hiring of a responsible manager can be costly for smaller FinTechs and payments firms seeking to enter the market. As this is a prerequisite of applying for an Australian Financial Services Licence (AFSL), they are required to fill this role ahead of operating in any meaningful way within the Australian market. Firms would be better placed to hire someone of this calibre once they have been operating in market for a period of time.

- The complexity of the regulatory system and its divergence from the European standard is an issue for UK based firms. Australian regulators have laid out plans to reform the retail payments sector in recognition of its overlapping regulatory frameworks. As these policy changes are enacted it would be valuable for UK based firms to have some form of equivalence or mutual recognition determination of key UK payments legislation when seeking to enter and operate in the Australian market.

- The expense related to the use of the New Payments Platform (NPP) as well as the regulatory burden for new entrants deter firms from using the NPP even though the faster payments are valuable to their business. Bringing down these costs as well as relaxing some of the regulatory burden could see wider adoption of the NPP for new entrants.

- An AFSL does not enable payments firms to deal in foreign exchange contracts. Firms are required to submit additional proofs to be able to offer certain services – an issue they do not face in other jurisdictions. An exemption or a more streamlined process would help firms widen the range of services they are able to offer Australian clients.

Other Considerations

- Under the Temporary Skills shortage structure, the two-year limit on visas makes it difficult to recruit staff and set up teams in Australian offices. This is further complicated by the onerous market testing requirements. A pathway for longer term employment would be of benefit to firms.

- Although the sandboxing facilitated by the FinTech Bridge had been very useful for firms, they would benefit from a scaling up programme and a defined pathway out of the sandbox.

- Reducing the regulatory fragmentation between the two markets would be beneficial for cross-border trade. An example cited here was the regulations around anti-money laundering. Greater coherence in the regulation between jurisdictions will be of mutual benefit.

The recommendations made here generally fall outside the remit of what can be achieved in an FTA. A focus on regulatory cooperation will likely reap greater mutual benefits for the UK and Australian financial services sectors. Essentially this report has should be viewed as a starting point for continuing a dialogue on the UK-Australia future financial services relationship.

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Introduction

Strategic importance

The UK and Australia enjoy a strong trading relationship with growing opportunities for financial and professional services firms in both markets. UK businesses traded £18.1 billion worth of goods and services with Australia in 2019.[1] The UK is Australia's seventh largest trading partner and second largest outside the Asia-Pacific.[2] The UK was the second largest direct investor in Australia and the second largest recipient of Australian foreign direct investment (FDI) in 2019.[3] The stock of UK FDI in Australia was £35.6 billion in 2018, while Australia invested £15.9 billion in the UK.[4]

With the UK having left the EU, it is imperative that these mutually beneficial trade links are safeguarded. This becomes more pertinent in the post Covid-19 world. The pandemic has caused volatility worldwide and the extent of the economic fall out is uncertain. However the fundamental opportunities for the two markets are unchanged. The UK financial services industry, by virtue of its global reach and innovation, is ready and willing to help the recovery of its partner markets worldwide.

The UK has committed to start negotiations with Australia on a comprehensive FTA as soon as possible. The objective of the FTA is to bolster trade and investment between these markets as similar trade agreements have done in the past – since the US and Australia FTA came in to force for instance, two-way investment has tripled.[5]

The Australian market also presents a gateway to the Asia Pacific. UK based firms with operations in Australia can leverage the existing agreements and mechanisms such as the Asia Region Funds Passport and the Trans-Tasman Agreement to supply their services to a much broader range of clients. These agreements are also examples of what can be achieved to mutual benefit outside a formalised FTA.

1 ONS, UK total trade: all countries, non-seasonally adjusted.

2 Australian Government Department for Foreign Affairs and Trade, Trade & investment data, information & publications.

3 Australian Bureau of Statistics, 5352.0 – International Investment Position, Australia: Supplementary Statistics, 2018

4 ONS, Foreign direct investment involving UK companies: 2018. These rankings exclude UK Offshore Territories

5 'Building a Bridge, Boosting trade links with Australia and New Zealand for UK financial and professional services', July 2018

Against this backdrop, this report seeks to identify policy areas where joint focus, either through FTA negotiations or other trade tools like mutual recognition agreements and regulatory dialogue, could bring mutual benefits. The report does so by analysing the experiences of UK based firms doing business, or seeking to do business in Australia, in the fields of asset management, banking and payments.

The UK-Australia relationship in Financial Services

Australia presents a unique opportunity for UK based firms. Asset managers are able to access the world's fourth largest pension market[6], the changing regulatory landscape for Australian banks is opening the market up to foreign players and the Australian government has strengthened its commitment to become the regional leader in payments technology[7].

Up until recently UK based firms were able to enter the Australian market with relative ease through the exemptions offered under the Sufficient Equivalence Relief. The changes made by Australian regulators to the licensing regime for FFSPs impact upon UK based firms as they operate in or seek to enter the Australian market. Section one of this report will outline these and highlight what can be done to mitigate their effects.

Sections two, three and four will focus on the sectors of asset management, banking and payments. We conducted a number of interviews with UK based firms from these sectors who have a presence in Australia, to analyse the way in which they access the Australian market, the regulatory framework they operate within and where the sector specific barriers lie.

Through our interviews we also came across several cross-cutting issues which were prevalent for firms across a range of sectors such as regulatory fragmentation and mobility and visas. These are noted in the final section of the report.

For each barrier the report will seek to make a recommendation as to how it can be overcome to ensure greater access to and smoother operations within the Australian market for UK based financial services firms. With the regulatory overlaps that exist there is a huge amount of potential to encourage greater collaboration between these two markets.

Methodology

In order to develop our evidence-based recommendations for UK and Australian based policy makers to address barriers to trade for UK based firms in Australia, we conducted an analysis of the new licensing arrangement for FFSPs as outlined by ASIC. We consulted ASIC as well as several legal professionals who seek to understand the effect of this on foreign firms accessing or operating in the Australian market. We carried out a number of stakeholder

6 Austrade 'Australia has the Fourth Largest Pension Fund Assets in the World', Feb 2019

7 'From Strength to Strength, Boosting trade links with Australia and New Zealand for UK financial and professional services', Feb 2018

interviews with UK based firms who work within or utilise the sectors of asset management, banking and payments. We collated feedback and identified common barriers faced by firms in each sector which were used as the basis for a roundtable discussion with industry to assess the impact of these upon their business. We used this forum to formulate recommendations based on what solutions industry would find most useful and which can be implemented as part of FTA negotiations or through regulatory cooperation.

Existing mechanisms that underpin trade in financial and professional services

For services trade in particular, agreements and mechanisms that sit outside of a formalised FTA can be of significant mutual benefit. Australia has engaged in a number of these, some of which are highlighted below:

The UK-Australia FinTech Bridge

The growing UK-Australia relationship is evidenced by policy initiatives such as the UK-Australia FinTech Bridge. This was signed in March 2018 to address market access frictions experienced by firms. The Bridge facilitates increased commitment and collaboration between governments, regulators and trade departments.

Since the signing of the Bridge, 28 Australian FinTech companies have commenced business in the UK and 19 UK FinTech companies have commenced business in Australia. As part of the Bridge, the UK and Australia launched a Pilot Programme in 2019 to provide bespoke support to cohorts of 10 firms in each jurisdiction, including coaching, mentorship, and in-market introductions designed to accelerate success in each market.

The Asia Region Funds Passport (ARFP)

This is an economic initiative to support the development of the Asian funds management industry through improving market access and achieving greater regulatory harmonisation.[8] The passport enables funds domiciled in one jurisdiction to be sold in other ARFP jurisdictions. The current signatories are Australia, New Zealand, Japan, the Republic of Korea and Thailand.

Once registered, passport funds must comply with the Passport Rules. This includes rules about permitted investments, portfolio restrictions and limits, breach reporting, notifying the home and host regulators of certain changes, custody, financial reporting, annual reviews of compliance with the Passport Rules, redemption and valuation and de-registration.

The Trans-Tasman Agreement

The Trans-Tasman Mutual Recognition Agreement (TTMRA) was signed in 1996 between Australia and New Zealand. The objective of the TTMRA was to remove regulatory barriers and to thereby facilitate trade between Australia and New Zealand. This is intended to enhance the international

8 Asia Region Funds Passport **https://fundspassport.apec.org/about-us/about/**

competitiveness of enterprises, increase the level of transparency in trading arrangements, encourage innovation and reduce compliance costs for business.[9]

The TTMRA has developed over the years to include mutual recognition of a range of occupations and products. In 2012 Australian and New Zealand regulators announced mutual recognition arrangements for financial advisers which enables financial advisers to provide services in each other's countries based on the qualifications and experience they have attained from their home country.[10]

The TTMRA also allows an issuer to offer certain financial products in Australia and New Zealand using one disclosure document prepared under regulation in its home country. Regulators on both sides have entered a Memorandum of Understanding for the exchange of data and information relating to companies carrying on business on both sides of the Tasman and for mutual assistance.[11]

TTMRA works by treating New Zealand as a de facto Australian state government. The agreement is much more robust than simple mutual recognition in some areas. There are shared institutions, such as a common food standards agency and a Trans-Tasman council on banking supervision. The deal includes a common rulebook in certain areas, using harmonisation, instead of mutual recognition.[12]

9 Text of TTMRA, **https://www.dfat.gov.au/sites/default/files/ttmra.pdf**

10 ASIC media release **https://asic.gov.au/about-asic/news-centre/find-a-media-release/2012-releases/12-149mr-joint-asic-financial-markets-authority-media-release-trans-tasman-mutual-recognition-of-financial-advisers-announced/**

11 ASIC RG 190**https://download.asic.gov.au/media/4398520/rg190-published-25-july-2017.pdf**

12 Institute for Government, Trade After Brexit 2017 **https://www.instituteforgovernment.org.uk/sites/default/files/publications/IFGJ5896-Brexit-Report-171214-final.pdf**

ASIC licensing

Main Takeaways:

The ASIC have repealed the Sufficient Equivalence Relief which allowed UK based financial services firms to service wholesale clients in Australia on the basis that they were regulated by the FCA.

The new licensing regime will significantly increase the cost of providing financial services through imposing new compliance burdens on UK based firms going forward.

The UK government could seek an exemption to this new regime as part of wider trade negotiations. In the absence of this opportunity, the UK should seek the effective operationalization of this new regime for UK based firms.

In June 2018 ASIC released Consultation Paper (CP) 301[13] which proposed a modified licensing regime for FFSPs carrying on financial services business in Australia with wholesale clients. These proposals were then updated in CP 315.[14]

The system before ASIC's proposals

Any person who provides financial services in Australia must hold an AFSL unless relief is granted, or an exemption applies. ASIC was able to exempt a FFSP from the requirement to hold an AFSL under the Corporations Act.[15] This was extended when ASIC believed the foreign regulatory requirements of the overseas regime achieved similar regulatory outcomes to the full AFSL regime requirements.

Two types of relief existed:

Sufficient Equivalence Relief

The Sufficient Equivalence Relief was established with the aim of attracting additional investment and liquidity to Australian markets through addressing the potential duplicated regulatory burden arising from compliance with Australia's regulatory regime and similar regimes in FFSPs home jurisdictions.[16]

13 CP 301: **https://asic.gov.au/regulatory-resources/find-a-document/consultation-papers/cp-301-foreign-financial-services-providers/**

14 CP 315: **https://asic.gov.au/regulatory-resources/find-a-document/consultation-papers/cp-315-foreign-financial-services-providers-further-consultation/**

15 Foreign financial services providers: Practical guidance on transitional arrangements: **https://asic.gov.au/for-finance-professionals/afs-licensees/applying-for-and-managing-an-afs-licence/licensing-certain-service-providers/foreign-financial-services-providers-practical-guidance/**

16 CP 301: **https://asic.gov.au/regulatory-resources/find-a-document/consultation-papers/cp-301-foreign-financial-services-providers/**

In 2003 and 2004, ASIC introduced instruments that conditionally exempted FFSPs from holding an AFSL when:

- the financial services were provided to wholesale clients only
- the provision of the financial service by the FFSP was regulated by an overseas regulatory authority
- the regulatory regime overseen by the overseas regulatory authority was sufficiently equivalent to the Australian regulatory regime
- there were effective cooperation arrangements in place between the overseas regulatory authority and ASIC; and
- the FFSP met all the relevant conditions of relief contained in the relevant instruments.

What is a 'Wholesale Client'?

A person may fall within the definition of a wholesale client if, among other things, they are:

- a person purchasing a financial product, or a financial service related to a financial product, where the value of the product is above the prescribed threshold (currently set by the Corporations Regulations at A$500,000, although this is not available for derivatives)

- a person with certified net assets of at least A$2.5 million or a person who had a gross income for each of the past two financial years of at least A$250,000

- a 'professional investor'. This category includes AFS licensees, listed entities, banks and friendly societies, and other entities that may be presumed to have the expertise or access to professional advice to justify their being treated as wholesale.

In most cases foreign firms today would, when relying on the current exemptive relief, generally rely on the definition of 'professional investor' as the touchstone defining which Australian clients they can deal with. However, there are cases where foreign firms rely on the price or value test or the category allowing dealings with wealthy individuals whose net income or gross assets have been certified by an accountant.

Source:ASIC

The Sufficient Equivalence Relief i.e. the exemption to hold an AFSL where FFSPs are regulated under overseas regulatory regimes that ASIC assessed as sufficiently equivalent to the Australian financial services regime, was contained in seven different ASIC class orders:

- UK regulated financial service providers
- US SEC regulated financial service providers

- US Federal Reserve and OCC regulated financial service providers
- Singapore MAS regulated financial service providers
- Hong Kong SFC regulated financial service providers
- US CFTC regulated financial services providers; and
- German BaFin regulated financial service providers.

Thus, FFSPs from these jurisdictions were exempt from holding an AFSL.

Limited Connection Relief

In 2003, ASIC issued a class order[17] which provided licensing relief to FFSPs with a limited connection to Australia i.e. not from within the jurisdiction, from providing financial services to wholesale clients. A further condition of this class order is that the FFSP is carrying on a financial services business only by engaging in conduct that is intended to induce people in the Australian jurisdiction to use the financial services it provides, or is likely to have that effect.

ASIC review of FFSP relief[18]

The class orders under which FFSPs were granted Sufficient Equivalence Relief were originally due to expire between 1 October 2016 and 1 April 2017. Firms were given a two-year extension in 2016 in order for ASIC to undertake a policy review.[19] ASIC also released CP 268 which sought feedback specifically on their proposal to repeal the Limited Connection Relief.

As part of the policy review, ASIC identified some supervisory and regulatory concerns about the current operation of the Sufficient Equivalence Relief. There were apprehensions that the framework no longer struck an appropriate balance between cross-border investment facilitation, market integrity and investor protection.

ASIC reportedly encountered non-compliance with the Sufficient Equivalence Relief by FFSPs providing investment banking services and identified several supervisory and enforcement concerns when dealing with entities that have benefited from the relief.

They also concluded that the current relief framework may be lowering compliance costs for FFSPs in Australia, without Australian entities obtaining a comparative reduction in compliance costs for the financial services they provide in key overseas markets. There was concern that the predominantly unilateral nature of the current framework may place AFSL licensees at a competitive disadvantage in the global marketplace. It can thus be argued that ASIC's adoption of this new licensing regime brings it in line with other jurisdictions in the Asia Pacific region. For example, the Hong Kong Securities and Futures Commission provides only a temporary licence to persons regulated by a relevant overseas regulatory body to provide certain financial

17 ASIC Class Order [CO 03/824] **https://www.legislation.gov.au/Details/F2007B00420**

18 Further info on this can be found in CP301 and CP 315

19 16-328MR ASIC extends foreign financial service provider class orders for two years and consults on related class order **https://asic.gov.au/about-asic/news-centre/find-a-media-release/2016-releases/16-328mr-asic-extends-foreign-financial-service-provider-class-orders-for-two-years-and-consults-on-related-class-order/**

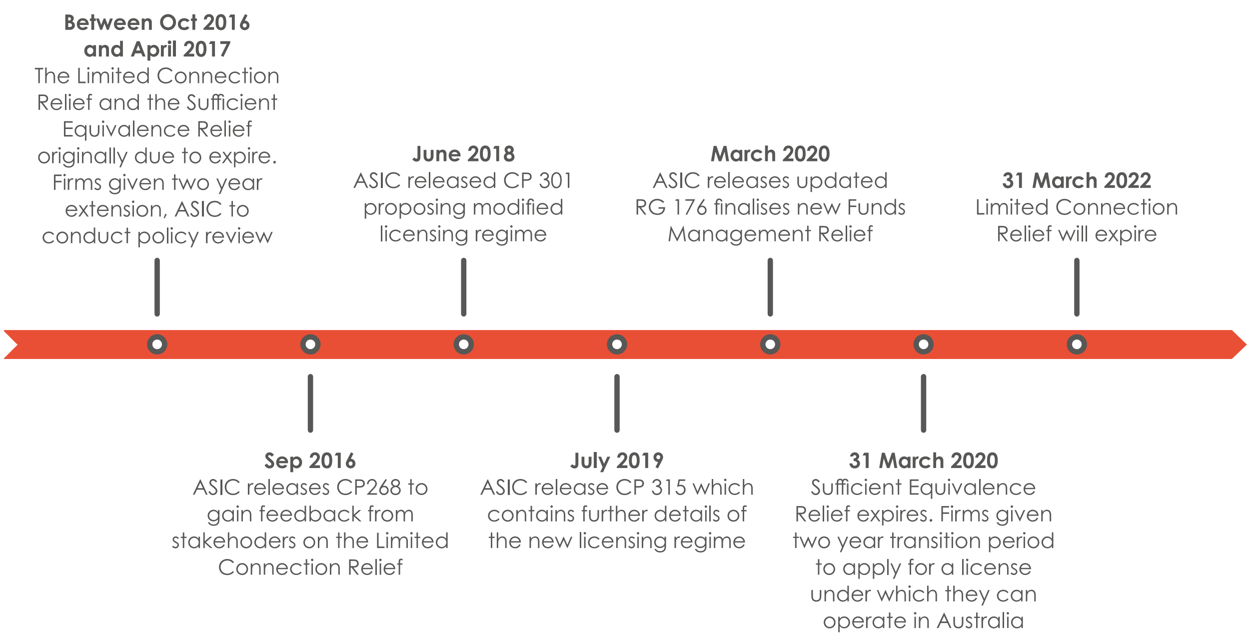
services in Hong Kong for a period of three months. Such persons are prohibited from holding a temporary licence for more than six months within any two-year period.

In addition to this, ASIC decided that some changes in international regulation that apply to wholesale financial services providers suggested that the policy reflected in the FFSP relief may no longer be appropriate. One example cited was the International Organization of Securities Commissions (IOSCO) task force report on wholesale market conduct released in June 2017.[20] This report highlights the risk of wholesale markets as a decentralised market structure and emphasises the importance of regulators possessing a range of supervisory and enforcement tools to address these risks. ASIC concluded that their regime for FFSP required reform to ensure their approach remained consistent with IOSCO's guidance.[21]

ASIC thus proposed to repeal the Sufficient Equivalence Relief and implement a modified AFSL regime to allow eligible FFSPs to apply for and maintain a foreign financial services licence (FFSL).

They also proposed to repeal the Limited Connection Relief. This was in part due to FFSPs not being required to notify ASIC of when they are using this relief and therefore limiting ASIC's knowledge of how many firms implement this and how.

Timeline



20 IOSCO Task Force Report on Wholesale Market Conduct, **https://www.iosco.org/library/pubdocs/pdf/IOSCOPD563.pdf**

21 CP 301 **https://asic.gov.au/regulatory-resources/find-a-document/consultation-papers/cp-301-foreign-financial-services-providers/**page 17

ASIC's new licensing requirements

In Consultation Paper 315, ASIC updated these proposals, extending the expiry of the Sufficient Equivalence Relief to 31 March 2020 with firms given a 2-year transition period to apply for the FFSL. The Limited Connection Relief will expire on 31 March 2022.

FFSPs will be able to apply for one of three types of regulatory arrangement:

Standard AFSL
This would apply to an FFSP that is carrying on financial services business in Australia and is not able to come within one of any other regulatory arrangements or operate under any other available exemption. A firm that holds an AFSL is permitted to provide financial services to retail clients in Australia. They are also able to appoint a 'Corporate Authorised Representative' (CAR) to provide specified financial services on their behalf. These authorised representatives may be individuals, bodies corporate, partnerships, or a group of individuals and/or bodies corporate that are the trustees of a trust. Some UK headquartered firms who hold an AFSL use this mechanism to allow the UK arm of their firm to operate in Australia. The CAR is only able to provide financial services to wholesale clients.

What is 'carrying on' financial services business?

You will be deemed to carry on a business in Australia if you:

- have a place of business in Australia
- establish or use a share transfer office or share registration office in Australia
- administer, manage, or otherwise deal with, property situated in Australia as an agent, legal personal representative or trustee, whether by employees or agents or otherwise.

FFSL
An FFSP that is licensed or authorised by an overseas regulatory authority that regulates the FFSP under a sufficiently equivalent regime (as assessed by ASIC) may be eligible to apply for a FFSL to provide financial services to wholesale clients in Australia. As outlined in ASIC Corporations (Foreign Financial Services Providers – Foreign AFS Licensees) Instrument 2020/198[22], these include firms regulated as per the class orders outlined above such as the UK.

22 ASIC Corporations (Foreign Financial Services Providers – Foreign AFS Licensees) Instrument 2020/198: **https://www.legislation.gov.au/Details/F2020L00237**

Several conditions will apply to a holder of a FFSL including an obligation to report to ASIC directly if there are any breaches of licensing conditions. This will provide ASIC with the necessary enforcement abilities it desires given that they have deemed their reliance on home jurisdiction regulators to provide adequate information as unsuccessful.

The FFSP also needs to check whether the services it wishes to provide are within the scope of services specified for that regulatory regime, which differ depending on the regulator.

On-going obligations of a FFSL

FFSL holders would be exempt from a number of the obligations applying to a standard AFSL, including the obligation to have adequate resources (such as financial resources) and to maintain competence, on the basis they are subject to sufficiently equivalent overseas regulatory requirements.

Obligations which would apply in the same way as a standard AFSL include (but are not limited to) requirements for conflicts arrangements, compliance with applicable financial services laws and having adequate risk management systems. Foreign AFSL holders would also be subject to supervisory and enforcement provisions such as breach reporting and potential regulator surveillance checks.

Source: Norton Rose

FFSL holders will also be subject to ASIC's strengthened powers under the Financial Sector Reform (Hayne Royal Commission Response – Stronger Regulators (2019 Measures)) Act 2020 (Cth), which received royal assent on 17 February 2020.[23] A suite of draft legislation was subject to recent public consultation by the Commonwealth Treasury, including proposals to significantly increase breach reporting obligations. Under the FFSL regime, FFSPs would likely be subject to these proposals if they are passed into law.[24]

Funds Management Relief

The Funds Management Relief will replace the Limited Connection Relief and covers activities described as a funds management financial service, generally offering interests in offshore funds and portfolio management services. This includes 'inducing conduct' – attempts to persuade, influence or encourage a particular person to become a client for a service that is not provided in Australia i.e. offshore.

23 Financial Sector Reform (Hayne Royal Commission Response – Stronger Regulators (2019 Measures)) Bill 2019: **https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r6456**

24 DLA Piper, Keys to the Kingdom (including Australia's superannuation honeypot): A Guide for Foreign Financial Services Providers (FFSP) providing, or considering to provide, financial services to the Australian wholesale client market **https://www.dlapiper.com/en/netherlands/sectors/financial-services/~/media/d90c232d6e78456aac71b3f20f24d2c6.ashx**

ASIC requested feedback on the Limited Connection Relief in CP 268 and CP 301 however, they received little data to support its continuation other than anecdotal feedback from firms. They decided to repeal this and instead, FFSPs carrying on financial services business under this relief would have been required to apply for a full AFSL. However, ASIC subsequently received feedback from stakeholders which indicated that for FFSPs operating under the Limited Connection Relief, obtaining an AFSL would impose an unnecessary and excessive regulatory burden. Often these FFSPs were not providing a significant volume of financial services to clients in Australia and hence it would not be justified for them to bear the costs of applying for and maintaining a licence.[25] ASIC decided to replace the Limited Connection Relief with the Funds Management Relief. After further consultation the conditions of this relief were extended to no longer include a limit on the percentage of total revenue that the FFSP is entitled to earn in Australia. The extent of financial services which are permitted to be provided under the Funds Management Relief has also been broadened.[26]

From 1 April 2022, an FFSP that intends to rely on the Funds Management Relief will be required to, among other things, provide ASIC with a written confirmation that they intend to use this exemption and appoint an agent who will be able to receive notices and respond to requests for relevant information about activities involving investors in Australia. There is currently no grandfathering proposed of the Limited Connection Relief so an offshore fund may breach the law if an Australian investor continues to hold interests in that offshore fund and the offshore fund cannot rely on other exemptions. The Funds Management Relief is not limited to regulated FFSPs from certain jurisdictions and thus has a wider remit however, reliance on the Funds Management Relief may attract ASIC industry levies payable annually.[27]

The Limited Connection Relief also allowed UK firms to service high net worth individuals in Australia from the UK. The new Funds Management Relief does not allow for this. This could be detrimental to firms if there is a demand for this service.

25 ASIC Report 656, Response to submissions on CP 301 and CP 315 on foreign financial services providers **https://download.asic.gov.au/media/5494182/rep656-published-10-march-2020.pdf**

26 ASIC 20-058MR Following consultation, ASIC releases new regulatory framework for foreign financial services providers, **https://asic.gov.au/about-asic/news-centre/find-a-media-release/2020-releases/20-058mr-following-consultation-asic-releases-new-regulatory-framework-for-foreign-financial-services-providers/**

27 DLA Piper Keys to the Kingdom, 2020 **https://www.dlapiper.com/en/netherlands/sectors/financial-services/~/media/d90c232d6e78456aac71b3f20f24d2c6.ashx**

Summary Table of ASIC's proposals

Regime	Foreign AFS licence	Funds Management Relief
Commencement	1 April 2020	1 April 2022
Previous regime	Sufficient Equivalence Relief provided under 'Class Order' exemptions	Limited Connection Relief
Transition	FFSPs that have previously relied on 'Class Order' relief have a 2 year window (ending on 1 April 2022) to adopt the new FFSL (or standard AFSL)	The Limited Connection Relief in ASIC's (Foreign Financial Services Providers – Limited Connection) Instrument 2017/182 has been extended to a hard deadline of 31 March 2022
Permitted Services for UK firms	FFSL: The relief applies to providing financial advice, dealing, making a market or providing a custodial or depository service, in respect of the following financial products: o eligible deposit products; o derivatives; o foreign exchange contracts; o securities; o debentures, stocks or bonds issued or proposed to be issued by a government; o managed investment products; or o interests in a managed investment scheme that is not required to be registered under Ch 5C.	Inducing Conduct – conduct that induces or is likely to induce certain types of professional investors in Australia to use its funds management financial services
Non-permitted services for UK firms	o Deposit-taking facilities that are not deposit products o Facilities through which a person makes non-cash payment	Any subsequent financial services

Implications of the new licensing regime

Through our interviews it has been highlighted that the new regime significantly increases the cost of providing financial services in Australia. This is through imposing new compliance burdens on foreign firms, for example in preparing applications – for which external advice may be required – and ongoing external audit costs.

One of the key risks of the licensing regime is that compliance costs could become so disproportionate that FFSPs providing services to wholesale clients may decide to exit the Australian market, as provision of services to Australian clients would no longer be commercially viable. In any case activities with FFSPs may be hindered as the FFSP would need a licence for any reciprocal activity.[28] This will restrict Australian banks and broker-dealers competing for clients in, or accessing global markets from Australia, especially in markets which are not currently regarded as equivalent for the purposes of the FFSL.

Australian-based banks or broker-dealers may also face complications when

28 ASIC Report 656, Response to submissions on CP 301 and CP 315 on foreign financial services providers **https://download.asic.gov.au/media/5494182/rep656-published-10-march-2020.pdf**

seeking to provide services to clients in Australia where the they involve reliance on non-Australian entities e.g. where securities and derivatives transactions have to be booked in or transacted through non-Australian entities which may need an FFSL.

As well as potential challenges for Australian firms, UK based firms will find that entering or operating in Australia will pose greater difficulties. There are currently around 300 UK based firms operating in Australia under the exemptions offered by the Sufficient Equivalence Relief. If these firms wish to continue operating, they will have to apply for the FFSL within the two-year transition period from 1 April 2020. Although the conditions under the Funds Management Relief have been extended, which has been seen as a successful outcome by industry, where FFSPs are looking to interact materially with a broad spectrum of clients, they would be advised to apply for a FFSL.

An eligible foreign firm would not be precluded from obtaining a FFSL if it had a place of business in Australia e.g. a branch office. In this respect the Australian regime is more user-friendly than the UK regime which does not offer similar arrangements for firms with a place of business in the UK. The FFSL regime is a cross-border business licence but it may (in effect) also be a 'lighter-touch' licensing regime for activities conducted through a branch.

The application process for a FFSL will involve providing ASIC with 'proof' documents and declarations from firms that they have the systems in place to comply with the ongoing licence conditions. As before, FFSPs will also need to consider whether they are required to register as a foreign company – this will depend on the structure of the FFSP's Australian offering. A firm is required to register as a foreign company if it has a place of business in Australia (e.g. a branch office), establishes or uses a share transfer office or share registration office in Australia or administers, manages or deals with property in Australia as an agent, legal personal representative, or otherwise. There is a cost associated with registering as a foreign company with ASIC and a registered foreign company must lodge an annual return and financial statement at least once every calendar year.

UK asset managers have also indicated that the Funds Management Relief puts greater limitations on their operations. The repealed Limited Connection Relief was used by FFSPs in global debt/equity raisings or investment offers by foreign entities into Australia. The Funds Management Relief and other exemptions are not applicable to these kinds of scenarios. Applying for a FFSL in these situations would not be a feasible option due to time constraints/urgency required.

Difficulties also arise in situations where an Australian client might be referred to a UK based firm for services where there has been no inducement offered by the UK based firm. Offshore brokers for example provide execution services to Australian clients without any direct solicitation in country and this would be in breach of the Funds Management Relief.

UK asset managers who acquire an FFSL are also required to register with Australian Transaction Reports and Analysis Centre (AUSTRAC) and provide them with a series of documents. This represents a duplication of regulation where some exemption might be helpful for UK asset managers.

The new licensing regime also does not provide exemptions from banking regulation in Australia therefore foreign banks would need to separately consider the requirements of Australian Prudential Regulation Authority (APRA). The Banking Act restricts an entity from conducting banking business i.e. consisting principally of the taking of deposits and making advances of money, it must apply to APRA for authority in Australia without authorisation from APRA. Many larger organisations have both a financial services licence from ASIC and are registered as an ADI with APRA and so are dual regulated. Standard Chartered is an example of that.

APRA does not generally require a foreign bank to obtain a licence to conduct business with Australian counterparties from its offshore offices, provided the foreign bank does not maintain an office or permanent staff in Australia or solicit business from retail customers in Australia.

However, branches of foreign banks in Australia are required to register with APRA and abide by certain conditions e.g. a branch of a foreign bank authorised as an authorised deposit-taking institution (ADI) is not permitted to accept initial deposits or other funds from individuals and non-corporate institutions of less than A$250,000. Such branches can accept deposits and other funds in any amount from incorporated entities, non-residents and their employees.[29]

In addition, it is an offence for a person to carry on a financial business using a restricted word or expression (including the words "bank" and "banking" or similar words) in relation to that business without APRA's consent. The purpose of this provision is to ensure potential customers are not misled into believing that an entity has the same level of capital adequacy, depositor priority and other prudential requirements that apply to ADIs. However, recent legislative changes now permit ADIs to use the word "bank" without restriction under the Banking Act.[30]

ASIC have stated that the ongoing obligations and conditions of the FFSL are similar or generally equivalent to those required of FFSPs in their home jurisdiction. However, it has been argued that this leads the Australian market to a system of dual regulation rather than deference which essentially adds more sand to the Australian economic machine.[31] This also has implications for international trade in services which contradict the Australian Government's trade policy position, particularly for services which is based on open markets and non-discriminatory treatment.[32]

29 Thomson Reuters Practical Law, Banking Regulation in Australia Overview **https://uk.practicallaw.thomsonreuters.com/w-006-9098?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1#co_anchor_a755295**

30 Thomson Reuters Practical Law, Banking Regulation in Australia Overview **https://uk.practicallaw.thomsonreuters.com/w-006-9098?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1#co_anchor_a755295**

31 AFMA submission to consultation on ASIC CP 315 **https://afma.com.au/policy/submissions/R29-19_ASIC_CP315_FFSP_licensing.pdf**

32 DFAT, The importance of services trade to Australia, **https://www.dfat.gov.au/trade/services-and-digital-trade/Pages/the-importance-of-services-trade-to-australia**

Recommendations

It is unlikely that a UK exemption to the new regime can be achieved at this stage however, this is not to not to suggest an exemption could not be achieved at some stage in the future if the matter is raised as part of broader trade negotiations between the UK and Australian governments.

In lieu of, or in the absence of this opportunity, the focus should be on the operationalisation of the new regime. Although there is a streamlined application process and the application requirements are less burdensome than those associated with applying for a full AFSL, firms have expressed concerns around the potential opacity of the process and the need to avoid bottlenecks in order to minimise disruption. ASIC have not indicated they will streamline the processing time for FFSLs. The guidance refers to the existing service charter, therefore similar timeframes as the AFSL processing time are expected. In comparison firms have reported that exemptions under the Sufficient Equivalence Relief have been relatively easy to achieve – usually taking a month from start to finish.

UK firms would thus benefit from a fast track application process, more akin to the what they enjoyed under the Sufficient Equivalence Relief. This could include shorter time frames for processing applications from UK firms and fewer compliance and lodgement conditions. This kind of targeted approach which details specific 'asks' are valuable in negotiations for policy makers. One way of achieving this is to highlight any potential reciprocal benefits which can be offered on a quid pro quo basis.

An analysis of ASIC's rationale behind the implementation of a new licensing regime also indicates a recommendation for the UK ahead of trade negotiations more broadly. ASIC has concerns that jurisdictions that were deemed to be sufficiently equivalent did not adopt a reciprocal approach to its equivalence exemption. ASIC argues that the FCA exemption applies only where the nature of the regulated activity requires the direct involvement of another party that is FCA-authorised. Or the provision of the financial service is as a result of 'reverse solicitation'.[33] However, the UK 'overseas persons regime' is not a form of reverse solicitation regime. It is a much more generous exemption that allows non-UK persons that do not have a UK place of business to conduct securities and derivatives business with a broad class of UK authorised and other institutional clients and counterparties without authorisation or registration in the UK. This is regardless of whether the non-UK person is authorised in its home country or whether its home country operates a regulatory regime equivalent to the UK regime. Failure to adequately communicate this has led, in part, to tangible negative outcomes which ultimately restrict cross-border trade.

33 ASIC RG 176, **https://download.asic.gov.au/media/5515018/rg176-published-24-march-2020.pdf**

Asset Management

Main Takeaways

Some UK firms access the asset management market in Australia through a full AFSL licence. Those that have previously relied on exemptions are currently considering which form of licence they will be required to obtain for their operations or indeed whether they will continue operating in Australia going forward

Two significant barriers to trade have been flagged to us by UK based asset management firms:

- FIRB approvals are required for some investments which fall above a certain threshold. Approvals can take up to forty days and seeking these can delay the acquisition process and make firms uncompetitive. Some jurisdictions operate under higher thresholds that have been negotiated as part of trade agreements. As the UK pursues an FTA with Australia it should seek to secure these higher thresholds for UK firms

- Marketing foreign funds to investors in Australia is limited to the wholesale market. For the retail market, firms have launched Australian domiciled funds which essentially duplicate the investment strategy of the offshore fund. To mitigate the associated costs of this, some form of mutual recognition of funds should be explored.

Australia has one of the largest asset management markets in the world as well as one of the largest sovereign wealth funds. Growth of the investible asset pool is also underpinned by the employer pensions contribution regime (superannuation) which is a legal requirement. The Australian pension market which is the fourth largest globally[34] has continued to attract asset management firms worldwide with non-resident international fund managers accounting for 39% of Australian superannuation investment assets.[35]

Some UK headquartered firms access the Australian asset management market thorough a standard AFSL. The process for achieving this can be long, lacking in transparency and dependent on the case manager a firm is assigned. Even after obtaining an AFSL, firms have reported they still face some regulatory barriers that Australian firms do not, as they are UK headquartered. Other firms have used the exemptions offered to the UK under the Sufficient Equivalence Relief and are therefore applying for

34 Austrade, **https://www.austrade.gov.au/news/economic-analysis/australia-has-the-fourth-largest-pension-fund-assets-in-the-world**

35 From Strength to Strength, Boosting trade links with Australia and New Zealand for UK financial and professional services Feb 2018

a FFSL or assessing the costs of doing so, considering the proposed changes by ASIC.

Other than the more general barriers that exist such as a difference in time zones and distance, the firms we interviewed highlighted two regulatory barriers, the removals of which would be beneficial to them when operating within the Australian market. These are outlined below. To understand how asset managers carry out business in Australia it is first necessary to analyse the regulatory framework.

Regulatory Framework

The primary legislation governing asset management sector entities is the Corporations Act 2001. Asset managers are regulated by ASIC and several other regulatory bodies:[36]

APRA – The Australian Prudential Regulation Authority focuses on the prudential regulation of, amongst others, insurance companies, banks and superannuation funds.

ASX – The Australian Securities Exchange provides a suite of services including listings, trading, clearing, settlement, technical and information services, and other post-trade services. It operates markets for a wide range of asset classes including equities, fixed income, commodities and energy.

AUSTRAC – The Australian Transaction Reports and Analysis Centre uses financial intelligence and regulation to disrupt money laundering, terrorism financing and administers related laws including those relating to identification of investors in investment funds and counterparties to derivative transactions

FIRB – The Foreign Investment Review Board is a non-statutory body established to advise the Treasurer and the Government on Australia's Foreign Investment Policy and its administration.

The Takeovers Panel – This is a peer review body that regulates corporate control transactions in widely held Australian entities, primarily by the efficient, effective and speedy resolution of takeover disputes.

ATO – The Australian Taxation Office regulates the self-managed superannuation fund sector.

Barriers facing UK asset management firms

FIRB Approvals

The FIRB examines proposals by foreign persons to invest in Australia and makes recommendations to the Treasurer subject to the Foreign Acquisitions and Takeovers Act (FATA)1975 and Australia's foreign investment policy.

36 The Law Reviews: **https://thelawreviews.co.uk/edition/the-asset-management-review-edition-8/1197339/australia**

The Australian Treasury has recently proposed sweeping changes to the foreign investment framework which, at the time of writing are subject to consultation from stakeholders. Before these proposed changes were laid out investment into residential property, large commercial real estate investments, agricultural investments, infrastructure, or other investments above certain monetary thresholds or that raised national interest considerations required approval by the FIRB.

These monetary thresholds were indexed on 1 Jan every year and depended on the type of foreign person and the type of acquisition. Unless an exemption applied, a relevant transaction that met the monetary threshold may require FIRB approval.

Foreign Government Investors (FGI) looking to buy assets in Australia were also required to abide by thresholds but these were much lower. They were required to make additional submissions to the FIRB and to provide assurances that the FGI is a standalone economic entity, separate from the state. The Treasurer made the final decision here and, on this basis, has ruled against Chinese FGIs in some cases. The definition of an FGI was broad – for fund management if an investment fund had any more than 20% government investment on its register it was treated as an FGI.

When is the requirement to seek FIRB approval triggered for private firms?

A foreign investor should assess the requirement to apply for FIRB approval if the acquisition is a significant and/or notifiable action under the Takeovers Act 1975 that meets prescribed monetary thresholds and no exemptions apply.

The Act 1975 defines significant and notifiable actions, and generally an acquisition of an interest in Australian land by a foreign person meets the criteria to be considered a significant and notifiable action.

Source: DLA Piper

Firms reported that even having obtained an AFSL, they were still required to seek FIRB approvals for some investments. Approvals could take up to forty days and although firms are confident that the approval will be granted, seeking this delayed the acquisition process and made firms uncompetitive.

The Organisation for Economic Co-operation and Development's (OECD) Foreign Direct Investment Regulatory Restrictiveness index shows that although Australia is open to investment the majority of Australia's barriers to investment fall under the category of 'screening and approval' restrictions. This category includes any obligatory procedures that investors must undergo before obtaining approval for their planned investment.[37] Monetary thresholds vary across jurisdictions depending on whether Australia had entered into a

37 OECD, Foreign Direct Investment Statistics http://www.oecd.org/investment/statistics.htm

trade agreement with the country that the investor was from. In this case higher thresholds would apply. The US, New Zealand and Chile as FTA partners were able to operate under higher thresholds, giving firms from these jurisdictions a competitive advantage. The same applied, for example, to countries for which the Comprehensive and Progressive Agreement for Trans-Pacific Partnership is in force (CPTPP) (as at 1 January 2020, the CPTPP is in force for: Canada, Japan, Mexico, New Zealand, Singapore and Vietnam).

For non-land proposals the threshold for FTA partner countries when investing in non-sensitive businesses was A$1,192m and for sensitive businesses was A$275m. In contrast, investors from other jurisdictions had a flat threshold of A$275m for business acquisitions across all sectors.[38]

Under this system there was a case to be made for UK firms, as a result of a UK-Australia FTA, to be given the opportunity to operate under higher thresholds.

In response to the Covid-19 pandemic, the Treasurer announced that all monetary screening thresholds will be temporarily reduced to A$0. This means that effectively all foreign investment, regardless of the investor country, must seek FIRB approval to ensure they are not contrary to the national interest.[39] The deadlines for approval processing were also increased from 30 days to 6 months.

The Treasury believes that without these changes it is possible many normally viable Australian businesses would be sold to foreign interests without any government oversight, presenting risks to the national interest. The disruption caused by the Coronavirus means that businesses are increasingly under pressure and there will likely be a rise in debt restructuring transactions for Australian businesses, along with opportunities to invest in distressed assets.[40]

Although these changes are temporary, the Treasury has also outlined some permanent changes to the foreign investment framework. The system will transition from the temporary Covid-19 measures to the new system. In short the proposals outline that:[41]

- Investments that fall outside the monetary thresholds will still require FIRB approval
- All investments in 'sensitive national security business' (which at the time of writing are yet to be defined), will be subject to a national security test, even if they fall within the monetary thresholds
- Where there is overlap between the national interest test (existing regime) and the new national security test, the national interest pathway will always prevail. National security is a subset of the national interest.
- Any investment (sensitive or not) that raises a national security concern could be subject to a national security test. FTA partners will this retain the higher thresholds but this does not exempt them from investigation

38 FIRB Monetary Thresholds **https://firb.gov.au/exemptions-thresholds/monetary-thresholds**

39 Australian Treasury, Temporary measures in response to the coronavirus **https://firb.gov.au/guidance-resources/guidance-notes/gn53**

40 Australian Treasury, Q&A – Temporary changes to foreign investment framework **https://firb.gov.au/qa-temporary-changes-foreign-investment-framework**

41 Australian Treasury, Major Reforms to Australia's Foreign Investment Review Framework, Summary Booklet. **https://firb.gov.au/about-firb/news/major-reforms-australias-foreign-investment-review-framework**

if concerns are raised. The Treasurer reserves the right to 'call in' a transaction for review.

At the time of writing these proposals have been outlined ahead of the release of draft legislation on the reforms which will be open for consultation prior to its introduction into Parliament.

In sum it will still be useful for UK firms to operate under the higher monetary thresholds afforded to them as an FTA partner and as a result of a UK-Australia trade deal. Australia welcomes foreign investment in principle and has historically attracted high inflows of foreign investment from the UK. In 2019 the UK was Australia's 2nd largest investor[42] and enabling the UK to operate under the higher thresholds will increase inward investment from highly developed, industry leading firms.

Retail Funds

Under the Corporations Act 2001[43] marketing foreign funds to investors in Australia are limited to the wholesale market. For retail funds, firms have launched Australian domiciled, Australian dollar (AUD) denominated funds which essentially duplicate the investment strategy of the offshore fund or act as feeder funds into an AUD class of the offshore fund. This comes with associated costs and firms have reported that they carry out assessments on a case by case basis to ascertain whether there is enough demand for each product.

Foreign firms can access retail clients by approaching a professional trustee company called 'Responsible Entities'. These would act as the trustee on record. The foreign manager would have a management agreement with the Australian domiciled fund. The foreign manager does not necessarily need a retail licence, they can attach to a foreign AFSL manager under the management agreement with the Australian fund. The structure of using the external Australian trustee effectively means that firms are using the trustee's licence to face retail clients. The local trustee has the full licence and the foreign manager reaps the benefit of this.

What is a Responsible Entity?

A Responsible Entity has the dual role of trustee and manager of an investment scheme, and must be appointed if an investment scheme needs to be registered. The Responsible Entity must be an Australian public company, with certain levels of net tangible assets, depending on the value of the scheme's assets.

When acting on behalf of an investment scheme, the Responsible entity must:

42 DFAT, Statistics on who invests in Australia. **https://www.dfat.gov.au/trade/resources/investment-statistics/Pages/statistics-on-who-invests-in-australia**

43 Corporations Act 2001 **https://www.legislation.gov.au/Details/C2018C00424**

- Act honestly
- Exercise a reasonable degree of care and diligence
- Act in the best interest of members of the investment scheme
- Treat all investment scheme members equally

Source: One Investment Group

This way of accessing retail clients is accepted by the regulator and this process is the same for any foreign firm from any jurisdiction in Australia. The Australian regulators deem this permissible as the trustee is a fully regulated fiduciary which is within the supervisory oversight of the regulator. Foreign firms that operate in Australia as a subsidiary do not face this issue as they are able to access retail as well as wholesale clients.

Although this process to access retail clients is often described as a well-trodden path, this does not alleviate the additional costs to firms of this arrangement. The costs of running an Australian domiciled fund varies depending on the investment strategy, the complexity of the fund structure, how many countries the fund invests into, fees negotiated with third party providers and so forth. However, firms have reported a minimum of A$50,000 per fund. Larger firms may have up to 20+ Australian domiciled funds covering domestic capabilities and offshore capabilities.

The firms we interviewed stressed that a form of enhanced equivalence or mutual recognition of funds would be of great benefit. The UK for example has such an agreement with Hong Kong where the adoption of the rules and principles of the home jurisdiction is a key and fundamental principle.

A Hong Kong or UK Covered Fund needs to meet the eligibility requirements stipulated by the Securities and Futures Commission and the FCA. It must first be approved and authorised by the relevant authority in the home jurisdiction (i.e. the jurisdiction in which the fund is domiciled and managed, namely Hong Kong or UK), and must further comply with applicable laws and regulations of the host jurisdiction (i.e. the foreign jurisdiction where the fund is to be publicly offered pursuant to the mutual recognition funds, namely Hong Kong or UK) regarding the sale and distribution of the fund in that jurisdiction.

The regulator of the home jurisdiction oversees the relevant fund in respect of its domestic authorisation or registration, as well as monitors the operation and management of the fund given this occurs in the home jurisdiction. The regulator of the host jurisdiction oversees the fund in respect of mutual recognition funds eligibility requirements, the sale and distribution of the fund in the host jurisdiction, as well as additional rules relating to authorisation or registration, and ongoing compliance in the host jurisdiction.[44]

A further example of a mutual funds regime is the Asia Region Funds Passport which Australia is party to and is overseen by ASIC. Firms have noted however that at this stage there has been little take-up of this regime – for a variety of

44 Lexology, Mutual Recognition of Funds between the United Kingdom and Hong Kong, h**ttps://www.lexology.com/library/detail.aspx?g=66c03995-b02e-451e-8db5-071c33c9be42**

reasons. One of these being non-resident withholding tax being too high in Australia, making investment in offshore vehicles unappealing. Firms reiterated that a funds passporting arrangement would reduce the need to launch a new fund in Australia where demand from investors for a new strategy could simply be fulfilled by distributing the UK fund directly into Australia. However, tax efficiencies would need to be reviewed, and potentially amended/reduced, for any passporting scheme between the UK and Australia to be successful.

Banking

Main takeaways:

- The recommendations made by the Royal Commission Report have changed regulations for domestic players and opened up the market for foreign banks

Three significant barriers have been flagged to us by UK based banks:

- For historical reasons UK banks are limited in the services they can provide in comparison to their counterparts in other jurisdictions. An extension of the UK licence to bring it in line with the licence coverage of other jurisductions would be of benefit to UK firms.
- A certain degree of ambiguity exists around the booking of transactions facilitated by Australian entities of UK banks between non-Australian companies and clients. Firms have highlighted the differing registration rules as well as the lack of clarity which makes booking these transactions difficult. Greater clarity, especially within the new licensing framework would be welcomed by firms.
- UK firms in Australia are subject to an interest withholding tax. This is a tax paid by UK banks on the interest they generate when they lend capital to Australian banks. Although there has been consensus around the removal of this tax, perhaps an FTA will provide the impetus needed to achieve this.

Australia's banking system is highly concentrated with four (Commonwealth Bank of Australia, Westpac, Australia and New Zealand Banking Group and National Australia Bank) of the largest banks representing almost 80% of the banking sector.[45] In the aftermath of the Global Financial Crisis, while many foreign firms pulled out of the Australian market, the Australian banking sector remained largely stable with Australian banks displaying high levels of resilience. This was attributed to a culture of prudent lending and banks being soundly capitalised with a well-diversified and stable funding base as well as a good track record of healthy profitability. The industry and regulators were independently recognised for their sound corporate governance and diligence in official oversight.[46]

It has been argued that in the decade after the Global Financial Crash, a sense of complacency developed across banks, government and regulators which led to a number of scandals and instigated the

45 WTO Trade Policy Review **https://www.wto.org/english/tratop_e/tpr_e/s396_sum_e.pdf**

46 The Global Credit Crisis: Why Have Australian Banks Been So Remarkably Resilient?, Kim Hawtrey (2009) **https://www.jstor.org/stable/pdf/43200267.pdf**

establishment of the Royal Commission to investigate misconduct in the financial services sector.[47]

This section will outline the regulatory framework for banks in Australia, discuss the impact of the Royal Commission on foreign firms and analyse some sector specific concerns for UK banks in the Australian market.

Regulatory Framework

Australia's 'twin peaks' model is based on the view that there should be two primary financial regulators – APRA and ASIC – operating together with the central bank, the Reserve Bank of Australia (RBA), and the competition regulator, the Australian Competition and Consumer Commission (ACCC).

These institutions have prime responsibility for maintaining the safety and soundness of financial institutions, promoting market integrity, thereby protecting consumers and investors and promoting systemic stability through implementing and administering the regulatory regimes that apply to the financial sector.

The Royal Commission endorsed the current 'twin peaks' model of financial regulation and recommended that it should remain – with some subtle, though important, realignments as outlined below.

The Royal Commission Report

In 2017 the government established a Royal Commission to investigate misconduct in banks and other financial services bodies. The Commission's recommendations consisted of sweeping changes to the models of operation in the financial services market as well as ensuring the regulatory bodies were more accountable and collaborative.

In banking, the reforms included, in large part, rebuilding trust in financial services and reorganizing compliance and regulatory engagement. It was recommended that concerns around compliance be reported and resolved promptly, with a firms' operating licence dependent upon this.

From a regulatory perspective the report recommended changing the regulators' supervisory and enforcement approaches. For APRA it was suggested that it have enhanced responsibilities to supervise remuneration and culture as well as governance through the creation and extension of a Governance, Culture and Remuneration team.[48] The report recommended that ASIC review its approach to enforcement. ASIC subsequently adopted a 'Why Not Litigate?' approach which focuses on increased and accelerated

47 APRA media release **https://www.apra.gov.au/news-and-publications/apra-releases-cba-prudential-inquiry-final-report-and-accepts-enforceable**

48 EY, How the Royal Commission impacts the financial services industry. **https://www.ey.com/en_au/financial-services/how-the-royal-commission-impacts-the-financial-services-industry**

court-based outcomes overseen by the Office of Enforcement.[49] These new tougher powers and penalties are used to achieve better outcomes. The institutions were also tasked with considering whether their regulatory engagement models were fit for purpose and refocusing efforts to comply with the spirit and intent of the law.

The tightening of regulation of the country's top four banks opened them up to competition from foreign firms. In the immediate aftermath it was reported that the likes of HSBC and Citi as well as ING Bank were seeking to establish a stronger foothold in the Australian market and ABN Amro, Société Générale and Barclays had expanded their Australian offices and reapplied for banking licences.[50]

The report highlighted the need for banks to meet stricter requirements to lend responsibly which has led in part to the government's adoption of an Open Banking regime. The Australian Treasury hopes that by giving customers greater access to and control over their banking data, Open Banking will transform the way in which customers use and benefit from the banking system.[51]

Although foreign banks in Australia still hold a small fraction of the market share when compared with the big four lenders, the firms we spoke to corroborated that they saw the Royal Commission report as an opening to expand into Australia, citing the high margins that exist in the Australian banking market as further impetus. FinTechs in particular were aware that the lack of trust does pose an issue for them but recognised that the onus was on firms to correct this.

Barriers facing UK Banks

Limited services

The ASIC Regulatory Guide 176 for Foreign Financial Services Providers who wish to provide financial services to wholesale clients or professional investors has recently been updated considering ASIC's requirement for all financial services firms to hold a FFSL.[52] This guide now outlines which products and services can be provided by firms within jurisdictions that ASIC deemed to be 'sufficiently equivalent'. From our conversations with stakeholders one issue that was pointed out was the fact that UK banks could not provide the following services and products under a FFSL.

- deposit-taking facilities that are not deposit products (which is allowed for German banks)
- facilities through which a person makes non-cash payments (which is allowed for French, German and Luxembourg banks).

The categories of financial products that the relief applies to was driven by the application to ASIC for licensing relief that was made in 2002. ASIC provided relief for the nominated financial products that the application referred to. These financial products were reflected in the original ASIC Class Order

49 ASIC media release **https://asic.gov.au/about-asic/news-centre/speeches/asic-s-approach-to-enforcement-after-the-royal-commission/**

50 FT, Foreign banks take aim at Australia's big four oligopoly **https://www.ft.com/content/668d60fe-97de-11e9-8cfb-30c211dcd229**

51 Review into Open Banking in Australia, Final Report **https://treasury.gov.au/consultation/c2018-t247313**

52 RG 176 Foreign Financial Services Providers **https://asic.gov.au/regulatory-resources/find-a-document/regulatory-guides/rg-176-foreign-financial-services-providers/**

applicable to UK regulated entities. That relief was then carried over into the recently issued legislative instrument.

If there is a desire to extend the UK relief to other types of financial products not currently referred to in the latest legislative instrument then individual entities wanting this extension could contact ASIC to seek a change to the legislative instrument. This could likely require ASIC to be satisfied about the regulatory equivalence of the UK regulation for those financial products provided by UK regulated entities.

If these services are required by a number of UK entities, the UK should seek to explore the possibility of an extension of the licence coverage for UK banks more broadly. There may also be scope to extend the coverage of the non cash payment facilities licence to FCA authorized non bank payment service providers.

Ambiguity around registration

A firm operating an Australian entity may want to use the staff employed there to negotiate or book transactions between a non-Australian group company (the booking entity) and a non-Australian client.

Firms may also require the ability for staff in their Australian office to book transactions to their UK balance sheet to cover hours when staff are not in the UK office. They have flagged that the various Australian registration processes and the ambiguity surrounding when they are triggered makes this difficult. These include both financial services and general business registration requirements. For example, an Australian staff member booking a trade between a Californian asset manager and a UK bank may trigger registration.

There is confusion as to whether the booking entity is regarded as having a presence in Australia. If this was the case they would require authorisation by ASIC or registration under local company law as a result of using agents in Australia. However, one could argue that the activities of the Australian staff could be covered by the licence of the Australian affiliate but the affiliate might then be subject to conduct requirements in relation to the non Australian client.

It is unclear from the ASIC guidance[53] whether the new licensing regime is available to non-Australian entities that operate through a presence in Australia. The ASIC guidance does not seem explicitly to rule this out but does indicate that non-Australian companies may be required to register as a foreign company under the company law regime if they have a 'branch' in Australia. One of the concerns is whether the use of the affiliate's staff amounts to a branch of the booking entity in Australia requiring corporate registration.

Greater clarity on registration rules and how they apply for foreign firms in this specific case would be useful here. UK banks who have been operating in

53 ASIC RG 16, **https://asic.gov.au/regulatory-resources/find-a-document/regulatory-guides/rg-176-foreign-financial-services-providers/**

Australia for a number of years still cite this as an ambiguity which is detrimental to their business.

Greater transparency of regulation more generally in Australia is supported by the OECD's Services Trade Restrictiveness Index (STRI). When analysing by type of restriction, the restrictions in Australia are highest for its restrictions on foreign entry (for example equity restrictions on business ownership), and transparency of regulations.

Interest Withholding Tax (IWT)

UK firms are subject to an interest withholding tax when operating in Australia. This is essentially a tax paid on the interest generated when a UK bank has lent capital to an Australian bank. The rate of this tax is 10% however interest paid by the Australian branch of a foreign bank to its foreign parent is subject to a IWT at the rate of 5%.[54]

There exists some consensus for the removal of the IWT which has been built in part by the Johnson Report. In 2008 the Minister for Financial Services established the Australian Financial Centre Forum (AFCF) to capitalise on Australia's competitive advantages in the financial sector and exploit opportunities in the region to increase cross-border trade and investment in financial services.[55] In November 2009, the AFCF delivered its report officially titled "Australia as a Financial Centre: Building on our Strengths" universally referred to as the Johnson Report. One of the key recommendations of the report is the removal of the IWT for financial institutions.

As noted, in the report Australia has always been and is likely to continue to be a net importer of capital. The report argues that tax policy measures that increase the cost of capital are detrimental to Australia's development as a financial centre, particularly noting that Australia's withholding tax regime is inconsistent with other financial centres. The report went so far as to noting that any frictions that stymie the attractiveness of Australia as a destination for such capital are contrary to the national interest.[56]

International tax treaties renegotiated by Australia with the UK, US, France, Finland, South Africa, Japan, Norway and New Zealand provided exemptions from IWT for interest paid to financial institutions, however the continuing application of IWT on financial institutions' borrowing offshore persists.[57]

The points made in the Johnson Report have been endorsed by the Henry Tax Review and the Financial System Inquiry. As such firms pointed out that this is a known tax policy issue. The theoretical consensus for its removal has been negated by the fact the fact that it has not been a practical political priority. Perhaps an overt commitment as part of FTA negotiations could create the necessary momentum to explore the removal of this tax on a bilateral basis through the precedent set by international tax treaties.

54 Australian Treasury, **https://treasury.gov.au/sites/default/files/2019-03/B1_33_Financial_instituti.pdf**

55 AFMA The second Johnson Report **https://afma.worldsecuresystems.com/opinion/2017%20Fin%20Services%20Conference%20-%20Second%20Johnson.pdf**

56 AFMA the second Johnson Report **https://afma.worldsecuresystems.com/opinion/2017%20Fin%20Services%20Conference%20-%20Second%20Johnson.pdf**

57 Australia as a Financial Centre: Building on our strengths **https://core.ac.uk/download/pdf/51343570.pdf**

Payments

Main takeaways

The growth of e-commerce has meant that the regulatory agenda is at the top of business priorities for many payments firms. Their focus lies on customer data protection, technical payment standards, interchange pricing and money laundering.

Four significant barriers have been flagged to us by UK payments firms in Australia:

The hiring of a responsible manager which can be costly for smaller FinTech firms and payments firms seeking to enter the market. As this is a prerequisite of applying for an AFSL, they are required to fill this role ahead of operating in any meaningful way within the Australian market. Firms would be better placed to hire someone of this calibre once they have been operating in market for a period of time.

The complexity of the regulatory system and its divergence from the European standard is an issue for UK firms. Australian regulators have laid out plans to reform the retail payments sector in recognition of its overlapping regulatory frameworks. As these policy changes are enacted it would be valuable for UK firms to have for some form of equivalence or mutual recognition determination of key UK payments legislation when seeking to enter and operate in the Australian market.

The expense related to the use of the New Payments Platform (NPP) as well as the regulatory burden for new entrants deter firms from using the NPP even though the faster payments are valuable to their business. Bringing down the costs of using the NPP would make it easier for new entrants to utilise this system.

An AFSL does not enable payments firms to deal in foreign exchange contracts. Firms are required to submit additional proofs to be able to offer certain services – an issue they do not face in other jurisdictions. An exemption or a more streamlined process would help firms widen the range of services they are able to offer Australian clients.

Payments generate around 25% of all revenue in the Australian financial system and are one of the most critical attributes customers look at when choosing financial institutions.[58]The payments systems of the past which have often been hard to reconcile, and cumbersome to send and receive, will need to be overhauled in order to service the rapidly evolving ecosystem. The growth of commerce across borders in particular, presents unique challenges for firms and creates the demand for banks with new capabilities such as

58 PwC, The Future of Payments in Australia **https://www.pwc.com.au/pdf/pwc_future-of-payments.pdf**

foreign exchange agreements and the management of multiple countries' regulatory and compliance requirements.

Regulatory Framework

The primary regulator of the payments system is the RBA with Australia being among one of the first countries in the world to make efficiency of payments a statutory objective of its central bank. Within this mandate, the RBA has encouraged a reduction in cheque-clearing times and the take-up of direct debits as a means of bill payment. They have also taken a number of steps to improve the competitiveness and efficiency of card systems.[59]

The RBA has powers to regulate the payments systems and has implemented several changes designed to promote the efficiency of payments and competition between payments services over the last two decades. However, its preferred approach is to identify areas where competition, efficiency or safety could be enhanced and then encourage industry to address those issues. A good example of this was the development of the NPP which is discussed below.

In order to benefit from the NPP, firms will have to adapt their operating models and comply with the increasing regulatory requirements. The regulatory agenda is now at the top of business priorities with focus on customer data protection, technical payment standards, interchange pricing and money laundering.[60]

Barriers Facing UK Payments Firms

NPP Access

Launched in February 2018, the NPP is an open access infrastructure for fast payments in Australia. It allows users of the payments system to send real-time payments with simple addressing 24/7. It also allows more complete information to be sent with payments. It was developed in response to a number of strategic objectives for the Australian payments system set by the RBA. While industry determined how it would achieve the objectives, the RBA played a significant role in encouraging and facilitating the cooperation required to develop and build the system.[61]

UK payments firms, particularly those who are new entrants to the market, have indicated that the costs of being a participant of the NPP are far too high. This becomes more apparent when compared with the direct costs of using the UK faster payments system. From our interviews we understand that cost to access the UK faster payments system falls in the region of £30,000. While UK based firms were not able to disclose the cost of accessing the NPP, a local start up firm has indicated that they have been quoted in the region of A$2m to be a direct member in addition n addition to per transaction fees of 8 cents for each NPP payment sent or received.[62]

59 RBA, Speech by Assistant Governor: **https://www.rba.gov.au/speeches/2019/sp-ag-2019-05-16.html**

60 PwC, The Future of Payments in Australia **https://www.pwc.com.au/pdf/pwc_future-of-payments.pdf**

61 RBA speech by Assistant Governor: **https://www.rba.gov.au/speeches/2018/sp-ag-2018-07-08.html**

62 Xinja Bank Submission to Select Committee on Financial Technology and Regulatory Technology **https://**

Firms have also indicated that they would like to use the NPP but only when there are a significant number of users within the market. For example, with regards to the direct debit system, there is a day delay when paying merchants via direct credit. NPP offers same day payments however this is 3-4 times more expensive than the direct credit payment. Furthermore, as there is limited take up of the NPP, firms would have to caveat the same day payment guarantee with stipulation that you have to use this specific system.

Firms have noted that the NPP entry requirements impose stringent regulatory obligations on entrants, which causes barriers to entry for startups – either financially, or technologically. For example, at present the NPP has requirements relating to anti-money laundering and transaction monitoring capabilities. In Europe, firms providing payment initiation services (PIS) do not conduct transaction monitoring at a granular level, because by the very nature of PIS, the firms do not have the customer identity and banking information that are needed for investigations. Without reconsidering the requirements imposed on entrants, it is therefore difficult, and burdensome, for smaller firms to enter the NPP. As a result, fewer products which will benefit consumers will be able to enter the market.[63]

Bringing down the costs of using the NPP would make it easier for new entrants to utilise this system which in comparison to the UK faster payments scheme is significantly higher. Relaxing the regulatory requirements will also make it easier for entrants in the market from the UK who are not used to transaction monitoring at a granular level.

Hiring of a responsible manager

ASIC have stated in RG 105, 'AFS licensing: Organisational competence', Australian financial services licensees must comply with the organisational competence obligation in s912A(1)(e) of the Corporations Act 2001. This includes the hiring of a responsible manager(s). The responsible manager is relied upon for organisational competence. At the very least firms must hire responsible managers who:

- are directly responsible for significant day-to-day decisions about the ongoing provision of financial services
- have appropriate knowledge and skills for all the firm's financial services and products
- individually, meet one of the five options for demonstrating appropriate knowledge and skills:
  Option 1: Relevant industry or APRA standard
  Option 2: Individual assessment
  Option 3: University degree and short industry course
  Option 4: Industry-specific or product-specific diploma (or higher)
  Option 5: Other demonstration of knowledge and skills.[64]

www.aph.gov.au/Parliamentary_Business/Committees/Senate/Financial_Technology_and_Regulatory_Technology/FinancialRegulatoryTech/Submissions

63 Truelayer submission to Review of Retail Payments Regulation, **https://www.rba.gov.au/payments-and-infrastructure/submissions/review-of-retail-payments-regulation/index.html**

64 ASIC RG 105, Organisational competence, **https://asic.gov.au/regulatory-resources/find-a-document/regulatory-guides/rg-105-afs-licensing-organisational-competence/**

The job description and title of responsible managers will vary from business to business and will depend upon its nature, scale and complexity. For example, in a small advisory business, the directors are likely to be the main people who have direct responsibility for significant day-to-day business decisions but, in a larger financial services group, anyone ranging from the chief executive officer down to middle management might have the required direct responsibility.[65] The responsible managers do not need to actually provide financial services on behalf of the firm although they might do so.

The responsible manager must be nominated when applying for an AFSL and ASIC must be notified of any changes to responsible managers.

It is evident that a responsible manager is required to be highly qualified and have a significant amount of market experience. For some smaller payments firms who are wishing to enter the Australian market this poses a significant hurdle. The expense of hiring a responsible manager coupled with the difficulty of finding someone who has the required experience is reported as a challenge. They must have enough knowledge about the Australian market to know what changes are required in comparison to operations in the home jurisdiction. It is not a requirement that the responsible manager be based in Australia however, given the time difference in comparison to the UK as well as the desire of firms to position themselves as global businesses, it is inevitable that this would be the case.

This is often a pre-requisite of obtaining a licence for ASIC which hinders UK firms when seeking to access the Australian market.

Complexity of regulation in comparison to the UK system

In 2018 the Council of Financial Regulators (CFR) in Australia (consisting of APRA, ASIC and the RBA) released for public consultation an Issues Paper entitled 'Review of Retail Payments Regulation: Stored-value Facilities'. Stored-value facilities include a wide range of services including purchased payment facilities (PPFs) i.e. a facility under which a holder of a stored value makes payments to another person on behalf of the user of the facility which covers products, like pre-paid cards or services that are bank-like, such as digital wallets.[66]

The complexity of the regulatory framework for PPFs and the lack of a clear guide for new entrants that outlines the regulatory requirements is a challenge for foreign payments firms entering the Australian market.

PPFs that are widely available and redeemable upon demand for Australian currency are considered banking business and are subject to regulation by APRA. To date there is only one PPF provider registered with APRA i.e. Paypal Australia.[67] PPFs originating from overseas are not redeemable for Australian currency – they require a home jurisdiction bank account – do not fall under APRA's prudential regulation.

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65 ASIC RG 105, Organisational competence, **https://asic.gov.au/regulatory-resources/find-a-document/regulatory-guides/rg-105-afs-licensing-organisational-competence**

66 BrightLaw, Review of Australian Retail Payments Regulation, **https://www.brightlaw.com.au/review-of-australian-retail-payments-regulations/**

67 Council of Financial Regulators, Review of Retail Payments Regulation: Stored-value Facilities, **https://www.cfr.gov.au/publications/consultations/2018/review-of-retail-payments-regulation-stored-value-facilities/**

To further complicate matters, ASIC's AFSL regime for non-cash payment facilities is unclear regarding PPFs.[68] In 2001 ASIC was given explicit responsibility for the financial services licensing, conduct and disclosure regime in relation to non-cash payment facilities, a broader class of entities which includes PPFs. ASIC has since taken a flexible approach to administering its obligations in relation to payments products, including granting exemptions for low-value facilities. Exemptions to some aspects of ASIC's financial services regime have also been granted for gift vouchers and gift cards, prepaid mobile phone accounts, loyalty schemes and electronic road toll devices.[69]

The Murray Financial System Inquiry found that the complex structure of retail payment systems, and the level of public interaction with them, has resulted in the sector's regulation being fragmented and unnecessarily complex. Relevant provisions are contained in numerous laws, regulations and instruments administered ASIC, APRA and the Payments System Board. The Inquiry recommended that the regulators should publish a clear guide to the framework for industry, and in particular for new entrants, that outlines thresholds and regulatory requirements.[70]

The Productivity Commission's final report on Competition in the Australian Financial System found that PPFs face complex and potentially stunting regulation that can deter entry and expansion.[71] It was recommended that the CFR should review, consult on and re-design regulation of PPFs to encourage entry and expansion. This would involve simplifying and clarifying regulation of PPFs at all stages of their development.

The CFR has recognised the lack of middle ground between the regulatory systems of ASIC, APRA and the RBA and that a new framework is needed. UK payments firms have indicated that consistency with the UK/EU approach of the E-money Directive would be of value. In the UK, under the E-money Directive, providers of e-money services such as consumer credit, payment services, e-money, lending, insurance and investment services must be authorised by the FCA.

The relating Payments Services Directive 2 (PSD2) which came into force in 2018, sets requirements for firms that provide payment services, and affects banks and building societies, payment institutions, e-money institutions and their customers.[72]

UK firms have noted that lessons can be learnt for the Australian case from the PSD2 in Europe, which has driven innovation in industry, especially for start-up FinTech firms. This has led to better outcomes for consumers, who increasingly want more control over their data and finances, and are moving towards interacting via third party applications that provide a better all-

68 BrightLaw, Regulatory Changes for Purchased Payments Facilities **https://www.brightlaw.com.au/regulatory-challenges-for-purchased-payment-facilities/**

69 Council of Financial Regulators, Review of Retail Payments Regulation: Stored-value Facilities, **https://www.cfr.gov.au/publications/consultations/2018/review-of-retail-payments-regulation-stored-value-facilities/**

70 Financial System Inquiry, Final Report, on Australian Treasury Website

71 Productivity Commission, 'Competition in the Australian Financial System', **https://www.pc.gov.au/inquiries/completed/financial-system#report**

72 FCA, FCA finalises revised Payment Services Directive (PSD2) requirements, **https://www.fca.org.uk/news/press-releases/fca-finalises-revised-psd2-requirements**

round experience than banks themselves. It also helps drive down the costs of payment services.[73]

An equivalence or mutual recognition determination of key UK payments legislation would be valued by UK firms going forward.[74] This will make it easier for UK firms to access the Australian market as well as reducing complexity within the regulatory framework. As the CFR has recognised that the expansion of types of payment services available for consumers and businesses, including those that facilitate online transactions and particularly cross-border purchasing and selling need to be reflected in the regulatory arrangements, any future changes should take into account the changes made by the UK/EU.

Foreign Exchange Contracts

One firm highlighted that even after obtaining an AFSL, certain products and services are restricted for them. For example, an AFSL does not enable them to deal in foreign exchange contracts, i.e. the authorisation needed to enable Australian merchants to collect funds from payers in non-AUD currency, and then receive these into a single bank account in Australia in AUD.

In 2019, ASIC made changes to the AFSL which requires firms to provide additional proofs and documents for specified financial services and products, foreign exchange contracts – where the applicant is seeking to make a market authorisation for foreign exchange contracts – being one such authorisation.[75]

Applying for this can delay the roll out particular services in the Australian market in comparison to other jurisdictions where firms do not have to provide additional documents.

An added complication is that payments firms often work with partners. A payment firm often collects money on behalf of a partner (e.g. an accountancy firm) which the partner would then distribute to other merchants. Partner firms may not have the authorisation to promote regulated activities such as dealing in foreign exchange contracts so even if a payment firm is authorised to provide such a service their partners may not be able to offer or promote this.

This limits the range and profitability of services which payments firms are able to offer to the Australian market. An exemption or streamlined process which allows UK firms to deal in foreign exchange contracts will help to mitigate some of the issues faced by firms.

73 Truelayer submission to Review of Retail Payments Regulation, **https://www.rba.gov.au/payments-and-infrastructure/submissions/review-of-retail-payments-regulation/index.html**

74 Worldpay from FIS Report, 'Trade in financial services, Policy Positioning', February 2020

75 ASIC, AFS licence applications: Providing information for fit and proper people and certain authorisations **https://asic.gov.au/for-finance-professionals/afs-licensees/applying-for-and-managing-an-afs-licence/sample-afs-elicensing-application/**

Other Considerations

Main Takeaways:

- Under the Temporary Skills shortage structure, the two-year limit on visas makes it difficult to recruit staff and set up teams in Australian offices. This is further complicated by the onerous market testing requirements. A pathway for longer term employment would be of benefit to firms.
- Although the sandboxing facilitated by the FinTech Bridge had been very useful for firms, they would benefit from a scaling up programme and a defined pathway out of the sandbox.
- Reducing the regulatory fragmentation between the two markets would be beneficial for cross-border trade. Two issues flagged here by firms were regulations around data and anti-money laundering. Greater coherence in the regulation between jurisdictions will be of mutual benefit.

Migration and Visas

In our interviews many firms highlighted the barriers posed by immigration and particularly the points-based visa system. Under the new Temporary Skills Shortage structure there exists a two year visa with a discretionary two year renewal. There are few pathways to offer long term employment which limits the opportunities firms can offer to staff and over the long term restricts their ability to grow/expand the business through the introduction of new capabilities.

Working Holiday Visas

Individuals can secure work in Australia for 12 months (but no longer than 6 months at any one company), if they are aged 30 or below

Firms have mentioned this is relatively easy to obtain however, it does not negate the need for a more longer term solution.

Firms spoke of the need to be able to strategically allocate staff which enhances leadership, understanding of their global business, improves knowledge sharing and relationships, and helps build consistent workflows and processes. While some of this can be accomplished on a two year visa, the timeline does not always align with business or personal circumstances.

A new investment team for example would ideally be led by a senior leader from another office to help establish a local team, hire local talent and build credibility in the market. A new investment team may take a lot longer than four years to gain credibility in the market and the current visas arrangements do not offer any certainty that firms could employ someone for that duration.

The onerous market testing requirements also pose an issue. Under the previous scheme the organisation needed to establish a business case for a visa to be granted. Under the new Temporary Skills Shortage visa scheme the following labour market testing measures are required. Firms are required to:

- Advertise the position within four months of lodging a visa application.
- The regulations specify where the job must be posted and the duration of posting (e.g. government job boards, newspaper and radio adverts)
- They must publicly advertise a salary or salary range for roles under A$100k
- Review and screen candidates and establish a citizen or PR cannot perform the role
- Document these efforts and submit them with the visa application

One firm suggested that relationship building in this space was very important particularly with the state government of where a firm operates but many firms who have been operating in Australia for several years still face a number of issues. Firms retain the ability to fill roles on a short term basis which is suitable for targeted short term assignments.

Sandboxes and Scaling up

Some of the FinTech firms we interviewed spoke very highly of the UK-Australia FinTech Bridge and how the sandboxing regime assisted them in getting a foothold in the Australian market. However they indicated that they required more support in order to scale up and graduate out of sandboxes, and particularly with regards to applying for a licence. There is little distinction made between firms who have only just graduated out of the sandbox and those who have been operating in the market for many years. Newer/smaller firms felt some form of differentiation would be of value.

There is a role for both the UK and Australian sides in supporting businesses to succeed in the new market past the point of initial establishment. The UK Department for International Trade hosts members events for businesses that have used the Bridge to continue to provide a support network and the ‘Alumni’ receive a specific support package which was launched this year including opportunities to promote themselves and gain advice from their partner network.

There is more to be done to expand and promote mechanisms like this – firms do not always know who to reach out to for such support. A clear pathway for progression may develop over time but in order to ensure the efficacy of the FinTech Bridge this perhaps needs to be formalised in some way.

Regulatory Fragmentation

Regulatory fragmentation between the UK and Australia was a general issue that was flagged in our conversations with firms. Fragmentation occurs through divergent regulatory frameworks which can impede the development of innovations and limit the effectiveness of efforts to promote stability within sectors and systems across jurisdictions. The UK-Australia FTA negotiations should seek to start a dialogue around greater regulatory coherence and ensure that this is the ultimate goal of any policy changes.

For example on the issue of anti-money laundering (AML), firms who have been operating in Australia, particularly as subsidiaries, for many years felt that they previously held a degree of autonomy in the fact they only had to, in large part, abide by Australian regulations. This put them on a par with domestic firms within the market. With the increase of regulation globally and within the UK, their compliance frameworks now need to be moulded to fit both the Australian and UK/European standard. On AML, UK regulations state that all subsidiaries must comply with the UK standard which makes subsidiaries uncompetitive in relation to their peers. UK subsidiaries now find themselves out of step with the Australian system which has very specific requirements around AML. Both jurisdictions should seek to adhere to greater regulatory convergence. In this case, this could mean the UK allowing subsidiaries in Australia relief from the regulations around AML. Greater harmonisation of AML rules that are proportional to the risk, and non-discriminatory against international suppliers would help to maintain robust global framework for the conduct of financial services would be in the interest of both jurisdictions.

Committing to global solutions wherever possible is likely to lead to positive outcomes. As outlined above, the payments sector would benefit from an equivalence or mutual recognition determination of key UK payments legislation. Data is also another area where convergence of standards would be of value. In over the counter trading for example, firms are required to provide regulators in different jurisdictions with all the information they require. However new rules on data provisions are often implemented by regulators which are not compatible with the laws in all the jurisdictions in which firms operate. Greater adherence to G20 reforms around data sharing would alleviate this and ensure greater regulatory coherence.

Conclusion

This report should be viewed as the initiation of a dialogue on the UK-Australian future financial services relationship. Through analysing the ways in which UK firms operate in Australia, the report has highlighted some key areas for greater regulatory cooperation. It has also cast a light on areas where further analysis on existing mechanisms and processes, which could be adopted for the UK-Australia case to mutual benefit, would be of value.

Our interviews highlighted the importance of the Australian market for UK firms, be that in terms of profitability, its forward looking regulatory regime or cultural similarities. The further strengthening of this relationship is a key priority for the UK evidenced by the prioritisation of Australia in trade negotiations.

The significant challenges faced by economies in dealing with the global Covid-19 pandemic and the subsequent recovery provides further impetus to liberalise market access between key trading partners – an area where the UK and Australia can provide leadership to ensure the continuation of trade and ultimately drive prosperity.

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Standard Chartered
TheCityUK
TransferWise
TrueLayer
UK Finance
WorldPay

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UK cross-border trade in services with Australia

An analysis of market access for financial services firms

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