Global Financial Services Regulatory Guide - Australia

4. How do the licensing requirements apply to cross-border business in your jurisdiction?

| Contents |
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| To generate table of contents, right-click here and select **Update Field.** |

# How do the licensing requirements apply to cross-border business in your jurisdiction?

**Connection to Australia**

Australian licensing requirements (with respect to both banking and financial services) will generally be triggered by an overseas entity conducting regulated activities with a sufficient connection to Australia, such that it will be taken to be "carrying out a business" in Australia. Whether an entity is carrying out a business in Australia depends on the factual circumstances of each case. However, an entity will generally be deemed to be carrying out a business in Australia if it provides services with system, repetition and continuity. Key indicia of carrying out a business include having a place of business in Australia; establishing or using a share transfer office or share registration office in Australia; and administering, managing or otherwise dealing with property situated in Australia.

In addition, and with respect to financial services regulation, the Corporations Act provides that an entity will be deemed to be carrying out a financial services business in Australia where that entity engages in conduct that is intended to induce or is likely to induce, people in Australia to use the financial services provided by the entity. This is referred to as "Inducing Conduct," and entities that engage in Inducing Conduct will be required to hold an AFSL covering the provision of such services (unless an exemption applies), despite the fact that the entity may not otherwise be strictly carrying out a business in Australia.

The two main regulators adopt the following approaches with respect to foreign entities providing services into Australia:

**Banking business**

APRA will authorize branches of foreign banks to carry out banking business in Australia as "foreign ADIs." Foreign ADIs are subject to a condition specifically restricting the acceptance of retail deposits from their Australian branches, as well as other limitations and restrictions. Foreign ADIs can, however, accept deposits and other funds in any amount from incorporated entities, non-residents and their employees.

Foreign banks operating as branches (and authorized as foreign ADIs) in Australia remain subject to the supervision of their own central bank, although APRA can still impose conditions or restrictions on such entities with respect to their Australian activities.

**Financial services**

Generally, the financial services regulatory regime will apply equally to Australian entities and foreign-registered entities. There used to be two key exemptions that offered a simplified arrangement that foreign financial services providers (FFSPs) often relied upon to exempt them from the requirement to hold an AFSL and enter the Australian market. These arrangements have been subject to significant changes in the last year and the options available to FFSPs are now more complicated and varied depending on whether they are a new market entrant or are a longstanding market participant.

**Passporting exemption**

Prior to 1 April, 2020, ASIC had implemented and maintained a number of class orders (known collectively as the "foreign financial service provider" or "passporting" class orders), which relieved a foreign entity from AFSL requirements where the foreign entity was regulated by a specified foreign regulator ("**Passporting Exemption**"). ASIC has, among others, previously specified regulators from Germany, Hong Kong, Singapore, UK and the USA. As operating regulatory regimes that are "sufficiently equivalent" to the regime in Australia for Passporting Exemption purposes. The Passporting Exemption is also commonly referred to as the "Sufficient Equivalence Exemption."

**2020 Revisions**

A revised framework for FFSPs offering services to wholesale clients or professional investors in Australia was released in March 2020 in updated ASIC Regulatory Guide 176 ("**RG 176**") which superseded the version released in June 2012. From 1 April 2020, subject to a transition arrangement of two years until March 2022 for entities already relying on its exemptive relief, the Passporting Exemption was discontinued and FFSPs were provided with two new options, from which to choose to offer services to Australian clients after the transition period expired:

Apply for a new foreign Australian Financial Services (AFS) license

Apply for a standard AFS license1

**Current status**

In August 2023, ASIC announced that it would extend the transitional relief for the Passporting Exemption until 31 March 2025 (for those entities already relying on the relief).

In November 2023, following public consultation, a new bill was tabled in the Australian parliament, which provides for four new FFSP exemptions ("**2023 Bill**"). One of the proposed exemptions under the 2023 Bill is the "comparable regulator exemption," which is akin to the Passporting Relief and provides an exemption from the requirement to hold an AFSL for FFSPs which provide financial services to wholesale clients only and where the person is authorized, registered or licensed (as necessary) by a "comparable regulator" to legally provide the same or substantially the same financial service in a place outside Australia. The 2023 Bill must be passed into law before such an exemption can take effect.

In the meantime, those entities that were not previously relying on the Passporting Exemption can apply for bespoke relief from ASIC on the terms of the previous class order relief.

Limited connection exemption

ASIC has historically granted class order relief from the requirement to hold an AFSL to entities that provide financial services with a "limited connection" to Australia ("**Limited Connection Exemption**"). The Limited Connection Exemption has been available to be used by entities that are:

not conducting business within Australia

only deemed to be carrying on a financial services business in Australia because of inducing, or intending to induce ("**Inducing Conduct**"), a person in Australia to use their financial services

such services are provided to wholesale clients only

**Current status**

The Limited Connection Exemption has been extended until 31 March 2025 under transitional relief. It is set to be replaced with the Funds Management Relief pursuant to ASIC Corporations (Foreign Financial Services Providers - Funds Management Financial Services) Instrument 2020/199, which is to take effect from 1 April 2025. This will apply for services to a narrower scope of potential clients and is intended to be available to the following:

FFSPs who only carry out a financial services business because they engage in conduct that is intended to, or will likely, induce people in Australia to use the financial services the FFSP provides under s911D Corporations Act 2001 (Cth) ("**Corporations Act**")

FFSPs who engage in the provision of "funds management financial services" to a subset of professional investors (i.e., Eligible Australian Users).

Examples of Eligible Australian Users currently include a responsible entity of a registered scheme, a trustee of a wholesale trust who holds an AFSL (or would be required to hold an AFSL but for the ASIC Corporations (Wholesale Equity Schemes Trustees Instrument 2017/849)), and bodies regulated by the Australian Prudential Regulatory Authority. ASIC has indicated that FFSPs wishing to induce other types of professional investors can apply to ASIC to obtain additional approval.

Certain conditions will be imposed on an FFSP when relying on the Funds Management Relief, including the appointment of a local agent and that the FFSP has no place of business in Australia. To rely on the Funds Management Relief, the FFSP must lodge a written notice with ASIC.

The 2023 Bill also introduces a new "Professional Investor Exemption," which under the proposed drafting is to apply where each of the following is satisfied:

The financial service is provided to "professional investors" (which is a limited subset of wholesale investors).

The financial services provider provides the financial service from a place outside Australia (with the exception of 28-calendar-day marketing visits per year).

The financial services provider's head office and principal place of business are located at one or more places outside Australia.

The financial services provider reasonably believes that providing the same or substantially the same financial service would not contravene any law in the head office and principal place of business location(s).

The financial service provider notifies ASIC of its intention to rely on this exemption.

**Foreign AFSL**

The foreign AFSL regime for FFSPs, which commenced on 1 April 2020, involves FFSPs applying for a modified AFSL that:

Maintains the Sufficient Equivalence designation for certain markets and enables FFSPs holding a relevant authorization from those markets to provide the services or products approved in ASIC Corporations (Foreign Financial Services Providers-Foreign AFS Licensees) Instrument 2020/198 or an individual relief instrument to wholesale clients in Australia

Requires compliance with the general obligations under s912A (for example, to have adequate risk management systems and to do all things necessary to ensure that the financial services covered by the license are provided efficiently, honestly and fairly).

Requires the FFSP to be subject to supervisory and enforcement provisions applicable to standard AFSL holders, including:

being directed to provide a written statement under s912C

breach reporting requirements under s912D

to give ASIC reasonable assistance during surveillance checks under s 912E

Exempts FFSPs from specific provisions under Chapter 7 Corporations Act, where the relevant overseas regulator monitors and enforces the FFSP's compliance in relation to business activities in Australia and the regulatory regime in the FFSP's home jurisdiction produces similar regulatory outcomes to the Australian regime

Put in place tailored conditions on the FFSP, including the following:

The foreign AFS Licensee must carry on a business in the relevant jurisdiction. This condition is aimed at ensuring that the licensee is subject to overseas regulatory oversight in that jurisdiction.

Unless the foreign AFS Licensee is a company, it must have an agent appointed at the time it purports to rely on the relief and not fail to have an agent for any consecutive period of 10 business days.

The foreign AFS Licensee must reasonably believe that it would not contravene any laws of its home jurisdiction relating to the provision of financial services if it were to provide the wholesale financial service in its home jurisdiction.

Require FFSPs to provide similar documentation when applying, as is required for an ordinary AFSL.

Given the extension of the Passporting Exemption, Limited Connection Exemption, and the proposals for other forms of relief for FFSPs, the Foreign AFSL application process has been largely put on hold.

**Standard AFSL**

Where the FFSP is not eligible for Funds Management Relief or a foreign AFSL, or there is no other licensing exemption that applies, the FFSP must apply for a standard AFSL. The application process will include a range of proofs as part of an online application. If successful, the FFSP will ultimately be subject to the normal AFSL arrangements and obligations unless specific relief is granted by ASIC.

[1](file:///C%3A/Users/BACFJB/Downloads/Australia%20Final%20-%20FSR%20Guide%20%29.docx). Please refer to our previous client alert available at the following link explaining the consultation process and outcome in more detail: [Australia's New Three market access options for Foreign Financial Services Providers | Insight | Baker McKenzie](https://www.bakermckenzie.com/en/insight/publications/2020/03/australia-foreign-financial-services-providers)

[2](file:///C%3A/Users/BACFJB/Downloads/Australia%20Final%20-%20FSR%20Guide%20%29.docx). Please refer to our previous client alert available at the following link for more detail: [International: ASIC extends transitional relief for foreign financial services providers - Baker McKenzie InsightPlus](https://insightplus.bakermckenzie.com/bm/financial-institutions_1/international-asic-extends-transitional-relief-for-foreign-financial-services-providers)

[3](file:///C%3A/Users/BACFJB/Downloads/Australia%20Final%20-%20FSR%20Guide%20%29.docx). [21-131MR ASIC extends transitional relief for foreign financial services providers following Federal Budget | ASIC - Australian Securities and Investments Commission](https://asic.gov.au/about-asic/news-centre/find-a-media-release/2021-releases/21-131mr-asic-extends-transitional-relief-for-foreign-financial-services-providers-following-federal-budget/)

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