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Committee Secretary
Senate Economics Legislation Committee
Department of the Senate
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23 February 2024
By email

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Dear Sir/Madam

Supplemental Submission – Treasury Laws Amendment (Better Targeted Superannuation Concessions and Other Measures) Bill 2023: Licensing exemptions for foreign financial services providers

1 Introduction

This supplemental submission is made by Herbert Smith Freehills (**HSF**) in response to the referral on 7 Dec 2023 to the Senate Economics Legislation Committee in relation to the *Treasury Laws Amendment (Better targeted Superannuation Concessions and Other Measures) Bill 2023 (Bill)* which was introduced into Parliament on 30 November 2023, for consideration “to carefully investigate this legislation and provide interested stakeholders with the opportunity to comment on the legislation”.

2 Submission

- (a) In addition to our submissions made on 16 February 2024 we wanted to write to you to follow up a submission made by APRA made yesterday in relation to section 911P(3) of the Bill.
- (b) As you may know, a foreign financial services provider (**FFSP**) may be taken to be (or deemed to be) carrying on a financial services business in Australia even when it is in fact carrying on a business outside Australia and has limited business activities relating to Australia, if it is inducing persons in Australia to use the FFSP's services, by virtue of section 911D of the Corporations Act 2001 (Cth) (**Act**).
- (c) Whether a person, including a FFSP, needs to register as a foreign entity under Part 5B.2 of the Act turns on whether it is in fact carrying on a business in Australia.
- (d) When it is not in fact carrying on a business in Australia but is merely deemed to be carrying on a financial services business in Australia under section 911D of the Act, registration under Part 5B.2 of the Act is not required.
- (e) We share AFMA's concern that the current language of section 911P(3) of the Bill may create uncertainty for FFSPs which are not carrying on a business in Australia and may cause them to think that they need to register under Part 5B.2 of the Act if they rely on the exemption under paragraph 911A(2)(ep) even when the FFSP:
 - is not carrying on a business in Australia; and
 - would not be otherwise be required to register under Part 5B.2 of the Act.

We raised this point in earlier submissions to Treasury in relation to the exposure draft of the Bill in 2023.

- (f) We also note that paragraph 5.178 to the explanatory memorandum for the Bill provides that section 911P(3) “is intended to streamline the requirements for FFSPs by relying on existing requirements under the Corporations Act, *rather than introducing new requirements*” (emphasis added).
- (g) To clarify the position (that section 911P(3) is not seeking to introduce a new registration requirement when it would not otherwise arise under Part 5B.2 of the Act) and remove this uncertainty, we would invite you to consider the following ‘marked up’ amendment:

Section 911P: Exemption for comparably regulated providers—agents

(1) For the purposes of subsection 911G(2), this section sets out conditions for a person that proposes to rely on the exemption under paragraph 911A(2)(ep) for providing one or more kinds of financial service.

Having an agent when providing each of those financial services

(2) The person must have an agent in this jurisdiction when providing each of those financial services in reliance on the exemption unless the consecutive period during which the person so provides the financial service without an agent is less than 10 business days.

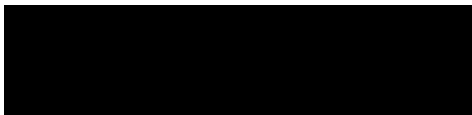
(3) The person must ensure that, [to the extent applicable](#):

(a) if the person is a foreign company—the person’s agent is appointed under Division 2 of Part 5B.2 as the person’s local agent; or

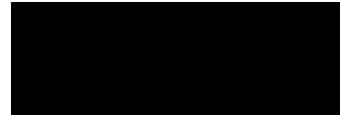
(b) if the person is not a foreign company but is a partnership formed outside this jurisdiction—the person complies with any obligations under paragraph 912A(1)(j) relating to the person’s agent that the person would have to comply with if the person were a financial services licensee.

If you would like to discuss the matters raised in this submission, please contact any of us at the details below.

Yours sincerely



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