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**THEMATIC REVIEW  
AUSTRALIA - EUROPEAN  
UNION FREE  
TRADE AGREEMENT:  
FINANCIAL SERVICES CHAPTER**

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# THEMATIC REVIEW

## AUSTRALIA - EUROPEAN UNION FREE TRADE AGREEMENT: FINANCIAL SERVICES CHAPTER



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### Introduction

The Australian Government has remained engaged with trade and trade partnerships under Free Trade Agreements. Not an easy task with the rapids for trade flows in the current global economy.

In Europe, negotiation is underway for an Australia-European Union Free Trade Agreement. Preparation for an Australia-United Kingdom Free Trade Agreement has also commenced.

This paper explores a number of thematic issues that arise for financial services under the Australia-European Union Free Trade Agreement.

### General

#### UNDERLYING THEMES FOR FINANCIAL SERVICES

- Duplicated regulatory requirements can be barriers to trade, such as requirements for licensing, fund registration and disclosure.
- Any regulatory equivalence assessment needs to be critical of European obligations and consider the regulatory framework, supervision and enforcement, eg the term prudential regulation carries a different meaning in the EU.
- Harmonisation of regulatory requirements or recognition of regulatory requirements can reduce duplication.
- Double passporting - interaction between EU authorised entities and EEA entities authorised to passport into the EU (eg Isle of Man, Channel Islands).

### Life Insurance

#### POSITION OF EFLICS IN AUSTRALIA

A foreign life insurer can operate in Australia via a locally-registered subsidiary (ie authorised here by APRA, with the usual requirements such as resident directors and a statutory fund) or as an Eligible Foreign Life Insurance Corporation (EFLIC).

#### Life Insurance Act 1995 (Cth)

Section 17

Section 21

Section 8

Section 16ZD

Life Insurance Act 1995 - regulation 2B.01  
authorises EFLICs from the following countries:

For paragraph 16ZD(1)(e) of the Act, the conditions  
are any of the following:

the body corporate:

- is authorised to carry on life insurance business in the **United States of America**; and
- is incorporated in the United States of America;

the body corporate:

- is authorised to carry on life insurance business in New Zealand; and
- is incorporated in **New Zealand**;

the body corporate:

- is authorised to carry on life insurance business in **Japan**; and
- is incorporated in Japan;

the body corporate:

- is authorised to carry on life insurance business in **Korea**; and
- is incorporated in Korea;

the body corporate:

- is authorised to carry on life insurance business in **China**; and
- is incorporated in China.

In paragraph (1)(e), a reference to China does not include a reference to the following members of the World Trade Organization established by the World Trade Organization Agreement:

- Hong Kong, China;
- Macao, China;
- Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu.

Will the EU require that EU/EEA home authorised life insurers will fall into the definition of EFLICs (ie double passporting)?

An easy solution for EU entry into Australia will be to list any member state of the EU in Regulation 2B.01.

Will the EU consider a reciprocal arrangement, or similar market access, for Australian life insurers?



## General Insurance

### POSITION OF UNAUTHORISED FOREIGN INSURERS (UFIS) IN AUSTRALIA

- Persons other than APRA authorised bodies corporate and Lloyd's underwriters who carry on insurance business in Australia commit an offence

*Insurance Act 1973* (Cth)

Section 9

Section 11

Section 3 definition of "insurance business" and "foreign general insurer"

Section 3A "insurance business" does not include undertaking liability under a contract of insurance specified in the regulations.

Regulation 4B-4D of the Insurance Regulations 2002 (Cth) provides exceptions to the definition of insurance business for the purposes of section 3A for a contract of insurance for which the insurer is, or is proposed to be, a UFI. These are:

- a. Insurance contract for high-value insured ie operating revenue or gross assets in excess of \$200 million; or

- b. Insurance contracts for atypical risks as defined; or
  - c. Insurance contracts for other risks that cannot reasonably be placed in Australia; or
  - d. Insurance contracts required by foreign laws.
- The EU could approach this by requesting that:
    - a. Insurance written by any EU home-authorized insurer falls within Regulation 3A;
    - b. The definition of "company" in the Act be amended to include EU home-authorized insurers; or
    - c. APRA grant authorisation to EU authorised "foreign general insurers" via national treatment.
  - Will the EU require this to be extended to EEA insurers (ie double passporting)?
  - Will the EU take a similar approach where there are similar prudential restrictions on Australian insurers?

## Insurance Intermediaries

- The regulation of risks relating to insurance intermediaries is somewhat different to those relating to EFLICs and UFIs, in particular in regard to the consumer facing outlook of intermediaries.
- Will the EU want any EU home-authorized insurance intermediary to be able to sell into Australia? Will there be reciprocity for Australian insurance intermediaries?
- Issues that arise include:
  - a. Is the Insurance Distribution Directive equivalent to requirements imposed upon insurance intermediaries in Australia by the AFSL and associated regulations?
  - b. Should an EU home-authorized insurance intermediary be restricted initially to selling to only to those parties to whom a UFI can sell? and
  - c. If an EU home-authorized insurance intermediary were permitted to operate in Australia via a branch (rather than via a subsidiary), would the requirement to hold a trust account and Australian accessible professional indemnity insurance for the broker in Australia resolve some issues?
- Would Australia be prepared to amend its law to address the issues that could arise in respect of insurance intermediaries who are home-authorized in the EU dealing only with high net worth or sophisticated clients (similarly to the UFI regime in general insurance) and not consumer clients?

## ADIs

### Position of ADIs in Australia

- A foreign bank wishing to establish a representative office in Australia must obtain APRA's written consent under section 67 of the *Banking Act 1959* (Cth).
- Foreign banks may alternatively choose to establish a locally incorporated banking subsidiary to operate in Australia.
- The *APRA Guidelines on Being Authorised as a Representative Office of a Foreign Bank (APRA Guidelines)* outline that an applicant wishing to establish a representative office in Australia will usually need to satisfy APRA that it:
  - a. Is recognised as a bank under the laws of its home country;
  - b. Is of good substance and repute;
  - c. Is subject to adequate standards of prudential supervision in its home country; and
  - d. Has received approval from its home country supervisor to establish a representative office in Australia

- If an applicant is successful, according to the APRA Guidelines, APRA will usually impose the following conditions:
  - a. The business of a representative office must be confined to the conduct of liaison and research activities;
  - b. The representative office must not conduct any form of banking business or activity related to the administration of banking business;
  - c. The representative office must not engage directly in financial transactions, except transactions which are necessary for and incidental to the maintenance of the office in Australia;
  - d. The name of the foreign bank must only be used by the representative office in conjunction with the description "representative office";
  - e. The activities of the representative office must be kept separate from those of any financial enterprise operating in Australia;
  - f. The Chief Representative should be an employee of the foreign bank and should possess the qualities necessary to perform properly the duties of the position of Chief Representative;
  - g. An AFP check for a Chief Representative must be submitted to APRA within three months of the date of his/her appointment;
  - h. Each representative must provide to APRA a written acknowledgement that he / she will ensure that the conditions applicable to the operation of the representative office will be complied with at all times;
  - i. Each foreign bank with a representative office in Australia must provide to APRA every year a statement confirming that the representative office is complying with the conditions applying to its consent;
  - j. Any proposal to close or change the location of a representative office, or to change the Chief Representative, must be immediately advised to APRA;
  - k. APRA must be informed immediately of any change in the arrangements for the foreign bank's oversight of its representative office in Australia;
  - l. A foreign bank which has a representative office in Australia must immediately inform APRA of any significant developments;
  - m. The representative office in Australia of a foreign bank must comply with all applicable Australian laws and must immediately inform APRA in writing of any breach or alleged breach, as well as any event which results or might reasonably be expected to result in the cancellation or suspension of the bank's registration as a foreign company; and
  - n. The representative office must promptly provide to APRA any information requested relating to its operations.



- Currently there are 15 foreign banks with consent to maintain a representative office in Australia:
  - a. CaixaBank, S.A.
  - b. China CITIC Bank Corporation Limited
  - c. China Development Bank
  - d. Commerzbank AG
  - e. Credit Industriel et Commercial
  - f. CTBC Bank Co., Ltd
  - g. DOHA Bank Q.S.C.
  - h. Global IME Bank Limited
  - i. Intesa Sanpaolo S.p.A
  - j. National Bank of Greece SA
  - k. Sumitomo Mitsui Trust Bank, Limited
  - l. Svenska Handelsbanken AB
  - m. The Korea Development Bank
  - n. The People's Bank of China; and
  - o. Wells Fargo Bank, National Association
- As far as we are aware none offer retail banking services.
- The Productivity Commission completed a detailed report on the financial services industry. Refer to the PC's comments on the competition aspects of the Four Pillars regime and the potential to open competition via overseas banks.<sup>1</sup> We would add that in addition to competition, innovation can also be impacted under a Four Pillars regime.
- It will be necessary to consider any interaction between APRA's DSIB prudential measures for ADIs and the EU's Winding Up Directive, Bank Recovery and Resolution Directive, and the Single Resolution Mechanism.

## Asia Region Funds Passport (ARFP)

- Australia is a participant in the [ARFP](#). The ARFP proposes a common framework of coordinated regulatory oversight to facilitate cross border issuing of managed investment funds. Australia, Japan, Korea, New Zealand and Thailand are signatories to the Passport's Memorandum of Cooperation. It is possible the ARFP will be operational in 2018.
- The ARFP is a similar arrangement and has been modelled on UCITS. A UCITS is an investment fund passporting arrangement in the European Union (EU) which allows for the passporting of the fund and fund manager in the region. UCITS has had significant penetration in many Asia economies, eg Singapore, Korea, Taiwan, Hong Kong, and Japan (under a fund of fund arrangement).
- Will the EU reciprocate and recognise an ARFP fund in Europe on a similar basis to a UCITS fund? If not, in what circumstances would the EU do so?

## Alternative Investment Fund Manager Directive (AIFMD)

- The AIFMD is an arrangement in the EU essentially for non-UCITS funds. The European Securities and Markets Authority (ESMA) carried out an [assessment](#) of the Australian regulatory regime for investment funds. This was for the purpose of possible passporting arrangements under the AIFMD. The assessment reported favourably for the registered scheme structure in Australia.
- A [final advice](#) was provided by the ESMA which advised that there are no significant obstacles regarding the monitoring of systemic risk impeding the application of the AIFMD passport to Australia.
- ASIC has also entered into (29) [supervisory cooperation arrangements](#) with EU financial markets regulators, agreeing to help each other supervise fund managers operating across borders. This is to support Australian licensees to provide portfolio services under the AIFMD arrangement and this was an important outcome for the Australian funds management industry.

<sup>1</sup><https://www.pc.gov.au/inquiries/completed/financial-system/report>

- Given the favourable assessment by ESMA, will the EU allow for passporting of Australian registered schemes or their responsible entities under the AIFMD? If not, in what circumstances would the EU do so?

## Foreign financial services provider framework

- ASIC has exempted certain foreign financial services providers from the obligation to hold an Australian financial services (AFS) licence, where the provision of financial services in Australia is to wholesale clients only and other requirements are met. Eligible EU financial service providers from Germany, Luxembourg and Sweden have received relief. ASIC is currently reviewing its policy for this relief. Relief has also be provided to UK eligible financial service providers.

Germany

Luxembourg

Sweden - ASIC Instrument 17/0503

- Will the EU seek to pursue this for all member state registered providers for wholesale (and/or retail)?
- Will the EU reciprocate and reduce regulatory compliance for AFS licensee's in Europe?

## Corporate collective investment vehicle (CCIV)

- Australian Treasury has prepared a draft Bill and previously consulted for the proposed CCIV (we have suggested "koala fund" as a colloquial reference). The CCIV will offer an internationally recognisable investment vehicle which can be readily marketed to foreign investors, including through the ARFP. The CCIV is considered to allow fund managers to offer investment products using corporate vehicles that are commonly in use overseas.
- Singapore and Hong Kong have recently implemented regulatory frameworks for variable capital companies.

- The CCIV is modelled on European fund vehicles in Luxembourg, being the SiCAV, and the UK, being the OEIC. Given the similarities, will the regulatory frameworks be considered to allow for a form of "passport", this could apply to the fund vehicle, fund operator, fund depositary, a cell and may recognise retail and wholesale structures.

## Fund migration

- Offshore financial centres (not all) in Europe provide for company migration regulatory frameworks. This can be useful and beneficial in attracting new business. For example, the Guernsey [company migration framework](#) is inclusive of investment fund management companies and corporate investment fund structures.
- Will a migration framework be considered for Australia?

## Disclosure for investors

- Harmonised disclosure and reporting arrangements should be considered. Issuers and sellers of financial products in Australia must comply with point-of-sale, periodic and continuous disclosure obligations:
  - a. Point-of-sale being a product disclosure statement (similar to a prospectus in Europe) for retail investors;
  - b. Periodic disclosure being a periodic statement for retail investors; and
  - c. Continuous disclosure being significant event and material change type disclosure that is specific to a registered scheme.

Point-of-sale - product disclosure statement - 1012B, 1012C *Corporations Act*

Periodic disclosure - periodic statement - 1017D *Corporations Act*

Continuous disclosure - 1017B, 674 and 675 *Corporations Act*

- Australia's financial reporting and audit requirements for registered schemes and companies are consistent with international standards for accounting and audit.

Chapter 2M *Corporations Act*

- Will the EU recognise Australian disclosure and reporting requirements, eg to meet Key Investor Information Document (KIID) and Prospectus Directive, or is harmonisation possible (all or some types of funds)?

## Responsible entity structure (public company)

- A registered scheme in Australia must have a responsible entity that is a public company that holds an AFSL authorising it to operate a managed investment scheme, 601FA *Corporations Act*.
- A similar requirement is proposed for the CCIV for the corporate director and depositary.
- The EU may consider these requirements as a barrier to trade? It is possible for a foreign company to incorporate an Australian public company, and the requirement applies the same to Australian business.

## New financial services

There appears to be merit in continuing the approach for each party to permit financial service suppliers of the other to offer any new financial service that a party would permit its own financial service suppliers to offer, in like circumstances.

## Unfair Contract Terms Directive

Will the EU consider harmonisation?

## Insolvency

- Issues to consider include:
  - a. The EU's Settlement Finality Directive in the context of ADIs; and
  - b. The handling of assets of a trustee in the event of insolvency.
- In respect of the latter:
  - a. The CCIV regime proposes to resolve insolvency issues in respect of cells by granting limited separate legal identity for insolvency purposes; but
  - b. There is some uncertainty in the law relating to assets of trusts in the event of trustee insolvency otherwise : see *Re Amerind Pty Ltd (receivers and managers apptd) (in liq)* [2017] VSC 127; *Commonwealth of Australia v Byrnes & Hewitt in their capacity as joint and several Receivers and Managers of Amerind Pty Ltd (Rcvrs and Mgrs appointed) (in liq)* [2018] VSCA 41; *Re Killarnee Civil & Concrete Contractors Pty Ltd ACN 085 230 486 (In Liquidation)* (awaiting decision FCFCA). This is a particular issue in view of the prevalence of trading trusts in Australia and some managed investment trusts.
- Should Australia require all EU member states to ratify the Hague Trust Convention (noting that co-property interests are known in German, Spanish and Dutch law, and Belgian and Luxemburgish decrees have established co-ownership). The Netherlands has also developed the parallel debt structure to handle the non-recognition of security trustees in the area of syndicated loans.

## Foreign ownership

- Australia has limited [ownership restrictions](#) for fund managers and financial service providers that support fund management, such as custody, portfolio management and administration.
- The Foreign Investment Review Board (FIRB) has set [monetary thresholds](#) for acquisitions for the purpose of the Foreign Acquisitions and Takeovers Act. There are higher monetary thresholds for FTA countries and for "securities technologies". Where we have been involved

with FinTech and RegTech there is a shortage of funding indicated to support the sector. In our view it is important to facilitate opportunities in this sector in its early stages of development.

## Tax imputation

Australia's tax imputation system may be considered as a potential barrier to trade for foreign funds with Australian investors. The tax is specific to Australian domiciled funds. In our view, any tax assessment should be on a comprehensive basis as against an assessment of isolated taxation treatment.

## Governance

- Governance requirements can be used as a barrier to trade. Australian law permits a foreign company carrying on business in Australia provided it is registered as a foreign company, appoints a local agent and lodges financial reports (prepared in accordance with the law in the place of origin) with ASIC.
- Is there similar access for Australian companies in the EU?

Part 5B.2 Division 2 *Corporations Act*

- A public company in Australia must have at least 3 directors, at least 2 of them must be ordinarily resident in Australia. There are good reasons for this requirement. However the approach may be inconsistent with a senior management and board of director requirement that neither party shall require that an enterprise of that party that is a covered investment appoint nationals of any particular nationality to senior management positions.

201A *Corporations Act*

- Australian financial services licensees are required to meet competence requirements. Will the EU recognise these requirements if an EU licence is required for similar services?
- Australian financial services licensees are required to have adequate arrangements for risk management and conflicts of interest management. This is in addition to other systems and procedures expected under ASIC policy such as complaints management framework, breach

reporting policy and related party transactions policy. Will the EU recognise these requirements if an EU licence is required for similar services?

- Australian assurance and standards for regulatory requirements for investment funds are consistent with international standards. Will the EU recognise these standards for EU requirements of a similar nature?

## Administration

- Administrative processes can be barriers to trade. Regulatory transparency can increase the prospects of reducing this however “soft handling” can mean that administrative processes are protracted and requirements opaque.
- What assurances can be provided by the EU for national treatment? A periodic reporting approach for administrative processes can facilitate monitoring administrative barriers.

## Technology

- Technology is expected to have a significant influence on financial services, including investment funds management. The technology can be for external services and internal functions. The manner in which the services are required to be provided for regulatory compliance can vary, for example ASIC recently provided relief to support online financial services disclosure.
- Differences in requirements for technology can be barriers to trade, eg the program form, the flow of data, the flow of information between regulatory bodies. Common names and requirements can support technology adoption and use across regions, and can reduce barriers to trade.

Regulatory Guide 221 Facilitating online financial services disclosures - [RG 221 Facilitating online financial services disclosures](#)

[ASIC Corporations](#) (Facilitating Electronic Delivery of Financial Services Disclosure) Instrument 2015/647)

- Common technology requirements should be explored. This can be particularly relevant for regulatory technology for compliance and risk management.

## Data science

- Australian financial services providers may benefit from commitments which require the EU to allow Australian financial institutions to transfer data into and out of its territory, allowing for more efficient data processing for Australian companies. The scope of data and a similar arrangement should be explored. The use of data for compliance and risk management for investment funds and financial services is increasing and data access is a key part of this.

## National treatment

- There appears to be merit in continuing the approach for each party to accord to services and service suppliers of the other party treatment no less favourable than that it accords to its own like services and service suppliers.
- Neither Party shall require a service supplier of the other Party to establish or maintain a representative office or any form of enterprise, or to be resident, in its Area as a condition for the supply of a service. Financial service providers for European funds may be required to be a European enterprise, eg UCITS requires a mandatory depositary that is prudentially regulated and either have its registered office or be established in the UCITS home Member State.

## Most Favoured Nation commitments

- There appears to be merit in continuing the approach to agree to confer any future more preferential treatment for providers of other countries.







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