



ASIC

Australian Securities & Investments Commission

REGULATORY GUIDE 54

Principles for cross border financial services regulation

Making the regulatory regime work in a cross border environment

November 2002

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Section 1 What are the Principles about?

Why have we formulated the Principles?

1.1 Due to globalisation and technological change, Australian investors are increasingly seeking access to financial markets, clearing and settlement facilities, financial services and financial products, originating from and regulated in a foreign jurisdiction (“foreign facilities, services and products”). At the same time, providers of foreign facilities, services and products (“foreign providers”) also wish to enter the Australian marketplace.

1.2 In regulating foreign providers and foreign facilities, services and products, we aim to:

- (a) facilitate the availability and provision of foreign facilities, services and products in Australia, in order to:
 - (i) enhance competition and innovation in the financial services industry; and
 - (ii) increase Australian investors’ access to financial facilities, services and products;
- (b) ensure that Australian investors who access foreign facilities, services and products are adequately protected;
- (c) ensure that foreign facilities, services and products do not adversely affect the integrity of Australian markets;
- (d) ensure that foreign facilities, services and products do not create systemic risks in the Australian financial system; and

Note: In the Australian context, systemic risk is likely to be an issue primarily when clearing and settlement facilities, large financial markets or large securities firms seek to operate in Australia. The Reserve Bank of Australia also has a role to play in the reduction of systemic risk: see paragraph 8.8, *Revised Explanatory Memorandum, Financial Services Reform Bill 2001*.

- (e) deal consistently with the regulatory issues that arise from the availability and provision of foreign facilities, services and products in Australia.

1.3 We have formulated the Principles in order to achieve these goals.

1.4 We also believe that the Principles will indirectly facilitate access to foreign jurisdictions for Australian providers. The Principles will lead to:

- (a) increased access to the Australian marketplace for foreign providers; and
- (b) closer relations between ASIC and foreign regulators.

It is reasonable to expect that both these outcomes will assist Australian providers who seek to enter foreign jurisdictions.

How will we use the Principles?

1.5 The Principles will guide our policy and decision-making about:

- (a) whether we should exercise a specific statutory discretion to recognise a foreign regulatory regime or regulator;

Note: For example, the Principles will guide our development of policy on when we will approve an overseas regulatory authority for the purposes of s911A(2)(h).

- (b) whether we should advise the Minister to exercise a specific statutory discretion to recognise a foreign regulatory regime or regulator;

Note: For example, the Principles will guide our development of policy on when we will advise the Minister that the home regulatory regime of an overseas market is sufficiently equivalent to the Australian regulatory regime: see s795B(2)(c). See also s824B(2)(c).

- (c) whether we should grant discretionary relief to a foreign provider to enable it to provide a foreign facility, service or product in Australia without being subject to:

- (i) Australian regulatory requirements that are inconsistent with its home regulatory regime; or
 - (ii) unnecessary regulatory duplication,
- and, if so, what relief we should give;

Note: For example, the Principles will influence our future policy on foreign collective investment schemes: see our policy proposal paper *Foreign collective investment schemes* (November 2002).

- (d) whether we should enter into bi- or multi-lateral recognition arrangements with foreign regulators.

Note: The Principles do not purport to provide guidance to the Federal Government on any recognition arrangements with foreign jurisdictions that the Federal Government may enter into.

1.6 The Principles will assist us to protect and promote the interests of Australian investors, protect the integrity of Australian markets, and manage systemic risk, without imposing unnecessary Australian regulation on foreign facilities, services and products.

1.7 The Principles are not directly relevant to the following matters and we will not directly use the Principles when asked to consider these matters:

- (a) the regulation of foreign providers who seek to fully comply with those parts of the Australian law that apply to comparable Australian providers;

Note: Foreign providers may enter the Australian marketplace by complying with the laws imposed on comparable Australian providers. For example, foreign market operators may obtain an Australian market licence under s795B(1), and foreign financial service providers may obtain an Australian financial services licence and comply with all applicable parts of the Corporations Act.

- (b) the jurisdictional reach of the Corporations Act. The Principles do not address the issue of what degree of connection between Australia and the foreign provider or foreign facility, service or product is necessary before the Corporations Act applies.

Section 2 The Principles

General Principles

2.1 The General Principles guide our policy, advice and decision-making in relation to the regulation of cross border financial services: see paragraph 1.5.

Principle 1

ASIC recognises foreign regulatory regimes that are sufficiently equivalent to the Australian regulatory regime, in relation to the degree of investor protection, market integrity and reduction of systemic risk that they achieve

Principle 2

ASIC gives the fullest possible recognition to sufficiently equivalent foreign regulatory regimes

Principle 3

ASIC must have effective co-operation arrangements with the home regulators of foreign facilities, services and products available in Australia

Principle 4

ASIC must be able to enforce the Australian laws that apply to foreign facilities, services and products

Principle 5

Adequate rights and remedies must be practically available to Australian investors who access foreign facilities, services or products in Australia

Principle 6

Adequate disclosure must be made of information that Australian investors may reasonably require to make an informed assessment of the consequences of any significant differences between the regulation of the foreign facilities, services or products and the regulation of comparable Australian facilities, services and products

Equivalence Principles

2.2 The Equivalence Principles guide our assessment of whether a relevant foreign regulatory regime is equivalent to the Australian regulatory regime: see Principle 1. We will treat a foreign regulatory regime, or the relevant parts of it, as equivalent to the Australian regulatory regime if it satisfies Principles 7–10.

Principle 7

An equivalent regulatory regime is clear, transparent and certain

Principle 8

An equivalent regulatory regime is consistent with the IOSCO Objectives and Principles of Securities Regulation

Principle 9

An equivalent regulatory regime is adequately enforced in the home jurisdiction

Principle 10

An equivalent regulatory regime achieves equivalent outcomes to the Australian regulatory regime

Section 3 Commentary on the General Principles

Principle 1

ASIC recognises foreign regulatory regimes that are sufficiently equivalent to the Australian regulatory regime, in relation to the degree of investor protection, market integrity and reduction of systemic risk that they achieve

What does the principle mean?

What does “recognises” mean?

3.1 We recognise a foreign regulatory regime when, because of the application of the foreign regulatory regime:

- (a) we declare, or advise the Minister, that the foreign regulatory regime meets explicit statutory criteria for such recognition: see, for example, s795B(2)(c); or
- (b) we give, or advise the Minister to give, varying degrees of relief from the Australian regulatory regime.

Recognition of a foreign regulatory regime means foreign providers can operate in Australia because they are subject to that foreign regulatory regime, even though that foreign regulatory regime differs from the Australian regulatory regime.

What does “equivalent” mean?

3.2 The equivalence test articulated in Principle 1:

- (a) defines equivalence according to the outcomes achieved by the regulatory regime. It requires a comparison of the outcomes of the Australian regulatory regime and the relevant foreign regulatory regime. It does not involve a comparison of the regulatory mechanisms used to achieve those outcomes; and
- (b) considers equivalence largely from the point of view of:
 - (i) the protection of Australian investors;
 - (ii) the integrity of Australian markets; and
 - (iii) the reduction of systemic risk in the Australian financial system.

Note: Some foreign regulatory regimes may not satisfy the equivalence test simply because the jurisdictional reach of their regulatory regime is such that they do not protect *Australian* investors and markets, or *Australia's* financial system. This may be

the case even though those regulatory regimes offer equivalent protection to their own investors and their own markets, and reduce systemic risk in their own financial system.

3.3 The equivalence test does not require that the Australian and foreign regulatory regimes impose comparable regulatory burdens on regulated entities.

3.4 For further explanation of what constitutes an equivalent regulatory regime for the purpose of Principle 1, see Section 4.

What does "sufficiently" mean?

3.5 The equivalence test in Principle 1 is flexible. What degree of equivalence is "sufficient" will depend on a number of factors. For example, if a foreign provider is given only limited relief from the Australian regulatory regime, it may not be necessary for the home regulatory regime to achieve all the relevant outcomes of the Australian regulatory regime: see Principle 10. Likewise, the degree of equivalence that is sufficient may be affected by the conditions imposed on any relief from the Australian regulatory regime granted to a foreign provider.

Is reciprocal recognition a relevant factor?

3.6 The basis of Principle 1 is that recognition of a foreign regulatory regime is largely dependent on the nature of the foreign regulatory regime and, in particular, its equivalence to the Australian regulatory regime. It is not dependent on reciprocal recognition of the Australian regulatory regime by the foreign jurisdiction. However, we will encourage and facilitate such reciprocal recognition.

Why have we adopted this principle?

3.7 The equivalence test in Principle 1 is essential to the protection of Australian investors, the integrity of Australian markets and the Australian financial system. Recognition of a foreign regulatory regime means the operation or provision of a foreign facility, service or product in Australia will be regulated, at least in part, by that foreign regulatory regime. Therefore, we must make some assessment of the quality of a foreign regulatory regime before recognising it.

3.8 Principle 1 defines equivalence according to the outcomes of the regulatory regime (rather than the regulatory mechanisms used to achieve those outcomes) because it is the outcomes of the regulatory regime that impact on investor protection, market integrity and systemic risk. Many different regulatory mechanisms may achieve the desired investor protection, market integrity and systemic risk outcomes. Moreover, defining equivalence according to regulatory mechanisms does not take into account whether those regulatory mechanisms are effectively

implemented. An outcome-focused test, on the other hand, involves assessment of the effectiveness of the foreign regulatory regime.

3.9 The equivalence test in Principle 1 is flexible because:

- (a) the outcomes of the Australian regulatory regime and relevant foreign regulatory regimes may not be identical; and
- (b) in different situations, varying degrees of equivalence are required.

3.10 In framing Principle 1, we were influenced by s795B(2)(c) and 824B(2)(c) of the *Corporations Act 2001* (“Corporations Act”). Under these provisions, recognition of foreign regulatory regimes is conditional on those regulatory regimes meeting an outcomes-focused equivalence test.

3.11 We also had regard to the approach of the International Organization of Securities Commissions (“IOSCO”) and foreign regulatory regimes. The IOSCO Objectives and Principles of Securities Regulation are generally expressed in terms of outcomes (rather than regulatory mechanisms) and IOSCO recognises that there “is often no single correct approach to a regulatory issue”: IOSCO *Objectives and Principles of Securities Regulation*, p 3. In a number of foreign jurisdictions, recognition of foreign regulatory regimes and access of foreign providers is conditional on the equivalence of the relevant foreign regulatory regime: see, for example, s270(2) and 292(3), *Financial Services and Markets Act 2000* (UK); Hong Kong Securities and Futures Commission’s *Guidelines for the Regulation of Automated Trading Services* (February 2002), para 62; and s287(2)(a), *Securities and Futures Act* (2001) (Sing).

Principle 2

ASIC gives the fullest possible recognition to sufficiently equivalent foreign regulatory regimes

What does the principle mean?

3.12 When regulating foreign facilities, services and products, we will rely on foreign regulation to the greatest extent possible. We will only require compliance with those Australian laws that are necessary to ensure that:

- (a) Australian investors who access foreign facilities, services and products are protected;
- (b) foreign facilities, services and products do not adversely affect the integrity of Australian markets; and

- (c) foreign facilities, services and products do not create systemic risks in the Australian financial system.

Note: In some circumstances, we do not have power to give relief from compliance with Australian laws. For example, Part 7.2 of the Corporations Act sets out all obligations imposed on a foreign market operator licensed under s795B(2). We have no power to give relief from compliance with these obligations.

3.13 In general, this principle means that we will only supplement the foreign regulatory regime by requiring the foreign provider to comply with Australian laws that are necessary to ensure the achievement of:

- (a) all relevant outcomes of Australian law: see Principle 10; and
- (b) the General Principles.

3.14 For example:

- (a) if the disclosure laws of the foreign regulatory regime are insufficient to ensure that Australian investors can make confident and informed decisions about whether to invest in a foreign financial product, we may impose some Australian disclosure laws on the foreign product provider;

Note: This situation may occur even if the foreign disclosure laws are comparable to Australian disclosure laws. The foreign disclosure laws may have a limited jurisdictional scope and not apply to offers made to Australian investors.

- (b) we may ensure that Principle 5 is achieved by requiring a foreign service provider who provides services to retail clients to comply with the obligation under s912A(2)(b) of the Corporations Act to be a member of an external dispute resolution scheme.

Why have we adopted this principle?

3.15 This principle enables us to balance the competing goals of, on the one hand, facilitating the availability and provision of foreign facilities, services and products in Australia, and, on the other hand, protecting Australian investors and Australian market integrity, and reducing systemic risks.

3.16 We will facilitate the availability and provision of foreign facilities, services and products in Australia by imposing the minimum regulatory burden on foreign providers. In particular, we will ensure that foreign providers are not subject to unnecessary regulatory duplication. However, when necessary, we will further our other goals by applying Australian laws to supplement a foreign regulatory regime that in our view does not do all that is needed to provide protection equivalent to the Australian regulatory regime.

Principle 3

ASIC must have effective co-operation arrangements with the home regulators of foreign facilities, services and products available in Australia

What does the principle mean?

3.17 Effective co-operation arrangements may be bi-lateral or multi-lateral. They will generally be in the form of a Memorandum of Understanding, or some other documented arrangement. They may, however, be supplemented by more informal arrangements and relationships.

3.18 Effective co-operation arrangements encompass:

- (a) sharing of information about foreign facilities, services and products and foreign providers; and
- (b) co-operation in relation to:
 - (i) the supervision and investigation of foreign facilities, services and products and foreign providers; and
 - (ii) enforcement actions involving foreign providers.

3.19 In particular, effective co-operation arrangements ensure the home regulator will, if requested by us, take appropriate actions to protect Australian investors and Australian market integrity, and reduce systemic risks in the Australian financial system. Those actions should be as effective as actions the home regulator would take to protect investors in its own jurisdiction, protect the integrity of markets in its jurisdiction and to reduce systemic risk in its jurisdiction.

3.20 In general, effective co-operation arrangements will not be possible unless the home regulator has power under the home regulatory regime to co-operate with ASIC in these ways.

Why have we adopted this principle?

3.20 In order to protect Australian investors and Australian market integrity, and reduce systemic risks in the Australian financial system, we may need to:

- (a) access information that is only available from the home regulator; and
- (b) ask the home regulator to:
 - (i) supervise or investigate activities conducted in the home jurisdiction; and
 - (ii) take enforcement action in the home jurisdiction.

3.22 The activities of foreign providers in their home jurisdiction may impact on Australian investors, Australian markets and systemic risks in the Australian financial system. However, we may have no ability to conduct compulsory supervision or investigations outside Australia without assistance from the home regulator. Moreover, under Principle 2, foreign facilities, services and products will largely be regulated by the law of their home jurisdiction. Generally we cannot enforce the law of the home jurisdiction or bring enforcement action as regulator in the home jurisdiction. Therefore, it is important that co-operation arrangements enable us to ask the home regulator to supervise or investigate foreign providers, or commence enforcement action against such providers.

3.23 Principle 3 is consistent with:

- (a) our current practice in relation to the regulation of foreign facilities, services and products;
- (b) s798A(3)(d) and 827A(3)(d), which require the Minister to have regard to whether “adequate arrangements exist for cooperation” between us and the home regulator of a foreign financial market or a clearing and settlement facility seeking an Australian licence;
- (c) Principles 11–13 of the IOSCO Objectives and Principles of Securities Regulation, which stress the importance of international cooperation between regulators; and
- (d) the approach to regulation of cross border financial services in other jurisdictions: see, for example, s270(2)(b) and 292(3)(d), *Financial Services and Markets Act 2000* (UK); and the Hong Kong Securities and Futures Commission’s *Guidelines for the Regulation of Automated Trading Services* (February 2002), para 65.

Principle 4

ASIC must be able to enforce the Australian laws that apply to foreign facilities, services and products

What does the principle mean?

3.24 We must be able to bring judicial and administrative enforcement action in Australia against foreign providers for breaches of the Australian law provisions that apply to foreign providers. In order to do this, we must have both sufficient information and legal power to commence enforcement action.

3.25 To ensure that we have sufficient information and legal power, we may:

- (a) impose, or advise the Minister to impose, appropriate conditions on a licence; or
- (b) impose appropriate conditions on any relief from the Australian regulatory regime granted to a foreign provider.

3.26 Appropriate conditions may include requiring the foreign provider to:

- (a) enter into co-operation arrangements with us that will enable us to obtain information from the foreign provider;
- (b) register under Division 2 of Part 5B.2 of the Corporations Act;
- (c) submit to the non-exclusive jurisdiction of the Australian courts;
- (d) appoint an agent in Australia to accept service of process on behalf of the foreign provider; and
- (e) comply with any lawful direction of ASIC or an Australian court.

Why have we adopted this principle?

3.27 We may rely on the home regulator to bring some enforcement action against a foreign provider in its home jurisdiction: see Principle 3. However, we must be able to enforce in Australia those Australian laws that apply to the foreign provider because:

- (a) the Australian laws that apply to the foreign provider will be those that we consider are essential to protecting Australian investors, Australian markets and reducing systemic risks; and
- (b) the foreign provider's home regulator may not be able to enforce these Australian laws in its home jurisdiction.

3.28 In framing this principle, we were influenced by the approach in other jurisdictions to enforcement of domestic legislation against foreign entities, and co-operation arrangements with foreign licensed entities: see, for example, s7(d), *Investment Company Act 1940* (US); and s292(3)(c), *Financial Services and Markets Act 2000* (UK).

Principle 5

Adequate rights and remedies must be practically available to Australian investors who access foreign facilities, services or products in Australia

What does the principle mean?

3.29 The phrase “rights and remedies” includes:

- (a) the right to seek remedies through private judicial actions;
- (b) access to internal and external alternative dispute resolution; and
- (c) access to compensation arrangements.

3.30 In general, Australian investors who use foreign facilities, services and products should have practical access to rights and remedies that provide the same level of protection as the rights and remedies available to Australian investors who use comparable Australian facilities, services and products.

3.31 The Australian investors who access foreign facilities, services and products may be either wholesale or retail. The nature of the investors will affect the determination of:

- (a) what rights and remedies are adequate; and
- (b) when those rights and remedies are practically available.

What does “adequate” mean?

3.32 When determining what constitutes adequate rights and remedies, we will give effect to the policy of the Corporations Act, which is that retail clients should generally have access to non-judicial remedies. Under s912A(2) and 912B, retail clients of financial service providers have access to both non-judicial compensation arrangements, and internal and external dispute resolution. Retail clients who use financial markets licensed under s795B(1), through licensed participants, may also make a claim under the markets’ compensation arrangements: see s881A and 888A, and the regulations made under s888A. On the other hand, under the Corporations Act, wholesale investors are generally only entitled to pursue their rights through private litigation. Therefore, we will generally treat the ability to pursue rights against foreign providers through private judicial action as adequate for wholesale investors.

What does “practically available” mean?

3.33 A right or remedy may not be practically available to retail investors if it can only be pursued through private action in a foreign jurisdiction. High costs, the problems associated with briefing foreign lawyers, and other practical matters are likely to be a significant impediment to any attempt by a retail investor client to obtain remedies

through private judicial action in a foreign jurisdiction. On the other hand, such remedies are more likely to be practically available to wholesale investors, who can be assumed to be better resourced.

What does this principle mean for foreign providers who deal with retail clients?

3.34 In many circumstances, foreign regulatory regimes will not give Australian retail investors practical access to rights and remedies that provide the same level of protection as the rights and remedies that are available to Australian retail investors who use comparable Australian facilities, services and products. In these circumstances, we will require the foreign provider to comply with a modified version of those parts of the Australian regime that relate to remedies. We may, for example, require a foreign service provider to be a member of an Australian external dispute resolution scheme. In other circumstances, we may be satisfied that a foreign alternative dispute resolution scheme (such as an ombudsman scheme) is practically accessible to Australian retail clients.

3.35 In addition, in order to facilitate private judicial actions by Australian retail investors against foreign providers, we may require foreign providers who are not registered under Division 2 of Part 5B.2 of the Corporations Act to:

- (a) submit to the jurisdiction of the Australian courts; and/or
- (b) appoint an agent in Australia to accept service of process on behalf of the foreign provider.

Why have we adopted this principle?

3.36 We have adopted this principle because adequate rights and remedies are essential to the protection of Australian investors. Investors must have the ability to protect their own interests, because neither the home regulator nor ASIC will be able to pursue all breaches of investors' rights.

3.37 This principle is also consistent with the enhanced investor remedies in Chapter 7 of the Corporations Act.

Principle 6

Adequate disclosure must be made of information that Australian investors may reasonably require to make an informed assessment of the consequences of any significant differences between the regulation of the foreign facilities, services or products and the regulation of comparable Australian facilities, services and products

What does the principle mean?

3.38 Under this principle, the disclosures required to enable investors to make an informed assessment will vary depending on whether the relevant investors are wholesale or retail.

3.39 Foreign providers who deal with retail investors will generally need to disclose the following information in an appropriate manner:

- (a) that the foreign facility, service or product is regulated, at least in part, by the laws of a foreign jurisdiction, and those laws differ from Australian laws;
- (b) that the rights and remedies available to Australian investors who access the foreign facility, service or product may differ from those of Australian investors who access comparable Australian facilities, services or products;
- (c) the nature of the rights and remedies available to Australian investors under the foreign regulatory regime and how those rights and remedies can be accessed;
- (d) the nature of any special risks associated with the foreign facility, service or product, such as risks arising from taxation, foreign currency or time differences; and
- (e) the nature and consequences of significant differences in the regulatory regime, such as the use of accounting standards that differ from those used in Australia.

3.40 Foreign providers who deal solely with wholesale investors will generally only need to disclose that the foreign facility, service or product is regulated, at least in part, by the laws of a foreign jurisdiction and those laws differ from Australian laws.

3.41 In general, we will ensure that such disclosure is made by:

- (a) imposing, or advising the Minister to impose, suitable conditions on a licence; or
- (b) imposing suitable conditions on any relief from the Australian regulatory regime granted to a foreign provider.

Why have we adopted this principle?

3.42 Disclosure fulfils an important investor protection role in the Australian regulatory regime. A key purpose of both Chapters 6D and 7 of the Corporations Act is to ensure that retail investors have access to sufficient information to make confident and informed decisions: see, in particular, s710 and 760A(a). This purpose is achieved by requiring certain disclosures and by ensuring that those disclosures are made in an appropriate form.

3.43 The effect of the Principles, and in particular Principles 1 and 2, is that, from the point of view of Australian investors, the outcomes of the regulation of foreign facilities, services and products will be equivalent to the outcomes of the regulation applying to comparable Australian facilities, services and products. In particular, the combination of the foreign regulatory regime and those parts of the Australian regulatory regime that apply to the foreign facility, service or product will ensure that Australian retail investors receive all the information necessary to make informed and confident decisions about the relevant foreign facility, service or product.

3.44 Therefore, significant and detailed additional disclosures, beyond those ordinarily required by the relevant foreign regulatory regime and those applicable parts of the Australian regulatory regime, will generally be unnecessary. Requiring such disclosures may also deter foreign providers from accessing the Australian marketplace and, therefore, limit the availability and provision of foreign facilities, services and products in Australia.

3.45 Nevertheless, we believe that *some* additional disclosures will be required. Even though the outcomes of the regulation of foreign facilities, services and products are equivalent to the outcomes of the regulation applying to comparable Australian facilities, services and products, the regulation itself differs from the regulation imposed on comparable Australian facilities, services and products. This fact should be disclosed to all Australian investors so that they can themselves assess whether this difference is significant to them. Moreover, retail investors should be informed of the consequences of any special risks associated with the foreign facility, service or product.

3.46 We believe that Principle 6 achieves an appropriate balance between the need to protect Australian investors in this way and the desire to facilitate the availability and provision of foreign facilities, services and products in Australia.

Section 4 Commentary on the Equivalence Principles

Principle 7

An equivalent regulatory regime is clear, transparent and certain

What does the principle mean?

4.1 A “clear” regulatory regime is one that is clearly articulated and easily understood. A “transparent” regulatory regime is one whose rules, policies and practices are readily available to and known by all relevant persons. A “certain” regulatory regime is one that is consistently applied and not subject to indiscriminate change. At a minimum, this principle means that the relevant parts of the regulatory regime must be in written form, available in English and not subject to arbitrary discretion.

Why have we adopted this principle?

4.2 We will not regard a regulatory regime that fails to meet these minimum conditions as equivalent to the Australian regulatory regime because:

- (a) it cannot be consistently or reliably applied or enforced;
- (b) Australian investors will not be able to understand their rights and remedies under such a regulatory regime; and/or
- (c) we will not be able to obtain sufficient knowledge of how the regime works in practice to assess the regime.

Principle 8

An equivalent regulatory regime is consistent with the IOSCO Objectives and Principles of Securities Regulation

What does the principle mean?

4.3 A foreign regulatory regime is consistent with the IOSCO Objectives and Principles of Securities Regulation if the relevant foreign regulator:

- (a) assesses the regulatory regime against those objectives and principles; and
- (b) reasonably determines that the regulatory regime is broadly compliant with those objectives and principles.

Why have we adopted this principle?

4.4 The aims, purposes and outcomes of the Australian regulatory regime are consistent with the IOSCO Objectives and Principles of Securities Regulation. Therefore, implementation of the IOSCO Objectives and Principles of Securities Regulation in the foreign regulatory regime indicates that the Australian and foreign regulatory regimes:

- (a) share a similar regulatory philosophy; and
- (b) are, at least at a high level, equivalent.

Principle 9

An equivalent regulatory regime is adequately enforced in the home jurisdiction

What does the principle mean?

4.5 A regulatory regime is adequately enforced if the regulator (or other responsible body):

- (a) has sufficient powers of investigation and enforcement;
- (b) has sufficient resources to use those powers; and
- (c) uses those powers and resources to promote compliance with the regulatory regime.

4.6 Additionally, the legal system within which the regulatory regime operates should be independent and have a reputation for integrity.

4.7 In making our assessment of whether a foreign regulatory regime is adequately enforced, we will rely on matters such as:

- (a) the international reputation of that regulatory regime;
- (b) self-assessments by the foreign regulator; and
- (c) assessments by international financial institutions and other international organisations.

Why have we adopted this principle?

4.8 A regulatory regime that is inadequately enforced in its home jurisdiction will not be sufficiently equivalent to the Australian regulatory regime. Unless a regulatory regime is adequately enforced, it will frequently be ignored and, consequently, it will not reliably achieve its investor protection, market integrity or systemic risk outcomes.

4.9 Enforcement initiated and carried out by individual investors is insufficient to protect investors, market integrity or systemic stability. Many investors have insufficient resources and powers to monitor and

investigate compliance with the financial services laws and to bring private enforcement action to protect their own interests. In addition, market integrity and systemic risk outcomes will not be achieved by private enforcement action because persons other than the regulator (or other responsible body) have insufficient resources, powers and incentives to ensure compliance with laws designed to protect these outcomes.

Principle 10

An equivalent regulatory regime achieves equivalent outcomes to the Australian regulatory regime

What does the principle mean?

4.10 Whatever its regulatory mechanisms, an equivalent regulatory regime must achieve, in the relevant areas, equivalent outcomes to the Australian regulatory regime.

4.11 The Australian regulatory regime ensures that certain outcomes are achieved in relation to:

- (a) financial markets;
- (b) clearing and settlement;
- (c) financial services; and
- (d) financial products.

We will assess whether these outcomes are met by the home regulatory regime largely from the perspective of Australian investors, Australian markets, and the Australian financial system.

Financial markets

4.12 Australian laws on financial markets promote fair, orderly and transparent financial markets by ensuring that, to the greatest extent possible:

- (a) market users use the market on an informed basis;
- (b) market users are confident that the market as a whole operates fairly and that they will be treated fairly;
- (c) market users are confident about the market participants they deal with;
- (d) market supervision is effective so that listed entities, market participants and market users that breach the law or the market's rules are likely to be detected and disciplined;
- (e) the market operates reliably and is not at risk of failing;

- (f) the price formation process operates reliably; and
- (g) transactions entered into on the market are cleared and settled promptly, fairly and effectively.

Note: These outcomes are set out in more detail in Table A “Regulatory outcomes and mechanisms in financial markets” of Policy Statement 172 *Australian market licences: Australian operators* [PS 172].

Clearing and settlement

4.13 Australian laws on clearing and settlement promote prompt, fair and effective services by clearing and settlement facilities, and the reduction of systemic risk, by ensuring that, to the greatest extent possible:

- (a) the clearing and settlement process operates reliably and is not at risk of failing;
- (b) users of clearing and settlement facilities are confident that the facility operates fairly and that settlement obligations will be met;
- (c) the facility and its participants are properly supervised so that breaches of the law or the facility’s rules are likely to be detected and disciplined; and
- (d) systemic and other risks relating to default are anticipated and appropriately dealt with.

Financial services

4.14 Australian laws on financial services promote the provision of efficient, honest and fair financial services by ensuring that financial services are provided by persons who:

- (a) are fair and honest;
- (b) are competent to provide the financial services;
- (c) have adequate resources; and

Note: The Australian Prudential Regulatory Authority is the prudential regulator of banks, insurance companies, superannuation funds, credit unions, building societies and friendly societies.

- (d) have adequate risk management processes, including for the holding of client assets and maintenance of financial records.

4.15 Australian laws on financial services also require retail investors to have access to the information they need to make confident and informed decisions about financial services.

Financial products

4.16 Australian laws on financial products promote confident and informed decisions by investors by ensuring that investors are provided with all information they reasonably require to make an informed decision about whether to:

- (a) buy a financial product; and
- (b) in appropriate circumstances, sell or hold a financial product.

Note 1: The amount of information that must be provided to an investor to allow the investor to make an informed decision will depend on whether the investor is a wholesale or retail investor.

Note 2: Australian continuous disclosure laws benefit both investors and market integrity. This outcome does not relate solely to retail investor protection.

Why have we adopted this principle?

4.17 We assess the equivalence of a foreign regulatory regime according to the outcomes achieved by that regime: see paragraph 3.2. An equivalent regulatory regime must achieve equivalent outcomes to the Australian regulatory regime.

4.18 The outcomes in paragraphs 4.12–4.16 are the outcomes achieved by the Corporations Act as it applies to Australian facilities, services and products.

Key terms

In this document, unless a contrary intention appears:

“ASIC” means the Australian Securities and Investments Commission

“Australian facilities, services and products” means market and clearing and settlement facilities, financial services, and financial products, originating in and regulated in Australia under Australian law

“Australian providers” means providers of Australian facilities, services and products

“Corporations Act” means the *Corporations Act 2001* and includes regulations made for the purposes of that Act

“Equivalence Principles” means the principles set out in Section 4

“foreign facilities, services and products” means market and clearing and settlement facilities, financial services, and financial products, originating in and regulated in a foreign jurisdiction and accessible to persons in Australia

“foreign providers” means providers of foreign facilities, services and products

“General Principles” means the principles set out in Section 3

“home jurisdiction” means the jurisdiction in which the relevant foreign facility, service or product originates and is regulated

“home regulator” means the relevant regulator of the foreign facility, service or product in the home jurisdiction

“home regulatory regime” means the regulatory regime in the home jurisdiction

“IOSCO” means the International Organization of Securities Commissions

“IOSCO Objectives and Principles of Securities Regulation” means the *Objectives and Principles of Securities Regulation*, originally adopted by IOSCO in September 1998, as amended from time to time

“market users” means investors who acquire or dispose of financial products in a financial market. They may be market participants dealing for themselves or, where market participants act as intermediaries, the clients of the participants

“Principles” means the General Principles and Equivalence Principles

“regulatory regime” means the rules that govern a financial facility, service or product and includes legislation, the rules, policies and practices of a regulator, and the rules, policies and practices of a self-regulatory organisation, such as a financial market operator

“s795B” (for example) means a section of the Corporations Act (in this example numbered 795B).