Australia

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1 Registration

1.1 Are funds that are offered to the public required to be registered under the securities laws of your jurisdiction? If so, what are the factors and criteria that determine whether a fund is required to be registered?

Funds that are offered to retail clients will generally be required to be registered as a "managed investment scheme" (MIS) under the Corporations Act 2001 (Cth) (Corporations Act).

Most Australian Funds are currently trust structures, but partnerships, limited partnerships and investment contracts are also used, as well as stapled structures with combinations of trust and company structure investments held by each investor. From 1 July 2022, a new investment Fund structure called a "corporate collective investment vehicle" (CCIV) will be introduced pursuant to the introduction of a new Chapter 8B of the Corporations Act. Further details of both of the MIS and CCIVs are set out below.

MISs

These structures are generally regulated as MISs under the Corporations Act and Corporations Regulations and Australian Securities and Investments Commission Act 2001 (ASIC Act), which are administered by the Australian Securities and Investments Commission (ASIC). MIS regulation includes:

- structural and operational requirements under Chapter 5C;
- advertising, market conduct, offering and issuing disclosure requirements under Chapter 7 and the ASIC Act;
- continuous disclosure requirements (Chapters 6 to 6CA and 7) and, for MISs listed on an exchange, takeovers and substantial holding regulation (Chapter 6); and
- Australian financial service licence (AFSL) requirements and regulation of dealers, advisers, Fund operators and market operators (Chapter 7).

A Fund will be an MIS if it is a scheme where:

- people contribute money or money's worth to acquire rights to benefits produced by the Fund;
- any of the contributions are pooled or used in common enterprise to produce financial benefits or property rights or interests for Fund members (as contributors or their transferees or assigns); and
- members do not have day-to-day control of the Fund's operation (even if they have a right to be consulted or to give directions).

Exceptions apply for Funds: (a) where all members and the operator are related bodies corporate; or (b) that have structural forms that are otherwise regulated, including bodies corporate, debentures and convertible notes, outsize partnerships (generally, professional partnerships, such as partnerships of accountants or lawyers) and Funds operated by Australian Depository Institutions (ADI) (banks and other financial institutions) in the ordinary course of their banking business. ASIC also has power to grant exemptions or to modify the way that the MIS regulation applies.

If a Fund is an MIS then, unless all of the issues of interests in the Fund would not have needed a regulated product disclosure statement (PDS) under the Corporations Act (which is the case principally where the offers and issues are only to wholesale clients, not retail clients: see question 3.1 below), the Fund must be registered if: (a) it has more than 20 members (and when counting members there is (i) a look through to the underlying members of trust investors where any beneficiaries of the investor trust are presently entitled to a share of the trust estate or income, or control the trustee, and (ii) aggregation across Funds as noted in (c) below); (b) it was promoted by a person or an associate of a person who, when the Fund was promoted, was in the business of promoting MISs; or (c) ASIC has made a determination that the Fund is one of a group of closely related Funds that together have more than 20 members.

CCIVs

A CCIV is a company that is limited by shares and has, as its sole director, a "corporate director", which is a public company that holds an Australian financial services licence with the appropriate authorisations to operate a CCIV. A CCIV is required to have a constitution and at least one sub-fund that has at least one member. A sub-fund is the vehicle through which the business and operations of the CCIV must be conducted. All securities (either shares or debentures) issued by the CCIV must be referable to, and all assets and liabilities of the CCIV must be attributable to, a specific sub-fund. An entity will be a member of a CCIV if it holds one or more shares in the CCIV. Unlike the MIS regime, all CCIVs (whether retail or wholesale) must be registered with ASIC.

The corporate director of the CCIV is responsible for the operations and affairs of the CCIV, functions that are conferred on the corporate director by the constitution of the CCIV and the Corporations Act. CCIVs serve as an alternative vehicle to that of MISs with a closer alignment to European-style corporate Funds under the European Undertakings for Collective Investment in Transferable Securities Directive (aka UCITS). Like the MIS regime, CCIVs can be either retail or wholesale, with a more comprehensive regulatory regime applying to retail CCIVs in order to protect retail investors.

Despite being a form of company, CCIVs are not subject to the disclosure requirements set out in Chapter 6D of the Corporations Act. Rather, CCIVs must adhere to the PDS disclosure regime contained in Part 7.9 of the Corporations Act.

1.2 What does the fund registration process involve, e.g., what documents are required to be filed?

To register an MIS, it must have:

(a) a public company responsible entity (RE) that is the sole operator of the Fund and an AFSL that authorises it to operate the Fund;

(b) unless at least 50% of the RE's board are external directors, a Fund Compliance Committee with at least 50% external members.

A director of the RE or member of a Compliance Committee is not external if that person is, or within the last two years has been, a senior manager or an employee of, substantially involved in a professional capacity or business dealings with, or has or is a relative or spouse of a person with a material interest in, the RE or a related body corporate;

(c) a name that is not the same as any other registered MIS; or

(d) a Constitution that meets the requirements under the Corporations Act.

The Constitution must be enforceable and must contain "adequate provision" for specific matters, including:

- the consideration that is to be paid for any interest in the Fund;
- the Fund's investment and borrowing powers;
- if Fund members are to be able to withdraw from the Fund, the members' rights to withdraw. For illiquid Funds (those where at least 80% of the assets are not liquid – for instance, money, bank bills and marketable securities) a withdrawal procedure must be followed, as set out in the Corporations Act;
- the procedures the Fund's RE will have for handling complaints;
- winding up the Fund; and
- the RE's fees and indemnity payable out of the Fund property;

(e) a Compliance Plan that meets the requirements under the Corporations Act.

The Compliance Plan must set out what the RE will do to ensure that it complies with the Corporations Act and the Fund Constitution. Minimum requirements for the Compliance Plan include:

- ensuring Fund assets are separately identified and held;
- arrangements for a compliance committee, if one is needed (membership, when it meets, reports and recommendations to the RE, access to records and access to the Fund auditor);
- how often Fund property is valued;
- auditing the Plan; and
- record-keeping.

A registered company auditor must audit the RE's compliance with the Compliance Plan at least once a year. The Plan auditor and Fund auditor may not be the same person. ASIC has power to require the RE to change and extend the Fund Compliance Plan and to call for information about the Plan.

Depending on its capital for the purposes of its AFSL requirements, the RE might also appoint a custodian to hold Fund property (see question 2.1, point (iii) below).

An application for registration of a Fund is to be made to ASIC by the RE in a prescribed form. The application is required to be lodged with: (a) a statement of compliance made by the directors of the RE; (b) the Fund's Constitution; and (c) the Fund's Compliance Plan. A Fund auditor and Compliance Plan auditor must be appointed and notified to ASIC.

ASIC must register the Fund within 14 days of the application being made, unless it appears to ASIC that the RE or lodged documents do not comply with the requirements of the Corporations Act.

Similar requirements will apply for CCIVs. All CCIVs, whether retail or wholesale, will need to be registered with ASIC and all of them will require a corporate director. The corporate director will need to lodge a constitution with ASIC, and also a Compliance Plan for retail CCIVs. A CCIV will be a retail CCIV if, effectively, at least one member is a retail client (including a client that acquires its interest in the CCIV through a custodial arrangement).

The corporate director will have to specify whether the CCIV is to be a retail or wholesale CCIV, provide information about the sub-fund that is to be registered, information about the person(s) who have consented to be members of the CCIV and the name of the sub-fund of the CCIV (which must include CCIV or "corporate collective investment vehicle" at the end of it – "limited" or "ltd" will not be used). ASIC have yet to designate the exact forms that will be required.

An Australian registered fund number will be issued to each sub-fund of a CCIV upon registration of the sub-fund. Although a CCIV is a legal entity, a sub-fund is not. Subsequent sub-funds are subject to streamlined registration.

1.3 What are the consequences for failing to register a fund that is required to be registered in your jurisdiction?

A Fund must not be operated if it is not registered when required. An application can be made by ASIC or an investor in the Fund to have it wound up if it has not been registered when required, and an investor may void their investment contract.

1.4 Are there local residency or other local qualification requirements that a fund must meet in order to register in your jurisdiction? Or are foreign funds permitted to register in your jurisdiction?

A registered MIS must be operated only by its RE and a CCIV must be operated only by its corporate director.

As the RE or a corporate director must be a public company, it must have at least three directors and at least two of those directors must ordinarily reside in Australia. A majority of the directors of a corporate director must be, effectively, independent.

If an offshore entity engages in Fund offerings in Australia, then the foreign operator may be conducting business in Australia. If that is the case, then it must be registered as a foreign company under the Corporations Act and a local agent must be appointed.

The Asia Region Funds Passport provides a multilateral framework between participating countries in the Asian region to facilitate the cross-border marketing of passport Funds across participating regions. As of 2 March 2022, Australia, Japan, The Republic of Korea, New Zealand and Thailand are ready to receive registration applications from local prospective passport Funds and entry applications from foreign passport Funds.

In order to register as a foreign passport Fund in Australia, the operator of the foreign passport Fund must:

1. register the Fund in its home economy;
2. register itself as a foreign company in Australia; and
3. notify ASIC of its intention to offer the foreign passport Fund in Australia.

Notification is made by submitting an ASIC form 5303 "Notify intention to offer interests in a foreign Passport Fund in Australia", attach a copy of the PDS and any consents required to use the proposed name.

2 Regulatory Framework

2.1 What are the main regulatory restrictions and requirements that a public fund must comply with in the following areas, if any? Are there other main areas of regulation that are imposed on public funds?

i. Governance

Registered MISs are subject to a high degree of regulation for which ASIC is the regulatory authority and issues various regulatory guides. CCIVs will also be subject to a similar level of regulation.

As noted in section 1 above, a registered Fund must have a complying Constitution, a complying Compliance Plan, a public company operator RE, auditors of the Fund and Compliance Plan and, if at least 50% of the RE board are not external, a Fund Compliance Committee.

The Fund Constitution sets out the rules governing the operation of the Fund with which the RE must comply, and the Constitution must at least contain adequate provisions about particular matters as noted in section 1 above.

The Corporations Act regulates various actions in relation to the registered Fund, including amendment of the Fund Constitution, removal and replacement of the RE, meetings of Fund members, annual and half-year Fund accounts, winding the Fund up, withdrawal by members from the Fund and ongoing reporting and disclosure.

The Compliance Plan for the Fund must specify adequate measures that the RE is to apply to ensure that the Fund is operated in accordance with its Constitution and the Corporations Act.

The RE, in exercising its powers and carrying out its duties from whatever source, has several duties under the Corporations Act, including:

(a) general obligations to act honestly; exercise the degree of care and skill that a reasonable person would exercise if they were in the RE's position; act in the best interests of the members, and give priority to the members' interests if there is a conflict between the members' interests and the interests of the RE; treat members holding interests of the same class equally and those with different classes of interests fairly; and not to make use of information acquired by being the RE to gain an improper advantage for themselves or someone else or to cause detriment to the members;

(b) compliance obligations to ensure that the Fund Constitution and Compliance Plan meet the requirements of the Corporations Act; carry out its duties under the Fund Constitution; and comply with the Compliance Plan;

(c) obligations to separate, regularly value and preserve Fund property; and

(d) reporting breaches to ASIC, which had or are likely to have a materially adverse effect on the interests of Fund members. The reporting obligation also relates to breaches by the Compliance Committee, directors or employees of the RE, any auditor of the Compliance Plan or advisor and their representatives.

The RE can appoint agents and others but it is responsible to the Fund members for the appointee's acts, even if those acts are outside the scope of the appointee's authority.

The directors of the RE also have duties to the Fund members that override any conflicting duties to the members of the RE company. The directors must: act honestly; exercise the degree of care and skill that a reasonable person would exercise if they were in the officer's position; act in the best interests of the members, and give priority to the members' interests if there is a conflict between the members' interests and the interests of the RE; not make improper use of information or their position or to cause detriment to the members; and take all reasonable steps to ensure the RE complies with the Corporations Act, its licence conditions, the Fund Constitution and Compliance Plan.

If a director breaches these obligations, civil penalties apply so that the Court may order that the employee pay compensation where the contravention caused loss or damage to, or diminution in value of, the Fund property.

Employees of the RE have similar duties.

The Compliance Committee is appointed by the RE and is to monitor the extent of compliance by the RE with the Fund Compliance Plan, report to the RE about breaches of the Corporations Act or Fund Constitution, and report to ASIC if the Committee is of the view that the RE is not taking appropriate action to deal with any matter that the Committee has reported. The Committee must also assess the adequacy of the Compliance Plan at regular intervals and report to the RE any changes that the Committee considers should be made. Requested changes must also be reported to ASIC where they amount to a breach of the Corporations Act. The Committee has the authority to commission independent legal, accounting and professional advice or assistance at the reasonable expense of the RE and must also assist ASIC where ASIC conducts surveillance checks of the RE's compliance with the Constitution, the Compliance Plan and the Corporations Act.

A Compliance Plan auditor must be appointed by the RE. The auditor conducts an annual audit of compliance with the Compliance Plan, and provides a report to the RE (which the RE lodges with ASIC with its annual financial statements) and, in circumstances of continuing non-compliance, to ASIC.

Further authorisation or registration requirements may apply to certain types of Funds. For example, conditions apply under an RE's AFSL where the RE operates a primary production scheme. A Fund structured as a limited partnership must also be registered under the relevant State Partnership legislation. Moreover, Funds listed on the Australian Securities Exchange (ASX) must comply with the ASX Listing Rules and are under the regulation of the ASX as well as ASIC.

ii. Selection of investment adviser, and review and approval of investment advisory agreement

There are no specified requirements for the selection of Fund investment advisers; however, general duties of the RE (see question 2.1, point (i) above) affect the selection, review and approval of investment advisers, and particular types of Funds (for instance, superannuation Funds and certain government Funds) have particular requirements for the appointment of advisers.

iii. Capital structure

There are no capital structure requirements for a Fund. However, the RE operating the MIS (or a corporate director of a CCIV) must meet the capital requirements of its AFSL. AFSL conditions generally require the RE to be solvent with positive net assets, project and meet at least 12 months' cash-flow requirements for Fund operation, have professional indemnity insurance and maintain a required level of net tangible assets (NTA). The required NTA where MIS assets are held by a custodian that meets the financial requirements is cash or cash equivalents valued at least the greater of: (a) A$150,000; (b) 0.5% of the average Funds value; or (c) 10% of average RE revenue. The required NTA where Fund assets are not held by a custodian that meets the financial requirements is at least the greater of: (a) A$10 million; or (b) 10% of the RE's average revenue.

iv. Limits on portfolio investments

There are no limits on Fund portfolio investments, but the holding must be permitted by the Fund's Constitution. It is typical to include broad investment powers in the Constitution.

It should be noted that certain investors may have restrictions on investment in Funds with derivative or leverage exposure, and the nature of Fund investments can affect whether the Fund is categorised as "liquid" under the Corporations Act. If a registered Fund is not liquid then: (a) investor withdrawal from the Fund is restricted to *ad hoc* withdrawal offers from identified Fund sources; and (b) it is not a "simple managed investment scheme" and therefore a short-form PDS may not be used for Fund offers.

v. Conflicts of interest

The RE has a duty to act in the best interests of the Fund members and not its own interest (see question 2.1, point (i) above).

Strict restrictions apply to related party dealings by a registered Fund RE. Any related party dealing either from, or which may endanger, Fund property is not permitted unless it is at arm's length or on less favourable (to the related party) terms or has the prior approval, in a meeting, of the Fund investors. In addition, under general law, a related party dealing is not permitted unless it is clearly authorised by the Fund Constitution.

Advisers are subject to a duty to act in the best interest of their client and impose limits on conflicted remuneration (see question 2.3 below).

Market conduct restrictions such as short-selling restrictions, insider trading and market manipulation prohibitions also affect the operations of the Fund RE and managers.

vi. Reporting and recordkeeping

In addition to the offer disclosure requirements referred to in section 3 below, ongoing and periodic reporting obligations apply for registered Funds.

The RE of a registered Fund must:

(a) give an investor confirmation of transactions about their investing and withdrawals, and a balance, value and transaction report for each reporting period (of up to one year);
(b) inform members or publish a notice of any material change or significant event in relation to the Fund, and comply with the continuous disclosure obligations where the Fund is a "disclosing entity" (generally, where there are at least 100 members or where the Fund is listed); and
(c) file reports with ASIC in respect of the Fund, including: reports of significant breaches; annual audit reports for the Fund, the RE, the RE's AFSL and the Fund Compliance Plan; notice of any change of officers and "responsible managers" and "key persons", if any, noted on the RE's AFSL; an "in use" and "out of use" notice in relation to a PDS (as noted in section 3 below); and any other information requested by ASIC.

Part 7.8A of the Corporations Act, which contains the design and distribution requirements relating to financial products for retail clients, came into force on 5 October 2021. These are commonly referred to as the design and distribution obligations (DDO Regime). The DDO Regime requires an RE to give ASIC written notice if there has been a "significant dealing" in an interest in the Fund in relation to a retail client that is inconsistent with the "target market determination" (TMD). The notice must be provided within 10 business days of the RE becoming aware of the significant dealing. ASIC may also compel an RE to provide it with additional information in relation to the distribution of an interest in the Fund or with records that DDO Regime requires an RE to keep. More information about DDO and TMDs is set out in questions 3.1 and 3.3 below.

REs must also file certain reports with the Australian Transaction Reports and Analysis Centre (AUSTRAC) or Australian Taxation Office (ATO) for the purpose of anti-money laundering and counter-terrorism, including suspicious matter reports.

vii. Other

Privacy, anti-money laundering and taxation (including income and capital gains tax (CGT), goods and services tax (GST) and stamp duty) legislation apply.

In addition to legislation and general law, listed Funds must comply with the Listing Rules. General trust law is particularly relevant for registered Funds as the Corporations Act provides that Fund property is held on trust for the Fund members and therefore registered Funds always involve at least a statutory trust.

2.2 Are investment advisers that advise public funds required to be registered and/or regulated in your jurisdiction? If so, what does the registration process involve?

Anyone who carries on a financial services business in Australia is usually required to hold an AFSL that is issued by ASIC under the Corporations Act.

A "financial services business" is a business of any of the following in relation to financial products:

(a) dealing – issuing, applying for, acquiring, varying or disposing of a financial product or arranging for such conduct. Self-dealing exceptions apply for some types of products;
(b) providing financial product advice – making a recommendation or statement of opinion or a report that is, or could reasonably be regarded as, intended to influence a person's decision about a financial product. Providing purely factual information is not advice. Advice is separated into general advice and personal advice. Personal advice is given when the recipient's objectives, financial situation or needs have been taken into account or a reasonable person might expect that to have been the case. All other advice is general advice. If personal advice is given to retail clients, then advisers must meet additional requirements;
(c) making a market – through a facility or at a place or otherwise, the person regularly states prices at which they propose to acquire or dispose of products on their own behalf and a person has a reasonable expectation that they will be able to regularly effect transactions at the stated prices. This is distinguished from operating a market (for which an authority is required) by the person accepting on their own behalf or on behalf of only one party to the transaction;
(d) operating a registered MIS; or
(e) providing a custodial or depositary service – an arrangement under which a product is held in trust for or on behalf of the client or the client's nominee.

Exercising its administrative power, ASIC has made various exceptions from the requirement to hold an AFSL apply. For instance, conditional exemptions apply to some advisers and dealers (referred to as foreign financial service providers or FFSPs) with certain UK, US, Singapore, Hong Kong, German or Luxembourg local licences where their activities in Australia are confined to wholesale clients and they lodge various complying documents with ASIC and meet ongoing disclosure requirements to both their Australian wholesale clients and ASIC. These exemptions expired with effect from 31 March 2020, but continue to be effective for a transitional period until 31 March 2023 (Transitional Period) during which time FFSPs that relied on them as at 31 March 2020 may continue to do so, provided they comply with the conditions. The purpose of the Transitional Period is to enable the FFSP to comply with the requirements of any replacement exemption. In February 2023, the government introduced legislation to reinstate the conditional exemptions in a substantially similar form to the

exemptions that were made by ASIC. A key difference is that an FFSP having the benefit of the exemption under the proposed legislation would need to provide financial services in Australia in compliance with Australian laws, not the laws of the FFSP's home jurisdiction. The legislation also provides that an FFSP is exempt from certain requirements in order to apply for a wholesale AFSL. It is uncertain whether this legislation will pass.

To obtain a regular AFSL, the proposed holder must meet capital adequacy, operational, education and experience requirements. An application must be made to ASIC, nominating responsible managers with required education and practical skills. The application must be lodged with a police check and bankruptcy check for nominated responsible managers and various proofs that establish the operational competencies of the applicant to provide the financial services sought to be authorised.

If an AFSL is granted, the holder has obligations, under the Corporations Act, requiring them to: operate their business efficiently, honestly and fairly; maintain the organisational competence; ensure their representatives comply, are competent and adequately trained; have adequate financial, technological and human resources to provide the financial services; maintain risk, conflict management, dispute resolution and compensation systems and arrangements for retail clients; and comply with the financial services laws and their AFSL.

2.3 In addition to the requirements above, are there additional regulatory restrictions and requirements imposed on investment advisers that advise public funds?

In addition to the restrictions associated with an AFSL holder's licence, restrictions apply to the conduct of advisers in marketing Funds as mentioned in section 3 below.

2.4 Are there any requirements or restrictions in your jurisdiction for public funds investing in digital currencies?

There are currently no statutory or regulatory requirements or restrictions for Funds to invest in digital currencies. On 29 October 2021, ASIC released Information Sheet 225: Crypto-assets to provide guidance on the application of the Australian financial services regulatory regime under the Corporations Act to crypto-assets and initial coin offerings (ICOs). Broadly, ASIC's current position is that crypto-assets and ICOs could be financial products, and if they are, that they are likely to be MISs, derivatives or securities. Crypto-assets and ICOs may also involve a non-cash payment facility. If conduct in relation to crypto-assets or an ICO involves a financial product, the Australian financial services regulatory regime will apply. There is currently a proposal from Senator Bragg that crypto assets be subject to specific regulation.

2.5 Are there additional requirements in your jurisdiction for exchange-traded funds?

Exchange-traded Funds (ETFs) must comply with the relevant rules of the exchange on which they are traded. For example, ETFs traded on the ASX must comply with the AQUA Rules. Issuers of ETFs must also satisfy the exchange on a range of criteria. The ASIC Information Sheet 230 provides more detail on the type of criteria that ASIC, as the regulator of market operators, expects market operators to consider and require of issuers of ETFs. They include matters of transparency of portfolio holdings, liquidity and market-making arrangements.

There are different requirements that apply to active ETFs (i.e. ETFs that do not track an index, but hold assets that are actively traded) and other ETFs. These requirements are considered in ASIC Report 583 dated August 2018.

3 Marketing of Public Funds

3.1 What regulatory frameworks apply to the marketing of public funds?

The DDO Regime, which came into force on 5 October 2021, aims to ensure financial products offered to retail clients (including Funds) are increasingly consumer-focused in design, preventing the sale of unsuitable financial products. In the case of a Fund, this is achieved by requiring:

- an RE to design financial products that are likely to be consistent with the likely objectives, financial situation and needs of the consumers they are designed for;
- an RE and its distributors to take "reasonable steps" in order to ensure that interests in a Fund are received by the consumers within the appropriate target market; and
- an RE to monitor consumer outcomes and undertake reviews to ensure that consumers are receiving Funds that are consistent with their likely objectives, financial situation and needs.

The TMD is the central document in the DDO Regime. A TMD for an interest in a Fund must describe the class of retail clients that comprises the target market for the Fund, as well as specify other information, including: any conditions and restrictions on issuing or distributing the Fund; events or circumstances that would suggest that the TMD is no longer "appropriate"; the date on which the first scheduled review of the TMD will occur; and the kinds of information that distributors must provide to the RE. The TMD must be available to the public free of charge. ASIC has stated in ASIC Regulatory Guide 274 that TMDs are not a "consumer-facing disclosure document".

REs and their distributors must also take "reasonable steps" to ensure distribution of a Fund to retail clients is consistent with the corresponding TMD. This includes an obligation to conduct periodic reviews of its TMDs to ensure compliance with content and appropriateness requirements.

The DDO Regime applies to REs and distributors of Funds established after 5 October 2021, as well as those Funds that existed prior to this date but will continue to be issued to retail clients thereafter.

Marketing materials for Funds are regulated by the Corporations Act and the ASIC Act. In addition, requirements and restrictions under general law may also apply.

A PDS is required to be given to a retail client before they can be offered or issued an interest in a Fund that is a financial product, such as an MIS interest.

An investor is a retail client if they are not a wholesale client. Whether an investor is a wholesale client for this purpose depends on the amount that they invest in the Fund, the amount of money that the investor controls or the type of investor body. For instance, an entity is a wholesale client, and therefore not a retail client, if:

(a) the price or value of the Fund interests to be acquired is at least A$500,000 (excluding amounts borrowed from the Fund offeror or the offeror's associate);
(b) the Fund investment is provided for use in conjunction with a business that is not a small business (less than 100 employees for a goods manufacturing business, and otherwise, 20 employees);
(c) the investor provides a qualified accountant's certificate given within the preceding 24 months that the person had

net assets of at least A$2.5 million or gross income for each of the last two years of at least A$250,000;

(d) the investor holds an AFSL, is a body regulated by the Australian Prudential Regulation Authority (APRA) (for instance, a bank), is registered under the Financial Corporations Act, is an exempt public authority, or is a listed entity or one of the listed entity's related bodies corporate;

(e) the investor controls A$10 million or more or is the trustee of certain superannuation Funds where the Fund has net assets of at least A$10 million; or

(f) the investor is a body that carries on the business of investing in financial products, interests in land or other investments, and invests Funds raised from the public on terms that provide for use of the Funds raised for that purpose.

A PDS must be up to date and "clear, concise and effective" and must contain prescribed statements and disclose the following about the Fund: significant benefits and risks; costs, fees and charges; details about dispute resolution; significant taxation implications; details of payments that may affect returns; in some cases, information about the availability of accounts; and whether ethical considerations are taken into account in investing.

Elements of these requirements contain prescriptive details of the information to be disclosed and how it is to be disclosed.

A short-form PDS may be used if the Fund is both, a "simple managed investment scheme", i.e. one where the RE can reasonably expect to realise 80% of the Fund assets for market value within 10 days – and not classified as a hedge Fund in accordance with ASIC regulatory Guide 240 (or otherwise subject to particular benchmark disclosure by ASIC). A short-form PDS for a simple MIS must be no longer than eight pages and contain specified information about the RE, how the Fund works, benefits and risks, the Fund investments, fees and costs, tax and how to apply.

The application form for investment must be in, or accompany, the PDS.

A PDS is only lodged with ASIC if the Fund interests are to be tradeable on a financial market (such as the ASX). Otherwise, ASIC must be given an "in use" notice in a prescribed form within five business days after a PDS is first given and an "out of use" notice within five business days after the PDS ceases to be used.

For PDSs that are lodged with ASIC, there is an exposure period (of seven days after lodgement, subject to an extension by ASIC of up to 14 days) during which investments cannot be issued or sold.

In addition to the regulated disclosure document requirements referred to above, all financial products are subject to prohibitions under the Corporations Act, ASIC Act and general law against dishonest, misleading, deceptive and unconscionable conduct.

3.2 Is licensure with a regulatory authority required of persons (whether entities or natural persons) engaged in marketing activities? If so: (i) are there commonly available exceptions that may be relied on?; and (ii) describe the level of substantive regulation applied to licensed persons.

An AFSL is generally required to be held by an entity that engages in marketing of Fund interests and thereby provides financial advice or deals in the financial product (see question 2.2 above). There are numerous exceptions to licensing requirements for particular circumstances – for instance, where advice is only provided to a related body or for certain offshore licensees who lodge various deeds and documents with ASIC and whose Australian clients are all wholesale clients, or where a Fund issues interests under an arrangement with an AFSL holding intermediary that offers to arrange for the issue on the terms of the offers.

A person providing services on behalf of an AFSL holder does not need their own AFSL, but must be appointed in writing as an authorised representative by the AFSL holder and the appointment notified to ASIC.

AFSL holders must comply with the financial and other conditions under their AFSL and general conduct conditions in the Corporations Act (see question 2.2 above).

3.3 What are the main regulatory restrictions and requirements in the following areas, if any, that must be complied with by entities that are involved in marketing public funds?

i. Distribution fees or other charges

Investment advisers may not be given or receive certain types of conflicted remuneration for retail client investments. Conflicted remuneration is any benefit, whether monetary or non-monetary, that, because of the nature of the benefit or the circumstances in which it is given: (a) could reasonably be expected to influence the choice of financial product recommended by the licensee or representative to retail clients; or (b) could reasonably be expected to influence the financial product advice given to retail clients.

ii. Advertising

Advertising restrictions apply so the potential investors are aware of the Fund PDS and that they should consider the PDS before deciding whether to invest. Cold-calling and anti-hawking restrictions regulate the way in which advertising and PDS material can be distributed.

Further, there are limited circumstances in which a Fund that needs to be registered as an MIS can be referred to prior to such registration.

iii. Investor suitability

Apart from the DDO Regime, which came into force on 5 October 2021, there are no prescriptive investor suitability requirements for types of Funds that may be offered.

As noted above in question 3.1, an RE must prepare a TMD before it issues an interest in a Fund to a retail client. The TMD must set out, among other things, the class of retail clients that comprise the target market. A TMD must also be "appropriate". This means that the TMD must be such that it would be reasonable to conclude that, if the Fund were to be issued or sold to a retail client in accordance with the distribution conditions, it would be likely that the retail client is in the target market and if it were sold to a retail client in the target market, it would be consistent with the likely objectives, financial situation and needs of the client. In addition to the DDO Regime, care must be taken to ensure that there is no unconscionable or misleading or deceptive conduct in marketing Funds and that disclosure is clear, concise and effective for investors. In RG 274, ASIC states that a TMD should state the RE's reasons for why a TMD is "appropriate".

iv. Custody of investor funds or securities

A custodian separate to the Fund RE is not required, but because capital adequacy requirements apply under the RE's AFSL if it holds certain Fund assets, it is usual to appoint a custodian of registered Fund assets (see question 2.1, point (iii) above). There is also no requirement for the assets of a sub-fund of a CCIV to be held by a separate custodian.

3.4 Are there restrictions on to whom public funds may be marketed or sold?

Unregistered Funds may not be marketed to retail clients. They can only be marketed or sold to wholesale clients. Otherwise,

subject to the rules under the DDO Regime that will apply to products being issued and sold to retail clients from 5 October 2021, there are currently no restrictions to whom a Fund may be marketed or sold.

Care must also be taken to ensure that there is no unconscionable or misleading or deceptive conduct in marketing Funds and that disclosure is clear, concise and effective for investors.

Advisers providing personal advice must take care to ensure that the selection of the Fund for investment takes into account the financial circumstances, needs and objectives of the client and whether a Fund could meet those circumstances, needs and objectives.

3.5 Are there other main areas of regulation that are imposed with respect to the marketing of public funds?

ASIC imposes requirements in respect of some Funds through conditions in the RE's AFSL. For instance, conditions are imposed pertaining to registration of real property interests that form the basis of primary production schemes.

4 Tax Treatment

4.1 What are the types of entities that can be public funds in your jurisdiction?

Most retail public Funds in Australia are established as unit trusts. Very broadly, a unit trust is a type of trust where the trustee (usually a proprietary limited company) legally owns property on behalf of beneficiaries under the terms of a trust deed in which the beneficial interests in the trust property are divided into a number of units in the trust that are granted, sold or redeemed by the trustee of the trust. The units typically entitle their holders to a proportionate share of the income and capital of the trust.

Recently, the Federal Government enacted the Corporate Collective Investment Vehicle Framework and Other Measures Bill 2021 (Cth) (CCIV Bill). The CCIV Bill sets out the regulatory and tax framework for a new type of investment entity, referred to as a CCIV. The CCIV regime is now law (receiving Royal Assent on 22 February 2022 and commences with effect from 1 July 2022.

CCIVs have the legal form of a company limited by shares. Very broadly, a CCIV is an umbrella vehicle that comprises one or more sub-funds, each of which is comparable to a separate unit trust with the beneficiaries of each sub-fund being issued with a different class of share. While each sub-fund does not have a separate legal personality, its assets and liabilities would be separated from the assets and liabilities of other sub-funds. It is expected that new Funds will consider structuring themselves as CCIVs, particularly due to the income tax consequences likely being the same, but with the advantage of there being a legal separation of assets and liabilities of each sub-fund of the CCIV.

4.2 What is the tax treatment of each such entity (both entity-level tax and taxation of investors in respect of allocations of income or distributions, as the case may be)?

Unit trusts are generally tax flow-through

Subject to the comments below, unit trusts are generally flow-through for Australian income tax purposes. Broadly, this means that the investors in the trust are subject to Australian income tax on their proportionate share of the net (taxable) income of the trust, and not the unit trust itself. Tax flow-through treatment should be available provided that the beneficiaries of the unit trust are presently entitled to all of the trust (accounting) income of the unit trust by the end of the relevant income year. To ensure that this flow-through tax treatment is maintained, the constitution of the unit trust should be drafted carefully and the trust managed properly.

Public trading trusts are taxed like companies

Where a unit trust is a "public trading trust" for a particular income year, that trust would be treated as a company for certain Australian income tax purposes. In particular, public trading trusts are subject to Australian income tax like a company such that the trustee of the trust is taxed on the taxable income of the trust, rather than in the hands of the beneficiaries.

A unit trust would be a "public trading trust" if it is both:

- a "public unit trust"; and
- a "trading trust".

Very broadly, a unit trust would be:

- a "public unit trust" for a particular income year if it is a unit trust that satisfies any of the following *at any time* during that income year:
  - had any units listed on an official stock exchange;
  - had any units offered to the public;
  - had units held by 50 or more persons; or
  - very broadly, had an exempt entity or exempt entities holding (or having a right to acquire) 20% or more of the interests in the trust; and
- a "trading trust" for a particular income year if it satisfies any of the following *at any time* during that income year:
  - carried on a trading business; or
  - controlled, or was able to control, the affairs and operations of another person in respect of the carrying on by that other person of a trading business.

In determining whether the units in a unit trust are held by 50 or more persons, there are special tracing rules. For example, where the units of a unit trust are held by a trustee of another trust, the interest in the unit trust should be traced through to the persons who ultimately hold a beneficial interests in the income or property of that trust, unless the units are held by a trustee of a complying superannuation entity, in which case there is no requirement to trace through that superannuation entity for income years commencing on or after 1 July 2016.

A trading business is defined in the tax laws and means any business that does not consist wholly of "eligible investment business". Very generally, "eligible investment business" captures activities of a passive nature, such as investing in land primarily for the purpose of deriving rent, and investing or trading in various debt and equity securities and derivatives.

It is very common for retail Funds in Australia to be "public unit trusts" such that, if those Funds are also trading trusts, then the Fund would not be able to benefit from the tax flow-through status. Accordingly, if tax flow-through treatment is wanted, it is important that such trusts are not trading trusts.

MITs and AMITs taxed at a concessional rate

Unit trusts may qualify as either of the following:

- a managed investment trust (MIT); or
- an attribution managed investment trust (AMIT).

A trust qualifies as an MIT if it meets certain requirements for a particular income year, including that it is not a "trading trust" (see above), it is an MIS, the trust has wholesale membership or is a registered scheme, and there is an appropriate spread of ownership of direct and indirect interests in the trust.

Some of the advantages of a trust being an MIT include:

- Fund payments made by MITs to foreign resident investors are subject to a final tax at a rate of:

- if the investor is in a country with which Australia has an effective exchange of information agreement (TIEA), between 10% and 15%; or
- otherwise, 30%.

- MITs may be able to make an irrevocable capital account election and have their gains and losses on certain assets always being treated as on capital account.

Furthermore, certain MITs may elect to be treated as AMITs for Australian income tax purposes. Some key advantages of being an AMIT include:

- the AMIT is deemed to be a fixed trust, which is important for various purposes, such as when applying the trust loss rules;
- receipts and the character of those receipts are attributed to the members of the AMIT, thereby aligning the commercial and tax consequences of the activities of the MIT and providing flowthrough of income and tax offset amounts with particular characteristics to the members of the AMIT; and
- underestimates and overestimates of taxable amounts can be recognised in the income year in which they are discovered, rather than needing to make amendments for a prior income year.

The ATO has general concerns with stapled securities and bifurcation of active businesses

In some cases, a Fund may involve stapled securities. This occurs where the same investors own in the same proportions units in a trust and shares/units in a separate company/trust, and each unit in the trust is "stapled" to the share/unit in the other company/trust such that those securities can only be traded together.

Very commonly, this would involve the trust carrying on an eligible investment business, such as holding land and leasing it to third parties and/or the other stapled entity that carries on an active trading business (such as managing a toll road or a hotel). The entity carrying on the active business would be taxed as a company, either because it is a public trading trust or because it is a company, and the trust is generally taxed either on a flow-through basis or as an MIT (see above). It is necessary to ensure an adequate split of profit between the entities and, in many cases, it is recommended that a tax ruling is obtained to confirm that the arrangements are acceptable to the Commissioner of Taxation (Commissioner).

In 2019, the Commonwealth Parliament enacted the Treasury Laws Amendment (Making Sure Foreign Investors Pay Their Fair Share of Tax in Australia and Other Measures) Act 2019 (Cth) (Stapled Measures Act). The Stapled Measures Act was introduced to address a number of issues relating to foreign investors, including investors in MITs. Very broadly, Fund payments attributable to "non-concessional MIT income" (NCMI), as defined in the Act, would be subject to tax at 30% instead of the concessional MIT withholding tax rates of 10% or 15%. Some examples of NCMI include:

- income received from a cross-stapled entity to the extent that it includes trading income of that entity; and
- income from agricultural land and residential housing (other than affordable housing).

There is a 15-year exception that is available from this taxation treatment for new government-approved, nationally significant infrastructure staples. The ATO released a law companion ruling on NCMI, which covers the key aspects of NCMI and focuses on cross-staple arrangement income. It also provides the Commissioner's views on a number of key issues, including:

- the meaning of "investing in land";
- what is "attributable" to NCMI;
- the meaning of "cross-staple arrangement"; and
- clarification of what constitutes an "economic infrastructure facility".

There are also transitional rules of either seven years or 15 years for structures that were in place before 27 March 2018.

Other up and coming Australian investment vehicles

As stated above, the Federal Government recently enacted the CCIV Bill, which sets out the regulatory and tax framework for a new type of investment entity, referred to as a CCIV. The CCIV regime commences from 1 July 2022.

Although a CCIV will be a company limited by shares in legal form, CCIVs may be entitled to tax flowthrough treatment. This is achieved by the deeming of each sub-fund as a separate unit trust for Australian income tax purposes, with the CCIV as the notional trustee of each sub-fund and members of the sub-fund as beneficiaries. Very broadly, provided that the AMIT rules are satisfied in respect of the relevant CCIV sub-fund "trust", the sub-fund should be treated as an AMIT (with certain modifications).

Foreign Funds not disadvantaged

Australia has an investment manager regime, which seeks to ensure that foreign Funds and their members are not disadvantaged by engaging Australian-based service providers and managers. Under these provisions, certain returns, gains, losses and deductions of widely held foreign Funds are disregarded where:

- the returns or gains would otherwise be assessable income of the Fund only because they are attributable to a permanent establishment in Australia; and
- that permanent establishment arises solely from the use of an Australian-based agent, manager or service provider.

The main types of gains covered by these rules are Australian-sourced capital gains (other than gains related to interests in land and other limited cases) and foreign-sourced income and gains. There are proposals to extend this concession.

Tax consequences for investors of Funds established as unit trusts

As stated above, most retail Funds in Australia are set up as unit trusts and structured in a way such that investors are subject to Australian income tax on their proportionate share of the net (taxable) income, and not the trustee of the unit trust.

For the purposes of the general resident *vs* non-resident investor tax comments below, we have assumed a tax flow-through unit trust structure.

Tax characteristics retained on distribution

Generally speaking, distributions from a trust should retain their character. In particular:

- capital gains realised by the trust should be capable of being passed through to investors as capital gains; and
- interest, dividends and royalties can be passed through to investors as interest, dividends and royalties.

The retention of the tax characteristics through a trust can be important. Broadly, this is because:

- resident investors may be eligible for capital gains discount treatment on such distributions. This would depend on a number of factors, including whether the trust held the relevant capital asset for at least 12 months and the entity type of the investor. For example, investors that are individuals or trusts may qualify for a 50% discount capital gain and complying superannuation entities may qualify for a 33.33% discount capital gain, but companies are not entitled to discount capital gains treatment;
- for non-resident investors:
  - any such capital gains may be disregarded under the non-resident CGT exemption (see below); and

- interest, dividends and royalties should be subject to the relevant withholding tax regimes, or should instead be subject to withholding tax at (generally speaking) the following rates (subject to any reductions available under a relevant tax treaty):
  - 10% in the case of interest;
  - 30% in the case of royalties;
  - 0% in the case of fully franked dividends; and
  - 30% in the case of unfranked dividends.

Tax-deferred distributions

If the Fund has deductions or allowances that reduce its taxable income below its accounting income, the cash distribution may exceed the amount of taxable income in that income year. This excess is commonly referred to as a "tax-free" or "tax-deferred" distribution. Any such distribution should reduce the unitholder's cost base in their units in the trust for CGT purposes. Once the cost base in the units reaches zero, further tax-deferred distributions give rise to capital gains for the investor. It is also possible that the amount of taxable income attributable to an investor could exceed the actual cash distribution, although Funds usually seek to manage such outcomes.

The consequences discussed above in relation to capital distributions should be equally applicable to resident and non-resident investors. However, if the non-resident is entitled to the non-resident CGT exemption in respect of its investment in the Fund, any capital gain realised from tax-deferred distributions received that are in excess of the cost base of the investment in the Fund should also be disregarded.

Exit from investment

The tax position of gains and losses made by investors on the disposal of their units varies depending on the character of the investment in the hands of the investor.

Generally, if the investor holds its interest in the unit trust on capital account (broadly, for long-term investment), the investor should realise either a capital gain or a capital loss when they exit their investment in the Fund. Such investors should realise in respect of each share/unit in the Fund:

- a capital gain, to the extent that their capital proceeds exceed their cost base;
- a capital loss, to the extent that their capital proceeds are less than their reduced cost base; or
- neither a capital gain or a capital loss, if the capital proceeds are between their reduced cost base and cost base.

For resident investors, the normal CGT consequences should arise in respect of any such capital gains or capital losses, including the potential application of discount capital gains treatment if the investor is an individual, trust or complying superannuation Fund.

Although non-resident investors do not qualify for discount capital gains treatment. the capital gain or capital loss that it realises on exit may be disregarded if, very broadly, the investor holds the investment on capital account and either of the following apply:

- the investor holds less than 10% of the units in the Fund; or
- otherwise, 50% or more of the market value of the Fund's assets are not attributable to (very broadly) Australian real property. However, if the non-resident investor held its interest in the Fund through an Australian permanent establishment at any time, the capital gain or loss that it realises on exiting the investment would not be disregarded.

Investments made by investors on revenue account (such as investments for the purposes of short-term gain or as part of business activities) may be taxable in Australia if they are Australian-sourced and subject to the operation of any relevant tax treaties.

Issues specific to non-resident investors

If the Fund qualifies as an MIT, non-resident investors will generally be taxed on distributions to them by way of a final withholding tax of 15%, provided they are resident in a country with a TIEA with Australia, other than:

- capital gains, interest, dividends and royalties, which are taxed as described above; and
- NCMI, which attracts a final withholding tax of 30%.

GST

Very broadly, an entity that is carrying on an enterprise that is registered (or is required to be registered) for GST can claim back any GST incurred by it on acquisitions, provided that it has a valid tax invoice. Furthermore, such entities are generally required to charge GST on supplies that they make.

However, there are special rules concerning the treatment of input-taxed supplies, such as financial supplies. If those rules apply, GST is not charged on the supplies that are made (e.g. issuing units) and the GST paid on acquisitions related to such supplies may not be recoverable. However, some Funds may be entitled to recover GST in full (e.g. if the acquisitions related to GST-free supplies, such as the issue of units to non-residents) or reduced input tax credits (RITC). Under regulations that commenced on 1 July 2012, trusts making financial supplies will receive RITC of 55% and, in the case of supplies and in certain specified cases (e.g. custodial services), an RITC of 75% of the GST paid.

4.3 If a public fund, or a type of entity that may be a public fund, qualifies for a special tax regime, what are the requirements necessary to permit the entity to qualify for this special tax regime?

See question 4.2 above regarding MITs, AMITs and CCIVs.

Austin Bell is recognised as a leading financial services and Funds management lawyer, with a particular focus on investment Funds and hedge Funds. He advises domestic and international Fund managers on all aspects of the Australian regulatory regime, including establishing and restructuring investment vehicles, Australian financial services licensing, disclosure obligations and negotiating contracts.
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