

**CORPORATIONS AMENDMENT (ASIA REGION FUNDS PASSPORT)  
BILL 2018**

**EXPOSURE DRAFT EXPLANATORY MATERIALS**



---

## ***Table of contents***

---

Glossary.....	1
Chapter 1      Context .....	3
Chapter 2      Key definitions .....	9
Chapter 3      Becoming a passport fund .....	21
Chapter 4      Notified foreign passport funds: Relationship with members and prospective members in Australia.....	43
Chapter 5      Notified foreign passport funds: Australian regulation of the fund's other activities in Australia.....	67
Chapter 6      Compliance and enforcement .....	87
Chapter 7      Exemptions and modifications .....	107



---

# Glossary

---

The following abbreviations and acronyms are used throughout the explanatory materials.

<i>Abbreviation</i>	<i>Definition</i>
AAT	Administrative Appeals Tribunal
AFSL	Australian Financial Services Licence
APEC	Asia-Pacific Economic Cooperation
APFRN	Australian Passport Fund Registration Number
ASIC	Australian Securities and Investments Commission
ASIC Act	<i>Australian Securities and Investments Commission Act 2001</i>
Bill	Corporations Amendment (Asia Region Funds Passport) Bill 2018
CIS	Collective investment scheme
CIV	Collective investment vehicle
Corporations Act	<i>Corporations Act 2001</i>
Corporations Regulations	<i>Corporations Regulations 2001</i>
Criminal Code	The Criminal Code, as set out in the Schedule to the <i>Criminal Code Act 1995</i>
FRL	Federal Register of Legislation established under the <i>Legislation Act 2003</i>
Guide	Attorney-General's Department, <i>A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers</i> , September 2011
IMR	Investment Manager Regime
IOSCO	International Organization of Securities Commissions
Johnson Report	Australian Financial Centre Forum, <i>Australia as a Financial Centre – Building on our Strengths</i> , 2010
Joint Committee	Asia Region Funds Passport Joint Committee

<i><b>Abbreviation</b></i>	<i><b>Definition</b></i>
MIS	Managed investment scheme
MOC	Memorandum of Cooperation on the Establishment and Implementation of the Asia Region Funds Passport
Participating economy	A country that has signed and implemented the MOC and not withdrawn from the MOC, until such time as the MOC is terminated
Passport	Asia Region Funds Passport
PDS	Product Disclosure Statement
Register	Register of Passport Funds

---

# Chapter 1

## Context

---

### Outline of chapter

1.1 This chapter sets out the context and background to the Bill. The Bill establishes a common regulatory framework for CISs in participating economies in the Asia region.

### Context of amendments

1.2 The Passport provides a multilateral framework that allows eligible funds to be marketed across member countries, with limited additional regulatory requirements. The Passport is intended to support the development of an Asia-wide managed funds industry through improved market access and regulatory harmonisation. This will bring many benefits for Australia and our region.

1.3 Australia has the largest funds management industry in the Asia region, largely as a result of our pool of superannuation assets. As a result, Australian fund managers can achieve greater economies of scale and can sell a single product across Asia through the Passport to create regional economies of scale. This should lower costs for consumers.

1.4 It will let managed fund providers from other Passport economies sell their products in Australia. This will increase competition and choice for Australian consumers. It will provide cost-effective opportunities to gain investment exposure to a wider range of assets. A study of global pension assets by Willis Towers Watson found that Australia was second only to the United States in its home equity bias.<sup>1</sup>

1.5 In turn, Australian managed fund providers can sell their products in other Passport economies, including to Asia's expanding middle class and high net worth individuals. This will continue an existing trend of Australian providers managing overseas funds.

1.6 The 2009 Johnson Report recommended a package of reforms to make it easier for Australian fund managers to attract overseas investors into funds run and administered out of Australia. The wider objective of

---

<sup>1</sup> Willis Towers Watson, *Global Pension Assets Study 2017*, 2017, at 29.

the Forum was to recommend reforms that would better position Australia as a leading financial services centre.

1.7 In relation to funds management, the Johnson Report recommended the establishment of an Investment Manager Regime (IMR), the introduction of new Collective investment vehicles (CIVs) and the development of the Passport.

1.8 The IMR clarifies that investments by non-residents in foreign assets will generally be exempt from tax in Australia. This ensures that Australian fund managers can compete with overseas financial centres, including Hong Kong, Singapore, London and Tokyo. Parliament passed legislation establishing the IMR in June 2015.

1.9 The new tax and regulatory framework for CIVs will complement the existing MIS framework. It is anticipated that the new corporate CIV, which the Government is also currently implementing, will be used to export funds management, including through the Passport, using a structure which many Asian investors are already familiar with. Fund managers are also likely to use CIVs to sell their services to domestic investors.

1.10 The Australian Government supported the recommendation to introduce the Passport and, in order to determine whether there was sufficient interest in the concept of a Passport, introduced it as an exploratory policy initiative within the Asia-Pacific Economic Cooperation (APEC) Finance Ministers' Process. This provided a region-wide platform to collaborate with financial policy makers, regulators, industry participants, and technical experts with the aim of examining how a Passport could be developed.

1.11 An APEC policy dialogue was held on 27 October 2010 in Kuala Lumpur, Malaysia to engage with relevant stakeholders and targeted APEC economies to discuss the idea of a Passport. During this dialogue, participants identified various policy and technical challenges, and looked at the options to further progress the concept.

1.12 Since 2010, a model for the Passport has been developed through a series of policy and technical workshops attended by representatives from 13 APEC economies. In May 2014, six economies (Australia, Korea, New Zealand, The Philippines, Singapore and Thailand) publicly released a consultation paper detailing proposed arrangements for the Passport. In February 2015, draft Passport Rules were released for public consultation. In September 2015 the then Assistant Treasurer and the Minister for Finance jointly announced that Australia had signed a Statement of Understanding signalling its commitment to join the Passport.



1.13 On 28 April 2016, the then Minister for Small Business and Assistant Treasurer, the Hon Kelly O'Dwyer MP, signed the MOC.<sup>2</sup> Japan, South Korea, New Zealand and Thailand are also members of the Passport. Under the MOC, further economies may join the Passport at a later stage.

## **The passport arrangements**

1.14 Currently, differences and duplication in regulatory requirements across economies can add significantly to the difficulties faced by fund operators attempting to sell CISs across borders (and in this way export their fund management services to foreign residents).

1.15 In some economies, foreign CISs may not be sold at all, or can only be sold to institutional or professional investors. To access these economies, a fund operator would, as a minimum, need to set up a subsidiary that is locally licensed to manage CISs. In a small number of other economies, notably New Zealand, Australian CISs enjoy relatively easy market access due to a bilateral mutual recognition arrangement.

1.16 The Passport allows certain CISs based and regulated in one economy (the home economy) to be 'passported' or sold to investors in other economies in the region (host economies). This will occur through mutual recognition, whereby two or more sufficiently equivalent jurisdictions agree to recognise aspects of each other's regulatory systems. Accordingly, there will be some host economy requirements applying to the operation and sale of schemes that CISs from participating economies do not have to meet.

1.17 The home economy regulator is generally responsible for supervision and enforcement of requirements relating to the operation of the funds, as set out in the home economy laws and regulations and in the Passport Rules. The host economy regulator is generally responsible for supervision and enforcement of investor-facing requirements such as disclosure.

1.18 Each Passport economy must incorporate the Passport Rules into their domestic law. The MOC obliges each economy to ensure their domestic Passport Rules are substantially the same as the Passport Rules in Annex 3 of the MOC. The Asia Region Funds Passport Joint Committee (Joint Committee), as part of its oversight of the implementation of the Passport, will work to ensure consistency in the Passport Rules across the Passport economies.

1.19 To ensure the appropriateness of these arrangements, the government of each Passport economy has assessed the regulatory

---

<sup>2</sup> The MOC is available under key documents at <http://fundspassport.apec.org/resources/>.

framework of each other Passport economy in terms of its regulatory outcomes for regulated CIVs. Each Passport signatory:

- must be a signatory to Appendix A of the IOSCO Multilateral Memorandum of Understanding Concerning Consultation and Co-operation and the Exchange of Information;
- must not be on the Financial Action Taskforce's list of high risk and non-cooperative jurisdictions; and
- must have fully or broadly implemented the relevant IOSCO principles relating to enforcement, cooperation and CISs.

Each government has determined that the other Passport economies' regulatory frameworks are equivalent to their own frameworks on that basis.

1.20 Regulator co-operation is central to the continuing operation of the Passport since host economy regulators place considerable reliance on home economy regulators to regulate the operation of the funds. The MOC sets out several mechanisms for regulator co-operation which have been incorporated into legislation. For example, in determining whether to reject a notice of intention to offer interests in Australia, or whether to issue a stop order against a foreign passport fund, the Australian Securities and Investments Commission (ASIC) must write to the home economy regulator if a decision to reject a notice of intention or issue a stop order would be made on the basis that a home economy law is not likely to be complied with.

1.21 Relying on the home regulator to enforce rules relating to operations justifies the need for Category A extended geographical jurisdiction. Australian authorities require this extended geographic reach to take enforcement action with regard to offences committed outside Australia by funds for which Australia is the home regulator.

1.22 The MOC is structured as follows:

- The body of the MOC sets out the signatories' commitment to participate in the Passport, establishes a governing framework and a mechanism for the resolution of differences, and sets out the eligibility criteria for economies wanting to participate in the arrangement. Paragraph 5 of the MOC establishes the commitment to implement the Passport arrangements and outlines what this means for participant economies.
- Annex 1 of the MOC outlines how a participant may impose obligations on passport funds from other economies that are offered in its economy (the **host economy** obligations).

- Annex 2 of the MOC sets out the common regulatory arrangements for passport funds that each participant will give effect to - how passport funds are to be registered and supervised by regulators and how the Passport arrangements are to be enforced (the **common regulatory arrangements**).
- Annex 3 of the MOC sets out the **Passport Rules**. This is a common set of obligations which the operators of passport funds will be required to comply with on an ongoing basis. They will apply to a passport fund concurrently in both the home and any host economies.
- Annex 4 of the MOC sets out arrangements for **cooperation** between regulators.
- Annex 5 of the MOC defines the form to be used for formal notification of participation in the MOC by **subsequent participants**.

1.23 Following the signing of the MOC, it is necessary to reflect the Passport arrangements in Australian law through amendments to the *Corporations Act 2001* (Corporations Act), the *Australian Securities and Investments Commission Act 2001* (ASIC Act) and related legislation. The Bill implements the following key changes:

- It establishes a mechanism for incorporating the Passport Rules in Annex 3 of the MOC into Australian law, and imposes an obligation on passport funds and operators registered in Australia as well as foreign passport funds and operators offering interests in Australia to comply with the Passport Rules.
- It establishes a new Chapter 8A in the Corporations Act which mainly implements the common regulatory arrangements in Annex 2 of the MOC. Chapter 8A among other things sets out the process whereby Australian CISS may be registered by ASIC as passport funds. It also sets out the process whereby foreign passport funds may notify ASIC of their intention to offer interests in the fund to Australian investors and the circumstances in which ASIC may reject such notifications.
- It makes amendments to other parts of the Corporations Act clarifying how the obligations in those parts are to apply to foreign passport funds, as allowed under Annex 1 of the MOC. Key areas in which obligations are made to apply to foreign passport funds in this manner include financial reporting, licensing and disclosure.

1.24 The detailed amendments in the Bill are explained in full in the following chapters of the explanatory materials. All provision references in the explanatory materials are to the Corporations Act unless otherwise stated.

---

## Chapter 2

### Key definitions

---

#### Outline of chapter

2.1 Schedule 1 to the Bill inserts a new Chapter 8A into the Corporations Act. Parts 8A.1 and 8A.2 mainly contain a number of key definitions and set out the mechanism for incorporating the rules for passport funds into Australian domestic law.

#### Context of amendments

2.2 The MOC provides the key definitions for the Passport as follows:

- definitions applicable to the framework of the MOC, such as Participant, the MOC, passport fund and Joint Committee (paragraph 4 of the MOC); and
- key definitions for the Passport Rules, such as home economy, home regulator, host economy, host regulator and operator (Part 9 of Annex 3 of the MOC).

2.3 To give effect to the Passport in Australia, key definitions are inserted into the Corporations Act.

2.4 The Passport Rules contained in Annex 3 of the MOC are the Passport's core operating rules that are to apply as requirements in each Participant's economy. They apply to CISs that are admitted to enter the passport arrangements by their home economy. They will have effect in Australia as a consequence of the Minister making rules incorporating the content of the Passport Rules, using a new rule-making provision.

#### Summary of new law

2.5 The new law states that a country is a *participating economy* and eligible for the special Passport arrangements if it signed and implemented the MOC and has not withdrawn from the MOC. Economies will cease to be participating economies if the MOC is terminated.

2.6 The Minister must publish a list of the participating economies.

2.7 The *Passport Rules for this jurisdiction* are the rules for passport funds that are made by the Minister and in force in Australia. The

**Passport Rules for a participating economy other than Australia** are the rules for passport funds in force in another country that has signed and implemented the MOC. Both the Passport Rules for this jurisdiction and the Passport Rules for a participating economy other than Australia must be substantially the same as the agreed rules for passport funds in Annex 3 of the MOC.

2.8 **Passport funds** are **regulated CISs** and sub-funds of regulated CISs that are registered as a passport fund in a participating economy. The economy where the passport fund is first registered or approved is referred to as the fund's **home economy**. If the fund applies or is permitted to offer interests in another economy, the other economy is the fund's **host economy**.

## Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
Special arrangements apply to passport funds. <b>Passport funds</b> are regulated CISs, and sub-funds of regulated CISs, that are registered as a passport fund in a participating economy.	No equivalent.
A <b>participating economy</b> is a country which has signed the MOC and been listed by the Joint Committee as having implemented the MOC. A country will cease to be a participating economy if it withdraws from the MOC or the MOC is terminated.	No equivalent.
The Minister must publish a list of the participating economies.	No equivalent.
The Minister may make the <b>Passport Rules for this jurisdiction</b> by legislative instrument and these rules must be substantially the same as the rules in Annex 3 of the MOC.	No equivalent.
The <b>Passport Rules for a participating economy other than Australia</b> are the rules in force in another country that has signed and implemented the MOC, provided that those rules are substantially the same as the rules in Annex 3 of the MOC.	No equivalent.

<i>New law</i>	<i>Current law</i>
The <b>home economy</b> for a fund is the participating economy where the fund was first registered or approved as a passport fund. The regulator in this country is referred to as the <b>home regulator</b> .	No equivalent.
The <b>host economy</b> is any participating economy where the fund subsequently applies, or is permitted, to offer interests. The regulator in the host economy is referred to as the <b>host regulator</b> .	No equivalent.

## Detailed explanation of new law

### Participating economies

2.9 A **participating economy** is a country which:

- is a signatory to the MOC;
- has not withdrawn from the MOC; and
- has been listed on the Joint Committee's website as a country which has successfully implemented the MOC at or before the time in question.

[Schedule 1, item 1, section 1210]

2.10 The MOC is defined by the term 'Memorandum of Cooperation'. The definition makes it clear that the expression includes future changes made to the MOC as allowed under paragraph 9 of the MOC. [Schedule 1, item 1, section 1210 and Schedule 2, item 24, section 9, definition of 'Memorandum of Cooperation']

2.11 The Joint Committee established under paragraph 6 of the MOC plays an important role in interpreting and co-ordinating implementation of the MOC among Passport economies. Its functions include monitoring the Passport Arrangements and their operation as well as publishing guidelines on the operation of the Passport. It may assume any other functions it considers necessary or desirable for the effective implementation and operation of the Passport.

2.12 The term **participating economy** is designed to capture all countries which have both signed and implemented the MOC. Signing is just the first step to becoming a participating economy; the country must also implement the MOC by amending the domestic laws in its country so that they are consistent with the MOC and the Passport Rules. Generally,

countries will endeavour to implement the arrangements within 18 months of signing the MOC (subparagraph 5.6 of the MOC).

2.13 The Joint Committee is required to publish a list of all of the countries that have successfully implemented the MOC on its website. Inclusion in this list is taken to be conclusive evidence that a country has implemented the MOC and is a participating economy. *[Schedule 1, item 1, section 1210]*

2.14 Countries will cease to be participating economies if they formally withdraw from the MOC by giving at least 28 days' notice to the Joint Committee Chair and other participating economies in accordance with subparagraph 14.2 of the MOC.

2.15 An economy does not cease to be a participating economy if it amends its domestic laws so that they are inconsistent with the MOC but does not formally withdraw from the MOC. Nevertheless, in this situation, the Minister may make a determination that funds from that economy must not offer interests in Australia (see Chapter 3 of the explanatory materials).

2.16 If the MOC is terminated, no countries will be participating economies. *[Schedule 1, item 1, section 1210]*

2.17 The Minister is required to publish a list of participating economies, which must include the date each economy became a participating economy or withdrew from the MOC. *[Schedule 1, item 1, subsection 1210A(1) and paragraphs 1210A(2)(a) and (b)]*

2.18 The inclusion of the date will make it easier to determine whether an economy was a participating economy at a particular point in time and remove the need for people to consult historical versions of the list.

2.19 This list must be updated as soon as is reasonably practicable after an economy:

- becomes a participating economy, that is, the Joint Committee lists the economy as successfully implementing on its website; or
- ceases to be a participating economy because it withdraws from the MOC or the MOC is terminated.

*[Schedule 1, item 1, paragraph 1210A(2)(c)]*

2.20 The list published by the Minister is not conclusive evidence of whether an economy is a participating economy. The criteria set out above are the critical factors in this regard: that is, the economy must have signed the MOC, been listed on the Joint Committee's website and not have withdrawn from the MOC, and the MOC must not have been terminated.



## Passport Rules

2.21 The requirements for passport funds are generally set out in Annex 3 — Passport Rules of the MOC. The Passport Rules cover:

- the matters that must be included in a passport fund's constituent documents;
- the eligibility requirements for operators of passport funds (including their experience, qualifications, financial resources, good standing and organisational arrangements);
- the responsibilities of operators of passport funds and limitations on their right to delegate;
- requirements for operators of passport funds to report breaches;
- a requirement for funds to have an independent party responsible for holding the assets, and that party's duties;
- a requirement for funds to have an independent oversight entity, such as a compliance committee;
- a requirement for funds to undertake annual implementation reviews or audits;
- extensive permissions, restrictions and limits with regard to asset classes, counterparties and investment limits;
- redemption and valuation of assets;
- the effect of deregistration; and
- a requirement for funds to prepare financial statements.

2.22 Australia, together with the other signatories to the MOC, agreed to give effect to the rules in Annex 3 of the MOC. However, the MOC does not amend domestic laws and Annex 3 does not have any force in Australia unless it is incorporated into Australian law.

2.23 Part 8A.2 of the new law provides the mechanism for incorporating Annex 3 of the MOC into Australian law. It provides that the Minister may make a legislative instrument that sets out the rules for passport funds. [*Schedule 1, item 1, subsection 1211(1)*]

2.24 The rules made by the Minister must be substantially the same as the rules in Annex 3 of the MOC but there may be minor differences, for example, to adapt the Passport Rules to existing legislative frameworks in this jurisdiction, such as the AFSL framework. [*Schedule 1, item 1, subsection 1211(2)*]

2.25 Some aspects of Annex 3 of the MOC are incorporated directly into the Act where this is appropriate. These instances are specifically noted in the explanatory materials.

2.26 The legislative instrument will be subject to Parliamentary scrutiny and disallowance in the same way as other legislative instrument. It must also be published on Federal Register of Legislation established under the *Legislation Act 2003* (FRL).

2.27 ***The Passport Rules for this jurisdiction*** are the Passport Rules set out in the legislative instrument made by the Minister.

2.28 The ***Passport Rules for a participating economy other than Australia*** are the rules for passport funds in force in one of the other countries that has signed and implemented the MOC, provided that those rules are substantially the same as Annex 3 of the MOC. [*Schedule 1, item 1, subsection 1211A(2)*]

2.29 The phrase ‘the Passport Rules for a participating economy other than Australia’ may not necessarily designate identical rules when used in relation to different participating economies. This situation would arise if a participating economy adopts a version of Annex 3 which includes minor differences from the rules adopted in another participating economy even though both sets of rules are substantially the same as Annex 3.

#### ***Amendments to the MOC***

2.30 The Joint Committee may recommend amendments to Annex 3 of the MOC from time to time. A recommended amendment will only have effect and amend Annex 3 if all participating economies accept the recommendation and make any necessary amendments to their domestic law. If one or more participating economies disagree with the recommendation or fail to implement the changes within the agreed time period, the recommendation has no effect and must be further considered at the next Joint Committee meeting (paragraph 9 of the MOC).

2.31 To incorporate a recommended amendment into Australian law, the Minister must make a new legislative instrument. The legislative instrument will be disallowable. This ensures that both the Minister and Parliament have the opportunity to consider the proposed amendment before there is any change to Australian law. [*Schedule 1, item 1, section 1211*]

2.32 If the Minister does not make a legislative instrument which incorporates the recommended amendment, Australia’s domestic law remains unchanged. This would also mean that the participating economies do not unanimously accept and implement the recommended amendment. Accordingly, the proposed amendment would need to be reconsidered at the next Joint Committee meeting.

**Example 2.1: Proposed amendment supported by all participating economies**

The Minister makes a legislative instrument which replicates the rules in Annex 3 of the MOC.

The Joint Committee recommends a substantial amendment to Annex 3 of the MOC. All participating economies support the amendment and agree to give effect to it by 31 December.

On 1 August, the Minister in Australia makes a legislative instrument to incorporate the proposed amendment into Australian law.

The legislative instrument will commence on 31 December but the commencement is conditional on all participating economies giving effect to it by that date.

All participating economies take the necessary steps to incorporate the recommended amendment into their domestic laws by 31 December.

As a result:

- Annex 3 of the MOC is amended; and
- the condition in the legislative instrument is satisfied and the amended rules commence in Australia on 31 December.

**Example 2.2: Amendments to Annex 3 of the MOC that are not supported by all participating economies**

The Joint Committee recommends another amendment to Annex 3 of the MOC. All participating economies agree to give effect to it by 1 July.

- In Australia, the Minister makes a legislative instrument to implement the amendment. The legislative instrument is to commence on 1 July and it contains a conditional commencement in similar terms to the commencement clause in the legislative instrument in the previous example.
- There is a change of government in one of the participating economies and the new government decides against implementing the recommended amendment. As a result, Annex 3 of the MOC is not amended.
- Australia's legislative instrument does not commence and 'the Passport Rules for this jurisdiction' is not amended.
- If Australia's legislative instrument did not contain a commencement provision and the proposed amendment was substantial, the Minister's act of making the legislative instrument may be beyond power. This is because the Minister only has power to make rules which are substantially the same as Annex 3 of the MOC.

2.33 The Joint Committee may make recommendations for other changes to the MOC, including the date when the amendment should take effect (paragraph (f) of subparagraph 6.2 of the MOC). The change will only take effect if it is agreed to by all participating economies and implemented by the time recommended by the Joint Committee (paragraph 9 of the MOC).

## **CISs and regulated CISs**

2.34 A **CIS** is a CIV or arrangement where:

- members contribute money or money's worth for the right to benefits;
- contributions are pooled to produce financial benefits or an interest in property for the members;
- not all the members, in their capacities as members, take part in day-to-day management of the scheme; and
- the pool is managed as a whole for the benefit of the members collectively (section 55 of Annex 3 of the MOC).

2.35 CISs are not restricted to vehicles which meet the definition of a 'managed investment scheme' in Australia. Instead, the definition of a CIS captures a range of investment vehicles including superannuation funds, partnerships and other contractual relationships, MISs and corporate CIVs.

2.36 The new law uses the definition of **regulated CIS** in the Passport Rules for this jurisdiction and this definition must be substantially the same as the definition in Annex 3 of the MOC. [*Schedule 1, item 1, section 1210 and subsection 1211(2)*]

2.37 Under the MOC, a **regulated CIS** is basically a CIS which is regulated by the corporations legislation in the participating economy. At the time that it first came into effect, section 56 of Annex 3 of the MOC set this out as:

- in relation to Australia, a CIS registered under the *Corporations Act 2001*;
- in relation to Japan, a scheme under the *Investment Trusts and Investment Corporations Act* of Japan;
- in relation to Korea, a CIS under the *Financial Investment Business and Capital Markets Act* of Korea;
- in relation to New Zealand, a MIS registered under the *Financial Markets Conduct Act 2013* of New Zealand;

- in relation to Singapore<sup>3</sup>, a CIS authorised under the *Securities and Futures Act* of Singapore; and
- in relation to Thailand, a CIS under the *Securities and Exchange Act* of Thailand.

## Passport funds, foreign passport funds and operators

2.38 An entity is a ***passport fund*** if it is:

- a regulated CIS or a sub-fund of a regulated CIS; and
- registered as a passport fund in a participating economy.

[Schedule 1, item 1, section 1210]

2.39 The first requirement restricts passport funds to regulated CISs and their sub-funds. For the definition of a regulated CIS, see paragraph 2.8 above.

2.40 ***Sub-funds*** will have the same definition as in the Passport Rules in this jurisdiction, and this definition must be substantially the same as in Annex 3 of the MOC. [Schedule 1, item 1, sections 1210 and 1211]

2.41 Sub-funds are basically distinct compartments of a CIS which are segregated in a way that prevents the assets of one sub-fund being used to discharge the liabilities of another sub-fund. Sub-funds may have different legal forms in each participating economy and they may or may not have their own legal personality.

2.42 In relation to the second requirement, each participating economy will have its own procedures for registering regulated CISs and sub-funds as passport funds. The procedures which apply in Australia are set out in Chapter 3 of the explanatory materials. The procedures that apply in other countries will be set out in their regulatory frameworks, but they will be based on the MOC and must be broadly similar to the procedures in Australia.

2.43 ***Australian passport funds*** are registered schemes that are also registered as passport funds in Australia using the process set out in Part 8A.3 of this Bill. [Schedule 2, item 7, section 9]

2.44 ***Foreign passport funds*** are regulated CISs and sub-funds of regulated CISs that are registered as passport funds by participating economies other than Australia. They may take a variety of legal forms and, accordingly, the word ‘entity’ takes its ordinary meaning when used in provisions relating to passport funds in the new Chapter 8A. [Schedule 2, items 17 and 38, sections 9 and 64A]

---

<sup>3</sup> While Singapore has not signed the MOC to date, it has participated in the discussions leading to the formulation of the MOC and may become a signatory in the future.

2.45 Foreign passport funds are only permitted to offer interests in Australia if they lodge a notice with ASIC and the notice is not rejected. The special streamlined application process that applies to foreign passport funds is discussed in Chapter 3 of the explanatory materials.

2.46 A **notified foreign passport fund** is a foreign passport fund that has submitted a notice to offer interests in Australia and has not been rejected within the prescribed period. Notified foreign passport funds are a subset of foreign passport funds. In other words, all notified funds will be foreign passport funds, but only those foreign passport funds that may offer interests in Australia will be notified foreign passport funds.

*[Schedule 1, item 1, subsection 1213C(2)]*

2.47 An **Australian member** of a notified foreign passport fund is defined as a person who either holds an interest in the fund that was acquired in Australia or is ordinarily resident in Australia and holds an interest in the fund. *[Schedule 2, item 7, section 9]*

2.48 The new law adopts the definition of an **operator** in the Passport Rules for this jurisdiction, and those rules must be substantially the same as Annex 3 of the MOC. The MOC contains a table that lists the operator in each participating economy (section 56 of Annex 3). The operator is the person or entity who is responsible for managing the overall operations of the CIS. In Australia, the operator is the ‘person licensed to operate the CIS under the Corporations Act’, which will be the responsible entity for a registered scheme. In some cases, the operator may be the same entity as the fund. *[Schedule 1, item 1, sections 1210 and 1211]*

## Home and host economies

2.49 All passport funds have a home economy and they may also have one or more host economies.

2.50 The **home economy** is the participating economy where the passport fund is registered or approved as a regulated CIS, regardless of the exact name given to the registration or approval process. If there is more than one such economy then the home economy is the one where the fund is first registered or approved. This is substantially the same as the definition of home economy in Annex 3 of the MOC. *[Schedule 1, item 1, section 1210 and Schedule 2, item 17, section 9, definition of ‘home economy’]*

2.51 The **host economy** is any other participating economy (apart from the home economy) where the passport fund is permitted to offer interests or has submitted an application to offer interests. The passport fund may have more than one host economy. Australia acts as a host economy to foreign passport funds that have submitted notifications of intention to offer interests, or are permitted to offer interests in Australia after having submitted a notification (see Chapter 3 of the explanatory

materials). [Schedule 1, item 1, section 1210 and Schedule 2, item 17, section 9, definition of ‘host economy’]

2.52 If a fund is deregistered as a passport fund in its home economy, it will no longer meet the definition of a passport fund and it will not have a home economy. It will also fail to meet the prerequisites for being permitted to offer interests in any other economy. Nonetheless, the Passport Rules specify that a regulated CIS or a sub-fund of a regulated CIS that has been deregistered as a passport fund must be operated in accordance with these rules until such point as certain conditions are met (section 54 of Annex 3 of the MOC).

## Home and host regulators

2.53 ‘Passport Regulator’ (as used in the definitions of ‘home regulator’ and ‘host regulator’) has the meaning as in the Passport Rules for this jurisdiction, and those rules must be substantially the same as Annex 3 of the MOC. Under the MOC, the **Passport Regulator** is the entity in each participating economy which performs the regulatory functions under the relevant legislation (as defined under the term passport regulator in section 55 of Annex 3). [Schedule 1, item 1, sections 1210 and 1211]

2.54 The Passport Regulators in each of the countries that initially signed the MOC are shown in the table below. If the entity responsible for the regulatory functions changes, the new entity will become the Passport Regulator.

**Table 2.1: Passport Regulator in each participating economy**

<i>Participant</i>	<i>Regulator</i>
Australia	ASIC
Japan	Financial Services Agency
Korea	Financial Supervisory Service and Financial Services Commission
New Zealand	Financial Markets Authority
Singapore <sup>4</sup>	Monetary Authority of Singapore
Thailand	Securities and Exchange Commission

2.55 The **home regulator** for a passport fund is the Passport Regulator in the fund’s home economy. The **host regulators** for a passport fund are the Passport Regulators in the fund’s host economies. While these definitions use the word ‘entity’, ‘entity’ takes its ordinary meaning

<sup>4</sup> Note: Singapore is not currently a signatory to the MOC but has been added because it was a signatory to the earlier Statement of Intent.

and does not draw on the definition in section 64A. See paragraphs 2.47 to 2.50 for an explanation of the definitions of home and host economy. *[Schedule 1, item 1, section 1210 and Schedule 2, item 17, section 9, definition of ‘home regulator’ and ‘host regulator’]*

## **Consequential amendments**

2.56 Consequential amendments have been made to the definition sections in the Corporations Act to include the Passport Rules for this jurisdiction in the definition of ‘this Act’ and ensure that ‘entity’ has the same definition in the new chapter as in Chapter 2E. *[Schedule 2, items 5 and 12, sections 9 and 64A]*



---

## **Chapter 3**

### ***Becoming a passport fund***

---

#### **Outline of chapter**

3.1 Schedule 1 to the Bill inserts a new Chapter 8A into the Corporations Act. Parts 8A.3, 8A.4 and 8A.5 set out the processes under which Australian and foreign passport funds are allowed to offer interests in Australia. Part 8A.8A sets out the rules and processes governing deregistration of Australian passport funds and denotification of foreign passport funds.

3.2 Schedule 2 to the Bill includes consequential amendments to extend the existing laws governing deregistration of registered schemes for registered schemes that are also Australian passport funds.

#### **Context of amendments**

3.3 The MOC sets out the application process for a home economy of a fund wishing to passport to another participating economy to register as a passport fund in their home economy, and the processes that a host economy may adopt to facilitate the entry of a foreign passport fund into its economy (see Part 2 of Annex 2 of the MOC).

3.4 Each passport regulator must maintain a Register of Passport Funds for which it is the home regulator (section 7 of Annex 2).

3.5 The MOC also sets out the rules for deregistration as a passport fund in its home economy as well as deregistration as a regulated CIS (sections 14 and 15 of Annex 2).

#### **Summary of new law**

3.6 Registered schemes may apply to become passport funds by lodging an application in the prescribed form with ASIC. ASIC must register the scheme as an Australian passport fund if ASIC is of the opinion that the Operator of the scheme meets the eligibility criteria in the MOC and ASIC is satisfied that the scheme will comply with the corporations legislation in Australia, including the Passport Rules for this jurisdiction. ASIC registers a scheme by assigning it a unique Australian Passport Fund Registration Number (APFRN) and ensuring that its details are entered on the Register.

3.7 Funds registered in another participating economy must lodge a notice of intention with ASIC if they intend to offer interests in Australia. ASIC generally has 15 business days consideration period to consider the application and decide whether the fund should be refused entry. ASIC may reject the notice for various reasons, including that the fund is unlikely to comply with the home or host economy's laws and regulations, that the entry is not in the public interest, or if the name of the fund is unavailable. If the notice of intention is not rejected, the fund becomes a notified foreign passport fund on the day after the end of the consideration period.

3.8 Nonetheless, the Minister may consent in writing to a name being available to a foreign passport fund in this jurisdiction even if the name would not otherwise be available.

3.9 The Minister may also determine that all funds (or all funds from a particular economy) are to be rejected if there is a difference about the proper interpretation of the MOC, Australia withdraws from the MOC, another economy withdraws from the MOC or the MOC is terminated.

3.10 Where Australia is regulating notified foreign passport funds as a host economy, the new law generally provides for the same or similar treatment as applies to MISs.

3.11 Similarly to the process for deregistration as a registered scheme, an Australian passport fund may lodge an application for deregistration as a passport fund. ASIC may also deregister the fund as a passport fund on its own initiative if the fund is not complying with relevant Australian laws.

3.12 A notified foreign passport fund may likewise lodge an application to be denotified as a notified foreign passport fund. ASIC must also denotify a fund as a notified foreign passport fund if the fund has been deregistered as a passport fund in its home economy.

3.13 A series of consequential amendments are made to extend the existing laws governing deregistration of registered schemes for registered schemes that are also Australian passport funds.

## Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
<p><b><i>Australian funds</i></b></p> <p>Funds that are registered schemes under the Corporations Act may apply for the passport regime by lodging an application in the prescribed form with ASIC.</p> <p>ASIC must register the fund if the Operator of the fund (the responsible entity) meets the eligibility criteria in the MOC and ASIC is of the opinion that the fund will comply with the corporations legislation in Australia.</p> <p>An Australian passport fund may lodge an application for deregistration as a passport fund. ASIC may also deregister the fund as a passport fund on its own initiative if the fund is not complying with relevant Australian laws</p>	No equivalent.
<p><b><i>Foreign passport funds</i></b></p> <p>Foreign passport funds may lodge a notice of intention to offer interests in Australia with ASIC by using the prescribed form.</p> <p>ASIC may request further information from the operator of the foreign passport fund.</p> <p>ASIC must consider a notice in the prescribed form within 15 business days of receiving it, unless a longer period is agreed by ASIC and the applicant.</p> <p>ASIC may reject the notice if:</p> <ul style="list-style-type: none"> <li>• ASIC is of the opinion that the fund does not comply, or is not likely to comply, with the home or host economy's laws and regulations;</li> <li>• ASIC is of the opinion that rejecting the notice is in Australia's public interest;</li> </ul>	No equivalent.

<i>New law</i>	<i>Current law</i>
<ul style="list-style-type: none"> <li>• Australia has imposed sanctions against another economy and ASIC is of the view that allowing the passport fund to operate in Australia would breach those sanctions;</li> <li>• ASIC does not consent to an exemption or modification that has been granted to the fund or its associated entities, by its home economy;</li> <li>• the name that the passport fund intends to use is not available; or</li> <li>• the Minister determines that ASIC is not to accept applications from the passport fund's home economy.</li> </ul> <p>Notified foreign passport funds may lodge an application to be denotified. ASIC must also denotify a notified foreign passport fund if the fund has been deregistered as a passport fund in its home economy.</p>	

## Detailed explanation of new law

### Registration of Australian funds

3.14 An Australian fund may only be registered as a passport fund if it is a MIS registered under section 601EB of the Corporations Act.<sup>5</sup>  
*[Schedule 1, item 1, section 1212]*

3.15 The Australian fund does not need to be a registered scheme at the time that it lodges an application to become a passport fund. This ensures that a new fund is able to lodge an application to become both a registered scheme and a passport fund at the same time. In this case, ASIC would complete registration of the fund as a registered scheme first, and would only decide the application for registration as a passport fund after

<sup>5</sup> It is also envisaged that corporate collective investment vehicles will be able to be registered as a passport fund once the regulatory framework for corporate collective investment vehicles is implemented (see Chapter 1 of the explanatory materials). Consequential amendments to Chapter 8A will be required to give effect to that outcome.

registration as a registered scheme is complete. This satisfies the requirement in the MOC for a passport fund to be a regulated CIS, which for Australia means a CIS registered under the Corporations Act.

*[Schedule 1, item 1, subsection 1212(1)]*

3.16 It is open to the responsible entity of a registered scheme to lodge an application with ASIC through another person acting as the agent of the responsible entity.

3.17 An application may also be withdrawn by lodging a further notice with ASIC in the prescribed form. *[Schedule 1, item 1, subsection 1212(3)]*

3.18 The existing law exempts certain schemes from the requirements to register (see subsection 601ED(2)). These schemes are mainly wholesale funds or small funds with no more than 20 members. Such funds are unlikely to wish to become passport funds. Nevertheless, if an unregistered scheme wished to apply to ASIC to become a passport fund, it would need to first voluntarily register as a registered scheme with ASIC under section 601EB. *[Schedule 1, item 1, subsection 1212(1)]*

3.19 ASIC has the power to prescribe the form of the application, including the required information and supporting documentation under section 350 of the Corporations Act. Applications must be in the prescribed form and accompanied by any fee prescribed under the *Corporations (Fees) Regulations 2001*. It is noted that ASIC is likely to prescribe an electronic form for this purpose. *[Schedule 1, item 1, subsection 1212(2)]*

3.20 The applicant must also provide ASIC with the PDS that it must prepare before it can offer interests to retail clients. This PDS must comply with the PDS requirements in the Corporations Act and must set out relevant information about the passport fund. *[Schedule 1, item 1, paragraph 1212(2)(b)]*

3.21 The PDS provided to ASIC does not need to include the APFRN because this number only needs to be included on documents after the CIS is registered as a passport fund. *[Schedule 1, item 1, section 1212B]*

3.22 Applicants are not required, as set out in existing section 601EC, to state the APFRN in the PDS that is submitted with the application because this identifier may not be known by new funds at the time of lodging an applications with ASIC. (See paragraph 3.15 for an explanation of how a new fund can lodge its application to become a registered scheme and a passport fund at the same time.)

3.23 The requirement to provide a PDS at the time of applying for registration differs from other registration processes under the Corporations Act. The requirement is designed to assist ASIC in determining whether the fund is likely to comply with the PDS requirements should it be registered as an Australian passport fund. Only

funds which are likely to comply with the Corporations Act and the ASIC Act may be registered as an Australian passport fund.

3.24 ASIC may, by legislative instrument, determine which parts of the application are to be public. This power could be used, for example, to protect information that is commercially sensitive and confidential.

*[Schedule 1, item 1, subsection 1212(4) and Schedule 2, item 270, subparagraph 1274(2)(a)(iab)]*

3.25 ASIC must register the registered scheme as a passport fund if ASIC is satisfied that the registered scheme meets two conditions, namely:

- the registered scheme is likely to comply with the Corporations Act, ASIC Act, and the Passport Rules for this jurisdiction; and
- the responsible entity for the registered scheme meets the eligibility requirements in subsection 3(4) of Annex 2 of the MOC. These eligibility requirements are that the operator:
  - is responsible for operating a CIS with assets of at least US\$500 million or has discretionary management powers over at least the same amount of client money;
  - has its principal place of business in Australia;
  - has officers with the qualifications specified in section 6 of the Passport Rules;
  - meets the financial resources test in section 7 of the Passport Rules (that is, the Operator has between US\$1 million and US\$21 million in equity, depending on the value of the assets under management);
  - meets the organisational arrangements test in section 8 of the Passport Rules, including by establishing internal control mechanisms, adequate risk monitoring and adequate procedures for managing conflicts of interest;
  - meets the track record test in section 9 of the Passport Rules by having at least five years of relevant experience; and
  - meets the good standing test in section 10 of the Passport Rules by not being subject to a notice that brings into question its integrity or competence.

*[Schedule 1, item 1, subsection 1212A(1)]*

3.26 ASIC is required to form a positive opinion about these matters, that is, it is not sufficient for ASIC to not form the view that the MIS is unlikely to comply with the relevant laws.

3.27 In order for ASIC to be able to form its opinion it may, where reasonable to do so, rely on specific assertions or representations made in the application. For example, in completing the application, an applicant may answer in the affirmative when asked whether the assets held by the passport fund comply with the Passport Rules. The applicant gives this answer knowing that making a false or misleading statement in the application is a criminal offence. In the absence of any facts which are sufficient to suggest to a reasonable person the answer is false, it is reasonable for ASIC to rely on this statement to form its opinion that the Corporations Act (including the Passport Rules) is likely to be complied with.

3.28 ASIC is not required to process applications within any specific period of time. ASIC registers a registered scheme as a passport fund by assigning it a unique APFRN and ensuring that its details are recorded on the Register of Passport Funds (the Register). *[Schedule 1, item 1, section 1210 and subsection 1212A(2)]*

3.29 The passport fund must include its APFRN on all documents subsequently lodged with ASIC. *[Schedule 1, item 1, subsection 1212B]*

**Table 3.1 Registration process for Australian passport funds**

<i>Stage</i>	<i>Requirements</i>
Application	<ul style="list-style-type: none"> <li>Registered scheme or application as registered scheme</li> <li>ASIC prescribed form</li> <li>Copy of PDS</li> </ul>
ASIC consideration	Two conditions: <ul style="list-style-type: none"> <li>Likely to comply with Corporations Act (including Passport Rules for this jurisdiction) and ASIC Act</li> <li>Complies with eligibility requirements in section 3 of Annex 2 of the MOC</li> </ul>
Registration	ASIC assigns APFRN and includes details on the Register

3.30 If an Australian passport fund uses a different name in another participating economy it must notify ASIC in writing within seven days after it begins offering interests in the fund under that name. If a fund uses a different name in several other participating economies, it must advise ASIC of all of its different names. This information will be entered on the Register kept by ASIC. *[Schedule 1, item 1, section 1212C]*

3.31 The fund may have to use a different name because the name it uses in Australia is not available in the other jurisdiction. A failure to notify ASIC under this provision carries a penalty of 60 penalty units. *[Schedule 1, item 1, section 1212C and Schedule 2, item 297, schedule 3 table item 328A]*

## Notification of funds from other participating economies

3.32 Funds that have been registered as a passport fund in another participating economy must notify ASIC of their intention to offer interests in Australia. This notification process is designed to be a streamlined process whereby notices of intention are considered within 15 business days of the day after the lodgement of the notice, subject to any extensions to the consideration period. The streamlined process acknowledges that applicants are regulated CISs in the other jurisdiction and have already been approved as a passport fund in that jurisdiction. ASIC may therefore only reject a notice of intention on limited grounds. For a discussion of the grounds for rejecting a notice of intention, see paragraphs 3.41 to 3.64 below.

3.33 The notification process involves the operator of the foreign passport fund lodging a notice of intention, in the prescribed form, with ASIC. In order to be able to do this, the operator must be registered as a foreign company in Australia. A notified foreign passport fund does not have to be registered as a registered scheme. [*Schedule 1, item 1, section 1213 and Schedule 2, items 119 and 120, subsections 601ED(1) and (2)*]

3.34 It is open to the operator of the foreign passport fund to lodge a notice of intention with ASIC through another person acting as the agent of the operator.

3.35 The consideration period begins on the day after a complete notice is lodged with ASIC. In accordance with section 25C of the *Acts Interpretation Act 1901*, the lodged form must be in substantial compliance with the prescribed form to be considered complete.

3.36 The operator is also required to provide ASIC with a PDS. This is intended to assist ASIC in determining whether the fund is likely to comply with Australia's disclosure requirements. The PDS must comply with the PDS requirements in the Corporations Act and must set out relevant information about the passport fund. The PDS that accompanies the notice of intention does not need to include a unique identifier because this will only be assigned after the notification process is complete. This mirrors the requirements for Australian funds applying for registration as Australian passport funds, and contrasts with the registration of Australian funds as registered schemes, where a PDS is not required to be provided on registration. [*Schedule 1, item 1, subsection 1213(2)*]

3.37 As with applications from Australian funds, ASIC may determine by legislative instrument that information lodged as part of a notice of intention is not publicly available for inspection or copying. This power is designed to ensure that commercial-in-confidence information included in the notice is given appropriate protection [*Schedule 1, item 1, subsection 1213(4) and Schedule 2, item 19, subparagraph 1274(2)(a)(iac)*]



3.38 The operator must pay any fee prescribed under the *Corporations (Fees) Regulation 2001*.

***Requests for further information***

3.39 If ASIC is of the opinion that information required under the prescribed form has not been provided, it may seek this information by notifying the operator of the foreign passport fund in writing. *[Schedule 1, item 1, section 1213A]*

3.40 The new law states that ASIC must make a request for further information within the ***consideration period*** that extends for 15 business days beginning on the day after a notice in the prescribed form is lodged. *[Schedule 1, item 1, section 1210 and paragraph 1213D(1)(a)]*

***Grounds for rejecting notices of intention***

3.41 ASIC may (or, in some cases, must) prohibit a fund from offering interests in Australia if:

- ASIC is of the opinion that the fund does not comply, or is not likely to comply, with the relevant laws in Australia or its home economy;
- ASIC is of the opinion that rejecting the notice is in Australia's public interest;
- ASIC does not consent to an exemption or modification that has been granted to the fund, or its associated entities, by its home economy;
- the name that the passport fund intends to use is not available;
- Australia has imposed sanctions on the home jurisdiction of the fund and the Minister has made a determination against the jurisdiction; or
- the Minister determines that operators of passport funds or a class of passport funds from a home economy must not offer interests in Australia.

*[Schedule 1, item 1, subsections 1213B(1), (5) and (8)]*

***Ground 1: Not likely to comply with relevant laws***

3.42 ASIC may reject a notice if the fund is not complying with the relevant laws in Australia or its home economy that are administered by the passport regulator. ASIC may also reject a notice if the fund is unlikely to comply with these laws in the future. *[Schedule 1, item 1, paragraph 1213B(1)(a)]*

3.43 The relevant Australian laws are the Corporations Act and the ASIC Act, but not the Passport Rules for this jurisdiction (that is as given

effect to in Australian law). The reason for not including the Passport Rules for this jurisdiction is that until the foreign passport fund is permitted to offer interests in Australia, compliance with the Passport Rules is enforced solely by the foreign passport regulator. *[Schedule 1, item 1, subparagraphs 1213B(1)(a)(i) and (ii)]*

3.44 When determining the likelihood of a foreign passport fund complying with its home economy laws (including the Passport Rules for that jurisdiction), ASIC must request the opinion of the fund's home regulator. ASIC must give effect to the home regulator's opinion if, and only if, it is provided within the stipulated timeframe. *[Schedule 1, item 1, subsection 1213B(2)]*

3.45 As set out above, ASIC also considers compliance with the relevant Australian laws with respect to Australian funds seeking registration as passport funds. However, for foreign passport funds, ASIC also considers compliance with foreign laws and applies a negative test.

**Table 3.2: Comparison of ASIC's consideration of likely compliance with the law for foreign and Australian passport fund**

	<i>Australian CISs</i>	<i>Foreign passport funds</i>
<b><i>Relevant laws</i></b>	<ul style="list-style-type: none"> <li>• ASIC Act and Corporations Act</li> <li>• The Passport Rules in this jurisdiction</li> </ul>	<ul style="list-style-type: none"> <li>• ASIC Act and Corporations Act</li> <li>• Laws in the fund's home economy administered by the home regulator (including the home economy's Passport Rules)</li> </ul>
<b><i>State of mind</i></b>	Positive test – ASIC considers whether the fund is likely to comply with the relevant laws	Negative test – ASIC may consider whether the fund is not complying or is not likely to comply with the relevant laws

*Ground 2: Public interest*

3.46 The second ground for rejecting a fund's notice of intention requires ASIC to weigh the public interest in allowing the passport fund to operate in Australia against any potential detriments or risks for Australian investors. In some circumstances, this may be similar to the balancing exercise that ASIC undertakes when it considers whether it is in the public interest to disqualify persons under existing section 206F of the Corporations Act. *[Schedule 1, item 1, paragraph 1213B(1)(b)]*

3.47 Benefits to the public may include greater competition, increased investment opportunities for Australian investors, and the strengthening of Australia's relationship with the host economy.

3.48 Harm to public interest may result from concerns that the fund will breach Australian laws or place Australian investors at risk. When considering the harm to the public interest, ASIC must not take into account any negative consequences of greater competition to Australia's fund management industry. *[Schedule 1, item 1, subsection 1213B(3)]*

3.49 ASIC is not required to conduct an assessment of the public interest in every case. It is likely that such an assessment will only be required in exceptional circumstances. *[Schedule 1, item 1, subsection 1213B(4)]*

*Ground 3: ASIC does not consent to an exemption or modification*

3.50 The third ground for rejecting notices is if ASIC does not consent to an exemption or modification from the Passport Rules granted by the home economy to the fund, or an entity connected to the passport fund. Entities connected to the passport fund may include its directors, custodian, or auditor. *[Schedule 1, item 1, paragraph 1213B(1)(c)]*

3.51 This ground only applies to exemptions or modifications to the Passport Rules, reflecting the requirement that host regulators must consent in writing to exemptions and modifications of the Passport Rules (but not to the home economy laws and regulations) under subsection 13(2) of Annex 2 of the MOC.

3.52 However, under subsection 13(4) of Annex 2 of the MOC, home regulators are required to ensure that there are publicly available records of any exemptions and modifications of both the Passport Rules, and the home economy laws and regulations. In some situations, the Joint committee may partly exempt a particular home regulator from this requirement. In rare or extreme cases, an exemption or modification to a passport fund's home economy laws and regulations, may be relevant to the public interest ground for rejecting a notification of intention. This may be because the modification or exemption means that Australian consumers would be inadequately protected in some respect by the home economy laws and regulations.

*Ground 4: Unavailability of the name of the passport fund*

3.53 ASIC may also reject notices if the name that the passport fund proposes to use in Australia is unavailable. This is similar to the process for Australian funds applying for registration under existing section 601EA and subregulation 5C.1.01. *[Schedule 1, item 1, paragraph 1213B(1)(d)]*

3.54 A name might be unavailable to a passport fund for a number of reasons, including because:

- another entity has registered the same name, as set out in regulations;
- another entity has reserved the same name;

- the name is identical to the name of a new MIS, which has lodged an application with ASIC for registration under section 601EB of the Corporations Act;
- the name is identical to the name of a foreign passport fund in relation to which a notice of intention has already been lodged;
- the name is identical (under rules set out in the *Corporations Regulations 2001* (Corporations Regulations)) to the name of an individual, managed investment scheme or other body that is not the operator of the fund and whose name is held or registered on the Business Names Register; or
- the name is unacceptable in Australia because it is offensive, or suggests a misleading connection with the government (see Schedule 6 of the Corporations Regulations).

*[Schedule 1, item 1, subsection 1213B(5)]*

3.55 To ascertain whether a given name is unavailable, ASIC intends to conduct names determination checks against a number of registers listing existing names of bodies such as MISs, businesses, companies and other foreign passport funds. Other registers may be added to this list in future if necessary (for example, to account for the existence of new forms of CIVs). If the name that a foreign passport fund uses in its home economy is unavailable in Australia, the passport fund must advise ASIC and its home regulator, in writing, that it will adopt an alternative name in Australia. *[Schedule 1, item 1, subsection 1213B(5)]*

3.56 The Minister may consent in writing to a name being available to a foreign passport fund in Australia even if the name would not otherwise be available. The Minister may delegate this power to ASIC by signed instrument. The consent may be subject to conditions. *[Schedule 1, item 1, subsections 1213B(6) and (7) and schedule 2, item 291E, subsection 1345A(1A)]*

*Ground 5: Minister's determination*

3.57 ASIC must reject the foreign passport fund if the Minister has made a determination that applies to the fund. *[Schedule 1, item 1, subsection 1213B(8)]*

3.58 The Minister may make a determination that relates to:

- all (or a class of) passport funds from a particular economy; or
- all passport funds, irrespective of their home economy.

*[Schedule 1, item 1, subsection 1210B(1)]*

3.59 Determinations which relate to passport funds from a particular economy, may only be made if there are grounds for making the determination under the MOC, and the processes set out in the MOC have

been followed. The MOC grants power for an economy to prohibit foreign passport funds from offering interests in two main situations:

- A difference has been raised between Australia and the home economy in accordance with the process set out in paragraph 8 of the MOC.
- The foreign passport fund's home economy has ceased to be a participating economy and it has formally withdrawn from the MOC by following the process set out in paragraph 14 of the MOC.

*[Schedule 1, item 1, subsection 1210B(2)]*

3.60 Paragraph 8 of the MOC requires the economies to attempt to resolve the dispute amicably, consult the Joint Committee on any questions relating to the interpretation of the MOC, form the reasonable opinion that its interests are being prejudiced, and give seven days' notice of its intention to decline applications. Paragraph 14 of the MOC requires the economy to give 28 days' notice and take steps to ensure that existing funds, their members and operators, are not unduly affected by the withdrawal.

3.61 A further reason for making a determination relating to all passport funds from a specified jurisdiction would be the imposition of broad sanctions against the jurisdiction that include such a prohibition within their scope. Once the Minister has made such a determination ASIC must reject all applications submitted by passport funds from the jurisdiction.

3.62 The Minister may also make a determination that relates to all passport funds, irrespective of their home economy, if the MOC is terminated or Australia withdraws from the MOC. Again, the process set out in paragraph 14 of the MOC (described above) must be followed.

*[Schedule 1, item 1, subsection 1210B(2)]*

3.63 If the Minister makes a determination because Australia withdraws from the MOC or the MOC is terminated, the regulations may deal with transitional matters relating to the withdrawal or termination.

*[Schedule 1, item 1, subsection 1210B(3)]*

3.64 This delegation of power is appropriate because it will only be used in exceptional situations where urgent regulation is necessary to protect Australia's interests. Further, the Minister's determinations are legislative instruments and are disallowable by Parliament. *[Schedule 1, item 1, subsection 1210B(1)]*

#### *Procedural fairness*

3.65 If ASIC rejects a notice of intention, it must notify the operator of the fund in writing. *[Schedule 1, item 1, subsection 1213B(9)]*

3.66 A foreign passport fund may seek merits review of ASIC's decision to refuse a notice under Part 9.4A of the Corporations Act.

***The consideration period and authority to offer interests in Australia***

3.67 ASIC has only a limited time to review the notice. This time is referred to as the ***consideration period*** and lasts, as explained above, for 15 business days after the day the notice is lodged with ASIC. If ASIC does not refuse the notice or request further information from the fund within the consideration period, and the notice is not withdrawn by the operator, the fund becomes a ***notified foreign passport fund*** on the first day after the end of the consideration period for the notice of intention. A notified foreign passport fund may start offering interests in Australia. *[Schedule 1, item 1, section 1213C]*

3.68 The MOC states that the consideration period should be 21 days (subsection 6(2) of Annex 2). However, the Joint Committee has since agreed that in order to account appropriately for public holidays, the consideration period may be expressed in terms of 15 business days. The 15 business day consideration period is marginally longer than the 14 day registration period for schemes under section 601EB. A longer period was considered appropriate because there may be additional complexity involved in reviewing applications from foreign passport funds and regulators need sufficient time to make any necessary enquiries with the applicant's home regulator or other host regulators. *[Schedule 1, item 1, subsection 1213D(1)]*

3.69 ASIC and the operator may agree in writing to extend the consideration period for up to five business days at a time. There is no cap on the number of times that the two parties may agree to extend the period. *[Schedule 1, item 1, subsection 1213D(2)]*

## **Treatment of notified foreign passport funds**

3.70 A notified foreign passport fund is to be treated as a MIS for the purposes of the Corporations Act, even if it would not otherwise be treated as a MIS because of the way in which that term is defined in section 9. Similarly, rights issues in a notified foreign passport fund are treated as ***rights issues of managed investment schemes***. This does not affect the other legal characteristics of a notified foreign passport fund. For example, if a notified foreign passport fund is a body corporate, it remains a body corporate for the purposes of the Corporations Act. *[Schedule 1, items 1, 20 to 23 and items 34 to 37, section 9, note at the end of the definition of 'managed investment scheme' and subsections 9A(2) to (3A) and 1213E(1)]*

3.71 To avoid doubt, neither the operator of a notified foreign passport fund nor the fund itself is to be treated as a company for the purposes of the corporations legislation, merely because the operator or

the fund is registered as a foreign company under Division 2 of Part 5B.2. *[Schedule 1, item 1, subsection 1213EA(1)]*

3.72 Furthermore, a reference in the corporations legislation to a share does not include an interest in a notified foreign passport fund unless the fund is also a company. *[Schedule 1, item 1, subsection 1213EA(2)]*

## Register of passport funds

3.73 ASIC must ensure that a Register of Passport Funds is maintained. The Register must include details of Australian passport funds and notified foreign passport funds (that is, funds permitted to offer interests in Australia), must include the prescribed details of funds that have been deregistered as Australian passport funds and foreign funds that have been denotified, and may also include details of other passport funds. The details to be included in the Register can be specified in the regulations. *[Schedule 1, item 1, subsections 1214(1) and (3)]*

3.74 The Register may be established and maintained by ASIC, or a third party on behalf of ASIC. If the register is kept by a third party, it will still be taken to be a Register kept by ASIC for the purposes of the Corporations Act. ASIC may decide the form in which the Register is kept. *[Schedule 1, item 1, subsections 1214(1), (2) and (4)]*

## Deregistration of Australian passport funds

### *Voluntary deregistration*

3.75 The operator of an Australian passport fund may lodge an application with ASIC for deregistration of the fund as an Australian passport fund. The application must be in the prescribed form. This mirrors the existing arrangements under section 601PA which allow the responsible entity of a registered scheme to lodge an application with ASIC for deregistration of the scheme. *[Schedule 1, item 1, section 1216A]*

3.76 ASIC must deregister the fund if there are no members of the fund (whether in Australia or any host economy) who became members after the fund became an Australian passport fund or on the expectation that it would do so (excluding any member who is or has been the operator of the fund or a ‘related party’ of the operator). The purpose of this condition is to ensure that members who joined the fund on the basis that it was a passport fund are not disadvantaged as a consequence of the fund being deregistered. ‘Related party’ is defined for the purposes of the provisions relating to deregistration of registered schemes that are not Australian passport funds to align it with the definition in the Passport Rules. *[Schedule 1, item 1, section 1216AA and Schedule 2, item 24A, section 9 definition of ‘related party’]*

3.77 The new law defines a person who becomes a member of a fund on the **expectation** that it would become an Australian passport fund as a person who acquires an interest in the fund on the basis of a representation made to them by the fund that it intended or expected to become an Australian passport fund. Such a representation could be made in any document or other communication that might reasonably be expected to be available to persons considering acquiring an interest in the fund. *[Schedule 1, item 1, section 1216AB]*

***Deregistration initiated by ASIC***

3.78 ASIC may decide to deregister an Australian passport fund if it is of the opinion that one or more of the following has not been, is not being or is not likely to be complied with (whether in Australia or in any other place):

- the Corporations Act and Regulations, including the Passport Rules incorporated in Australian law;
- the ASIC Act and Regulations;

This is similar to the existing power that ASIC has to deregister a registered scheme in section 601PB. *[Schedule 1, item 1, subsection 1216B(1)]*

3.79 However, ASIC can only proceed with deregistration of the fund if it is of the opinion that to do so would not be contrary to the interests of members of the fund, whether in Australia or any host economy for the fund, who became members after the fund became an Australian passport fund, or on the expectation that it would do so. Any member who is or has been the operator of the fund or a related party of the operator is excluded from consideration when ASIC is forming its opinion. *[Schedule 1, item 1, subsection 1216B(2) and (3)]*

3.80 This requirement is intended to reflect the obligation in subsection 15(2) of Annex 2 of the MOC requiring ASIC to form an opinion about whether deregistration would not be in the interests of members who joined the fund after it became a passport fund or on the expectation that it would become a passport fund, prior to deregistering a registered scheme.

***‘Show cause’ process***

3.81 Before deciding to deregister the fund as an Australian passport fund, ASIC must give the operator of the fund a written notice that requires the operator to show cause, at a hearing before a specified person, why the fund should not be deregistered. *[Schedule 1, item 1, subsection 1216B(4)]*

3.82 The written notice must specify the grounds on which it is proposed to deregister the fund as an Australian passport fund as well as a reasonable time and place at which the hearing is to be held. If the



operator consents, the person conducting the hearing may fix a different time or place. *[Schedule 1, item 1, subsection 1216B(5)]*

**3.83** The person conducting the hearing must give the operator an opportunity to be heard at the hearing and give ASIC a report about the hearing and a recommendation about the grounds in the notice on which it is proposed to deregister the fund. After considering the report and recommendation, ASIC may decide to take no further action in relation to the matter and give written advice of that decision to the operator, or deregister the fund as an Australian passport fund. If the operator does not attend the hearing, the person conducting the hearing may still prepare and give ASIC a report and a recommendation about the fund's deregistration. *[Schedule 1, item 1, subsections 1216B(6) and (7)]*

**3.84** Neither a notice given by ASIC requiring the operator of the fund to show cause nor a written report about the hearing is to be considered a legislative instrument. *[Schedule 1, item 1, subsection 1216B(8)]*

### ***Process for deregistration as an Australian passport fund***

**3.85** If ASIC proposes to deregister a fund as an Australian passport fund (whether subsequent to an application from the operator or by ASIC initiation), ASIC must give written notice setting out the date on which it proposes to do so to both the operator of the fund and each host regulator for the fund. The notice must be given at least 5 business days before the fund is deregistered. *[Schedule 1, item 1, subsections 1216BA(1) and (2)]*

**3.86** A fund is deregistered as an Australian passport fund by ASIC including an annotation on the Register of Passport Funds that the fund has been deregistered. The fund ceases to be an Australian passport fund on the day on which the annotation is made. Once this is done, within 5 business days of the fund's deregistration, ASIC must give written notice of the deregistration as well as the date of deregistration to the operator of the fund and each host regulator for the fund. This is similar to the process in place for deregistration as a registered scheme under existing sections 601PA or 601PB. *[Schedule 1, item 1, subsections 1216BA(3), (4) and (5)]*

## **Denotification of notified foreign passport funds**

### ***Voluntary denotification***

**3.87** In the same way as an operator of an Australian passport fund may lodge an application for deregistration as a passport fund, the operator of a notified foreign passport fund may lodge an application for denotification. The application must be in the form prescribed by the regulations. *[Schedule 1, item 1, subsections 1217C(1) and (2)]*

**3.88** If there are no Australian members of the fund who became members after the fund became a notified foreign passport fund or on the

expectation that it would do so, then ASIC must denotify the fund as a notified foreign passport fund. As with deregistration of Australian passport funds, the purpose of this condition on members is to ensure that members who joined the fund on the basis that it was a notified foreign passport fund are not disadvantaged as a consequence of the fund being denotified. However, any member who is or has been the operator of the fund or a related party of the operator is excluded for the purposes of this requirement. *[Schedule 1, item 1, subsections 1216CA(1) and (2)]*

3.89 As with the definition applicable to Australian passport funds, the new law defines a person who becomes a member of a fund on the ***expectation*** that it would become a notified foreign passport fund as a person who acquires an interest in the fund on the basis of a representation made to them by the fund that it intended or expected to become a notified foreign passport fund. Such a representation could be any document or other means of communication that might reasonably be expected to be available to persons considering acquiring an interest in the fund. *[Schedule 1, item 1, section 1216CB]*

***Notified foreign passport fund deregistered in the fund's home economy***

3.90 ASIC must denotify a fund as a notified foreign passport fund if the fund's home regulator informs ASIC that it has been deregistered as a passport fund in its home economy. While subsection 12(5) of Annex 3 of the MOC (corresponding to the Passport Rules) establishes that the operator of the notified foreign passport fund must also notify ASIC that it has been deregistered as a passport fund, this requirement has not been included in the Australian law. This is because the home regulator is considered the authoritative source for confirming that a notified foreign passport fund has been deregistered in its home economy. *[Schedule 1, item 1, section 1216D]*

***Process for denotification***

3.91 As with deregistration as an Australian passport fund, if ASIC proposes to denotify a fund as a notified foreign passport fund (whether subsequent to an application from the operator or by ASIC initiation), ASIC must give written notice setting out the date on which it proposes to do so to the operator of the fund, the home regulator and each other host regulator for the fund. The notice must be given at least 5 business days before the fund is denotified. *[Schedule 1, item 1, subsections 1216DA(1) and (2)]*

3.92 As with deregistration as an Australian passport fund, a notified foreign passport fund is denotified from the day when an annotation is made on the Register of Passport Funds to that effect. ASIC must, within 5 business days of the fund's denotification, give written notice including the date of denotification to the operator of the fund, the home regulator and each other host regulator for the fund. *[Schedule 1, item 1, subsections 1216DA(3), (4) and (5)]*

## Consequential amendments

3.93 When referring to registered schemes, the Corporations Act currently refers to both ‘registered managed investment schemes’ and ‘registered schemes’. Noting that a notified foreign passport fund is generally treated as a MIS, but is neither a registered scheme nor generally to be treated as a registered scheme, references to registered MISs are now standardised to refer to registered schemes to avoid confusion. *[Schedule 2, items 10, 32, 62 to 64, 122, 147 to 149 and 292, sections 9 (definitions of ‘consolidated entity’ and ‘substantial holding’), section 247A, subsection 247A(1), heading to Part 2G.4, paragraph 601JB(4)(b), subsection 671B(1) and note to subsection 1378(1)]*

3.94 A consequential amendment clarifies that the existing provisions governing deregistration of a registered scheme only apply to registered schemes that are not Australian passport funds. A series of consequential amendments are also made to provide for deregistration of a registered scheme that is an Australian passport fund, as explained in the following paragraphs. *[Schedule 2, items 122A, 122B, 122C and item 122D, section 601PBA]*

### ***Consequences of deregistration on status as an Australian passport fund***

3.95 The new law provides that a registered scheme ceases to be an Australian passport fund at the same time as it ceases to be a registered scheme. This is because being an Australian passport fund is conditional on being a registered scheme (although it is envisaged that when a legislative framework is established for corporative collective investment vehicles, these will also be able to register as Australian passport funds). Thus ASIC must either annotate the Register of Passport Funds to indicate that such a scheme is no longer a registered scheme or an Australian passport fund, or cause that annotation to be made on the Register (in the event the Register is maintained by another entity). *[Schedule 2, item 122D, section 601PBE]*

### ***Voluntary and ASIC-initiated deregistration of a scheme as a registered scheme, if the scheme is also an Australian passport fund***

3.96 On an application to deregister a registered scheme that is also an Australian passport fund, ASIC may only deregister the fund as a registered scheme if, in addition to satisfying the usual grounds on which a registered scheme can be voluntarily deregistered (outlined in existing paragraphs 601PA(2)(a), (b) and (c)), there are no members of the fund (whether in Australia or any host economy for the fund) who became members after the fund became an Australian passport fund or on the expectation that it would do so (excluding any member who is or has been the operator of the fund or a related party of the operator). The application must be in the form prescribed by the regulations. This mirrors the requirement on Australian passport funds wishing to deregister as passport funds (considering, as indicated above, that deregistration as a registered

scheme implies deregistration as a passport fund). *[Schedule 2, item 122D, subsections 601PBB(1) to (4)]*

3.97 In contrast, ASIC may only decide on its own initiative to deregister a registered scheme that is also an Australian passport fund if, in addition to satisfying the usual grounds on which ASIC may decide to deregister a registered scheme (that is, one of the criteria set out in existing paragraphs 601PB(1)(a) to (f), which are replicated in the new law), ASIC is of the opinion that to do so would not be contrary to the interests of members of the fund who became members after the fund became an Australian passport fund or on the expectation that it would do so (excluding any member who is or has been the operator of the fund or a related party of the operator). As with the equivalent provision covering ASIC-initiated deregistration of a fund as an Australian passport fund, this provision is designed to implement the requirement in subsection 15(2) of Annex 2 of the MOC. *[Schedule 2, item 122D, subsections 601PBC(1) to (3)]*

3.98 If ASIC deregisters a registered scheme that is also an Australian passport fund, it must give the operator of the scheme a written notice that requires the operator to show cause, at a hearing before a specified person, why the fund should not be deregistered as a registered scheme. Such a notice must specify the grounds on which it is proposed to deregister the fund as a registered scheme as well as a reasonable time and place at which the hearing is to be held. If the operator consents, the person conducting the hearing may fix a different time or place. *[Schedule 2, item 122D, subsections 601PBC(4) and (5)]*

3.99 The person conducting the hearing must give the operator an opportunity to be heard at the hearing and give ASIC both a report about the hearing and a recommendation about the grounds in the notice on which it is proposed to deregister the fund as a registered scheme. After considering the report and recommendation, ASIC may decide to take no further action in relation to the matter and give written advice of that decision to the operator, or deregister the fund as a registered scheme. *[Schedule 2, item 122D, subsections 601PBC(6) and (7)]*

3.100 Neither a notice given by ASIC requiring the operator of the fund to show cause why the fund should not be deregistered or a written report about the hearing is to be considered a legislative instrument. *[Schedule 2, item 122D, subsection 601PBC(8)]*

### ***Notices relating to deregistration process***

3.101 If ASIC proposes to deregister a registered scheme that is an Australian passport fund, it must give written notice setting out the date on which it proposes to deregister the registered scheme on the national database, to the operator and to each host regulator for the Australian passport fund. The notice must be given at least 5 business days before the fund is deregistered as a registered scheme. *[Schedule 2, item 122D, subsections 601PBD(1) and (2)]*

3.102 If ASIC subsequently deregisters a registered scheme that is an Australian passport fund, it must give written notice that the fund has been deregistered as a registered scheme and the date on which it has been deregistered on the national database, to the operator and to each host regulator for the Australian passport fund. The notice must be given within 5 business days after the fund is deregistered as a registered scheme. *[Schedule 2, item 122D, subsections 601PBD(3) and (4)]*

***Effect of reinstatement of a registered scheme that was an Australian passport fund***

3.103 A consequential amendment to the existing provisions governing reinstatement of a managed investment scheme as a registered scheme is made to clarify that reinstatement does not result in the scheme becoming an Australian passport fund, even if the scheme was an Australian passport fund immediately before its deregistration. Accordingly, such a scheme would need to reapply to become an Australian passport fund. *[Schedule 2, item 122E, subsection 601PC(5)]*

***Applicability of definition of expectation that a scheme will become a passport fund***

3.104 A consequential amendment clarifies that a person has an expectation that a managed investment scheme will become an Australian passport fund or a fund will become a notified foreign passport fund only as set out in the provisions governing deregistration of Australian passport funds and denotification of foreign passport funds. *[Schedule 2, item 13A, section 9]*



---

## **Chapter 4**

# ***Notified foreign passport funds: Relationship with members and prospective members in Australia***

---

### **Outline of chapter**

4.1 Items 213 to 257 of Schedule 2 of the Bill amend Parts 7.7, 7.7A and 7.9 of the Corporations Act to set disclosure and other requirements applicable to financial products and services, particularly when parties make offers in Australia to solicit investors to invest in notified foreign passport funds.

4.2 Items 65 to 89 of Schedule 2 of the Bill amends Chapter 2M of the Corporations Act to require the operator of a notified foreign passport fund to provide annual financial reports of the fund and periodic statements of a member's investment in a fund, to fund members in Australia.

4.3 The Bill also extends certain existing disclosure requirements and the obligations to provide information on request that apply to MISs and companies to operators of notified foreign passport funds. For example, certain persons have a right to request a copy of a notified foreign passport fund's constitution or its register of members.

4.4 Where the use of the information received is currently subject to restrictions, similar restrictions apply to the information received from operators of notified foreign passport funds.

### **Context of amendments**

4.5 The MOC, under section 2 of Annex 1, allows for host economies to regulate disclosure, distribution, member complaints and other similar investor protections.

4.6 In addition to the above matters, additional requirements may be imposed by the host economy, as per section 3 of Annex 1, so long as the requirements are:

- not unduly burdensome for the foreign passport fund in comparison to the requirements applying to CISs in the host jurisdiction; and

- are reasonable to promote retail investors' confidence in the funds.

## Summary of new law

4.7 An offer of interests, or an option to acquire an interest, in a notified foreign passport funds (a ***foreign passport fund product***) requires a PDS. In addition to the standard requirements, the PDS must include key information about the fund including its home economy and members' main rights and remedies under the home economy's laws.

4.8 Retail clients must also be provided with a Statement of Advice if they receive personal advice on a foreign passport fund product. There is no requirement to provide retail clients with a Financial Services Guide if the financial service relates only to the operation of the fund.

4.9 The existing prohibitions on short-selling financial products and giving conflicted remuneration have been extended to foreign passport fund products. These products are also subject to the existing requirements relating to dealing with money received and the cooling-off period.

4.10 Operators of notified foreign passport funds must provide Australian members<sup>6</sup> with a copy of the annual financial report for the fund and the auditor's report for the financial report within three months after the end of the financial report. The copies must be in English, unless the member has elected to receive the reports in an official language of the home economy of the fund. Members may elect to receive the reports either in hard copy or electronically. If the member makes no election, the member may access the English copies of the reports on a specified website. In this case, the operator makes English copies of the reports available on a website and notifies in writing all Australian members that have not made an election of the availability of the reports and the website address for accessing them.

4.11 Operators of notified foreign passport funds must provide retail members in Australia with a periodic statement for each reporting period during which the holder holds interests in the fund.

4.12 Operators of notified foreign passport funds must provide certain information in relation to their fund in response to requests from specified persons. These include prospective, current, and former members of notified foreign passport funds and, depending on the requirement, to other persons that meet applicable conditions.

---

<sup>6</sup> See paragraph 2.47 for the definition that applies for 'Australian member'.



4.13 There are certain circumstances where investors or other parties may request other information in relation to a notified foreign passport fund from the operator of the fund. Fees may apply and the use of the information received may be subject to limitations. For example, a party may request a copy of the register of members or additional information more generally.

4.14 The new law provides certain persons with the right to obtain a copy of the register of members and the constitution of a notified foreign passport fund. It also restricts the purposes for which the register of members may be used.

4.15 An Australian member or former member of the fund who acquired an interest in the fund in Australia, or is ordinarily resident in this Australia may request a copy of the constitution. Furthermore, any person meeting these criteria, as well as any person in Australia, may request a copy of the register of members from the operator of a notified foreign passport fund. The operator must provide a copy in English or in an official language of the home economy of the fund within seven days after receiving the application. The applicant must pay the reasonable costs of providing the copy.

4.16 Information obtained from a register of members cannot be used to contact, or send material to members, other than in accordance with the law.

4.17 ASIC may require the operator of a notified foreign passport fund to lodge a copy of the whole or a specified part of the register of members of the fund.

4.18 The operator of a notified foreign passport fund must provide Australian members of the fund with a copy of any reports that it makes available to members in the home economy without charge, as well as a summary in English where the language is not English.

4.19 Where notified foreign passport funds meet specified requirements, such as number of members in Australia, they will be subject to the existing enhanced disclosure requirements that apply to certain body corporates and schemes.

4.20 ASIC may destroy documents lodged in relation to a notified foreign passport fund that it is no longer required to retain and no longer deems necessary to retain.

## Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
An offer of a foreign passport fund product generally requires a PDS.	An offer of a managed investment product generally requires a PDS.
A Statement of Advice must be provided to a retail client for a foreign passport fund product.	A Statement of Advice must be provided for most financial products, including managed investment products.
The operator of a notified foreign passport fund does not need to provide a retail client with a Financial Services Guide to merely operate the fund.	A responsible entity does not need to provide a Financial Services Guide if the financial service merely relates to operating the fund.
A person is prohibited from recommending or offering an interest in a foreign passport fund which is not a notified foreign passport fund. Short sales are only permitted where the person has a right to vest the product in the buyer.	A person is prohibited from recommending or offering an interest in an unregistered scheme which is required to be registered. Short sales of managed investment products are only permitted where the person has a right to vest the product in the buyer.
New members of notified foreign passport funds have a 14 day cooling-off period.	New members of registered schemes have a 14 day cooling-off period and their money must be held in designated accounts before they receive their interest.

<i>New law</i>	<i>Current law</i>
<p>The operator of a notified foreign passport must provide Australian members, free of charge, with a copy of the annual financial report for the fund and the auditor's report for the financial report.</p> <p>There is no option for this to be provided as a concise financial report.</p> <p>Subject to any member election to either not receive a report or receive the report in a particular manner, reports may be provided in hard copy or electronically, or if a member has not elected to receive a hard copy, then by accessing the report on a specified website.</p> <p>The report is to be provided within three months of the end of the financial year.</p> <p>Reports are provided in English unless a member has elected to receive a report in an official language of the fund's home economy other than English.</p>	<p>Companies, registered schemes and disclosing entities must provide to members, free of charge, specified reports including the annual financial report and the auditor's report for the financial report.</p> <p>If conditions are met, they can provide a concise financial report in lieu of a full financial report.</p> <p>Subject to any member election to either not receive a report or receive the report in a particular manner, reports may be provided in hard copy or electronically, or if a member has not elected to receive a hard copy, then by accessing the report on a specified website.</p> <p>For registered schemes, the report is to be provided within three months of the end of the financial year.</p> <p>Reports are provided in English.</p>
<p>Retail members of a notified foreign passport fund who are in Australia are provided by the operator of a fund with periodic statement in relation to their investment in the fund.</p>	<p>Issuers of financial products with an investment component must provide retail investors with a periodic statement in relation to their investment.</p>
<p>An Australian member or former member of the fund who acquired an interest in the fund in Australia, or is ordinarily resident in this Australia may request a copy of the constitution. They must pay the required fee.</p>	<p>A member of an Australian registered scheme may request a copy of the constitution. They must pay the required fee.</p>
<p>An Australian member or former member of the fund who acquired an interest in the fund in Australia, or is ordinarily resident in this Australia, , as well as anyone in Australia, may request a copy of the register of members. They must pay the required fee.</p>	<p>Anyone may request a copy of the register of members of an Australian registered scheme. They must pay the required fee.</p>

<i>New law</i>	<i>Current law</i>
Copies of the constitution or register of members must be sent (but not necessarily received) within seven days unless ASIC allows a longer period.	Copies of the register of members must be provided within seven days. ASIC may allow a longer period for requests for copies of the register.
<p>The information in the register of members of a notified foreign passport fund or Australian scheme must not be used, or disclosed for the purpose of using, it to:</p> <ul style="list-style-type: none"> <li>• contact or send material to members, unless the material relates to the member's interest or has been approved by the fund; or</li> <li>• any other purpose specified in regulations.</li> </ul>	<p>The information in a register of members for an Australian scheme must not be used or disclosed for the purpose of using it to:</p> <ul style="list-style-type: none"> <li>• contact or send material to members, unless the material relates to the member's interest or has been approved by the fund; or</li> <li>• any other purpose specified in regulations.</li> </ul>
ASIC may require the operator of a notified foreign passport fund to lodge a copy of the whole or a specified part of the register of members of the fund.	A company or registered scheme must set up and maintain a register of members. A company or registered scheme must allow anyone to inspect the register.
The operator of a notified foreign passport fund must provide Australian members of the fund with a copy of any reports that it makes available to members in the home economy without charge, as well as a summary in English where the language is not English.	No equivalent.
Notified foreign passport funds meeting with 100 or more members holding interests of a class in Australia may be subject to enhanced disclosure.	Bodies or MISs with 100 or more members may be subject to enhanced disclosure.
ASIC may destroy or otherwise dispose of documents lodged in relation to a notified foreign passport fund that it is no longer required to retain and no longer deems necessary to retain.	ASIC may destroy or otherwise dispose of documents that it is no longer required to retain and no longer deems necessary to retain that were lodged under or for the purposes of a provision of Chapter 7.
The operator of a notified foreign passport fund may be required to compensate the fund if the operator breaches the prohibition on paying conflicted remuneration to a financial services licensee.	A person may be required to compensate another person or registered scheme if the first person breaches a financial services civil penalty provision and damage results.

<i>New law</i>	<i>Current law</i>
A platform operator is prohibited from accepting volume-based shelf-space fees from a notified foreign passport fund.	A platform operator is prohibited from accepting volume-based shelf-space fees from a financial services licensee or a Registrable Superannuation Entity (RSE) licensee.

### Detailed explanation of new law

4.21 A notified foreign passport fund is to be treated as a MIS for the purposes of the Corporations Act. However, this does not affect the other legal characteristics of a notified foreign passport fund (see treatment of notified foreign passport funds in Chapter 3 of the explanatory materials).

### Foreign passport fund products and investments in notified foreign passport funds

4.22 A *foreign passport fund product* is an interest, legal or equitable right in an interest, or an option to acquire an interest in a notified foreign passport fund. [Schedule 2, item 184, section 761A]

4.23 This definition is based on the existing definition of managed investment products (which covers interests, rights in interests and options in registered schemes). An additional definition for foreign passport fund product is required because notified foreign passport funds are MISs, but not necessarily registered schemes.

4.24 For all parts of the Corporations Act except Chapters 6 to 6D and 7, the definition of *securities* includes interests in a notified foreign passport fund, a legal or equitable right in an interest in notified foreign passport fund or an option to acquire an interest in a notified foreign passport fund. [Schedule 2, item 39, subsection 92(2A)]

4.25 Foreign passport fund products are financial products for the purposes of Chapter 7. [Schedule 2, item 187, paragraph 764A(1)(bb)]

4.26 Rights to acquire foreign passport fund products by way of issue under a rights issue are securities for the purposes of Chapter 7. Other foreign passport fund products are only included in the definition of security for the purposes of Part 7.11. [Schedule 2, items 185 and 186, section 761A definition of 'security']

#### Example 4.1: Circumstances where foreign passport fund products are securities for the purposes of Chapter 7

Amanda has an interest in The Foreign Fund. Bob has a right to acquire an interest in The Foreign Fund by way of issue under a rights issue.

Both Amanda and Bob hold a foreign passport fund product and this is a type of ‘financial product’.

Amanda’s interest is only a security for the purposes of Part 7.11.  
Bob’s right is a security for all parts of Chapter 7.

4.27 An *investment* in a notified foreign passport fund is an interest in a notified foreign passport fund, a legal or equitable interest in an interest in the fund (eg a beneficial interest in a share of a corporate fund), a derivative which derives its value from an interest in the fund, or an option to dispose or acquire an interest in the fund. Investments in the operator of a notified foreign passport fund are also treated as investments in the fund. This mirrors the definition of an investment in a registered scheme in the existing law. [*Schedule 2, item 19, section 9, definition of ‘investment’*]

## Disclosure obligations

### *PDSs*

#### *When a PDS is required*

4.28 The operator of a foreign passport fund must provide a copy of the PDS for the fund when notifying ASIC of its intention to offer interests in Australia.

4.29 The PDS requirements in existing Part 7.9 automatically apply to most offers and recommendations that are received in this jurisdiction and relate to foreign passport fund products.

4.30 The only exception is for rights to acquire an interest in a foreign passport fund product under a rights issue. These rights are exempt from the PDS requirements because they are securities for the purposes of Chapter 7 and the PDS requirements do not apply to securities.

4.31 The issue of all foreign passport fund products is taken to occur in the course of a business of issuing financial products. This ensures that regulated persons cannot take advantage of the exemption from the PDS requirements which apply to financial products not issued in the course of a business of issuing financial products. It parallels the existing requirements for managed investment products. [*Schedule 2, item 222, paragraph 1010B(2)(aa)*]

4.32 Existing exemptions from the requirement to provide a PDS that apply to managed investment products are extended to foreign passport fund products. [*Schedule 2, items 223 to 227, subparagraphs 1012D(5)(b)(ia) and 1012D(7)(ia), subsections 1012D(9BA) and (9BB), and paragraphs 1012D(10)(a) and (b)*]

4.33 Sections 1012DAA and 1012DA of the existing law exempt issuers from the PDS requirements for certain indirect issues and rights

issues of quoted securities if they provide a notice with certain disclosures. For foreign passport fund products, the notice must state that the issuer has complied with the new financial reporting requirements and continuous disclosure requirements for notified foreign passport funds. *[Schedule 2, items 230 to 234, paragraphs 1012DAA(7)(da) and 1012DA(2)(a), (2)(b) and (6)(e)]*

4.34 The existing law grants ASIC the power to require exempt issuers to prepare a PDS if they contravene certain sections in the Corporations Act. These sections are expanded to include the new financial reporting requirements and continuous disclosure requirements for notified foreign passport funds. *[Schedule 2, items 228 and 229, paragraphs 1012DAA(3)(aa) and (ba)]*

4.35 A technical correction has been made to fix a grammatical error in the definition of ‘responsible person’. *[Schedule 2, item 235, subsection 1013A(3)]*

#### *Content requirements for PDSs*

4.36 PDSs for foreign passport fund products must include the same content as for other financial products. Foreign passport fund products are taken to have an investment component and, accordingly, the PDS must also state whether the fund considers any labour standards or environmental, social or ethical considerations when making investment decisions. *[Schedule 2, item 236, subsection 1013D(2A)]*

4.37 The PDS does not need to include any of the general information required under existing sections 1013D, 1013E or 1013F if the right to acquire the foreign passport fund interest is a continuously quoted security and the information is included in the most recent financial report (prepared in accordance with the home economy’s reporting requirements), the accompanying auditor’s report or a continuous disclosure notice lodged before the date of the PDS. If the preparer of the PDS seeks to rely on this exemption, the PDS must state that regular reporting requirements apply to the fund and inform people of their right to request a copy of the relevant document free of charge. *[Schedule 2, items 237 to 239, paragraphs 1013FA(2)(a) and (aa) and subparagraph 1013FA(2)(b)(ii)]*

4.38 In addition to the general content requirements applying to other financial products, PDSs for foreign passport fund products must also state:

- the fund’s home economy;
- that the fund, the operator of the fund and the fund custodian are regulated by the fund’s home economy laws and that members’ rights and remedies may differ from those available to members of registered schemes;

- that information may be posted on the fund's website and details about how this information can be accessed by members;
- members' main rights and remedies under the fund's home economy laws.

*[Schedule 2, item 240, section 1013GA]*

4.39 An issue may only be made on the basis of an application form that is accompanied by a PDS.. This is achieved by amending the definition of 'relevant financial product' so that it includes foreign passport fund products. *[Schedule 2, item 246, paragraph 1016A(1)(aa)]*

4.40 If the right to acquire the foreign passport fund product is an ED security, the PDS must also state that the fund is subject to regular reporting and disclosure obligations and that documents lodged with ASIC are available from ASIC. The PDS must either include copies of the financial statement and auditor's report for the most recent financial year, or inform people of their right to obtain a copy of these documents from the issuer or the seller. *[Schedule 2, item 241, subsections 1013IA(1) to (3)]*

4.41 If the PDS does not include copies of the most recent financial statement and auditor's report, a person may request a copy in English. The copy must be handed, mailed, emailed or faxed to the person or their agent free of charge and within five days after the request is received. The penalty for contravening this requirement is 100 penalty units or imprisonment for two years or both. *[Schedule 2, items 241 and 295, subsections 1013IA(5) and (6) and schedule 3 table item 291BA]*

*Lodgment with ASIC*

4.42 PDSs and supplementary PDSs for foreign passport fund products must be lodged with ASIC if the product can be traded on a financial market or the PDS states that the product can be traded on a financial market. The copy of the PDS accompanying a notice of intention to offer in Australia is to be treated as having been lodged with ASIC even if that copy did not include the final Australian Passport Fund Registration Number (which is not issued until after notification). The operator of the fund or the responsible person must consent to the lodgment. This mirrors the requirements for managed investment products. *[Schedule 2, items 242 to 245, subparagraph 1015B(1)(a)(i), paragraph 1015B(1)(b) and subsections 1015B(2) to (3)]*

*Requests for additional information*

4.43 A person who is entitled to a PDS, a licensee or an authorised representative may request additional information about a foreign passport fund product from the issuer under existing section 1017A. This provision applies to all financial products and the new law includes foreign passport



fund products in the definition of ‘financial products’ (see paragraphs 4.22 to 4.25 of the explanatory materials).

4.44 The issuer may provide the requested information by making a document available for inspection at a suitable place in this jurisdiction during normal business hours or in any other way agreed by the parties. *[Schedule 2, item 247, subparagraph 1017A(4)(a)(i)]*

### ***Financial Service Guides and Statements of Advice***

4.45 The operator of a notified foreign passport fund does not need to provide a retail client with a Financial Services Guide if they issue an interest in the fund or provide any other financial service that relates only to the operation of the fund. This exemption mirrors the exemption for responsible entities of MISs and is appropriate as the relevant information is contained in the PDS. *[Schedule 2, item 213, subsection 941C(3A)]*

4.46 The existing law requires licensees or representatives to provide a Statement of Advice to retail client if they provide them with personal advice on a financial product. Financial products include foreign passport fund products (see paragraphs 4.22 to 4.25 of the explanatory materials).

4.47 Existing exemptions from the requirements to provide a Statement of Advice that apply to managed investment products are extended to foreign passport fund products. *[Schedule 2, items 8, 214 to 217, section 9, definition of ‘cash management trust interest’, paragraph 946B(1)(c) and subsection 946B(2) definitions of ‘able to be traded on a licensed market’, ‘cash management facility’ and ‘cash management facility advice’]*

### ***Ongoing disclosure requirements***

4.48 The ongoing disclosure requirements for ED securities in Division 3 of Part 7.9 of the existing law do not apply to foreign passport fund products that are subject to the continuous disclosure obligations in Chapter 6CA. This replicates the exemption for managed investment products. *[Schedule 2, items 248 and 249, subsection 1017B(2) and note to subsection 1017B(2)]*

### ***Dispute resolution systems***

4.49 Issuers of foreign passport fund products that are not financial services licensees must have an internal and external dispute resolution system to handle complaints relating to alleged contraventions of Part 7.9. This extends the existing requirements in section 1017G to foreign passport fund products. *[Schedule 2, item 252, subparagraphs 1017G(2)(a)(ii) and (b)(ii)]*

## Enhanced disclosure for specified notified foreign passport funds

4.50 Notified foreign passport funds are disclosing entities for the purposes of the Corporations Act, when the interests in notified foreign passport funds are ED (enhanced disclosure) securities. This occurs in the following circumstances and in such situations enhanced disclosure requirements will apply, such as the continuous disclosure requirements under Chapter 6CA (see ongoing disclosure requirements at paragraph 4.45):

- when included in the official list of a prescribed financial market and subject to that market's listing rules; or
- when the interests were made available pursuant to a PDS and remain widely-held.

*[Schedule 2, items 41 to 49, paragraph 111AD(1)(a), heading to section 111AE, paragraph 111AE(1)(a), subsection 111AE(1B), section 111AFB, heading to section 111AH, subsections 111AH(1A) and (2) and note 1A to subsection 168(1A)]*

4.51 Foreign passport fund products in a class of foreign passport fund products are ED securities, if 100 or more people who reside in this jurisdiction hold foreign passport fund products in that class. *[Schedule 2, item 45, section 111AFB]*

4.52 A person holds securities in a notified foreign passport fund if they are registered as the holder of the securities in a register maintained by the operator of the fund or entitled to be registered in the register. *[Schedule 2, item 47, subsection 111AH(1A)]*

4.53 The first requirement replicates that for the securities of listed companies and listed registered schemes. The second requirement replicates that for widely held managed investment products (that is, interests in registered schemes).

4.54 To be included in the official list of a prescribed market the operator of the notified foreign passport fund must have agreed, consented or acquiesced to this and the market rules apply to some or all of the foreign passport fund products related to the fund. The operator must also comply with the Passport Rules, including subsection 48(2) of Annex 3 of the MOC, which requires that each member must be able to sell their interest at a price not materially different from the net asset value price. *[Schedule 2, item 44, subsection 111AE(1B)]*

4.55 A prescribed financial market is a financial market or financial market operator listed in the Corporations Regulations.

## Restrictions on offering foreign passport fund products

4.56 A person is prohibited from recommending or offering an interest in a foreign passport fund product which is not a notified foreign passport fund. This mirrors the prohibition on recommending or offering

an interest in a managed investment product which is required to be registered under Chapter 5C but has not been registered. *[Schedule 2, item 255, section 1020BAA]*

4.57 The maximum penalty for contravening this prohibition is 200 penalty units or imprisonment for five years or both. *[Schedule 2, item 296, schedule 3 table item 300BA]*

4.58 The Passport Rules prohibit notified foreign passport funds from short-selling foreign passport fund products.

4.59 Other parties may short-sell foreign passport fund products but only if the person has, or believes on reasonable grounds, that the person has a presently exercisable and unconditional right to vest the products in the buyer. This replicates the restrictions on short-selling managed investment products. *[Schedule 2, items 256 and 257, heading to section 1020B and paragraph 1020B(1)(ba)]*

4.60 If the short sale is supported by a securities lending arrangement, the seller of the foreign passport fund product and the AFS licensee must make the disclosures in existing Division 5B. *[Schedule 2, item 254, subsection 1020AA(1)]*

## **Conflicted remuneration**

4.61 A notified foreign passport fund will be prohibited from giving an Australian financial services licensee conflicted remuneration (that is, remuneration that could reasonably be expected to influence what financial products are recommended or the financial product advice that is given to a consumer). This will be achieved by the operation of the existing prohibition on conflicted remuneration at section 963K.

4.62 A person may be ordered by a Court to compensate a notified foreign passport fund if the person breached a financial services civil penalty provision, including the prohibition on an issuer or seller of a financial product giving a financial services licensee conflicted remuneration. *[Schedule 2, item 281, subsection 1317HA(1)]*

4.63 For further information about compensation orders, see paragraphs 6.92 to 6.97.

4.64 The prohibition on a financial services licensee accepting a volume-based shelf-space fee is extended to notified foreign passport funds by applying Subdivision A of Division 5, Part 7.8 to the operator of a notified foreign passport fund. This ensures that a financial services licensee cannot accept a volume-based shelf-space fee from the operator of a notified foreign passport fund. *[Schedule 2, item 218, paragraph 964(1)(b)]*

## Acquiring a foreign passport fund product

4.65 The existing law requires issuers and sellers to hold money received for financial products in a designated account before they issue the product. However, these requirements do not apply to money received to acquire an interest or increase an existing interest in a foreign passport fund product. [*Schedule 2, item 251, subsection 1017E(1A)*]

4.66 New retail clients of foreign passport fund products are entitled to a 14 day cooling-off period. The cooling-off period operates in the same way as for managed investment products, even if redemptions are subsequently suspended. In other words, if redemptions are suspended under section 51 of the Passport Rules, new members may still return their product within 14 days. [*Schedule 2, item 253, subparagraph 1019A(1)(a)(iiia)*]

4.67 It is appropriate to apply the cooling-off provisions to foreign passport fund products as this is an aspect of distribution and paragraph 2(1)(c) of Annex 2 of the MOC allows the host economy to apply its own laws in relation to distribution.

## Providing reports and periodic statements to Australian members<sup>7</sup>

### *Annual financial reports to Australian members*

#### *Obligation on the operator*

4.68 The operator of a notified foreign passport fund is responsible for the performance of the fund's obligations under Chapter 2M of the Corporations Act, including providing copies of the fund's annual financial report and audit statements to members in this jurisdiction, as well as reporting to ASIC on financial matters. [*Schedule 2, items 65 to 68, heading to subsection 285(1) and subsections 285(1A) and (4)*]

4.69 For the purposes of Chapter 2M, debts incurred in operating the fund are taken to be debts of the fund. [*Schedule 2, item 68, paragraph 285(4)(b)*]

#### *Requirement to provide copies of annual financial reports to members*

4.70 Operators of notified foreign passport funds must provide Australian members with a copy of the financial report for the fund for the financial year and each auditor's report that relates to the financial report. The copies are to be provided within three months after the end of the financial year and the operator is taken to have complied with this once they have met all the necessary requirements. This replicates the existing law in relation to MISs. [*Schedule 2, items 69 to 73, heading to section 314 and subsections 314A(1) and 315(3A) and (6)*]

---

<sup>7</sup> See paragraph 2.47 for the definition of 'Australian member'.

4.71 The financial report is prepared in accordance with the financial reporting requirements that apply to the fund in its home economy under the Passport Rules. [*Schedule 2, item 71, paragraph 314A(1)(a)*]

4.72 For a notified foreign passport fund, the financial year is a 12 month period in relation to which the operator must prepare a report for the fund its home economy under the Passport Rules. This may be either a shorter or longer period than 12 months if an exception under the home economy law of the fund allows for this. [*Schedule 2, items 16 and 89, section 9 definition of ‘financial year’ and section 323DAA*]

4.73 An example of when a shorter period or longer period may apply is when a fund is established part-way through a financial year.

4.74 A amendment is made to clarify that section 323D, which covers financial years and half-years, refers to financial years and half-years for companies, registered schemes and disclosing entities. [*Schedule 2, item 88, heading to section 323D*]

*How a report may be provided*

4.75 If an Australian member has made an election to have the reports sent to them in a particular manner, that is, in hard copy or electronically, the operator of the fund must provide the report in the manner specified in the election. The operator must at least once directly write to each Australian member notifying the member that they may elect to receive free of charge, either a hard copy or an electronic copy of the reports for each financial year and that, if they do not make such an election, the member may access the reports on a specified website. An election will be treated as a standing election for each later financial year until the member changes their election. Where the operator is required to send the reports either in hardcopy or electronically, an Australian member of the fund may request the operator to not send one or more of the required reports either for a particular financial year or on an ongoing basis. [*Schedule 2, items 71 and 74 to 76, subsections 314A(2) to (6), heading to section 316, and section 316AA*]

4.76 Note that paragraph 9(1)(d) of the *Electronic Transactions Act 1999* also provides that information that is required to be given to a person who is neither a Commonwealth entity nor a person acting on behalf of a Commonwealth entity may be given by electronic means if the person to whom the information is required to be given consents to the information being given by way of electronic communication. However the detailed and prescriptive nature of section 314A, which is modelled on the existing section 314 applicable to managed investment schemes, implies that electronic communication of the annual financial reports is intended to be dealt with only by that section, rather than under the *Electronic Transactions Act 1999*.

4.77 The default language for copies of reports is English. However, when making an election, a member may elect instead to receive the copies in an official language of the home economy of the fund.

*[Schedule 2, item 71, paragraphs 314A(2)(b) and (3)(d) and subsection 314A(7)]*

4.78 Failure to provide the reports as required is an offence of strict liability carrying a penalty of 10 penalty units or imprisonment for three months, or both. This is consistent with the existing offences for reports of companies and MISs. The existing offence for directors of a company, registered scheme or disclosing entity who fails to take all reasonable steps to comply with, or secure compliances with specified sections and Parts of Chapter 2M is extended to directors of operators of notified foreign passport funds. To be an offence the director must also have acted dishonestly. The offence carries a maximum penalty of 2,000 penalty units or imprisonment for five years, or both. Existing section 344 is also a civil penalty provision and the section does not affect the application of Part 2M.2 or 2M.3 to a director as an officer of the operator. *[Schedule 2, items 71, 97 to 99 and 272, subsection 314A(9), note to subsection 344(1), subsections 344(1A) and (2) and column 1 of table item 5 of subsection 1317(1)]*

#### ***Periodic statements***

4.79 The issuer must provide retail clients in Australia who hold a foreign passport fund product with a periodic statement on their investment for each reporting period. *[Schedule 2, item 250, subparagraph 1017D(1)(b)(ia)]*

4.80 The statement must be given within six months after the end of the period to which it relates and include information that the issuer has reason to believe is required for the member to understand their investment in the fund, including if applicable, each matter specified in subsection 1017D(5).

4.81 Consistent with the existing offence for an issuer failing to provide a periodic statement to a retail investor holding a financial product with an investment component, the offence for operators of notified foreign passport funds carries a penalty of 100 penalty units or imprisonment for two years, or both (see schedule 3 table item 297C).

## **Obtaining a copy of the constitution**

### ***Persons who may request a copy***

4.82 An Australian member, or former member of the fund who either acquired an interest in the fund in Australia or is ordinarily resident in Australia, may request a consolidated copy of the constitution. *[Schedule 1, item 1, subsection 1213F(1)]*

4.83 This new right only applies to notified foreign passport funds, not to Australian passport funds. Members of Australian passport funds have a right to a copy of the constitution under existing subsection 601GC(4).

4.84 Failure to provide a consolidated copy of the constitution as requested is an offence of strict liability carrying a penalty of 60 penalty units. This offence is given extended geographical reach (Category A as set out in section 15.1 of the Criminal Code) because any breaches would be committed by the operator of a notified foreign passport fund, which will be a foreign entity. Category A extended geographical reach will allow the offence to apply to these entities, but it is noted that there is a defence for the operator under this category if there is no corresponding offence in the home jurisdiction. [*Schedule 1, item 1, subsections 1213F(1) and (8)*]

4.85 ASIC may serve penalty notices on operators who fail to provide a consolidated copy of the constitution. Using an infringement notice regime is consistent with the Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (the Guide – see Chapters 2 and 6). It enhances the effectiveness of enforcement and protects members' rights to access information about their fund. The penalty amount is also consistent with the Guide. [*Schedule 2, item 271AA, subparagraph 1313(8)(aa)(ii)*]

#### ***Process for making a request***

4.86 Requests for a copy of the constitution must be provided in writing to the operator of the fund and the costs to the operator of providing the copy must be paid. [*Schedule 1, item 1, paragraph 1213F(1)(c) and subsection 1213F(2)*]

4.87 The amount that can be charged by the operator for providing a copy of the constitution is determined by the operator, but it must be reasonable and cannot exceed the prescribed amount. An amount is reasonable if it reflects the operator's reasonable costs, for example, of processing the request, making a copy and any postage, but not of translating the document into English. The restrictions on the amount that can be charged are designed to ensure that there is no barrier to investors obtaining a copy of the constitution. [*Schedule 1, item 1, paragraph 1213F(1)(c)*]

4.88 A copy of the constitution may be provided electronically or in hard copy. Different amounts may be prescribed depending on whether the copy is provided electronically, or in hard copy. [*Schedule 1, item 1, subsections 1213F(3) and (4)*]

### ***Processing the request***

4.89 The operator must provide the copy of the constitution that has been requested in English, unless the applicant requests a copy in an official language of the fund's home economy. *[Schedule 1, item 1, subsections 1213F(6) and (7)]*

4.90 The copy of the constitution should be provided electronically, unless the applicant expressly requests a paper copy. This is designed to reduce the costs for the applicant and is consistent with the general trend towards 'digital by default'. *[Schedule 1, item 1, subsections 1213F(3) and (4)]*

4.91 Electronic copies of the constitution must be provided within seven days after the application is made. There are rules in Part 6 of the *Acts Interpretation Act 1901* which govern when applications are taken to be given or made. *[Schedule 1, item 1, subsection 1213F(4)]*

4.92 If the person expressly requested a hard copy, the copy of the constitution must be posted within seven days. However, it may not be received by the applicant for several days or even weeks after it is posted. *[Schedule 1, item 1, subsection 1213F(3)]*

4.93 ASIC may allow an operator a longer period to provide a copy of the constitution. *[Schedule 1, item 1, subsection 1213F(5)]*

## **Obtaining a copy of the register of members**

### ***Persons who may request a copy***

4.94 Anyone in Australia may request a copy of the register of members. An Australian member, or a former member of the fund who either acquired an interest in the fund in Australia or is ordinarily resident in Australia, may also request a copy. *[Schedule 1, item 1, subsection 1213G(1)]*

4.95 As with a copy of the constitution, this new right only applies to notified foreign passport funds, not to Australian passport funds. A person may already inspect and obtain copies of registers of members of registered schemes under existing section 173 of the Corporations Act.

4.96 As with a copy of the constitution, failure to provide a copy of the register of members upon request is an offence of strict liability carrying a penalty of 60 penalty units. This offence is given extended geographical reach (Category A as set out in section 15.1 of the Criminal Code) because any breaches would be committed by the operator of a notified foreign passport fund, which will be a foreign entity. Category A extended geographical reach will allow the offence to apply to these entities, but it is noted that there is a defence for the operator if there is no corresponding offence in the home jurisdiction. *[Schedule 1, item 1, subsections 1213G(1) and (8)]*



4.97 Similarly, failure to provide a copy of the register of members is also subject to the existing penalty notice regime. For further information, see paragraph 4.80. [*Schedule 2, item 271AA, subparagraph 1313(8)(aa)(iii)*]

***Process for making a request***

4.98 As with a copy of the constitution, requests for a copy of the register of members must be provided in writing to the operator of the fund and the operator's cost of providing the copy must be paid. [*Schedule 1, item 1, paragraphs 1213G(1)(c) and (2)(a)*]

4.99 Similarly, the amount charged for providing a copy of the register is determined by the operator, but it must be reasonable and cannot exceed the amount prescribed. [*Schedule 1, item 1, paragraph 1213G(1)(c)*]

4.100 A copy of the register may be provided electronically or in hard copy. Different amounts may be prescribed depending on whether the copy is provided electronically, or in hard copy. [*Schedule 1, item 1, subsections 1213G(3) and (4)*]

4.101 These costs should be minimal where the copy of the register is provided electronically.

4.102 Requests for registers of members must also state the purpose for which the information is intended to be used. This purpose must not be a prohibited purpose. The prohibited purposes may be set out in regulations. [*Schedule 1, item 1, paragraphs 1213G(2)(b) and (c)*]

***Processing the request***

4.103 As with a copy of the constitution, the operator must provide the copy of the register that has been requested in English, unless the applicant requests a copy in an official language of the fund's home economy. [*Schedule 1, item 1, subsections 1213G(6) and (7)*]

4.104 Similarly, the copy of the register of members may be provided electronically, unless the applicant expressly requests a paper copy. [*Schedule 1, item 1, subsections 1213G(3) and (4)*]

4.105 Electronic copies of the register of members must be provided within seven days after the application is made. [*Schedule 1, item 1, subsection 1213G(4)*]

4.106 But if the person expressly requested a hard copy of the register of members, it must be posted within seven days. [*Schedule 1, item 1, subsection 1213G(3)*]

4.107 ASIC may allow an operator a longer period to provide a copy of the register of members. [*Schedule 1, item 1, subsection 1213G(5)*]

***Restrictions on the use of information from the register of members***

4.108 While it is in many circumstances beneficial to members that third parties can access their contact and other information on member registers, there is also the potential of abuse of this access, which gives rise to the need for appropriate restrictions. Generally persons are not permitted to request, or use, copies of the register of members to contact or send material to members. They are also prohibited from disclosing the information to another person if they know that the other person is likely to use the information to contact or send material to members. The regulations may prescribe additional prohibited purposes. This power is included as a precaution; in case specific forms of abuse arise in future that need to be addressed urgently and quickly. There is a similar power in the existing member register regime in Part 2C (subsection 177(1AA)), which to date has not been put to use. *[Schedule 1, item 1, subsections 1213H(1) and (3)]*

4.109 The restrictions on the use of information in the register of members are designed to protect the privacy of members of the fund and prevent their details being used for soliciting donations, advertising, or other improper purposes. The same restrictions apply to the use of registers of companies and registered schemes under section 177 of the existing law.

4.110 There are two exceptions where the information in a register may be used to contact fund members. These are:

- if the material is relevant to member's interest in the fund or the rights attaching to the interests; or
- the operator of the foreign passport fund has approved the person contacting the members.

*[Schedule 1, item 1, subsection 1213H(2)]*

4.111 As discussed above these exceptions would allow actions (including the provision of information) that are in the members' best interest, such as mailing out of invitations to support convening a meeting of members. *[Schedule 1, item 1, subsection 1213H(2)]*

4.112 Under the Criminal Code, a defendant wishing to rely on an exception bears the evidential burden of providing evidence that 'suggests a reasonable possibility' that the exception applies (subsection 13.3(3) of the Criminal Code). The new law does not amend the evidential burden of proof and the note is merely included for the avoidance of doubt. The rationale for the defendant bearing the evidential burden of proof for all exceptions is that the information is peculiarly within the defendant's knowledge. In this case, the defendant is best placed to show that the material was relevant to the member's interests, or the fund had approved

the person contacting the members. [*Schedule 1, item 1, note to subsection 1213H(2)*]

4.113 Breaches of these prohibitions are a strict liability offence, punishable by a fine of 60 penalty units, and are also subject to the existing penalty notice regime in the Corporations Act. (For further information about the penalty notice regime, see paragraph 4.80.) The offence carries the same extended geographical reach of Category A as set out in section 15.1 of the Criminal Code which ensures that misuse of the information with respect to Australian members is captured, even if the offence is committed by a person overseas. The imposition of a strict liability offence together with an infringement notice regime is consistent with the Guide (see Chapters 2 and 6). It enhances the effectiveness of the enforcement regime while protecting members' right to privacy. Requiring proof of fault would undermine deterrence as the offence is relatively minor and involves funds which are not based in Australia. Finally, as this is a strict liability offence, assessing whether a breach has occurred is straightforward and can be decided on a review of the facts in the case. The penalty amount is also consistent with the Guide. [*Schedule 1, item 1, subsections 1213H(1), (4) and (5) and Schedule 2, item 271AA, subparagraph 1313(8)(aa)(iv)*]

4.114 A person who breaches the prohibition on using the information in a register to contact members may also have to compensate any member who suffers loss or damage because of the breach. Any profits made by the person committing the breach may be recovered by the fund as a debt owed to the fund. These provisions could be used for example against persons making offers to purchase interests from members at below market prices. [*Schedule 1, item 1, subsections 1213H(6) to (8)*]

## Obtaining a copy of reports required under the law of the home economy

### *Right to a copy of reports*

4.115 Unless the operator of a notified foreign passport fund is otherwise required under the Corporations Act to lodge a report with ASIC or provide a report to Australian members, the operator must provide Australian members of the fund a copy of any reports that it makes available to members in its home economy without charge. [*Schedule 1, item 1, subsections 1213HA(1) and (6)*]

4.116 Failure to provide a copy of the report is an offence of strict liability carrying a penalty of 60 penalty units. This offence is given extended geographical reach (Category A as set out in section 15.1 of the Criminal Code) because any breaches would be committed by the operator of a notified foreign passport fund, which will be a foreign entity. Category A extended geographical reach enables the offence to apply to these entities, but it is noted that there is a defence for the operator if there

is no corresponding offence in the home jurisdiction. ASIC may issue penalty notices for breaches of this requirement. For further information about the penalty notice regime, see paragraph 4.80. [*Schedule 1, item 1, subsections 1213HA(1) and (7) and Schedule 2, item 271AA, subparagraph 1313(8)(aa)(v)*]

### ***Process for obtaining a copy of the report***

4.117 The report must be given to Australian members of the fund within seven days after the first day on which the report is made available to a member of the fund in the home economy without charge. [*Schedule 1, item 1, subsection 1213HA(2)*]

4.118 The operator gives the report to Australian members of the fund by making it available on its website for members to access. If the operator notifies members of the fund in the home economy that the report is available or how to access it, it must similarly also notify Australian members of the fund. This ensures that Australian members are given equivalent notice of a report's availability as members of the fund in the home economy. [*Schedule 1, item 1, subsection 1213HA(3)*]

4.119 The report must be given without charge. [*Schedule 1, item 1, subsection 1213HA(4)*]

4.120 If all or part of the report is not in English, the operator must also give Australian members of the fund a summary of the report, or that part of the report, in English. [*Schedule 1, item 1, subparagraph 1213HA(c)(ii) and subsection 1213HA(5)*]

## **Requests for additional information**

4.121 Members of a notified foreign passport fund may request additional information. See paragraph 4.40 of the explanatory materials. [*Schedule 2, item 247, subparagraph 1017A(4)(a)(i)*]

## **Destruction of records by ASIC**

4.122 ASIC may destroy or otherwise dispose of any document that is lodged in relation to a notified foreign passport fund, if it is of the opinion it is no longer necessary or desirable to retain it and it has been in its possession for such period as is specified in the regulations. [*Schedule 1, item 1, section 1213K*]

## **Consequential amendments**

4.123 Annex 3 of the MOC uses the term *constituent documents*, rather than the term constitution, to identify the governing documents establishing and setting out the rules for a fund. The constituent

documents for each home economy are listed in section 4 of Annex 3 of the MOC.

4.124 For the avoidance of doubt, a note has been added to the definition of ‘constitution’ in section 9 of the Corporations Act to clarify that the constituent documents of a notified foreign passport fund are taken to be its constitution. *[Schedule 2, items 11 and 12, section 9 and Schedule 1, item 1, subsection 1213E(2)]*

4.125 An amendment is also made to allow the court to take into account the effect of a contravention on a notified foreign passport fund’s financial position when determining whether a contravention is significant. *[Schedule 2, item 121, subsection 601HG(10)]*

4.126 Record keeping requirements that currently apply to financial licensees in relation to managed investment products will also apply in relation to foreign passport fund products. *[Schedule 2, item 219, paragraphs 988E(e) and (f)]*

4.127 The jurisdictional reach of any offence, in the new or existing law, that relates to the operation of a notified foreign passport fund and occurs wholly in a foreign country has also been limited by inserting an extra requirement into the physical element of the offence. This additional element requires the ‘result’ to occur in Australia, that is, a person in Australia must suffer financial or other disadvantage. *[Schedule 1, item 1, section 1213EAA]*

## Application and transitional provisions

4.128 There are no application and transitional provisions for this Division.



---

## **Chapter 5**

# ***Notified foreign passport funds: Australian regulation of the fund's other activities in Australia***

---

### **Outline of chapter**

5.1 In addition to the regulation by Australia of the investor-facing interactions of a notified foreign passport fund dealt with in Chapter 4, where other aspects of Australia's corporations legislation can and will be applied to such funds, they are generally given like treatment to Australian MISs.

5.2 This Chapter sets out matters such as:

- clarifying that Australia's takeovers framework does not apply in relation to takeovers of a notified foreign passport fund;
- disclosures of substantial holdings in notified foreign passport funds that are listed in Australia;
- materials that notified foreign passport funds may or are required to give to ASIC; and
- the rules that apply to other financial services and markets activities of the fund in Australia, which are outside the ordinary activities of a notified foreign passport fund.

### **Context of amendments**

5.3 As indicated in Chapter 4 of the explanatory materials, the MOC allows for host economies to generally regulate investor-facing requirements, such as disclosure, the distribution arrangements for interests in the foreign passport funds and member complaints (section 2 of Annex 1 of the MOC).

5.4 In addition to the above matters, additional requirements (see subsection 3(1) of Annex 1) may be imposed by the host economy so long as the requirements are:

- not unduly burdensome for the foreign passport fund in comparison to the requirements applying to CISs in the host jurisdiction; and

- are reasonable to promote retail investors' confidence in the funds.

## **Summary of new law**

5.5 Where Australia is regulating notified foreign passport funds as a host economy, the new law generally provides for the same or similar treatment as applies to MISs. However, the operator will always be responsible for the obligations owed by an issuer of an interest in a notified foreign passport fund regardless of whether it would otherwise be considered the issuer.

5.6 Notified foreign passport funds will be subject to the obligations in Chapter 7 that apply to MISs, such as the requirement to be licensed to operate a clearing and settlement facility or a market, and the regulation of derivative transactions will apply to notified foreign passport funds in the event that they apply to the activities of the fund. Except where noted below, amendments are not required to give effect to this outcome.

5.7 The review date for a notified foreign passport fund is the anniversary of the day on which the fund first became a notified foreign passport fund. However, the operator of a notified foreign passport fund may choose a different review date with ASIC's approval.

5.8 Within two weeks after each review date for a notified foreign passport fund, ASIC must give the operator of the fund an extract of particulars for the fund. If the extract of particulars either contains a particular that is not correct or includes a requirement to provide a specific particular, then the operator must respond by providing the correct particular(s) or required particular.

5.9 ASIC may give to the operator of a notified foreign passport fund a return of particulars if it suspects or believes that they are incorrect. The operator must respond to a return of particulars that it receives within two months after the date of issue of the return, with the response such that the particulars set out in the return, taken together with the response, are correct, as well as provide any particular that ASIC may require.

5.10 A document lodged with ASIC with respect to a notified foreign passport fund must be signed by the appropriate representative of that fund.

5.11 A notified foreign passport fund must comply with Australia's takeover rules when it acquires, or intends to acquire securities in a company, body or scheme that is subject to Australia's takeovers rules.

5.12 Some matters and activities of notified foreign passport funds will not be regulated by Australia as a host economy. The new law makes amendments to existing provisions as required to achieve this outcome. In



particular, the acquisition of a notified foreign passport fund will not be subject to Australia's takeovers rules; however such an acquisition may be subject to takeovers rules in the fund's home economy.

5.13 Chapter 6 already applies to Australian passport funds in their capacity as a company, body or scheme registered in Australia.

5.14 The operator of a notified foreign passport fund will not require an AFSL in the ordinary course of operating a notified foreign passport fund. Separate exemptions are provided in respect of operating the fund, holding the fund assets, investing the fund assets and disposing of those investments, and issuing derivatives or foreign exchange contracts to manage the financial risks of the fund. If the operator or other persons provide other financial services, they will be subject to the same financial services laws (including licensing) as other financial services providers.

5.15 As foreign passport fund products are financial products, insider trading provisions, hawking and other prohibited conduct provisions apply in their ordinary manner.

5.16 The ASIC Act consumer protections, including the prohibition on unconscionable conduct, apply to notified foreign passport fund products and financial services in respect of those products.

## **Comparison of key features of new law and current law**

<i>New law</i>	<i>Current law</i>
A notified foreign passport fund may not offer debentures in Australia.	A CIS may offer debentures in Australia.
The Minister may require notified foreign passport funds from a particular participant, to prepare and audit their financial statements in accordance with Australian financial reporting and audit standards.	No equivalent.
The review date for a notified foreign passport fund is the anniversary of the day on which the fund first became a notified foreign passport fund. With ASIC's approval, the operator of a notified foreign passport fund may choose a different review date.	The review date for a company or registered scheme is the anniversary of the day on which it first became a company or registered scheme. With ASIC's approval, the company or responsible entity of the registered scheme may choose a different review date.

<i>New law</i>	<i>Current law</i>
Within two weeks after each review date for a notified foreign passport fund ASIC must give the operator of the fund an extract of particulars for the fund. If the extract of particulars either contains a particular that is not correct or includes a requirement to provide a specific particular, then the operator must respond by providing the correct particular(s) or required particular respectively.	Within two weeks after each review date for a company or registered scheme, ASIC must give to the company or responsible entity of a registered scheme an extract of particulars in relation to it. If the extract of particulars either contains a particular that is not correct or includes a requirement to provide a specific particular, then it must respond by providing the correct particular(s) or required particular respectively.
ASIC may give the operator of a notified foreign passport fund a return of particulars if it suspects or believes that they are incorrect. The operator must respond to a return of particulars that it receives within two months after the date of issue of the return, with the response such that the particulars set out in the return, taken together with the response, are correct, as well as provide any particular that ASIC may require.	ASIC may give to a company or responsible entity of a registered scheme a return of particulars if it suspects or believes that they are incorrect. The company or responsible entity of the registered scheme must respond to a return of particulars that it receives within two months after the date of issue of the return, with the response such that the particulars set out in the return, taken together with the response, are correct, as well as provide any particular that ASIC may require.
A document lodged with ASIC by, or on behalf of, a notified foreign passport fund or its operator, must either be signed by a director or secretary of the operator of the fund, or the local agent for the operator of the fund, or if the local agent is a company — a director or secretary of that company.	A document lodged with ASIC in writing by, or on behalf of, a body or a registered scheme must be signed by a director or secretary of the body or of the responsible entity of the registered scheme. If the body is a foreign company, it may be signed by its local agent; or if the local agent is a company — a director or secretary of the company.
The takeover of a listed notified foreign passport fund is not subject to Chapter 6.	No equivalent.
Persons operating a notified foreign passport fund are responsible for the obligations owed by the issuer of an interest in a notified foreign passport fund.	The issuer is responsible for the obligations owed by the issuer of an interest in a notified foreign passport fund.

<i>New law</i>	<i>Current law</i>
Persons operating a notified foreign passport fund or holding fund assets are not required to hold a licence.	Persons operating a registered scheme must hold a licence but persons holding the assets of registered schemes are not required to be licensed.
The operator of a notified foreign passport fund or a person acting on the direction of the operator or its agents is not required to hold a licence to acquire financial products as an investment of the fund assets or to dispose of those investments.	Persons acquiring and disposing of assets on behalf of the members of a MIS are required to be licensed. This may include the custodian of a scheme who holds and deals in the fund assets at the direction of the responsible entity.
The operator of a notified foreign passport fund or a person acting on the direction of the operator or its agents is not required to hold a licence to issue or dispose of derivative or foreign exchange contracts where the issuance or disposal is for the purpose of financial risk management.	Persons issuing or disposing of derivatives or foreign exchange contracts on behalf of the members of a MIS are required to be licensed.
Market misconduct and other prohibited conduct relates to financial products, financial services and notified foreign passport fund products.	Market misconduct and other prohibited conduct relates to financial products and financial services.
Unconscionable conduct and other consumer protections apply to notified foreign passport fund products and financial services in respect of such products.	Unconscionable conduct and other consumer protections apply to financial services and financial products.

## Detailed explanation of new law

5.17 A notified foreign passport fund is to be treated as a MIS for the purposes of the Corporations Act. However, this does not affect the other legal characteristics of a notified foreign passport fund (see treatment of notified foreign passport funds in Chapter 3 of the explanatory materials).

## Notified foreign passport funds and Australian markets

5.18 Where a notified foreign passport fund is a participant in an Australian licensed market, the operator of the fund is subject to the

market's operating rules. *[Schedule 2, items 192 to 196, paragraph 793C(2)(b) and subsections 793C(3) to (4A)]*

5.19 A notified foreign passport fund whose operator is a related body corporate of the market licensee may be included in a market's official list. While, it is possible for a notified foreign passport fund to be quoted on an Australian licensed market, the Passport Rules contained in Annex 3 of the MOC may make it impractical to list a passport fund. This is because clause 48 of the Passport Rules requires that redemptions occur at a price that is not materially different from the net asset value per interest but listed funds generally trade at the market price. *[Schedule 2, items 197 to 201, subsection 798C(1), paragraph 798C(1)(ca), note to subsection 798C(1) and subsection 798C(6)]*

5.20 Many of the provisions in Chapters 6 to 7 have been extended to apply to notified foreign passport funds or their operators (see Chapters 4 and 5). ASIC has the power to exempt funds included in a market's official list from these requirements or omit, modify or vary their application. *[Schedule 2, items 202 to 203, paragraphs 798D(1)(a) and (b) and subsections 798D(4) and (5)]*

## **Prohibition on offering debentures**

5.21 A notified foreign passport fund may not offer debentures in Australia. Under the Passport, streamlined Australian financial reports and audit requirements apply to notified foreign passport funds, which are considered insufficient to allow for such funds to offer debentures in Australia. Failure to comply with this prohibition is an offence punishable by a penalty of up to 60 penalty units. *[Schedule 1, item 1, section 1213EB]*

## **Matters that may be subject to regulation**

5.22 Under the MOC, a host economy can require foreign passport funds admitted to its economy to prepare and audit their financial statements in accordance with the host economy financial reporting and audit standards. However, consistent with the spirit of the MOC being to minimise regulatory duplication, participants have generally agreed that they will not require this where accounting and auditing standards of other participants are of an equivalent standard.

5.23 The new law provides the Minister with the power to make a legislative instrument that requires notified fund passport funds from one or more participant countries to prepare and audit financial statements in accordance with Australian financial reporting and audit standards. *[Schedule 2, item 96, section 343A]*

5.24 For example, if another participant as a host economy were to require incoming passport funds from Australia to prepare and audit their financial statements in accordance with host economy financial reporting and audit standards, the Minister may consider exercising the power to

impose reciprocal requirements on notified foreign passport funds from that participant.

## **Materials to be lodged with ASIC or that ASIC may require**

### ***ASIC power to require lodgment of register of members***

5.25 ASIC may, by written notice given to the operator of a notified foreign passport fund, require the operator to lodge a copy of the whole or a specified part of the register of members of the fund. [*Schedule 1, item 1, subsection 1213J(2)*]

5.26 Failure to comply is an offence of strict liability carrying a penalty of 60 penalty units. This offence is given extended geographical reach (Category A as set out in section 15.1 of the Criminal Code) because any breaches would be committed by the operator of a notified foreign passport fund, which will be a foreign entity. Category A extended geographical reach will allow the offence to apply to these entities, but it is noted that there is a defence for the operator if there is no corresponding offence in the home jurisdiction. ASIC may issue a penalty notice to an operator who fails to lodge a register of members. For further information about the penalty notice regime, see paragraph 4.80. [*Schedule 1, item 1, subsections 1213J(1) and (7) and Schedule 2, item 271AA, subparagraph 1313(8)(aa)(vi)*]

5.27 ASIC may require the copy of the whole or the specified part of the register to be lodged in English. [*Schedule 1, item 1, subsections 1213J(3) and (6)*]

5.28 The operator must lodge a copy of the register with ASIC electronically within seven days after being given notice to do so. [*Schedule 1, item 1, subsection 1213J(4)*]

5.29 ASIC may allow a longer period for the operator to lodge a copy of the register. [*Schedule 1, item 1, subsection 1213J(5)*]

### ***Lodging of annual financial reports with ASIC***

5.30 The operator of a notified foreign passport funds must provide members in Australia with a copy of the financial report for the fund for the financial year and each auditor's report that relates to the financial report, as prepared in accordance with the financial reporting requirements that apply to the fund in its home economy under the Passport Rules (see Chapter 4 of the explanatory materials). [*Schedule 2, item 71, paragraph 314(A)(a)*]

5.31 As the operator of a notified foreign passport fund is responsible for the performance of the fund's obligations under Chapter 2M, the operator is also required to lodge the above reports with ASIC within

three months of the end of the financial year. *[Schedule 2, items 77 to 79, subsections 319(IAA) and (IA) and paragraph 319(3)(a)]*

5.32 Failure to lodge these reports with ASIC is an offence of strict liability. *[Schedule 2, items 77 and 78, subsections 319(1) and (IA)]*

5.33 Consistent with the existing offence for the lodgment of annual reports with ASIC for companies, registered schemes and disclosing entities, the offence for operators of notified foreign passport funds carries a penalty of 60 penalty units or imprisonment for one year, or both.

5.34 ASIC may also direct the operator of a notified foreign passport fund to lodge these reports with ASIC. A failure to comply with the direction is an offence of strict liability. *[Schedule 2, items 80 and 81, subsections 319(1) and (IAA)]*

5.35 Consistent with the existing offence for companies, registered schemes, and disclosing entities failing to comply with an ASIC direction to lodge, the offence carries a penalty of 10 penalty units or imprisonment for three months, or both.

5.36 If a report is amended after it is lodged with ASIC, the operator of the notified foreign passport fund must lodge with ASIC the amended report within 14 days of it being amended. If a member of the fund requests a copy of the amended report, the operator must provide this to the member free of charge. If the amendment to the report is material, the operator must notify members of this. The notification to members must be made as soon as practicable after the amendment and include the nature of the amendment and inform members that they have a right to obtain a copy of the amended report free of charge. *[Schedule 2, items 82 to 85, heading to subsection 322(1), subsections 322(1A) and (2) and paragraph 322(2)(b)]*

5.37 A failure to either lodge the amended report with ASIC or to notify members of the fund of the material amendment is a strict liability offence. *[Schedule 2, items 86 and 87, heading to subsection 322(3) and subsection 322(3)]*

5.38 Consistent with the existing offence for the relodgment of reports amended after lodgment with ASIC for companies, registered schemes, and disclosing entities, the offence for an operator of a notified foreign passport funds carries a penalty of 10 penalty units or imprisonment for three months, or both. *[Schedule 2, item 293, schedule 3 table item 108A]*

### ***Updating ASIC information about notified foreign passport funds***

#### ***Review date***

5.39 As with a registered scheme, the review date for a notified foreign passport fund is the anniversary of the day on which the fund first became a notified foreign passport fund. *[Schedule 2, item 101, subsection 345A(3)]*

5.40 The operator of a notified foreign passport fund may choose a different review date, subject to ASIC's approval. If ASIC approves the choice, ASIC must notify the operator in writing. *[Schedule 2, items 101 to 104, sections 345A and 345B and subsections 345B(2A) and (3)]*

5.41 If ASIC notifies the operator of the passport fund of its approval, the choice has effect either at the time that ASIC notifies its approval or immediately after the next review date for the fund. *[Schedule 2, items 105 and 106, section 345C and paragraphs 345C(a) and (b)]*

*Extract of particulars*

5.42 In the context of notified foreign passport funds, the **extract of particulars** refers to the particulars about the fund held in a register maintained by ASIC or the Register of Passport Funds. *[Schedule 2, items 14 and 15, section 9]*

5.43 As with a company or registered scheme, within two weeks after each review date for a notified foreign passport fund ASIC must give to the operator of the fund (or its local agent, where relevant) an extract of particulars for the fund. If an agreement is already in place with the operator to lodge electronically, ASIC may do this by either electronic or postal means. *[Schedule 2, item 107, subsections 346A(1) and (2)]*

5.44 ASIC may ask questions in an extract of particulars for a notified foreign passport fund by including a requirement that the operator of the fund provide a particular prescribed by the regulations. *[Schedule 2, item 108, section 346B]*

5.45 An operator of a notified foreign passport fund must respond to an extract of particulars that it receives if any particular in the extract is not correct. It must also respond to an extract of particulars that it receives if it includes a requirement from ASIC to provide a particular, by providing the required particular. The response must be lodged within 28 days after the date of issue of the extract, be in the prescribed form and signed or authenticated. *[Schedule 2, items 109 and 110, subsections 346C(1) to (3)]*

*Return of particulars*

5.46 As with a company or registered scheme, ASIC may give to the operator of a notified foreign passport fund (or its local agent, where relevant) a return of particulars for the fund if it suspects or believes that particulars recorded in relation to the fund in specific registers that it maintains are incorrect. In the context of notified foreign passport funds, a **return of particulars** refers to the statement given by ASIC which contains the fund's particulars, and a requirement to provide further particulars or a solvency resolution. *[Schedule 2, items 30, 31, 111 and 112, section 9 definition of 'return of particulars' and subsections 348A(1A) to (2A)]*

5.47 ASIC may make the return of particulars available electronically, if the operator has agreed. The process for the operator

formally agreeing to electronic communication is the same as under the existing corporations law (see existing subsection 352(1) of the Corporations Act). This process expands on the general requirements for when information may be provided by electronic means in the *Electronic Transactions Act 1999*.

5.48 ASIC may ask questions in a return of particulars for a notified foreign passport fund by including a requirement that the operator of the fund provide a particular prescribed by the regulations. [*Schedule 2, item 113, section 348B*]

5.49 The operator of a notified foreign passport fund must respond to a return of particulars that it receives. The response must be such that the particulars set out in the return, taken together with the response, are correct, as well as provide any particular that ASIC may require. The response must be lodged with ASIC within two months after the date of issue of the return, be in the prescribed form, and be signed or authenticated. [*Schedule 2, items 114 to 116, subsections 348D(1) and (2) and paragraph 348D(2)(e)*]

5.50 A relevant heading is also updated to refer to notified foreign passport funds, in addition to companies and registered schemes. [*Schedule 2, item 100, heading to Chapter 2N*]

### ***Lodgments with ASIC***

5.51 Similar to a body or registered scheme, a document lodged with ASIC by, or on behalf of, a notified foreign passport fund or its operator, must either be signed by a director or secretary of the operator of the fund, or the local agent for the operator of the fund, or if the local agent is a company — a director or secretary of that company. [*Schedule 2, item 117, subsection 351(1A)*]

5.52 An amendment unrelated to notified foreign passport funds is also made to clarify that liability for late lodgment fees or continuing offences is not affected if ASIC accepts a telephone notice of a change to a particular in respect of telephone notices made by registered schemes, in addition to companies as currently provided. [*Schedule 2, item 118, subsection 354(2)*]

### ***Sanctions and exemption orders relating to Part 2M.3 Financial reporting***

5.53 Directors and operators of notified foreign passport funds who contravene the financial reporting requirements in Part 2M.3 commit an offence. This offence is a civil penalty provision. [*Schedule 2, items 97 to 99 and 272, note to subsection 344(1), subsections 344(1) and (2) and subsection 1317E(1) table item 5*]



5.54 Exemption orders in relation to the application of all or specified requirements under Part 2M.3 to notified foreign passport funds are discussed at paragraphs 7.27 to 7.36.

***Process for inspecting books***

5.55 The existing law gives persons a right to inspect any document lodged with ASIC. In the context of notified foreign passport funds, documents lodged with ASIC include PDSs, financial statements and audit reports.

5.56 Any book that the Act requires to be made available for inspection may be inspected by attending the registered Australian office of the operator of the fund at any time when the office is open to the public. [*Schedule 2, item 270A, section 1300*]

5.57 A member or former member of the fund who acquired an interest in Australia or is ordinarily resident in Australia may also apply to the Court for an order that the operator of the fund provide them with an electronic copy of the books that relate to the fund or an English translation of those books. These books may also be copied, unless the Court orders otherwise. An application by a person seeking books will only be granted if the person acts in good faith and for a proper purpose. [*Schedule 1, item 1, section 1213HB*]

## **Takeovers**

***Securities and registered schemes***

5.58 The definition of 'securities' for the purposes of Chapters 6 to 6CA is repealed and replaced with a revised definition. [*Schedule 2, item 40, subsection 92(3)*]

5.59 To ensure that the acquisition of interests in a notified foreign passport fund will not be subject to Australia's takeovers rules, the meaning of securities in Chapters 6 to 6B and 6CA excludes interests in a notified foreign passport fund. Takeovers of notified foreign passport funds are more appropriately regulated in the fund's home economy. [*Schedule 2, item 40, paragraph 92(3)(i)*]

5.60 For the purposes of Chapter 6C, the meaning of 'securities' includes interests in a listed notified foreign passport fund, and the definition of 'substantial holding' is also extended. This means that a person who holds a substantial interest in a listed notified foreign passport fund (and a listed notified foreign passport fund itself) will be subject to the information and disclosure requirements set out in Chapter 6C. These disclosure requirements are important protections for Australian investors so they are also applied to notified foreign passport funds. [*Schedule 2, items 32A, 40 and 127A, section 9 and paragraph 92(3)(d), section 608*]

5.61 The definition of ‘relevant financial market’ has also been updated to include any financial market on which a notified foreign passport fund is listed. The definition of ‘relevant operator’ has been expanded to include the operator of these markets. *[Schedule 2, items 25 to 28, section 9, definitions of ‘relevant financial market’ and ‘relevant market operator’]*

5.62 In addition, references to ‘registered managed investment scheme’ generally in Chapters 6 to 6CA are replaced with references to ‘registered scheme’. This clarifies that these provisions only apply to registered schemes and not more generally to MISs (including notified foreign passport funds). *[Schedule 2, items 40, 124 to 127, 128, 130, 138 to 139, paragraph 92(3)(c), subparagraph 602(a)(iii), sections 602A and 604 paragraph 636(1)(d), subparagraphs 636(1)(ga)(i) and (ii), and and section 660B]*

5.63 Similarly, notified foreign passport funds are excluded from references to ‘listed body’ for the purposes of Chapter 6. This is because takeovers of notified foreign passport funds are covered by home economy laws. *[Schedule 2, item 123, subparagraph 602(a)(ii)]*

5.64 Amendments are also made so that the court may give directions to the directors of the operator of a notified foreign passport fund where a person contravenes a rule made by the Takeovers Panel. Investment restrictions in the Passport Rules will effectively prohibit a notified foreign passport fund from using the Chapter 6 takeovers provisions to acquire a controlling interest in an entity. However, it is possible that the Takeovers Panel could nonetheless make rules that would apply to the operator of a notified foreign passport fund under section 658C. These amendments ensure that any such rules are enforceable by a court. To date, the Takeovers Panel has not made any rules under section 658C. *[Schedule 2, items 136 and 137, paragraphs 658C(5)(b) and (c)]*

### ***Prohibition on certain acquisitions***

5.65 The general prohibition on certain acquisitions in Chapter 6 does not apply if the acquisition is of a relevant interest in a notified foreign passport fund. This is because the definition of ‘securities’ for the purposes of Chapters 6 to 6CA (inclusive, but not Chapter 6C) excludes interests in a notified foreign passport fund (see paragraphs 5.54 and 5.55). *[Schedule 2, item 40, subsection 92(3)]*

5.66 Paragraph 36 of Annex 3 of the MOC prohibits a Passport Fund from holding sufficient voting shares in an entity that would allow the fund or its operator to exert significant influence on the management of the business of the entity. Paragraph 37 of the Passport Rules provides additional limits on the non-voting securities of an entity. Together, these limits mean that a notified foreign passport fund will not be able to take over another entity. As such, Chapter 6 does not allow for notified foreign passport funds to make takeover bids.

## Information about ownership of listed notified foreign passport funds

5.67 Chapter 6C is amended to apply the information and disclosure requirements to persons who hold interests in a listed notified foreign passport fund (and the listed notified foreign passport fund itself). To give effect to this, the definitions of 'securities', 'substantial holding', and 'relevant interest' are extended to ensure that the Chapter 6C obligations apply. *[Schedule 2, items 32A, 40 and 127A, sections 9, subsection 92(3), and 608]*

5.68 In particular, if a person acquires a 'substantial holding' in a listed notified foreign passport fund, that person is required to disclose that fact to the fund's operator. The obligation also applies where a person's substantial holding in the fund changes (with a movement of at least 1 per cent in their holding). *[Schedule 2, items 146 to 152, paragraphs 671B(1)(a) to (c), subsection 672(2), paragraphs 672(3)(b) to (d) and subparagraph 671B(6)(b)(i)]*

5.69 ASIC or the operator of a listed notified foreign passport fund may direct a person to disclose their relevant interest in the fund. ASIC must also direct a person to make such a disclosure, if requested by a member of the fund, unless it considers that it would be unreasonable to do so in all the circumstances. *[Schedule 2, items 154 to 158, subsections 672A(1) and (2), paragraphs 672B(1)(a) and (2)(c) and subsection 672B(3)]*

5.70 If ASIC does receive information in response to a direction to a person about their interests in a listed notified foreign passport fund, it may pass on that information to the operator of the fund. If the disclosure was made under a request by another member of the fund under subsection 672A(2), ASIC must also pass on that information to the member who made the request for that information, unless it considers it unreasonable to do so in all the circumstances. *[Schedule 2, items 159 and 160, section 672C and paragraph 672C(a)]*

5.71 The regulations may prescribe fees that the operator of a listed notified foreign passport fund is required to pay to persons for complying with a direction to disclose information in relation to their relevant interests. *[Schedule 2, items 161 to 163, subsections 672D(1) and (2)]*

5.72 An operator of a listed notified foreign passport fund is not taken to have notice of a person's right in relation to an interest in the fund because of anything done under Part 6C.2. An amendment is not strictly required to achieve this result because the former provision applied to listed MISs. (Notified foreign passport funds are treated as MISs as outlined in paragraph 3.65 of the explanatory materials.) However, for the avoidance of doubt, the reference to a listed MIS is replaced with a reference to a listed registered scheme or a listed notified foreign passport fund. *[Schedule 2, item 178, section 672E]*

5.73 The operator of a listed notified foreign passport fund must keep a register of information about interests in a listed notified foreign passport fund. This register must include:

- details of the nature and extent of a person's relevant interest in the fund and the circumstances that give rise to members' interests;
- the name and address of a person who has a relevant interest in the fund; and
- details of instructions that a person has given about matters relating to their interests in the fund, including the acquisition or disposal of their interests and the voting or other rights attached to their interests.

*[Schedule 2, item 165, subsection 672DA(1)]*

5.74 The register must be kept at the operator's registered office, their principal place of business or another place in this jurisdiction approved by ASIC. The operator of the fund must notify ASIC of changes to the location of the register in the same circumstances as for listed registered schemes. *[Schedule 2, items 164 and 166 to 168, section 672DA and subsections 672DA(3) to (4)]*

5.75 A failure to comply with the requirements relating to the register is a strict liability offence with a maximum penalty of 10 penalty units. *[Schedule 2, items 169 and 294, subsection 672DA(5) and schedule 3 table item 229AA]*

5.76 Minor amendments are also made to replace the references to scheme in Chapter 6C with the words 'scheme or fund', and insert a reference to 'operator' or 'fund operator' after the word 'responsible entity'. This ensures that the other provisions in Chapter 6C apply to notified foreign passport funds in the same way that they apply to registered schemes. *[Schedule 2, items 147 and 170 to 177, section 671B, subsections 672DA(6) to (9) and section 672E]*

## **Continuous disclosure**

5.77 The operator of a listed notified foreign passport fund must comply with the continuous disclosure requirements set out in Chapter 6CA. In particular, if the listing rules of a listing market apply to a listed notified foreign passport fund, then the operator of the fund must notify the market operator of certain information that is expected to materially affect the price of their securities and is not generally available in accordance with the provisions of the listing rules. This mirrors the requirements for listed registered schemes. *[Schedule 2, items 179 and 180, subsections 674(3A) and (5)]*

5.78 If the listing rules of the listing market (or listing markets) do not contain provisions that require a listed disclosing entity or an unlisted

disclosing entity (being an undertaking to which interests in a notified foreign passport fund relate) to disclose information to the market operator, and the operator of that notified foreign passport fund becomes aware of certain information (that has not been disclosed in a PDS), the operator must lodge a document with ASIC containing that information. *[Schedule 2, items 181 and 182, subsections 675(2) and (4)]*

5.79 The existing infringement notice regime in Part 9.4AA applies to alleged contraventions of the new continuous disclosure provisions. The operator of the fund is taken to be the disclosing entity for the purposes of applying the regime. *[Schedule 2, items 271B to 271F, subsections 1317DAA(1) and (3) and paragraphs 1317DAA(2)(f), 1317DAE(3)(e), 1317DAE(5)(c) and 1317DAG(5)(c)]*

## Provision of financial services

### *Who is responsible for obligations owed by the issuer of an interest in a notified foreign passport fund?*

5.80 Various obligations in the financial services regime apply to the issuer of a financial product, including certain product disclosure obligations. To provide clarity and to ensure consistency for all foreign passport funds, the operator of a notified foreign passport fund is taken to be responsible for the obligations owed under the terms of the financial product that is an interest in the fund. The operator will therefore always be the issuer of the financial product. *[Schedule 2, item 186A, subsection 761E(4A)]*

### *Definition of 'provides a financial service'*

5.81 Several amendments are made to the definition of 'provides a financial service' to capture activities associated with notified foreign passport funds. Current section 766A defines 'provides a financial service' to include 'providing financial product advice', 'dealing in a financial product', 'making a market for a financial product', 'operating a registered scheme' and 'providing a custodial or depositary service'.

5.82 First, the definition of providing financial product advice is expanded to include providing advice about an interest in a foreign passport fund product. For the definition of a foreign passport fund product, see paragraph 4.22 of the explanatory materials. *[Schedule 2, items 184 and 187, section 761A and paragraph 761A(1)(bb)]*

5.83 Interests in unregistered schemes and other similar interests continue to be specifically excluded from the definition of a financial product but only if they do not relate to a notified foreign passport fund. *[Schedule 2, item 188, paragraph 765A(1)(s)]*

5.84 The definition of dealing in a financial product is also expanded to include underwriting securities or interests in foreign passport fund products. [*Schedule 2, item 189, paragraph 766C(1)(c)*]

5.85 An amendment is made to the definition of ‘makes a market’ to clarify that a person does not make a market by stating the prices for foreign passport fund products. [*Schedule 2, item 190, paragraph 766D(2)(b)*]

5.86 Finally, the definition of ‘providing a custodial or depositary service’ is amended to exclude operating a notified foreign passport fund or holding its assets. This is consistent with excluding from the definition persons holding the assets of a registered scheme. [*Schedule 2, item 191, paragraphs 766E(3)(ba) and (bb)*]

### ***Licensing requirements***

5.87 A number of licensing exemptions are provided to entities associated with a notified foreign passport fund so that AFSLs are not required in the ordinary course of operating a notified foreign passport fund. Operators and others who carry on a financial services business in this jurisdiction that do not fall within these exemptions will continue to require a licence.

5.88 The new licensing exemptions are designed to operate broadly because the MOC is based on the principle that notified foreign passport funds are primarily regulated by their home economy. Further, there are restrictions on the activities of notified foreign passport funds in the Passport Rules contained in Annex 3 of the MOC.

5.89 The new law grants a licensing exemption for custody of assets of notified foreign passport funds regardless of the location of the assets. The MOC provides host economies the choice of whether to require the passport fund or its operator be licensed for services provided in the host economy related to assets in the host economy (see subparagraph 2(2)(c)(i) of Annex 1 of the MOC). Nevertheless, the new law includes this optional licensing exemption as it is consistent with the policy intention of promoting market access. [*Schedule 2, item 191, paragraph 766E(3)(bb)*]

5.90 Similarly, the new law provides a licensing exemption for the operator and persons acting on the direction of the operator when acquiring and disposing of the property of the fund. This addresses a concern that the operators or custodians of funds that are not separate legal persons could, depending on the structure of the fund, be considered to be acquiring or disposing of financial products on behalf of the members of the fund. The assets of the fund are those required by subsection 13(6) of the Passport Rules in Annex 3 of the MOC to be held separately from other assets or in a clearly recorded omnibus account. The term ‘investment’ takes its ordinary meaning and does not rely on the

definition of that word in section 9 (which only applies to investments in registered schemes). [*Schedule 2, item 204, paragraphs 911A(2)(eh) and (ei)*]

5.91 The new exemption relating to investments also covers operators (or persons acting on the direction of the operator) investing fund assets in unlisted derivatives or foreign exchange contracts. This is because each party to a derivative is considered to be both issuing and acquiring that derivative.

5.92 The new law also provides an exemption for the issuance, acquisition or disposal of derivatives and foreign exchange contracts for the purposes of financial risk management. This allows notified foreign passport funds to hedge their exposure to risk without requiring a licence or an Australian distributor. It also allows them to enter netting arrangements to manage, for example, the default risk of a counterparty where those arrangements constitute a derivative. This exemption is intended to be limited to derivatives issued to wholesale investors but the exemption was not limited to wholesale investors because an operator may not always be aware of the identify of its counterparties (e.g. where it purchases the derivatives on a financial market). [*Schedule 2, item 204, paragraph 911A(2)(ej)*]

5.93 The exemption for the issuance of derivatives and foreign exchange contracts automatically covers their acquisition. This is because the person who acquires a derivative or foreign exchange contract also acquires it (see subsections 761E(1) and (3) and the note to subsection 761E(5) in the existing law).

5.94 The MOC provides that a notified foreign passport fund and its operator shall not be required to be licensed in a host economy to issue, redeem or sell interests in a notified foreign passport fund through a qualified distributor (see paragraphs 2(2)(b) and (d) of Annex 1 of the MOC). Without a licensed distributor, the operator would require an AFSL to issue, redeem or sell these interests. Under existing exemptions in paragraphs 911A(2)(b) and (ba), passport operators are able to enter an intermediary authorisation with a licensed distributor to issue, vary or dispose of interests in a notified foreign passport fund without requiring a licence. The disposal of financial products, as defined in section 761A, includes the redemption of an interest in a notified foreign passport fund. As such, no separate exemption is required to give effect to this provision of the MOC.

### ***Hawking of foreign passport fund products***

5.95 The prohibition on hawking interests in MISs in existing section 992AA is extended to foreign passport fund products. This is achieved by treating notified foreign passport funds as MISs. It ensures that the same consumer protections apply to both managed investment

products and foreign passport fund products. *[Schedule 1, item 1, section 1213E]*

5.96 An amendment is made to the heading of current section 992AA (which prohibits hawking of interests in MISs). This amendment clarifies that the section applies to all MISs, rather than merely registered schemes. It does not alter the effect of the section because the text of the section applies to all MISs and section headings have less weight than the substantive text under established principles of statutory interpretation. *[Schedule 2, item 221, heading to section 992AA]*

5.97 Foreign passport fund products are excluded from the section in the Corporations Act which applies to hawking products other than interests in MISs. *[Schedule 2, item 220, subsection 992A(2)]*

***Insider trading and other prohibited conduct***

5.98 Part 7.10 of the Corporations Act generally applies to notified foreign passport funds in the ordinary manner as foreign passport fund products are financial products (see paragraph 4.22 of the explanatory materials). The existing requirements relating to representations made, that induce persons to deal in financial products using false, misleading or deceptive information, as outlined in section 1041F, also apply to representations made in this jurisdiction about interests in notified foreign passport funds.

5.99 An interest in a foreign passport fund is a Division 3 financial product and hence is subject to the insider trading prohibitions. This is because interests in a MIS are Division 3 financial products under existing section 1042A and a foreign passport fund product is to be treated as a MIS. *[Schedule 1, item 1, section 1213EA]*

5.100 The insider trading provisions in Division 3 of Part 7.10 apply to dealings in interests in notified foreign passport funds in their ordinary manner. Existing section 1043B, which creates an exception from the use of inside information for withdrawals from registered schemes, applies to notified foreign passport funds the same way as it does for registered schemes. *[Schedule 2, items 258 to 259, heading to section 1043B and section 1043B]*

5.101 Similarly, existing section 1043C, which provides an exception from restrictions on communicating inside information for underwriters, applies to foreign passport fund products the same way as it does for managed investment products. *[Schedule 2, items 260 and 261, paragraphs 1043C(1)(a), (1)(c), (2)(a) and (2)(b)]*

5.102 Minor amendments have been made to the compensation arrangements to ensure that amounts recovered by operators of notified foreign passport funds are held by the operator on behalf of members at the relevant time. Similarly, amounts recovered by ASIC on behalf of operators are to be held on behalf of the persons who have interests in the



fund at the relevant time. [*Schedule 2, items 29, 262 to 269, section 9, definition of 'responsible holding party', heading to subsection 1043L(8), paragraphs 1043L(8)(a) and (b), subsections 1043L(8), paragraph 1043L(8)(c), heading to subsection 1043L(9), paragraphs 1043L(9)(a) and (b), subsection 1043L(9) and paragraph 1043L(9)(c)*]

5.103 Off-market transfers of notified foreign passport fund interests in Australia are subject to home economy laws and existing Part 7.11 does not regulate these transactions. Listed or quoted notified foreign passport fund interest transfers on the Australian market are also subject to home economy laws, rather than the requirements in Part 7.11.

***Prohibition of unconscionable conduct and other ASIC Act consumer protections***

5.104 The ASIC Act includes important consumer protections as well as the basis for ASIC's regulatory and other functions. Under subsection 5(2)(b) of the ASIC Act, an expression has the same meaning in the ASIC Act as in the Corporations Act where the expression is used in both Acts and not defined in the ASIC Act.

5.105 A notified foreign passport fund is to be treated as a MIS for the purposes of the Corporations Act, even if it would not otherwise be treated as a MIS. This means that a notified foreign passport fund will also be a MIS for the purposes of the ASIC Act.

***Financial products and financial services for the purposes of the ASIC Act***

5.106 Division 2 of Part 2 of the ASIC Act establishes a framework for consumer protection and unconscionable conduct in relation to financial products and financial services. Amendments clarify the operation of this Part with respect to MIS's and notified foreign passport funds. Clarifying notes provide certainty that protections against unconscionable conduct operate in relation to interests in a notified foreign passport fund.

5.107 Subsection 12BAA(7) lists specific things that are financial products for the purposes of the ASIC Act. This includes interests in a MIS, and subsequently interests in a notified foreign passport fund. This means that interests in a notified foreign passport fund, or rights or interests in such an interest, or an option over those interests are financial products. [*Schedule 2, items 2A-2D, notes to subsections 12BAA(7) and 12BAB(7), and paragraph 12BAB(7)(c)*]

5.108 Subsections 12BAB(1) and (7) provide that dealing in interests in a MIS constitutes a financial service under the ASIC Act. Dealing in an interest in a notified foreign passport fund also therefore constitutes providing a financial service. A minor amendment replaces the phrase 'managed investment interests' with 'interests in a managed investment schemes' in paragraph 12BAB(7)(c) to provide consistency across the corporations legislation.

5.109 The operation of a notified foreign passport fund and the holding of the assets of such a fund are excluded from the definition of custodial or depository services. This is consistent with amendments to the definition of custodial or depository services in the Corporations Act. *[Schedule 2, item 2E, paragraphs 12BAB(14)(ba) and (bb)]*

5.110 The amendments also clarify that the unfair contract terms protections in the ASIC Act do not apply to a contract that is the constitution of a notified foreign passport fund (as it is treated as a MIS for the purposes of the ASIC Act). *[Schedule 2, item 2F, section 12BL]*

---

## **Chapter 6**

# ***Compliance and enforcement***

---

### **Outline of chapter**

6.1 Part 8A.6 of the new law gives ASIC additional compliance and enforcement powers for Australian passport funds and notified foreign passport funds. In addition, Schedule 2 of the Bill:

- provides ASIC with an additional regulatory function of passport regulator under the MOC;
- allows ASIC to accept enforceable undertakings from operators of notified foreign passport funds; and
- authorises persons to disclose confidential information held by ASIC to other passport regulators under the MOC.

### **Context of amendments**

6.2 The MOC requires, as reflected in paragraph 5, that participants:

- apply and conduct reasonable checks on compliance with and, where appropriate, enforce the home economy laws and regulations for regulated CISs, in relation to passport funds registered in the participant's economy;
- apply any host economy laws and regulations consistently with Annex 1 of the MOC in relation to passport funds registered in the economies of other participants;
- conduct reasonable checks on compliance with and, where appropriate, enforce the Passport Rules, whether by administrative action, regulatory or supervisory function or other means, and whether directly or through another entity that is subject to supervision by the participant.

6.3 Accordingly, for example, in the event that a home regulator is of the opinion that a passport fund is not complying, or is not likely to comply, with either home economy laws and regulations, host economy laws and regulations or the passport rules, subject to meeting certain conditions it may notify the fund or its operator that it must not or must no longer offer interests in the passport fund to persons in the home or host economy (see section 10 of Annex 2 of the MOC).

## **Summary of new law**

6.4 There are two offences for breaches of the Passport Rules:

- A person who intentionally or recklessly breaches the Passport Rules commits an offence punishable by a fine of up to 2,000 penalty units or five years imprisonment or both. This offence may also attract a civil penalty.
- Minor breaches of the Passport Rules are strict liability offences punishable by up to 60 penalty units. The strict liability offence is subject to an infringement notice regime.

6.5 Both offences apply to Australian passport funds, notified foreign passport funds, and any person connected to such funds. Australia has jurisdiction over Australian citizens and bodies corporate irrespective of whether the physical elements of the offence occurred in Australia, or overseas, and irrespective of the laws of the foreign country. For foreign citizens and bodies corporate, a defence is available if the conduct occurs overseas and there is no equivalent offence in the laws of the foreign jurisdiction.

6.6 ASIC may also make a final or interim stop order against an Australian or notified foreign passport fund that is not complying, or is not likely to comply, with the relevant corporations legislation, or the Passport Rules for this jurisdiction. Notified foreign passport funds that are not registered as foreign companies, or fail to appoint a local agent, may also be subject to a stop order. Finally, a stop order may also be made against notified foreign passport funds from economies that have ceased to be participating economies, or have a different understanding about the application or implementation of the MOC to Australia.

6.7 The licensing and breach reporting requirements, ASIC's banning powers, and the court's power to award compensation have been extended to cover non-compliance with the Passport Rules for this jurisdiction and host economy laws.

6.8 In addition, ASIC may:

- perform the functions and exercise the powers of a passport regulator under the MOC; and
- accept enforceable undertakings from the operators of notified foreign passport funds.

6.9 ASIC may also disclose information that it was given in confidence, or which is protected information, to another passport regulator under the MOC to enable or assist the passport regulator to perform its functions as a passport regulator.

## Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
<p>A person who intentionally or recklessly breaches the Passport Rules commits an offence punishable by a fine of up to 2,000 penalty units or five years imprisonment or both.</p> <p>A person who breaches the Passport Rules commits a strict liability offence punishable by up to 60 penalty units.</p> <p>The strict liability offence is subject to an infringement notice regime.</p>	No equivalent.
<p>ASIC may make a final or interim stop order against an operator who:</p> <ul style="list-style-type: none"> <li>• is not complying, or is not likely to comply, with the relevant corporations laws or the Passport Rules in this jurisdiction;</li> <li>• ceases to be a registered foreign company or fails to appoint a local agent; or</li> <li>• in the case of a notified foreign passport fund, is subject to any determination made by the Minister.</li> </ul>	No equivalent.
ASIC may exercise the functions and powers of a home regulator or a host regulator under the MOC.	No equivalent.
ASIC may disclose confidential information to assist or enable another passport regulator to perform their functions.	No equivalent.
ASIC may accept an enforceable undertaking from the operator of a notified foreign passport fund.	ASIC may accept an enforceable undertaking from the responsible entity of a MIS.

## Detailed explanation of new law

### Breaches of the Passport Rules in this Jurisdiction

#### *Offences for breaching the Passport Rules*

6.10 Breaches of the Passport Rules are an offence under the amendments contained in the Bill. It is generally not best practice for the content of an offence to be set out in another instrument (an arrangement known as a ‘delegation of offence content’. See the Guide, section 2.3.4). The general concern is that such an arrangement may obscure the scope and effect of the offence for Parliament and those subject to the offence.

6.11 The Guide provides a number of circumstances in which it may nevertheless be appropriate for a delegation of offence content to occur, several of which apply to breaches of the Passport Rules. The first, is that the Australian Government has committed to abide by the Passport Rules as an internationally agreed set of requirements, and to incorporate the Passport Rules in the domestic law. In doing so, it is necessary to support the implementation of the Passport Rules in Australia with the appropriate penalties. Secondly, the Passport Rules contain a large number of technical and detailed requirements which are inappropriate for inclusion in an Act. Finally, it is possible that the Passport Rules may have to be amended as the Passport arrangements are implemented, or to deal with unanticipated consequences and changing market circumstances. The delegation of offence content in this context is therefore justified and complies with the Guide.

6.12 Furthermore, incorporation of the Passport Rules in the domestic law of Australia will occur in the form of a legislative instrument which will be subject to consideration and scrutiny by Parliament (see paragraph 2.23 of the explanatory materials). For this and the other reasons set out above, it is considered that the delegation of offence content inherent in the offences included in the Bill with regard to breaches of the Passport Rules are consistent with the Guide.

6.13 The new law sets out two offences for persons who breach the Passport Rules in this jurisdiction. [*Schedule 1, item 1, section 1211C*]

6.14 The first offence is a more serious offence that applies if the person acted intentionally or recklessly. As that section does not specify the fault element, the default fault element of ‘intention’ or ‘recklessness’ in section 5.6 of the Criminal Code applies. The penalty for the more serious offence is a fine of up to 2,000 penalty units or imprisonment for up to five years or both. This penalty is consistent with those for similar offences applying to MISs in the Corporations Act (for example, in the case of a person intentionally or recklessly breaching their duties as an

officer of a responsible entity— see subsection 601FD(4) and related penalty). [*Schedule 1, item 1, subsection 1211C(3)*]

6.15 The second, less serious, offence applies even if there is no intention or recklessness. It is a strict liability offence; that is, the prosecution does not need to prove fault elements (intention, knowledge, recklessness or negligence) for any of the physical elements of the offence. The defence of reasonable mistake of fact, and other general defences, remain available under section 6.1 of the Criminal Code. [*Schedule 1, item 1, subsection 1211C(4)*]

6.16 The penalty for the less serious offence is a fine of up to 60 penalty units. There is no imprisonment penalty. The amount of the fine and the absence of an imprisonment penalty are consistent with the recommended penalties in the Guide. [*Schedule 1, item 1, subsection 1211C(5)*]

6.17 While strict liability offences often sit uncomfortably with the presumption of innocence, they are appropriate if they pursue a legitimate aim and are proportionate to achieving that aim (see the Guide, section 2.2.6). The strict liability offence for less serious breaches of the Passport Rules is consistent with the Guide. It is designed to ensure the integrity of the new regime, protect investors, and make it easier for ASIC to prosecute an offence. The Passport Rules contain a large number of detailed rules, especially with respect to investment restrictions, and it is conceivable that there may be a significant number of minor infringements. Proof of fault is likely to be relatively easy to demonstrate, as the investment restrictions provide objective criteria which can be used to assess whether an infringement has occurred. A quick and effective means of dealing with these infringements is an essential element in preserving the integrity of the passport regime.

6.18 Both of the offences for breaches of the Passport Rules in this jurisdiction apply to Australian passport funds, notified foreign passport funds (that is, funds which are permitted to offer interests in Australia), and any person connected with one of these funds. In the case of notified foreign passport funds, the breach must also result, or be likely to result, in financial losses or other disadvantages for members of the fund in Australia. [*Schedule 1, item 1, subsections 1211C(1) and (2)*]

6.19 Breaches of the Passport Rules are subject to the existing penalty notice regime in the Corporations Act. For further information about the penalty notice regime, see paragraph 4.80. [*Schedule 2, item 271AA, subparagraph 1313(8)(aa)(i)*]

6.20 The penalty notice scheme follows the guidance set out in the Guide. Because the Passport Rules contain a large number of detailed requirements, for example with regard to investment restrictions for various asset classes, the breaches covered by the less serious offence would be relatively minor and it would not make sense for ASIC to have

to consider complex legal distinctions (such as the defendant's mental state) to determine whether a breach has occurred. As there may be a high volume of breaches, a penalty notice regime is more efficient to deal with this type of breach.

6.21 The Court has the power to make a declaration of contravention and order a person who breaches the Passport Rules to compensate another person or entity, including a passport fund, for damage suffered as a result of the breach. Damage suffered includes any diminution in the value of the fund's property and any profits made by the person who breached the Passport Rules. The court must specify the amount of compensation. *[Schedule 2, items 273A, 275 to 280 and 287, subsections 1317H(1) and (2), heading to subsections 1317H(3), subsections 1317H(3) and (4) and 1317HC(1) to (4) and 1317E(1) table item 45A]*

***Extended geographical jurisdiction***

6.22 Extended geographical jurisdiction Category A as set out in section 15.1 of the Criminal Code applies to the two offences for breaching the Passport Rules. *[Schedule 1, item 1, subsection 1211C(5)]*

6.23 Under this category, the offences apply to Australian citizens, or bodies corporate, regardless of where the conduct giving rise to the offence occurs, whether in Australia or overseas. In contrast to the circumstances of foreign nationals and bodies corporate (see next paragraph), no defence is available if there is no equivalent offence applying to the conduct in the domestic law of the overseas jurisdiction where the conduct occurs.

6.24 The offences apply to foreign nationals and bodies corporate if the conduct giving rise to the offences occurs in Australia. They also apply if the conduct occurs abroad, provided that a result of the conduct occurs in Australia. However, under these circumstances there is a defence available if there is no equivalent offence in the domestic law of the jurisdiction where the conduct occurs.

6.25 This could, for example, apply in the case of a person connected with a notified foreign passport fund breaching the Australian Passport Rules through conduct occurring in a foreign jurisdiction, such as the fund's home economy. However, given that the Passport Rules in all participating economies are required to be consistent with the Passport Rules in Annex 3 of the MOC, it is expected that a breach of the Australian Passport Rules will also constitute a breach of the foreign jurisdiction's Passport Rules. The defence available under Category A to foreign citizens and bodies corporate would accordingly not be available under these circumstances.



## Stop orders

### *Stop orders against Australian passport funds*

6.26 ASIC may make a stop order against an Australian passport fund if it is satisfied that the fund, or a person associated with the fund, does not comply, or is not likely to comply, with the Corporations Act, Passport Rules for this jurisdiction, ASIC Act or the associated regulations. The stop order may:

- prohibit the passport fund or its operator from offering interests in Australia;
- prohibit the passport fund or its operator from offering interests in another jurisdiction; or
- require the fund or its operator to take or cease any action reasonably necessary to give effect to the prohibition on offering interests.

The stop order must be in writing and may be for the period specified in the order or an indefinite period. [*Schedule 1, item 1, subsections 1215(1) and (3)*]

6.27 A stop order may specify that conduct of a particular kind will be regarded as constituting a breach of a particular provision in the Corporations Act. It must be given to the operator of the fund as soon as reasonably practicable after it is made. [*Schedule 1, item 1, subsections 1215(2) and (5)*]

6.28 Before making a stop order relating to an Australian passport fund, ASIC must offer procedural fairness to the operator of the fund and any interested persons, including by:

- holding a hearing; and
- giving the persons a reasonable opportunity to make written, or oral submissions, on whether an order should be made.

These are the same due process requirements as those that apply to stop orders made by ASIC under section 739 of the Corporations Act. The legislation does not prescribe the form of the hearing, allowing it to be held by telephone, or other technological means, in order to reduce costs or afford convenience to participants. [*Schedule 1, item 1, subsection 1215(4)*]

6.29 A copy of the stop orders must be given to the operator of the fund. The operator of the fund as well as any other person who is aware of the order must not contravene the order. [*Schedule 1, item 1, subsection 1215C(5) and section 1215D*]

6.30 ASIC has the power to vary or revoke a stop order under section 33 of the *Acts Interpretation Act 1901*. This has been confirmed in the context of other stop order provisions in the Corporations Act, such as section 1020E.

6.31 A person may seek review of a stop order under Part 9.4A of the Corporations Act and the *Administrative Appeals Tribunals Act 1975*.

***Stop orders against notified foreign passport funds***

6.32 ASIC may by written instrument make a stop order prohibiting the operator of a notified foreign passport fund from offering interests in Australia. The stop order may also require the fund, or its operator, to take or cease any action reasonably necessary to give effect to the prohibition on offering interests. The power to order that other action be taken or not taken, as the case may be, is designed to ensure ASIC is able to require any additional steps that are necessary to ensure a stop order is effective. This includes ordering not to issue an interest where an offer has previously been made and is to be later accepted, or when an application is made without an offer. *[Schedule 1, item 1, subsection 1215A(1) and paragraphs 1215A(3)(e) and (f)]*

6.33 A stop order may specify that conduct of a particular kind will be regarded as constituting a breach of a particular provision in the Corporations Act. *[Schedule 1, item 1, subsection 1215A(2)]*

6.34 The notification requirements, right to merits review, and ASIC's variation and revocation powers are the same as for Australian passport funds (see paragraphs 6.33 and 6.55 to 6.58). *[Schedule 1, item 1, subsection 1215A(8)]*

6.35 There are three situations where ASIC may make a stop order against a notified foreign passport fund:

- the fund or its operators are not complying, or are not likely to comply, with certain laws and regulations in Australia or the fund's home economy;
- the operator of the fund has ceased to be registered as a foreign company, or has not had a local agent for more than 21 days as set out in section 601CF in Division 2 of Part 5B.2 of the Corporations Act; or
- the Minister has made a determination that applies to the fund.

*[Schedule 1, item 1, paragraphs 1215A(3)(a) to (d)]*

***Ground 1: Non-compliance with the law***

6.36 ASIC may make a stop order if the fund, or its operator, is not complying, or not likely to comply with:

- the Corporations Act and Regulations, including the Passport Rules incorporated in Australian law;
- the ASIC Act and Regulations; or

- the fund's home economy laws and regulations, including the Passport Rules as incorporated into the home economy's laws.

*[Schedule 1, item 1, paragraph 1215A(3)(a) and subsection 1215A(4)]*

6.37 There are three additional factors that ASIC must consider before making the stop order. First, ASIC must consider the impact of the likely non-compliance on the members and prospective members of the fund. Second, ASIC must consider whether the order is necessary having regard to any action taken or that may be taken by the home regulator. Finally, if ASIC is concerned about non-compliance with the fund's home economy laws and regulations, including the Passport Rules for the home economy, ASIC must ask the home regulator for its opinion and give effect to that opinion if, and only if, it is provided within the stipulated timeframe. *[Schedule 1, item 1, subsection 1215A(5) and paragraphs 1215A(6)(a) and (b)]*

6.38 Before making a stop order because Australian or home economy laws may not be complied with, ASIC is required to hold a hearing and give any interested people an opportunity to make submissions. *[Schedule 1, item 1, subsection 1215A(7)]*

6.39 Stop orders made against notified foreign passport funds for non-compliance with the law are similar to stop orders made against Australian passport funds for non-compliance with the law. However, the applicable laws and additional considerations are different for notified foreign passport funds. These differences are summarised below:

**Table 4.1: Stop order for non-compliance with relevant laws**

	<i>Australian Passport Funds</i>	<i>Notified Foreign Passport Funds</i>
<b><i>Conditions for making order</i></b>	ASIC is of the opinion that the relevant laws (being Australian laws including the Passport Rules for this jurisdiction) are not being, or are not likely to be, complied with.	<ul style="list-style-type: none"> <li>• ASIC is of the opinion that the relevant laws (being Australian and home economy laws) are not being, or are not likely to be, complied with.</li> <li>• ASIC is of the opinion that the order is necessary having regard to: <ul style="list-style-type: none"> <li>– the impact on fund members and potential members; and</li> <li>– any action taken or that may be taken by the home regulator.</li> </ul> </li> <li>• ASIC has sought, and given effect to, the home regulator's</li> </ul>

	<i>Australian Passport Funds</i>	<i>Notified Foreign Passport Funds</i>
		opinion with respect to non-compliance with home economy laws.
<b>Relevant laws</b>	<ul style="list-style-type: none"> <li>• Corporations Act and Regulations</li> <li>• ASIC Act and Regulations</li> <li>• Passport Rules in this jurisdiction</li> </ul>	<ul style="list-style-type: none"> <li>• Corporations Act and Regulations</li> <li>• ASIC Act and Regulations</li> <li>• Passport Rules in this jurisdiction</li> <li>• Home economy laws and regulations, including the Passport Rules for the home economy</li> </ul>

*Ground 2: Ceasing to be a registered foreign company and failure to appoint a local agent*

6.40 Ceasing to be a registered foreign company or failure to appoint a local agent for more than 21 days constitute the second ground allowing ASIC to issue a stop order. The requirements in this regard are set out in Division 2 of Part 5B.2 of the Corporations Act. In this situation ASIC is not required to hold a hearing or allow interested parties to make submissions. This differs to the procedure for stop orders made against funds which are not complying, or are not likely to comply, with the law. *[Schedule 1, item 1, paragraphs 1215A(3)(b) and (c)]*

*Ground 3: Minister's determination*

6.41 The third ground for making a stop order is if the Minister has determined that funds from a particular home economy should be prohibited from offering interests in Australia, and the fund is from that particular home economy. *[Schedule 1, item 1, paragraph 1215A(3)(d)]*

6.42 The Minister may make a determination because:

- a difference has been raised under the MOC because Australia disagrees with another economy's interpretation or application of the MOC and the Minister considers the difference has not been satisfactorily resolved;
- an economy other than Australia has ceased to be a participating economy;
- Australia has withdrawn from the MOC; or
- the MOC has been terminated.

*[Schedule 1, item 1, section 1210B]*

6.43 Further information about the Minister's power to make such determinations can be found in Chapter 3 of the explanatory materials.

6.44 In situations where the Minister has made a determination, ASIC does not need to give the operator a right to be heard before making a stop order. This differs to the procedure for stop orders made against funds which are not complying, or are not likely to comply, with the law.

6.45 ASIC's power to issue stop orders when the Minister has made a determination complements ASIC's power to reject notices of intentions when the Minister has made a determination. [*Schedule 1, item 1, subsection 1213B(8)*]

### ***Interim stop orders***

6.46 ASIC may make interim stop orders before or during a hearing if it considers that any delay in making a stop order would be prejudicial to the public interest. This is the same as the condition for issuing interim stop orders under subsection 739(3) of the Corporations Act. In addition, ASIC must also consider that one or more of the grounds for issuing a stop order exist, as set out in subsections 1215(3) (for Australian passport funds) and 1215A(3) (for notified foreign passport funds). [*Schedule 1, item 1, subsection 1215B(1)*]

6.47 Interim stop orders may apply to Australian passport funds or notified foreign passport funds. An interim stop order may prohibit a fund from issuing its interests in Australia or require the fund to take or not take any other action that ASIC considers reasonably necessary. As explained above, the power to order that other action be taken or not taken, as the case may be, is designed to ensure ASIC is able to require any additional steps that are necessary to ensure an interim stop order is effective. If the fund is an Australian passport fund, the stop order may also prohibit the issue of interests outside of Australia.

6.48 The maximum duration of an interim stop order made before a hearing is 21 days. [*Schedule 1, item 1, subparagraph 1215B(2)(c)(ii)*]

6.49 Stop orders made during a hearing last until the end of the hearing (unless sooner revoked), even if the hearing lasts for more than 21 days. [*Schedule 1, item 1, subparagraph 1215B(2)(c)(i)*]

6.50 ASIC is not required to hold a hearing or give a person the opportunity to be heard before making an interim stop order. This denial of procedural fairness is justified by the temporary nature of the stop order and the need to protect the public against financial loss. There is precedent for ASIC issuing interim stop orders without giving the person a right to be heard (for example, section 739 of the Corporations Act) and it has been sanctioned by the Australian Law Reform Commission.<sup>8</sup> [*Schedule 1, item 1, paragraph 1215B(2)(a)*]

---

<sup>8</sup> See Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws* (ALRC Report 129), December 2015. The report is

6.51 Interim stop orders must be in writing and given to the operator of the fund as soon as reasonably practicable after they are made. *[Schedule 1, item 1, paragraph 1215B(2)(b) and subsection 1215B(3)]*

6.52 ASIC has the power to vary or revoke an interim stop order under section 33 of the *Acts Interpretation Act 1901*.

*Revocation of stop orders*

6.53 Operators of Australian and notified foreign passport funds may apply to ASIC to have a stop order removed because the grounds on which it was issued no longer exist. *[Schedule 1, item 1, subsections 1215C(1) and (2)]*

6.54 Any application must be in the form prescribed by ASIC and must explain why the operator believes that the grounds for the stop order no longer exist. *[Schedule 1, item 1, subsection 1215C(3)]*

6.55 If ASIC, on considering an application, comes to the opinion that the grounds for the stop order no longer exist it must revoke the stop order. It is also made clear that ASIC may decide to vary or revoke a stop order for another reason. *[Schedule 1, item 1, subsections 1215C(4) and (5)]*

*Compliance with stop orders*

6.56 If the operator of a fund receives a notice from ASIC, the operator must comply with the stop order. *[Schedule 1, item 1, subsections 1215D(1) and (2)]*

6.57 Failure to comply is an offence attracting a penalty of 100 penalty units or imprisonment for two years or both. *[Schedule 2, item 297, schedule 3 table item 328B]*

6.58 The operator is also required to take reasonable steps to bring the stop order to the attention of any other person who might engage in conduct that is contrary to the order. *[Schedule 1, item 1, subsection 1215D(3)]*

6.59 Failure to do so is an offence, punishable by a fine of up to 100 penalty units or imprisonment for two years or both. *[Schedule 2, item 297, schedule 3 table item 328C]*

6.60 If the other person breaches the stop order after being given notice of it, they also commit an offence, punishable by a fine of up to 100 penalty units or imprisonment for two years or both. *[Schedule 1, item 1, subsection 1215D(4) and Schedule 2, item 297, schedule 3 table item 328D]*

## Consequential amendments

### ***Providing ASIC with an additional function of the Passport Regulator under the MOC***

6.61 ASIC, as regulator, has specified functions under sections 11 and 12A of the ASIC Act. Under the MOC and the Passport Rules, a passport regulator is responsible for matters such as regulating the activities of passport funds in their jurisdiction, either as the home regulator or the host regulator. Annex 4 of the MOC provides for arrangements for cross-border supervisory cooperation, including exchange of information.

6.62 To facilitate ASIC's activities as the Passport Regulator for Australia, ASIC has the functions and powers of a home regulator and a host regulator under the MOC. ASIC is not subject to directions of the Minister in relation to exercising this function or exercising any related powers. ASIC is also not under a duty to perform the function or exercise the powers. *[Schedule 2, items 1 and 2, subsection 11(16A) and paragraph 11(17)(c) of the ASIC Act]*

### ***Authorising ASIC to disclose information to other passport regulators for the performance of their functions***

6.63 ASIC must take all reasonable measures to protect information given to it in confidence or which is protected information. Unless the use or disclosure is authorised under section 127 of the ASIC Act, ASIC is unable to disclose such information.

6.64 A person who is authorised by the Chairperson of ASIC may disclose information given to ASIC in confidence, or which is protected information, if the disclosure is to enable or assist a passport regulator for a passport fund under the MOC in the performance of their functions or the exercise of their powers. *[Schedule 2, item 6, subsection 127(3AA) of the ASIC Act]*

### ***Allowing ASIC to accept enforceable undertakings from operators of notified foreign passport funds***

6.65 ASIC may accept an enforceable undertaking from an operator of a notified foreign passport fund. Such a written undertaking in connection with the fund will relate to a matter which ASIC has a power or function under the corporations legislation. Once given, the operator may only withdraw the undertaking with ASIC's consent. In the event that the undertaking is breached, ASIC may apply to the Court seeking orders requiring:

- the operator to comply with the undertaking;

- the operator to transfer to fund property up to an amount of any financial benefit that the operator has obtained, which is attributable to the breach;
- the operator to compensate a person who has suffered loss or damage as a result of the breach; and/or
- the operator to do or not do any other action that the Court considers appropriate.

*[Schedule 2, items 3 to 5, heading to Part 3A, heading to section 93A and subsections 93B(1) to (4) of the ASIC Act]*

6.66 ASIC is required to keep a record of the undertaking and provide a copy of it to any person who requests it. Information in the undertaking that meets specified criteria, such as being commercial-in-confidence, must be redacted by ASIC. *[Schedule 2, item 5, subsections 93B(5) to (7) of the ASIC Act]*

6.67 Part 6 of the Regulatory Powers (Standard Provisions) Act 2014 (the Regulatory Powers Act) provides a framework for accepting and enforcing undertakings relating to compliance with provisions. However, matters in relation to which undertakings can be accepted are stated more broadly in section 93A, and the new section 93B, than they are in the Regulatory Powers Act. Under the Regulatory Powers Act, undertakings may be accepted to do or not do something to comply or ensure compliance with provisions specified in the triggering Act as enforceable. Under section 93A, ASIC would be entitled to accept an undertaking in relation to other matters.

6.68 For example, one of ASIC's functions is to monitor and promote market integrity and consumer protection in relation to the Australian financial system (see subsection 12A(2) of the ASIC Act). Thus, under subsection 93A(1), ASIC could accept an undertaking from the responsible entity for a registered scheme not to do something in relation to the scheme that might threaten the Australian financial system. That undertaking might not relate to a breach of a particular provision of the corporations legislation, so much as a course of action in relation to a fund. For this reason, section 93B has been based on 93A, rather than have it trigger the Regulatory Powers Act.

6.69 The requirements around enforceable undertakings for notified foreign passport funds replicate the requirements for enforceable undertakings for registered schemes under the ASIC Act.

### ***Extension of licensing obligations***

6.70 Under the existing law, the operator of an Australian passport fund is carrying on a financial services business in this jurisdiction and must hold an AFSL that covers the provision of all financial services (whether or not in this jurisdiction).



6.71 Consequential amendments have been made to the general licensing obligations to ensure that operators of Australian passport funds are required to comply with the laws of each host economy for the fund. A similar requirement applies to other persons with functions and duties in relation to the fund. These persons are referred to as **persons with responsibilities in relation to an Australian passport fund**. [*Schedule 2, items 205 to 208, paragraph 912A(1)(cb) and subsection 912A(6)*]

***Extension of breach reporting and banning orders***

6.72 The definition of ‘financial services law’ has been expanded to include the Passport Rules for this jurisdiction and Chapter 8A. This has the effect of extending the breaching reporting and banning orders so that they apply to the new law. [*Schedule 2, items 183B and 183C, section 761A, definition of ‘financial services law’*]

6.73 Consequential amendments have been made to extend the breach reporting requirements applying to Australian financial services licensees to include compliance with the laws of each host economy for the fund and the Passport Rules for this jurisdiction. This also has the effect of extending ASIC’s existing power to ban a person for non-compliance with the licensing obligations or the financial services law. [*Schedule 2, items 183B, 185 and 208, section 761A, definition of ‘financial services law’, subparagraph 761A(e)(ii), definition of ‘security’ and subparagraph 912D(1)(a)(ii)*]

6.74 The new law gives ASIC the power to ban an operator or person connected with an Australian passport fund if the host regulator is of the opinion that the person or fund does not comply, or is not likely to comply, with the laws of the host economy. The host regulator must notify ASIC of its concern in writing. [*Schedule 2, item 212, subparagraph 920A(1)(i)(i)*]

6.75 Before banning a person because of the host regulator’s concern, ASIC must consider the potential impact of the failure, or potential failure to comply on members and potential members of the fund. This is in addition to the usual limitations on ASIC’s power to make a banning order, including that ASIC must form the view that the public interest in exercising the banning power outweighs the detriment to the individual. [*Schedule 2, item 18, subparagraph 920A(1)(i)(ii)*]

6.76 ASIC has been granted power to immediately suspend or cancel the AFSL of an operator of a notified foreign passport fund if the members have suffered, or are likely to suffer, loss because the fund breached the Corporations Act, Corporations Regulations or the Passport Rules for this jurisdiction. It is noted that operators of such funds may not necessarily be required to have such a licence. [*Schedule 2, item 209, paragraph 915B(3)(caa)*]

6.77 ASIC may also suspend or cancel an Australian financial service licence of an operator or person with responsibilities in relation to an

Australian passport fund if a host regulator notifies ASIC that the person has not complied, or is not likely to comply, with the host economy's laws. ASIC may only exercise this power after having regard to the potential impact of the person's non-compliance on fund members and granting the person a hearing. *[Schedule 2, items 210 and 211, paragraph 915C(1)(e) and subsection 915C(5)]*

6.78 A person may seek merits review by the Administrative Appeals Tribunal (AAT) of ASIC's decision to ban a person or suspend or cancel a licence under existing section 1317B. The right to merits review exists irrespective of whether the person is an Australian or foreign resident or citizen.

### ***Officers and employees***

6.79 Division 1 of Part 2D.1, which relates to duties imposed on officers, directors and employees of a corporation, does not apply to the actions or omissions of officers, directors or employees of a notified foreign passport fund or its operator. *[Schedule 2, item 53, section 190C]*

6.80 Directors of notified foreign passport funds or of the fund's operator are not personally liable for a liability incurred by the fund or operator acting as trustee. *[Schedule 2, item 54, subsection 197(3A)]*

### ***Disqualification from managing corporations***

6.81 Consequential amendments have been made to automatically disqualify a person from managing corporations if the person is disqualified from being a director of a passport fund or the fund's operator, or from being concerned with the management of a passport fund under an order made by court of a foreign jurisdiction (that is in force). Similarly, ASIC may apply to the court to disqualify a person from managing corporations, if the person is disqualified under the law of a foreign jurisdiction. *[Schedule 2, items 56 to 59, paragraphs 206B(6)(b) and (c) and 206EAA(1)(a) and (3)(a)]*

6.82 Except for the provisions referred to above, Part 2D.6 will only apply to people managing a notified foreign passport fund, or the fund's operator, with respect to their actions or omissions committed in this jurisdiction. *[Schedule 2, item 61, section 206HAA]*

6.83 An amendment changing the heading of section 206H from "Territorial application of this Part" to "Limited application of Part to foreign companies" is also made. *[Schedule 2, item 60, heading to section 206H]*

### ***Declarations of contravention***

6.84 The Court may make declarations of contravention when a notified foreign passport fund breaches the Passport Rules or new reporting requirements. For further details about the new reporting

requirements, please see paragraphs 4.67 to 4.76. [*Schedule 2, items 272 and 273A, paragraph 1317E(1), table items 5 and 45A*]

6.85 The declaration of contravention must specify the name of the relevant passport fund. [*Schedule 2, items 273 and 273B, paragraphs 1317E(2)(e) and (f)*]

6.86 The operator of a notified foreign passport fund may intervene in an application for a declaration of contravention that relates to the fund. The operator may make submissions on any matter, apart from whether the declaration should be made. [*Schedule 2, item 289, subsection 1317J(3)*]

### ***Pecuniary penalty orders***

6.87 The Court may make pecuniary penalty orders if there is a breach of:

- a corporations/scheme civil penalty provision (eg the new reporting requirement)
- a financial services civil penalty provision (such as the continuous disclosure obligations or the obligations in relation to margin lending facilities); or
- the Passport Rules for this jurisdiction.

[*Schedule 2, items 274, 274A and 274C, subparagraphs 1317G(1)(b)(i) and 1317G(1A)(c)(ii) and subsections 1317G(1H) and 1317G(1J)*]

6.88 In order for the Court to make a pecuniary penalty order, the breach must be serious or materially prejudice the interests of the fund, its members, the acquirers of the relevant financial product, or the disposers of the financial product. The Court is also required to make a declaration of contravention before it makes a pecuniary penalty order. [*Schedule 2, items 274, 274A and 274C, subparagraphs 1317G(1)(b)(i) and 1317G(1A)(c)(ii) and subsection 1317G(1H)*]

6.89 The maximum penalty for a breach of the Passport Rules is \$200,000 for an individual and \$1 million for a body corporate. This is the same as the maximum penalty for a breach of a financial services civil penalty provision under the existing law. [*Schedule 2, item 274C, subsection 1317G(1J)*]

6.90 The pecuniary penalty is payable by the operator of the fund, even if the underlying obligation was placed on the fund. This protects members' interests by ensuring that fund assets are not used to pay for penalties which resulted from the operator's actions or inaction. Since notified foreign passport funds are required to have an Australian operator, this also avoids the jurisdictional challenges of enforcing an order against a non-Australian fund.

6.91 The operator of a notified foreign passport fund may intervene in an application for a pecuniary penalty in relation to the fund and make submissions. This mirrors the operator's rights in applications for declarations of contraventions that relate to the fund (see paragraph 6.85 above). *[Schedule 2, item 289, subsection 1317J(3)]*

### ***Compensation orders***

6.92 The Court's power to make compensation orders for breaches of a civil penalty provision have been expanded to apply to notified foreign passport funds. This ensures that persons who suffer damage as a result of a notified foreign passport fund breaching a civil penalty provision (eg an Australian member) are able to access compensation from the operator of the fund. *[Schedule 2, items 275 to 279 and 281 to 285, subsections 1317H(1) to (3) and 1317HA(1) to (3)]*

6.93 Compensation orders may also be made for breaches of the Passport Rules and the market integrity rules. See paragraphs 6.92 to 6.97 of the explanatory memorandum. *[Schedule 2, items 286A to 287, sections 1317HB and 1317HC]*

6.94 The operator of the notified foreign passport fund, a person who has suffered damage as a result of a breach of the Passport Rules or ASIC may apply for a compensation order. *[Schedule 2, items 288 and 290, subsections 1317J(2) and (3AA)]*

6.95 If the operator of the fund is ordered to compensate the fund, the operator must transfer the compensation to fund property. If another person is ordered to pay the compensation, it should be paid to the operator who holds it on behalf of the fund. *[Schedule 2, items 280, 286, 286F and 287, subsection 1317H(4A), 1317HA(4A), 1317HB(4B) and 1317HC(5)]*

6.96 Compensation orders may be enforced as if they were a judgment of the court. The court has the same powers to grant relief from liability for contraventions of the new compensation order as for existing compensation powers. *[Schedule 2, items 9, 287 and 291, section 9, definition of 'civil penalty order', subsection 1317HC(6) and subsection 1317S(1), definition of 'eligible proceedings']*

6.97 A company or a related body corporate must not indemnify a person against liability for a compensation order, including a compensation order relating to a contravention of the Passport Rules. *[Schedule 2, items 13 and 55, section 9, definition of 'entity' and paragraph 199A(2)(b)]*

### ***Other Court orders***

6.98 The Court has a general power to make other orders (for example, an order varying part of a contract or an order requiring money to be refunded) if a party to the proceedings or person on whose behalf an application is made suffers loss as a result of a breach of the Passport Rules for this jurisdiction. *[Schedule 2, items 291A to 291D, section 1325]*

***Review by the Administrative Appeals Tribunal***

6.99 An operator, notified foreign passport fund or other interested person may apply to the Administrative Appeals Tribunal for merits review of any decision made by the Minister or ASIC. The process for applying for review is governed by the existing framework for seeking merits review in Part 9.4A of the Corporations Act.

6.100 Review by the Administrative Appeals Tribunal is not available for decisions by ASIC to give, withdraw or not withdraw a penalty notice for:

- for breaching the Passport Rules;
- misusing information on the register of members;
- failing to lodge a register of members (where required by ASIC); or
- failing to provide a copy of the constitution, register of members or report to which members are entitled under the home economy laws.

*[Schedule 2, item 271A, paragraphs 1317C(gf)]*

6.101 The exclusion of these decisions from merits review by the Administrative Appeals Tribunal is consistent with the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (the Guide). Parts 6.7 and 6.8 of the Guide explicitly state that decisions to issue or withdraw infringement or penalty notices should not be subject to merits review. This is because penalty notices are not final or operative determinations of substantive rights, and a person may elect to challenge the penalty notice in court. The exclusion of these types of decisions from merits review is also consistent with the treatment of other similar decisions in the Corporations Act (see, for example, existing paragraphs 1317C(i) and (j)).

***Miscellaneous consequential amendments***

6.102 Consequential amendments have been made to include the new penalties in the list of general penalty provisions in existing section 1311. A note has also been corrected so that it uses the defined term ‘registered schemes’. *[Schedule 2, items , 271 and 292, paragraph 1311(1A)(dd) and note to subsection 1378(1)]*

6.103 Consequential amendments have been made to clarify rules pertaining to overseas branch registers for Australian passport funds. Under existing law a company may keep a branch register of members of the company at a place outside Australia. The new law provides that an Australian passport fund may also keep a branch register of members of the fund outside Australia in the same way a company may. That is, the fund must:

- keep the branch register in the same manner as it is required to keep the principal register of the fund;
- enter in the principal register the details contained in the branch register; and
- distinguish interests registered in the branch register from those registered in the principal register.

*[Schedule 2, items 50 to 52, heading to section 178, subsection 178(1) and section 178AA]*

## **Application and transitional provisions**

6.104     There are no application and transitional provisions for this Part.

---

## **Chapter 7**

### ***Exemptions and modifications***

---

#### **Outline of chapter**

7.1 Part 8A.8 of the new law grants ASIC the power to exempt entities from the provisions in Chapter 8A and the Passport Rules, or modify any such provision as it applies to an entity. It also allows the regulations to provide an exemption from any provisions in the Corporations Act applying to passport funds, and for any such provisions to be modified as specified in the regulations. Division 3 of Part 8A.8A of the new law provides both that regulations can be made and that ASIC may declare that the Corporations legislation continues to apply to funds that have been deregistered as passport funds or removed as notified foreign passport funds.

7.2 ASIC is also granted the power to exempt notified foreign passport funds, their operators and the directors of the operators from Part 2M.3 financial reporting obligations. The new law extends the existing power for the regulations to modify the operation of Chapter 2M in relation to companies, registered schemes and disclosing entities to notified foreign passport funds.

#### **Context of amendments**

7.3 The MOC, under subsection 13(1) of Annex 2, allows a passport regulator to exercise any powers it has to:

- exempt a passport fund for which it is the home regulator from the home economy laws and regulations, or modify those laws and regulations with respect to the fund; or
- exempt a passport fund for which it is the host regulator from the home economy laws and regulations that apply to the passport fund in its economy or subject to Annex 1 of the MOC, or modify those laws and regulation with respect to the fund.

7.4 Subsection 13(2) of Annex 2 furthermore allows a home regulator to exempt a passport fund from a passport rule or modify a passport rule with respect to such a fund, provided that all host regulators of the passport fund consent in writing to the exemption or modification of the passport rule.

7.5 Section 54 of Annex 3 of the MOC imposes requirements on funds that have been deregistered as passport funds, including that they continue to be operated in accordance with the Passport Rules until certain conditions are met.

## **Summary of new law**

7.6 Part 8A.8 of the new law grants ASIC the power to exempt entities from the provisions in Chapter 8A and the Passport Rules in this jurisdiction, or modify, omit or vary these provisions. ASIC may also impose conditions on its exemptions.

7.7 ASIC may exempt or modify, omit or vary the Passport Rules in this jurisdiction for Australian passport funds only if all host regulators of the fund have agreed to the proposed exemption or modification. Exemptions and modifications which relate to the Passport Rules in this jurisdiction and apply to foreign passport funds must be the same as an exemption or modification granted by the home regulator.

7.8 ASIC may exempt notified foreign passport funds, their operators and the directors of the operators from financial reporting obligations under the Corporations Act. Regulations may also be made to modify the operation of Chapter 2M in relation to notified foreign passport funds.

7.9 ASIC must use a legislative instrument for exemptions and modifications that apply to all entities or all entities within a class. It may use a notifiable instrument for exemptions and modifications that only apply to specified entities.

7.10 The new law also allows for regulations to be made to provide exemptions from or modify the operation of Chapter 8A, the Passport Rules or a provision in any other chapter of the Corporations Act or of the ASIC Act that relates to passport funds.

7.11 The new law grants ASIC the power to continue the application of the Corporations legislation to funds that have been deregistered as Australian passport funds or removed as notified foreign passport funds. Regulations may also provide that the Corporations legislation continues to apply to funds that have been deregistered as Australian passport funds or removed as notified foreign passport funds.



## Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
ASIC has the power to exempt entities from the provisions in Chapter 8A, or modify their effect. ASIC may impose conditions on its exemptions and seek a court order to enforce these conditions in a specified way.	No equivalent.
ASIC has the power to exempt entities from the Passport Rules in this jurisdiction, or modify their effect if: <ul style="list-style-type: none"> <li>• for exemptions relating to Australian passport funds, the exemption has been agreed by all host regulators; or</li> <li>• for exemptions relating to notified foreign passport funds, the exemption is the same as an exemption or modification granted by the foreign passport fund's home regulator.</li> </ul> ASIC may impose conditions on its exemptions and seek a court order to enforce these conditions in a specified way.	No equivalent.
Regulations may provide exemptions from or modify the operation of Chapter 8A and any other provisions of the Corporations Act or the ASIC Act that relate to passport funds or a class of passport funds.	No equivalent.
ASIC has the power to make orders exempting notified foreign passport funds, their operators and the directors of the operators from all or specified financial reporting requirements in Part 2M.3. ASIC may impose conditions on exemptions and the exemption may be for a limited or indefinite period.	ASIC has the power to make orders exempting companies, registered schemes and disclosing entities from all or specified financial reporting requirements in Parts 2M.2, 2M.3 and 2M.4 (other than Division 4). ASIC may impose conditions on exemptions and the exemption may be for a limited or indefinite period.

<i>New law</i>	<i>Current law</i>
Regulations may modify the operation of Chapter 2M in relation to a notified foreign passport fund or a class of notified foreign passport funds.	Regulations may modify the operation of Chapter 2M in relation to a company, registered scheme or disclosing entity, or a class of these.
ASIC may declare that the Corporations legislation continues to apply to funds that have been deregistered as passport funds or removed as notified foreign passport funds	No equivalent
Regulations may provide that the Corporations legislation continues to apply to funds that have been deregistered as Australian passport funds or removed as notified foreign passport funds	No equivalent

## Detailed explanation of new law

### ASIC's exemption and modification power

#### *Exemptions and modifications in relation to Chapter 8A*

7.12 ASIC has the power to exempt entities from the provisions in Chapter 8A. It may also omit, modify or vary the effect of these provisions. The exemption may apply to nominated requirements or all of the requirements in the chapter. *[Schedule 1, item 1, section 1217]*

7.13 The exemption and modification power is limited to the provisions in Chapter 8A, the definitions that apply to Chapter 8A and regulations made for the purposes of Chapter 8A. *[Schedule 1, item 1, paragraph 1217(2)(a) and subsection 1217(9)]*

7.14 The power does not extend to the other chapters in the Corporations Act. This is similar to the scope of the exemption and modification power that applies to registered schemes in Chapter 5C.

7.15 The existing law already includes exemption and modification powers for some of the other provisions which potentially apply to passport funds.

7.16 The exemption and modification power may relate to:

- all entities or a specified class of entities (which may include operators, custodians and auditors); or

- all passport funds, a specified class of passport funds or specified funds.

*[Schedule 1, item 1, paragraphs 1217(2)(b) to (d)]*

7.17 ASIC may impose conditions on its exemptions and apply to the court for an order compelling the entity to comply with the condition in a specified way. *[Schedule 1, item 1, subsections 1217(3) to (5)]*

7.18 If the exemption applies only to a single specified entity, ASIC must use a notifiable instrument which is not subject to disallowance. Notifiable instruments must be entered on the FRL. ASIC must also give a copy of the exemption or declaration to the specified entity or operator of the passport fund in writing as soon as reasonably practicable after making the notifiable instrument. *[Schedule 1, item 1, subsections 1217(7) and (8)]*

7.19 If the exemption or modification relates to all entities or all entities within a class, ASIC must make a legislative instrument. The legislative instrument is subject to disallowance and entered on the FRL. It is not necessary for ASIC to provide a notice to the affected entities because ASIC may not know the identity of all entities that are, or may be, affected. *[Schedule 1, item 1, subsection 1217(6)]*

7.20 Table 7.1 below compares the two mechanisms that ASIC may use to make an exemption or modification.

**Table 4.2: Mechanism for making an exemption or modification**

	<i>(1) Legislative Instruments</i>	<i>(2) Notifiable Instruments</i>
<b><i>Applies to:</i></b>	All entities/passport funds or all entities/passport funds in a class	Specified entities
<b><i>Disallowable?</i></b>	Yes	No
<b><i>Notification</i></b>	FRL	<ul style="list-style-type: none"> <li>• FRL</li> <li>• Written notification from ASIC</li> </ul>

7.21 The new exemption and modification powers allow ASIC to provide administrative relief in circumstances where the strict operation of the Corporations Act produces unintended or unforeseen results. Issues may arise that were not contemplated at the time of drafting because the Passport is a new regime, the funds industry is undergoing rapid innovation, and many foreign passport funds are structured differently to MISs or use CIVs that are not available in Australia. In view of these circumstances, it is considered highly likely that unintended consequences will arise in particular circumstances. Administrative relief provided by ASIC may be the best approach for dealing with them in many instances,

as the issues may be too individual and specific to justify addressing them through legislation.

7.22 The exemption and modification powers in the new law are subject to the usual safeguards, including administrative review by the AAT, judicial review and consideration in appropriate circumstances by the Commonwealth Ombudsman.

***Exemptions relating to the Passport Rules***

7.23 ASIC's exemption and modification powers with respect to the Passport Rules are the same as its exemption and modification powers for Chapter 8A, except that there are certain preconditions that must be satisfied before ASIC can exercise its powers. These conditions are designed to prevent one economy from unilaterally changing the Passport Rules and are based on subsection 13(2) of Annex 2 of the MOC. *[Schedule 1, item 1, section 1217A]*

7.24 The first precondition applies to exemptions or modifications for Australian funds. It requires the approval of all **host regulators** for the fund before the exemption or modification can take effect. *[Schedule 1, item 1, paragraph 1217A(3)(a)]*

7.25 **Host regulators** include the regulators in countries where Australian funds are allowed to offer interests or applied to offer interests (and not yet been rejected). *[Schedule 1, item 1, section 1210]*

7.26 It is not necessary to obtain the approval of participating economies that are not host regulators. Nevertheless, if the fund wanted to offer interests in one of these participating economies at a later point and the regulator of that participating economy did not accept the exemption, the regulator may refuse the notice of intention to offer interests. See Chapter 3 of the explanatory materials for an explanation of this ground for refusing a notice of intention.

7.27 The second precondition applies to exemptions or modifications which relate to notified foreign passport funds. It prohibits ASIC from exercising its powers unless a similar exemption or modification has been granted by the foreign passport fund's home economy. *[Schedule 1, item 1, paragraph 1217A(3)(b)]*

7.28 Under the MOC, the home economy will only be able to make an exemption or modification if it has been agreed by all host regulators.

***Exemption orders relating to financial reporting***

7.29 Upon receipt of a written application authorised by the operator of a notified foreign passport fund and lodged with ASIC, ASIC may make an order to exempt the notified foreign passport fund, the fund operator, or directors of the operator from all or specified requirements of Part 2M.3 that relate to financial reporting. *[Schedule 2, item 90, section 340A]*

7.30 When making, revoking or suspending an order, ASIC must give written notice to the applicant; that is, the operator of the applicable notified foreign passport fund. *[Schedule 2, item 90, subsection 340A(4)]*

7.31 This replicates ASIC's existing exemption order powers relating to financial reporting for companies, registered schemes and disclosing entities.

7.32 ASIC may make an order to exempt a notified foreign passport fund, the fund operator, or directors of the operator from all or specified requirements of Part 2M.3. The order is made by a notifiable instrument, which is not disallowable. Notifiable instruments must be entered on the FRL. *[Schedule 2, item 91, section 341A]*

7.33 When making an exemption order in relation to a class, it is not necessary for ASIC to provide a notice to the affected entities because ASIC may not know the identity of all entities that are, or may be, affected.

7.34 This replicates the existing exemption class orders relating to financial reporting for companies, registered schemes and disclosing entities.

7.35 The existing criteria for making exemption orders for companies, registered schemes and disclosing entities is in section 342 (see below).

7.36 The exemption order powers allow ASIC to provide administrative relief in appropriate circumstances, which are reflected in the below criteria for making exemption orders.

*The criteria for making exemption orders*

7.37 Under the existing law, to make an exemption order in relation to companies, registered schemes and disclosing entities and requirements under a relevant Part of Chapter 2M, ASIC must be satisfied that complying with the relevant financial reporting requirements would:

- make the financial report or other reports misleading;
- be inappropriate in the circumstances; or
- impose unreasonable burdens.

7.38 These criteria are extended to also apply to when ASIC makes exemption orders in relation to notified foreign passport funds and financial reporting under Part 2.M3. *[Schedule 2, items 92 and 93, heading to section 342 and subsection 342(1)]*

## **Regulation-making power regarding exemptions and modifications**

### ***Regulation-making powers in respect of Chapter 8A, the Passport Rules and the corporations legislation***

7.39 Regulations may provide exemptions from or modify the operation of Chapter 8A, the Passport Rules or a provision in any other chapter of the Corporations Act or the ASIC Act. The exemptions or modifications may apply to a single passport fund, a class of passport funds or all passport funds, as well as to a single entity, a class of entities or all entities in relation to a passport fund. This is broader than ASIC's exemption and modification power, which is confined to the new Chapter 8A and the Passport Rules in this jurisdiction. *[Schedule 1, item 1, section 1217B]*

7.40 This power provides the flexibility required to deal with the unintended consequences that are almost certain to arise when a new regime as broad as the Passport is introduced. The modifications powers provided under this section represent a useful and necessary tool to deal with these circumstances.

7.41 These regulations will be disallowable, are subject to the sunseting regime and must be notified on the FRL.

### ***Financial reporting***

7.42 Regulations may also modify the operation of Chapter 2M. The modifications may apply to a single notified foreign passport fund or a class of notified foreign passport funds. *[Schedule 2, items 94 and 95, paragraphs 343(a) and (b)]*

7.43 This power provides the flexibility required to deal with the unintended consequences and extends the existing modification by regulations power in relation to companies, registered schemes and disclosing entities.

7.44 These regulations will be disallowable, are subject to the sunseting regime and must be notified on the FRL.

## **ASIC's power to continue the application of the corporations legislation**

7.45 ASIC may declare that the corporations legislation continues to apply in relation to a fund (or to an entity in relation to a fund) that has been deregistered as an Australian passport fund or denotified as a notified foreign passport fund, either in its existing form or as if specified provisions were omitted, modified or varied as specified in the declaration. *[Schedule 1, item 1, subsection 1216BB(1)]*

7.46 A declaration may apply to all or specified provisions in the Corporations Act; to all entities, a class of entities or a particular entity;

and to all former passport funds, a class of former passport funds or a particular former passport fund. The declaration may relate to matters generally or as specified in the declaration. [*Schedule 1, item 1, subsection 1216BB(2)*]

7.47 This power is designed to enable ASIC to deal flexibly with any issues that may exist and which require continuing regulatory oversight after an Australian passport fund has been deregistered or a notified foreign passport fund has been denotified. For example, there is the potential for continuing issues that arise, inter alia, from the need to give specific regulatory consideration to any members who became members after or on the expectation that the fund would become an Australian passport fund or notified foreign passport fund. Subsection 15(2) of Annex 2 and section 54 of Annex 3 of the MOC in particular recognise the potential continued need for deregistered funds to be subject to the same obligations applicable to registered funds.

7.48 As with exemptions and modifications in relation to Chapter 8A, if the declaration relates only to a single specified entity, it must be a notifiable instrument, which is not subject to disallowance. Notifiable instruments must be entered on the FRL. ASIC must also give a copy of the declaration to the specified entity or most recent operator of the passport fund soon as reasonably practicable after making the notifiable instrument. [*Schedule 1, item 1, subsections 1216BB(4) and (5)*]

7.49 If the declaration relates to all entities, all entities within a class, all former passport funds or a specified class of former passport funds, ASIC's declaration must take the form of a legislative instrument. The legislative instrument is subject to disallowance and entered on the FRL. It is not necessary for ASIC to provide a notice to the affected entities because ASIC may not know the identity of all entities that are, or may be, affected. [*Schedule 1, item 1, subsection 1216BB(3)*]

## **Regulation-making power regarding continuation of the application of the Corporations legislation**

7.50 In addition to ASIC's powers described above, the new law also provides that regulations may provide that the corporations legislation continues to apply, either as it is or as if specified provisions were omitted, modified or varied:

- in relation to a fund, all funds of a specified class or all funds that have been deregistered as Australian passport funds or denotified as notified foreign passport funds; and
- to an entity, all entities of a specified class or all entities in relation to a fund, all funds of a specified class or all funds that have been deregistered as Australian passport funds or

denotified as notified foreign passport funds. [*Schedule 1, item 1, paragraph 1216BC*]

7.51 The regulations are disallowable, subject to the sunset setting regime and must be notified on the FRL.

## **Consequential amendments**

7.52 There are no consequential amendments for this Part.







