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CORPORATIONS AMENDMENT (ASIA REGION FUNDS PASSPORT)  
BILL 2017

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EXPOSURE DRAFT EXPLANATORY MATERIALS



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## ***Glossary***

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

<b><i>Abbreviation</i></b>	<b><i>Definition</i></b>
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	<i>Corporations Amendment (Asia Region Funds Passport) Bill 2017</i>
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>Guide to Framing Commonwealth Offences</i>
IMR	Investment Manager Regime
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
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Participating economy	A country that has signed and implemented the MOC and not withdrawn from the MOC, until such time as the MOC is terminated.

<b><i>Abbreviation</i></b>	<b><i>Definition</i></b>
Passport	Asia Region Funds Passport
PDS	Product Disclosure Statement
Register	Register of Passport Funds
Regulatory Powers Act	<i>Regulatory Powers (Standard Provisions) Act 2014</i>

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# Chapter 1

## Context

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### Outline of chapter

1.1 This chapter sets out the context and background to the legislation contained in the Bill. The legislation in essence establishes a common regulatory framework for collective investment schemes (CISs) in participating economies in the Asia region.

### Context of amendments

1.2 The Asia Region Funds Passport (the Passport) provides a multi-lateral framework which 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 also enable managed fund providers from other Passport economies to sell their products in Australia. This will increase competition and choice for Australian consumers. It will also 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 will be able to 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.

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

1.6 The Australian Financial Centre Forum's 2009 report, *Australia as a Financial Centre – Building on our Strengths* (the 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 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 managed investment scheme framework. It is anticipated that the new corporate CIV 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, the 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 Memorandum of Cooperation on the Establishment and Implementation of the Asia Region Funds Passport (the MOC). 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. Please see Attachment A for the text of the MOC.

## **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 are not allowed to 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 will allow 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 obligates 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 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 collective investment schemes.

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, ASIC must write to the home economy regulator if it is doing so on the basis that a home economy law is not likely to be complied with.

1.21 The reliance on the home regulator to enforce rules relating to operations justifies the need for extended geographical jurisdiction – Category A. Australian authorities require this extended geographic reach to take enforcement action with regard to offences committed outside Australia by funds for whom 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 with which the operators of passport funds will be required to comply 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 a package of amendments to the *Corporations Act 2001* (the Corporations Act), the *Australian Securities and Investments Commission Act 2001* (the 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 the Australian Securities and Investments Commission (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; and

- 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 these explanatory materials. All provision references in these explanatory materials are to the Corporations Act unless otherwise stated.

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## Chapter 2

### Key definitions

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#### Outline of chapter

2.1 Schedule 1 to the Bill inserts a new Chapter 8A into the 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.

#### Summary of new law

2.2 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 it has not withdrawn from the MOC. Economies will cease to be participating economies if the MOC is terminated.

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

2.4 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.

2.5 *Passport funds* are *regulated CISs* (that is, collective investment vehicles), 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>
<p>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.</p> <p>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.</p>	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.
<p>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>.</p> <p>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>.</p>	No equivalent

## Detailed explanation of new law

### Participating Economies

2.6 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]*

2.7 The MOC is defined under 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]*

2.8 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.

2.9 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).

2.10 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]*.

2.11 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 paragraph 14 of the MOC.

2.12 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).

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

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

2.15 This list must be updated as soon as is reasonably practical 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)]*

2.16 The list published by the Minister is not conclusive evidence of whether a country 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**

2.17 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 the operators 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.

2.18 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.

2.19 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)*]. These rules 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 the existing legislative concepts such as the Australian Financial Services Licence framework. [*Schedule 1, item 1, subsection 1211(2)*].

2.20 The legislative instrument will be subject to Parliamentary scrutiny and disallowance in the same way as any other legislative instrument. It must also be published on the Federal Register of Legislation (FRL).

2.21 ***The Passport Rules for this jurisdiction*** are the Passport Rules set out in the legislative instrument made by the Minister. [*Schedule 1, item 1, subsection 1211A(1)*]

2.22 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. Any rules adopted by a participating economy other than Australia which are not substantially the same as Annex 3 of the MOC will not qualify as Passport Rules. *[Schedule 1, item 1, subsection 1211A(2)]*

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

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

2.24 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).

2.25 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]*

2.26 If the Minister does not make a legislative instrument which incorporates the recommended amendment, Australia’s domestic law remains unchanged. Australia’s decision will also mean that the participating economies do not unanimously accept and implement the recommended amendment. Accordingly, the proposed amendment will 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 will be amended; and
- the condition in the legislative instrument will be satisfied and the amended rules commence in Australia on 31 December.

**Example 2.2: Amendments to Annex 3 of the MOC which 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 will not commence and 'the Passport Rules for this jurisdiction' will not be 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 ultra vires. This is because the Minister only has power to make rules which are substantially the same as Annex 3 of the MOC.

2.27 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(f) 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**

2.28 A **collective investment scheme** or a **CIS** is a collective investment vehicle 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).

2.29 CISs are not restricted to vehicles which meet the definition of a 'scheme' in domestic law. Instead, the definition of a CIS captures a range of collective investment vehicles including partnerships and other contractual relationships, managed investment schemes and corporate collective investment vehicles.

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

2.31 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 managed investment scheme registered under the *Financial Markets Conduct Act 2013* of New Zealand;
- in relation to Singapore<sup>2</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

2.32 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]*

2.33 The first requirement restricts passport funds to regulated CISs and their sub-funds. For the definition of a regulated CIS, see paragraph 2.31 above.

2.34 **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]*. 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.

2.35 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 these explanatory materials. The procedures which apply in other countries will be set out in their domestic laws, but they will be based on the MOC and must be broadly similar to the procedures in Australia.

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<sup>2</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.

2.36 **Australian passport funds** are registered schemes which are also registered as passport funds in Australia using the process set out in Part 8A.3 of this Bill. *[Schedule 1, item 1, section 1210]*

2.37 **Foreign passport funds** are regulated CISs and sub-funds which are registered as passport funds by participating economies other than Australia. *[Schedule 1, item 1, section 1210]*

2.38 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 these explanatory materials.

2.39 A **notified foreign passport fund** is a foreign passport fund which has submitted a notice to offer interests in Australia and has not been rejected within the prescribed period *[Schedule 2, item 9, section 9]*. 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 which may offer interests in Australia will be notified foreign passport funds.

2.40 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 *[Schedule 1, item 1, sections 1210 and 1211]*. Section 56 of Annex 3 of the MOC contains a table which lists the operator in each participating economy. 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.

## Home and Host Economies

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

2.42 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]*

2.43 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). [*Schedule 1, item 1, section 1210J*]

2.44 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 actually being permitted to offer interests in any other economy.

## Home and Host Regulators

2.45 **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 [*Schedule 1, item 1, sections 1210 and 1211J*]. 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).

2.46 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>3</sup>	Monetary Authority of Singapore
Thailand	Securities and Exchange Commission

2.47 The **home regulator** for a passport fund is the Passport Regulator in the fund's home economy [*Schedule 1, item 1, section 1210J*]. The **host regulators** for a passport fund are the Passport Regulators in the

<sup>3</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.

fund's host economies *[Schedule 1, item 1, section 1210]*. See paragraphs 2.41 to 2.44 for an explanation of the definitions of home and host economy.

## **Consequential amendments**

2.48 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]*



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## **Chapter 3**

### ***Application and registration***

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#### **Outline of chapter**

3.1 Parts 8A.3, 8A.4 and 8A.5 of the new law set out the processes under which Australian and foreign passport funds are allowed to offer interests in Australia.

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

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

3.3 Funds registered in another participating economy must lodge a notice with ASIC if they intend to offer interests in Australia. ASIC generally has 21 days 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, entry is not in the public interest, or the name of the fund is unavailable.

3.4 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.

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

<i>New law</i>	<i>Current law</i>
<p><b>Australian Funds:</b></p> <p>Funds registered as managed investment 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 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>No equivalent</p>
<p><b>Foreign passport funds:</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 21 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> <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> </ul>	<p>No equivalent.</p>

<i>New law</i>	<i>Current law</i>
<ul style="list-style-type: none"> <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>	

## Detailed explanation of new law

### Registration of Australian Funds

3.5 An Australian fund may only be registered as a passport fund if it is a managed investment scheme (MIS) registered under section 601EB of the Corporations Act. *[Schedule 1, item 1, section 1212]*

3.6 A fund needs to be registered as a MIS before it becomes registered as a passport fund. It does not need to be a registered MIS at the time that it (or a person acting on its behalf) 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 MIS and a passport fund at the same time. In this case, ASIC would complete registration as a MIS first, and would only process the application for registration as a passport fund after registration as a MIS was completed. 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)]*

3.7 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 less 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 with ASIC under section 601EB. *[Schedule 1, item 1, subsection 1212(1)]*

3.8 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 *[Schedule 1, item 1, subsection 1212(2)]* 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.

3.9 The applicant must also provide ASIC with the Product Disclosure Statement (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)]*

3.10 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]*. Applicants are not required as set out in existing section 601EC to state the ARSN in the PDS because this identifier may not be known by new funds at the time of lodging their applications with ASIC. (See paragraph 3.6 for an explanation of how a new fund can lodge its application for registration as a MIS and a passport fund at the same time.)

3.11 The requirement to provide a PDS at the time of applying for registration differs from other registration processes under the Corporations Act. However, this is considered necessary to enable ASIC to determine whether the fund is likely to comply with the PDS requirements. Compliance with the Corporations Act, including the PDS rules, is one of the factors that ASIC must consider before registering a fund as a passport fund.

3.12 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(3) and Schedule 2, item 19, subparagraph 1274(2)(a)(ii)]*

3.13 ASIC must register the MIS as a passport fund if ASIC is satisfied that the MIS meets two conditions, namely:

- the MIS is likely to comply with the Corporations Act, ASIC Act, and the Passport Rules for this jurisdiction; and
- the Operator of the MIS 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 MIS with assets of at least USD500 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 the Passport Rules;
- meets the financial resources test in the Passport Rules (that is, the Operator has between USD1 million and 20 million in equity, depending on the value of the assets under management);
- meets the organisational arrangements test in 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 the Passport Rules by having at least five years of relevant experience; and
- meets the good standing test in 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)]*

3.14 ASIC is required to form a positive opinion about these matters, that is, it is not enough for ASIC to not form the view that the MIS is unlikely to comply with the relevant laws. This is similar to the state of satisfaction that ASIC must reach before it registers a scheme under section 601EB of the existing law.

3.15 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 “yes” 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 Act (including the Passport Rules) is likely to be complied with.

3.16 ASIC is not required to process applications within any specific period of time. ASIC registers a MIS 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)]*. The MIS 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 of Passport Funds

3.17 If an Australian passport fund uses a different name in another participating economy it must notify ASIC in writing and as soon as practicable after it begins offering interests in the fund under that name. This information will be entered on the Register of Passport Funds kept by ASIC. *[Schedule 1, item 1, section 1212C]*

3.18 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 25, table row 328A]*

### **Registration of funds from other participating economies**

3.19 Funds which 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 applications must be processed within 21 days, subject to any extensions (see further explanation below). The reason is that applicants are regulated CIS 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 (see below for further details) and should be able to complete any further consideration it thinks necessary within the allowed timeframe.

3.20 The notification process involves the operator of the foreign passport fund (or a person acting on behalf of the operator) 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. *[Schedule 1, item 1, section 1213]*. The consideration period begins when 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.

3.21 The operator is also required to provide ASIC with a PDS to assist ASIC to determine whether the fund is likely to comply with Australia's disclosure requirements. This PDS must comply with the PDS requirements in the Corporations Act and must set out relevant information about the Passport Fund. The PDS does not need to include a unique identifier because this will only be assigned after the notification process is complete. This 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)]*

3.22 As with applications from Australian funds, ASIC may determine by legislative instruments that specified parts of applications are not publicly available. *[Schedule 1, item 1, subsection 1213(3) and Schedule 2, item 19, subparagraph 1274(2)(a)(iac)]*

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

#### ***Requests for further information***

3.24 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]*

3.25 The new law states that ASIC must make a request for further information within the ***consideration period*** which extends for 21 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)]*.

3.26 If ASIC does not take any action before the consideration period ends, the foreign passport fund will be permitted to offer interests in Australia *[Schedule 1, item 1, section 1213C]*. Further information about the consideration period is set out at paragraphs 3.50 to 3.52 below.

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

3.27 ASIC may 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 ASIC is not to accept applications from all operators of passport funds or operators from that home economy.

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

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

3.28 ASIC may reject a notice if the fund is not complying with the 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)]*

3.29 The relevant Australian laws are the Corporations Act and the ASIC Act, but not the Passport Rules for this jurisdiction. The reason for not including the Passport Rules is that compliance with these rules will be assessed by the home regulator, as required by the MOC. The core purpose of the Passport arrangements is to avoid unnecessary duplication of regulatory requirements. This would not be achieved if the host regulator was to conduct another compliance check that had already been completed by the home regulator. *[Schedule 1, item 1, subparagraphs 1213B(1)(a)(i) and (ii)]*

3.30 When determining the likelihood of a foreign passport fund complying with its home economy laws, ASIC must request the opinion of the fund's home regulator. If the home regulator provides its opinion within the stipulated timeframe, ASIC must give effect to it. *[Schedule 1, item 1, subsection 1213B(2)]*



3.31 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*

3.32 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 [*Schedule 1, item 1, paragraph 1213B(2)(b)*]. This is 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.

3.33 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.

3.34 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)*]

3.35 ASIC is not required to conduct an assessment of the public interests 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*

3.36 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)]*

3.37 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.

3.38 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 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*

3.39 ASIC may also reject notices if the name that the passport fund proposes to use in Australia is unavailable, for example, 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 the Business Name of another individual or body that is not the operator of the fund; and
- the name is unacceptable in Australia because it is offensive, or suggests a misleading connection with the government (see Schedule 6 the Corporations Regulations 2001 (the Corporations Regulations)).

*[Schedule 1, item 1, paragraph 1213B(1)(d)]*

3.40 In order 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 managed investment schemes, businesses, companies and other foreign passport funds. Other registers may be added to this list in future if necessary (for example, for new collective investment vehicles, if they become possible in future). 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, paragraph 1213B(1)(d)]*

*Ground 5: Minister's determination*

3.41 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(5)]*

3.42 The Minister may make a determination that relates to:

- all (or a class of) passport funds from a particular economy;
- all passport funds, irrespective of their home economy. *[Schedule 1, item 1, subsection 1210B(1)]*

3.43 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. (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.)
- 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. (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.) *[Schedule 1, item 1, subsection 1210B(2)]*

3.44 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.

3.45 The Minister may also make a determination which 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)]*

3.46 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)]*

3.47 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*

3.48 If ASIC rejects a notice of intention, it must notify the operator of the fund in writing. *[Schedule 1, item 1, subsection 1213B(6)]*

3.49 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*

3.50 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 21 days. If ASIC does not refuse the notice or request further information from the fund within the consideration period, the fund may start offering interests in Australia and will be a **notified foreign passport fund** *[Schedule 1, item 1, section 1213C]*.

3.51 The 21 day consideration period is marginally longer than the 14 day registration period for schemes in section 601EB. This reflects the agreement reached between the signatories to the MOC (Annex 2, section 6). A 21 day 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.

3.52 ASIC and the operator may agree in writing to extend the consideration period for up to seven 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)]*

### **Register of Passport Funds**

3.53 ASIC must ensure that a Register of Passport Funds (the Register) 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), and may also include details of other passport funds. *[Schedule 1, item 1, subsections 1214(1) and (3)]*

3.54 ASIC must ensure the details of Australian passport funds are recorded on the Register at the time that the fund is registered as a passport fund. *[Schedule 1, item 1, subsection 1212A(2)]*

3.55 The Register may be established and maintained by ASIC, or a third party on behalf of ASIC. ASIC is free to determine the form in which the Register is kept. *[Schedule 1, item 1, subsections 1214(1)( and (2)]*



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## **Chapter 4**

### **Members' rights to certain records**

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#### **Outline of chapter**

4.1 Division 3 of Part 8A.4 of the new law provides certain persons with the right to obtain a copy of the register of members or the constitution. It also restricts the purposes for which the register of members may be used.

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

4.2 A member or former member may request a copy of the constitution, and any person 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.

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

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

<i>New law</i>	<i>Current law</i>
A member or a person respectively may request a copy of the constitution or of the register of members. The member or person must pay the required fee.	A member of an Australian registered scheme may request a copy of the constitution. Anyone may request a copy of the register of members. The member or person must pay the required fee.
Copies 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.

<i>New law</i>	<i>Current law</i>
<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>

## Detailed explanation of new law

### Obtaining copies of the register of members and the constitution

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

4.4 A member or former member may request a copy of the constitution. Anyone in Australia or a member or former member regardless of where they are may request a copy of the register of members. *[Schedule 1, item 1, subsections 1213F(1) and 1213G(1)]*

4.5 This new right only applies to notified foreign passport funds, not to Australian passport funds *[Schedule 1, item 1, subsections 1213F(1) and 1213G(1)]*. A person may already inspect and obtain copies of registers of members under existing section 173 of the Corporations Act. Similarly, members have a right to a copy of the constitution under existing subsection 601GC(4).

4.6 Registers of members generally include member contact information, as well as details of the shares or interests held. This constitutes private information, and providing access to third parties requires justification. The main reason for granting such access is that in important respects it is in the member’s best interest. For example, critical member powers, such as taking action against company directors or scheme managers, may depend on calling of a general meeting and a vote on the proposed action. Having access to member contact details through the register is vital in order to obtain the necessary number of signatures for calling a meeting. Similarly, a bidder intending to take over a company is required to send a statement setting out the price and other terms it is willing to offer to all existing members for their consideration. As a takeover offer may be a valuable way of maximising shareholder value it is in the members’ best interests that access to their contact details is



available to bidders. Existing member register regimes, such as the one in Part 2C of the Corporations Act, therefore generally grant third parties the right to such access.

4.7 Failure to provide a copy as requested is an offence carrying a penalty of 60 penalty units. These offences are given extended geographical reach because any breaches would be committed by the operator of a notified foreign passport fund, which will be a foreign entity. The category of geographical reach provided (Category A as set out in section 15.1 of the Criminal Code) 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 1213F(1) and (8) and 1213G(1) and (8)*]

4.8 Failure to provide a copy is also subject to the infringement notice scheme in Part 5 of the *Regulatory Powers (Standard Provisions) Act 2014* (the Regulatory Powers Act). ASIC is the infringement officer responsible for issuing infringement notices. ASIC also has all of the powers of the 'chief executive' under the Regulatory Powers Act, for example, it may extend the time period for paying a notice or withdraw a notice. [*Schedule 1, item 1, section 1216*]

4.9 The imposition of a strict liability offence together with an infringement notice regime is consistent with the Attorney-General's Department, *Guide to Framing Commonwealth Offences* (the Guide – see Chapters 2 and 6). It enhances the effectiveness of the enforcement regime and protects members' right to access information about their fund. Requiring proof of fault would undermine deterrence as the offence is relatively minor and involves funds which are not based in Australia. Further, it would be difficult to prove that an operator intentionally failed to provide a requested document because this is peculiarly within the operator's knowledge. 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.

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

4.10 Requests for copies of registers and constitutions 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 1213F(1)(c) and 1213G(1)(c), subsection 1213F(2) and paragraph 1213G(2)(a)*]

4.11 The amount charged for providing a copy of the constitution is determined by the operator, but it must be reasonable and cannot exceed the amount prescribed [*Schedule 1, item 1, paragraphs 1213F(1)(c) and 1213G(1)(c)*]. An amount is reasonable if it reflects the operator's

reasonable costs, for example, of processing the request, making a copy and 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 or register.

4.12 Copies may be provided electronically or in hard copy *[Schedule 1, item 1, subsections 1213F(3) to (4) and 1213G(3) to (4)]*. Different amounts may be prescribed depending on whether the copy is provided electronically, or in hard copy. Where the copy of the register is provided electronically, the costs should be minimal.

4.13 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***

4.14 The operator must provide the copy of the register or 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) and 1213G(6) and (7)]*

4.15 The copy 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) to (4) and 1213G(3) to (4)]*

4.16 Electronic copies must be provided within seven days after the application is made *[Schedule 1, item 1, subsections 1213F(4) and 1213G(4)]*. If the person expressly requested a hard copy, the copy must be posted within seven days. However, the copy may not be received by the applicant for several days or even weeks after it is posted *[Schedule 1, item 1, subsections 1213F(3) and 1213G(3)]*. ASIC may allow an operator a longer period to provide a copy *[Schedule 1, item 1, subsections 1213F(5) and 1213G(5)]*.

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

4.17 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 1213H(3)]*

4.18 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.

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

- 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.

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 the calling of a meeting of members. *[Schedule 1, item 1, subsection 1213H(2)]*

4.20 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 (Criminal Code subsection 13.3(3)). 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)]*

4.21 Breaches of these prohibitions are a strict liability offence, punishable by a fine of 60 penalty units, and are also subject to the infringement notice scheme in Part 5 of the Regulatory Powers Act. ASIC is the infringement officer responsible for issuing infringement notices. ASIC also has all of the powers of the 'chief executive' under the Regulatory Powers Act. 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 section 1216]*

4.22 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)]*

## Consequential amendments

4.23 Annex 3 of the MOC uses the term *constituent documents*, rather than the term constitution. The constituent documents are the governing documents which establish and set out the rules for a fund, and are listed in section 4 of Annex 3 of the MOC.

4.24 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 3 and 4, section 9]*

## Application and transitional provisions

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

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## **Chapter 5**

# **Compliance and enforcement**

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### **Outline of chapter**

5.1 Part 8A.6 of the new law grants ASIC additional compliance and enforcement powers for Australian passport funds and notified foreign passport funds.

### **Summary of new law**

5.2 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.

5.3 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.

5.4 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.

5.5 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.

### 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 but does not act intentionally or recklessly 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.

### Detailed explanation of new law

#### Breaches of the Passport Rules in this Jurisdiction

##### *Penalties*

5.6 Breaches of the Passport Rules are an offence under the amendments 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.

5.7 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 likely that the content of the Passport Rules will have to be amended as the Passport arrangements are implemented, 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.

5.8 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 2.20 above). 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.

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

5.10 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 managed investment schemes 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)]*

5.11 The second less serious offence applies 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)]*

5.12 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)]*

5.13 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.

5.14 Breaches of the Passport Rules are also subject to the infringement notice scheme established under the Regulatory Powers Act. ASIC is the infringement officer responsible for issuing infringement notices. ASIC also has all of the powers of the ‘chief executive’ under the Regulatory Powers Act, for example, it may extend the time period for paying a notice or withdraw a notice. ASIC may delegate these powers as permitted by section 102 of the ASIC Act. *[Schedule 1, item 1, section 1216]*

5.15 The infringement 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, an infringement notice regime is more efficient to deal with this type of breach.

5.16 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 Australian members of the fund. *[Schedule 1, item 1, subsections 1211C(1) and (2)]*

5.17 Consequential amendments have been made to give the court the power to 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, item 21, subsections 1317H(1) and 1317HC(1) to (4)]*

5.18 Applications may be made by a corporation or responsible entity for a registered scheme, a person who has suffered damage as a result of a contravention or the operator of a passport fund who has suffered damage. *[Schedule 2, items 22 and 23, subsections 1317J(2) and (2A)]*

5.19 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 2, 21 and 23, section 9 and subsections 1317HC(5) and 1317S(1)]*

5.20 A company or a related body corporate must not indemnify a person for a liability for a compensation order. *[Schedule 2, item 13, paragraph 199A(2)(b)]*

### ***Extended geographical jurisdiction***

5.21 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)]*

5.22 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.

5.23 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.

5.24 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***

5.25 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 issuing interests in Australia;
- prohibit the passport fund or its operator from issuing 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 issuing 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)]*

5.26 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 1215(2)]*

5.27 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)]*

5.28 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]*.

5.29 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.

5.30 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***

5.31 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 issuing interests. It is important to note that the link between such ‘other action’ and the prohibition on issuing interests must be direct and tight in order to justify the imposition of an order to take or cease taking it. *[Schedule 1, item 1, subsection 1215A(1) and paragraphs 1215A(3)(e) and (f)]*

5.32 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)]*

5.33 The notification requirements, right to merits review, and ASIC’s variation and revocation powers are the same as for Australian passport funds (see paragraphs 5.29 and 5.30). *[Schedule 1, item 1, subsection 1215A(8)]*

5.34 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), (b), (c), and (d)]*

*Ground 1: Non-compliance with the law*

5.35 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 home economy's Passport Rules.

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

5.36 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 *[Schedule 1, item 1, paragraph 1215A(6)(a)]*. Second, ASIC must consider whether the order is necessary having regard to any action taken or that may be taken by the home regulator *[Schedule 1, item 1, paragraph 1215A(6)(b)]*. 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 it is provided *[Schedule 1, item 1, subsection 1215A(5)]*.

5.37 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)]*

5.38 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 5.1: 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 satisfied 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 satisfied 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 satisfied 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 opinion with respect to non-compliance with home economy laws.</li> </ul>
<b><i>Relevant Laws</i></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*

5.39 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*

5.40 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)]*

5.41 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;
- 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]*

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

5.43 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.

5.44 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(5)]*

***Interim Stop Orders***

5.45 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)]*

5.46 Interim stop orders may apply to Australian passport funds or notified foreign passport funds. It may prohibit the fund from issuing its interests in Australia or require the fund to take or cease to take any other action that ASIC considers reasonably necessary. As explained above, it is important to note that the link between such ‘other action’ and the interim prohibition on issuing interests must be direct and tight in order to justify the imposition of an order to take or cease taking it. If the fund is an Australian passport fund, the stop order may also prohibit the issue of interests outside of Australia.

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

5.48 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>4</sup>. [*Schedule 1, item 1, paragraph 1215B(2)(a)*]

5.49 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)*]

#### *Revocation of stop orders*

5.50 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)*]

5.51 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)*]

5.52 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

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<sup>4</sup> See Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws (ALRC Report 129)*, December 2015. The report is available at <https://www.alrc.gov.au/publications/freedoms-alrc129> (accessed August 2017).

order. It is also made clear that ASIC may decide to vary or revoke a stop order for another reason, as explained in paragraph 5.29 above. *[Schedule 1, item 1, subsections 1215C(4) and (5)]*

#### *Compliance with Stop Orders*

5.53 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)]*. Failure to comply is an offence attracting a penalty of 100 penalty units or imprisonment for two years or both *[Schedule 2, item 25, table row 328B]*.

5.54 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 1251D(3)]*. 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 25, table row 328C]*. 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 25, table row 328D]*.

## **Consequential amendments**

### *Extension of licensing conditions, breach reporting and banning orders*

5.55 Consequential amendments have been made to extend the licensing conditions and 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 14 to 16, paragraph 761A(ba), paragraph 912A(1)(cb) and subparagraph 912D(1)(a)(ii)]*

5.56 The new law gives ASIC the power to ban an operator or person connected with an Australian passport fund if the host regulator is not of the opinion that the person or fund complies, or is likely to comply with the laws of the host economy. The host regulator must notify ASIC of its concern in writing. *[Schedule 2, item 18, subparagraph 920A(1)(i)(i)]*

5.57 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)]*

5.58 ASIC has been granted power to suspend or cancel the Australian financial services licence 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 17, paragraph 915B(3)(caa)]*

5.59 Persons may seek merits review of ASIC's decision to ban a person or suspend or cancel a licence under existing section 1317B of the Corporations Act. The right to merits review exists irrespective of whether the person is an Australian or foreign resident or citizen.

#### ***Miscellaneous consequential amendments***

5.60 Consequential amendments have been made to include the new penalties in the list of general penalty provisions in existing section 1311 and insert a definition of the Regulatory Powers Act into the dictionary in section 9. *[Schedule 2, items 10 and 20, section 9 and paragraph 1311(1A)(dd)]*

### **Application and transitional provisions**

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



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## **Chapter 6**

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

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#### **Outline of chapter**

6.1 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.

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

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

6.2 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.

6.3 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.

6.4 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.

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

<i>New law</i>	<i>Current law</i>
<p>ASIC has the power to exempt entities from the provisions in Chapter 8A, or modify their effect.</p> <p>ASIC may impose conditions on its exemptions and seek a court order to enforce these conditions in a specified way.</p>	No equivalent.
<p>ASIC has the power to exempt entities from the Passport Rules in this jurisdiction, or modify their effect if:</p> <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> <p>ASIC may impose conditions on its exemptions and seek a court order to enforce these conditions in a specified way.</p>	No equivalent.
<p>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.</p>	No equivalent.

## Detailed explanation of new law

### ASIC's exemption and modification power

6.5 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]*

6.6 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)]*. It 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.

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

6.8 The exemption and modification power may relate to:

- all entities or a specified class of entities (which may include operators, custodians, auditors etc.); or
- all passport funds, a specified class of passport funds or specified funds.

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

6.9 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)]*

6.10 If the exemption applies only to a single specified entity, ASIC may use a notifiable instrument which is not subject to disallowance. Notifiable instruments must be entered on the FRL. ASIC must also notify the specified entities in writing as soon as reasonably practicable after making the notifiable instrument. *[Schedule 1, item 1, subsections 1217(7) to (8)]*

6.11 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)]*

6.12 Table 6.1 below compares the two mechanisms that ASIC may use to make an exemption or modification.

**Table 6.1: Mechanism for making an exemption or modification**

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

6.13 The new exemption and modification powers allow ASIC to provide administrative relief in circumstances where the strict operation of the Act produces unintended or unforeseen results. Issues may arise that were not contemplated at the time of drafting because the Asia Region Funds Passport is a new regime, the funds industry is undergoing rapid innovation, and many foreign passport funds are structured differently to Australian managed investment schemes or use vehicles which are not available in Australia. It is considered highly likely that in view of these circumstances unintended consequences will arise. 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.

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

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

6.15 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]*

6.16 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)]*

6.17 **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*]. 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 these explanatory materials for an explanation of this ground for refusing a notice of intention.

6.18 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)*]. 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.

### **Regulation-making power**

6.19 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*]

6.20 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.

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

### **Consequential amendments**

6.22 There are no consequential amendments for this Part.