3.5 Asia Region Funds Passport

In 2009, the Australian Financial Centre Forum in a report ("Johnson Report") recommended that an Asia Region Funds Passport ("Passport") be developed.\(^1\) One of the purposes of this proposed Passport was to give market access for Australian fund managers overseas and at the same time for overseas fund managers market access in Australia.\(^2\) If introduced, the Passport will constitute a multilateral arrangement that aims to facilitate cross-border trade in managed funds between member countries by either waiving or diminishing key regulatory impediments to trade as well as enabling fund operators in member countries to offer eligible schemes to retail investors in other member countries under a streamlined process.\(^3\) For Australian fund managers, it will enable them to achieve greater economies of scale and enable them to sell a single product across Asia through the Passport to create regional economies of scale.

On 25 August 2017, the Commonwealth Government issued exposure draft legislation to give effect to the Passport which will establish a common regulatory framework for collective investment schemes ("CISs") in participating economies in the Asia region.\(^4\) The provisions will be contained in a new Chapter 8A of the 

An entity will be a passport fund for the purposes of this additional regulatory regime ("Passport Fund") if it is a regulated CIS or a sub-fund of a regulated CIS (eg, for an Australian CIS, a registered managed investment scheme under Chapter 5C of the Corps Act or a sub-fund of such a scheme) and it is registered as a Passport Fund in a participating economy.

If an Australian registered managed investment scheme wishes to be a Passport fund an application to ASIC may be made by lodging an application in the prescribed form with ASIC.\(^5\) ASIC must register the fund if the operator of the fund meets the eligibility criteria in the Memorandum of Cooperation on the Establishment and Implementation of the Asia Region Funds Passport ("MOC") and ASIC is of the opinion that the fund will comply with the corporations legislation in Australia.\(^6\) The scheme will be allocated a unique number similar to the current ARSN, but will be an Australian Passport Fund Registration Number or APFRN.\(^7\) A procedure of notification for foreign CISs is set out in the proposed legislation.\(^8\)

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\(^1\) Australian Financial Centre Forum Report, *Australia as a Financial Centre Building on Our Strengths*, 2009, ch 4 and Appendix 8.

\(^2\) Ibid.

\(^3\) Ibid.


\(^5\) Corps Act, proposed s 1212.

\(^6\) Corps Act, proposed s 1212A.

\(^7\) Ibid.

\(^8\) Corps Act, proposed Divs 1 and 2 of Chapter 8A.
As part of this new regime for Passport Funds, 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 Australia and host economy laws.\(^9\)

Therefore registered schemes wishing to become a Passport Fund will also need to register under the proposed Chapter 8A of the \textit{Corps Act} in addition to their normal registration under Chapter 5C of the \textit{Corps Act}.

### 3.5 CAMAC reform proposals

In March 2014, CAMAC issued a further discussion paper in relation to its ongoing review of managed investment schemes ("Stage 2 Discussion Paper").\(^{10}\) In that discussion paper, CAMAC has raised a number of specific issues with respect to the establishment and operation of managed investment schemes where it considers there may need to be some amendment to the current law. In particular, it was at that time considering where amendments may be made to enable there to be an alignment between the regulatory regime applicable to schemes and the regulatory regime applicable to companies.

CAMAC’s general approach was that the regulatory regime for managed investment schemes should be aligned with that for companies, unless there are compelling reasons for treating schemes differently.\(^{11}\)

As discussed earlier in this chapter, not all schemes are required to be registered.

As a broad proposition, CAMAC considered that schemes should generally be subject to the regulatory requirements of the \textit{Corps Act} and therefore CAMAC favoured abolition of the disclosure test for exemption from registration.\(^{12}\) CAMAC saw no policy reason for linking registration to the disclosure test. In particular, CAMAC saw no reason why wholesale schemes should not be subject to the regulatory provisions of the \textit{Corps Act} in the same manner as companies that may only have wholesale investors.\(^{13}\) After all, it has been observed that there is little to differentiate between registered and unregistered schemes apart from registration itself.\(^{14}\)

However, notwithstanding this broad proposition, the registration of a company that has only wholesale investors is a simple exercise with the company being able to be registered on the same day as the application. On the other hand, the registration of a scheme with wholesale investors is not so simple and can take months to obtain all necessary regulatory approvals.

First, the operator would have to obtain an Australian financial services licence, or a variation to its existing licence, in order to operate the scheme unless its authorisations were wide enough to cover the particular named scheme. This can take months to obtain. A report by ASIC indicates that this is an issue in that in 2015-2016 only:

- 52% of new licences were granted within 60 days; and

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\(^9\) \textit{Corps Act}, proposed ss 912A(1)(cb), 912D(1)(a)(ii), 915B(3)(c), 920A(1)(i) and 1317HC.


\(^11\) Ibid at p 35.

\(^12\) Ibid at p 36.

\(^13\) Ibid at p 38.

62% of licence variations were decided within 60 days.\(^{(15)}\)

Secondly, the scheme would need to be registered which generally in practice takes the full statutory 14-day maximum period to occur. Because ASIC gives active consideration to each of the elements entitling it to refuse to register a scheme before deciding whether to grant an application, this can result in ASIC asking the applicant to withdraw the application until various amendments are made to the proposed scheme documents thus delaying the process of registration further. On the other hand, registration of a company is simple and unlikely to be refused in most circumstances.

The requirement to register all schemes, given the current regulatory practice of ASIC, will not meet the commercial imperatives of the collective investment scheme sector and is likely to delay and impact significantly on investment in Australia.

However, the problems with obtaining registration of a scheme have been considered by CAMAC in the Stage 2 Discussion Paper.\(^{(16)}\) CAMAC acknowledged that obtaining registration of a company is much easier than obtaining registration of a scheme.\(^{(17)}\) CAMAC has therefore suggested that it may be possible to bring the scheme registration procedure more closely into line with the corporate procedure (thereby giving ASIC more administrative flexibility), while retaining the investor protection purpose of scheme registration, by:

- permitting registration of a scheme upon lodgment of an application for registration, without the need for detailed consideration of the registration criteria; and
- ensuring that ASIC has the power to make a stop order, on an interim as well as on a final basis, to prevent any issue of interests in a materially non-compliant scheme.

CAMAC suggested that this procedure would remove the need for ASIC to give active consideration in every case to whether the relevant registration criteria have been satisfied.\(^{(18)}\)


\(^{(16)}\) Above n 10, at section 4.2.

\(^{(17)}\) Ibid at p 43.

\(^{(18)}\) Ibid.