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Financial Services Update

October 2014

In this Financial Services update, we look at:

- Significant Investor Visa reforms and the new AU$15m Premium Investor Visa: The Australian Government has announced sweeping changes to the Significant Investor Visa and introduced a new Premium Investor Visa for those investing AU$15 million.
- Are your SMSF clients wholesale or retail? ASIC has revoked its opinion that SMSF investors are almost always subject to a AU$10 million net asset test in order to be categorised as wholesale investors.
- Breach reporting obligations: When should you turn yourself in? ASIC has confirmed that breach reporting should occur as soon as practicable and in any case within 10 business days after a licensee is aware of the breach.
- ASIC wants better RG 46 disclosure from unlisted property schemes: ASIC is increasingly monitoring disclosure against the benchmarks and disclosure principles for unlisted property schemes.
- Financial advisers have new record keeping obligations: For providers of personal advice, ASIC has introduced a new class order which imposes record keeping obligations to meet FOFA requirements.

Significant Investor Visa Reforms and the New AU$15 Million Premium Investor Visa

On 14 October 2014, the Australian Government announced changes to the Significant Investor Visa (SIV) programme to diversify the source of investors, target premium investors and streamline the administration process.

The changes include a new 'Premium Investor Visa', the introduction of Austrade as a nominating entity and the involvement of Austrade in the process of determining eligible complying investments. From the Government's announcement, it appears that investment eligibility criteria will change to target key economic and industry portfolios.

The changes are scheduled to take effect during 2014-15.

The new Premium Investor Visa

From 1 July 2015, the Premium Investment Visa (PIV) will be introduced for high net-worth foreign individuals who can meet an increased **AU$15 million** investment threshold. The Government describes the PIV as offering a 'more expeditious, 12 month pathway to permanent residency'.

In contrast, the SIV requires applicants to invest AU$5 million over a four year period before they are eligible for permanent residency (under Subclass 888). During the four year SIV investment period, applicants hold a provisional visa (Subclass 188). Applicants can withdraw their investments at the end of the four year term.

At this stage, limited information has been provided about the criteria and conditions for the PIV. It is not clear whether the expedited '12 month pathway to permanent residency' will allow for an applicant to withdraw their AU$15 million investment after only one year. We will keep you updated as further details are announced.

Foreign investors should be aware that a fast-track process to permanent residency may have unwanted consequences if a foreign investor ceases to be treated as a "temporary resident" for tax purposes and could become subject to Australian tax on their worldwide income. Foreign investors should obtain professional advice on the Australian tax implications of being a temporary or permanent resident.

Austrade to Play an Important Role

Under the proposed changes, Austrade will have two important roles:

1. Austrade will determine investment criteria

   In determining the investment eligibility criteria, Austrade will consult with key economic and industry portfolios. The Australian Government has identified the following areas as national investment priorities:

   - agribusiness and food;
   - major infrastructure;
   - tourism infrastructure;
   - resources and energy; and
   - advanced manufacturing, services and technologies.

2. Austrade will act as a nominating entity

   For the SIV, Austrade will become a nominating entity 'complementing' the current State and Territory governments' roles as nominators. On the face of this announcement, it appears that applicants who are nominated by Austrade are not required to be nominated by a State or Territory. However, this will need to be confirmed.

   Austrade will be the sole nominating entity for the PIV.

Streamlining the Application Process

The Government has recognised that analogous SIV programmes in other countries often have less onerous application criteria and processing requirements. As a result, the changes are intended to streamline and enhance the visa administration process.

There are no further details as to how such streamlining is to take place, and any changing or narrowing of the investment criteria by Austrade could ostensibly have the opposite effect. Accordingly, we will wait to see how such measures will be implemented and keep you updated.

Impact for Fund Managers

We have recently reviewed the impact of the SIV on Australia's funds landscape since its introduction in November 2012. As of 30 September 2014, there has been over AU$2 billion of SIV investment into Australia. 82% of those funds have gone towards government bonds or managed funds, with only 8% invested in private companies.

Fund managers and other financial services providers, who are keen to capitalise on the influx of investment, will no doubt be looking to attract the attention of PIV applicants with AU$15 million to invest. However, if Austrade changes or narrows the investment criteria, fund managers will need to react to ensure their fund offerings remain compliant.

We will continue to monitor and provide updates on Australia's SIV programme. Our funds and financial services team can advise you on implementing your SIV strategies. Our tax team can advise on Australian and cross-border taxation issues for SIV funds and SIV investors and our migration team can advise on all migration issues and visa applications.

If you have any questions, please contact: Michelle Segaert (partner, Global Corporate Practice), Vinod Kumar (associate, Global Corporate Practice), Louise Boyce (of counsel, Tax Strategy & Benefits), Andrew Burnett (of counsel, Labour & Employment registered Migration Agent) or Jillian Howard (senior associate, Labour & Employment registered Migration Agent).

Are Your SMSF Clients Wholesale or Retail Investors?

ASIC has issued a media release revising its position in relation to the treatment of self-managed super funds (**SMSFs**) as wholesale or retail investors under the Corporations Act.

ASIC's former view, set out in QFS 150 (issued in 2004), was that a financial service would generally relate to a superannuation product in a situation where financial services were provided to the trustee of an SMSF. Accordingly, an AU$10 million net asset test would apply to determine whether the SMSF was a retail or wholesale client and the trustee of the SMSF would be classified as a retail client if it did not satisfy this test. On 8 August 2014, ASIC withdrew QFS 150.

Under ASIC's revised approach, where the financial service does not relate to a superannuation product, the general wholesale test applies, being whether the trustee has an accountant's certificate stating they have AU$2.5 million in net assets or if the value of the investment is at least AU$500,000. ASIC provides by way of example that, where the trustee of an existing SMSF receives advice about how to invest the fund's assets, ASIC will not take action if the person providing the advice determines that the trustee is a wholesale client based on this general test.

ASIC's revised stance gives fund managers and other financial services providers more confidence in dealing with their SMSF clients (who satisfy the criteria of the general test) as wholesale clients. While the media release was welcomed by industry stakeholders, ASIC has not extended its advice to more clearly define when a financial service will 'relate' to a superannuation product.

If you have any questions in relation to the classification of your clients as wholesale or retail investors, please contact: Michelle Segaert (partner, Global Corporate Practice) or Vinod Kumar (associate, Global Corporate Practice).

Breach Reporting Obligations: When Should You Turn Yourself In?

ASIC has responded to a request for guidance from industry in relation to financial services breach reporting obligations. ASIC has clarified that significant breach reporting under section 912D of the Corporations Act must occur as soon as practicable and in any case within 10 business days after the entity becomes aware of the breach.

ASIC highlights that licensees should not wait to report until:

- the breach (or likely breach) has been considered by the AFS licensee's board of directors or legal advisers;
- they have taken steps to rectify the breach; or
- in the case of a likely breach, the breach has in fact occurred.

It is important to address potential breaches quickly and prudently. ASIC looks favourably on timely and transparent breach reporting. If you would like any advice or assistance in this regard, please contact: Michelle Segaert (partner, Global Corporate Practice) or Vinod Kumar (associate, Global Corporate Practice).

ASIC Wants Better RG46 Disclosure from Unlisted Property Schemes

As part of its review of managed investment and superannuation sectors, ASIC has advised that many unlisted property schemes are failing to adequately address their disclosure benchmarks as required under ASIC Regulatory Guide 46 *Unlisted property schemes: Improving disclosure for retail investors* (**RG 46**). One scheme has withdrawn its product disclosure statement and three others are being questioned about their disclosure practices.

ASIC's review presents a timely reminder for operators of unlisted property schemes to update their RG 46 disclosure. The enhanced disclosure requirements have been in place for almost two years and require scheme operators to:

- disclose against the six benchmarks on an 'if not, why not' basis; and
- apply the eight disclosure principles.

ASIC also provides guidance to facilitate 'clear, concise and effective' disclosure practices.

We are happy to assist you in preparing disclosure documents and complying with your ongoing disclosure obligations. If you need assistance, lease contact: Michelle Segaert (partner, Global Corporate Practice) or Vinod Kumar (associate, Global Corporate Practice).

Financial Advisers Have New Record-keeping Obligations

ASIC has issued Class Order [CO 14/923] *Record-keeping obligations for Australian financial services licensees when giving personal advice.* The new class order affects financial services licensees who give personal advice to retail clients.

The record keeping obligations align with the Future of Financial Advice (**FOFA**) best interests duty and related obligations in Div 2 of Pt 7.7A of the Corporations Act. In summary, financial advisers must keep the following records when providing financial advice to retail clients:

- the information relied on and the action taken which indicates the adviser has acted in the best interests of the client;
- if safe harbour provisions in the Corporations Act have been relied on, the information relied on and the action taken to satisfy the safe harbour provisions;
- the advice given and the reasons why it is appropriate to the client; and
- where a conflict of interest arises, the information relied on and the action taken to indicate that priority has been given to the client's interests.

Records must be kept for seven years. There is a transitional period until 12 March 2015 for licensees to comply with the updated record-keeping obligations.

Please contact: Michelle Segaert (partner, Global Corporate Practice) or Vinod Kumar (associate, Global Corporate Practice). If you would like advice about your record keeping obligations, FOFA or other financial services obligations.