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*Practice Group:**Investment
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Investment Management in Australia

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Asset managers are increasingly looking to Australia as a source of growth and as a gateway to the Asia Pacific region. This overview will assist managers navigate the Australian regulatory landscape.

Financial Services Licensing

The Australian Securities and Investments Commission (ASIC) administers a licensing regime for "financial services" providers. Under the regime, providers must generally hold an Australian Financial Services Licence (AFSL) and meet various compliance, conduct and disclosure obligations.

The regime can apply to entities operating outside Australia where they provide services to Australian clients. In particular, foreign asset managers who do any of the following are likely to fall within Australia's licensing regime:

- establishing, managing or acting as trustee of a collective investment vehicle in Australia, such as a managed fund, limited partnership, investment company, mortgage trust or property trust
- operating, managing or acting as trustee of a collective investment vehicle outside Australia which invites Australian clients to invest
- entering into individual investment mandates with Australian clients
- promoting and distributing collective investment vehicles or other financial products to Australian clients
- giving Australian clients advice about securities, collective investment vehicles, government and corporate bonds, derivatives, foreign exchange, general insurance, life insurance, superannuation or other financial products
- trading in or having custody of financial products on behalf of Australian clients.

Foreign Entity Exemptions

There are, however, a number of exemptions that may be available to foreign asset management firms. For example, an exemption may be available where:

- the foreign firm only provides a one-off service to wholesale clients
- the foreign firm is subject to regulation in its home jurisdiction which is broadly equivalent to the Australian financial services regulatory regime. Typically, such an exemption would only be available to a firm that provides its services to wholesale clients
- the foreign firm is authorised to provide financial services by an entity which already holds an AFSL. Unlike the other exemptions listed above, the compliance obligations (discussed below) will apply to the foreign firm's activities.

Each exemption is subject to a number of detailed eligibility criteria.

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In the absence of one of the above exemptions, a foreign asset manager will need to apply to ASIC for an AFSL. An AFSL will only be granted if ASIC is satisfied and the firm has the necessary skills, resources and compliance arrangements.

Compliance Obligations on AFSL Holders

AFSL holders must comply with a range of compliance, conduct and disclosure obligations. These obligations also apply to foreign entities which are exempt from the need to hold an AFSL as a result of entering into an arrangement with an AFSL holder (as discussed above). Some of the key obligations on these entities include:

- conducting their business honestly, efficiently and fairly and having processes in place to demonstrate that this will be the case
- maintaining sufficient financial resources and human resources
- holding client money on trust for clients in a separate bank account and segregating client assets from their own assets
- implementing an anti-money laundering program
- keeping records of their compliance with the regulatory regime and reporting any significant breaches to ASIC.

Where an AFSL holder provides services to retail clients, significant additional obligations apply. In particular, an AFSL holder must:

- register collective investment vehicles with ASIC and implement a range of safeguards to protect the interests of investors
- provide comprehensive disclosure documentation to prospective investors which includes certain prescribed information, such as details of the benefits, risks, fees, terms and conditions and tax implications of investing with the firm
- provide a formal statement to the client supporting any financial product advice which considers the client's personal circumstances
- establish internal and external dispute resolution procedures
- hold adequate professional indemnity insurance.

Taxation

Australia's taxation regime could well impact the way foreign financial services firms expand into Australia and the Asia Pacific region. A detailed consideration of Australian tax issues should be conducted prior to commencing operations here. The following observations concern some recent developments in the Australian tax treatment of foreign managed funds with an Australian connection.

Double Tax Treaties

Australian tax is generally levied on the worldwide income of its residents and on any Australian sourced income of non-residents. However, Australia has entered a number of double tax treaties which modify this position. Typically, an entity that is resident in a country with which Australia has a double tax treaty will only be subject to Australian tax in respect of income which is attributable to a

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"permanent establishment" in Australia. Detailed rules govern when income will be attributable to a permanent establishment.

Investment Manager Regime

Previously, foreign funds which appointed an Australian asset manager (and certain other service providers) may, as a result, have been treated as having a permanent establishment in Australia and hence be subject to Australian tax.

The Australian Government recently enacted an Investment Manager Regime to address this issue and remove the existing tax disincentive to the use of Australian asset managers by foreign funds. This regime exempts eligible foreign managed funds from Australian tax on income which is only taxable in Australia because the fund engaged an Australian asset manager, agent or other service provider. In order to be eligible for this concession, the foreign managed fund must be "widely held" and the income must relate to "passive portfolios investments".

The Investment Manager Regime is also designed to provide clarity to US entities regarding the historical tax treatment of certain Australian sourced income, in order to avoid a disclosure obligation under the "United States Financial Accounting Standards Board Interpretation Number 48 Accounting for Uncertainty in Income Taxes" (Fin 48).

FATCA

The US Government enacted the Foreign Account Tax Compliance Act (FATCA) in 2010. FATCA will impose due diligence and reporting obligations on certain non-US financial institutions. Certain Australian entities (such as Australian superannuation funds) are likely to be exempt from FATCA. In addition, as with many other countries, Australia is currently considering entering into an agreement with the US to minimize the FATCA compliance costs for Australian entities.

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