

Funds Management & Financial Services Alert

Raising capital for funds under the new Significant Investor visa

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The new Significant Investor visa provides a great opportunity for Australian fund managers to promote their managed investment products to high net worth individuals who wish to migrate to Australia.

The new visa rules introduce a simplified pathway to permanent residence for migrant investors who invest \$5 million into "complying investments" in Australia for a minimum period of four years.

First movers

Although the concept of the Significant Investor visa was first announced in May 2012, the regulations which introduced the new visa were only registered on 23 November 2012, a day before they commenced.

Despite the rules only being registered just prior to commencement, some fund managers have already taken the opportunity to create funds intended to comply with the new rules. For example, Moelis & Co has established the Moelis Australia Property Visa Fund which is seeking to raise \$500 million from migrants to be invested in Australian real estate assets and NSW state government bonds. The Australia Capital Investment Fund has also been established to take advantage of the new rules and it is being reported that JBWere, who has been appointed as asset consultant to that fund, has already attracted \$500 million investment from 100 Chinese investors for that fund.

What is a "complying investment"?

The \$5 million aggregate investment can be invested

solely in, or divided amongst, the following investment products:

- an investment in a government bond of the commonwealth, a state or territory;
- a direct investment in an Australian proprietary company that meets the following requirements:
 - the company is not listed on an Australian stock exchange;
 - the company has not been established wholly or substantially to comply with the new visa rules; and
 - the investment is an "ownership interest" in the company.
- an investment in a "managed fund" (directly or through an investor-directed portfolio service) where the fund only makes investments in assets which fall into categories determined by the Minister for Immigration and Citizenship (set out below).

Which funds qualify as "managed funds" under the new rules?

If you are considering establishing a fund or investment vehicle to source investments from migrants who wish to apply for permanent residency using the Significant Investor visa, then you should address the following key questions (and consider our answers):

Does my fund need to be registered to comply?

No. The rules require that the investment is an acquisition of interests in a "managed investment scheme" (as that

term is defined in the Corporations Act 2001 (Cth) (**Corporations Act**). This means the fund can be a registered or unregistered (e.g., wholesale) managed investment scheme.

Does the trustee need to hold an Australian financial services (AFS) licence?

No. The rules do not expressly require that the trustee holds an AFS licence: they state that the issue of an interest in the fund is “covered by” an AFS licence.

Can units in the fund be listed (now or in the future)?

No. The interests in the fund must not be able to be traded on a financial market and no representation can be made to any member of the scheme that the interests will be able to be traded on a financial market.

What can the fund invest in?

There are a number of investment restrictions imposed by the Commonwealth government which are set out below. In addition, the grant of a Significant Investor visa is generally a two-step process: an applicant must be nominated by a state or territory government agency before their application will be considered by the Commonwealth Department of Immigration and Citizenship (**DIAC**). This gives the states and territories the opportunity to impose their own investment requirements on a fund seeking to comply with the new rules. For example, the NSW state government requires applicants to invest at least 30 percent of the required \$5 million investment into NSW Waratah Bonds in order to be nominated.

At the time this article was prepared, the state and territory requirements can be summarised as follows:

State	Relevant Authority	Requirements
NSW	Business Migration and Industry Skills, Department of Trade and Investment.	<ul style="list-style-type: none"> Applicant must invest at least 30 percent of the \$5 million in NSW Waratah Bonds.
QLD	Skilled and Business Migration Unit, Department of Education, Training and Employment.	<ul style="list-style-type: none"> Applicants will be considered on a case by case basis with preference given to applicants with investments that have a direct economic benefit to Queensland. Applicants should have a genuine and realistic commitment to reside in Queensland. Complying investments can include Queensland Treasury Corporation’s Queensland Bonds which are used for significant infrastructure projects in Queensland. If the investment is in a new or existing business, the business will be required to be registered and operating in Queensland.
SA	Immigration South Australia.	<ul style="list-style-type: none"> Applicants must have a commitment to conduct bi-annual surveys issued by Immigration SA during the provisional visa term. Applicants must invest a minimum of \$3 million in a South Australian ASIC registered proprietary business for a minimum of 2 of the 4 year provisional visa period.
TAS	Department of Economic Development, Tourism and the Arts.	<ul style="list-style-type: none"> Applicants must participate in regular surveys conducted by the Tasmanian Government to track investment and success of visa programs. Applicants must consult the Tasmanian Government prior to switching between complying investments. Applicants may hold complying investments in any proportion they choose. Complying investments include Tasmanian State Government Bonds issued by the Tasmanian Public Finance Corporation (TASCORP), Australian Securities and Investment Commission (ASIC) regulated managed funds and direct investments made into Tasmanian companies not listed on the Australian stock exchange.
WA	Small Business Development Corporation, Business Migration Centre.	<ul style="list-style-type: none"> Applicants must have an additional \$50,000 available for domestic and/or settlement purposes. Applicants may hold complying investments in any proportion they choose. Complying investments can include Western Australian State Government bonds. Applicants will be considered on a case by case basis with the contribution to the Western Australian economy being the prime factor considered for approval.

State	Relevant Authority	Requirements
ACT	Migration and Information Services, Chief Minister's Department.	<ul style="list-style-type: none"> Criteria are currently under review by the relevant State authority.
VIC	Skilled and Business Migration Program, Department of Business and Innovation.	<ul style="list-style-type: none"> Criteria are currently under review by the relevant State authority.
NT	Skilled Migration, Department of Business and Employment.	<ul style="list-style-type: none"> No statement regarding criteria has been issued.

Can I promote my product outside Australia?

If you intend to promote your investment products overseas, then you will need to consider the laws applying in the jurisdiction in which your offer is being made. Otherwise, you must ensure that any offer you make is received by potential investors in Australia.

- the company must genuinely operate a "qualifying business" in Australia;
- the applicant must obtain an "ownership interest" in the company;
- the company must be registered with ASIC; and
- the business must have an Australian Business Number.

Fund investment restrictions

In addition to meeting the requirements above, the fund must only make investments in the following classes of assets determined by the Minister:

- infrastructure projects in Australia;
- cash held by Australian deposit taking institutions;
- bonds issued by the commonwealth or a state or territory government;
- bonds, equity, hybrids or other corporate debt in companies and trusts listed on an Australian stock exchange;
- bonds or term deposits issued by Australian financial institutions;
- real estate in Australia;
- Australian agribusiness; and
- other ASIC regulated managed funds that invest in the above list of investments.

The rules define a "qualifying business" as an enterprise that is operated for the purpose of making profit through the provision of goods, services or goods and services (other than the provision of rental property) to the public and is not operated primarily or substantially for the purpose of speculative or passive investment.

A business will not be a qualifying business if, for example, the main activity of the business is holding share portfolios, interest bearing deposits or rental property, involves currency speculation, or is property speculation (i.e., buying and selling real estate) rather than property development (i.e., building or renovating property). "Ownership interest" means an interest in the business as a shareholder in a company that carries on the business, a partner in a partnership that carries on the business or the sole proprietor of the business. This includes an interest held indirectly through one or more interposed companies, partnerships or trusts.

Fund manager declaration

Visa applicants must submit a declaration, which has been completed by the relevant fund manager, to the Minister to verify that the ASIC regulated managed fund is a complying investment. The declaration required is that the investments made by the managed fund are limited to the aforementioned categories of investments in Australia specified by the Minister.

Direct investments in property

Direct investment in property, or direct investment in an Australian proprietary company which operates with the purpose of providing rental property or property speculation, does not constitute a complying investment. However, investments in ASIC regulated managed funds which invest in real estate in Australia are complying investments.

Investments in shares in Australian proprietary companies

To be complying, a direct investment into an Australian proprietary company must satisfy the following criteria:

Gains and losses and switching investments

The rules require visa holders to hold the complying investment for the whole of the investment period. However, visa holders have the ability to switch between investments, provided that the visa holder makes a new investment of at least the value of the withdrawn money or

the cancelled investment, the new investment is a complying investment and the reinvestment is made within 30 days of withdrawing the funds from the original complying investment.

If the balance of the complying investment fluctuates below \$5 million, the visa holder is not required to provide additional funds to maintain the threshold value so long as they do not withdraw their complying investment. Conversely, if the balance increases, the visa holder cannot withdraw the increased value.

Implications for migrants

The Significant Investor visa also provides valuable opportunities for prospective business migrants as it provides several concessions which are not available for other types of visas. For example, there is no upper age limit, there is no need to satisfy the innovation points test, there is no English language threshold requirement and the residency requirement is reduced to 160 days cumulatively over the initial four year visa period. Business migrants may include family members such as their partner (spouse or de facto of at least 12 months), their partner's dependent children, and other dependent relatives in the visa application.

Opportunities for fund managers to attract new capital

It has been estimated by DIAC that it will grant 700 visas annually with \$3.5 billion potentially flowing to complying investments. If these estimates are accurate, then there is a significant opportunity for fund managers to source capital from prospective business migrants.

If you are considering establishing a fund to attract migrant investors, then you need to ensure the fund meets the relevant requirements under the rules. Thomsons Lawyers are experienced in establishing investment vehicles and advising on AFS licensing requirements, and can assist you develop an investment product which will comply with the Significant Investor visa requirements.

Written by:
Chris Mee
Special Counsel

Brigid Mulcahy
Legal Clerk

For further information, please [click here](#) to contact our national Funds Management & Financial Services team.

www.thomsonslawyers.com.au