

A large, abstract graphic of a network or sphere made of interconnected blue nodes and lines, positioned in the upper right background of the page.

Australia

Regulation

FUNDS AND FUND MANAGEMENT 2009

2.1 Type of funds

Collective investment funds can be organized in Australia either as trusts or as companies. Companies may be either public or private. In practice most funds are organized as unit trusts.

Unit trust structures are most commonly adopted for the management of both wholesale and retail funds and are generally referred to as managed investment schemes, schemes, or retail schemes to distinguish them from other types of unit trusts, such as those used to carry on active businesses.

Trust structures are also usually established for the management of superannuation (pension/retirement) funds.

2.2 Laws

All trusts are created in equity rather than under statute.

A company is established under and subject to the Australian Corporations and Securities Legislation (Corporations Act).

Both wholesale unit trusts (those funds whose units are held by large investors including other funds) and retail unit trusts (those funds widely held and offered to the public for subscription), either must be or can be registered under the managed investment scheme provisions of the Corporations Act (Chapter 5C).

Superannuation entities are regulated by the Superannuation Industry (Supervision) Act 1993 (SIS Act) and its Regulations.

2.3 Managers, trustees, and custodians

Managers

A Responsible Entity (RE) must be appointed to manage retail schemes registered under the Corporations Act. The RE effectively replaces the prior dual regime structure where there was a separate trustee and manager of a

fund. The RE must be an Australian registered public company and hold an Australian financial services (AFS) license authorizing it to operate a managed investment scheme. The Australian Securities and Investments Commission (ASIC), (the Regulator) must also accept lodgment of the constitution of the scheme before it can become registered under the Corporations Act.

There are generally no restrictions (subject to having adequate qualifications and experience) on the classes of persons who may act as the investment manager of a unit trust. Bankrupts and persons guilty of certain offences are excluded. Under the current requirements, it is also necessary that the investment manager of a unit trust, whether an Australian corporation or individual, hold an AFS license issued by the Regulator. A manager holding an AFS license becomes subject to the restriction and conditions of the license, the Australian Stock Exchange (if applicable) and Corporations Act. There are no rules as to the residence of an investment manager of a fund. There are generally no limits imposed on the fees that investment managers may charge to funds.

Trustees

A superannuation fund must have a trustee. The trustee must be a constitutional corporation, or where allowed, two or more individuals. The trustee of a public offer superannuation entity (superannuation fund, approved deposit fund, pooled superannuation trust) must be an Approved Trustee under the SIS Act.

There are generally no limits imposed on the fees that trustees may charge to funds.

2.4 Investment restrictions

There are generally no restrictions on the type of investments which funds may make. The scheme constitution may provide specific restrictions which need to be observed.

2.5 Borrowing

Funds are allowed to borrow and there are generally no limits on their powers of borrowing. Specific limitations apply in the case of superannuation entities (SIS Act section 67).

2.6 Accounts and prospectus

Widely-held (retail) schemes may only be offered to the public for subscription on publication of a Product Disclosure Statement. The Corporations Act contains provisions applying to the content of the document.

Funds must be audited and accounts must be published at least annually. Under tax law, funds are generally (but not always) required to produce accounts to 30 June in each year.

2.7 Supervision

The Australian Securities and Investments Commission (ASIC) is the federal regulatory body for publicly subscribed unit trusts and companies and superannuation entities, in accordance with the Corporations Act. The Australian Prudential Regulation Authority (APRA) also regulates superannuation entities under the SIS Act. There is no separate state supervision of funds.

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National Office
Level 18, No 1 Martin Place
GPO Box 9827
Sydney
NSW 2000
Australia

Australian Prudential Regulation Authority
Level 26, 400 George Street
GPO Box 9836
Sydney
NSW 2001
Australia

Australian Taxation Office
GPO Box 9990
Sydney
NSW 2001
Australia

2.8 Fund ownership

There are generally no restrictions on the percentage of units in the fund which may be held by any one person.

2.9 Fund structure

Funds are permitted to invest in other funds. Umbrella funds and hedge funds are also permitted. The same regulatory requirements apply to hedge funds as they apply to other funds.

2.10 Stock exchange

Stock exchange quotations are available to funds but there are no provisions exempting them from the full requirements relating to obtaining a listing.

2.11 Bank secrecy

Funds are captured by the new anti-money laundering (AML) and counter terrorist financing (CTF) laws. The laws require reporting entities to develop, implement, and maintain an AML/CTF program which must include appropriate risk based systems and controls. The systems should be designed to effectively identify and materially mitigate the risk that providing a designated service might involve money laundering or the financing of terrorism.

2.12 Fund set-up

The cost of creating a fund can vary from upwards of AUD 20,000, depending on the complexity of the fund. Creating the fund can take upwards of two months.

2.13 Foreign funds

Where a widely held fund is offered to the public for subscription in Australia, it is necessary that a Product Disclosure Statement be published regardless of whether the fund is foreign or domestic.

Under certain circumstances the Regulators will grant relief from the law prohibiting the offering of certain unit trusts in Australia except by a public company. This relief is granted on an individual scheme basis and is subject to the standard pre-conditions and ongoing conditions of the law. In general, unit trusts governed by the Hong Kong Securities and Futures Commission, the UK Financial Services (Regulated Schemes) Regulations, the Investment Company Act of 1940 (US), the New Zealand, and Guernsey jurisdictions, have been approved by the regulators as meeting the key regulatory requirements for the granting of relief.

Exchange Control regulations require disclosure of cash transactions exceeding AUD 10,000. Therefore it may be necessary to disclose details of substantial investments in foreign organized mutual funds. Foreign funds need to comply with the new AML/CTF laws.

2.14 Bearer shares

Units are not issued in bearer form in Australia as a matter of practice although there are no regulatory or legal restrictions on the issue of such units. However, from a tax perspective it should be noted that an investor must quote a tax file number, or an Australian Business Number in connection with an investment in order to avoid a 48.5 percent withholding tax being deducted from any payment arising on the investment.

2.15 Use of the internet

The Australian managed investments industry has embraced the internet as a means to accessing a larger customer base and the provision of more timely information to customers. Trends emerging include the following:

- Vertically integrated players are becoming involved in the distribution of their own and other fund managers' products.
- Financial advisers are providing investors with online portfolio management services to manage all their investments.
- Industry players are combining forces with leading Internet portals to create online managed fund research and transaction facilities.
- Leading industry players are allowing customers to view not only investment balances and transactions but also the ability to switch between funds, invest, and make additional contributions to existing investments, reinvest distributions, and make withdrawals.

ASIC permits widely held funds to provide Product Disclosure Statement information on the internet. In addition, nothing in the Corporations Act precludes applications from being submitted to the issuer in electronic form and paper form, where the application is a print-out of a computer screen.

The information contained herein is of a general nature and is not intended to address the circumstances of any particular individual or entity. Although we endeavor to provide accurate and timely information, there can be no guarantee that such information is accurate as of the date it is received or that it will continue to be accurate in the future. No one should act upon such information without appropriate professional advice after a thorough examination of the particular situation.