

# Business migrants

## Gates open for 'significant investors'

The introduction of the Significant Investor visa gives advisers the opportunity to provide compliance and investment advice to business immigrants, as Macquarie Adviser Services' David Shirlow and Stephanie Lee explain.

**B**usiness migrants with \$5 million or more to invest in the Australian economy can now apply for a 'Significant Investor' visa. This has been designed to enable Australia to compete in our region for high wealth and high skilled migrants and the capital that comes with them by offering concessions on visa requirements.

Amendments have been made to the Migration Regulations 1994 which, with effect from 24 November 2012, provide a streamlined pathway to permanent residence for migrant investors who make a complying investment in Australia, totaling at least \$5 million for a minimum period of four years.

A successful applicant may obtain a provisional visa without having to satisfy the existing innovation points test that currently applies for the Business Innovation and Investment visa nor meet its maximum age limit (age 55). There is no English-language threshold requirement.

Those who hold a provisional visa for a four-year period and have been nominated by a State or Territory government may qualify for a permanent visa if they maintain their complying investment for that period and meet a relatively low residence requirement: broadly, they must be in Australia for at least 160 days during that period.

### What are the investment rules?

Broadly, the regulations provide that a complying investment must consist of one or more of the following:

- an investment in a Commonwealth, State or Territory government bond;
- an investment - either directly or through an investor directed portfolio service (IDPS) - in a managed fund the investments of which have been made for limited purposes specified by the Minister;
- a direct investment in an Australian proprietary company that meets certain conditions (see below).

As the Department of Immigration and Citizenship's website confirms, investments directly in real property will not be

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considered as a complying investment (although may be held via a managed fund - see below).

The investment must be made by the applicant either:

- personally;
- with their spouse or de facto partner;
- through a company in which they and/or their spouse/partner hold all the issued shares; or

- through a lawfully established trust of which they and/or their spouse/partner are the only trustees and beneficiaries. A single individual cannot be the sole trustee and beneficiary of a lawfully established trust. Also, corporate trustees will not qualify. Further, the Department indicates that an SMSF or other superannuation investment will not qualify.

The assets used to make the investments must be lawfully acquired and unencumbered.

### Which managed funds qualify?

Broadly, 'managed fund' is defined as an investment in a managed investment scheme in which members acquire interests which are not able to be traded on a financial market. A managed fund which meets a purposes test may qualify as part or all of a visa applicant's complying investment. To meet the purpose test an applicant will need to provide a completed Form 1413 in relation to each managed fund on which the applicant's complying investment is based. This form requires the fund manager to declare that the investments of the fund are limited to one or more of the following:

- infrastructure projects in Australia;
- agribusiness in Australia;
- cash held by Australian deposit taking institutions;
- bonds issued by a State or Territory government;
- bonds or equity in Australian companies listed on the Australian Stock Exchange;
- bonds or term deposits issued by Australian financial institutions;
- real estate property in Australia;
- investments into other ASIC regulated managed funds that invest in the above list of assets.

It would seem that virtually all current managed funds which invest predominantly in the categories designated would fail to qualify as complying investments because, for example, the manager is permitted to invest in a broader range of asset sectors, or uses derivatives. So unless and until the declaration requirement is broadened to accommodate typical managed fund mandates, it appears that funds will need to be tailored to meet the current requirements.

### Which direct private company investments qualify?

For a direct company investment to qualify as a complying investment, the company must be unlisted and not have been established for the purpose of meeting the complying investment test. It must also potentially operate a 'qualifying business' for a certain period of time (typically at least two years). A 'qualifying business' means 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. It must have an ABN.

The investment must be an 'ownership interest' in the company, ie, an interest as a shareholder in a company that carries on the business, including interests held directly through one or more interposed companies, partnerships or trusts.

### What is the application process?

The Department's website indicates that applicants for a provisional Significant Investor visa must submit an Expression of Interest (EOI) through SkillSelect and be nominated by a State or Territory government in order to receive an invitation to lodge a visa application.

SkillSelect is an online service that enables skilled workers and business people interested in migrating to Australia to record their details to be considered for a





skilled visa through an EOI. More information on SkillSelect is available on the Department's website.

If an applicant has been nominated through SkillSelect by a State or Territory for a Significant Investor visa and meets other mandatory criteria, they will receive an invitation to make an application for a Significant Investor visa.

#### Providing advice to visa applicants

**Financial advice:** Generally, only those who work for or represent a financial advisory business that holds an Australian Financial Services (AFS) licence under the *Corporations Law* will be able to provide advice in Australia to visa applicants on complying investments that are financial products.

**Taxation advice:** Eligibility for the Significant Investor visa does not appear to be dependent on an applicant's tax residency status. Visa holders who are foreign residents for tax purposes will be taxed differently on income, including investment income, from those who are Australian tax residents.

It will be important for investors who are foreign residents to seek tax advice on both the Australian and overseas tax treatment.

Under the tax agent services exemption for financial product advice, financial advisers may be able to provide incidental advice on the Australian tax consequences of the financial products on which they advise without needing to be a registered tax agent. It should be noted that the current tax agent services exemption for financial advisers ends on 30 June 2013 and the Government intends to bring financial advisers who provide tax advice into the tax agent services regime from 1 July 2013.

Australian financial advisers are generally unable to assist with advice on the overseas tax treatment.

**Marketing issues:** Financial advisers intending to provide advice to applicants outside Australia should also be aware that different financial services and product marketing rules may apply in other countries. Some countries, such as the USA, have strict laws that any marketing in their jurisdiction must comply with.

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#### Conclusion

The Significant Investor visa provides a streamlined pathway to permanent residence for migrant investors with \$5 million to invest in complying investments. However, for the time being at least, it appears that the investment limitations on managed funds are so constrained that managed fund investments will need to be tailored to meet the complying investment requirements.

The introduction of the visa provides

an opportunity for financial advisers to assist applicants meet the complying investment requirements and provide ongoing investment advice to visa holders. However, it is important for advisers to be aware of the issues associated with giving advice to prospective investors including overseas financial services marketing and taxation laws.

*David Shirlow and Stephanie Lee are employed by Macquarie Adviser Services.*