

CCIV regime to be introduced during 2018 – what property funds need to know

Treasury's Corporate Collective Investment Vehicle (CCIV) bill (*Treasury Laws Amendment (Corporate Collective Investment Vehicle) Act 2018*) is set to be passed by parliament this spring, ushering in a new investment structure relevant for both retail and wholesale unlisted property funds. The CCIV acts as an alternative to a Managed Investment Scheme (MIS), while also being appropriate for foreign investors.

A CCIV will technically be a new form of company – yet acting more as a hybrid between a MIS and a company, which may create some new complexities. There is no guidance yet for those interested in transitioning from a MIS to a CCIV.

CCIV introduces an opportunity for unlisted property funds to release new investment vehicles and attract foreign property investors, but it does come with a potentially greater compliance burden. Unfortunately, property funds were excluded from the Asia Regional Funds Passport, which was introduced alongside the CCIV bill. PFA hopes this will be reviewed in time.

Some key CCIV aspects which unlisted property funds need to know include:

CCIV structural requirements

A company may be registered as a CCIV only if:

- the company is a company limited by shares
- the company has a constitution
- the company has a corporate director (similar to the role of a responsible entity)

At least half of a retail CCIVs directors must be external directors, to protect retail clients

The constitution of a retail CCIV must make adequate provision for the following:

- the establishment of sub-funds, and classes of shares referable to sub-funds
- the method by which complaints made by members in relation to the CCIV are to be dealt with.

A CCIV must have at least one sub-fund at all times.

All retail CCIVs must have a depositary, but a depositary is optional for wholesale CCIV. There are requirements around depositaries for retail property funds. A depositary must be:

- a public company; or
- a foreign company registered under Division 2 of Part 5B.2; and
- must hold an Australian financial services licence authorising it to act as a depositary

Some key issues arising from the CCIV structure includes how sub-funds are to be managed, and issues around corporate directors, depositaries, and compliance.

Issues around sub-funds

CCIVs are allowed to operate various sub-funds, immediately setting the new regime apart from the MIS structure, which forbids multiple sub-funds under a single MIS.

CCIVs must operate at least one sub-fund at any given time, and all sub-funds need to be registered with ASIC.

There are rules designed to protect each sub-fund's distinct investment activity (with its own assets portfolio and investment objectives) from the investment activities carried on by the other sub-funds of the CCIV. For example, a sub-fund's assets may only be applied for a specified purpose – a single asset of a CCIV cannot be an asset of more than one sub-fund in the CCIV. And the assets of different sub-funds must not be applied jointly to acquire a single asset.

The rules regarding liabilities states corporate directors must ensure any sub-fund liabilities are clearly identified for that sub-fund.

Things can become more complex when we consider liabilities which do not solely relate to one sub-fund. This circumstance requires the corporate director to allocate a proportion of the liability that is "fair and reasonable" in the circumstances, reflecting the extent to which the liability relates to the business of the sub-fund.

Issues around corporate directors

All CCIVs are required to have a corporate director, which is similar to a responsible entity. The corporate director must be a public company that holds an Australian financial services licence authorising it to operate the business and conduct the affairs of the CCIV.

A CCIV must not have any directors other than the corporate director.

If members of a CCIV want to remove the corporate director, they may act under Division 1 of Part 2G.4 by calling a members' meeting to consider and vote on a special resolution that the current corporate director should be removed, and a special resolution choosing a company to be the new corporate director.

Issues around depositaries

A retail CCIV must have a depositary, which holds the assets on trust for the CCIV. CCIVs must transfer assets to the depositary immediately after they are acquired. A CCIV is not allowed more than one depositary and corporate directors must notify ASIC when a new depositary is first appointed.

Wholesale CCIVs may also have a depositary, but it is optional. Given the additional legal and compliance requirements around having a depositary, and the likely cost implications, it is unlikely wholesale CCIVs will rush to appoint depositaries.

A depositary has a responsibility to supervise and ensure the CCIVs activities meet its constitution and the requirements of the Act. This includes an obligation to report any breaches to ASIC. However, depositaries must also provide "reasonable assistance" to a CCIVs corporate director.

If the corporate director wishes to remove a depositary from a CCIV the director may call a meeting of the CCIV's members to vote on: a special resolution that the depositary should be removed; and a special resolution choosing a body to be the new depositary.

CCIV members may also remove a depositary by also calling a meeting and voting on similar special resolutions.

Additional compliance for retail funds

The compliance demands for CCIVs are set to be a contentious and costly issue, with considerable demands and some "grey areas" which may prove challenging.

All retail CCIVs must have a "compliance plan", and must lodge a copy of the compliance plan with ASIC together with the application to register the company as a CCIV. The copy must be signed by all the directors of the corporate director.

The compliance plan must set out adequate measures for the corporate director to fulfil its responsibilities to the Act and the CCIV's constitution.

The corporate director of a CCIV may modify the CCIV's compliance plan or repeal it and replace it with a new compliance plan. The corporate director must lodge a copy of any modifications or any new compliance plan with ASIC within 14 days after the modification is made or the old plan is repealed. The copy must be signed by all the directors of the corporate director.

Auditing the compliance plan: A CCIVs corporate director must ensure a registered company auditor, an audit firm, or an authorised audit company, is engaged to audit compliance with the CCIV's compliance plan at all times.

Auditors must examine the CCIV's compliance plan and conduct an audit within three months of the end of the financial year for a CCIV.

Compliance plan auditors have right of access at all reasonable times to the books of the CCIV; and may require an officer of the corporate director to give the auditor information and explanations for the purposes of the audit.

An officer of the corporate director must allow the compliance plan auditor to have access to the books of the CCIV; and give the auditor information or explanations required, and otherwise assist the conduct of the audit.

The corporate director must lodge the auditor's report with ASIC at the same time as the financial statements and reports in respect of the CCIV are to be lodged with ASIC

If a CCIV changes its auditor the corporate director must, within seven days and in writing, ask ASIC to alter the record of the CCIV's registration to show the name of the new auditor as the auditor of the CCIV's compliance plan.