



# The proposed Corporate Collective Investment Vehicle Regime

## Introduction

On 25 August 2017 the Federal Government released the draft *Treasury Laws Amendment (Corporate Collective Investment Vehicle) Bill 2017* (Bill) which proposes the creation of a new type of collective investment vehicle designed to be marketed to foreign investors. The Bill will insert a new chapter to the Corporations Act to create and regulate a corporate collective investment vehicle (CCIV).

The changes will ultimately implement recommendations from the Australian Financial Centre Forum's *Australia as a Financial Centre: Building on our Strengths* report from November 2009, creating a corporate fund structure similar to those popular throughout Europe and Asia.

The draft Explanatory Materials provide that aligning Australia's regulatory framework with international regimes will likely lower the barriers to entry for new funds managers seeking to operate in Australia. Also, as a result, it will help create a more cohesive regional managed funds industry and increase the competitiveness of Australia's financial sector generally.

As Australia has the largest funds management industry in the Asia-Pacific region and the sixth largest in the world, it is well poised to export financial services to the growing middle class in the Asia-

Pacific region. The introduction of the CCIV will also expedite the effort to align Australia's funds management industry with the rest of the world.

The Bill is said to be modelled on the UK's open-ended investment company legislation. The CCIV is a hybrid structure combining regulatory regimes of a managed investment scheme and a company with share capital.

## Key features of the CCIV regulatory framework

- A CCIV must be a company limited by shares and must have a corporate director (CD) (similar to the role of a responsible entity).
- A CD must be a public company which holds an Australian financial services licence authorising it to operate a CCIV. It will have its own board of directors – a majority of the directors are required to be external directors.
- On the other hand, a CCIV must not have individual directors as it is a passive investment vehicle as opposed to an active business operated by directors.
- A CCIV will be classified as either retail or wholesale, with different tests and requirements for each.
- A CCIV must have at least one sub-

fund at all times.

- A CCIV may be open or closed-ended.
- A CCIV must have a constitution (different requirements apply for retail and wholesale).
- If one investor in the CCIV is a retail investor, then the CCIV is Retail CCIV.
- A Retail CCIV must have a compliance plan.
- A Retail CCIV must have a depositary (optional for wholesale CCIVs). The depositary holds the assets of the CCIV on trust for the CCIV.

## Key issues of the CCIV regulatory framework open to debate

While the legislative reforms to introduce a CCIV have been greeted with enthusiasm, there are some issues which may render the CCIV less commercial or desirable. Set out below are some of these issues that the Government will no doubt consider in more detail before it finalises the Bill.

### (a) New requirements in relation to Wholesale CCIV

Under the Bill, a Wholesale CCIV is required to comply with a number of new requirements which a wholesale MIS in the current regulatory framework is not subject to. For example, while a wholesale



MIS does not have to be registered with ASIC, a Wholesale CCIV is required to be registered with ASIC. As part of the registration process, it will also have to lodge its constitution with ASIC. While a trustee of a wholesale MIS can be a proprietary company with AFSL, the CD of a Wholesale CCIV must be a public company with AFSL. A majority of the directors of the CD are required to be external directors.

Under the Corporations Act, a wholesale MIS is not required to be registered as its offer would not require a product disclosure statement. In contrast, the Bill does not provide such an exemption. Nor does it have the numerical threshold of 20 retail investors, which means a CCIV with only one retail client will make the CCIV a Retail CCIV which is subject to significantly more regulatory requirements.

The Bill also requires a CD to be liable for the actions of its agents and sub-agents with no distinction between Retail CCIVs and Wholesale CCIVs (similar to the responsibility of responsible entities for the actions of their agents that currently applies under Chapter 5C of the Corporations Act).

Also it appears that there is an unintended outcome that where a CD is a CD for a Retail CCIV and a Wholesale CCIV, that the Wholesale CCIV will be a Retail CCIV as the CD is in the business of promoting CCIVs to retail clients.

These new requirements will inevitably result in higher costs for establishing and maintaining a Wholesale CCIV than operating a wholesale MIS in the current regime.

## (b) Depositary

A depositary (depositary) is a mandatory requirement for a Retail CCIV in the Bill. A depositary is similarly required under the UCITS regime which is well understood and a popular investment vehicle in the Asian region. That being said, some of legal requirements in the Bill applicable to a depositary are so onerous as to have significant cost implications for the operation of a CCIV.

**Replacement** – Unlike a custodian appointed and removed by a responsible

entity of MIS, a depositary cannot be removed by the CD and can only be replaced by a special resolution at a general meeting of members.

**Independence Tests** – Under the Bill, a depositary is required to satisfy all of the following three statutory independence tests:

**Conflict of interest test** is not met if a director or officer of the CD of the CCIV, or any associate of a director of the CD:

- is a director, officer or employee of the depositary
- is in a position to control more than 0.5% of the maximum number of votes that could be cast at a general meeting of the depositary
- has any other relationship with the depositary which might reasonably be expected to give rise to a potential conflict of interest.

**20% voting power test** is not met if:

- the CD's voting power in the depositary exceeds 20% or
- the depositary's voting power in the CCIV, CD or a class or classes of shares in the CD exceeds 20%.

**Control test** is not met if the depositary controls the CD.

These independence tests will likely be problematic for current independent outsourced responsible entities that may have a related entity providing custody services to their schemes.

**Statutory duties to oversee CD** – a depositary will be subject to a number of statutory duties. For example, a depositary is required to ensure that the CD conducts activities in respect of capital management, valuation and allocations of assets/liabilities in a manner that complies with the constitution and the Corporations Act.

The three independence tests seem to be a significant departure from comparable international regulatory regimes and also extremely onerous. Also, the legal requirement imposed on a depositary to ensure the CD's instructions and

conducts are lawful and compliant with the constitution will result in delays and added costs as the depositary will need to undertake its due diligence or verification on the CD's instructions and activities before it performs its activities.

Given the smaller size of Australia's fund industry and also the number of entities that will be able to act as a depositary, these burdensome requirements will potentially lessen competition and add costs.

## Sub-fund

The existing regime does not allow multiple funds to operate under a single MIS without giving rise to a concern about whether such funds established under an overarching MIS may constitute a separate MIS and therefore need to be registered with ASIC. In contrast, the Bill allows sub-funds to be established under a single CCIV with a separate set of assets and liabilities.

A CCIV must have at least one sub-fund at all times. Although a sub-fund does not have a separate legal personality, the assets of liabilities of the CCIV must be allocated to a sub-fund of the CCIV. The assets of a sub-fund must not be used to meet the liabilities or expenses of other sub-funds. This segregation of sub-funds is intended to protect investors in a sub-fund from investment results of other sub-funds.

As is the case for the existing MIS regime, a sub-fund can have classes. Several classes of shares may be referable to the same sub-fund although every share in a CCIV must be referable to only one sub-fund. A holder of a share in a particular sub-fund will be a member of that particular sub-fund as well as a member of the CCIV.

The operation of sub-funds is expected to produce economies of scale and costs savings for funds managers. However, there appear to be some issues which may give rise to uncertainty and unfairness among investors.

- **Prohibition on cross investments**
  - The Bill prohibits the CD from allocating an asset to more than one sub-fund which results in prevention



of 'joint investments' in a single asset by multiple sub-funds of the same CCIV. The EM of the Bill explains that this is not intended to prevent multiple sub-funds of a CCIV from investing in a single physical asset through another investment vehicle such as a trust, provided that each sub-fund's interest is separately identified and transferable. This prohibition seems to arise from the Bill's strict allocation rules which require the CD to allocate the assets or liabilities to a separate sub-fund to ensure the segregation of assets and liabilities of each sub-fund. However, the benefits of a strict application of the segregation are not clear, especially considering investing in a single asset is allowed through another vehicle such as a trust or other ownership arrangement. It should be possible to separately identify interests of sub-funds investing in the same asset.

- **Allocation of liabilities** – The Bill contradictorily requires that a CD must

not allocate a liability to more than one sub-fund while at the same time providing that where a liability has not been allocated solely to a sub-fund then it is to be allocated in a manner that is fair and reasonable in the circumstances.

- **Voting by sub-fund shareholders** – Currently, the Bill does not contemplate a possibility of a sub-fund shareholders voting for a particular issue that affects the sub-fund shareholders only (for example changing a constitution affecting the sub-fund or a winding-up of the sub-fund). However, where appropriate, the shareholders of a sub-fund should be able to determine how the sub-fund operates without having to convene a meeting of all the shareholders in the CCIV.

#### (d) Share capital

The management of share capital is where laws relating to companies clash with laws relating to investment vehicles.

One particular feature of open-ended investment fund is that it provides a right to withdraw from the fund in certain circumstances. On the other hand, a company has share capital which needs to be preserved under the doctrine of the maintenance of share capital. In broad terms, the types of capital reduction which are regulated under the Corporations Act are share capital reductions, share buy-backs, self-acquisitions and financial assistance by a company to acquire its own shares.

Reflecting that a CCIV is intended to operate as a passive investment vehicle rather than carrying on active businesses, the Bill takes a more flexible approach to the circumstances in which a CCIV can reduce its capital by switching off parts of the Corporations Act irrelevant to an investment vehicle.

Comparisons between managed investment scheme and corporate collective investment vehicle

## Comparisons between managed investment scheme and corporate collective investment vehicle

Regulatory requirements	Managed Investment Scheme (MIS)	Corporate Collective Investment Vehicle (CCIV)	
		Retail CCIV	Wholesale CCIV
<b>Definition</b>	<p>MIS is a scheme where:</p> <ul style="list-style-type: none"> <li>• contribution to acquire rights to benefits</li> <li>• the contributions are to be pooled or used in a common enterprise and</li> <li>• the members have no day-to-day control over the scheme.</li> </ul>	<p>CCIV is a company limited by shares which must:</p> <ul style="list-style-type: none"> <li>• be registered as a CCIV under the Corporations Act</li> <li>• have a single corporate director which is a public company holding AFSL and authorised to operate a CCIV</li> <li>• not have any officers or employees other than the corporate director</li> <li>• have at least one sub-fund at all times and</li> <li>• have a constitution</li> </ul>	
<b>Registration with ASIC</b>	<p>Yes, registration required if the MIS:</p> <ul style="list-style-type: none"> <li>• involves more than 20 investors or</li> <li>• was promoted by a person in the business of promoting MIS.</li> </ul>	Yes, but no numerical threshold (20 investors) and if there is one retail client, a registration is required.	Yes, registration is required. Wholesale CCIV is CCIV that does not have a retail client.



Regulatory requirements	Managed Investment Scheme (MIS)	Corporate Collective Investment Vehicle (CCIV)	
		Retail CCIV	Wholesale CCIV
<b>Legal status</b>	MIS is not a legal entity	Retail CCIV is a legal entity.	Wholesale CCIV is a legal entity
<b>Registration with ASIC</b>	Yes, registration required if the MIS: <ul style="list-style-type: none"> <li>involves more than 20 investors or</li> <li>was promoted by a person in the business of promoting MIS.</li> </ul>	Yes, but no numerical threshold (20 investors) and if there is one retail client, a registration is required.	Yes, registration is required.  Wholesale CCIV is CCIV that does not have a retail client.
<b>Name of the operator</b>	Registered Schemes - Mandatory to appoint a Responsible Entity (RE)  Wholesale Schemes - generally a trustee	Mandatory to appoint a Corporate Director (CD) with a board of the directors, with a majority that are external  BUT, the CCIV does NOT have natural person directors	
<b>Eligibility</b>	Registered schemes - Public company holding an AFSL authorising it to operate the MIS  Wholesale schemes - Public or proprietary company holding an AFSL authorising it to operate the MIS	Public company holding an AFSL authorising it to operate a CCIV	
<b>Statutory duties</b>	Registered schemes - Yes. To act honestly, etc (s601FC)  The RE's officers and employees are also subject to similar statutory duties (ss601FD and 601FE).  Unregistered schemes - No	Yes - duties owed by the CD and its officers and employees (similar to ss601FC, 601FD and 601E with some additional duties)	No statutory duties owed by the CD of a Wholesale CCIV - investors in a Wholesale CCIV should be able to negotiate flexible arrangements.
<b>Liability</b>	Registered Schemes - Yes To the members for breach of its duties (including the acts of its agent)  Unregistered Schemes - No	To the CCIV for breach of its duties (including the acts of its agent)	
<b>Retirement or removal</b>	Registered Schemes - RE may retire (be removed) if a meeting of members choose another RE by extraordinary resolution (s601FL and s601FM)  Wholesale scheme - as set out in the trust deed	Yes, similar to s601FL and s601FM  Members' meetings will be able to be held at both the CCIV and the sub-fund level.	



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		Retail CCIV	Wholesale CCIV
Depository (or Custodian)			
Depository or Custodian required	Not mandatory.	Mandatory.  Assets of a Retail CCIV must only be held on trust by a depository.  Depository must be a public company or a registered foreign company with AFSL.	Not mandatory, but may choose to have a depository.
Statutory duties	No statutory duties.	Yes - three core duties <ul style="list-style-type: none"><li>To hold the assets of the CCIV on trust for the CCIV.</li><li>To execute the instructions of the CD in dealing with those assets.</li><li>To supervise the CD's certain activities.</li></ul>	
Constitution			
Constitution required	Registered Scheme - Yes. Must have a constitution, and the constitution must make adequate provision for certain matters (s601GA).  Wholesale scheme - No	Yes. The constitution must: <ul style="list-style-type: none"><li>be lodged with ASIC</li><li>be a statutory contract between the CCIV, each member and the corporate director and</li><li>make provision for certain matters (similar to s601GA).</li></ul>	Yes. Must have a constitution (a statutory contract as is the case for the Retail CCIV) to be lodged with ASIC but no prescribed contents.
Changing the constitution	Registered Scheme -Can be changed by special resolution of the members or by RE if the changes will not adversely affect members' rights (s601GC)  Wholesale Scheme - As set out in the trust deed	Can be changed by special resolution of the members or by the corporate director if the changes will not adversely affect members' rights (similar to s601GC)	



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Compliance plan			
Compliance plan Required	Registered Scheme - Yes - need to be lodged with ASIC  Wholesale schemes - No  Prescribed content requirements in s601HA	Yes - need to be lodged with ASIC  No prescribed content requirements in order to improve administrative efficiency and reduce cost to members	No, not required
Compliance plan audit requirement	Registered Scheme - Yes - carry out an annual audit of the RE's compliance with the compliance plan  Wholesale Scheme - N/A	Yes - carry out an annual audit of the CD's compliance with the compliance plan	N/A
Auditor	Registered Scheme - Cannot be an associate of the RE, an agent holding the scheme property, or the auditor of the RE's financial statement (s601HG)  Wholesale Scheme - N/A	Similar requirements to s601HG	N/A
Compliance Committee			
Compliance committee Required	Yes, where less than half of the directors of RE are not external directors.	No - but, half of the directors of the CD must be external directors.	No - but, half of the directors of the CD must be external directors.
Sub-Fund			
At least one sub-fund	No sub-fund is required.	Yes - must have at least one sub-fund at all times which has a unique name and identifies the class or classes of shares that are referable to the sub-fund.  A class of shares is referable to a sub-fund of a CCIV if the rights attached to every share in the class are restricted to rights in respect of the assets of the sub-fund.  Yes	
Legal personality		No - A sub-fund is not a separate legal entity	
ASIC registration		Sub-funds are not individually registered with ASIC. However, ASIC must be notified when a sub-fund is established.	
Segregation of assets and liabilities		The assets and liabilities of a CCIV must be allocated to a sub-fund of the CCIV. Assets of sub-funds must be held separately from the assets of other sub-funds and must not be used to meet the liabilities or expenses of other sub-funds.	



Regulatory requirements	Managed Investment Scheme (MIS)	Corporate Collective Investment Vehicle (CCIV)	
		Retail CCIV	Wholesale CCIV
Allocation of CCIV assets to sub-funds		Although a sub-fund is not a legal entity and therefore does not own assets in its own name, assets of a CCIV are deemed to also be ‘assets of the sub-fund’ to which the assets are allocated.  The CD has a responsibility to allocate assets and liabilities to sub-funds. No assets are to remain outside of sub-funds as unallocated assets.	
Application of assets of sub-funds		A CCIV must not apply or deal with assets of a sub-fund except for specified purposes.	
Share capital			
Share capital required	No	Yes - CCIV is a company limited by shares and therefore it will have share capital.	Yes
Capital reduction other than share redemption	N/A for MIS	Yes - subject to conditions - more flexible than a company as CCIV is a passive investment. (Chapter 2J of the Corporations Act doesn’t apply)	Yes - subject to conditions
Redemption / Withdrawal			
Redemption of redeemable shares	N/A	Part 2H.2 does not apply to CCIVs.  Both Retail and Wholesale CCIVs are permitted to apply assets of a sub-fund for the purpose of redeeming redeemable shares in the sub-fund. On redemption, the shares are cancelled.  CCIV may redeem shares only if: <ul style="list-style-type: none"><li>the shares to be redeemed are fully paid-up</li><li>the share are redeemed at the option of a member of the CCIV and</li><li>each sub-fund to which the shares are referable is solvent immediately before the redemption and will not be insolvent immediately after the redemption.</li></ul>	
Redemption	Members of MIS do not have a right to redemption.  However, if they have a redemption right, it must be set out in the constitution.	In addition to the three requirements above, Retail CCIV may redeem shares only if: <ul style="list-style-type: none"><li>the redemption is conducted according to the terms on which the shares are on issue</li><li>the redemption is permitted by the constitution.</li></ul>	



Regulatory requirements	Managed Investment Scheme (MIS)	Corporate Collective Investment Vehicle (CCIV)	
		Retail CCIV	Wholesale CCIV
<b>Winding-up</b>			
<b>Winding-up</b>	<p>The Constitution must make adequate provision for adequate winding-up procedures.</p> <p>No voluntary administration.</p> <p>No procedures for the winding up of the common enterprise MIS.</p>	Draft provisions still under development	Draft provisions still under development

## Taxation of CCIVs

On 20 December 2017 Treasury released draft consultation material with respect to the taxation framework for CCIV. The policy intent of the CCIV is to establish a new form of passive investment vehicle, providing broad alignment with the attribution tax regime for managed investment trusts. The consultation closes on 2 February 2018.

An update on the consultation material for the taxation of CCIVs will follow shortly.

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