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TREASURY LAWS AMENDMENT (CORPORATE COLLECTIVE INVESTMENT  
VEHICLE) BILL 2017

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EXPOSURE DRAFT EXPLANATORY MATERIALS



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## ***Glossary***

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The following abbreviations and acronyms are used throughout these explanatory materials.

<b><i>Abbreviation</i></b>	<b><i>Definition</i></b>
AFSL	Australian financial services licence
AMIT	Attribution managed investment trust
ASIC	Australian Securities and Investment Commission
CIV	Collective investment vehicle
CCIV	Corporate collective investment vehicle A reference to 'CCIV' in the explanatory materials is a reference to both retail and wholesale CCIVs unless otherwise specified.
ITAA 1997	<i>Income Tax Assessment Act 1997</i>
MIS	Managed investment scheme
OEIC	A company that is an Open-Ended Investment Company regulated under legislation of the United Kingdom.
PDS	Product disclosure statement
The Act	<i>Corporations Act 2001</i>
The Bill	Exposure draft of the <i>Treasury Laws Amendment (Corporate Collective Investment Vehicle) Bill 2017</i>
UCITS fund	A collective investment vehicle that complies with the Undertakings for Collective Investment in Transferable Securities (UCITS) Directive (a regulatory framework adopted by the European Union).



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# **Chapter 1**

## **Introduction**

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### **Outline of chapter**

1.1 The exposure draft of the *Treasury Laws Amendment (Corporate Collective Investment Vehicle) Bill 2017* (the Bill) inserts Chapter 7A into the *Corporations Act 2001* (the Act). Chapter 7A establishes the regulatory framework for corporate collective investment vehicles (CCIVs).

1.2 This chapter of the explanatory materials discusses the policy context for the establishment of CCIVs and provides an overview of the regulatory framework.

### **Context of amendments**

#### **History**

1.3 In November 2009, the Australian Financial Centre Forum released the *Australia as a Financial Centre: Building on our Strengths* report (the Johnson report). The Johnson report made a number of policy recommendations aimed at increasing Australia's cross-border trade in financial services and improving the competitiveness and efficiency of the financial sector.

1.4 In relation to funds management, the Johnson report recommended the establishment of an Investment Manager Regime (IMR), the introduction of the Asia Region Funds Passport (Passport), and the development of new collective investment vehicles (CIVs).

1.5 The IMR improves Australia's competitiveness as a financial centre by clarifying that investments by non-residents in foreign assets will be generally exempt from tax in Australia. The IMR generally applies from the 2015-16 income year.

1.6 The Passport will provide a multilateral framework which allows eligible funds to be marketed across member countries, with limited extra regulatory requirements. The Passport is intended to support

the development of an Asia-wide managed funds industry through improved market access and regulatory harmonisation.

1.7 The Johnson report also identified Australia's need for a CIV that provides flow-through tax treatment, maintains investor protection, and is more internationally recognisable than the managed investment scheme (Australia's current trust-based CIV). In order to address this gap, the report recommended that the Board of Taxation review the scope for providing a broader range of CIVs that would be subject to flow-through taxation.

1.8 The Government accepted this recommendation and the subsequent *Review of Tax Arrangements Applying to Collective Investment Vehicles* was released by the Board of Taxation in December 2011. The review recommended the creation of new CIVs which provide tax neutral outcomes for investors. The report also recommended that overseas experience in offshore jurisdictions, such as Ireland and Luxembourg, inform the design of the new CIVs.

1.9 In the 2016-17 Budget, as part of the Ten Year Enterprise Tax Plan, the Government announced it would introduce tax and regulatory frameworks for two new types of CIVs, the CCIV and the limited partnership CIV. This Bill establishes the regulatory framework for CCIVs.

## **Policy objectives**

1.10 In developing the CCIV framework, a key policy objective has been to increase the competitiveness of Australia's managed fund industry through the introduction of internationally recognisable investment products.

1.11 To this end, the Government has analysed the regulatory regimes of leading fund domiciles, target export markets, and major financial centres in our region. European economies are the most common global domiciles for cross-border funds management. Funds managed in Europe are subject to the Undertakings for Collective Investment in Transferable Securities (UCITS) Directive and operate with a corporate structure.

1.12 Currently, Australian funds management is generally conducted through a managed investment scheme (MIS), which has a trust-based structure. Like UCITS funds, CCIVs will operate with a corporate structure, meaning they will have the legal form of a company limited by shares with most of the powers, rights, duties and characteristics of a public company.



1.13 The introduction of the CCIV is also intended to support the establishment of the Passport as it will provide Australian fund managers with a vehicle that is compliant with Passport requirements and is similar to the European-style corporate funds already popular in parts of Asia.

1.14 The legislation also advances the more general objective of global regulatory alignment. The introduction of the CCIV advances this objective by helping to create a cohesive regional managed funds industry and facilitate more efficient participation in the global market-place.

1.15 Aligning Australia's regulatory framework with well-developed international regimes will lower the barriers to entry for new fund managers seeking to operate in Australia. This will increase competition and allow Australian consumers greater product choice, including exposure to new asset classes. The legislation will also lower barriers to entry for service providers, such as providers of depositary services. Making it easier for entities presently offering depositary services in other countries to apply their existing business practices will encourage them to offer services in Australia, either through existing subsidiaries or by newly entering the market.

1.16 By introducing regulatory structures that are similar to overseas regimes, the legislation should also make substituted compliance processes simpler for Australian fund managers seeking to offer products overseas.

## **Regulatory framework**

1.17 The CCIV regulatory framework utilises a conventional company limited by shares but is modelled on the United Kingdom's Open-Ended Investment Companies (OEIC) regime so that it is recognisable to offshore investors and fund managers.

1.18 As a company, a CCIV will generally be subject to the ordinary company rules under the Act unless otherwise specified. However, features of the MIS regime have also been incorporated into the design of CCIVs to the extent that they are consistent with the policy objective. In doing so, regulatory parity is maintained (to the extent possible) between the existing MIS framework and the CCIV framework. This will ensure efficient operation of the domestic funds management industry and ease of transition for fund managers wishing to migrate members from a MIS to a CCIV.

1.19 For example, a CCIV must have share capital but the CCIV can issue some or all of its shares as shares redeemable at the member's option. This feature is similar to a member's right to withdraw from a

registered scheme. Further, while other types of companies are required to appoint natural person directors, a CCIV must have a single corporate director, which is consistent with the OEIC model and also similar to the responsible entity of a registered scheme.

1.20 The CCIV framework retains and expands the retail investor protections of a registered scheme while also replicating the flexibility and light touch regulatory philosophy applying to wholesale MISs. This reflects that sophisticated investors are better able to negotiate bespoke contractual protections and assess investment risks than retail investors.

#### *Flow-through taxation*

1.21 The taxation arrangements applying to Attribution Managed Investment Trusts (AMITs) will be extended to CCIVs, subject to meeting certain eligibility criteria. Exposure draft legislation addressing the taxation treatment of CCIVs will be released at a later date.

### **Note on consequential amendments**

1.22 This exposure draft of the Bill contains the core features of the CCIV regulatory framework.

1.23 Consequential amendments will be required to allow any person interacting with a CCIV (as well as Courts and regulators) to have clarity as to which other parts of the Act and other laws apply to a CCIV or which have been modified because it is a company limited by shares but operating as a collective for passive investment purposes.

1.24 An exposure draft of the consequential amendments will be released for consultation in the coming months.

1.25 The intended approach includes:

- developing an insolvency regime which may include features of Chapter 5; and
- generally applying the provisions of Chapter 6 and Chapter 7 to retail CCIVs.

1.26 Penalties (and related matters) for breaches of provisions in Chapter 7A are still under consideration and will be included in the next exposure draft of the Bill.

## **Summary of new law**

1.27 The list below sets out the core features of the regulatory framework for CCIVs.

- A company may register as a CCIV if the company is a company limited by shares and operated by a single corporate director.
- The corporate director must be a public company that holds an Australian financial services licence (AFSL) authorising it to operate a CCIV.
- A CCIV must not have any officers or employees other than the corporate director.
- The corporate director owes duties to the members of the CCIV and these duties will take precedence over the duties the corporate director owes to its own shareholders.
- 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 that includes certain prescribed content requirements if the CCIV is a retail CCIV. A retail CCIV must also have a compliance plan.
- A retail CCIV must have a depositary that holds the assets of the CCIV on trust for the CCIV and supervises certain aspects of the corporate director's responsibilities for the benefit of members. A wholesale CCIV may choose to have a depositary.
- The corporate director or depositary may appoint an agent or otherwise engage a person to do anything it is authorised to do in connection with the CCIV (except for the depositary's supervisory role over the corporate director).
- A retail CCIV is subject to the full regulatory framework for CCIVs whereas a wholesale CCIV is subject to minimal requirements.

1.28 The Appendix contains a diagram that demonstrates the full regulatory framework as it applies to retail CCIVs.

## **Object and outline of new Chapter**

1.29 Part 1 of Chapter 7A sets out the objects and simplified outline of the Chapter.

1.30 The objects of Chapter 7A are to establish a regulatory framework for forming and operating CCIVs in a way that is fair, efficient and competitive, and which complements the retail investor protection rules in Chapter 7 of the Act to promote confident and informed investors in CCIVs. *[Schedule 1, Part 1, item 1, section 1136]*

1.31 The simplified outline of Chapter 7A shows how the Chapter is structured. Part 2 establishes rules governing the internal structure and operation of CCIVs and Part 3 sets out additional protections applicable to retail CCIVs. *[Schedule 1, Part 1, item 1, section 1136A]*

1.32 The chapter outline also provides that a CCIV is a type of company limited by shares and draws attention to the particular taxation arrangements applying to CCIVs. *[Schedule 1, Part 1, item 1, section 1136A]*

1.33 The taxation arrangements applying to attribution managed investment trusts (AMITs), contained in Division 276 of the *Income Tax Assessment Act 1997* (ITAA 1997), will be extended to CCIVs, subject to meeting certain requirements including widely held requirements, not closely held requirements and restrictions on carrying on an active business. These requirements will operate alongside the regulatory requirements contained in Chapter 7A. The Government will consult separately on the proposed taxation arrangements for CCIVs.

1.34 Legislative references in these explanatory materials are to the *Corporations Act 2001* unless otherwise specified.

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## **Chapter 2**

### ***Basic features of a CCIV***

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#### **Outline of chapter**

2.1 Schedule 1 to the Bill inserts Chapter 7A into the Act to establish the regulatory framework for CCIVs.

2.2 This chapter of the explanatory materials outlines the basic features of a CCIV, including the:

- basic requirements to register as a CCIV;
- difference between retail CCIVs and wholesale CCIVs;
- requirement that a CCIV must have a constitution and that a retail CCIV's constitution must make provision for certain matters; and
- requirement that a retail CCIV must have a compliance plan.

#### **Detailed explanation of new law**

##### **A new type of company**

2.3 'Corporate collective investment vehicle', or 'CCIV', is defined as a company that is registered as a CCIV under the Act. Defining a CCIV in this way reflects the fact that registration as a CCIV is a voluntary election. *[Schedule 1, Part 2, item 3, the definitions of 'CCIV' and 'corporate collective investment vehicle' in section 9]*

2.4 As a CCIV is a company, it is included in the table of types of companies that are registrable under the Act in subsection 112(1). *[Schedule 1, Part 2, items 14 to 16, the table in subsection 112(1) and the notes to subsection 112(1)]*

##### ***Basic registration requirements***

2.5 A company may register as a CCIV if it satisfies the basic requirements for registration. These are that:

- the company is limited by shares; and

- the director of the company is a public company that holds an Australian financial services licence authorising it to operate a CCIV. *[Schedule 1, Part 1, item 1, subsection 1137(1)]*

2.6 A foreign company registered under Division 2 of Part 5B.2 may not be registered as a CCIV. *[Schedule 1, Part 1, item 1, subsection 1137(2)]*

### ***Process for registration***

2.7 The process for registering a CCIV is still under consideration and will be included in the next exposure draft of the Bill.

## **Application of CCIV regulatory framework to retail CCIVs and wholesale CCIVs**

2.8 The distinction between retail CCIVs and wholesale CCIVs is an important one. This is because retail CCIVs are subject to the full regulatory framework in Chapter 7A whereas wholesale CCIVs are subject to fewer requirements. While Parts 1 and 2 of Chapter 7A apply to both retail and wholesale CCIVs, Part 3 (which contains additional investor protections) generally does not apply to wholesale CCIVs. *[Schedule 1, Part 1, item 1, section 1154]*

2.9 This matches the general approach of the MIS regime under which only retail MIS are subject to the full regulatory requirements as registered schemes. Unlike the MIS regime, all CCIVs (including wholesale CCIVs) are required to be registered. It is intended that these regulatory requirements will be flexible and light-touch where appropriate, in conformity with existing policy settings for CIVs generally.

2.10 The table below sets out these differences.

**Table 2.1 Comparison of regulatory requirements for retail CCIVs and wholesale CCIVs**

<b>Regulatory requirement</b>	<b>Retail CCIV</b>	<b>Wholesale CCIV</b>
<b>Registration</b>	Yes	Yes
<b>Corporate director</b>	Yes. Must have a corporate director, and the corporate director (and officers and employees of the corporate director) owe specific statutory duties.	Yes. Must have a corporate director, but the corporate director (and officers and employees of the corporate director) do not owe specific statutory duties.

Regulatory requirement	Retail CCIV	Wholesale CCIV
Depository	Yes	No, but may choose to have a depository.
At least one sub-fund	Yes	Yes
Share capital	Yes	Yes, with some exemptions
Constitution	Yes. Must have a constitution, and the constitution must make adequate provision for certain matters.	Yes. Must have a constitution but no prescribed contents.
Compliance plan	Yes	No

***Meaning of ‘retail CCIV’ and ‘wholesale CCIV’***

2.11 A CCIV is deemed to be a wholesale CCIV if it does not meet the definition of a retail CCIV. *[Schedule 1, Parts 1 and 2, items 1 and 13, the definition of ‘wholesale CCIV’ in section 9 and subsection 1154A(1)]*

2.12 A CCIV is a retail CCIV if:

- it has a member who acquired one or more shares in the company as a retail client or an indirect retail client; or
- the CCIV was promoted by a professional promoter to a retail client.

*[Schedule 1, Parts 1 and 2, items 1 and 8, the definition of ‘retail CCIV’ in section 9 and subsections 1154A(2) and (3)]*

2.13 A member of a CCIV will be a retail client if they are a retail client within the meaning of Chapter 7. *[Schedule 1, Part 1, item 1, paragraphs 1154A(2)(b) and (3)(a)]*

2.14 Chapter 7 contains different tests for determining whether a person is a retail client depending on whether the product is a general insurance product, a superannuation and retirement savings account product, or any other kind of financial product.

2.15 A member will be an indirect retail client where the member acquires one or more shares in the company under a custodial

arrangement (within the meaning of section 1012IA) and the Act required the provider to give the member a Product Disclosure Statement (PDS) before the acquisition occurred. *[Schedule 1, Part 1, item 1, paragraph 1154A(3)(b)]*

2.16 Indirect retail clients are captured within the meaning of a retail CCIV so as to avoid a CCIV being treated as a wholesale CCIV (and being subject to a lighter regulatory framework) where they have no retail clients within the meaning of Chapter 7, but have acquired retail clients indirectly through custodial arrangements within the meaning of section 1012IA.

2.17 A CCIV is promoted by a professional promoter if it is promoted by a person (or an associate of a person) who was, at the time the CCIV was promoted, in the business of promoting CCIVs to persons who are currently or prospectively retail clients (within the meaning of Chapter 7). *[Schedule 1, Part 1, item 1, paragraph 1154A(2)(b)]*

2.18 This limb is intended to capture the situation where a person intends to sell shares in the CCIV to retail clients but has not yet done so. In this situation, the CCIV should be registered as a retail CCIV despite it not yet having any retail clients or indirect retail clients.

2.19 Importantly, this test is confined to a professional promoter to retail clients, rather than a professional promoter of CCIVs generally so that professional promoters of wholesale CCIVs are not so restricted.

2.20 Defining ‘retail CCIV’ and ‘wholesale CCIV’ is necessary as, unlike the MIS regime, all CCIVs must be registered irrespective of whether they are retail or wholesale.

2.21 The test for defining a retail CCIV is modelled on the test in section 601ED for determining when a MIS must be registered. However, some adjustments have been made to reflect the mandatory registration requirement for all CCIVs and to create a simpler test.

2.22 A key difference is that having one retail client is sufficient for a CCIV to be deemed a retail CCIV.

2.23 A further difference is that there is no numerical member threshold for registration as a CCIV. While the numerical test in section 601ED is useful for MISs where it is intended to exclude small funds from the requirement to register, it has less utility in the ‘opt-in’ CCIV regulatory framework where registration is mandatory for both retail and wholesale CCIVs.



2.24 In these explanatory materials, a reference to a ‘CCIV’ is a reference to both retail and wholesale CCIVs. Where a provision applies only to either a retail CCIV or a wholesale CCIV, this will be specified.

## **Constitution**

2.25 A CCIV must have a constitution and a copy of the constitution must be lodged with ASIC with the application to register the company as a CCIV. *[Schedule 1, Part 1, item 1, section 1137A]*

2.26 The constitution governs the internal operation of the CCIV and acts as a statutory contract between the CCIV, each member and the corporate director. The replaceable rules for companies contained in Part 2B.4 of the Act may not be adopted for a CCIV; the other requirements of Part 2B.4 concerning company constitutions do apply. *[Schedule 1, Part 2, item 17, subparagraph 135(1)(a)(i)].*

2.27 The content of constitutions of wholesale CCIVs are not prescribed, whereas constitutions of retail CCIVs must make adequate provision for:

- the consideration that is to be paid to acquire a share in the CCIV;
- the powers of the corporate director in relation to making investments of, or otherwise dealing with, assets of the CCIV; and
- the establishment of sub-funds, and classes of shares referable to sub-funds.

*[Schedule 1, Part 1, item 1, subsection 1155(1)]*

2.28 Further, if the corporate director of a retail CCIV is to have rights to be paid fees or be indemnified out of assets of a sub-fund of the CCIV, or the power to borrow or raise money for the purposes of the CCIV, then these rights and powers must be specified in the constitution. *[Schedule 1, Part 1, item 1, subsections 1155(2) and (3)]*

2.29 These requirements are based on the requirements for constitutions of registered schemes, contained in section 601GA. However, unlike section 601GA, a retail CCIV’s constitution does not need to set out a complaint resolution mechanism as this is adequately provided for by subsection 912A(2).

2.30 There is no equivalent provision to subsection 601GA(4) (winding up arrangements) as the external administration regime for

CCIVs will be prescribed by legislation. These provisions are still under development and will be consulted on as part of the next exposure draft of the Bill.

2.31 The constitution of a retail CCIV must also provide for redemption of share capital if all or some of the shares in the CCIV are redeemable at the member's option. This is further discussed at paragraph 5.47 below. *[Schedule 1, Part 1, item 1, section 1159]*

2.32 It is a duty of the corporate director of a retail CCIV to ensure that a retail CCIV's constitution meets the requirements of Part 2B.4 of the Act (to the extent they apply) and the specific requirements outlined at paragraphs 2.27 to 2.28. *[Schedule 1, Part 1, item 1, paragraph 1156(f)]*

### ***Changing the constitution***

2.33 The constitution of a CCIV may be modified, or repealed and replaced with a new constitution, by special resolution of the CCIV's members or by the corporate director. The corporate director may only change the constitution on its own initiative if it reasonably considers the change will not adversely affect members' rights. *[Schedule 1 Part 1, item 1, subsection 1155A(1)]*

2.34 The corporate director must lodge with ASIC a copy of the modification or the new constitution, which only takes effect upon lodgement. *[Schedule 1, Part 1, item 1, subsection 1155A(2)]*

2.35 These requirements are based on the requirements for changing the constitution of a registered scheme contained in section 601GC.

## **Compliance plan**

### ***Documenting the compliance plan for retail CCIVs***

2.36 A retail CCIV must have a compliance plan. *[Schedule 1, Part 1, item 1, section 1161]*.

2.37 A copy of the compliance plan must be lodged with ASIC with the application to register the company as a CCIV. The copy that is lodged with ASIC must be signed by all of the directors of the corporate director. *[Schedule 1, Part 1, item 1, sections 1161 and 1161C]*

2.38 The compliance plan must set out adequate measures to be applied by the corporate director in operating the CCIV to ensure compliance with the Act and that CCIV's constitution. *[Schedule 1, Part 1, item 1, section 1161A]*

2.39 The corporate director has a duty to ensure the adequacy of the CCIV's compliance plan and to comply with the compliance plan.

*[Schedule 1, Part 1, item 1, paragraphs 1156(g) and (h)]*

2.40 The corporate director's duty to ensure the adequacy of compliance measures is consistent with other jurisdictions. For example, UCITS funds must have adequate internal control mechanisms designed to secure compliance with decisions and procedures at all levels of the management company.

2.41 Unlike the compliance plan requirements for registered schemes contained in sections 601HA to 601HF, there are no prescribed content requirements for the compliance plans of retail CCIVs. This is intended to improve administrative efficiency and reduce cost to members through a more flexible and outcomes-focused approach.

2.42 The legislative requirements will be supported by ASIC guidance as to the content of compliance plans, including the need to identify non-compliance risks specific to the CCIV and measures for mitigating those risks, and that the compliance plan is tailored to suit the nature, scale, complexity and assets of the CCIV. An adequate compliance plan should be reasonably likely to allow potential breaches of the Act or the CCIV's constitution to be detected in advance.

2.43 The compliance plan forms a part of the overall compliance management system that the corporate director, as an AFSL holder, should implement to meet its obligations under section 912A.

2.44 Similar to the registered scheme requirements, if the corporate director is also the corporate director of another CCIV, it may lodge with ASIC a compliance plan for the CCIV that incorporates by reference elements of the compliance plan for the other CCIV. *[Schedule 1, Part 1, item 1, section 1161B]*

2.45 If this approach is adopted, ASIC may require the corporate director to lodge a consolidated copy of the CCIV's compliance plan that sets out the full text of provisions taken to be included in the plan.

*[Schedule 1, Part 1, item 1, section 1161F]*

2.46 ASIC may also direct (in writing) the corporate director of a CCIV to give it information about arrangements contained in the compliance plan. *[Schedule 1, Part 1, item 1, section 1161D]*

2.47 The corporate director of a CCIV may modify the CCIV's compliance plan or repeal and replace it. ASIC may also direct the corporate director to modify the CCIV's compliance plan. If the compliance plan is modified or replaced, the corporate director must lodge a copy of the modified or new compliance plan (signed by all the directors

of the corporate director) with ASIC within 14 days. *[Schedule 1, Part 1, item 1, section 1161E]*

2.48 In contrast to the requirements for registered schemes, there is no requirement for the corporate director of a retail CCIV to establish a compliance committee to provide oversight of the operations of the CCIV. Instead, at least half of the directors of the corporate director of a retail CCIV must be external directors. This applies generally in respect of all retail CCIVs and aligns with the circumstances in which a responsible entity of a registered scheme is relieved of the requirement to have a compliance committee under Part 5C.5. The requirement for the corporate director of a retail CCIV to have external directors is discussed in further detail at paragraphs 3.65 to 3.71.

### ***Auditing the compliance plan***

#### *The audit report*

2.49 The corporate director of a retail CCIV must engage an auditor to conduct an annual audit of the compliance plan and report whether, in the auditor's opinion, the corporate director has complied with the CCIV's compliance plan and that the plan continues to meet the requirements for compliance plans discussed above at paragraphs 2.36 to 2.48. The corporate director can also arrange for the auditor to carry out additional audits. *[Schedule 1, Part 1, item 1, subsections 1162(1) and (4), and 1162A(1)]*

2.50 The auditor of the compliance plan must be a registered company auditor, an audit firm or an authorised audit company and must not be:

- the corporate director (or an associate of the corporate director);
- the depositary (or an associate of the depositary);
- an agent holding assets of the CCIV on behalf of the depositary (or an associate of the agent); or
- the auditor of the corporate director's own statutory financial statements (however, in this instance only, the CCIV compliance plan auditor may be from the same audit firm as the auditor of the corporate director).

*[Schedule 1, Part 1, item 1, subsections 1162(1) to (3)]*

2.51 These requirements are designed to ensure the compliance plan auditor is independent of the corporate director.

2.52 The auditor of the compliance plan must be given right of access at all reasonable times to the books of the CCIV and assistance from officers of the corporate director. *[Schedule 1, Part 1, item 1, subsections 1162A(2) and (3)]*

2.53 The auditor's report of the compliance plan must be lodged with ASIC at the same time as the financial statements and reports of the CCIV. *[Schedule 1, Part 1, item 1, subsection 1162A(4)]*

2.54 The auditor of the compliance plan has qualified privilege in respect of statements made in the audit report. *[Schedule 1, Part 1, item 1, subsection 1162A(5)]*

2.55 The requirements for auditing the compliance plan of a retail CCIV are substantially similar to the requirements for compliance plans of registered schemes contained in section 601HG.

2.56 The compliance plan audit requirement ensures there is an independent, annual compliance review process to assist the corporate director and its officers in monitoring and managing compliance risks. This role is in addition to the depositary's oversight responsibility in respect of certain corporate director decisions. This parallels the UCITS regime in which the UCITS fund must have a management company with an internal audit function to evaluate the adequacy of its internal control mechanisms as well as a depositary.

#### *Changing the auditor*

2.57 The auditor of the compliance plan may be removed by the corporate director or may resign on its own initiative.

2.58 The corporate director must remove the auditor if it is no longer eligible to act as the auditor of the compliance plan and may remove the auditor for other reasons if ASIC consents to the removal. *[Schedule 1, Part 1, item 1, subsection 1162B(1)]*

2.59 The auditor may, by written application, resign subject to ASIC consenting to the resignation. ASIC must notify the auditor and the corporate director whether it consents to the auditor's resignation as soon as practicable after receiving the application. *[Schedule 1, Part 1, item 1, subsections 1162B(2) and (3)]*

2.60 To encourage proper disclosure of an auditor's reasons for resigning, a statement by the auditor in its application or in answer to an inquiry by ASIC concerning the reasons for its resignation cannot be used as evidence in civil or criminal proceedings or as the basis for prosecution, action or suit against the auditor (other than in respect of a contravention relating to false or misleading statements under section

1308). A certificate by ASIC that the statement was made in the auditor's application for resignation, or in answer to an inquiry by ASIC, is conclusive evidence that the statement was so made. *[Schedule 1, Part 1, item 1, subsection 1162B(4)]*

2.61 The day on which the auditor's resignation takes effect is either: the day specified in the notice of resignation; or the day ASIC consents to the resignation; or the day fixed by ASIC for the resignation. *[Schedule 1, Part 1, item 1, subsection 1162B(5)]*

2.62 If the auditor of the compliance plan changes, the corporate director must, within 7 days, write to ASIC asking it to alter the record of the CCIV's registration to show the name of the new auditor. ASIC must comply with the request if the change complies with the Act. *[Schedule 1, Part 1, item 1, section 1162C]*

2.63 These requirements are substantially similar to the requirements for changing the auditor of a compliance plan for a registered scheme in section 601HH.

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## **Chapter 3**

### **Corporate director**

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#### **Outline of chapter**

3.1 Division 2 of Part 2 of Chapter 7A establishes the legislative framework for the single corporate director of a CCIV.

3.2 Division 3 of Part 3 of Chapter 7A sets out the powers, duties and other requirements for the corporate director of a retail CCIV.

#### **Context of amendments**

3.3 The requirement for a CCIV to have a single corporate director draws on aspects of the United Kingdom's OEIC regime. OEICs may have either an authorised corporate director or a board of natural persons, but funds overwhelmingly choose to have an authorised corporate director for reasons of governance and cost-effectiveness.

3.4 A single corporate director model aligns with the existing responsible entity model for the operation of registered schemes and provides a simpler governance structure with clearer lines of responsibility than a board of individual directors.

3.5 The single corporate director must be a separate company to the CCIV. As the sole director, the corporate director will be responsible for both the governance and operation of the CCIV.

#### **Summary of new law**

3.6 Division 2 of Part 2 of Chapter 7A establishes the legislative framework for the single corporate director of a CCIV.

3.7 Subdivision A of Division 2 establishes the requirements of the single corporate director. That is, the basic requirements to be a corporate director and the powers of the corporate director.

3.8 Subdivision B of Division 2 sets out the rules for replacing the corporate director, whether by retirement or removal.

3.9 Division 3 of Part 3 of Chapter 7A sets out the duties owed by the corporate director of a retail CCIV, including by its officers and employees. It also requires at least half of the directors of the corporate director of a retail CCIV to be external directors. These requirements do not apply to the corporate director of a wholesale CCIV.

## **Detailed explanation of new law**

### **Requirement for single corporate director**

#### ***Basic requirements***

3.10 A CCIV must be operated by a single corporate director. The corporate director of a CCIV must be a public company that holds an Australian financial services licence authorising it to operate a CCIV. *[Schedule 1, Parts 1 and 2, items 1 and 3, the definition of ‘corporate director’ in section 9, and subsections 1138(1) and (2) and 1138A(1)]*

3.11 A foreign company registered under Division 2 of Part 5B.2 may not be the corporate director of a CCIV. *[Schedule 1, Part 1, item 1, subsection 1138(3)]* This restriction is merely declaratory of the existing law as a public company can only be registered under Chapter 2A or Part 5B.1.

3.12 The corporate director is the sole director of the CCIV and the CCIV must not have any other officers or employees. *[Schedule 1, Part 1, item 1, subsection 1137B]* This ensures that a CCIV does not undertake an active business.

3.13 The corporate director of a retail CCIV owes specific statutory duties that are discussed below at paragraphs 3.55 to 3.64.

#### ***Powers of corporate director***

3.14 The corporate director must operate the CCIV and perform the functions conferred on it by the CCIV’s constitution and the Act. *[Schedule 1, Part 1, item 1, subsection 1138A(1)]*

3.15 The corporate director may appoint an agent or otherwise engage a person to do anything it is authorised to do in connection with the CCIV. This allows the corporate director to engage specialist expertise to assist it in performing its functions. However, the agent or person must not be the depositary of the CCIV. *[Schedule 1, Part 1, item 1, subsection 1138A(2)]*

3.16 However, if the corporate director appoints an agent or otherwise engages a person, the corporate director still remains ultimately



liable to the CCIV, even if the agent or person acts fraudulently or outside the scope of the authority or engagement. *[Schedule 1, Part 1, item 1, paragraph 1138A(3)(a)]*

3.17 This means the corporate director is liable to the CCIV for any act or omission in relation to the affairs of the CCIV, and the onus is upon the corporate director to make good to the CCIV any losses suffered as a result of the conduct of persons engaged by the corporate director in relation to the CCIV. The corporate director may in turn seek to recover its costs from the agent or engaged person.

3.18 The acts or omissions of the appointed agent or engaged person are relevant in determining whether the corporate director of a retail CCIV has properly performed its duties and is able to be paid fees, or be indemnified for liabilities or expenses incurred, out of the assets of a sub-fund of the CCIV. *[Schedule 1, Part 1, item 1, paragraph 1138A(3)(b)]*

3.19 Any sub-agents appointed or otherwise engaged by an agent of the corporate director are to be treated as if they were themselves agents appointed by the corporate director. *[Schedule 1, Part 1, item 1, subsection 1138A(4)]*

3.20 The rules concerning agents and sub-agents of a corporate director are based on the rules for delegating the functions of a responsible entity of a registered scheme that are contained in subsections 601FB(2) and (3). This approach offers a higher level of investor protection than the delegation rules for other types of companies contained in section 190. It is required because the corporate director has sole responsibility for the actions of the CCIV and its compliance with the law.

### ***Officers of the CCIV and the corporate director***

3.21 A CCIV is specifically prohibited from having any directors other than the corporate director as well as any employees. A CCIV must also not have any officers other than the corporate director and a receiver, administrator, liquidator or a trustee or other person administering an arrangement between the CCIV and someone else. *[Schedule 1, Part 1, item 1, subsections 1137B(1) to (3)]*

3.22 The prohibition against the CCIV having officers or employees other than the corporate director ensures the CCIV only undertakes passive investment activities, rather than conducting active business through officers and employees. This is consistent with the requirements for receiving attribution tax treatment under the ITAA 1997.

## **Replacing the corporate director**

3.23 The corporate director of a CCIV must be replaced if the corporate director chooses to retire or is removed by the members of the CCIV. It is critical that a CCIV has a corporate director at all times because, without other officers or employees, the CCIV cannot operate and will have no governing mind.

3.24 In some circumstances the court may appoint a temporary corporate director. This will enable the CCIV to continue to operate until a permanent corporate director can be appointed by the members of the CCIV.

3.25 A company cannot be chosen or appointed as the corporate director or temporary corporate director of a CCIV unless it is a public company that holds an AFSL authorising it to operate a CCIV. *[Schedule 1, Parts 1 and 2, items 1 and 20, paragraph 766A(1)(da) and section 1139A]*

3.26 Any change of the CCIV's corporate director or temporary corporate director only takes effect when ASIC's record of registration is altered to name another company as the CCIV's corporate director or temporary corporate director and the change is in accordance with the rules described below in paragraphs 3.28 to 3.50. *[Schedule 1, Part 1, item 1, section 1139]*

3.27 The rules for replacing the corporate director of a CCIV by retirement or removal are described in detail below. They are based on the requirements to replace the responsible entity of a registered scheme in sections 601FJ to 601FT, with some modifications.

### ***Retirement of the corporate director***

3.28 A corporate director that wants to retire must call a member's meeting to explain its reason for wanting to retire and enable members to vote on a resolution to choose a company to be the new corporate director. The resolution must be an extraordinary resolution if the CCIV is not listed. *[Schedule 1, Part 1, item 1, subsection 1139B(1)]*

3.29 If the CCIV is listed, the resolution need only be an ordinary resolution, unless the constitution of the CCIV provides otherwise.

3.30 The notice of meeting of the CCIV's members must set out the corporate director's reason for wanting to retire and nominate a company to be the new corporate director of the CCIV. *[Schedule 1, Part 1, item 1, subsection 1139B(2)]*

3.31 The notice must also comply with the requirements generally applicable to notices for calling a meeting of members of a CCIV. These

requirements are still under development and will be included in the next exposure draft of the Bill.

3.32 It is intended that members' meetings will be able to be held at both the CCIV and the sub-fund level. The process for meetings of members of sub-funds will be set out in the next exposure draft of the Bill.

3.33 To support the possibility of meetings at both the CCIV and sub-fund level, the Bill contains amended definitions of 'extraordinary resolution' and 'special resolution'.

3.34 'Extraordinary resolution' is amended so that:

- in relation to a CCIV, it means:
  - a resolution of which the notice of a meeting of company's members in subsection 249L(1) is given; and
  - that is passed by at least 50% of the total votes that may be cast by members entitled to vote (including members who are not present); and
- in relation to a sub-fund, it means:
  - a resolution that has been passed by at least 50% of the total votes that may be cast by members entitled to vote.

*[Schedule 1, Part 2, item 4, the definition of 'extraordinary resolution' in section 9]*

3.35 'Special resolution' is amended so that, in relation to a sub-fund, it means a resolution that has been passed by at least 75% of the votes cast by members entitled to vote on the resolution. *[Schedule 1, Part 2, item 10, the definition of 'special resolution' in section 9]*

3.36 If the members of a CCIV choose a company to be the new corporate director and that company has provided its written consent to the appointment, the current corporate director must lodge a notice with ASIC requesting that the CCIV's registration record be updated to reflect the change. The notice must be lodged as soon as practicable after the resolution is passed and in any event within two business days. If the current corporate director does not do so then the new corporate director may lodge the notice. ASIC must comply with the notice when it is lodged. *[Schedule 1, Part 1, item 1, subsections 1139B(3) and (5)]*

3.37 It is anticipated as a practical matter that the company nominated to become the CCIV's corporate director will have provided written consent prior to the member's meeting. However, that is not

mandated and the company chosen by the members need not be the one nominated in the notice of meeting.

3.38 If the members do not choose a company to be the new corporate director, or the chosen company does not consent to the appointment, the current corporate director or the depositary (if there is one) may apply to the Court for a temporary corporate director to be appointed. *[Schedule 1, Part 1, item 1, subsection 1139B(4)]*

3.39 The process for applying to the Court for a temporary corporate director is discussed at paragraphs 3.43 to 3.50.

#### ***Removal of the corporate director***

3.40 Members of a CCIV may remove the CCIV's corporate director by calling a meeting in accordance with Division 2 of Part 2G.2 of the Act and voting on both a resolution to remove the current corporate director and a resolution choosing a new corporate director. The resolutions must be extraordinary resolutions if the scheme is not listed. *[Schedule 1, Part 1, item 1, subsection 1139C(1)]*

3.41 If the CCIV is listed, the resolution need only be an ordinary resolution, unless the CCIV's constitution provides otherwise. This is the only method by which the members of a CCIV can remove its corporate director.

3.42 If both resolutions are passed and the new corporate director has consented in writing to becoming the CCIV's corporate director, the current corporate director must lodge a notice with ASIC requesting the CCIV's registration record be updated to reflect the change. The notice must be lodged as soon as practicable after the resolutions are passed and in any event within two business days. If the current corporate director does not do so then the new corporate director may lodge the notice. ASIC must comply with the notice when it is lodged. *[Schedule 1, Part 1, item 1, subsections 1139C(2) and (3)]*

#### ***Temporary corporate director***

3.43 An application for the Court to appoint a temporary corporate director can be made:

- by the current corporate director or depositary (if there is one) where the current corporate director wants to retire and members do not choose a new corporate director, or the chosen company does not consent to the appointment (see discussion at paragraph 3.38); or

- by ASIC, a member of the CCIV or the depositary (if there is one) where the CCIV does not have a corporate director that is a public company that holds an AFSL authorising it to operate a CCIV (for example, where the corporate director's AFSL has been cancelled).

*[Schedule 1, Part 1, item 1, subsection 1139B(4), section 1139D and subsection 1139E(1)]*

3.44 On application, the Court may appoint a temporary corporate director if it is satisfied that such an appointment is in the interests of the members and the company has consented in writing to becoming the temporary corporate director. The Court has discretion to make any further orders that it considers appropriate. *[Schedule 1, Part 1, item 1, subsections 1139E(1) and (2)]*

3.45 If the application to the Court was made by the current corporate director, the current corporate director must, as soon as practicable after the Court's order appointing the temporary corporate director, lodge a notice with ASIC informing ASIC of the appointment. ASIC must alter the record of the CCIV's registration to reflect the change as soon as practicable after the appointment. *[Schedule 1, Part 1, item 1, subsections 1139E(3) and (4)]*

3.46 The temporary corporate director must take steps to ensure that members appoint a new corporate director or, if this fails to occur, to apply to the Court to have the CCIV wound up. The temporary corporate director must call a member's meeting within three months of its appointment to allow the members to choose a new corporate director. The resolution must be an extraordinary resolution if the CCIV is not listed. If the CCIV is listed, then the resolution may be an ordinary resolution, unless the constitution provides otherwise. Further meetings may be called within the three month period, or such period as the Court permits. *[Schedule 1, Part 1, item 1, subsections 1139F(1) and (2)]*

3.47 The temporary corporate director may be chosen by the members to be the new corporate director so long as it meets the requirements for being a corporate director. *[Schedule 1, Part 1, item 1, subsection 1139F(3)]*

3.48 If the members of the CCIV choose a company to be the new corporate director and that company consents to the appointment, the temporary corporate director must, as soon as practicable, lodge a notice with ASIC requesting that the CCIV's registration record be updated to reflect the change. ASIC must comply with the notice when it is lodged. *[Schedule 1, Part 1, item 1, subsections 1139F(4) and (6)]*

3.49 If no meeting to choose a new corporate director is called within three months or such period as the Court permits, or members do not choose a new corporate director that consents to the appointment, the temporary corporate director must apply to the Court for a winding up of the CCIV. *[Schedule 1, Part 1, item 1, subsection 1139F(5)]*

3.50 ASIC or a member of the CCIV may apply to the Court to have the CCIV wound up if the temporary corporate director does not do so. *[Schedule 1, Part 1, item 1, subsection 1139F(5)]*

### ***Consequences of changing the corporate director***

3.51 If the corporate director changes, the former corporate director must, as soon as practicable, give the new corporate director any books in the former corporate director's possession or control that the Act requires to be kept in relation to the CCIV, and to give other reasonable assistance to facilitate the change in corporate director. *[Schedule 1, Part 1, item 1, section 1140]*

3.52 Further, if the corporate director changes then the rights, obligations and liabilities of the former corporate director in relation to the CCIV become the rights, obligations and liabilities of the new corporate director. However, the former corporate director will retain the right to be paid fees and to be indemnified for expenses incurred relating to the period when it was the corporate director. The former corporate director also retains any right, obligation or liability it had as a member of the CCIV and any liability for which it could not have been indemnified out of the assets of the CCIV had it remained the corporate director. *[Schedule 1, Part 1, item 1, section 1140A]*

3.53 A document to which the former corporate director was a party is to be read as if the new corporate director (and not the former corporate director) was the party to that document where the document is capable of having effect after the change. *[Schedule 1, Part 1, item 1, section 1140B]*

3.54 These provisions are modelled on sections 601FS and 601FT that apply to registered schemes and are intended to provide an administratively efficient mechanism for the novation of obligations to the new corporate director.

### **Duties owed by the corporate director of a retail CCCIV and its officers and employees**

3.55 Division 3 of Part 3 of Chapter 7A sets out the duties owed by the corporate director of a retail CCIV, including by its officers and employees. These requirements are not imposed in respect of a wholesale CCIV on the basis that members of a wholesale CCIV should be given the

flexibility to negotiate arrangements with the corporate director to protect their interests. *[Schedule 1, Part 1, items 1, section 1154]*

3.56 The statutory duties imposed on the corporate director of a retail CCIV, its officers and its employees are in addition to those that may be imposed by the general law and by the constitution of the CCIV.

3.57 The statutory duties have been substantially based on the duties owed by a responsible entity of a registered scheme, its officers and its employees under sections 601FC to 601FE. The registered scheme duties are preferred over the duties of company directors, officers and employees as they are better tailored to the nature of a managed fund. The imposition of specific statutory duties emphasises that the responsibility for the operation of the CCIV and its compliance with the law rests with the corporate director.

3.58 Further, as the corporate director is a public company, the corporate director, its officers and its employees owe duties under Part 2D.1 of the Act to the corporate director's own shareholders. If these duties conflict with the corresponding duties to the CCIV and its members, then the latter prevail. *[Schedule 1, Part 1, item 1, sections 1156A, 1157A and 1158A]*

#### ***Duties owed by corporate director of a retail CCIV***

3.59 The corporate director of a retail CCIV owes a range of duties. Some of these duties reflect the fundamental duties of a fiduciary, including the duties to:

- act honestly;
- exercise the degree of care and diligence that a reasonable person would exercise in the corporate director's position;
- act in the best interests of members and, if there is a conflict, give priority to members' interests over its own;
- treat members who hold shares of the same class equally, members who hold shares of different classes fairly and members of different sub-funds fairly; and
- not make use of information acquired through being the corporate director to gain an improper advantage for itself or another person or to cause detriment to members of the CCIV.

*[Schedule 1, Part 1, item 1, paragraphs 1156(a) to (e)]*

3.60 Other duties reflect the special nature of the role of the corporate director, including the duties to:

- ensure that the CCIV's constitution complies with the requirements of Part 2B.4 of the Act and the prescribed content requirements explained at paragraphs 2.27 to 2.28;
- ensure that the CCIV's compliance plan sets out adequate measures the corporate director is to apply to ensure compliance with the Act and the CCIV's constitution;
- comply with the CCIV's compliance plan;
- ensure that the assets of a sub-fund of the CCIV are clearly identified as assets of the sub-fund and held separately from property of the corporate director and assets of any other sub-fund;
- ensure that the assets of a sub-fund of the CCIV are valued at regular intervals appropriate to their nature;
- ensure that all payments out of assets of the CCIV are made in accordance with the CCIV's constitution and the Act;
- report to ASIC any breach of the Act that relates to the CCIV and has had, or is likely to have, a materially adverse effect on the interests of members; and
- carry out or comply with any other duty, not inconsistent with the Act, that is conferred on the corporate director by the CCIV's constitution.

*[Schedule 1, Part 1, item 1, paragraphs 1156(f) to (m)]*

3.61 The duty to act in the best interests of members interacts to some extent with members' rights and remedies in Chapter 2F of the Act. Further detail on this interaction will be included in the next exposure draft of the Bill.

***Duties owed by officers of corporate director of a retail CCIV***

3.62 The duties owed by officers of a corporate director of a retail CCIV are similar to some of the duties owed by the corporate director itself. These are the duties to:

- act honestly;



- exercise the degree of care and diligence that a reasonable person would exercise in the officer's position;
- act in the best interests of members and, if there is a conflict, give priority to members' interests over their own;
- not make use of information acquired through being an officer of the corporate director to gain an improper advantage for the officer or another person or to cause detriment to members of the CCIV; and
- not make improper use of their position to gain an advantage for themselves or any other person or to cause detriment to members of the CCIV.

*[Schedule 1, Part 1, item 1, paragraphs 1157(a) to (e)]*

3.63 An officer of a corporate director of a retail CCIV will also be required to take all steps that a reasonable person would take to ensure that the corporate director complies with the Act, any conditions imposed on the corporate director's AFSL, the CCIV's constitution and the CCIV's compliance plan. *[Schedule 1, Part 1, item 1, paragraph 1157(f)]*

***Duties owed by employees of corporate director of a retail CCIV***

3.64 An employee of a corporate director of a retail CCIV must not make improper use of their position or of information acquired through being an employee of a corporate director in order to gain an advantage for themselves or another person or to cause detriment to members of the CCIV. *[Schedule 1, Part 1, item 1, section 1158]*

***Requirement for external directors of corporate director***

3.65 As a public company, the corporate director will have natural person directors in accordance with Part 2D.3 of the Act. At least half of the directors of the corporate director of a retail CCIV must be external directors. *[Schedule 1, Part 1, item 1, subsection 1156B(1)]*.

3.66 A director of a corporate director is an external director if the director:

- is not, and has not been in the previous 2 years:
  - an employee of the corporate director or a related body corporate;
  - a senior manager of a related body corporate;

- substantially involved in business dealings, or in a professional capacity with the body corporate or a related body corporate;
- a member of a partnership that is or was substantially involved in business dealings, or in a professional capacity, with the body corporate or a related body corporate;
- does not have a material interest in the corporate director or a related body corporate; and
- is not a relative of a person who has a material interest in the corporate director or a related body corporate.

*[Schedule 1, Part 1, item 1, subsection 1156B(2)]*

3.67 A ‘related body corporate’ is defined in section 50 of the Act and would, for example, include a holding company or a subsidiary of the corporate director.

3.68 The corporate director of a retail CCIV must comply with the external director requirement within 14 days (or longer period allowed in writing by ASIC) of becoming the corporate director. If at some later stage the corporate director does not comply with the external director requirement, then the corporate director has 14 days from that day (or a longer period allowed in writing by ASIC) to comply. *[Schedule 1, Part 1, item 1, subsections 1156B(3) and (4)]*

3.69 This provision is intended to provide some flexibility with non-compliance due to unforeseen circumstances such as the death of a natural person director of the corporate director. A penalty for non-compliance would not be appropriate in these circumstances.

3.70 These requirements draw upon section 601JA, which requires the responsible entity of a registered scheme to establish a compliance committee if less than half of its directors are external directors. As discussed above at paragraph 2.48, the requirement that at least half the directors of a corporate director of a retail CCIV be external directors aligns with the circumstances in which a responsible entity is relieved of the requirement to have a compliance committee under Part 5C.5.

3.71 External directors bring a degree of detached supervision that is expected to enhance the standard of corporate governance of corporate directors of retail CCIVs in the absence of a compliance committee. Since there is no compliance committee to assist them, the corporate director’s

board is responsible for monitoring the extent to which the corporate director complies with the CCIV's compliance plan.



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## Chapter 4

### Sub-funds

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#### Outline of chapter

4.1 Division 3 of Part 2 of Chapter 7A establishes the regulatory framework for sub-funds.

#### Context of amendments

4.2 Fund managers generally offer investors a choice of funds with different investment strategies. This allows investors flexibility around the asset and other risk-return exposures they wish to take. The establishment of a sub-fund regime for CCIVs will enable CCIVs to offer multiple investment strategies under a single corporate vehicle. This is an important feature of the CCIV regime that is expected to produce economies of scale and hence cost savings for funds managers, compared with the existing MIS regime that does not allow the consolidation of multiple funds under a single CIV.

4.3 The concept of a sub-fund, commonly referred to internationally as a protected cell, draws on precedents such as the United Kingdom's OEIC regime. The Australian sub-fund regime is intended to operate similarly to the protected cell regimes that operate in these other jurisdictions. The concept has, however, been modified to suit Australia's existing regulatory and legislative framework.

4.4 For example, some elements of the legislative design for sub-funds have been modelled on the concepts of 'statutory funds' in the *Life Insurance Act 1995* and 'health benefit funds' in the *Private Health Insurance Act 2007* and the *Private Health Insurance (Prudential Supervision) Act 2015*. A key similarity is that while these funds sit within a corporate structure they are not separate legal entities in their own right.

4.5 The purpose of the sub-fund framework is to allow managed funds to offer a variety of investment options through multiple sub-funds under a single 'umbrella' CCIV, and to protect investors in respect of a particular sub-fund of a CCIV by quarantining them from the consequences of activities in respect of other sub-funds of the CCIV. This is achieved by segregating the assets and liabilities allocated to a sub-fund of a CCIV from the assets and liabilities of other sub-funds of the CCIV.

4.6 This segregation, or protection, of sub-funds is intended to extend to the rights of creditors, legal proceedings and external administration of or in relation to a CCIV. The external administration process for CCIVs (and sub-funds) is still under development and will be included in the next exposure draft of the Bill.

## **Summary of new law**

4.7 Division 3 of Part 2 of Chapter 7A establishes the regulatory framework for sub-funds. Subdivision A sets out the general requirements for sub-funds, including the fundamental concept that a CCIV must have at least one sub-fund at all times. Subdivision B sets out the rules for segregating and allocating the assets and liabilities of the CCIV between multiple sub-funds.

## **Detailed explanation of new law**

### **Requirement for sub-funds**

#### ***Meaning of sub-fund***

4.8 A CCIV must at all times have at least one sub-fund, and may have multiple sub-funds. *[Schedule 1, Part 1, item 1, subsection 1141A(1)]*

4.9 No business of the CCIV can be conducted that is not conducted through a sub-fund. If a CCIV has only one sub-fund then the entire business of the CCIV must be conducted through that sub-fund. If a CCIV has multiple sub-funds, then the CCIV must have a sub-fund in respect of each particular part of its business and, together, the businesses of each sub-fund must constitute the entire business of the CCIV. Each sub-fund must relate solely to a particular part of the business of the CCIV. *[Schedule 1, Part 1, item 1, section 1141A(2)]*

4.10 A sub-fund of a CCIV is a fund that is established in the records of the CCIV, and that either relates to the entire business of the CCIV (if there is only one sub-fund) or solely to a particular part of the business of the CCIV (if there are multiple sub-funds). *[Schedule 1, Parts 1 and 2, items 1 and 11, the definition of 'sub-fund' in section 9, and subsection 1141(1)]*

4.11 A sub-fund is established in the records of the CCIV by:

- assigning a unique name to the sub-fund; and

- identifying the class or classes of shares that are to be referable to the sub-fund.

*[Schedule 1, Part 1, item 1, subsection 1141(2)]*

4.12 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. If a CCIV only has one sub-fund, then all classes of shares in the CCIV must be referable to that sub-fund. *[Schedule 1, Part 1, item 1, the note to subsection 1141(2), and subsection 1141B(2)]*

4.13 This is discussed in further detail at paragraphs 4.18 to 4.21 below.

4.14 The above requirements are modelled in part on the requirements for statutory funds under the *Life Insurance Act 1995* and health benefit funds under the *Private Health Insurance Act 2007* and *Private Health Insurance (Prudential Supervision) Act 2015*.

#### ***Nature of sub-funds***

4.15 A sub-fund does not have legal personality. *[Schedule 1, Part 1, item 1, subsection 1141(3)]*

4.16 This means that a sub-fund cannot enter into contracts, cannot sue and be sued in its own name, and cannot acquire, hold or dispose of assets in its own name. A sub-fund does not have its own directors, and does not need to apply for separate licences from the CCIV to which it belongs.

4.17 Despite the fact that a sub-fund neither holds assets nor incurs liabilities in its own name, assets and liabilities of the CCIV are allocated to the sub-fund in accordance with the rules discussed below at paragraphs 4.31 to 4.54.

#### ***Shares in the CCIV must be referable to a sub-fund***

4.18 A share is referable to a sub-fund if the share is in a class of shares that is referable to the sub-fund. *[Schedule 1, Parts 1 and 2, items 1 and 8, the definition of ‘referable’ in section 9, and subsection 1141B(2)]*

4.19 A class of shares is referable to a sub-fund if the rights attached to every share in the class, so far as the rights are in respect of assets of the CCIV, are restricted to rights in respect of the assets that have been allocated by the corporate director to that sub-fund in accordance with the asset allocation rules for sub-funds (which are explained further below). *[Schedule 1, Part 1, item 1, subsection 1141B(3) and section 1142]*

4.20 Every share in a CCIV must be referable to one (and only one) sub-fund of the CCIV; but multiple classes of shares may be referable to the same sub-fund. *[Schedule 1, Part 1, item 1, subsection 1141B(1) and (4)]*

4.21 If the CCIV only has one sub-fund then all classes of shares in the CCIV must be referable to that sub-fund. *[Schedule 1, Part 1, item 1, the note to subsection 1141(2)]*

**Example 4.1: Shares referable to a sub-fund**

Casterly House CCIV has 3 sub-funds: Sub-fund A; Sub-fund B; and Sub-fund C.

Share class A is referable to Sub-fund A; share class B is referable to Sub-fund B; and share class C is referable to Sub-fund C.

Share class D is also referable to Sub-fund C.

Because every class of shares must only be referable to one sub-fund of the CCIV, share class D could not also be referable to Sub-funds A or B.

*Part 2F.2 does not permit variation contrary to the rules about the classes of shares that are referable to sub-funds*

4.22 Nothing in Part 2F.2 of the Act, concerning share class rights, permits rights attached to shares in a class of shares to be varied or cancelled in a manner that results in a share or shares failing to be referable to one (and only one) sub-fund of the CCIV. *[Schedule 1, Part 1, item 1, subsection 1141B(5)]*

4.23 This provision prevents Part 2F.2 being used to vary the rights of members of a sub-fund so as to give them an interest in the assets of another sub-fund.

***Membership of a sub-fund***

4.24 Despite the fact that a sub-fund does not have separate legal personality, all members of a CCIV are also deemed to be members of at least one sub-fund of that CCIV.

4.25 A person is deemed to be a member of a sub-fund of a CCIV if the person is a member of the CCIV and holds one or more shares that are referable to the sub-fund. *[Schedule 1, Part 1, item 1, paragraph (b) of the definition of 'member' in section 9 and section 1141C]*



#### **Example 4.2: Membership of a sub-fund**

Tyrone holds two shares in Casterly House CCIV. Casterly House CCIV has three sub-funds: Sub-fund A, Sub-fund B and Sub-fund C.

Tyrone holds one share referable to Sub-fund A and one share referable to Sub-fund C.

Tyrone is a member of Casterly House CCIV, a member of Sub-fund A and a member of Sub-fund C, but is not a member of Sub-fund B.

#### ***Notifying ASIC when sub-funds are established***

4.26 Sub-funds are not individually registered with ASIC, as they are not separate legal entities.

4.27 However, ASIC must be notified when a sub-fund of a CCIV is established. The corporate director must give ASIC written notice of the establishment of the sub-fund, the day on which it was established and such other matters as specified by CCIV rules. *[Schedule 1, Part 1, item 1, subsection 1141D(1)]*

4.28 The notice must be given to ASIC in the approved form at least 14 days before the day the CCIV offers shares referable to the new sub-fund. *[Schedule 1, Part 1, item 1, subsection 1141D(2)]*

4.29 This requirement is based in part on requirements for statutory funds under the *Life Insurance Act 1995* and health benefit funds under the *Private Health Insurance (Prudential Supervision) Act 2015*. It ensures that ASIC has necessary information about the sub-funds of CCIVs that are registered under the Act.

#### **Segregation of assets and liabilities between sub-funds**

4.30 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. These requirements are explained in further detail below.

#### ***Allocation of CCIV assets to sub-funds***

##### ***Assets of a sub-fund***

4.31 Despite the fact that a sub-fund does not have separate legal personality and, therefore, does not own assets in its own name, assets (including money, assets and investments) of a CCIV are deemed to also be ‘assets of the sub-fund’ to which they are allocated (in accordance with

the allocation rules explained below). *[Schedule 1, Parts 1 and 2, items 1 and 2, the definition of ‘assets’ in section 9, and subsection 1142D(1)]*

4.32 The words ‘money, assets and investments’ in the provision do not limit what may be considered assets of the CCIV.

4.33 Additionally, ‘assets of the sub-fund’ include assets of the CCIV that are to be assets of the sub-fund under a restructure, arrangement or court order, but do not include assets of the CCIV that, in accordance with a restructure, arrangement or court order, are no longer to be assets of the sub-fund. *[Schedule 1, Part 1, item 1, paragraph 1142D(1)(b)) and subsection 1142D(2)]*

4.34 Provisions about restructures and arrangements for a CCIV will be included in the next exposure draft of the Bill.

4.35 The above draws in part on requirements for statutory funds under the *Life Insurance Act 1995* and health benefit funds under the *Private Health Insurance (Prudential Supervision) Act 2015*. However, a significant difference is that the corporate director has a responsibility to allocate assets and liabilities to sub-funds of a CCIV. The allocation does not occur merely by the force of the provisions contained in the Bill.

4.36 Assets of a retail CCIV must only be held on trust by a depositary appointed in accordance with the rules described at Chapter 6 of these explanatory materials. *[Schedule 1, Part 1, item 1, subsection 1142A(1)]*

4.37 Other than an asset that is a class of assets determined by CCIV Rules, assets of a wholesale CCIV may be held by:

- the CCIV itself;
- on trust by a depositary appointed in accordance with the rules described at Chapter 6 of these explanatory materials;  
or
- on trust by a person other than the CCIV.

*[Schedule 1, Part 1, item 1, subsections 1142A(2) and (3)]*

*No assets to remain unallocated*

4.38 All assets of a CCIV must be allocated to a sub-fund in accordance with the allocation rules explained below. This means that no assets of a CCIV are to remain outside of sub-funds as unallocated assets. *[Schedule 1, Part 1, item 1, section 1142]*

*Allocation rules*

4.39 The corporate director must allocate all the assets of the CCIV to the sub-funds of the CCIV as soon as practicable and in accordance with the following rules:

- any amounts paid up in consideration for the issue of a class of shares that is referable to the sub-fund must be allocated to that sub-fund;
- any assets obtained by the CCIV as a result of the application of assets of the sub-fund in carrying on the business of the sub-fund must be allocated to that sub-fund; and
- assets of the CCIV not covered by the preceding rules must be allocated among the sub-funds of the CCIV in a manner that is fair and reasonable in the circumstances.

*[Schedule 1, Part 1, item 1, subsections 1142E(1) to (3)]*

4.40 Additional rules in relation to the allocation of assets to the sub-funds of CCIVs may be prescribed by regulation. *[Schedule 1, Part 1, item 1, subsection 1142E(6)]*

*Prohibition on joint investments*

4.41 The corporate director must not allocate an asset to more than one sub-fund. *[Schedule 1, Part 1, item 1, subsection 1142E(4)]*

4.42 This provision prevents ‘joint investments’ in a single asset by multiple sub-funds of the same CCIV. However, this is not intended to prevent multiple sub-funds in a CCIV from investing in a single physical asset through a trust or other ownership arrangement, provided that each sub-fund’s interest is separately identified and transferable.

*Prohibition on cross-allocation*

4.43 The corporate director must not allocate an asset to a particular sub-fund if the asset was obtained as a result of expenditure or application of assets allocated to another sub-fund. *[Schedule 1, Part 1, item 1, subsection 1142E(5)]*

4.44 As a consequence, the corporate director must allocate assets obtained by the application of assets of a sub-fund (in carrying on the business of the sub-fund) to that sub-fund and no other sub-fund.

### ***Allocation of CCIV liabilities to sub-funds***

#### ***Liabilities of a sub-fund***

4.45 Despite the fact that a sub-fund does not have separate legal personality and, therefore, does not incur liabilities in its own name, liabilities of a CCIV are deemed also to be ‘liabilities of the sub-fund’ to which they are allocated (in accordance with the allocation rules explained below). *[Schedule 1, Parts 1 and 2, items 1 and 6, the definition of ‘liabilities’ in section 9, and paragraph 1142H(1)(a)]*

4.46 The word ‘liabilities’ (of the CCIV or sub-fund) includes expenses (of the CCIV or sub-fund).

4.47 Additionally, ‘liabilities of the sub-fund’ include liabilities of the CCIV that are to be liabilities of the sub-fund under a restructure, arrangement or court order, but do not include liabilities of the CCIV that, in accordance with a restructure, arrangement or court order, are no longer to be liabilities of the sub-fund. *[Schedule 1, Part 1, item 1, paragraph 1142H(1)(b) and subsection 1142H(2)]*

4.48 Provisions about restructures and arrangements for a CCIV will be included in the next exposure draft of the Bill.

4.49 This approach draws in part on requirements for statutory funds under the *Life Insurance Act 1995* and health benefit funds under the *Private Health Insurance (Prudential Supervision) Act 2015*. It is designed to help facilitate the proper allocation of the liabilities of a CCIV to sub-funds.

#### ***No liabilities to remain unallocated***

4.50 All liabilities of a CCIV must be allocated to a sub-fund in accordance with the allocation rules explained below. This means that no liabilities of a CCIV are to remain unallocated. *[Schedule 1, Part 1, item 1, section 1142F]*

#### ***Allocation rules***

4.51 The corporate director must allocate all the liabilities of the CCIV to the sub-funds of the CCIV as soon as practicable and in accordance with the following rules:

- each liability of the CCIV that relates solely to the business of a particular sub-fund must be allocated to that sub-fund; and

- liabilities of the CCIV not covered by the preceding rule must be allocated among the sub-funds of the CCIV in a manner that is fair and reasonable in the circumstances.

*[Schedule 1, Part 1, item 1, subsections 1142J(1) to (3)]*

4.52 Additional rules in relation to the allocation of liabilities to the sub-funds of a CCIV may be prescribed by regulation. *[Schedule 1, Part 1, item 1, subsection 1142J(5)]*

*Prohibition on joint liabilities*

4.53 The corporate director must not allocate a liability to more than one sub-fund. *[Schedule 1, Part 1, item 1, subsection 1142J(4)]*

4.54 This rule supports the segregation of liabilities of sub-funds by ensuring that each liability of a CCIV is allocated to one, and only one, sub-fund.

***Documenting the allocation of assets and liabilities to sub-funds***

4.55 The corporate director must keep records that show:

- for each allocated asset of the CCIV, the sub-fund to which the asset has been allocated;
- for each allocated liability of the CCIV, the sub-fund to which the liability has been allocated; and
- details of any un-allocated assets or liabilities of the CCIV. *[Schedule 1, Part 1, item 1, subsection 1142K(1)]*

4.56 The corporate director must retain the records for seven years after the year to which the records relate. A record may be kept and retained in written or electronic form. *[Schedule 1, Part 1, item 1, subsections 1142K(2) and (3)]*

***Segregated holding of assets and liabilities of sub-funds***

4.57 A CCIV must ensure that assets of a sub-fund of the CCIV are:

- clearly identified as assets of that sub-fund;
- held separately from assets of any other sub-fund of the CCIV; and
- held separately from property of the corporate director.

*[Schedule 1, Part 1, item 1, subsection 1142B(1)]*

4.58 A CCIV must also ensure that liabilities of a sub-fund of the CCIV are clearly identified as liabilities of the sub-fund (as distinct from liabilities of the corporate director and liabilities of any other sub-fund of the CCIV). *[Schedule 1, Part 1, item 1, section 1142G]*

4.59 A separate authorised deposit-taking institution (ADI) account must be maintained for each sub-fund. *[Schedule 1, Part 1, item 1, subsection 1142B(2)]*

4.60 A clarification is also provided that none of the requirements about sub-funds are intended to have the effect of making a CCIV or its corporate director a trustee of the assets of the sub-fund of the CCIV. *[Schedule 1, Part 1, item 1, subsection 1142B(3)]*

4.61 These requirements draw in part on requirements for statutory funds under the *Life Insurance Act 1995* and health benefit funds under the *Private Health Insurance (Prudential Supervision) Act 2015*.

***Segregated application of assets of sub-funds***

4.62 A CCIV must not apply or deal with assets of a sub-fund, whether directly or indirectly, except for one or more of the following purposes:

- meeting liabilities or expenses of the sub-fund;
- making investments in the course of the business of the sub-fund;
- paying a dividend to members of the sub-fund;
- providing consideration to a member of the sub-fund in respect of a reduction of share capital affecting the sub-fund;
- redeeming redeemable shares in the sub-fund;
- a purpose specified in CCIV rules as a permitted purpose.

*[Schedule 1, Part 1, item 1, subsections 1142C(1) and (2)]*

4.63 However, a CCIV must not apply or deal with assets of a sub-fund, whether directly or indirectly, for a purpose specified in CCIV rules as a prohibited purpose. *[Schedule 1, Part 1, item 1, paragraph 1142C(2)(b)]*

4.64 Where such a purpose conflicts with the purposes in paragraph 4.62, the prohibited purpose provision prevails. For instance, if CCIV rules specify a particular method of payment of dividends to members of

the sub-fund as a prohibited purpose, that specification applies despite the payment of dividends being an expressly permitted purpose.

4.65 This means that the assets of a sub-fund must not be applied for the purpose of meeting liabilities or expenses of another sub-fund of the CCIV. Any liability or expense of a sub-fund must be met solely out of the assets of that sub-fund.

4.66 It also means that an asset of a CCIV cannot be applied, and a liability of a CCIV cannot be met, until such time as that asset or liability has been allocated to a sub-fund.

4.67 This protects the distinct investment activity carried on by each sub-fund (with its discrete portfolio of assets and its own investment objectives) from the impacts of the investment activity carried on by all the other sub-funds of that CCIV. Creditors of a poorly-performing sub-fund should not have access to the assets of a well-performing sub-fund.

4.68 ASIC's power to make 'CCIV rules' in respect of the purposes for which a CCIV can apply assets of a sub-fund does not limit ASIC's power to provide individual or class modifications under the *Corporations Regulations 2001* or to use ASIC's relief powers.

4.69 The asset application rules draw in part on requirements for statutory funds under the *Life Insurance Act 1995* and health benefit funds under the *Private Health Insurance (Prudential Supervision) Act 2015*. They also draw on elements of the United Kingdom's OEIC regime.





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## **Chapter 5**

### **Shares**

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#### **Outline of chapter**

5.1 Division 5 of Part 2 of Chapter 7A establishes the legislative framework for transactions affecting share capital of a CCIV. It sets out permitted transactions and certain requirements that apply in carrying them out, and also prohibits certain types of transactions.

5.2 Division 4 of Part 2 of Chapter 7A establishes the legislative framework for issuing, converting and redeeming redeemable shares in a CCIV.

5.3 Division 4 of Part 3 of Chapter 7A sets out additional requirements for redeeming redeemable shares in a retail CCIV.

#### **Context of amendments**

5.4 A feature of many managed funds is that they are open-ended. This means that the fund is able to issue and redeem shares at any time. Proprietary and public companies are not able to be open-ended.

5.5 As a CCIV is a company limited by shares, it will have share capital and there are existing rules about the use and management of that share capital. However, Chapter 7A substantially modifies some of those rules to reflect the nature and purpose of a CCIV.

5.6 At common law, the doctrine of the maintenance of share capital ordinarily prevents companies from reducing their capital except in the legitimate course of its business. This doctrine is intended to protect creditors who are entitled to make the assumption that capital is maintained in this manner. Chapter 2J modifies that position so that capital can be reduced in some circumstances where it does not materially prejudice the company's ability to pay its creditors.

5.7 Reflecting that CCIVs are intended to operate as investment funds, rather than carrying on active businesses, Chapter 7A takes a more flexible approach to the circumstances in which a CCIV can reduce its capital than for other types of companies.

## **Summary of new law**

5.8 Division 5 of Part 2 of Chapter 7A establishes the legislative framework for transactions affecting share capital of a CCIV.

5.9 Subdivision A of Division 5 provides that Chapter 2J, which regulates transactions affecting share capital of companies, does not apply to CCIVs.

5.10 Subdivision B of Division 5 sets out the circumstances in which a CCIV can reduce its share capital. This includes some specific circumstances and a general share capital reduction procedure. The general procedure includes a solvency requirement designed to protect the interests of creditors, a requirement that a share capital reduction is fair and reasonable to members and a requirement for member approval before the reduction can proceed.

5.11 Subdivision C of Division 5 sets out rules about self-acquisition and control of shares, and Subdivision D prohibits financial assistance.

5.12 Division 4 of Part 2 of Chapter 7A establishes the legislative framework for issuing, converting and redeeming redeemable shares in a CCIV. Subdivision A of Division 4 sets out rules about issuing and converting redeemable shares, and Subdivision B sets out rules about redeeming redeemable shares. The latter includes a solvency test designed to protect the interests of creditors.

5.13 Division 4 of Part 3 of Chapter 7A sets out additional requirements for the redemption of redeemable shares in a retail CCIV.

5.14 Subdivision A of Division 4 sets out certain requirements for a retail CCIV's constitution if redeemable shares will be issued.

5.15 Subdivision B of Division 4 sets out rules about the redemption of redeemable shares in a retail CCIV which apply in addition to those set out in Division 4 of Part 2 of Chapter 7A. These include a liquidity test designed to protect the interests of remaining members and requirements about the price at which shares in a retail CCIV can be redeemed.

## **Detailed explanation of new law**

### **Issuing shares in a CCIV**

5.16 The issuing of shares in a CCIV, like any other company, is regulated generally by Chapter 2H of the Act (noting that consequential

amendments to Chapter 2H are still under development and will be included in the next exposure draft of the Bill).

5.17 Paragraph 124(1)(a) gives a CCIV, like any other company, the power to issue shares in the CCIV. It is clarified that, for a CCIV, this includes the power to issue redeemable shares that are liable to be redeemed at the member's option. *[Schedule 1, Part 1, item 1, subsection 1143(1)]*

5.18 However Part 2H.2 of the Act, which imposes certain requirements on the redemption of redeemable preference shares, does not apply to CCIVs. *[Schedule 1, Parts 1 and 2, items 1 and 18, the note before section 254J and section 1144]*

5.19 This clarifies that the only requirements for redeeming shares in a CCIV are those set out in Chapter 7A (see paragraphs 5.41 to 5.69). This ensures that all holders of redeemable shares in a CCIV have the same rights of share redemption.

#### *Self-dealing exemption from AFSL requirement*

5.20 Companies are generally permitted to issue their own shares without holding an AFSL, under a self-dealing exemption in subsection 766C(4). This exemption is extended to CCIVs. *[Schedule 1, Part 2, items 21 and 22, paragraphs 766C(4)(c) and (ca)]*

#### *Constitution of a retail CCIV must deal with consideration to acquire a share*

5.21 The constitution of a retail CCIV must make adequate provision for the consideration that is to be paid to acquire a share in the CCIV. *[Schedule 1, Part 1, item 1, paragraph 1155(1)(a)]*

## **Transactions affecting share capital**

### *Chapter 2J does not apply to CCIVs*

5.22 Chapter 2J of the Act does not apply to CCIVs. *[Schedule 1, Parts 1 and 2, items 1 and 19, the note to section 256A, and section 1145]*

5.23 Instead, Chapter 7A sets out the processes for conducting a share capital reduction and for redeeming shares in a CCIV. These processes are explained in paragraphs 5.25 to 5.30 and paragraphs 5.41 to 5.69 respectively.

5.24 The prohibitions on self-acquisition, taking security over shares and financial assistance explained below are required to replicate, with modifications, the equivalent prohibitions in Chapter 2J.

***Share capital reductions other than share redemptions***

5.25 A CCIV may only reduce its share capital (other than by redeeming shares) in one of the following circumstances:

- under a court order;
- as prescribed in CCIV rules; or
- if all of the following requirements are met:
  - the reduction is permitted by the CCIV’s constitution;
  - the reduction is fair and reasonable to the members of each affected sub-fund;
  - each sub-fund to be affected by the reduction is solvent immediately before the reduction and will not be insolvent immediately after the reduction; and
  - the reduction is approved by a resolution passed at a general meeting of members of the affected sub-fund.

*[Schedule 1, Part 1, item 1, sections 1146, 1146A, 1146C and 1146D]*

5.26 A share capital reduction affects a sub-fund if it relates to shares that are referable to that sub-fund. *[Schedule 1, Part 1, item 1, subsection 1146A(2)]* See paragraph 4.18 for an explanation of when a share is referable to a sub-fund.

5.27 A sub-fund is solvent if, and only if, the CCIV is able to pay all the debts that are liabilities of the sub-fund, as and when they become due and payable. Otherwise, the sub-fund is insolvent. *[Schedule 1, Parts 1 and 2, items 1, 5 and 9, the definitions of ‘insolvent’ and ‘solvent’ in section 9, and subsections 1146A(3) and (4)]*

5.28 A CCIV is permitted to apply assets of a sub-fund for the purpose of providing consideration for a reduction of share capital affecting the sub-fund. *[Schedule 1, Part 1, item 1, subparagraph 1142C(2)(a)(iv)]*

5.29 Relatedly, a consequential amendment is being considered to ensure the corporate director of a CCIV has a duty to prevent insolvent trading of a sub-fund of the CCIV. This amendment is still under development and will be included in the next exposure draft of the Bill.

5.30 The ability to prescribe circumstances allowing a reduction of share capital in CCIV rules may be used, for example, to permit certain on-market buy-backs for exchange-traded funds.

***Rule against self-acquisition***

5.31 A CCIV is expressly prohibited from acquiring shares (or units of shares) in itself except:

- in buying back shares (for the purposes of a permitted reduction of share capital); or
- under a court order.

*[Schedule 1, Part 1, item 1, section 1147]*

5.32 Consistently with section 259A, this prohibition includes acquisition of ‘units of shares’, as defined in section 9.

***Prohibition on cross-investment***

5.33 One implication of the rule against self-acquisition is that a sub-fund of a CCIV cannot acquire shares that are referable to another sub-fund of the CCIV, except under a court order. *[Schedule 1, Part 1, item 1, the note to section 1147]*

5.34 This prevents one sub-fund from ‘cross-investing’ in another sub-fund. Allowing cross-investment would increase the risk of contagion between the sub-funds of a CCIV in the absence of investment restrictions such as those included in the United Kingdom’s OEIC regime (which allows cross-investment between sub-funds) and other jurisdictions.

***Rule against taking security over own shares***

5.35 A CCIV is expressly prohibited from taking security over shares (or units of shares) in itself, or in a company that controls it. *[Schedule 1, Part 1, item 1, section 1147A]*

5.36 A company controls the CCIV if the company has the capacity to determine the outcome of decisions about the CCIV’s financial and operating policies (see section 50AA for the meaning of control).

***Rule against financial assistance***

5.37 A CCIV is expressly prohibited from financially assisting a person to acquire shares (or units of shares) in the CCIV. *[Schedule 1, Part 1, item 1, subsection 1148(1)]*

5.38 Without limiting the types of financial assistance that are prohibited, a CCIV must not financially assist a person to acquire shares (or units of shares) in the CCIV by way of:

- financial assistance given before or after the time of that acquisition;
- paying a dividend; or
- a reduction of share capital.

*[Schedule 1, Part 1, item 1, subsection 1148(2)]*

5.39 As a consequence, a CCIV is, for example, prohibited from paying a dividend to a member for the purpose of the member purchasing more shares in the CCIV. However, a member may purchase shares in the CCIV using dividend proceeds if this occurs at the member's own initiative.

5.40 This prohibition applies to an acquisition of shares (or units of shares), whether that acquisition occurs by the CCIV issuing the shares, by transfer of the shares or by any other means. *[Schedule 1, Part 1, item 1, subsection 1148(3)]*

## **Issuing and converting redeemable shares**

### ***Issue of redeemable shares***

5.41 The shares of a CCIV may be issued on the terms that they are liable to be redeemed at the member's option. All, or some, of the shares in a CCIV may be redeemable shares. *[Schedule 1, Part 1, item 1, section 1143]*

5.42 A CCIV can choose to be 'open-ended' by issuing shares in this way. This allows individual members on their own initiative to seek a return of their paid-up capital in exchange for extinguishing the shares.

5.43 This feature is similar to a member's right to withdraw from a registered scheme and is based in part on Part 5C.6 of the Act.

### ***Conversion of redeemable shares***

5.44 A CCIV may convert a non-redeemable share into a redeemable share and vice versa, but only if this is approved by a special resolution of members of the sub-fund to which the share is referable. *[Schedule 1, Part 1, item 1, section 1143A]*

5.45 A CCIV can use this procedure to:

- change from being 'open-ended' to 'closed-ended', by converting all its redeemable shares to non-redeemable shares;

- change from being ‘closed-ended’ to partially ‘open-ended’, by converting any of its (non-redeemable) shares to redeemable shares; or
- change from being ‘closed-ended’ to fully ‘open-ended’, by converting all of its (non-redeemable) shares to redeemable shares.

5.46 The rules about variation of class rights in sections 246B to 246G will also apply to any such conversion. *[Schedule 1, Part 1, item 1, the note to subsection 1143A(1)]*

## Constitution to provide for redemption

5.47 The constitution of a retail CCIV must provide for redemption of shares in accordance with the rules explained below at paragraphs 5.51 to 5.65 if all or some of its shares are issued on the terms that they are liable to be redeemed at the member’s option. The constitution may make different provision for sub-funds that are liquid and sub-funds that are not liquid. *[Schedule 1, Part 1, item 1, section 1159]*

### *When a sub-fund of a retail CCIV is liquid*

5.48 A sub-fund of a retail CCIV is liquid if liquid assets account for at least 80 per cent of the value of the assets of the sub-fund. Liquid assets are easily realisable assets such as money deposited in financial institutions, bank accepted bills and marketable securities. *[Schedule 1, Part 1, item 1, section 1159A]*

5.49 The liquid assets test is based on the rules concerning liquidity of registered schemes in subsections 601KA(4) to (6).

5.50 The liquid assets test does not apply to a sub-fund of a wholesale CCIV. This is because members of a wholesale CCIV should be given the flexibility to negotiate appropriate arrangements with the corporate director that protect their interests.

## Redemption of redeemable shares

### *When a retail CCIV may redeem shares in the CCIV*

5.51 A retail CCIV may redeem shares in the CCIV only if:

- the shares to be redeemed are fully paid-up;
- the shares are redeemed at the option of a member of the CCIV;

- each sub-fund to which the shares are referable is solvent immediately before the redemption and will not be insolvent immediately after the redemption;
- the redemption is conducted according to the terms on which the shares are on issue;
- the redemption is permitted by the CCIV's constitution;
- where the shares are referable to a liquid sub-fund, the redemption meets the further requirements explained below in paragraphs 5.52 to 5.56; and
- where the shares are referable to a non-liquid sub-fund, the redemption meets the further requirements explained below in paragraphs 5.57 to 5.65.

***[Schedule 1, Part 1, item 1, subsection 1144A(1) and sections 1146, 1146B and 1160]***

*Further requirements for redemption of a redeemable share referable to a liquid sub-fund*

5.52 There are further requirements that deal with the consideration a retail CCIV must pay to a member of a liquid sub-fund who exercises the option to have their share or shares redeemed.

5.53 Where the CCIV is unlisted, the share must be redeemable for a price determined by reference to the net asset value of the sub-fund to which it is referable. ***[Schedule 1, Part 1, item 1, section 1160A]***

5.54 Where the CCIV is listed, the share must be redeemable for a price determined by reference to the market price, just before the redemption, of the share. ***[Schedule 1, Part 1, item 1, section 1160B]***

5.55 This ensures that the consideration paid on redemption is reflective of the net asset value or market price, while allowing the possibility of adjustments for things like transaction fees.

5.56 A failure to comply with these further requirements does not invalidate the redemption or any contract or transaction connected with it. However, ASIC, the corporate director, the depositary, a member or a group of members can apply to the Court for an order adjusting the price of the redeemed shares. ***[Schedule 1, Part 1, item 1, section 1160C]***



*Further requirements for redemption of a redeemable share referable to a non-liquid sub-fund*

5.57 There are also further requirements that constrain when and how a retail CCIV may redeem redeemable shares that are referable to a non-liquid sub-fund.

5.58 The corporate director may offer members an opportunity to redeem shares in a non-liquid sub-fund:

- to the extent that particular assets of the sub-fund are available and able to be converted to money in time to satisfy redemption requests that members may make in response to the offer; and
- so long as no other redemption offer is open in relation to the particular sub-fund.

*[Schedule 1, Part 1, item 1, subsection 1160D(1)]*

5.59 A redemption offer must be in writing and must be made in accordance with any procedures for doing so in the CCIV's constitution, or otherwise by giving a copy to all members of the sub-fund in question. For joint members, a copy need only be given to the joint member named first in the register of members. *[Schedule 1, Part 1, item 1, subsections 1160D(2) and (4)]*

5.60 The corporate director must also lodge a copy of the offer with ASIC as soon as practicable after making the offer. *[Schedule 1, Part 1, item 1, subsection 1160D(5)]*

5.61 A redemption offer must specify:

- the period during which the offer will remain open (which must last for at least 21 days after the offer is made);
- the assets that will be used to satisfy redemption requests;
- the amount of money that is expected to be available when those assets are converted to money; and
- the method the CCIV will use to deal with redemption requests if the money available is insufficient to satisfy all requests (provided the method complies with the requirements set out below in paragraphs 5.62 and 5.63).

*[Schedule 1, Part 1, item 1, subsection 1160D(3)]*

5.62 The corporate director must ensure redemption requests made in response to a redemption offer are satisfied within 21 days after the offer closes. However, the corporate director must not satisfy a request while the offer is still open. *[Schedule 1, Part 1, item 1, subsections 1160E(1) and (2)]*

5.63 If an insufficient amount of money is available (from assets specified in the offer) to satisfy all redemption requests, the requests must be satisfied proportionately according to the following formula:

$$\text{Amount of money available} \times \frac{\text{Amount shareholder requested to redeem}}{\text{Total of all amounts shareholders request to redeem}}$$

*[Schedule 1, Part 1, item 1, subsection 1160E(3)]*

5.64 The corporate director has the option of cancelling a redemption offer before it closes if it contains a material error, and must cancel the redemption offer before it closes if it is in the best interests of members to do so. *[Schedule 1, Part 1, item 1, subsection 1160F(1)]*

5.65 The corporate director must make the cancellation in accordance with any procedures for doing so in the CCIV's constitution or otherwise by notice in writing to the members to whom the offer was made. The corporate director must also lodge written notice of the cancellation with ASIC. *[Schedule 1, Part 1, item 1, subsections 1160F(2) and (3)]*

***When a wholesale CCIV may redeem shares in the CCIV***

5.66 A wholesale CCIV may redeem shares in the CCIV only if:

- the shares to be redeemed are fully paid-up;
- the shares are redeemed at the option of a member of the CCIV; and
- each sub-fund to which the shares are referable is solvent immediately before the redemption and will not be insolvent immediately after the redemption.

*[Schedule 1, Part 1, item 1, subsection 1144A(1), section 1146 and paragraphs 1146B(a) and (b)]*

***Redemptions of redeemable shares generally***

5.67 A CCIV is permitted to apply assets of a sub-fund for the purpose of redeeming redeemable shares in the sub-fund. *[Schedule 1, Part 1, item 1, subparagraph 1142C(2)(a)(v)]*

5.68 On redemption, the shares are cancelled. *[Schedule 1, Part 1, item 1, subsection 1144A(2)]*

5.69 See paragraph 5.27 above for an explanation of the meaning of solvency and insolvency of a sub-fund. See paragraph 4.18 for an explanation of when a share is referable to a sub-fund.



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## **Chapter 6**

### ***Depository***

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#### **Outline of chapter**

6.1 Division 6 of Part 3 of Chapter 7A sets out the requirements for the depository of a retail CCIV. This includes the powers and duties of the depository and rules for replacing the depository.

#### **Context of amendments**

6.2 A key feature of UCITS funds is the requirement to have a depository. In the UCITS regime, the depository safeguards the assets of the fund and also has oversight of certain functions undertaken by the fund.

6.3 The depository's duties in Chapter 7A generally reflect most of the duties of the depository of a UCITS fund. This ensures a level of regulatory alignment that will enable existing depositaries operating in overseas jurisdictions to more easily adapt their operations to the Australian regulatory framework for CCIVs.

6.4 However, some adjustments have been made to reflect Australia's existing laws. For example, as the CCIV legislative framework does not impose statutory investment restrictions, a depository of a retail CCIV will not be required to oversee the investment functions undertaken by the CCIV.

6.5 As the depository is an important consumer protection, it will be mandatory for retail CCIVs. The depository is also subject to independence requirements.

#### **Summary of new law**

6.6 Division 6 of Part 3 of Chapter 7A establishes the legislative framework for the depository of a retail CCIV.

6.7 Subdivision A sets out the basic requirements for the depository.

6.8 Subdivision B sets out the duties and powers of the depositary, including the key requirements that a depositary must hold the assets of the CCIV on trust for the CCIV and the depositary must oversee the corporate director.

6.9 Subdivision C sets out the rules for replacing the depositary, whether on occasion of the retirement of the depositary or upon the depositary's removal.

6.10 It is a mandatory requirement for a retail CCIV to have a depositary. A wholesale CCIV may opt to have a depositary, but if it does so, the full regulatory requirements for depositaries apply.

6.11 References to 'CCIV' in this Chapter will generally be to a retail CCIV. However, as a wholesale CCIV may choose to have a depositary the broader term 'CCIV' has been used.

## **Detailed explanation of new law**

### **Requirement for depositary**

#### *Meaning of depositary*

6.12 The depositary of a CCIV is the company named in ASIC's record of the CCIV's registration as the depositary or temporary depositary of the CCIV. *[Schedule 1, Part 2, item 3, the definition of 'depositary' in section 9]*

6.13 Chapter 7 of the Act has a definition of 'custodial or depositary service' whereby, under an arrangement between a provider and a client, a financial product is held by the provider in trust for the client (see section 766E).

6.14 The depositary of a CCIV is distinct from 'depositary services' as that term is used in Chapter 7. It is a new statutory concept that should not be confused with the concept of 'custodial or depositary services' in Chapter 7.

6.15 A consequential amendment currently under consideration for the next exposure draft of the Bill will be to rename the concept of 'custodial or depositary services' in Chapter 7 as 'custodial services' to avoid confusion. For instance, a wholesale CCIV might decide to engage a custodian to hold assets of the CCIV on trust, but that custodian would not be regulated as a 'depositary' under this Bill.

***Who must have a depository***

6.16 A retail CCIV must have a depository. *[Schedule 1, Part 1, item 1, subsection 1163(1)]*

6.17 A wholesale CCIV may choose to have a depository. If a wholesale CCIV appoints a depository and notifies ASIC in the manner explained below in paragraph 6.24, then the rules about depositories explained in this Chapter apply to the wholesale CCIV and the depository in their entirety. *[Schedule 1, Part 1, item 1, section 1163A]*

6.18 For instance, if a wholesale CCIV chooses to have a depository, the assets of the CCIV must be held (on trust) by the depository. *[Schedule 1, Part 1, item 1, subsection 1164(1)]*

6.19 The rules about the depository of a CCIV are identical for retail and wholesale CCIVs, except that having a depository is mandatory for the former and voluntary for the latter.

6.20 Once a wholesale CCIV appoints a depository, it cannot revoke its election to have one.

6.21 It is envisaged that wholesale CCIVs may elect to have a depository in the expectation that prospective investors would be attracted to the additional protection that would afford them.

***Basic requirements***

6.22 The depository of a CCIV must be:

- either:
  - a public company; or
  - a foreign company registered under Division 2 of Part 5B.2 of the Act;
- that holds an AFSL authorising it to act as a depository; and
- that meets the independence requirement explained below at paragraphs 6.25 to 6.34.

*[Schedule 1, Part 1, item 1, subsection 1163(2)]*

6.23 It is envisaged the initial appointment of a depository will be made by nomination at the time of registration of a company as a CCIV, with the name of the depository included in the prospective CCIV's application for registration. The registration process for CCIVs is still

under development and will be included in the next exposure draft of the Bill.

6.24 In the event of any subsequent replacement of the depositary with a new depositary, the corporate director must give ASIC written notice of the name, and the address of the registered office, of the depositary. *[Schedule 1, Part 1, item 1, section 1163B]* The circumstances that could give rise to subsequent appointments are discussed below at paragraphs 6.73 to 6.117.

*Independence requirement*

6.25 A person that is, or is to be appointed as the depositary, as an agent of the depositary or otherwise engaged by the depositary must satisfy the independence requirement. For the purposes of determining whether the person meets the independence requirement, the concept of a ‘test depositary’ is used. *[Schedule 1, Part 1, item 1, paragraph 1163(2)(c), section 1163C and paragraph 1164(3)(b)]*

6.26 A person (the test depositary) satisfies the independence requirement unless one or more of the following is true:

- a director or officer of the corporate director of the CCIV, or any associate of a director of the corporate director of the CCIV:
  - is a director, officer or employee of the test depositary;
  - is in a position to cast, or to control (whether directly or indirectly) the casting of more than 0.5 per cent of the maximum number of votes at a general meeting of the test depositary, if the only shares in the test depositary were shares of a particular class;
  - has any other relationship with the test depositary which might reasonably be expected to give rise to a potential conflict of interest;
- the voting power of the corporate director of the CCIV in the test depositary exceeds 20 per cent;
- the test depositary’s voting power in any of the following exceeds 20 per cent:
  - the CCIV;
  - the corporate director of the CCIV;



- a class or classes of shares in the corporate director of the CCIV (see paragraphs 6.28 to 6.29);
- the corporate director of the CCIV controls the test depositary, or the test depositary controls the corporate director of the CCIV (see paragraph 6.30).

*[Schedule 1, Part 1, item 1, section 1163C]*

6.27 Note that the independence requirement does not prevent the depositary owning shares in the CCIV.

6.28 A person's voting power in a class of shares is worked out using the following formula:

$$\frac{\text{Person's and associates' votes}}{\text{Total votes}} \times 100$$

6.29 This formula accounts for the number of votes attached to all the voting shares in the class of shares that the person or an associate has a relevant interest in. A person's voting power in multiple classes of shares, or in the company or corporate director as a whole, is worked out using that formula as if all the shares were of the same class. *[Schedule 1, Parts 1 and 2, items 1 and 12, the definition of 'voting power' in section 9, and section 1163D]*

6.30 'Control', for the purposes of determining whether or not the corporate director of the CCIV controls the test depositary, or whether or not the test depositary controls the corporate director of the CCIV, is defined in section 50AA.

6.31 'Associate', for the purposes of determining who is an associate of a director of the corporate director of the CCIV, or who is an associate of the person whose voting power is to be calculated (see above formula), takes its meaning from Division 2 of Part 1.2 of the Act.

6.32 The independence requirement ensures the depositary is independent of the directors of the corporate director (who are the directing minds of the CCIV), does not have significant voting power in the CCIV and does not have practical control of the CCIV.

6.33 The independence requirement is based in part on the requirements in the United Kingdom's OEIC regime, but includes a higher threshold for the prohibition on voting power (20 per cent rather than 15 per cent) and includes an additional requirement prohibiting practical control. The higher threshold is used for the prohibition on

voting power because the 20 per cent threshold is used widely in Australian law (see for example, Part 6.1 of the Act).

6.34 The independence requirement supplements the general obligations on the depositary and the corporate director as AFSL holders. They are obliged to have in place adequate arrangements for the management of conflicts of interest that may arise wholly, or partially, in relation to their financial services activities (see paragraph 912A(1)(aa)).

*Corporate director and depositary to provide each other with reasonable assistance*

6.35 The roles of the corporate director and depositary are complementary and, hence, the corporate director must give the depositary reasonable assistance to support the depositary's performance of its duties. The depositary must likewise give the corporate director reasonable assistance to support the corporate director's performance of its duties. *[Schedule 1, Part 1, item 1, subsections 1163E(1) and 1164C(1)]*

6.36 This includes requiring the corporate director or depositary to provide any information in its possession or control that the depositary or corporate director reasonably requires to fulfil its responsibilities in relation to the CCIV. A written request for information must be complied with in a reasonable period. *[Schedule 1, Part 1, item 1, sections 1163E and 1164C]*

## **Duties and powers of the depositary**

6.37 The depositary of a CCIV has three core duties: to hold the assets of the CCIV on trust for the CCIV; to execute the instructions of the corporate director in dealing with those assets; and to supervise the corporate director's conduct of certain activities.

6.38 The depositary also has some other statutory duties. These duties are in addition to those that may be imposed by the general law and by the constitution of the CCIV.

### ***Depositary to hold CCIV assets on trust***

6.39 The depositary must hold the assets of the CCIV on trust for the CCIV – this is its main function. ASIC may (in CCIV rules) determine exceptions to this rule in respect of a class of assets, such that the specified assets are not required to be held by the depositary. *[Schedule 1, Part 1, item 1, subsections 1164(1) and (2)]*

6.40 The depositary is to hold the assets on trust for the CCIV rather than for the members of the CCIV. This is because the CCIV, as a corporate entity, is the beneficial owner of its assets.

*Delegation of powers*

6.41 The depository may appoint an agent or otherwise engage a person to do anything it is authorised to do in connection with the CCIV, except to perform the depository's supervisory responsibility over the corporate director. The agent or person must not be the corporate director of the CCIV and must meet the independence requirement discussed above at paragraphs 6.25 to 6.34. *[Schedule 1, Part 1, item 1, subsection 1164(3)]*

6.42 If the depository appoints an agent or otherwise engages a person, the depository remains ultimately liable to members even if the agent or person acts fraudulently or outside the scope of the authority or engagement. *[Schedule 1, Part 1, item 1, subsection 1164(4)]*

6.43 The effect of this provision is to place the onus on the depository to make good to members any losses suffered as a result of the conduct of persons engaged by the depository in relation to the CCIV. The depository may in turn seek to recover its costs from the agent or engaged person.

6.44 Sub-agents engaged or appointed by an agent of the depository are to be treated as if they are agents appointed by the depository. *[Schedule 1, Part 1, item 1, subsection 1164(5)]*

6.45 The above approach is based on the rules for delegating the functions of a responsible entity of a registered scheme in subsections 601FB(2) and (3). This approach offers a higher level of investor protection than the delegation rules for other types of companies in section 190.

***Depository to deal with assets on corporate director's instructions***

6.46 Another core function of the depository is to execute the instructions of the corporate director in relation to dealing with the assets that the depository holds on trust for the CCIV.

6.47 The depository may deal with those assets only on instructions from the corporate director that are lawful and that comply with the CCIV's constitution. *[Schedule 1, Part 1, item 1, section 1164A]*

6.48 Though the assets are held by the depository, in order to effectively operate the CCIV the corporate director must be able to implement its commercial decisions about how the CCIV's assets are to be dealt with. The limitation on this principle is that the decisions and the implementation of the decisions must be lawful and compliant with the CCIV's constitution.

***Depositary to have supervisory responsibility***

6.49 Another core function of the depositary is to supervise the corporate director's conduct of certain activities. The depositary cannot delegate this function. *[Schedule 1, Part 1, item 1, subsections 1164B(1) and (3)]*

6.50 The depositary must supervise the corporate director's conduct of the following activities of the CCIV:

- issuing, redeeming and cancelling shares in the CCIV;
- valuing shares in the CCIV;
- allocating assets and liabilities of the CCIV to sub-funds of the CCIV; and
- allocating and distributing income of the CCIV.

*[Schedule 1, Part 1, item 1, subsection 1164B(2)]*

6.51 These activities are explained in further detail at paragraphs 6.54 to 6.66 below.

6.52 In order to discharge its supervisory responsibility, the depositary must take reasonable care to ensure that the corporate director conducts these activities in a manner that complies with the CCIV's constitution and the provisions of the Act. *[Schedule 1, Part 1, item 1, subsection 1164B(1)]*

6.53 The above is based in part on the activities specified for depositary supervision by Article 22(3) of the UCITS Directive.

***Issue, redemption and cancellation of shares in the CCIV***

6.54 The depositary must supervise the corporate director's conduct of issuing, redeeming and cancelling shares in the CCIV.

6.55 The corporate director of a CCIV must comply with Chapter 2H of the Act in respect of issuing shares and Division 4 of Part 2 of Chapter 7A in respect of issuing and redeeming redeemable shares (as well as Division 4 of Part 3 of Chapter 7A in the case of a retail CCIV).

6.56 The corporate director will also need to comply with requirements concerning cancellation of CCIV shares, to the extent provided for in the Act or this Bill (see, for example, the rule explained above at paragraph 5.68), the corporate director will need to comply with these provisions.

6.57 The constitution of the CCIV may set out further processes or requirements in respect of the issue, redemption and cancellation of shares. For example, shares are generally issued at net asset value to ensure the buy and sell prices are aligned.

*Valuing shares in the CCIV*

6.58 The depository must supervise the corporate director's conduct of valuing shares in the CCIV.

6.59 The constitution of a retail CCIV must make adequate provision for the consideration that is to be paid to acquire a share in the CCIV. *[Schedule 1, Part 1, item 1, paragraph 1155(1)(a)]* In the MIS regime, the equivalent provision (paragraph 601GA(1)(a)) is interpreted to mean that the constitution must include provisions for calculating the issue price of an interest in a scheme.

6.60 The corporate director must ensure that the assets of a sub-fund of the CCIV are valued at regular intervals appropriate to the nature of the assets. *[Schedule 1, Part 1, item 1, paragraph 1156(j)]* This is relevant to the net asset valuation calculations required by the rules about redemption of shares in a CCIV.

*Allocating assets and liabilities of the CCIV to sub-funds of the CCIV*

6.61 The depository must supervise the corporate director's conduct of allocating assets and liabilities of the CCIV to sub-funds of the CCIV.

6.62 The corporate director must allocate the assets and liabilities of the CCIV to the sub-funds of the CCIV in accordance with the requirements explained above at paragraphs 4.38 to 4.44 and 4.50 to 4.54. *[Schedule 1, Part 1, item 1, sections 1142, 1142E, 1142F and 1142J]*

*Allocating and distributing income of the CCIV*

6.63 The depository must supervise the corporate director's conduct of allocating and distributing income.

6.64 Part 2H.5 of the Act (concerning dividends) will affect the circumstances in which the corporate director may distribute the income of a sub-fund to the members of that sub-fund. Consequential amendments to Part 2H.5 of the Act are still under development and will be included in the next exposure draft.

6.65 As part of its obligation to prepare financial statements, and as a corollary of its obligation to allocate assets and liabilities to the sub-funds, the corporate director will be required to allocate the income of the CCIV to each of the sub-funds.

6.66 The allocation or distribution of the income of the CCIV must be determined in accordance with the constitution.

***Breach reporting***

6.67 The depositary must report breaches or suspected breaches to ASIC that:

- relate to the CCIV;
- arise in relation to the conduct by the corporate director of the activities described at paragraph 6.50 above; and
- are, or would be, in the opinion of the depositary, a serious breach of the Act.

*[Schedule 1, Part 1, item 1, subsection 1164E(1)]*

6.68 If the depositary becomes aware of a breach or suspected breach it must lodge a written report on the matter with ASIC as soon as practicable, and in any case within 10 business days after becoming aware of or reasonably suspecting the breach. *[Schedule 1, Part 1, item 1, subsection 1164E(2)]*

6.69 This breach-reporting obligation is based on the duty imposed on the responsible entity of a registered scheme in paragraph 601FC(1)(l).

***Further duties of the depositary***

6.70 The depositary owes the following general duties, which reflect the fundamental duties of a fiduciary, in exercising its powers and carrying out all of its other duties:

- to act honestly;
- to exercise the degree of care and diligence that a reasonable person would exercise in the depositary's position;
- to act in the best interests of the CCIV and, if there is a conflict, to give priority to the CCIV's interests over its own; and
- to treat members of the CCIV who hold shares of the same class equally, members of the CCIV who hold shares of different classes fairly and members of the CCIV who are members of different sub-funds fairly.

*[Schedule 1, Part 1, item 1, section 1164D]*

6.71 These duties are based in part on the duties of the responsible entity of a registered scheme in section 601FC.

6.72 As the depository is a company, its officers and its employees will owe duties under Part 2D.1 to the depository's own shareholders. If these duties conflict with the obligations placed on the depository by the requirements explained in paragraphs 6.37 to 6.71, then the latter prevail. *[Schedule 1, Part 1, item 1, section 1164F]*

### **Replacing the depository**

6.73 The depository of a CCIV may not retire, or be removed by members of the CCIV, unless a new depository is chosen. *[Schedule 1, Part 1, item 1, section 1165C]*

6.74 This is the case even for wholesale CCIVs that have elected to have a depository.

6.75 A new depository is chosen only if a meeting of members of the CCIV passes a special resolution appointing a company to be the new depository of the CCIV and that company consents in writing to the appointment. *[Schedule 1, Part 1, item 1, section 1165D]*

6.76 The Court may appoint a temporary depository in some circumstances. *[Schedule 1, Part 1, item 1, section 1165E]*

6.77 A company cannot be chosen or appointed as the depository or temporary depository unless it meets the requirements for being a depository (see paragraph 6.22). *[Schedule 1, Part 1, item 1, section 1165A]*

6.78 Any purported change of the CCIV's depository or temporary depository is ineffective until ASIC's record of registration is altered to name another company as the CCIV's depository or temporary depository and the change is in accordance with the rules described in paragraphs 6.73 to 6.117. *[Schedule 1, Part 1, item 1, section 1165(1) and (2)]*

6.79 Whenever a new depository or temporary depository is chosen, or appointed by the Court, the corporate director of the CCIV must, as soon as practicable, lodge a notice with ASIC informing ASIC of the choice or appointment. *[Schedule 1, Part 1, item 1, section 1165(3)]*

6.80 The rules below have been based in part on the requirements to replace the responsible entity of a registered scheme in sections 601FJ to 601FT. These rules are also similar to those described above at paragraphs 3.23 to 3.50 for replacing the corporate director.

***Retirement of the depositary***

6.81 A depositary that wants to retire must notify the corporate director of its intention to retire and explain its reasons for wanting to retire. *[Schedule 1, Part 1, item 1, subsection 1165B(1)]*

6.82 Within 21 days of the corporate director receiving that notice, the corporate director must call a members' meeting to enable members to vote on a special resolution to choose a company to be the new depositary. *[Schedule 1, Part 1, item 1, subsection 1165B(2)]*

6.83 The notice of meeting of the CCIV's members must:

- set out the depositary's reason for wanting to retire;
- set a day for the meeting that is no later than two months after the depositary gave the corporate director notice of its intention to retire; and
- nominate a company to be the new depositary of the CCIV.

*[Schedule 1, Part 1, item 1, subsection 1165B(3)]*

6.84 If the corporate director fails to call the meeting within 21 days, the depositary may call the meeting. *[Schedule 1, Part 1, item 1, subsection 1165B(4)]*

6.85 These rules apply despite anything to the contrary in the CCIV's constitution or any contract entered into by the depositary, the CCIV, the corporate director or the members of the CCIV. *[Schedule 1, Part 1, item 1, section subsection 1165B(8)]*

6.86 This means that parties cannot develop a different process for the retirement of the depositary of a CCIV.

6.87 If the members' meeting passes a special resolution appointing a company to be the new depositary of the CCIV, and that company has consented in writing to become the new depositary, that company is chosen to be the new depositary. This is the only way a new depositary can be chosen to replace a retiring depositary. *[Schedule 1, Part 1, item 1, subsection 1165D(1)]*

6.88 The company chosen by the members need not be the one nominated in the notice of meeting. Further, nothing prevents a company that is the temporary depositary of a CCIV from being chosen as the new depositary, provided it meets the requirements for being a depositary. *[Schedule 1, Part 1, item 1, subsection 1165D(2)]*



*Application to Court*

6.89 If the members cannot choose a new depository, the corporate director must apply to the Court for the appointment of a temporary depository. *[Schedule 1, Part 1, item 1, subsections 1165E(1) to (3)]*

6.90 In these circumstances, ASIC, the current depository, or a member or group of members of the CCIV may also apply to the Court for the appointment of a temporary depository. *[Schedule 1, Part 1, item 1, subsections 1165E(1) and (2) and (4)]*

6.91 The conferral of standing in the latter case is intended to act as a backstop where the corporate director fails to make the application.

***Removal of the depository***

6.92 Removal of the depository can be initiated by the corporate director of the CCIV or by the members of the CCIV.

6.93 The corporate director may initiate the removal of the depository by calling a meeting of the CCIV's members to consider and vote on both a special resolution to remove the current depository and a special resolution choosing a new depository. *[Schedule 1, Part 1, item 1, subsection 1165B(5)]*

6.94 This is the only method by which the corporate director can initiate the removal of the depository.

6.95 Members may initiate the removal of the depository by calling a meeting in accordance with Part 2G.2 of the Act to consider and vote on both a special resolution to remove the current depository and a special resolution choosing a new depository. *[Schedule 1, Part 1, item 1, subsection 1165B(6)]*

6.96 This is the only method by which members can initiate the removal of the depository.

6.97 In either case (corporate director-initiated or member-initiated), the notice of meeting of the CCIV's members must:

- set out the intention to remove the depository; and
- nominate a company to be the new depository of the CCIV that meets the requirements for being a depository and consents to be chosen as the new depository.

*[Schedule 1, Part 1, item 1, subsection 1165B(7)]*

6.98 The rules concerning the removal of the depositary apply despite anything to the contrary in:

- the CCIV's constitution; or
- any contract entered into by the depositary, the CCIV, the corporate director or the members of the CCIV.

*[Schedule 1, Part 1, item 1, subsection 1165B(8)]*

6.99 This means that parties cannot develop an alternative process for removing the depositary of a CCIV.

6.100 If the members' meeting passes a special resolution appointing a company to be the new depositary of the CCIV, and that company has consented in writing to become the new depositary, that company is chosen to be the new depositary. This is the only way a new depositary can be chosen to replace a depositary that has been removed. *[Schedule 1, Part 1, item 1, subsection 1165D(1)]*

6.101 The company chosen by the members need not be the one nominated in the notice of meeting. Further, nothing prevents a company that is the temporary depositary from being chosen as the new depositary, provided it meets the requirements for being a depositary. *[Schedule 1, Part 1, item 1, subsection 1165D(2)]*

#### *Application to Court*

6.102 If the removal of the depositary is initiated and the members pass a special resolution to remove it but are unable to choose a new depositary, the corporate director must apply to the Court for the appointment of a temporary depositary. *[Schedule 1, Part 1, item 1, subsections 1165E(1) to (3)]*

6.103 In these circumstances ASIC, the current depositary, or a member or group of members of the CCIV may also apply to the Court for the appointment of a temporary depositary. *[Schedule 1, Part 1, item 1, subsections 1165E(1) and (2) and (4)]*

6.104 The conferral of standing in the latter case is intended to act as a backstop where the corporate director fails to make the application.

6.105 If the removal of the depositary is initiated and the members fail to pass a special resolution to remove it, the current depositary remains in place. That depositary can only be removed when members, at a properly convened meeting, succeed in passing a special resolution to remove it.

### *Temporary depository*

6.106 The Court may make an order removing the current depository of a CCIV and appointing a temporary depository in its place in the following three scenarios:

- the retirement of the depository is initiated but the members are unable to choose a new depository;
- the removal of the depository is initiated and the members pass a special resolution to remove it but are unable to choose a new depository; or
- the depository loses its AFSL.

*[Schedule 1, Part 1, item 1, sections 1165E and 1165F and subsection 1165G(1)]*

6.107 The Court can only make the order if satisfied that it is in the interest of the members of the CCIV and the company consents in writing to becoming the CCIV's temporary depository. The Court may also make any further orders that it considers appropriate. *[Schedule 1, Part 1, item 1, subsections 1165G(2) and (3)]*

### *Application to Court if depository loses AFSL*

6.108 In the event of the depository of a CCIV losing its AFSL, the corporate director must apply to the Court for the appointment of a temporary depository. *[Schedule 1, Part 1, item 1, subsections 1165F(1) and (2)]*

6.109 In the event of the depository of a CCIV losing its AFSL, ASIC, or a member or group of members of the CCIV may apply to the Court for the appointment of a temporary depository. *[Schedule 1, Part 1, item 1, subsection 1165F(3)]*

6.110 The conferral of standing in the latter case is intended to act as a backstop where the corporate director fails to make the application. Unlike removal and retirement, the outgoing depository (which has lost its AFSL) does not have standing to make the application.

### *Corporate director to seek appointment of permanent depository*

6.111 Following the appointment of a temporary depository, the corporate director must take steps to ensure that members appoint a new depository or, if this fails to occur, to apply to the Court to have the CCIV wound up.

6.112 The corporate director must call a members' meeting within three months of the Court appointing the temporary depositary for the members to consider and vote on a special resolution choosing a company to be the new depositary. *[Schedule 1, Part 1, item 1, subsection 1165H(1)]*

6.113 The notice of meeting must nominate a company to be the new depositary of the CCIV that:

- meets the requirements for being a depositary (see paragraph 6.22); and
- consents to be chosen as the new depositary.

*[Schedule 1, Part 1, item 1, subsection 1165H(3)]*

6.114 On application by the corporate director within the three month period, the Court may grant an extension of time to call the meeting. *[Schedule 1, Part 1, item 1, subsection 1165H(2)]*

6.115 The corporate director must apply to the Court for the CCIV to be wound up if:

- the corporate director calls a meeting but the members are unable to choose a new depositary; or
- the corporate director fails to call a meeting at all within three months or any extended period.

*[Schedule 1, Part 1, item 1, subsection 1165J(1) and (2)]*

6.116 ASIC, or a member or group of members of the CCIV, may apply to the Court for the CCIV to be wound up if the corporate director does not do so. *[Schedule 1, Part 1, item 1, subsection 1165J(3)]*

6.117 These rules are based on the process in section 601FQ for the temporary responsible entity of a registered scheme to take steps for the appointment of a new responsible entity. However, unlike section 601FQ, the temporary depositary should not have responsibility for appointing a new depositary. The appropriate entity to have that responsibility is the corporate director.

### ***Consequences of changing the depositary***

6.118 If the depositary changes, the former depositary must as soon as practicable give the new depositary any books in the former depositary's possession or control that the Act requires to be kept in relation to the CCIV, and to give other reasonable assistance to facilitate the change in depositary. *[Schedule 1, Part 1, item 1, section 1166]*

6.119 Further, if the depository changes then the rights, obligations and liabilities of the former depository in relation to the CCIV become the rights, obligations and liabilities of the new depository. However, the former depository will retain the right to be paid fees and to be indemnified for expenses incurred relating to the period when it was the depository. The former depository also retains any right, obligation or liability it had as a member of the CCIV and any liability for which it could not have been indemnified out of the assets of the CCIV had it remained the depository. *[Schedule 1, Part 1, item 1, section 116A]* This would not preclude liability on the part of the former depository for its conduct while performing the depository function.

6.120 A document to which the former depository was a party is to be read as if the new depository (and not the former depository) was the party to that document where the document is capable of having effect after the change. *[Schedule 1, Part 1, item 1, section 1166B]*

6.121 These requirements are designed to facilitate a smooth transition between the outgoing depository and the incoming depository.

*Qualified privilege*

6.122 Officers, employees, former officers and former employees have qualified privilege in proceedings for defamation in respect of a statement to ASIC in connection with replacing the depository of a CCIV. *[Schedule 1, Part 1, item 1, section 1166C]*

6.123 This provision is based on section 601JE which grants qualified privilege to a member of a registered scheme's compliance committee.



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## **Chapter 7**

### **CCIV Rules**

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#### **Outline of chapter**

7.1 Division 6 of Part 2 of Chapter 7A provides for ASIC to make CCIV rules and specific exemption and modification orders in relation to the new Chapter. A regulation making power is also included.

7.2 This rule making power enables ASIC to make rules of a timely, commercially relevant or technical nature that support the effective operation of the CCIV regime and are consistent with the Object of Chapter 7A.

#### **Detailed explanation of new law**

##### ***CCIV rules***

7.3 ASIC may make CCIV rules, by legislative instrument, prescribing matters that are required or permitted by the Act or that are necessary or convenient to be prescribed for carrying out or giving effect to Chapter 7A. *[Schedule 1, Parts 1 and 2, items 1 and 3, the definition of ‘CCIV rules’ in section 9, and subsection 1149(1)]*

7.4 CCIV rules may not do any of the following:

- create an offence or civil penalty;
- provide powers of arrest, or detention or entry, search or seizure;
- impose a tax;
- set an amount to be appropriated from the Consolidated Revenue Fund; or
- directly amend the Act.

*[Schedule 1, Part 1, item 1, subsection 1149(2)]*

7.5 In considering whether to make a CCIV rule, ASIC must have regard to the objects of Chapter 7A and the likely regulatory impact of the proposed rule and may have regard to any other matter ASIC considers relevant. *[Schedule 1, Part 1, item 1, 1149A]*

7.6 CCIV rules that are inconsistent with the regulations have no effect to the extent of the inconsistency. *[Schedule 1, Part 1, item 1, subsection 1149(3)]*

7.7 This is a safeguard provision that allows the Minister to disable by regulation any CCIV rule, or part of a rule, that the Minister considers is inappropriate or inconsistent with the CCIV legislation or the Government's policy intention.

#### ***Exemption and modification powers***

7.8 ASIC may make specific exemption and modification orders in relation to Chapter 7A and regulations made for the purposes of Chapter 7A. ASIC must give a copy of an exemption or declaration that relates to a specified person to that person as soon as reasonably practicable after the exemption or declaration is made. *[Schedule 1, Part 1, item 1, section 1149B]*

#### ***Regulations***

7.9 The operation of Chapter 7A, or any other provision of the Act that relates to a CCIV, or a class of CCIVs or all CCIVs, may be modified by regulation. *[Schedule 1, Part 1, item 1, section 1149C]*

7.10 This provision corresponds to the regulation making power in respect of registered schemes contained in section 601QB.

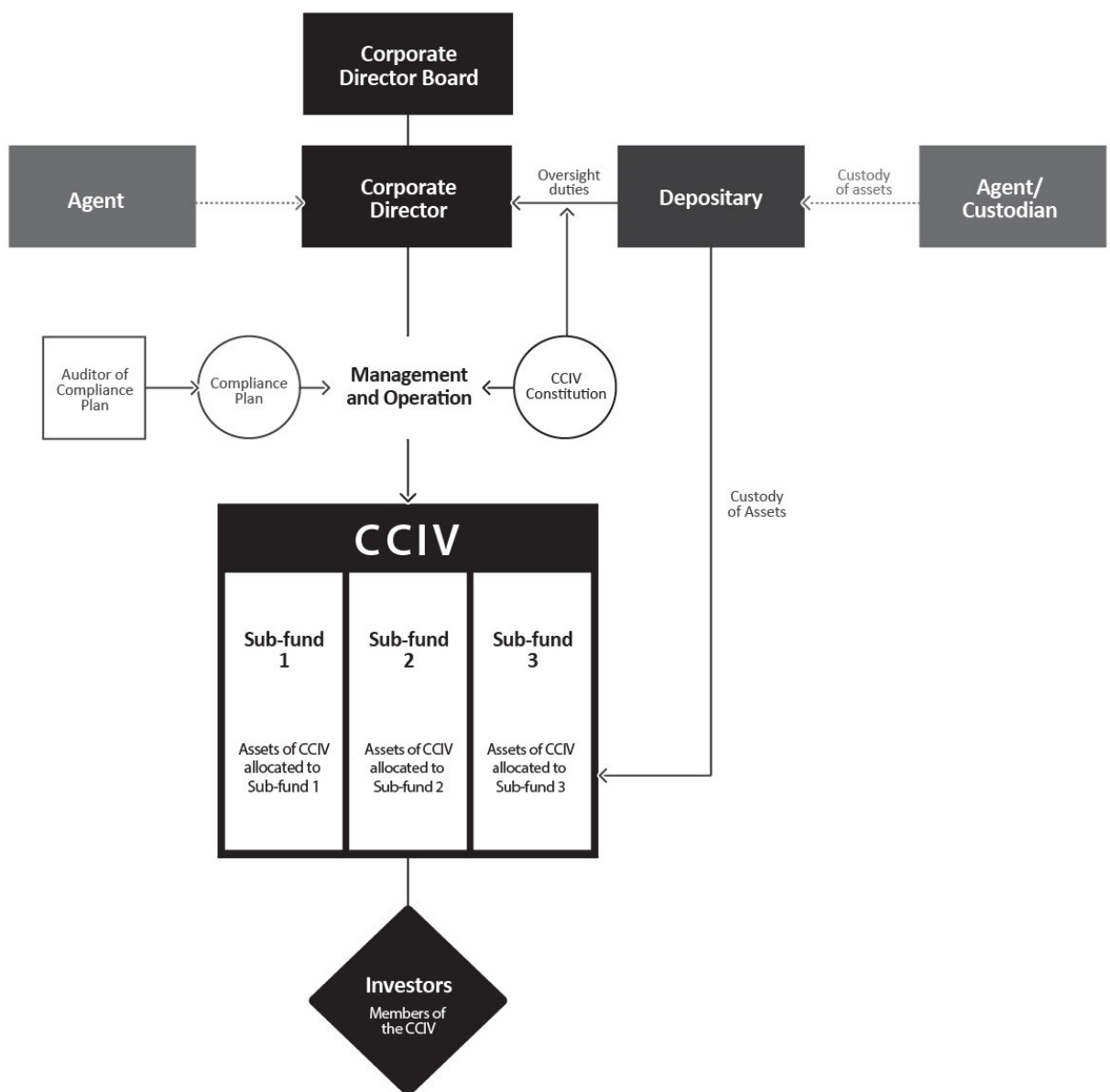


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## ***Appendix***

### ***Regulatory framework for a retail CCIV***

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Note: This diagram shows the regulatory framework as it applies to a retail CCIV. A wholesale CCIV is not required to have a depository or a compliance plan (or an auditor of a compliance plan). The appointment of an agent or custodian of the corporate director or depository is optional for both retail and wholesale CCIVs.