
TREASURY LAWS AMENDMENT (CORPORATE COLLECTIVE INVESTMENT
VEHICLE) BILL 2018

EXPOSURE DRAFT EXPLANATORY MATERIALS

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Glossary

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

| <i>Abbreviation</i> | <i>Definition</i> |
|---------------------|--|
| AAT | Administrative Appeals Tribunal |
| ACN | Australian Company Number |
| AFSL | Australian financial services licence |
| AMIT | Attribution managed investment trust |
| APFRN | Australian Passport Fund Registration Number |
| ARFN | Australian registered fund number |
| ARFP | Asia Region Funds Passport |
| ARFP Act | <i>Corporations Amendment (Asia Region Funds Passport) Act 2018</i> |
| ASIC | Australian Securities and Investment Commission |
| ASIC Act | <i>Australian Securities and Investments Commission Act 2001</i> |
| AQUA | ASX Quoted Assets Market |
| CCIV | Corporate collective investment vehicle A reference to 'CCIV' in these explanatory materials is a reference to both retail and wholesale CCIVs unless otherwise specified |
| CIV | Collective investment vehicle |
| Criminal Code | Schedule to the <i>Criminal Code Act 1995</i> |
| Guide | Attorney-General's Department, A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers, September 2011 |
| IMR | Investment Manager Regime |
| MIS | Managed investment scheme |
| OEIC | A company that is an Open-Ended Investment Company regulated under legislation of the United Kingdom |

| <i>Abbreviation</i> | <i>Definition</i> |
|----------------------------|--|
| Passport | Asia Region Funds Passport |
| PDS | Product disclosure statement |
| PPSA | <i>Personal Property Securities Act 2009</i> |
| The Act | <i>Corporations Act 2001</i> |
| The Bill | Exposure draft of the Treasury Laws Amendment (Corporate Collective Investment Vehicle) Bill 2018 |
| UCITS | Undertakings for Collective Investment in Transferable Securities (UCITS) Directive (a regulatory framework adopted by the European Union) |

Chapter 1

Introduction

Outline of chapter

- 1.1 The exposure draft of the Treasury Laws Amendment (Corporate Collective Investment Vehicle) Bill 2018 inserts Chapter 8B into the Act and makes related amendments to the Act, the ASIC Act and the PPSA. Chapter 8B establishes the regulatory framework for CCIVs.
- 1.2 This chapter of the explanatory materials discusses the policy context for 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 IMR, the introduction of the ARFP Act, and the development of new CIVs.
- 1.5 The IMR improves Australia's competitiveness as a financial centre by clarifying that investments by non-residents in foreign assets will generally be 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. Legislation to implement the Passport in Australia was introduced into the Parliament on 28 March 2018.
- 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 MIS (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. The 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 UCITS Directive and operate with a corporate structure.

1.12 Australian funds management is generally conducted through a 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 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 contributes to a 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 can lower the barriers to entry for new fund managers seeking to operate in Australia. This can increase competition

and allow Australian consumers greater product choice, including exposure to new asset classes. The creation of an internationally recognisable CCIV framework is also expected to encourage the entry of new service providers, such as providers of depositary services, into the Australian market. 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, over time, 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 company structure limited by shares but is modelled in general terms on the United Kingdom's 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 that are 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 regulatory framework distinguishes between retail and wholesale CCIVs. It retains and expands the retail investor protections of a registered scheme while also replicating elements of the flexibility and lighter touch regulatory approach applying to wholesale MISs. This reflects the fact 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 AMITs will be extended to CCIVs, subject to meeting certain eligibility criteria. Exposure draft legislation addressing the taxation treatment of CCIVs is being consulted on separately and is not dealt with in these explanatory materials.

Summary of new law

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

Registration

Registration of a CCIV

1.23 A CCIV is a new type of company that is limited by shares and has as its director a public company with an AFSL authorising it to operate the business and conduct the affairs of the CCIV (the corporate director).

1.24 A company may be registered as a CCIV if it meets certain basic registration requirements, including that upon registration it will have at least one sub-fund (which must have at least one member). The registration requirements are broadly similar to those of other companies.

1.25 Upon registration, the persons identified in the application as the proposed corporate director, depositary and members of the CCIV assume those roles (subject to meeting the regulatory requirements for the roles). The shares specified in the application form are taken to be issued to those members upon registration.

1.26 A CCIV may be either retail or wholesale, with retail CCIVs subject to a regulatory framework that encompasses additional regulatory protections necessary for retail investors. Wholesale CCIVs are subject to a more limited regulatory framework, reflecting the higher degree of investor sophistication among wholesale investors and capacity to negotiate bespoke arrangements with fund providers.

1.27 A CCIV will be a wholesale CCIV unless securities in the CCIV were issued to retail clients, or transferred to a retail client in circumstances that would have required that a PDS be given to that client. This is intended to ensure that a CCIV with one or more retail clients (within the existing definitions in Chapter 7 of the Act) will generally be a retail CCIV.

1.28 A CCIV, as well as a sub-fund of a CCIV, are both prohibited from being included in the official list of a prescribed financial market operated in Australia. This prohibition does not restrict a security in a

CCIV from being quoted on a financial market or settled using financial market infrastructure, such as AQUA, subject to the rules of the relevant market. Listing will be considered further once the CCIV regime is operating.

Registration of a sub-fund of a CCIV

1.29 A sub-fund of a CCIV is all or part of the CCIV's business that is registered by ASIC as a sub-fund of the CCIV. A sub-fund is established on registration.

1.30 The initial sub-fund or sub-funds of the CCIV are registered by ASIC as part of the registration of the CCIV. Registration of a sub-fund of the CCIV after the registration of the CCIV itself is by a stand-alone process.

1.31 An ARFN is given to each sub-fund as part of the registration process. A sub-fund's name is the name specified in the record of the sub-fund's registration. A sub-fund's name is subject to naming requirements, including that it must have the CCIV's name at the end of its name.

Registers

1.32 Similar to a company and a registered scheme, a CCIV must maintain a register of members including the details of the securities held by each member and which sub-fund of the CCIV each security is referable to.

Corporate governance

Governance rules

1.33 As a CCIV is a type of company, it has all the powers of an individual and a body corporate, including the power to enter into contracts and issue and cancel shares in the company.

1.34 Unlike other companies, a CCIV has a single corporate director. The corporate director is a public company with its own officers and employees. The new law includes provisions that allow the natural person officers of the corporate director to do some activities, such as enter into a contract on behalf of the CCIV in certain circumstances.

1.35 Both retail and wholesale CCIVs must have a constitution. The constitution of a CCIV is enforceable as a statutory contract between:

- the CCIV and each member;
- the CCIV and the corporate director;
- the corporate director and each member; and
- a member and each other member.

1.36 The constitution of a retail CCIV must make adequate provision for certain matters (such as the establishment of sub-funds and the method by which member complaints are to be dealt with).

Officers and employees of the CCIV

1.37 The CCIV must have as its sole director a public company that holds an AFSL authorising it to operate the business and conduct the affairs of a CCIV. The CCIV does not have any other officers or employees other than the corporate director. The primary exception to this is any liquidator, administrator or receiver appointed to the CCIV, who is also an officer of the CCIV.

1.38 The corporate director of a CCIV has an obligation to operate the business and conduct the affairs of the CCIV. The corporate director must also perform the functions conferred on it by the CCIV's constitution and the Act, and ensure that these are complied with by the CCIV.

1.39 The Bill sets out the powers and obligations of corporate directors in relation to the CCIV and its members. The corporate director has certain duties and obligations that arise from its role as a director of a company, and others that are specific to CCIVs. The corporate director of a retail CCIV, and the officers and employees of the corporate director, owe additional duties and obligations that reflect those that apply to responsible entities of registered schemes.

1.40 If there is any conflict between the duties that officers and employees owe to the CCIV and the duties they owe to the corporate director, the duties owed to the CCIV prevail. This approach ensures general parity between the registered scheme and retail CCIV regimes.

1.41 For the purposes of determining certain liabilities, the corporate director of a retail CCIV is liable for the acts of its agents (and other persons taken to be its agents such as the agents of the CCIV), even if those acts are fraudulent or outside the scope of its authority. This ensures parity with the existing model for registered schemes and ensures the corporate director is ultimately liable for all of the operations of the CCIV.

Depositary

1.42 A retail CCIV must have a depositary. A wholesale CCIV may choose to have a depositary. If it so chooses, the wholesale CCIV is subject to the full regulatory requirements for depositaries.

1.43 The depositary must be a public company or a registered foreign company that holds an AFSL authorising it to act as a depositary for a CCIV. The depositary of a CCIV (and any entities performing depositary functions) must also meet the independence requirement.

1.44 The independence requirement involves a simple prohibition on the body that is (or proposes to be) the depositary, and any agents or persons engaged by the depositary to perform depositary functions, from also being an entity that directs investment decisions for the CCIV. This means that the depositary and any other entity performing depositary functions for the CCIV is legally separated from any entity that directs investment decisions for the CCIV.

1.45 The regulations may prescribe further functional independence requirements that the depositary (and its agents) must comply with in certain circumstances.

1.46 One of the depositary's core functions is to hold the assets of the CCIV. Another core function of the depositary is to supervise the conduct of certain activities carried out in relation to the CCIV.

1.47 Money or property acquired by a CCIV that has a depositary must be transferred to the depositary immediately after it is acquired. The depositary must hold the CCIV's money and property in a segregated manner and on trust for the CCIV. It must execute lawful instructions in relation to the assets of a CCIV. It also supervises certain aspects of the operations of the CCIV.

1.48 The depositary is appointed either as part of the registration of the CCIV or by notice to ASIC. The process for changing depositary depends on the circumstances in which the depositary is being changed.

Compliance plan

1.49 A retail CCIV must have a compliance plan and a compliance plan auditor (similar to the requirements for a compliance plan of a registered scheme).

1.50 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 the CCIV's constitution. This is the only basic content requirement for the compliance plan.

1.51 The corporate director must ensure at all times that the CCIV's compliance plan meets the legislative requirements for compliance plans. The corporate director must also comply with the compliance plan.

Member protection

1.52 Except in limited circumstances, a CCIV must obtain the approval of the members of each affected sub-fund if the CCIV wishes to give a financial benefit to a related party of the CCIV.

1.53 As for other companies, members of a CCIV are able to seek remedy against a CCIV if its affairs (of the affairs of one or more sub-funds) are being conducted in a manner that is contrary to the interests of

the members of the CCIV (as a whole) or is oppressive to a member, or class of members, of the CCIV. The grounds for an order by the Court are not exhaustive and include an order to modify or repeal the CCIV's constitution.

1.54 A member of a CCIV may bring, or intervene in, legal proceedings on behalf of the CCIV in certain circumstances.

1.55 The corporate director of a CCIV has civil liability to members of the CCIV for a contravention of Chapter 8B (regardless of whether or not the corporate director has been convicted). This is consistent with the right of a member of a registered scheme to seek remedy against the responsible entity of the scheme in similar circumstances.

Meetings

1.56 The corporate director (being a company with its own board of directors) may pass a resolution on behalf of the CCIV if the directors of the corporate director pass a resolution that expressly states it is on behalf of the corporate director and, if it is the corporate director of more than one CCIV, the CCIV to which the resolution applies.

1.57 A meeting of the members of the whole CCIV or a sub-fund of the CCIV may be called by a director or by a member. The requirements for meetings of members of CCIVs are based on the requirements that apply to registered schemes.

1.58 Some modifications are made to account for a CCIV's corporate status. In particular, a member's voting power at a meeting (of either the CCIV or a sub-fund) is referable to the value of the shares the member holds in the CCIV.

Corporate contraventions

1.59 The corporate director of a CCIV is generally responsible for conduct of the CCIV. This reflects the fact that a CCIV does not have any employees and the corporate director is its only director. The Bill includes bespoke rules that apply across all Commonwealth laws, and to conduct that constitutes a contravention of a criminal offence or a civil penalty provision. These rules operate in place of Part 2.5 of the Criminal Code and any other attribution rules that would otherwise apply in relation to conduct undertaken by or in relation to a CCIV.

1.60 The consequences of a contravention of a civil or criminal penalty provision by a CCIV do not apply to the CCIV. A CCIV is not liable for any fine or penalty and may not be given an infringement notice. However, if a CCIV is found to have committed an offence or breached a civil penalty provision then the corporate director of the CCIV at the time of the offence or breach is also taken to have committed the offence or breached the provision and is liable for any associated fine or penalty.

1.61 The new law does not apply to contraventions of State and Territory laws. However, if a CCIV breaches a State or Territory law then ASIC, the CCIV or a member of the CCIV may apply to a Court for a compensation order to be made against the corporate director in respect of any loss or damage as a result of the breach.

Shares and debentures

1.62 A CCIV may issue shares and debentures, provided that each security is referable to only one sub-fund. The CCIV may also issue ordinary shares that are liable to be redeemed ('redeemable shares'). Unlike for ordinary companies, redemptions do not need to be paid out of profit, but the sub-fund to which the shares are referable must be solvent immediately before the redemption and not insolvent immediately after the redemption.

1.63 CCIVs may pay dividends, redeem redeemable preference shares and reduce their share capital in a similar way to other companies. Some modifications have been made to these rules to make it easier for CCIVs to reduce share capital and apply the requirements at the sub-fund level.

Financial reporting and updating ASIC information

1.64 The reporting requirements in Chapter 2M apply to retail CCIVs with modifications where appropriate to ensure that reporting is undertaken at the sub-fund level. Chapter 2M generally does not apply to wholesale CCIVs, with the exception of provisions relating to financial records. A CCIV's annual directors' report requirements are adapted so that it must include specific details about the corporate director and its directors, such as any benefits or interests of a director of the corporate director in the CCIV.

Operating a CCIV

1.65 A CCIV must have at least one sub-fund. Each part of the CCIV's business must be referable to one (and only one) sub-fund of the CCIV. The cumulative business of all of the sub-funds of the CCIV must constitute the entire business of the CCIV.

1.66 A sub-fund is established on registration by ASIC and is identifiable by its unique name and ARFN. A sub-fund does not have legal personality. Each security that is issued by a CCIV must be referable to a sub-fund.

1.67 Allocation rules set out how assets and liabilities of the CCIV are attributed to the CCIV's sub-funds. In the event that money (acquired in a single lump sum) or property acquired by the CCIV relates to the business of more than one sub-fund, the corporate director must determine the proportion of the money or property that is to be allocated to each sub-fund of the CCIV. The proportion that is allocated must be fair and reasonable in the circumstances. A single item of property that relates to the business of more than one sub-fund of the CCIV must be converted into money or other property that can be allocated among the sub-funds of the CCIV in accordance with the allocation rules.

1.68 Similar rules also apply to liabilities incurred by a CCIV.

External administration and deregistration

External administration

1.69 External administration applies on a sub-fund-by-sub-fund basis. This is achieved by applying translation rules to the existing external administration provisions in Chapter 5.

1.70 The translation rules ensure that the process for winding up a company in Chapter 5 applies in respect of a sub-fund of a CCIV. A CCIV cannot be wound up.

1.71 The new law also sets out the powers of a liquidator, corporate director and depositary when a sub-fund is being wound up. A liquidator only has the power to perform a function to the extent that it relates to the sub-fund that is being wound up. The corporate director continues to make all allocation determinations and exercise its normal powers for the sub-funds that are not being wound up.

1.72 In the arrangement and reconstruction provisions in Part 5.1, the consequence of applying the translation rules is that sub-funds may be rearranged within a CCIV or transferred between CCIVs. The new law also grants the Court additional powers to make orders in the CCIV context. This includes the power to make orders in relation to the assets and liabilities of a sub-fund.

1.73 In the receivership provisions, receivers are taken to be appointed by each sub-fund separately. Receivers have special powers to instruct the depositary and challenge allocation determinations before the Court.

Deregistration

1.74 A sub-fund of a CCIV may be voluntarily deregistered on application by the CCIV, the corporate director or the liquidator of the sub-fund. ASIC or a Court may also initiate deregistration of a sub-fund in certain circumstances.

1.75 A CCIV must be deregistered by ASIC after the CCIV's last sub-fund has been deregistered. This is the only way a CCIV may be deregistered.

1.76 The consequences of deregistering a sub-fund or CCIV generally mirror the consequences of deregistering other types of companies under Chapter 5A. On deregistration, a sub-fund ceases to be established and a CCIV ceases to exist. Any assets of the sub-fund vest in the Commonwealth or ASIC. The books of the sub-fund or the CCIV must be retained for three years after deregistration.

Takeovers, compulsory acquisitions, continuous disclosure and fundraising

1.77 The acquisition of a relevant interest in a CCIV is not regulated by procedural rules and obligations regarding takeovers, compulsory acquisitions and buy-outs. However, a CCIV must comply with the rules around takeovers, compulsory acquisitions and buy-outs when it is proposing to acquire interests in another entity that is subject to these rules.

1.78 The Takeovers Panel's jurisdiction does not apply in relation to the affairs of a CCIV. This means that the Takeovers Panel does not have power to intervene in the affairs of a CCIV, including in relation to a takeover of a CCIV.

1.79 If a CCIV is a disclosing entity, then it must comply with the continuous disclosure requirements in section 675 of the Act in the same way as a disclosing entity whose interests are managed investment products.

Financial services and markets

1.80 The new law modifies the operation of Chapter 7 of the Act, which regulates financial services and markets. Key modifications are made to provisions that relate to assigning responsibility for conduct, financial services licencing and disclosure for financial products.

1.81 The corporate director of the CCIV is taken to do any financial services that would otherwise be provided by a CCIV, with the exception of issuing securities in a CCIV, which is undertaken by the CCIV itself. The corporate director, therefore, is required to hold an AFSL that

authorises it to provide the financial service of ‘operating the business and conducting the affairs of a CCIV’. A CCIV is always exempt from the requirement to hold an AFSL.

1.82 A PDS, rather than a prospectus, must be given to retail clients who acquire a security in a CCIV. Limited exceptions apply to the PDS requirements where a retail client is associated with a CCIV or corporate director, and in other circumstances as appropriate.

Asia Region Funds Passport regime

1.83 The provisions relating to the ARFP regime have been extended to cover CCIVs. The corporate director of a retail CCIV may lodge an application with ASIC to register a sub-fund of the CCIV as an Australian passport fund. If the conditions for registration are satisfied, the sub-fund then becomes an Australian passport fund and the corporate director becomes the operator of the fund.

Miscellaneous

Amendments to Chapter 9 of the Act

1.84 Chapter 9 of the Act includes a number of miscellaneous provisions, including relating to registers, auditors and offences. Modifications to certain provisions in Chapter 9 ensure that these administrative provisions work appropriately in relation to CCIVs and corporate directors.

Amendments to the ASIC Act

1.85 Amendments to the ASIC Act ensure that the definition of financial services in the ASIC Act applies correctly, and that ASIC can exercise its powers and functions effectively in relation to CCIVs.

Subordinate legislation

1.86 ASIC may make CCIV rules, having regard to the Objects of Chapter 8B, the likely regulatory impact of the proposed rules and any other matter ASIC considers relevant. ASIC may also make exemption orders and modification declarations in relation to the Act and the CCIV rules. Regulations may also modify the operation of Chapter 8B, or any other provision of the Act.

Objects and outline of Chapter 8B

1.87 Part 8B.1 of Chapter 8B sets out the objects of the Chapter.

1.88 The objects of Chapter 8B are to establish a regulatory framework for forming and operating CCIVs in a way that is fair, efficient

and competitive and, in conjunction with the financial services licensing framework in Chapter 7 of the Act, to promote confident and informed investors in CCIVs. *[Schedule 1, item 4, section 1230]*

1.89 Part 8B.2 of Chapter 8B sets out the registration requirements for a CCIV and a sub-fund of a CCIV. Part 8B.2 also sets out the rules for registers relating to CCIVs, including the register of the CCIV's members.

1.90 Part 8B.3 of Chapter 8B sets out the rules relating to the corporate governance of CCIVs. This includes the rules regarding:

- governance of CCIVs (such as how a CCIV exercises company powers and the rules regarding a CCIV's constitution);
- the officers and employees of the CCIV (including the core obligations for the corporate director of the CCIV and the rules relating to its replacement);
- the officers, employees and auditors of the corporate director of the CCIV;
- the depositary of the CCIV;
- the compliance plan of a retail CCIV;
- member protection (including related party transactions by retail CCIVs, rights and remedies for the member of a CCIV and the corporate director's civil liability to members);
- meetings (including resolutions of a CCIV and meetings of the members of a CCIV (or a sub-fund of the CCIV)); and
- corporate contraventions (including the rules for establishing civil and criminal liability under Commonwealth laws).

1.91 Divisions 1 to 3 of Part 8B.4 of Chapter 8B establish the rules for corporate financing of a CCIV. It outlines the types of securities that CCIVs may issue and the circumstances when a CCIV is permitted to pay dividends. These Divisions also explain the requirements that must be satisfied before a CCIV may redeem its shares or reduce its share capital.

1.92 Divisions 4 and 5 of Part 8B.4 of Chapter 8B set out the rules for how financial reports and audits are to be prepared and conducted for CCIVs and sub-funds, as well as how the existing law about updating ASIC information for companies and registered schemes applies to CCIVs.

1.93 Part 8B.5 of Chapter 8B establishes the regulatory framework for operating the sub-funds of a CCIV and allocating the assets and liabilities to sub-funds.

1.94 Part 8B.6 of Chapter 8B outlines the process for winding up a sub-fund and how the other external administration processes apply in the CCIV context. It also outlines the process for deregistering a CCIV and sub-funds of a CCIV.

1.95 Part 8B.7 of Chapter 8B engages with several parts of the Act. Divisions 1 to 3 of Part 8B.7 outline how the following Chapters of the Act apply to CCIVs:

- Chapters 6 to 6C regarding takeovers, compulsory acquisitions and buy-outs;
- Chapter 6CA regarding continuous disclosure; and
- Chapter 6D regarding fundraising and disclosure.

1.96 Division 4 of Part 8B.7 modifies the operation of Chapter 7 for CCIVs and sets out how markets and financial services regulation apply to CCIVs and corporate directors.

1.97 Part 8B.8 of Chapter 8B outlines consequential amendments to Chapter 9 of the Act. The Bill modifies certain provisions, such as those relating to registers, to ensure that they operate appropriately in relation to CCIVs and their corporate directors.

1.98 Part 8B.9 of Chapter 8B allows ASIC to make CCIV rules and issue exemption orders and modification declarations in respect of the CCIV provisions (comprising the Act and the CCIV rules). A corresponding regulation making power is also included.

Chapter 2

Registration of a CCIV

Outline of chapter

2.1 Chapter 2 of these explanatory materials sets out the registration requirements for a CCIV and a sub-fund of a CCIV.

2.2 It sets out:

- the requirements for registration as a CCIV;
- how a CCIV is registered;
- the rules for a CCIV's name;
- the meaning of a retail CCIV and a wholesale CCIV;
- the prohibition on listing a CCIV; and
- the prohibition on changing company type.

2.3 In relation to the registration of a sub-fund of a CCIV, it sets out:

- what a sub-fund of a CCIV is;
- how a sub-fund of a CCIV is registered; and
- the rules for a sub-fund's name.

2.4 Chapter 2 also sets out the rules for registers relating to CCIVs, including the register of the CCIV's members.

Context of amendments

2.5 The key feature of a CCIV is its corporate status: a CCIV is a passive investment company used for funds management. Prior to the implementation of the CCIV regime in Australia, the only vehicle used for passive investment business activities has been trust-based MISs. MISs that offer interests to retail clients must be registered schemes, which are regulated under Chapter 5C of the Act.

2.6 The establishment of CCIVs brings the Australian regime for funds management into line with jurisdictions overseas, in particular the European Union's UCITS regime, the UK's OEIC regime, and various other regimes in the Asian region.

2.7 Several of the core features of a CCIV have been drawn from overseas regulatory precedents, including that a CCIV is a company limited by shares and the concept of a sub-fund of a CCIV.

2.8 In addition, parts of the regulatory framework for CCIVs have been drawn from the MIS regime in order to ensure general parity and consistency between the two regimes.

2.9 Similar to a MIS, a CCIV may either be retail or wholesale. Generally, a CCIV is a retail CCIV if it issues or has issued its securities to retail clients. Otherwise it is a wholesale CCIV. Different regulatory requirements apply to retail and wholesale CCIVs to ensure an appropriate balance between regulation and investor protection for retail and wholesale clients.

2.10 However, unlike the MIS regime, which only requires the registration of retail MISs, all CCIVs must be registered as a company with ASIC.

Summary of new law

Registration of a CCIV

2.11 A CCIV is a new type of company that is limited by shares and has as its director a public company with an AFSL authorising it to operate the business and conduct the affairs of the CCIV.

2.12 A company may be registered as a CCIV if it meets certain basic registration requirements, including that upon registration it will have at least one sub-fund (which must have at least one member).

2.13 A CCIV is registered through the same process as other companies, although the application process reflects the unique corporate structure of a CCIV (for example, additional information must be provided in relation to the proposed depositary of the CCIV and the sub-fund or sub-funds that the CCIV proposes to have on registration). Some of the content that is required for other companies is not relevant in the CCIV context (such as the details of the company's secretary).

2.14 The application for registration must be accompanied by a notice stating whether the CCIV is to be a retail CCIV or a wholesale CCIV. If the CCIV is to be a retail CCIV, the application must also be accompanied by a copy of the CCIV's compliance plan.

2.15 Upon registration, the persons identified in the application as the proposed corporate director, depositary and members of the CCIV assume those roles. The shares specified in the application form are also taken to be issued to those members upon registration.

2.16 A CCIV's name is subject to special naming requirements – including requiring the expression “Corporate Collective Investment Vehicle” or the abbreviation “CCIV” at the end of its name.

2.17 A CCIV may be a retail CCIV or a wholesale CCIV. Retail CCIVs must meet a higher regulatory standard than wholesale CCIVs and are subject to additional regulatory requirements. The new law sets out when a CCIV is a retail CCIV or a wholesale CCIV. A CCIV is a wholesale CCIV unless securities in the CCIV were issued to retail clients, or transferred to a retail client in circumstances that required that a PDS be given to that client. This will generally ensure that a CCIV with one or more retail clients (within the existing definitions in Chapter 7 of the Act) will be a retail CCIV. This includes where a CCIV has one or more ‘indirect’ retail clients, who hold their interest in the CCIV under a custodial arrangement.

2.18 A CCIV, and a sub-fund of a CCIV, are prohibited from being included in the official list of a prescribed financial market operated in the Australian jurisdiction. This prohibition does not prevent a security in a CCIV from being quoted on a financial market, such as AQUA, subject to the rules of that financial market.

2.19 A CCIV may not change into another type of company. Another type of company may not change into a CCIV.

Registration of a sub-fund of a CCIV

2.20 A sub-fund of a CCIV is all or part of the CCIV's business that is registered by ASIC as a sub-fund of the CCIV. A sub-fund is established on registration.

2.21 The initial sub-fund or sub-funds of the CCIV are registered by ASIC as part of the registration of the CCIV. Registration of a sub-fund of the CCIV after the registration of the CCIV itself is by a stand-alone process.

2.22 This stand-alone process involves lodging an application with ASIC in the prescribed form that states the proposed name of the sub-fund, the name and ACN of the CCIV, the details of each person who consents to become a member of the sub-fund and certain information about the shares that each member will take up. This information aligns with the information required for registration of an initial sub-fund as part of the registration of the CCIV itself.

2.23 An ARFN is given to each sub-fund as part of the registration process.

2.24 A sub-fund's name is the name specified in the record of the sub-fund's registration. A sub-fund's name is subject to naming

requirements, including that it must have the CCIV's name at the end of its name.

2.25 A sub-fund's name and ARFN must be identified on certain documents, including all public documents and negotiable instruments.

Registers

2.26 Similar to a company and a registered scheme, a CCIV must maintain a register of members including the details of the securities held by each member and which sub-fund of the CCIV each security is referable to.

Comparison of key features of new law and old law

| <i>New law</i> | <i>Current law</i> |
|---|--------------------|
| <i>Registration of a CCIV</i> | |
| A CCIV is a new type of company that is limited by shares and has as its director a public company with an AFSL authorising it to operate the business and conduct the affairs of the CCIV. | No equivalent. |
| A CCIV comes into existence on registration by ASIC. A company may be registered as a CCIV by ASIC if it meets certain basic registration requirements. | No equivalent. |
| A person applying to register a CCIV must provide certain content on registration, such as the details of the CCIV's depositary (if any) and the details of the sub-fund or sub-funds the CCIV proposes to have on registration. The application must be accompanied by a notice stating whether the CCIV is to be a retail CCIV or a wholesale CCIV. If a CCIV is to be a retail CCIV, the application must also be accompanied by the CCIV's compliance plan. | No equivalent. |

| <i>New law</i> | <i>Current law</i> |
|--|--------------------|
| A CCIV may be a retail or wholesale CCIV. A CCIV will be a wholesale CCIV unless a security in the CCIV was issued to a retail client, or the transfer of a security in the CCIV to a client was in circumstances that required a PDS to be given to that client. | No equivalent. |
| <i>Registration of a sub-fund of the CCIV</i> | |
| A sub-fund of a CCIV is all or part of the CCIV's business that is registered by ASIC as a sub-fund of the CCIV. It is established on registration by ASIC. | No equivalent. |
| The initial sub-fund or sub-funds of the CCIV are registered by ASIC as part of the registration of the CCIV. The registration of a sub-fund of the CCIV after the registration of the CCIV itself is by a stand-alone process. The information required as part of this stand-alone process aligns with the information required for the registration of the initial sub-fund or sub-funds as part of the CCIV's registration. | No equivalent. |
| An ARFN is given to each sub-fund as part of the registration process. | No equivalent. |
| A sub-fund's name is the name specified in the record of the sub-fund's registration. A sub-fund's name is subject to naming requirements, including that it must have the CCIV's name at the end of its name. | No equivalent. |
| A sub-fund's name and ARFN must be identified on certain documents, including all public documents and negotiable instruments. | No equivalent. |

| <i>New law</i> | <i>Current law</i> |
|--|--------------------|
| <i>Registers</i> | |
| A CCIV must maintain a register of members including the details of the securities held by each member and which sub-fund of the CCIV each security is referable to. | No equivalent. |

Detailed explanation of new law

A new type of company

2.27 A corporate collective investment vehicle, or CCIV, is 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 2, items 5 and 9, definitions of ‘CCIV’ and ‘corporate collective investment vehicle’ in section 9]*

2.28 As a CCIV is a new type of company, it is included separately in the table of types of companies that are registrable under the Act in subsection 112(1). *[Schedule 1, items 1 to 3, table in subsection 112(1) and notes to subsection 112(1); Schedule 2, item 21, definition of ‘public company’ in section 9]*

Registering a CCIV

Basic registration requirements

2.29 A company may be registered as a CCIV if it meets certain basic requirements for registration, including that:

- it is a company limited by shares;
- it has a constitution;
- the proposed director of the company is a public company that holds an AFSL authorising it to operate the business and conduct the affairs of the CCIV; and
- upon registration, it will have at least one sub-fund (which will have at least one member).

[Schedule 1, item 4, section 1222]

2.30 In order to be registered as a CCIV, a notice about whether the CCIV is to be a retail or wholesale CCIV must also be lodged with the application for registration. If the CCIV will be a retail CCIV upon registration, it must also have a compliance plan and propose, as its depository, a public company or foreign company registered under Division 2 of Part 5B.2 of the Act that holds an AFSL authorising it to act

as the depositary of a CCIV. *[Schedule 1, item 4, paragraph 1222(f) and subsection 1222A(4)]*

Process for registration

2.31 The ordinary process for applying to register a company, contained in section 117 of the Act, is modified for CCIVs. Consistent with subsection 117(4) of the Act, an application to register a CCIV must be in the prescribed form. *[Schedule 1, item 4, subsection 1222A(1); Schedule 2, item 42, note 5 to subsection 117(2)]*

2.32 The application must include the information requirements for companies listed in subsection 117(2) of the Act, with the exception of the following information, which is not relevant for CCIVs:

- the personal details and addresses of individual directors, as individuals may not be appointed as directors of a CCIV;
- the personal details and address of the company secretary, as a CCIV must not appoint a company secretary; and
- whether or not the company will have an ultimate holding company (and the details of the holding company).
[Schedule 1, item 4, subsection 1222A(2)]

2.33 The application must also include certain additional information, reflecting a CCIV's unique form as a company, including:

- the name and registered office address of the public company that has consented, in writing, to be the CCIV's corporate director;
- the proposed name of each sub-fund the CCIV proposes to have on registration of the CCIV;
- for each proposed sub-fund, information regarding the shares being taken up by persons who have consented to become members of the CCIV; and
- if the CCIV is to have a depositary, the name and registered office address of the public company (or foreign company registered under Division 2 of Part 5B.2 of the Act) that has consented, in writing, to be the depositary. *[Schedule 1, item 4, subsection 1222A(3)]*

2.34 The person making the application must have the written consents of the proposed corporate director, depositary and members of the CCIV which, after the CCIV is registered, must be given to the CCIV. The CCIV has an obligation to keep the consents. *[Schedule 1, item 4, subsection 1222A(7)]*

2.35 The application must be accompanied by a notice stating whether the CCIV is to be a retail CCIV or a wholesale CCIV and a copy of the CCIV's constitution. *[Schedule 1, item 4, subsections 1222A(4) and (5)]*

2.36 If the CCIV is to be a retail CCIV, then the application must also be accompanied by a copy of the compliance plan that has been signed by all the directors of the proposed corporate director. *[Schedule 1, item 4, subsection 1222A(6)]*

2.37 After receiving an application to register a company as a CCIV, ASIC may register the company under section 118 of the Act if it is of the opinion that the company meets the basic registration requirements discussed above. *[Schedule 1 Item 4, section 1222C; Schedule 2, items 43 and 44, note 2 at the end of subsection 118(1)]*

2.38 A body may only be registered as a CCIV through this application process. There is no other way to register a CCIV. In particular, a body that is registered under State or Territory law may not be taken to be registered as a CCIV under section 5H of the Act. Allowing only one process for the registration of a CCIV ensures that ASIC is able to oversee the registration of all CCIVs and ensure the basic registration requirements discussed above are met. *[Schedule 1, item 4, section 1222B]*

Effect of registration

2.39 Upon registration, the persons proposed in the application to become the corporate director, depositary and members of the CCIV become those things. The shares specified in the application form are also taken to be issued to those members upon registration. *[Schedule 1, item 4, section 1222D; Schedule 2, item 45, note at the end of subsection 120(1)]*

Special naming requirements for a CCIV's name

2.40 The naming requirements for the names of companies under Part 2B.6 of Chapter 2B of the Act generally apply to the name of a CCIV. However, there are some special requirements for a CCIV's name.

2.41 Even though a CCIV is a company limited by shares, it does not need to have the word "Limited" at the end of its name. Instead, it is required to have the expression "Corporate Collective Investment Vehicle" at the end of its name. Alternatively, the abbreviation "CCIV" can be used. *[Schedule 1, item 4, sections 1222E and 1222F]*

2.42 In the same way that a person is prohibited from carrying on a business using the words "Limited", "No Liability" or "Proprietary" in their name (or an abbreviation of these words) unless allowed or required to do so under law, a person is also prohibited from carrying on a business with "Corporate Collective Investment Vehicle" or "CCIV" in their name unless allowed or required to do so under law. *[Schedule 1, item 4, section 1222G]*

2.43 An application to change a CCIV's name may not be lodged with ASIC under section 157A of the Act while a sub-fund of the CCIV is in liquidation. *[Schedule 1, item 4, section 1222H]*

2.44 The naming requirements for a sub-fund's unique name are discussed further in paragraphs 2.85 to 2.102 .

Definition of a 'retail CCIV' and 'wholesale CCIV'

2.45 A CCIV is a **retail CCIV** if it satisfies the retail CCIV test or if it notifies ASIC that it is a retail CCIV. A CCIV is a **wholesale CCIV** if it is not a retail CCIV. *[Schedule 1, item 4, section 1222J; Schedule 2, items 26 and 30, definitions of 'retail CCIV' and 'wholesale CCIV' in section 9]*

Retail CCIV test

2.46 Distinguishing between retail CCIVs and wholesale CCIVs is necessary as, unlike the MIS regime, all CCIVs must be registered irrespective of whether they are retail or wholesale. However, retail CCIVs are subject to additional regulatory requirements compared to wholesale CCIVs.

2.47 A CCIV meets the **retail CCIV test** if it has at least one member who is a 'protected retail client', a 'protected client under a custodial arrangement' or a 'protected member of a passport fund'. *[Schedule 1, item 4, subsection 1222K(1)]*

2.48 A person is a **protected retail client** if the person acquires a security issued by a CCIV as a retail client. The retail client may acquire the security by way of issue or a transfer if the transfer amounts to an off-market sale by a controller of the CCIV (as set out in subsection 1012C(5) of the Act), is a sale amounting to an indirect issue (subsection 1012C(6) of the Act) or is a sale amounting to an indirect off-market sale by a controller of the CCIV (subsection 1012C(8) of the Act). The definition of a retail client in existing section 761G of the Act excludes persons who acquire a product in connection with a business, professional investors and certain products of a particularly high value. *[Schedule 1, item 4, paragraphs 1222K(2)(a) and (b)]*

2.49 There are two categories of members that are always excluded from the definition of a protected retail client, namely:

- persons 'associated' with the CCIV (see paragraph 9.36); and
- persons that acquire the security by way of an issue that is part of a small scale personal offer (see paragraph 9.40).

[Schedule 1, item 4, paragraphs 1222K(2)(c) and (d)]

2.50 A person is a **protected client under a custodial arrangement** if the acquisition of the security occurs under a 'custodial arrangement', the person would have been a retail client if there was an 'equivalent direct

acquisition', and the person is not associated with the CCIV. Refer to section 1012IA of the Act for the 'definition of a custodial arrangement' and 'equivalent direct acquisition'. *[Schedule 1, item 4, subsection 1222K(3)]*

2.51 It is expected that 'protected retail clients' and 'protected clients under a custodial arrangement' are less sophisticated clients who may not have the knowledge, resources or expertise to protect their own interests.

2.52 Finally, a person is a **protected passport fund member** if the sub-fund is an Australian passport fund and the person became a member after the sub-fund became an Australian passport fund or on the expectation that the sub-fund would become an Australian passport fund (see sections 9 and 1216B of the Act). *[Schedule 1, item 4, subsection 1222K(4)]*

2.53 A sub-fund of a CCIV with one or more protected passport fund members must remain an Australian passport fund under the Memorandum of Cooperation on the Establishment and Implementation of the Asia Region Funds Passport¹. Only sub-funds of retail CCIVs are eligible to become Australian passport funds. It is for this reason that a CCIV with a protected passport fund member must remain a retail CCIV. See Chapter 10 of these explanatory materials for a discussion of how the ARFP regime applies to CCIVs.

2.54 The corporate director, a former corporate director or a related party of the current or a former corporate director are not protected passport fund members. These persons are considered to have greater knowledge than other passport fund members and are in a better position to protect their own interests. *[Schedule 1, item 4, paragraph 1222K(4)(c)]*

2.55 The carve-out for corporate directors and related parties is narrower than the carve-out for persons associated with the CCIV from the definition of a protected retail client or protected client under a custodial arrangement. This difference reflects the fact that only corporate directors and related parties are carved out from the special protections that apply when a registered scheme is an Australian passport funds in sections 1216A and 1216C of the Act.

2.56 The new law includes a power to make regulations that amend the circumstances where a person is a protected retail client, a protected client under a custodial arrangement or a protected passport fund member. This regulation-making power is necessary because minor amendments may need to be made to the definitions to take into account unforeseen circumstances or changes to the PDS regime (which uses similar concepts and links conceptually with the definition of a retail CCIV). It is

¹ The Memorandum of Cooperation on the Establishment and Implementation of the Asia Region Funds Passport is available at: <http://fundspassport.apec.org/2016/04/28/asia-region-funds-passport-memorandum-of-cooperation/>.

envisaged that the regulation-making power will be used to deal with the same sorts of contingencies as the general regulation making power in Part 8B.9 of the new law (see Chapter 12 of these explanatory materials). *[Schedule 1, item 4, subsection 1222K(5)]*

Notification as a retail CCIV

2.57 A CCIV is a retail CCIV if the most recent notice lodged with ASIC states that the CCIV is, or wishes to be, a retail CCIV. This notice may have been provided at the time of applying to register the CCIV or when the CCIV wishes to change its status. *[Schedule 1, item 4, subsection 1222L(1)]*

2.58 A CCIV must state whether it intends to be a retail CCIV or a wholesale CCIV on registration. A wholesale CCIV or a retail CCIV can also provide a new notice to ASIC when its status changes.

Wholesale CCIVs changing their status

2.59 If a wholesale CCIV meets the retail CCIV test (see paragraphs 2.46 to 2.56), it must lodge a notice in the prescribed form within two business days of meeting the test. *[Schedule 1, item 4, paragraph 1222L(2)(a) and subsections 1222L(3) and (4)]*

2.60 All CCIVs that meet the retail CCIV test are retail CCIVs, irrespective of whether they lodge a notice. Nevertheless, a CCIV is required to notify ASIC that it has become a retail CCIV to ensure that ASIC is aware that the CCIV is now subject to the additional regulatory requirements that apply only to retail CCIVs. Notification of a CCIV's status to ASIC does not affect the obligations that apply to the CCIV.

2.61 A wholesale CCIV that fails to notify that is a retail CCIV within two business days of meeting the retail CCIV test commits a strict liability offence punishable by a fine of up to 20 penalty units. See paragraph 2.66 for a discussion of why a strict liability offence is appropriate in this circumstance. *[Schedule 1, item 4, subsection 1222L(5); Schedule 2, item 202, table item 329 in Schedule 3]*

2.62 Nevertheless, a CCIV has a defence if the CCIV did not know and could not reasonably have been expected to know that the CCIV had a protected retail client, a protected client under a custodial arrangement or a protected member of a passport fund. This supplements the defence for mistake of fact in section 9.2 of the Criminal Code. *[Schedule 1, item 4, subsection 1222L(6)]*

2.63 A wholesale CCIV may voluntarily elect to become a retail CCIV even if it does not meet the retail CCIV test. One situation where a wholesale CCIV may wish to become a retail CCIV is where it wishes to apply for one of its sub-funds to become a passport fund. In order to become a retail CCIV, the wholesale CCIV needs to lodge a notice with ASIC. *[Schedule 1, item 4, paragraph 1222L(2)(a)]*

Retail CCIVs changing their status

2.64 A retail CCIV that ceases to meet the retail CCIV test may notify ASIC that it wishes to become a wholesale CCIV. It is not required to provide this notice. This recognises that some CCIVs that do not meet the retail CCIV test may wish to remain as retail CCIVs; for example, so that they can apply to become Australian passport funds or because they intend to market their interests to retail clients. *[Schedule 1, item 4, paragraph 1222L(2)(b)]*

2.65 Nevertheless, a CCIV must not notify ASIC that they are a wholesale CCIV if they meet the retail CCIV test. A CCIV which breaches this requirement commits a strict liability offence punishable by 20 penalty units. *[Schedule 1, item 4, subsections 1222L(6) and (7); Schedule 2, item 202, table item 329A in Schedule 3]*

Strict liability offences

2.66 The strict liability offences in the notification provisions are appropriate as the integrity of the regulatory regime is threatened if ASIC is unaware of the true status of a fund. There are additional regulatory requirements that apply to retail CCIVs, primarily to ensure there are appropriate protections in place for retail investors, and ASIC’s ability to enforce those requirements is hampered if it does not know whether a CCIV is a retail CCIV or a wholesale CCIV. For these reasons, the imposition of a strict liability offence is consistent with the Guide.

Application of the CCIV regulatory framework to retail CCIVs and wholesale CCIVs

2.67 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 8B, whereas wholesale CCIVs are subject to fewer requirements. This follows the regulatory approach for MISs, where retail MISs – that is, registered schemes – are subject to the full regulatory requirements. However, unlike the MIS regime, all CCIVs (including wholesale CCIVs) are required to be registered under the Act.

2.68 The table below sets out the key differences in the way retail and wholesale CCIVs are regulated.

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

| Regulatory requirement | Retail CCIV | Wholesale CCIV |
|------------------------|-------------|----------------|
| Registration | Yes | Yes |

| Regulatory requirement | Retail CCIV | Wholesale CCIV |
|------------------------------|--|---|
| Corporate director | Yes. Must have a corporate director, which has an explicit obligation to operate the CCIV. The corporate director (and officers and employees of the corporate director) owe general duties under Chapter 2D as well as specific statutory duties. | Yes. Must have a corporate director, which has an explicit obligation to operate the CCIV. The corporate director (and officers and employees of the corporate director) owe general duties under Chapter 2D. |
| Depository | Yes | No, but may choose to have a depository (which is then subject to the regulatory requirements for depositories). |
| At least one sub-fund | Yes | Yes |
| Share capital rules | Yes | Yes, with some exemptions (such as when calculating the price for redemptions of shares) |
| Constitution | Yes. The constitution must make adequate provision for certain matters. | Yes. Must have a constitution but no prescribed contents. |
| Compliance plan | Yes | No |

Prohibitions on listing

2.69 A CCIV is prohibited from being included on the official list of a prescribed financial market operated in the Australian jurisdiction. A sub-fund of a CCIV is similarly prohibited. *[Schedule 1, item 4, section 1222N]*

2.70 This prohibition does not prevent a security in a CCIV from being quoted on a financial market, such as AQUA, subject to meeting the market's quoting rules.

Prohibition on changing company type

2.71 Part 2B.7 of the Act does not apply to a CCIV. This means that a CCIV may not change company type into another type of company. This

also means that another type of company may not change company type into a CCIV. *[Schedule 1, item 4, section 1222P]*

Registering a sub-fund of a CCIV

Meaning and nature of a sub-fund

2.72 A sub-fund of a CCIV is all or part of the business of the CCIV that is registered by ASIC as a sub-fund of the CCIV. It is established on registration by ASIC (discussed further below). *[Schedule 1, item 4, subsection 1233(1), section 1222T]*

2.73 A sub-fund does not have legal personality. *[Schedule 1, item 4, subsection 1222Q(2)]*

2.74 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 or liabilities in its own name. It is the CCIV itself which has legal personality with the power to do all of this. However, a sub-fund is a distinct and protected part of the CCIV's business. It is strictly segregated from any other sub-fund of the CCIV.

2.75 Despite the fact that a sub-fund does not hold assets or incur liabilities in its own name, assets and liabilities of the CCIV are allocated to each sub-fund of the CCIV in accordance with the allocation rules (see Chapter 6 of these explanatory materials).

2.76 Further, despite a sub-fund not being able to enter into agreements, or sue and be sued its own name, member and third party rights and obligations may accrue against the assets and liabilities of the sub-fund.

2.77 A person is a member of a sub-fund if the person is a member of a CCIV and holds one or more shares that are referable to that sub-fund. The meaning of 'referable' in relation to a share of a CCIV is discussed further in paragraph 4.14. *[Schedule 1, item 4, subsection 1222Q(3); Schedule 2, items 18, 23 and 29, definitions of 'member', 'referable' and 'sub-fund']*

Registering a sub-fund of the CCIV

2.78 Sub-funds are subject to a streamlined registration process.

2.79 The initial sub-fund(s) of a CCIV are registered by ASIC as part of the registration of the CCIV itself (see discussion in paragraphs 2.29 to 2.39 above). ASIC may register the initial sub-fund(s) of the CCIV if it registers the CCIV and if the sub-fund's proposed name has been provided in the application to register the CCIV. ASIC must register at least one sub-fund if it registers the CCIV. *[Schedule 1, item 4, section 1231DA, subsection 1222S(1)]*

2.80 Once a CCIV has been registered, ASIC may register further sub-funds of the CCIV upon receiving an application from the CCIV. The application must be in the prescribed form and include:

- the proposed name of the sub-fund;
- the name and ACN of the CCIV;
- the name and address of each person who consents to become a member of the sub-fund; and
- certain information about the shares that will be referable to the sub-fund that each member will take up.

[Schedule 1, item 4, subsection 1222S(2), section 1222U]

2.81 The information about the initial membership of the sub-fund and the shares that are referable to it is the same type of information that is required upon registration of the initial sub-fund(s) of the CCIV as part of the application for registration of the CCIV itself. It reflects the fact that the new sub-fund would be a discrete part of the CCIV's business.

2.82 If ASIC registers a sub-fund, whether as part of the initial registration of a CCIV or subsequently, it must give the sub-fund an ARFN and keep a record of the registration. *[Schedule 1, item 4, subsections 1222S(3) and (4)]*

2.83 Similar to the records of registration of companies under section 118(2) of the Act, subsections 1274(2) and (5) of the Act apply to the record as if the records were documents lodged with ASIC. This allows a person to, among other things, inspect the records and use the record as evidence in legal proceedings.

The significance of separate registration of sub-funds

2.84 The separate registration of each sub-fund of a CCIV helps to ensure the business of the sub-fund is protected from the business of other sub-funds of the CCIV. In effect, a sub-fund does not come into being until the day it is registered and given a unique name and identifier – its ARFN – by ASIC. This supports the clear identification (and segregation) of the assets and liabilities of each sub-fund of a CCIV and ensures counterparties will always be able to identify the part of the business of a CCIV they are transacting with. This is further supported by the requirement to identify the sub-fund on documents that relate to the business of the sub-fund (see paragraphs 2.103 to 2.108).

Names of sub-funds

2.85 A sub-fund's name is the name specified in ASIC's record of the registration of the sub-fund. *[Schedule 1, item 4, subsection 1222T]*

Naming requirements

2.86 The name of a sub-fund of the CCIV is dependent on the CCIV's name.

2.87 If the CCIV has, as its name, the expression "Australian Company Number" followed by its ACN, then a sub-fund of the CCIV's name may be the expression "Australian Registered Fund Number" followed by the sub-fund's ARFN. *[Schedule 1, item 4, subsection 1222V(1)]*

2.88 If the CCIV has, as its name, an available name, then the sub-fund's name must be constituted of the following three elements, in the following order:

- element 1: the CCIV's name (without the expression "Corporate Collective Investment Vehicle", which the CCIV is required to have at the end of its name (see paragraph 2.41));
- element 2: a name that is not:
 - identical to name of the second element of the name of any other sub-fund of the CCIV; or
 - a name that has been reserved by ASIC for a person who is not the person applying to have the sub-fund's name registered; or
 - unacceptable for registration under the regulations;
- element 3: the expression "Sub-fund".

[Schedule 1, item 4, subsections 1222V(2) and (3)]

2.89 Certain permitted abbreviations may be used in the sub-fund's name in place of the words or expressions required by the Act to be included in a sub-funds name. These abbreviations are:

- SF (for the expression "Sub-fund");
- AFRN (for the expression "Australian Registered Fund Number");
- Aust (for the word "Australian");
- No (for the word "number"); and
- & (for the word "and").

[Schedule 1, item 4, section 1222X]

Example 2.1: Name of a sub-fund of a CCIV

Ironbank CCIV has two sub-funds.

The first sub-fund is referable to a part of its business that invests in global equities. This sub-fund has as its name Ironbank Global Equities SF.

The second sub-fund is referable to a part of its business that invests in Australian bonds. This sub-fund has as its name Ironbank Fixed Income SF.

2.90 The incorporation of the CCIV's name into the sub-fund's name ensures that the CCIV and the sub-fund are intrinsically linked by their respective names. In all of the CCIV's dealings with other people in respect of a particular sub-fund of the CCIV (including investors and third parties), a person can identify the CCIV to which the sub-fund relates.

2.91 The second element of the sub-fund's name allows that sub-fund to be uniquely identifiable from any other sub-fund of the CCIV. This supports the CCIV differentiating between the different parts of the business to which each sub-fund of the CCIV relates.

2.92 Requiring the expression "Sub-fund" to be at the end of the sub-fund's name is a means of signalling that the entity is a sub-fund (which is important given a sub-fund is not a separate legal entity (see the discussion in paragraph 2.73)).

Changing a sub-fund's name

2.93 The provisions for changing a sub-fund's name are based on the provisions that apply to changing a company's name (Division 2 of Part 2B.6 of Chapter 2B of the Act).

2.94 The name of a sub-fund of the CCIV may be changed in the following circumstances:

- if the members of the sub-fund agree to change the name, by special resolution of the members of the sub-fund; or
- at the direction of ASIC.

[Schedule 1, item 4, subsections 1222Y(1) and 1222Z(1)]

2.95 If the members of a sub-fund of the CCIV pass a special resolution to change the sub-fund's name, then the CCIV must, within 14 days of passing the resolution, lodge with ASIC a copy of the resolution and an application to change the name of the sub-fund in the prescribed form. *[Schedule 1, item 4, subsections 1222Y(1) and (2)]*

2.96 A CCIV may not lodge an application to change a sub-fund's name if the sub-fund is in liquidation. This ensures that creditors in a winding up situation are unambiguously able to identify the sub-fund for the purposes of any debt or claim against the sub-fund throughout the winding up process. See Chapter 7 of these explanatory materials for an explanation of the process for winding up a sub-fund. *[Schedule 1, item 4, subsection 1222Y(3)]*

2.97 A failure to lodge a copy of the special resolution and application to change the sub-fund's name within the timeframe is a strict liability offence attracting a fine of up to 20 penalty units. Strict liability ensures there is a strong incentive to comply with this requirement, which is critical to ensuring the sub-fund can be properly identified following a name change. The penalty is consistent with the Guide. *[Schedule 1, item 4, subsection 1222Y(4); Schedule 2, item 202, table item 329AB in Schedule 3]*

2.98 If the naming requirements for the sub-fund's name are met, then ASIC must change the sub-fund's name by altering the sub-fund's record of registration. The change of name only takes effect once ASIC's record has been altered. *[Schedule 1, item 4, subsection 1222Y(5)]*

2.99 ASIC may also direct a CCIV to change a sub-fund's name if:

- the name should not have been registered; or
- ASIC has directed the CCIV to change its name under section 158 (necessitating a corresponding change to each of the names of the sub-funds of the CCIV).

[Schedule 1, item 4, subsection 1222Z(1)]

2.100 The CCIV has two months from the date on which it is given the direction to lodge an application to change the sub-fund's name. It is not necessary for the CCIV to pass a special resolution before lodging an application. The CCIV commits a strict liability offence with a fine of up to 20 penalty units if it fails to comply with the direction from ASIC within this timeframe. This penalty supports the objective of ensuring that sub-funds are clearly identifiable by ensuring there is a strong incentive to comply with a direction from ASIC. The penalty is consistent with the Guide. *[Schedule 1, item 4, subsections 1222Z(2) to (4); Schedule 2, item 202, table item 329AC in Schedule 3]*

2.101 If a CCIV has failed to comply with ASIC's direction, ASIC may change the sub-fund's name to the expression "Australian Registered Fund Number" followed by the sub-fund's ARFN. ASIC may do this by altering the sub-fund's record of registration and the change will take effect once the record has been altered. *[Schedule 1, item 4, subsections 1222Z(5) and (6)]*

2.102 Regardless of how a sub-fund's name is changed, any change in a sub-fund's name does not:

- create a new legal entity;
- affect the sub-fund's existing property, rights or obligations;
- or
- render defective any legal proceedings by or against the CCIV and relating to the sub-fund.

[Schedule 1, item 4, subsections 1222ZA]

Requirement to identify sub-fund of the CCIV on certain documents

2.103 A CCIV is required to set out a sub-fund's name and ARFN on all of its public documents and negotiable instruments that relate to that sub-fund. If the particular document or negotiable instrument relates to more than one sub-fund of the CCIV, then the name and ARFN of each relevant sub-fund of the CCIV must be set out on the document.

[Schedule 1, item 4, subsection 1222W(1)]

2.104 This requirement is based on section 153 of the Act that requires a company to identify its name and ACN all public documents and negotiable instruments. It will require a CCIV to identify all relevant sub-funds of the CCIV on a broad range of documents, including documents that might give third parties rights or obligations in relation to an asset of a sub-fund of the CCIV.

2.105 'Public document' is defined under section 88A of the Act and includes a range of documents, such as documents lodged with ASIC and documents that are signed or issued by or on behalf of the CCIV in the course of a particular transaction or dealing. There are some carve-outs to the definition, including for example, a label.

2.106 'Negotiable instrument' is defined in section 9 of the Act and includes, for example, a cheque or letter of credit that is signed or issued by or on behalf of the CCIV.

2.107 The requirements for identifying the sub-fund on certain documents relating to the business of that sub-fund ensures persons who are dealing with the CCIV (being a legal person) can identify which part of the CCIV's business its rights, or obligations, are accruing against. This is important given that a sub-fund is not a separate legal entity from the CCIV, but it is a protected part of the CCIV's business that is strictly segregated from all other parts of the CCIV's business.

2.108 Consistent with the equivalent requirement for companies, a contravention of the requirement to identify the relevant sub-fund(s) of all public documents and negotiable instruments is a strict liability offence attracting a fine of up to 30 penalty units. This is consistent with the Guide. *[Schedule 1, item 4, subsection 1222W(2); Schedule 2, item 202, table item 329AA in Schedule 3]*

Registers

2.109 As is the case for companies and registered schemes under Chapter 2C of the Act, CCIVs must keep a register of:

- members;
- holders of options over unissued shares and related options documents; and

- debenture holders (if any).

2.110 In addition, a CCIV's register must show the sub-fund to which each share, option or debenture issued by the CCIV is referable.

[Schedule 1, item 4, section 1222ZB; Schedule 2, item 55, note 3 to subsection 169(3)]

Chapter 3

Corporate governance of CCIVs

Outline of chapter

3.1 This Chapter sets out the requirements for corporate governance of a CCIV.

3.2 It sets out the rules regarding:

- governance of CCIVs (such as how a CCIV exercises company powers and the rules regarding a CCIV's constitution);
- the officers and employees of the CCIV (including the core obligations for the corporate director of the CCIV and the rules relating to its replacement);
- the officers, employees and auditors of the corporate director of the CCIV;
- the depositary of the CCIV;
- the compliance plan of a retail CCIV;
- member protection (including related party transactions by retail CCIVs, rights and remedies for the member of a CCIV and the corporate director's civil liability to members);
- meetings (including resolutions of a CCIV and meetings of the members of a CCIV (or a sub-fund of the CCIV)); and
- corporate contraventions (including the rules for establishing civil and criminal liability under Commonwealth laws).

Context of amendments

Governance rules

3.3 As noted above, the key feature of a CCIV is its corporate status: a CCIV is a passive investment company used for funds management.

3.4 Several of the core features of a CCIV have been drawn from overseas regulatory precedents – including that it is a passive vehicle and its business and affairs is operated by another company (its single 'corporate director').

3.5 In addition, parts of the regulatory framework for CCIVs have been drawn from the MIS regime in order to ensure general parity and consistency between the two regimes (such as the requirements for the constitution of a CCIV).

Officers and employees of the CCIV

3.6 The requirement for a CCIV to be operated by 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 person directors, but choose overwhelmingly to have an authorised corporate director for reasons of governance and cost-effectiveness.

3.7 The 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.

3.8 The existing model for the operation of registered schemes imposes duties on the responsible entity. These duties are specific to the operation of collective investment vehicles for retail clients. The duties are a key investor protection mechanism that needs to be replicated in the retail CCIV context to ensure that members of a retail CCIV have an equivalent level of investor protection to an investor in a registered scheme.

Officers and employees of the corporate director of the CCIV

3.9 In addition to the duties placed on the responsible entity under the existing responsible entity model, duties are also imposed on the officers and employees of the responsible entity of a registered scheme. These duties are also a key investor protection that needs to be replicated in the retail CCIV context.

3.10 The officers and employees of the corporate director also owe duties to the corporate director (being a company) under the existing law.

Depository of the CCIV

3.11 The depository of a CCIV is an important consumer protection: the depository safeguards the assets of the CCIV and oversees certain aspects of the operations of the CCIV. While some aspects of the depository's functions are currently performed by custodians, the depository is a new concept in Australian funds management with a broader range of functions than custodians under the MIS regime.

3.12 The depository of a CCIV is intended to serve a similar purpose to depositaries in other jurisdictions. The requirements for the depository of a CCIV have generally been adapted from the European Union's

UCITS regime for collective investment funds and from the United Kingdom's OEIC regime.

3.13 In particular, the depositary's duties under Chapter 8B generally reflect most of the duties of the depositary of a UCITS fund. The depositary is also subject to an independence requirement, aspects of which have been drawn from the UCITS regime. This ensures a level of regulatory alignment that will enable existing depositaries operating in overseas jurisdictions to more easily adapt their operations to the CCIVs regulatory framework.

3.14 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, the depositary is not required to oversee the investment functions undertaken by a CCIV.

3.15 As the depositary is an important consumer protection, it is mandatory for retail CCIVs. A wholesale CCIV may choose to appoint a depositary. However, if a wholesale CCIV chooses to appoint a depositary it becomes subject to the full regulatory requirements concerning depositaries.

Compliance plan of a retail CCIV

3.16 The existing model for registered schemes includes a requirement to maintain a compliance plan. The compliance plan sets out the measures the responsible entity will apply in operating the scheme to ensure compliance with the law and the scheme's constitution.

3.17 This mechanism needs to be replicated in the retail CCIV context to ensure that members of a retail CCIV have an equivalent level of investor protection to an investor in a registered scheme. However, unlike for registered schemes, a retail CCIV does not need to have a compliance committee as there is a requirement for the corporate director of the CCIV to have at least half of its directors as external directors.

Member protection

3.18 Chapter 2E of the Act sets out the rules regarding member approval of related party transactions for a public company. These rules apply to registered schemes (in a modified form) under Chapter 5C of the Act.

3.19 Similar rules need to be included in the context of retail CCIVs to ensure that investors in a retail CCIV have an equivalent level of consumer protection as investors in a registered scheme. The rules require further modification in the retail CCIV context to ensure that member approval is obtained by each affected sub-fund of the CCIV (given that the membership of the CCIV is referable to strictly segregated sub-funds

of the CCIV and that the financial benefit may be paid out of the assets of one or more sub-funds of the CCIV).

3.20 Chapter 2F of the Act sets out the rights and remedies available to members of companies. Given a CCIV is a company, these rights and remedies should be available to members of a CCIV. Some modifications are required to account for the unique structure of CCIVs. For example, some modifications are required to ensure that members of a sub-fund also have some of the rights and remedies available at the CCIV level.

3.21 The existing responsible entity model also holds the responsible entity directly responsible to members for civil contraventions of Chapter 5C. A similar mechanism is required in the CCIV context to ensure that members of the CCIV also have a direct right of action against the corporate director for similar civil contraventions.

Meetings

3.22 As the directorship of a CCIV is held by a single corporate director and not individual person directors, it is necessary to provide special rules clarifying how a director's resolution may be passed by the directors of the corporate director, on behalf of the CCIV.

3.23 The Act prescribes different rules for meetings of members of companies and members of registered schemes. While CCIVs are companies, they have many features in common with registered schemes. In particular, and relevantly for the rules regarding meetings, a CCIV has a corporate director (similar to the responsible entity of a registered scheme) and a compliance plan (similar to the compliance plan of a registered scheme). Accordingly, the rules for meetings of members of the CCIV are adapted from those applying to registered schemes.

3.24 Membership in the CCIV is referable to a sub-fund of the CCIV. Each sub-fund is strictly segregated from any other sub-fund of the CCIV. Accordingly, provision has been made for meetings (and resolutions) of members of a sub-fund (or sub-funds) of the CCIV (in addition to meetings (and resolutions) of the whole CCIV).

Corporate contraventions

3.25 A CCIV has corporate responsibility for contraventions of its legal obligations, in the same way that other companies do. However, unlike other companies, generally a CCIV's only officer is another

company, its corporate director.² Further, a CCIV does not have any employees.

3.26 The corporate director of a CCIV has an overarching obligation to operate the business and conduct the affairs of the CCIV. The corporate director must also perform the functions conferred on it by the CCIV's constitution and the Act, as well as ensure the CCIV itself complies with its constitution and the Act.

3.27 The responsibilities of the corporate director are designed to be similar to those of the responsible entity of a registered scheme. Under the framework that applies for registered schemes, the responsible entity (or trustee) of a scheme is directly responsible for any contravention of the law in relation to the scheme.

Summary of new law

Governance rules

3.28 As a CCIV is a type of company, it has all the powers of an individual and a body corporate, including the power to enter into contracts and issue and cancel shares in the company.

3.29 Unlike other companies, a CCIV has a single corporate director. The corporate director is a public company with its own officers and employees. The new law includes provisions that allow the natural person officers of the corporate director to do some activities, such as enter into a contract on behalf of the CCIV in certain circumstances.

3.30 Both retail and wholesale CCIVs must have a constitution. The constitution of a CCIV is enforceable as a statutory contract between:

- the CCIV and each member;
- the CCIV and the corporate director;
- the corporate director and each member; and
- a member and each other member.

3.31 The constitution of a retail CCIV must make adequate provision for certain matters (such as the establishment of sub-funds and the method by which member complaints are to be dealt with).

² The primary exception to this is any liquidator, person administering an arrangement or compromise or receiver appointed to the CCIV, which is an officer of the CCIV.

Officers and employees of the CCIV

Officers and employees generally

3.32 A CCIV may only appoint one director: its corporate director. The corporate director is the public company named in ASIC's record of the CCIV's registration as its corporate director or temporary corporate director. A CCIV must not have a secretary or any employees.

3.33 A CCIV may not have any officers, other than a director, a receiver, a liquidator or a trustee or other person administering an arrangement between a CCIV and someone else.

3.34 An officer of a CCIV owes the duties that officers of a company owe under Part 2D.1 of the Act. In addition, a director of a retail CCIV owes duties similar to those owed by a responsible entity of a registered scheme. The latter duties prevail over the duties to the CCIV under Part 2D.1, to the extent of any conflict.

Further requirements for the corporate director of a CCIV

3.35 Only a public company that holds an AFSL authorising it to operate the business and conduct the affairs of the CCIV may be appointed as corporate director of the CCIV.

3.36 As a public company, the corporate director has natural person directors. At least half of the directors of the corporate director of a retail CCIV must be external directors. External directors bring a degree of detached supervision that is expected to enhance the standard of corporate governance of corporate directors of retail CCIVs.

3.37 The rules for appointing and replacing the corporate director of a CCIV are similar to the rules that apply to the appointment and replacement of a responsible entity of a registered scheme.

3.38 As noted above, the corporate director (as an officer of the CCIV) owes the same duties and has the same powers, as other officers of the CCIV (including its duties under Part 2D.1 of the Act). The director of a retail CCIV also owes additional duties similar to the duties of the responsible entity of a registered scheme.

3.39 The corporate director of a CCIV also owes further duties that are specific to its role – including an obligation to operate the business and conduct the affairs of the CCIV and a duty to provide the depositary with reasonable assistance (if the CCIV has a depositary).

3.40 The corporate director of a CCIV cannot appoint delegates but it has the power to appoint an agent to do anything that the corporate director is authorised to do in connection with the CCIV. These agents may appoint sub-agents. Akin to other companies, a CCIV also has the power to appoint an agent, who may also appoint sub-agents. The agents

of the CCIV and the sub-agents of both the corporate director and the CCIV are taken to be agents of the corporate director.

3.41 The corporate director of a retail CCIV has extended liability for its agents (and persons taken to be its agents) for the purposes of determining whether there is a liability to the CCIV (or its members) or whether it has properly performed its duties (in order to be paid its fees, or be indemnified, out of the assets of a sub-fund of the CCIV).

Officers and employees of the corporate director of the CCIV

3.42 The officers and employees of the corporate director owe obligations to the corporate director under the existing law, in their capacity as officers and employees of a public company. The new law creates further obligations on these persons in relation to the CCIV.

3.43 In particular, the officers and employees of a corporate director of a retail CCIV owe duties that are similar to the duties owed by officers and employees of a responsible entity in relation to the registered scheme under the existing law.

3.44 The secretary of the corporate director of a CCIV has responsibility for certain contraventions of the law by the corporate director as well as certain contraventions of the law by the CCIV. This extension of the secretary of the corporate director's responsibility is important given a CCIV may not have a secretary.

3.45 Each of the directors of the corporate director of a CCIV has an extended duty to disclose their material personal interests in relation to the affairs of the CCIV to the other directors of the corporate director.

3.46 The restrictions on indemnifying, exempting or insuring an officer or auditor of a CCIV against certain liabilities to the CCIV has been extended to also cover an officer or auditor of the corporate director.

Depository of the CCIV

3.47 The depository of a CCIV is the entity named in ASIC's record of the CCIV's registration as the depository or temporary depository of the CCIV. A CCIV may only have one depository.

3.48 A retail CCIV must have a depository. A wholesale CCIV may choose to have a depository. If a wholesale CCIV opts into the regime for depositaries, then the regulatory requirements for depositaries apply to the wholesale CCIV and the depository in their entirety. However, a wholesale CCIV that has a depository may remove the depository and not replace it.

3.49 The depository of a CCIV must:

- be either a public company or a foreign company registered under Part 5B.2 of the Act;
- hold an AFSL authorising it to act as a depositary; and
- meet the independence requirement.

3.50 The independence requirement involves a simple prohibition on the body that is (or proposes to be) the depositary, and any agents or persons engaged by the depositary to perform depositary functions, from also being an entity that directs investment decisions for the CCIV. This means that the depositary, and any other entity performing depositary functions for the CCIV, is legally separated from any entity that directs investment decisions for the CCIV.

3.51 The regulations may prescribe further functional independence requirements that the depositary (and its agents) must comply with in certain circumstances.

3.52 One of the depositary's core functions is to hold the assets of the CCIV. Another core function of the depositary is to supervise the conduct of certain activities carried out in relation to the CCIV.

3.53 The depositary, and any former depositary, must report material breaches or suspected breaches to ASIC that relate to the CCIV and arise in relation to the activities it supervises.

3.54 The depositary of a CCIV owes statutory duties, which are based in part on the duties of the responsible entity of a registered scheme and reflect the fundamental duties of a fiduciary.

3.55 The depositary 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 depositary's supervisory function.

3.56 The depositary is appointed either as part of the registration of the CCIV or by notice to ASIC. The process for changing depositary depends on the circumstances in which the depositary is being changed. The appointment of an entity as depositary (including any change) only takes effect once the record of the CCIV's registration has been updated to name the body as the CCIV's depositary (or temporary depositary).

Compliance plan of a retail CCIV

3.57 A retail CCIV must have a compliance plan and a compliance plan auditor (similar to the requirements for a compliance plan of a registered scheme).

3.58 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 the CCIV's constitution. This is the only basic content requirement for the compliance plan.

3.59 The corporate director must ensure at all times that the CCIV's compliance plan meets the legislative requirements for compliance plans. The corporate director must also comply with the compliance plan.

Member protection

3.60 The rules in Chapter 2E of the Act (regarding member approval of a transaction that seeks to give a related party a financial benefit) apply to retail CCIVs in generally the same way as they apply to public companies. However, the rules are modified to ensure that member approval is obtained by each affected sub-fund of the CCIV (given that the membership of the CCIV is referable to strictly segregated sub-funds of the CCIV and that the financial benefit may be paid out of the assets of one or more sub-funds of the CCIV). In addition, some modifications are made to align the rules that apply to a CCIV (as a company) to the rules that apply to related party transactions in respect of a registered scheme under Part 5C.7 of Chapter 5C of the Act.

3.61 The rights and remedies available to members of a company under Chapter 2F of the Act are available to members of a CCIV. Some modifications have been made to extend certain rights and remedies that are available to members at the CCIV level to ensure they are available at the sub-fund level.

3.62 A member of a CCIV may bring, or intervene in, legal proceedings on behalf of the CCIV in certain circumstances.

3.63 The corporate director of a CCIV has civil liability to members of the CCIV for a contravention of Chapter 8B (regardless of whether or not the corporate director has been convicted). This is consistent with the right of a member of a registered scheme to seek remedy against the responsible entity of the scheme in similar circumstances.

Meetings

3.64 Similar to other companies, a CCIV's powers may be exercised by its director or its members. As with other companies, some decisions may only be made by the CCIV's members. Similarly, some decisions may only be made by the members of a particular sub-fund.

3.65 The corporate director of a CCIV may pass a resolution for the CCIV by passing a resolution of the directors of the corporate director. This mechanism effectively 'looks through' the corporate director of the CCIV (being a company itself) to the natural person directors of the corporate director who are making the decision to exercise the CCIV's powers. Part 2G.1 of the Act, which sets out the requirements for

directors' meetings, does not apply to a CCIV, as this bespoke rule applies instead.

3.66 The rules for holding meetings of members of a CCIV, or a sub-fund, are based on the rules for registered schemes, rather than the rules for companies.

3.67 Some modifications are made to account for a CCIV's corporate status. In particular, a member's voting power at a meeting (of either the CCIV or a sub-fund) is referable to the value of the shares the member holds in the CCIV.

Corporate contraventions

3.68 Bespoke rules apply for the purposes of attributing the physical and mental elements of an offence to a CCIV. These bespoke rules apply to all Commonwealth laws. The general rules contained in the Criminal Code and other attribution rules (for example those contained in Chapter 7 of the Act) do not apply to a CCIV.

3.69 As a general rule, conduct engaged in by a person other than the CCIV is attributed to the CCIV if it is engaged in by one of the following parties, and the conduct was engaged in on behalf of the CCIV:

- an agent of the CCIV;
- a director of the CCIV;
- an employee, director or agent of the corporate director of the CCIV; or
- any other person acting at the direction, or with the consent or agreement of one of the entities listed above.

3.70 If the CCIV commits an offence, the new law deems the corporate director to have committed the offence and relieves from the CCIV from being liable for any penalty in respect of the offence. This applies to both criminal contraventions by the CCIV and breaches of civil penalty provisions by the CCIV.

3.71 Separate rules allow a Court to order compensation be paid to a CCIV if it suffers loss or damage as a result of a contravention of a State or Territory law.

Comparison of key features of new law and current law

| <i>New law</i> | <i>Current law</i> |
|--|--------------------|
| <i>Governance rules</i> | |
| As a CCIV is a type of company, it has all the powers of an individual and a body corporate, including the power to enter into contracts and issue and cancel shares in the company. | No equivalent. |
| <p>The CCIV's powers to make, vary, ratify or discharge a contract may be exercised by an individual acting with the CCIV's express or implied authority, akin to other companies.</p> <p>However, unlike other companies, a CCIV has only one director – its corporate director. This affects the application of section 127 of the existing law (relating to when a company is taken to have signed a document or fixed a seal). The new law effectively 'looks through' the corporate director to the natural person directors and secretary of the corporate director.</p> | No equivalent. |
| <p>A CCIV must have a constitution. The constitution governs the internal operation of the CCIV and acts as a statutory contract between:</p> <ul style="list-style-type: none"> • the CCIV and each member; • the CCIV and the corporate director; • the corporate director and each member; and • a member and each other member. | No equivalent. |
| <p>The constitution of a CCIV must meet the basic content requirements.</p> <p>For a wholesale CCIV, it must set out the process for modifying and repealing and replacing the constitution. The content for a</p> | No equivalent. |

| <i>New law</i> | <i>Current law</i> |
|---|--------------------|
| <p>wholesale CCIV's constitution is otherwise not prescribed.</p> <p>The constitution of a retail CCIV must make provision for the establishment of sub-funds, the establishment of classes of shares referable to sub-funds and the method by which complaints made by members of the CCIV are to be dealt with. The constitution of a retail CCIV must also state that the CCIV has power to borrow or raise money (noting that, being a company, the CCIV has inherent power to do this). If there are to be limits on the CCIV's exercise of this power, the constitution must also set out those limits.</p> | |
| <p>ASIC may direct a retail CCIV to modify its constitution to either:</p> <ul style="list-style-type: none"> • comply with the minimum content requirements that apply to it; or • ensure that the constitution deals with the matters that are the subject of the minimum content requirements, or the corporate director's right to be paid fees out of the assets of a sub-fund of the CCIV, in adequate detail. | No equivalent. |
| <i>Officers and employees of the CCIV</i> | |
| A CCIV may only appoint one director: its 'corporate director'. | No equivalent. |
| The corporate director is the public company named in ASIC's record of the CCIV's registration as its corporate director or temporary corporate director. | No equivalent. |
| Only a public company that holds an AFSL authorising it to operate the business and conduct the affairs of the CCIV may be appointed as corporate director of the CCIV. | No equivalent. |

| <i>New law</i> | <i>Current law</i> |
|---|--------------------|
| As a public company, the corporate director has natural person directors. At least half of the directors of the corporate director of a retail CCIV must be external directors. | No equivalent. |
| <p>The corporate director of the CCIV is first appointed as part of the registration of the CCIV.</p> <p>A change in the corporate director only takes effect once the record of the CCIV's registration is altered to name another company as the CCIV's corporate director (or temporary corporate director).</p> <p>The process for changing the corporate director depends on the circumstances in which the corporate director is being changed. For example, different requirements apply in circumstances where the corporate director must be removed because it is no longer eligible to be the corporate director compared to circumstances where the corporate director wishes to retire from office of its own volition. The rules that apply are based on the rules for replacing the responsible entity of a registered scheme.</p> | No equivalent. |
| A CCIV may not have any officers, other than a director, a receiver, a liquidator or a person administering an arrangement between a CCIV and someone else. | No equivalent. |
| A CCIV must not have a secretary or any employees. | No equivalent. |

| <i>New law</i> | <i>Current law</i> |
|---|--------------------|
| An officer of a CCIV owes the duties that officers of a company owe under Part 2D.1 of the Act. In addition, a director of a retail CCIV owed duties similar to those owed by a responsible entity of a registered scheme. The latter duties prevail over the duties to the CCIV under Part 2D.1, to the extent of any conflict. | |
| The corporate director of a CCIV also owes further duties that are specific to its role – including an obligation to operate the business and conduct the affairs of the CCIV and a duty to provide the depositary reasonable assistance (if the CCIV has a depositary). | No equivalent. |
| The corporate director of a CCIV cannot appoint delegates but it has the power to appoint an agent an agent to do anything that the corporate director is authorised to do in connection with the CCIV. These agents may appoint sub-agents. Akin to other companies, a CCIV also has the power to appoint an agent, who may also appoint sub-agents. The agents of the CCIV and the sub-agents of both the corporate director and the CCIV are taken to be agents of the corporate director. | No equivalent. |
| The corporate director of a retail CCIV has extended liability for its agents (and persons taken to be its agents) for the purposes of determining whether there is a liability to the CCIV (or its members) or whether it has properly performed its duties (in order to be paid its fees, or be indemnified, out of the assets of a sub-fund of the CCIV. | No equivalent. |
| The officers and employees of the corporate director owe obligations to the corporate director under the existing law, in their capacity as officers and employees of a public company. The new law creates | No equivalent. |

| <i>New law</i> | <i>Current law</i> |
|--|--------------------|
| further obligations on these persons in relation to the CCIV. | |
| The officers and employees of a corporate director of a retail CCIV owe duties that are similar to the duties owed by officers and employees of a responsible entity in relation to the registered scheme under the existing law. | No equivalent. |
| The secretary of the corporate director of a CCIV has responsibility for certain contraventions of the law by the corporate director as well as certain contraventions of the law by the CCIV. This extension of the secretary of the corporate director's responsibility is important given a CCIV must not appoint a secretary itself. | No equivalent. |
| The directors of the corporate director of a CCIV have an extended duty to disclose material personal interests in relation to the affairs of the CCIV to the other directors of the corporate director. | No equivalent. |
| The restrictions on indemnifying, exempting or insuring an officer or auditor of a CCIV against certain liabilities to the CCIV has been extended to also cover an officer or auditor of the corporate director. | No equivalent. |
| <i>Officers and employees of the corporate director of the CCIV</i> | |
| The officers and employees of a corporate director of a retail CCIV owe duties that are similar to the duties owed by officers and employees of a responsible entity in relation to the registered scheme under the existing law. | No equivalent. |
| The secretary of the corporate director of a CCIV has responsibility for certain contraventions of the law by the corporate director as well as certain contraventions of the law by the CCIV. This extension of the secretary of the corporate director's | No equivalent. |

| <i>New law</i> | <i>Current law</i> |
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| responsibility is important given a CCIV must not appoint a secretary itself. | |
| The directors of the corporate director of a CCIV have an extended duty to disclose material personal interests in relation to the affairs of the CCIV to the other directors of the corporate director. | |
| The restrictions on indemnifying, exempting or insuring an officer or auditor of a CCIV against certain liabilities to the CCIV has been extended to also cover an officer or auditor of the corporate director. | No equivalent. |
| <i>Depository of the CCIV</i> | |
| The depository of a CCIV is the entity named in ASIC's record of the CCIV's registration as the depository or temporary depository of the CCIV. A CCIV can only have one depository. | No equivalent. |
| A retail CCIV must have a depository. A wholesale CCIV may choose to have a depository. If a wholesale CCIV opts into the regime for depositaries, then the regulatory requirements for depositaries apply to the wholesale CCIV and the depository in their entirety. However, a wholesale CCIV that has a depository may remove the depository and not replace it. | No equivalent. |
| <p>The depository of a CCIV must:</p> <ul style="list-style-type: none"> • be either: <ul style="list-style-type: none"> – a public company; or – a foreign company registered under Division 2 of Part 5B.2 of the Act; • hold an AFSL authorising it to act as a depository for the CCIV; and • meet the independence requirement. | No equivalent. |
| The independence requirement involves a simple prohibition on the | No equivalent. |

| <i>New law</i> | <i>Current law</i> |
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| body that is (or proposes to be) the depositary, and any agents or persons engaged by the depositary to perform depositary functions, from also being an entity that directs investment decisions for the CCIV. This means that the depositary, and any other entity performing depositary functions for the CCIV, is legally separated from any entity that directs investment decisions for the CCIV. | |
| The regulations may prescribe further functional independence requirements that the depositary (and its agents) must comply with in certain circumstances | No equivalent. |
| A depositary must: <ul style="list-style-type: none"> • hold the assets of the CCIV in a segregated manner and on trust for the CCIV; and • supervise the conduct of certain activities undertaken in relation to the CCIV. | No equivalent. |
| The depositary, and any former depositary, must report material breaches or suspected breaches to ASIC that relate to the CCIV and arise in relation to the activities it supervises. | No equivalent. |
| The depositary of a CCIV owes statutory duties, which are based in part on the duties of the responsible entity of a registered scheme. | No equivalent. |
| The depositary 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 depositary's supervisory function | No equivalent. |
| The depositary is appointed either as part of the registration of the CCIV or by notice to ASIC. The process for changing depositary depends on the circumstances in which the depositary is being changed. The appointment of an entity as depositary (including any | No equivalent. |

| <i>New law</i> | <i>Current law</i> |
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| change) only takes effect once the record of the CCIV's registration has been updated to name the body as the CCIV's depositary (or temporary depositary). | |
| <i>Compliance plan of a retail CCIV</i> | |
| A retail CCIV must have a compliance plan and a compliance plan auditor (similar to the requirements for a compliance plan of a registered scheme). | No equivalent. |
| 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 the CCIV's constitution. This is the only basic content requirement for the compliance plan. | No equivalent. |
| The corporate director must ensure at all times that the CCIV's compliance plan meets the legislative requirements for compliance plans. The corporate director must also comply with the compliance plan. | No equivalent. |
| The corporate director of a retail CCIV must engage an auditor to audit compliance with the CCIV's compliance plan. | No equivalent. |
| <i>Member protection</i> | |
| The approval of the members of each affected sub-fund of a retail CCIV is required if the CCIV wishes to give a financial benefit to a related party. | No equivalent. |
| Member approval is not required for any fees or indemnities to be given to the corporate director of a retail CCIV that are specified in the CCIV's constitution and that the corporate director is entitled to in the proper performance of its duties. | No equivalent. |
| Financial benefits from a retail CCIV to a closely-held subsidiary, remuneration and reimbursement to an officer of the CCIV, or a financial benefit of a small amount to a related | No equivalent. |

| <i>New law</i> | <i>Current law</i> |
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| party are not exempt from requiring member approval. | |
| The related parties of a CCIV extend to entities that control the corporate director, an agent (or person engaged) by the corporate director and the directors of the corporate director (and their relatives). | No equivalent. |
| If a person has grounds for an order by the Court (because, for example, the CCIV's affairs have been conducted in a way that is contrary to the interests of the CCIV as a whole or in a way that is contrary to the interests of a sub-fund (or sub-funds) as a whole), then the orders the Court can make include an order to modify or repeal the CCIV's constitution. | No equivalent. |
| A CCIV must notify ASIC of the particulars of a division of the shares in the CCIV into classes (if the shares were not previously divided in this way) and a conversion of shares in a class into shares in another class. | No equivalent. |
| The corporate director of a CCIV has civil liability to members of the CCIV for a contravention of Chapter 8B (regardless of whether or not the corporate director has been convicted). | No equivalent. |
| <i>Meetings</i> | |
| The corporate director of a CCIV may pass a resolution for the CCIV by passing a resolution of the directors of the corporate director. | No equivalent. |
| Meetings of members of CCIVs are subject to the rules for meetings of members of registered MISs) as if: <ul style="list-style-type: none"> the CCIV were a registered scheme; the members of the CCIV were the members of that scheme; the corporate director of the CCIV were the responsible entity of that scheme; and the CCIV's compliance plan was | No equivalent. |

| <i>New law</i> | <i>Current law</i> |
|---|--------------------|
| <p>the compliance plan of that scheme.</p> <p>The same rules apply to meetings of members of a sub-fund of a CCIV, but as if the sub-fund was a registered scheme, and its members were the members of that scheme.</p> | |
| <p>A resolution of a sub-fund may only be moved by the members of that sub-fund if it does not treat members of any other sub-fund of the CCIV differently or affect any other interest of a member of any other sub-fund.</p> | No equivalent. |
| <p>Associates of a CCIV (which includes the corporate director) and the corporate director's associates are not entitled to vote at a meeting of the members of the CCIV or a sub-fund if they have an interest in the resolution other than in their capacity as a member.</p> | No equivalent. |
| <i>Corporate contraventions</i> | |
| <p>The conduct of specified persons is attributed to a CCIV for the purposes of all Commonwealth laws, these rules replace Part 2.5 of the Criminal Code and any bespoke attribution rules contained in Commonwealth laws. The provisions do not apply to State and Territory laws.</p> | No equivalent. |
| <p>The conduct of others <i>in relation to</i> specified persons is also taken to be in relation to the CCIV in certain circumstances.</p> | No equivalent. |
| <p>If the conduct of a person is attributed to a CCIV, then that person's state of mind can also be attributed to the CCIV if certain conditions are met.</p> | No equivalent. |
| <p>If a CCIV commits an offence against a Commonwealth law, or contravenes a civil penalty provision, the corporate director of the CCIV is also taken to commit the offence or contravene the provision.</p> | No equivalent. |
| <p>The consequences of a breach of a Commonwealth law or a civil penalty</p> | No equivalent. |

| <i>New law</i> | <i>Current law</i> |
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| provision by a CCIV do not apply to the CCIV. A CCIV is not liable for any fine or penalty, and may not be given an infringement notice. | |
| In the event that the CCIV breaches a State or Territory law, ASIC, the CCIV or a member of the CCIV may apply to the Court for a compensation order payable by the corporate director if the CCIV has suffered loss or damage as a result. | No equivalent. |
| If a sub-fund is in external administration, the corporate director is not liable for any breach or contravention of Commonwealth laws if the relevant conduct is caused wholly by a receiver, liquidator or person administering a compromise or arrangement. | No equivalent. |

Detailed explanation of new law

Governance rules

CCIV's powers

3.72 As a CCIV is a type of company, it has all the powers of an individual and a body corporate, including the power to enter into contracts and issue and cancel shares in the company. The CCIV's powers to make, vary, ratify or discharge a contract may be exercised by an individual acting with the CCIV's express or implied authority, akin to other companies. It should be noted, however, that a CCIV's power to issue shares and debentures are modified by the requirements of Part 8B.4 of the Bill. Further details about a CCIV's power to issue securities are contained in Chapter 4. *[Schedule 2, items 46 and 47, note 2 to subsection 124(1)]*

3.73 However, unlike other companies, a CCIV has only one director – its corporate director. This affects the application of section 127 of the existing law (relating to when a company is taken to have signed a document or fixed a seal). The new law effectively 'looks through' the corporate director to the natural person directors and secretary of the corporate director. Specifically, the CCIV is taken to have:

- signed a document if two directors, or a director and secretary, of the corporate director of the CCIV sign the document; or

- fixed a seal to a document if two directors, or a director and secretary of the corporate director of the CCIV witness the fixing of the seal.

[Schedule 1, item 4, section 1223; Schedule 2, items 48 to 51, notes 1 and 2 to subsection 127(1) and notes 1 and 2 to subsection 127(2)]

3.74 No amendments have been made to the statutory assumptions that people dealing with companies are entitled to make. However, these assumptions already apply cumulatively as existing subsection 129(8) allows an assumption to be made (for example, about the corporate director's compliance with its internal rules) for the purposes of making another assumption (for example, about the CCIV's compliance with its internal rules).

Constitution

3.75 A CCIV must have a constitution. The constitution governs the internal operation of the CCIV and acts as a statutory contract between:

- the CCIV and each member;
- the CCIV and the corporate director;
- the corporate director and each member; and
- a member and each other member.

[Schedule 1, item 4, subsection 1223B(1), section 1223E]

3.76 Provisions in the Act that are replaceable rules do not apply as replaceable rules for a CCIV. This means that if the CCIV's constitution does not make provision for a particular matter that is the subject of a replaceable rule, the replaceable rule will not apply and no rules will operate with regard to that matter. *[Schedule 1, item 4, section 1223A]*

Adopting, modifying or repealing and replacing the constitution

3.77 A CCIV adopts its constitution on registration. Its constitution cannot be repealed unless it is replaced with another constitution. *[Schedule 1, item 4, subsection 1223B(1) and subsection 1223D(1)]*

3.78 The process for modifying, or repealing and replacing, the constitution differs depending on whether the CCIV is a retail or wholesale CCIV. Section 136 of the existing law does not apply to the adoption, modification or repeal of the constitution of a CCIV. *[Schedule 1, item 4, subsection 1223D(6)]*

3.79 For a wholesale CCIV, the process for modifying the constitution must be set out in the CCIV's constitution. This process must be complied with if the constitution is subsequently modified, repealed or replaced. *[Schedule 1, item 4, paragraph 1223D(2)(b) and section 1223F]*

3.80 For a retail CCIV, the constitution may be modified, repealed or replaced by a special resolution of the CCIV's members or by the corporate director on its own initiative. The corporate director may only change the constitution on its own initiative if it reasonably considers the change will not adversely affect members' rights. These requirements are based on the requirements for changing the constitution of a registered scheme in existing section 601GC. *[Schedule 1, item 4, subsection 1223D(2)]*

3.81 If the constitution of either a wholesale or retail CCIV is modified or repealed and replaced, it must be lodged with ASIC within 14 days of the modification. A failure to do so is an offence of strict liability with a maximum penalty of 20 penalty units. This is consistent with the Guide. *[Schedule 1, item 4, subsections 1223D(3) and (4)]*

3.82 Section 137 of the existing law sets the date that a modification or repeal of a CCIV's constitution takes effect in certain circumstances. If section 137 of the existing law does not set the date of effect, then the modification or repeal takes effect on the latest of the following:

- the date on which the modification or the new constitution is lodged with ASIC;
- if the CCIV is a retail CCIV, and the corporate director of the CCIV determines a later date, that date;
- if the CCIV is a wholesale CCIV, and the corporate director of the CCIV determines a later date in accordance with any requirements in its constitution, that date.

[Schedule 1, item 4, subsection 1223D(5)]

Basic content requirements

3.83 The content of a constitution of a wholesale CCIV is not prescribed, apart from the requirement for the CCIV to set out the process for adopting a constitution after registration, and repealing or modifying the constitution. *[Schedule 1, item 4, section 1223F]*

3.84 The constitution of a retail CCIV must make provision for the establishment of sub-funds, the establishment of classes of shares referable to sub-funds and the method by which complaints made by members of the CCIV are to be dealt with. *[Schedule 1, item 4, paragraphs 1223G(a) to (c)]*

3.85 The constitution of a retail CCIV must also state that the CCIV has power to borrow or raise money (noting that, being a company, the CCIV has inherent power to do this). If there are to be limits on the CCIV's exercise of this power, the constitution must also set out those limits. *[Schedule 1, item 4, paragraphs 1223G(d) and (e)]*

3.86 If some or all of the shares of the CCIV are redeemable shares or redeemable preference shares, then the CCIV's constitution must make

provision for the shares to be redeemed. This provision must meet certain requirements – including that it specify the period within which redemptions can be made (while the sub-fund is liquid), be fair and reasonable to the members of each sub-fund of the CCIV and be consistent with the provisions in Part 8B.4 regarding the redemption of shares. The redemption provisions in Part 8B.4 are discussed further in Chapter 4. *[Schedule 1, item 4, section 1223H]*

3.87 These requirements are based on the requirements for constitutions of registered schemes, contained in section 601GA. However, unlike for registered schemes, a retail CCIV's constitution does not need to set out the consideration that must be paid to become a member because the price of shares in a company may vary over time. Nor does it need to give power to a third party to deal with the CCIV's assets because the CCIV has power to make investments itself.

3.88 A failure to comply with the relevant minimum content requirements is a strict liability offence with a maximum penalty of 20 penalty units. Both the offence and penalty are consistent with the Guide. *[Schedule 1, item 4, subsections 1223B(2) and (3)]*

3.89 ASIC also has power to direct a retail CCIV to modify its constitution to either:

- comply with the minimum content requirements that apply to it; or
- ensure that the constitution deals with the matters that are the subject of the minimum content requirements, or the corporate director's right to be paid fees out of the assets of a sub-fund of the CCIV, in adequate detail.

[Schedule 1, item 4, subsections 1223(1) and (2)]

3.90 The direction must be given to the CCIV by notice in writing. The corporate director must comply with the direction within 14 days after it has been given the notice and lodge a copy of the modified constitution with ASIC within 14 days after the modification. A failure to comply with the direction within the required timeframe is a strict liability offence with a maximum penalty of 20 penalty units. A failure to lodge the modified constitution with ASIC within the required timeframe is also a strict liability offence with a maximum penalty of 20 penalty units. Both of these strict liability offences are consistent with the Guide and with offences in the Act that apply in other circumstances involving the failure to lodge documents with ASIC or comply with directions given by ASIC. *[Schedule 1, item 4, subsections 1223C(4) to (6)]*

3.91 When modifying the CCIV's constitution in accordance with a direction from ASIC, the corporate director does not need to comply with the requirements that prescribe how a CCIV's constitution may be

modified (see paragraphs 3.77 to 3.82). *[Schedule 1, item 4, subsection 1223C(3)]*

Officers and employees of the CCIV

Requirements for officers and employees generally

3.92 A CCIV must only appoint one director: its ‘corporate director’. The corporate director is the public company named in ASIC’s record of the CCIV’s registration as its corporate director or temporary corporate director. The rules relating to the appointment, removal and replacement of the corporate director are discussed further below. *[Schedule 1, item 4, subsections 1224(1) to (3)]*

3.93 The appointment of more than one director, being a director appointed to a position other than the position of corporate director, is an offence punishable by up to two years imprisonment. *[Schedule 2, item 202, table item 329C in Schedule 3]*

3.94 These obligations are significant as, unlike other companies that are governed by the Act, a CCIV’s sole director is a public company and not an individual person director.

3.95 Moreover, unlike other directors of conventional companies, the corporate director commits an offence if it appoints an alternate director to exercise some, or all, of its powers. *[Schedule 1, item 4, subsections 1224(4) and (5); Schedule 2, item 202, table item 329CA in Schedule 3]*

3.96 The prohibition on appointing more than one director and the restriction on appointing an alternate director do not prevent a person from being held to be a shadow director of a CCIV within the meaning of the definition of ‘director’ in paragraph (b) of section 9 of the existing law. *[Schedule 1, item 4, subsection 1238EA(6)]*

3.97 A CCIV must not have any other officers other than a director or a receiver, liquidator or a trustee or other person administering an arrangement between the CCIV and someone else. It is specifically prohibited from appointing a secretary or having any employees. A contravention of either of these requirements is an offence punishable by up to two years imprisonment. *[Schedule 1, item 4, sections 1224A and 1224B; Schedule 2, item 202, table item 329CD in Schedule 3]*

3.98 An officer of a CCIV, including its director (and any shadow director), owes the duties imposed on all company officers under Part 2D.1 of the existing law. This includes the duty to act in good faith in the best interests of the corporation and for a proper purpose.

3.99 The provisions in the existing law in relation to external administration have been modified so that external administration applies to each sub-fund of the CCIV rather than to the CCIV as a whole. The statutory duties that officers owe under Part 2D.1 of the existing law have

been similarly modified so that an officer other than a director (such as a receiver or liquidator) only owes these duties to the sub-fund for which they have been appointed. *[Schedule 1, item 4, section 1224C]*

3.100 The director of a retail CCIV (including any shadow director) owes duties in addition to the Part 2D.1 duties, being 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;
- 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;
- ensure that the CCIV's constitution complies with the requirements of the Act;
- ensure that the CCIV's compliance plan meets the requirements set out in paragraph 3.299;
- comply with the CCIV's compliance plan;
- ensure all assets and liabilities are clearly identified;
- ensure that assets that are not required to be held by the depositary are held separately from the assets of any other sub-fund of the CCIV;
- ensure the assets of the CCIV are valued at regular intervals appropriate to the nature of the assets;
- ensure all payments out of the assets of the CCIV are made in accordance with the CCIV's constitution and this 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, as soon as practicable after becoming aware of the breach; 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, item 4, subsection 1224D(1)]

3.101 If a director of a retail CCIV contravenes one of these duties, the director contravenes a civil penalty provision. *[Schedule 2, table item 45B in subsection 1317E(1)]*

3.102 If there is a conflict between a director of a retail CCIV's duties under Part 2D.1 and the additional duties set out above, the additional duties prevail. *[Schedule 1, item 4, subsection 1224D(2)]*

3.103 The additional duties set out above interact with other laws in the same way that the duties in Part 2D.1 do under section 185 of the existing law. That is, the additional duties have effect in addition to, and not in derogation of, any other rule of law that the person has because of their office or employment in relation to a corporation. *[Schedule 1, item 4, subsection 1224D(3)]*

3.104 In the same way that a director cannot be insured against a liability arising out of a contravention of section 182 or 183 of the existing law (being duties owed under Part 2D.1), a director of a retail CCIV cannot be insured against a liability arising out of a contravention of the additional duties outlined above. *[Schedule 1, item 4, subsection 1224D(4)]*

3.105 Parts 2D.3 to 2D.5 of the existing law (about the appointment, remuneration, cessation of appointment of directors, the appointment of secretaries and public information about directors and secretaries) do not apply to CCIVs, as a CCIV is prohibited from appointing a director other than the corporate director or a company secretary (as discussed above). The rules regarding the appointment, remuneration, removal and replacement of the corporate director are discussed further below. *[Schedule 1, item 4, paragraphs 1224E(a) and (b)]*

3.106 Part 2D.6 of the Act (about disqualification from managing corporations) does not apply for the purposes of disqualifying the corporate director of the CCIV. An effective mechanism for the disqualification of the corporate director is provided for as part of the requirements for the corporate director to hold an AFSL authorising it to operate the business and conduct the affairs of the CCIV. *[Schedule 1, item 4, paragraph 1224F(d)]*

3.107 Under Part 7.6 of the Act, a person (including the corporate director) may be disqualified from holding an AFSL in certain circumstances. The regime in Part 7.6 of the Act also applies to responsible entities of registered schemes (who are required to hold an AFSL authorising it to operate the scheme). An equivalent of Part 2D.6 does not apply to responsible entities of schemes.

3.108 Part 2D.7 of the Act (which prohibits hedging of remuneration of key management personnel) does not apply to the fees and benefits payable to a corporate director of a CCIV. This is consistent with the treatment for responsible entities of registered schemes, which are also not subject to this prohibition. *[Schedule 1, item 4, paragraph 1224E(e)]*

3.109 Part 2D.8 of the Act (about remuneration recommendations in relation to key management personnel for disclosing entities) does not apply to CCIVs that are disclosing entities. This is because fees and benefits payable to a corporate director of a CCIV are not subject to the remuneration recommendations made by remuneration consultants. For the corporate director of a retail CCIV, these fees and benefits must be set out in the CCIV's constitution (discussed in paragraph 3.143). *[Schedule 1, item 4, paragraph 1224E(f)]*

3.110 The modifications to Parts 2D.5, 2D.6, 2D.7 and 2D.8 do not affect their application to the officers of the corporate director as a public company.

Further requirements for the corporate director of the CCIV

Appointment of the corporate director

3.111 As noted in paragraph 3.92, a CCIV may only appoint one director – its corporate director. The corporate director is the public company named in ASIC's record of the CCIV's registration as its corporate director or temporary corporate director.

3.112 A person applying to register a CCIV must provide information about the company that meets the basic eligibility requirement (discussed below) and has consented in writing to becoming the CCIV's corporate director. Upon registration of the CCIV, the body named in the application for registration as the proposed corporate director becomes the corporate director of the CCIV (see paragraph 2.39).

3.113 A change in the corporate director only takes effect once the record of the CCIV's registration is altered to name another company as the CCIV's corporate director (or temporary corporate director). The rules for replacing the corporate director are discussed further below. *[Schedule 1, item 4, section 1224R]*

3.114 Even if the corporate director's appointment, or continuance of its appointment is invalid (because the CCIV or the corporate director did not comply with the CCIV's constitution or this Act), acts done by the company named in ASIC's record as the corporate director are effective. However, the effectiveness of the act by the corporate director does not necessarily bind the CCIV in its dealings with any other people, nor does it necessarily make the CCIV liable to a third party. *[Schedule 1, item 4, section 1224H]*

Basic eligibility requirement

3.115 Only a public company that holds an AFSL authorising it to operate the business and conduct the affairs of the CCIV may be appointed as corporate director of the CCIV. *[Schedule 1, item 4, section 1224F]*

3.116 The corporate director's obligation to operate the business and conduct the affairs of the CCIV is discussed further in paragraphs 3.126 to 3.131 below.

Requirement for corporate director of retail CCIV to have external directors

3.117 As a public company, the corporate director has natural person directors. At least half of the directors of the corporate director of a retail CCIV must be external directors. External directors bring a degree of detached supervision that is expected to enhance the standard of corporate governance of corporate directors of retail CCIVs. *[Schedule 1, item 4, subsection 1224G(1)]*

3.118 A director of a corporate director is an external director if:

- the director is not, and has not been in the previous two years:
 - an employee or senior manager of the corporate director or a related body corporate;
 - substantially involved in business dealings, or in a professional capacity with the corporate director 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 corporate director or a related body corporate;
- the director does not have a material interest in the corporate director or a related body corporate; and
- the director is not a relative of a person who has a material interest in the corporate director or a related body corporate.

[Schedule 1, item 4, subsection 1224G(2)]

3.119 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.

3.120 The corporate director of a retail CCIV must comply with the external director requirement within 14 days (or a 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, item 4, subsections 1224G(3) and (6)]*

3.121 This provision, including discretion for ASIC to extend the 14 day period, is intended to provide some flexibility in the event of

non-compliance due to unforeseen circumstances, such as the death or incapacity of a natural person director of the corporate director. In giving an extension, ASIC may impose conditions to be complied with by the corporate director.

3.122 If the corporate director fails to comply with the external director requirement within the relevant period, it is liable for a strict liability offence with a maximum penalty of 20 penalty units. An intentional or reckless failure is an offence punishable by up to two years imprisonment. A failure to comply with a condition imposed by ASIC in extending the 14 day period is a strict liability offence with a maximum penalty of 60 penalty units. These penalties are appropriate given that a failure to have the appropriate number of external directors would reduce or remove the external or independent oversight that is provided by external directors of the corporate director and are consistent with the Guide. [*Schedule 1, item 4, subsections 1224G(4), (5) and (7); Schedule 2, item 202, table items 329CE, 329CF and 329CG in Schedule 3*]

3.123 Although the maximum penalty for the ordinary offence is expressed only in terms of imprisonment in Schedule 3 of the Act, the multipliers in section 4B of the Crimes Act operate to convert this term of imprisonment into the maximum fine the CCIV may be liable for in the event of a contravention. The *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Bill 2018* proposes to include a bespoke formula for converting a penalty for an offence committed by a body corporate that expressed only in terms of imprisonment into the maximum number of penalty units (which would replace the formula set out in the Crimes Act). The maximum term of imprisonment continues to be relevant for any natural persons that are found to be liable for the offence (including, for example, through the application of the accessorial liability provisions in the Criminal Code).

3.124 The requirements (and penalties) for external directors within the corporate director 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, 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.

3.125 The corporate director's board is responsible, in place of the compliance committee, for monitoring the extent to which the corporate director complies with the CCIV's compliance plan.

Powers and obligations of the corporate director

3.126 As discussed in paragraph 3.98, the corporate director (as an officer of the CCIV) owes the same duties, and has the same powers, as

other officers of the CCIV (including its duties under Part 2D.1 of the Act). The director of a retail CCIV also owes additional duties similar to the duties of the responsible entity of a registered scheme (see paragraph 3.100 above).

3.127 The corporate director of a CCIV also owes further duties that are specific to its role – including an obligation to operate the business and conduct the affairs of the CCIV and a duty to provide the depositary reasonable assistance (if the CCIV has a depositary).

Obligation to operate the CCIV

3.128 The obligation to operate the CCIV applies to the corporate director of both a retail CCIV and a wholesale CCIV. The obligation has two limbs.

3.129 The first limb requires the corporate director to operate the business and conduct the affairs of the CCIV. This is designed to be a single encompassing requirement, rather than one obligation to operate the business and a separate obligation to conduct its affairs. [*Schedule 1, item 4, paragraph 1224J(1)(a)*]

3.130 The new definition of ‘affairs’ of a CCIV (which is largely based on the definition of ‘affairs’ of a body corporate) applies to this first limb. The definition sets out a range of activities that are included in the concept of ‘affairs’ of a CCIV (such as the promotion, formation, trading, transactions and dealings of the CCIV). The definition is not exhaustive and does not limit the types of matters or activities that are captured by the term. [*Schedule 2, item 35, section 53AA*]

3.131 The second limb places an obligation on the corporate director of a CCIV to perform the functions conferred on it by the CCIV’s constitution and the Act. This is appropriate because the corporate director is the controlling mind of the CCIV. [*Schedule 1, item 4, paragraph 1237J(1)(b)*]

Corporate director’s power to exercise the powers of the CCIV

3.132 The corporate director has the power to exercise all the powers of the CCIV except those powers that the Act or the CCIV’s constitution requires the CCIV to exercise in a general meeting. One example of a power that can only be exercised in a general meeting is amending the constitution. [*Schedule 1, item 4, subsection 1224J(2)*]

3.133 This power is analogous to the power granted to directors of other companies in existing section 198A. Existing section 198A does not apply to CCIVs as it is a replaceable rule. For a discussion of the application of replaceable rules in the CCIV context, see Chapter 2 of these explanatory materials.

Obligation to provide reasonable assistance

3.134 The roles of corporate director and depositary are complementary. Accordingly, each owes the other an obligation to provide reasonable assistance to support the performance of their duties.

3.135 This includes requiring the corporate director to give any information in its possession or control to the depositary that the depositary reasonably requires in order to fulfil its responsibilities in relation to the CCIV. A written request for information must be complied with in a reasonable period. *[Schedule 1, item 4, sections 1224K and 1226J]*

3.136 A failure to provide the information that is the subject of such a written request is an offence punishable by up to six months imprisonment. The explanation regarding the maximum penalty (and the conversion of the term of imprisonment into penalty units for a body corporate) in paragraph 3.122 is also relevant to this offence. *[Schedule 2, item 202, table item 329CH in Schedule 3]*

No obligation to disclose material personal interests

3.137 Unlike other directors of conventional companies, the corporate director is not required to disclose a material personal interest to another director as the CCIV may only appoint one director. Accordingly, section 191 (relating to the director's duty to disclose material personal interests) of the existing law does not apply to the corporate director of a CCIV. *[Schedule 1, item 4, section 1224L; Schedule 2, item 60, note to Division 2 of Part 2D.1]*

Corporate director's responsibility for agents

3.138 The corporate director of a CCIV cannot appoint delegates but it has the power to appoint an agent to do anything that the corporate director is authorised to do in connection with the CCIV. These agents may appoint sub-agents. Akin to other companies, a CCIV also has the power to appoint an agent, who may also appoint sub-agents. The agents of the CCIV and the sub-agents of both the corporate director and the CCIV are taken to be agents of the corporate director. *[Schedule 1, item 4, section 1224M; Schedule 2, items 63 and 64, note 2 to subsection 198D(1)]*

3.139 When determining whether there is a liability to the CCIV or the CCIV's members, or whether the corporate director of a retail CCIV has properly performed its duties (for the purposes of being paid its fees or being indemnified out of the CCIV's assets), the corporate director of a retail CCIV is responsible for its agents (and persons taken to be its agents) even if the agent (or person) acts fraudulently or outside the scope of its authority. This offers a higher level of investor protection than the delegation rules for other types of companies in existing section 190 and the common law (for example, vicarious liability). It ensures that corporate directors of a retail CCIV have the same responsibility for

agents as responsible entities of registered schemes in existing subsection 601FB(3).³ [*Schedule 1, item 4, section 1224N*]

3.140 The corporate director of a retail CCIV may have a liability to the CCIV, for example, if it was to breach the duties it owes to the CCIV under Part 2D.1 of the existing law. The corporate director of a retail CCIV may have a liability to the CCIV's members, for example, if it contravened a section of Chapter 8B.

3.141 The corporate director of a wholesale CCIV is not responsible for its agents (and sub-agents), as well as the CCIV's agents (and sub-agents) to the same degree as the corporate director of a retail CCIV. This reflects the fact that sophisticated investors are better able to negotiate bespoke contractual protections and assess investment risks than retail investors.

3.142 Other officers are not responsible for their agents in the same way as the corporate director. Extending the duty to liquidators would significantly increase the risk for liquidators of CCIVs relative to liquidators of conventional companies, potentially making it more difficult to appoint a liquidator of a CCIV.

Limitation on corporate director's right to fees and indemnities

3.143 If the corporate director of a retail CCIV is to have any right to be paid fees, or be indemnified, out of the assets of a sub-fund of the CCIV, then those fees or indemnities must be specified in the CCIV's constitution and are only available if the corporate director has properly performed its duties. [*Schedule 1, item 4, section 1224P*]

3.144 Any other agreement or arrangement which purports to provide otherwise has no effect.

Exercise of powers while sub-fund is in liquidation

3.145 The appointment of a liquidator does not remove the corporate director from office. However, the corporate director must cease to exercise a function or power that relates solely to the business of the sub-fund that is being wound up. The corporate director may continue to exercise functions and powers that relate to the other sub-funds. [*Schedule 1, item 4, section 1224Q*]

3.146 There are two offences that apply to a corporate director who exercises a function or power that relates solely to the sub-fund that is being wound up. First, if the corporate director acts intentionally, the

³ Note that, unlike for responsible entities of registered schemes, the corporate director of a CCIV that has a depositary is not responsible for any agents performing custody functions for the CCIV, as the custody function must be performed by the CCIV's depositary. The depositary may appoint agents to perform custody functions. See Chapter 3.

corporate director commits an offence with a penalty of 30 penalty units. Intention is the default fault element under section 5.6 of the Criminal Code. *[Schedule 1, item 4, subsection 1224Q(4); Schedule 2, item 202, table item 329CI in Schedule 3]*

3.147 Second, if intention cannot be established, the corporate director commits a strict liability offence punishable by up to 20 penalty units. The application of a strict liability offence in this circumstance is consistent with the Guide and is intended to ensure the integrity of the wind up rules as they apply to sub-funds, in particular the role of the liquidator. *[Schedule 1, item 4, subsection 1224Q(5); Schedule 2, item 202, table item 329CJ in Schedule 3]*

3.148 The prohibition on exercising a function or power that relates solely to the sub-fund that is being wound-up does not apply to:

- a person acting with the liquidator, provisional liquidator or Court's approval; or
- a person acting in circumstances permitted by the Act.

[Schedule 1, item 4, subsection 1224Q(2)]

These exceptions mirror the exceptions to section 198G.

3.149 Unlike section 198G, the defendant does not bear the evidential burden for establishing that they are permitted to act. In other words, the prosecution must state in their pleadings that the person is not permitted to act and the burden would then shift to the defendant to prove otherwise. This departure from section 198G has been made to ensure consistency with the Guide. *[Schedule 1, item 4, subsection 1224Q(3)]*

3.150 On the other hand, the defendant bears the evidential burden for proving that they are acting with the approval of the liquidator, provisional liquidator or the Court. The reversal of the evidential burden of proof is consistent with the Guide because the prosecution is unlikely to be aware of any correspondence between the liquidator/provisional liquidator and the defendant. These facts lie peculiarly within the knowledge of the defendant and there would be no additional burden on a defendant to produce evidence of the grant of approval.

3.151 If there is a conflict between a function or power of the corporate director and the liquidator or provisional liquidator, the functions and powers of the liquidator or provisional liquidator prevail. *[Schedule 1, item 4, subsections 1224Q(6) and (11)]*

3.152 The new provisions relating to the functions of the officer do not interfere with any provision in the Act which applies despite section 198G (see, for example, sections 60-11, 65-45, 70-20, 90-10, 90-20 and 90-28 of the Insolvency Practice Schedule). *[Schedule 1, item 4, subsections 1224Q(9) and (10)]*

Replacing the corporate director

3.153 The process for changing the corporate director depends on the circumstances in which the corporate director is being changed. For example, different requirements apply in circumstances where the corporate director must be removed because it is no longer eligible to be the corporate director compared to circumstances where the corporate director wishes to retire from office of its own volition.

3.154 As discussed in paragraph 3.113 above, a change in the corporate director only takes effect once the record of the CCIV's registration is altered to name another company as the CCIV's corporate director (or temporary corporate director). 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

Replacement of an ineligible corporate director

3.155 If the corporate director fails to meet the basic eligibility requirement (discussed in paragraph 3.115 above), then ASIC, a member (or group of members) of the CCIV or the depositary may apply to the Court for the appointment of a temporary corporate director. *[Schedule 1, item 4, section 1224S]*

3.156 The application to Court is not mandatory (unlike the corporate director's obligation to apply to the Court for a temporary depositary in circumstances where the current depositary fails the basic requirements). However, the appointment of a temporary corporate enables the CCIV to continue to operate with a corporate director who is duly capable of being the corporate director until a permanent corporate director can be secured.

Retirement of corporate director

3.157 If the corporate director of the CCIV wishes to retire from its role, then it must call a meeting of the CCIV's members for the members to consider, and vote on, a special resolution to choose a new company to be the CCIV's corporate director. *[Schedule 1, item 4, subsection 1224T(1)]*

3.158 The notice of the meeting of the CCIV's members must set out the corporate director's reason for wanting to retire and nominate a new company that meets the basic eligibility requirement (discussed in paragraph 3.115 above) and has consented, in writing, to becoming the CCIV's corporate director. *[Schedule 1, item 4, subsection 1224T(2)]*

3.159 A new company is only appointed as the CCIV's corporate director if the special resolution passes. However, the company chosen by members need not be the one nominated in the notice of the meeting.

3.160 If the special resolution passes, such that the members of the CCIV have chosen a new company to be the corporate director of the CCIV, then the current corporate director must notify ASIC of the change

and asking it to alter the record of the CCIV's registration to name the new company as the CCIV's corporate director. This notice must be lodged with ASIC as soon as practicable, and in any event within two business days. It is only once the CCIV's record of registration has been updated that the appointment of the new corporate director is given effect. *[Schedule 1, item 4, subsection 1224T(3)]*

3.161 A failure to provide ASIC with the requisite notice is a strict liability offence with a penalty of 20 penalty units. The strict liability offence is consistent with the Guide justified in this situation as it is important that ASIC has up-to-date information about a CCIV changing its corporate director and is able to update the record of registration to give effect to the change. *[Schedule 1, item 4, subsection 1224T(5); Schedule 2, item 202, table item 329CL in Schedule 3]*

3.162 In addition, if the corporate director fails to give the requisite notice, the company chosen by the CCIV's members to be the CCIV's corporate director may also lodge the notice with ASIC. *[Schedule 1, item 4, subsection 1224T(4)]*

3.163 If the special resolution does not pass, such that the members have not chosen a new company to be its corporate director, then the current corporate director or the depositary of the CCIV may apply to the Court for the appointment of a temporary corporate director. The appointment of a temporary corporate director would enable the current corporate director to retire, while also ensuring the CCIV has a suitability qualified company to act as corporate director until a permanent corporate director can be secured. *[Schedule 1, item 4, subsection 1224T(6)]*

3.164 There is also nothing to prevent the corporate director from recommencing the process and calling a new meeting for the CCIV's members to consider and vote on a further special resolution to choose a new company to be the CCIV's corporate director under these provisions.

Replacement of corporate director by members

3.165 If the members of the CCIV wish to replace the corporate director of the CCIV, they may do so by calling a meeting of the CCIV's members to consider and vote on two special resolutions:

- first, a special resolution that the current corporate director should be removed; and
- second, a special resolution choosing a body to be the new corporate director of the CCIV.

[Schedule 1, item 4, subsection 1224U(1)]

3.166 The notice of the meeting of the CCIV's members must set out the intention to remove the current corporate director and nominate a company to be the new corporate director that meets the basic eligibility

requirement and has consented in writing to becoming the corporate director of the CCIV. *[Schedule 1, item 4, subsection 1224U(2)]*

3.167 The decision to remove the corporate director can only be made by all of the members of the CCIV and cannot be initiated by the members of a single sub-fund (unless they control more than 50 per cent of the total votes of the whole CCIV).

3.168 The current corporate director is only removed and replaced with a new company if both special resolutions pass. The company chosen by members to be the new corporate director need not be the one nominated in the notice of the meeting.

3.169 The corporate director must notify ASIC of the appointment as soon as practicable (and in any event within two business days of the appointment) and asking it to alter the CCIV's record of registration to name the appointed company as the CCIV's corporate director. It is only once the CCIV's record of registration has been updated that the appointment of the new corporate director is given effect. *[Schedule 1, item 4, subsection 1224U(4)]*

3.170 A failure to provide ASIC with the requisite notice is a strict liability offence with a penalty of 20 penalty units. The strict liability offence is consistent with the Guide justified in this situation as it is important that ASIC has up-to-date information about a CCIV changing its corporate director and is able to update the record of registration to give effect to the change. *[Schedule 1, item 4, subsection 1224U(6); Schedule 2, item 202, table item 329CK in Schedule 3]*

Requirements for a temporary corporate director

3.171 An application to the Court to appoint a temporary corporate director can be made by:

- ASIC, a member of the CCIV, a group of members of the CCIV or the depositary (if there is one) if the CCIV does not have a corporate director that meets the basic eligibility requirement (for example, where the corporate director's AFSL has been cancelled) (see discussed in paragraph 3.155 above); or
- the current corporate director or depositary (if there is one) if 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 3.163 above); or
- ASIC, a member of the CCIV, a group of members of the CCIV or the depositary (if there is one) if the temporary corporate director of the CCIV fails to take steps to appoint a permanent corporate director.

[Schedule 1, item 4, subsection 1224V(1)]

3.172 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, the company meets the basic eligibility requirement 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, item 4, subsections 1224V(2) and (3)]*

3.173 If the Court appoints a temporary corporate director, the person who made the application must, as soon as practicable after the Court's order appointing the temporary corporate director, and in any event within two business days, lodge a notice with ASIC informing ASIC of the appointment. *[Schedule 1, item 4, subsection 1224V(4)]*

3.174 A failure to provide ASIC with the requisite notice is a strict liability offence with a penalty of 20 penalty units. The strict liability offence is consistent with the Guide justified in this situation as it is important that ASIC has up-to-date information about a Court changing the CCIV's corporate director and is able to update the record of registration to give effect to the change. *[Schedule 1, item 4, subsection 1224V(6); Schedule 2, item 202, table item 329CM in Schedule 3]*

3.175 In addition, if the person who made the application fails to give ASIC the requisite notice, the company appointed as the CCIV's temporary corporate director may lodge the notice with ASIC. *[Schedule 1, item 4, subsection 1224V(5)]*

3.176 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 meeting of the CCIV's within three months of its appointment to allow the members to choose a new corporate director (or any later period as extended by the Court). The resolution must be a special resolution. Further meetings may be called within the three month period, or such period as the Court permits. *[Schedule 1, item 4, subsections 1224W(1) to (5)]*

3.177 A failure to call the meeting of the CCIV's members is a strict liability offence with a penalty of 20 penalty units. The strict liability offence is consistent with the Guide justified in this situation as it is important that the corporate director take steps to ensure a permanent depository is appointed. *[Schedule 1, item 4, subsection 1224W(10); Schedule 2, item 202, table item 329CN in Schedule 3]*

3.178 The notice of the meeting of the members must nominate a company to be the permanent corporate director of the CCIV that meets the basic eligibility requirement and has consented, in writing, to becoming the CCIV's permanent corporate director. There is nothing in the new law to prevent the temporary corporate director from being chosen by the members to be the new corporate director, or another

company (that is not the subject of the notice of the meeting) from being appointed as the permanent corporate director. *[Schedule 1, item 4, subsection 1224W(6)]*

3.179 If the members of the CCIV choose a company to be the new corporate director, 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. *[Schedule 1, item 4, subsections 1224W(7) and (8)]*

3.180 A failure to provide ASIC with the requisite notice is a strict liability offence with a penalty of 20 penalty units. The strict liability offence is consistent with the Guide justified in this situation as it is important that ASIC has up-to-date information about a Court changing the CCIV's corporate director and is able to update the record of registration to give effect to the change. *[Schedule 1, item 4, subsection 1224W(10); Schedule 2, item 202, table item 329CO in Schedule 3]*

3.181 If the temporary corporate director fails to call a meeting of the CCIV's members to appoint a permanent corporate director within the required period, ASIC, a member of the CCIV, a group of members of the CCIV or the depositary (if there is one) may apply to the Court for the appointment of a new temporary corporate director. The new temporary corporate director would then be under the same obligation to take steps to appoint a permanent corporate director. This process is not mandatory. It has been included as a stopgap to provide the CCIV with the opportunity to appoint a new temporary corporate director (who will be subject to the requirements to take steps to secure a permanent corporate director). *[Schedule 1, item 4, section 1224X]*

3.182 If the temporary corporate director has called one (or more) meetings of the CCIV's members to appoint a permanent corporate director within the required period, but the CCIV's members fail to pass a special resolution appointing a permanent corporate director, the temporary corporate director must apply to the Court for the winding up of all of the sub-funds of the CCIV. If the temporary corporate director does not make this application, ASIC, a member or a group of members of the CCIV may make the application. *[Schedule 1, item 4, section 1224Y]*

Consequences for changing the corporate director

3.183 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. The former corporate director must also give other reasonable assistance to facilitate the change in corporate director. *[Schedule 1, item 4, subsection 1224Z(1)]*

3.184 A failure to hand over any books, or to give any other reasonable assistance, is a strict liability offence with a maximum penalty of 20

penalty units. This penalty is consistent with the Guide and is justified in this situation as it is important that the incoming corporate director has the necessary reports and information about the CCIV and its operation in order to perform its role effectively. *[Schedule 1, item 4, subsection 1224Z(2); Schedule 2, item 202; table item 329CP in Schedule 3]*

3.185 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 retains 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, and any liability it has arising out of a contravention of a provision of the Act. *[Schedule 1, Part 1, item 4, section 1224ZA]*

3.186 A document to which the former corporate director was a party has effect 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 this effect after the change in corporate director. *[Schedule 1, Part 1, item 4, section 1224ZB]*

3.187 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.

Termination payments

3.188 A CCIV must not give the corporate director a benefit in connection with its retirement from its position as director of the CCIV unless:

- it is provided for under the CCIV's constitution (and, if it is a retail CCIV, the requirements described in paragraph 3.145 of these explanatory materials have been met); or
- the members of each affected sub-fund of the CCIV have approved the giving of the benefit.

[Schedule 1, item 4, sections 1224ZC and 1224ZD]

3.189 The exceptions for member approval that are available for other companies are also available for a CCIV. In particular, a CCIV does not need to obtain member approval if the benefit is given:

- under an order of the court; or
- in prescribed circumstances.

3.190 Some of the exceptions that are available to other companies are not relevant to the benefits given to a corporate director (being a company and not a natural person), in particular the exception for benefits given in respect of:

- a leave of absence that an officer of another company is entitled to under an industrial agreement; and
- pensions or lump sum payments (such as retiring allowances of superannuation gratuities); and
- damages for breach of contract or an agreement between the company and a person as consideration for the person agreeing to hold a position with the company.

[Schedule 1, item 4, section 1224ZE]

Officers and employees of the corporate director of the CCIV

3.191 The officers and employees owe obligations to the corporate director under the existing law, in their capacity as officers and employees of a public company. The new law creates further obligations on these persons in relation to the CCIV. It also extends certain obligations to the auditors of corporate director's.

Duties owed by officers of the corporate director in relation to the CCIV

Duties owed by officers of a retail CCIV

3.192 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 duty 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, item 4, paragraphs 1225(1)(a) to (e)]

3.193 An officer of a corporate director of a retail CCIV is also 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, item 4, paragraph 1225(1)(f)]*

3.194 The duties owed by an officer of a retail CCIV are modelled on the duties owed by officers of a responsible entity in relation to the scheme in section 601FD of the existing law.

3.195 A breach of any of the above duties is a breach of a civil penalty provision. If the breach is intentional or reckless, or a person's involvement in the breach is intentional or reckless, then the person is liable for an offence with a maximum penalty of five years imprisonment. This penalty is consistent with the Guide and with the penalties an officer of a responsible entity is liable for under the existing law. *[Schedule 1, item 4, subsection 1225(2); Schedule 2, item 195, table item 45C in subsection 1317E(1), item 202, table item 329D in Schedule 3]*

3.196 The officers of the corporate director also owe the Part 2D.1 duties to the corporate director under the existing law. To the extent that there is a conflict between the duties in the new law and the Part 2D.1 duties, the duties in the new law prevail. *[Schedule 1, item 4, subsection 1225(3)]*

3.197 The additional duties set out above interact with other laws in the same way that the duties in Part 2D.1 do under section 185 of the existing law. That is, the additional duties have effect in addition to, and not in derogation of, any other rule of law that the person has because of their office or employment in relation to a corporation. *[Schedule 1, item 4, subsection 1225(4)]*

Secretary of the corporate director's responsibility for certain contraventions

3.198 As discussed in paragraph 3.97, the CCIV must not appoint a secretary. The corporate director's secretary has responsibility for certain contraventions of the law by the corporate director (being a public company) under section 188 of the existing law.

3.199 The new law extends the operation of section 188 to also hold the corporate director responsible for certain contraventions of law by the corporate director (being obligations the corporate director has in relation to the CCIV, such as obligations on the corporate director to lodge certain notices with ASIC). The new law also extends the operation of section 188 to hold the corporate director responsible for certain contraventions of the law by CCIV's contravention of certain provisions (such as obligations on the CCIV to lodge certain notices with ASIC). *[Schedule 1, item 4, sections 1225A and 1225B]*

Extended duty to disclose material personal interests

3.200 Section 191 of the existing law (relating to the director's duty to disclose material personal interests) continues to apply to the natural

person directors of the corporate director. Akin to other companies, the directors of the corporate director must disclose any material personal interest in the corporate director to the other directors of the corporate director.

3.201 In addition, the new law extends section 191 of the existing law so that a natural person director of the corporate director must also disclose any material personal interest in the affairs of the CCIV to the other natural person directors of the corporate director. *[Schedule 1, item 4, section 1225C(1) and (2); Schedule 2, item 62, note to Division 2 of Part 2D.1]*

3.202 Strict liability applies to the circumstance that the director of the corporate director has a material personal interest in a matter that relates to the affairs of a CCIV. The imposition of strict liability on this element of the offence is consistent with the operation of subsection 191A(1A) of the existing law (which imposes strict liability in similar circumstances). *[Schedule 1, item 4, subsection 1225C(3)]*

3.203 The existing exceptions for when a director does not have to disclose a material personal interest continue to apply to the natural person directors of the corporate director, both in respect of their material interests in the corporate director and in the CCIV. These include if the material personal interest arises because the director is a member of the CCIV and the interest is held in common with the other members of the CCIV. *[Schedule 1, item 4, subsections 1225C(4) and (5)]*

Right of access to CCIV books

3.204 Each natural person director of a corporate director of the CCIV has a right to inspect the books of the CCIV for the purposes of certain legal proceedings. This right is the same as the right of access that applies to directors of other types of companies. *[Schedule 1, item 4, section 1225D and items 65 and 66, note 2 to subsection 198F(1)]*

Indemnities, exemptions and insurance against certain liabilities to the CCIV

Restrictions on indemnities and exemptions

3.205 As a CCIV is a type of company, existing section 199A prohibits retail and wholesale CCIVs from granting an officer (including corporate directors) or an auditor:

- an exemption from a liability to the CCIV incurred as an officer or auditor;
- an indemnity from a liability owed to the CCIV;
- an indemnity for certain pecuniary penalties or compensation orders;
- an indemnity from a liability that do not arise out of conduct in good faith; and

- certain indemnities for legal costs.

[Schedule 1, item 4, subsection 1225E(2); Schedule 2, item 68, note to subsection 199A(1)]

3.206 The restrictions in existing section 199A are also extended to prohibit the CCIV from granting these types of exemptions or indemnities to an officer or auditor of the corporate director. *[Schedule 1, item 4, subsection 1225E(1)]*

3.207 Neither existing section 199A, nor the extended operation of section 199A, prohibits all types of indemnities. Similarly, they do not constrain whether the indemnity is given in an employment contract, the constitution or a deed.

Restrictions on insurance

3.208 The CCIV (or a related body corporate) is prohibited from insuring a current or former officer or auditor of the CCIV from a liability (other than legal costs) that arises out of:

- a wilful breach of duty in relation to the CCIV; or
- a breach of the officer's statutory duties not to improperly use their position or improperly use information under section 182 and 183 of the Act (respectively).

3.209 This restriction on insurance is extended to cover a liability of an officer or auditor of the corporate director of the CCIV. *[Schedule 1, item 4, subsection 1225F(1) and (2); Schedule 2, item 69, note to subsection 199B(1)]*

3.210 In addition, a retail CCIV is prohibited from insuring an officer or auditor of the corporate director of the CCIV for a liability to the members of the CCIV that arises out of a breach of their statutory duties under new section 1225D. *[Schedule 1, item 4, subsection 1225F(3)]*

Duties of employees of the corporate director in relation to the CCIV

3.211 The employees of the corporate director owe a duty 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, item 4, subsection 1225G(1)]*

3.212 These duties that are owed by employees of the corporate director are modelled on the duties of employees of responsible entities of registered schemes in section 601FE of the existing law. As with the corresponding registered scheme provisions, the new duties owed by officers of the corporate director are owed directly to the members.

3.213 A breach of the above duties is a breach of a civil penalty provision. If the breach is intentional or reckless, or a person's involvement in the breach is intentional or reckless, then the person is

liable for an offence with a maximum penalty of five years imprisonment. This penalty is consistent with the Guide and with the penalties an officer of a responsible entity is liable for under the existing law. *[Schedule 1, item 4, subsection 1225G(2); Schedule 2, item 195, table item 45D in subsection 1317E(1), item 202, table item 329DA in Schedule 3]*

3.214 The employees of the corporate director also owe the Part 2D.1 duties to the corporate director under the existing law. To the extent that there is a conflict between the duties in the new law and the Part 2D.1 duties, the duties in the new law prevail. *[Schedule 1, item 4, subsection 1225G(3)]*

3.215 The additional duties set out above interact with other laws in the same way that the duties in Part 2D.1 do under section 185 of the existing law. That is, the additional duties have effect in addition to, and not in derogation of, any other rule of law that the person has because of their office or employment in relation to a corporation. *[Schedule 1, item 4, subsection 1225G(4)]*

Depository of the CCIV

Meaning of depository

3.216 The **depository of a CCIV** is the entity named in ASIC's record of the CCIV's registration as the depository or temporary depository of the CCIV. A CCIV can only have one depository. *[Schedule 1, item 4, subsections 1226(3) and (4); Schedule 2, item 11, definition of 'depository' in section 9]*

3.217 The depository of a CCIV is a new statutory concept that is distinct from a 'custodial or depository service' as used in Chapter 7 of the Act to describe an arrangement between a provider and a client whereby a financial product is held by the provider in trust for the client (see section 766E).

Who must have a depository

3.218 A retail CCIV must have a depository. If a retail CCIV does not have a depository, it is liable for an offence with a maximum penalty of two years imprisonment. See paragraph 3.123 for an explanation of why the penalty for this offence by the CCIV is expressed as a term of imprisonment. *[Schedule 1, item 4, subsection 1226(1)]*

3.219 A wholesale CCIV may choose to have a depository. If a wholesale CCIV appoints a depository and notifies ASIC in the manner explained below, then the regulatory requirements for depositaries apply to the wholesale CCIV and the depository in their entirety. However, a wholesale CCIV that has a depository may remove the depository and not replace it (see paragraphs 3.277 to 3.280 for an explanation of the process for removing a depository of a wholesale CCIV). *[Schedule 1, item 4, subsection 1226(2)]*

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

Requirements for becoming the depositary of a CCIV

Basic requirements

3.221 The depositary of a CCIV must:

- be either:
 - a public company; or
 - a foreign company registered under Division 2 of Part 5B.2 of the Act;
- hold an AFSL authorising it to act as a depositary; and
- meet the independence requirement.

[Schedule 1, item 4, subsections 1226A(1) and (2)]

3.222 The independence requirement involves a simple prohibition on the body that is (or proposes to be) the depositary, and any agents or persons engaged by the depositary to perform depositary functions, from also being an entity that directs investment decisions for the CCIV. This means that the depositary, and any other entity performing depositary functions for the CCIV, is legally separated from any entity that directs investment decisions for the CCIV. ***[Schedule 1, item 4, subsections 1226B(1) and (2)]***

3.223 An entity directs investment decisions for the CCIV if it is:

- the corporate director; or
- an agent appointed, or a person otherwise engaged, by the corporate director under section 1224M (including any person taken to be an agent or otherwise engaged by the corporate director under subsection 1224M(2)) to perform portfolio management functions or investment risk management functions for the CCIV.

[Schedule 1, item 4, subsection 1226B(3)]

3.224 The independence requirement is designed to ensure that the depositary of a CCIV (and any other entity performing depositary functions) cannot be unduly influenced by the corporate director or another entity directing investment decisions in relation to the CCIV.

3.225 The independence requirement does not prevent the depositary (and any entity that performs depositary functions) from being in the same corporate group as an entity that directs investment decisions for the CCIV.

3.226 The terms ‘portfolio management functions’ and ‘investment risk management functions’ are in common usage in the funds management industry and are designed to capture entities that, along with the corporate director, are the controlling mind and decision-makers in relation to an asset, or assets, of the CCIV (or a sub-fund of the CCIV).

3.227 An entity is not taken to direct investment decisions merely because it is managing foreign currency or managing bank deposits. These functions are considered administrative in nature. *[Schedule 1, item 1, subsection 1226B(4)]*

3.228 If the depositary fails to meet the basic requirements (including the independence requirement), then the corporate director must remove and replace it with a new depositary (discussed further below).

3.229 If the depositary’s agent, or a person it has engaged to perform depositary functions, fails the independence requirement, then the depositary itself fails the independence requirement. The corporate director is then obligated to remove and replace the depositary with a new depositary (on the basis that the depositary itself has failed to meet the basic requirements).

Functional independence requirements

3.230 The regulations may prescribe further functional independence requirements for ensuring the depositary (and its agents) cannot be unduly influenced, or controlled, by the corporate director or another entity directing investment decisions for the CCIV that can apply where:

- the depositary (or agent of the depositary) performs any other functions for the CCIV (that is not portfolio management or investment risk management – such as fund administration); or
- a related body corporate of the depositary (or a related body corporate of the depositary’s agent):
 - directs investment decisions for the CCIV; or
 - performs any other functions for the CCIV (such as fund administration).

[Schedule 1, item 4, subsections 1226N(1) to (4)]

3.231 A failure to comply with any prescribed functional independence requirements is a strict liability offence with a fine of up to 60 penalty units. This penalty reflects the importance of ensuring a CCIV’s depositary is not influenced or controlled by the corporate director or any other entity that directs investment decisions for the CCIV and is consistent with the Guide. The corporate director is not obligated to replace the depositary if it, or its agents, fail to comply with these

functional independence requirements. *[Schedule 1, item 4, subsection 1226N(5); Schedule 2, item 202, table item 329EE in Schedule 3]*

Appointment of the depositary

3.232 A person applying to register a retail CCIV must provide information about the body that meets the necessary requirements and has consented in writing to becoming the CCIV's depositary (including its name and registered office) as part of its application for registration. A person applying to register a wholesale CCIV may also provide this information if it elects to have a depositary from the time it is registered. Upon registration of the CCIV, the body named in the application for registration as the proposed depositary becomes the depositary of the CCIV (see paragraph 3.220 for the requirements for becoming a depositary).

3.233 A CCIV that has not appointed a depositary on registration (such as a CCIV that becomes a retail CCIV after registration or a wholesale CCIV that later elects to appoint a depositary) may appoint a depositary by lodging a notice with ASIC nominating a body that meets the basic requirements to become a depositary and has consented in writing to being the CCIV's depositary. *[Schedule 1, item 4, section 1226D]*

3.234 The appointment of a depositary has no effect until ASIC updates the record of the CCIV's registration to name the body as the CCIV's depositary (or temporary depositary). This body remains the CCIV's depositary until the record of the CCIV's registration is updated to name a new body as the CCIV's depositary (or temporary depositary). *[Schedule 1, item 4, subsection 1226C(1)]*

3.235 A body may only be appointed (or removed) if the requirements in Division 4 of Chapter 8B have been complied with. The constitution of the CCIV, or any arrangements between the CCIV and the depositary, cannot set out any alternative processes for appointing, removing or replacing the depositary of the CCIV. *[Schedule 1, item 4, subsection 1226C(2)]*

3.236 The requirements for removing and replacing the depositary are discussed further below.

Duties and powers of the depositary

Core functions

3.237 One of the depositary's core functions is to hold the assets of the CCIV. Division 6 of Part 8B.5 sets out the requirements for holding the assets of the CCIV (see paragraphs 6.89 to 6.99). *[Schedule 1, item 4, paragraph 1226E(a)]*

3.238 Another core function of the depositary is to supervise the conduct of certain activities carried out in relation to the CCIV.

The depositary cannot delegate this function. *[Schedule 1, item 4, paragraph 1226E(b), subsections 1226G(1) and 3)]*

3.239 The depositary must supervise the 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, item 4, subsection 1234L(2)]

3.240 These activities are explained in further detail below and are based in part on the activities specified for depositary supervision by Article 22(3) of the UCITS Directive.

3.241 In order to discharge its supervisory responsibility, the depositary must take reasonable care to verify that these activities are carried out in a manner that complies with the CCIV's constitution and the provisions of the Act. *[Schedule 1, item 4, subsection 1226G(1)]*

3.242 A failure to take reasonable care to verify the above activities are carried out in compliance with CCIV's constitution and the Act is an offence with a maximum penalty of two years imprisonment. See paragraph 3.123 for an explanation of why the penalty for this offence by the CCIV is expressed as a term of imprisonment.

Issue, redemption and cancellation of shares in the CCIV

3.243 The depositary must supervise the corporate director's conduct of issuing, redeeming and cancelling shares in the CCIV in accordance with the rules in Part 8B.4 of the new law (see Chapter 4 of these explanatory materials) as well as any requirements in the CCIV's constitution.

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

3.244 The depositary must supervise the allocation of assets and liabilities of the CCIV to sub-funds of the CCIV in accordance with the requirements in Part 8B.5 of the new law (see Chapter 6 of these explanatory materials).

Allocating and distributing income of the CCIV

3.245 The depositary must supervise the conduct of allocating and distributing the CCIV's income. Division 1 of Part 8B.4 (concerning dividends) will affect the circumstances in which the income referable to a sub-fund of the CCIV may be distributed to the members of that sub-fund (see paragraph 4.56 of these explanatory materials).

Breach reporting

3.246 The depositary, and any former depositary, must report breaches or suspected breaches to ASIC that:

- relate to the CCIV;
- arise in relation to the conduct of the activities described at paragraph 3.239; and
- are, or would be, in the opinion of the depositary, a material breach of the Act.

[Schedule 1, item 4, subsection 1226H(1)]

3.247 If the depositary (or a former 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, item 4, subsection 1226H(2)]*

3.248 A failure to report a relevant breach within the required timeframe is a contravention of a civil penalty provision and an offence punishable by up to two years imprisonment. This breach-reporting obligation and the penalties for a contravention are based on the duty imposed on the responsible entity of a registered scheme in paragraph 601FC(1)(l). See paragraph 3.123 for an explanation of why the penalty for this offence by the CCIV is expressed as a term of imprisonment.

Reasonable assistance

3.249 The roles of officer of the CCIV (in particular, corporate director) and depositary are complementary and, hence, an officer of the CCIV must give the depositary reasonable assistance to support the depositary's performance of its duties. The depositary must likewise give an officer of the CCIV reasonable assistance to support the officer's performance of its duties. This includes requiring the officer of the CCIV or depositary to provide any information in its possession or control that the depositary or officer reasonably requires in order to fulfil its responsibilities in relation to the CCIV. A written request for information must be complied with in a reasonable period. *[Schedule 1, item 4, sections 1224K and 1226J]*

3.250 A failure to provide the information that is the subject of such a written request is an offence punishable by up to six months imprisonment. The explanation regarding the maximum penalty (and the conversion of the term of imprisonment into penalty units for a body corporate) in paragraph 3.123 above is also relevant to this offence. *[Schedule 2, item 202, table item 329ED in Schedule 3]*

Further duties

3.251 In exercising its powers, and carrying out its functions, the depositary owes the following statutory duties, which are based in part on the duties of the responsible entity of a registered scheme in section 601FC and reflect the fundamental duties of a fiduciary:

- 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 not make sure of information it acquires through being the depositary of the CCIV to gain an improper advantage or cause detriment to the CCIV's members.

[Schedule 1, item 4, subsection 1226K(1)]

3.252 A breach of any of these duties is a contravention of a civil penalty provision. *[Schedule 2, item 195, table item 45F in subsection 1317E(1)]*

3.253 The additional duties set out above interact with other laws in the same way that the duties in Part 2D.1 do under section 185 of the existing law. That is, the additional duties have effect in addition to, and not in derogation of, any other rule of law that the person has because of their office or employment in relation to a corporation. *[Schedule 1, item 4, subsection 1226K(2)]*

3.254 As the depositary is a body, its officers and its employees will owe duties to the depositary (including, for example, the statutory duties under Part 2D.1 if the depositary is a company). If these duties conflict with the obligations placed on the depositary by the requirements explained above, then the latter prevails. *[Schedule 1, item 4, section 1226L]*

Delegation of powers

3.255 The depositary 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 depositary's supervisory function explained above in paragraphs 3.238 to 3.242. *[Schedule 1, item 4, subsection 1226F(1)]*

3.256 Sub-agents engaged or appointed by an agent of the depositary are to be treated as if they are agents appointed by the depositary. *[Schedule 1, item 4, subsection 1226F(2)]*

3.257 The above approach is based in part on the rules for delegating the functions of a responsible entity of a registered scheme in subsections 601FB(2) and (3).

Powers and functions while sub-fund is in liquidation or receivership

3.258 If there is a conflict between a function or power of a liquidator of a sub-fund, or a receiver of property of a sub-fund, and a function or power of the depositary, then the former prevails. This ensures the integrity of the external administration procedures contained in Chapter 5 of the Act, as modified by Part 8B.6 for CCIVs. *[Schedule 1, item 4, section 1226M]*

Changing the depositary

3.259 The process for changing depositary depends on the circumstances in which the depositary is being changed. For example, different requirements apply in circumstances where the depositary must be removed because it is no longer eligible to be the depositary compared to circumstances where a wholesale CCIV wishes to remove and not replace its depositary. In circumstances where the depositary is being removed for commercial considerations, different requirements apply depending on whether it is the corporate director, the members of the CCIV, or the depositary itself that is initiating the change.

Replacement of an ineligible depositary

3.260 As noted in paragraph 3.228 above, if a depositary fails to meet the basic requirements for being a depositary of the CCIV (including the independence requirement), then the corporate director must remove and replace it. *[Schedule 1, item 4, subsection 1226P(1)]*

3.261 The corporate director can remove and replace the depositary in these circumstances by giving ASIC written notice of the body it nominates as depositary of the CCIV and asking ASIC to alter the CCIV's record of registration accordingly. The body that is nominated by the corporate director must meet the basic requirements for being a depositary and have consented in writing to the appointment. *[Schedule 1, item 4, subsection 1226P(2)]*

3.262 The corporate director must give ASIC this notice within 21 days of the CCIV's depositary no longer meeting the basic requirements for being the depositary. A failure to do so is a strict liability offence with a penalty of up to 20 penalty units. This penalty is consistent with the Guide. *[Schedule 1, item 4, subsection 1226P(4); Schedule 2, item 202, table item 329EF in Schedule 3]*

3.263 ASIC, a member of the CCIV, or a group of members of the CCIV also have the right to apply to the Court for the appointment of a temporary depositary if the corporate director has failed to lodge the requisite notice with ASIC. This right is designed to ensure that steps can be taken to remove and replace an ineligible depositary in the event of the corporate director's inaction. The requirements for a temporary depositary are discussed further below.

Retirement of the depositary

3.264 If the depositary wishes to retire from its role, it must notify the corporate director of the CCIV of its intention to do so and explain the reason why. *[Schedule 1, item 4, subsection 1226Q(1)]*

3.265 Within 21 days of receiving the depositary's notice of its intention to retire, the corporate director must lodge a notice with ASIC nominating a new body as the depositary and asking it to alter the record of the CCIV's registration accordingly. The notice must meet the same requirements as the notice described in paragraph 3.261 above. *[Schedule 1, item 4, subsection 1226Q(2)]*

3.266 A failure by the corporate director to lodge the requisite notice is a strict liability offence attracting a maximum penalty of 20 penalty units. This penalty is consistent with the Guide. *[Schedule 1, item 4, subsection 1226Q(4); Schedule 2, item 202, table item 329EG in Schedule 3]*

3.267 If the corporate director fails to appoint a new depositary within 21 days of receiving the retiring depositary's notice, the retiring depositary may make an application to the Court for the appointment of a temporary depositary. This recognises that the retiring depositary should have the power to take steps to remove itself from its role in the event of inaction by the corporate director. *[Schedule 1, item 4, subsection 1226Q(4)]*

Replacement by the corporate director

3.268 If the corporate director wishes to remove the depositary, it can do so by:

- lodging a written notice with ASIC nominating a new body to be the depositary of the CCIV (which meets the basic requirements described above in paragraphs 0 to 3.229 and has consented in writing to becoming the depositary) and asking ASIC to alter the CCIV's record of registration accordingly; and
- within 7 days of lodging this notice with ASIC, also notifying the members of the CCIV of the proposed change (including identifying the body it has nominated as the new depositary of the CCIV and setting out its reasons for doing so).

[Schedule 1, item 4, subsections 1226R(1) to (3)]

3.269 A failure to provide the members of the CCIV with the requisite notice within is a strict liability offence with a maximum penalty of 20 penalty units. A strict liability offence is warranted in this circumstance as it is critical that members of the CCIV receive timely information about the corporate director's decision to replace the CCIV's depositary. The penalty is consistent with the Guide. *[Schedule 1, item 4,*

subsection 1226R(4); Schedule 2, item 202, table item 329EH in Schedule 3]

3.270 The notice to members ensures that the proposed change, and the reasons for the change, is transparent. The requirement does not limit the reasons for which a corporate director may wish to make the change. If the members disagree with the change, the members may take steps to remove and replace the depositary of the CCIV through the member-initiated replacement process discussed below.

Replacement by the members of the CCIV

3.271 The members of a CCIV may take steps to remove and replace the depositary of the CCIV at any time, and for any reason. The members may do this by calling a meeting of the CCIV's members to consider and vote on two special resolutions:

- first, a special resolution that the current depositary should be removed; and
- second, a special resolution choosing a body to be the new depositary of the CCIV.

[Schedule 1, item 4, subsection 1226S(1)]

3.272 The notice of the meeting of the CCIV's members must set out the intention to remove the current depositary and nominate a depositary that meets the basic requirements for being a depositary and has consented in writing to becoming the depositary of the CCIV. *[Schedule 1, item 4, subsection 1235E(2)]*

3.273 The current depositary of the CCIV is only removed and replaced with the body that has been nominated in the notice of the meeting if both special resolutions pass. In this case, the corporate director must notify ASIC of the appointment as soon as practicable (and in any event within two business days of the appointment) and asking it to alter the CCIV's record of registration to name the appointed body as the CCIV's depositary. It is only once the CCIV's record of registration has been updated that the appointment of the new depositary is given effect. *[Schedule 1, item 4, subsections 1226S(6) and (7)]*

3.274 A failure to provide ASIC with the requisite notice is a strict liability offence with a penalty of 20 penalty units. The strict liability offence is consistent with the Guide justified in this situation as it is important that ASIC has up-to-date information about a CCIV changing its depositary and is able to update the record of registration to give effect to the change. *[Schedule 1, item 4, subsection 1226S(8); Schedule 2, item 202, table item 329EI in Schedule 3]*

3.275 If the first special resolution does not pass, then the proposal to remove and replace the depositary fails. The second special resolution does not need to proceed. *[Schedule 1, item 4, subsection 1226S(3)]*

3.276 If the first special resolution passes, but the second special resolution does not pass then the proposal to remove and replace the

depository also fails. However, in this circumstance, both the corporate director and the current depository have the right to apply to the Court to appoint a temporary depository. This right of recourse has been included in recognition of the fact that, even though the members' proposal has failed overall, the corporate director or the current depository may wish to take steps to remove the depository in any event on the basis that the members had agreed to remove it but failed to appoint a new one.

[Schedule 1, item 4, subsections 1226S(4) and (5)]

Removal of the depository of wholesale CCIV

3.277 Both the corporate director and the members of a wholesale CCIV have the right to remove, and not replace, the depository of the CCIV. This right recognises that there are circumstances in which a wholesale CCIV may wish to remove a depository that has been appointed to the CCIV. For example, a wholesale CCIV that has voluntarily opted-in to the regime for depositaries may decide to opt back out. Similarly, the corporate director or members of a retail CCIV that has become a wholesale CCIV may wish to remove the depository that had been appointed to the CCIV when it met the requirements for being a retail CCIV.

3.278 Both the corporate director, and the members of the CCIV, may do this by calling a meeting of the CCIV's members to vote on a special resolution to remove the depository of the CCIV. *[Schedule 1, item 4, subsections 1226T(1) and (2)]*

3.279 If the special resolution is passed, then the CCIV has taken to have removed the depository. The corporate director must notify ASIC of the removal and ask it to alter the record of the CCIV's registration as soon as practicable (and in any event within two business days' of the removal). It is only once the CCIV's record of registration has been updated to remove the details of the CCIV's depository that the removal is given effect. *[Schedule 1, item 4, subsection 1226T(3)]*

3.280 A failure to provide ASIC with the requisite notice is a strict liability offence with a penalty of 20 penalty units. The strict liability offence is consistent with the Guide and warranted on the same grounds as the penalty described in paragraph 3.274. *[Schedule 1, item 4, subsection 1226T(4); Schedule 2, item 202, table item 329EJ in Schedule 3]*

Requirements for a temporary depository

3.281 The new law confers standing on certain persons to apply to the Court for the appointment of a temporary depository in certain circumstances when the removal and replacement process for the depository has failed. The conferral of standing on the above persons to apply to the Court for a temporary depository in these circumstances is intended to act as a backstop in these circumstances. The table below sets out those circumstances.

Table 3.1

| Circumstances in which a person may apply to the Court for a temporary depositary | Person(s) with standing |
|--|--|
| The corporate director has failed to remove and replace an ineligible depositary | <ul style="list-style-type: none"> • ASIC • a member or a group of members |
| The corporate director has failed to appoint a new depositary in circumstances where the current depositary wishes to retire | <ul style="list-style-type: none"> • the current depositary |
| The members have passed a special resolution to remove the current depositary but have failed to appoint a new depositary – so the member-initiated process has failed overall | <ul style="list-style-type: none"> • the corporate director • the current depositary |

3.282 On application to the Court in the above circumstances, the Court may remove and replace the depositary with a temporary depositary. The Court may only do this if it is satisfied that the order is in the best interests of the members of the CCIV and the body (that the Court proposes to appoint as temporary depositary) meets the basic requirements discussed above in paragraphs 3.221 to 3.229 and has consented, in writing, to being so appointed. The Court may also make any further orders that it considers is appropriate. *[Schedule 1, item 4, subsections 1226U(1) to (3)]*

3.283 If the Court makes an order to remove and replace the depositary, the person who made the application to the Court must notify ASIC as soon as practicable (and in any event within two business days after the order) of the change and asking ASIC to alter the record of the CCIV's registration accordingly. It is only once the record of CCIV's registration has been updated that the appointment of the temporary depositary is given effect. *[Schedule 1, item 4, subsection 1226U(4)]*

3.284 A failure to provide ASIC with the requisite notice is a strict liability offence with a penalty of 20 penalty units. The strict liability offence is consistent with the Guide and warranted on the same grounds as the penalty described in paragraph 3.274. *[Schedule 1, item 4, subsection 1226U(5); Schedule 2, item 202; table item 329EK in Schedule 3]*

3.285 If the Court appoints a temporary depositary, the corporate director must take steps to appoint a permanent depositary. Within three months of the appointment of the temporary depositary, or a longer period as extended by the Court, the corporate director must lodge a notice with ASIC nominating a body to be the permanent depositary of the CCIV and asking it to alter the record of the CCIV's registration according.

The nominated permanent depositary must meet the basic requirements for depositaries and consent, in writing, to the appointment. *[Schedule 1, item 4, subsections 1226V(1) to (4)]*

3.286 A failure to provide ASIC with the requisite notice is a strict liability offence with a penalty of 20 penalty units. The strict liability offence is consistent with the Guide and warranted on the same grounds as the penalty described in paragraph 3.274. *[Schedule 1, item 4, subsection 1226V(5); Schedule 2, item 202, table item 329EL in Schedule 3]*

3.287 In addition, if the corporate director fails to appoint a permanent depositary within the required period, it must apply to the Court for an order to wind up all of the sub-funds of the CCIV. If the corporate director fails to make this application, then ASIC or a member (or group of members) may make the application instead. *[Schedule 1, item 4, section 1226W]*

3.288 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 as this is more appropriately the responsibility of the corporate director of the CCIV.

Consequences of changing the depositary

3.289 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, item 4, section 1226X]*

3.290 Further, if the depositary changes then the rights, obligations and liabilities of the former depositary in relation to the CCIV become the rights, obligations and liabilities of the new depositary. However, the former depositary will retain the right to be paid fees and to be indemnified for expenses incurred relating to the period when it was the depositary. The former depositary 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 depositary and any liability it has arising out of a contravention of a provision of the Act. *[Schedule 1, item 4, section 1226Y]*

3.291 This would not preclude liability on the part of the former depositary for its conduct while performing the depositary function.

3.292 A document to which the former depositary was a party is to be read as if the new depositary (and not the former depositary) was the party to that document where the document is capable of having effect after the change. *[Schedule 1, item 4, section 1226Z]*

3.293 These requirements are designed to facilitate a smooth transition between the outgoing depositary and the incoming depositary.

Qualified privilege

3.294 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 depositary of a CCIV.

[Schedule 1, item 4, section 1226ZA]

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

Compliance plan of a retail CCIV

Documenting the compliance plan

3.296 A retail CCIV must have a compliance plan. A wholesale CCIV is not required to have a compliance plan. *[Schedule 1, item 4, subsections 1241A(1) and (2)]*

3.297 A CCIV that will, upon registration, be a retail CCIV is required to lodge with ASIC a copy of its compliance plan at the same time it lodges its application for registration (see paragraph 2.14 above).

3.298 In any event, a CCIV that becomes a retail CCIV must lodge a copy of the CCIV's compliance plan with ASIC within 14 days of becoming a retail CCIV. The copy must be signed by all of the directors of the corporate director. A failure to do so is a strict liability offence with a maximum penalty of 20 penalty units. This penalty is consistent with the Guide and is also consistent with other offences in the Act that impose strict liability for failure to lodge a document with ASIC. *[Schedule 1, item 4, subsections 1227(3) and (4); Schedule 2, item 202, table item 329F in Schedule 3]*

3.299 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 the CCIV's constitution. This is the only basic content requirement for the compliance plan. *[Schedule 1, item 4, section 1227A]*

3.300 The corporate director must ensure at all times that the CCIV's compliance plan meets the legislative requirements for compliance plans. The corporate director must also comply with the compliance plan. *[Schedule 1, item 4, paragraphs 1224C(1)(b) and (c)]*

3.301 The corporate director's responsibilities in relation to the compliance plan are similar to those applying to responsible entities of registered schemes. However, unlike for registered schemes, there are no prescriptive content requirements for a CCIV's compliance plan. This is intended to improve the administrative efficiency and effectiveness of

compliance plans through a more flexible and outcomes-focused approach.

3.302 The compliance plan requirements contained in the new law will be supported by ASIC guidance regarding the content of compliance plans, including in relation to identifying risks of non-compliance and measures for mitigating those risks. This means the compliance plan must be tailored to suit the nature, scale, complexity and assets of the CCIV. An adequate compliance plan should include mechanisms and procedures for early identification of potential breaches and for monitoring overall adherence to the compliance plan.

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

3.304 As it is likely that some corporate directors will be the corporate director for more than one CCIV, the Bill provides flexibility for the compliance plan of a CCIV that is lodged with ASIC to incorporate by reference specified provisions of a compliance plan of another CCIV. The provisions incorporated by reference may be incorporated as at a specific date, or as in force from time to time. These provisions will be taken to be included in the plan. *[Schedule 1, item 4, section 1227B]*

3.305 This is expected to reduce the administrative burden where a corporate director is the corporate director of more than one CCIV. However, 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. If the corporate director does not comply with this direction, it commits an offence of strict liability, with a penalty of up to 20 penalty units. *[Schedule 1, item 4, section 1227E; Schedule 2, item 202, table item 329FD in Schedule 3]*

3.306 ASIC may also give a written direction to the corporate director of a CCIV to give it information about arrangements contained in the compliance plan. The direction must specify the timeframe within which the corporate director must give the information (of no less than 14 days after the direction is given). A failure to comply with this requirement is a strict liability offence, with a penalty of up to 60 penalty units. *[Schedule 1, item 4, section 1227C; Schedule 2, item 202; table item 329FA in Schedule 3]*

3.307 The corporate director of a CCIV may amend the CCIV's compliance plan or repeal and replace it. ASIC may also direct the corporate director to modify the CCIV's compliance plan to ensure it complies with the basic content requirement discussed in paragraph 3.299 above. 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 of the change. The corporate director commits a strict liability

offence if it does not comply with ASIC's direction or does not lodge the copy of the modified or new plan. Both of these offences carry a penalty of up to 20 penalty units. These penalties are consistent with the Guide. *[Schedule 1, item 4, section 1227D; Schedule 2, item 202, table items 329FB and 329FC in Schedule 3]*

3.308 These strict liability offences in paragraphs 3.305 to 3.307 above are important mechanisms for ensuring that ASIC can access comprehensive and up-to-date information about the compliance plan of a CCIV and for ensuring that CCIVs have in place robust measures for complying with the regulatory requirements and the CCIV's constitution. The offences are consistent with the Guide.

3.309 In contrast to the requirements for registered schemes, there is no requirement for a CCIV to have 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. The CCIV's depositary also has oversight functions in respect of the CCIV.

3.310 The requirement for external directors 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 3.117 to 3.125.

Auditing the compliance plan

3.311 The corporate director of a retail CCIV must engage an auditor to audit compliance with the CCIV's compliance plan. A failure to do so is a strict liability offence with a penalty of up to 20 penalty units. A strict liability offence provides a strong incentive to comply with this requirement, which ensures there is external scrutiny of a CCIV's compliance plan. The penalty is consistent with the Guide. *[Schedule 1, item 4, subsections 1227F(1) and (2); Schedule 2, item 202, table item 329FE in Schedule 3]*

3.312 The auditor of the compliance plan must be a registered company auditor, an audit firm or an authorised audit company. In order to ensure independent scrutiny, the auditor of the compliance plan 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, item 4, subsections 1227F(1) to (4)]

3.313 Within three months of the end of the financial year (generally by 30 September), the auditor must 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 whether the plan continues to meet the requirements for compliance plans discussed above. A contravention of this requirement is a strict liability offence with a maximum penalty of 20 penalty units. A strict liability offence ensures there is a strong incentive for the auditor to undertake a regular and timely audit of the CCIV's compliance plan. The penalty is consistent with the Guide. *[Schedule 1, item 4, subsections 1227G(1) and (6); Schedule 2, item 202, table item 329FF in Schedule 3]*

3.314 The corporate director can also arrange for the auditor to carry out additional audits. *[Schedule 1, item 4, subsection 1227F(5)]*

3.315 The auditor of the compliance plan must have access at all reasonable times to the books of the CCIV and assistance for the purposes of the audit of the compliance plan, including assistance with information and explanations as required from officers of the corporate director. An officer of the corporate director who fails to provide this access, or give this information, commits an offence of strict liability with a maximum penalty of 20 penalty units. A strict liability offence ensures officers of the corporate director have a strong incentive to provide the compliance plan auditor with full assistance and disclosure during the audit process and is consistent with the Guide. *[Schedule 1, item 4, subsections 1227G(2) and (3); Schedule 2, item 202, table item 329FG in Schedule 3]*

3.316 The corporate director must lodge the auditor's report of the compliance plan with ASIC at the same time as it lodges the annual financial statements and reports of the CCIV. A contravention of this requirement is a strict liability offence with a maximum penalty of 20 penalty units. This offence creates a strong incentive for the corporate director to provide ASIC with timely and independently audited information about the CCIV's compliance processes and record over the previous financial year and is consistent with the Guide. *[Schedule 1, item 4, subsections 1227G(4); Schedule 2, item 202, table item 329FH in Schedule 3]*

3.317 The auditor of the compliance plan has qualified privilege in respect of statements made in the audit report and notifications that the auditor makes to ASIC about contraventions of the compliance plan. *[Schedule 1, item 4, subsection 1227G(5)]*

3.318 These requirements are similar to the requirements for compliance plans of registered schemes contained in section 601HG.

They ensure there is an independent, annual compliance review process to assist the corporate director and its officers in monitoring and managing compliance risks.

Offences for contraventions by individual auditor

3.319 An individual auditor, audit company, or lead auditor commits an offence if the person fails to notify ASIC of certain matters within seven days of becoming aware of them. The person must notify ASIC if they become aware of:

- a significant contravention of the Act;
- a contravention of the Act that is not significant but that the auditor believes has not or will not be adequately dealt with through the audit process; or
- an attempt by a person to influence or interfere with the audit.

[Schedule 1, item 4, subsections 1227H(1), (2), (3) and (7)]

3.320 A failure to notify ASIC of any of the above matters is an offence with a maximum penalty of one years imprisonment. ***[Schedule 1, item 4, subsection 1227H(6)]***

3.321 In determining whether a contravention is a significant one, a person should consider:

- the penalty for the contravention;
- the effect that the contravention has or may have on the financial position of the CCIV or a sub-fund of the CCIV or the information available about the financial position of the CCIV or a sub-fund of the CCIV; and
- any other relevant matter.

[Schedule 1, item 4, subsection 1227H(4) and (5)]

3.322 The circumstances that give rise to a contravention and the matters that need to be considered when determining whether a contravention is significant follow the equivalent provisions for registered schemes.

Changing the compliance plan auditor

3.323 The auditor of the compliance plan may be removed by the corporate director or may resign on its own initiative. In certain circumstances, the corporate director must remove the auditor of the compliance plan.

3.324 The corporate director must remove the auditor if it is no longer eligible to act as the auditor of the compliance plan (see paragraph 3.312

for the eligibility requirements for a CCIV's compliance plan auditor). A failure to do so is a strict liability offence with a penalty of up to 20 penalty units. The corporate director may also remove the auditor for other reasons if ASIC consents to the removal. *[Schedule 1, item 4, subsections 1227J(1) and (2); Schedule 2, item 202, table item 329FJ in Schedule 3]*

3.325 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, item 4, subsections 1227J(3) and (4)]*

3.326 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. It also cannot be used 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, item 4, subsection 1227J(5)]*

3.327 The day on which the auditor's resignation takes effect is the later of:

- 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, item 4, subsection 1227J(6)]

3.328 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. A failure to do so is a strict liability offence with a penalty of up to 20 penalty units. A strict liability offence ensures there is a strong incentive for the corporate director to provide information to ASIC about the identity of the compliance plan auditor in the event of a change in auditor. The offence is consistent with the Guide. ASIC must comply with the request if the change complies with the Act. *[Schedule 1, item 4, section 1227K; Schedule 2, item 202, table item 329FK in Schedule 3]*

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

Member protection

Related party transactions by retail CCIVs

Approval of related party transactions required at the sub-fund level (not at whole-of-CCIV level)

3.330 The rules concerning related party transactions in Chapter 2E of the Act generally apply to retail CCIVs in the same way that they apply to public companies, and to an entity that a retail CCIV controls in the same way as it applies to an entity a public company controls. The rules concerning related party transactions do not apply to wholesale CCIVs. *[Schedule 1, item 4, section 1228; Schedule 2, item 72, note to Chapter 2E]*

3.331 To the extent the rules require a retail CCIV to obtain the approval of its members to give a related party a financial benefit, the CCIV must separately obtain the approval of the members of each sub-fund that is affected by the giving of the financial benefit (not the CCIV as a whole). *[Schedule 1, item 4, subsections 1228A(1) and (2), Schedule 2, item 73, note to subsection 208(1), item 74, note to subsection 209(2)]*

3.332 This means that if the members of a sub-fund of the retail CCIV that are affected by the proposed transaction do not give approval, the CCIV cannot enter into the transaction with respect to that sub-fund. If a transaction relates to more than one sub-fund of the retail CCIV, the CCIV must obtain the approval of the members of each affected sub-fund. If the members of any of the affected sub-funds do not approve the transaction, the CCIV will not be able to enter into the transaction with respect to those sub-funds.

Exceptions

3.333 If the corporate director of a retail CCIV is entitled to fees or an indemnity under the CCIV's constitution, and the provisions of the constitution comply with the requirements for such clauses (see paragraphs 3.143 to 3.144 above), then a retail CCIV is not required to obtain the approval of the affected members. A similar exception applies to the fees and indemnities given to a responsible entity of a registered scheme (that is set out in the registered scheme's constitution). *[Schedule 1, item 4, subsection 1228A(3)]*

Exceptions available to public companies not available for retail CCIVs

3.334 The exception for remuneration and reimbursement to an officer or employee of a public company under section 211 of the existing law is not available for a retail CCIV, as there are bespoke exceptions for the corporate director's financial benefits discussed above. *[Schedule 1, paragraph 1228B(1)(a)]*

3.335 The exceptions in sections 213 and 214 of the existing law for small amounts given to a related party, or financial benefits given a

closely held subsidiary, are also not available for retail CCIVs. This is consistent with the rules that apply to related party transactions in respect of a registered scheme (see section 601LE in Chapter 5C of the Act). It recognises that the payment of any amount by a retail CCIV to a related party of the CCIV (no matter how small) requires member approval (given the passive investment nature of the CCIV). *[Schedule 1, paragraphs 1228B(1)(b) and (c)]*

3.336 The exceptions from the related party transaction rules in the existing law continue to apply to entities the retail CCIV controls in relation to benefits given to its related parties. *[Schedule 1, item 4, subsection 1228B(2)]*

Procedural requirements for member approval

3.337 Approval for a related party transaction may only be given at a meeting of the members of each affected sub-fund of a retail CCIV. A body corporate that is a member of the CCIV may appoint an individual representative to exercise its powers at the meeting in the same way as an individual may be appointed to exercise the body corporate's powers at a meeting of a registered scheme. *[Schedule 1, item 4 sections 1228D and 1229A]*

3.338 A retail CCIV must, as for a public company, prepare an explanatory statement to members as part of the process of obtaining member approval. The statement must include certain information, such as the identity of the related party and the nature of the financial benefit to be given. The corporate director of a CCIV, and any of the directors of the corporate director of the CCIV, are also required to set out in the explanatory statement certain information, including:

- any recommendation about the giving of the financial benefit, and the reasons for the recommendation;
- whether they have an interest in the outcome of the proposed resolution to approve the financial benefit; and
- all other information that is known to the company, the corporate director, or any of the directors of the corporate director that is reasonably required by the members in order to decide whether it is in the sub-fund's interest to pass the proposed resolution.

[Schedule 1, item 4, section 1228C]

Meaning of 'related party'

3.339 Section 228 (about 'related parties' of a public company) does not apply to a CCIV. Related parties of a CCIV are instead:

- the corporate director of the CCIV, an entity that controls the corporate director of the CCIV, an agent or person engaged by the corporate director and any entity controlled by any of these persons (unless also controlled by the CCIV);

- the directors of the corporate director and their parents and children, the directors (if any) of an entity that controls the corporate director and their parents and children and any entity controlled by any of these persons (unless also controlled by the CCIV);
- any entity acting in concert with a related party of the CCIV on the understanding that the related entity will receive a financial benefit if the CCIV gives the entity a financial benefit. *[Schedule 1, item 4, subsections 1228E(1) to (5) and (8)]*

3.340 An entity is also a related party of a CCIV if it was a related party in the previous six months or if it has reasonable grounds to believe it will become a related party of the CCIV at any time in the future. *[Schedule 1, item 4, subsections 1228E(6) and (7)]*

3.341 Consequential amendments are made to the definitions of ‘entity’, ‘financial benefit’ and ‘related party’ to reflect the modifications contained Part 8B.4 of the new law. *[Schedule 2, items 12, 15 and 25, definitions of ‘entity’, ‘financial benefit’ and ‘related party’ in section 9]*

Rights and remedies of members of a CCIV

3.342 Members of a CCIV, like members of any other company, may apply to the court for remedy in circumstances where:

- the conduct of the affairs of the CCIV;
- an actual or proposed act or omission on behalf of the CCIV; or
- an actual or proposed resolution of the CCIV’s members, or a class of members;

is either contrary to the interests of the CCIV as a whole or oppressive to (or unfairly prejudicial to or unfairly discriminatory against) a member or class of members of the CCIV. This right is extended so that members of one or more sub-funds of the CCIV may seek also remedy when it is contrary to the interests of the members of that sub-fund (or those sub-funds), considered as a whole *[Schedule 1, item 4, section 1228F; Schedule 2, item 75, note to section 232]*

3.343 The court has power to make any order provided for under section 233 of the Act that it considers appropriate in relation to a CCIV (in the same way that it can in relation to any other company). This includes an order to appoint a receiver to manage any or all of a sub-fund’s property or modify or repeal the CCIV’s constitution. *[Schedule 1, item 4, section 1228G; Schedule 2, item 76, note to subsection 233(1)]*

3.344 A member or officer of a CCIV (or a former member or former officer) may bring, or intervene in, proceedings on behalf of the CCIV with leave from the court in the same way that a member or officer of any

other company can. The court must grant the application for leave if certain factors are established, including if it is probable that the company itself will not bring the proceedings and it is in the best interests of the company that the applicant be granted leave (among other things). The rebuttable presumption that granting leave is not in the best interests of the company applies to CCIVs in the same way as it applies to other companies (except that references to a third party means a person that is not a related party of the CCIV). *[Schedule 1, item 4, section 1228H; Schedule 2, items 77 and 78, note to subsection 237(4)]*

3.345 The CCIV must comply with the relevant procedures for varying and cancelling class rights in the same way that other companies are required to do so. If the CCIV's constitution sets out the procedure for varying and cancelling class rights, the CCIV must follow that procedure. If the CCIV's constitution does not set out the procedure for varying and cancelling class rights, the CCIV must pass a special resolution of the sub-fund of the CCIV to which the affected shares are referable, instead of a special resolution of the whole CCIV. The CCIV must also pass a special resolution of the affected class of members (in the same way that other companies are required to do so). *[Schedule 1, item 4, section 1228J; Schedule 2, items 79 and 80, notes to subsections 246B(1) and 246B(2)]*

3.346 Certain actions are taken to vary rights attached to shares of a CCIV in the same way that certain actions are taken to vary the rights attached to shares of other companies (except that sub-funds of the CCIV to which only one class of shares are referable are treated in the same way as other companies with one class of shares). *[Schedule 1, item 4, section 1228K]*

3.347 A CCIV must notify ASIC in the prescribed form of the particulars of a division of the shares in the CCIV into classes (if the shares were not previously divided in this way) and a conversion of shares in a class into shares in another class in the same way that a public company is required to do so. *[Schedule 1, item 4, section 1228L; Schedule 2, item 81, note to subsection 246F(3)]*

Civil liability of corporate director to members

3.348 If a member suffers loss or damage because the corporate director has contravened a provision in Chapter 8B, then the member has a direct right of recourse against the corporate director to recover the amount of the loss or damage from the corporate director. This is regardless of whether or not the corporate director has been convicted of an offence, or has a civil penalty order made against it, in respect of the contravention. *[Schedule 1, item 4, subsection 1228M(1)]*

3.349 This right is consistent with the right of a member of a registered scheme to seek remedy against the responsible entity of the registered scheme in similar circumstances, as provided for in section 601MA of the existing law.

3.350 The new law includes a statutory limitation period that requires the action against the corporate director to be taken within 6 years after the member's cause of action has arisen. *[Schedule 1, item 4, subsection 1228M(2)]*

3.351 The availability of this remedy for members of a CCIV does not affect any liability that a person, including the corporate director or an officer or employee of the corporate director, has under the Act or under any other laws. In particular, it does not affect the ability to convict the person of an offence, or make a civil penalty order against it, for the contravention of the relevant provision in Chapter 8B. *[Schedule 1, item 4, subsection 1228M(3)]*

Meetings

3.352 A CCIV's powers may be exercised by its director or its members. As discussed in paragraphs 3.132 and 3.133 above, some of the CCIV's powers must be exercised by the members of the CCIV. For example, the decision to replace the corporate director of a CCIV must be made by the CCIV's members.

3.353 In addition, some of the CCIV's powers may be exercised in relation to a particular sub-fund of the CCIV, by that sub-fund's members. For example, a decision to wind up a sub-fund voluntarily.

3.354 The new law sets out the method by which a resolution for the CCIV may be passed by the corporate director or by the CCIV's members.

Directors' meetings

3.355 The corporate director of a CCIV may pass a resolution for the CCIV by passing a resolution of the directors of the corporate director. This mechanism effectively 'looks through' the corporate director of the CCIV (being a company itself) to the natural person directors of the corporate director who are making the decision to exercise the CCIV's powers. *[Schedule 1, item 4, subsection 1229(1)]*

3.356 The resolution must clearly state that it is on behalf of the corporate director in its capacity as a corporate director of the CCIV. It should also state which CCIV the resolution relates to if the corporate director is the corporate director of more than one CCIV. These requirements aim to avoid uncertainty about which company the natural person directors of the corporate director are acting for (that is, the CCIV, another CCIV or the corporate director itself). *[Schedule 1, item 4, paragraphs 1229(1)(a) and (b)]*

3.357 Part 2G.1 of the Act, which sets out the requirements for directors' meetings, does not apply to a CCIV, as this bespoke rule applies instead. This does not affect the application of Part 2G.1 for resolutions,

or meetings, of the corporate director of the CCIV (being a company itself). *[Schedule 1, item 4, subsections 1229(2) and (3); Schedule 2, item 82, note to Part 2G.1]*

Meetings of members of the CCIV and sub-funds

3.358 The rules for holding meetings of members of a CCIV and its sub-funds are based on the rules for registered schemes, rather than the rules for companies. The rules for meetings of members of registered schemes apply to a CCIV as if:

- the CCIV is a registered scheme;
- the CCIV's members are the members of that scheme;
- the corporate director is the responsible entity of the registered scheme; and
- the CCIV's compliance plan is the registered scheme's compliance plan.

[Schedule 1, item 4, section 1229A; Schedule 2, items 14, 28 and 83 to 85, definitions of 'extraordinary resolution' and 'special resolution' in section 9 and notes Part 2G.2, Part 2G.3 and Part 2G.4]

3.359 Similar adaptations have been made for meetings of the members of a sub-fund of a CCIV. As such, the rules apply to meetings of members of a sub-fund of a CCIV as if:

- the sub-fund is a registered scheme;
- the sub-fund's members are the members of the scheme;
- the corporate director is the responsible entity of the registered scheme; and
- the CCIV's compliance plan is the registered scheme's compliance plan.

[Schedule 1, item 4, section 1229B]

3.360 A resolution may only be moved by the members if the resolution does not treat any other member of any other sub-fund differently or affect any other interest of a member of any other sub-fund. *[Schedule 1, item 4, section 1229E]*

3.361 If a member of a sub-fund wishes to call a meeting of the members of a sub-fund of the CCIV, then that member may only request a copy of so much of the register of the CCIV's members as relates to that particular sub-fund of the CCIV. If a member is calling a meeting of the members of the whole CCIV, it may request a copy of the full register of members. The CCIV must, without charge, produce a copy of the register of members (in part or in full, as required). A failure to do this is a strict liability offence with a maximum penalty of 20 penalty units. This penalty is consistent with the Guide. *[Schedule 1, item 4, section 1229D]*

Example 3.1: Meetings of members of a CCIV and its sub-funds

Ironbank CCIV has three sub-funds, Ironbank Growth SF, Ironbank Wealth SF and Ironbank Gold Investment SF.

Two proposals are put forward.

- The first proposal involves replacing the corporate director.
- The second proposal relates to cancelling forfeited shares in each of two of the sub-funds, Ironbank Growth SF and Ironbank Wealth SF.

Separate meetings of the whole CCIV, the members of Ironbank Growth SF and Ironbank Wealth SF are called. For administrative convenience, the meetings are to be held on the same day.

The first proposal affects the interests of the members of the whole CCIV. Accordingly, a resolution is put to all of the members of the CCIV who must vote on the proposal together.

Eighty per cent of the members of the whole CCIV vote in favour of the first proposal. A review of the count of the votes indicates that only 20 per cent of the members of Ironbank Gold Investment SF voted in favour of the proposal. However, because it is a resolution of the whole CCIV (with the vote of all of the members of the CCIV considered as a whole), the resolution is carried.

As the second proposal only affects the interests of the members of Ironbank Growth SF and Ironbank Wealth SF, it is only put forward at the meetings of Ironbank Growth SF and Ironbank Wealth SF.

Eighty per cent of the members of Ironbank Growth SF vote in favour of the second proposal. However, only five per cent of the members of Ironbank Wealth SF are in favour of the proposal.

As the second proposal can proceed in a manner that does not affect the interests of the members of Ironbank Wealth SF, it can proceed in respect of just Ironbank Growth SF. It cannot proceed in respect of Ironbank Wealth SF.

Further modifications to the meeting rules for CCIVs and sub-funds

3.362 Some further modifications to the meeting rules are made to account for the CCIV's corporate status.

3.363 In particular, a member in a CCIV has a share in the CCIV (which are different to interests in a scheme). At a meeting of the CCIV or a sub-fund of the CCIV, a member's voting power is:

- for a vote on a show of hands, 1 vote;
- for a vote on a poll at a meeting of the CCIV, 1 vote for each dollar of the value of the total shares in the CCIV that the member holds (and, in the case of a meetings of the members of a sub-fund, that is referable to the relevant sub-fund); or

- for a vote on a poll at a meeting of a sub-fund of a CCIV, 1 vote for each dollar of the value of the total shares that the member holds in the CCIV that are referable to that sub-fund. *[Schedule 1, item 4, section 1229F]*

3.364 The chair has a casting vote and, if the chair is a member, any vote it has in its capacity as member. *[Schedule 1, item 4, paragraph 1229F(2)(c)]*

3.365 If a member holds a share jointly with another person, then only the vote of the member whose name appears first in the register of members of the CCIV counts. *[Schedule 1, item 4, paragraph 1229F(2)(d)]*

3.366 If an associate of a CCIV (including the corporate director), or an associate of the corporate director has an interest in the resolution other than in their capacity as a member of the CCIV, they are not entitled to vote at either a meeting of the members of the CCIV or a sub-fund of the CCIV. *[Schedule 1, item 4, section 1229G]*

3.367 A bespoke rule applies for determining how to calculate the value of a person's shares, for the purposes of determining that person's voting power at a meeting of the CCIV or of the sub-fund. A different method of calculating the value of a person's shares applies depending on whether:

- the person's shares is redeemable;
- the sub-fund to which the person's shares are referable is liquid; and
- the person's shares is in a retail or wholesale CCIV.

[Schedule 1, item 4, section 1229H]

3.368 If the person holds shares in a retail CCIV that are redeemable and referable to a sub-fund that is liquid, then the value of those shares are calculated in accordance with the rules in the retail CCIV's constitution and consistent with the rules in Subdivision B of Division 1 of Part 8B.4 (discussed further in paragraph 4.33 to 4.36). A retail CCIV's constitution must make provision for certain matters regarding the redemption of redeemable shares. *[Schedule 1, item 4, subsection 1229H(3)]*

3.369 If the person holds shares in a wholesale CCIV that are redeemable and referable to a sub-fund that is liquid, and its constitution has set out the amount to be paid for redeeming a share, then the value of the person's shares are calculated in accordance with those rules. *[Schedule 1, item 4, subsection 1229H(4)]*

3.370 In all other cases, the value of a person's shares is the amount that the corporate director of the CCIV determines in writing to be the price that a willing but not anxious buyer would pay for the shares if it

was sold on the business day immediately before the day on which the poll at the meeting is taken. *[Schedule 1, item 4, subsection 1229H(2)]*

3.371 These methods for calculating the value of the shares of a CCIV are based on the methods for calculating the value of a member's interests in a registered scheme for the purposes of calculating that member's voting power at a meeting of the scheme's members under section 253F of the existing law.

3.372 The right of the auditor of a scheme's compliance plan to attend a meeting of the scheme's members, contained in Part 2G.4 of the Act, is not applicable to wholesale CCIVs or sub-funds of wholesale CCIVs as a wholesale CCIV is not required to have a compliance plane. *[Schedule 1, item 4 section 1229C]*

Corporate contraventions

General attribution rules

3.373 The new rules for attributing the physical and mental element of an offence to a CCIV apply for the purposes of all Commonwealth laws, irrespective of whether those laws currently apply or disapply Part 2.5 of the Criminal Code, or include other attribution rules for conduct.

The special attribution rules do not apply to offences under State laws because such an application would offend the *Melbourne Corporation* doctrine.⁴ *[Schedule 1, item 4, section 1230]*

Other attribution rules do not apply

3.374 The new attribution rules are designed to be comprehensive and all existing Commonwealth attribution rules are disapplied in determining whether a CCIV has committed an offence. This includes Part 2.5 of the Criminal Code and any other bespoke rules that attribute:

- conduct engaged in by a person;
- conduct engaged in by a person in relation to another person;
or
- a state of mind

to a body corporate. *[Schedule 1, item 4, section 1230A]*

3.375 In the context of civil penalty provisions, rules that attribute an offence or a provision in relation to a contravention to a body corporate are also disapplied in the CCIV context. *[Schedule 1, item 4, section 1230A]*

⁴ The *Melbourne Corporation* doctrine is a principle of constitutional law which prevents the Commonwealth from interfering with the States exercising their powers of fulfilling their functions.

3.376 Examples of bespoke attribution rules that are disapplied are section 769B of the Act, section 12GH of the ASIC Act, section 199 of the *Aboriginal and Torres Strait Islander Act 1995* and section 324 of the *National Consumer Credit Protection Act 2009*.

3.377 The attribution rules do not interfere with the special rules in the new law for determining when a corporate director is responsible for acts of its agents and the CCIV's agents for the purposes of determining certain liabilities (see paragraph 3.139). [*Schedule 1, item 4, section 1230C*]

Attributing conduct to a CCIV

3.378 As a general rule, conduct engaged in by a person other than the CCIV is attributed to the CCIV if it is engaged in by one of the following parties, and the conduct was engaged in on behalf of the CCIV:

- an agent of the CCIV;
- a director of the CCIV;
- an employee, director or agent (*an official*) of the corporate director of the CCIV; or
- any other person acting at the direction, or with the consent or agreement of one of the entities listed above.

3.379 For the purposes of the liability provisions, **conduct** has the same meaning as in section 769B of the existing law. Section 769B defines 'conduct' as an act, or omission to perform an act, or a state of affairs. [*Schedule 1, item 4, subsection 1230B(6)*]

3.380 There are certain conditions which need to be established before attributing conduct of an agent, an official of the corporate director or a person acting at the direction of another person. These conditions are explained below.

Attribution from agents of the CCIV

3.381 Conduct engaged in by an agent of the CCIV is taken to have been engaged in by a CCIV if the conduct was engaged in on behalf of the CCIV and the agent was acting within the scope of that agent's actual or apparent authority in relation to the CCIV. [*Schedule 1, item 4, subsections 1230B(1) and (4), item 1 of the table*]

3.382 Conduct engaged in by an agent appointed by a liquidator, receiver or person administering a compromise is not attributed to a CCIV. If a receiver, liquidator or provisional liquidator is an agent of the CCIV, conduct engaged in by the receiver is also not attributed to the CCIV. [*Schedule 1, item 4, subsection 1230B(5)*]

Attribution from directors of the CCIV

3.383 Conduct engaged in by a corporate director or a shadow director of the CCIV is taken to have been engaged in by a CCIV if the conduct

was engaged in on behalf of the CCIV. *[Schedule 1, item 4, subsections 1230B(1) and (4), item 2 of the table]*

3.384 Note that the conduct of a liquidator, receiver or person administering a compromise will not be attributed to the CCIV as those persons are not covered by the definition of ‘director’.

Attribution from officials of the corporate director

3.385 Conduct engaged in by an employee, director or agent of the corporate director of the CCIV is also taken to have been engaged in by a CCIV if the:

- conduct was engaged in on behalf of the CCIV; and
- the employee, director or agent was acting within the scope of their actual or apparent authority in relation to the corporate director.

[Schedule 1, item 4, subsections 1230B(1) and (4), item 3 of the table]

3.386 For the purposes of the attribution rules, the employee, director or agent is referred to as an **official**. *[Schedule 1, item 4, subsection 1230B(4), item 2 of the table]*

3.387 Officials of the corporate director are one step further removed from the CCIV. In other words, officials only have a relationship with the CCIV by virtue of their relationship with the corporate director. The new law recognises that both the official and the corporate director must be acting within the scope of their authority.

3.388 This attribution rule does not cover officials of a shadow director. However, they may be covered by the attribution rule for persons acting at the direction or consent of another person.

Example 3.2: Attribution from officials of the corporate director

Samantha is an employee at DB Director Services Ltd. DB Director Services Ltd is the corporate director for multiple CCIVs, including Magic Investments CCIV and Bewitching Investments CCIV.

Samantha is instructed to undertake work for Magic Investments CCIV. While undertaking this work in accordance with the instructions, she engages in conduct which would constitute the physical element of an offence.

Samantha’s conduct can be attributed to Magic Investment CCIV because:

- DB Director Services Ltd is acting on behalf of Magic Investments CCIV; and
- Samantha is acting within the scope of her authority as an employee at DB Director Services Ltd.

However, Samantha's conduct cannot be attributed to Bewitching Investments CCIV because DB Director Services Ltd is not acting on behalf of Bewitching Investments CCIV.

Attribution from other persons acting at the direction of another person

3.389 There is also an attribution rule that applies to any other person acting at the direction, or with the consent or agreement of:

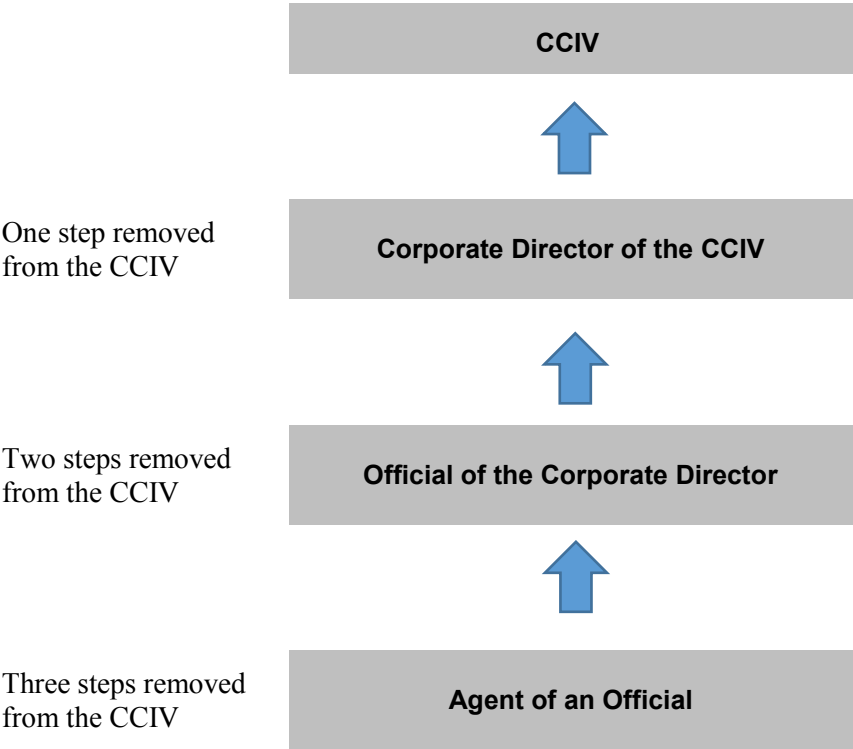
- an official of the corporate director;
- an agent of the CCIV; or
- the director (or shadow director) of a CCIV.

[Schedule 1, item 4, subsections 1230B(1) and (4), item 4 of the table]

3.390 The person providing the direction, consent or agreement is referred to as the **first person**. These explanatory materials use the term 'the second person' to refer to the person acting at the first person's direction. This second person could be a sub-agent of the CCIV, an agent of a director or an agent of an official of the corporate director. *[Schedule 1, item 4, subsection 1230B(4), item 4]*

3.391 The second person is one step further removed from the CCIV. For example, an agent of an official of the corporate director only has a relationship with the CCIV by virtue of the agent's relationship with the official, the official's relationship with the corporate director and the corporate director's relationship with the CCIV. This is illustrated in Figure 3.1.

Figure 3.1: Relationship between agents of officials and the CCIV



3.392 The conduct of the other person is attributed to the CCIV only if each person in the chain is acting on behalf of the person directly above them in the chain. For example, the conduct of an agent of an official is only attributed to the CCIV if:

- the agent is acting at the direction, or with the consent or agreement of the official of the corporate director;
- the official is acting within the scope of the official’s actual or apparent authority in relation to the corporate director; and
- the corporate director is acting on behalf of the CCIV.

[Schedule 1, item 4, subsections 1230B(1) and (4), item 4 of the table]

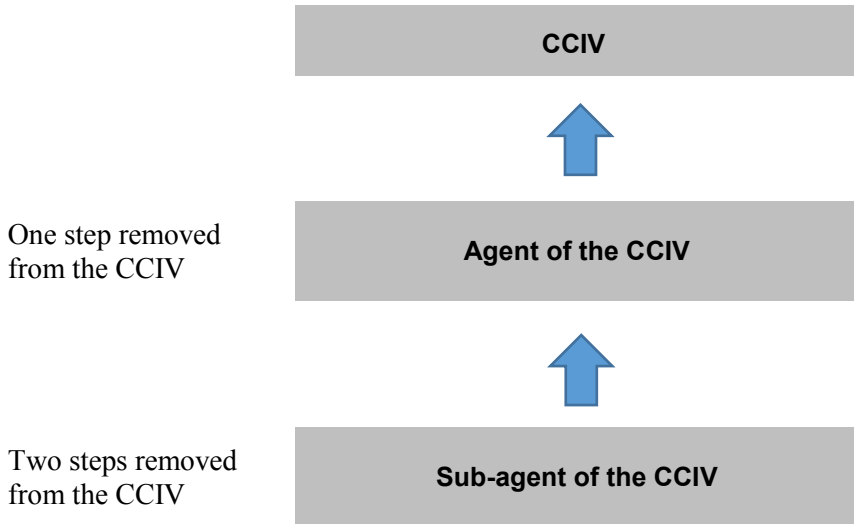
3.393 Similarly, the conduct of an agent of an agent of the CCIV (a sub-agent of the CCIV) is only attributed to the CCIV if:

- the sub-agent of the CCIV is acting at the direction, or with the consent or agreement of the agent of the CCIV;
- the agent of the CCIV is acting on behalf of the CCIV.

[Schedule 1, item 4, subsections 1230B(1) and (4), item 4 of the table]

3.394 This is illustrated in the figure below.

Figure 3.2: Relationship between sub-agents and the CCIV



Recursive operation

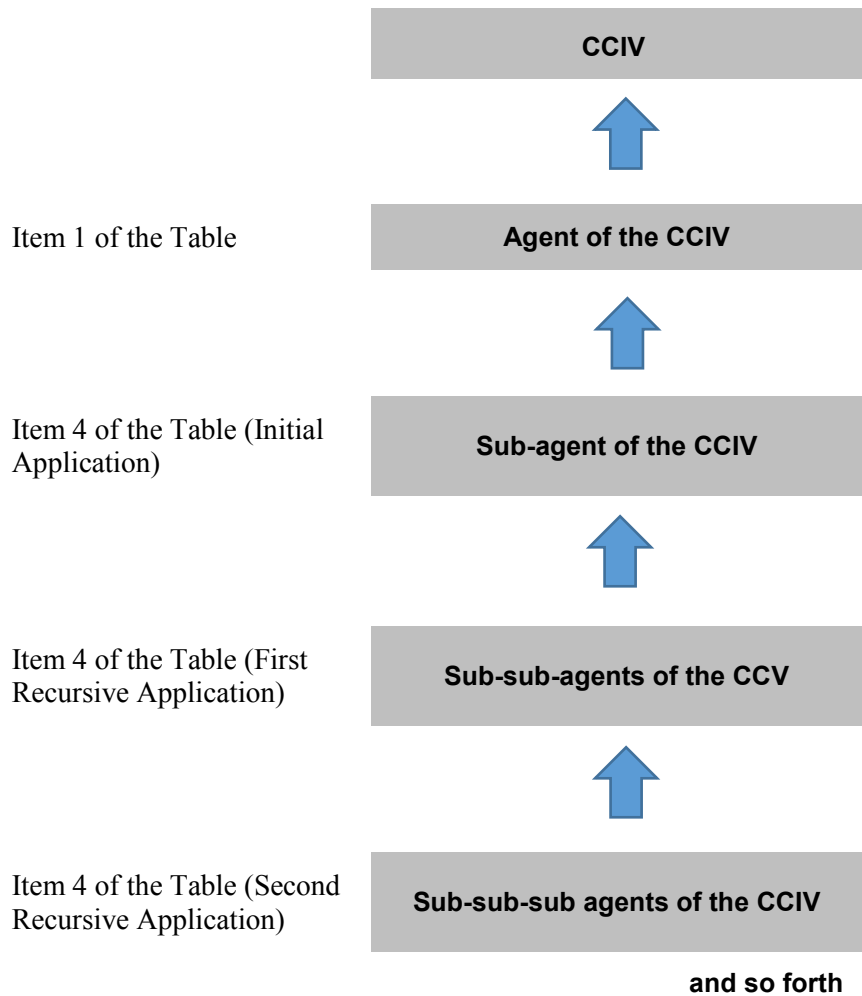
3.395 The final item in the table in the new law has a recursive operation. In other words, it applies to:

- a person acting at the direction, or with the consent or agreement of an official of the corporate director, an agent of the director or a director of a CCIV;
- a person acting at the direction of a person acting at the direction of an official of the corporate director, an agent of director or a director of a CCIV;
- a person acting at the direction of a person acting at the direction of a person acting at the direction of an official of the corporate director, an agent of a director or a director of a CCIV

and so forth.

3.396 There is no legal limit to the number of times that the final item in the table can be relied on.

Figure 3.3: Recursive operation for agents of the CCIV



Attributing conduct in relation to a counterparty of the CCIV

3.397 Conduct engaged in by a person in relation to a counterparty of the CCIV is taken to be engaged in in relation to a CCIV if certain conditions are satisfied.

3.398 A **counterparty** may be:

- an agent of the CCIV;
- a corporate director or shadow director of the CCIV;
- an official of the corporate director (that is, an employee, director or agent of a corporate director);

- a person acting at the direction or with the consent or agreement of an agent of the CCIV, a director of the CCIV or an official of the CCIV (recursively applied).

[Schedule 1, item 4, subsections 1230B(2) and (4)]

3.399 The other conditions that need to be satisfied are the same as those that apply when attributing conduct to a CCIV (see paragraphs 3.378 to 3.396). These are summarised in the below table. *[Schedule 1, item 4, subsections 1230B(2) and (4)]*

Table 3.2: Conditions that need to be satisfied before attributing conduct in relation to a counterparty to also be in relation to the CCIV

| <i>Counterparty</i> | <i>Conditions</i> |
|---|---|
| <i>Agents of the CCIV and person acting at their direction</i> | |
| Agent of the CCIV | <ul style="list-style-type: none"> • the agent of the CCIV is acting on behalf of the CCIV • the agent is acting within the scope of the agent's actual or apparent authority in relation to the CCIV |
| Persons connected to an agent of the CCIV | In addition to the above conditions for the agent of the CCIV: <ul style="list-style-type: none"> • the person must be acting at the direction, or with the consent or agreement (whether express or implied) of the agent.* |
| <i>Directors of the CCIV and person acting at their direction</i> | |
| Director of the CCIV | The director of the CCIV is acting on behalf of the CCIV |
| Persons connected to the director of the CCIV | In addition to the above conditions for the director of the CCIV: <ul style="list-style-type: none"> • the person must be acting at the direction, or with the consent or agreement (whether express or implied) of the director.* |
| <i>Officials of the corporate director and person acting at their direction</i> | |
| An official of the corporate director | <ul style="list-style-type: none"> • the official is acting within the scope of the official's actual or apparent authority in relation to the corporate director; • the corporate director is acting on behalf of the CCIV |
| Persons connected to the official of the corporate director | In addition to the above conditions for the official of the CCIV: <ul style="list-style-type: none"> • the person must be acting at the direction, or with the consent or agreement (whether express or implied) of the official.* |

** Operates recursively.*

Attributing state of mind to a CCIV

3.400 If the conduct of a person is attributed to the CCIV, that person's state of mind can also be attributed to the CCIV. In attributing the conduct of the person to the CCIV, all of the conditions set out in earlier parts of this Chapter must be satisfied (see Table 3.2 for a summary of these conditions). *[Schedule 1, item 4, subsections 1230B(3) and (4)]*

3.401 It is not permissible to attribute conduct from one person and the mental element from another person. Instead, the physical and mental element must be attributed from the same person. *[Schedule 1, item 4, subsection 1230B(3)]*

3.402 The mental state of a receiver or an agent appointed by a liquidator, receiver or a person administering a compromise is not attributed to the CCIV, as those persons are not captured within the definition of 'director'.

3.403 For the purposes of the liability provisions, ***state of mind*** has the same meaning as in section 769B of the existing law. Section 769B defines 'state of mind' to include a reference to the knowledge, intention, opinion, belief or purpose of the person and the person's reasons for the person's intention, opinion, belief or purpose. *[Schedule 1, item 4, subsection 1230B(6)]*

Consequences of contraventions by the CCIV

Policy rationale for treating CCIVs differently to other companies

3.404 Similar to other companies, a CCIV has corporate criminal responsibility for any offence it commits under a Commonwealth, State or Territory law. However, unlike other companies, there are several policy concerns with holding the company solely responsible.

3.405 First, a CCIV has no officers or employees other than its corporate director (except when a sub-fund is in external administration). If a CCIV contravenes its obligations under the law, it is because its corporate director or its agent has caused it to do so.

3.406 The corporate director has overarching responsibility for the CCIV's operations. The corporate director is under an obligation to operate the business and conduct the affairs of the CCIV. It is also under an obligation to ensure the CCIV complies with its constitution and the Act.

3.407 Second, if a CCIV had sole responsibility for a contravention of the law and was required to pay the resulting fine or penalty, the members would suffer loss. This is because the fine or penalty would need to be paid out of the assets of a sub-fund (or sub-funds) of the CCIV, thereby reducing the pool of assets available to members. The consequence is that

members who are passive investors in this vehicle would suffer loss for contraventions for which they were not responsible and had no control over.

3.408 Third, in the context of registered schemes, the responsible entity (or trustee) for the scheme bears the consequence for a contravention rather than the registered scheme (or its members). The responsible entity is the only legal person and has responsibility for all of the obligations in relation to the scheme. If the law operated differently for CCIVs and registered schemes, CCIVs would potentially be at a competitive disadvantage.

3.409 For these reasons, the new law seeks to protect members from loss when there has been a contravention of the law by a CCIV. It adopts a different approach for contraventions of Commonwealth and State laws, as set out below.

Contraventions of Commonwealth laws

3.410 If a CCIV commits an offence against a law of the Commonwealth or contravenes a civil penalty provision, the corporate director of the CCIV at the time of the commission of the offence is taken to commit the offence or contravene the provision, along with the CCIV. *[Schedule 1, item 4, subsections 1230D(1) and (2) and 1230E(1) and (2)]*

3.411 The new law then removes the consequences of committing an offence for the CCIV. Specifically:

- the CCIV may not be convicted of the offence;
- the CCIV is not liability for any fine or penalty;
- an infringement notice may not be given to the CCIV in relation to the alleged commission of the offence or contravention;

[Schedule 1, item 4, subsection 1230D(4) and (5) and subsections 1230E(4) and (5)]

3.412 These provisions do not affect any consequences that apply to the corporate director as a result of the corporate director also being taken to have committed the offence or contravened the provision.

3.413 Nothing in the new law prevents ASIC from seeking an injunction against either the corporate director or the CCIV.

3.414 If there is a change in the corporate director after the commission of the offence, the new corporate director is not liable. Only the corporate director at the time of the commission of the offence (or the contravention is taken to have committed the offence (or contravened the civil penalty provision).

3.415 These laws cover:

- Commonwealth criminal offences;
- Commonwealth civil penalty provisions in the Act; and
- other laws of the Commonwealth which impose a civil penalty in relation to the contravention.

[Schedule 1, item 4, subsection 1230D(1) and subsections 1230E(2)]

Contraventions of State and Territory laws

3.416 ASIC, the CCIV or a member may apply to the Court for a compensation order payable by the corporate director if the CCIV suffers loss or damage as a result of a contravention or an alleged contravention of a State or Territory law. *[Schedule 1, item 4, section 1230F]*

3.417 A compensation order may be available if:

- the CCIV is found to have committed a State or Territory offence and ordered to pay a fine;
- the CCIV is found to have committed a State or Territory civil penalty provision and ordered to pay a penalty; or
- the CCIV pays an amount in settlement of proceedings in respect of an alleged contravention.

[Schedule 1, item 4, subsections 1230F(2) and (5)]

3.418 An application for a compensation order must be commenced within 6 years of the time when a contravention was proven. If the proceedings were settled and no contravention was proven, an application for a compensation order must be made within 6 years of the alleged contravention. *[Schedule 1, item 4, section 1230G]*

3.419 The order is enforceable as if it were a judgment of the Court. *[Schedule 1, item 4, subsection 1230F(4)]*

3.420 These provisions are designed to minimise the likelihood of members suffering damage as a result of the corporate director causing the CCIV to breach its State or Territory obligations. The new laws recognise the Commonwealth does not have the power to deem the corporate director to have committed a State offence and they do not interfere with the State or Territory laws under which the contravention arises. *[Schedule 1, item 4, subsection 1230F(6)]*

Exception when a sub-fund is in external administration

3.421 The new law ensures that a corporate director is not responsible for an offence or contravention when the relevant conduct is caused wholly by a receiver, liquidator or a person administering a compromise ('an external administrator').

3.422 There are three mechanisms used to achieve this. These are discussed below.

1. Attribution rules do not apply

3.423 The conduct or mental state of an external administrator or an agent appointed by an external administrator is not attributed to a CCIV. This is because:

- Receivers and liquidators (who may be agents of a CCIV) and agents of an external administrator are expressly carved out of the attribution rules that apply to other agents of a CCIV.
- Only the conduct of directors (not officers) is attributed to the CCIV. This differs to other attribution regimes, such as Part 2.5 of the Criminal Code.

[Schedule 1, item 4, subsections 1230B(4)]

3.424 This may mean that the physical or mental element is not attributed to the CCIV and the CCIV does not commit an offence or contravene a civil penalty provision at all. If the CCIV does not commit an offence (or contravene a civil penalty provision), then none of the consequences of a contravention by the CCIV flow.

2. Corporate director not taken to be responsible for Commonwealth offences

3.425 Second, there is an exception to the provision that holds that the corporate director is taken to have committed any offence committed by the CCIV. This exception applies if the conduct constituting the offence was engaged by the CCIV solely as a result of an exercise of powers by an external administrator. *[Schedule 1, item 4, paragraphs 1230D(1)(b) and 1230E(1)(b)]*

3.426 The exception only applies if all of the conduct giving rise to the offence was caused wholly by the external administrator. In other words, the exception does not apply if two acts need to be established, the external administrator caused one act to occur but the corporate director caused the other act to occur.

3. Compensation orders not available for State and Territory offences

3.427 Third, a Court cannot order the corporate director at the time of the commission of the offence to compensate the CCIV if the conduct constituting the contravention solely resulted from the exercise of powers of an external administrator. *[Schedule 1, item 4, subsection 1230F(3)]*

3.428 This exception operates in the same way as the exception to the provision that holds the corporate director to have committed a Commonwealth offence (see the discussion at paragraph 3.425 to 3.426 above).

Chapter 4

Securities

Outline of chapter

4.1 This chapter outlines the types of securities that CCIVs may issue and the circumstances when a CCIV is permitted to pay dividends. The chapter also explains the requirements that a CCIV must satisfy before redeeming its shares or reducing its share capital.

Context of amendments

4.2 A feature of many managed funds is that they are open-ended. Proprietary and public companies are not able to be open-ended.

4.3 At common law, the doctrine of the maintenance of share capital ordinarily prevents a company from reducing its share capital except in the legitimate course of its business. This doctrine is intended to protect creditors. 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.

4.4 Parts 8B.7 and 8B.8 recognise that CCIVs are intended to operate as investment funds, rather than carrying on active businesses. The rules in these Parts are more flexible and allow a CCIV to reduce its share capital in circumstances where other types of companies are prohibited from doing so.

Summary of new law

4.5 Parts 8B.7 and 8B.8 govern the issue and redemption of shares, the payment of dividends and other transactions affecting share capital.

4.6 Division 1 of Part 8B.7 provides that a CCIV may issue shares in itself, including redeemable shares. It also specifies the requirements for converting shares of one type into another type.

4.7 Division 2 of Part 8B.7 relaxes the requirements for redemptions of redeemable shares in a CCIV. In particular, redemptions do not need to be paid out of profit, but the sub-fund to which the shares are referable must be solvent immediately before the redemption and not insolvent immediately after the redemption.

4.8 Division 3 of Part 8B.7 modifies the requirements for dividends that apply to companies generally so that they apply at the sub-fund level.

4.9 Division 4 of Part 8B.7 relaxes the requirements for reporting to ASIC so that CCIVs only need to report at the end of each six month reporting period.

4.10 Division 1 of Part 8B.8 sets out the circumstances when a CCIV may make share capital reductions. These are similar to the existing provisions for other types of companies but certain amendments are made to make it easier for CCIVs to reduce share capital and apply the requirements at the sub-fund level.

4.11 Divisions 2 and 3 of Part 8B.8 prohibit a CCIV from acquiring or taking security over its own shares, broadly mirroring the restriction applying to other companies.

4.12 Finally, Part 8B.9 allows a CCIV to issue debentures, but these must also be referable to only one sub-fund.

Comparison of key features of new law and current law

| <i>New law</i> | <i>Current law</i> |
|--|--------------------|
| A CCIV can issue shares provided the share is referable to one and only one sub-fund. A CCIV can issue debentures but the debenture must be referable to one and only one sub-fund. | No equivalent. |
| A CCIV may issue redeemable shares (ordinary shares which are liable to be redeemed) or redeemable preference shares. A right of redemption is not a preferential right. | No equivalent. |

| <i>New law</i> | <i>Current law</i> |
|---|--------------------|
| <p>A CCIV may redeem redeemable shares or redeemable preference shares if:</p> <ul style="list-style-type: none"> • it is on the terms on which they are issued; and • the sub-fund to which the shares are referable is solvent immediately before the redemption and is not insolvent immediately after the redemption. <p>Additional requirements apply to redemptions of shares in retail CCIVs and include requirements relating to the mechanism for calculating the price.</p> | No equivalent. |
| <p>A CCIV may only pay dividends to members of a particular sub-fund if the sub-fund to which the shares are referable is solvent immediately before the redemption and is not insolvent immediately after the redemption.</p> | No equivalent. |
| <p>A CCIV may reduce its share capital if:</p> <ul style="list-style-type: none"> • the reduction is permitted by the CCIV's constitution; and • each sub-fund affected by the reduction is solvent immediately before the reduction and will not be insolvent immediately after the reduction. | No equivalent. |
| <p>A CCIV is prohibited from acquiring or taking security over its own shares.</p> | No equivalent. |

Detailed explanation of new law

Issuing shares in a CCIV

4.13 A CCIV has the power to issue shares in itself. The self-dealing exemption, which allows companies to issue their own shares without holding an AFSL, applies to CCIVs as a CCIV is a type of company.

4.14 A CCIV can also determine the terms of issue and the rights and restrictions attaching to its shares in the same way as other companies, subject to one caveat. Each share must be referable to a single sub-fund. That is, the rights attaching to the share must relate to the assets of one sub-fund and to no other sub-funds. This preserves the segregation of assets between each sub-fund. *[Schedule 1, item 4, subsections 1231(1) and (2); Schedule 2, item 51, note 5 to subsection 254B(1)]*

4.15 The requirement for each share to be referable to only one sub-fund does not preclude a CCIV from issuing multiple classes of shares for each sub-fund. Nor does it prevent members holding shares in more than one sub-fund.

4.16 A court can only make an order that is inconsistent with the requirement for each share to be referable to only one sub-fund if the interests of justice require it. *[Schedule 1, item 4, subsection 1231(3)]*

Example 4.1: Shares must be referable to only one sub-fund

Ironbank CCIV has two sub-funds, Ironbank Global Equities SF and Ironbank Fixed Income SF.

The CCIV issues Class A shares which are referable to Ironbank Global Equities SF and Class B shares which are referable to Ironbank Fixed Income SF.

The CCIV may choose to issue Class C shares which are also referable to Ironbank Global Equities SF. While two classes of shares (Class A and Class C shares) are referable to the same sub-fund, each share is referable to only one sub-fund.

The CCIV must not issue Class D shares which give members a right to the assets of both Ironbank Global Equities SF and Ironbank Fixed Income SF.

4.17 If a CCIV with multiple sub-funds issues only one type of shares, those shares are, by operation of the law, automatically divided into a different class for each sub-fund. The separation of

shares into different classes for each sub-fund cannot be varied using Part 2F.2. *[Schedule 1, item 4, subsections 1231A(1) and (3)]*

Example 4.2: Shares automatically divided into a separate class for each sub-fund

Ironbank CCIV has two sub-funds, Ironbank Global Equities SF and Ironbank Fixed Income SF. Ironbank CCIV issues some shares which are referable only to Ironbank Global Equities SF and some shares which are referable only to Ironbank Fixed Income SF.

The shares referable only to Ironbank Global Equities SF form one class of shares and the shares referable only to Ironbank Fixed Income SF form a second class of shares.

4.18 A class of shares is referable to a sub-fund of a CCIV if the shares in that class are referable to the sub-fund. *[Schedule 1, item 4, subsection 1231A(2)]*

Types of shares that may be issued

4.19 A CCIV may issue the same types of shares as other companies, including ordinary shares and preference shares.

4.20 A CCIV also has the power to issue shares that can be redeemed at the member's option and/or the CCIV's option. If all the CCIV's shares are redeemable at the member's option, the CCIV is 'open-ended' and members can seek a return of their paid-up capital in exchange for extinguishing the shares. *[Schedule 1, item 4, subsections 1231B(1) to (4)]*

4.21 The mere fact that a share can be redeemed does not make it a preference share. This modifies the common law position where shares liable to be redeemed at the member's option are 'preference shares' if the other shares on issue (or the other shares that the CCIV has the power, in its constitution, to issue) cannot be redeemed. *[Schedule 1, item 4, subsection 1231B(5)]*

4.22 A share that can be redeemed may be either a 'redeemable share' or a 'redeemable preference share'. A redeemable share is an ordinary share that can be redeemed. In the context of a CCIV, a redeemable preference share is a share that can be redeemed and has a preference attached to it (apart from a preference relating to redemptions). Any preferences relating to redemptions are ignored for the purposes of determining whether a share is redeemable. *[Schedule 1, item 4, subsections 1231B(4) to (5); Schedule 2, item 22, definition of 'redeemable share' in section 9]*

Example 4.3: Redeemable shares and redeemable preference shares

Excellent CCIV issues 200 shares which can be redeemed at the member's option. No other shares are on issue and the CCIV does not have the power to issue any other types of shares in its constitution.

All 200 shares in Excellent CCIV are 'redeemable shares', rather than 'redeemable preference shares'. They would not be preference shares at common law as all the shares have the same bundle of rights attached to them as the other shares on issue.

Superior CCIV issues 200 shares. Fifty of these shares can be redeemed at the member's option. The other 150 cannot be redeemed.

The 200 shares in Superior CCIV are all 'redeemable shares', rather than 'redeemable preference shares'. The new law states that a right of redemption does not render a share a preference share even if other shares on issue cannot be redeemed.

Fantastic CCIV issues 200 shares. All of the shares are redeemable. Thirty of the shares entitle their holders to priority over dividends.

The 30 shares which entitle their holders to priority over dividends are 'redeemable preference shares' as they have an additional right attached to them. The other 170 shares in Fantastic CCIV are 'redeemable shares'.

Share conversions

4.23 A CCIV may convert any type of share into an ordinary share that is not a redeemable share. There are no specific requirements for this type of share conversion. The new law is based on the provisions applying to the conversion of preference shares into ordinary shares in existing section 254G. *[Schedule 1, item 4, item 1 of the table at subsection 1231C(1) and subsection 1231C(4); Schedule 2, items 87 and 88, note 2 to subsection 254G]*

4.24 In addition, the CCIV may convert any share (including a preference share or an ordinary share that is not redeemable) into a redeemable share if the conversion is approved by a special resolution of the sub-fund of the CCIV to which the share is referable (subject to the restrictions on varying class rights). The requirement to obtain a special resolution is based on the existing requirements for converting ordinary shares into preference shares. Redeemable shares, like preference shares, have special rights attaching to them that do not apply to other ordinary shares.

[Schedule 1, item 4, item 2 of the table at subsection 1231C(1) and subsection 1231C(4)]

4.25 Conversions of any type of share into a preference share (other than a redeemable preference share) are permitted if the holders rights are set out in the CCIV's constitution or the rights have been approved by a special resolution of the sub-fund of the CCIV to which the share is referable. If there are amounts unpaid on the shares, the unpaid amount is divided equally among the replacement shares. *[Schedule 1, item 4, item 3 of the table at subsection 1231C(1) and subsection 1231C(4); Schedule 2, items 87 and 88, note 2 to subsection 254G(1)]*

4.26 Conversions of any type of share (whether an ordinary share, redeemable share or preference share) into a redeemable preference share are prohibited. This reflects existing subsection 254G(3). Nevertheless, the requirements for CCIVs are significantly more flexible than for other types of companies because the right to redemption is not itself a preferential right in the CCIV context. *[Schedule 1, item 4, item 3 of the table at subsection 1231C(2) and subsection 1231C(4)]*

4.27 A CCIV is also permitted to convert shares into a larger or smaller number. Unlike other types of companies, the CCIV is not required to hold a general meeting and pass a resolution. *[Schedule 1, item 4, item 3 of the table at subsection 1231C(3) and subsection 1231C(4); Schedule 2, items 89 and 90, note to subsection 254H(1)]*

Share redemptions

4.28 The requirements for redeeming shares in a CCIV are more flexible than the requirements for redeeming shares in other types of companies. This reflects the fact that CCIVs are a type of collective investment vehicle where members of a CCIV can seek a return of their paid-up capital, while still providing a level of protection for creditors. *[Schedule 1, item 4, section 1231D]*

4.29 The share redemptions rules differ depending on whether the CCIV is a retail or wholesale CCIV and whether the sub-fund to which the share relates is liquid. The requirements for each type of redemption are summarised in Table 4.1 and explained in more detail in the following paragraphs. *[Schedule 1, item 4, section 1231D and 1231F; Schedule 2, item 91, note to Part 2H.2]*

4.30 All shares must be cancelled after they have been redeemed. *[Schedule 1, item 4, section 1231E]*

Table 4.1: Rules for Share Redemptions

| | <i>Type of Share Redemption</i> | <i>Main Requirements</i> |
|----|---|--|
| 1. | Any redemption in a wholesale CCIV. | <ul style="list-style-type: none"> • Must be on the terms on which they are issued. • Sub-fund to which the shares are referable must not be insolvent immediately before the redemption and there must be no reasonable grounds for suspecting that the sub-fund would become insolvent immediately after the redemption. |
| 2. | Redemptions in a retail CCIV when the sub-fund is liquid. | <p>In addition to the requirements for a wholesale CCIV:</p> <ul style="list-style-type: none"> • Must be permitted by the CCIV's constitution. • Price must be determined by reference to the net asset value of the sub-fund (for an unlisted CCIV) or the market price just before the redemption (for a listed CCIV). |
| 3. | Redemptions in a retail CCIV when the sub-fund is not liquid. | <p>In addition to the requirements for a wholesale CCIV:</p> <ul style="list-style-type: none"> • Must be permitted by the CCIV's constitution. • Particular assets of the sub-fund are able to be converted to money in time to satisfy the request. • Comply with certain procedural requirements, including lodging a copy of the offer with ASIC. |

Redeeming shares of a wholesale CCIV

4.31 A wholesale CCIV may only redeem shares (either redeemable shares or redeemable preference shares) if it is in accordance with the terms on which the shares were issued, the sub-fund to which the shares are referable is not insolvent and there are no reasonable grounds for suspecting that the sub-fund to which the shares are referable would become insolvent immediately after the redemption (row 1 of Table 4.1). For the definition of solvent and insolvent, see paragraph 4.63 of these explanatory materials.
[Schedule 1, item 4, subsections 1231F(1) and (2)]

4.32 The requirements for redemptions of shares in a wholesale CCIV are more flexible than the requirements for

redemptions of ‘redeemable preference shares’ in a company, contained in existing Part 2H.2. In particular, a share redemption in a wholesale CCIV does not need to be paid out of profits or the proceeds of a new share issue, provided that it does not result in the sub-fund to which the share is referable becoming insolvent. This makes it easier for members of a CCIV to seek a return of their paid-up capital while still providing a level of protection for creditors.

Redeeming shares of a retail CCIV where the sub-fund is liquid

4.33 If a sub-fund is liquid, a retail CCIV may redeem a share in the CCIV only if:

- the sub-fund to which the share is referable is not insolvent immediately before the redemption and there are no reasonable grounds for suspecting that the sub-fund would become insolvent immediately after the redemption;
- the redemption is conducted according to the terms on which the share is on issue;
- the redemption is permitted by the CCIV’s constitution; and
- 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, item 4, sections 1231F and 1231G]

4.34 The first two requirements are the same as those that apply to redemptions in a wholesale CCIV. The last two requirements are additional requirements that apply only to redemptions of shares in a retail CCIV. They are designed to provide additional protection to retail investors who may not have the same experience, knowledge or financial resources as wholesale investors.

4.35 The requirement for the price to be based on the net asset value does not mean that the price must exactly reflect the net asset value of the sub-fund. The redemption price should be underpinned by the net asset value but may also include other adjustments, for example, to reflect transaction costs. This requirement also allows the CCIV to combine another payment (such as, dividend payments) with the consideration for the redemption of shares. The new law also recognises that different investment managers may calculate the net asset value in different ways.

4.36 See paragraphs 4.53 and 4.54 of these explanatory materials for the difference between a ‘liquid’ and ‘illiquid’ sub-fund.

Redeeming shares of a retail CCIV where the sub-fund is not liquid

4.37 The CCIV may only offer members an opportunity to redeem shares in a non-liquid sub-fund to the extent that particular assets of the sub-fund are able to be converted to money in time to satisfy redemption requests that members may make in response to the offer. *[Schedule 1, item 4, subsection 1245L(1)]*

4.38 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, item 4, subsections 1231J(2) and (4)]*

4.39 The CCIV must also lodge a copy of the offer with ASIC as soon as practicable after making the offer. A failure to lodge this notice is a strict liability offence punishable by up to 20 penalty units. There are legitimate grounds for penalising persons who do not intentionally or recklessly fail to lodge the offer because ASIC needs to be aware of all offers to properly perform its supervisory role and protect consumers. Existing offences for failing to lodge other documents with ASIC are also strict liability offences (see, for example, sections 319 and 320). Both the offence and the penalty are consistent with the principles in the Guide. *[Schedule 1, item 4, subsection 1231J(5)–(6); Schedule 2, item 202, table item 329HD in Schedule 3]*

4.40 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 paragraph 4.43).

[Schedule 1, item 4, subsection 1231J(3)]

4.41 The CCIV must ensure redemption requests made in response to a redemption offer are satisfied within 21 days after the offer closes. *[Schedule 1, item 4, subsection 1231K(1)]*

4.42 Only one offer may be open in relation to a particular sub-fund at any one time and the CCIV cannot satisfy the redemption until the offer closes. Thus, a CCIV may not make a standing offer with respect to an illiquid sub-fund. This mirrors the requirements for registered schemes and reduces the risk of members of the same sub-fund being treated differently. *[Schedule 1, item 4, subsections 1231J(1) and 1231K(2)]*

4.43 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, item 4, subsection 1231K(3)]

4.44 The CCIV 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 of the sub-fund to do so. *[Schedule 1, item 4, subsection 1231J(6)]*

4.45 The CCIV 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 CCIV must also lodge written notice of the cancellation with ASIC as soon as practicable and in any event within two business days after the cancellation. *[Schedule 1, item 4, subsections 1231J(7) to (8)]*

4.46 A failure to lodge a written notice of the cancellation with ASIC is a strict liability offence punishable by a penalty of up to 20 penalty units. Both the offence and the penalty are consistent with the principles in the Guide. A strict liability offence is appropriate because a failure to lodge the document undermines ASIC's ability to perform its supervisory responsibilities. It is consistent with the

imposition of strict liability in other circumstances involving the failure to lodge documents with ASIC in the existing law. *[Schedule 1, item 4, subsection 1231J(9); Schedule 2, item 202, table item 329HE in Schedule 3]*

Consequences of contravening requirements for redemptions

4.47 A contravention of the requirements for redeeming shares does not affect the validity of the redemption or any contract or transaction connected with it. *[Schedule 1, item 4, subsections 1231F(3) and 1231G(6)]*

4.48 The penalty for contravening the requirements depends on whether the requirement is one that applies to all CCIVs or one of the additional requirements that applies only to retail CCIVs.

4.49 If the requirement applies generally to all CCIVs, the CCIV does not commit an offence. However, a person involved in the contravention commits an offence punishable by up to 2000 penalty units and imprisonment for five years (for a natural person) or 20 000 penalty units (for a body corporate) if the person acted dishonestly. If the person did not act dishonestly, the person contravenes a corporation/scheme civil penalty provision and compensation may be payable under existing section 1317H. *[Schedule 1, item 4, subsections 1231F(4)-(5); Schedule 2, item 195, table item 45G in subsection 1317E(1) and item 202, table item 329H in Schedule 3]*

4.50 For the definition of ‘involved’, see section 79 of the existing law. A person involved in the contravention may include a natural person director of the corporate director, the corporate director, a lawyer or an accountant.

4.51 If the requirement is an additional one that applies only to shares of a retail CCIV, the CCIV commits a strict liability offence punishable by up to 20 penalty units. The strict liability offence is consistent with the principles in the Guide because the additional requirements mainly relate to the mechanism for determining the price of the redemptions and communicating the offer to members. There is a real risk of members being disadvantaged or treated inequitably if these requirements are not satisfied and this could undermine the integrity of the new CCIV regime. *[Schedule 1, item 4, subsection 1231G(4), subsections 1231J(9); Schedule 2, item 202, table items 329HA to 329HE in Schedule 3]*

4.52 If there is a contravention of the additional requirements applying only to retail CCIVs, ASIC, the corporate director, the depositary or a member may apply to the Court for relief. The Court may make any order that it considers appropriate. *[Schedule 1, item 4, subsections 1231G(6)-(7)]*

Definition of a 'liquid' sub-fund

4.53 A sub-fund is liquid if at least 80 per cent of the value of its assets are liquid; that is, they can be realised within the period specified in the CCIV's constitution for satisfying redemptions. *[Schedule 1, item 4, section 1231H]*

4.54 There is a presumption that money in an account or on deposit with a bank, bank accepted bills and marketable securities are liquid assets but the presumption may be rebutted. The CCIV Rules may also specify other kinds of property that are presumed to be liquid. Additionally, any other property is a liquid asset if the CCIV's corporate director reasonably expects that the property can be realised for its market value within the period specified in the CCIV's constitution for satisfying redemptions when the sub-fund is liquid. *[Schedule 1, item 4, subsection 1231H(2)]*

Calls on capital

4.55 The power for a company to limit calls on share capital to when a company is externally administered in existing section 254N does not apply to a CCIV. *[Schedule 1, item 4, section 1245N; Schedule 2, item 92, note to subsection 254N(1)]*

Dividends

4.56 A CCIV may only pay dividends to members of a sub-fund if the sub-fund to which the share is referable is solvent immediately before the dividend is paid and there are no reasonable grounds for suspecting that the sub-fund would become insolvent immediately after the dividend is paid. *[Schedule 1, item 4, section 1231M; Schedule 2, item 93, note 3 to subsection 254T(1)]*

4.57 The preconditions for paying dividends are less onerous for CCIVs than for other types of companies (see existing section 254T). Other types of companies are prohibited from paying dividends if their assets do not exceed their liabilities, the payment is not fair and reasonable to the company's shareholders as a whole or the payment of dividends could materially prejudice the company's ability to pay its creditors. Similarly, there is no explicit or implicit requirement for the dividends to be paid from profit.

4.58 Less onerous requirements are appropriate in the CCIV context as CCIVs are a form of collective investment vehicle and may return capital or pay dividends to members on a more regular basis than other types of companies. The only constraints on the payment of capital for registered schemes are those contained in

the trust deeds. If a CCIV was required to satisfy the same preconditions for paying dividends as other types of companies, the flexibility of the CCIV regime would be hampered and CCIVs would be at a commercial disadvantage to registered schemes.

4.59 A failure to comply with the requirements for paying dividends is an offence with a maximum term of imprisonment of two years. This is the same as the corresponding offence for other types of companies in existing section 254T. *[Schedule 2, item 202, table item 329HF in Schedule 3]*

4.60 Each share in a class of shares in a CCIV must have the same dividend rights unless the CCIV's constitution provides for differential rights or differential rights are agreed by special resolution of the sub-fund to which the shares are referable. *[Schedule 1, item 4, section 1245R; Schedule 2, item 94, note to subsection 254W(1)]*

Notice requirements

4.61 The notice requirements in Part 2H.6 do not apply to CCIVs. This is because share issues, redemptions and cancellations are expected to occur more frequently in the CCIV context and the notice requirements could create a large compliance burden for CCIVs. Further, there are no notice requirements applying to registered schemes. *[Schedule 1, item 4, section 1231P; Schedule 2, item 95, note to Part 2H.6]*

Share capital reductions

General requirements

4.62 A CCIV is generally prohibited from reducing its share capital. However, share capital reductions are permitted if all of the following requirements are met:

- each sub-fund affected by the reduction is solvent immediately before the reduction (that is, the CCIV is able to pay all the debts that are liabilities of the sub-fund, as and when they become due and payable); and
- there are no reasonable grounds for suspecting that the sub-fund will become insolvent immediately after the reduction.

[Schedule 1, item 4, sections 1231Q and 1246A; Schedule 2, items 96 to 100, notes to Divisions 1, 2 and 3 of Part 2J.1 and Part 2J.2]

4.63 A sub-fund is solvent if it is able to pay the debts that are liabilities of the sub-fund as and when they become due and payable. If a sub-fund is not able to pay the debts that are liabilities of sub-fund as and when they become due and payable then the sub-fund is insolvent. These definitions are based on the cash-flow test of solvency which is used for other companies (see existing section 95A) but applies them at the sub-fund level. *[Schedule 1, item 4, subsections 1231R(2) and (3); Schedule 2, items 16 and 27, definitions of ‘insolvent’ and ‘solvent’ in section 9]*

4.64 The requirements for reducing share capital relax the existing provisions that apply generally to companies. In particular, they replace the requirement that creditors must not be materially prejudiced by the share capital reduction with a requirement that the reductions must not undermine the solvency of the sub-fund. The CCIV-specific requirements also omit the requirement for shareholder approval. This recognises that calling a shareholder’s meeting and obtain shareholders’ approval may be time-consuming for a CCIV as members of a collective investment vehicle tend to be disinterested. *[Schedule 1, item 4, section 1231Q]*

Consequences of non-compliance

4.65 If a CCIV does not comply with the requirements for share capital reductions, the CCIV does not commit an offence. Instead, the person involved in the CCIV’s contravention commits an offence if the person acted dishonestly. The offence is punishable by five years imprisonment, 2000 penalty units or both (for an individual) or 20 000 penalty units (for a body corporate). These penalties are consistent with the Guide. *[Schedule 1, item 4, subsections 1231S(1) to (3); Schedule 2, item 202, table item 329HG of Schedule 3]*

4.66 If the person involved in the contravention does not act dishonestly, the person contravenes a corporation/scheme civil penalty provision. The maximum penalty for contravening a corporation/scheme civil penalty provision is \$200 000. *[Schedule 1, item 4, subsection 1231S(4); Schedule 2, item 195, table item 45H in subsection 1317E(1)]*

4.67 For a discussion of the meaning of ‘involved’ in a contravention, see paragraph 4.50.

4.68 If a share capital reduction is unauthorised, the validity of the reduction or of any contract connected with it is not affected. This promotes certainty and ensures that third parties can rely on acts by the CCIV relating to share capital reductions. *[Schedule 1, item 4, subsection 1213S(2)]*

Interaction with redemption rules

4.69 The general requirements for share capital reductions do not apply to redemptions of redeemable shares. The new streamlined arrangements for redemptions of redeemable shares are discussed at paragraph 4.28 of these explanatory materials.

[Schedule 1, item 4, section 1231U and subsection 1231V(1)]

Share buy-backs

4.70 As with other companies, a CCIV may buy back its shares. A share buy-back that amounts to a share capital reduction must meet the same requirements as other share capital reductions by a CCIV. These requirements are set out in these explanatory materials from paragraph 4.60. *[Schedule 1, item 4, subsections 1231T(1), (2) and (6)]*

4.71 A retail CCIV cannot use the share buy-back rules to redeem its redeemable or redeemable preference shares. This ensures that share buy-back rules cannot be used to avoid the special rules for calculating the price of redemptions that apply to retail CCIVs. For a discussion of these rules, see paragraphs 4.33 to 4.52. *[Schedule 1, item 4, subsection 1231T(1)]*

4.72 Once a CCIV has agreed to buy back its shares, all rights attaching to the shares are suspended. The suspension is lifted if the agreement is terminated. Immediately after the shares are transferred back to the CCIV, the shares are cancelled and the CCIV cannot dispose of them. *[Schedule 1, item 4, subsections 1231T(3) to (5)]*

Other share capital reductions

4.73 A CCIV may reduce its share capital by redeeming redeemable shares or redeemable preference shares. These redemptions must meet the requirements summarised above in Table 4.1. *[Schedule 1, item 4, section 1231U]*

4.74 The CCIV rules may set out other circumstances where a CCIV is permitted to reduce its share capital. *[Schedule 1, item 4, section 1231V]*

4.75 A CCIV may also reduce its share capital under a Court order. *[Schedule 1, item 4, section 1231W]*

4.76 CCIVs are also permitted to cancel forfeited shares, akin to other companies. A share cancellation must be approved by a resolution passed at a meeting of the members of each sub-fund to which the shares are referable. *[Schedule 1, item 4, section 1231Y]*

4.77 A CCIV may also cancel shares returned to it under the cooling-off provisions and the new law authorises any resulting reduction in the CCIV's share capital. For a discussion of how the cooling-off provisions apply to CCIV, see paragraph 9.49.

[Schedule 1, item 4, section 1231X]

Self-acquisition of shares

4.78 A CCIV is generally prohibited from acquiring shares (or units of shares) in itself. *[Schedule 1, item 4, section 1231Z]*

4.79 One implication of this 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. This prevents one sub-fund from 'cross-investing' in another sub-fund.

4.80 There are three exceptions where a CCIV is permitted to acquire its shares. These are:

- in buying back shares (see paragraphs 4.70 to 4.71 of these explanatory materials);
- in acquiring an interest (other than a legal interest) in fully-paid shares in the company if no consideration is given by the company or an entity it controls; or
- under a court order.

[Schedule 1, item 4, section 1231Z; Schedule 2, items 101 and 102, note 2 to subsection 259B(1)]

4.81 Akin to other companies, a CCIV is also prohibited from taking security over shares in itself or a company that it controls. The existing law provides exceptions for companies which are financial institutions or take security under approved employee share schemes. These exceptions are not available for CCIVs as they should not be financial institutions and cannot hire employees. *[Schedule 1, item 4, section 1231ZA]*

Rule against giving financial assistance

4.82 There is no prohibition on a CCIV giving financial assistance. The prohibition on giving financial assistance in Part 2J.3 of the existing law is primarily designed to protect the interests of existing shareholders and creditors by ensuring that a trading company is not able to hand over control of the company to another person. A specific prohibition on a CCIV giving financial assistance is not required because:

- a CCIV is not a trading company;

- a CCIV must be widely held if it wishes to take advantage of the concessional tax treatment; and
- there are specific duties which protect the interests of members of a retail CCIV (see, for example, the corporate director's duty to act in the best interests of members, discussed at paragraph 3.192).

[Schedule 1, item 4, section 1231ZB]

4.83 Retaining the prohibition on giving financial assistance could prevent some of the transactional dealings which are conventional for managed investment schemes, such as, fee rebates and the payments of expenses associated with the issue of interests by the corporate director.

Effect on corporate director's duties

4.84 A corporate director is not relieved from any of its duties (including the new duties set out Chapter 5 of these explanatory materials) because it complied with the relevant requirements for share capital reductions or redemptions. *[Schedule 1, item 4, section 1231ZC]*

Debentures

4.85 A CCIV may issue debentures so long as each debenture is referable to one and only one sub-fund. Thus, the debenture holder's rights in respect of the assets of the CCIV must be limited to rights in respect to the assets of the single sub-fund against to which the debenture is referable. *[Schedule 1, item 4, section 1231ZD]*

4.86 If the debenture or the required trust deed creates or includes a security interest, that interest must not be over CCIV assets that are referable to a different sub-fund. *[Schedule 1, item 4, section 1231ZD]*

Chapter 5

Financial reporting and updating ASIC information

Outline of chapter

- 5.1 Division 4 of Part 8B.4 sets out the rules for how financial reports and audits are to be prepared and conducted for CCIVs and sub-funds.
- 5.2 Division 5 of Part 8B.4 outlines how particular provisions in the existing law about updating ASIC information for companies and registered schemes apply to CCIVs.

Context of amendments

- 5.3 The Act sets out the requirements for financial records, financial and directors' reports, and audits. These requirements apply to retail CCIVs and sub-funds, subject to certain modifications.
- 5.4 Wholesale CCIVs, like unregistered MISs, are not subject to the reporting and auditing requirements in Chapter 2M. However, wholesale CCIVs are required to keep financial records at both the CCIV and sub-fund levels.
- 5.5 For retail CCIVs, adjustments to auditing requirements, especially for auditor independence, are needed to account for the range of relationships and potential conflicts of interest between an auditor of a CCIV and the CCIV or its corporate director. Modifications ensure that full reporting is provided at the sub-fund level and not just the CCIV level. These modifications are required as a CCIV may have multiple sub-funds with different activities and investment strategies. It is important that members of each sub-fund receive information about the financial position of the sub-fund, and not just the CCIV as a whole.
- 5.6 The requirements to update ASIC information remain largely unmodified for CCIVs, although CCIVs are excluded from the requirements for directors to pass solvency resolutions. This ensures consistency with MISs, which are similarly not subject to this rule.

Summary of new law

5.7 Subdivision A of Division 4 of Part 8B.4 sets out generally how Chapter 2M applies to CCIVs. The rules apply to a retail CCIV as if it is a company or a disclosing entity (where relevant) and as though references to ‘director’ or ‘directors’ are references to the corporate director of the CCIV.

5.8 With the exception of Part 2M.2, about financial records, Chapter 2M does not apply to wholesale CCIVs. Part 2M.2 applies to a wholesale CCIV as if references to ‘director’ or ‘directors’ were references to the corporate director of the CCIV.

5.9 Subdivision B provides that a CCIV’s obligation to keep financial records extends to keeping financial records for its sub-funds.

5.10 Subdivision C governs what kind of financial reporting requirements for a retail CCIV and its sub-funds, what should be contained in those reports, and how auditing and auditor’s reports (Division 3 of Part 2M.3) apply to CCIVs and sub-funds.

5.11 Financial reporting requirements for sub-funds are largely similar to those for CCIVs. A CCIV is required to prepare an annual financial report for each sub-fund, but must prepare only one directors’ report for the CCIV as a whole, and not separate reports for each sub-fund. Half-year financial and directors’ reports must be prepared for sub-funds with enhanced disclosure (ED) securities on issue. An auditor for a sub-fund’s financial reports only audits those reports that must be kept for the sub-fund.

5.12 Subdivision D adapts the provisions for financial reporting for CCIVs and its sub-funds. Reports must be provided to the members of each sub-fund, as well as to members of the CCIV as a whole. It also sets out amendments for reporting requirements for CCIVs that are debenture issuers.

5.13 Subdivision E applies the requirement to re-lodge amended financial statements with ASIC to sub-funds.

5.14 Subdivision F deals with the appointment and removal of auditors for CCIVs. Where there is a relationship between the auditor and the CCIV or a corporate director (including current and former corporate directors, directors of the corporate director, and persons involved in the management of either), a conflict of interest situation may arise. The rules for appointment, removal and fees of auditors of a CCIV are adapted from those for MISs.

5.15 Subdivision G sets out the liability of directors of the corporate director of a CCIV for contraventions of Chapter 2M.

5.16 Division 5 of Part 8B.4 disappplies provisions about solvency resolutions (Part 2N.3 and section 348C of the Act) to CCIVs. This is in line with arrangements for MISs.

Comparison of key features of new law and current law

| <i>New law</i> | <i>Current law</i> |
|--|--------------------|
| Retail CCIVs are subject to the rules in Chapter 2M that apply to companies and disclosing entities (where relevant). Wholesale CCIVs are only subject to the rules about financial records in Part 2M.2. | No equivalent. |
| In addition to its own financial records, a CCIV must keep financial records for each sub-fund. | No equivalent. |
| A retail CCIV's annual directors' report must include specific details about the corporate director and its directors, such as whether a director of the corporate director is a party to a contract which entitles that director to a benefit of a right to call for or deliver shares in the CCIV. | No equivalent. |
| The financial reports of retail CCIVs and their sub-funds are to be audited in line with the requirements in Division 3 of Part 2M.3. | No equivalent. |
| A retail CCIV is required to report to members of each sub-fund the relevant financial reports. | No equivalent. |
| <p>If a retail CCIV is being audited, the auditor has a conflict of interest if it is currently or formerly:</p> <ul style="list-style-type: none"> the corporate director of the CCIV; a director of the corporate director; or a person involved in the management of the CCIV or corporate director. | No equivalent. |

Detailed explanation of new law

How the rules in Chapter 2M apply to CCIVs

5.17 Division 4 of Part 8B.4 modifies the application of Chapter 2M so that the reporting requirements in Chapter 2M apply to retail CCIVs in the same way as they apply to registered schemes. *[Schedule 1, item 4, subsection 1232(1); Schedule 2, item 104, note to section 285]*

5.18 Only the rules about financial records in Part 2M.2 apply to wholesale CCIVs. *[Schedule 1, item 4, subsection 1232(2)]*

5.19 Division 4 of Part 8B.4 also sets out how financial reporting applies at the sub-fund level. A retail CCIV that is a disclosing entity⁵ will also be subject to the additional disclosure requirements that apply to disclosing entities, such as the requirement for half-yearly financial reports.

Financial records

5.20 The obligation to keep written financial records in line with Part 2M.2 applies to retail and wholesale CCIVs and each sub-fund of a CCIV. A CCIV must keep written financial records that:

- record and explain the transactions relating to the sub-fund and the performance of the sub-fund; and
- would enable accurate financial statements to be prepared and audited for the sub-fund.

[Schedule 1, item 4, section 1232A; Schedule 2, item 105, notes to subsection 286(1)]

5.21 The obligations relating to financial records apply as though the sub-fund were the CCIV. This includes:

- the language requirements for the records;
- the physical format of the records; and
- where the records may be kept.

5.22 The corporate director is also entitled, as the director of the CCIV, to access the records under section 290. *[Schedule 1, item 4, section 1232B; Schedule 2, item 106, note to subsection 290(1)]*

Financial reporting

5.23 A retail CCIV is required to prepare a financial report and a director's report for each financial year. *[Schedule 1, item 4, section 1232C; Schedule 2, item 107, note to Division 1 of Part 2M.3]*

⁵ Refer to paragraph 8.21 for further detail on ED securities in a CCIV.

5.24 Retail CCIVs must also prepare an annual financial report for each of its sub-funds. The annual financial report for each sub-fund must contain:

- financial statements for the year;
- the notes to the financial statements; and
- the directors' declaration about the statements and notes.

[Schedule 1, item 4, section 1232D; Schedule 2, item 108, notes to subsection 292(1)]

5.25 The corporate director must make a directors' declaration in relation to the financial statement for each sub-fund of a retail CCIV.
[Schedule 1, item 4, section 1232D; Schedule 2, item 109, note to subsection 295(5)]

5.26 A CCIV that is a disclosing entity has additional reporting requirements. If any securities in a retail CCIV are ED securities, then the CCIV must prepare half-yearly financial and directors' reports in accordance with section 302 for each sub-fund to which the ED securities are referable. The remainder of Division 2 of Part 2M.3, which sets out the requirements for half-year financial and directors' reports, applies to CCIVs in relation to sub-funds to which ED securities are referable.
[Schedule 1, item 4, section 1232F; Schedule 2, items 113 and 114, note 4 to section 302 and note to subsection 303(5)]

Directors' reports

5.27 The directors' report for a CCIV must disclose the name of each officer of the CCIV and each officer of the corporate director of the CCIV, at any time during the financial year or since the end of the financial year, and for how long they were an officer of the CCIV or the corporate director. Additionally, the CCIV must provide the name of each corporate director of the CCIV during the financial year, and each director of a company that has been the corporate director of the CCIV at any time during the financial year or since the end of the financial year. *[Schedule 1, item 4, subsection 1232E(1); Schedule 2, items 109 and 110, note to subsection 295(5) and note to subsection 298(2)]*

5.28 This extension of the usual disclosure requirements reflects the unique corporate structure of a CCIV and ensures that there is full and proper disclosure of the individuals involved in the CCIV's decision-making.

5.29 The directors' report for a CCIV must contain the information required for registered schemes in subsection 300(13), including the fees paid to the corporate director and its associates out of the CCIV's assets during the financial year. *[Schedule 1, item 4, subsection 1232E(2); Schedule 2, items 111 and 112, notes to subsections 300(1) and 300(13)]*

Half-year reporting

5.30 A CCIV with any sub-funds that have ED securities referable to them must prepare a half-year directors' report for the CCIV and half-year financial reports for those sub-funds. As with the annual reports of a sub-fund, the requirements for these reports are tailored for CCIVs and sub-funds. The directors' report must include information about the directors of the corporate director of the CCIV as well as about the corporate director of the CCIV. *[Schedule 1, item 4, section 1232G; Schedule 2, items 115 and 116, notes to subsections 306(1) and (3)]*

5.31 The half-yearly directors' reports must disclose the name of each corporate director of the CCIV at any time during the half year or since the end of the half year, and for how long they were the corporate director of the CCIV. The CCIV must provide the name of each director of a company that has been the corporate director of the CCIV at any time during the half year or since the end of the half year. *[Schedule 1, item 4, section 1232G]*

5.32 Importantly, where a CCIV has one or more sub-funds that issue ED securities, the reporting obligations that apply to disclosing entities also apply to the CCIV in relation to those sub-funds. *[Schedule 1, item 4, note to subsection 1232F(4)]*

Auditing

Auditing and audit reports

5.33 The audit and auditor's report requirements in Division 3 of Part 2M.3 of the Act generally apply to retail CCIVs in the same way as for other companies, subject to modifications to also apply them at the sub-fund level. As such, these provisions, including in relation to the retention of audit papers, the independence of the auditor and the powers of the auditor, apply to the audit of a sub-fund.

5.34 The financial reports of both a retail CCIV and its sub-funds may be audited. The requirements for audits and auditor's reports that apply to a CCIV also apply in the same way to sub-funds of a CCIV. Applying the audit and auditor's report provisions in this way ensures that there is appropriate oversight of the financial reports at the sub-fund level. *[Schedule 1, item 4, subsections 1232H(1) and (2); Schedule 2, item 117, note to Division 3 of Part 2M.3]*

5.35 When auditing a sub-fund, the auditor must form an opinion about whether the CCIV has kept sufficient financial records to enable a financial report to be prepared and audited for the sub-fund, as well as kept other records and registers relating to the sub-fund as required by the Act. *[Schedule 1, item 4, subsection 1232H(3); Schedule 2, item 118, note to section 307]*

Auditing and audit reports

5.36 Provisions in the Act dealing with registration, independence, and other requirements for auditors apply in the normal way to auditors of retail CCIVs and sub-funds.

5.37 To ensure that there is clarity about when an auditor or audit company has a conflict of interest with a retail CCIV, the application rule that otherwise applies to Chapter 2M (see paragraph 5.17) does not apply for the purposes of subsection 324CD(2). *[Schedule 1, item 4, subsection 1232Q(2); Schedule 2, item 127, note to subsection 324CD(2)]*

5.38 Instead, when determining whether there is a conflict of interest situation between a retail CCIV and an auditor, the standard test is expanded to include consideration of the relationship between the auditor, audit firm or company, any current or former member of the firm or company, or an audit company's current or former management (including directors) and:

- the current or former corporate director;
- a current or former director of the corporate director;
- a person currently or formerly involved in the management of the CCIV; or
- a person currently or formerly involved in the management of the corporate director.

[Schedule 1, item 4, subsection 1232Q(1); Schedule 2, item 127, note to subsection 324CD(2)]

5.39 The auditor independence requirements in the Act are similarly extended to require consideration of the relationship between the auditor or audit firm and the corporate director of the audited CCIV (as an audited body). *[Schedule 1, item 4, section 1232R; Schedule 2, item 128, note to Subdivision B of Division 3 of Part 2M.4]*

5.40 The Bill also extends section 324CL of the Act, which determines who is an officer for the purposes of establishing whether an auditor is independent, to the officers of the corporate director of the CCIV. *[Schedule 1, item 4, section 1232S; Schedule 2, item 129, note to subsection 324CL(1)]*

5.41 The rules in Division 7 of Part 2M.4 concerning appointment, removal and fees of auditors for registered schemes apply to retail CCIVs

as though a retail CCIV were a registered scheme and the CCIV's corporate director was the responsible entity for the scheme. Division 7 is applied instead of Division 6 of Part 2M.4 (which provides for the appointment, removal and fees for auditors for companies) so that there is regulatory alignment between the requirements for registered schemes and CCIVs. *[Schedule 1, item 4, section 1232T; Schedule 2, items 130 and 131, notes to Division 6 and Division 7 of Part 2M.4]*

5.42 If an auditor, in the course of an audit, considers that there are circumstances that give rise to a significant contravention of the Act the auditor must notify ASIC. When determining whether a significant contravention has occurred, the auditor must consider the effect of the contravention on the overall financial position of the CCIV, sub-fund or both, as well as the adequacy of information available about their overall financial position. *[Schedule 1, item 4, subsection 1232H(4); Schedule 2, item 119, note to subsection 311(4)]*

Financial reporting to members

5.43 The requirement to provide annual financial reports to members under Division 4 of Part 2M.3 of the Act applies to retail CCIVs and sub-funds with modifications to account for reporting at the sub-fund level.

5.44 A retail CCIV must provide the reports required under section 314 of the Act, including financial reports, directors' reports, and auditor's reports, to its entire membership. In addition, the CCIV must provide the same reports in respect of each of its sub-funds to the sub-fund's members. *[Schedule 1, item 4, subsection 1232J; Schedule 2, item 120, note to Division 4 of Part 2M.3]*

5.45 The rules about annual financial reporting to members in Division 4 of Part 2M.3 are amended so that they apply to sub-funds. For a report relating to a sub-fund references to 'members' in this Division are treated as if they are references to members of the sub-fund. *[Schedule 1, item 4, subsection 1232J(2)]*

5.46 The documents that a retail CCIV must provide to the members of a sub-fund are either:

- the financial report relating the sub-fund for the year, and the auditor's report on the financial report; or
- a concise report relating to the sub-fund for the year, in compliance with subsection 314(2).

[Schedule 1, item 4, subsection 1232J(1); Schedule 2, item 121, note to subsection 314(1)]

5.47 A retail CCIV must report to its members and the members of each of its sub-funds within three months after the end of the financial

year. *[Schedule 1, item 4, section 1232K; Schedule 2, item 122, note to subsection 315(3)]*

5.48 Section 316 of the Act, about the types of annual financial information a member may choose to receive, is modified to apply appropriately for CCIVs. A member of a sub-fund is also a member of the CCIV, so may use section 316 to request reports relating to either the CCIV or the sub-fund of which they are a member. The modification excludes references in the section to directors' reports in relation to the section's application to sub-funds. These references are not relevant for annual financial reporting at the sub-fund level as a directors' report is required for the CCIV as a whole and not for each sub-fund (see paragraphs 5.27 to 5.29). Instead, the members of the CCIV may request the directors' report that applies to the CCIV as a whole. *[Schedule 1, item 4, section 1232L; Schedule 2, item 123, note to subsection 316(1)]*

5.49 The Act also sets out reporting requirements that apply to a company that issues debentures. These require that the issuer of debentures provide and make available certain reports to the trustee for debenture holders or the debenture holders. If a retail CCIV issues debentures, the modifications that apply to financial reports, directors' reports and auditor's reports (described in paragraphs 5.44 to 5.47) also apply in relation to the CCIV's reporting in relation to its debentures. *[Schedule 1, item 4, section 1232N; Schedule 2, item 125, note to subsection 318(1)]*

5.50 A CCIV is not required to hold an annual general meeting and the requirement to consider reports for financial records at an annual general meeting does not apply to CCIVs. *[Schedule 1, item 4, section 1232M; Schedule 2, item 124, note to subsection 317(1)]*

Liability

5.51 A corporate director of a CCIV and the natural person directors of the corporate director are each deemed to be directors of the CCIV for the purposes of placing liability for failing to take all reasonable steps to comply with certain requirements under Chapter 2M. This applies to the corporate director of a wholesale CCIV, and its natural person directors, to the extent that they fail to take all reasonable steps to comply with Part 2M.2 of the Act, as modified by Division 4 of Part 8B.4. *[Schedule 1, item 4, section 1232V; Schedule 2, items 133 and 134, notes to subsections 344(1) and 344(2)]*

Lodging amended reports with ASIC

5.52 If there is an amendment to the financial report of a sub-fund of a retail CCIV after that report has been lodged with ASIC, then the CCIV must lodge the amended report with ASIC and provide a copy to any member who requests one. *[Schedule 1, item 4, section 1232P; Schedule 2, item 126, note to subsection 322(1)]*

5.53 If the amendment is a material one, then the CCIV must notify the members of that sub-fund as soon as is practicable of the nature of the amendment and their right to obtain a copy of the amended report.
[Schedule 1, item 4, section 1232P]

Solvency resolutions

5.54 The requirements concerning solvency resolutions contained in Parts 2N.3 and 2N.4 of the Act do not apply to CCIVs or sub-funds. This ensures consistency of treatment between MISs and CCIVs.
[Schedule 1, item 4, section 1232W; Schedule 2, items 135 and 136, notes to Part 2N.3 and subsection 348C(1)]

Chapter 6

Operating a CCIV

Outline of chapter

6.1 Divisions 1 to 5 of Part 8B.5 of Chapter 8B establish the regulatory framework for operating the sub-funds of a CCIV and allocating the assets and liabilities to sub-funds.

Context of amendments

6.2 Fund managers generally offer investors a choice of funds with different investment strategies. This allows investors flexibility around the assets underpinning their investments and the risk-return exposures they wish to take. Through the facility of sub-funds, CCIVs will be able 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 cost savings for funds managers, compared with the existing MIS regime that does not allow the consolidation of multiple funds.

6.3 The concept of a sub-fund draws on overseas regulatory precedents such as the United Kingdom's OEIC regime, in particular by having sub-funds sit within a corporate structure but not as a separate legal entity.

6.4 The sub-fund framework allows managed funds to offer a variety of investment options through multiple sub-funds under a single 'umbrella' CCIV, and protects investors in a particular sub-fund of a CCIV by quarantining the business of that sub-fund from the business of all the other sub-funds of the CCIV. This is achieved by strictly segregating the assets and liabilities of each sub-fund from the assets and liabilities of the other sub-funds of the CCIV, including in an external administration context. See Chapter 7 for an explanation of the external administration arrangements for CCIVs and sub-funds.

Summary of new law

6.5 Divisions 1 to 5 of Part 8B.5 of Chapter 8B of the Bill establish the regulatory framework for sub-funds.

6.6 Division 1 clarifies the meaning of references to property of a CCIV and liabilities of a CCIV.

6.7 Division 2 sets out the fundamental requirement that every part of a CCIV's business must be referable to one and only one sub-fund and, taken together, the businesses of all of the sub-funds of a CCIV must comprise the entire business of the CCIV. Each sub-fund of a CCIV must be operated as a separate business.

6.8 Division 3 sets out the rules for determining what are the assets and liabilities of sub-funds and the segregated application of assets of sub-funds. It also establishes requirements for keeping an allocation register of the assets and liabilities of a CCIV.

6.9 Divisions 4 and 5 establish the purposes for which sub-fund assets may be applied and requirements for holding assets.

Comparison of key features of new law and old law

| <i>New law</i> | <i>Current law</i> |
|--|--------------------|
| A CCIV may only operate a part of its business if the part of the business has been registered as a sub-fund. Every part of the CCIV's business must be referable to a sub-fund, and no part may be referable to more than one sub-fund. | No equivalent. |
| Every part of the CCIV's business must be operated as a sub-fund and must be operated separately. | No equivalent. |
| The assets of the CCIV include the money and property the CCIV acquires in carrying on its business. | No equivalent. |
| All assets of a CCIV must be allocated to a sub-fund. This may occur through the automatic application of the allocation rules, or through an allocation determination made by the corporate director. | No equivalent. |
| An allocation determination made by the corporate director must be 'fair and reasonable in the circumstances'. | No equivalent. |
| A single asset cannot be allocated to more than one sub-fund. The corporate director must convert a single item of property that would otherwise be part of the assets of multiple sub-funds into money or other fungible property that can be | No equivalent. |

| <i>New law</i> | <i>Current law</i> |
|--|--------------------|
| allocated separately. | |
| The liabilities of the CCIV include all debts and expenses of the CCIV. This includes contingent or prospective liabilities including those that may be submitted to a liquidator in the context of winding up. | No equivalent. |
| All liabilities of a CCIV must be allocated to a sub-fund. If a liability does not relate solely to the business of a sub-fund, the corporate director must make an allocation determination in respect of the liability. | No equivalent. |
| The corporate director must set up and maintain a register of the assets and liabilities of the sub-funds of its CCIV. Assets and liabilities must be clearly identified as assets and liabilities of the sub-fund/s of the CCIV. | No equivalent. |
| A CCIV must not apply or deal with assets of a sub-fund except for certain purposes (including meeting the liabilities of the sub-fund or carrying on the business of the sub-fund). A CCIV must not apply or deal with the money or property of a CCIV that has not been clearly identified in the CCIV's allocation register. | No equivalent. |
| A depositary must hold the money and property of a retail CCIV and may hold the money and property of a wholesale CCIV. If the wholesale CCIV has a depositary then the rules that apply to the holding of the CCIV's assets apply to that wholesale CCIV. | No equivalent. |

Detailed explanation of new law

Operating a sub-fund as a separate business

6.10 A CCIV may only operate a part of its business if that part of the business has been registered as a sub-fund. For the rules relating to

registration of a sub-fund, see paragraphs 2.78 to 2.83. *[Schedule 1, item 4, subsection 1233B(1)]*

6.11 Each part of the CCIV's business that is registered must be operated separately from any other part of the CCIV's business. *[Schedule 1, item 4, subsection 1233B(2)]*

6.12 The effect of these requirements is that every part of the business of the CCIV must be referable to a sub-fund and no part of a CCIV's business can be referable to more than one sub-fund. If a CCIV has only one sub-fund, then the entire business of the CCIV is referable to that sub-fund. If a CCIV has multiple sub-funds, then each sub-fund must comprise a particular part of the CCIV's business and the business of every sub-fund of a CCIV must, when taken together, constitute the entire business of the CCIV.

6.13 If the corporate director does not register a part of the CCIV's business as a sub-fund or does not operate each sub-fund as a separate business, the corporate director commits an offence. If the corporate director acted intentionally, the offence is a fault-based offence with a maximum penalty of two years imprisonment. If intention cannot be established, the corporate director commits a strict liability offence with a penalty of 60 penalty units. *[Schedule 1, item 4, subsections 1233B(3) to (5); Schedule 2, item 202, table item 329J and 329JA in Schedule 3]*

6.14 The requirement to register sub-funds and operate them separately is critical for ensuring segregation between each of the parts of the CCIV's business. If the corporate director does not comply with these obligations, the integrity of the CCIVs regime would be fundamentally compromised. For this reason, the imposition of a strict liability offence is appropriate. The offence is consistent with the Guide.

Allocating assets and liabilities to sub-funds

6.15 The rules for allocating assets and liabilities of a CCIV to its constituent sub-funds are, to the greatest extent possible, automatic in their application. In this respect, they draw in part on requirements for statutory funds under the *Life Insurance Act 1995* and for health benefit funds under the *Private Health Insurance (Prudential Supervision) Act 2015*.

6.16 The allocation rules are designed to ensure that all of a CCIV's assets and liabilities can be allocated to its sub-funds by the force of the rules themselves and cannot be left unallocated due to an act or omission by the corporate director of the CCIV. This is particularly important given that key aspects of the regulatory framework for CCIVs, such as the rules for external administration, operate at the sub-fund level.

Assets of a sub-fund

6.17 The assets of a CCIV generally comprise the money and property the CCIV acquires in the course of conducting its business. References to ***property of a CCIV*** for the purposes of Part 8B.5 include PPSA retention of title property that has vested in the CCIV. For an explanation of the meaning of PPSA retention of title property and a discussion of when PPSA retention of title property vests in a CCIV, refer to paragraphs 7.150 to 7.152. This extension is required as references in the Act to property of a corporation do not include PPSA retention of title property unless expressly provided for (see the note to the definition of ‘property’ in section 9). It ensures that the asset allocation rules can apply comprehensively to property of a CCIV. *[Schedule 1, item 4, section 1233]*

6.18 As a general rule, money or property acquired by a CCIV forms part of the ***assets of a sub-fund*** to the extent that the money or property was obtained by applying assets of the sub-fund (for example, by making investments). *[Schedule 1, item 4, subsection 1233H(1); Schedule 2, item 3, definition of ‘assets’ in section 9]*

6.19 Subject to this general rule, the assets of a sub-fund comprise:

- amounts paid in consideration for the issue of any shares that are referable to the sub-fund;
- money deposited with or lent to the CCIV in connection with the issue of debentures that are referable to the sub-fund; and
- any other money or property of the CCIV that, at the time it is acquired, relates solely to the business of the sub-fund.

[Schedule 1, item 4, paragraphs 1233H(2)(a) to (c)]

6.20 Money or property of a CCIV that is not covered by these rules – that is, money or property that relates to the business of more than one sub-fund of a CCIV – is allocated to a sub-fund in the proportion that is fair and reasonable to allocate at the time the money or property is acquired. The proportion that is fair and reasonable to allocate may be nil. *[Schedule 1, item 4, paragraph 1233H(2)(d)]*

6.21 This is a default allocation that applies subject to there being an operative allocation determination in respect of the money or property. In the absence of an operative allocation determination, the default allocation operates to ensure money or property of a CCIV that relates to the business of more than one sub-fund can be included as assets of a sub-fund. Allocation determinations for assets are explained at paragraphs 6.24 to 6.36 of these explanatory materials.

6.22 Provision is also made for the regulations to prescribe matters to be considered in determining the extent to which money or property of a CCIV forms part of the assets of a sub-fund of the CCIV. This ensures

any gaps, ambiguities or unintended consequences resulting from the application of the rules governing what are the assets of a sub-fund can be addressed in a timely manner. This is critical given the central importance of the asset allocation rules for the effective operation of CCIVs and sub-funds. *[Schedule 1, item 4, subsection 1233H(5)]*

6.23 The assets of a sub-fund also include (or exclude) assets that the Court has ordered are to be (or are no longer to be) assets of the sub-fund as part of an arrangement or reconstruction (see paragraph 7.54). The Court's power to determine assets to be, or not to be, assets of a sub-fund operates despite the allocation rules for assets described above. *[Schedule 1, item 4, subsection 1233H(4)]*

Allocation determinations – assets

6.24 If money or property acquired by a CCIV in a single transaction relates to the business of more than one sub-fund of the CCIV, the corporate director must determine in writing the proportion of the money or property that is to be allocated to each sub-fund. The proportion that is to be allocated to a sub-fund may be nil. *[Schedule 1, item 4, subsections 1233J(1) and (2)]*

6.25 The determination by the corporate director must be fair and reasonable in the circumstances, having regard to the rules for what are assets of a particular sub-fund (see paragraphs 6.17 to 6.23). The determination must be made as soon as practicable after the money or property is acquired and must result in the money or property being wholly allocated between the CCIV's sub-funds. This protects the segregation of sub-fund assets by ensuring that all money or property that is subject to an allocation determination is allocated across the CCIV's sub-funds and there is no unallocated or partially allocated money or property. *[Schedule 1, item 4, subsection 1233J(3)]*

Example 6.1: All of the money or property must be allocated

A CCIV acquires property that relates to the business of both of its sub-funds. The corporate director determines that 50 percent of the property should be allocated to one sub-fund and 45 percent of the asset should be allocated to the other sub-fund.

This would not be a permissible allocation as it would leave 5 percent of the property unallocated to a sub-fund.

6.26 In practice, there may be several allocation determinations that are 'fair and reasonable in the circumstances'. The corporate director may determine an allocation of money or property to be fair and reasonable in the circumstances so long as it lies within the bounds of what a reasonable person in the corporate director's position could consider to be fair and reasonable in the circumstances. It does not matter that there may be other allocations that are fair and reasonable.

6.27 As long as the determination is one that a reasonable person in the corporate director's position could make, the allocation determination is operative from the time the money or property is acquired by the CCIV. If such an allocation determination is made after the money or property is acquired by the CCIV then the determination will be retrospective in its application. *[Schedule 1, item 4, subsections 1233J(4)]*

6.28 The particular proportion of money or property that is allocated to a sub-fund under an operative allocation determination is then taken to form part of the assets of the sub-fund from the time the money or property was acquired. This means that the default allocation for money or property that relates to the business of more than one sub-fund (see paragraphs 6.20 and 6.21) no longer applies in respect of that money or property. This ensures there is certainty about how the money or property is allocated between sub-funds as an operative allocation determination is definitive. *[Schedule 1, item 4, subsection 1233H(3)]*

Example 6.2: When the default allocation operates

On 31 December a CCIV acquires property that requires an allocation determination. The corporate director does not make an allocation determination until 2 January. The default allocation initially operates on 31 December and 1 January.

On 2 January, the corporate director makes an operative allocation determination. This allocation determination then operates retrospectively from the day the property was acquired, that is, from 31 December and replaces the default allocation, such that the default allocation no longer applies for the period 31 December to 1 January.

6.29 An operative allocation determination is irrevocable. This means that an operative determination may only be declared to be inoperative under an order of the Court. See paragraphs 6.60 to 6.62 for information about orders the Court can make in relation to assets and liabilities of sub-funds. *[Schedule 1, item 4, subsection 1233J(5) and section 1233Q]*

6.30 If an allocation determination is not 'fair and reasonable', does not result in the money or property being wholly allocated or does not comply with any relevant regulations, then the determination is not an operative determination. Instead, the corporate director's attempted exercise of its power has miscarried and there is no allocation determination by the corporate director. In the absence of an operative allocation determination, the default rule that applies to money or property that relates to the business of more than one sub-fund would continue to have effect (see paragraphs 6.20 and 6.21).

Example 6.3 An operative allocation determination

Grevillea CCIV has three sub-funds (Sub-fund A, Sub-fund B and Sub-fund C). Grevillea CCIV receives a lump-sum transfer of \$1,000 from an investor that is consideration for shares to the value of \$400 in

Sub-fund A and shares to the value of \$600 in Sub-fund B. Since the money is received in a single transaction and relates to the business of more than one of Grevillea CCIV's sub-funds, Grevillea CCIV's corporate director must make an allocation determination.

After considering the rules about when money or property forms part of the assets of a sub-fund – in particular the rule that amounts paid up in consideration for the issue of shares in a sub-fund are assets of the sub-fund – the corporate director determines that the allocation for Sub-fund A is \$400, the allocation for Sub-fund B is \$600 and the allocation for Sub-fund C is \$0. The corporate director's allocation determination is fair and reasonable in the circumstances having regard for the rules about when money or property forms part of the assets of a sub-fund and results in the \$1,000 lump sum being wholly allocated and so is an operative allocation determination.

As a result, \$400 becomes part of the assets of Sub-fund A and \$600 becomes part of the assets of Sub-fund B from the day the \$1,000 lump sum was received by Grevillea CCIV.

6.31 A failure to comply with the requirements for allocation determinations is a fault-based offence, punishable by up to two years imprisonment. See paragraph 3.123 for an explanation of why the penalty for this offence by the CCIV is expressed as a term of imprisonment. *[Schedule 1, item 4, subsection 1233J(6); Schedule 2, item 202, table item 329JJ in Schedule 3]*

6.32 A corporate director is not required to make an allocation determination if all of the sub-funds of the CCIV are being wound up. In a prosecution, the corporate director does not bear an evidential burden in relation to whether all of the sub-funds of the CCIV are in wind up as this information is not uniquely within the knowledge of the corporate director. In this situation, the liquidator or receiver must apply to the Court for an order declaring the extent to which money or property forms part of the assets of each sub-fund of the CCIV. For a discussion of how an allocation determination can be made or challenged after all of the sub-funds enter wind up, see paragraph 7.116. *[Schedule 1, item 4, subsections 1233KJ(7) to (9), paragraph 1233Q (1)(e)]*

When a single item of property must be converted into money or other fungible property

6.33 If, as a consequence of applying the allocation rules (see paragraphs 6.17 to 6.22), a single item of property forms part of the assets of two or more sub-funds, the corporate director must convert the property into money or other fungible property that can be allocated between the sub-funds. Once converted, the money or converted assets become assets of each sub-fund of the CCIV according to the proportion of the original asset that formed part of the assets each sub-fund. This is consistent with the general rule that is described in paragraph 6.18. *[Schedule 1, item 4, subsections 1233K(1) and (3)]*

6.34 For the purposes of this requirement, an item of property should be treated as a single item of property if it would generally be applied or dealt with as a single indivisible item in the ordinary course of commercial dealing. *[Schedule 1, item 4, subsection 1233K(2)]*

6.35 Converted property must also comply with the allocation rules; that is, no single item of converted property can form part of the assets of two or more sub-funds, as this would necessitate a further conversion of the property. *[Schedule 1, item 4, subsection 1233K(3)]*

6.36 The conversion must be completed as soon as practicable after the item of property is acquired. A failure to comply with the requirements for converting assets is a fault-based offence, punishable by up to two years imprisonment. *[Schedule 1, item 4, subsection 1233K(5); Schedule 2, item 202, table item 329JK in Schedule 3]*

Liabilities of a sub-fund

6.37 As with assets, liabilities that are incurred by a CCIV in the course of its business must be allocated to the CCIV's sub-funds. The ***liabilities of a CCIV*** for the purposes of the Act include:

- debts of the CCIV (including contingent and prospective debts);
- expenses of the CCIV: and
- anything else that might give rise to a debt or claim against the CCIV, whether present or future, certain or contingent, ascertained or sounding only in damages.

[Schedule 1, item 4, subsection 1233A(1)]

6.38 This definition is wide enough to capture contingent or prospective liabilities that may be submitted to a liquidator in the context of winding up.

6.39 For the purposes of the sub-fund rules in Part 8B.5, a CCIV is taken to have incurred a liability when the circumstances giving rise to the debt, expense or claim occur. A debt is generally incurred when the obligation to pay arises. A contingent claim usually arises when the circumstances giving rise to the potential future liability arises. *[Schedule 1, item 4, subsection 1233A(2)]*

6.40 The ***liabilities of a sub-fund*** of a CCIV at a particular time are:

- liabilities of the CCIV that relate solely to the business of that sub-fund; and
- any other liabilities of the CCIV to the extent that it is fair and reasonable in the circumstances to allocate the liability to the sub-fund.

[Schedule 1, item 1, subsection 1233L(1)]

6.41 In determining whether it is fair and reasonable in the circumstances to allocate a part of a liability to a sub-fund, the following matters must be taken into account:

- the extent to which the liability, at the time it arose, related to the business of the sub-fund;
- the extent to which the assets of the sub-fund, as against assets of other sub-funds, have been applied to meet the liability since it arose; and
- any regulations made for the purpose of determining whether a liability of a CCIV forms part of the liabilities of a sub-fund of the CCIV.

[Schedule 1, item 4, paragraph 1233L(1)(b) and subsection 1233L(4)]

6.42 The second of these three matters is ambulatory in its operation and is relevant in situations where the proportion of a liability that relates to the sub-fund may alter over time. It is for this reason that the liabilities of a sub-fund are defined with reference to a particular time.

Example 6.4 Variation in the allocation of a liability over time

Hovea CCIV takes out an interest only loan for two of its sub-funds, Sub-fund A and Sub-fund B, for the purposes of making investments for each of the sub-funds. 50 per cent of the loan principal is borrowed against the assets of sub-fund A and 50 per cent of the loan principal is borrowed against the assets of sub-fund B. Interest on the loan accrues daily and is payable in regular instalments.

At the time the first repayment of interest is due, 50 per cent of the interest charge is allocated to each sub-fund, reflecting the sub-funds' respective shares of the loan principal upon which the interest accrued during the first repayment period. At that time, Hovea CCIV pays 50 per cent of the interest charge and repays 25 per cent of the loan principal out of the assets of Sub-fund A and 50 per cent of the interest charge out of the assets of Sub-fund B (no principal is repaid out of the assets of Sub-fund B).

At the time the second payment of interest is due, taking into account the rules for determining when it is fair and reasonable in the circumstances to allocate a liability of a CCIV to a sub-fund, 33⅓ per cent of the interest charge forms part of the liabilities of Sub-fund A and 66⅔ of the interest charge forms part of the liabilities of Sub-fund B, since this reflects the sub-funds' respective shares of the outstanding principle on which interest accrued during the second repayment period.

6.43 As with the rules for assets of a sub-fund, default rules apply for liabilities of a CCIV that do not relate solely to the business of a particular sub-fund, subject to there being an operative allocation determination (see

paragraphs 6.45 to 6.53 in respect of the liability. In the absence of an operative allocation determination, the default rules ensure a liability of the CCIV that relates to more than one sub-fund can be included as part of the liabilities of a sub-fund.

6.44 The liabilities of a sub-fund also include (or exclude) liabilities that the Court has ordered are to be (or are no longer to be) liabilities of the sub-fund as part of an arrangement or reconstruction (see paragraph 7.54). The Court's power to determine liabilities to be, or not to be, liabilities of a sub-fund operates despite the allocation rules for liabilities described above. *[Schedule 1, item 4, subsection 1233L(3)]*

Allocation determinations – liabilities

6.45 If a liability of a CCIV relates to the business of more than one of the CCIV's sub-funds, the corporate director must determine in writing the proportion of the liability that is to be allocated to each sub-fund. The proportion of the liability that is to be allocated to a sub-fund may be nil. *[Schedule 1, item 4, subsections 1233M(1) and (2)]*

6.46 The corporate director's determination must be fair and reasonable in the circumstances, having regard to the rules for allocating liabilities to sub-funds (see paragraph 6.41). The determination must be made as soon as practicable after the liability arises, result in the liability being wholly allocated between the CCIV's sub-funds, and be expressed to apply from the time the liability arises. *[Schedule 1, item 4, subsection 1233M(3)]*

6.47 The rules governing allocation determinations for liabilities broadly mirror the requirements for allocation determinations for assets. For a discussion of when a determination is 'fair and reasonable' and why 100 per cent of a liability must be allocated, see paragraphs 6.25 to 6.27.

6.48 The proportion of the liability that is to be allocated to a sub-fund under an allocation determination may be varied in certain circumstances (see paragraphs 6.54 to 6.59) and thus an allocation determination has application at a particular time.

6.49 The allocation determination is operative at a time if the determination applies at that time and is one that a reasonable person in the corporate director's position could make. This means an operative determination may be retrospective in its application. *[Schedule 1, item 4, subsection 1233M(4)]*

6.50 The proportion of a liability that is allocated to a sub-fund under an operative allocation determination is then taken to form part of the liabilities of the sub-fund at that time. This means that the default allocation for a liability that relates to the business of more than one sub-fund (see paragraph 6.45) no longer applies in respect of that liability at that time. This ensures there is certainty about how the money or

property is allocated between sub-funds as an operative allocation determination is definitive. *[Schedule 1, item 4, subsection 1233L(2)]*

6.51 An operative allocation determination is irrevocable. This means that an operative determination may only be declared to be inoperative under an order of the Court. See paragraphs 6.60 to 6.62 for information about orders the Court can make in relation to assets and liabilities of sub-funds. Although it is irrevocable, the corporate director may vary an allocation determination in certain circumstances (see paragraphs 6.54 to 6.59). *[Schedule 1, item 4, subsection 1233M(5) and section 1233Q]*

6.52 A failure by the corporate director of a CCIV to comply with the requirements for allocation determinations is a fault-based offence, punishable by up to two years imprisonment. See paragraph 3.123 for an explanation of why the penalty for this offence by the CCIV is expressed as a term of imprisonment. *[Schedule 1, item 4, subsections 1233M(6); Schedule 2, item 202, table item 329JL in Schedule 3]*

6.53 A corporate director is not required to make an allocation determination if all of the sub-funds of the CCIV are being wound up. In a prosecution, the corporate director does not bear an evidential burden in relation to whether all of the sub-funds of the CCIV are in wind up as this information is not uniquely within the knowledge of the corporate director. In this situation, the liquidator or receiver must apply to the Court for an order declaring the extent to which a liability forms part of the liabilities of each sub-fund of the CCIV. *[Schedule 1, item 4, subsections 1233M(7) to (9)]*

Varying an allocation determination for a liability

6.54 A corporate director may vary an allocation determination if it is necessary to do so in order for the allocation determination to remain an operative determination. For example, a corporate director may decide to exercise this discretion when it is aware of a prospective change in circumstances that could render an allocation determination inoperative. *[Schedule 1, item 4, subsection 1233N(1)]*

6.55 A corporate director must vary a determination if a change in circumstances means that the existing determination becomes, or will become, inoperative. The variation must be made as soon as practicable after the change in circumstances occurs. One situation where a determination may become inoperative is if, as a consequence of one sub-fund paying the part of a liability it is allocated faster than another sub-fund pays the part of the liability it is allocated, the determination ceases to be fair and reasonable in the circumstances. *[Schedule 1, item 4, subsection 1233N(2)]*

6.56 The corporate director may need to vary a determination multiple times in response to changes in circumstances. That is, the

obligation to vary a determination has a recursive operation and operates in respect of the determination as subsequently varied.

6.57 If a corporate director fails to vary a determination as soon as practicable after a determination has or will become inoperative, the corporate director commits an offence punishable by up to two years imprisonment. The corporate director may have a defence available under section 9.1 of the Criminal Code if the corporate director was ignorant of the fact which resulted in the existing determination ceasing to be fair and reasonable. *[Schedule 1, item 4, subsection 1233N(5); Schedule 2, item 202, table item 329JM in Schedule 3]*

Requirements for variations of allocation determinations

6.58 A variation of an allocation determination must be in writing and meet the requirements for allocation determinations, namely, the variation must be fair and reasonable in the circumstances (including having regard to the time when the variation applies), comply with any relevant regulations and result in the liability being wholly allocated. For an explanation of these requirements, see paragraph 6.46. *[Schedule 1, item 4, subsection 1233N(3)]*

6.59 The variation must also specify the time at which the variation starts to apply, which may be an earlier or a later point in time from when the variation is made. The variation takes effect from the time specified in the variation. This means a variation could take effect retrospectively to make an inoperative allocation determination operative once again, or prospectively to take into account circumstances that will arise in the future that may render an allocation determination inoperative. *[Schedule 1, item 4, paragraph 1233N(3)(b), subsection 1233M(4), note to subsection 1233N(2)]*

Orders a Court can make in relation to assets and liabilities of sub-funds

6.60 A Court may make an order or give directions in relation to the assets and liabilities of a sub-fund of a CCIV where it is satisfied an allocation determination is not operative, the CCIV's allocation register is incorrect or deficient, or if all of a CCIV's sub-funds are being wound up. The corporate director of the CCIV, a liquidator or a controller of property of a sub-fund may make an application for such an order. *[Schedule 1, item 4, subsections 1233Q(2) and (3)]*

6.61 The Court may give any order or direction it considers appropriate in relation to the assets and liabilities of the sub-funds of a CCIV, including an order:

- requiring the corporate director to update or correct the CCIV's allocation register;
- declaring that money or property, or a liability, forms part of the assets of a particular sub-fund (or sub-funds);

- declaring the extent to which money or property, or a liability, forms part of the assets of the CCIV’s sub-funds;
- requiring the corporate director to make an allocation determination or to vary an allocation determination; or
- declaring that an allocation determination is not operative.

[Schedule 1, item 4, subsection 1233Q(1)]

6.62 Where an order requires a corporate director to make an allocation determination (or vary a determination), the determination (or variation) the corporate director makes must be consistent with the order unless the order authorises the corporate director to do otherwise, or the corporate director first obtains leave of the Court. *[Schedule 1, item 4, subsection 1233Q(4)]*

Documenting the allocation of assets and liabilities to sub-funds

Obligation to set up and maintain an allocation register

6.63 The corporate director must set up and maintain a register of the assets and liabilities of the sub-funds of the CCIV. Under section 1306 of the Act, the allocation register may be in written or electronic form. The maintenance of the allocation register continues to be a function of the corporate director even when one, some or all of the sub-funds of the CCIV are being wound up. *[Schedule 1, item 4, subsections 1233C(1) and (3)]*

6.64 This requirement applies from the time the CCIV is registered. A failure by the corporate director to meet this requirement is a strict liability offence with a penalty of 60 penalty units. The imposition of a strict liability offence is appropriate as the establishment and continuing maintenance of the allocation register is critical to ensuring there is a complete and up-to-date register of the assets and liabilities of the sub-funds of a CCIV. *[Schedule 1, item 4, subsection 1233C(2); Schedule 2, item 202, table item 329JB in Schedule 3]*

6.65 Assets and liabilities of a sub-fund of a CCIV must be clearly identified as assets and liabilities of the sub-fund. *[Schedule 1, item 4; subsections 1233D(1) and 1233E(1)]*

6.66 The information that must be recorded in the allocation register and when it must be recorded is set out in Table 6.1.

Table 6.1: Information to be recorded in the allocation register and when it must be recorded

| <i>Event</i> | <i>Requirements for the entry on the Register</i> | <i>When the entry must be made</i> |
|-------------------|---|------------------------------------|
| The CCIV acquires | The name of the sub-fund to which the | Within 5 business |

| <i>Event</i> | <i>Requirements for the entry on the Register</i> | <i>When the entry must be made</i> |
|---|--|---|
| money or property that relates solely to the business of a sub-fund of the CCIV. | money or property relates. | days after the money or property is acquired by the CCIV. |
| The CCIV acquires money or fungible property that relates to the business of more than one sub-fund of the CCIV (requiring an allocation determination but not conversion into money or other fungible property). | The proportion of the money or property that is allocated to each sub-fund by the allocation determination for the money or property. | Within 5 business days after the allocation determination is made. |
| The CCIV acquires a single item of property that forms part of the assets of two or more sub-funds of the CCIV (requiring an allocation determination and conversion into money or other fungible property). | Identification as an item of property requiring conversion. The proportion of the property applicable to each sub-fund under the allocation determination for the property. | Within 5 business days after the allocation determination is made. |
| Money or property is disposed of or otherwise ceases to be money or property of the CCIV. | Removal of the money or property as assets of the sub-fund. | Within 5 business days after the property is disposed of or otherwise ceases to be money or property of the CCIV. |
| The CCIV incurs a liability that relates solely to the business of a sub-fund of the CCIV. | The name of the sub-fund | Within 5 business days after the liability arises. |
| The CCIV incurs a liability that relates to | The proportion of the liability that is | Within 5 business days after the |

| <i>Event</i> | <i>Requirements for the entry on the Register</i> | <i>When the entry must be made</i> |
|--|---|---|
| the business of more than one sub-fund of the CCIV (requiring an allocation determination). | allocated to each sub-fund by the allocation determination for the liability. | allocation determination is made. |
| The CCIV discharges a liability or a liability otherwise ceases to be a liability of a sub-fund of the CCIV. | Removal of the liability as a liability of the sub-fund. | Within 5 business days after the liability is discharged or otherwise ceases to be a liability of the sub-fund. |

[Schedule 1, item 4, subsections 1233D(2) to (4), subsections 1233E(2) to (4)]

6.67 If the corporate director fails to maintain or update the record, the corporate director commits an offence. If the corporate director acted intentionally or recklessly, the maximum penalty is up to two years imprisonment. If intention or recklessness cannot be established, the offence is a strict liability offence with a penalty of 60 penalty units. The imposition of a strict liability offence is appropriate as the accuracy of the register is critical to preserving the segregation between the sub-funds and therefore the integrity of the regime. *[Schedule 1, item 4, subsections 1233D(5) and (6) and subsections 1233E(5) and (6); Schedule 2, item 202, table items 329JC, 329JD, 329JE and 329JF in Schedule 3]*

Retention of records

6.68 The records of entries made in the allocation register and allocation determinations (including variations of allocation determinations) for money or property and liabilities of the CCIV must be retained for seven years after the end of the year in which:

- the CCIV disposes of money or property; or
- a liability is discharged or otherwise ceases to be a liability of the CCIV.

[Schedule 1, item 4, subsections 1233G(1) and (2)]

6.69 The failure to retain records is a fault-based offence punishable by up to two years imprisonment (if intention or recklessness is established) or a strict liability offence punishable by up to 60 penalty units. The imposition of the strict liability offence is consistent with the Guide and appropriate because the retention of accurate records of the assets and liabilities of a sub-fund is critical for ensuring the segregation between the sub-funds and the integrity of the CCIV regime. *[Schedule 1,*

item 4, subsections 1233G(3) and (4); Schedule 2, item 202, table items 329JH and 329JI in Schedule 3]

Interaction with the winding-up rules

6.70 The register provides a record of the assets and liabilities of each sub-fund. This information may be particularly useful to creditors or liquidators.

6.71 A creditor of a CCIV may request information about an allocation and a copy of the relevant part of the register (see paragraphs 7.80 to 7.83 of these explanatory materials). *[Schedule 1, item 4, section 1233P]*

6.72 A liquidator must also be provided with access to the register (see paragraph 7.128). *[Schedule 1, item 4, subsections 1238N(2) and (5)]*

6.73 The corporate director must update the register even if one or more of the sub-funds are being wound up. In situations where all of the sub-funds are being wound up, the corporate director is not required to make allocation determinations but it must still record any self-allocating assets in the register and update the register to record any determinations made by the Court. For a more detailed discussion of the corporate director's obligations when one or more sub-funds are being wound up, see Chapter 7. *[Schedule 1, item 4, section 1233C(3)]*

6.74 If the corporate director fails to record an asset or liability in the allocation register, a liquidator may require the corporate director to record the asset or liability. For a discussion of this power, refer to paragraphs 7.113 to 7.115. *[Schedule 1, item 4, section 1233F]*

Segregated application of assets of sub-funds

Purposes for which an asset of a sub-fund may be applied

6.75 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 of the sub-fund;
- carrying on 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 or redeemable preference shares in the sub-fund;
- making a payment under the Chapter 5 external administration rules relating to winding up or certain priority

payments by a receiver (see Chapter 7 of these explanatory materials);

- complying with a Court-approved compromise or arrangement (see Chapter 7 of these explanatory materials);
- making any other distribution to members of the sub-fund that the CCIV is permitted to make under the Act and the CCIV's constitution (for example, half yearly distributions); or
- a purpose specified in the CCIV rules as a permitted purpose.

[Schedule 1, item 4, sections 1233S(1) and 1233T]

6.76 A CCIV is not permitted to apply or deal with money or property of a CCIV that has not been clearly identified in the CCIV's allocation register as forming part of the assets of a sub-fund or sub-funds.

[Schedule 1, item 4, section 1233R]

6.77 A CCIV is also not permitted to jointly apply the assets of two or more sub-funds to acquire a single asset or grant a single security interest over the assets of more than one sub-fund. These prohibitions are designed to preserve the segregation between the sub-funds. *[Schedule 1, item 4, subsection 1233S(3) and section 1233V]*

6.78 These provisions ensure that all of the business of a CCIV is conducted through its constituent sub-funds and that the assets of a sub-fund are not 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. Similarly, 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.

6.79 This protects the distinct investment activity carried on by each sub-fund from the impacts of the investment activity carried on by the other sub-funds of that CCIV.

6.80 A single item of property that forms part of the assets of two or more sub-funds of the CCIV (requiring conversion into money or other fungible property) may not be applied for any purpose other than for the purpose of converting the property (see paragraphs 6.33 to 6.36). *[Schedule 1, item 4, section 1233U]*

ASIC's power to make rules

6.81 ASIC may develop rules that specify additional permitted purposes for which sub-fund assets may be applied. These rules may also limit the circumstances where a CCIV can apply or deal with an asset of a sub-fund. *[Schedule 1, item 4, paragraphs 1233T(j) and 1233S(1)(b)]*

6.82 The power to make rules that modify the Act is designed to ensure that the law is flexible and can be developed in response to

particular circumstances that may not have been apparent at the time of drafting. It is also possible that the rules relating to a particular type of asset or purpose may be quite technical or detailed in nature or only relevant in certain circumstances.

6.83 For a more detailed discussion of the process for making the CCIV rules, see Chapter 12.

Court orders

6.84 A court can only make an order that is inconsistent with the rules relating to the purposes for which the assets of a sub-fund may be applied if the court considers the interests of justice to require it to do so. This caveat protects the integrity of the court by ensuring that it is not required to make an unjust order. *[Schedule 1, item 4, subsection 1233W(1)]*

6.85 Court orders have priority over the rules about the application of sub-fund assets. In other words, if a court makes an order that is inconsistent with these rules, the CCIV must apply the assets and liabilities of the sub-fund so as to comply with the court order, in priority over any other permitted application of sub-fund assets. *[Schedule 1, item 4, subsection 1233W(2)]*

Consequences of a non-compliant application

6.86 A contravention of the rules concerning the segregated application of assets by a CCIV does not invalidate a contract or transaction related to the contravention. This provides certainty for counterparties of the CCIV entering into contracts or transactions in respect of the business of a sub-fund. However, a Court may prevent a dealing or transaction by issuing an injunction under section 1324 of the Act. *[Schedule 1, item 4, subsection 1233X(1)]*

6.87 A person who contravenes the rules relating to the segregated application of assets commits an offence. If intention or recklessness is established, the offence carries a maximum of two years imprisonment. Otherwise, the offence is a strict liability offence with a penalty of 60 penalty units. *[Schedule 1, item 4, subsections 1233X(2) to (4); Schedule 2, item 202, table items 329JO and 329JP in Schedule 3]*

6.88 The imposition of a strict liability offence is appropriate and consistent with the Guide. The rules relating to the application of assets are critical to ensuring the segregation between sub-funds and protecting the interests of creditors and members of each sub-fund. In this way, they are fundamental to the integrity of the CCIV regime.

How CCIV assets are held

The depositary must hold assets of a CCIV

6.89 If a CCIV has a depositary, the depositary must hold the money and property of the CCIV. This requirement is subject to any CCIV rules and any other law of the Commonwealth. For an explanation of the requirements for a depositary, see Chapter 3 of these explanatory materials. *[Schedule 1, item 4, subsections 1233Y(1) and (2)]*

6.90 If money or property of a CCIV is required to be held by a depositary, the person holding the assets must transfer them to the depositary:

- if the CCIV does not have a depositary at the time the asset is acquired by the CCIV, within one business day of the CCIV's register being updated and the depositary taking up its position; or
- otherwise, on the day that the asset is acquired or the next business day.

[Schedule 1, item 4, subsection 1233ZB(1)]

6.91 A person who fails to transfer the relevant assets to the depositary commits a fault based offence punishable by up to two years imprisonment if intention or recklessness is established. Otherwise, the person commits a strict liability offence punishable by 60 penalty units. See paragraphs 6.101 to 6.103 for an explanation of why a strict liability offence is appropriate. *[Schedule 1, item 4, subsections 1233ZB(2) to (4); Schedule 2, item 202, table items 329JR and 329JS in Schedule 3]*

6.92 Division 5 of Part 8B.5 does not contain rules relating to the transfer of assets from a former depositary to a new depositary. This is instead covered by the bespoke rules relating to the replacement of the depositary. For a discussion of the novation of the former depositary's obligation to hold assets to the new depositary, see paragraph 3.290 of these explanatory materials. For an explanation of the former depositary's obligation to provide reasonable assistance to the new depositary (including by transferring assets), see paragraph 3.289.

Exceptions

6.93 There are two situations where the assets of a sub-fund of a CCIV may be held by someone other than the depositary. First, where a wholesale CCIV does not have a depositary, it may either chose to hold the assets of the CCIV itself or engage another person (for example, a custodian) to hold the assets of the CCIV. *[Schedule 1, item 4, section 1233Z(1)]*

6.94 Second, another law of the Commonwealth or the CCIV rules may state that a person other than the depositary of a CCIV must hold the assets, for example in the situation where property vests in the Commonwealth on deregistration of a sub-fund. *[Schedule 1, item 4, subsection 1233Y(2)]*

How CCIV money and property must be held

6.95 All assets of a sub-fund of a CCIV that have been clearly identified in the allocation register as such must be held separately from the assets of any other sub-fund of the CCIV. This requirement is subject to the CCIV rules. *[Schedule 1, item 4, subsections 1233ZC(1) and (4)]*

6.96 In addition, money or property of a CCIV that has not yet been identified in the CCIV's allocation register as forming part of the assets of a sub-fund and any property of a CCIV that must be converted into money or other fungible property must each be kept separately from any other money or property of the CCIV. This ensures that money or property which does not yet form part of the assets of a sub-fund is not applied as part of the business of the sub-fund. *[Schedule 1, item 4 subsections 1233ZC(2) and (3)]*

6.97 If a person fails to hold money or property of a CCIV in accordance with these requirements, the person contravenes a civil penalty provision and commits a strict liability offence punishable by up to 60 penalty units. For an explanation of why a strict liability offence is appropriate, see paragraphs 6.101 to 6.103. *[Schedule 1, item 4, subsection 1233ZC(5); Schedule 2, item 195, table item 45J in subsection 1317E(1), item 202, table item 329JT in Schedule 3]*

6.98 If the asset is held by a depositary or a person other than the CCIV, the asset must be held on trust for the CCIV. As a result, there is a fiduciary relationship between the person and the CCIV. However, nothing in this Chapter is intended to make a CCIV or its corporate director a trustee or trustees of the money or property of the CCIV. *[Schedule 1, item 4, section 1233ZA]*

6.99 This differs from the trust relationship that exists in the context of registered schemes where the responsible entity holds the assets on trust for the members. The difference reflects the fact that a CCIV, unlike a registered scheme, is a separate legal entity.

CCIV rules

6.100 ASIC has the power to make CCIV rules that modify various provisions in the new laws. One of the matters that may be covered in the CCIV rules is the segregation of assets. In particular, the CCIV rules may create exceptions for various classes of assets. For a discussion of the CCIV rules and the reasons that this power is needed, refer to Chapter 12 of these explanatory materials. *[Schedule 1, item 4, section 1233ZD]*

Why strict liability offences are appropriate

6.101 Several of the offences in Division 5 are strict liability offences. Under the Guide, the imposition of a strict liability offence is appropriate where it is necessary to protect the integrity of the regime. Each of the strict liability offences in Division 5 protects the integrity of the CCIV regime for the reasons set out in the following paragraphs.

6.102 The rules relating to the segregated holding of assets protect the segregation between the sub-funds and the interests of the creditors and members of each sub-fund. If the rules are breached and assets of different sub-funds are comingled, there is a real risk that assets of one sub-fund will be mistakenly used to discharge the liabilities of another sub-fund. This would threaten the integrity of the CCIVs regime.

6.103 Similarly, a strict liability offence is appropriate to promote compliance with the requirement to transfer money and property of the CCIV to the depositary (if a CCIV is required to or otherwise has a depositary). The depositary is a separately-licenced and independent third party that is under an obligation to hold the assets of each sub-fund separately on trust for the CCIV. In this way, the depositary is a key aspect of the investor protection regime. If assets of a CCIV are not transferred to its depositary, there is a risk that the assets of different sub-funds will be comingled and applied in a manner which undermines the segregation between the sub-funds, thereby threatening the integrity of the CCIVs regime.

Chapter 7

External Administration

Outline of chapter

7.1 This chapter outlines the process for winding up a sub-fund and how the other external administration processes apply in the CCIV context. It also outlines the process for deregistering a CCIV and sub-funds of a CCIV.

Context of amendments

7.2 The regulatory requirements for schemes of arrangement, receivership, winding up and voluntary administration for Australian companies – collectively referred to as external administration – are contained in Chapter 5 of the Act. The amendments contained in Parts 8B.6 of the Bill modify the application of the external administration framework so that, in the case of CCIVs, external administration applies to each sub-fund of a CCIV rather than to the CCIV as a whole. This ensures the strict segregation of the assets and liabilities of a sub-fund is preserved throughout the external administration process.

7.3 The provisions in Part 8B.6 draw in part on the approach adopted for external administration of health benefits funds under the *Private Health Insurance (Prudential Supervision) Act 2015*. Health benefits funds have some similarities to sub-funds of a CCIV in that they are not separate legal entities.

7.4 This approach contrasts with the approach used in the United Kingdom's OEIC regime, where sub-funds are deemed to have separate legal personality for the purposes of external administration (but not for any other purpose). The United Kingdom's approach has not been adopted because it would artificially distinguish between the legal personality of sub-funds before and during external administration.

7.5 Chapter 5A of the Act sets out the process for deregistering a company. The amendments contained in Part 8B.6 provide a process for deregistering sub-funds and CCIVs. A CCIV must be deregistered if it has no registered sub-funds.

Summary of new law

- 7.6 Part 8B.6 applies the external administration provisions on a sub-fund-by-sub-fund basis by using translation rules. Most significantly, the first translation rule requires references in the provisions to the company undergoing external administration to be read as a reference to the sub-fund.
- 7.7 Division 1 of Part 8B.6 contains general rules for construing terms and expressions.
- 7.8 Division 2 of Part 8B.6 sets out the translation rules for the arrangement and reconstruction provisions. It also expands the Court’s power to make orders in situations where the arrangement and reconstruction involves a sub-fund.
- 7.9 Division 3 of Part 8B.6 contains the translation rules for receivership and sets out the special duties and powers of receivers of sub-funds.
- 7.10 Division 4 of Part 8B.6 covers the winding up provisions. It sets out the translation rules and the powers of the corporate director, liquidator and depositary when a sub-fund is being wound up. It also makes bespoke amendments to the process for serving a statutory demand and applying to the Court for an order for winding up.
- 7.11 Divisions 5 to 7 of Part 8B.6 cover the insolvent trading provisions in Divisions 3 to 6 of Part 5.7B, offence provisions in Part 5.8 and miscellaneous machinery provisions in Part 5.9. Several of the offence provisions in these Parts (including the duty to prevent insolvent trading) are owed by the natural person directors of the corporate director.
- 7.12 Division 8 of Part 8B.6 covers the provisions for deregistration and transfer of registration of a CCIV and its sub-funds

Comparison of key features of new law and current law

| <i>New law</i> | <i>Current law</i> |
|--|--------------------|
| Core principle The external administration provisions apply on a sub-fund-by-sub-fund basis. | No equivalent. |

| <i>New law</i> | <i>Current law</i> |
|---|--------------------|
| <p>General translation rules</p> <p>The first translation rule replaces a reference in the provisions to the company undergoing external administration (the <i>relevant company</i>) with a reference to the sub-fund.</p> <p>The second translation rule replaces a reference in the provisions to the ‘directors’ of the relevant company with a reference to the corporate director.</p> <p>The third translation rule replaces a reference in the provisions to the ‘officers’ of the relevant company with a reference to the corporate director, a shadow director or an external administrator of a sub-fund.</p> <p>The fourth and fifth translation rules replace a reference in the provisions to the ‘shares’ or ‘debentures’ of the relevant company to the shares or debentures referable to the sub-fund.</p> | No equivalent. |
| <p>Arrangements and reconstructions</p> <p><i>Sub-fund by sub-fund application</i></p> <p>The general translation rules apply to the arrangement and reconstruction provisions in Part 5.1 (and related provisions).</p> <p>The second translation rule is also extended for the reconstructions and amalgamation provisions. This extension requires references to the ‘director’ to be read as including the natural person directors of the corporate director, in addition to the corporate director.</p> <p>Arrangements and reconstructions involving multiple sub-funds are treated as separate arrangements for the purposes of Part 5.1.</p> | No equivalent. |

| <i>New law</i> | <i>Current law</i> |
|---|--------------------|
| <p><i>Persons prohibited from administering an arrangement</i></p> <p>The natural person directors of a corporate director and the depositary must not administer an arrangement or compromise.</p> <p><i>Additional Court powers</i></p> <p>The Court has additional powers to make orders when the arrangement or reconstruction involves sub-funds. This includes the power to make any order it considers appropriate in relation to the assets and liabilities of the sub-fund.</p> | |
| <p>Receivers and other controllers of property</p> <p><i>Sub-fund by sub-fund application</i></p> <p>The general translation rules apply to the receivership provisions in Part 5.2 and Division 2B of Part 5.7B (and related provisions).</p> <p>If a controller is appointed in relation to property allocated to more than one sub-fund, it is treated as two separate appointments.</p> <p><i>Persons prohibited from acting as a receiver</i></p> <p>The natural person directors of a corporate director and the depositary are prohibited from acting as a receiver.</p> <p><i>Controller's relationship with the depositary</i></p> <p>The controller must notify the depositary of its appointment and if it ceases to act.</p> <p>The controller's functions and powers prevail over those of the corporate director.</p> <p><i>Dealing with assets</i></p> <p>Receivers may instruct the depositary</p> | |

| <i>New law</i> | <i>Current law</i> |
|---|-----------------------|
| <p>in relation to dealing with assets of the sub-fund in receivership.</p> <p>Receivers and other controllers may challenge an allocation determination before the Court.</p> <p>The controller may inspect the allocation register and any other books of the CCIV to the extent that inspection is necessary to attain the objectives for which the controller was appointed.</p> | |
| <p>Winding up of sub-funds</p> <p>The general translation rules apply to the winding up provisions in Parts 5.4 to 5.6, Divisions 2 and 2A of Part 5.7B and Schedule 2 to the Act (and related provisions).</p> <p><i>Statutory demands</i></p> <p>A statutory demand served on a CCIV must specify the name of the sub-funds of the CCIV to which the debt relates and the proportion of the debt that relates to each sub-fund.</p> <p>A creditor may seek information about the name of the sub-funds and the proportion of the debt allocated to each sub-fund from the corporate director.</p> <p>A CCIV may dispute:</p> <ul style="list-style-type: none"> • the identity of the sub-funds or the proportion of the debt; or • the amount or existence of the debt. <p>If the statutory demand fails to identify the correct sub-fund or the correct proportion, the Court may make an order varying the statutory demand.</p> <p><i>Applications to wind up a sub-fund</i></p> <p>An application to wind up a sub-fund in insolvency must specify the sub-</p> | <p>No equivalent.</p> |

| <i>New law</i> | <i>Current law</i> |
|--|--------------------|
| <p>fund.</p> <p>The CCIV may dispute the name of the sub-fund if the application does not rely on a failure to comply with a statutory demand. If the Court accepts the CCIV's submissions, the Court may substitute the name of the sub-fund on the application.</p> <p><i>Persons prohibited from acting as a liquidator or provisional liquidator</i></p> <p>The natural person directors of a corporate director and the depositary of a CCIV are disqualified from acting as a liquidator or provisional liquidator of a sub-fund of the CCIV.</p> <p><i>Powers of liquidator, corporate director and depositary</i></p> <p>A liquidator or provisional liquidator may only exercise a power or perform a function to the extent that it relates solely to the carrying on of the sub-fund that is being wound up.</p> <p>The corporate director remains in office but must not exercise a function or power that relates solely to the sub-fund that is being wound up.</p> <p>The liquidator does not have the power to determine the proportion of assets and liabilities that are allocated to each sub-fund but it may:</p> <ul style="list-style-type: none"> • direct the corporate director to make an allocation determination; or • challenge an allocation determination before the Court. <p>The liquidator has the power to instruct the depositary about the assets of the sub-fund that is being wound up. The liquidator may also seek reasonable assistance from the depositary.</p> | |

| <i>New law</i> | <i>Current law</i> |
|---|--------------------|
| <p><i>Auditor's functions</i></p> <p>An auditor does not need to undertake any audit activities for the sub-fund that is being wound up.</p> <p><i>Books</i></p> <p>The corporate director must deliver to the liquidator all books relating solely to the sub-fund being wound up.</p> <p>The corporate director may inspect the books held by the liquidator, and the liquidator may inspect the books held by the corporate director or the depositary (to the extent that the books are necessary for the person to perform their functions).</p> <p>A liquidator, provisional liquidator or ASIC may apply to the Court for a search and inspection for any books of the CCIV. They may also apply for a search and seizure warrant for books of the CCIV that relate solely to the sub-fund that is being wound up.</p> <p><i>Proof and ranking of claims</i></p> <p>The liquidator must consider whether a debt or claim submitted to it is a liability of the sub-fund.</p> <p>If the debt is not a liability of the sub-fund, the debt is not admissible to proof.</p> <p>If the debt is a liability of the sub-fund, the liquidator must determine the value of the debt or refer the question to the Court.</p> <p><i>Voidable transactions</i></p> <p>'Unreasonable director-related transactions' include certain payments, dispositions and issues made to either the corporate director or a natural person director. These transactions are voidable.</p> | |

| <i>New law</i> | <i>Current law</i> |
|---|--------------------|
| <p><i>Operating a CCIV while disqualified</i></p> <p>A person who operates a CCIV while a sub-fund is being wound up or within four years of the date that sub-fund enters into winding up may be personally liable for the sub-fund's debts.</p> | |
| <p>Property recovery provisions</p> <p>The translation rules apply to the provisions relating to recovery of property and insolvent trading in Divisions 3, 4, 5 and 6 of Part 5.7B. However, the second and third translation rules are modified to ensure that the natural person directors (rather than the corporate director) owe the duty to prevent insolvent trading.</p> | |
| <p>Offence and miscellaneous provisions</p> <p>The general translation rules apply to the external administration offences in Part 5.8 and the miscellaneous provisions in Part 5.9.</p> <p>The offence for fraud by officers (existing section 596) and the Court's power to summons a person for mandatory examination (existing section 596A) also apply to the natural person directors of the corporate director.</p> | |
| <p>Deregistration of sub-funds</p> <p>A sub-fund may be voluntarily deregistered, on application by the CCIV, the corporate director or the liquidator of the sub-fund, if the CCIV is not a party to any legal proceedings relating to the sub-fund and the sub-fund has no remaining assets or liabilities. ASIC may also initiate the deregistration of a sub-fund in certain circumstances.</p> | No equivalent. |

| <i>New law</i> | <i>Current law</i> |
|---|--------------------|
| ASIC must deregister a sub-fund if the Court orders the sub-fund's deregistration following the conclusion of a reconstruction under Part 5.1, the release of a liquidator or the lodgment of an end of administration return. | No equivalent. |
| Deregistration of a CCIV A CCIV must be deregistered if it does not have any registered sub-funds. A CCIV that is also an Australian passport fund ceases to be a passport fund when it is deregistered. | No equivalent. |
| Retention of books The CCIV must retain the books of the sub-fund for three years after the sub-fund is deregistered. If the CCIV is also deregistered, the books of the sub-fund and the CCIV must be held by the last corporate director of the CCIV. | No equivalent. |

Detailed explanation of new law

General principles

Provisions apply on a sub-fund-by-sub-fund basis

7.13 The provisions relating to external administration apply on a sub-fund-by-sub-fund basis. This is designed to preserve the segregated application of assets of each sub-fund. It also accommodates the possibility that different sub-funds of a CCIV could enter an external administration process at different times. *[Schedule 1, item 4, sections 1237 and 1238]*

7.14 Notwithstanding that the provisions apply on a sub-fund-by-sub-fund basis, they recognise that the CCIV is the only legal entity. Unlike the OEIC regime in the United Kingdom, sub-funds are not deemed to have separate legal personality for winding up. This ensures that the legal character of a sub-fund remains consistent throughout its life and a sub-fund does not become imbued with legal personality when it enters into external administration.

Translation rules

7.15 The main mechanism that is used to apply the external administration provisions on a sub-fund-by-sub-fund basis is the translation rules. These rules ensure that the existing external administration provisions, as they relate to companies, can be applied to sub-funds of a CCIV by substituting references to certain key words with references to alternative words that are relevant in the CCIV context.

[Schedule 1, item 4, sections 1236B, 1237E, 1238B, 1239A, 1240 and 1241]

7.16 The translation rules also apply, by application of section 23 of the *Acts Interpretation Act* 1901, irrespective of whether the section uses the singular of the word or the plural, for example, it applies to both references to ‘a share in the company’ and ‘shares in the company’.

7.17 The translation rules applying to each of the Chapter 5 external administration procedures for CCIVs (that is, schemes of arrangement, receivership, winding up and voluntary administration) are broadly equivalent. The main difference relates to whether references to ‘directors’ and ‘officers’ include the natural person directors of the corporate director. Subtle differences also exist to reflect differences in the language in the various parts of Chapter 5. For example, the entity subject to the external administration procedure is referred to as a ‘corporation’ in Part 5.2 and a ‘company’ in Part 5.8. These differences are noted in the discussion below.

First translation rule – references to the company

7.18 The first translation rule substitutes a reference in the provisions to the company that is, or is to be, the subject of an external administration procedure with a reference to ‘the sub-fund’. The company that is, or is to be, subject to the external administration procedure is referred to as the **relevant company**. For example, in the context of the winding up provisions in Parts 5.4 to 5.6, the relevant company is the company that is to be, or has been, wound up or is the subject of an application for a winding up order. *[Schedule 1, item 4, item 1 of the tables in subsections 1236B(4), 1237E(4), 1238B(4), 1239A(4), 1240(4) and 1241(3)]*

7.19 The first translation rule applies irrespective of whether the relevant company is referred to as a company, a body corporate or in some other way. It also applies where the reference to the company is implicit, for example, in paragraph 459P(1)(b) where the provision refers to a ‘creditor’ and it is implied that it is a ‘a creditor of the relevant company’. *[Schedule 1, item 4, item 1 of the tables in subsections 1236B(4), 1237E(4), 1238B(4), 1239A(4), 1240(5) and 1241(4)]*

7.20 The first translation rule shifts the focus of the provisions from the CCIV to the sub-fund. It recognises that part of the business of the CCIV relates to the sub-fund, which can be wound up (or undergo another

external administration process) independently of the parts of the business that relate to the other sub-funds.

7.21 There are two situations where the first translation rule does not apply, namely, where:

- the reference is to a company other than the ‘relevant company’ (see, for example, section 588V, which refers to a ‘holding company’); and
- the reference is to the ‘relevant company’ but the context requires the entity to have the capacity and powers of a legal person (see examples and further discussion below).

[Schedule 1, item 4, subsections 1236B(4) and (5), 1237E(4) and (5), 1238B(4) and (5), 1239A(4) and (5), 1240(5) and (6) and 1241(4) and (5)]

7.22 Examples of the types of provisions that refer to the legal capacity and powers of the company include references to the company:

- entering into a transaction;
- paying compensation;
- being bound by a compromise or arrangement;
- dealing with property;
- bringing or being a party to legal proceedings;
- executing a document or instrument;
- giving or receiving a document or notice;
- making an application to the Court or ASIC;
- having a bank account;
- having a constitution (as a sub-fund does not have a constitution); and
- contravening a provision of the Act.

7.23 In sections which assume legal personality, references to the company continue to be read as references to the CCIV. However, to the extent that it is possible, the operation of these sections is confined to the sub-fund. This approach recognises that the sub-fund is not a legal entity, while still ensuring that external administration applies on a sub-fund-by-sub-fund basis. *[Schedule 1, item 4, subsections 1236B(6), 1237E(6), 1238B(6), 1239A(6), 1240(7) and 1241(6)]*

Example 7.1: Applying the first translation rule

Section 459A states that ‘[o]n application under section 459P, the Court may order that an insolvent company be wound up in insolvency’.

Applying the first translation rule, the reference to the insolvent ‘company’ must be read as a reference to the insolvent ‘sub-fund’. In other words, the Court must make an order that refers to a single sub-fund of the CCIV, rather than the CCIV as a whole.

Example 7.2: Situation where the first translation rule does not apply

Section 471B provides that:

While a company is being wound up in insolvency or by the Court, or a provisional liquidator of a company is acting, a person cannot begin or proceed with:

(a) a proceeding in a court against the company

(emphasis added)

Applying the first translation rule, the first and second reference to a company should be read as a reference to the sub-fund that is being wound up and a provisional liquidator of that sub-fund.

The first translation rule does not apply to paragraph (a) because only a legal person can be sued. This reference should continue to refer to the company, but its operation should be confined to the sub-fund in wind up. For example, it captures proceedings in a court that relate to assets allocated to the sub-fund that is being wound up, but not proceedings that relate solely to assets and liabilities allocated to other sub-funds.

Second and third translation rules – references to director, officer etc.

7.24 The second translation rule replaces a reference in the provisions to ‘director’, ‘directors’ and ‘board’ with a reference to the ‘corporate director of the CCIV’. *[Schedule 1, item 4, item 2 of the tables in subsections 1236B(4), 1237E(4), 1238B(4), 1239A(4), 1240(5) and 1241(4)]*

7.25 The second translation rule is necessary as CCIVs, unlike other companies, do not have natural person directors. The effect of the second translation rule is that references to directors generally do not include natural person directors of the corporate director.

7.26 The third translation rule clarifies that a reference to the ‘officer’ of the relevant company refers to the:

- corporate director of the CCIV;
- a shadow director of the CCIV;⁶ or
- a receiver, receiver and manager, administrator of a deed of company arrangement, liquidator or trustee administering a compromise for the sub-fund that is in external administration.

⁶ A CCIV is only permitted to appoint a corporate director as a director. However, if a person acts as a shadow director, that person is bound by all of the requirements that apply to other officers of the CCIVs.

[Schedule 1, item 4, item 3 of the tables in subsections 1236B(4), 1237E(4), 1238B(4), 1239A(4), 1240(5) and 1241(4)]

7.27 This third translation rule recognises that a CCIV may only appoint a single corporate director, but that a different external administrator may be appointed for each sub-fund (as Chapter 5 applies to CCIVs on a sub-fund-by-sub-fund basis).

7.28 There are some exceptions to the second and third transaction rules. These provide that the natural person directors of the corporate director:

- are each taken to be a director of a sub-fund for the purposes of the arrangement and reconstruction provisions (see paragraph 7.48 of these explanatory materials for an explanation of the special second translation rule that applies to the arrangements and reconstructions provisions);
- are ineligible to act as a receiver or a liquidator (see paragraphs 7.58 and 7.105);
- are required to provide reasonable assistance to the liquidator under existing section 530A (see paragraph 7.109);
- each individually owe a duty to ensure that a CCIV does not trade in relation to a sub-fund when the sub-fund is insolvent (see paragraph 7.158 for an explanation of the special second translation rule for the property recovery provisions);
- may commit an offence under existing section 596 if they use fraud to induce a person to give credit to the CCIV, gift the sub-fund's property with the intent to defraud or engage in certain other similar conduct (see paragraph 7.164); and
- may be mandatorily summonsed up to two years after the end of the external administration procedure under existing section 596A (see paragraph 7.164).

Example 7.3: Applying the third translation rule

A CCIV has two sub-funds. The corporate director of the CCIV is Director Services Ltd and the CCIV has no shadow directors. A receiver has been appointed to the first sub-fund. The second sub-fund is about to be wound up.

Paragraph 532(2)(c) of the existing law prohibits a person from being appointed as the liquidator of a company if the person is 'an officer or employee of the company (otherwise than by reason of being a liquidator of the company or of a related body corporate)' (emphasis added).

Applying the third translation rule, Director Services Ltd cannot be appointed as the liquidator for the second sub-fund.

Paragraph 532(1A)(c), when read subject to the third translation rule, does not prohibit the receiver of the first sub-fund from being appointed as the liquidator of the second sub-fund. This is because a reference to an ‘officer’ only includes the receiver of the sub-fund that is to be wound up, not a receiver appointed in respect of another sub-fund.

Fourth and fifth translation rules

7.29 The fourth translation rule substitutes a reference to ‘shares’ in the relevant company with a reference to the ‘shares referable to the sub-fund’. This recognises that all shares are shares of a CCIV but the rights attaching to those shares must relate to only one sub-fund. Refer to paragraphs 4.14 to 4.18 of these explanatory materials for an explanation of the meaning of shares being referable to a sub-fund. *[Schedule 1, item 4, item 4 of the tables in subsections 1236B(4), 1237E(4), 1238B(4), 1239A(4), 1240(5) and item 3 of the table in subsection 1241(4)]*

7.30 Similarly, the fifth translation rule replaces references to the ‘debentures’ of a relevant company with references to the ‘debentures referable to the sub-fund’. *[Schedule 1, item 4, item 5 of the table in subsections 36B(4), 1237E(4), 1238B(4)]*

7.31 The fifth translation rule is not required for the property recovery provisions or the offence or miscellaneous provisions in Divisions 5, 6 and 7 of Part 8B.6 as there is no reference to ‘debentures’ in these Parts.

Example 7.4: Applying the fourth translation rule

A CCIV has two sub-funds. The Court orders the winding up of the first sub-fund. The CCIV then transfers shares in the second sub-fund.

Existing section 486A voids certain transfers of shares in a company that are made after the commencement of winding up by the Court.

Applying the fourth translation rule, the reference to shares is read as a reference to the shares referable to the first sub-fund. Therefore, the transfer of shares in the second sub-fund is not void, notwithstanding that it occurred after the first sub-fund commenced winding up.

Sixth, seventh and eighth translation rules

7.32 The sixth and seventh translation rules replace references to ‘a general meeting’ of the relevant company, and to the relevant company ‘in general meeting’ with a reference to ‘a meeting of members of the sub-fund’ and ‘the members of the sub-fund at a meeting of members of the sub-fund’. The rules for members’ meetings of sub-funds are explained in Chapter 3 of these explanatory materials. *[Schedule 1, item 4, items 6 and 7 of the table in subsection 1238B(4)]*

7.33 The eighth translation rule replaces references to ‘incorporation’ of the relevant company with a reference to ‘registration of the sub-fund’. The rules for registration of a sub-fund are explained in paragraphs 2.78 to

2.84 of these explanatory materials. *[Schedule 1, item 4, item 8 of the table in subsection 1238B(4)]*

7.34 The sixth, seventh and eighth translation rules are only required in the parts of Chapter 5 that relate to winding up. The Corporations legislation does not refer to ‘general meetings’ or ‘incorporation’ in the context of any other external administration procedures.

Example 7.5: Applying the seventh translation rule

Subsection 495(1) of the existing law requires the ‘company in general meeting’ to appoint a liquidator for a voluntary wind up.

Applying the seventh translation rule, the liquidator may be appointed at a members’ meeting of the sub-fund. There is no need call a general meeting of the CCIV.

Example 7.6: Applying the eighth translation rule

Paragraph 461(1)(c) of the existing law provides that a company may be wound up if it does not commence business within one year from its incorporation or suspends its business for a whole year.

Applying the eighth translation rule, a sub-fund in a CCIV may be wound up if business is not commenced within one year from its registration or if the business of the sub-fund is suspended for a whole year.

Terms defined in relation to a company

7.35 A special translation rule applies to terms or expressions that are only defined in relation to a company or body corporate. This rule states that the company definition is applied but the CCIV is treated as if it had only the sub-fund that is in external administration. All of the other sub-funds of the CCIV are disregarded. *[Schedule 1, item 4, subsection 1235(2)]*

7.36 Examples of terms that are defined only in relation to a company or body corporate include:

- related entity in relation to a body corporate;
- holding company;
- subsidiary of a company; and
- affairs of a body corporate.

7.37 Some terms are defined both in relation to a company and in relation to a sub-fund. The special rule for terms defined in relation to a company is not used in these instances. Instead, the definition of the term in relation to a sub-fund is used in the ordinary way. The main terms used in Chapter 5 which are defined in relation to a sub-fund are set out in Table 7.1. *[Schedule 1, item 4, subsection 1235(1)]*

Table 7.1: Terms defined in relation to a sub-fund

| <i>Term</i> | <i>Definition</i> |
|---|---|
| Assets in relation to a sub-fund | The meaning given by section 1233H of the Bill (see paragraphs 6.17 to 6.36 of these explanatory materials). |
| Creditor of a sub-fund | A creditor of a CCIV if the debt or claim is to any extent a liability of the sub-fund. |
| Contributory in relation to a sub-fund | A person who is a contributory of the CCIV if the person is liable as a member or past member of the sub-fund or is a holder of shares referable to the sub-fund. |
| Extraordinary resolution | A resolution passed by at least 50 per cent of the votes cast by members entitled to vote on the resolution (that is, members of the sub-fund) including members who are not present in person or by proxy. |
| Insolvent in relation to a fund | A sub-fund is insolvent if the CCIV is not able to pay the debts that are liabilities of the sub-fund as, and when, they become due and payable. |
| Liabilities in relation to a sub-fund | The meaning given by section 1233L of the Bill (see paragraphs 6.37 to 6.59 of these explanatory materials). |
| Member in relation a sub-fund | A person who is a member of the CCIV and holds one or more shares referable to the sub-fund. |
| Property of a sub-fund | Something that is property of the CCIV and an asset of the sub-fund of the CCIV. |
| Secured creditor of a sub-fund of a CCIV | A secured creditor of the CCIV if the debt owing to the creditor is a liability of the sub-fund. |
| Solvent in relation to a sub-fund | A sub-fund is solvent if the CCIV is able to pay the debts that are liabilities of the sub-fund as, and when, they become due and payable. |
| Special resolution, in relation to a sub-fund of a CCIV | A resolution passed by at least 75% of the votes cast by members entitled to vote on the resolution (that is, members of the sub-fund) |

[Schedule 1, item 4, sections 1233H, 1233L and 1231R; Schedule 2, items 3, 8, 10, 14, 16-18, 27-28, 31-32, section 9, definitions of 'assets', 'contributory', 'creditor of a sub-fund', 'extraordinary resolution', 'insolvent', 'liabilities', 'member', 'solvent' and 'special resolution', section 51E, definition of 'secured creditor', section 51F]

Other modifications

7.38 The new law provides that any other modifications that are necessary may be made so that the provisions apply to a sub-fund instead of a company. This provides the flexibility to deal with any circumstances

that are not directly addressed by the Bill. It reflects a precedent used in other parts of the Act where it is not possible to account expressly for all possible scenarios (see, for example, paragraph 233(2)(b) and subsection 324BD(2) of the Act). *[Schedule 1, item 4, subparagraphs 1236B(1)(b), 1237E(1)(b), 1237F(1)(b)(ii), 1237G(1)(b)(i), 1237H(1)(b) and 1241 (1)(b)]*

7.39 When determining whether a modification is necessary, the following factors could be considered:

- the unique characteristics which distinguish CCIVs from other types of companies;
- the fact that a sub-fund is not a legal person; and
- the object of the translation rules, namely, to preserve the segregated application of assets of a sub-fund.

Provisions to which the translation rules apply

7.40 The translation rules apply to most of the provisions in Chapter 5 of the Act that relate to arrangements and reconstructions, receivership, winding up, recovery of property, external administration offences and other miscellaneous external administration provisions (see Table 7.2). *[Schedule 1, item 4, paragraphs 1236B (2)(a), 1237E(2)(a), 1238B(2)(a), 1239A(2)(a), 1240(3)(a) and 1241 (2)(a)]*

Table 7.2: Provisions in Chapter 5 where the translation rules apply

| <i>Subject Matter</i> | <i>Provisions</i> |
|---|---|
| Arrangements and reconstructions | Part 5.1 other than subsections 411(1A), (1B) and (1C) and paragraph 411(17)(a) |
| Receivership | Part 5.2 (other than section 418) and Division 2B of Part 5.7B |
| Winding up | Section 53, 91, Paragraph 233(1)(a) Parts 5.4, 5.4A, 5.4B, 5.5, 5.6, Divisions 2 and 2A of Part 5.7B and Schedule 2 (apart from section 459T and Division 8 of Part 5.6). |
| Property recovery provisions | Division 3, 4, 5 and 6 of Part 5.7B |
| External administration offences | Part 5.8 |
| Court's power to summon a person and other miscellaneous offences | Part 5.9 |

7.41 Regulations may be made to disapply the translation rules for specified provisions. This regulation making power ensures that adjustments can be made if the translation rules produce an unanticipated result in a particular section, or when later amendments are made to Chapter 5. Flexibility is important as CCIVs are a new type of vehicle and

are structured differently to the other types of companies that are subject to Chapter 5. *[Schedule 1, item 4, paragraphs 1236B(3)(d), 1237E(3)(c) and 1238B(3)(c), and subsections 1239A(3), 1240(4) and 1241(3)]*

7.42 The translation rules also apply to other provisions in the Act and ASIC Act that relate to the operation of one of the provisions listed in Table 7.2. The Corporations Act is defined in section 9 of the Act to include the Corporations Regulations, the Passport Rules for this jurisdiction, and the Insolvency Practice Rules. Similarly, the ASIC Act includes the regulations made under the ASIC Act. *[Schedule 1, item 4, paragraphs 1236B (2)(b), 1237E(2)(b), 1238B(2)(b), 1239A(2)(b), 1240(3)(b) and 1241(2)(b)]*

7.43 The provisions to which the translation rules apply are referred to as the **arrangement and reconstructions provisions** (for provisions relating to arrangements and reconstructions), **receiver provisions** (for provisions relating to receivership), **winding up provisions** (for provisions relating to winding up), **property recovery provisions** (for provisions relating to property recovery) **external administration offences provisions** (for provisions relating to Chapter 5 offences) and **external administration miscellaneous provisions** (for provisions relating to the miscellaneous provisions in Part 5.9). This terminology is modelled on existing subsection 233(2) of the Act which refers to ‘winding up provisions’. *[Schedule 1, item 4, subsections 1236B (2), 1237E (2), 1238B (2), 1239A(2), 1240(3) and 1241(2)]*

References to debts and claims

7.44 In the winding up provisions, references to ‘debts’ of the CCIV refer to ‘liabilities of a sub-fund’, that is, liabilities of the CCIV that have been allocated to the sub-fund in accordance with the allocation rules for liabilities. References to a claim against the CCIV are read as references to ‘claims against a sub-fund’ to the extent that the claim is a liability of the sub-fund. *[Schedule 1, item 4, section 1238C]*

7.45 Similarly, in the property recovery provisions, references to ‘incurring debts’ cover liabilities of the sub-fund incurred by the CCIV. *[Schedule 1, item 4, section 1239B]*

7.46 The arrangement and reconstruction provisions, property recovery provisions, external administration offences provisions and external administration miscellaneous provisions do not refer to debts or claims. Accordingly, a corresponding rule is not required for these parts of Chapter 5.

References to ‘a Chapter 5 body corporate’

7.47 A CCIV is a ‘Chapter 5 body corporate’ if any of its sub-funds are undergoing an external administration procedure. In other words, a CCIV is a ‘Chapter 5 body corporate’ if one or more of its sub-funds is

being wound up, a receiver has been appointed to property of the CCIV, or the CCIV enters into a compromise or arrangement which involves one or more of its sub-funds. *[Schedule 2, item 6, section 9, definition of ‘Chapter 5 body corporate’]*

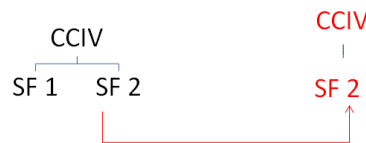
Arrangements and reconstructions

7.48 Arrangements and reconstructions of sub-funds of CCIVs occur in the same way as arrangements and reconstructions of Part 5.1 bodies. This is largely achieved by applying the translation rules explained at paragraphs 7.15 to 7.43 of these explanatory materials. *[Schedule 1, item 4, section 1236 and 1236B]*

7.49 Arrangements and reconstructions involving multiple sub-funds may proceed but they are treated as two separate arrangements for the purposes of Part 5.1. This ensures that separate meetings are held for each sub-fund. *[Schedule 1, item 4, sections 1236B]*

Example 7.7: A ‘demerger’ of a sub-fund

Casterley House CCIV has two sub-funds and wishes to spin off one sub-fund into a new CCIV.



Casterley House may use Part 5.1 to achieve this. The new CCIV would also need to be registered.

Example 7.8: A ‘friendly takeover’ of a sub-fund

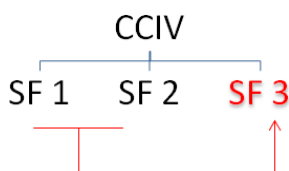
Braavos CCIV also has two sub-funds. Meereen CCIV approaches Braavos CCIV with a proposition that involves moving one of the sub-funds into Meereen CCIV.



Part 5.1 may be used to facilitate this ‘friendly takeover’.

Example 7.9: An internal reorganisation of a CCIV

Greyjoy CCIV wishes to amalgamate two of its sub-funds into a single sub-fund.



Part 5.1 can be used to facilitate this internal reorganisation. For the purposes of applying Part 5.1, the reorganisation is treated as two separate arrangements – one involving sub-fund 1 and one involving sub-fund 2. Sub-funds 1 and 2 must vote separately on the proposal.

References to the ‘director’

7.50 The second translation rule is extended so that a reference to the ‘director’ of a Part 5.1 body includes both the corporate director and the natural person directors of the corporate director. This is consistent with existing section 410 which extends references to the director in Part 5.1 to the ‘directors of the body or any one or more of them’. *[Schedule 1, item 4, item 2 of the table in subsection 1236B(4)]*

7.51 The consequence of extending the second translation rule to include the natural person directors of the corporate director are that:

- the natural person directors each owe the obligations in Part 5.1, such as the obligation to instruct an accountant or solicitor if the members resolve to do so (see subsection 411(13));
- the material interests of the natural person directors must also be disclosed in explanatory statements (see subsection 411(1)); and
- the natural person directors are prohibited from administering a compromise or arrangement (see subsection 411(7)).

7.52 A depositary of the CCIV is also prohibited from administering an arrangement or compromise. *[Schedule 1, item 4, section 1236C]*

Court’s powers

7.53 The Court’s powers to facilitate reconstructions and amalgamations of Part 5.1 bodies have been expanded so that the Court may also make orders when the property or undertakings of one sub-fund are transferred to another sub-fund of the same CCIV. These orders could relate to deregistration of a sub-fund, the allotment or appropriation of shares or any of the other matters listed in section 413. *[Schedule 1, item 4, section 1236D]*

7.54 The Court also has the power to make any order it considers appropriate in relation to the assets and liabilities of a sub-fund involved

in the compromise or amalgamation. Part 5.1 may be used to facilitate a variety of reconstructions and amalgamations and this power gives the Court the flexibility to make whatever orders are required in the circumstances. *[Schedule 1, item 4, section 1236E]*

Receivers and other controllers of property of sub-funds

7.55 The receivership provisions in Part 5.2 and Division 2B of Part 5.7B operate on a sub-fund-by-sub-fund basis and must be read in accordance with the translation rules. For an explanation of the translation rules, see paragraphs 7.15 to 7.43 of these explanatory materials. *[Schedule 1, item 4, sections 1237 and 1237E; Schedule 2, item 138, note to 'Part 5.2']*

Appointment of a controller

7.56 A controller of property may only be appointed in relation to property of a particular sub-fund of a CCIV. If a controller is appointed in relation to property allocated to more than one sub-fund, it is treated as two separate appointments (one appointment relating to the first item of property and one appointment relating to the second). *[Schedule 1, item 4, section 1237A, definition of 'property' and section 1237B]*

7.57 Controllers of property are persons who assume control of property subject to a security interest even if they have no management function. They include mortgagees in possession, a receiver and a receiver and manager. The Act and the new law use the term **receiver** to refer to both 'receivers' and 'receivers and managers' (see also existing section 416). *[Schedule 1, item 4, section 1237A, definition of 'receiver']*

7.58 The persons who are disqualified from being appointed as a receiver of a sub-fund generally follow the persons who are disqualified from being receivers of other types of companies in existing section 418. These persons include the corporate director, the natural person directors of the corporate director, the depositary, the auditor of the CCIV or the sub-fund, certain persons connected with a related body corporate of the CCIV, a secured party in relation to any property of the sub-fund or the secured party's director, secretary, senior manager or employee. Persons who were the corporate director, a director of the corporate director (or a body corporate related to the corporate director), promoter or connected with a related body corporate of the CCIV within the last 12 months are also prohibited from acting as a receiver unless ASIC grants permission in a written direction. *[Schedule 1, item 4, section 1237C]*

7.59 The person appointed to act as the receiver must either be a registered liquidator or authorised by, or under, a State, Territory or Commonwealth law to act as a receiver of property of the particular sub-fund. *[Schedule 1, item 4, paragraph 1237C (1)(f) and subsection 1237C (2)]*

Controller's relationship with the depositary

7.60 If the CCIV has a depositary, the controller must notify the depositary of its appointment in writing as soon as practicable and in any event within three business days after the appointment. The controller must also notify the depositary within seven business days if it ceases to act in the role. *[Schedule 1, item 4, section 1237D]*

7.61 The receiver may instruct the depositary in relation to dealing with assets of the sub-fund in respect of which the receiver was appointed. This power does not extend to mortgagees in possession and other controllers who are not receivers. *[Schedule 1, item 4, section 1237G]*

7.62 If there is a conflict between the receiver and depositary's functions or powers, the functions or powers of the receiver prevail (see also paragraph 7.121 of these explanatory materials). *[Schedule 1, item 4, section 1226M]*

Dealing with assets of the sub-fund

7.63 The appointment of a receiver does not affect the operation of the allocation rules or the rules relating to the segregated application of assets (see Chapter 6 of these explanatory materials for a discussion of these rules). For example, the receiver cannot make any determinations with respect to the allocation of assets or liabilities to a particular sub-fund.

7.64 A receiver, or other controller, may challenge an allocation determination before the Court. For an explanation of this power, see paragraph 7.116. *[Schedule 1, item 4, section 1233Q]*

7.65 If a receiver is appointed on behalf of the holders of any debentures of the sub-fund, certain liabilities of the sub-fund (including auditor's fees) need to be paid in priority to any claim for principal or interest in respect of the debentures. This reflects the position for receivers of other types of companies in existing section 433. *[Schedule 1, item 4, section 1237K]*

Rights to inspect books and access reports

7.66 The corporate director must provide a controller with a report about the sub-fund's affairs under existing section 429.

7.67 If the controller requires additional information, it may require a further report from the current or former corporate director, the corporate director's officers or employees or any other persons who participated in the registration of the sub-fund (if the sub-fund was registered within one year of the date of the controller's appointment). This further report may relate to the affairs of the sub-fund or any other sub-fund to the extent that the information is required by the controller for the purpose of attaining

the objectives for which the person was appointed. *[Schedule 1, item 4, section 1237H]*

7.68 The controller has a right, under existing section 431, to inspect any books of the sub-fund that relate to the property in respect of which the controller was appointed (read subject to the translation rules). In addition, bespoke amendments are made to extend the controller's inspection rights to include the right to inspect:

- the allocation register; and
- any other books of the CCIV to the extent that inspection is necessary for the purposes of attaining the objectives for which the person was appointed.

[Schedule 1, item 4, section 1237J]

7.69 The controller's inspection rights apply irrespective of whether the books are held by the corporate director, the natural person directors of the corporate director, the depositary or a custodian (noting that existing section 431 refers generally to books held by 'a person').

7.70 If a controller ceases to act, ASIC may require the controller to transfer any books of the sub-fund to it under existing section 422D. Under the existing law, ASIC is permitted to destroy any books that it still holds after a two year period. A bespoke amendment is made to require ASIC to notify the CCIV before it destroys any books transferred to it under existing section 422D (unless the CCIV has been deregistered). If the CCIV, by resolution of the corporate director, directs ASIC not to destroy the books, ASIC must transfer the books to the CCIV. *[Schedule 1, item 4, section 1237L]*

Voluntary administration

7.71 Voluntary administration is not available in the CCIV context. Voluntary administration allows a company to continue trading for 20 business days without unsecured creditors enforcing their claims, thereby giving the company the opportunity to restructure and negotiate a compromise with its creditors. As a CCIV does not carrying on an active business, a 20 business day moratorium is less likely to improve the outcomes for creditors and members in the CCIV context. *[Schedule 2, item 139, section 435D]*

Winding up of sub-funds

Core principles

7.72 Winding up also operates on a sub-fund-by-sub-fund basis. Only a sub-fund of a CCIV can be wound up and the CCIV itself cannot be wound up.⁷ *[Schedule 1, item 4, sections 1238 and 1238A]*

7.73 The translation rules generally apply for the purposes of winding up (see the discussion of the translation rules at paragraphs 7.15 to 7.43). The translation rules apply to sections 53 and 91, paragraph 233(1)(a), Parts 5.4, 5.4A, 5.4B, 5.5 and 5.6, Divisions 2 and 2A of Part 5.7B and Schedule 2 to this Act, along with any other provisions of the Act and ASIC Act which relate to the operation of these sections. *[Schedule 1, item 4, sections 1238B and 1238C; Schedule 2, item 76, notes to subsection 233(1), items 140 to 142 and 144 to 147, notes to Parts 5.4, 5.4A, 5.4B, 5.5 and 5.6, 5.7B and subsection 530C(1)]*

7.74 The reference to the ‘majority of directors’ in section 494 is not expressly covered by the second translation rule which states that references to the director are to be read as the corporate director. Nevertheless, it is also to be read as a reference to the corporate director. *[Schedule 1, item 4, section 1238K]*

7.75 The consequence of applying the translation rules to the winding up provisions is that there are three winding up processes for sub-funds, namely:

- winding up in insolvency (see existing sections 459A, 459B, 459P and 462);
- winding up on other grounds (see existing section 461), including if:
 - a special resolution has been passed by the members of the sub-fund for the sub-fund to be wound up by the Court;
 - the CCIV suspends the part of its business that relates to the sub-fund for a whole year;
 - an act or omission is oppressive, unfairly prejudicial or unfairly discriminatory to members of the sub-fund; or
 - the Court is of the opinion that it is just and equitable that the sub-fund is wound up; and

⁷ This prohibition on the winding up of a sub-fund does not override subsection 5G(8) which provides that Chapter 5 of the Act does not apply to a scheme of arrangement, receivership or winding up carried out in accordance with a provision of a law of a State or Territory.

- voluntary winding up by the members (if the sub-fund is solvent) or by the creditors (if the sub-fund is insolvent) (see existing Part 5.5).

Statutory demands

7.76 A creditor may serve a statutory demand on a CCIV. The statutory demand must specify the names of the sub-funds of the CCIV to which the debt relates and the proportion of the debt that relates to each sub-fund. This requirement is included to ensure that the solvency of the other sub-funds is not put into doubt by the service of the statutory demand. *[Schedule 1, item 4, subsections 1238E(1) and (2)]*

7.77 A statutory demand which does not name any sub-funds or does not specify the proportion of the debt allocated to each sub-fund is invalid. However, if the statutory demand names the incorrect sub-fund or the incorrect proportions, the statutory demand is not invalid and the Court may correct the defect (see paragraph 7.103 below).

7.78 Generally, a creditor would be able to identify the name of the sub-funds from its contract with the CCIV because the CCIV must set out a sub-fund's name and ARFN on all public documents and negotiable instruments relating to the sub-fund's business (see paragraph 2.103 of these explanatory materials).

7.79 Nevertheless, the creditor may require the corporate director to confirm the name of the sub-fund. *[Schedule 1, item 4, paragraph 1233P(1)(a)]*

7.80 The creditor may also require the corporate director to provide the part of the allocation records which relate to the debt. This power is included as the allocation records are not publicly available and contracts do not need to state the proportion of the debt that is to be allocated to each sub-fund. *[Schedule 1, item 4, paragraph 1233P(1)(b)]*

7.81 A request for details about the identity of the sub-fund or the proportion of the debt allocated to the sub-funds must:

- take the form of a written notice;
- include sufficient information to enable the corporate director to identify the debt, claim or property; and
- specify how and by when the information needs to be provided.

[Schedule 1, item 4, subsections 1233P(1) and (2)]

7.82 The creditor must give the corporate director at least fourteen days to respond. *[Schedule 1, item 4, subsection 1233P(1)]*

7.83 If the corporate director fails to comply with a request for information within the specified time period, the corporate director commits a strict liability offence punishable by a fine of up to 20 penalty

units. The imposition of a strict liability offence and the penalty is consistent with the Guide. A strict liability offence is required to ensure the integrity of the regime. If the corporate director fails to provide the requested information, a creditor may specify the incorrect sub-fund or proportion in the statutory demand and thereby unnecessarily cast doubt on the solvency of other sub-funds. *[Schedule 1, item 4, subsection 1233P(3); Schedule 2, item 202, table item 329JN in Schedule 3]*

7.84 A failure to comply with a statutory demand affects only the sub-funds specified in the statutory demand. The CCIV may challenge the identity of the sub-funds before the Court (see paragraphs 7.87 to 7.91 of these explanatory materials) and if that challenge is successful, only the correct sub-funds specified in the statutory demand are affected. *[Schedule 1, item 4, subsection 1238E(3)]*

Example 7.10: Consequence of failing to comply with a statutory demand

A CCIV has two sub-funds. A statutory demand is served on the CCIV. The statutory demand refers only to the first sub-fund and the CCIV does not seek to have the statutory demand set aside or dispute the identity of the sub-fund listed in the statutory demand.

The CCIV fails to comply with the statutory demand.

Only the first sub-fund is presumed to be insolvent and may potentially be wound up. The failure to comply with statutory demand does not create any presumption of insolvency for the second sub-fund.

Setting aside a statutory demand

7.85 A CCIV may apply to the Court for an order setting aside a statutory demand if there is:

- a dispute about the identity of the sub-funds or the proportion of the debt allocated to each sub-fund;
- a genuine dispute about the amount or existence of the debt (under existing sections 459G and 459H); or
- a dispute about both the identity of the sub-funds (or the proportion of the debt allocated to each sub-fund) and the amount/existence of the debt.

[Schedule 1, item 4, subsections 12138F to 12138H]

7.86 A different process must be used to apply to the Court for an order setting aside a statutory demand in each of the scenarios outlined at paragraph 7.85 above. These processes are explained below.

Disputes about the identity of the sub-fund or the proportion of the debt allocated to each sub-fund

7.87 The CCIV can challenge the name of the sub-funds in a statutory demand by:

- applying to the Court for an order setting aside a statutory demand under existing section 459G;
- filing a notice setting out the name of the sub-fund(s) that the corporate director believes the debt relates to and the proportion of the debt allocated to each of those sub-funds; and
- serving a copy of the notice on the person who served the statutory demand on the CCIV.

[Schedule 2, item 1, subsections 1238H (1) and 1238H(6)]

7.88 The application to the Court, along with the lodgment and serving of the notice, must occur within 21 days after the statutory demand is served on the CCIV (see existing section 459G). *[Schedule 1, item 4, subsection 1238H(1)]*

7.89 The Court must determine the sub-fund or sub-funds of which the debt is a liability and the proportion of the debt allocated to each sub-fund. If the statutory demand fails to identify the correct sub-fund or the correct proportion, the Court may make an order varying the statutory demand and declaring the demand to have had effect as from when the demand was served on the CCIV. The order may be made subject to conditions. *[Schedule 1, item 4, subsections 1238H (2) and (3)]*

7.90 The Court retains its discretionary power to set aside the statutory demand if it is of the view that the failure to identify the correct sub-fund or the correct proportion will cause substantial injustice under existing section 459J. Alternatively, the Court may impose conditions on the order varying the statutory demand. *[Schedule 1, item 4, subsections 1238H(3) and (4)]*

7.91 If the Court concludes that the statutory demand correctly identifies the sub-fund, the Court must dismiss the application under existing section 459L. *[Schedule 1, item 4, subsection 1238H (5)]*

Disputes about the existence or amount of a debt

7.92 The Court may set aside the statutory demand if there is a genuine dispute about the existence of the debt or there is a genuine dispute about the amount of the debt and the ‘substantiated amount’ (essentially the amount not in dispute) is less than \$2,000. The substantiated amount is the difference between the ‘admitted amount’ (which is essentially the amount of the debt that is not, in the Court’s view, in dispute) and the amount of any offsetting claims (see existing section 459H).

7.93 The ‘substantiated amount’ and the ‘admitted amount’ are calculated separately in relation to each sub-fund specified in the statutory demand. In other words, the amount of the debt is determined by having regard to only the proportion of the debt and any offsetting claims that relate to the sub-fund. These amounts may be calculated by using the records of allocations that corporate directors are required to retain (see paragraph 6.63 of these explanatory materials). *[Schedule 1, item 4, section 1238G]*

7.94 The Court must dismiss the application if the Court is not of the view that there is a genuine dispute about the existence of the debt or that the substantiated amount is less than \$2,000 (see existing section 459L).

Disputes about both the identity of the sub-funds and the existence/amount of the debt

7.95 If the CCIV disputes both the identity of the sub-fund (or the proportion of the debt allocated to each sub-fund) and the existence or amount of the debt, it should follow the process for disputing the existence/amount of the debt set out at paragraphs 7.92 to 7.94. The Court may then deal with the identity of the sub-funds as part of any order that it makes at the end of the proceedings relating to the existence/amount of the debt. *[Schedule 1, item 4, paragraph 1238H(1)(d)]*

Applications to wind up a sub-fund in insolvency

7.96 The CCIV, the corporate director, ASIC, or a creditor, contributory or liquidator of a sub-fund may apply for a sub-fund to be wound up in insolvency under Division 4 of Part 5.4 of the existing law.

7.97 Under the existing law, the corporate director and contributories, liquidators and certain creditors of the sub-fund may only apply for winding up in insolvency with the leave of the Court. The Court may only grant leave if there is a prima facie case that the company is insolvent (see existing section 459P).

7.98 A sub-fund is presumed to be insolvent in the same situations as when a company is presumed to be insolvent under existing section 459C. This includes if a CCIV failed to comply with a statutory demand and the failure affects the sub-fund. *[Schedule 1, item 4, section 1238D]*

7.99 As the translation rules apply to Part 5.4, an application to wind up a sub-fund in insolvency must specify the sub-fund. Generally, the creditor can identify the name of the sub-fund from documentation associated with the debt or claim against the CCIV (see paragraphs 2.103 to 2.108 of these explanatory materials for a discussion of the requirement to set out the sub-fund’s name on all public documents and negotiable instruments). The creditor may also seek information about the identity of the sub-fund from the corporate director (see paragraphs 7.78 to 7.84 of these explanatory materials). This parallels the requirement for creditors

to specify the name of the sub-funds in a statutory demand. [*Schedule 1, item 4, subsection 1238B*]

Disputing the identity of the sub-fund

7.100 The CCIV may only dispute the identity of the sub-fund(s) in the application if the application to wind up the sub-fund does not rely on a failure to comply with a statutory demand. If the application is based on a failure to comply with a statutory demand, the CCIV may only dispute the identity of the sub-funds in the statutory demand (see paragraphs 7.87 to 7.91 for a discussion of the process for disputing the identity of the sub-funds named in a statutory demand). [*Schedule 1, item 4, paragraph 1238J(1)(b)*]

7.101 This is consistent with section 459S which prohibits a company opposing an application for winding up on a ground which could have formed the basis of an application to set aside a statutory demand.

7.102 To dispute the identity of the sub-fund(s), the CCIV must file a notice with the Court that specifies the name of the correct sub-fund(s) and the proportion of the debt that relates to each sub-fund. [*Schedule 1, item 4, section 1238J and subsection 1238H(6)*]

7.103 The Court may substitute the name of the sub-fund with the name of another sub-fund if it thinks it is appropriate to do so and the notice filed by the creditor complied with the requirements in the Act (in that it named a sub-fund and the proportion of the debt, albeit that incorrect sub-fund was named). The application then has effect as if the substituted sub-fund had been the original sub-fund. This ensures that the creditor is not disadvantaged if they identify the incorrect sub-fund. It also ensures that other provisions in the Act which rely on a sub-fund being named in an application for winding up operate appropriately (see, for example, existing section 490). For example, if the Court substitutes the name of a sub-fund, section 490 prohibits the voluntary wind up of the substituted sub-fund (which would now be wound up insolvency) and not the original sub-fund. [*Schedule 1, item 4, subsections 1238J(2) to (5)*]

Example 7.11: Effect of the Court substituting the name of a sub-fund in an application for winding up in insolvency

Section 490 of the existing law (when read subject to the translation rules) prohibits the members of a sub-fund from voluntarily winding up the sub-fund if an application for winding up of the sub-fund in insolvency has been filed.

Casterley House CCIV has two sub-funds, Casterley House Growth SF and Casterley House Low Risk SF. An application to wind up Casterley House Growth SF in insolvency was lodged by a creditor.

Casterley House CCIV successfully challenges the identity of the sub-fund in the notice. The Court orders that the name of Casterley House Growth SF be substituted with the name of Casterley House Low Risk SF in the application for winding up in insolvency.

The members of Casterley House Growth SF vote to voluntarily wind up the sub-fund. This is not prohibited by section 490 of the existing law as the application for winding up has effect as if the substituted sub-fund (Casterley House Low Risk SF) had been the original sub-fund specified in the application.

Persons prohibited from acting as a liquidator or provisional liquidator

7.104 Certain persons are prohibited from acting as a liquidator or provisional liquidator under existing section 532. These persons include the corporate director and any person who is not a registered liquidator.

7.105 In addition, the new law modifies the effect of section 532 so that a depositary and the natural person directors of a corporate director are also disqualified from acting as a liquidator or provisional liquidator. *[Schedule 1, item 4, section 1238L]*

Duties and powers of the liquidator or provisional liquidator

7.106 A liquidator or provisional liquidator may only exercise a power or perform a function to the extent that it relates solely to the carrying on of the business of the sub-fund that is being wound up. This limitation ensures that the liquidator or provisional liquidator controls the affairs of only the sub-fund that is being wound up. *[Schedule 1, item 4, subsection 1238N(1)]*

Relationship between the powers of a liquidator and the corporate director

7.107 Table 7.3 summarises the responsibilities of the liquidator (or provisional liquidator) and the corporate director after a sub-fund enters into winding up. Further detail is provided in the following paragraphs.

Table 7.3: Powers of the liquidator or provisional liquidator

| Function | <i>Person responsible for function</i> | |
|--|---|------------------------|
| | <i>Sub-fund being wound up</i> | <i>Other sub-funds</i> |
| <i>Carrying on sub-fund's business</i> | Liquidator | Corporate director |
| <i>Allocation determinations for assets and liabilities of sub-funds⁸</i> | Corporate director | Corporate director |
| <i>Instructing the depositary</i> | Liquidator | Corporate director |

7.108 The corporate director remains in office after the appointment of the liquidator but the corporate director must cease to exercise a function or power that relates solely to the business of the sub-fund that is being wound up. See paragraphs 3.145 to 3.152 for further information about the duties and powers of the corporate director when a sub-fund is being wound up. *[Schedule 1, item 4, section 1224Q]*

7.109 The liquidator may also seek reasonable assistance from:

- the corporate director;
- officers of the corporate director;
- a former corporate director; and
- the officers and former officers of a former corporate director.

[Schedule 1, item 4, section 1238Q]

Powers relating to the allocation of assets and liabilities

7.110 A liquidator or provisional liquidator does not have power to determine the proportion of assets and liabilities that are to be allocated to the sub-fund that is being wound up (or any other sub-fund). This remains the responsibility of the corporate director. *[Schedule 1, item 4, subsections 1233J(9) and 1233M(9)]*

7.111 Nevertheless, the liquidator has the power to require the corporate director to make an allocation determination and the power to

⁸ An asset or liability of a CCIV that relates solely to the business of a sub-fund of the CCIV is allocated to that sub-fund. Where an asset or liability relates to more than one sub-fund, the asset or liability is allocated to the sub-fund in a proportion that is fair and reasonable in the circumstances. The corporate director of the CCIV must determine the proportion that is fair and reasonable in the circumstances. See Chapter 6 of these explanatory materials.

challenge an allocation determination before the Court. *[Schedule 1, item 4, section 1238N and 1233Q]*

7.112 These powers are not granted to a provisional liquidator. This is because the main function of a provisional liquidator is to preserve the status of the assets pending the making of a winding up order. The provisional liquidator may apply to the Court for this additional power if the provisional liquidator feels that it is necessary to perform its functions (see *Re Rothwells Ltd* (1989) 7 ACLC 545).

i) Liquidator's power to direct the corporate director to make an allocation determination

7.113 The liquidator may provide the corporate director with a written notice requiring the corporate director to record a debt, claim or property in the allocation register (and make any required allocation determination) within a specified period. The written notice must contain sufficient information to enable the corporate director to identify the debt, claim or property. Further, the specified period must be at least one business day after the notice is given. *[Schedule 1, item 4, section 1233F]*

7.114 The liquidator may wish to exercise the power to require the corporate director to record a debt, claim or property in two main situations:

- where a debt or claim is not known until after the sub-fund enters into winding up; or
- where a debt, claim or property is known before the sub-fund enters into winding up but was not recorded.

7.115 If the corporate director fails to record the debt, claim or property in the allocation register, the corporate director commits an offence. This is a strict liability offence with a penalty of up to 20 penalty units. The imposition of a strict liability offence is consistent with the Guide because it is necessary to ensure the integrity of the winding up regime. The failure to make and record allocation determinations could prevent the liquidator from performing their functions and disadvantage creditors. *[Schedule 1, item 4, subsections 1233F(4) and (5); Schedule 2, item 202, table item 329JG in Schedule 3]*

ii) Liquidator's power to challenge an allocation determination before the Court

7.116 A liquidator may apply to the Court to challenge an allocation determination. See paragraphs 6.60 to 6.62 for an explanation of the orders a Court can make in relation to assets and liabilities of sub-funds.

Liquidator and provisional liquidator's interaction with the depositary

7.117 If the CCIV has a depositary, the liquidator or provisional liquidator must notify the depositary of their appointment as soon as

practicable and in any case within three business days after being appointed. This ensures that the depositary receives timely notification. For other sections which require notification ‘as soon as practicable’ and also specify a maximum period, see sections 311, 450A and 533 of the existing law. *[Schedule 1, item 4, subsection 1238M (1)]*

7.118 If the liquidator or provisional liquidator of a sub-fund resigns or is removed from office, the sub-fund must also notify the depositary in writing as soon as practicable and in any event within three business days after the resignation or removal. *[Schedule 1, item 4, subsection 1238M (2)]*

7.119 The liquidator or provisional liquidator has the power to instruct the depositary about the assets of the sub-fund that is being wound up. This ensures that a liquidator or provisional liquidator can bring in all assets of the sub-fund that is being wound up. *[Schedule 2, item 1, subsections 1238N(3) and (5)]*

7.120 The liquidator or provisional liquidator may also seek reasonable assistance from the depositary. This supplements the liquidator or provisional liquidators’ power to seek assistance from the corporate director (see section 530A of the Act). It also recognises that the corporate director and depositary have an obligation to provide each other with reasonable assistance (see paragraphs 3.134 to 3.136 of these explanatory materials) and that many of the corporate director’s functions are exercised by the liquidator when a sub-fund is being wound up (see paragraph 7.107 of these explanatory materials). *[Schedule 2, item 4, section 1226J]*

7.121 The functions and powers of a liquidator or provisional liquidator prevail over the depositary’s functions and powers to the extent of any conflict. It is appropriate for the functions and powers of the liquidator or the provisional liquidator to prevail over those of the depositary because liquidators must prioritise the interests of creditors and are supervised by the Court. *[Schedule 1, item 4, section 1226M]*

Example 7.12: Powers of the liquidator

Asha is appointed as liquidator of Ironbank CCIV in respect of Maximum Return SF. The CCIV has two other sub-funds which are not being wound up.

Asha may carry on only the part of the business that relates to Maximum Return SF and issue instructions to the depositary regarding the assets allocated to Maximum Return SF.

Asha cannot determine the proportion of assets and liabilities that are allocated to Maximum Return SF. Nor can she control the part of the business that relates to the other sub-funds or take in the assets of those sub-funds.

Rights of secured creditors

7.122 None of the constraints on the powers of the corporate director or the depositary affect the rights of a secured creditor to realise or otherwise deal with a security interest. *[Schedule 1, item 4, subsections 1224Q(8) and 1226M(3)]*

Effect of winding up on the auditor

7.123 In the CCIV context, the auditor requirements apply to the CCIV as a whole and each of the sub-funds (see paragraphs 5.33 to 5.42 of these explanatory materials).

7.124 An auditor does not need to undertake any audit activities for the sub-fund that is being wound up. *[Schedule 1, item 4, section 1232U]*

7.125 If the CCIV has other sub-funds that are not being wound up, the auditor must continue to undertake their audit activities for:

- for each of the sub-funds that are not being wound up; and
- the CCIV as a whole as if the only business carried on by the CCIV was the business of the sub-funds that are not being wound up.

7.126 If all of the sub-funds of a CCIV are being wound up, the auditor has no functions to perform and it ceases to hold office. *[Schedule 1, item 4, section 1232U]*

Access to books

7.127 The corporate director must deliver to the liquidator or provisional liquidator all books relating solely to the sub-fund that is being wound up under existing section 530A. The corporate director does not need to deliver:

- books that relate to other sub-funds of the CCIV that are not in wind up; or
- books that relate to the CCIV as a whole (even if those books also relate to the sub-fund that is in wind up).

[Schedule 1, item 4, section 1238R]

7.128 The liquidator or provisional liquidator may inspect the allocation register or any other book retained by the corporate director or held by the depositary if inspection is necessary for the liquidator to perform its functions or exercise its powers. Under section 1300 of the existing law, the corporate director may also make copies or take extracts. *[Schedule 1, item 4, subsections 1238N(2), (4) and (5)]*

7.129 Correspondingly, the corporate director may inspect and copy the books relating to the winding up of a sub-fund that are held by the liquidator or provisional liquidator. Inspection is only permitted to the

extent that inspection is necessary for the corporate director to perform its functions or exercise its powers. *[Schedule 1, item 4, section 1238S]*

7.130 The liquidator or provisional liquidator, or ASIC, may also seek a warrant for books or property under existing section 530C.

7.131 The new law clarifies the types of books covered by search, seizure and inspection warrants in section 530C. The books which may be subject to a seizure warrant are the books of the CCIV that relate solely to the business of the sub-fund that is being wound up. These are the category of books that the corporate director must transfer to the liquidator (see paragraph 7.127). *[Schedule 1, item 4, subsections 1238Z (1) and (2); Schedule 2, item 146, note to subsection 530C(1)]*

7.132 The books that may be covered by a search and inspection warrant are any books of the CCIV, including books that do not relate solely to the business of the sub-fund. This ensures that books that may relate in part to other sub-funds that are not in wind up can be inspected and copied but remain in the hands of the corporate director. *[Schedule 2, item 1, subsections 1238Z (1) and (3); Schedule 2, item 146, note to subsection 530C(1)]*

7.133 The new law includes additional safeguards when warrants are granted in relation to the books or property of the CCIV. Consistent with the Guide, these safeguards include that:

- the person exercising the warrant must announce that they are authorised to enter the premises and provide the occupier of the premises (or their representative) with current photographic identity;
- the person exercising the warrant must give the occupier (or their representative) a copy of the warrant and information about their rights and responsibilities as soon as practicable;
- the person who takes custody of the seized property or books may only use them for the purposes of performing their functions;
- the person who takes custody of the seized property or books must take reasonable steps to return them to the CCIV when they are no longer required to perform the person's functions; and
- the person exercising the warrant must provide a receipt for the property or book seized under the warrant (one receipt is sufficient if two or more books or items of property are seized).

[Schedule 2, item 1, subsections 1238Z (4) to (11)]

Retention and destruction of books

Books held by an external administrator

7.134 A liquidator or provisional liquidator must, under the Insolvency Practice Rules⁹, retain the books of the CCIV that are transferred to them for at least five years after the sub-fund is wound up (the ***retention period***).

7.135 The CCIV may, by written notice, request the liquidator or provisional liquidator to transfer the books back to the CCIV at the end of the retention period. The liquidator or provisional liquidator is only permitted to destroy the books at the end of the retention period if the CCIV has not made such a request. *[Schedule 1, item 4, subsections 1238P (1) to (3); Schedule 2, item 200 and 201, notes to subsections 70-35(3) and 70-35(4) of Schedule 2 of the Act]*

7.136 A liquidator or provisional liquidator who intentionally or recklessly fails to comply with the requirement to transfer the books back to the CCIV commits an offence punishable by a fine of up to 50 penalty units. This is the same as the existing offence for destroying books during the retention period in subsection 70-35(5) of the Insolvency Practice Rules. *[Schedule 1, item 4, subsection 1238P (4); Schedule 2, item 202, table item 329K in Schedule 3]*

Books held by ASIC

7.137 The Insolvency Practice Rules require a liquidator or provisional liquidator to transfer books in its possession to ASIC if the person ceases to be the liquidator or provisional liquidator and ASIC requests the transfer of the books (see existing section 70-31 of Schedule 2 to the Act).

7.138 The Insolvency Practice Rules, when read subject to the separating assumptions, require ASIC to retain any books that it obtains under section 70-31 for at least two years after the winding up of the sub-fund is completed (ASIC's ***retention period***) (see existing subsection 70-31(8) of Schedule 2 to the Act).

7.139 If ASIC wishes to destroy the books at the end of ASIC's retention period, it must notify the CCIV (if the CCIV has not been deregistered). The CCIV may require ASIC to transfer the books to the CCIV, instead of destroying them. This ensures that books are not destroyed if the CCIV remains in existence and the corporate director considers the books to be relevant to the business of sub-funds which have not been wound up. *[Schedule 1, item 4, section 1238T]*

⁹ See existing section 70-35 of Schedule 2 to the Act.

Operating a CCIV while disqualified

7.140 A person who operates the business and conducts the affairs of the CCIV while a sub-fund is being wound up and within four years of the relation back date (generally the date that the sub-fund enters into winding up) may be personally liable for part of the sub-fund's debts and liabilities. The liquidator of the sub-fund must apply to the Court and the person is only liable if the Court makes an order to that effect. [*Schedule 1, item 4, section 1238V*]

7.141 This provision ensures that persons unlawfully operating the CCIV bear a liability commensurate with that of the corporate director. It mirrors existing Division 7 of Part 5.7B which does not apply as a CCIV does not have a managing director.

Proof and ranking of claims

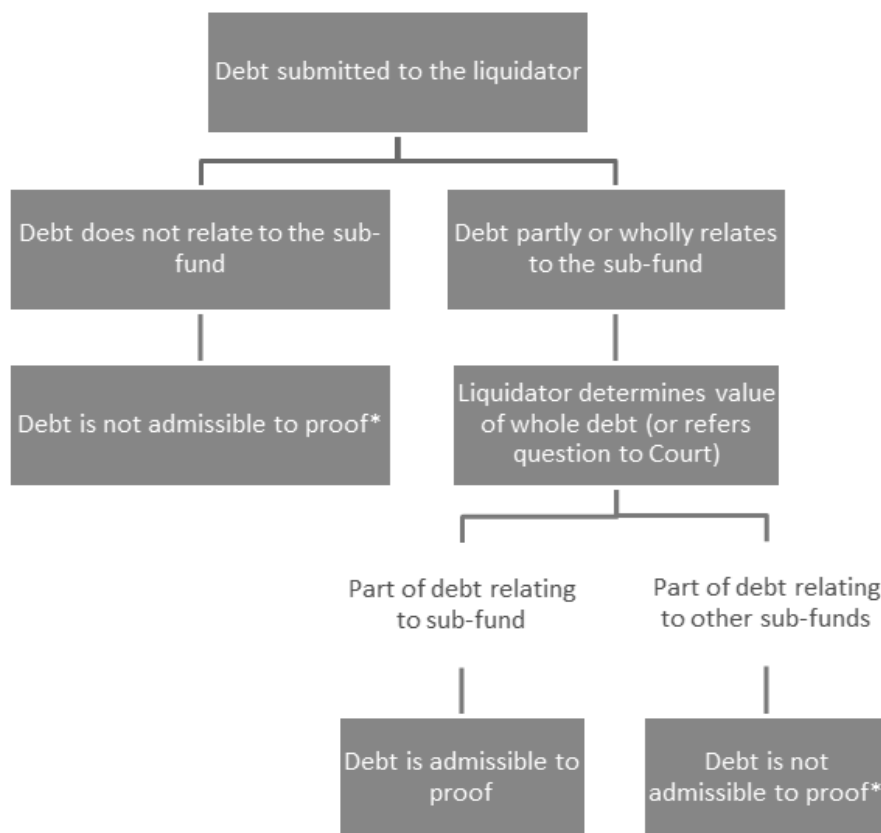
7.142 If a creditor submits a debt or claim to the liquidator, the liquidator must consider whether the debt or claim is a liability of the sub-fund. If the liquidator determines that the debt or part of the debt is not a liability of the sub-fund, the debt or part of the debt is not admissible to proof. [*Schedule 1, item 4, subsection 1238W (1)*]

7.143 The debt or part of the debt that is not a liability of the sub-fund is not extinguished. This recognises that the creditor may have a legitimate claim against the CCIV but in respect of another part of the CCIV's business. [*Schedule 1, item 4, subsection 1238W (2)*]

7.144 If the liquidator determines that the debt or claim is partly or wholly a liability of the sub-fund, the liquidator must determine the value of the debt or claim or refer the question to the Court (see existing section 554A). If the debt relates to more than one sub-fund, the liquidator must determine the value of the entire debt, not just the portion of the debt that relates to the sub-fund that is being wound up. Nevertheless, the value of the debt that is admissible to proof under Division 6 of Part 5.6 is just the portion of the debt that relates to the sub-fund that is being wound up. [*Schedule 1, item 4, section 1238X*]

7.145 Figure 2.1 summarises the process that a liquidator must follow when a debt or claim is submitted to it.

Figure 2.1: Process for debts or claims submitted to a liquidator



** Note: The debt is not extinguished in these circumstances.*

Voidable transactions

7.146 The liquidator of the sub-fund may apply to the Court for orders avoiding certain voidable transactions entered into by the CCIV prior to the sub-fund's winding up under existing Divisions 1 and 2 of Part 5.7B. The translation rules apply to these provisions so that they operate only to the extent that the transaction affects the assets and liabilities allocated to the sub-fund. For a discussion of the translation rules, see paragraphs 7.15 to 7.43. *[Schedule 1, item 4, section 1238B; Schedule 2, item 147, note to Part 5.7B]*

7.147 Voidable transactions consist of insolvent transactions, unfair loans and unreasonable director-related transactions (see Divisions 1 and 2 of Part 5.7B of the existing law). Two bespoke modifications are made to these concepts in the context of CCIVs.

7.148 First, for the purposes of determining whether a transaction is an 'insolvent transaction', the company is presumed to be insolvent if the

financial records of either the CCIV or the sub-fund are missing.

[Schedule 1, item 4, section 1238ZA]

7.149 Second, ‘unreasonable director-related transactions’ include certain payments, dispositions and issues made to either the corporate director or a natural person director of the corporate director (or their associates or persons acting on their behalf). *[Schedule 1, item 4, section 1238ZB]*

Vesting of PPSA security interests that are not continuously perfected

7.150 If a PPSA security interest in the collateral of assets of a sub-fund is not registered within time, the PPSA security interest vests in the CCIV.¹⁰ This achieves the same effect as existing section 588FL but recognises that:

- the PPSA security interest is granted by the CCIV which is the legal person; and
- the winding-up provisions operate at the sub-fund level and the assets to which the security interest attach are allocated to sub-funds.

[Schedule 1, item 4, section 1238ZC]

7.151 Consequential amendments are also made to section 267 of the PPSA to vest security interests in the CCIV if the security interest is not perfected by the time when the winding up of the sub-fund commences. *[Schedule 3, item 15, section 267 of the PPSA]*

7.152 Other provisions in Division 2A also operate at the sub-fund level and must be read in accordance with the translation rules. For a discussion of the translation rules, see paragraphs 7.15 to 7.43. *[Schedule 1, item 4, section 1238B; Schedule 2, item 147, note to Part 5.7B]*

Winding up provisions which do not apply

7.153 Part 5.4C of the Act (about winding up by ASIC) does not apply to a CCIV. One of the main reasons that ASIC uses its Part 5.4C powers is to protect employees’ entitlements. As a CCIV has no employees, ASIC does not require this power in the CCIV context. *[Schedule 2, item 143, note to Part 5.4C]*

7.154 A pooling determination (Division 8 of Part 5.6) may not be made in respect of a CCIV and a CCIV or its sub-funds may not be part of a pooled group. A pooling determination results in each company in a group being taken to be jointly and severally liable for the debts payable by other members of the group. These determinations would interfere with

¹⁰ Generally, a security interest must be registered before the later of: (1) six months before the sub-fund commences winding-up; or (2) the end of 20 business days after the agreement was made or the time winding up commences (whichever is earlier).

the segregation of assets and liabilities between sub-funds if they were to apply in the context of CCIVs and sub-funds. *[Schedule 1, item 4, paragraph 1238B(3)(b)]*

7.155 Part 5.7 (about winding up bodies other than companies) does not apply to CCIVs. A CCIV cannot be a ‘Part 5.7 body’ as it cannot be registered with ASIC unless it is a company (see paragraph 2.28 of these explanatory materials).

7.156 Part 5.4C, Division 8 of Part 5.6 and Part 5.7 are not expressly disapplied. Rather, this result is achieved by disapplying all winding up provisions and then activating select provisions. Parts 5.4C, Division 8 of Part 5.6 and Part 5.7 are not activated. *[Schedule 1, item 4, sections 1238A and 1238B]*

7.157 Finally, none of the provisions relating to employees or secretaries of a company apply in the CCIV context because a CCIV does not have employees or a company secretary.

Property recovery provisions

Special translation rules

7.158 Special translation rules apply to the property recovery provisions in Divisions 3, 4, 5 and 6 of Part 5.7B. These translation rules ensure that the directors of the corporate director of the CCIV, instead of the corporate director, owe a duty to prevent insolvent trading and other duties in those Divisions. *[Schedule 1, item 4, section 1239]*

7.159 These special translation rules treat references to the ‘director’ and ‘officer’ differently from the general translation rules that apply to the other Parts of Chapter 5. References to ‘director’ etc are replaced with a reference to the natural person directors of the corporate director, rather than the corporate director. Similarly, references to an ‘officer’ are replaced with a reference to the natural person director of the corporate director, any shadow director of the corporate director or an external administrator of the sub-fund. *[Schedule 1, item 4, subsection 1239A(4), table items 2 and 3]*

7.160 Apart from these changes, the translation rules operate in the same way as the rules discussed above at paragraphs 7.15 to 7.43 of these explanatory materials. *[Schedule 1, item 4, section 1239A]*

When a debt is taken to have been incurred

7.161 The existing law sets out when a debt is taken to have been incurred for the purposes of the insolvent trading provisions (see existing subsection 588G(1A)). These rules also apply in the CCIV context. *[Schedule 1, item 4, subsection 1239C(1)]*

7.162 New rules are inserted for redeemable shares which are a new type of ordinary share that is liable to be redeemed (see Chapter 4 of these

explanatory materials). These rules are modelled on the rules for redeemable preference shares. They provide that a debt is taken to have been incurred when a redeemable share that is redeemable at the CCIV's option is redeemed. If the redeemable share is redeemable otherwise than at the CCIV's option, the debt is taken to have been incurred when the share is issued or another share is converted into the redeemable share. *[Schedule 1, item 4, subsection 1239C(2)]*

External administration offences and other miscellaneous provisions

7.163 The translation rules discussed at paragraphs 7.15 of these explanatory materials apply to the external administration offences in Part 5.8 and related machinery provisions in Part 5.9. These Parts include offences for a past or present officer who does not disclose, to the external administration, all of the property of the sub-fund or fraudulently makes a material omission in any statement relating to the affairs of the sub-fund (existing section 590). Part 5.8 also prohibits a person inducing a person to appoint them as the external administrator and fraud by an officer (existing sections 595 and 596).¹¹ *[Schedule 1, item 4, sections 1239A and 1240; Schedule 2, items 148 and 150, notes to Part 5.8 and 5.9]*

7.164 Bespoke amendments are made to existing section 596 (relating to fraud by officers) and 596A (summoning a person for mandatory examination) to apply them to the natural person directors of the corporate director, as well as any other natural persons that are officers. These amendments are required because, as per the second translation rule, 'director' is generally read to mean the corporate director. *[Schedule 1, item 4, sections 1238U and 1240B; Schedule 2, items 149 and 151, notes to subsection 596(1) and section 596A]*

Deregistration of a sub-fund

7.165 There are three processes for deregistering a sub-fund:

- voluntary deregistration;
- ASIC-initiated deregistration; and
- deregistration following amalgamation or winding up.

[Schedule 1, item 4, sections 1242, 1242A and 1242C; Schedule 2, item 152, note 1 to Part 5A.1]

Voluntary deregistration

7.166 A CCIV, the corporate director of the CCIV or the liquidator of the sub-fund may apply for a sub-fund of the CCIV to be deregistered if:

¹¹ Sections 592 to 594 (which relate to debts incurred before 1993) do not apply to CCIVs.

- the CCIV is not a party to any legal proceedings that relate to the sub-fund; and
- the sub-fund has no remaining assets or liabilities.

[Schedule 1, item 4, subsections 1242(1) and (2)]

7.167 The circumstances in which a sub-fund can be voluntarily deregistered generally mirror the circumstances for companies in subsections 601AA(1) and (2). While there is no explicit requirement for the CCIV not to be carrying on any business that relates to the sub-fund, this is generally the case if the sub-fund has no remaining assets or liabilities.

7.168 Applications to voluntarily deregister a sub-fund must be in the prescribed form and, if the CCIV lodges the application, the CCIV must nominate a person who is to be given notice of the deregistration.

[Schedule 1, item 4, subsections 1242(1) and (3)]

7.169 ASIC also has a power to ask for information about the current and former officers of the CCIV (including the corporate director or the liquidator) and the current and former officers of the corporate director. This parallels ASIC's information-gathering powers when deregistering a company in existing subsection 601AA(4). *[Schedule 1, item 4, subsection 1242(4)]*

7.170 The procedure for ASIC to deregister a sub-fund is the same as the procedure for deregistering a company in existing subsections 601AA(4) to (7). It involves ASIC giving two months notice of the intended deregistration on its database and publishing a notice of the proposed deregistration. After the two months has passed, ASIC may deregister the sub-fund. It must also notify the applicant (or their nominee) when the deregistration has occurred. *[Schedule 1, item 4, subsections 1242(5) to (7)]*

7.171 Notices given or published in accordance with the new bespoke provisions for voluntarily deregistering a sub-fund are taken to have been given or published under the existing provisions for voluntarily deregistering a company. This ensures that sections in the Act that refer to the company notice provisions continue to operate appropriately (see, for example, subsections 589(3), 589(5) and 1351(4)). *[Schedule 1, item 4, subsections 1242(8)]*

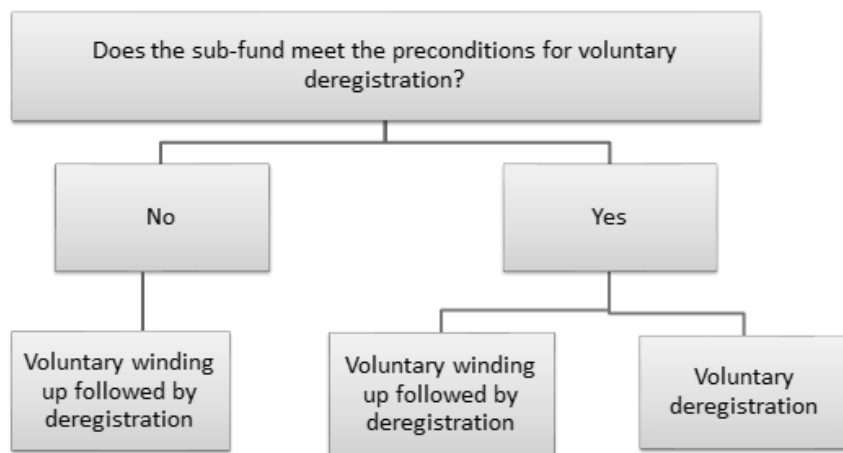
7.172 If the sub-fund is an Australian passport fund, ASIC is prohibited from deregistering the sub-fund if the sub-fund has 'protected members'. For an explanation of which members are protected members and the passport arrangements, see Chapter 10 of these explanatory materials and in particular paragraph 10.10 *[Schedule 1, item 4, subsections 1242(9) to (10)]*

Interaction with Chapter 5

7.173 A CCIV that wishes to deregister a solvent sub-fund has two options. First, it could liquidate the sub-fund's assets, discharge the sub-fund's liabilities, redeem all shares referable to the sub-fund and then voluntarily deregister the sub-fund. Alternatively, it could voluntarily wind up the sub-fund (see paragraphs 7.72 to 7.157 of these explanatory materials). Figure 3.1 summarises these two options.

7.174 The decision about whether or not to use the voluntary wind up process is a commercial decision for the CCIV. Generally, a voluntary winding up process would be used if the preconditions for voluntary deregistration are not satisfied, for example, because the sub-fund has remaining assets which cannot be liquidated.

Figure 3.1: Two routes for deregistering a solvent sub-fund



ASIC-initiated deregistration

7.175 ASIC may deregister a sub-fund if:

- the CCIV has not lodged any documents that relate to the sub-fund under the Act in the last 18 months and ASIC has no reason to believe that the part of the business of the CCIV that relates to the sub-fund is being carried on;
- the CCIV has not paid the portion of the review fees that relates to the sub-fund for at least 12 months after the due date for payment;
- the liquidator of the sub-fund is no longer acting;
- the sub-fund's affairs have been fully wound up and the return that the liquidator should have lodged is at least six months late; or

- the sub-fund's affairs have been fully wound up and the assets of the sub-fund are not enough to cover the costs of obtaining a Court order for the sub-fund's deregistration.

[Schedule 1, item 4, subsections 1242A(1) to (3)]

7.176 The grounds for ASIC deregistering a sub-fund differ from the grounds for deregistering a company in existing subsections 601AB(1) and (2) in two respects. First, the ground for deregistering a company if a response to a return of particulars has not been lodged is not required for a sub-fund as a sub-fund is not a legal entity and is not required to respond to returns of particulars. Second, there is no ground for deregistering a sub-fund if the ASIC Supervisory Cost Recovery Levy is unpaid because this levy is to be imposed on the corporate director, not the CCIV.¹²

7.177 ASIC must not deregister a sub-fund if the sub-fund has an asset that relates to multiple sub-funds and the asset has not yet been converted into money or multiple fungible assets that can be allocated between the sub-funds. For an explanation of the corporate director's obligation to convert assets that are automatically allocated to one sub-fund and are not fungible assets, see paragraphs 6.17 to 6.36 of these explanatory materials.

7.178 If the sub-fund is an Australian passport fund, ASIC is also prohibited from deregistering the sub-fund if the sub-fund has 'protected members' and deregistration would be contrary to the interests of these persons. For an explanation of which members are protected members and the passport arrangements, see paragraph 10.10 of these explanatory materials. *[Schedule 1, item 4, subsections 1242A(4) and (5)]*

7.179 The procedure for ASIC to deregister a sub-fund involves three steps:

- providing the CCIV with an opportunity to show cause as to why the sub-fund should not be deregistered at a hearing;
- issuing a notice of intended deregistration; and
- deregistering the sub-fund and issuing a notice of deregistration.

7.180 The first step (the show cause process) involves ASIC giving the CCIV a written notice that requires the CCIV to show cause, at a hearing before a specified person, as to why the sub-fund should not be deregistered. The notice must specify the grounds on which ASIC proposes to deregister the sub-fund and a reasonable time and place at

¹² The levy is to be imposed on the corporate director, as the only licensed entity, to ensure symmetry with the way that the ASIC Supervisory Cost Recovery Levy operates for responsible entities of registered schemes and operators of notified foreign passport funds.

which the hearing is to be held. The hearing must be held at the time and place specified in the notice, unless the CCIV agrees to a different time or place. *[Schedule 1, item 4, subsections 1242A(6) to (7)]*

7.181 The person conducting the hearing must give the CCIV an opportunity to be heard at the hearing. After the hearing, the person must provide a report to ASIC with a recommendation about whether the sub-fund should be deregistered and ASIC must consider the report and recommendation. *[Schedule 1, item 4, subsections 1242A(8) to (9)]*

7.182 Notices provided by ASIC to the CCIV and the report prepared after a hearing are administrative in character and are therefore not legislative instruments. The new law expressly states that these documents are not legislative instruments. This provision is merely declaratory of their existing status and is designed to assist readers. It does not provide an exemption from the *Legislation Act 2003*. *[Schedule 1, item 4, subsection 1242A(10)]*

7.183 If ASIC decides to deregister the sub-fund after the hearing, it must give at least five business days' notice of the proposed deregistration to the CCIV, the corporate director and any liquidator of the sub-fund and publish the notice on its database (unless ASIC does not have the necessary information about the person's identity or address). ASIC may deregister the sub-fund after the notice period has ended. *[Schedule 1, item 4, subsections 1242B(1) to (4)]*

7.184 ASIC must not deregister the sub-fund if it has reason to believe that the CCIV has one or more single items of property that relate to more than one sub-fund and have not been converted into money, or other property that can be allocated between the sub-funds. The corporate director is required to convert the property as soon as practicable after the property is acquired (see paragraphs 6.33 to 6.36 of these explanatory materials). *[Schedule 1, item 4, paragraph 1242B(3)(b)]*

7.185 Within five business days after the sub-fund is deregistered, ASIC must notify the CCIV, the corporate director and any liquidator of the sub-fund of the deregistration and the date on which the deregistration occurred. *[Schedule 1, item 4, subsections 1242B(5) and (6)]*

7.186 The deregistration procedure roughly parallels the process for an ASIC-initiated deregistration of a company with two exceptions. First, a show cause process is included to ensure procedural fairness. Deregistration procedures and other similar processes introduced in recent years have included a show cause process and this is now considered best practice. See, for example, existing section 905J (cancellation of derivative trade repository), section 908BJ (suspension or cancellation of a benchmark administrator license) and section 1216C (deregistration of a passport fund).

7.187 The second difference is that ASIC may issue a notice of deregistration after issuing the notice of deregistration (rather than two months). This change is appropriate as the notice of intended deregistration may only be issued after the show cause procedure has been completed. If ASIC was required to complete the show cause procedure and wait an additional two months after issuing the final notice of intended deregistration, inactive sub-funds would remain registered for a significant period of time.

7.188 Notices given or published in accordance with the new bespoke provision for the ASIC-initiated deregistration of a sub-fund are taken to have been given or published under the corresponding company provision. Similarly, references to the period between ASIC notifying of the proposed deregistration of the company and the actual deregistration are taken to refer to the five-business-day period between ASIC notifying of the proposed deregistration of the sub-fund and its actual deregistration. This ensures that other references in the Act to the company notice provisions continue to operate appropriately (see, for example, subsections 589(3) and 589(5)). *[Schedule 1, item 4, subsection 1242B(7) and section 1240A]*

Deregistration following amalgamation or winding up

7.189 ASIC is also required to deregister a sub-fund if the Court orders the deregistration of the sub-fund after the conclusion of a reconstruction under Part 5.1, the release of a liquidator or the lodgment of an end of administration return. *[Schedule 1, item 4, section 1242C]*

Effect of deregistration of a sub-fund

7.190 On deregistration, the property of the sub-fund vests in either the Commonwealth (for trust property) or ASIC (for other property). This vesting occurs in the same way that assets of deregistered companies vest in the Commonwealth or ASIC. *[Schedule 1, item 4, subsections 1242D(1) and (2)]*

7.191 Subsection 601AD(1) of the Act (which provides that a company ceases to exist on deregistration) does not apply in the context of a sub-fund being deregistered. This is because the CCIV continues to exist after the sub-fund has been deregistered, noting that a CCIV is automatically deregistered once its last sub-fund has been deregistered (see paragraphs 7.211 to 7.213 of these explanatory materials). As a sub-fund does not have legal personality, it is unnecessary to provide that a sub-fund ceases to exist on deregistration. *[Schedule 1, item 4, note to subsection 1242D(1)]*

7.192 The CCIV must retain, for three years after the sub-fund has been deregistered, the books of the sub-fund apart from the books that a liquidator is required to retain. If the CCIV is also deregistered, the books

are to be held by the last corporate director of the CCIV. *[Schedule 1, item 4, subsections 1242D(3)]*

7.193 Failing to keep books is a strict liability offence with a maximum penalty of 20 penalty units. As the offence is not one of absolute liability, the defence of honest and reasonable mistake of fact is available. *[Schedule 1, item 4, subsection 1242D(4); Schedule 2, item 202, table item 329KA in Schedule 3]*

7.194 The offence and penalty for failing to retain books is consistent with the Guide. The imposition of a strict liability offence is appropriate in this circumstance as it is necessary to strongly deter misconduct that could result in the sub-fund's records being lost. The strict liability offence also reduces non-compliance and bolsters the integrity of the regulatory regime by allowing ASIC to deal with offences expeditiously. The penalty mirrors the penalty for failing to retain books after the deregistration of the company in existing subsection 601AD(5).

7.195 If the Commonwealth or ASIC becomes aware of any outstanding obligations in relation to the deregistered sub-fund and the CCIV or liquidator would have been bound to act if the sub-fund had not been deregistered, the Commonwealth or ASIC may fulfil the obligation. This gives the Commonwealth and ASIC the same power to fulfil any outstanding obligations relating to a deregistered sub-fund in the same way as for a deregistered company. Alternatively, if ASIC becomes aware of outstanding obligations after the sub-fund's deregistration, ASIC may seek to have the sub-fund reinstated (see paragraph 7.199). *[Schedule 1, item 4, section 1242E]*

7.196 A creditor of the sub-fund may recover any amount which is payable to the CCIV under an insurance contract which covered the creditor's liability immediately before the sub-fund was deregistered. This achieves the same effect as existing section 601AG. *[Schedule 1, item 4, section 1242F]*

7.197 If the sub-fund is also an Australian passport fund, it ceases to be a passport fund. The Register of Passport Funds must be updated to reflect this. See Chapter 10 of these explanatory materials for a discussion of how the Passport arrangements apply in the CCIV context. *[Schedule 1, item 4, subsections 1242D(5)]*

7.198 If a CCIV has its annual fee payable during the period when it is being deregistered then the fee is not required to be paid. *[Schedule 1, item 4, section 1245G; Schedule 2, item 199, note to section 1351]*

Reinstatement of a sub-fund

7.199 Under existing section 601AH, a sub-fund may be reinstated if:

- ASIC is satisfied that the sub-fund should not have been deregistered; or

- the Court orders its reinstatement. *[Schedule 3, item 1, subsection 1242G(1)]*

7.200 There is no requirement for the ASIC Supervisory Cost Recovery Levy to be paid in full before ASIC reinstates a sub-fund, unlike existing subsection 601AH(1A). This requirement is not needed because the ASIC Supervisory Cost Recovery Levy is imposed on the corporate director, not the CCIV *[Schedule 1, item 4, subsection 1242G(5)]*

7.201 If a sub-fund is reinstated, the sub-fund is taken to have been registered throughout the period it was deregistered. This departs from the language in subsection 601AH(5) because a sub-fund does not ‘exist’ as it is not a legal person. *[Schedule 1, item 4, subsections 1242G(2) and (5)]*

7.202 Further, on reinstatement, any property which vested in the Commonwealth or ASIC on deregistration reverts in the CCIV (subject to any security interest that may have attached to the property before it vested in the Commonwealth or ASIC). The property is then allocated to the sub-fund in accordance with the allocation rules. *[Schedule 1, item 4, subsection 1242G(4)]*

7.203 The existing law also gives the Court the power to validate anything done during the period when the sub-fund was deregistered or make any other order that it considers appropriate. This could include an order in relation to the assets or liabilities of the sub-fund or an order in relation to the assets and liabilities of another sub-fund. *[Schedule 1, item 4, subsection 1242G (3)]*

Reinstatement after the CCIV has been deregistered

7.204 If the CCIV has been deregistered and a sub-fund of the CCIV is to be reinstated, the CCIV must also be reinstated. The CCIV is then taken to have continued in existence as if it had not been deregistered (but only to the extent of the reinstated sub-fund). *[Schedule 1, item 4, subsections 1242H(1) and (2)]*

7.205 The reinstatement of the CCIV does not reinstate all of the sub-funds. Each sub-fund must be reinstated separately.

Example 7.13: Reinstatement of the CCIV

Frey CCIV and its two sub-funds (Frey Growth Sub-fund and Frey Wealth Sub-fund) have been deregistered.

The Court orders the reinstatement of Frey Growth Sub-fund and Frey CCIV. This does not result in the reinstatement of Frey Wealth Sub-fund.

7.206 The former corporate director and any former depositary are automatically reinstated. These people’s reappointments operate from the time when the CCIV is reinstated. *[Schedule 1, item 4, subsections 1242H(3)]*

7.207 If the former corporate director or depositary cease to exist or are no longer eligible to hold that position (for example, because their license has been suspended or they are a Chapter 5 body corporate), ASIC may apply for the appointment of a temporary corporate director or depositary. Refer to Chapter 3 of these explanatory materials for a discussion of the process for appointing a temporary corporate director or depositary and an explanation of the eligibility requirements for these positions.

7.208 If the sub-fund was an Australian passport fund prior to its deregistration, the reinstatement of the sub-fund does not result in it becoming a passport fund again. If the sub-fund wished to become a passport fund again, the corporate director must make a new application. *[Schedule 1, item 4, subsection 1242G (6)]*

Notice requirements

7.209 ASIC must give notice of the reinstatement of a sub-fund and the CCIV in the Gazette. The notice requirements parallel those that apply when a company is reinstated as per subsection 601AH(4) of the existing law. *[Schedule 1, item 4, subsections 1242G(5) and 1242J (1)]*

7.210 If a CCIV is reinstated, notice must be provided to the company that is reinstated as the corporate director and, if the CCIV had a depositary, the depositary. *[Schedule 1, item 4, subsection 1242J(2)]*

Deregistration of a CCIV

7.211 ASIC must deregister a CCIV if it does not have any registered sub-funds. This reflects the fact that a CCIV, by definition, must have at least one sub-fund. *[Schedule 1, item 4, subsection 1242K(1)]*

7.212 ASIC must give the corporate director of the CCIV written notice that the CCIV has been deregistered and the date on which it has been deregistered within 5 days after the date the CCIV is deregistered. *[Schedule 1, item 4, subsections 1242K(2) and (3)]*

7.213 A CCIV cannot be deregistered under section 601AA, 601AB or 601AC of the Act. It is not necessary to also include a voluntary deregistration process because a CCIV cannot be deregistered while it still has registered sub-funds (and the CCIV is automatically deregistered when it ceases to have any registered sub-funds). Similarly, there is no need for a process for deregistering a CCIV following amalgamation or winding up because these procedures operate at the sub-fund level. *[Schedule 1, item 4, subsection 1242K(4)]*

Consequences of deregistration

Retention of books of the CCIV

7.214 If the CCIV is deregistered, the corporate director of the CCIV at the time of deregistration must retain the books of the CCIV (apart from the books that the liquidator is required to retain) for three years after the CCIV's deregistration. For an explanation of the books that the liquidator is required to retain, see paragraphs 7.134 to 7.139 of these explanatory materials. *[Schedule 1, item 4, subsections 1242L(1) and (4)]*

7.215 If the corporate director is deregistered during the three year retention period, the natural person directors of the corporate director at the time of the corporate director's deregistration must retain the books for the remainder of the period. *[Schedule 1, item 4, section 1242L(3)]*

7.216 A failure to retain the books is a strict liability offence with a penalty of 20 penalty units. The imposition of a strict liability offence and the penalty complies with the Guide. Strict liability is appropriate as it is necessary to deter misconduct which could result in the books of the CCIV being lost and allows the regulator to expeditiously deal with offences to maintain public confidence. It is also consistent with the existing offence for failing to retain the books of a deregistered company and the new offence for failing to retain the books of a deregistered sub-fund (see paragraphs 7.192 to 7.194 of these explanatory materials). *[Schedule 1, item 4, subsection 1242L(2); Schedule 2, item 202, table item 329KB in Schedule 3]*

Example 7.14: Retention of books following deregistration

ASIC deregisters Baratheon CCIV on 23 March 2020. The corporate director of Baratheon CCIV at the time of deregistration is CD Services Ltd.

At the time that Baratheon CCIV is deregistered, CD Services Ltd has three directors, Arryn, Brienne and Catelyn. One month later, on 23 April 2020, Arryn resigns as a director of CD Services Ltd and is replaced by Dany.

CD Services Ltd is then deregistered on 26 June 2020.

The books of Baratheon CCIV must be retained by CD Services Ltd from 23 March to 26 June 2020.

After the deregistration of CD Services Ltd on 26 June 2020, Baratheon CCIV's books must be retained by the natural person directors of CD Services Ltd at the time of the corporate director's deregistration (Brienne, Catelyn and Dany).

Brienne, Catelyn and Dany must continue to retain the books until the three year period expires, that is, until 23 March 2023.

Other consequences of deregistration

7.217 Subsections 601AD(1) and (3), and sections 601AF and 601AG continue to apply to CCIVs in the same way that they apply to other types of companies. This means that the CCIV ceases to exist on deregistration

and claims may be made against insurers in certain circumstances.

[Schedule 1, item 4, subsection 1242L(4); Schedule 2, item 152, note 2 to Part 5A.1]

7.218 Provisions relating to the vesting of property (such as subsection 601AD(2) and section 601AE) are not expressly disapplied but they have no operation in the context of the deregistration of a CCIV. This is because a CCIV may only be deregistered if it has no assets (whereas other types of companies may be deregistered if they have up to \$1,000 of assets).

Reinstatement of a CCIV

7.219 A CCIV may only be reinstated if one of its sub-funds is reinstated. For an explanation of the process for reinstating a sub-fund, see paragraphs 7.165 to 7.210 of these explanatory materials. *[Schedule 1, item 4, section 1242M]*

Transfer of registration

7.220 A CCIV cannot transfer its registration under a State or Territory law. State and Territory laws do not currently provide for a company to be registered as a CCIV. *[Schedule 1, item 4, section 1242N; Schedule 2, item 153, note to Part 5A.2]*

Chapter 8

Takeovers, compulsory acquisitions and buy-outs, continuous disclosure and fundraising

Outline of chapter

8.1 This Chapter outlines how the following Chapters of the Act apply to CCIVs:

- Chapters 6 to 6C regarding takeovers, compulsory acquisitions and buy-outs;
- Chapter 6CA regarding continuous disclosure; and
- Chapter 6D regarding fundraising and disclosure.

Context of amendments

8.2 Chapters 6 to 6C of the Act set out the regulatory requirements for takeovers, compulsory acquisitions and buy-outs of certain entities, including companies, listed bodies and listed managed investment schemes. In particular, these chapters set out requirements regarding the acquisition of a relevant interest in such entities.

8.3 Chapter 6CA sets out the continuous disclosure requirements for disclosing entities.

8.4 Chapter 6D sets out the fundraising and disclosure requirements for companies.

8.5 The corporate director of a CCIV is a public company (that is subject to the full regulatory requirements for public companies, including the provisions of Chapters 6 to 6D).

8.6 Both UCITS funds and OEICs are not subject to the requirements and regulations regarding takeovers in their respective jurisdictions. The structural similarities between CCIVs, OEICs and UCITS mean it is appropriate to take a similar approach to CCIVs.

Summary of new law

8.7 Part 8B.7 exempts the acquisition of a relevant interest in a CCIV from the regulatory requirements set out in Chapters 6 to 6B of the Act. It also excludes such transactions from the Takeover Panel's jurisdiction.

8.8 Chapter 6C will not apply to CCIVs because a CCIV is prohibited from being listed on a prescribed financial market.

8.9 The provisions of Chapters 6 to 6C of the Act will continue to apply to CCIVs that propose to acquire, or hold, a relevant interest in another entity that is the subject of these rules.

8.10 CCIVs that are disclosing entities are subject to the continuous disclosure requirements in Chapter 6CA, as modified by Part 8B.7.

8.11 Division 3 of Part 8B.7 exempts offers of securities in a CCIV from the fundraising and disclosure requirements in Chapter 6D of the Act. It also prohibits offering securities in a CCIV that does not exist, and offering securities in a CCIV that are referable to a sub-fund of the CCIV that is not yet established.

Comparison of key features of new law and current law

| <i>New law</i> | <i>Current law</i> |
|---|--------------------|
| The acquisition of a relevant interest in a CCIV is not regulated by rules in Chapters 6 to 6B. Chapter 6C also does not apply to CCIVs, as CCIVs are prohibited from being listed. | No equivalent. |
| CCIVs that are disclosing entities are subject to the continuous disclosure requirements in Chapter 6CA. Consequential amendments to the definition of 'ED securities' and the requirements for debentures have been made to give effect to this outcome. | No equivalent. |
| Offers and issues of securities in a CCIV are exempted from the fundraising and disclosure regime under Chapter 6D. | No equivalent. |
| Offering securities in a CCIV that does not exist, or offering securities in a CCIV that are referable to a sub-fund of the CCIV that is not yet established, is prohibited. | No equivalent. |

Detailed explanation of new law

Takeovers, compulsory acquisitions and buy-outs

8.12 The prohibitions on certain acquisitions of a relevant interest in the voting shares of a company, set out in section 606 of the Act, do not apply to the acquisition of a relevant interest in a CCIV (including the acquisition of a legal or equitable interest in securities of a CCIV).

[Schedule 1, item 4, subsection 1243A(1); Schedule 2, item 154, note to Chapter 6]

8.13 This means that neither the person seeking to acquire a relevant interest in a CCIV, nor the CCIV itself, is required to follow the procedural rules and obligations in Chapter 6 relating to takeovers of interests in a CCIV (even if the proposed acquisition would have otherwise contravened the prohibitions in section 606). This includes an off-market bid for securities in a CCIV.

[Schedule 1, item 4, subsection 1243A(3); Schedule 2, item 159, note to Chapter 6B]

8.14 In the event of a takeover of a CCIV, the rules in Chapter 6A that require the bidder to compulsorily acquire or buy-out certain securities in the target company also do not apply to a target CCIV.

[Schedule 1, item 4, section 1243C; Schedule 1, items 157 and 158, note 2 to section 660A]

8.15 Similarly, the rules in Chapter 6B (regarding rights and liabilities in relation to Chapter 6 and 6A matters) do not apply to acquisitions of a relevant interest in a CCIV (including off-market bids for securities of a CCIV).

8.16 The rules in Chapter 6C (regarding information about ownership in listed companies and managed investment schemes) also do not apply to CCIVs because a CCIV will be prohibited from being listed on a prescribed financial market (see paragraph 2.69 of these explanatory materials).

8.17 The Takeovers Panel's jurisdiction to declare circumstances in relation to the affairs of a company to be unacceptable circumstances does not apply in relation to the affairs of a CCIV. This means that the Takeovers Panel does not have power to intervene in the affairs of a CCIV, including in relation to a takeover of a CCIV. *[Schedule 1, item 4, section 1243B]*

8.18 The fact that the rules relating to takeovers, compulsory acquisitions and buy-outs in Chapters 6 to 6B do not apply to the acquisition of interests in a CCIV does not exempt CCIVs from complying with these rules when it is proposing to acquire interests in another entity that is subject to these rules (that is, when the CCIV itself is the bidder in a takeover process). In particular, nothing prevents an offer for securities in a CCIV from constituting an off-market bid in another

target entity. *[Schedule 1, item 4, subsection 1243A(2); Schedule 2, items 155 and 156, note 2 to subsection 616(1)]*

8.19 For the purposes of Part 8B.7, the term ‘securities’ has the same meaning as it has in Chapters 6 to 6CA of the Act. *[Schedule 1, item 4, section 1243]*

Continuous disclosure

8.20 If a CCIV is a disclosing entity, then it must comply with the continuous disclosure requirements in section 675 of the Act in the same way as a disclosing entity whose interests are managed investment products. This is because securities in a CCIV are generally subject to the same disclosure requirements as managed investment products (in particular, the PDS disclosure regime). *[Schedule 1, item 4, section 1243D; Schedule 2, item 162, note 5 to subsection 675(2)]*

8.21 Consequential amendments have been made to the definition of ‘ED Securities’ and the requirements relating to debentures to reflect the fact that securities in a CCIV are subject to the PDS disclosure regime. Securities in a CCIV that are not debentures are ED securities if at least 100 people hold securities in that class under offers that required the CCIV to give a PDS. Debentures in a CCIV are ED securities if the offer for the debentures required the CCIV to give a PDS. This does not prevent securities in a CCIV being ED securities in other circumstances as set out in Division 2 of Part 1.2A of the Act. *[Schedule 1, item 4, section 1231ZE; Schedule 2, item 40, subsection 111AF(3)]*

Fundraising

Disclosure requirements for offers of securities in a CCIV

8.22 CCIVs are not subject to the disclosure requirements under Chapter 6D of the Act. Instead, CCIVs are subject to the PDS disclosure regime under Part 7.9 of the Act, as modified by Division 4 of Part 8B.7 of the Bill. *[Schedule 1, item 4, section 1243E; Schedule 2, items 39 and 163, notes to subsections 92(4) and 700(1)]*

Offering securities in a CCIV that does not exist, or referable to a sub-fund that is not established

8.23 A person must not offer securities in a CCIV that does not exist, or securities that are referable to a sub-fund that is not established, if the offer would give rise to an obligation to give a PDS. This is the case even if the person is proposing to register the CCIV or the sub-fund. The penalty for failing to comply with this requirement is five years imprisonment. *[Schedule 1, item 4, subsections 1243F(1) to (3); Schedule 2, item 202, table items 329L and 329LA in Schedule 3]*

8.24 For the purposes of this new prohibition, the term ‘securities’ has the same meaning as in Chapter 6D. The provisions further clarify that a legal or equitable right or interest in a security, or an option to acquire

by way of issue a security, is referable to a sub-fund if the security itself is referable to the sub-fund. *[Schedule 1, item 4, subsections 1243F(4) and (5)]*

Certain other provisions in Chapter 6D are extended to the new prohibition. These provisions clarify such matters as the scope of offers that are caught by the prohibition (including geographical scope), who the offeror is, the treatment of offers of options over securities and limitations on contracting out of the prohibition. *[Schedule 1, item 4, subsection 1243F(6)]*

Chapter 9

Financial services and regulation

Outline of chapter

9.1 This Chapter explains the operation of Division 4 of Part 8B.7. Division 4 modifies the operation of Chapter 7 for CCIVs and sets out how markets and financial services regulation apply to CCIVs and corporate directors.

Context of amendments

9.2 The rules in Chapter 7 set out how financial markets and financial services are regulated, including disclosure requirements for certain financial products and services.

9.3 The provisions in Chapter 7 generally apply to CCIVs and corporate directors in the same way as they apply to other companies. However, certain modifications are required to account for the particular corporate structure of a CCIV, and to ensure that consumer protections and other provisions apply comparably to CCIVs as to registered schemes.

Summary of new law

9.4 The new law modifies Chapter 7 to ensure that the AFSL and PDS regimes apply appropriately to CCIVs and corporate directors.

9.5 For the purposes of Chapter 7 of the Act, any action undertaken by a CCIV relating to a financial service or financial services business is deemed to also be undertaken by its corporate director, with the exception of issuing securities in a CCIV, which is undertaken by the CCIV itself. This ensures that a corporate director is required to hold an AFSL for the financial services provided in relation to the CCIV. A CCIV is always exempt from the requirement to hold an AFSL.

9.6 Additionally, a corporate director is required to hold an AFSL that authorises it to provide the financial service of ‘operating the business and conducting the affairs of the CCIV’. Modifications apply to Part 7.6 (concerning licensing of providers of financial services) to ensure that the AFSL regime applies appropriately in the context of CCIVs.

9.7 As shares and debentures in a CCIV are defined as ‘securities’, they would ordinarily be subject to the prospectus requirements in

Part 6D.2. However, modifications to Part 7.9 require that a PDS, rather than a prospectus, be given to retail clients who acquire a security in a CCIV. This approach ensures consistency with the disclosure arrangements that apply to registered schemes. Limited exceptions apply to the PDS requirements where a retail client is associated with a CCIV or corporate director, and in other circumstances as appropriate.

Comparison of key features of new law and current law

| <i>New law</i> | <i>Current law</i> |
|---|--------------------|
| A corporate director must have an AFSL to 'operate the business and conduct the affairs of a CCIV'. A CCIV is not required to hold an AFSL. | No equivalent. |
| The client of the financial service of 'operating the business and conducting the affairs of a CCIV' is the members of the CCIV. | No equivalent. |
| The issuer of shares in a CCIV is the CCIV itself. | No equivalent. |
| A corporate director may have its AFSL suspended or cancelled if the CCIV or its members have suffered, or are likely to suffer, loss or damage because of a breach of the Act by the corporate director or the CCIV. | No equivalent. |
| A depositary of a CCIV may have its AFSL suspended or cancelled if the CCIV or its members have suffered, or are likely to suffer, loss or damage because the depositary has breached the Act. | No equivalent. |
| A CCIV that offers a buy-back facility, or issues or redeems redeemable shares or redeemable preference shares does not make a market for the purposes of the Act. | No equivalent. |
| A person who enters into an agreement with a CCIV can rescind that agreement if the CCIV's corporate director does not have an AFSL. | No equivalent. |
| The financial services disclosure provisions do not apply to a CCIV or its corporate director in respect of the operation of a CCIV. | No equivalent. |

| <i>New law</i> | <i>Current law</i> |
|--|--------------------|
| When a CCIV issues a security to a retail client it must provide that person with a PDS. | No equivalent. |
| A CCIV or corporate director who possesses inside information and acquires or disposes of certain financial products, or causes another person to acquire or dispose of relevant financial products, is in breach of the prohibition on insider trading. Limited defenses apply to the prohibition on insider trading. | No equivalent. |

Detailed explanation of new law

9.8 Chapter 7 of the Act applies to a CCIV with the modifications that are set out in Division 4 of Part 8B.7. These modifications ensure that Chapter 7 applies appropriately to CCIVs, corporate directors and depositaries, consistent with the policy objective that the corporate director of a CCIV (and the CCIV's depositary), and not the CCIV itself, be required to have an AFSL. *[Schedule 1, item 4, section 1244]*

Treatment of financial services provided by a CCIV

9.9 For the purposes of Chapter 7, most actions relating to financial services that are legally undertaken by a CCIV are *also* attributed to the CCIV's corporate director. As a CCIV generally has no officers or employees other than its corporate director, it is the corporate director that operates the business and conducts the affairs of a CCIV. Treating the actions of a CCIV as also being actions of its corporate director provides a framework where the corporate director retains responsibility for the actions of the CCIV.

9.10 Any conduct in relation to financial services or a financial services business that is engaged in by or on behalf of a CCIV (for example, where an agent is acting on behalf of the CCIV) is to be treated as also being engaged in by or on behalf of the corporate director. *[Schedule 1, item 4, subsection 1244A(2)]*

9.11 Similarly, where conduct relating to a CCIV is engaged in by a third party (that is, not by the corporate director or the CCIV itself), then that conduct is taken to also have been engaged in in relation to the corporate director. *[Schedule 1, item 4, subsection 1244A(2)]*

9.12 However, these rules do not make the corporate director the issuer of securities in a CCIV (if the CCIV issues securities), and do not

make the corporate director a participant in a licensed market or clearing and settlement facility. *[Schedule 1, item 4, subsections 1244A(4) and (5)]*

9.13 The regulations may also prescribe any other matters to which the provisions relating to conduct apply. The regulations may also exempt matters from the operation of the provisions. *[Schedule 1, item 4, subsections 1244A(1)(c) and (6)]*

Financial services licencing

9.14 The modifications to Chapter 7 made in Division 4 of Part 8B.7 do not substantively alter the operation of the AFSL regime. Rather, the modifications ensure that the existing provisions apply appropriately to corporate directors and CCIVs. A CCIV is exempt from the requirement to hold an AFSL for the provision of financial services. However, to ensure financial services that are provided by a CCIV are covered by the AFSL regime, the CCIV's corporate director is taken to also provide those financial services, and is therefore generally required to hold an appropriate AFSL (subject to any exemptions). See paragraphs 9.9 to 9.13 of these explanatory materials for further information on when a corporate director is taken to provide financial services otherwise provided by a CCIV.

Financial services provided by a CCIV

9.15 A CCIV may provide one or more financial services in the course of its operations. As a matter of practice, it is expected that a CCIV generally would provide the financial service of 'dealing in a financial product' (see Division 4 of Part 7.1 of the Act).

9.16 Notwithstanding that a CCIV may provide a financial service, a CCIV is exempted from the requirement to hold an AFSL. Modifications to provisions regarding authorised representatives of AFSL holders and others who provide financial services on behalf of AFSL holders ensure that a CCIV is never required to hold an AFSL for any financial services that it provides, and is not subject to regulation as a representative (within the meaning of Part 7.6). *[Schedule 1, item 4, section 1244B]*

9.17 Other entities that provide financial services in relation to or on behalf of a CCIV (for example, an agent of a CCIV), may also require an AFSL in relation to those services.

Financial services provided by a corporate director

9.18 Chapter 7 is modified to create a new financial service (provided by the corporate director of a CCIV) of 'operating the business and conducting the affairs of a CCIV'. This financial service reflects the obligation imposed on the corporate director of a CCIV under Division 2

of Part 8B.3 to ‘operate the business and conduct the affairs of the CCIV’ (see paragraphs 3.128 to 3.131 of these explanatory materials). Each of the members of a CCIV is a ‘client’ of this financial service. *[Schedule 1, item 4, section 1244C]*

9.19 Where a corporate director provides financial services that relate to a CCIV, those services may be provided directly or as a result of the deeming provisions that treat a corporate director as also providing any financial services that are provided by the CCIV itself. A corporate director may need an AFSL for financial services provided by a CCIV, depending on the nature of those services.

9.20 For the avoidance of doubt, a provision is included clarifying that a single AFSL may cover operating the business and conducting the affairs of more than one CCIV. *[Schedule 1, item 4, subsection 1244F(1)]*

9.21 The requirements for corporate directors of CCIVs contained in Part 8B.17 are comparable to the AFSL obligations and exemptions that apply to responsible entities of registered schemes. For example, provisions that exempt an RSE licensee from certain AFSL obligations unless the RSE licensee is also a responsible entity of a registered scheme are replicated for corporate directors. *[Schedule 1, item 4, subsections 1244F(2)-(5)]*

9.22 It is open to a corporate director of a CCIV to provide other financial services (as defined in Division 4 of Part 7.1 of the Act) in addition to the financial service of operating the business and conducting the affairs of the CCIV. The obligations that fall on a corporate director providing financial services that are not related to its corporate director role are unchanged by the Bill.

Record keeping obligations of the corporate director

9.23 AFSL holders have particular record keeping obligations regarding the financial services they provide under Division 6 of Part 7.8 of the Act. A corporate director of a CCIV must keep these records so that the information required to be kept is clearly identifiable for each sub-fund of the CCIV. See paragraphs 5.20 to 5.22 of these Explanatory Materials for more information on the financial records that must be kept for a CCIV. *[Schedule 1, item 4, section 1244L]*

Financial services provided by a depositary

9.24 A new kind of financial service is also created for acting as the depositary of a CCIV (see Chapter 3 of these explanatory materials for more information on the depositary of a CCIV). *[Schedule 1, item 4, paragraph 1244C(1)(b)]*

When ASIC may suspend or cancel the AFSL of a corporate director or depositary

9.25 The Act requires that a person who provides a ‘financial service’ hold an AFSL that authorises the provision of that financial service (see section 911A of the Act). ASIC has corresponding powers under section 915B to suspend or cancel a person’s AFSL in certain circumstances.

9.26 ASIC’s suspension and cancellation powers are extended so that ASIC may suspend or cancel a corporate director’s AFSL where a CCIV or the members of a CCIV have suffered, or are likely to suffer, loss or damage as a result of a breach of the Act by the corporate director or the CCIV. Similarly, ASIC may suspend or cancel a depositary’s AFSL where a CCIV or the members of the CCIV have suffered, or are likely to suffer, loss or damage as a result of a breach of the Act by the depositary. These suspension and modification powers are similar to those applying for responsible entities of registered schemes. *[Schedule 1, item 4, section 1244G]*

Disclosure requirements for CCIVs and corporate directors

9.27 Part 7.9 of the Act deals with the disclosure requirements for financial products. This part generally does not apply to securities, such as shares or debentures. However, Part 7.9 does apply to interests in a registered scheme. To provide consistency with the disclosure requirements for registered schemes, the PDS regime in Part 7.9 applies to all securities in a CCIV, and in relation to the issue or sale of all securities in a CCIV. *[Schedule 1, item 4, section 1244N]*

9.28 The disclosure requirements for securities in Chapter 6D do not apply to securities in a CCIV.

Product Disclosure Statements

9.29 The CCIV, rather than the corporate director, is generally responsible for providing a PDS in relation to securities of the CCIV.

9.30 As the issuer of securities in the CCIV, the CCIV itself is a ‘regulated person’ (within the meaning of section 1011B of the Act). In addition, the CCIV is the ‘regulated person’ in place of its corporate director where the corporate director is the seller of a security in the CCIV and would otherwise be a ‘regulated person’ by virtue of the definitions in Division 2 of Part 7.9. *[Schedule 1, item 4, section 1244N]*

9.31 A corporate director of a CCIV continues to be a ‘regulated person’ for any other reason or in any other circumstance, other than where it is the seller of a security in a CCIV. *[Schedule 1, item 4, note 1 to subsection 1244N(3)]*

9.32 A PDS for a CCIV is subject to the same content requirements that ordinarily apply to PDSs for other financial products (see section 1013D of the Act). This includes the specific requirements applying to financial products that have an investment component (see paragraph 1013D(1)(l)) of the Act and, where a security in a CCIV is an ED security, the same requirements applying to interests in registered schemes that are ED securities. *[Schedule 1, item 4, section 1244R]*

Financial products ‘of the same kind’

9.33 Sections 1012C and 1012D of the Act apply in certain circumstances to financial products, or financial products ‘of the same kind’ (for example, section 1012D provides exemptions to the PDS requirements for certain clients who already hold financial products ‘of the same kind’ as those that are newly acquired). Given the unique structure of CCIVs, which may be made up of multiple sub-funds, a security in a CCIV is only ‘of the same kind’ as another security in the CCIV if the securities are referable to the same sub-fund and issued on the same terms and conditions as the first security. This ensures that a security in a CCIV cannot be ‘of the same kind’ as another security in the CCIV that is referable to a different sub-fund. *[Schedule 1, item 4, section 1244P]*

When a PDS is not required

9.34 The Act sets out a number of circumstances where a PDS is not required. These provisions apply to CCIVs with modifications as appropriate.

9.35 A PDS is not required in a recommendation, issue or sale situation where there is no consideration for the issue or sale of the security in a CCIV. This replicates the equivalent provision that applies for ‘managed investment products’, which includes interests in a registered scheme. *[Schedule 1, item 4, subsection 1244Q(1)]*

9.36 A PDS is not required where the client being issued or sold the security is ‘associated’ with the CCIV. A person is associated with a CCIV where they have a close relationship with the CCIV or its corporate director. This includes where they are the corporate director of the CCIV, a director, secretary, or senior manager of the corporate director, or a close relative of a director or senior manager of the corporate director. *[Schedule 1, item 4, subsections 1244Q(2)-(3)]*

9.37 A PDS is not required where the client is being recommended or issued fully-paid shares in a CCIV under a dividend reinvestment plan or bonus share plan. The client must already hold shares in the CCIV of the same kind as those being recommended by the corporate director or issued by the CCIV. A PDS is also not required when securities in a CCIV are offered for issue or sale under a compromise or arrangement ordered by the Court under Part 5.1 of the Act. *[Schedule 1, item 4, subsections 1244Q(4)-(5)]*

9.38 These provisions draw on existing exemptions that are available to ordinary companies that are subject to the disclosure requirements in Chapter 6D of the Act. Although a CCIV is, like a MIS, subject to the PDS requirements, certain situations specific to companies, such as bonus share plans, are not addressed under the existing PDS regime. As such, an equivalent is required for CCIVs.

9.39 Section 1012DAA of the Act sets out when a PDS is not required for a rights issue. These provisions include the ability for ASIC to remove a regulated person from the exemption if it is satisfied that the person has breached specified sections of the Act. This section is modified to apply to CCIVs in the same way as it applies to registered schemes.

[Schedule 1, item 4, subsections 1244Q(6)-(7)]

9.40 A PDS is also not required to be issued in relation to personal offers where the offer is made in accordance with section 1012E of the Act, which sets out when an offer is a small scale offering. This provision is extended to cover small scale offers of securities in a CCIV. *[Schedule 1, item 4, subsection 1244Q(8)]*

Replacement PDSs for stapled securities

9.41 Subdivision DA of Division 2 of Part 7.9 allows a replacement PDS to be issued in certain circumstances where an interest in a managed investment scheme is offered as part of a ‘stapled security’ (that is, where the interest in the managed investment scheme is only able to be acquired or disposed of with a security). This subdivision is modified to also extend to CCIVs that are part of a stapled security arrangement. *[Schedule 1, item 4, section 1244S]*

When a PDS must be lodged with ASIC

9.42 In certain circumstances a PDS must be lodged with ASIC. This includes where an interest in a registered scheme is traded on a financial market or the PDS implies that it will be able to be traded on a financial market, or when a financial product is of a kind specified in regulations (see section 1015B). This provision is modified to also require the PDS for a security in a CCIV to be lodged with ASIC in the same circumstances, including when the security in the CCIV is referable to a sub-fund that is an Australian passport fund. Every natural person director of the corporate director of the CCIV must give their consent to the lodgment. *[Schedule 1, item 4, section 1244T]*

Application forms

9.43 Section 1016A of the Act provides that the issuer or seller of a financial product may be prohibited from issuing or selling a financial product to a retail client except following an eligible application from the recipient of the financial product. This provision is modified to ensure that it applies to the issue or sale of a security in a CCIV. *[Schedule 1, item 4, section 1244U]*

Specified period before issuing or selling securities

9.44 Securities in a CCIV that are referable to a sub-fund that is an Australian passport fund can be issued or sold any time after the PDS is lodged with ASIC. There is no requirement to wait seven days after the PDS is lodged with ASIC as there is for other types of managed investment products. *[Schedule 1, item 4, section 1244V]*

Ongoing disclosure and periodic statements for securities in a CCIV

9.45 Where a security in a CCIV is an ED security,¹³ the continuous disclosure provisions in Chapter 6CA will apply. These securities are not subject to the ongoing disclosure requirements in section 1017B. This provides the same treatment for securities in a CCIV that are ED securities as interests in a registered scheme that are ED securities. *[Schedule 1, item 4, subsection 1244X(1)]*

9.46 However, the issuer of securities in a CCIV must provide a periodic statement to holders of CCIV securities, as securities in a CCIV are considered financial products that have an investment component under section 1017D. *[Schedule 1, item 4, subsection 1244X(2)]*

Financial Services Guides

9.47 Under Part 7.7, an AFSL holder is generally required to provide a Financial Services Guide when they provide financial services to a retail client. However, a corporate director is not required to provide a Financial Services Guide when the financial service they are providing to the client consists only of operating the business and conducting the affairs of the CCIV. This mirrors the requirements for responsible entities of registered schemes. As a CCIV is not required to hold an AFSL, it is also not required to provide a Financial Services Guide to clients. *[Schedule 1, item 4, section 1244K]*

Securities of a CCIV sold or issued under a defective PDS

9.48 If a person is issued or sold securities in a CCIV under a defective PDS, the person has the right to return the securities and have the money they paid for the securities returned to them, even if the CCIV or the CCIV's corporate director is being wound up. The directors of the corporate director are personally liable to repay the money. *[Schedule 1, item 4, section 1244W]*

Cooling-off periods

9.49 Retail clients who are issued or sold a security in a CCIV have the same statutory cooling-off rights under Division 5 of Part 7.9 as those that attach to interests in a registered scheme. This provides an important

¹³ Refer to paragraph 8.21 for further detail on ED securities in a CCIV.

consumer protection for retail clients and ensures parity of treatment between registered schemes and CCIVs. *[Schedule 1, item 4, section 1244Y]*

Unsolicited offers to purchase securities in a CCIV

9.50 Division 5A of Part 7.9, which applies to unsolicited offers to purchase financial products that are not made on a licensed market, also applies to offers to purchase securities in a CCIV. However, section 1019D (which determines the offers to which Division 5A applies) is modified so that Division 5A does not apply where an unsolicited offer to purchase securities is made to the corporate director of the CCIV. This is appropriate as Division 5A also does not apply when the offer to purchase securities is made to the CCIV (as issuer of the securities). *[Schedule 1, item 4, section 1244Z]*

Agreements with unlicensed corporate directors and their CCIVs

9.51 Division 11 of Part 7.6 deals with agreements with a person who does not hold an AFSL, but who is required to hold an AFSL (a ‘non-licensee’). Division 11 allows a person who enters into a contract with a non-licensee to rescind the contract in certain circumstances.

9.52 The application of Division 11 is extended so that it also applies where a person enters into an agreement with a CCIV that has a non-licensee corporate director. The modifications account for the unique structure of a CCIV and its corporate director. In this way, a person who enters into a contract with a CCIV will have the same protections as a person who enters into an agreement with a non-licensee responsible entity. *[Schedule 1, item 4, section 1244J]*

Prohibition on hawking securities in a CCIV

9.53 The Act includes separate prohibitions on hawking for financial products, for managed investment schemes and securities (sections 992A(1), 992AA(1) and 736(1), respectively). The Bill modifies the operation of these provisions so that only the section 992AA(1) prohibition on hawking managed investment scheme products applies to securities in a CCIV. The exemptions to offers that are not made to retail clients, and offers made by an AFSL holder through which a client has acquired or disposed of an interest in a managed investment scheme are also replicated for securities in a CCIV. These modifications ensure equivalent prohibitions on hawking apply for securities in a CCIV and interests in a managed investment scheme. *[Schedule 1, item 4, section 1244M]*

Insider trading

9.54 The prohibition on insider trading in section 1043A of the Act applies to CCIVs and their corporate directors without modification, subject to the provisions that set out how and when a CCIV is taken to

engage in conduct and have a certain state of mind (see Chapter 9 of these explanatory materials).

9.55 A member of a CCIV who redeems their CCIV securities is not subject to the insider trading provisions. This mirrors the existing exception for a member of a registered scheme, and ensures that the insider trading provisions do not limit a member's ability to redeem their securities. *[Schedule 1, item 4, subsection 1244ZA(1)]*

9.56 The exceptions to the prohibition on insider trading that apply in relation to a body corporate's knowledge of its own actions, or the knowledge of its actions by officers, directors and employees of the body corporate, are extended to also apply in relation to the knowledge of a CCIV's actions by the corporate director, or the officers, directors and employees of the corporate director. This is consistent with the approach for body corporates more generally, while ensuring that the provisions apply appropriately given that a CCIV is a separate legal entity to its corporate director, but is a passive investment vehicle without employees. *[Schedule 1, item 4, subsections 1244ZA(2)-(3)]*

Miscellaneous and clarifying provisions

9.57 For the avoidance of doubt, and to bring CCIVs in line with registered schemes, a number of miscellaneous provisions in Chapter 7 are modified to clarify how the law applies to CCIVs.

9.58 Where a CCIV issues or redeems redeemable shares or redeemable preference shares, this facility does not constitute the financial service of 'making a market'. The issuers of interests in registered schemes and of certain other financial products are similarly excluded from this definition to ensure that a mere redemption facility is not considered a market and subject to additional regulation. *[Schedule 1, item 4, section 1244D]*

9.59 A CCIV, a corporate director or an entity that is a depository of a CCIV under Chapter 8B is not providing a custodial or depository service within the meaning of section 766E of the Act. This ensures that these entities are not subject to the regulation that applies to an entity that provides a custodial or depository service. *[Schedule 1, item 4, section 1244E]*

9.60 Section 923A also applies to prohibit a CCIV from using a restricted word or expression in relation to a financial service or financial services business. This confirms that the existing restrictions apply to CCIVs as well as to corporate directors and other companies. *[Schedule 1, item 4, section 1244H]*

9.61 The definition of 'financial services law' is directly amended (rather than modified) to also include Chapter 8B. This ensures that a breach of Chapter 8B will constitute a breach of the financial services laws. *[Schedule 2, item 166, section 761A definition of financial services law]*

Chapter 10

Asia Region Funds Passport

Outline of chapter

10.1 This Chapter details amendments that extend the ARFP regime to CCIVs.

Context of amendments

10.2 The ARFP Act provides a multilateral framework that allows eligible funds to be marketed across participating economies. The ARFP allows certain funds from other participating economies (notified foreign passport funds) to sell their products in Australia. Funds that qualify as Australian passport funds may also offer interests outside of Australia in other participating economies.

10.3 Currently, only registered schemes may become Australian passport funds. This is because registered schemes were the only type of regulated collective investment vehicle for retail investors at the time that the ARFP Act commenced. However, the Government’s intention has always been that, once established, sub-funds of retail CCIVs would also be permitted to become Australian passport funds.

Summary of new law

10.4 Amendments in Schedule 2 to the Bill allow a sub-fund of a retail CCIV to register as an Australian passport fund. Other minor amendments have also been made to extend the passport arrangements to sub-funds that become Australian passport funds.

Comparison of key features of new law and current law

| <i>New law</i> | <i>Current law</i> |
|---|--------------------|
| A sub-fund of a retail CCIV may become an Australian passport fund. The corporate director of the | No equivalent. |

| <i>New law</i> | <i>Current law</i> |
|--|--------------------|
| CCIV is the operator of the fund. | |
| A sub-fund ceases to be an Australian passport fund if it is deregistered as a sub-fund. | No equivalent. |
| When deciding whether to reject a foreign passport fund's notice of intention on the ground that it would be contrary to the public interest, ASIC must disregard any benefits that may arise from limiting competition for managed investment schemes or CCIVs. | No equivalent. |

Detailed explanation of new law

Registering a sub-fund as an Australian Passport Fund

10.5 The corporate director of a retail CCIV may lodge an application with ASIC to register a sub-fund of the CCIV as an Australian passport fund. This provides the corporate director with the flexibility to elect to register only some of the sub-funds of the CCIV as passport funds. *[Schedule 2, items 4 and 170, section 9 (definition of 'Australian passport fund') and subsection 1212(1)]*

10.6 Sub-funds of a wholesale CCIV cannot become Australian passport funds. Nevertheless, a CCIV which does not have any retail clients may elect to become a retail CCIV by notifying ASIC of its status as a retail CCIV. This ensures that a sub-fund may be registered as an Australian Passport Fund before it has any members.

10.7 The process for registering a sub-fund of a retail CCIV as a passport fund is the same as the process for registering registered schemes as passport funds. ASIC must consider whether the requirements in the Act and the ASIC Act are likely to be complied with and whether the corporate director meets the requirements for an operator of a passport fund in Annex 2 of the Memorandum of Cooperation on the Establishment and Implementation of the Asia Region Funds Passport¹⁴. If satisfied of these matters, ASIC must

¹⁴ The Memorandum of Cooperation on the Establishment and Implementation of the Asia Region Funds Passport is available at:

register the sub-fund as an Australian passport fund and assign it an APFRN. The corporate director then becomes the operator of the passport fund. *[Schedule 2, items 171 to 179, subparagraphs 1212(2)(b)(i) to (ii), paragraphs 1212(2)(b), 1212A(1)(a) to (b), subsections 1212(3) and 1212A(1) to (2), and section 1212A]*

10.8 When lodging documents with ASIC, the CCIV must ensure that all documents relating to the sub-fund that has been registered as an Australian passport fund contain the fund's APFRN. *[Schedule 2, items 180 to 181, section 1212B]*

10.9 Amendments have also been made to Part 8A.3 to account for the possibility of the passport arrangements being extended to other types of entities in the future. A new defined term has been created to describe a fund that seeks to become an Australian passport fund (*collective investment fund*) and the person that would control the fund (*proposed operator*). Currently the only types of funds that may register to become Australian passport funds are registered schemes, managed investment schemes that have applied to become registered schemes and sub-funds of retail CCIVs. The only companies that may be a proposed operator are the responsibility entity of a scheme and the corporate director of a CCIV. *[Schedule 2, items 170 to 181, sections 1212, 1212A and 1212B]*

Deregistration of an Australian Passport Fund

10.10 If a sub-fund is an Australian passport fund, ASIC cannot deregister the sub-fund unless it is of the opinion that deregistration would not be contrary to the interests of protected members. Protected members are members who became members after the fund became an Australian passport fund or on the expectation that the fund would become an Australian passport fund (excluding the operator, a former operator or any persons related to the current or former operator). For a discussion of the process for ASIC-initiated deregistration, see paragraphs 7.175 to 7.188. *[Schedule 1, item 4, subsections 1242A(4) and (5)]*

10.11 Similarly, a person cannot apply to voluntarily deregister a sub-fund if the sub-fund has protected members. For a discussion of the voluntary deregistration process, see paragraphs 7.166 to 7.174. *[Schedule 1, item 4, subsections 1242(9) to (10)]*

10.12 If a sub-fund is deregistered as a sub-fund, the sub-fund automatically ceases to be an Australian passport fund and ASIC must ensure that the Register of Passport Funds is updated (see paragraph 7.197). The reinstatement of the sub-fund does not reinstate it as an Australian passport fund (see paragraph 7.208). *[Schedule 1, item 4, subsections 1242D(5) and 1242G(3)]*

10.13 There is also a process in the existing law for a sub-fund to deregister as only an Australian passport fund and continue to remain established as a sub-fund (see existing Subdivision A of Division 1 of Part 8A.7).

Rejecting a notice of intention from a foreign passport fund

10.14 A minor amendment has been made to one of the circumstances when ASIC may reject a foreign passport fund's notice of intention to become a notified foreign passport fund and offer interests in Australia.

10.15 The existing law allows ASIC to reject the notice if ASIC is of the opinion that it is not in Australia's public interest for the fund to offer interests in Australia. Public interest is then defined so that it excludes any benefits that may arise from limiting competition for managed investment schemes (see paragraph 1213B(1)(b) and subsection 1213B(3) of the Act). This definition has been amended to also exclude any benefits from limiting competition for CCIVs. *[Schedule 2, items 13 and 182, section 9, paragraph (a) of the definition of 'expectation' and subsection 1213B(3)]*

Chapter 11

Other amendments

Outline of chapter

11.1 This Chapter outlines consequential amendments to Chapter 9 of the Act, contained in Part 8B.8 of the Bill, and to the ASIC Act. These amendments extend ASIC's powers under the ASIC Act and ensure that relevant provisions apply appropriately to CCIVs.

Context of amendments

11.2 Chapter 9 of the Act includes provisions that deal with a number of miscellaneous matters, including registers, audit companies, offences and the power of the Courts. The Bill modifies certain provisions to ensure that they operate appropriately in relation to CCIVs and their corporate directors.

11.3 The ASIC Act enables the majority of ASIC's powers, including investigative powers, and the power to conduct hearings for the purposes of its powers and functions. The ASIC Act also includes ASIC's powers in relation to unconscionable conduct and consumer protections for financial services. Amendments to the ASIC Act ensure that ASIC can appropriately exercise these powers in relation to CCIVs.

11.4 Many of ASIC's powers under the ASIC Act intersect with financial services framework in Chapter 7 of the Act, which is modified for CCIVs by Division 4 of Part 8B.7 of the Bill. As such, most of the amendments to the ASIC Act are to ensure consistency between Chapter 7 of the Act and the ASIC Act.

Summary of new law

11.5 Part 8B.8 modifies the operation of certain provisions in Chapter 9 of the Act ensure:

- breach reports relating to the depositary that are lodged with ASIC are not publicly available for inspection;

- provisions relating to the books of a company apply correctly to CCIVs;
- certain offence provisions apply to CCIVs and their corporate directors appropriately; and
- the powers of the AAT and the courts in relation to defects in decision-making and powers of review cover CCIVs.

11.6 Amendments to the ASIC Act ensure that:

- the unconscionable conduct provisions in Division 2 of Part 2 adequately capture the kinds of financial services that relate to CCIVs;
- there is consistency in the treatment of financial services between the ASIC Act and Chapter 7 of the Act; and
- ASIC's powers and functions work effectively in relation to CCIVs.

Comparison of key features of new law and current law

| <i>New law</i> | <i>Current law</i> |
|--|--------------------|
| A written report of a suspected or material breach of the Act by a depositary is not publicly available. | No equivalent. |
| The constitution of a wholesale CCIV is not publicly available. | No equivalent. |
| A CCIV must make its books available for inspection in the same way as proprietary companies. | No equivalent. |

| <i>New law</i> | <i>Current law</i> |
|--|--------------------|
| <p>It is an offence for any of the following to falsify or destroy securities of a CCIV, or the books of the CCIV:</p> <ul style="list-style-type: none"> • a current or former officer of the CCIV; • a current or former officer of the corporate director; • a current or former employee of the corporate director; or • a current or former member of the CCIV. | No equivalent. |
| A CCIV may not rely on information provided to it by an officer or agent of the CCIV, or an officer, employee, or agent of the corporate director as a defence to an offence relating to false or misleading statements made by the CCIV. | No equivalent. |
| If a CCIV is a defendant in a prosecution, or upcoming prosecution, ASIC may compel assistance from a current or former officer or agent of the CCIV, or a current or former officer, employee or agent of the corporate director. | No equivalent. |
| <p>The whistleblower protections apply if one of the following persons makes a disclosure about potential misconduct by the CCIV or the corporate director:</p> <ul style="list-style-type: none"> • an officer of the CCIV; • a supplier of the CCIV; • an employee, officer or supplier of the corporate director. | No equivalent. |
| There is no merits review by the AAT in relation to a decision to make, vary or revoke the CCIV rules. | No equivalent. |

| <i>New law</i> | <i>Current law</i> |
|---|--------------------|
| A Court has the same powers in relation to an irregularity or defect in a meeting of a sub-fund or a joint meeting of creditors and members of a sub-fund of a CCIV as it has in relation to an irregularity or defect in a meeting of members or members and creditors of a corporation. | No equivalent. |
| <p>The definition of ‘financial service’ for the purposes of Division 2 of Part 2 of the ASIC Act includes when a person:</p> <ul style="list-style-type: none"> • as the corporate director of a CCIV, operates the business and conducts the affairs of the CCIV; or • acts as a depositary of a CCIV. | No equivalent. |
| <p>For the purposes of Division 2 of Part 2 of the ASIC Act, the following does not constitute providing a ‘custodial or depositary service’:</p> <ul style="list-style-type: none"> • operating as a CCIV; • operating the business and conducting the affairs of a CCIV; and • acting as a depositary of a CCIV. | No equivalent. |
| <p>For the purposes of Subdivision D of Division 2 of Part 2 of the ASIC Act, a CCIV cannot rely on information or conduct by the following persons as a defence for a contravention:</p> <ul style="list-style-type: none"> • an agent or corporate director of the CCIV; or • an employee, director or agent of the corporate director of the CCIV. | No equivalent. |

| <i>New law</i> | <i>Current law</i> |
|---|--------------------|
| <p>A CCIV can be represented at a hearing conducted by ASIC by the following persons:</p> <ul style="list-style-type: none"> • an officer of the CCIV (other than the corporate director); • an officer or employee of the corporate director. | No equivalent. |
| <p>If ASIC makes a requirement of a CCIV, it can make that same requirement of the following persons:</p> <ul style="list-style-type: none"> • an officer of the CCIV (other than the corporate director); and • an officer or employee of the corporate director. | No equivalent. |
| <p>A corporate director of a CCIV may give an enforceable undertaking in relation to conduct concerning the CCIV. If there is a breach of the undertaking, the Court may order that the corporate director transfer an amount to the CCIV.</p> | No equivalent. |
| <p>Where the CCIV is providing financial services, the corporate director is treated as also providing those financial services. However, this is not the case where the CCIV is:</p> <ul style="list-style-type: none"> • issuing a security; or • participating in a clearing and settlement facility; or • participating in a financial market. | No equivalent. |

Detailed explanation of new law

Amendments to Chapter 9 of the Act made by Part 8B.8

Amendments relating to registers and books

11.7 Documents lodged with ASIC are generally able to be viewed by the public. However, certain documents are not publicly available as they include confidential information. A written report of a suspected or actual material breach of the Act by the depositary that is lodged with ASIC is not able to be inspected. This provides protection for potentially sensitive or confidential information to ensure there is full reporting of material breaches to ASIC. *[Schedule 1, item 4, paragraph 1245(vii); Schedule 2, item 183, note to subsection 1274(2)]*

11.8 The constitution of a wholesale CCIV is also exempted from public inspection. This provides equivalent treatment to wholesale managed investment schemes which are not required to provide ASIC with a copy of their constitution, such that the constitution is not available for public inspection. *[Schedule 1, item 4, paragraph 1245(vi); Schedule 2, item 183, note to subsection 1274(2)]*

11.9 Any book of the CCIV that the Act requires to be made available for inspection may be inspected in accordance with the rules that apply to proprietary companies. This includes the requirement that the CCIV must make a book available within seven days if a person has requested to inspect it. *[Schedule 1, item 4, section 1245A; Schedule 2, item 184, note to subsection 1300(2A)]*

11.10 It is an offence for a person to falsify or destroy securities of a company, or to falsify or destroy the books of, or relating to the affairs of a company. This applies to a person who is a current or former officer, employee, or member of a company. Modifications are made to ensure that it is also an offence for a person who is or has been an officer of the CCIV, an officer of the corporate director or an employee of the corporate director to falsify or destroy the CCIV's securities or books. *[Schedule 1, item 4, section 1245B; Schedule 2, item 185, note to subsection 1307(1)]*

Amendments relating to offences

11.11 It is an offence for a corporation, such as a CCIV, to make a false or misleading statement that relates to its capital. It is also an offence for an officer or employee of a corporation to make false or misleading statements to certain people (including auditors

or operators of financial markets) relating to the affairs of the corporation.

11.12 It is a defence to these offences if the corporation, officer or employee made the statement in reasonable reliance on information given to them by a third party (that is, if the person is a corporation, someone other than a director, employee or agent of the corporation, or if the person is an individual, someone other than an employee or agent of the individual).

11.13 For the purposes of these offences (found in sections 1308 and 1309 of the Act), modifications apply to ensure that persons with a relationship with the corporate director are also treated as having a relationship with the CCIV. This ensures that the defence operates appropriately for CCIVs, given that a CCIV is a separate legal entity to its corporate director. *[Schedule 1, item 4, section 1245C; Schedule 2, items 186 to 188, note to subsections 1308(12) and (13), note to subsections 1309(1) and (2), and note to subsections 1309 (9) and (10)]*

11.14 Where a prosecution of an offence against the Act has started, or if ASIC believes that a prosecution should be started, ASIC may require certain persons to assist in the prosecution. Where the defendant in such a prosecution is a CCIV, ASIC may receive assistance from a current or former corporate director, liquidator or agent of the CCIV, or a current or former officer, employee or agent of the corporate director. *[Schedule 1, item 4, section 1245C; Schedule 2, item 190, note to subsection 1317(1)]*

11.15 Where a person is being prosecuted for a contravention of certain provisions of the Act, including Chapter 8B, the Court may order an injunction under section 1324 on the conduct or conduct of that kind. For that same contravention, the Court may also direct the person to disclose certain information or also publish an advertisement in accordance with the Court's order. The Court also has the power to make other orders for such contraventions, such as an order to refuse to enforce provisions of a contract. *[Schedule 2, items 197 and 198, note to sections 1324A and 1324B, and subsection 1325(7)]*

Protections for whistleblowers

11.16 The protections for whistleblowers in Part 9.4AAA are extended so that certain persons connected to the corporate director, as well as the CCIV, may make disclosures that relate to the CCIV. More specifically, a discloser may be:

- an officer of the CCIV;
- an officer of the corporate director of the CCIV;

- an employee of the corporate director; and
- a person who has a contract for the supply of services or goods to the CCIV or the corporate director of the CCIV and their employees.

[Schedule 1, item 4, paragraphs 1245D(1)(a) to (c); Schedule 2, items 191 and 192, note 2 to subsection 1317AA(1)]

11.17 Disclosures may also be made to a larger group of persons in the CCIV context, namely to:

- ASIC;
- the CCIV's auditor, an auditor of a sub-fund of the CCIV, or any member of those audit teams;
- the auditor of the corporate director or a member of that audit team;
- the corporate director of the CCIV;
- a director, secretary or senior manager of the corporate director of the CCIV; or
- a person authorised by the CCIV or the corporate director of the CCIV to receive disclosures.

[Schedule 1, item 4, paragraph 1245D(1)(d) to (g); Schedule 2, items 191 and 192, note 2 to subsection 1317AA(1)]

11.18 The same confidentiality requirements apply to these disclosures as for disclosures that relate to other entities. *[Schedule 1, item 4, section 1245D(2); Schedule 2, item 193, note to subsection 1317AE(1)]*

11.19 A disclosure of information by the corporate director of a CCIV does not qualify for protection because the corporate director is the controlling mind of the CCIV. The corporate director is already under an obligation to report breaches (see paragraph 3.100 of these explanatory materials) *[Schedule 1, item 4, subsection 1245D(3)]*

Powers of the courts and the AAT

11.20 Review by the AAT is not available for a decision by ASIC to make, vary or revoke the CCIV rules. This is appropriate because the CCIV rules are of a general nature and ASIC's decisions in relation to making, varying or revoking similar rules are also excluded from merits review. *[Schedule 1, item 4, section 1245E]*

11.21 A Court has the same powers in relation to an irregularity or defect in a meeting of a sub-fund or a joint meeting of creditors and members of a sub-fund of a CCIV as it has in relation to an

irregularity or defect in a meeting of members or members and creditors of a corporation. *[Schedule 1, item 4, section 1245F; Schedule 2, item 196, note to subsection 1322(1)]*

Meaning of *financial services* in the ASIC Act

11.22 Outside Division 2 of Part 2 of the ASIC Act, key terms in the ASIC Act have the same meaning as in Chapter 7 of the Act. Where Division 4 of Part 8B.7 of the Act modifies the meaning of a provision in Chapter 7 as it applies to CCIVs, then the modified meaning also applies in relation to CCIVs in the ASIC Act. A note to the definition of ***financial service*** confirms this approach. *[Schedule 3, item 4, definition of financial service in subsection 5(1)]*

11.23 To provide consistency with the treatment of financial services that are provided by the CCIV across the ASIC Act and Chapter 7 of the Act, the corporate director of a CCIV is also taken to provide financial services that are provided by the CCIV. This ensures that the corporate director is responsible for actions of the CCIV that constitute the provision of financial services. See Chapter 9 of these explanatory materials for more information on the treatment of financial services provided by a CCIV in Chapter 7 of the Act. *[Schedule 3, item 14, section 243F]*

Amendments relating to ASIC's investigation and information gathering powers and CCIVs

11.24 ASIC has certain powers in relation to bodies corporate and their employees, agents and officers. These include powers to request information or documents, or to hold hearings. Amendments ensure that these provisions appropriately reflect the relationship between a CCIV and its corporate director.

11.25 The definition of 'eligible person' extends to the corporate director of a CCIV or liquidator of a sub-fund, as well as the officers of the corporate director or liquidator. This allows ASIC to request books relating to the affairs of the CCIV from the corporate director or its officers, or to require that person to give assistance to ASIC in connection with a prosecution under an offence in the Corporations legislation. *[Schedule 3, items 1 to 3, subsection 5(1), definition of eligible person]*

11.26 At a hearing held by ASIC, a CCIV may be represented by an officer or employee of the corporate director who has been approved by ASIC, or by the liquidator of a sub-fund. Similarly, where a person can make a requirement of a CCIV under the ASIC Act's investigation and information-gathering provisions, then that

requirement may also be made of a person who is or has been an officer of the CCIV or an officer or employee of the corporate director. *[Schedule 3, items 10 and 11, subsection 59(6) and section 84]*

11.27 Section 93AA of the ASIC Act sets out the process by which ASIC may accept an enforceable undertaking from a person (including CCIVs and corporate directors). This section continues to apply, however the new law applies in relation to conduct by a corporate director that concerns a CCIV. This bespoke provision ensures that the same protections and remedies can apply in relation to a corporate director and CCIV as apply to a responsible entity and a registered scheme. *[Schedule 3, items 12 and 13, heading to Part 3A and section 93B]*

Amendments to Division 2 of Part 2 of the ASIC Act

Definitions in Division 2 of Part 2 of the ASIC Act

11.28 Division 2 of Part 2 of the ASIC Act provides the framework for ASIC's jurisdiction over unconscionable conduct and other consumer protections in relation to financial services. This Division has its own defined terms, even where that same term is defined for the rest of the ASIC Act. To provide consistency across the Corporations Act and ASIC Act, the amendments to the ASIC Act are similar to those made to Chapter 7 of the Act.

11.29 Amendments to Division 2 of Part 2 of the ASIC Act ensure that the definition of ***financial service*** for the purposes of that Division include financial services related to CCIVs; specifically the financial services of 'operating the business and conducting the affairs of a CCIV' (undertaken by the corporate director) and 'acting as the depositary of a CCIV'. For the avoidance of doubt, operating a CCIV, operating the business and conducting the affairs of a CCIV, and acting as the depositary of a CCIV do not constitute providing a custodial or depository service. *[Schedule 3, items 5 to 7, paragraphs 12BAB(1)(g) and 12BAB(14)(d) and subsection 12BAB(1)]*

Defences for prosecutions under Subdivision G of Division 2 of Part 2

11.30 It is a defence to a prosecution under Subdivision G of Division 2 of Part 2 of the ASIC Act if the defendant can establish the existence of certain facts, including that the contravention was due to reasonable reliance on information supplied by another person, or that the contravention was due to the act or default of

another person. However, this does not apply where the other person is an employee, agent, or director of the defendant.

11.31 Amendments provide that where the defendant is a CCIV, the CCIV may not use this defence where the other person is the corporate director or an agent of the CCIV, or an employee, director or agent of the corporate director of the CCIV. These amendments ensure that the defence operates appropriately for CCIVs, given that the CCIV is a separate legal entity to its corporate director and is a passive investment vehicle without employees. *[Schedule 3, items 8 and 9, paragraph 12GI(2)(b)]*

Chapter 12

CCIV Rules and Regulations

Outline of chapter

12.1 Part 8B.9 of Chapter 8B allows ASIC to make CCIV rules, exemption orders and modification declarations in relation to new Chapter 8B. A corresponding regulation making power is also included, consistent with the equivalent power that applies for registered schemes.

Comparison of key features of new law and current law

| <i>New law</i> | <i>Current law</i> |
|--|--------------------|
| ASIC may make CCIV rules, having regard for regard to the objects of Chapter 8B, the likely regulatory impact of the proposed rule and any other matter ASIC considers relevant. | No equivalent. |
| The regulations may modify the operation of Chapter 8B, or any other provision of the Act. | No equivalent. |

Detailed explanation of new law

CCIV rules

12.2 ASIC may, by legislative instrument, make CCIV rules that prescribe 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 8B. This CCIV rule making power enables ASIC to make rules of a timely, commercially relevant or technical nature that support the operation of the CCIV regime and are consistent with the objects of Chapter 8B. It is expected that ASIC would use this power to prescribe specific requirements for the safe, effective and efficient operation of CCIVs that are not suited for inclusion in the primary law or in regulations. [*Schedule 1, item 4, subsection 1246(1); Schedule 2, item 5, definition of 'CCIV rule' in section 9*]

12.3 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, item 4, subsection 1246(2)]

12.4 In considering whether to make a CCIV rule, ASIC must have regard to the objects of Chapter 8B and the likely regulatory impact of the proposed rule. ASIC may also have regard to any other matter ASIC considers relevant. Section 17 of the *Legislation Act 2003* also requires ASIC to undertake any consultation that is appropriate and reasonably practicable to undertake. *[Schedule 1, item 4, section 1246A]*

12.5 CCIV rules that are inconsistent with the regulations have no effect to the extent of the inconsistency. In effect, this would give the Executive Council, acting on the advice of the Minister, the power to disable by regulation any CCIV rule, or part of a rule, that the Minister considers inappropriate or inconsistent with the CCIV legislation or the Government's policy intention. CCIV rules are deemed to be consistent with the regulations to the extent they are capable of operating concurrently with the regulations. *[Schedule 1, item 4, subsection 1246(3)]*

Exemption and modification powers

12.6 ASIC may make specific exemption orders and modification declarations in relation to the Act and the CCIV rules (referred to collectively as the ***CCIV provisions***). *[Schedule 1, item 4, subsections 1246B(1)]*

12.7 Exemption orders and modification declarations are made either by legislative or notifiable instrument. If the order or declaration relates to all sub-funds of all CCIVs, or all sub-funds of a specified class of CCIVs, or a specified class of sub-funds of CCIVs, then the order or declaration must be made by legislative instrument. *[Schedule 1, item 4, subsections 1246B(2) to (4)]*

12.8 Exemption orders and modification declarations must be made by notifiable instrument if the exemption or declaration relates to a specified CCIV or a specified entity. Such an order may apply to the CCIV or entity in respect of a specified sub-fund, a specified class of sub-funds or all sub-funds of the CCIV. *[Schedule 1, item 4, subsections 1246B(5) to (7)]*

12.9 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, item 4, subsection 1246B(8)]*

12.10 The exemption and modification powers support the effective operation of the CCIVs regime by enabling ASIC to adjust the application of the CCIV legislation in circumstances where the strict application of the law would result in inappropriate or anomalous outcomes that would be inconsistent with the policy intention of the CCIV regime.

For example, ASIC would be able to adjust the specific operation of the regime so as to avoid any unintended consequences that may arise with respect to a particular class of sub-funds.

12.11 ASIC presently has a range of exemption and modification powers under the Act, including managed investment schemes, takeovers, fundraising, licensing, accounting and disclosure requirements for financial products. ASIC's exemption and modification powers for CCIVs apply across the Act and CCIV rules. It is necessary to extend this power across the Act as the Bill substantially modifies the operation of provisions outside of the new Chapter 8B specifically for CCIVs.

Regulations

12.12 The regulations may modify the operation of Chapter 8B, or any other provision of the Act for:

- a specified CCIV;
- a specified class of CCIVs;
- all CCIVs;
- a specified class of sub-funds;
- all sub-funds of a specified class of CCIVs; or
- all sub-funds.

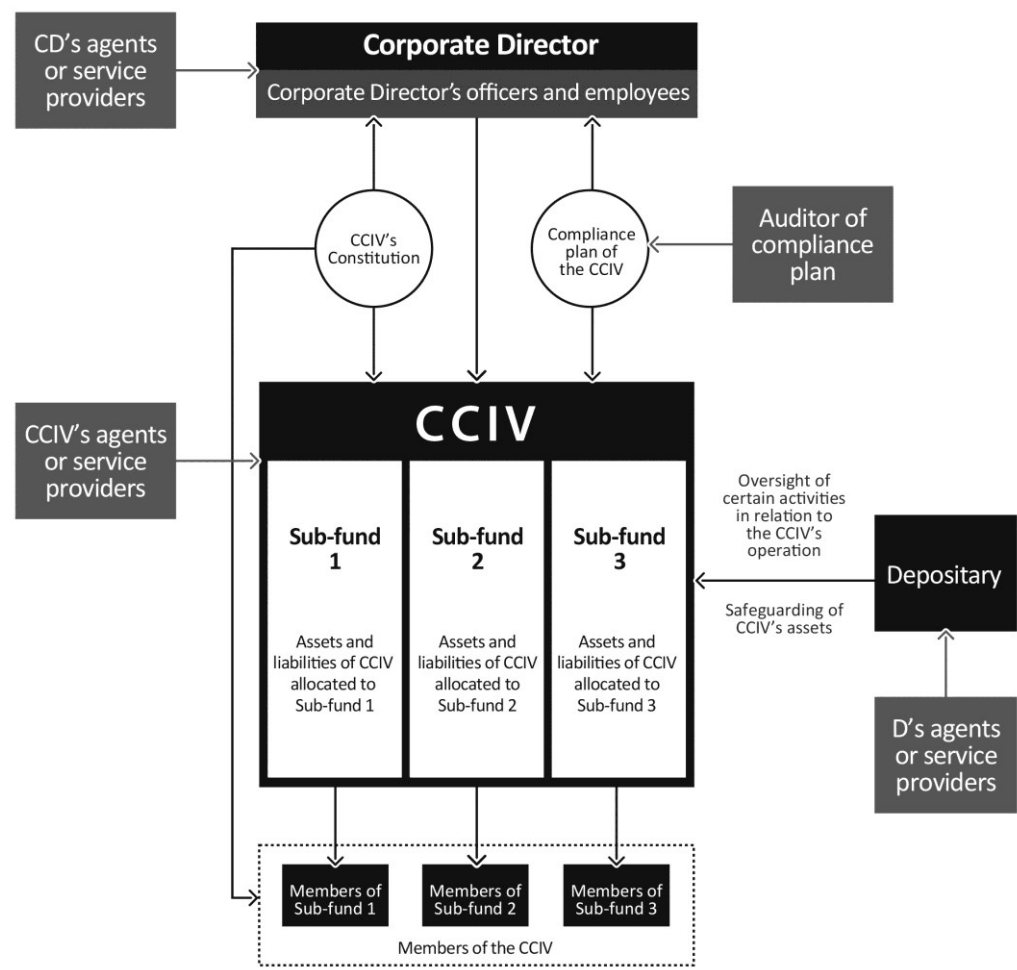
[Schedule 1, item 4, subsection 1246C(1)]

12.13 Regulations made for the purposes of this provision may apply to a specified CCIV, a specified sub-fund or class of sub-funds of the CCIV, or all the sub-funds of the CCIV. *[Schedule 1, item 4, subsection 1246C(2)]*

12.14 The power to modify the operation of the Act for CCIVs will provide the Government with appropriate flexibility to make targeted adjustments where this is necessary to address inappropriate or anomalous outcomes that would be inconsistent with the policy intention of the CCIV regime. Regulations are disallowable instruments and therefore are subject to parliamentary scrutiny.

Appendix

Regulatory framework for a retail CCIV



Note: This diagram shows the regulatory framework as it applies to a retail CCIV. A retail CCIV must have a depository. A wholesale CCIV may choose to have a depository, but if it does so, it is subject to the full regulatory requirements for depositories. A wholesale CCIV is not required to have a compliance plan. The CCIV, the corporate director and the depository may each appoint agents and service providers to exercise their respective powers and functions, except that the depository may not appoint an agent to perform its oversight function in relation to the CCIV.