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# Glossary

The following abbreviations and acronyms are used throughout this explanatory memorandum.

Abbreviation	Definition
AAT	Administrative Appeals Tribunal
ARFN	Australian registered fund number
ARFP	Asia Region Funds Passport
ARFP Act	Corporations Amendment (Asia Region Funds Passport) Act 2018
ASIC	Australian Securities and Investments Commission
ASIC Act	Australian Securities and Investments Commission Act 2001
CCIV	Corporate collective investment vehicle
	A reference to 'CCIV' in the explanatory materials is a reference to both retail and wholesale CCIVs unless otherwise specified
Criminal Code	Schedule to the Criminal Code Act 1995
Guide	Attorney-General's Department, A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers, September 2011
OEIC	A company that is an Open-Ended Investment Company regulated under legislation of the United Kingdom
PDS	Product disclosure statement
PPSA	Personal Property Securities Act 2009
The Act	Corporations Act 2001
Tranche 1 Exposure Bill	Exposure draft of the Treasury Laws Amendment (Corporate Collective Investment Vehicle) Bill 2018 released for consultation on 13 June 2018
Tranche 2 Exposure Bill	Exposure draft of the Treasury Laws Amendment (Corporate Collective Investment Vehicle) Bill 2018 released for consultation on 19 July 2018

Abbreviation	Definition
Tranche 3 Exposure Bill	Exposure draft of the Treasury Laws Amendment (Corporate Collective Investment Vehicle) Bill 2018 released for consultation on 12 October 2018
Tranche 1 Explanatory Materials	Explanatory materials accompanying the Tranche 1 Exposure Bill and released for exposure on 13 June 2018
Tranche 2 Explanatory Materials	Explanatory materials accompanying the Tranche 1 Exposure Bill and released for exposure on 19 July 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 Tranche 3 Exposure Bill provides for further aspects of the regulatory framework for CCIVs, building on the Tranche 1 Exposure Bill that was released for consultation on 13 June 2018 and the Tranche 2 Exposure Bill that was released for consultation on 19 July 2018.
- 1.2 This Chapter of the explanatory materials for the Tranche 3 Exposure Bill provides an overview of these further aspects.

#### Context of amendments

- 1.3 The general context for the amendments establishing the regulatory framework for CCIVs is outlined in Chapter 1 of the Tranche 1 Explanatory Materials.
- 1.4 The Tranche 1 Exposure Bill included:
  - revised core provisions establishing how the CCIV and its sub-funds operate; and
  - amendments to apply Chapters 2A to 2P of the Act (such as the meetings rules and members' rights and remedies) to CCIVs.
- 1.5 The Tranche 1 Explanatory Materials included an outline of the proposed legislative approach to depositary independence. The Tranche 3 Exposure Bill includes draft legislation giving effect to depositary independence, taking into account the outcomes of consultation on the earlier proposal.
- 1.6 The Tranche 2 Exposure Bill included further provisions concerning:
  - external administration of a sub-fund in a wind up situation;
  - the application of the financial services regime in Chapter 7 of the Act to CCIVs; and
  - the establishment of contraventions of the law by a CCIV and the corporate director's liability for such contraventions.

- 1.7 The Tranche 2 Explanatory Materials also outlined the proposed penalties framework for CCIVs, and the proposed approach to takeovers, compulsory acquisitions and buy-outs of a CCIV.
- 1.8 The Tranche 3 Exposure Bill contains further provisions relating to:
  - the independence requirement for the depositary of a CCIV;
  - the external administration procedures for a sub-fund (including schemes of arrangement, receivership and a refined approach for winding up);
  - takeovers, compulsory acquisitions and buy-outs, disclosure and fundraising;
  - amendments to Chapter 9 of the Act;
  - the application of the ARFP regime to CCIVs; and
  - consequential amendments to the ASIC Act.

# Summary of new law

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

# **Depositary independence**

- 1.10 The depositary of a CCIV, any other entity performing depositary functions and any related bodies corporate of these entities must meet the independence requirement in relation to entities that direct investment decisions for the CCIV (in particular, the corporate director).
- 1.11 The independence requirement consists of three tests: a structural independence test, a voting/control test and an independent director test.
- 1.12 If the depositary, any other entity performing depositary functions or any of their related bodies corporate fail any of the above three tests, then the depositary itself fails the independence requirement.
- 1.13 If the depositary of a CCIV or any other entity performing depositary functions performs any other functions for the CCIV, then it must also comply with any functional independence requirements prescribed in the regulations.

#### External administration of a CCIV

- 1.14 External administration applies on a sub-fund-by-sub-fund basis. This is achieved by applying five translation rules to the existing external administration provisions in Chapter 5.
  - The first translation rule replaces a reference in the provisions to the company undergoing external administration (the relevant company) with a reference to the sub-fund.
  - The second translation rule replaces a reference in the provisions to the 'directors' of the relevant company with a reference to the corporate director.
  - 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.
  - The fourth and fifth translation rules replace a reference in the provisions to the 'shares' or 'debentures' of the relevant company with a reference to the shares or debentures referable to the sub-fund.
- 1.15 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.
- 1.16 In the receivership provisions, receivers are taken to be appointed for each sub-fund separately where the asset has been allocated to more than one sub-fund. Receivers have special powers to instruct the depositary and challenge allocation determinations before the Court.
- 1.17 The most significant consequence of applying the winding up provisions on a sub-fund-by-sub-fund basis is that the creditor must specify the sub-funds in a statutory demand or an application for the Court to order winding up. To ensure that a creditor is not disadvantaged, the creditor is given power to request information from the corporate director about the identity of the sub-fund and the proportion of the debt allocated to each sub-fund. Further, if the CCIV challenges the identity of the sub-fund in a statutory demand or an application for a Court-ordered winding up, the Court has the power to vary the statutory demand or application so that it specifies the correct sub-fund.
- 1.18 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.

#### Deregistering a sub-fund and a CCIV

- 1.19 There are three processes for deregistering a sub-fund.
- 1.20 First, 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 that relate to the sub-fund; and
  - the sub-fund has no remaining assets or liabilities.
- 1.21 Second, deregistration of a sub-fund may be initiated by ASIC in certain circumstances, such as if the CCIV has not lodged any documents relating to the sub-fund for 19 months and ASIC has no reason to believe that the part of the business of the CCIV relating to the sub-fund is being carried on. Where ASIC initiates deregistration of a sub-fund, the CCIV must be given an opportunity to show cause as to why the sub-fund should not be deregistered.
- 1.22 Finally, a sub-fund must be deregistered if the Court orders its 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.
- 1.23 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.
- 1.24 The consequences of deregistering a sub-fund or deregistering a 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.
- 1.25 A sub-fund may be reinstated. If the CCIV has been deregistered, the CCIV must also be reinstated on the reinstatement of the sub-fund. In most circumstances, the persons that were the corporate director and depositary immediately before deregistration of the CCIV are also reinstated.

# Takeovers, compulsory acquisitions and buy-outs, disclosure and fundraising

- 1.26 The acquisition of a relevant interest in a CCIV is not regulated by procedural rules and obligations regarding takeovers, compulsory acquisitions and buy-outs (set out in Chapters 6 to 6B of the Act). Chapter 6C also does not apply to CCIVs, as CCIVs are prohibited from being listed.
- 1.27 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.
- 1.28 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).
- 1.29 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.
- 1.30 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 Part 8B.17 of the Tranche 2 Exposure Bill.
- 1.31 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 incorporate the CCIV or register the sub-fund.

### Amendments to Chapter 9 of the Act

1.32 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.

#### **Asia Region Funds Passport regime**

1.33 The provisions relating to ARFP 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.

#### Amendments to the ASIC Act

1.34 The ASIC Act provides the basis for many of ASIC's powers of investigation and enforcement. It also establishes ASIC's jurisdiction over unconscionable conduct that relates to financial services. Amendments to the ASIC Act ensure that the definition of financial services in the ASIC Act applies correctly, and that ASIC's powers and functions work effectively in relation to CCIVs.

# Chapter 2 Depositary independence

# **Outline of chapter**

2.1 This Chapter outlines the independence requirements for the depositary of a CCIV.

#### Context of amendments

- 2.2 The depositary of a CCIV is an important consumer protection: the depositary safeguards the assets of the CCIV and oversees certain aspects of the operations of the CCIV. While some aspects of the depositary's functions are currently performed by custodians, the depositary is a new concept in Australian funds management with a broader range of functions than custodians under the MIS regime.
- 2.3 The depositary of a CCIV is intended to serve a similar purpose to depositaries in other jurisdictions. The requirements for the depositary 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.
- 2.4 The legislative framework for the depositary of a CCIV (other than the independence requirements) was consulted on in the Tranche 1 Exposure Draft. The proposed independence requirements for the depositary of a CCIV were outlined in the Tranche 1 Explanatory Materials. The provisions contained in the Tranche 3 exposure draft takes into account the outcomes of consultation on Tranche 1

# Summary of new law

- 2.5 The depositary of a CCIV, any other entity performing depositary functions and any related bodies corporate of these entities must meet the independence requirement in relation to entities that direct investment decisions for the CCIV (in particular, the corporate director).
- 2.6 The independence requirement consists of three tests: a structural independence test, a voting/control test and an independent director test

- 2.7 If the depositary, any other entity performing depositary functions or any of their related bodies corporate fail any of the above three tests, then the depositary itself fails the independence requirement.
- 2.8 If the depositary of a CCIV or any other entity performing depositary functions performs any other functions for the CCIV, then it must also comply with any functional independence requirements prescribed in the regulations.

# Comparison of key features of new law and current law

New law	Current law
The depositary of a CCIV, any entity performing depositary functions and any related bodies corporate of these entities must meet the independence requirement.	No equivalent.
The independence requirement consists of three tests:	
• a structural independence test;	
<ul> <li>a voting/control test; and</li> </ul>	
• an independent director test.	
If the depositary, any other entity performing depositary functions or any of their related bodies corporate fail any of the above three tests, then the depositary itself fails the independence requirement.	No equivalent.
If the depositary of a CCIV or any other entity performing depositary functions performs any other functions for the CCIV, then it must also comply with any functional independence requirements prescribed in the regulations.	No equivalent.

# Detailed explanation of new law

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

- 2.10 The independence requirement imposes restrictions on the relationships between two groups: entities that perform depositary functions and any of their related bodies corporate in one group; and entities that direct investment decisions for the CCIV and any of their related bodies corporate in the other.
- 2.11 The entities that perform depositary functions are:
  - the depositary; and
  - an agent appointed, or a person otherwise engaged, by the depositary under section 1234H (including any person taken to be an agent or person otherwise engaged by the depositary under subsection 1234H(2)) (see paragraphs 4.67 to 4.71 of the Tranche 1 Explanatory Materials).

#### [Schedule 1, item 1, subsection 1234D(2)]

- 2.12 The entities that direct investment decisions for the CCIV are:
  - the corporate director; and
  - an agent appointed, or a person otherwise engaged, by the corporate director under section 1237K (including any person taken to be an agent or otherwise engaged by the corporate director under subsection 1237K(2)) to perform portfolio management functions or investment risk management functions for the CCIV (see paragraphs 5.63 to 5.68 of the Tranche 1 Explanatory Materials).

#### [Schedule 1, item 1, subsection 1234DA(2)]

- 2.13 The terms 'portfolio management functions' and 'investment management functions' 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).
- 2.14 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 1234DA(3)]
- 2.15 If the entity that performs depositary functions, or the entity that directs investment decisions for the CCIV, is a body corporate, then the independence requirements are also imposed on their related bodies corporate.
- 2.16 Although this discussion refers to 'entities' that perform depositary functions for the CCIV, or direct investment decisions for the CCIV, there is nothing in the law that restricts the type of legal person that

can be appointed or engaged to carry out these activities in relation to the CCIV. For example, there is nothing in the law that prevents a natural person from performing these activities. If a natural person is so appointed or engaged, then the requirements apply to them to the greatest extent possible.

#### The independence requirement

- 2.17 The independence requirement consists of three tests:
  - · a structural independence test;
  - a voting/control test; and
  - an independent director test.

#### [Schedule 1, item 1, subsection 1234D(1)]

- 2.18 The entities performing depositary functions and any of their related bodies corporate must all meet the independence requirement. If any entity performing depositary functions, or any of its related bodies corporate, fail any of the above three tests then the depositary itself fails the independence requirement.
- 2.19 The corporate director is then obligated to take steps to remove and replace the depositary with a temporary depositary (see section 1235F of the Tranche 1 Exposure Bill and paragraphs 4.130 to 4.134 of the Tranche 1 Explanatory Materials).

#### Structural independence test

- 2.20 The structural independence test prohibits any entity performing depositary functions and any of their related bodies corporate from directing investment decisions for the CCIV. [Schedule 1, item 1, subsection 1234DA(1)]
- 2.21 This means that the depositary, any other entity performing depositary functions, and any of these entities' related bodies corporate cannot:
  - be appointed as corporate director of the CCIV; or
  - be appointed or engaged to perform portfolio management or investment risk management functions in relation to the CCIV.

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<sup>&</sup>lt;sup>1</sup> The primary exceptions to this are the corporate director and the depositary. The law requires the corporate director to be a public company (see subsection 1238E(1) of the Tranche 1 Exposure Draft). It also requires the depositary to be a public company or a foreign company (see paragraph 1234C(a) of the Tranche 1 Exposure Draft).

#### Voting/control test

- 2.22 The voting/control test is designed to ensure that entities directing investment decisions for the CCIV cannot unduly influence or control an entity performing depositary functions or its related bodies corporate.
- 2.23 If the entity performing depositary functions is an entity that may hold a general meeting at which votes may be cast, such as a company, then all of the votes that any entity that directs investment decisions for the CCIV and any of their related bodies corporate combined must not exceed 20 per cent of the total votes that may be cast in a general meeting of the entity performing depositary functions or its related body corporate. [Schedule 1, item 1, paragraph 1234DB(1)(a) and subsection 1234DB(2)]
- 2.24 When considering whether the 20 per cent threshold has been exceeded, all of the votes of any entities directing investment decisions for the CCIV (such as the corporate director or an entity performing portfolio management functions or investment risk management functions) and any of these entities' related bodies corporate are calculated in the aggregate.
- 2.25 Certain matters are to be disregarded when calculating votes at a general meeting of an entity. [Schedule 1, item 1, subsection 1234DB(3)]
- 2.26 If it is not possible to calculate the votes to be cast at a general meeting of the entity performing depositary functions, then the entities directing investment decisions in the CCIV's control over that entity is instead relevant. The depositary will fail the voting/control test if an entity directing investment decisions controls an entity performing depositary functions. [Schedule 1, item 1, paragraph 1234DB(1)(b)]

#### Example 2.1

Ironbank CCIV has appointed Cersei CD Ltd as its corporate director and Stark Depositary Services Ltd as its depositary.

Cersei CD Ltd is part of a corporate group. Its parent company is Lannister Ltd. Cersei CD Ltd has decided to outsource portfolio management functions for the CCIV to Tywin IM Ltd.

Tywin IM Ltd is a subsidiary of Westeros Management Services Ltd.

Cersei CD Ltd does not own any shares in Stark Depositary Services Ltd. However, Lannister Ltd and other companies in the Lannister corporate group hold shares in Stark Depositary Ltd such that, when considered together in the aggregate, they can cast 5 per cent of the total votes at a general meeting of Stark Depositary Services Ltd.

This, in itself, does not cause the depositary to fail the voting/control test.

However, Westeros Management Services Ltd also holds shares in Stark Depositary Services Ltd such that it is able to cast 16 per cent of the total votes at a general meeting of Stark Depositary Services Ltd.

This causes Stark Depositary Services Ltd to fail the voting/control test, despite the fact that:

- none of the entities appointed to perform functions for the CCIV hold any shares in Stark Depositary Services Ltd; and
- no entity, in its own right, exceeds the 20 per cent threshold.

In considering whether the 20 per cent threshold has been exceeded, the voting/control test calculates all of the combined votes of:

- Cersei CD Ltd (as corporate director);
- Lannister Ltd (as parent company of Cersei CD Ltd) and all of the other related bodies corporate of Cersei CD Ltd in the Lannister corporate group;
- Tywin IM Ltd (as an entity directing investment decisions for the CCIV); and
- Westeros Management Services Ltd (as parent company of Tywin IM Ltd).

#### Example 2.2

Ironbank CCIV has appointed Oberyn CD Ltd as its corporate director and Tyrion Depositary Services Ltd as its depositary.

Oberyn CD Ltd is a subsidiary of Martell Ltd.

Tyrion Depositary Services has decided to appoint two agents to provide custody services on its behalf: Bronn Custodian Ltd and Podrick Custody. Podrick Custody is a foreign company.

Oberyn CD holds shares in Bronn Custodian Ltd such that it can cast 13 per cent of the total votes at a general meeting of Bronn Custodian Ltd.

Martell Ltd holds shares in Tyrion Depositary Services Ltd, such that it can cast 8% of the total votes at a general meeting of Tyrion Depositary Services Ltd.

This does not cause Tyrion Depositary Services to fail the voting/control test, even though the entities that direct investment decisions for the CCIV and their related bodies corporate hold more than 20 per cent of the votes in all of the entities that perform depositary functions. This is because the voting/control test is applied to each entity that performs depositary services in its own right – it does not consider the votes in all of the entities in the aggregate.

The votes in Podrick Custody cannot be calculated, because it is a foreign company that does not hold general meetings. Accordingly, when considering whether Tyrion Depositary Services Ltd has failed the voting/control test, the entities that direct investment decisions' practical control over Podrick Custody will instead be relevant.

#### Independent director test

- 2.27 An entity that is performing depositary functions (including the depositary itself) must:
  - if it has fewer than 6 directors, have at least one director who is not also a director of an entity directing investment decisions for the CCIV; or
  - if it has 6 or more directors, have at least 2 directors who are not also a director of an entity directing investment decisions for the CCIV.

#### [Schedule 1, item 1, subsection 1234DC(1)]

2.28 If the entity performing depositary functions does not have directors (because, for example, it is a natural person or a type of legal entity that does not have directors), then it is not subject to the independent director test. [Schedule 1, item 1, subsection 1234DC(2)]

#### **Functional independence requirements**

- 2.29 Although an entity performing depositary functions is prohibited from directing investment decisions for the CCIV (such that it cannot perform portfolio management functions or investment risk management functions for the CCIV), there is nothing in the law that prevents it from performing any other functions for the CCIV (such as fund administration).
- 2.30 The regulations may prescribe requirements that must be complied with in circumstances where an entity is both:
  - performing depositary functions (as the depositary itself or an agent or person engaged by the depositary or taken to be an agent or engaged by the depositary under section 1234H);
     and
  - an agent appointed, or otherwise engaged, by the corporate director (or taken to be an agent or otherwise engaged by the corporate director) under section 1237K to perform functions in relation to the CCIV.

#### [Schedule 1, item 1, subsections 1234QA(1) and (2)]

2.31 A failure to comply with the functional independence requirements is a strict liability offence with a penalty of up to 60 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 regime for depositaries, as the failure to comply with the functional independence requirements could jeopardise the depositary's ability to perform its oversight and custody functions in an independent manner (free from the influence of entities directing investment decisions for the CCIV). [Schedule 1, item 1, subsections 1234QA(3)]

# Chapter 3 External Administration

# **Outline of chapter**

3.1 Chapter 2 outlines the process for winding up a sub-fund. It also explains how the other external administration processes apply in the CCIV context.

#### **Context of amendments**

- 3.2 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.12 of the Tranche 3 Exposure 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.
- 3.3 The provisions in Part 8B.12 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.
- 3.4 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.

### Summary of new law

- 3.5 Part 8B.12 applies the external administration provisions on a sub-fund-by-sub-fund basis by using five 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
- 3.6 Division 1 of Part 8B.12 contains general rules for construing terms and expressions.
- 3.7 Division 2 of Part 8B.12 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.
- 3.8 Division 3 of Part 8B.12 contains the translation rules for receivership and sets out the special duties and powers of receivers of sub-funds.
- 3.9 Division 4 of Part 8B.12 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.
- 3.10 Divisions 5 to 7 of Part 8B.12 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.

# Comparison of key features of new law and current law

New law	Current law
Core principle	No equivalent.
The external administration provisions apply on a sub-fund-by-sub-fund basis.	

New law	Current law
General translation rules	No equivalent.
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.	
The second translation rule replaces a reference in the provisions to the 'directors' of the relevant company with a reference to the corporate director.	
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 subfund.	
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 subfund.	
Arrangements and reconstructions	No equivalent.
Sub-fund by sub-fund application	
The general translation rules apply to the arrangement and reconstruction provisions in Part 5.1 (and related provisions).	
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	

New law	Current law
director.	
Arrangements and reconstructions involving multiple sub-funds are treated as separate arrangements for the purposes of Part 5.1.	
Persons prohibited from administering an arrangement	
The natural person directors of a corporate director and the depositary must not administer an arrangement or compromise.	
Additional Court powers	
The Court has additional powers to make orders when the arrangement or reconstruction involves subfunds. This includes the power to make any order it considers appropriate in relation to the assets and liabilities of the sub-fund.	
Receivers and other controllers of property	
Sub-fund by sub-fund application	
The general translation rules apply to the receivership provisions in Part 5.2 and Division 2B of Part 5.7B (and related provisions).	
If a controller is appointed in relation to property allocated to more than one sub-fund, it is treated as two separate appointments.	
Persons prohibited from acting as a receiver	
The natural person directors of a corporate director and the depositary are prohibited from acting as a receiver.	
Controller's relationship with the depositary	
The controller must notify the	

New law	Current law
depositary of its appointment and if it ceases to act.	
The controller's functions and powers prevail over those of the corporate director.	
Dealing with assets	
Receivers may instruct the depositary in relation to dealing with assets of the sub-fund in receivership.	
Receivers and other controllers may challenge an allocation determination before the Court.	
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.	
Winding up of sub-funds	No equivalent.
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).	
Statutory demands	
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.	
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.	
A CCIV may dispute	
• the identity of the sub-funds or the proportion of the debt; or	

New law	Current law
• the amount or existence of the debt.	
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.	
Applications to wind up a sub-fund	
An application to wind up a sub- fund in insolvency must specify the sub-fund.	
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.	
Persons prohibited from acting as a liquidator or provisional liquidator	
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.	
Powers of liquidator, corporate director and depositary	
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.	
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.	
The liquidator does not have the	

New law	Current law
power to determine the proportion of assets and liabilities that are allocated to each sub-fund but it may:	
direct the corporate director to make an allocation determination; or	
• challenge an allocation determination before the Court.	
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.	
Auditor's functions	
An auditor does not need to undertake any audit activities for the sub-fund that is being wound up.	
Books	
The corporate director must deliver to the liquidator all books relating solely to the sub-fund being wound up.	
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).	
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.	

New law	Current law
Proof and ranking of claims	
The liquidator must consider whether a debt or claim submitted to it is a liability of the sub-fund.	
If the debt is not a liability of the sub-fund, the debt is not admissible to proof.	
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.	
Voidable transactions	
'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.	
Operating a CCIV while disqualified	
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.	
Property recovery provisions	
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.	
Offence and miscellaneous provisions	

New law	Current law
The general translation rules apply to the external administration offences in Part 5.8 and the miscellaneous provisions in Part 5.9.	
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.	

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

#### **General principles**

#### Provisions apply on a sub-fund-by-sub-fund basis

- 3.11 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 2, item 1, sections 12-035 and 12-095]*
- 3.12 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

3.13 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 2, item 1, sections 12-015, 12-060, 12-105, 12-260, 12-275 and 12-290]
- 3.14 The translation rules also apply 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'. Refer to section 23 of the *Acts Interpretation Act* 1901.
- 3.15 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*

- 3.16 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 subfund'. 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 2, item 1, item 1 of the tables in subsections 12-015(4), 12-060(4), 12-105(4), 12-260(4), 12-275(4) and 12-290(3)]
- 3.17 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 1, item 1 of subsections 12-015(4), 12-060(4), 12-105(4), 12-260(4), 12-275(4) and 12-290(3)]
- 3.18 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.

- 3.19 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 2, item 1, item 1 of subsections 12-015(4) and (5), 12-060(4) and (5), 12-105(4) and (5), 12-260(4) and (5), 12-275(4) and (5) and 12-290(3) and (4)]

- 3.20 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 proceedings in court;
  - 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.
- 3.21 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 1, subsections 12-015(6), 12-060(6), 12-105(6), 12-260(6), 12-275(6) and 1290(5)]

#### **Example 3.1: 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 'subfund'. 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 3.2: Situation where the first translation rule does not apply**

Section 471B provides that:

While a <u>company</u> is being wound up in insolvency or by the Court, or a provisional liquidator of a <u>company</u> is acting, a person cannot begin or proceed with:

(a) a proceeding in a court against the <u>company</u> ....

(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.

- 3.22 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 2, item1, item 2 of subsections 12-015(4), 12-060(4), 12-105(4), 12-260(4) and 12-290(3)]
- 3.23 The second translation rule is necessary as CCIVs, unlike other companies, do not appoint natural person directors (see paragraph 5.14 of the Tranche 1 Explanatory Materials). The effect of the second translation rule is that references to directors generally do not include natural person directors of the corporate director.

- 3.24 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;<sup>2</sup> 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.

[Schedule 2, item 1, item 3 of subsections 12-015(4), 12-060(4), 12-105(4), 12-260(4) and 12-290(3)]

- 3.25 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).
- 3.26 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 3.46 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 3.56 and 3.103);
  - are required to provide reasonable assistance to the liquidator under existing section 530A (see paragraph 3.114);
  - each individually owe a duty to ensure that a CCIV does not trade in relation to a sub-fund when the subfund is insolvent (see paragraph 3.168 for an explanation of the special second translation rule for the property recovery provisions);

A CCIV is only permitted to appoint a corporate director as a director (see paragraph 5.14 of the Tranche 1 Explanatory Materials). 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.

- 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 3.173); and
- may be mandatorily summonsed up to two years after the end of the external administration procedure under existing section 596A (see paragraph 3.173).

#### **Example 3.3: 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 <u>officer</u> 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 subfund from being appointed as the liquidator of the second subfund. 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

- 3.27 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 paragraph 3.25 of the Tranche 1 Explanatory Materials for an explanation of the meaning of shares being referable to a sub-fund. [Schedule 2, item 1, item 4 of subsections 12-015(4), 12-060(4), 12-105(4), 12-260(4), 12-275(4) and 12-290(3)]
- 3.28 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 2, item 1, item 5 of subsections 12-015(4), 12-060(4), 12-105(4), 12-260(4) and 12-275(4)]
- 3.29 The fifth translation rule is not required for the property recovery provisions or the offence or miscellaneous provisions in

Parts 5.7B, 5.8 and 5.9 as there is no reference to 'debentures' in these Parts.

#### **Example 3.4: 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 and seventh translation rules

- 3.30 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 7 of the Tranche 1 Explanatory Materials. [Schedule 2, item 1, items 6 and 7 of subsection 12-105(4)]
- 3.31 The sixth and seventh 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' in the context of any other external administration procedures.

#### **Example 3.5: 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.

#### *Terms defined in relation to a company*

3.32 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 2, item 1, subsection 12-000(2)]

- 3.33 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.
- 3.34 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 3.1. [Schedule 2, item 1, subsection 12-000(1)]

Table 3.1: Terms defined in relation to a sub-fund

Term	Definition
Assets in relation to a sub-fund	The assets of the CCIV that relate solely to the business of the sub-fund and the proportion of assets of the CCIV that have been allocated to the sub-fund (see Chapter 3 of the Tranche 1 Explanatory Materials for a discussion of the allocation rules for assets and liabilities of a CCIV).
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 subfund) 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 subfund as, and when, they become due and payable.

Term	Definition
Liabilities in relation to a sub-fund	The liabilities of the CCIV that relate solely to the business of the sub-fund and the proportion of liabilities of the CCIV relating to more than one sub-fund that have been allocated to the sub-fund (see Chapter 3.32 to 3.51 of the Tranche 1 Explanatory Materials for a discussion of the allocation rules).
Member in relation a sub-fund	A person who is a member of the CCIV and holds one or more shares referable to the subfund.
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 subfund.
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 2, item 1, section 9, definitions of 'assets', 'contributory in relation to a sub-fund', 'creditor of a sub-fund', 'extraordinary resolution', 'insolvent', 'liabilities', 'member', 'solvent' and 'special resolution', section 51E, definition of 'secured creditor', section 51F, sections 1233C, 1233J, 1233P and 1246A]

#### Other modifications

- 3.35 The new law provides that any other modifications that are necessary may be made so that the provisions apply to a subfund 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 2, item 1, subparagraphs 12-015(1)(b)(ii), 12-060(1)(b)(iii), 12-105(1)(b)(iii), 12-260(1)(b)(iii) and 12-290(1)(b)(iii)]
- 3.36 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* 

3.37 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 and external administration offences (see Table 2.2). [Schedule 2, item 1, paragraphs 12-015(3)(a), 12-060(3) (a), 12-105(3) (a), 12-260(3)(a) and 12-290(2)(a)]

Table 3.2: Provisions in Chapter 5 where the translation rules apply

Subject Matter	Provisions
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

- 3.38 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 2, item 1, paragraphs 12-015(3)(e), 12-060(3)(c), 12-105(3)(c), 12-260(3)(b) and 12-290(2)(a)]
- 3.39 The translation rules also apply to other provisions in the Corporations Act and ASIC Act that relate to the operation of one of the provisions listed in Table 3.2. 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 2, item 1, paragraphs 12-015(2)(b), 12-060(2)(b), 12-105(2)(b), 12-260(2)(b) and 12-290(2)(b)]
- 3.40 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 2, item 1, subsections 12-015, 12-060(3), 12-105(3), 12-260(3) and 12-290(2)]*

#### References to debts and claims

- 3.41 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 assets and 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 2, item 1, section 12-110]*
- 3.42 Similarly, in the property recovery provisions, references to 'incurring debts' cover liabilities of the sub-fund incurred by the CCIV. [Schedule 2, item 1, section 12-265]
- 3.43 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.
- 3.44 Refer to paragraphs 3.45 to 3.51 of the Tranche 1 Explanatory Materials for an explanation of the allocation rules and the meaning of the term 'liabilities of a sub-fund'.

#### References to 'a Chapter 5 body corporate'

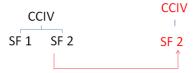
3.45 A CCIV is a 'Chapter 5 body corporate' if any of its subfunds are undergoing an external administration procedure. In other words, a CCIV is a 'Chapter 5 body corporate' if one or more of its sub-funds is being wound up, a receiver has been appointed to property of the CCIV, or the CCIV enters into a compromise or arrangement which involves one or more of its sub-funds. [Schedule 2, item 1, section 9, definition of 'Chapter 5 body corporate']

#### **Arrangements and reconstructions**

- 3.46 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 3.13 to 3.40 of these explanatory materials. [Schedule 2, item 1, section 12-005 and 12-015]
- 3.47 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 2, item 1, sections 12-015]

#### Example 3.6: 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 3.7: A 'friendly takeover' of a sub-fund

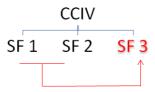
Ravenclaw CCIV also has two sub-funds. Hufflepuff CCIV approaches Ravenclaw CCIV with a proposition that involves moving one of the sub-funds into Hufflepuff CCIV.



Part 5.1 may be used to facilitate this 'friendly takeover'.

#### Example 3.8: An internal reorganisation of a CCIV

High Flying 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'

- 3.48 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 2, item 1, subsection 12-015(3), item 2]
- 3.49 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)).
- 3.50 A depositary of the CCIV is also prohibited from administering an arrangement or compromise. [Schedule 2, item 1, section 12-020]

#### Court's powers

3.51 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 2, item 1, section 12-025]
- 3.52 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 2, item 1, section 12-030]

#### Receivers and other controllers of property of sub-funds

3.53 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 3.13 to 3.40 of these explanatory materials. [Schedule 2, item 1, sections 12-035 and 12-060, Schedule 2, item 15,note after the heading 'Part 5.2']

#### Appointment of a controller

- 3.54 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 2, item 1, section 12-040, definition of 'property' and section 12-045]
- 3.55 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 2, item 1, section 12-040, definition of 'receiver']
- 3.56 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, 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. *ISchedule 2, item 1, section 12-0501* 

3.57 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 2, item 1, paragraph 12-050(1)(f) and subsection 12-050(2)]

#### Controller's relationship with the depositary

- 3.58 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 2, item 1, section 12-055]
- 3.59 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 2, item 1, section 12-070]
- 3.60 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 3.129 of these explanatory materials). [Schedule 2, item 3, section 1234R]

#### Dealing with assets of the sub-fund

- 3.61 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 3 of the Tranche 1 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.
- 3.62 A receiver, or other controller, may challenge an allocation determination before the Court. For an explanation of this power, see paragraphs 3.121 to 3.123. [Schedule 2, item 1, section 12-235]

3.63 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 2, item 1, section 12-085]

#### Rights to inspect books and access reports

- 3.64 The corporate director must provide a controller with a report about the sub-fund's affairs under existing section 429.
- 3.65 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 2, item 2, section 12-075]
- 3.66 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 2, item 1, section 12-080]

- 3.67 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').
- 3.68 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 2, item 1, section 12-090]

#### **Voluntary administration**

3.69 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 16, section 435D]

#### Winding up of sub-funds

#### Core principles

- 3.70 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.<sup>3</sup> [Schedule 2, item 1, sections 12-095 and 12-100]
- 3.71 The translation rules generally apply for the purposes of winding up (see the discussion of the translation rules at paragraphs 3.13 to 3.40). 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 2, item 1, sections 12-105 and 12-110; Schedule 2, items 17 to 24, notes to subsection 233(1), Parts 5.4, 5.4A, 5.4B, 5.5 and 5.6, 5.7B and subsection 530C(1)]
- 3.72 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 2, item 1, section 12-150]

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.

- 3.73 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
  - 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

- 3.74 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 2, item 1, subsections 12-120(1) and (2)]
- 3.75 A statutory demand which does not name any sub-funds or does not specify the proportion of the debt allocated to each subfund 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 3.101 below).
- 3.76 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 3.76 of the Tranche 1 Explanatory Materials).

- 3.77 Nevertheless, the creditor may require the corporate director to confirm the name of the sub-fund. [Schedule 2, item 1, paragraph 12-155(1)(a)]
- 3.78 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 2, item 1, paragraph 12-155(1)(b)]
- 3.79 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 2, item 1, subsections 12-155(1) and (2)]

- 3.80 The creditor must give the corporate director at least fourteen days to respond. [Schedule 2, item 1, subsection 12-155(1)]
- 3.81 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 publishable 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 2, item 1, subsection 12-155(3)]
- 3.82 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 paragraph 3.85 to 3.89 of these explanatory materials) and if that challenge is successful, only the correct sub-funds specified in the statutory demand are affected. [Schedule 2, item 1, subsection 12-120(3)]

### Example 3.9: 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 subfund 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

- 3.83 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 2, item 1, subsection 12-125 and 12-135]

3.84 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 3.83 above. These processes are explained below

<u>Disputes about the identity of the sub-fund or the proportion of the</u> debt allocated to each sub-fund

- 3.85 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, subsection 12-135(1) and section 12-140]

3.86 The application to the Court, along with the lodgement and serving of the notice, must occur within 21 days after the

- statutory demand is served on the CCIV (see existing section 459G). [Schedule 2, item 1, subsection 12-135(1)]
- 3.87 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 2, item 1, subsections 12-135(2) and (3)]
- 3.88 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 2, item 1, subsections 12-135(3) and (4)]
- 3.89 If the Court concludes that the statutory demand correctly identifies the sub-fund, the Court must dismiss the application under existing section 459L. [Schedule 2, item 1, subsection 12-135(5)]

#### Disputes about the existence or amount of a debt

- 3.90 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).
- 3.91 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 3.55 of the Tranche 1 Explanatory Materials). [Schedule 2, item 1, section 12-130]
- 3.92 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).

### <u>Disputes about both the identity of the sub-funds and the</u> existence/amount of the debt

3.93 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 3.90 to 3.92. 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 2, item 1, paragraph 12-135(1)(d)]

#### Applications to wind up a sub-fund in insolvency

- 3.94 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.
- 3.95 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).
- 3.96 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 2, item 1, section12-115]
- 3.97 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 paragraph 3.76 of the Tranche 1 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 paragraph 3.78 of these explanatory materials). This parallels the requirement for creditors to specify the name of the sub-funds in a statutory demand. [Schedule 2, item 1, subsection 12-105]

#### Disputing the identity of the sub-fund

3.98 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 3.85 to 3.89 for a discussion of the process for disputing the identity of the sub-funds named in a statutory demand). [Schedule 2, item 1, paragraph 12-145(1)(b)]

- 3.99 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.
- 3.100 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 2, item 1, sections 12-140]
- 3.101 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. 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 2, item 1, subsections 12-145(2) to (4)]

# Example 3.10: 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

- 3.102 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.
- 3.103 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 2, item 1, sections 12-160]

#### Duties and powers of the liquidator or provisional liquidator

3.104 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 2, item 1, subsection 12-170(1)]

Relationship between the powers of a liquidator and the corporate director

3.105 Table 3.3 summarises the responsibilities of the liquidator (or provisional liquidator) and the corporate director after a subfund enters into winding up. Further detail is provided in the following paragraphs.

Table 3.3: Powers of the liquidator or provisional liquidator

Function	Person responsible for function	
	Sub-fund being wound up	Other sub-funds
Carrying on sub-fund's business	Liquidator	Corporate director
Allocation determinations for assets and liabilities of sub-funds <sup>4</sup>	Corporate director	Corporate director
Instructing the depositary	Liquidator	Corporate director

- 3.106 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 2, item 1, section 1237M]
- There are two offences that apply to a corporate director who exercises a function or power that relates solely to the subfund that is being wound up. First, if the corporate director acts intentionally, the corporate director commits an offence with a penalty of 20 penalty units. Intention is the default fault element under section 5.6 of the Criminal Code. [Schedule 2, item 1, subsections 1237M(4)]
- Second, if intention cannot be established, the corporate 3.108 director commits a strict liability offence punishable by up to 30 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 2, item 1, subsections 1237M(5)]

determine the proportion that is fair and reasonable in the circumstances. See Chapter 3 of the Tranche 1 Explanatory Materials.

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

- 3.109 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 2, item 1, subsection 1237M(3)]

These exceptions mirror the exceptions to section 198G.

- 3.110 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 2, item 1, subsection 1237M(3)]
- 3.111 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.
- 3.112 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 2, item 1, subsections 1237M(6) and (11)]
- 3.113 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 2, item 1, subsections 1237M(9) and (10)]
- 3.114 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 2, item 1, section 12-185)]

Powers relating to the allocation of assets and liabilities

- 3.115 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 2, item 1, subsection 12-170(4)]
- 3.116 Nevertheless, the liquidator has the power to require the corporate director to make an allocation determination and the power to challenge an allocation determination before the Court. [Schedule 2, item 1, section 12-175 and 12-235]
- 3.117 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
- 3.118 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 2, item 1, section 12-175]
- 3.119 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 subfund 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.
- 3.120 If the corporate director fails to record the debt, claim or property in the allocation register and the prosecution can establish intention, the corporate director commits an offence punishable by up to 200 penalty units or imprisonment for 2 years or both. If intention cannot be established, the corporate director commits a

strict liability offence punishable by up to 60 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 2, item 1, subsections 12-175(4) and (5)]

## <u>ii)</u> Liquidator's power to challenge an allocation determination before the Court

- 3.121 A liquidator may apply to the Court if:
  - the corporate director has not made an allocation determination; or
  - the liquidator believes that the corporate director's allocation determination has miscarried; that is, it is not one that a reasonable person in the corporate director's position would have made.

#### [Schedule 2, item 1, subsections 12-235(1) to (4)]

- 3.122 There is no ground for challenging an allocation determination if it is within the bounds of what a reasonable person in the corporate director's position could have determined. The mere fact that another reasonable person may have made an alternative determination is not a ground for challenge.
- 3.123 The Court may set aside the corporate director's allocation determination, refer the question back to the corporate director or substitute its own determination. It may also require the corporate director to correct its records if the records are incorrect or deficient. [Schedule 2, item 1, subsections 12-235(1) to (3)]
- 3.124 If the Court substitutes its own determination for the corporate director's determination, the corporate director is prohibited from determining a different proportion. [Schedule 2, item 1, subsection 12-235(5)]

Liquidator and provisional liquidator's interaction with the depositary

3.125 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 2, item 1, subsection 12-165(1)]

- 3.126 If the liquidator or provisional liquidator of a sub-fund resigns, 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. [Schedule 2, item 1, subsection 12-165(2)]
- 3.127 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 12-170(3) and (6)]
- 3.128 There is nothing in the new law which precludes the liquidator or provisional liquidator from determining that the depositary should continue to hold the assets of the sub-fund that is being wound up.
- 3.129 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 existing section 530A). It also recognises that the corporate director and depositary have an obligation to provide each other with reasonable assistance (see paragraphs 4.60 and 4.61 of the Tranche 1 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 3.104 of these explanatory materials). [Schedule 2, item 1, section 1237M]
- 3.130 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 2, item 1, section 1234R]

#### **Example 3.11: Powers of the liquidator**

Mandy 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.

Mandy 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.

Mandy 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

3.131 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 2, item 1, subsections 1237M(8) and 1234R(3)]

#### Effect of winding up on the auditor

- 3.132 In the CCIV context, the auditor requirements apply to the CCIV as a whole and each of the sub-funds (see paragraphs 9.32 to 9.40 of the Tranche 1 Explanatory Materials).
- 3.133 An auditor does not need to undertake any audit activities for the sub-fund that is being wound up. [Schedule 2, item 1, section 1248W]
- 3.134 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.
- 3.135 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 2, item 1, section 1248W]

#### Access to books

- 3.136 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 2, item 1, section 12-190]
- 3.137 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 2, item 1, subsections 12-170(2), (5) and (6)]

- 3.138 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 2, item 1, section 12-195]
- 3.139 The liquidator or provisional liquidator, or ASIC, may also seek a warrant for books or property under existing section 530C.
- 3.140 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 3.136). [Schedule 2, item 1, subsections 12-230(1) and (2), Schedule 2, item 23, note to subsection 530C(1)]
- 3.141 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 12-230(1) and (3), Schedule 2, item 23, note to subsection 530C(1)]
- 3.142 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 evidence of their identity;
  - 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; and
  - 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.

#### [Schedule 2, item 1, subsections 12-230(4) to (9)]

#### Retention and destruction of books

Books held by an external administrator

- 3.143 A liquidator or provisional liquidator must, under the Insolvency Practice Rules<sup>5</sup>, 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*).
- 3.144 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 2, item 1, subsections 12-180(1) to (3), Schedule 2, item 29 to 30, notes to subsections 70-35(3) and 70-35(4) of Schedule 2 [
- 3.145 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 2, item 1, subsection 12-180(4)]

Books held by ASIC

- 3.146 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).
- 3.147 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).
- 3.148 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

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<sup>&</sup>lt;sup>5</sup> See existing section 70-35 of Schedule 2 to the Act.

director considers the books to be relevant to the business of sub-funds which have not been wound up. [Schedule 2, item 1, section 12-200]

#### Operating a CCIV while disqualified

- 3.149 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 2, item 1, section 12-210]
- 3.150 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

- 3.151 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 2, item 1, subsection 12-215(1)]
- 3.152 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 2, item 1, subsection 12-215(2)]
- 3.153 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 subfund, 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 2, item 1, section 12-220]
- 3.154 Figure 2.1 summarises the process that a liquidator must follow when a debt or claim is submitted to it

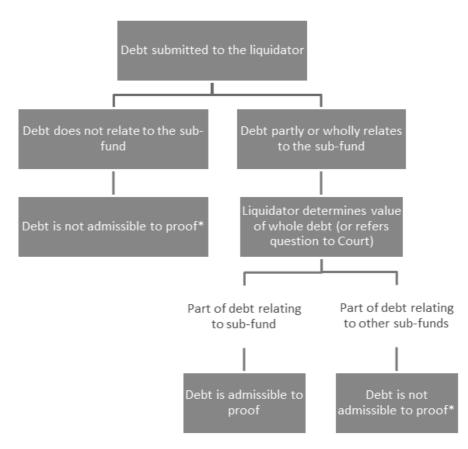


Figure 2.1: Process for debts or claims submitted to a liquidator

\* Note: The debt is not extinguished in these circumstances.

#### Voidable transactions

- 3.155 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 3.13 to 3.40. [Schedule 2, item 1, section 12-105, Schedule 2, item 24, note to Part 5.7B]
- 3.156 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.

- 3.157 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 2, item 1, section 12-204]
- 3.158 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 2, item 1, section 12-245]

# Vesting of PPSA security interests that are not continuously perfected

- 3.159 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.<sup>6</sup> 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 2, item 1, section 12-250]

- 3.160 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 2, item 31, section 267 of the PPSA]
- 3.161 Other provisions in Division 2A also operate at the subfund level and must be read in accordance with the translation rules. For a discussion of the translation rules, see paragraphs 3.13 to 3.40. [Schedule 2, item 1, section 12-105, Schedule 2, item 24, note to Part 5.7B]

#### Winding up provisions which do not apply

3.162 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

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<sup>&</sup>lt;sup>6</sup> 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).

has no employees, ASIC does not require this power in the CCIV context. [Schedule 2, item 20, note to Part 5.4C]

- 3.163 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 the segregation of assets and liabilities between sub-funds if they were to apply in the context of CCIVs and sub-funds. [Schedule 2, item 22, note to Division 8 of Part 5.6]
- 3.164 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 2.18 of the Tranche 1 Explanatory Materials).
- 3.165 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 2, item 1, 12-100 and 12-105]
- 3.166 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 (see paragraphs 5.50 to 5.52 of the Tranche 1 Explanatory Materials).

#### **Property recovery provisions**

#### Special translation rules

- 3.167 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 2, item 1, section 12-255]
- 3.168 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 2, item 1, sections 12-260(4), table items 2 and 3]

3.169 Apart from these changes, the translation rules operate in the same way as the rules discussed above at paragraphs 5.50 to 5.52 of the Tranche 1 Explanatory. Materials. [Schedule 2, item 1, sections 12-260]

#### When a debt is taken to have been incurred

- 3.170 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 2, item 1, subsection 12-270(1)]
- 3.171 New rules are inserted for redeemable shares which are a new type of ordinary share that is liable to be redeemed (see Chapter 8 of the Tranche 1 Explanatory Material). 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 2, item 1, subsection 12-270(2)]

# External administration offences and other miscellaneous provisions

- 3.172 The translation rules discussed at paragraph 3.13 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). [Schedule 2, item 1, sections 12-260 and 12-275, Schedule 2, item 25 and 28, notes to Part 5.8 and 5.9]
- 3.173 Bespoke amendments are made to existing section 596 (relating to fraud by officers) and 596A (summonsing a person for mandatory examination) to apply them to the natural person

<sup>&</sup>lt;sup>7</sup> Sections 592 to 594 (which relate to debts incurred before 1993) do not apply to CCIVs.

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 2, item 1, sections 12-205and 12-285, , Schedule 2, items 26 and 27, notes to section 596 and 596A]

# Chapter 4 Deregistration of CCIVs and sub-funds

#### **Outline of chapter**

4.1 This Chapter outlines the process for deregistering a CCIV and a sub-fund.

#### Context of amendments

- 4.2 Chapter 5A of the Act sets out the process for deregistering a company. A company may be deregistered voluntarily, on ASIC's initiation or following an amalgamation or winding up process.
- 4.3 Both the CCIV and each sub-fund of the CCIV must register with ASIC. Accordingly, it is necessary to provide a process for deregistering both a sub-fund and the CCIV.

#### Summary of new law

- 4.4 Division 1 of Part 8B.13 outlines the three procedures for deregistering a sub-fund of a CCIV (voluntary deregistration, ASIC-initiated deregistration and deregistration following amalgamation or winding up). It also sets out the effect of deregistration and the procedure for reinstating a deregistered a sub-fund. These provisions broadly mirror the provisions that govern deregistration and reinstatement of other types of companies.
- 4.5 Division 2 sets out the automatic process for deregistering a CCIV after all of its sub-funds have been deregistered and the consequences of deregistration. Division 3 clarifies that a CCIV cannot transfer its registration to a registration under the law of a State or Territory.

#### Comparison of key features of new law and current law

New law	Current law
Deregistration of sub-funds	No equivalent.
A sub-fund may be voluntarily deregistered, on application by the	

New law	Current law
CCIV, the corporate director or the liquidator of the sub-fund, if:	
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.	
ASIC may initiate the deregistration of a sub-fund if:	No equivalent.
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 6 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.	
ASIC is also required to deregister a sub-fund if the Court orders its 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.
Retention of books	No equivalent.

New law	Current law
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.	
Effect of deregistration of a sub- fund	No equivalent.
On deregistration, the property of the sub-fund vests in either the Commonwealth (for trust property) or ASIC (for other property).	
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.	
A creditor of the sub-fund may recover any amount payable to the CCIV under an insurance contract which covered the creditor's liability immediately before the sub-fund was deregistered.	
Deregistration of a CCIV	No equivalent.
A CCIV must be deregistered if it does not have any registered subfunds.	
On deregistration, the CCIV ceases to exist. If the retail CCIV is also a passport fund, it ceases to be a passport fund at the time that it is deregistered.	
Reinstatement of a sub-fund and a CCIV	No equivalent.
A deregistered sub-fund may be reinstated. If the CCIV has been deregistered, the CCIV must also be reinstated.	

New law	Current law
After reinstatement the sub-fund is taken to have been registered throughout the period it was deregistered. Any property which vested in the Commonwealth or ASIC on deregistration revests in the CCIV	
Similarly, if the CCIV is reinstated, the CCIV is taken to have existed throughout the period it was deregistered. Generally, the persons that were the corporate director and depositary immediately before deregistration are reinstated.	

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

#### Deregistration of a sub-fund

- 4.6 There are three processes for deregistering a sub-fund:
  - voluntary deregistration;
  - ASIC-initiated deregistration; and
  - deregistration following amalgamation or winding up.

[Schedule 3, item 1, sections 13-000, 13-005 and 13-015 and item 2, note 1 to Part 5.A.1.]

#### Voluntary deregistration

- 4.7 The CCIV, the corporate director of the CCIV or the liquidator of the sub-fund may apply for the sub-fund to be deregistered if:
  - 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 3, item 1, subsections 13-000(1) and (2)]

4.8 There is no requirement for the CCIV to have no remaining members with shares referable to the sub-fund. This allows the CCIV to apply for voluntary deregistration of the sub-fund even if it is unable to redeem shares in the sub-fund because it cannot locate the members who own those shares (provided the other conditions for voluntary deregistration are satisfied).

- 4.9 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
- 4.10 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 3, item 1, subsections 13-000(1) and (3)]
- 4.11 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 3, item 1, subsection 13-000(4)]
- 4.12 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 3, item 1, subsections @1300(5) to (7)]
- 4.13 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 which refer to the company notice provisions continue to operate appropriately (see, for example, subsections 589(3), 589(5) and 1351(4)). [Schedule 3, item 1, subsections 13-000(8)]
- 4.14 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 6 of these explanatory materials and in particular paragraph 6.7 [Schedule 3, item 1, subsections 13-000(9) to (10)]

#### Interaction with Chapter 5

4.15 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 Chapter 2 of these explanatory materials). Figure 3.1 summarises these two options.

4.16 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.

No

Voluntary winding up followed by deregistration

Figure 3.1: Two routes for deregistering a solvent sub-fund

#### ASIC-initiated deregistration

- 4.17 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 6 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 3, item 1, subsections 13-005(1) to (3)]

4.18 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.<sup>8</sup>
- 4.19 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 paragraph 3.43 of the Tranche 1 Explanatory Materials
- 4.20 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 Chapter 6 of these explanatory materials and in particular paragraph 6.7. [Schedule 3, item 1, subsections 13-005(4) and (5)]
- 4.21 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.
- 4.22 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 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 3, item 1, subsections 13-005(6) to (7)]
- 4.23 The person conducting the hearing must give the CCIV an opportunity to be heard at the hearing. After the hearing, the person must

<sup>&</sup>lt;sup>8</sup> 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.

- provide a report to ASIC with a recommendation about whether the subfund should be deregistered and ASIC must consider the report and recommendation. [Schedule 3, item 1, subsections 13-005(7) to (9)]
- 4.24 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 3, item 1, subsection 13-005(10)]
- 4.25 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 3, item 1, subsections 13-010(1) to (4)]
- 4.26 ASIC must not deregister the sub-fund if it has reason to believe that the CCIV has assets which relate to multiple sub-funds and have not been converted into money, or multiple fungible assets that can be allocated between the sub-funds. The corporate director is required to convert these assets as soon as practicable (see paragraphs 3.39 to 3.44 of the Tranche 1 Explanatory Materials). [Schedule 3, item 1, paragraph 13-010(3)(b)]
- 4.27 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 3, item 1, subsections 13-010(5) and (6)]
- 4.28 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).
- 4.29 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.

4.30 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 3, item 1, subsection 13-010(7) and Schedule 2, item 1, section 12-280]

#### Deregistration following amalgamation or winding up

4.31 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 lodgement of an end of administration return. [Schedule 2, item 1, section 12-280]

#### Effect of deregistration of a sub-fund

- 4.32 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 3, item 1, subsections 13-020(1) and (2)]
- 4.33 Subsection 601AD(1) of the existing law (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 4.52 to 4.55 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 3, item 1, note to subsection 13-020(1)]
- 4.34 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. See paragraphs 3.143 to 3.148 of these explanatory materials for the liquidator's requirement to retain books and paragraph 4.56 for the rules relating to retention of books on deregistration of a CCIV. [Schedule 3, item 1, subsections 13-020 (3)]
- 4.35 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 3, item 1, subsection 13-020(4))]
- 4.36 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) (noting that the Government committed to increasing this penalty to 20 penalty units in its response to the ASIC Enforcement Review<sup>9</sup>).
- 4.37 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 4.41). [Schedule 3, item 1, section 13-025]
- 4.38 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 3, item 1, section 13-035]
- 4.39 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 6 of these explanatory materials for a discussion of how the Passport arrangements apply in the CCIV context. [Schedule 3, item 1, subsections 13-020(5)]
- 4.40 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 5, item 1, section 20-030 and Schedule 5, item 11, note to section 1351]

#### Reinstatement of a sub-fund

- 4.41 Under existing section 601AH, a sub-fund may be reinstated if:
  - ASIC is satisfied that the sub-fund should not have been deregistered; or

<sup>&</sup>lt;sup>9</sup> Information about the ASIC Enforcement Review, including the Government's response to the Review can be found at: https://treasury.gov.au/review/asic-enforcement-review/.

- the Court orders its reinstatement. [Schedule 3, item 1, subsection 13-035(1)]
- 4.42 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 (see paragraph 4.18). [Schedule 3, item 1, subsection 13-035(5)]
- 4.43 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 3, item 1, subsections 13-035(2) and (5)]
- 4.44 Further, on reinstatement, any property which vested in the Commonwealth or ASIC on deregistration revests 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 3, item 1, subsection 13-035(4)*]
- 4.45 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 3, item 1, subsection 13-035(3)]

Reinstatement after the CCIV has been deregistered

- 4.46 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) and the entities that were the corporate director and depositary immediately before the deregistration are reinstated. [Schedule 3, item 1, subsections 13-045(1), (2) and (5)]
- 4.47 The reinstatement of the CCIV does not reinstate all of the subfunds. Each sub-fund must be reinstated separately.

#### **Example 4.1: Reinstatement of the CCIV**

Investor CCIV and its two sub-funds (Investor Growth Sub-fund and Investor Wealth Sub-fund) have been deregistered.

The Court orders the reinstatement of Investor Growth Sub-fund and Investor CCIV. This does not result in the reinstatement of Investor Wealth Sub-fund.

4.48 If the entity that was formerly the corporate director or the depositary no longer meets the eligibility requirements for holding that position or has become a Chapter 5 body corporate, the entity is not

- reinstated. Instead, ASIC must apply to the Court for the appointment of a temporary corporate director or depositary. For the eligibility requirements of these positions and the process for appointing a temporary corporate director or depositary, see Chapters 4 and 5 of the Tranche 1 Explanatory Materials. [Schedule 3, item 1, subsection 13-040(3) and (4)]
- 4.49 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 3, item 1, subsection 13-035(6)]

#### *Notice requirements*

- 4.50 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 3, item 1, subsections 13-035(5) and 13-045(1)]
- 4.51 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 3, item 1, subsection 13-045(2)]

#### **Deregistration of a CCIV**

- 4.52 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 3, item 1, subsection 13-050(1)]
- 4.53 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 3, item 1, subsections 13-050(2) and (3)]
- 4.54 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). Sub-funds are not legal persons and cannot exist without a CCIV. [Schedule 3, item 1, subsection 13-050(5)]
- 4.55 Similarly, there is no need for a process for deregistering a CCIV following amalgamation or winding up because these Chapter 5 procedures operate at the sub-fund level (see Chapter 3 of these explanatory materials). [Schedule 3, item 1, subsection 13-050(5)]

#### Consequences of deregistration

#### Retention of books of the CCIV

4.56 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 3.143 to 3.148 of these explanatory materials. [Schedule 3, item 1, subsections 13-055(1) and (4)]

- 4.57 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 3, item 1, section 13-055(3)]
- 4.58 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 subfund (see paragraph 4.36 and 4.37 of these explanatory materials). [Schedule 3, item 1, subsection 13-055(2)]

#### **Example 4.2: Retention of books following deregistration**

ASIC deregisters Casterley House CCIV on 23 March 2020. The corporate director of Casterley House CCIV at the time of deregistration is CD Services Ltd.

At the time that Casterley House CCIV is deregistered, CD Services Ltd has three directors, Amanda, Bob and Carolyn. One month later, on 23 April 2020, Amanda resigns as a director of CD Services Ltd and is replaced by David.

CD Services Ltd is then deregistered on 26 June 2020.

The books of Casterley House 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, Casterley House CCIV's books must be retained by the natural person directors of CD Services Ltd at the time of the corporate director's deregistration (Bob, Carolyn and David).

Bob, Carolyn and David must continue to retain the books until the three year period expires, that is, until 23 March 2023.

Other consequences of deregistration

- 4.59 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 3, item 1, subsection 13-055(4) and item 2, note 2 to Part 5A.1]
- 4.60 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

4.61 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 4.45 to 4.48 of these explanatory materials. [Schedule 3, item 1, section 13-060]

#### Transfer of registration

4.62 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 3, item 1, section 13-065 and item 3, note to Part 5.4.2]

### Chapter 5

# Takeovers, compulsory acquisitions and buy-outs, continuous disclosure and fundraising

#### **Outline of chapter**

- 5.1 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

- 5.2 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.
- 5.3 Chapter 6CA sets out the continuous disclosure requirements for disclosing entities.
- 5.4 Chapter 6D sets out the fundraising and disclosure requirements for companies.
- 5.5 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).
- 5.6 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

- 5.7 Part 8B.14 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.
- 5.8 Chapter 6C will not apply to CCIVs because a CCIV is prohibited from being listed on a prescribed financial market.
- 5.9 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.
- 5.10 CCIVs that are disclosing entities are subject to the continuous disclosure requirements in Chapter 6CA, as modified by Part 8B.15.
- 5.11 Part 8B.16 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

New law	Current law
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-	No equivalent.

New law	Current law
fund of the CCIV that is not yet established, is prohibited.	

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

#### Takeovers, compulsory acquisitions and buy-outs

- 5.12 The prohibitions on certain acquisitions of a relevant interest in the voting shares of a company, set out in section 606 of the existing law, 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 4, item 2, subsection 14-005(1); item 5, note after heading 'Chapter 6']
- 5.13 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 (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 4, item 2, subsection 14-005(3); item 10, note after heading 'Chapter 6B']
- 5.14 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 4, item 2, section 14-015; items 8 and 9, section 660A, note 2]
- 5.15 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).
- 5.16 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 1.21 of the Tranche 1 Explanatory Materials).
- 5.17 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 4, item 2, section 14-010]
- 5.18 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 4, item 2, subsection 14-005(2); items 6 and 7, subsection 616(1), note 2]

5.19 For the purposes of Part 8B.14, the term 'securities' has the same meaning as it has in Chapters 6 to 6CA of the Act. [Schedule 4, item 1, section 14-000]

#### Continuous disclosure

- 5.20 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 4, item 2, section 15-000; item 12, subsection 675(2)]
- 5.21 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. [Schedule 4,item 1, section 1247A; item 4, subsection 111AF(3)]

#### **Fundraising**

#### Disclosure requirements for offers of securities in a CCIV

5.22 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 Part 8B.17 of the Tranche 2 Exposure Bill. [Schedule 4, item 2, section 16-000; item 3, note to subsection 92(4); item 13, note to subsection 700(1)]

#### Offering securities in a CCIV that does not exist, or referable to a subfund that is not established

- 5.23 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 incorporate the CCIV or register the sub-fund. [Schedule 4, item 2, subsections 16-005(1) to (3)]
- 5.24 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 4, item 2, subsections 16-005(4) and (5)]
- 5.25 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 4, item 2, subsection 16-005(6)]

# Chapter 6 Asia Region Funds Passport

#### **Outline of chapter**

6.1 This Chapter details the amendments that have been made to extend the Asia Region Funds Passport (ARFP) regime to CCIVs.

#### Context of amendments

- 6.2 The ARFP Act provides a multilateral framework that allows eligible funds to be marketed across participating economies. The ARFP allows certain fund providers from other participating economies (notified foreign passport funds) to sell their products in Australia. Australian passport funds may also offer interests outside of Australia in other participating economies.
- 6.3 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

6.1 Amendments in Schedule 6 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

New law	Current law
A sub-fund of a retail CCIV may become an Australian passport fund. The corporate director of the CCIV is the operator of the fund.	No equivalent.
A sub-fund ceases to be an Australian passport fund if it is deregistered as a sub-fund.	No equivalent.

New law	Current law
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

- 6.2 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 6, items 1 and 3, section 9 (definition of 'Australian passport fund' and subsection 1212(1)]
- 6.3 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.<sup>10</sup> This ensures that a sub-fund may be registered as an Australian Passport Fund before it has any members.
- 6.4 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 Passport<sup>11</sup>. If satisfied of these matters, ASIC must register the sub-fund as an Australian passport fund and assign it an Australian Passport Fund Registration Number (APFRN). The corporate director then becomes the

Amendments have been made to the definition of a retail CCIV released for exposure in the Tranche 1 Exposure Draft. A CCIV will be a retail CCIV if it is promoted to retail clients, has retail clients (except in certain circumstances) or has notified ASIC that it is a retail CCIV

<sup>&</sup>lt;sup>11</sup> The Memorandum of Cooperation on the Establishment and Implementation of the Asia Region Funds Passport is available at: <a href="http://fundspassport.apec.org/2016/04/28/asia-region-funds-passport-memorandum-of-cooperation/">http://fundspassport.apec.org/2016/04/28/asia-region-funds-passport-memorandum-of-cooperation/</a>.

- operator of the passport fund. [Schedule 6, items 4 to 12, paragraph 1212(2)(b), subsection 1212(3) and section 1212A]
- 6.5 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 6, items 13 to 15, section 1212B]
- 6.6 Amendments have also been made to Part 8A.3 to account for the possibility that the passport arrangements may be 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 6, item 3 to 15, section 1212, 1212A and 1212B]*

#### **Deregistration of an Australian Passport Fund**

- 6.7 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 4.17 to 4.30. [Schedule 3, item 1, subsections 13-005(4) and (5)]
- 6.8 Similarly, a person cannot apply to voluntarily deregister a subfund if the sub-fund has protected members. For a discussion of the voluntary deregistration process, see paragraphs 4.7 to 4.14. [Schedule 3, item 1, subsections 13-000(9) to (10)]
- 6.9 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 4.39 of these explanatory materials). The reinstatement of the sub-fund does not reinstate it as an Australian passport fund (see paragraph 4.49). [Schedule 3, item 1, subsections 13-020(5) to (6) and subsection 13-030(3)]
- 6.10 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

- 6.11 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.
- 6.12 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)). This definition has been amended to also exclude any benefits from limiting competition for CCIVs. [Schedule 6, items 2 and 15, section 9, paragraph (a) of the definition of 'expectation' and subsection 1213B(3)]

# Chapter 7 Other amendments

#### **Outline of chapter**

7.1 Chapter 7 outlines consequential amendments to Chapter 9 of the Act and to the ASIC Act. These amendments are necessary to ensure that the provisions apply appropriately to CCIVs, and to extend ASIC's powers under the ASIC Act, to the extent they are relevant, to cover CCIVs.

#### **Context of amendments**

- 7.2 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.
- 7.3 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.
- 7.4 Many of ASIC's powers under the ASIC Act intersect with financial services framework in Chapter 7 of the Corporation Act, which is modified for CCIVs by Part 8B.17 of the Bill. As such, most of the amendments made to the ASIC Act are to ensure consistency between Chapter 7 of the Act and the ASIC Act.

#### Summary of new law

- 7.5 Amendments to Chapter 9 of the Act provide:
  - that breach reports relating to the depositary that are lodged with ASIC are not publicly available for inspection;
  - that provisions relating to the books of a company apply correctly to CCIVs;
  - that 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.
- 7.6 Amendments to the ASIC Act ensure that:
  - the unconscionable conduct provisions in Division 2 of Part 2 adequately describe 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

New law	Current law
A written report of a suspected or material breach of the Act by a depositary is not publicly available.	No equivalent.
A CCIV must make its books available for inspection in the same way as proprietary companies.	No equivalent.
It is an offence for any of the following to falsify or destroy securities of a CCIV, or the books of the CCIV:  • 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.
There is no merits review by the AAT in relation to a decision to make, vary or revoke the CCIV rules.	No equivalent.
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.

New law	Current law
The definition of 'financial service' for the purposes of Division 2 of Part 2 of the ASIC Act includes when a person:  • 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.
For the purposes of Division 2 of Part 2 of the ASIC Act, the following does not constitute providing a 'custodial or depository service':  • operating as a CCIV;  • operating the business and conducting the affairs of a CCIV; and  • acting as a depositary of a CCIV.	No equivalent.
For the purposes of Division 2 of Part 2 of the ASIC Act, conduct is attributed to a CCIV in the same manner as in Chapter 7 of the Act.	No equivalent.
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:  • an agent or corporate director of the CCIV; or  • an employee, director or agent of the corporate director of the CCIV.	No equivalent.
<ul> <li>A CCIV can be represented at a hearing conducted by ASIC by the following persons:</li> <li>an officer of the CCIV (other than the corporate director);</li> <li>an officer or employee of the corporate director.</li> </ul>	No equivalent.

New law	Current law
If ASIC makes a requirement of a CCIV, it can make that same requirement of the following persons:  • an officer of the CCIV (other than the corporate director); and  • an officer or employee of the corporate director.	No equivalent.
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.	No equivalent.
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:  • 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

#### Amendments relating to registers and books

- 7.7 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. [Schedule 5, item 1, section 20-000; Schedule 5, item 2, note to subsection 1274(2)]
- 7.8 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 5, item 1, section 20-005; Schedule 5, item 3, note to subsection 1300(2A)]

7.9 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 5, item 1, section 20-010; Schedule 5, item 4, note to subsection 1307(1)]

#### Amendments relating to offences

- 7.10 It is an offence for a corporation, such as a CCIV, to make misleading or false 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.
- 7.11 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).
- 7.12 For the purposes of these offences (found in sections 1308 and 1309), 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 5, item 1, section 20-015; Schedule 5, items 5 to 7, note to subsections 1308(12) and (13), and note to subsections 1309(1), (2), (9) and (10)]
- 7.13 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 5, item 1, section 20-015; Schedule 5, item 8, note to subsection 1317(1)]

#### Powers of the courts and the AAT

7.14 Review by the AAT is not available for a decision by ASIC to make, vary or revoke the CCIV rules (see section 1269 of the Tranche 1 Exposure Bill for ASIC's power to make 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 5, item 1, section 20-020]

7.15 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 5, item 1, section 20-025, Schedule 5, item 9, note to subsection 1322(1)]

#### Meaning of financial services in the ASIC Act

- 7.16 Outside Division 2 of Part 2, key terms in the ASIC Act have the same meaning as in Chapter 7 of the Act. Where Part 8B.17 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 to *financial service* confirms this approach. [Schedule 7, item 4, definition of financial service in subsection 5(1)]
- 7.17 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 paragraphs 4.10 to 4.14 of the Tranche 2 Explanatory Materials for more information on the treatment of financial services provided by a CCIV in Chapter 7 of the Act. [Schedule 7, item 16, section 243F]

# Amendments relating to ASIC's investigation and information gathering powers and CCIVs

- 7.18 ASIC has certain powers in relation to body corporates 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.
- 7.19 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 7, items 1 to 3, subsection 5(1), definition of eligible person]
- 7.20 At a hearing held by ASIC, a CCIV may be represented at a hearing 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 the ASIC Act's investigation and information-gathering provisions allow a person to make a requirement of a CCIV, then that requirement may also be made of a person who is or has been the corporate director of the CCIV

or an officer or employee of the corporate director, or the liquidator of a sub-fund. [Schedule 7, items 12-13, subsection 59(6) and section 84]

7.21 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 7, items 14 to 15, 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

- 7.22 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.
- 7.23 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 the CCIV' (undertaken by the corporate director) and acting as a 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 the CCIV do not constitute providing a custodial or depository service. [Schedule 7, items 5 to 7, subsections 12BAB(1)] and 12BAB(14)]

## Liability framework for Subdivision G of Division 2 of Part 2 of the ASIC Act

- 7.24 Chapter 5 of the Tranche 2 Explanatory Materials sets out the liability framework for CCIVs. Broadly, Part 8B.19 of the Tranche 2 exposure draft provides that the corporate director of a CCIV is responsible for any contravention of the law by the CCIV, and is taken to have committed any offence or contravened the civil penalty provision instead of the CCIV.
- 7.25 Part 8B.17 establishes the liability framework for provisions of Chapter 7 of the Act, and proceedings under Chapter 7. These provisions are discussed in paragraphs 4.27 to 4.43 of the Tranche 2 Explanatory Materials. Provisions in Chapter 7 of the Act are treated separately to other offences in the Act and across Commonwealth laws as Chapter 7

disapplies Part 2.5 of the Criminal Code and includes its own liability framework.

- 7.26 Subdivision G of Division 2 of Part 2 of the ASIC Act also disapplies Part 2.5 of the Criminal Code. This subdivision includes penalties for breaches of the consumer protection provisions in the Division. Rather than using Part 2.5 of the Criminal Code, an alternative liability framework applies for proceedings under that subdivision. this is similar to section 769B, which sets out how liability is assigned for the purposes of Chapter 7 of the Act.
- ASIC Act, a new alternative liability provision is inserted in the ASIC Act for the purposes of Subdivision G of Division 2 of Part 2. This section provides a comparable liability framework for CCIVs to that which applies under Chapter 7 (see section 1250F of the Tranche 2 Explanatory Materials). The new liability provision operates in conjunction with Part 8B.19 to establish when a CCIV is taken to engage in conduct, or have a certain state of mind, and subsequently assigns liability to the corporate director if appropriate. Tailored provisions are required for the CCIV regime as a CCIV does not have employees and its only director is a corporate director, rather than a natural person director. [Schedule 7, items 8 and 9, heading to section 12GH and subsections 12GHA(1) and (2)]
- 7.28 The following paragraphs describe how and when conduct is taken to also have been engaged in by a CCIV.

Conduct engaged in by an agent of the CCIV

7.29 Conduct undertaken by an agent of the CCIV is taken to also have been engaged in by the CCIV where the agent was acting within the scope of the agent's actual or apparent authority in relation to the CCIV. [Schedule 7, item 9, paragraph 12GHA(3)(a)]

Conduct engaged in by the corporate director of the CCIV

7.30 Conduct undertaken by the corporate director of the CCIV is taken to also have been engaged in by the CCIV where the corporate director is acting within the scope of their actual or apparent authority in relation to the CCIV. [Schedule 7, item 9, paragraph 12GHA(3)(a)]

Conduct engaged in by employees, directors or agents of the corporate director of a CCIV

- 7.31 The actions of an employee of the corporate director of a CCIV are taken to also have been actions of the CCIV where the employee is acting within the actual or apparent scope of their employment, and within the actual apparent authority of the corporate director in relation to the CCIV. [Schedule 7, item 9, paragraph 12GHA(3)(b)]
- 7.32 Conduct undertaken by an agent or director of the corporate director is taken to also have been undertaken by the CCIV where the

action is within the director or agent's actual or apparent authority in relation to the corporate director, and within the scope of the actual or apparent authority of the corporate director in relation to the CCIV. [Schedule 7, item 9, paragraph 12GHA(3)(b)]

Conduct engaged in by any other person

# With the consent or agreement of an agent of the CCIV or the corporate director of the CCIV

7.33 Conduct engaged in by another person is also taken to be undertaken by a CCIV when the conduct is undertaken at the direction of, or with the implied or explicit consent or agreement of, an agent of the CCIV, or the corporate director of the CCIV. However, the consent or agreement must be given within the scope of the actual or apparent authority of the agent or corporate director of the CCIV. [Schedule 7, item 9, paragraph 12GHA(3)(c)]

# With the consent or agreement of an employee, director or agent of the corporate director of the CCIV

- 7.34 Conduct engaged in by a person with the consent or agreement of an employee, director or agent of the corporate director of the CCIV is also taken to be undertaken by the CCIV where:
  - the direction or consent is given within the actual or apparent scope of the employee's employment, or the director or agent's actual or apparent authority in relation to the corporate director; and
  - the direction or consent is also given within the scope of the actual or apparent authority of the corporate director in relation to the CCIV.

#### [Schedule 7, item 9, paragraph 12GHA(3)(d)]

Where a CCIV is taken to have the same state of mind as another person

- 7.35 The new law assigns a certain state of mind to a CCIV where a proceeding under Subdivision G of Division 2 of Part 2 requires establishing the state of mind of a CCIV in relation to conduct undertaken by the CCIV. This provides that the CCIV's state of mind may be established by showing that one or more of the following people (who undertook the conduct) had that state of mind:
  - an agent of the CCIV engaging in the conduct within the scope of their actual or apparent authority in relation to the CCIV;
  - a director or agent of the corporate director of the CCIV engaging in the conduct within their actual or apparent authority and within the actual or apparent authority of the corporate director in relation to the CCIV; or

• an employee of the corporate director of the CCIV acting within the scope of their employment and within the scope of the actual or apparent authority of the corporate director in relation to the CCIV.

#### [Schedule7, item 9, subsections 12GHA(4) to (5)]

- 7.36 For the purposes of establishing the state of mind of the CCIV, a person who is acting under the direction of an agent of the CCIV or the corporate director of the CCIV is taken to be an agent of the CCIV. A person acting under the direction of an employee, agent or director of the corporate director is taken to be an agent of the corporate director of the CCIV. [Schedule 7, item 9, subsection 12GHA(6)]
- 7.37 A reference to the state of mind of a person includes a reference to the person's knowledge, intention, opinion, belief or purpose of the person, and the reason that they hold that intention, opinion, belief or purpose. Note that this list is not exhaustive and state of mind could include other states of mind. [Schedule 7, item 9, subsection 12GHA(7)]

#### Defences for prosecutions under Subdivision G of Division 2 of Part 2

- 7.38 It is a defence to a prosecution under Subdivision G of Division 2 of Part 2 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.
- 7.39 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 7, items 10-11, subsection 12GI(2)(b)]