Australian Government

The Treasury

Introducing the new regulatory framework for Corporate Collective Investment Vehicles

Summary

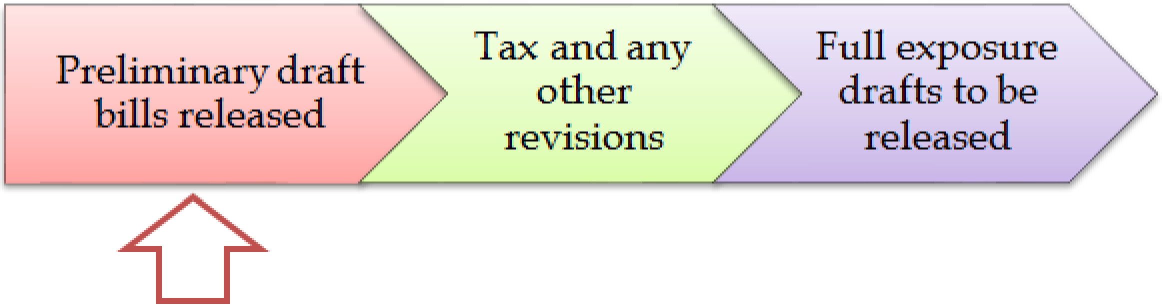
- Context and scope
- Consultation process
- Proposed regulatory model
- Key elements
- International comparison
- The framework
  - In the draft bills
  - Consequential amendments
  - Tax framework

Context and scope

- Recommended by the 2009 Johnson Report on Australia as a Financial Centre
  - Followed by Board of Taxation report, released June 2015.
- 2016-17 Budget announcement
  - Government committed to develop a corporate CIV and a limited partnership CIV.
  - Limited partnership CIV to be developed.

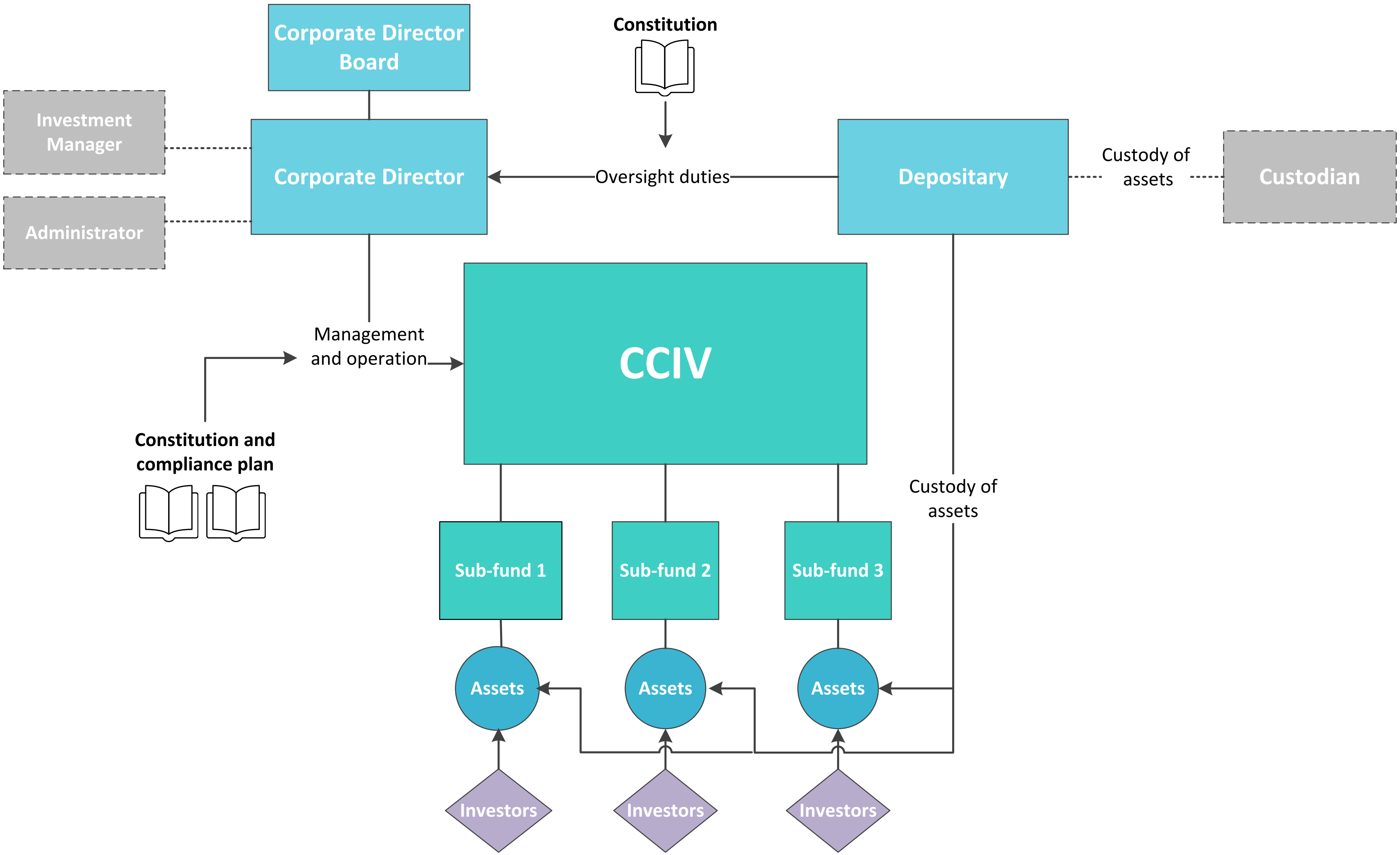
Consultation process

- Exposure draft of core Bill now released.
- Consequential amendments will be drafted once the core framework is settled.
- Consultation on full exposure draft prior to Bill's introduction.



Current consultation

Proposed regulatory model



Key elements

- **Corporate Collective Investment Vehicle (CCIV)**
  - The company itself that has beneficial ownership of the assets. May be open-ended.
  - The company will have at least one ‘sub-fund’. Each fund/sub-fund may establish different currency classes.
- **Corporate Director (CD)**
  - Like an RE, it will operate the CCIV.
- **Depositary**
  - Will oversight key decisions relating to pricing and assets by the CD.
  - Responsible for (but may delegate) custody of the assets.
  - Important role in investor protection and ensuring international familiarity.

International comparison

Proposed
Hong Kong Open-ended Fund Company (OFC)

- Corporate investment vehicle regulated and administered by Securities and Futures Commission
- Must be open-ended

Key entities
- Board of directors of OFC with at least two directors
    - Duties owed to OFC including reasonable care, skill and diligence
- Must have licensed investment manager (Type 9)
- Custodian entrusted with safe-keeping of scheme property – may outsource custodial duty

Structure
- Protected cell regime with sub-funds within one legal entity
- Cross sub-fund investments may be enabled

Winding up as if individual sub-funds are separate legal persons

Proposed
Singapore Variable Capital Company (S-VACC)

- Corporate investment vehicle regulated by the Monetary Authority of Singapore and administered by the Accounting and Corporate Regulatory Authority
- Can be open or closed-ended

Key entities
- Board of directors of S-VACC with at least 3 directors (retail) 1 director (non-retail)
    - Subject to disqualification and duties similar to company directors
- Must have licensed fund manager (R/L FMC)
- Mandatory custodian (all funds) must safeguard assets and rights and interests of shareholders

Structure
- Single legal entity with sub-funds as separate cells (without legal personality)
- Assets and liabilities of each sub-fund must be segregated from others

Winding up of each sub-fund as if it were a separate legal person

Proposed
CCIV Regime

- Corporate investment vehicle regulated and administered by ASIC
- Can be open or closed-ended

Key entities
- Corporate Director is a licensed (AFSL) public company, made up of external directors
    - Duties owed to members including care, skill, diligence
- Mandatory depositary for retail CCIV to safeguard assets and oversee CD's key decisions – may outsource custodial duty

Structure
- Single legal entity with sub-funds as separate cells (without legal personality)
- Assets and liabilities of each sub-fund must be segregated from others
- No joint sub-fund investments

Winding up would treat each sub-fund as if separate legal person

The framework

In the draft Bill

- Corporate director role and duties
- Depositary role and duties
- The interaction between Depositary and Corporate Director
- Protected cell/sub-funds
- Shares.

Consequential amendments

- Registration requirements
- Disclosure, meeting rules, notification requirements
- Interaction with Chapters 6 and 7
- External administration and deregistration.

Tax framework

Corporate Director

The Status Quo
MIS regime

Eligibility:

- be a public company;
- hold AFSL which authorises it to operate a MIS; and
- meet AFSL obligations, including certain financial requirements.

Appointment: mandatory to appoint responsible entity.

Role: to operate the scheme and perform the functions required under the scheme constitution and the law.

Duties: In exercising its powers, the RE has duties to members and must ensure the scheme operates in accordance with the law and the scheme constitution.

Liability: to the members for breach of its duties (including for the acts of its agents)

International best practice
UK OEIC Regime

Eligibility:

- be established in the UK or another country in the European Economic Area (if a corporate director); and
- be authorised by the FCA to managing the relevant kind of fund.

Appointment: optional – may appoint natural person directors or a corporate director. In practice, most funds have a corporate director.

Role: to operate the scheme on a day to day basis in accordance with the law and constitution.

Duties: to act in the best interests of the fund and shareholders and exercise due diligence. In operating the fund, the director must comply with extensive regulatory guidance.

Liability: to the members for breach of its duties (including for the acts of its agents)

Proposal
CCIV Regime

Eligibility:

- be a public company;
- hold AFSL which authorises it to operate a CCIV; and
- meet AFSL obligations, including certain financial requirements, and align to those applicable to REs.

Appointment: mandatory to appoint a single corporate director.

Role: to operate the CCIV and perform the functions required under the constitution and the law.

Duties: In exercising its powers, the CD has duties to its members (including best interests). Must ensure the CCIV operates in accordance with the law and the constitution.

Liability: to the members for breach of its duties (including for the acts of its agents).

Corporate Director duties

- Primary responsibility to operate the CCIV – may appoint agent e.g. investment manager.
- Ensure assets are held separately in sub-funds, clearly identified, valued and distributed appropriately.
- Other duties include:
  - Ensure constitution and compliance plan comply with law
  - Best interests duty to members, and other duties similar to those of company director
  - Engaging compliance plan auditor.

Depositary

The Status Quo
MIS Regime

Eligibility

- must hold AFSL which authorises it to provide custodial or depositary services; and
- must meet certain capital requirements (e.g. be Australian ADI or hold $10 million in net tangible assets)

Appointment: Custodian optional but encouraged by net tangible assets requirements.

Oversight: No

Custody

- bare trustee that acts on instruction of the RE
- holds assets on trust for the RE.

Liability

- for a loss suffered as a result of custodian's own fraud, negligence or willful default;
- however, if loss occurred because the custodian acted on instruction from the RE the custodian is indemnified by the RE.

International Best Practice
UCITS V and AIFMD

Eligibility

- must be a legal entity authorised by its national competent authority to carry on depositary activities subject to fulfillment of certain capital, prudential and organisational requirements

Appointment: Depositary mandatory

Oversight: Yes

- issue, redemption, cancellation of units
- unit/share valuations
- carry out instructions of management company
- transactions involving fund's assets (remitted w/in time limits) and fund's income
- proper monitoring of cash flows

Safekeeping

- either custody or record-keeping depending on the type of assets owned by the fund

Liability

- for a loss of a financial instrument held in custody; and
- for a loss suffered as a result of depositary's negligence or intentional failure to properly fulfil its obligations under its statutory duties

Proposal
CCIV Regime

Eligibility

- be a public company;
- hold an AFSL; and
- be independent of the Corporate Director (including any of its agents).

Appointment: Depositary mandatory (retail)

Oversight: Yes

- issue, redemption and cancellation of shares
- valuation of shares
- allocation of assets & liabilities to sub-funds
- income allocation and distribution

Custody

- holds the CCIV's property on trust for CCIV, unless asset belongs to a "special class of assets"

Liability

- for a loss of an asset held on trust;
- for a loss suffered as a result of the depositary's breach of its duties.

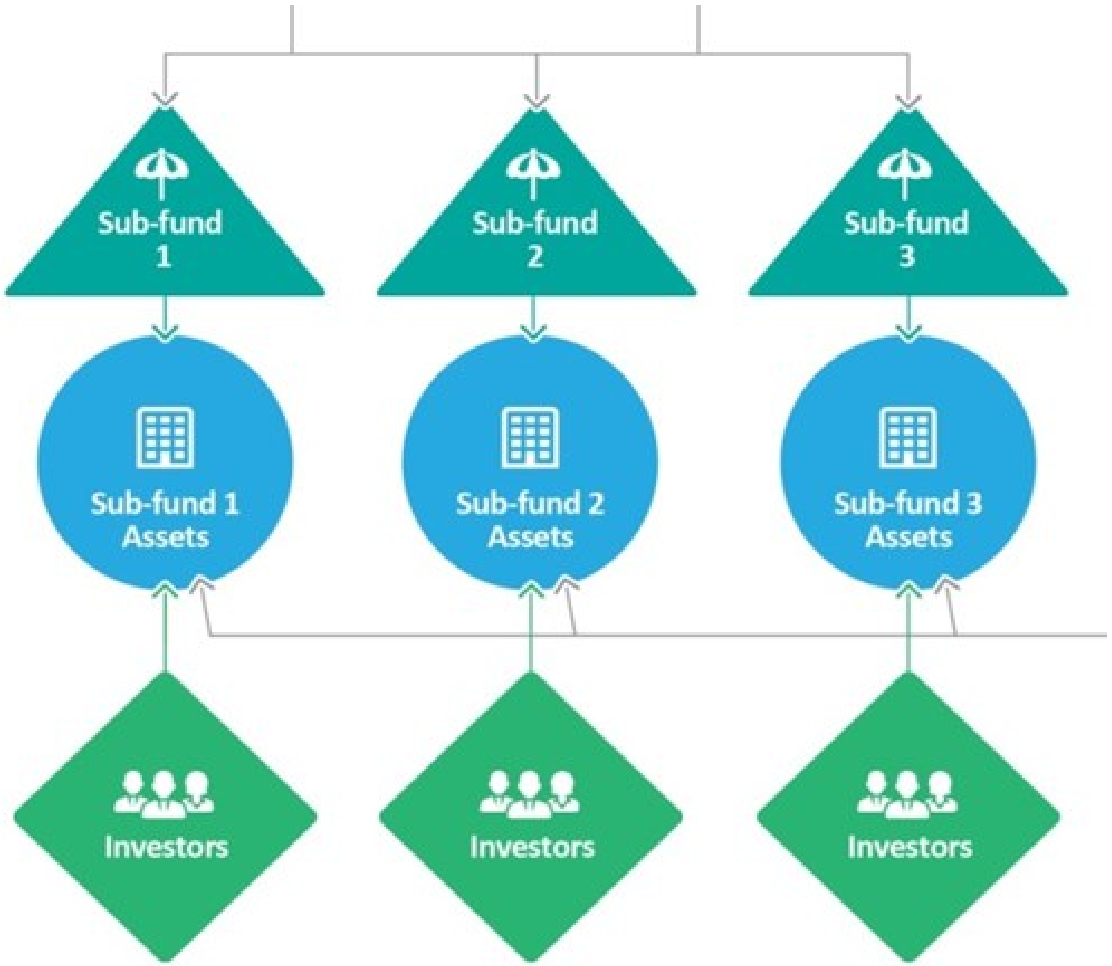
Depositary duties

- Deal with assets on instructions of CD.
- Take reasonable care to ensure the following activities of the CD are compliant with the constitution and the Act:
  - issue, redemption and cancellation of shares
  - valuing shares
  - allocation of assets and liabilities to sub-funds
  - allocation and distribution of income.
- Maintain separate accounts for each sub-fund – regulations or ASIC will prescribe further requirements.
- May sub-custodise but cannot outsource supervisory function.
- Other duties to CCIV including acting in best interests.

Interaction between Corporate Director and Depositary

- The CD has statutory responsibility for operating CCIV like an RE.
- The Depositary oversees key decisions made by the CD relating to income and asset allocations and valuations.
- Both have breach reporting duties (Depositary's confined to supervisory responsibilities over CD).
- The constitution and compliance plan sets out the operational arrangements between the CD and Depositary (e.g. information sharing).

Protected cell/sub-funds



Protected cell/sub-funds

The Status Quo
MIT Regime

- **Generally, independent sub-funds cannot exist under a registered scheme.**
- Some funds may establish sub-funds and attempt to create limited liability through a contract.
- Currently, when feeder funds establish sub-funds, the relevant constituent documents usually have provisions limiting the liability of the feeder fund and by connection to its investors.
- That said, following the release of CAMAC's consultation paper on MIS in 2012, many respondents noted that it would be beneficial if limited liability were to be confirmed by statute, with the primary rationale being the greater protection to scheme members and greater certainty to scheme creditors.

International Best Practice
Protected Cell Companies

UK, USA, Luxembourg, Ireland, Hong Kong, Caymans, Delaware, Guernsey, Jersey

Key features:

- A cell is required to be **treated as though a separate legal entity.**
- **Liability limited by procedural rules** - provisions preventing cell's creditors from claiming non-cellular assets provide enhanced protection.
- **The fund contracts on behalf of each sub-fund.**
- Directors of the PCC obliged **to separate properly cellular assets** and to notify and record when contracting for cell.

Incorporated Cell Companies

Guernsey and Jersey allow both protected cells and incorporated cells

Key features:

- Each cell/sub-fund is **a separate legal entity.**
- **Liability limited by structure** (separate legal personality).
- **Cell has power to enter into contracts** because of the separate legal personality.
- With cell being a separate legal entity, **claims are limited as a matter of law to assets of that cell**

Proposal
CCIV Regime

Protected cell: sub-funds do not have a separate legal personality to the umbrella CCIV.

Sub-funds:

- do not need to register
- cannot enter into contracts
- cannot acquire, hold or dispose of assets in their own name
- do not need to apply for separate licences
- do not have their own board of directors;
- do not have their own CD or D
- cannot continue to exist if the CCIV is terminated.

Sub-funds should be treated as a separate legal person in limited situations, namely, winding-up and dealing with the assets pursuant to a court order. This ensures that the net assets of each sub-fund remain segregated.

Shares

- Shares provisions reflect that CCIV shareholders will be different to MIS unitholders.
- Constitution must provide for redemption.
- Modelled from Chapter 2H with necessary modifications.
- Includes:
  - Share redemptions at the option of shareholders.
  - Share buy-backs initiated by CCIV under particular circumstances, including that it is fair and reasonable to members of affected sub-fund.
  - Rules against financial assistance (of CCIV to persons to buy shares).

Registration requirements

- Similar to the registration provisions for registered schemes.
- Registration application must be made in the form prescribed by ASIC. ASIC would have the power to require additional information by using its forms power in s 350 of the Corporations Act.
- Registration and lodgement fees similar to those for a MIS.
- ASIC would give the CCIV an ACN and sub-funds an Australian Registered Fund Number (ARFN).
- A CCIV may use the ACN as its name. It would also be required to have the abbreviation “CCIV” at the end of its name.

Disclosure, meetings and notifications

Disclosure

- Persons issuing/selling shares in CCIV to retail investor must provide PDS.
- Shares in a CCIV will be carved out from the prospectus regime.

Meeting rules

- CCIVs will be subject to the meeting rules applicable to registered schemes (not companies). Reflects the fact they will generally be passive vehicles.

Notification requirements to ASIC

- CCIV will be required to notify ASIC of each sub-fund of a CCIV.
- CCIV must notify ASIC before offering shares which carry an interest in a new sub-fund and inform ASIC of the sub-fund's investment strategy.
- CCIV must also update ASIC where certain information supplied at registration changes materially.

Interaction with Chapters 6 and 7

- Both Depositaries and CDs will be required to hold AFSLs and comply with licensing obligations.
- Chapter 6 will only apply to listed retail CCIVs.
- Chapter 7 will apply to listed retail CCIVs in the same way as it does for listed companies.

External administration and deregistration

- Exploring different options, which may include Chapters 5 and 5A of the Corporations Act, with necessary modifications to recognise unique features of CCIV.
- Considering UK OEIC model.

Tax framework

- There will be tax neutral outcomes between CCIVs and Managed Investment Trusts (MITs). CCIVs will be attribution vehicles (ACCIVs), that is, the CCIV will be able to attribute amounts to investors for tax purposes.
- Investors will generally be taxed as if they had undertaken the investments directly. Similar to AMITs, non-resident investors will generally be taxed at concessional rates on attributed income and subject to the withholding tax provisions.