
TREASURY LAWS AMENDMENT (CORPORATE COLLECTIVE INVESTMENT
VEHICLE) BILL 2018

EXPOSURE DRAFT EXPLANATORY MATERIALS

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Glossary

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

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

Chapter 1

Introduction

Outline of chapter

- 1.1 The exposure draft of the *Treasury Laws Amendment (Corporate Collective Investment Vehicle) Bill 2018* (the Bill) inserts Chapter 8B into the Act. Chapter 8B establishes the regulatory framework for CCIVs.
- 1.2 This chapter of the explanatory materials discusses the policy context for CCIVs and provides an overview of the regulatory framework.

Context of amendments

History

- 1.3 In November 2009, the Australian Financial Centre Forum released the *Australia as a Financial Centre: Building on our Strengths* report (the Johnson report). The Johnson report made a number of policy recommendations aimed at increasing Australia's cross-border trade in financial services and improving the competitiveness and efficiency of the financial sector.
- 1.4 In relation to funds management, the Johnson report recommended the establishment of an IMR, the introduction of the Asia Region Funds Passport, and the development of new CIVs.
- 1.5 The IMR improves Australia's competitiveness as a financial centre by clarifying that investments by non-residents in foreign assets will generally be exempt from tax in Australia. The IMR generally applies from the 2015-16 income year.
- 1.6 The Passport will provide a multilateral framework which allows eligible funds to be marketed across member countries, with limited extra regulatory requirements. The Passport is intended to support the development of an Asia-wide managed funds industry through improved market access and regulatory harmonisation. Legislation to implement the Passport in Australia was introduced into the Parliament on 28 March 2018.
- 1.7 The Johnson report also identified Australia's need for a CIV that provides flow-through tax treatment, maintains investor protection, and is more internationally recognisable than the MIS (Australia's current trust-based CIV). In order to address this gap, the report recommended

that the Board of Taxation review the scope for providing a broader range of CIVs that would be subject to flow-through taxation.

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

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

Policy objectives

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

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

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

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

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

1.15 Aligning Australia's regulatory framework with well-developed international regimes can lower the barriers to entry for new fund managers seeking to operate in Australia. This can increase competition

and allow Australian consumers greater product choice, including exposure to new asset classes. The creation of an internationally recognisable CCIV framework is also expected to encourage the entry of new service providers, such as providers of depositary services, into the Australian market. Making it easier for entities presently offering depositary services in other countries to apply their existing business practices will encourage them to offer services in Australia, either through existing subsidiaries or by newly entering the market.

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

Regulatory framework

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

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

1.19 For example, a CCIV must have share capital but the CCIV can issue some or all of its shares as shares redeemable at the member's option. This feature is similar to a member's right to withdraw from a registered scheme. Further, while other types of companies are required to appoint natural person directors, a CCIV must have a single corporate director, which is consistent with the OEIC model and also similar to the responsible entity of a registered scheme.

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

1.21 The CCIV regulatory framework has been developed on the basis that CCIVs will be prohibited from being listed on a prescribed

financial market, but securities in a CCIV could be quoted on financial markets or settled using financial market infrastructure (subject to the rules of the relevant market). Listing of CCIVs will be considered further once the CCIV regime is operating.

Flow-through taxation

1.22 The taxation arrangements applying to AMITs will be extended to CCIVs, subject to meeting certain eligibility criteria. Exposure draft legislation addressing the taxation treatment of CCIVs has been consulted on separately and is not dealt with in the explanatory materials.

Summary of new law

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

Basic features of a CCIV

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

1.25 A CCIV must have at least one sub-fund. The CCIV, and each sub-fund of the CCIV, must have at least one member.

1.26 A CCIV comes into existence on registration by ASIC. A CCIV is registered through the same process as other companies, except that a person applying to register a CCIV must provide some additional content in the application form reflecting the regulatory requirements for CCIVs (for example, information regarding the proposed depositary of the CCIV and the sub-fund(s) that the CCIV proposes to have on registration).

1.27 Upon registration, a CCIV has separate legal status as a company. It has all the powers of an individual and a body corporate, including the power to enter into contracts, sue and be sued in its own name and issue securities in itself (as a company).

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

1.29 A CCIV will be a wholesale CCIV unless an offer of securities in the CCIV requires a PDS. This will generally ensure that a CCIV with

one or more retail clients (within the existing definitions in Chapter 7 of the Act) will be a retail CCIV.

1.30 Both retail and wholesale CCIVs must have a constitution. The constitution of a retail CCIV must make adequate provision for certain matters (such as the fees and indemnities payable to its corporate director, the establishment of sub-funds and the method by which member complaints are to be dealt with. The constitution of a CCIV is enforceable as a statutory contract between the following parties: the CCIV, the corporate director, and each member.

Sub-funds

1.31 The business of a CCIV must be conducted through one or more sub-funds (that is, a CCIV must have at least one sub-fund). Each part of the CCIV's business must be referable to one (and only one) sub-fund of the CCIV. Taken together, the business of all of the sub-funds of the CCIV must constitute the entire business of the CCIV. If a CCIV has only one sub-fund, the entire business of the CCIV is referable to that sub-fund. This ensures the business of a CCIV that is referable to each sub-fund of a CCIV is strictly segregated (or protected) from the business of all of the other sub-funds of the CCIV.

1.32 A sub-fund is established on registration by ASIC and is identifiable by its unique name and ARFN. When a new CCIV is established, registration of its initial sub-funds occurs as part of the registration of the CCIV. A sub-fund does not have legal personality.

1.33 Each security that is issued by a CCIV must be referable to one (and only one) sub-fund. The members of a CCIV who hold one or more shares that are referable to the same sub-fund form a class of shareholders. Shares that are referable to the same sub-fund may be further divided into classes, such that a CCIV may have multiple classes of shares that are referable to the same sub-fund.

1.34 Consistent with the requirement for strict segregation of the business of each sub-fund of a CCIV, each asset and liability of a CCIV must be allocated to a sub-fund.

1.35 Assets of a CCIV that relate solely to the business of a single sub-fund are automatically allocated to that sub-fund. Assets of a CCIV that are not automatically allocated are allocated to each sub-fund of the CCIV in a proportion that is fair and reasonable in the circumstances. The corporate director of the CCIV must determine the proportion of the asset to be allocated to each sub-fund on this basis. Assets that are not automatically allocated and which are not fungible assets must be converted into money, or two or more fungible assets, before they become assets of a sub-fund according to the proportion determined for the sub-fund.

1.36 Liabilities of a CCIV that relate solely to the business of a single sub-fund are liabilities of that sub-fund. A liability of a CCIV that relates to the business of more than one sub-fund is allocated to each sub-fund of the CCIV in a proportion that is fair and reasonable in the circumstances. The corporate director of the CCIV must determine the proportion of the liability to be allocated to each sub-fund on this basis.

Depository

1.37 A retail CCIV must have a depository. A wholesale CCIV may choose to have a depository (for example, if it considers investors may be attracted by the additional protections a depository affords). If it so chooses, the wholesale CCIV is subject to the full regulatory requirements for depositories.

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

1.39 If a CCIV acquires an asset that is required to be held by the depository, it must transfer that asset to the depository immediately after it is acquired.

1.40 The depository must hold the assets of the CCIV in a segregated manner and on trust for the CCIV. It must execute lawful instructions in relation to the assets of a CCIV. It also supervises certain aspects of the operations of the CCIV.

1.41 The depository cannot retire or be replaced by the CCIV's members unless a new depository is appointed.

Officers of the CCIV

1.42 The CCIV must have, as its sole director, a public company that holds an AFSL authorising it to operate the business and conduct the affairs of the CCIV. The director of a CCIV is the company named in ASIC's registration as the corporate director. This company remains corporate director until ASIC's record is altered to name another company. The corporate director cannot retire or be removed unless (and until) a new company is appointed as corporate director.

1.43 The CCIV does not have any other officers or employees other than the corporate director. The primary exception to this is any liquidator, administrator or receiver appointed to the CCIV.

1.44 The corporate director of a CCIV has an obligation to operate the business and conduct the affairs of the CCIV. The corporate director must also perform the functions conferred on it by the CCIV's

constitution and the Act, as well as ensure the CCIV complies with its constitution and the Act.

1.45 The corporate director of a CCIV may exercise all of the powers of the CCIV other than any power that must be exercised in a meeting of the members of the CCIV (or a sub-fund of the CCIV). This is consistent with the corporate director's role as director of a company.

1.46 The corporate director of a CCIV also owes statutory duties to the CCIV under Part 2D.1 of Chapter 2D of the Act in its capacity as an officer of the CCIV.

1.47 The corporate director of a retail CCIV, and the officers and employees of the corporate director, owe additional statutory duties to the members of the CCIV. These are based on the statutory duties a responsible entity and its officers and employees owe to the members of a registered scheme. If there is any conflict between the duties officers and employees owe to the members of a CCIV and the duties they owe to the corporate director, the duties owed to the members of the CCIV prevail. This approach ensures general parity between the registered scheme and retail CCIV regimes.

1.48 The corporate director of a CCIV is liable for the acts of its agents and the agents of the CCIV, even if those acts are fraudulent or outside the scope of its authority. This ensures the corporate director is liable for all of the operations of the CCIV (regardless of whether the operations are carried out by itself or by third parties).

1.49 There are also restrictions on the CCIV granting an indemnity or insuring an officer of the CCIV (such as the corporate director) or an auditor of the CCIV from liability to the CCIV. Similarly, there are restrictions on granting an indemnity or insuring an officer of the corporate director or its auditors from a liability to the CCIV. This is consistent with the restrictions on indemnities that apply to other companies.

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

Related party transactions and members' rights and remedies

1.51 A CCIV must obtain the approval of the members of each affected sub-fund if the CCIV wishes to give a financial benefit to a related party.

1.52 The key exception to this is for fees or indemnities payable to the corporate director of the CCIV that:

- are specified in the CCIV's constitution (noting that a retail CCIV is required to do so); or
- in the case of a wholesale CCIV, for the performance of its duties as officer of the CCIV that are reasonable in the circumstances.

1.53 The related parties of a CCIV extend to, for example, entities that control the corporate director, an agent of the corporate director, and the directors of the corporate director (and their relatives).

1.54 Similar to other companies, members of a CCIV are able to seek remedy against a CCIV if its affairs are being conducted in a manner that is contrary to the interests of the members of the CCIV (as a whole) or is oppressive to a member, or class of members, of the CCIV. The grounds for a court order are not exhaustive and include an order to modify or repeal the CCIV's constitution.

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

Meetings

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

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

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

Securities

1.59 A CCIV may issue shares and debentures, provided that the security is referable to only one sub-fund. The CCIV may also issue ordinary shares which are liable to be redeemed ('redeemable shares'). These shares can be redeemed if the redemption does not result in the sub-fund to which the shares are referable becoming insolvent and certain other conditions are satisfied.

1.60 CCIVs may pay dividends, redeem redeemable preference shares and reduce their share capital in a similar way to other companies.

Some modifications have been made to these rules to apply them at the sub-fund level.

Reporting and audit

1.61 The reporting requirements in Chapters 2M to 2P apply to retail CCIVs in the same way as companies, including with additional reporting requirements where a CCIV is a disclosing entity. A wholesale CCIV is not subject to the reporting and audit requirements in Chapter 2M in the same way that these requirements do not extend to unregistered (or wholesale) MISs.

1.62 Some reporting provisions are adapted to accommodate specific features of a CCIV. Importantly, a CCIV must keep records and make financial reports at the sub-fund level, rather than just across the whole of the CCIV. This ensures that members have appropriate information about the sub-fund to which their interest relates.

1.63 The financial records that a CCIV must keep, both for itself and for its sub-funds are subject to similar requirements regarding auditing, financial reporting and reporting to members as those of a registered scheme. A CCIV's annual directors' report requirements are adapted so that it must include specific details about the corporate director and its directors, such as any benefits or interests of a director of the corporate director in the CCIV.

1.64 The Appendix contains a diagram depicting the full regulatory framework as it applies to retail CCIVs.

Object and outline of Chapter 8B

1.65 Part 8B.1 of Chapter 8B sets out the objects and simplified outline of the Chapter.

1.66 The objects of Chapter 8B are to establish a regulatory framework for forming and operating CCIVs in a way that is fair, efficient and competitive and, in conjunction with the financial services licensing framework in Chapter 7 of the Act, to promote confident and informed investors in CCIVs. *[Schedule 1, item 4, section 1230]*

1.67 Part 8B.2 sets out the registration process for CCIVs and establishes the basic features of a CCIV as a new type of company, including the requirements to have a single corporate director and constitution. Part 8B.2 also establishes requirements for sub-funds of a CCIV, including the strict segregation of assets and liabilities, and for the depository.

1.68 Part 8B.3 establishes the general duties of the corporate director and its powers and obligations, including the fundamental obligation

operate the business and conduct the affairs of the CCIV and the requirement to have a compliance plan. Part 8B.3 also imposes restrictions on indemnities, insurance and termination payments for officers of a CCIV and the methods for appointing a corporate director and terminating a corporate director's appointment. It also imposes restrictions on the engagement of persons by the CCIV, including a prohibition on having employees or officers other than a corporate director or receiver or administrator under Chapter 5 of the Act.

1.69 Part 8B.4 modifies the application of Chapter 2E of the Act for CCIVs and sub-funds of a CCIV, specifically in relation to the requirements for seeking member approval for related party transactions.

1.70 Part 8B.5 clarifies how the rules concerning members' rights and remedies contained in Chapter 2F of the Act apply to CCIVs and sub-funds of CCIVs.

1.71 Part 8B.6 modifies the operation of the requirements for meetings contained in Chapter 2G of the Act, including how the corporate director may pass resolutions for the CCIV and rules for meetings of members of a CCIV and members of sub-funds.

1.72 Part 8B.7 establishes rules for issuing and redeeming shares in a CCIV, including the power to issue redeemable shares and redeemable preference shares, noting that an option to redeem is not itself a preference. Additional requirements are imposed on the redemption of redeemable shares in retail CCIVs. Requirements concerning the payment of dividends are also included in Part 8B.7.

1.73 Part 8B.8 modifies the rules contained in Chapter 2J of the Act concerning transactions affecting share capital, including establishing requirements for seeking the approval of sub-fund members for share capital reductions.

1.74 Part 8B.9 clarifies that debentures can only be issued in respect of sub-funds, consistent with the requirement for strict segregation of assets and liabilities between sub-funds.

1.75 Part 8B.10 modifies the operation of Chapter 2M of the Act, concerning financial reporting and audit requirements, for CCIVs.

1.76 Part 8B.11 clarifies that requirements concerning solvency resolutions in Part 2N.3 of the Act do not apply to CCIVs.

1.77 Part 8B.12 establishes powers for ASIC to make CCIV rules, subject to certain conditions being met, and to make exemption and modification orders in respect of Chapter 8B. Chapter 8B may also be modified by the regulations.

Chapter 2

Registration and basic features of a CCIV

Outline of chapter

2.1 Chapter 2 of the explanatory materials sets out the registration requirements and basic features of a CCIV, including:

- the process for applying for registration;
- the meaning of wholesale CCIV and retail CCIV;
- the CCIV's powers (as a company);
- requirements for a CCIV's constitution; and
- the requirement for the CCIV to maintain a register of its members.

Context of amendments

2.2 The key feature of a CCIV is its corporate status: a CCIV is a passive investment company used for funds management. In the absence of CCIVs, trust-based MISs have generally been the only vehicles used in Australia for passive funds management activities. MISs that offer interests to retail clients must be registered schemes, which are regulated under Chapter 5C of the Act.

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

2.4 Several basic features of a CCIV have been drawn from overseas regulatory precedents, including that a CCIV is a company limited by shares, the concept of a sub-fund of a CCIV and the requirement for a CCIV to have a depositary.

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

2.6 Similar to a MIS, a CCIV may either be retail or wholesale – meaning its securities are either issued to retail or wholesale clients. Different regulatory requirements apply to retail and wholesale CCIVs to ensure an appropriate balance between regulation and investor protection for retail and wholesale clients.

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

Summary of new law

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

2.9 A CCIV must have at least one sub-fund. The CCIV, and each sub-fund of the CCIV, must each have at least one member.

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

2.11 The initial sub-funds of the CCIV are also registered by ASIC as part of the registration of the CCIV (and given an ARFN). The registration of any sub-funds of the CCIV, that are being established after registration of the CCIV itself, are subject to a stand-alone process discussed further in Chapter 3 of the explanatory materials.

2.12 Upon registration, a CCIV has separate legal status. It has all the powers of an individual and body corporate, including the power to enter into contracts and issue and cancel shares in the CCIV.

2.13 Unlike other companies, a CCIV has a single corporate director. The corporate director is a public company (that meets certain requirements discussed further in Chapter 5) with its own officers and employees. The new law includes provisions that allow the natural person officers of the corporate director to do some activities, such as enter into a contract on behalf of the CCIV in certain circumstances. The statutory assumptions that people dealing with companies are entitled to make about companies apply in respect of CCIVs.

2.14 A CCIV may be a retail CCIV or a wholesale CCIV. Retail CCIVs have a higher responsibility to their members and additional regulatory requirements. The new law sets out when a CCIV will be a retail or a wholesale CCIV. A CCIV will be a wholesale CCIV unless the issue of a security in the CCIV to a client required it to give the client a PDS. This will generally ensure that a CCIV with one or more retail clients (within the existing definitions in Chapter 7 of the Act) will be a retail CCIV. This includes where a CCIV has one or more 'indirect' retail

clients, who hold their interest in the CCIV under a custodial arrangement (as defined in subsection 1012IA(1)).

2.15 Both retail and wholesale CCIVs must have a constitution. The constitution of a retail CCIV must make adequate provision for certain matters (such as the fees and indemnities payable to its corporate director, the establishment of sub-funds and the method by which member complaints are to be dealt with). The constitution of a CCIV is enforceable as a statutory contract between:

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

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

Comparison of key features of new law and old law

<i>New law</i>	<i>Current law</i>
A CCIV is a new type of company that is limited by shares and has as its director a public company with an AFSL authorising it to operate the business and conduct the affairs of the CCIV.	No equivalent.
A CCIV must have at least one sub-fund. A CCIV must have at least one member (and each sub-fund of the CCIV must have at least one member).	No equivalent.
A CCIV comes into existence on registration by ASIC. A person applying to register a CCIV must provide certain content on registration, such as the details of the CCIV's depositary (if any) and the details of the sub-funds the CCIV's proposes to have on registration).	No equivalent.
A CCIV may be a retail or wholesale CCIV. A CCIV will be a wholesale	No equivalent.

<i>New law</i>	<i>Current law</i>
CCIV unless the issue of a security in the CCIV to a client required the CCIV to give the client a PDS.	
A CCIV must have a constitution. The constitution of a retail CCIV must make adequate provision for certain matters, such as the fees and indemnities payable to its corporate director.	No equivalent.
The constitution is enforceable as a statutory contract between: <ul style="list-style-type: none"> - the CCIV and each member; - the CCIV and the corporate director; - the corporate director and each member; and - a member and each other member. 	No equivalent.
A CCIV must maintain a register of members including the details of the securities held by each member and which sub-fund of the CCIV each security is referable to	No equivalent.

Detailed explanation of new law

A new type of company

2.17 A corporate collective investment vehicle, or CCIV, is a company that is registered as a CCIV under the Act. Defining a CCIV in this way reflects the fact that registration as a CCIV is a voluntary election. *[Schedule 2, items 2 and 4, the definitions of ‘CCIV’ and ‘corporate collective investment vehicle’ in section 9]*

2.18 As a CCIV is a new type of company, it is included separately in the table of types of companies that are registrable under the Act in subsection 112(1). *[Schedule 1, items 1 to 3, the table in subsection 112(1) and the notes to subsection 112(1), Schedule 2, item 12, definition of ‘public company’ in section 9]*

Registering a CCIV

Basic registration requirements

2.19 A company may be registered as a CCIV if it is a company limited by shares, has a constitution and the proposed director of the company is a public company that holds an AFSL authorising it to operate

the business and conduct the affairs of the CCIV. *[Schedule 1, item 4, section 1231]*

2.20 This latter requirement is a significant one as, unlike other companies that may be registered under the Act, a CCIV must have a public company as its sole director and not individual person directors. On registration, this company becomes the ‘corporate director’.

2.21 A CCIV is required to have at least one sub-fund in respect of its business (see also discussion in paragraphs 3.9 to 3.16 which outlines this requirement and what the nature and meaning of a sub-fund is). *[Schedule 1, item 4, subsection 1231A(1)]*

2.22 In addition to the existing requirement under section 114 of the Act for a company to have at least one member, each sub-fund of a CCIV must also have at least one member. *[Schedule 1, item 4, subsection 1231A(2)]*

Process for registration

2.23 The ordinary process for applying to register a company, contained in section 117 of the Act, is modified for CCIVs. To register a CCIV, a person must lodge an application with ASIC in the prescribed form. *[Schedule 1, item 4, subsections 1231B(1) and (5), Schedule 2, item 23, note 5 under subsection 117(2)]*

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

- the personal details and addresses of individual directors, as individuals may not be directors of a CCIV;
- the personal details and address of the company secretary, as a CCIV is not required to have a company secretary; and
- whether or not the company will have an ultimate holding company (and the details of the holding company). *[Schedule 1, item 4, subsection 1231B(2)]*

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

- the name and registered office address of the public company that has consented to be the CCIV’s corporate director;
- the proposed name of each sub-fund the CCIV proposes to have on registration of the CCIV;
- for each proposed sub-fund, information regarding the shares being taken up by persons who have consented to become members of the CCIV; and
- if the CCIV is to have a depositary, the name and registered office address of the public company (or foreign company

registered under Division 2 of Part 5B.2) that gives written consent to be the depositary. *[Schedule 1, item 4, subsection 1231B(3)]*

2.26 The person making the application must have the written consents of the proposed corporate director, depositary and members of the CCIV which, after the CCIV is registered, must be given to the CCIV. The CCIV has an obligation to keep the consents. *[Schedule 1, item 4, subsection 1231B(6)]*

2.27 The application must also be accompanied by a copy of the CCIV's constitution. *[Schedule 1, item 4, subsection 1231B(4)]*

2.28 These application requirements are mirrored if a person lodges an application to register a CCIV on the basis of a law of a State or Territory under section 5H of the Act. *[Schedule 1, item 4, section 1231C]*

2.29 After receiving an application to register a company as a CCIV, ASIC may register the company under section 118 of the Act if it is of the opinion that the proposed corporate director and the depositary (if the CCIV has a depositary) meet the necessary requirements. See Chapter 4 of the explanatory materials for details of the requirements for a depositary. *[Schedule 1 Item 4, subsection 1231DAB(1) ; Schedule 2, items 24 and 25, note 2 at the end of subsection 118(1)]*

2.30 If ASIC registers the CCIV, ASIC must also register one or more sub-funds of the CCIV (depending on the number of sub-funds the CCIV proposes to have on registration that meet the registration requirements). There is a separate process for the registration of sub-funds of the CCIV that are established after registration of the CCIV. ASIC's power to register a sub-fund of the CCIV is discussed further in paragraphs 3.17 to 3.24. *[Schedule 1, item 4, subsection 1231D(2)]*

Effect of registration

2.31 Upon registration, the persons mentioned in the application as proposed to become the corporate director, depositary and members of the CCIV become those things. The shares specified in the application form are also taken to be issued to those members upon registration. *[Schedule 1, item 4, section 1231E; Schedule 2, item 26, note at the end of subsection 120(1)]*

Application of CCIV regulatory framework to retail CCIVs and wholesale CCIVs

2.32 The distinction between retail CCIVs and wholesale CCIVs is an important one. This is because retail CCIVs are subject to the full regulatory framework in Chapter 8B, whereas wholesale CCIVs are subject to fewer requirements. This follows the regulatory approach for MISs, where retail MIS are subject to the full regulatory requirements as registered schemes. However, unlike the MIS regime, all CCIVs (including wholesale CCIVs) are required to be registered under the Act.

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

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

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

Meaning of ‘retail CCIV’ and ‘wholesale CCIV’

2.34 A CCIV is a wholesale CCIV if it does not meet the definition of a retail CCIV. [Schedule 1, item 4, subsection 1232F(1), and Schedule 2, items 16 and 20, the definitions of ‘retail CCIV’ and ‘wholesale CCIV’ in section 9]

2.35 A CCIV is a retail CCIV if the issue of a security in the CCIV required a PDS¹ to be given to the person who acquired the security. The operation of the PDS obligations in Chapter 7 means that a PDS is only required to be given to retail clients. *[Schedule 1, item 4, subsection 1232F(2)]*

2.36 For the purposes of determining whether a CCIV is a retail CCIV, ‘security’ has the same meaning as in Chapter 7. Using the Chapter 7 definition ensures that there is consistency with the PDS requirements found in Part 7.9. The definition of security for these purposes includes a share and a debenture in a CCIV, as well as a legal or equitable interest in, or an option or right to acquire a share or debenture in a CCIV. *[Schedule 1, item 4, paragraph 1232F(2)(a)]*

2.37 A CCIV will also be a retail CCIV if a member acquires one or more shares in the company under a custodial arrangement (within the meaning of section 1012IA) and the Act required the provider to give the member a PDS before the acquisition occurred. *[Schedule 1, item 4, paragraph 1232F(2)(b)]*

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

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

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

A CCIV's powers

2.41 As a CCIV is a type of company, it has all the powers of an individual and a body corporate, including the power to enter into

¹ Amendments to Chapter 7, including the PDS obligations in Part 7.9, are under development. A PDS is not normally required to be provided in relation to the acquisition or issue of securities of other companies (including shares and debentures in that company). The issue of securities in a company is normally subject to the disclosure regime in Chapter 6D. However, it is proposed that the issue of securities in a CCIV will be subject to the PDS regime (including shares and debentures in the CCIV). This approach ensures consistency with the disclosure arrangements for registered schemes. Details of the PDS requirements for securities in a CCIV, including when a PDS is not required to be provided to a retail client, will be provided in the next exposure draft of the Bill.

contracts, and issue and cancel shares in the company. The CCIV's powers to make, vary, ratify or discharge a contract may be exercised by an individual acting with the CCIV's express or implied authority, akin to other companies. It should be noted, however, that a CCIV's power to issue shares and debentures are modified by the requirements of Part 8B.7 and Part 8B.9 of the Bill. Further details about a CCIV's power to issue securities are contained in Chapter 8 of the explanatory materials. *[Schedule 2, items 27 and 28, note 2 to subsection 124(1)]*

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

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

[Schedule 1, item 4, section 1232 and Schedule 2, items 29 to 32, notes 1 and 2 to subsections 127(1) and notes 1 and 2 to subsection 127(2)]

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

Constitution

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

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

[Schedule 1, item 4, sections 1232B and 1232D]

2.45 The enforceability of the constitution, as a statutory contract, between the corporate director and each member is an extension on the way the provisions can be enforced by members of another company. It provides a member of the CCIV a direct right of recourse against the

corporate director for any breach by the corporate director of its obligations under the constitution. This is similar to the way the constitution of a registered scheme can be enforced (see section 601GB of Chapter 5C of the Act).

2.46 The replaceable rules for companies contained in Part 2B.4 of the Act do not generally apply as replaceable rules for a CCIV. The only replaceable rules for a CCIV are:

- the replaceable rule relating to a member's voting power at meetings of the CCIV or a sub-fund of the CCIV (see paragraphs 7.15 to 7.17 of the explanatory materials); and
- the new provision that sets out how the corporate director makes decisions on behalf of the CCIV (see paragraphs 7.6 to 7.9 of the explanatory materials)

[Schedule 1, item 4, sections 1232A and 1232E, Schedule 2, item 33, note 3 to subsection 135(1)]

Adopting and modifying the constitution

2.47 A CCIV adopts its constitution on registration. The persons who are to become members on registration must consent to the constitution.

[Schedule 1, item 4, subsection 1232B(3)]

2.48 The process for modifying, or repealing and replacing, the constitution differs depending on whether the CCIV is a retail or wholesale CCIV.

2.49 For a wholesale CCIV, the process for modifying the constitution must be set out in the first constitution that the CCIV adopts. This process must be complied with if the constitution is subsequently modified, repealed or replaced. *[Schedule 1, item 4, paragraph 1232B(4)(b), Schedule 2, items 34 and 35, note 2 to subsection 136(1)]*

2.50 For a retail CCIV, the constitution may be modified, repealed or replaced by a special resolution of the CCIV's members or by the corporate director. The corporate director may only change the constitution on its own initiative if it reasonably considers the change will not adversely affect members' rights. These requirements are based on the requirements for changing the constitution of a registered scheme in existing section 601GC. *[Schedule 1 item 4, paragraph 1232B(4)(a) and section 1232H, and Schedule 2, items 34 and 35, note 2 to subsection 136(1)]*

2.51 A CCIV is not permitted to amend the constitution if it is inconsistent with an order made by a Court under existing section 233 (see paragraph 6.19 below). *[Schedule 1, item 4, subsection 1232B(5) and subsection 1137AJ(1)]*

2.52 The CCIV must lodge a copy of the modification or the new constitution with ASIC. A failure to lodge a copy is a strict liability offence. *[Schedule 1, item 4, subsections 1232B(5)]*

2.53 The adoption or modification of the constitution takes effect upon lodgement or a later date determined by the corporate director.
[Schedule 1, item 4, section 1232C]

Content of the constitution

2.54 The content of a constitution of a wholesale CCIV is not prescribed, apart from the requirement for the CCIV to set out the process for adopting a constitution after registration, and repealing or modifying the constitution. *[Schedule 1, item 4, subsection 1232B(2)]*

2.55 The constitution of a retail CCIV must make adequate provision for the establishment of sub-funds and classes of shares referable to sub-funds, and the method by which member complaints are to be dealt with.
[Schedule 1, item 4, subsection 1232G(1)]

2.56 Further, if the corporate director of a retail CCIV is to have rights to be paid fees or be indemnified out of assets of a sub-fund of the CCIV, or the power to borrow or raise money for the purposes of the CCIV, then these rights and powers must be specified in the constitution.
[Schedule 1, item 4, subsections 1232G(2) and (3)]

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

2.58 There is no equivalent provision to subsection 601GA(4) (winding up arrangements) as the external administration regime for CCIVs will be prescribed by legislation. These provisions are still under development and will be consulted on as part of the next exposure draft of the Bill.

2.59 The constitution of a retail CCIV must also provide for redemptions of share capital if all or some of the shares in the CCIV are redeemable at the member's option, consistent with the rules for redemption of redeemable shares. This is further discussed in Chapter 8 of the explanatory materials. *[Schedule 1, item 4, section 1232J]*

2.60 It is a duty of the corporate director of a retail CCIV to ensure that a retail CCIV's constitution meets the requirements of Part 2B.4 of the Act (to the extent they apply) and the specific requirements outlined above. The corporate director is also required to comply with the CCIV's constitution. For a further discussion of the duties and responsibilities of the corporate director, see Chapter 5 of the explanatory materials.

2.61 The rules for changing the company type in Part 2B.7 of the Act do not apply to CCIVs. *[Schedule 1, item 4, section 1232K]*

Special naming requirements for a CCIV's name

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

2.63 Even though a CCIV is a company limited by shares, it does not need to have the word "Limited" at the end of its name. Instead, it is required to have the expression "Corporate Collective Vehicle" at the end of its name. Alternatively, the abbreviation "CCIV" can be used. *[Schedule 1, item 4, sections 1232L and 1232M]*

2.64 In the same way that a person is prohibited from carrying on a business using the words "Limited", "No Liability" or "Proprietary" in their name (or an abbreviation of these words) unless allowed or required to do so under law, a person is also prohibited from carrying on a business with "Corporate Collective Investment Vehicle" or "CCIV" in their name. *[Schedule 1, item 4, section 1232N]*

2.65 The naming requirements for a sub-fund's unique name are discussed further in paragraphs 3.85 to 3.100.

Registers

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

- members;
- holders of options over unissued shares and related options documents; and
- debenture holders (if any).

2.67 In addition, a CCIV's register must show the sub-fund to which each share, option or debenture issued by the CCIV is referable. *[Schedule 1, item 4, section 1236, Schedule 2, item 36, note 3 to subsection 169(3)]*

Chapter 3

Sub-funds

Outline of chapter

3.1 Division 3 of Part 8B.2 of Chapter 8B establishes the regulatory framework for sub-funds of a CCIV.

Context of amendments

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

3.3 The concept of a sub-fund, commonly referred to internationally as a protected cell, draws on overseas regulatory precedents such as the United Kingdom's OEIC regime, in particular by having sub-funds sit within a corporate structure but not as a separate legal entity.

3.4 The sub-fund framework allows managed funds to offer a variety of investment options through multiple sub-funds under a single 'umbrella' CCIV, and protects investors in a particular sub-fund of a CCIV by quarantining the business of that sub-fund from the business of all the other sub-funds of the CCIV. This is achieved by strictly segregating the assets and liabilities of each sub-fund from the assets and liabilities of the other sub-funds of the CCIV.

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

Summary of new law

3.6 Division 3 of Part 8B.2 of Chapter 8B of the Bill establishes the regulatory framework for sub-funds.

3.7 Subdivision A sets out the general requirements for sub-funds. In particular, it sets out the fundamental concept that every part of a CCIV's business must be referable to one and only one sub-fund and, taken together, the businesses of all of the sub-funds of a CCIV must comprise the entire business of the CCIV. Each sub-fund of a CCIV must have at least one class of shares that is referable to it. Subdivision A also sets out the process for registering a sub-fund of the CCIV with ASIC (which is the means through which the sub-fund(s) of the CCIV are established).

3.8 Subdivision B sets out the rules for determining the assets of sub-funds and the segregated application of assets of sub-funds. This includes a requirement that each asset of a CCIV be allocated to one, and only one, of the CCIV's sub-funds. Subdivision C sets out the rules for determining the liabilities of sub-funds, including the allocation of liabilities that are incurred in respect of the business of two or more of a CCIV's sub-funds. Subdivision D establishes requirements for documenting the allocation of assets and liabilities to sub-funds.

Comparison of key features of new law and old law

<i>New law</i>	<i>Current law</i>
Each part of the CCIV's business must be referable to one (and only one) sub-fund of the CCIV. Together, the business of all sub-funds of the CCIV must constitute the entire business of the CCIV.	No equivalent.
A sub-fund of the CCIV is all or part of the CCIV's business that is registered with ASIC. It is established at the beginning of the day on which it is registered by ASIC. Each sub-fund of the CCIV must be registered and must be operated separately from any other sub-fund of the CCIV.	No equivalent.
A sub-fund does not have legal personality.	No equivalent.
Securities in a CCIV are referable to a sub-fund. A class of securities cannot be referable to more than one sub-fund, but a sub-fund may have multiple classes of securities referable to it.	No equivalent.

<i>New law</i>	<i>Current law</i>
All assets and liabilities of a CCIV must be allocated to sub-funds.	No equivalent.
A sub-fund is identifiable by a unique name and an ARFN. A CCIV must identify any relevant sub-fund(s) of the CCIV with their unique names and ARFNs on all public documents and negotiable instruments that relate to that sub-fund (or those sub-funds).	No equivalent.

Detailed explanation of new law

Requirements for sub-funds

The nature of sub-funds

3.9 A CCIV must at all times have at least one sub-fund, and may have multiple sub-funds (see discussion in paragraph 2.21 above). *[Schedule 1, item 4, subsection 1231A]*

3.10 A sub-fund does not have legal personality. *[Schedule 1, item 4, subsection 1233(2)]*

3.11 This means that a sub-fund cannot enter into contracts, cannot sue and be sued in its own name, and cannot acquire, hold or dispose of assets or liabilities in its own name. It is the CCIV itself which has legal personality with the power to do all of this. However, a sub-fund is a distinct and protected part of the CCIV's business. It is strictly segregated from other any other sub-fund of the CCIV. This is a key consumer protection which ensures investors in a sub-fund of a CCIV are not exposed to risk from the business of the other sub-funds of the CCIV.

3.12 Despite the fact that a sub-fund does not hold assets or incur liabilities in its own name, assets and liabilities of the CCIV are allocated to each sub-fund of the CCIV in accordance with the rules outlined in paragraphs 3.32 to 3.75 below.

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

Meaning of a sub-fund

3.14 A sub-fund is all or part of the CCIV's business that is registered as a sub-fund by ASIC. A sub-fund of the CCIV is established at the beginning of the day on which it is registered by ASIC. *[Schedule 1, item 4,*

subsections 1233(1) and 1233E(1), Schedule 2, item 19, definition of ‘sub-fund’ in section 9]

3.15 If a CCIV’s business is divided into parts, then each part must be registered. No part of the CCIV’s business can be operated unless it is registered. Each part of the CCIV’s business that is registered must be operated separately from any other part of the CCIV’s business.

[Schedule 1, item 4, section 1233A]

3.16 The effect of this requirement is that every part of the CCIVs business of the CCIV must be referable to a sub-fund and no part of a CCIV’s business can be referable to more than one sub-fund. If a CCIV has only one sub-fund, then the entire business of the CCIV is referable to that sub-fund. If a CCIV has multiple sub-funds, then each sub-fund must relate solely to a particular part of the CCIV’s business and the business of every sub-fund of a CCIV must, when taken together, constitute the entire business of the CCIV.

Registering a sub-fund of the CCIV

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

3.18 The initial sub-fund(s) of the CCIV are registered by ASIC as part of the registration of the CCIV itself (see discussion in paragraphs 2.23 to 2.30 above). ASIC may register the initial sub-fund(s) of the CCIV if it registers the CCIV and if the sub-fund’s proposed name has been provided. *[Schedule 1, item 4, subsection 1233D(1)]*

3.19 The registration of a new sub-fund that is established after registration of the CCIV is subject to a discrete registration process. To register a new sub-fund of a CCIV, the CCIV must lodge an application with ASIC in the prescribed form that states:

- the proposed name of the sub-fund; and
- the name and ACN of the CCIV.

[Schedule 1, item 4, section 1233F]

3.20 ASIC may register a sub-fund of the CCIV upon receiving an application. If it does so, it must give the sub-fund an ARFN and keep a record of the registration. *[Schedule 1, item 4, subsections 1233D(2) and (3)]*

3.21 Similar to the records of registration of companies under section 118(2), subsections 1274(2) and (5) apply to the record as if the records were documents lodged with ASIC. This allows a person to, among other things, inspect the records and use the record as evidence in legal proceedings. *[Schedule 1, item 4, subsection 1233D(3)]*

3.22 The sub-fund’s name is the name specified in ASIC’s record of registration (see discussion in paragraphs 3.85 to 3.100 below in relation to the naming requirements for a sub-fund’s name). *[Schedule 1, item 4, subsection 1233E(2)]*

3.23 A separate account in an Authorised Deposit-taking Institution must be maintained for each sub-fund. *[Schedule 1, item 4, subsection 1233H(4)]*

The significance of separate registration of sub-funds

3.24 The separate registration of each sub-fund of a CCIV helps to ensure the business of the sub-fund is protected from the business of other sub-funds of the CCIV. In effect, a sub-fund does not come into being until the day it is registered and given a unique name and identifier – its ARFN – by ASIC. This supports the clear identification (and segregation) of the assets and liabilities of each sub-fund of a CCIV and ensures counterparties will always be able to identify the part of the business of a CCIV they are transacting with. This is further supported by the requirement to identify the sub-fund on documents that relate to the business of the sub-fund. See paragraphs 3.76 to 3.84 for further detail about this requirement.

Shares, and classes of shares, in a CCIV must be referable to a sub-fund

3.25 Every share in a CCIV must be referable to one, and only one, sub-fund of the CCIV. The sub-fund to which the share is referable is the sub-fund to which the rights attaching to the share relate (see Chapter 6 of the explanatory materials for a detailed explanation of the requirements for issuing shares in a CCIV). *[Schedule 1, item 4, section 1245 and the note to subsection 1233B(1), Schedule 2, item 14, definition of ‘referable’ in section 9]*

3.26 The members of a CCIV who hold one or more shares in a CCIV that are referable to the same sub-fund form a separate class of shareholders in the CCIV. The effect of this provision is that a sub-fund of a CCIV must have at least one class of shares. *[Schedule 1, item 4, subsection 1233B(1); Schedule 2, items 3, 14, 21 and 45, definitions of ‘class’ and ‘referable’ in section 9, notes to subsections 57(1) and 246B(1)]*

3.27 Shares that are referable to the same sub-fund of a CCIV may be divided into further classes of shares, such that CCIVs may have multiple classes of shares that are referable to the same sub-fund. *[Schedule 1, item 4, subsection 1233B(2)]*

3.28 The Bill clarifies that a class of shares is referable to a sub-fund of a CCIV if all of the shares within the class are referable to the sub-fund. If the CCIV only has one sub-fund then all classes of shares in the CCIV must be referable to that sub-fund. *[Schedule 1, item 4, subsection 1233B(3)]*

Restriction on varying class rights of shares in a sub-fund

3.29 The rules concerning classes of shares in a sub-fund of a CCIV are strict rules that apply despite anything to the contrary in Part 2F.2 of the Act (concerning class rights). The provisions in Part 2F.2 cannot be used to alter the rights that are attached to shares in a sub-fund so as to give them rights in another sub-fund. *[Schedule 1, item 4, subsection 1233B(4)]*

Example 3.1: Shares referable to a sub-fund

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

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

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

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

Membership of a sub-fund

3.30 Despite the fact that a sub-fund does not have separate legal personality, each member of a CCIV is also deemed to be a member of at least one sub-fund of that CCIV, depending on the nature of the share or shares they hold in the CCIV.

3.31 A person is deemed to be a member of a sub-fund of a CCIV if the person is a member of the CCIV and holds one or more shares that are referable to the sub-fund. This is important for the operation of other provisions that confer rights or obligations in relation to members of sub-funds, such as the meeting rules and approval of related party transactions. *[Schedule 1, item 4, section 1233C; Schedule 2, item 11, paragraph (b) of definition of ‘member’ in section 9]*

Example 3.2: Membership of a sub-fund

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

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

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

Allocation of assets and liabilities to sub-funds

3.32 The assets and liabilities of a CCIV must be allocated to one, and only one, sub-fund of the CCIV. This ensures segregation of assets and liabilities between sub-funds. *[Schedule 1, item 4, subsection 1233J(1)]*

3.33 The allocation rules are, to the greatest extent possible, automatic in their application. In this respect, they draw in part on requirements for statutory funds under the *Life Insurance Act 1995* and for health benefit funds under the *Private Health Insurance (Prudential Supervision) Act 2015*.

3.34 The allocation rules are designed to ensure that all assets and liabilities of a CCIV can be allocated to sub-funds of a CCIV by the force of the allocation rules and cannot be left unallocated as a consequence of an act or omission by the corporate director of the CCIV. This is particularly important given that key aspects of the regulatory framework for CCIVs, such as the rules for external administration, will operate at the sub-fund level.²

Allocation of assets to sub-funds

3.35 Despite the fact that a sub-fund does not have separate legal personality and cannot own assets in its own name, assets of a CCIV are also assets of a sub-fund. *[Schedule 1, item 4, section 1233J]*

3.36 A single asset of a CCIV can only be an asset of one sub-fund. This is consistent with the policy objective of strict segregation of each part of the business of a CCIV that is referable to a sub-fund of the CCIV. *[Schedule 1, item 4, subsection 1233J(1)]*

3.37 The assets of a sub-fund at any particular time are:

- amounts paid in consideration for the issue of any shares that are referable to the sub-fund;
- money deposited with or lent to the CCIV in connection with the issue of debentures that are referable to the sub-fund;
- assets obtained as a result of the application of the assets of the sub-fund in carrying on the business of the sub-fund (for example, to make investments); and
- assets that relate solely to the business of the sub-fund.

[Schedule 1, item 4, subsection 1233J(2), Schedule 2, item 1, definition of 'assets' in section 9]

3.38 Assets that fall within these four categories are automatically allocated to the relevant sub-fund.

Assets that are not automatically allocated to sub-funds

3.39 Assets of a CCIV that do not fall into one of the above categories are not automatically allocated to a sub-fund. These assets are allocated to sub-funds according to special allocation rules. *[Schedule 1, item 4, subsection 1233J(3) and subsection 1233K(1)]*

3.40 The default rule for allocating assets that are not automatically allocated to a sub-fund is that the proportion of the asset to be allocated to

² The operation of the external administration provisions contained in Chapter 5 of the Act will be modified so that external administration can occur at the sub-fund level. These modifications are under development and will be included in the next exposure draft of the Bill.

a sub-fund is the proportion that is fair and reasonable in the circumstances. The point at which this allocation is determined is at the time the asset is acquired by the CCIV. *[Schedule 1, item 4, subsections 1233K(2) and (3)]*

3.41 While this default rule applies independently of any act or omission by the corporate director, it is the responsibility of the corporate director of the CCIV to determine, in writing, the proportion of the asset that is to be allocated to each sub-fund. The corporate director’s determination of the proportion that is fair and reasonable in the circumstances must be made as soon as practicable after the CCIV acquires the asset. A fair and reasonable allocation to a sub-fund in the circumstances may be a zero allocation. *[Schedule 1, item 4, subsections 1233K(4) and (5)]*

3.42 A safe harbour provision is included so that if the corporate director’s determination is one that a reasonable person in the corporate director’s position could make, then the proportion of the asset that is allocated to each sub-fund is as determined by the corporate director. *[Schedule 1, item 4, subsection 1233K(6)]*

3.43 In the event that the asset to be allocated is not fungible, the corporate must also convert the asset (the original asset) either into money or into two or more fungible assets (converted assets) so as to be able to allocate the proportion of the original asset that is fair and reasonable in the circumstances to each sub-fund. Once converted, the money or converted assets become assets of each sub-fund of the CCIV in accordance with the proportion of the original asset that was allocated to each sub-fund. *[Schedule 1, item 4, subsections 1233J(5) and 1233K (7)]*

3.44 To remove doubt, if an asset has not yet been converted into two or more fungible assets, the assets of the sub-fund still includes the proportion of the asset that is allocated to the sub-fund according to the rules outlined above. *[Schedule 1, item 4, subsection 1233K(4)]*

Example 3.3: Allocation of assets

A CCIV has two sub-funds, Sub-Fund A and Sub-fund B. Sub-fund A invests only in shares in property trusts while Sub-Fund B invests only in shares in equity trusts.

The CCIV has the following assets:

Consideration for the Issue of Shares

Sub-Fund A	\$10,000
Sub-Fund B	\$20,000
<i>Shares</i>	
Shares in property trusts	\$15,000

Shares in equity trusts	\$16,000
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<i>Cash held on deposit (from selling shares in equity trusts)</i>	\$2,000
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The assets of Sub-Fund A are:

- \$10,000 paid in consideration for the issue of shares referable to that sub-fund; and
- the \$15,000 of property trust shares.

The assets of Sub-Fund B are:

- \$20,000 paid in consideration for the issue of shares referable to that sub-fund;
- \$16,000 of equity trust shares; and
- \$2,000 cash.

Example 3.4: Allocation of assets not automatically allocated

A third party engaged by the CCIV to provide investment management services for its only two sub-funds acts negligently. The CCIV sues the third party and the proceedings are settled for \$100,000.

The \$100,000 settlement is an orphan asset because it does not relate solely to the business of either sub-fund. The corporate director must determine the proportion of the money that is fair and reasonable to allocate to each of the sub-funds in the circumstances.

The corporate director notes that the investment management services provided by the third party (and the ensuing negligence) related equally to both of the sub-funds. Accordingly, the corporate director determines, in writing, to allocate the money in equal proportions to both sub-funds.

The assets of each sub-fund then include \$50,000 of the settlement money.

Allocation of a CCIV's liabilities to its sub-funds

Liabilities of a sub-fund

3.45 The liabilities of a CCIV that relate solely to the business of a sub-fund of the CCIV are liabilities of that sub-fund. *[Schedule 1, item 4, subsection 1233P(1); Schedule 2, item 10, definition of 'liabilities' in section 9]*

3.46 A liability of a CCIV that relates to the business of more than one of the CCIV's sub-funds is allocated proportionately to each sub-fund according to the following allocation rules. *[Schedule 1, item 4, subsection 1233P(2)]*

Allocation rules for liabilities that do not relate solely to the business of a single sub-fund

3.47 In the case of liabilities of a CCIV that do not relate solely to the business of a single sub-fund, the proportion of the liability that is allocated to each of the CCIV's sub-funds is the proportion that is fair and reasonable in the circumstances at the time the liability is incurred. This is the default rule for allocating liabilities that do not relate solely to the business of a single sub-fund. *[Schedule 1, item 4, subsections 1233Q(2) and (3)]*

3.48 The proportion that is fair and reasonable in the circumstances must reflect the extent to which the liability relates to the business of the sub-fund. The proportion may be zero, if none of the liability relates to the business of the sub-fund. *[Schedule 1, item 4, subsection 1233Q(4)]*

3.49 While this default rule applies independently of any act or omission by the corporate director, it is the responsibility of the corporate director of the CCIV to determine, in writing, the proportion of the liability that is to be allocated to each sub-fund. The corporate director's determination must be made as soon as practicable after the liability is incurred. *[Schedule 1, item 4, subsection 1233Q(4)]*

3.50 A safe harbour provision is included so that if the corporate director's determination is one that a reasonable person in the corporate director's position could make, then the proportion of the liability that is allocated to each sub-fund is as determined by the corporate director. *[Schedule 1, item 4, subsection 1233Q(7)]*

3.51 A method for determining a fair and reasonable allocation of liabilities to the sub-funds of a CCIV may also be prescribed by regulation. *[Schedule 1, item 4, subsection 1233Q(8)]*

Documenting the allocation of assets and liabilities to sub-funds

3.52 The corporate director has an obligation to ensure that the assets and liabilities that are allocated to a sub-fund of a CCIV are clearly identified as assets and liabilities of the sub-fund. In relation to a liability of a CCIV that does not relate solely to the business of the sub-fund, the proportion of the liability that is allocated to the sub-fund must be clearly identified. *[Schedule 1, item 4, subsection 1233G(1) and section 1233N(1)]*

3.53 Consistent with this requirement, the corporate director must keep records, in either written or electronic form, that set out for each of the CCIV's sub-funds the assets and liabilities of the CCIV that are identified as assets and liabilities of the sub-fund. *[Schedule 1, item 4, subsections 1233R(1) and (2)]*

3.54 The corporate director must, in respect of each asset and liability, retain the record for seven years after the year in which the CCIV disposes of the asset or discharges the liability (as the case may be). *[Schedule 1, item 4, subsections 1233R(3)]*

Segregated holding of assets of sub-funds

3.55 While the assets of sub-funds of a retail CCIV are required to be held by the CCIV's depositary (see Chapter 4 of the explanatory materials), there are a number of situations where the assets of a sub-fund of a CCIV may be held by someone other than the depositary. This includes situations where a wholesale CCIV does not have a depositary and either chooses to hold the assets of the CCIV itself, or engages another person (for example, a custodian) to hold the assets of the CCIV. A further situation is where a CCIV acquires an asset that is not automatically allocated to a sub-fund of the CCIV under the asset allocation rules outlined above and must first be converted into money or two or more fungible assets before it becomes an asset of a sub-fund.

3.56 The Bill contains specific requirements concerning the segregated holding of assets of sub-funds in situations where a CCIV's depositary does not hold the assets of a sub-fund of a CCIV. Regulations may specify exemptions from these rules for classes of assets. *[Schedule 1, item 4, subsection 1233H(7)]*

Segregated holding of assets held by the CCIV

3.57 Where the assets of a sub-fund of a CCIV that are not required to be held by a depositary are held by the CCIV, the assets must be held separately from the assets of any other sub-fund of the CCIV. *[Schedule 1, item 4, subsection 1233H(1)]*

Segregated holding of assets held by a person other than the depositary or the CCIV

3.58 Where the assets of a sub-fund of a CCIV that are not required to be held by a depositary are held by a person other than the CCIV, the person must hold the assets separately from the property of the person and also separately from the assets of other sub-funds of the CCIV. *[Schedule 1, item 4, paragraph 1233H(2)(a)]*

3.59 In this situation, if the assets of the sub-fund are not already held on trust by the person for the CCIV (for example, if the assets are held by a custodian), they are taken to be held on trust for the CCIV. This establishes a fiduciary relationship between the person and the CCIV. *[Schedule 1, item 4, paragraph 1233H(2)(b)]*

Segregated holding of assets that are not automatically allocated to a sub-fund of the CCIV

3.60 As noted above, assets of a CCIV that are not automatically allocated to a sub-fund of a CCIV must be allocated to each sub-fund of the CCIV in a proportion that is fair and reasonable in the circumstances. Until that allocation takes place the asset does not become an asset of a sub-fund of the CCIV. In some cases the asset may need to be converted

into money or two or more fungible assets before the allocation can be effected and the converted asset can become an asset of a sub-fund.

3.61 In this situation, the asset must be held by the CCIV separately from the assets of each of the CCIV's sub-funds until the conversion takes place. *[subsection 1233H(3)]*

3.62 A clarification is also provided to ensure that none of the requirements about the holding of the assets of a sub-fund are intended to have the effect of making a CCIV or its corporate director a trustee of the assets of the sub-fund of the CCIV. *[Schedule 1, item 4, subsection 1233H(5)]*

Segregated holding of liabilities of sub-funds

3.63 A CCIV must also ensure that the liabilities of a sub-fund of the CCIV are clearly identified as liabilities of the sub-fund (as distinct from liabilities of the corporate director or liabilities of any other sub-fund of the CCIV). *[Schedule 1, item 4, section 1233N]*

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

Segregated application of assets of sub-funds

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

- meeting liabilities or expenses relating to the business of the sub-fund;
- carrying on the business of the sub-fund;
- making a distribution under the Chapter 5 external administration rules;³
- paying a dividend to members of the sub-fund;
- providing consideration to a member of the sub-fund in respect of a reduction of share capital affecting the sub-fund;
- redeeming redeemable shares or redeemable preference shares in the sub-fund;
- making any other distribution to members of the sub-fund that the CCIV is permitted to make under the Act and the CCIV's constitution (for example, half yearly distributions);

³ The external administration provisions contained in Chapter 5 of the Act apply in modified form to CCIVs and are under development. These provisions will be included in the next exposure draft of the Bill.

- a purpose specified in the CCIV rules as a permitted purpose.

[Schedule 1, item 4, subsections 1233L(1) and (2)]

3.66 A CCIV must also not apply or deal with assets of a sub-fund, whether directly or indirectly, for a purpose specified in CCIV rules as a prohibited purpose. *[Schedule 1, item 4, paragraph 1233L(2)(b)]*

3.67 Where a permitted purpose conflicts with a prohibited purpose, the prohibited purpose provision prevails. For instance, if CCIV rules specify a particular method of payment of dividends to members of the sub-fund as a prohibited purpose, that specification applies despite the payment of dividends being an expressly permitted purpose.

3.68 The assets of different sub-funds must not be applied jointly to acquire a single asset. *[Schedule 1, item 4, subsection 1233L(4)]*

3.69 An asset of a CCIV that is not automatically allocated to a sub-fund of a CCIV and must be converted into money or into two or more fungible assets, as outlined above, may not be applied for any purpose other than for the purpose of converting the asset. *[Schedule 1, item 4, subsection 1233L(3)]*

3.70 These provisions mean that the assets of a sub-fund must not be applied for the purpose of meeting liabilities or expenses of another sub-fund of the CCIV. Any liability or expense of a sub-fund must be met solely out of the assets of that sub-fund. Similarly, an asset of a CCIV cannot be applied, and a liability of a CCIV cannot be met, until such time as that asset or liability has been allocated to a sub-fund.

3.71 This protects the distinct investment activity carried on by each sub-fund (with its discrete portfolio of assets and its own investment objectives) from the impacts of the investment activity carried on by the other sub-funds of that CCIV.

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

Applying an asset of a sub-fund for a prohibited purpose does not affect the validity of a transaction

3.73 A contravention of the rules concerning the segregated application of assets by a CCIV does not invalidate a contract or transaction related to the contravention. This provides certainty for counterparties of the CCIV entering into contracts or transactions in respect of the business of a sub-fund. A contravention also does not amount to an offence; however, a Court may prevent a dealing or transaction by issuing an injunction under section 1324 of the Act. *[Schedule 1, item 4, section 1233M]*

Court orders affecting the application of assets and liabilities to sub-funds

3.74 A court can only make an order that is inconsistent with the rules relating to allocation of assets and liabilities set out above if the court considers the interests of justice to require it. This caveat protects the integrity of the court by ensuring that it is not required to make an unjust order. *[Schedule 1, item 4, subsection 1233L(5)]*

3.75 Court orders have priority over the application rules. In other words, if a court makes an order that is inconsistent with the allocation rules, the CCIV must apply the assets and liabilities of the sub-fund in accordance with the court order. *[Schedule 1, item 4, subsection 1233L(6)]*

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

3.76 A sub-fund of the CCIV is identifiable by a unique name and an ARFN. A sub-fund of the CCIV is given an ARFN by ASIC as part of the registration process for the sub-fund (see discussion in paragraph 3.20). A sub-fund's name is the name recorded by ASIC in its record of the sub-fund registration (see discussion in paragraph 3.22 above).

3.77 A CCIV is required to set out a sub-fund's name and ARFN on all of its public documents and negotiable instruments that relate to that sub-fund. If the particular document or negotiable instrument relates to more than one sub-fund of the CCIV, then the name and ARFN of each relevant sub-fund of the CCIV must be set out on the document. *[Schedule 1, item 4, subsection 1233T(1)]*

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

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

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

3.81 The requirements for identifying the sub-fund on certain documents relating to the business of that sub-fund ensures persons who are dealing with the CCIV (being a legal person) to be able to identify which part of the CCIV's business its rights, or obligations, are accruing

against. This is important given that a sub-fund is not a separate legal entity from the CCIV, but it is a protected part of the CCIV's business that is strictly segregated from all other parts of the CCIV's business.

3.82 Similar to section 153, a contravention of the requirement to identify the relevant sub-fund(s) of all public documents and negotiable instruments is a strict liability offence. The penalties framework for CCIVs is under development and further details regarding the penalty for a contravention of this offence will be provided in the next exposure draft. *[Schedule 1, item 4, subsection 1233T(2)]*

3.83 However, a contravention of this requirement should not necessarily affect the ability of any asset or liability that arises or accrues under that document or instrument to be allocated to the relevant sub-fund in accordance with the allocation provisions discussed in paragraphs 3.32 to 3.75 above.

3.84 The regulations may exempt a CCIV from the requirement to identify the sub-fund with its name and ARFN on a particular document or instrument, or on a class of documents or instruments. This mechanism for exemption is based on section 155 (which provides for a similar exemption to the requirement at the company level). *[Schedule 1, item 4, subsection 1233T(3)]*

Names of sub-funds

Naming requirements

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

3.86 If the CCIV has, as its name, the expression "Australian Company Number" followed by its ACN, then a sub-fund of the CCIV's name is the expression "Australian Registered Fund Number" followed by the sub-fund's ARFN. *[Schedule 1, item 4, subsection 1233S(1)]*

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

- element 1: the CCIV's name (without the expression "Corporate Collective Investment Vehicle", which the CCIV is required to have at the end of its name (see paragraph 2.63));
- element 2: a name that meets that is neither:
 - identical to name of any other sub-fund of the CCIV; or
 - unacceptable for registration under the regulations;
- element 3: the expression "Sub-fund".

[Schedule 1, item 4, subsections 1233S(2) and (3)]

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

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

[Schedule 1, item 4, section 1233U]

Example 3.5: Name of a sub-fund of a CCIV

Ironbank CCIV has two sub-funds.

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

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

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

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

3.91 Requiring the expression “Sub-fund” to be at the end of the sub-fund's name is a means of signalling that the entity is a sub-fund (which is important given a sub-fund is not a separate legal entity (see discussion in paragraph 3.10 above)).

Changing a sub-fund's name

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

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

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

[Schedule 1, item 4, subsections 1233V(1) and 1233W(1)]

3.94 If the members of a sub-fund of the CCIV pass a special resolution to change the name of the sub-fund, then the CCIV must lodge an application in the prescribed form with ASIC. *[Schedule 1, item 4, subsection 1233V(1)]*

3.95 The CCIV must also lodge a copy of the special resolution with ASIC within 14 days after it is passed. A failure to do so is a strict liability offence. The penalty framework for CCIVs is under development and further details regarding the relevant penalty for a contravention of this obligation will be provided in the next exposure draft. *[Schedule 1, item 4, subsections 1233V(2) and (3)]*

3.96 If the naming requirements for the sub-fund's name are met, then ASIC must change the sub-fund's name by altering the sub-fund's record of registration. The change of name only takes effect once ASIC's record has been altered. *[Schedule 1, item 4, subsection 1233V(4)]*

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

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

[Schedule 1, item 4, subsection 1233W(1)]

3.98 The CCIV has 2 months to change the sub-fund's name. The CCIV commits a strict liability offence if it fails to comply with the direction from ASIC within this timeframe. The penalties framework for CCIVs is under development and further details regarding the penalty for a contravention of this offence will be provided in the next exposure draft. *[Schedule 1, item 4, subsections 1233W(2), (3)]*

3.99 If a CCIV has failed to comply with ASIC's direction, ASIC may change the sub-fund's name to the expression "Australian Registered Fund Number" followed by the sub-fund's ARFN. ASIC may do this by altering the sub-fund's record of registration and the change will take effect once the record has been altered. *[Schedule 1, item 4, subsections 1233W(4) and (5)]*

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

- create a new legal entity;

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

[Schedule 1, item 4, subsections 1233X]

Chapter 4

Depository

Outline of chapter

4.1 This Chapter explains the requirements for the depository of a CCIV. This includes the requirements for becoming a depository and powers and duties of the depository with regard to overseeing the operations of the CCIV and safeguarding the CCIV's assets. The Chapter also outlines the proposed independence requirements for the depository, noting that the legislative provisions addressing depository independence are still under development.

Context of amendments

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

4.3 The depository of a CCIV is intended to serve a similar purpose to depositaries in other jurisdictions. The requirements for the depository of a CCIV have generally been adapted from the European Union's UCITS regime for collective investment funds and from the United Kingdom's OEIC regime.

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

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

4.6 As the depository is an important consumer protection, it is mandatory for retail CCIVs. A wholesale CCIV may choose to appoint a depository. However, if a wholesale CCIV opts to appoint a depository it

becomes subject to the full regulatory requirements concerning the depositaries.

Summary of new law

4.7 Division 3 of Chapter 8B establishes the legislative framework for the depositary of a retail CCIV.

4.8 Subdivision A sets out when a CCIV's assets must be held by a depositary and the independence requirements for the depositary (noting these provisions are still under development).

4.9 Subdivision B sets out the duties and powers of the depositary, including the key requirements that a depositary must hold the assets of the CCIV in a segregated manner and on trust for the CCIV. The depositary must also supervise certain activities undertaken in relation to the CCIV.

4.10 Subdivision C sets out the rules for replacing the depositary, whether on the initiative of the depositary itself, or on the initiative of the corporate director or members of the CCIV.

4.11 Subdivision D sets out the rights and obligations of the former depositary in respect of any incoming depositary of the CCIV. These rules are designed to ensure a smooth transition where a depositary is replaced by a different depositary.

4.12 As noted above, it is a mandatory requirement for a retail CCIV to have a depositary. A wholesale CCIV may opt to have a depositary, but if it does so, the full regulatory requirements for depositaries apply. References to 'CCIV' in this Chapter will generally be to a retail CCIV. However, the references also intend to capture a wholesale CCIV that has elected to have a depositary. Accordingly, the broader term 'CCIV' has been used.

Comparison of key features of new law and old law

<i>New law</i>	<i>Current law</i>
A person can be a depositary if they: <ul style="list-style-type: none">• are either:<ul style="list-style-type: none">– a public company; or– a foreign company registered under Division 2 of Part 5B.2 of the Act;• hold an AFSL authorising it to act as a depositary for the CCIV; and	No equivalent.

<i>New law</i>	<i>Current law</i>
<ul style="list-style-type: none"> • meet the independence requirements. 	
A retail CCIV must have a depository. A wholesale CCIV may opt to have a depository. If it does so, it is subject to the full regulatory regime for depositaries.	No equivalent.
If a CCIV acquires an asset that is required to be held by the depository, it must transfer that asset to the depository immediately after it is acquired.	No equivalent.
The depository of a CCIV (and any entity performing depository functions) must meet independence requirements.	No equivalent.
<p>A depository must:</p> <ul style="list-style-type: none"> • hold the assets of the CCIV in a segregated manner and on trust for the CCIV; • execute lawful instructions given by, or on behalf of, the corporate director or CCIV in dealing with those assets; and • supervise the conduct of certain activities undertaken in relation to the CCIV. 	No equivalent.
<p>A depository may appoint an agent, or otherwise engage a person, to do anything it is authorised to do in relation to the CCIV, except its supervisory functions.</p> <p>For the purposes of determining any liability to the CCIV, the depository is taken to have done anything that an agent or person has done (or failed to do) because of the appointment or engagement, regardless of whether that agent or person was acting fraudulently or outside the scope of the authority.</p>	No equivalent.

Detailed explanation of new law

Requirement for CCIV to transfer assets to the depositary

4.13 A CCIV must transfer an asset acquired by the CCIV (that is required to be held by the depositary) to the depositary immediately after acquisition. *[Schedule 1, item 4, section 1234]*

4.14 If a CCIV has, or is required to have, a depositary, then all of its assets must be held by the depositary unless:

- the asset is an asset that is not automatically allocated to a sub-fund of the CCIV (discussed in paragraphs 3.39 to 3.44); or
- the asset is not required to be held by the depositary under the CCIV rules. The manner in which the depositary is required to hold the asset is discussed further below. *[Schedule 1, item 4, subsections 1234A(1), (2) and (3)]*

4.15 ASIC may (in CCIV rules) exempt a class of assets of a CCIV from the requirements for them to be held by the depositary. *[Schedule 1, item 4, subsection 1234A(4)]*

Requirement for depositary

Meaning of depositary

4.16 The depositary of a CCIV is the entity named in ASIC's record of the CCIV's registration as the depositary or temporary depositary of the CCIV. *[Schedule 1, item 4, subsection 1234B(5), Schedule 2, item 5, definition of 'depositary' in section 9]*

4.17 The body named in ASIC's record as the depositary or temporary depositary of the CCIV remains the CCIV's depositary until ASIC's record is altered to name another body. Any other purported change to the depositary is not effective. *[Schedule 1, item 4, subsections 1235(2) and (3)]*

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

4.19 The depositary of a CCIV is distinct from 'depositary services' as that term is used in Chapter 7. It is a new statutory concept that has a different meaning to the concept of 'custodial or depositary services' in Chapter 7.

Who must have a depository

4.20 A retail CCIV must have a depository. *[Schedule 1, item 4, subsection 1234B(1)]*

4.21 A wholesale CCIV may choose to have a depository. If a wholesale CCIV appoints a depository and notifies ASIC in the manner explained below, then the rules about depositaries explained in this Chapter apply to the wholesale CCIV and the depository in their entirety. *[Schedule 1, item 4, subsections 1234B(2) and (4)]*

4.22 A CCIV who has a depository can only have one depository. *[Schedule 1, item 4, subsection 1234B(3)]*

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

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

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

Basic requirements

4.26 The depository of a CCIV must:

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

[Schedule 1, item 4, section 1234C]

4.27 A retail CCIV must provide the details of the entity that consents to being the CCIV's depository (including its name and registered office) as part of its application for registration with ASIC (discussed further in paragraph 2.31 above).

4.28 A wholesale CCIV who elects to appoint a depository may do so as part of the registration process for the CCIV. Alternatively, it may give ASIC written notice of the details of the entity that consents to being the CCIV's depository (including its name and registered office). *[Schedule 1, item 4, section 1234E]*

The depositary independence requirements

4.29 The depositary independence requirements are designed to ensure that the depositary of a CCIV (and any other entities performing depositary functions) cannot be controlled or influenced by the corporate director. The legislative provisions concerning the independence requirements for the depositary are under development and are not included in the exposure draft. This section of the explanatory materials outlines the proposed operation of the depositary independence requirements as a guide to the development of the legislation. *[Schedule 1, item 4, section 1234G]*

4.30 The CCIV, being a passive investment vehicle, will be operated by its corporate director (see discussion in paragraphs 5.53 to 5.58). The corporate director of the CCIV may perform all of the operations of the CCIV in its own right (other than the depositary functions, in the case of a retail CCIV). Alternatively, it may decide to outsource some functions to other entities (who may be engaged as agents of the corporate director or agents of the CCIV, or otherwise engaged by either the corporate director or the CCIV, depending on the circumstances). For simplicity, these entities are referred to in this discussion as “entities performing corporate director functions”.

Who the depositary must be independent from

4.31 The depositary (and any other entity performing depositary functions) must be independent from:

- the CCIV; and
- the corporate director; and
- any other entity that is performing corporate director functions.

4.32 The nature and degree of independence that is required depends on which two entities are being considered in terms of the relationship between them.

4.33 The depositary will be required to meet a higher level of independence in relation to the corporate director. Similarly, the depositary will be required to meet a higher degree of independence in relation to any other entity that is making investment decisions (on behalf of the CCIV or the corporate director) in relation to an asset or assets of the CCIV or a sub-fund of the CCIV.

4.34 In the UK’s implementation of the UCITS regime, functions related to investment decisions are identified generally as ‘portfolio management’ and ‘risk management’. It is proposed that similar terminology be adopted in the CCIVs context, subject to ensuring there is sufficient clarity as to the scope of these terms. The terms are designed to

capture entities that are effectively the discretionary decision-making mind in relation to an asset, or assets, of the CCIV (or a sub-fund of the CCIV).

4.35 Portfolio management and investment risk management may be performed as part of a broader investment management function. However, it would not be appropriate to apply to the higher degree of independence to all activities that may fall within the broad categorisation of ‘investment management’ – as this may also capture other activities that are more administrative in nature.

4.36 Managing foreign currency or bank deposits will be expressly carved out of the functions of ‘portfolio management’ and ‘investment risk management’ as these activities are administrative in nature.

4.37 A lower degree of independence is required for the depository in respect of any entity performing any other corporate functions in relation to the CCIV (that is, activities that are not ‘portfolio management’ or ‘risk management’). These other corporate functions are generally considered to be more administrative in nature, so the higher degree of independence is not required.

4.38 The following table illustrates the application of the different degrees of independence to the different relationships described in paragraphs 4.31 to 4.36 above.

Figure 4.1: Relationships between the depository, the CCIV and the corporate director and degree of independence required

	CCIV	Corporate director	Entity performing corporate director functions		
			Portfolio management	Investment risk management	Any other function
Depository	Higher	Higher	Higher	Higher	Lower
Entity performing depository functions	Higher	Higher	Higher	Higher	Lower

4.39 For the purpose of applying the different independence requirements, the various entities can be grouped in accordance with the following table.

Figure 4.2: Grouping of entities for the purposes of the different independence requirements

	Group 1	Group 2	Group 3
Tier A	<ul style="list-style-type: none"> - Depositary - Entities performing depositary functions 	<ul style="list-style-type: none"> - CCIV - Corporate director - Entities that are performing portfolio management or investment risk management functions for the CCIV or a sub-fund 	Any other entity performing corporate director functions for the CCIV or a sub-fund (that is not portfolio management or investment risk management)
Tier B	<ul style="list-style-type: none"> - Officers or employees of the depositary - Officers or employees of entities performing depositary functions 	<ul style="list-style-type: none"> - Officers or associates of the corporate director - Officers of entities that are performing portfolio management or investment risk management for the CCIV or a sub-fund 	Officers of entities that are performing any corporate director function for the CCIV or a sub-fund that is not (portfolio management or investment risk management)

Depositary prohibited from having certain relationships

4.40 A person that is, or is to be appointed, as depositary of the CCIV (or is, or is to be, engaged to perform depositary functions) will be prohibited from having certain relationships with the CCIV, its corporate director and any other entity that is carrying out portfolio management or investment risk management functions in relation to the assets of the CCIV or an asset (or assets) of a sub-fund of the CCIV.

4.41 These relationships are:

- (a) A person in Tier B of Group 2 must not be an officer or employee of an entity in Tier A of Group 1.
- (b) A person in Tier B of Group 2 must not be in a position to cast, or control (directly or indirectly), the casting of more than 0.5% of the maximum number of votes that could be cast at a resolution of the general meeting of an entity in Tier A of Group 1 or a resolution at a meeting of the members of a particular class of an entity in Tier A of Group 1.
- (c) A person or entity in Group 2 must not have any other relationship with a person or entity in Group 1 which might

reasonably be expected to give rise to an actual or potential conflict of interest.

- (d) The voting power that an entity in Tier A of Group 2 has in an entity in Tier A of Group 1 must not exceed 20%.
- (e) The voting power that an entity in Tier A of Group 1 has in an entity in Tier A of Group 2 must not exceed 20%.
- (f) An entity in Tier A of Group 2 must not control an entity in Tier A of Group 1.
- (g) An entity in Tier A of Group 1 must not control an entity in Tier A of Group 2.

4.42 The regulations may prescribe:

- further entities to which these prohibited relationships apply; or
- further relationships between the entities that are prohibited.

4.43 These prohibited relationships are designed to ensure a high degree of independence between the depository (and any entity performing depository functions) and the persons who are in a position of control over the CCIV and are the key decision-makers in relation to the investment of an asset or assets of the CCIV (or a sub-fund of the CCIV). These persons are effectively the directing minds of the CCIV.

4.44 The requirements also aim to ensure the depository (and any entity performing depository functions) does not have significant voting power or practical control over the corporate director or CCIV.

4.45 Note that these requirements do not prevent the depository (and any entity performing depository functions) from owning shares in the CCIV or the corporate director.

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

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

4.47 This formula accounts for the number of votes attached to all the voting shares in the class of shares that the person or an associate has a relevant interest in. A person's voting power in multiple classes of shares, or in the company or corporate director as a whole, is worked out using that formula as if all the shares were of the same class.

4.48 'Control', for the purposes of determining whether or not the corporate director of the CCIV controls the test depository, or whether or

not the test depositary controls the corporate director of the CCIV, is defined in section 50AA of the Act.

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

4.50 These requirements are based in part on the requirements in the United Kingdom’s OEIC regime (that implement the UCITS regime), but include a higher threshold for the prohibition on voting power (20 per cent rather than 15 per cent) and they also include an additional requirement prohibiting practical control. The higher threshold of 20 per cent follows other precedents in Australian law (see, for example, Part 6.1 of the Act).

Restrictions on relationships between the depositary and any other entity performing corporate director functions in relation to the CCIV (or a sub-fund of the CCIV)

4.51 It is envisaged that conditions will also be placed on the relationship between the depositary (and any other entity performing depositary functions) and any other entity performing corporate director functions in relation to the CCIV that are not:

- portfolio management; or
- investment risk management,

in relation to an asset or assets of the CCIV (or a sub-fund of the CCIV). In effect, these conditions will govern the relationship between Group 1 and Group 3 in Figure 4.2 above.

4.52 The intention is to include the following two restrictions on the relationships described in paragraph 4.51 above:

- a requirement of legal separation; and
- a restriction on common directors.

4.53 The first restriction will prohibit a person that is, or is to be appointed, as depositary of the CCIV (or is, or is to be, engaged to perform depositary functions) from performing any other corporate functions in relation to the CCIV (or a sub-fund of the CCIV).

4.54 This means that the depositary (and any entity performing depositary functions) must be a separate legal entity from any entity that is performing any other corporate director function in relation to the CCIV (or a sub-fund of the CCIV). However, it is possible for the depositary (or any entity performing depositary functions) to be in the same corporate group as an entity performing any other corporate director functions for the CCIV.

4.55 This first restriction aims to impose a degree of independence between the entities in Tier A of Group 1 and Tier A of Group 3 in Figure 4.2 above.

4.56 The restriction on common directors is that at least one director of the depository (or entity performing depository functions) must not also be a director of any entity performing any other corporate director functions in relation to the CCIV (or a sub-fund of the CCIV). If the depository (or entity performing depository functions) has 6 or more directors, at least 2 of them must not also be directors of any entity performing any other corporate director functions.

4.57 This second restriction aims to impose a degree of independence between the persons in Tier B of Group 1 and Tier B of Group 3 in Figure 4.2 above.

4.58 A limited regulation-making power will be included to allow further restrictions on the relationships between the depository (and other entities performing depository functions) and any other entity performing corporate director functions in relation to the CCIV (or a sub-fund of the CCIV).

Independence requirements to supplement AFSL regime

4.59 All of the independence requirements described in paragraphs 4.29 to 4.58 above supplement the general obligations on the depository and the corporate director as AFSL holders. They are obliged to have in place adequate arrangements for the management of conflicts of interest that may arise wholly, or partially, in relation to their financial services activities (see paragraph 912A(1)(aa)).

Corporate director and depository to provide each other with reasonable assistance

4.60 The roles of the corporate director and depository are complementary and, hence, the corporate director must give the depository reasonable assistance to support the depository's performance of its duties. The depository must likewise give the corporate director reasonable assistance to support the corporate director's performance of its duties. *[Schedule 1, item 4, subsections 1234F(1) and 1234M(1)]*

4.61 This includes requiring the corporate director or depository to provide any information in its possession or control that the depository or corporate director reasonably requires to fulfil its responsibilities in relation to the CCIV. A written request for information must be complied with in a reasonable period. *[Schedule 1, item 4, sections 1234F and 1234M]*

Duties and powers of the depositary

4.62 The depositary of a CCIV has three core duties: to hold the assets of the CCIV in a segregated manner and on trust for the CCIV; to execute the instructions by, or on behalf of, the corporate director (or the CCIV) in dealing with those assets; and to supervise the corporate director's conduct of certain activities.

4.63 The depositary also has some other statutory duties. These duties are in addition to those that may be imposed by the general law and by the constitution of the CCIV. *[Schedule 1, item 4, section 1234G]*

Depositary to hold CCIV assets on trust

4.64 The depositary must hold the assets of the CCIV in a segregated manner and on trust for the CCIV – this is its main function. Consistent with the rules regarding the segregation of assets of sub-funds of the CCIV (discussed above at paragraph 3.32), the assets that are required to be held by the depositary must be held separately from the depositary's property and from the assets of any other sub-fund of the CCIV. *[Schedule 1, item 4, subsection 1234A(4), section 1234J]*

4.65 As discussed in paragraph 4.15 above, ASIC may (in CCIV rules) determine exceptions to this rule in respect of a class of assets, such that the specified assets are not required to be held by the depositary.

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

Delegation of powers

4.67 The depositary may appoint an agent or otherwise engage a person to do anything it is authorised to do in connection with the CCIV, except to perform the depositary's supervisory responsibility over the corporate director. The agent or person must not be the corporate director of the CCIV and must meet the independence requirements discussed above at paragraphs 4.29 to 4.59. *[Schedule 1, item 4, subsection 1234H(1)]*

4.68 If the depositary appoints an agent or otherwise engages a person, the depositary remains ultimately liable to the CCIV even if the agent or person acts fraudulently or outside the scope of the authority or engagement. *[Schedule 1, item 4, subsection 1234H(3)]*

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

4.70 Sub-agents engaged or appointed by an agent of the depository are to be treated as if they are agents appointed by the depository. *[Schedule 1, item 4, subsection 1234H(1)]*

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

Depository to deal with assets on corporate director's instructions

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

4.73 The depository may deal with those assets only on instructions by, or on behalf of, the corporate director or the CCIV that the depository reasonably believes are lawful and that comply with the CCIV's constitution. *[Schedule 1, item 4, section 1234K]*

4.74 Though the assets are held by the depository, in order to effectively operate the CCIV, instructions given by the corporate director (or another entity, by or on behalf of the corporate director or the CCIV) must be able to be implemented. These instructions reflect the commercial decisions about how the CCIV's assets are to be dealt with. The limitation on this principle is that the instructions and the implementation of the instructions must be lawful and compliant with the CCIV's constitution.

Depository to have supervisory responsibility

4.75 Another core function of the depository is to supervise the conduct of certain activities carried out in relation to the CCIV. The depository cannot delegate this function. *[Schedule 1, item 4, subsections 1234L(1) and (3)]*

4.76 The depository must supervise the conduct of the following activities of the CCIV:

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

[Schedule 1, item 4, subsection 1234L(2)]

4.77 These activities are explained in further detail below.

4.78 In order to discharge its supervisory responsibility, the depositary must take reasonable care to verify that these activities are carried out in a manner that complies with the CCIV's constitution and the provisions of the Act. *[Schedule 1, item 4, subsection 1234L(1)]*

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

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

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

4.81 The CCIV must comply with Chapter 2H of the Act and Part 8B.7 in respect of issuing shares and in respect of issuing and redeeming redeemable shares (as well as Subdivision B of Division 2 Part 8B.7 of Chapter 8B in the case of a retail CCIV).

4.82 The CCIV will also need to comply with requirements concerning cancellation of CCIV shares, to the extent provided for in the Act or this Bill, the corporate director will need to comply with these provisions.

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

4.84 The depositary must also supervise the conduct of valuing shares in the CCIV.

4.85 The corporate director must ensure that the assets of a sub-fund of the CCIV are valued at regular intervals appropriate to the nature of the assets. *[Schedule 1, item 4, paragraph 1237C(2)(f)]*

4.86 This is relevant to the net asset valuation calculations required by the rules about redemption of shares in a CCIV.

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

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

4.88 The assets and liabilities of the CCIV to the sub-funds of the CCIV must be allocated in accordance with the requirements explained above at paragraphs 3.32 to 3.75. *[Schedule 1, item 4, sections 1233G to 1233R]*

Allocating and distributing income of the CCIV

4.89 The depositary must supervise the conduct of allocating and distributing the CCIV's income.

4.90 Part 2H.5 of the Act (concerning dividends) will affect the circumstances in which the income referable to a sub-fund of the CCIV may be distributed to the members of that sub-fund.

Breach reporting

4.91 The depository must report breaches or suspected breaches to ASIC that:

- relate to the CCIV;
- arise in relation to the conduct of the activities described at paragraph 4.76 above; and
- are, or would be, in the opinion of the depository, a material breach of the Act.

[Schedule 1, item 4, subsection 1234P(1)]

4.92 If the depository becomes aware of a breach or suspected breach it must lodge a written report on the matter with ASIC as soon as practicable, and in any case within 10 business days after becoming aware of or reasonably suspecting the breach. *[Schedule 1, item 4, subsection 1234P(2)]*

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

Further duties of the depository

4.94 In exercising its powers, and carrying out its functions, the depository owes the following statutory duties, which reflect the fundamental duties of a fiduciary:

- to act honestly;
- to exercise the degree of care and diligence that a reasonable person would exercise in the depository's position; and
- to act in the best interests of the CCIV and, if there is a conflict, to give priority to the CCIV's interests over its own; and

[Schedule 1, item 4, section 1234N]

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

4.96 As the depository is a body, its officers and its employees will owe duties to the depository (including, for example, the statutory duties under Part 2D.1 if the depository is a company within the meaning of the Act). If these duties conflict with the obligations placed on the depository by the requirements explained in paragraphs 4.62 to 4.95, then the latter prevail. *[Schedule 1, item 4, section 1234Q]*

Replacing the depositary

4.97 The depositary of a CCIV may not retire, or be removed by members of the CCIV, unless a new depositary is chosen. *[Schedule 1, item 4, section 1235C]*

4.98 This is the case even for wholesale CCIVs that have elected to have a depositary.

4.99 A new depositary is chosen only if a meeting of members of the CCIV passes a special resolution appointing a body to be the new depositary of the CCIV and that body consents in writing to the appointment. *[Schedule 1, item 4, section 1235D]*

4.100 The Court may appoint a temporary depositary in some circumstances. These circumstances are explained further below. *[Schedule 1, item 4, section 1235E]*

4.101 A body cannot be chosen or appointed as the depositary or temporary depositary unless it meets the requirements for being a depositary (see paragraph 4.26). *[Schedule 1, item 4, section 1235A]*

4.102 Any purported change of the CCIV's depositary or temporary depositary is ineffective until ASIC's record of registration is altered to name another company as the CCIV's depositary or temporary depositary and the change is in accordance with the rules described below. *[Schedule 1, item 4, section 1235(1) and (2)]*

4.103 Whenever a new depositary or temporary depositary is chosen, or appointed by the Court, the corporate director of the CCIV must, as soon as practicable, lodge a notice with ASIC informing ASIC of the choice or appointment. *[Schedule 1, item 4, section 1235(3)]*

4.104 The rules below are based in part on the requirements to replace the responsible entity of a registered scheme in sections 601FJ to 601FT. These rules are also similar to those described below at paragraphs 5.14 to 5.45 for replacing the corporate director.

Retirement of the depositary

4.105 A depositary that wants to retire must notify the corporate director of its intention to retire and explain its reasons for wanting to retire. *[Schedule 1, item 4, subsection 1235B(1)]*

4.106 Within 21 days of the corporate director receiving the depositary's notice, the corporate director must call a members' meeting to enable members to vote on a special resolution to choose a body to be the new depositary. *[Schedule 1, item 4, subsection 1235B(2)]*

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

- set out the depositary's reason for wanting to retire;

- set a day for the meeting that is no later than two months after the depository gave the corporate director notice of its intention to retire; and
- nominate a body to be the new depository of the CCIV.

[Schedule 1, item 4, subsection 1235B(3)]

4.108 If the corporate director fails to call the meeting within 21 days, the depository may call the meeting. *[Schedule 1, item 4, subsection 1235B(4)]*

4.109 These rules apply despite anything to the contrary in the CCIV's constitution or any contract entered into by the depository, the CCIV, the corporate director or the members of the CCIV. *[Schedule 1, item 4, subsection 1235B(8)]*

4.110 This means that parties cannot develop a different process for the retirement of the depository of a CCIV.

4.111 If the members' meeting passes a special resolution appointing a body to be the new depository of the CCIV, and that body has consented in writing to become the new depository, that body is chosen to be the new depository. This is the only way a new depository can be chosen to replace a retiring depository. *[Schedule 1, item 4, subsection 1235D(1)]*

4.112 The body chosen by the members need not be the one nominated in the notice of meeting. Further, nothing prevents a company that is the temporary depository of a CCIV from being chosen as the new depository, provided it meets the requirements for being a depository. *[Schedule 1, item 4, subsection 1235D(2)]*

Application to Court

4.113 If the members cannot choose a new depository, the corporate director must apply to the Court for the appointment of a temporary depository. *[Schedule 1, item 4, subsections 1235E(1) to (3)]*

4.114 In these circumstances, ASIC, the current depository, or a member or group of members of the CCIV may also apply to the Court for the appointment of a temporary depository. *[Schedule 1, item 4, subsections 1235E(1) and (2) and (4)]*

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

Removal of the depository

4.116 The removal of the depository can be initiated by the corporate director of the CCIV or by the members of the CCIV.

4.117 The corporate director may initiate the removal of the depository by calling a meeting of the CCIV's members to consider and vote on both a special resolution to remove the current depository and a special resolution choosing a new depository. *[Schedule 1, item 4, subsection 1235B(5)]*

4.118 This is the only method by which the corporate director can initiate the removal of the depositary.

4.119 Members may initiate the removal of the depositary by calling a meeting in accordance with Part 2G.4 of the Act and Part 8B.6 of Chapter 8B to consider and vote on both a special resolution to remove the current depositary and a special resolution choosing a new depositary. *[Schedule 1, item 4, subsection 1235B(6)]*

4.120 This is the only method by which members can initiate the removal of the depositary.

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

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

[Schedule 1, item 4, subsection 1235B(7)]

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

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

[Schedule 1, item 4, subsection 1235(8)]

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

4.124 If the members' meeting passes a special resolution appointing a company to be the new depositary of the CCIV, and that body has consented in writing to become the new depositary, that body is chosen to be the new depositary. This is the only way a new depositary can be chosen to replace a depositary that has been removed. *[Schedule 1, item 4, subsection 1235D(1)]*

4.125 The body chosen by the members need not be the one nominated in the notice of meeting. Further, nothing prevents a company that is the temporary depositary from being chosen as the new body, provided it meets the requirements for being a depositary. *[Schedule 1, item 4, subsection 1235D(2)]*

Application to Court

4.126 If the removal of the depositary is initiated and the members pass a special resolution to remove it but are unable to choose a new depositary, the corporate director must apply to the Court for the

appointment of a temporary depository. *[Schedule 1, item 4, subsections 1235E(1) to (3)]*

4.127 In these circumstances ASIC, the current depository, or a member or group of members of the CCIV may also apply to the Court for the appointment of a temporary depository. *[Schedule 1, item 4, subsections 1235E(1) and (2) and (4)]*

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

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

Temporary depository

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

- the retirement of the depository is initiated but the members are unable to choose a new depository;
- the removal of the depository is initiated and the members pass a special resolution to remove it but are unable to choose a new depository; or
- the depository stops meeting the requirements for being a depository (for example, it loses its AFSL or it fails to comply with the independence requirements).

[Schedule 1, item 4, sections 1235E and 1235F and subsection 1235G(1)]

4.131 The Court can only make the order if satisfied that it is in the interest of the members of the CCIV and the body consents in writing to becoming the CCIV's temporary depository. The Court may also make any further orders that it considers appropriate. *[Schedule 1, item 4, subsections 1235G(2) and (3)]*

Application to Court if depository stops meeting requirements

4.132 In the event of the depository of a CCIV failing to meet its requirements (such as losing its AFSL), the corporate director must apply to the Court for the appointment of a temporary depository. *[Schedule 1, item 4, subsections 1235F(1) and (2)]*

4.133 ASIC, or a member or group of members of the CCIV may also apply to the Court for the appointment of a temporary depository. *[Schedule 1, item 4, subsection 1235F(3)]*

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

Unlike removal and retirement, the outgoing depositary (which has stopped meeting requirements) does not have standing to make the application.

Corporate director to seek appointment of permanent depositary

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

4.136 The corporate director must call a members' meeting within three months of the Court appointing the temporary depositary for the members to consider and vote on a special resolution choosing a company to be the new depositary. *[Schedule 1, item 4, subsection 1235H(1)]*

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

- meets the requirements for being a depositary (see paragraph 4.26); and
- consents to be chosen as the new depositary.

[Schedule 1, item 4, subsection 1235H(3)]

4.138 On application by the corporate director within the three month period, the Court may grant an extension of time to call the meeting. *[Schedule 1, item 4, subsection 1235H(2)]*

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

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

[Schedule 1, item 4, subsection 1235J(1) and (2)]

4.140 ASIC, or a member or group of members of the CCIV, may apply to the Court for the CCIV to be wound up if the corporate director does not do so. *[Schedule 1, item 4, subsection 1235J(3)]*

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

Consequences of changing the depository

4.142 If the depository changes, the former depository must, as soon as practicable, give the new depository any books in the former depository's possession or control that the Act requires to be kept in relation to the CCIV, and to give other reasonable assistance to facilitate the change in depository. *[Schedule 1, item 4, section 1235K]*

4.143 Further, if the depository changes then the rights, obligations and liabilities of the former depository in relation to the CCIV become the rights, obligations and liabilities of the new depository. However, the former depository will retain the right to be paid fees and to be indemnified for expenses incurred relating to the period when it was the depository. The former depository also retains any right, obligation or liability it had as a member of the CCIV and any liability for which it could not have been indemnified out of the assets of the CCIV had it remained the depository. *[Schedule 1, item 4, section 1235L]*

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

4.145 A document to which the former depository was a party is to be read as if the new depository (and not the former depository) was the party to that document where the document is capable of having effect after the change. *[Schedule 1, item 4, section 1235M]*

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

Qualified privilege

4.147 Officers, employees, former officers and former employees have qualified privilege in proceedings for defamation in respect of a statement to ASIC in connection with replacing the depository of a CCIV. *[Schedule 1, item 4, section 1235N]*

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

Chapter 5

Officers of the CCIV

Outline of chapter

5.1 Part 8B.3 establishes the duties and powers of a corporate director of a CCIV. It also sets out the obligations of officers of a CCIV, and the officers and employees of the corporate director of a CCIV.

Context of amendments

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

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

5.4 Similarly, the existing model for the operation of registered schemes imposes duties on the responsible entity, its officers and employees. These duties are specific to the operation of collective investment vehicles and are owed directly to the members of the scheme. The duties, together with members' ability to bring a direct action for a contravention, are key investor protection mechanisms. These mechanisms need to be replicated in the CCIV context to ensure that members of the CCIV have an equivalent level of investor protection to an investor in a registered scheme.

Summary of new law

5.5 Division 1 of Part 8B.3 set out the duties and powers of the corporate director and the officers and employees of the corporate director of a CCIV. It also sets out the responsibility of the company secretary of the corporate director for certain contraventions by the CCIV.

5.6 Division 2 of Part 8B.3 modifies certain aspects of the rules in Part 2D.2 of the Act relating to termination payments and

indemnifications and exemptions from a liability to a company incurred as an officer of a CCIV.

5.7 Division 3 of Part 8B.3 outlines how a corporate director may be appointed, removed and replaced.

5.8 Division 4 of Part 8B.3 establishes that a corporate director is the only director of a CCIV, and that a CCIV may have no employees or officers other than an administrator or receiver appointed under Chapter 5 of the Act.

5.9 Division 5 of Part 8B.3 clarifies that Parts 2D.5, 2D.6, 2D.7 and 2D.8 of the Act do not apply to CCIVs.

5.10 Division 6 of Part 8B.3 establishes the rules for when a CCIV must have a compliance plan, and what it should contain.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
A CCIV is to have a single corporate director and no other officers except a liquidator or administrator appointed under Chapter 5. A CCIV may not have any employees.	No equivalent.
The corporate director of a CCIV is the company named in ASIC's registration as the corporate director. This company remains corporate director unless (and until) a new company is appointed as corporate director.	No equivalent.
The corporate director of a CCIV is required to: <ul style="list-style-type: none"> • operate the business of the CCIV and conduct its affairs; • perform the functions conferred on it by the CCIV's constitution and the Act; and • ensure the CCIV complies with its constitution and the Act. 	No equivalent.
The corporate director of a CCIV may exercise all of the powers of the CCIV other than any power that must be exercised in a meeting of the members of the CCIV (or a sub-fund)	No equivalent.
The corporate director of a CCIV	

<i>New law</i>	<i>Current law</i>
owes statutory duties to the CCIV under Part 2D.1 of Chapter 2D of the Act in its capacity as an officer of the CCIV.	
The corporate director of a retail CCIV (and its officers and employees) owe additional statutory duties to the members of the CCIV that are based on the statutory duties that a responsible entity (and its officers and employees) owe to the members of a registered scheme. If there is any conflict between the duties of officers and employees owe to the members of a CCIV and the duties they owe to the corporate director, the duties owed to the members of the CCIV prevail	No equivalent.
The corporate director is liable for the acts of its agents and those of the CCIV. The corporate director of a CCIV is not liable for the acts of the CCIV's depository.	No equivalent.
The corporate director of a retail CCIV may only be indemnified by the CCIV for expenses and liabilities incurred in the proper performance of its duties.	No equivalent.
At least half the directors of the corporate director must be external directors.	No equivalent.
A retail CCIV must have a compliance plan and a compliance plan auditor.	No equivalent.

Detailed explanation of new law

Offences committed by a CCIV

5.11 Several of the offences in the new and existing law apply to CCIVs and attract fines or penalties. If the law was left unamended, the CCIV would be required to pay the fine or penalty out of the assets of the sub-fund(s) of the CCIV and the pool of assets available to members would be reduced. However, a CCIV (being a passive investment vehicle) would only commit an offence if the corporate director has caused it to

commit the offence or has failed in its responsibility to operate the CCIV. This is inconsistent with the position for schemes, where the responsible entity (or trustee) is the only legal person, with responsibility for all of the obligations in relation to a scheme and, accordingly, the responsibility for any contravention of these obligations.

5.12 Bespoke provisions are being developed to ensure that the corporate director bears the ultimate consequences of any contraventions. In particular, these provisions will:

- re-route the consequences of contravening a provision in the Commonwealth law from the CCIV to the corporate director, so that the corporate director is liable for any fine or penalty; and
- require the corporate director to indemnify the CCIV against any losses or damages that the CCIV incurs as a result of the CCIV's contravention of the law (such as a State or Territory law).

5.13 Provisions are also under development to ensure that the attribution rules for bodies corporate in Part 2.5 of the Criminal Code apply appropriately. These will ensure that offences committed by a CCIV can be proved by attributing the physical and mental elements of the offence from the corporate director's officers and employees to the corporate director and then the CCIV.

Corporate director – appointment and cessation of appointment

Appointment of corporate director

5.14 The CCIV (being a company) must have as its sole director a public company that holds an AFSL authorising it to operate the business and conduct the affairs of the CCIV (the 'corporate director'). The CCIV must not have any directors other than a corporate director. *[Schedule 1, item 4, sections 1238E and 1238F, Schedule 2, item 4 the definition of 'corporate director' in section 9, Schedule 2, item 44, note to subsection 201B(1)]*

5.15 The corporate director of the CCIV is the company that is named in ASIC's record of the CCIV's registration as the corporate director or the temporary corporate director of the CCIV. This company remains corporate director of the CCIV until the record is altered to name another company as the corporate director. Any other purported change of the corporate director of the CCIV is not effective until ASIC's record of the CCIV's registration has been updated. *[Schedule 1, item 4, subsection 1238E(3) and section 1238K]*

5.16 In the same way that the acts of a director of a conventional company are effective (even if the appointment of the director or the continuance of the appointment is invalid) under section 201M of the Act,

the acts of the corporate director are also effective if the corporate director is invalidly appointed. *[Schedule 1, item 4, section 1238G]*

5.17 As a public company, the corporate director has natural person directors. At least half of the directors of the corporate director of a retail CCIV must be external directors. *[Schedule 1, item 4, subsection 1238H(1)]*.

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

- the director is not, and has not been in the previous 2 years:
 - an employee or senior manager of the corporate director or a related body corporate;
 - substantially involved in business dealings, or in a professional capacity with the corporate director or a related body corporate;
 - a member of a partnership that is or was substantially involved in business dealings, or in a professional capacity, with the corporate director or a related body corporate;
- the director does not have a material interest in the corporate director or a related body corporate; and
- the director is not a relative of a person who has a material interest in the corporate director or a related body corporate.

[Schedule 1, item 4, subsection 1238H(2)]

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

5.20 The corporate director of a retail CCIV must comply with the external director requirement within 14 days (or a longer period allowed in writing by ASIC) of becoming the corporate director. If at some later stage the corporate director does not comply with the external director requirement, then the corporate director has 14 days from that day (or a longer period allowed in writing by ASIC) to comply. *[Schedule 1, item 4, subsections 1238H(3) and (4)]*

5.21 This provision, including discretion for ASIC to extend the 14 day period, is intended to provide some flexibility in the event of non-compliance due to unforeseen circumstances, such as the death or incapacity of a natural person director of the corporate director.

5.22 These requirements draw upon section 601JA, which requires the responsible entity of a registered scheme to establish a compliance committee if less than half of its directors are external directors. As discussed above, the requirement that at least half the directors of a corporate director of a retail CCIV be external directors aligns with the

circumstances in which a responsible entity is relieved of the requirement to have a compliance committee under Part 5C.5.

5.23 External directors bring a degree of detached supervision that is expected to enhance the standard of corporate governance of corporate directors of retail CCIVs. The corporate director's board is responsible, in place of the compliance committee, for monitoring the extent to which the corporate director complies with the CCIV's compliance plan.

5.24 The rules in Part 2D.3 of Chapter 2D about appointment, remuneration and cessation of appointment of directors do not apply to a CCIV. *[Schedule 1, item 4, section 1238J]*

Replacing the corporate director

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

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

5.27 A company cannot be chosen or appointed as the corporate director or temporary corporate director of a CCIV unless it is a public company that holds an AFSL authorising it to operate the business and conduct the affairs of the CCIV. *[Schedule 1, item 4, subsection 1238E(1) and section 1238L]*

5.28 Any change of the CCIV's corporate director or temporary corporate director only takes effect when ASIC's record of registration is altered to name another company as the CCIV's corporate director or temporary corporate director. The change must be in accordance with the rules described below in paragraphs 5.30 to 5.45. *[Schedule 1, item 4, section 1238K]*

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

Retirement of the corporate director

5.30 A corporate director that wants to retire must call a member's meeting to explain its reason for wanting to retire and enable members to vote on a resolution to choose a company to be the new corporate director. The resolution must be a special resolution. *[Schedule 1, item 4, subsection 1238M(1)]*

5.31 The notice of meeting of the CCIV's members must set out the corporate director's reason for wanting to retire and nominate a company to be the new corporate director of the CCIV. *[Schedule 1, item 4, subsection 1238M(2)]*

5.32 If the members of a CCIV choose a company to be the new corporate director and that company has provided its written consent to the appointment, the current corporate director must lodge a notice with ASIC requesting that the CCIV's registration record be updated to reflect the change. The notice must be lodged as soon as practicable after the resolution is passed and in any event within two business days. If the current corporate director does not do so then the new corporate director may lodge the notice. ASIC must comply with the notice when it is lodged. *[Schedule 1, item 4 subsections 1238M(3) and (5)]*

5.33 It is anticipated as a practical matter that the company nominated to become the CCIV's corporate director will have provided written consent prior to the member's meeting. However, that is not mandated and the company chosen by the members need not be the one nominated in the notice of meeting.

5.34 If the members do not choose a company to be the new corporate director, or the chosen company does not consent to the appointment, the current corporate director or the depositary (if there is one) may apply to the Court for a temporary corporate director to be appointed. *[Schedule 1, item 4, subsection 1238M(4)]*

5.35 The process for applying to the Court for a temporary corporate director is discussed at paragraphs 5.38 to 5.45.

Removal of the corporate director

5.36 Members of a CCIV may remove the CCIV's corporate director by calling a meeting, in accordance with Division 1 of Part 2G.4 of the Act, and voting on both a resolution to remove the current corporate director and a resolution choosing a new corporate director. Both resolutions must be special resolutions. The decision to remove the corporate director can only be made by all of the members of the CCIV and cannot be initiated by the members of a single sub-fund (unless they control more than 50 per cent of the total votes of the whole CCIV). *[Schedule 1, item 4, subsection 1238N(1)]*

5.37 If both resolutions are passed and the new corporate director has consented in writing to becoming the CCIV's corporate director, the outgoing corporate director must lodge a notice with ASIC requesting the CCIV's registration record be updated to reflect the change. The notice must be lodged as soon as practicable after the resolutions are passed and in any event within two business days. If the outgoing corporate director does not do so then the new corporate director may lodge the notice. ASIC

must comply with the notice when it is lodged. *[Schedule 1, item 4, subsections 1238N(2) and (3)]*

Temporary corporate director

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

- the current corporate director or depositary (if there is one) if the current corporate director wants to retire and members do not choose a new corporate director, or the chosen company does not consent to the appointment (see discussion at paragraph 5.33); or
- ASIC, a member of the CCIV or the depositary (if there is one) if the CCIV does not have a corporate director that is a public company that holds an AFSL authorising it to operate a CCIV (for example, where the corporate director's AFSL has been cancelled).

[Schedule 1, item 4, subsection 1238M(4) and section 1238P]

5.39 On application, the Court may appoint a temporary corporate director if it is satisfied that such an appointment is in the interests of the members and the company has consented in writing to becoming the temporary corporate director. The Court has discretion to make any further orders that it considers appropriate. *[Schedule 1, item 4, subsections 1238Q(1) and (2)]*

5.40 If the application to the Court was made by the current corporate director, the current corporate director must, as soon as practicable after the Court's order appointing the temporary corporate director, lodge a notice with ASIC informing ASIC of the appointment. ASIC must alter the record of the CCIV's registration to reflect the change as soon as practicable after the appointment. *[Schedule 1, item 4, subsections 1238Q(3) and (4)]*

5.41 The temporary corporate director must take steps to ensure that members appoint a new corporate director or, if this fails to occur, to apply to the Court to have the CCIV wound up. The temporary corporate director must call a member's meeting within three months of its appointment to allow the members to choose a new corporate director. The resolution must be a special resolution. Further meetings may be called within the three month period, or such period as the Court permits. *[Schedule 1, item 4, subsections 1238R(1), (2) and (5)]*

5.42 The temporary corporate director may be chosen by the members to be the new corporate director so long as it meets the requirements for being a corporate director. *[Schedule 1, item 4, subsection 1238R(3)]*

5.43 If the members of the CCIV choose a company to be the new corporate director and that company consents to the appointment, the temporary corporate director must, as soon as practicable, lodge a notice with ASIC requesting that the CCIV's registration record be updated to reflect the change. ASIC must comply with the notice when it is lodged. *[Schedule 1, item 4, subsections 1238R(4) and (6)]*

5.44 If no meeting to choose a new corporate director is called within three months or such period as the Court permits, or members do not choose a new corporate director that consents to the appointment, the temporary corporate director must apply to the Court for a winding up of the CCIV. *[Schedule 1, item 4, subsection 1238R(5)]*

5.45 ASIC or a member of the CCIV may apply to the Court to have the CCIV wound up if the temporary corporate director does not do so. *[Schedule 1, item 4, subsection 1139R(5)]*

Consequences of changing the corporate director

5.46 If the corporate director changes, the former corporate director must, as soon as practicable, give the new corporate director any books in the former corporate director's possession or control that the Act requires to be kept in relation to the CCIV. The former corporate director must also give other reasonable assistance to facilitate the change in corporate director. *[Schedule 1, item 4, section 1238S]*

5.47 Further, if the corporate director changes then the rights, obligations and liabilities of the former corporate director in relation to the CCIV become the rights, obligations and liabilities of the new corporate director. However, the former corporate director retains the right to be paid fees and to be indemnified in certain circumstances (including for expenses incurred in the performance of its functions during the period when it was the corporate director). The former corporate director also retains any right, obligation or liability it had as a member of the CCIV and any liability for which it could not have been indemnified out of the assets of the CCIV had it remained the corporate director. *[Schedule 1, Part 1, item 4, section 1238T]*

5.48 A document to which the former corporate director was a party has effect as if the new corporate director (and not the former corporate director) was the party to that document where the document is capable of having this effect after the change in corporate director. *[Schedule 1, Part 1, item 4, section 1238U]*

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

Restrictions on appointment of other officers and employees

5.50 The corporate director is the sole director of the CCIV and the CCIV must not have any other officers or employees. This ensures that a CCIV does not undertake an active business. *[Schedule 1, item 4, section 1239]*

5.51 A CCIV is specifically prohibited from having any employees. It is also specifically prohibited from having any officers other than the corporate director or a receiver, administrator, liquidator or a trustee or other person administering an arrangement between the CCIV and someone else. *[Schedule 1, item 4, section 1239]*

5.52 The prohibition against the CCIV having any officers or employees other than the corporate director ensures the business and the affairs of the CCIV is operated by the corporate director. It is also consistent with the fact that a CCIV should only undertake passive investment activities, rather than conducting active business through officers and employees.

Powers and obligations of the corporate director

Obligation to operate the CCIV

5.53 Both the corporate director of a retail CCIV and the corporate director of a wholesale CCIV have an obligation to operate the CCIV. This obligation has three limbs.

5.54 The first limb requires the corporate director to operate the business of the CCIV and conduct its affairs. This is designed to be a single encompassing requirement, rather than one obligation to operate the business and a separate obligation to conduct its affairs. *[Schedule 1, item 4, paragraph 1237J(1)(a)]*

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

5.56 The final limb requires the corporate director to ensure that the CCIV complies with its constitution and the Act. As the CCIV generally has no officers or employees other than the corporate director, responsibility rests wholly with the corporate director. *[Schedule 1, item 4, paragraph 1237J(1)(c)]*

5.57 The first and second limb are closely modelled on the responsible entity's obligation to operate the scheme in subsection 601FB(1) of the existing law. The third limb expands existing subsection 601FB(1). This extension is required because the new law confers some functions directly on the CCIV whereas, in the scheme context, functions

cannot be conferred directly on the scheme because it does not have legal personality.

5.58 A breach of the obligation to operate the CCIV does not attract any penalty. An affected party may apply for a declaration of contravention under existing section 1317J but the declaration does not have any statutory consequences. This mirrors the consequences for breaching the corresponding provisions applying to responsible entities in existing subsection 601FB(1). It also recognizes that the corporate directors of a CCIV owe other duties which attract penalties (including in Part 2D.1, Chapter 7 and the provisions discussed below at paragraph 5.73 to 5.75).

Company law duties

5.59 As the CCIV is a type of company, the corporate director of a CCIV owes the duties imposed on all company officers under Part 2D.1 of the existing law. This includes the duty to act in good faith in the best interests of the corporation and for a proper purpose.

Corporate director's power to exercise powers of the CCIV

5.60 The corporate director has the power to exercise all the powers of the CCIV except those powers that the Act or the CCIV's constitution requires the CCIV to exercise in a general meeting. One example of a power that can only be exercised in a general meeting is amending the constitution. *[Schedule 1, item 4, subsection 1237J(2)]*

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

Corporate director's responsibility for agents

5.62 The corporate director cannot appoint delegates but it has the power to appoint an agent to do anything that the corporate director is authorised to do in connection with the CCIV. These agents may appoint sub-agents. *[Schedule 1, item 4, subsections 1237K(1) and 1237K(5), items 38 and 39, note 2 to subsection 198D(1)]*

5.63 Akin to other companies, a CCIV also has the power to appoint an agent, who may also appoint sub-agents. *[Schedule 1, item 4, note to subsection 1237K(1)]*

5.64 Nevertheless, the corporate director is responsible for the acts of agents of the CCIV and the corporate director (where those agents are appointed to do something in connection with the CCIV) and any sub-agents appointed by these agents. This is achieved by taking the corporate director to have done anything that the agent or a sub-agent does (or fails to do) for the purposes of determining the corporate director's

liability to the CCIV or its members. *[Schedule 1, item 4, subsection 1237K(2) and (3)]*

5.65 The corporate director remains responsible even if the agent acts fraudulently or outside the scope of its authority. This offers a higher level of investor protection than the delegation rules for other types of companies in existing section 190 and the common law (for example, vicarious liability). It ensures that corporate directors have the same responsibility for agents as responsible entities of registered schemes in existing subsection 601FB(3). *[Schedule 1, item 4, subsection 1237K(2) and (3)]*

5.66 There is one exception to the principle that a corporate director remains liable for the acts of its agents. The corporate director is not taken to have done the acts of the depositary (when the depositary is acting in that capacity). This is designed to ensure that the duties of the corporate director and the depositary do not overlap, thereby avoiding the problems with the ‘prescribed interests’ regime which preceded the *Managed Investments Act 1998*.⁴ *[Schedule 1, item 4, subsection 1237K(4)]*

Example 5.1: Responsibility for agents

DEF Depositary Services Ltd carries on a business of providing custodial/depositary services and administrator functions to CCIVs.

Ironbank CCIV, a retail CCIV, engages DEF Depositary Services Ltd as its depositary. The corporate director of Ironbank CCIV is not taken to have done the acts of DEF Depositary Services Ltd.

Guiltedge CCIV engages DEF Depositary Services as an agent to provide administrator functions. The corporate director of Guiltedge CCIV is taken to have done the acts of DEF Depositary Services Ltd as DEF Depositary Services Ltd is not acting as Guiltedge CCIV’s depositary.

5.67 Other officers that may be appointed to a CCIV – such as a liquidator or administrator – are not responsible for their agents in the same way as the corporate director.

Access to books

5.68 Each natural person director of a corporate director of the CCIV has a right to inspect the books of the CCIV for the purposes of certain legal proceeding. This right is the same as the right of access that applies to directors of other types of companies. *[Schedule 1, item 4, section 1237L and items 40 and 41, note 2 to subsection 198F(1)]*

⁴ For a discussion of the confusion of responsibility in the ‘prescribed interests’ regime, see the Australian Law Reform Commission and the Companies and Securities Advisory Committee, *Collective Investments: Other People’s Money* (Report No 65).

Responsibility of secretary of the corporate director

5.69 Section 188 of the existing law is modified so that the secretary of the corporate director of a CCIV is responsible for breaches, by the CCIV, of the CCIV's obligation to:

- have a registered office (existing section 142);
- lodge a notice of change of its principal place of business (existing section 146);
- report on the issue of shares (see paragraphs 8.54 to 8.57 of the explanatory materials);
- lodge annual or half-year reports (existing section 320 and see also Chapter 9 of the explanatory materials); and
- correct an extract of particulars or respond to a return of particulars (existing sections 346C and 348D).

[Schedule 1, item 4, section 1237]

5.70 For other types of companies, the secretary of the company is responsible for these activities. A modification is required in the CCIV context because a CCIV does not have a secretary.

5.71 In addition, the secretary of the corporate director is also responsible for the corporate director's failure to lodge various notices relating to the appointment or replacement of the corporate director or the depository (see paragraphs 4.17, 4.103, 5.32, 5.37, 5.40 and 5.43 of the explanatory materials). This is consistent with the fact that the secretary is responsible for a company's failure to lodge other types of notices under the existing law. *[Schedule 1, item 4, section 1237A]*

Additional protections for retail clients

5.72 Corporate directors of retail CCIVs (and their officers and employees) owe additional duties which are not owed by the corporate directors of wholesale CCIVs. This recognizes that investors in a retail CCIV do not necessarily have the same knowledge, expertise and resources as investors in a wholesale CCIV. *[Schedule 1, item 4, section 1237B]*

Additional duties owed by officers of a CCIV

5.73 In addition to the obligation to operate the CCIV and the Part 2D.1 duties, an officer of a retail CCIV (including the corporate director) also owes a duty to:

- act honestly;
- exercise the degree of care and diligence that a reasonable person would exercise in the corporate director's position;

- act in the best interests of members and, if there is a conflict, give priority to members' interests over its own;
- treat members who hold shares of the same class equally, members who hold shares of different classes fairly and members of different sub-funds fairly;
- not make use of information acquired through being the corporate director to gain an improper advantage for itself or another person or to cause detriment to members of the CCIV;
- ensure all payments out of the assets of the CCIV are made in accordance with the CCIV's constitution and this Act;
- report to ASIC any breach of the Act that relates to the CCIV and has had, or is likely to have, a materially adverse effect on the interests of members, as soon as practicable after becoming aware of the breach; and
- carry out or comply with any other duty, not inconsistent with the Act, that is conferred on the corporate director by the CCIV's constitution.

[Schedule 1, item 4, subsection 1237C(1)]

Additional duties owed by the corporate director

5.74 In addition the corporate director also owes a duty to:

- ensure that the CCIV's constitution complies with the requirements of the Act (see paragraphs 2.54 to 2.65 of the explanatory materials);
- ensure that the CCIV's compliance plan meets the requirements set out above in paragraphs 5.105 to 5.117 of the explanatory materials;
- comply with the CCIV's compliance plan; and
- ensure that assets of the CCIV are clearly identified as assets of a sub-fund of the CCIV, held in the manner required by the Act, and valued at regular intervals (see Chapter 3 of the explanatory materials).

[Schedule 1, item 4, subsection 1237C(2)]

Additional duties owed by officers and employees of the corporate director

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

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

[Schedule 1, item 4, paragraphs 1237D(1)(a) to (e)]

5.76 An officer of a corporate director of a retail CCIV is also required to take all steps that a reasonable person would take to ensure that the corporate director complies with the Act, any conditions imposed on the corporate director's AFSL, the CCIV's constitution and the CCIV's compliance plan. *[Schedule 1, item 4, paragraph 1237D(1)(f)]*

5.77 The employees of the corporate director also owe a duty not make improper use of their position or of information acquired through being an employee of a corporate director in order to gain an advantage for themselves or another person or to cause detriment to members of the CCIV. *[Schedule 1, item 4, subsection 1237E(1)]*

5.78 The duties owed by employees and officers of the corporate director are modelled on the duties of employees and officers of responsible entities of registered schemes in sections 601FD and 601FE of the existing law. As with the corresponding registered scheme provisions, the new duties owed by officers of the corporate director are owed directly to the members.

Interaction with other duties

5.79 The corporate director, its employees and officers also owe the Part 2D.1 duties under the existing law. The corporate director owes the Part 2D.1 duties to the CCIV, whereas its employees and officers owe the Part 2D.1 duties to the corporate director. Many of these duties are similar to the additional duties owed directly to members in the new law. *[Schedule 1, item 4, section 1237B]*

5.80 To the extent that there is a conflict between the duties in the new law and the Part 2D.1 duties, the duties in the new law prevail. *[Schedule 1, item 4, subsections 1237C(3), 1237D(2) and 1237E(2)]*

5.81 The corporate director, its officers and employees may also owe other duties because of their office or employment. These duties, and any

resulting liability or right to commence civil proceedings are not affected in any way by the additional duties outlined above. *[Schedule 1, item 4, section 1237F]*

Example 5.2: Claims for breaches of duties

Ironbank CCIV is a retail CCIV. The corporate director of Ironbank CCIV hires an accountant to prepare the CCIV's financial report. The accountant misclassifies current liabilities as non-current liabilities and materially overstates the net assets of the CCIV.

Because the officers of the corporate director did not institute steps to scrutinise the report, they accept its content on face value. As a consequence, they do not detect the omissions. The CCIV provides the financial report to its members, some of whom act upon the report and suffer loss.

The members have a direct right of action against both the corporate director and the officers of the corporate director for breaching their respective duties to exercise the degree of care and diligence that a reasonable person would exercise in that position (new paragraphs 1156(1)(b) and 1157(1)(b)).⁵

The CCIV may also bring an action against the corporate director for a breach of its duties under sections 180 and 1137JA.

For a discussion of the breaches of the financial reporting requirements, see Chapter 9 of the explanatory materials.

Disclosing material personal interests

5.82 Existing section 191 (relating to the director's duty to disclose material personal interests) does not apply to the corporate director of a CCIV. As the CCIV has only a single corporate director, it not relevant to require the corporate director to disclose any material personal interest to the other directors of the CCIV. *[Schedule 1, item 4, section 1237H, Schedule 2, item 37, note to Division 2 of Part 2D.1]*

5.83 Existing section 191 continues to apply to the natural person directors of the corporate director. Akin to other companies, the directors of the corporate director must disclose any material personal interest in the corporate director to the other directors of the corporate director. *[Schedule 1, item 4, subsection 1237G(2)]*

5.84 In addition, the new law extends existing section 191 so that a natural person director of the corporate director must also disclose any material personal interest in the affairs of the CCIV to the other natural person directors of the corporate director. *[Schedule 1, item 4, subsections 1237G(1)-(2), section 1237H]*

⁵ A provision based on section 601MA is under development and will allow the members to sue in their own name.

5.85 Failure to give notice of a material personal interest is a strict liability offence. *[Schedule 1, item 4, subsection 1237G(3)]*

5.86 The existing exceptions for when a director does not have to disclose a material personal interest continue to apply to the natural person directors of the corporate director, both in respect of their material interests in the corporate director and in the CCIV. These include if the material personal interest arises because the director is a member of the CCIV and the interest is held in common with the other members of the CCIV. *[Schedule 1, item 4, subsections 1237G(4) and (5)]*

Restrictions on indemnities and insurance

Restrictions on indemnities

Restrictions applying to retail and wholesale CCIVs

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

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

[Schedule 1, item 4, subsection 1238(2), Schedule 2, item 42, note to subsection 199A(1)]

5.88 The restrictions in existing section 199A are also extended to prohibit the CCIV from granting these types of exemptions or indemnities to an officer or auditor of the corporate director. *[Schedule 1, item 4, subsection 1238(1)]*

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

Additional restrictions for retail CCIVs

5.90 The corporate director of a retail CCIV may only be paid fees or be indemnified by the CCIV for expenses and liabilities incurred in relation to the performance of its duties if the right is specified in the constitution and it relates to the proper performance of its duties. This ensures that the corporate director must personally bear any expenses or

liabilities that result from it breaching its duties. *[Schedule 1, item 4, section 1232G]*

5.91 For the purposes of determining whether the corporate director has properly performed its duties, the corporate director is taken to have done the acts of its agents and the CCIV's agents, even if the agent acted fraudulently (see paragraph 5.65 of the explanatory materials).

5.92 This restriction only affects indemnities granted to the corporate director of a retail CCIV. It does not apply to indemnities granted to other officers or auditors. Nor does it apply to wholesale CCIVs.

Example 5.3: Restrictions on indemnifying the corporate director

Ironbank CCIV is a retail CCIV and Highwealth CCIV is a wholesale CCIV. Both CCIVs wish to indemnify their corporate directors.

Ironbank CCIV must include the right to an indemnity in its constitution (new section 1137AK). Highwealth CCIV may choose to grant the indemnity in a deed, rather than including it in the constitution.

Restrictions on insurance

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

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

[Schedule 1, item 4, subsection 1238A(3) and Schedule 2, item 43, note to subsection 199B(1)]

5.94 This restriction on insurance is extended to cover a liability of an officer or auditor of the corporate director of the CCIV. *[Schedule 1, item 4, subsection 1238A(1)]*

Additional restrictions for retail CCIVs

5.95 In addition, a retail CCIV is prohibited from insuring an officer or auditor of the corporate director of the CCIV for a liability to the members of the CCIV that arises out of a breach of their statutory duties under new sections 1156, 1157 and 1158. *[Schedule 1, item 4, subsection 1238A(2)]*

Termination payments

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

- it is provided for under the CCIV's constitution (and, if it is a retail CCIV, the requirements described in paragraph 5.90) of the explanatory materials have been met); or
- the members of each affected sub-fund of the CCIV have approved the giving of the benefit.

[Schedule 1, item 4, sections 1238B and 1238C]

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

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

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

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

[Schedule 1, item 4, sections 1244A and 1238D]

Modifications relating to Parts 2D.5, 2D.6, 2D.7 and 2D.8

5.99 Part 2D.5 of the Act (about public information about directors and secretaries) does not apply to CCIVs as the requirements for notice to ASIC of the appointment, retirement or removal of the corporate director is instead dealt with under Division 3 of Part 8B.3 (discussed in paragraphs 5.14 to 5.50 above) and a CCIV does not have a secretary.

[Schedule 1, item 4, section 1240]

5.100 Part 2D.6 of the Act (about disqualification from managing corporations) does not apply for the purposes of disqualifying the corporate director of the CCIV. An effective mechanism for the disqualification of the corporate director is provided for as part of the requirements for the corporate director to hold an AFSL authorising it to operate the business and conduct the affairs of the CCIV (discussed in paragraph 5.54 above). *[Schedule 1, item 4, section 1240A]*

5.101 Under Part 7.6 of the Act, a person (including the corporate director) may be disqualified from holding an AFSL in certain

circumstances. The regime in Part 7.6 of the Act also applies to responsible entities of registered schemes (who are required to hold an AFSL authorising it to operate the scheme). An equivalent of Part 2D.6 does not apply to responsible entities of schemes.

5.102 Part 2D.7 of the Act (which prohibits hedging of remuneration of key management personnel) does not apply to the fees and benefits payable to a corporate director of a CCIV. This is consistent with the treatment for responsible entities of registered schemes, which are also not subject to this prohibition. *[Schedule 1, item 4, section 1240B]*

5.103 Part 2D.8 of the Act (about remuneration recommendations in relation to key management personnel for disclosing entities) does not apply to CCIVs that are disclosing entities. This is because fees and benefits payable to a corporate director of a CCIV are not subject to the remuneration recommendations made by remuneration consultants. For the corporate director of a retail CCIV, these fees and benefits must be set out in the CCIV's constitution (discussed in paragraph 5.90 above). *[Schedule 1, item 4, sections 1232G and 1240C]*

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

Compliance plan

Documenting the compliance plan for retail CCIVs

5.105 A retail CCIV must have a compliance plan. A wholesale CCIV is not required to have a compliance plan. *[Schedule 1, item 4, sections 1241 and 1241A]*

5.106 A copy of the compliance plan must be lodged with ASIC with the application to register the company as a CCIV. The copy that is lodged with ASIC must be signed by all of the directors of the corporate director. *[Schedule 1, item 4, sections 1241A and 1241D]*

5.107 The compliance plan must set out the measures to be applied by the corporate director in operating the CCIV to ensure compliance with the Act and the CCIV's constitution. *[Schedule 1, item 4, section 1241B]*

5.108 The corporate director must ensure at all times that the CCIV's compliance plan meets the legislative requirements for compliance plans. The corporate director must also comply with the compliance plan. *[Schedule 1, item 4, paragraphs 1237C(2)(b) and (c)]*

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

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

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

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

5.112 As it is likely that some corporate directors will be the corporate director for more than one CCIV, the Bill provides flexibility for the compliance plan of a CCIV that is lodged with ASIC to incorporate by reference specified provisions of a compliance plan of another CCIV. The provisions incorporated by reference may be incorporated as at a specific date, or as in force from time to time. These provisions will be taken to be included in the plan. *[Schedule 1, item 4, section 1241C]*

5.113 This is expected to reduce the administrative burden where a corporate director is the corporate director of more than one CCIV. However, ASIC may require the corporate director to lodge a consolidated copy of the CCIV's compliance plan that sets out the full text of provisions taken to be included in the plan. *[Schedule 1, item 4, section 1241G]*

5.114 ASIC may also make a written request to the corporate director of a CCIV to give it information about arrangements contained in the compliance plan. *[Schedule 1, item 4, section 1241E]*

5.115 The corporate director of a CCIV may amend the CCIV's compliance plan or repeal and replace it. ASIC may also direct the corporate director to modify the CCIV's compliance plan. If the compliance plan is modified or replaced, the corporate director must lodge a copy of the modified or new compliance plan (signed by all the directors of the corporate director) with ASIC within 14 days. *[Schedule 1, item 4, section 1241F]*

5.116 In contrast to the requirements for registered schemes, there is no requirement for a CCIV to have a compliance committee to provide oversight of the operations of the CCIV. Instead, at least half of the directors of the corporate director of a retail CCIV must be external directors. The CCIV's depository also has oversight functions in respect of the CCIV.

5.117 The requirement for external directors applies generally in respect of all retail CCIVs and aligns with the circumstances in which a responsible entity of a registered scheme is relieved of the requirement to have a compliance committee under Part 5C.5. The requirement for the corporate director of a retail CCIV to have external directors is discussed in further detail at paragraphs 5.17 to 5.18.

Auditing the compliance plan

The audit report

5.118 The corporate director of a retail CCIV must engage an auditor to audit compliance with the compliance plan. The auditor of the compliance plan must be a registered company auditor, an audit firm or an authorised audit company. In order to ensure independent scrutiny, the auditor of the compliance plan must not be:

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

[Schedule 1, item 4, subsections 1241H(1) to (3)]

5.119 Prior to 30 September each year, the auditor must conduct an annual audit of the compliance plan and report whether, in the auditor's opinion, the corporate director has complied with the CCIV's compliance plan, and whether the plan continues to meet the requirements for compliance plans discussed above. The corporate director can also arrange for the auditor to carry out additional audits. ***[Schedule 1, item 4, subsections 1241H(1) and (4), and 1241J(1)]***

5.120 The auditor of the compliance plan must have access at all reasonable times to the books of the CCIV and assistance for the purposes of the audit, including information and explanations as required from officers of the corporate director. ***[Schedule 1, item 4, subsections 1241J(2) and (3)]***

5.121 The auditor's report of the compliance plan must be lodged with ASIC at the same time as the financial statements and reports of the CCIV. ***[Schedule 1, item 4, subsection 1241J(4)]***

5.122 The auditor of the compliance plan has qualified privilege in respect of statements made in the audit report and notifications that the

auditor makes to ASIC about contraventions of the compliance plan.

[Schedule 1, item 4, subsection 1241J(5)]

5.123 These requirements are similar to the requirements for compliance plans of registered schemes contained in section 601HG. They ensure there is an independent, annual compliance review process to assist the corporate director and its officers in monitoring and managing compliance risks.

Offences relating to the compliance plan

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

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

[Schedule 1, item 4, subsections 1241K(1)-(3)]

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

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

[Schedule 1, item 4, subsections 1241K(4)]

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

5.127 A person who contravenes these provisions is subject to a penalty. The penalties approach for CCIVs is still under development.

Changing the auditor

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

5.129 The corporate director must remove the auditor if it is no longer eligible to act as the auditor of the compliance plan, and may remove the auditor for other reasons if ASIC consents to the removal. *[Schedule 1, item 4 1, subsection 1241L(1)]*

5.130 The auditor may, by written application, resign subject to ASIC consenting to the resignation. ASIC must notify the auditor and the corporate director whether it consents to the auditor's resignation as soon as practicable after receiving the application. *[Schedule 1, item 4, subsections 1241L(2) and (3)]*

5.131 To encourage proper disclosure of an auditor's reasons for resigning, a statement by the auditor in its application or in answer to an inquiry by ASIC concerning the reasons for its resignation cannot be used as evidence in civil or criminal proceedings. It also cannot be used as the basis for prosecution, action or suit against the auditor (other than in respect of a contravention relating to false or misleading statements under section 1308). A certificate by ASIC that the statement was made in the auditor's application for resignation, or in answer to an inquiry by ASIC, is conclusive evidence that the statement was so made. *[Schedule 1, item 4, subsection 1241L(4)]*

5.132 The day on which the auditor's resignation takes effect is either: the day specified in the notice of resignation; or the day ASIC consents to the resignation; or the day fixed by ASIC for the resignation. *[Schedule 1, item 4, subsection 1241L(5)]*

5.133 If the auditor of the compliance plan changes, the corporate director must, within 7 days, write to ASIC asking it to alter the record of the CCIV's registration to show the name of the new auditor. ASIC must comply with the request if the change complies with the Act. *[Schedule 1, item 4, section 1241M]*

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

Chapter 6

Related party transactions and members' rights and remedies

Outline of chapter

6.1 This chapter outlines how the requirements for member approval before a company can give a financial benefit to a related party apply to CCIVs. The chapter also explains how members' rights and remedies that are available under Chapter 2F of the Act are modified for the CCIV context, particularly to ensure they apply appropriately for members of a sub-fund of a CCIV.

Context of amendments

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

6.3 The rights and remedies available to members of companies (in Chapter 2F of the Act) are also available to members of the CCIV, with some modifications, again to accommodate the unique structure of CCIVs.

Summary of new law

6.4 Part 8B.4 applies Chapter 2E of the Act to CCIVs in generally the same way that it applies to public companies. Because a financial benefit to a related party may be payable out of the assets of one or more sub-funds of the CCIV, modifications have been made to require the approval of the members of each affected sub-fund of the CCIV (and not the company as a whole). The rules are intended to apply so as to protect the interests of members of each sub-fund of a CCIV.

6.5 Part 8B.5 modifies Chapter 2F of the Act so that the rights and remedies available to members operate appropriately in a CCIV context. Modifications are made to the orders a court can make under section 233 and the rules concerning varying and cancelling class rights.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
The approval of the members of each affected sub-fund of a CCIV is required if the CCIV wishes to give a financial benefit to a related party.	No equivalent.
Member approval is not required for any fees or indemnities to be given to the corporate director of a CCIV that are specified in the CCIV's constitution. A specific exemption has been included for the fees or indemnities given to the corporate director of a wholesale CCIV (given a wholesale CCIV is not required to include these in its constitution).	No equivalent.
Financial benefits from the CCIV to a closely-held subsidiary or a financial benefit of a small amount to a related party are not exempt from requiring member approval.	No equivalent.
The related parties of a CCIV extend to entities that control the corporate director, an agent (or person engaged) by the corporate director and the directors of the corporate director (and their relatives).	No equivalent.
If a person has grounds for a court order (because, for example, the CCIV's affairs have been conducted in a way that is contrary to the interests of the CCIV as a whole), then the orders the court can make include an order to modify or repeal the CCIV's constitution. (The grounds for a court order have not been modified.)	No equivalent.
A CCIV must notify ASIC of the	No equivalent.

<i>New law</i>	<i>Current law</i>
particulars of a division of the shares in the CCIV into classes (if the shares were not previously divided in this way) and a conversion of shares in a class into shares in another class.	

Detailed explanation of new law

Related party transactions

Member approval of related party transactions

6.6 The rules concerning related party transactions in Chapter 2E of the Act generally apply to CCIVs in the same way that they apply to public companies, and to an entity that a CCIV controls in the same way as it applies to an entity a public company controls. The exception is, to the extent the rules require a CCIV to obtain the approval of its members to give a related party a financial benefit, a CCIV must separately obtain the approval of the members of each sub-fund that is affected by the giving of the financial benefit (not the CCIV as a whole). *[Schedule 1, item 4, section 1242]*

6.7 This means that if the members of a sub-fund of the CCIV that are affected by the proposed transaction do not give approval, the CCIV cannot enter into the transaction with respect to that sub-fund. If a transaction relates to more than one sub-fund of the CCIV, the CCIV must obtain the approval of the members of each affected sub-fund. If the members of any of the affected sub-funds do not approve the transaction, the CCIV will not be able to enter into the transaction with respect to those sub-funds. *[Schedule 1, item 4, subsections 1242A(1) and (2)]*

6.8 The exceptions from the requirement for member approval for reasonable remuneration and reimbursement of expenses for officers and employees of a public company contained in section 211 do not apply in respect of a benefit given by a CCIV. Instead special rules apply to CCIVs, reflecting the distinction between wholesale and retail CCIVs and the requirements for constitutions of retail CCIVs. *[Schedule 1, item 4, subsection 1242B(1)]*

6.9 A retail CCIV is not required to obtain the approval of the members of the affected sub-fund(s) of a CCIV for the giving of a financial benefit to the corporate director of a CCIV if the financial benefit is fees or an indemnity and the corporate director is entitled to the benefit (subject to being expressly provided for in the CCIV's constitution – see paragraphs 2.56 of the explanatory materials) under the CCIV's constitution. A similar exception applies to the fees and indemnities given

to a responsible entity of a registered scheme (that is set out in the registered scheme's constitution). *[Schedule 1, item 4, subsection 1242A(3)]*

6.10 As a wholesale CCIV is not required to include provision in its constitution concerning rights of the corporate director to be paid fees and reimbursement of expenses, a specific exception is provided for payment of fees or reimbursement of expenses by a wholesale CCIV to its corporate director in the course of performing its duties as an officer of the CCIV. The payments must be reasonable in the circumstances. *[Schedule 1, item 4, subsections 1242B(3) and (4)]*

6.11 The normal exceptions from the requirement for member approval for reasonable remuneration and reimbursement of expenses for officers and employees of a public company contained in section 211 continue to apply if the benefit is given by an entity the CCIV controls. *[Schedule 1, item 4, subsection 1242B(2)]*

6.12 Unlike other companies, CCIVs must gain member approval prior to giving a financial benefit that is a 'small amount' (currently \$5,000 or less) to a related party. CCIVs must also gain member approval prior to giving a financial benefit to a closely-held subsidiary of the CCIV. However, if the closely-held subsidiary is giving the financial benefit to the CCIV, member approval is not required. Member approval is also not required if an entity the CCIV controls is giving a financial benefit that is a small amount to a related party. This is consistent with the rules that apply to related party transactions in respect of a registered scheme (see section 601LE in Chapter 5C of the Act). It recognises that the payment of any amount to a related party of a CCIV (no matter how small) requires member approval (given the passive investment nature of the CCIV). *[Schedule 1, item 4, section 1242C]*

6.13 Approval for a related party transaction may only be given at a meeting of the members of each affected sub-fund. The CCIV may appoint an individual representative to exercise its powers at the meeting. *[Schedule 1, item 4 sections 1242E and 1244A]*

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

- any recommendation about the giving of the financial benefit, and the reasons for the recommendation;
- whether they have an interest in the outcome of the proposed resolution to approve the financial benefit; and

- all other information that is known to the company, the corporate director, or any of the directors of the corporate director that is reasonably required by the members in order to decide whether it is in the sub-fund's interest to pass the proposed resolution. *[Schedule 1, item 4, section 1242D]*

Meaning of 'related party'

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

- the corporate director of the CCIV, an entity that controls the corporate director of the CCIV, an agent or person engaged by the corporate director and any entity controlled by any of these persons (unless also controlled by the CCIV);
- the directors of the corporate director and their parents and children, the directors (if any) of an entity that controls the corporate director and their parents and children and any entity controlled by any of these persons (unless also controlled by the CCIV);
- any entity acting in concert with a related party of the CCIV on the understanding that the related entity will receive a financial benefit if the CCIV gives the entity a financial benefit. *[Schedule 1, item 4, subsections 1242F(2)-(5) and (8)]*

6.16 An entity is also a related party of a CCIV if it was a related party in the previous six months or if it has reasonable grounds to believe it will become a related party of the CCIV at any time in the future. *[Schedule 1, item 4, subsections 1242F(6) and (7)]*

6.17 Consequential amendments are made to the definitions of 'entity', 'financial benefit' and 'related party' to reflect the modifications contained Part 8B.4 of the Bill. *[Schedule 2, items 6, 8, 15, definitions of 'entity', 'financial benefit' and 'related party' in section 9]*

Members' rights and remedies

6.18 Members of a CCIV, like members of any other company, may apply to the court for remedy in circumstances where the CCIV's affairs are being conducted in a way that is either contrary to the interests of the CCIV as a whole or oppressive to (or unfairly prejudicial to or unfairly discriminatory against) a member or class of members of the CCIV.

6.19 The court has power to make any order provided for under section 233 of the Act that it considers appropriate in relation to a CCIV (in the same way that it can in relation to any other company). This includes an order to modify or repeal the CCIV's constitution. *[Schedule 1, item 4, section 1243]*

6.20 A member or officer of a CCIV (or a former member or former officer) may bring, or intervene in, proceedings on behalf of the CCIV with leave from the court (in the same way that a member or officer of any other company can). The court must grant the application for leave if certain factors are established, including if it is probable that the company itself will not bring the proceedings and it is in the best interests of the company that the applicant be granted leave (among other things). The rebuttable presumption that granting leave is not in the best interests of the company applies to CCIVs in the same way as it applies to other companies (except that references to a third party means a person that is not a related party of the CCIV). *[Schedule 1, item 4, section 1243A]*

6.21 The CCIV must comply with the relevant procedures for varying and cancelling class rights in the same way that other companies are required to do so. If the CCIV's constitution sets out the procedure for varying and cancelling class rights, the CCIV must follow that procedure. If the CCIV's constitution does not set out the procedure for varying and cancelling class rights, the CCIV must pass a special resolution of the sub-fund of the CCIV to which the affected shares are referable, instead of a special resolution of the whole CCIV. The CCIV must also pass a special resolution of the affected class of members (in the same way that other companies are required to do so). *[Schedule 1, item 4, section 1243B]*

6.22 Certain actions are taken to vary rights attached to shares of a CCIV in the same way that certain actions are taken to vary the rights attached to shares of other companies (except that sub-funds of the CCIV to which only one class of shares are referable are treated in the same way as other companies with one class of shares). *[Schedule 1, item 4, section 1243C]*

6.23 A CCIV must notify ASIC in the prescribed form of the particulars of a division of the shares in the CCIV into classes (if the shares were not previously divided in this way) and a conversion of shares in a class into shares in another class in the same way that a public company is required to do so. *[Schedule 1, item 4, section 1243D; Schedule 2, item 46, note to subsection 246F(3)]*

Chapter 7

Meetings

Outline of chapter

7.1 Chapter 7 of the explanatory materials sets out the framework for conducting meetings of a CCIV, including the method for passing resolutions of the corporate director and the conduct of meetings of members of CCIVs and sub-funds of CCIVs.

Context of amendments

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

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

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

Summary of new law

7.5 Part 8B.6 establishes the framework for conducting meetings of a CCIV. Division 1 establishes how a corporate director may pass a resolution on behalf of the CCIV. Division 2 sets out the rules for conducting meetings of members of a CCIV and meetings of members of a sub-fund of the CCIV, based on the existing provisions for meetings of a registered scheme.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
The corporate director may pass a resolution on behalf of the CCIV if the directors of the corporate director pass a resolution that expressly states it is on behalf of the corporate director and the CCIV to which the resolution applies.	No equivalent.
<p>Meetings of members of CCIVs are subject to the rules for meetings of members of registered MISs) as if:</p> <ul style="list-style-type: none"> • the CCIV were a registered scheme; • the members of the CCIV were the members of that scheme; • the corporate director of the CCIV were the responsible entity of that scheme; and • the CCIV's compliance plan was the compliance plan of that scheme. <p>The same rules apply to meetings of members of a sub-fund of a CCIV, but as if the sub-fund was a registered scheme, and its members were the members of that scheme.</p>	No equivalent.
A resolution of a sub-fund may only be moved by the members of that sub-fund if it does not treat members of any other sub-fund of the CCIV differently or affect any other interest of a member of any other sub-fund.	No equivalent.
Associates of a CCIV (which includes the corporate director) and the corporate director's associates are not entitled to vote at a meeting of the members of the CCIV or a sub-fund if they have an interest in the resolution other than in their capacity as a member.	No equivalent.

Detailed explanation of new law

Resolution of director of CCIV

7.6 Resolutions of the director of CCIV may be passed by the directors of the corporate director. This avoids the legal fiction of needing to call two separate meetings (a meeting of the directors of the corporate director, and a meeting of the director of the CCIV). *[Schedule 1, item 4, subsection 1244(1)]*

7.7 As a meeting of the director of the CCIV is not required, Part 2G.1 does not apply to CCIVs. However, it continues to apply to meetings of the directors of the corporate director. *[Schedule 1, item 4, subsections 1244(2) and (3); Schedule 2, item 47, note to Part 2G.1]*

7.8 A resolution by the directors of the corporate director must clearly state that it is on behalf of the corporate director in its capacity as a corporate director of a CCIV. It should also state which CCIV the resolution relates to if the corporate director is the corporate director of more than one CCIV. *[Schedule 1, item 4, paragraphs 1244(1)(a) to (b)]*

7.9 The rule that resolutions of the CCIVs may be passed by directors of the corporate director is a replaceable rule and may be modified or displaced by the CCIV's constitution. *[Schedule 1, item 4, sections 1244 and 1232A]*

Meetings of members of a CCIV and its sub-funds

Meetings of members of CCIV and members of a sub-fund (or sub-funds) of the CCIV

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

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

[Schedule 1, item 4, section 1244A; Schedule 2, items 7, 18 and 48 to 50, definitions of 'extraordinary resolution' and 'special resolution' in section 9 and notes to Part 2G.2, Part 2G.3 and Part 2G.4]

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

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

[Schedule 1, item 4, section 1244B; Schedule 2, items 7, 18 and 48 to 50, definitions of 'extraordinary resolution' and 'special resolution' in section 9 and the note to Part 2G.4]

7.12 A resolution may only be moved by the members if the resolution does not treat any other member of any other sub-fund (not in attendance at that meeting) differently or affect any other interest of a member of any other sub-fund. *[Schedule 1, item 4, section 1244E]*

7.13 If a member of a sub-fund wishes to call a meeting of the members of a sub-fund of the CCIV, then that member may only request a copy of so much of the register of the CCIV's members as relates to that particular sub-fund of the CCIV. If a member is calling a meeting of the members of the whole CCIV, it may request a copy of the full register of members. The CCIV must, without charge, produce a copy of the register of members (in part or in full, as required). A failure to do this is a strict liability offence. *[Schedule 1, item 4, section 1244D]*

Example 7.1: Meetings of members of a CCIV and its sub-funds

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

Two proposals are put forward.

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

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

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

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

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

Eighty per cent of the members of Ironbank Growth SF vote in favour of the second proposal. However, only 5 per cent of the members of Ironbank Wealth SF are in favour of the proposal.

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

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

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

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

- for a vote on a show of hands, 1 vote;
- for a vote on a poll, 1 vote per for each share in the CCIV that the member holds.

7.16 If a member holds a share jointly with another person, then only the vote of the member whose name appears first in the register of members of the CCIV counts.

7.17 The requirements for a member's vote at a meeting form part of a replaceable rule which can be displaced in the CCIV's constitution. This is consistent with the equivalent provisions that apply to companies (which are also replaceable rules – see existing sections 250E and 250F of the Act). *[Schedule 1, item 4, 1244F, section 1244H]*

7.18 The associates of a CCIV (which includes the corporate director) and the corporate director's associates are not entitled to vote at either a meeting of the members of the CCIV or a sub-fund of the CCIV if they have an interest in the resolution other than in their capacity as a member of the CCIV (or sub-fund). *[Schedule 1, item 4, section 1244G]*

7.19 The right of an auditor of a scheme compliance plan to attend a meeting of the scheme's members, contained in Part 2G.4 of the Act, is not applicable to wholesale CCIVs or sub-funds of wholesale CCIVs (as a wholesale CCIV is not required to have a compliance plan). *[Schedule 1, item 4 section 1244C]*

Chapter 8

Securities

Outline of chapter

8.1 This chapter outlines the types of securities that CCIVs may issue and the circumstances when a CCIV is permitted to pay dividends. The chapter also explains the requirements that must be satisfied before a CCIV may redeem its shares or reduce its share capital.

Context of amendments

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

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

8.4 Reflecting that CCIVs are intended to operate as investment funds, rather than carrying on active businesses, Parts 8B.7 and 8B.8 take a more flexible approach to the circumstances in which a CCIV can reduce its capital than for other types of companies, while maintaining appropriate protections for shareholders.

Summary of new law

8.5 Parts 8B.7 and 8B.8 govern the issue and redemption of shares, the payment of dividends and other transactions affecting share capital.

8.6 Division 1 of Part 8B.7 provides that CCIVs may issue shares in itself, including redeemable shares. It also specifies the requirements for converting shares of one type into another type.

8.7 Division 2 of Part 8B.7 relaxes the requirements for redemptions of redeemable shares in a CCIV. In particular, redemptions do not need to be paid out of profit, but the sub-fund to which the shares are referable

must be solvent immediately before the redemption and not insolvent immediately after the redemption.

8.8 Division 3 of Part 8B.7 modifies the requirements for dividends that apply to companies generally so that they apply at the sub-fund level.

8.9 Division 4 of Part 8B.7 relaxes the requirements for reporting to ASIC so that CCIVs only need to report at the end of each six month reporting period.

8.10 Division 1 of Part 8B.8 sets out the circumstances when a CCIV may make share capital reductions. These are similar to the existing provisions for other types of companies but certain amendments are made to make it easier for CCIVs to reduce share capital and apply the requirements at the sub-fund level.

8.11 Divisions 2 and 3 of Part 8B.8 prohibit a CCIV from acquiring or taking security over its own shares, or providing financial assistance to a person for the purposes of acquiring shares in the CCIV except in limited circumstances. These restrictions broadly mirror those that apply to other companies.

8.12 Finally, Part 8B.9 allows a CCIV to issue debentures, but these must also be referable to only one sub-fund.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
A CCIV can issue shares provided the share is referable to one and only one sub-fund. A CCIV can issue debentures but the debenture must be referable to one and only one sub-fund.	No equivalent.
A CCIV may issue redeemable shares (ordinary shares which are liable to be redeemed) or redeemable preference shares. A right of redemption is not a preferential right.	No equivalent.

<i>New law</i>	<i>Current law</i>
<p>A CCIV may redeem redeemable shares if:</p> <ul style="list-style-type: none"> • it is on the terms on which they are issued; • the shares are fully paid-up; and • the sub-fund to which the shares are referable must be solvent immediately before the redemption and not insolvent immediately after the redemption. <p>Additional requirements apply to redemptions of shares in retail CCIVs and include requirements relating to the mechanism for calculating the price.</p>	No equivalent.
<p>A CCIV may only pay dividends to members of a particular sub-fund if:</p> <ul style="list-style-type: none"> • the sub-fund's assets exceed its liabilities and the excess is sufficient for the payment of the dividend; • the payment of the dividend is fair and reasonable to the members of the sub-fund as a whole; and • the payment of the dividend does not materially prejudice the CCIV's ability to pay creditors in respect of the liabilities of the sub-fund. 	No equivalent.
<p>A CCIV must notify ASIC of certain matters relating to shares within 28 days after the end of each six month reporting period.</p>	No equivalent.

<i>New law</i>	<i>Current law</i>
<p>A CCIV may reduce its share capital if:</p> <ul style="list-style-type: none"> • the reduction is fair and reasonable to the members of each sub-fund affected by the share capital reduction; • the reduction is permitted by the CCIV's constitution; • each sub-fund affected by the reduction is solvent immediately before the reduction and will not be insolvent immediately after the reduction; and • the reduction is approved members of each affected sub-fund. 	No equivalent.
A CCIV is prohibited from acquiring or taking security over its own shares, or financially assisting a person to acquire shares in the CCIV (except in limited situations).	No equivalent.

Detailed explanation of new law

Issuing shares in a CCIV

8.13 A CCIV, like any other company, has the power to issue shares in itself. The self-dealing exemption, which allows companies to issue their own shares without holding an AFSL, is extended to CCIVs.

8.14 A CCIV can also determine the terms of issue and the rights and restrictions attaching to its shares in the same way as other companies, subject to one caveat. Each share must be referable to a single sub-fund. That is, the rights attaching to the share must relate to the assets of one sub-fund and to no other sub-funds. This preserves the segregation of assets between each sub-fund. *[Schedule 1, item 4, subsection 1245 and Schedule 2, item 51, note 5 to subsection 254B(1)]*

8.15 The requirement for each share to be referable to only one sub-fund does not preclude a CCIV from issuing multiple classes of shares for each sub-fund. Nor does it prevent members holding shares in more than one sub-fund.

8.16 A court can only make an order that is inconsistent with the requirement for each share to be referable to only one sub-fund if the interests of justice require it. *[Schedule 1, item 4, subsection 1245(3)]*

Example 8.1: Shares referable to only one sub-fund

Ironbank CCIV has two sub-funds, Ironbank Global Equities SF and Ironbank Fixed Income SF.

The CCIV issues Class A shares which are referable to Ironbank Global Equities SF and Class B shares which are referable to sub-fund Ironbank Fixed Income SF.

The CCIV may choose to issue Class C shares which are also referable to Ironbank Global Equities SF. While two classes of shares (Class A and Class C shares) are referable to the same sub-fund, each share is referable to only one sub-fund.

The CCIV must not issue Class D shares which give members a right to the assets of both Ironbank Global Equities SF and Ironbank Fixed Income SF.

Types of shares that may be issued

8.17 A CCIV may issue the same types of shares as other companies, including ordinary shares and preference shares.

8.18 A CCIV also has the power to issue shares that can be redeemed at the member and/or CCIV's option. If all the CCIV's shares are redeemable at the member's option, the CCIV is 'open-ended' and members can seek a return of their paid-up capital in exchange for extinguishing the shares. *[Schedule 1, item 4, section 1245A]*

8.19 The mere fact that a share can be redeemed does not make it a preference share. This modifies the common law position where shares liable to be redeemed at the member's option are 'preference shares' if the other shares on issue (or the other shares that the CCIV has the power, in its constitution, to issue) cannot be redeemed. *[Schedule 1, item 4, subsection 1245A(4)]*

8.20 A share that can be redeemed may be either a 'redeemable share' or a 'redeemable preference share'. A redeemable share is an ordinary share that can be redeemed. In the context of a CCIV, a redeemable preference share is a share that can be redeemed and has a preference attached to it (apart from a preference relating to redemptions). Any preferences relating to redemptions are ignored for the purposes of determining whether a share is redeemable. *[Schedule 1, item 4, subsections 1245A(4) to (5) and Schedule 2, item 13, definition of 'redeemable share' in section 9]*

Example 8.2: Redeemable shares and redeemable preference shares

Excellent CCIV issues 200 shares which can be redeemed at the member's option. No other shares are on issue and the CCIV does not have the power to issue any other types of shares in its constitution.

All 200 shares in Excellent CCIV are 'redeemable shares', rather than 'redeemable preference shares'. They would not be preference shares at common law as all the shares have the same bundle of rights attached to them as the other shares on issue.

Superior CCIV issues 200 shares. Fifty of these shares can be redeemed at the member's option. The other 150 cannot be redeemed.

The 200 shares in Superior CCIV are all 'redeemable shares', rather than 'redeemable preference shares'. The new law states that a right of redemption does not render a share a preference share even if other shares on issue cannot be redeemed.

Fantastic CCIV issues 200 shares. All of the shares are redeemable. Thirty of the shares entitle their holders to priority over dividends.

The 30 shares which entitle their holders to priority over dividends are 'redeemable preference shares' as they have an additional right attached to them. The other 170 shares in Fantastic CCIV are 'redeemable shares'.

Share conversions

8.21 A CCIV may convert ordinary shares into preference shares, preference shares into ordinary shares, and any share into a larger or smaller number of shares. The procedural requirements are the same as for other companies, but the resolution must be passed by the sub-fund of the CCIV to which the shares are referable. See existing subsections 254G(1) and (2), existing subsection 254H and rows 1 to 3 of Table 8.1 for a summary of the procedural requirements. *[Schedule 1, item 4, note 1 to section 1245B and sections 1245C and 1245D]*

8.22 In addition, the CCIV may convert an ordinary share into a 'redeemable share', and a 'redeemable share' into an ordinary share. Conversions of ordinary shares into 'redeemable shares' must be approved by special resolution of the sub-fund to which the share is referable. This aligns with the procedural requirements in the existing law for converting ordinary shares into preference shares in circumstances where the constitution does not set out the required matters (see rows 4 and 5 of Table 8.1). *[Schedule 1, item 4, section 1245B]*.

8.23 The existing law prohibits conversions of any type of share (whether an ordinary share, redeemable share or preference share) into a redeemable preference share (see row 6 of Table 8.1). This is not modified for CCIVs because the right to redemption is not itself a preferential right

in the CCIV context and CCIVs are not expected to use redeemable preference shares more commonly than other types of companies.

8.24 The variation of class rights provisions also apply to conversion. See paragraphs 6.21 and 6.22 of the explanatory materials. *[Schedule 1, item 4, note 2 to section 1245B]*

Table 8.1: Rules for Share Conversions

	<i>Type of Share Conversion</i>	<i>Permitted or Prohibited</i>
1.	Ordinary share into a preference share.	Permitted (if certain matters are set out in the constitution or approved by special resolution of the sub-fund).
2.	Preference share into an ordinary share.	Permitted.
3.	Shares into a larger or smaller number of shares.	Permitted (if approved by resolution of the sub-fund).
4.	Ordinary share into a redeemable share.	Permitted (if approved by special resolution of the sub-fund).
5.	Redeemable share into an ordinary share.	Permitted.
6.	Any share into a redeemable preference share.	Prohibited.

Share redemptions

8.25 The requirements for redeeming shares of a CCIV differ depending on whether the shares are ‘redeemable preference shares’ or ‘redeemable shares’, whether the CCIV is a retail or wholesale CCIV and listed or unlisted, and whether the sub-fund is liquid. The requirements for each type of redemption are summarised in Table 8.2 and explained in more detail in the following paragraphs. *[Schedule 1, item 4, section 1144A]*

8.26 For an explanation of the difference between redeemable shares and redeemable preference shares, see paragraph 8.20 of the explanatory materials.

8.27 All shares must be cancelled after they have been redeemed. *[Schedule 1, item 4, subsection 1245E(1)]*

Table 8.2: Rules for Share Redemptions

	<i>Type of Share Redemption</i>	<i>Main Requirements</i>
1.	Any redemption of a ‘redeemable preference share’.	<ul style="list-style-type: none"> • Must be on the terms on which they are issued. • Shares must be fully paid-up. • Must be paid out of profits of the

	<i>Type of Share Redemption</i>	<i>Main Requirements</i>
		same sub-fund to which the preference shares are referable or the proceeds of a new share issue of that sub-fund.
2.	Any redemptions of a 'redeemable share' in a wholesale CCIV.	<ul style="list-style-type: none"> • Must be on the terms on which they are issued. • Shares must be fully paid-up. • Sub-fund to which the shares are referable must be solvent immediately before the redemption and not insolvent immediately after the redemption.
3.	Redemptions of a 'redeemable share' in a retail CCIV when the sub-fund is liquid.	<p>In addition to the requirements for a wholesale CCIV:</p> <ul style="list-style-type: none"> • Must be permitted by the CCIV's constitution • Price must be determined by reference to the net asset value of the sub-fund (for an unlisted CCIV) or the market price just before the redemption (for a listed CCIV).
4.	Redemptions of a 'redeemable share' in a retail CCIV when the sub-fund is not liquid.	<p>In addition to the requirements for a wholesale CCIV:</p> <ul style="list-style-type: none"> • Must be permitted by the CCIV's constitution. • Particular assets of the sub-fund are able to be converted to money in time to satisfy the request. • Comply with the certain procedural requirements, including lodging a copy of the offer with ASIC.

Redeeming 'redeemable preference shares'

8.28 The requirements for redeeming 'redeemable preference shares' are substantially the same as the existing requirements for other types of companies in Part 2H.2 (row 1 of Table 8.2). This is appropriate because most of the shares in a typical open-ended CCIV will be redeemable shares (given that the right to redemption is not a preference right).

8.29 The only difference between the redemption of 'redeemable preference shares' in a CCIV and in another company is that, in a CCIV, the redemption must be paid out of:

- profits of the sub-fund to which the shares are referable (rather than the profits of the company generally); or

- the proceeds of a new share issue which is referable to the same sub-fund as the redeemable preference shares (rather than any share issue).

This modification is necessary to preserve the segregation of assets between the sub-funds. *[Schedule 1, item 4, section 1245P and note 2 to section 1245E]*

Redeeming ‘redeemable shares’ of a wholesale CCIV

8.30 A wholesale CCIV may only redeem ‘redeemable shares’ if they are fully paid up, in accordance with the terms on which the shares were issued and do not result in the sub-fund becoming insolvent (row 2 of Table 8.2). For the definition of solvent and insolvent, see paragraph 8.59 of the explanatory materials. *[Schedule 1, item 4, section 1245E]*

8.31 The requirements for redemptions of ‘redeemable shares’ of a wholesale CCIV are more flexible than the requirements for redemptions of ‘redeemable preference shares’ in a company in existing Part 2H.2. In particular, a redemption does not need to be paid out of profits or the proceeds of a new share issue, provided that it does not result in the sub-fund becoming insolvent. This makes it easier for members of a CCIV to seek a return of their paid-up capital while still providing a level of protection for creditors.

Redeeming ‘redeemable shares’ of a retail CCIV where the sub-fund is liquid

8.32 If a sub-fund is liquid, a retail CCIV may redeem shares in the CCIV only if:

- the shares to be redeemed are fully paid-up;
- each sub-fund to which the shares are referable is solvent immediately before the redemption and will not be insolvent immediately after the redemption;
- the redemption is conducted according to the terms on which the shares are on issue;
- the redemption is permitted by the CCIV’s constitution; and
- the share must be redeemable for a price determined by reference to the net asset value of the sub-fund to which it is referable.

[Schedule 1, item 4, sections 1245E, 1245G, 1245H and 1245J]

8.33 The first three requirements are the same as those that apply to redemptions in a wholesale CCIV. The last two requirements are additional requirements that apply only to redemptions of ‘redeemable shares’ of a retail CCIV. They are designed to provide additional

protection to retail investors who may not have the same experience, knowledge or financial resources as wholesale investors.

8.34 See paragraphs 8.49 and 8.50 of the explanatory materials for the difference between a ‘liquid’ and ‘illiquid’ sub-fund.

Redeeming ‘redeemable shares’ of a retail CCIV where the sub-fund is not liquid

8.35 The CCIV may only offer members an opportunity to redeem shares in a non-liquid sub-fund to the extent that particular assets of the sub-fund are able to be converted to money in time to satisfy redemption requests that members may make in response to the offer. *[Schedule 1, item 4, subsection 1245L(1)]*

8.36 A redemption offer must be in writing and must be made in accordance with any procedures for doing so in the CCIV’s constitution, or otherwise by giving a copy to all members of the sub-fund in question. For joint members, a copy need only be given to the joint member named first in the register of members. *[Schedule 1, item 4, subsections 1245L(2) and (4)]*

8.37 The CCIV must also lodge a copy of the offer with ASIC as soon as practicable after making the offer. *[Schedule 1, item 4, subsection 1245L(5)-(6)]*

8.38 A redemption offer must specify:

- the period during which the offer will remain open (which must last for at least 21 days after the offer is made);
- the assets that will be used to satisfy redemption requests;
- the amount of money that is expected to be available when those assets are converted to money; and
- the method the CCIV will use to deal with redemption requests if the money available is insufficient to satisfy all requests (provided the method complies with the requirements set out below in paragraph 8.41).

[Schedule 1, item 4, subsection 1245L(3)]

8.39 The CCIV must ensure redemption requests made in response to a redemption offer are satisfied within 21 days after the offer closes. *[Schedule 1, item 4, subsections 1245M(1)]*

8.40 Only one offer may be open in relation to a particular sub-fund at any one time and the CCIV cannot satisfy the redemption until the offer closes. Thus, a CCIV may not make a standing offer with respect to an illiquid sub-fund. This mirrors the requirements for registered schemes and reduces the risk of members of the same sub-fund being treated differently. *[Schedule 1, item 4, subsections 1245L(1) and 1245M(2)]*

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

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

[Schedule 1, item 4, subsection 1160E(3)]

8.42 The CCIV has the option of cancelling a redemption offer before it closes if it contains a material error, and must cancel the redemption offer before it closes if it is in the best interests of members of the sub-fund to do so. *[Schedule 1, item 4, subsection 1245N(1)]*

8.43 The CCIV must make the cancellation in accordance with any procedures for doing so in the CCIV's constitution or otherwise by notice in writing to the members to whom the offer was made. The CCIV must also lodge written notice of the cancellation with ASIC. *[Schedule 1, item 4, subsections 1245N(2) to (3)]*

8.44 A failure to lodge a written notice of the cancellation is a strict liability offence *[Schedule 1, item 4, subsection 1245N(4)]*

Consequences of contravening requirements for 'redeemable share' redemptions

8.45 A contravention of the requirements for redeeming 'redeemable shares' does not affect the validity of the redemption or any contract or transaction connected with it. *[Schedule 1, item 4, subsections 1245F(1) and 1245H(2)]*

8.46 The penalty for contravening the requirements depends on whether the requirement is one that applies to all CCIVs or one of the additional requirements that applies only to retail CCIVs.

8.47 If the requirement applies generally to all CCIVs, the CCIV does not commit an offence. However, a person involved in the contravention commits an offence. A person involved in the contravention may include a natural person director of the corporate director, the corporate director, a lawyer or an accountant. *[Schedule 1, item 4, subsection 1245F(2)]*

8.48 If there is a contravention of the additional requirements applying only to retail CCIVs, ASIC, the corporate director, the depositary or a member may apply to the Court for relief. The Court may make any order that it considers appropriate. *[Schedule 1, item 4, subsections 1245H(3)-(4)]*

Definition of a ‘liquid’ sub-fund

8.49 A sub-fund is liquid if 80 per cent of the value of its assets are liquid, that is, they can be realised within the period specified in constitution for satisfying redemptions. *[Schedule 1, item 4, section 1245K]*

8.50 There is a presumption that money in a bank account or on deposit with a bank, bank accepted bills and marketable securities are liquid but the presumption may be rebutted. The CCIV Rules may also specify other kinds of property that are presumed to be liquid. *[Schedule 1, item 4, subsection 1245K(2)]*

Dividends

8.51 A CCIV may only pay dividends to members of a sub-fund if:

- the sub-fund’s assets exceed its liabilities and the excess is sufficient for payment of the dividend;
- the payment of the dividend is fair and reasonable to the members of the sub-fund as a whole; and
- the payment of the dividend does not materially prejudice the CCIV’s ability to pay creditors in respect of the liabilities of the sub-fund.

[Schedule 1, item 4, section 1245Q and Schedule 2, item 52, note 3 to subsection 254T(1)]

8.52 Each share in a class of shares in a CCIV must have the same dividend rights unless the CCIV’s constitution provides for differential rights or differential rights are agreed by special resolution of the sub-fund to which the shares are referable. *[Schedule 1, item 4, section 1245R and Schedule 2, item 53, note to subsection 254W(1)]*

8.53 These requirements parallel the provisions that apply to companies generally (see existing sections 254T and 254W), except that they have been modified so that they apply at the sub-fund level.

Notice requirements

8.54 A CCIV must notify ASIC within 28 days after the end of each six month reporting period (starting on 1 January or 1 July) of:

- the number of shares in each class on issue at the end of the reporting period;
- the number of shares in each class that were issued during the reporting period, and the amount of consideration (total and unpaid) in respect of each share;
- the number of shareholders of the shares in each class of shares on issue and issued during the reporting period;

- the number of shares redeemed during the reporting period, the class to which the shares belonged and the amount paid on redemption; and
- if any shares were issued for non-cash consideration, the prescribed particulars about the issue of the shares and a certificate stating that all stamp duty payable on the contract has been paid.

[Schedule 1, item 4, subsections 1245S(1) to (3) and (5)]

8.55 This relaxes the reporting requirements that apply to companies generally so that a CCIV only needs to report every six months, rather than after every share issue and redemption. This modification is necessary because CCIVs, as collective investment vehicles, issue and redeem shares more frequently than other types of companies.

8.56 The failure to comply with the reporting requirements is a strict liability offence. This mirrors the offence that applies to other companies that fail to report to ASIC on share issues in existing subsection 254X(2A). *[Schedule 1, item 4, subsection 1245S(4), Schedule 2, item 6, definition of 'entity' in section 9]*

8.57 The notice does not need to set out information about the issue of shares to a person on registration. This information is instead included in the application for registration of the CCIV. The same exemption also applies for other companies in existing subsection 254X(3). *[Schedule 1, item 4, subsections 1231B(1) and 1245S(6)]*

Share capital reductions

General requirements

8.58 A CCIV is generally prohibited from reducing its share capital. However, share capital reductions are permitted if all of the following requirements are met:

- the reduction is fair and reasonable to the members of each sub-fund affected by the share capital reduction;
- the reduction is permitted by the CCIV's constitution;
- each sub-fund affected by the reduction is solvent immediately before the reduction (that is, the CCIV is able to pay all the debts that are liabilities of the sub-fund, as and when they become due and payable);
- the sub-fund will not be insolvent immediately after the reduction; and

- the reduction is approved by the members of the affected sub-fund (that is, the sub-fund to which the shares are referable).

[Schedule 1, item 4, section 1246A and Schedule 2, items 54, 55 and 56, note to section 256A, note 6 to subsection 256B(1), and note 3 to section 257A]

8.59 A sub-fund is solvent if it is able to pay the debts that are liabilities of the sub-fund as and when they become due and payable. If a sub-fund is not able to pay the debts that are liabilities of sub-fund as and when they become due and payable then the sub-fund is insolvent. These definitions are based on the cash-flow test of solvency which is used for other companies (see existing section 95A) but applies it at the sub-fund level. *[Schedule 1, item 4, subsections 1246A(3) and (4) and Schedule 2, items 9 and 17, definitions of ‘insolvent’ and ‘solvent’ in section 9]*

8.60 This relaxes the existing provisions that apply generally to companies. In particular, it replaces the requirement that creditors must not be materially prejudiced by the share capital reduction with a requirement that the reductions must not undermine the solvency of the sub-fund. A relaxation of the existing company provisions is appropriate as CCIVs may be open-ended investment vehicles. *[Schedule 1, item 4, section 1246, Schedule 2, item 54, note to section 256A]*

Requirements for the member approval

8.61 The form of the member approval differs depending on whether the reduction is an equal reduction or a selective reduction.

8.62 A reduction is an equal reduction if it relates only to ordinary shares and applies to each member on the same terms and in proportion to the number of ordinary shares they hold (ignoring any accrued dividend entitlements, or unpaid amounts owing on the shares). Minor differences between members which result from the fact that each shareholder must be left with a whole number of shares are disregarded. *[Schedule 1, item 4, subsections 1246B(5) and (6)]*

8.63 All other reductions are selective reductions. *[Schedule 1, item 41, subsections 1246B(5) and (6)]*

8.64 The requirements for each type of reduction are set out at Table 8.3. *[Schedule 1, item 4, subsections 1246B(1) to (4)]*

Table 8.3: Required Member Approval for Share Capital Reductions

	<i>Equal Reductions</i>	<i>Selective Reductions</i>
<i>Type of resolution required</i>	A resolution passed at a general meeting of the affected sub-fund.	<p>Either:</p> <ul style="list-style-type: none"> • a resolution agreed to, at a general meeting, by all members of the affected sub-fund; or • a special resolution passed at a general meeting of the sub-fund (which excludes any votes in favour passed by certain persons who would benefit from the reduction because, for example, they have unpaid amounts on their shares).
<i>Information that must accompany notice of the meeting</i>	All known information known that is material to the decision on how to vote.	All known information known that is material to the decision on how to vote.
<i>Documents to be lodged with ASIC</i>	None.	<ul style="list-style-type: none"> • Notice of the meeting and any supporting document (before the meeting); and • a copy of the resolution (at least 14 days before the reduction).

8.65 The above requirements relating to member approval are modelled on the provisions that apply generally to share capital reductions for other types of companies. Some modifications are made to preserve the segregation between the sub-funds. Further, the requirement to lodge documents with ASIC are removed for equal reductions because CCIVs are expected to conduct equal reductions more frequently than other types of companies.

Share buy-backs

8.66 As with other companies, a CCIV may buy-back its shares. A share buy-back that amounts to a share capital reduction must meet the

same requirements as other share capital reductions by a CCIV. These requirements are set out in the explanatory materials at 8.52 to 8.65. *[Schedule 1, item 4, subsections 1246C(1) and (2)]*

8.67 Once a CCIV has agreed to back its shares, all rights attaching to the shares are suspended. Immediately after the shares are transferred back to the CCIV, the shares are cancelled and the CCIV cannot dispose of them. *[Schedule 1, item 4, subsection 1246C(3) to (5)]*

Other share capital reductions

8.68 A CCIV may reduce its share capital by redeeming ‘redeemable shares’ or ‘redeemable preference shares’. These redemptions must meet the requirements summarised above in Table 8.2. *[Schedule 1, item 4, section 1246D and subsection 1246E(1)]*

8.69 CCIVs are also permitted to cancel forfeited shares, akin to other companies. This must be approved by a resolution passed at a meeting of the members of each sub-fund to which the shares are referable. *[Schedule 1, item 4, subsection 1246F]*

8.70 Finally, a CCIV may reduce its share capital under a court order. *[Schedule 1, item 4, subsection 1246G(2)]*

8.71 The CCIV rules may set out other circumstances where a CCIV is permitted to reduce its share capital. *[Schedule 1, item 4, section 1246E]*

Consequential amendment to signpost material

8.72 The signpost to other relevant provisions in Part 2J.1 has been updated to also refer readers to the new provisions dealing with share capital reductions for CCIVs. *[Schedule 2, item 56, section 256E, row 8]*

Self-acquisition of shares

8.73 A CCIV is generally prohibited from acquiring shares (or units of shares) in itself. *[Schedule 1, item 4, section 1246H]*

8.74 One implication of this rule against self-acquisition is that a sub-fund of a CCIV cannot acquire shares that are referable to another sub-fund of the CCIV, except under a court order. This prevents one sub-fund from ‘cross-investing’ in another sub-fund, thereby minimising the risk of contagion between the sub-funds.

8.75 There are three exceptions where a CCIV is permitted to acquire its shares. These are:

- in buying back shares (see paragraphs 8.66 to 8.67 of the explanatory materials);
- in acquiring an interest (other than a legal interest) in fully-paid shares in the company if no consideration is given by the company or an entity it controls; or

- under a court order.

[Schedule 1, item 4, section 1246H, Schedule 2, items 58 and 59, note 2 to subsection 259B(1)]

8.76 Akin to other companies, a CCIV is also prohibited from taking security over shares in itself or a company that it controls. The existing law provides exceptions for companies which are financial institutions or take security under approved employee share schemes. These exceptions are not available for CCIVs as they should not be financial securities and cannot hire employees. *[Schedule 1, item 4, section 1246J]*

Rule against giving financial assistance

8.77 A CCIV may only financially assist a person to acquire shares (or units of shares) in a sub-fund if the assistance:

- does not materially prejudice the interests of the CCIV, or the members or creditors of the sub-fund (the segregation rules prevent the members and creditors of other sub-funds from suffering material prejudice);
- is approved at a general meeting of each sub-fund that would be affected by the giving of financial assistance;
- consists of the company acquiring a lien over partly paid shares or the purchase of the shares by instalment in the ordinary course of commercial dealing;
- complies with the requirements for share buy-backs and share capital reductions (see paragraphs 8.58 to 8.66 of the explanatory materials)
- is given under a court order; or
- discharges a liability that the sub-fund incurred as a result of a transaction entered into on ordinary commercial terms.

[Schedule 1, item 4, sections 1246K, 1246L and 1246M, Schedule 2, items 60 and 61, notes 1 and 2 at the end of subsection 260A(1)]

8.78 The exceptions to the rule against giving financial assistance are based on the exceptions which apply to other companies in Part 2J.3 of the Act. However the exemptions have been recast at the sub-fund level. For example, shareholder approvals must be obtained at a general meeting of the affected sub-fund (rather than the CCIV) and the sub-fund affected by the giving of the financial assistance must be the same as the sub-fund to which the shares are referable. This is designed to preserve the segregation of assets and liabilities between sub-funds. *[Schedule 1, item 4, subsection 1246L(2) and section 1246K]*

Effect on corporate director's duties

8.79 A corporate director is not relieved from any of its duties (including the new duties set out Chapter 5 of the explanatory materials) because it complied with the relevant requirements for the share capital reduction or redemptions. *[Schedule 1, item 4, section 1246N]*

Debentures

8.80 A CCIV may issue debentures so long as each debenture is referable to one and only one sub-fund. Thus, the debenture holder's rights in respect of the assets of the CCIV must be limited to rights in respect to the assets of the single sub-fund against to which the debenture is referable. *[Schedule 1, item 4, section 1247]*

8.81 If the debenture or the required trust deed creates or includes a security interest, that interest must not be over CCIV assets that are referable to a different sub-fund. *[Schedule 1, item 4, section 1247]*

Application and transitional provisions

8.82 The first period for reporting to ASIC about shares starts when the Bill commences and ends at the next 30 June or 31 December (whichever is earlier). This means that it may cover a period which is longer or shorter than six months. *[Schedule 3, item 1, new Part 10.35]*

Chapter 9

Reporting

Outline of chapter

- 9.1 Part 8B.10 sets out the rules of how financial reports and audits are to be prepared and conducted for CCIVs and sub-funds.
- 9.2 Part 8B.11 outlines how particular provisions in the existing law about updating ASIC information for companies and registered schemes are altered for CCIVs.

Context of amendments

- 9.3 The Act sets out the requirements for financial records, financial and directors' reports, and audits. These requirements apply to retail CCIVs and sub-funds, subject to certain modifications.
- 9.4 Neither wholesale CCIVs nor unregistered MISs are subject to the reporting, recording and audit requirements in Chapter 2M.
- 9.5 For retail CCIVs, adjustments to auditing requirements, especially auditor independence, are needed to account for the range of relationships and possibilities for conflicts of interest between an auditor and a CCIV or its corporate director. Modifications ensure that full reporting is provided at the sub-fund level and not just the CCIV level. These modifications are required as a CCIV may have multiple sub-funds with different activities and investment strategies. It is important that members of each sub-fund receive information that is appropriate for their sub-fund, and not just the CCIV as a whole.
- 9.6 The requirements to update ASIC information remain largely unmodified for CCIVs, although CCIVs are excluded from the requirements for directors to pass solvency resolutions. This ensures consistency with MISs, which are similarly not subject to this rule.

Summary of new law

- 9.7 Division 1 of Part 8B.6 sets out generally how Chapter 2M applies to CCIVs. The rules apply to a retail CCIV as if it is a company or a disclosing entity (where relevant) and as though references to 'director' or 'directors' are references to the corporate director of the CCIV.

9.8 Division 2 of Part 8B.6 provides that a CCIV's obligation to keep financial records extends to keeping financial records for its sub-funds. Subdivisions A and B of Division 3 govern what kind of financial records should be kept for a CCIV and its sub-funds, and what should be contained in those records. Financial records requirements for sub-funds are largely similar to those for CCIVs.

9.9 Subdivision A of Division 3 sets out how the requirements for annual financial and directors' reports apply to CCIVs and sub-funds. A CCIV is required to prepare an annual financial report for each sub-fund, but must prepare only one directors' report for the CCIV as a whole, and not separate reports for each sub-fund.

9.10 Subdivision B of Division 3 applies to disclosing entities and provides that half-year financial and directors' reports must be prepared for a sub-fund where a CCIV is a disclosing entity.

9.11 Subdivision C of Division 3 sets out how the rules around auditing and auditor's reports (Division 3 of Part 2M.3) apply to CCIVs and sub-funds. An auditor for a sub-fund's financial records only audits those records that must be kept for the sub-fund in accordance with subdivisions A and B of Division 3.

9.12 Subdivision D of Part 3 adapts the provisions for financial reporting for CCIVs and its sub-funds. Reports must be provided to the members of each sub-fund, as well as to members of the CCIV as a whole. It also sets out amendments for reporting requirements for CCIVs that are debenture issuers.

9.13 Subdivision E of Division 3 of Part 8B.6 applies the requirement to re-lodge amended financial statements with ASIC to sub-funds.

9.14 Division 4 of Part 8B.6 deals with the appointment and removal of auditors for CCIVs. Where there is a relationship between the auditor and the CCIV or a corporate director (including current and former corporate directors, directors of the corporate director, and persons involved in the management of either), a conflict of interest situation may arise. The rules for appointment, removal and fees of auditors of a CCIV are adapted from those for MISs

9.15 Part 8B.7 disapplies provisions about solvency resolutions (Part 2N.3 and section 348C) to CCIVs. This is in line with arrangements for MISs.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
Retail CCIVs are subject to the rules in Chapter 2M that apply to companies and disclosing entities (where relevant).	No equivalent.
In addition to its own financial records, the CCIV must keep financial records for each sub-fund.	No equivalent.
A CCIV's annual directors' report must include specific details about the corporate director and its directors, such as whether a director of the corporate director is a party to a contract which entitles that director to a benefit of a right to call for or deliver shares in the CCIV.	No equivalent.
The financial records of CCIVs and their sub-funds are to be audited in line with the requirements in Division 3 of Part 2M.3.	No equivalent.
A CCIV is required to report to members of each sub-fund the relevant financial reports.	No equivalent.
<p>If a CCIV is being audited, the auditor has a conflict of interest if it is currently or formerly:</p> <ul style="list-style-type: none"> • the corporate director of the CCIV; • a director of the corporate director; or • a person involved in the management of the CCIV or corporate director. 	No equivalent.

Detailed explanation of new law

How the rules in Chapter 2M apply to CCIVs

9.16 Part 8B.10 modifies the application of Chapter 2M so that the reporting requirements in Chapter 2M apply to CCIVs in the same way as

they apply to registered schemes. Part 8B.10 also sets out how financial reporting applies at the sub-fund level. A CCIV that is a disclosing entity⁶ will also be subject to the additional disclosure requirements that apply to disclosing entities such as the requirement for half-yearly financial reports. *[Schedule 1, item 4, subsection 1248(1), Schedule 2, item 62, note to section 285]*

9.17 The rules in Chapter 2M do not apply to wholesale CCIVs as they do not apply to unregistered schemes. *[Schedule 1, item 4, subsection 1248(2)]*

Financial records

9.18 A CCIV must keep written financial records in line with the requirements in Part 2M.2. These records include annual financial reports, annual directors' reports and, if the CCIV is a disclosing entity, a half-yearly financial report and director's report. *[Schedule 1, item 4, section 1248B]*

9.19 The general obligation to keep financial records applies to CCIVs and each sub-fund of a CCIV. A CCIV must keep written financial records that:

- record and explain the transactions relating to the sub-fund and the performance of the sub-fund; and
- would enable accurate financial statements to be prepared and audited for the sub-fund.

[Schedule 1, item 4, section 1248A, Schedule 2, item 63, notes to subsection 286(1)]

9.20 The obligations relating to financial records apply as though the sub-fund were the CCIV. This includes:

- the language requirements for the records;
- the physical format of the records; and
- where the records may be kept.

9.21 The corporate director is also entitled, as the director of the CCIV, to access the records under section 290. *[Schedule 1, item 4, section 1248B, Schedule 2, item 64, note to subsection 290(1)]*

⁶ A disclosing entity is an entity where any of the securities in the entity are ED securities (as defined in sections 111AE, 111AF, 111AFA, 111AG or 111AI). The provisions that set out when a security in a CCIV will be an ED security are under consideration. However, it is intended that the definitions will apply to a CCIV in the same way that they apply to registered schemes.

Financial reporting

9.22 A retail CCIV is required to prepare a financial report and a director's report for each financial year. *[Schedule 1, item 4, section 1248C, Schedule 2, item 65, note to Division 1 of Part 2M.3]*

9.23 The CCIV must prepare an annual financial report for its sub-funds. The annual financial report for each sub-fund must contain:

- financial statements for the year,
- the notes to the financial statements, and
- the directors' declaration about the statements and notes.

[Schedule 1, item 4, section 1248D, Schedule 2, item 66, notes to subsection 292(1)]

9.24 The corporate director must make a directors' declaration in relation to the financial statement for each sub-fund of the CCIV. *[Schedule 1, item 4, section 1248D]*

9.25 Similar requirements are in place for half-year financial reports for sub-funds of a CCIV that is a disclosing entity. *[Schedule 1, item 4, section 1248F, Schedule 2, items 73 and 74, note 4 to section 302 and note to subsection 303(5)]*

Directors' reports

9.26 The directors' report for a sub-fund must disclose the name of each corporate director of the CCIV at any time during the financial year or since the end of the financial year, and for how long they were the corporate director of the CCIV. Additionally, the CCIV must provide the name of each director of a company that has been the corporate director of the CCIV at any time during the financial year or since the end of the financial year. *[Schedule 1, item 4, subsection 1248E(1), Schedule 2, items 67 and 68, note to subsection 295(5) and note to subsection 298(2)]*

9.27 This extension of the usual disclosure requirements reflects the unique corporate structure of a CCIV and ensures that there is full and proper disclosure of the individuals involved in the CCIV's decision-making.

9.28 The directors' report for a CCIV must contain the information required for registered schemes in subsection 300(13), including the fees paid to the corporate director and its associates out of the CCIV's assets during the financial year. *[Schedule 1, item 4, subsection 1248E(2) and (3), Schedule 2, items 69-72, notes to subsections 300(1), (11), (12), and (13)]*

Half-year reporting

9.29 A CCIV that is a disclosing entity must prepare half-year financial and directors' reports for its sub-funds. As with the annual reports of a sub-fund, the requirements for these reports are tailored for

CCIVs and sub-funds. The directors' report must include information about the directors of the corporate director of the CCIV as well as about the corporate director of the CCIV. *[Schedule 1, item 4, section 1248G, Schedule 2, items 75 and 76, notes to subsections 306(1) and (3)]*

9.30 The half-yearly directors' reports must disclose the name of each corporate director of the CCIV at any time during the half year or since the end of the half year, and for how long they were the corporate director of the CCIV. The CCIV must provide the name of each director of a company that has been the corporate director of the CCIV at any time during the half year or since the end of the half year. *[Schedule 1, item 4, section 1248G]*

9.31 Importantly, where a CCIV is a disclosing entity, the reporting obligations that apply to disclosing entities also apply to the CCIV's sub-funds. *[Schedule 1, item 4, note to subsection 1248F(2)]*

Auditing

Auditing and audit reports

9.32 The audit and auditor's report requirements in Division 3 of Part 2M.3 of the Act generally apply to CCIVs in the same way as for other companies, subject to modifications to also apply them at the sub-fund level. As such, these provisions, including in relation to the retention of audit papers, the independence of the auditor and the powers of the auditor, apply to the audit of a sub-fund.

9.33 The financial reports of both a CCIV and its sub-funds may be audited. The requirements for audits and auditor's reports that apply to a CCIV also apply in the same way to sub-funds of a CCIV. Applying the audit and auditor's report provisions in this way ensures that there is appropriate oversight of the financial and directors' reports at the sub-fund level. *[Schedule 1, item 4, section 1248H, Schedule 2, item 77, note to Division 3 of Part 2M.3]*

9.34 When auditing a sub-fund, the auditor must form an opinion about whether the CCIV has kept sufficient financial records to enable a financial report to be prepared and audited for the sub-fund, as well as kept other records and registers relating to the sub-fund as required by the Act. *[Schedule 1, item 4, section 1248J, Schedule 2, item 78, note to section 307]*

Auditing and audit reports

9.35 The Act includes comprehensive guidance on registration, independence, and other requirements for auditors. These provisions apply in the normal way to auditors of CCIVs and sub-funds.

9.36 However, when determining whether there is a conflict of interest situation between the CCIV and the auditor, the standard test is

expanded to include consideration of the relationship between the auditor, audit firm or company, any current or former member of the firm or company, or an audit company's current or former management (including directors) and:

- the current or former corporate director;
- a current or former director of the corporate director;
- a person currently or formerly involved in the management of the CCIV; or
- a person currently or formerly involved in the management of the corporate director.

[Schedule 1, item 4, subsection 1248S(1), Schedule 2, item 87, note to subsection 324CD(2)]

9.37 The auditor independence requirements in the Act are similarly extended to require consideration of the relationship between the auditor or audit firm and the corporate director of the audited CCIV (as an audited body). *[Schedule 1, item 4, section 1248T, Schedule 2, item 88, note to Subdivision B of Division 3 of Part 2M.4]*

9.38 The Bill also extends section 324CL of the Act, which determines who is an officer for the purposes of establishing whether an auditor is independent, to the officers of the corporate director of the CCIV. *[Schedule 1, item 4, section 1248U, Schedule 2, item 89, note to subsection 324CL(1)]*

9.39 The rules in Division 7 of Part 2M.4 concerning appointment, removal and fees of auditors for registered schemes apply to retail CCIVs as though a retail CCIV were a registered scheme and the CCIV's corporate director was the responsible entity for the scheme. Division 7 is applied instead of Division 6 (which provides for the appointment, removal and fees for auditors for companies) so that there is alignment between the requirements for registered schemes and CCIVs. *[Schedule 1, item 4, section 1248V, Schedule 2, items 90 and 91, notes to Division 6 and Division 7 of Part 2M.4]*

9.40 If an auditor, in the course of an audit, considers that there are circumstances that give rise to a significant contravention of the Act the auditor must notify ASIC. When determining whether a significant contravention has occurred, the auditor must consider the effect of the contravention on the overall financial position of the CCIV, sub-fund or both; and the adequacy of information available about their overall financial position. *[Schedule 1, item 4, section 1248K, Schedule 2, item 79, note to subsection 311(4)]*

Financial reporting to members

9.41 CCIVs and sub-funds will be subject to the requirement to provide annual financial reporting to members under Division 4 of

Part 2M.3, with modifications to account for reporting at the sub-fund level.

9.42 A CCIV must provide the reports required under section 314, including financial reports, directors' reports, and auditor's reports, to its entire membership. In addition, the CCIV must provide the same reports in respect of each of its sub-funds to the sub-fund's members. *[Schedule 1, item 4, subsection 1248L, Schedule 2, item 80, note to Division 4 of Part 2M.3]*

9.43 The rules in Division 4 of Part 2M.3 (annual financial reporting to members) are amended for application to sub-funds. For a report relating a sub-fund, in this Division, references to "members" are treated as if they are references to members of the sub-fund. *[Schedule 1, item 4, subsection 1248L(2)]*

9.44 A CCIV is not required to give the members of a sub-fund the annual directors' report in line with the rules on preparing financial records for sub-funds. The documents that a CCIV must provide to the members of a sub-fund are either:

- the financial report relating the sub-fund for the year, and the auditor's report on the financial report; or
- a concise report relating to the sub-fund for the year, in compliance with subsection 314(2).

[Schedule 1, item 4, subsection 1248L(1), Schedule 2, item 81, note to subsection 314(1)]

9.45 A CCIV must report to its members and the members of each of its sub-funds prior to 30 September each year. *[Schedule 1, item 4, section 1248M, Schedule 2, item 82, note to subsection 315(3)]*

9.46 The members of a sub-fund of a CCIV cannot request a directors' report for the sub-fund. This is because a CCIV does not have to prepare a directors' report for each sub-fund, (see paragraphs 9.11 to 9.13). Instead, the members of the CCIV may request the directors' report that applies to the CCIV as a whole. *[Schedule 1, item 4, section 1248N, Schedule 2, item 83, note to subsection 316(1)]*

9.47 Where a CCIV issues debentures, the modifications described in paragraphs 9.8 to 9.10 and 9.41 to 9.45 apply in relation to the debenture holder. For example, the members of the sub-fund may request copies of the last reports provided to members under subsection 1248L(1). *[Schedule 1, item 4, section 1248Q, Schedule 2, item 85, note to subsection 318(1)]*

9.48 A CCIV is not a public company, so it is not required to consider reports for financial records at an AGM. *[Schedule 1, item 4, section 1248P, Schedule 2, item 84, note to subsection 317(1)]*

Lodging amended reports with ASIC

9.49 If there is an amendment to the financial or directors' report of a sub-fund of a CCIV after that report has been lodged with ASIC, then the

CCIV must lodge the amended report with ASIC and provide a copy to any member who requests one. *[Schedule 1, item 4, section 1248R, Schedule 2, item 86, note to subsection 322(1)]*

9.50 If the amendment is a material one, then the CCIV must notify the members of that sub-fund as soon as is practicable of the nature of the amendment and their right to obtain a copy of the amended report. *[Schedule 1, item 4, section 1248R]*

Solvency resolutions

9.51 The requirements concerning solvency resolutions contained in Parts 2N.3 and 2N.4 of the Act do not apply to CCIVs or sub-funds. This ensures consistency of treatment between MISs and CCIVs. *[Schedule 1, item 4, section 1249, Schedule 2, items 92 and 93, notes to Part 2N.3 and subsection 348C(1)]*

Chapter 10

CCIV Rules

Outline of chapter

10.1 Part 8B.12 of Chapter 8B allows ASIC to make CCIV rules and exemption and modification orders in relation to the new Chapter. A regulation making power is also included that allows ASIC to modify the operation of Chapter 8B in relation to one or more CCIVs.

10.2 This rule making power enables ASIC to make rules of a timely, commercially relevant or technical nature that support the effective operation of the CCIV regime and are consistent with the Object of Chapter 8B.

Detailed explanation of new law

CCIV rules

10.3 ASIC may make CCIV rules by legislative instrument that prescribe matters that are required or permitted by the Act or that are necessary or convenient to be prescribed for carrying out or giving effect to Chapter 8B. *[Schedule 1, item 4, subsection 1269(1), and Schedule 2, item 2 the definition of ‘CCIV rule’ in section 9]*

10.4 CCIV rules may not do any of the following:

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

[Schedule 1, item 4, subsection 1269(2)]

10.5 In considering whether to make a CCIV rule, ASIC must have regard to the objects of Chapter 8B and the likely regulatory impact of the proposed rule, and may have regard to any other matter ASIC considers relevant. Section 17 of the *Legislation Act 2003* also requires ASIC to undertake any consultation that is appropriate and reasonably practicable to undertake. *[Schedule 1, item 4, 1269A]*

10.6 CCIV rules that are inconsistent with the regulations have no effect to the extent of the inconsistency. *[Schedule 1, item 4, subsection 1269(3)]*

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

Exemption and modification powers

10.8 ASIC may make specific exemption and modification orders in relation to Chapter 8B, the CCIV rules, and regulations made for the purposes of Chapter 8B. ASIC must give a copy of an exemption or declaration that relates to a specified person to that person as soon as reasonably practicable after the exemption or declaration is made. *[Schedule 1, item 4, section 1269B]*

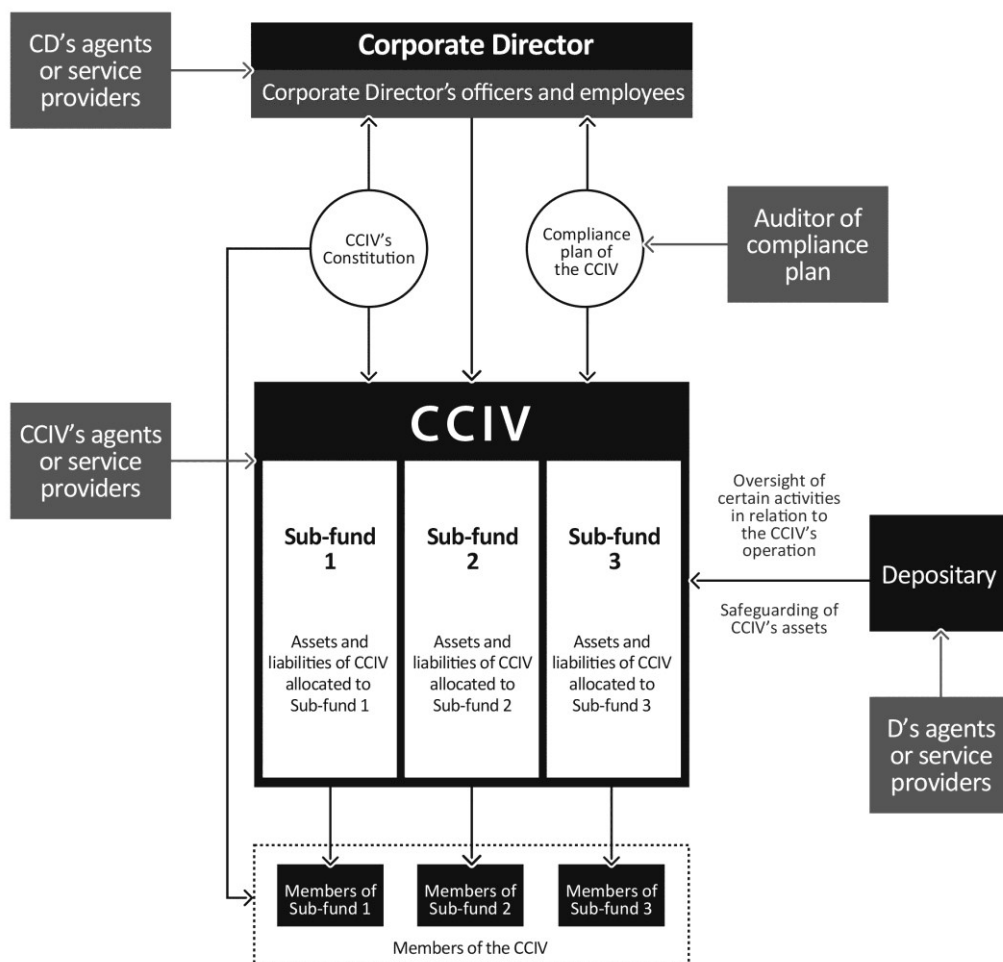
Regulations

10.9 The operation of Chapter 8B, or any other provision of the Act that relates to a CCIV, or a class of CCIVs or all CCIVs, may be modified by regulation. *[Schedule 1, item 4, section 1269C]*

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

Appendix

Regulatory framework for a retail CCIV



Note: This diagram shows the regulatory framework as it applies to a retail CCIV. A retail CCIV must have a depository. A wholesale CCIV may choose to have a depository, but if it does so, it is subject to the full regulatory requirements for depositaries. A wholesale CCIV is not required to have a compliance plan. The CCIV, the corporate director and the depository may each appoint agents and service providers to exercise their respective powers and functions, except that the depository may not appoint an agent to perform its oversight function in relation to the CCIV.