
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 this explanatory memorandum.

<i>Abbreviation</i>	<i>Definition</i>
AFSL	Australian financial services licence
ARFN	Australian registered fund number
ASIC	Australian Securities and Investments Commission
CCIV	Corporate collective investment vehicle A reference to 'CCIV' in the explanatory materials is a reference to both retail and wholesale CCIVs unless otherwise specified
Criminal Code	Schedule to the <i>Criminal Code Act 1995</i>
OEIC	A company that is an Open-Ended Investment Company regulated under legislation of the United Kingdom
PDS	Product disclosure statement
The Act	<i>Corporations Act 2001</i>
Tranche 1 Exposure Bill	Exposure draft of the Treasury Laws Amendment (Corporate Collective Investment Vehicle) Bill 2018 released for consultation on 13 June 2018
Tranche 2 Exposure Bill	Exposure draft of the Treasury Laws Amendment (Corporate Collective Investment Vehicle) Bill 2018 released for consultation on 19 July 2018
Tranche 1 Explanatory Materials	Explanatory materials accompanying the Tranche 1 Exposure Bill and released for exposure on 13 June 2018
UCITS	Undertakings for Collective Investment in Transferable Securities (UCITS) Directive (a regulatory framework adopted by the European Union)

Chapter 1

Introduction

Outline of chapter

1.1 The Tranche 2 Exposure Bill provides for further aspects of the regulatory framework for CCIVs, building on the Tranche 1 Exposure Bill that was released for consultation on 13 June 2018.

1.2 This chapter of the explanatory materials for the Tranche 2 Exposure Bill provides an overview of these further aspects.

Context of amendments

1.3 The general context for the amendments establishing the regulatory framework for CCIVs is outlined in Chapter 1 of the Tranche 1 Explanatory Materials.

1.4 The Tranche 1 Exposure Bill included:

- revised core provisions establishing how the CCIV and its sub-funds operate; and
- amendments to apply Chapters 2A to 2P of the Act (such as the meetings rules and members' rights and remedies) to CCIVs.

1.5 The Tranche 1 Explanatory Materials included an outline of the proposed legislative approach to depositary independence.

1.6 The Tranche 2 Exposure Bill includes further provisions concerning:

- external administration of a CCIV in a wind up situation;
- the application of the financial services regime in Chapter 7 of the Act to CCIVs; and
- the liability of the corporate director of a CCIV and contraventions by the CCIV.

1.7 These explanatory materials also outline the proposed penalties framework for CCIVs and the proposed approach to takeovers, compulsory acquisitions and buyouts of a CCIV. Legislation implementing these aspects of the CCIVs regime is still under development.

1.8 Other aspects of the legislation implementing CCIVs, including provisions applying the rules for receiverships and schemes of arrangement to CCIVs, the miscellaneous provisions contained in Chapter 9 of the Act and amendments to the *Personal Property and Securities Act 2009*, are still under development and are not included in the Tranche 2 Exposure Bill.

Summary of new law

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

External administration of a CCIV – winding up

1.10 The provisions in the Act relating to winding up generally apply separately in respect of each sub-fund of the CCIV. In essence, this involves treating the CCIV in a winding up situation as if it is comprised only of the sub-fund that is affected by the winding up. Any other sub-fund of the CCIV is disregarded.

1.11 The winding up provisions operate in respect of each sub-fund by applying four separating assumptions. These assumptions are that:

- the only business carried on by the CCIV is the business of the sub-fund in respect of which the CCIV is being wound up;
- the only shares issued by the CCIV are the shares referable to that sub-fund;
- the only property of the CCIV is the property allocated to that sub-fund; and
- the only debts and claims of the CCIV are the liabilities of that sub-fund.

1.12 This approach preserves the segregation of assets between sub-funds. Further, it recognises that the CCIV is the only legal entity and avoids deeming sub-funds to have a separate legal personality just for winding up.

Takeovers

1.13 The provisions in the Act relating to takeovers, compulsory acquisitions and buy-outs do not apply to acquisitions to gain control in a CCIV. Therefore, such acquisitions are not regulated by the provisions in Chapters 6 to 6C.

1.14 CCIVs that are disclosing entities are subject to the continuous disclosure requirements set out in Chapter 6CA of the Act.

Financial services and regulation

1.15 The Tranche 2 Exposure Bill includes modifications to the operation of Chapter 7 of the Act, which regulates financial services and markets. Key modifications are made to provisions that relate to assigning responsibility for conduct, financial services licencing and disclosure for financial products. Other modifications provide that the application of Chapter 7 to CCIVs is comparable to its application to registered schemes.

Liability of the corporate director for contraventions

1.16 The corporate director of a CCIV is responsible for the consequences of a contravention of Commonwealth law by the CCIV. A provision is also under development to require the corporate director to indemnify the CCIV for any loss or damage the CCIV sustains as a result of the CCIV's contravention of the law.

1.17 These provisions recognise that the corporate director operates the business and conducts the affairs of the CCIV. They also ensure consistency with the position for registered schemes (noting that the responsibility entity is responsible for all obligations in relation to the scheme).

1.18 The new law also contains rules for attributing the physical and fault elements of an offence (for offences generally and separately for those in Chapter 7) to the CCIV. In relation to the physical elements of offences outside Chapter 7, the acts or omissions of the corporate director's employees, agents and officers are attributed directly to the CCIV rather than being attributed to the corporate director. Similarly, when proving the fault elements, the corporate director's authorisation or permission of the offence is attributed to the CCIV.

Penalties for a contravention of a provision of Chapter 8B

1.19 The proposed penalties for a contravention of a provision of Chapter 8B are set out in the Appendix. The proposed penalties are designed to be consistent with comparable provisions of the Act. The Appendix does not reflect the outcomes of the ASIC Enforcement Review. Legislation implementing the Government's response to the ASIC Enforcement Review is being progressed separately.

Chapter 2

External administration and deregistration

Outline of chapter

2.1 This chapter outlines the process for winding up and deregistering a sub-fund, and deregistering a CCIV. It also explains how the other procedures in Chapter 5 of the Act apply in the CCIV context.

Context of amendments

2.2 The regulatory requirements for schemes of arrangement, receivership, winding up and voluntary administration for Australian companies – collectively referred to as external administration – are contained in Chapter 5 of the Act. The amendments contained in Parts 8B.12 and 8B.21 of the Tranche 2 Exposure Bill modify the application of the external administration framework so that, in the case of CCIVs as distinct from other companies, external administration applies in respect of a sub-fund of a CCIV, rather than to the CCIV as a whole.

2.3 The provisions in Parts 8B.12 and 8B.21 draw on the approach adopted for external administration of health benefits funds under the *Private Health Insurance (Prudential Supervision) Act 2015*. Health benefits funds have some similarities to sub-funds of a CCIV as they are not separate legal entities.

2.4 This approach contrasts with the approach adopted under the United Kingdom's OEIC regime, where sub-funds are deemed to have separate legal personality for the purposes of external administration (but not for any other purpose). The United Kingdom's approach has not been adopted because it would artificially distinguish between the legal personality of sub-funds before and during external administration.

Summary of new law

2.5 Part 8B.12 sets out how the winding up provisions apply to CCIVs. It applies most of the winding up provisions separately in respect of each sub-fund by constructing four 'separating assumptions'.

2.6 Part 8B.21 amends the Insolvency Practice Schedule to ensure that books relating to the sub-fund that is subject to the winding up are not necessarily destroyed at the end of the external administration process.

These books may be relevant to the corporate director's functions with respect to the other sub-funds that continue to operate.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
<i>The separating assumptions</i> The winding up provisions generally apply to a CCIV separately in respect of each sub-fund of the CCIV. This is achieved by assuming in a wind up situation that: • the only business carried on by the CCIV is the business of the sub-fund in respect of which the CCIV is being wound up; • the only shares issued by the CCIV are the shares referable to that sub-fund; • the only property of the CCIV is the property allocated to that sub-fund; and • the only debts and claims of the CCIV are the liabilities of that sub-fund.	No equivalent.
<i>Other sub-funds</i> A winding up procedure in respect of one sub-fund has no legal effect on the other sub-funds.	No equivalent.
<i>Court ordered wind ups</i> Applications for leave to make a winding up order and applications for a winding up order do not need to specify the sub-fund. The Court must take into account the separating assumptions when determining whether to give the order sought in the application.	No equivalent.

<i>New law</i>	<i>Current law</i>
<i>Statutory demands</i> A creditor is not required to specify, in a statutory demand served on a CCIV, the sub-fund to which the statutory demand relates. The separating assumptions then apply from the point when the CCIV fails to comply with the statutory demand. If the CCIV fails to comply with the statutory demand and it has multiple sub-funds, the CCIV is taken to have failed to comply with the statutory demand in respect of each and every sub-fund unless it identifies the relevant sub-fund or sub-funds in a written notice. An application to set aside a statutory demand must be accompanied by a written notice identifying the sub-fund if the dispute relates to the amount of the debt (rather than the existence of the debt).	No equivalent.
<i>Voluntary wind ups</i> In a voluntary wind up situation, the separating assumptions generally apply for the purposes of determining whether the CCIV may resolve, or has resolved, to wind up the CCIV in respect of a sub-fund.	No equivalent.
<i>Identifying the sub-fund on documents</i> A notice or document relating to the winding up must specify the name and ARFN of the sub-fund in respect of which the CCIV is being wound up. All public documents and negotiable instruments that contain the name of the sub-fund must include the words ‘in liquidation’ after the sub-fund’s name.	No equivalent.
<i>Liquidator’s powers and functions</i> A liquidator may only exercise a power or perform a function to the extent that	No equivalent.

<i>New law</i>	<i>Current law</i>
it relates to the sub-fund that is being wound up. The liquidator may also instruct the depositary in relation to the assets of the sub-fund in respect of which the CCIV is being wound up. The allocation rules for assets and liabilities of a CCIV (including a sub-fund in wind up) are not affected by the appointment of a liquidator.	
<i>Auditor's functions</i> An auditor does not need to undertake any audit activities for the sub-fund that is affected by the wind up.	No equivalent.
<i>Books</i> The corporate director must deliver to the liquidator all books relating solely to the sub-fund in respect of which the CCIV is being wound up. The corporate director may inspect the books held by the liquidator, and the liquidator may inspect the books held by the corporate director or the depositary (to the extent that the books are necessary for the person to perform their functions).	No equivalent.
<i>Other Chapter 5 procedures</i> Receivership and schemes of arrangement will also apply in respect of a sub-fund. Voluntary administration and ASIC-initiated wind up procedures will not apply. These provisions are under development.	No equivalent.
<i>Deregistration</i> The Chapter 5A procedures for deregistration will apply in respect of a sub-fund. There will be a new streamlined process for deregistering a CCIV when it ceases to have any sub-funds.	No equivalent.

<i>New law</i>	<i>Current law</i>
These provisions are under development.	

Detailed explanation of new law

Winding up

The separating assumptions

2.7 The amendments in Part 8B.12 apply the provisions in the Act relating to the winding up of companies on a sub-fund-by-sub-fund basis. This is designed to ensure that the strict segregation of assets and liabilities between the sub-funds of a CCIV is preserved throughout the external administration process. It also accommodates the possibility that different sub-funds of a CCIV could enter external administration at different times. *[Schedule 1, item 1, section 1249A]*

2.8 The mechanism for applying the provisions relating to winding up on a sub-fund-by-sub-fund basis is to assume that the CCIV is wound up separately in respect of each sub-fund. This is achieved by applying four assumptions (*the separating assumptions*), namely, that:

- the only business carried on by the CCIV is the business of the sub-fund in respect of which the CCIV is being wound up;
- the only shares issued by the CCIV are the shares referable to that sub-fund;
- the only property of the CCIV is the property allocated to that sub-fund; and
- the only debts and claims of the CCIV are the liabilities of that sub-fund.

[Schedule 1, item 1, paragraph 1249B(a) and subsection 1249C(1)]

2.9 The effect of the separating assumptions is that, in each winding up instance, the CCIV is treated as if it has only the sub-fund that is affected by the winding up. All of the other sub-funds are disregarded. *[Schedule 1, item 1, note 1 to section 1249C]*

2.10 There is a subtle distinction between applying the provisions relating to winding up separately ‘in respect of each sub-fund’ and applying the provisions directly to each sub-fund. Applying the provisions ‘in respect of each sub-fund’ recognises that the CCIV is the only legal entity. Unlike the OEIC regime in the United Kingdom, sub-funds are not deemed to have separate legal personality for winding up. This ensures

that the legal character of a sub-fund remains consistent throughout its life and a sub-fund does not become imbued with legal personality when the CCIV is wound up in respect of the sub-fund.

2.11 As a sub-fund does not have separate legal personality, a CCIV is always wound up in respect of a sub-fund. Sub-funds are not themselves wound up. Nevertheless, for simplicity, these explanatory materials generally refer to a ‘sub-fund being wound up’ rather than the winding up of a CCIV in respect of a sub-fund.

How the separating assumptions are to be applied

2.12 The separating assumptions are not designed to apply in a way that simply requires certain words to be substituted with other words or phrases. Instead, the separating assumptions should be interpreted as principles or a particular construction through which the provisions should be applied. This means that the provisions operate with any other changes as are made necessary by the winding up of the CCIV in respect of a sub-fund. This approach provides flexibility and adopts a precedent used in other parts of the Act where it is not possible for the legislation to deal with all possible scenarios that may arise (see, for example, paragraph 233(2)(b) and subsection 324BD(2) of the Act). *[Schedule 1, item 1, paragraph 1249B(c)]*

Provisions to which the separating assumptions apply

2.13 The separating assumptions apply to all provisions of the Act relating to the winding up of companies, unless otherwise stated. This terminology is modelled on existing subsection 233(2) of the Act. The provisions to which the separating assumptions apply include provisions outside of Chapter 5 of the Act, such as section 161A, Division 5 of Chapter 2D, and sections 638 and 639. *[Schedule 1, item 1, paragraph 1249B(b)]*

2.14 The separating assumptions also apply to the *Corporations Regulations 2001* and the Insolvency Practice Rules. This is because ‘this Act’ is defined in existing section 9 of the Act to include the regulations and the Insolvency Practice Rules. *[Schedule 1, item 1, note 1 to section 1249B]*

2.15 Each provision to which the separating assumptions apply is referred to as a **winding up provision**. *[Schedule 1, item 1, subsection 1249C(2)]*

Meaning of terms defined outside of Chapter 5

2.16 The meaning of all terms and expressions defined outside of Chapter 5 are also affected by the separating assumptions. This means that defined terms may have a different meaning in a provision relating to winding up than in other parts of the Act. *[Schedule 1, item 1, subsection 1249C(2)]*

Example 2.1: Meaning of ‘members’

In a provision relating to winding up, the ‘members’ are the members of the CCIV disregarding all members that do not hold shares referable to the sub-fund that is being wound up. In other words, the only relevant members are the members who hold shares referable to the sub-fund being wound up.

Example 2.2: Meaning of ‘solvency’

In a provision relating to winding up, ‘solvency’ refers to the solvency of the CCIV in respect of the sub-fund, disregarding the assets and liabilities of other sub-funds. This is conceptually different from the concept of ‘solvency of a sub-fund’ in the new law (see paragraph 8.59 of the Tranche 1 Explanatory Materials).

2.17 An amendment has been made to the meaning of ‘meeting of a CCIV’ in the context of winding up. If the separating assumptions were applied to the definition of a ‘meeting of a CCIV’ without amendment, the term would refer to a meeting *of the CCIV* disregarding all members who do not hold shares referable to the sub-fund being wound up. This is legally different to a meeting *of the sub-fund* (see paragraphs 7.10 to 7.13 of the Tranche 1 Explanatory Materials), albeit that in practice, the same members would be entitled to vote at both meetings. The new law avoids the need to distinguish between these two concepts by deeming a meeting of the sub-fund to be a meeting of the CCIV for the purposes of the winding up provisions. *[Schedule 1, item 1, paragraph 1249C(3)(a)]*

2.18 The new law also deems a resolution passed by members of the sub-fund to be a resolution passed by the members of the CCIV for the purposes of the winding up provisions. If this deeming provision did not exist, for the purposes of the winding up provisions, a ‘resolution’ would need to be passed at a meeting *of the CCIV* rather than a meeting *of the sub-fund* (see paragraphs 7.10 to 7.13 of the Tranche 1 Explanatory Materials). *[Schedule 1, item 1, paragraph 1249C(3)(b)]*

Effect of winding up on other sub-funds

2.19 A winding up procedure for one sub-fund of a CCIV has no legal effect on the other sub-funds of the CCIV, the shares referable to those sub-funds, the assets and liabilities allocated to the sub-funds, the business of the sub-funds, or any proceedings relating solely to their business. *[Schedule 1, item 1, section 1249D]*

2.20 Multiple sub-funds of the same CCIV may all undergo an external administration procedure at the same time (with the same or a different liquidator). They may start the wind up process at the same time or at different times.

Example 2.3: Multiple sub-funds being wound up

Ironbank CCIV has three sub-funds, Ironbank Global Equities SF, Ironbank Fixed Income SF and Ironbank Low Risk SF. Ironbank Global Equities SF and Ironbank Fixed Income SF are being wound up.

For the purposes of applying the wind up provisions to Ironbank Global Equities SF, the other two sub-funds are disregarded.

When the wind up provisions are applied for Ironbank Fixed Income SF, both Ironbank Global Equities SF and Ironbank Low Risk SF are disregarded.

Interaction with the allocation rules

2.21 The fact that a CCIV is being wound up in respect of a sub-fund does not affect the operation of the allocation rules, the corporate director's responsibility to determine the proportion of the assets that are to be allocated to each sub-fund in certain circumstances, or the purposes for which assets of a sub-fund may be applied. For a discussion of the allocation rules, see paragraphs 3.32 to 3.54 of the Tranche 1 Explanatory Materials; and for a discussion of the powers of the corporate director vis a vis the liquidator, see paragraphs 2.53 to 2.54 of these explanatory materials. *[Schedule 1, item 1, section 1249E and subsection 1249Q(2)]*

2.22 Chapter 5 generally uses the concepts of 'property' and 'debts and claims', rather than the concept of 'assets' and 'liabilities'. Minor amendments will be made to expand the allocation rules to cover all 'property' (rather than just assets) and all 'debts and claims' (rather than just 'liabilities'). These amendments will only have a material effect in the context of Chapter 5. They will not affect the substance or mechanics of the allocation rules.

2.23 An amendment is also made to the requirements relating to the segregated application of assets of sub-funds (see paragraphs 3.65 to 3.73 of the Tranche 1 Explanatory Materials for an explanation of these requirements). This amendment ensures that the liquidator may use the assets of the sub-fund that is being wound up to pay the debts and claims that must be paid in priority to other unsecured debts and claims. *[Schedule 1, item 1, section 1249T]*

Court-ordered wind ups

2.24 The provisions relating to court-ordered wind ups generally apply on a sub-fund-by-sub-fund basis from the point when the Court considers whether to grant a winding up order. This is achieved by drafting bespoke provisions, rather than relying on the separating assumptions. *[Schedule 1, item 1, subsections 1249F(1) and 1249L(1)]*

2.25 Applications for leave to make a winding up order and applications for a winding up order do not need to specify the sub-fund.

This recognises that some creditors may not be able to identify the relevant sub-fund to which the debt or claim relates to. This ensures that any creditor of the CCIV can make an application. *[Schedule 1, item 1, subsections 1249L(2) and (3)]*

2.26 The Court must consider the separating assumptions when determining whether to give leave to allow the applicant to apply for winding up or whether to make an order to wind up the CCIV in respect of a sub-fund. *[Schedule 1, item 1, subsections 1249F(3) and 1249L(4)]*

2.27 If the Court decides to order the winding up of a CCIV in respect of a sub-fund, the Court must identify the sub-fund. *[Schedule 1, item 1, subsection 1249F(4)]*

Statutory demands

2.28 The separating assumptions do not apply to Divisions 2 or 3 of Part 5.4 (about statutory demands). Instead, bespoke rules are used to compel the CCIV, rather than the creditor, to identify the relevant sub-fund. This ensures that creditors who may be unable to identify the relevant sub-fund are not disadvantaged and recognises that the CCIV is best placed to identify the sub-fund to which a liability has been allocated. *[Schedule 1, item 1, subsections 1249G(1), 1249H(1) and 1249K(1)]*

2.29 A creditor is not required to specify the sub-fund in a statutory demand served on a CCIV. *[Schedule 1, item 1, subsection 1249G(2)]*

2.30 The separating assumptions then apply from the point when the CCIV fails to comply with the statutory demand. *[Schedule 1, item 1, subsections 1249H(2)]*

2.31 If the CCIV fails to comply with the statutory demand and it has multiple sub-funds, the CCIV is taken to have failed to comply with the statutory demand in respect of each and every sub-fund unless it identifies the affected sub-funds in a written notice. If there is more than one sub-fund, the notice must also identify the proportion of the debt allocated to each sub-fund. This is designed to incentivise the CCIV to identify the relevant sub-fund or sub-funds. *[Schedule 1, item 1, paragraph 1249H(2)(b), subsection 1249H(3), section 1249J, subsection 1249K(4) and paragraph 1249K(5)(e)]*

2.32 To be effective, the written notice must either be:

- served on the person who served the statutory demand before the court makes an order for winding up; or
- filed with the court in conjunction with an application for the statutory demand to be set aside.

[Schedule 1, item 1, paragraph 1249H(3)(b) and subsection 1249K(4)]

Applications for statutory demands to be set aside

2.33 A CCIV may file an application to set aside the statutory demand if it disputes the existence of the debt or the amount of the debt under existing section 459H.

2.34 If the dispute relates to the existence of the debt, the CCIV does not need to identify the sub-fund. The Court must only make an order setting aside the statutory demand under existing subsection 459H(3) if the Court is satisfied that there is a genuine dispute about the existence of all debts to which the demand relates (see Scenario A in Figure 1.1).¹

[Schedule 1, item 1, subsection 1249K(2)]

2.35 If the dispute relates to the amount of the debt, the Court must dismiss the application if a written notice identifying the sub-funds affected by the statutory demand (and the proportion of the debt allocated to each sub-fund) has not been filed with the court (Scenario B in Figure 1.1). *[Schedule 1, item 1, subsection 1249K(3)]*

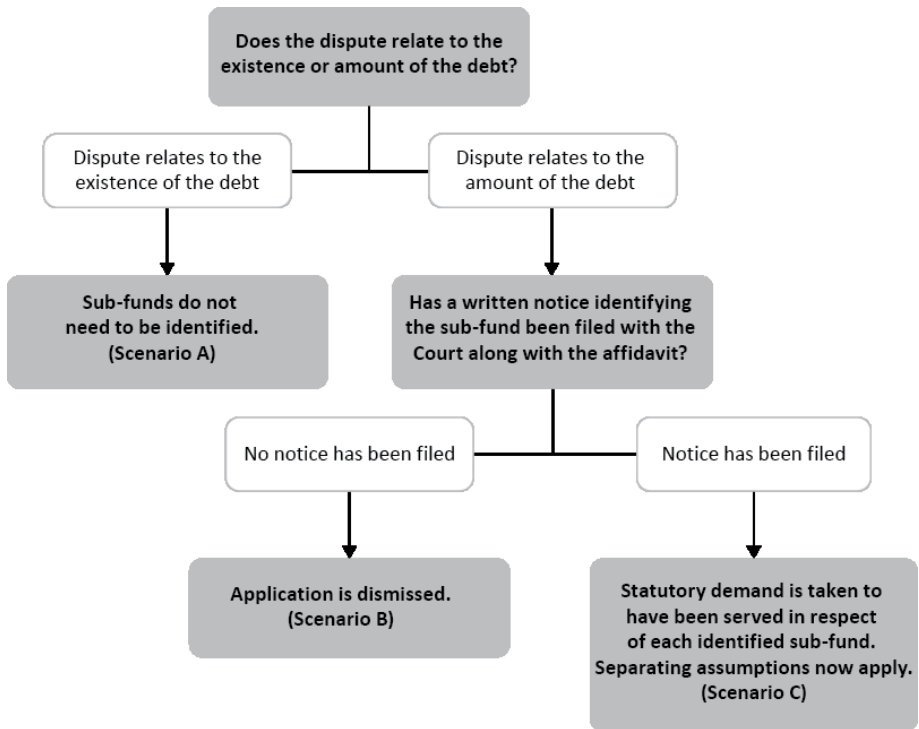
2.36 If a written notice identifying the sub-fund has been filed, the statutory demand is taken to be a separate statutory demand served on the CCIV in respect of each sub-fund or sub-funds identified in the notice, and the CCIV is taken to have applied to the Court for an order setting aside each of those statutory demands. The amount of the debt specified in the statutory demand for each sub-fund is taken to be the proportion of the debt set out in the notice. The time for serving the statutory demands in respect of each sub-fund is taken to be the time that the actual statutory demand was served (Scenario C in Figure 2.1). *[Schedule 1, item 1, subsections 1249K(4) and (5)]*

2.37 The Court must then consider the separating assumptions when determining whether to set aside the statutory demand under subsections 459H(2) to (6) of the existing law. *[Schedule 1, item 1, paragraph 1249K(5)(d)]*

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¹ Subsection 459H(3) requires the Court to set aside a demand if the substantiated amount is less than the statutory minimum. The substantiated amount is nil if there is a genuine dispute about the existence of the debt (assuming no offsetting total) (see subsections 459H(2) and (5)).

Figure 2.1: Applications for statutory demands to be set aside



Voluntary winding up

2.38 In voluntary winding up processes, the separating assumptions apply in a modified manner. *[Schedule 1, item 1, subsection 1249M(1)]*

2.39 As per the separating assumptions, the CCIV may only be voluntarily wound up in respect of a sub-fund. *[Schedule 1, item 1, subsection 1249M(2)]*

2.40 The separating assumptions generally apply for the purposes of determining whether a CCIV may, or has resolved to, wind up the CCIV in respect of a sub-fund. The consequences of this are that:

- the corporate director is only required to call a meeting of the affected sub-fund and notify the members of the sub-fund of the proposed resolution, rather than calling a meeting of the CCIV (see paragraphs 2.17 and 2.18 of these explanatory materials which explain that meetings of a sub-fund are deemed to be meetings of the CCIV for the purposes of the winding up provisions); and

- the separating assumptions then apply when determining whether a CCIV may be wound up under existing sections 490 and 491.

[Schedule 1, item 1, subsection 1249M(3)]

2.41 There is one situation where the separating assumptions do not apply for the purposes of determining whether a CCIV may resolve to wind up the CCIV in respect of a sub-fund. A resolution for winding up cannot be passed if an application for the CCIV to be wound up in insolvency has been filed. This prohibition applies irrespective of which sub-fund is likely to be wound up pursuant to the application. In effect, this applies the prohibition on voluntary wind ups in paragraph 490(1)(a) of the existing law but turns off the separating assumption. ***[Schedule 1, item 1, subsection 1249M(4)]***

2.42 The policy rationale for turning off the separating assumptions for the purposes of paragraph 490(1)(a) is that applications for wind up do not specify the sub-fund (see paragraph 2.25 of these explanatory materials). It is not practical for members to attempt to ascertain which sub-funds are potentially affected by the application.

2.43 References to the director in the voluntary wind up provisions refer to the corporate director of the CCIV. ***[Schedule 1, item 1, subsection 1249M(5)]***

Identifying the sub-fund that is being wound up in notices and documents

All public documents and negotiable instruments

2.44 A CCIV must set out a sub-fund's name and ARFN on all public documents and negotiable instruments that relate to that sub-fund (see paragraphs 3.76 to 3.84 of the Tranche 1 Explanatory Materials).

2.45 If a sub-fund is being wound up, then the words 'in liquidation' must follow the name of that sub-fund. ***[Schedule 1, item 1, subsection 1249N(2)]***

Documents provided in connection with the wind up

2.46 A notice or document relating to the winding up may either be provided:

- in accordance with a requirement in the Act; or
- voluntarily.

2.47 In both of these circumstances, documents must set out the name and ARFN of each sub-fund that is being wound up. However, the consequences for breaching this requirement differ. ***[Schedule 1, item 1, subsection 1249N(1) and (3)]***

2.48 If the document is provided under a provision of the Act and it does not contain the required information about the sub-fund, the person has not discharged their obligation under the relevant provision of the Act. The penalty for a breach of that provision applies. *[Schedule 1, item 1, subsection 1249N(1)]*

2.49 If the document does not need to be provided under the Act, there is no penalty for failing to include the required information about the sub-fund. Nevertheless, the document may not be effective or achieve its desired purpose. *[Schedule 1, item 1, subsection 1249N(3)]*

Powers of the liquidator

2.50 The respective powers of the liquidator, corporate director and depositary are summarised in the table below and explained in more detail in the subsequent paragraphs.

Table 2.1: Powers of the liquidator

<i>Function</i>	<i>Person responsible for function</i>	
	<i>Sub-fund being wound up</i>	<i>Other sub-funds</i>
<i>Carrying on sub-fund's business</i>	Liquidator	Corporate director
<i>Allocation determinations for assets and liabilities of sub-funds²</i>	Corporate director	Corporate director
<i>Holding the assets (for retail CCIVs)</i>	Liquidator	Depositary

2.51 A liquidator or provisional liquidator may only exercise a power or perform a function to the extent that it relates to the sub-fund that is being wound up. Further, the exercise of the power must not affect another sub-fund's business, the shares referable to another sub-fund, or the assets and liabilities allocated to that sub-fund. This limitation on the liquidator's powers ensures that the liquidator controls the affairs of only

² An asset or liability of a CCIV that relates solely to the business of a sub-fund of the CCIV is allocated to that sub-fund. Where an asset or liability relates to more than one sub-fund, the asset or liability is allocated to the sub-fund in a proportion that is fair and reasonable in the circumstances. The corporate director of the CCIV must determine the proportion that is fair and reasonable in the circumstances. See Chapter 3 of the Tranche 1 Explanatory Materials.

the sub-fund that is being wound up. *[Schedule 1, item 1, subsections 1249Q(1) and (9)]*

2.52 The corporate director must cease to exercise a function or power that relates solely to a sub-fund that is being wound up. However, the corporate director may continue to exercise functions and powers that relate to the other sub-funds. *[Schedule 1, item 1, subsection 1249P(1)]*

2.53 A liquidator or provisional liquidator does not have power to determine the proportion of assets and liabilities that are to be allocated to the sub-fund that is being wound up (or any other sub-fund). In most cases, this automatically follows from the general principle that a liquidator or provisional liquidator cannot exercise their powers in a way that affects the other sub-funds (see paragraph 2.51 of these explanatory materials). *[Schedule 1, item 1, subsections 1249Q(2) and (9)]*

2.54 The corporate director remains responsible for any determinations that need to be made with respect to the allocation of assets and liabilities. *[Schedule 1, item 1, sections 1233J, 1233K and 1233P and subsection 1249P(1)]*

Relationship between the powers of the liquidator and the depositary

2.55 The liquidator or provisional liquidator must notify the depositary of the liquidator's appointment as soon as practicable, and in any case within three days after being appointed. *[Schedule 1, item 1, subsections 1249Q(4), (5) and (9)]*

2.56 The liquidator or provisional liquidator has the power to instruct the depositary about the assets of the sub-fund that is being wound up. Further, the liquidator or provisional liquidator's instructions in respect of the sub-fund being wound up prevail over any inconsistent instructions given by the corporate director. This ensures that a liquidator or provisional liquidator can bring in all assets of the sub-fund that is being wound up. *[Schedule 1, item 1, subsections 1249Q(6), (7) and (9)]*

2.57 There is nothing in the new law which precludes the liquidator from determining that the depositary should continue to hold the assets of the sub-fund that is being wound up.

2.58 However, the functions and powers of a liquidator or provisional liquidator prevail over the depositary's functions and powers to the extent of any conflict. *[Schedule 1, item 1, section 1249R]*

2.59 It is appropriate for the functions and powers of the liquidator to prevail over those of the depositary because the liquidator must prioritise the interests of creditors and is supervised by the court.

Example 2.4: Powers of the liquidator

Mandy is appointed as liquidator of Ironbank CCIV in respect of Maximum Return SF. The CCIV has two other sub-funds which are not being wound up.

Mandy may carry on only the part of the business that relates to Maximum Return SF and issue instructions to the depositary regarding the assets allocated to Maximum Return SF.

Mandy cannot determine the proportion of assets and liabilities that are allocated to Maximum Return SF. Nor can she control the part of the business that relates to the other sub-funds or take in the assets of these sub-funds.

Effect of wind-up on the auditor

2.60 In the CCIV context, the auditor requirements apply to the CCIV as a whole and each of the sub-funds (see paragraphs 9.32 to 9.40 of the Tranche 1 Explanatory Materials).

2.61 An auditor does not need to undertake any audit activities for the sub-fund that is being wound up. *[Schedule 1, item 1, section 1249S]*

2.62 If the CCIV has other sub-funds that are not being wound up, the auditor must continue to undertake their audit activities for:

- for each of the sub-funds that are not being wound up; and
- the CCIV as a whole as if the only business carried on by the CCIV was the business of the sub-funds that are not being wound up.

2.63 If all of the sub-funds of a CCIV are being wound up, the auditor has no functions to perform and it ceases to hold office. *[Schedule 1, item 1, section 1249S]*

Access to books

2.64 The corporate director must deliver to the liquidator or provisional liquidator all books relating solely to the sub-fund that is being wound up. Books that relate to other sub-funds or to the CCIV as a whole do not need to be delivered to the liquidator. *[Schedule 1, item 1, subsections 1249P(2), (3) and (5)]*

2.65 The corporate director may inspect the books held by liquidator or provisional liquidator to the extent that access is necessary for the corporate director to perform its functions or exercise its powers. Under section 1300 of the existing law, the corporate director may also make copies or take extracts. *[Schedule 1, item 1, subsection 1249P(4) and (5)]*

2.66 Similarly, a liquidator or provisional liquidator may inspect and copy books held by the corporate director or the depositary if it is necessary for the liquidator to perform its functions or exercise its powers. *[Schedule 1, item 1, subsections 1249Q(3), (8) and (9)]*

Retention and destruction of books

Books held by an external administrator

2.67 A liquidator or any other external administrator must,³ under the Insolvency Practice Rules,⁴ retain the books relating solely to the sub-fund for at least five years after the end of the external administration of the CCIV in respect of the sub-fund is completed (the ***retention period***).

2.68 The CCIV may, by written notice, request the external administrator to transfer the books back to the CCIV at the end of the retention period. The external administrator is only permitted to destroy the books at the end of the retention period if the CCIV has not made such a request. [*Schedule 1, item 1, subsections 1270A(1) to (3)*]

2.69 An external administrator who intentionally or recklessly fails to comply with the requirement to transfer the books back to the CCIV commits an offence punishable by a fine of up to 50 penalty units. This is the same as the existing offence for destroying books during the retention period in subsection 70-35(5) of the Insolvency Practice Rules. [*Schedule 1, item 1, subsection 1270A(4)*]

Books held by ASIC

2.70 The Insolvency Practice Rules require an external administrator to transfer books in its possession to ASIC if the person ceases to be the external administrator and ASIC requests the transfer of the books (see existing section 70-31 of Schedule 2 to the Act).

2.71 The Insolvency Practice Rules, when read subject to the separating assumptions, require ASIC to retain any books that it obtains under section 70-31 for at least two years after the end of the external administration of the CCIV in respect of the sub-fund is completed (ASIC's ***retention period***) (see existing subsection 70-31(8) of Schedule 2 to the Act).

2.72 If ASIC wishes to destroy the books at the end of ASIC's retention period, it must notify the CCIV (if the CCIV has not been deregistered). The CCIV may require ASIC to transfer the books to the CCIV, instead of destroying them. This ensures that books are not destroyed if the CCIV remains in existence and the corporate director considers the books to be relevant to the business of sub-funds which have not been wound up. [*Schedule 1, item 1, section 1270*]

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An external administrator is a liquidator, provisional liquidator, administrator of the company or an administrator appointed pursuant to a deed of company arrangement (see section 5-20 of the Insolvency Practice Rules).

⁴

See existing section 70-35 of Schedule 2 to the Act.

Winding up provisions which do not apply

2.73 None of the provisions which relate to employees of a company apply in the CCIV context because a CCIV does not have employees (see paragraphs 5.50 to 5.52 of the Tranche 1 Explanatory Materials). These provisions have not been expressly disapplied but they have no operation.

2.74 Part 5.4C of the Act (about winding up by ASIC) does not apply to a CCIV. One of the main reasons that ASIC uses its Part 5.4C powers is to protect employees' entitlements. As a CCIV has no employees, ASIC does not require this power in the CCIV context. *[Schedule 1, item 1, subsection 1249U(1)]*

2.75 A pooling determination may not be made in respect of a CCIV and a CCIV or its sub-funds may not be part of a pooled group. A pooling determination results in each company in a group being taken to be jointly and severally liable for the debts payable by other members of the group. These determinations would interfere with the segregation of assets and liabilities between sub-funds if they were to apply in the context of CCIVs and sub-funds. *[Schedule 1, item 1, subsection 1249U(2)]*

2.76 The new law also states that Part 5.7 (about winding up bodies other than companies) does not apply to CCIVs. A CCIV cannot be a 'Part 5.7 body' as it cannot be registered with ASIC unless it is a company (see paragraph 2.18 of the Tranche 1 Explanatory Materials). *[Schedule 1, item 1, subsection 1249U(3)]*

Other Chapter 5 procedures

2.77 Rules for receivership and schemes of arrangement are also under development. These rules will apply the provisions relating to receivership and schemes of arrangement separately in respect of each sub-fund, along similar lines to the approach for winding up.

2.78 Voluntary administration will not be available in the CCIV context.

Deregistration of sub-funds and CCIVs

2.79 Special procedures for deregistering a sub-fund are under development. There will be a voluntary process, an ASIC-initiated process and a court-ordered process for deregistering a sub-fund. These processes will be closely modelled on the existing processes for deregistering a company in Chapter 5A.

2.80 A CCIV should be deregistered when all of its sub-funds have been deregistered. New streamlined processes for deregistering a CCIV are under development. There will be two processes:

- *Voluntary deregistration process* – A CCIV, corporate director or liquidator may apply to ASIC to deregister the CCIV if the CCIV does not have any sub-funds (and has no remaining assets and liabilities).
- *ASIC-initiated deregistration process* – ASIC may deregister a CCIV if the CCIV does not have any sub-funds (and has no remaining assets and liabilities).

Chapter 3

Takeovers, compulsory acquisitions and buy-outs

Outline of chapter

- 3.1 This Chapter outlines how Chapters 6 to 6C of the Act (regarding takeovers, compulsory acquisitions and buy-outs) and Chapter 6CA (regarding the continuous disclosure requirements for disclosing entities) will apply to CCIVs.
- 3.2 The legislative provisions giving effect to the intended approach are under development and are not included in the exposure draft bill. This Chapter is a guide to the development of the proposed legislation.

Context of amendments

- 3.3 Chapters 6 to 6C of the Act set out the regulatory requirements for takeovers, compulsory acquisitions and buy-outs of certain entities, including companies, listed bodies and listed managed investment schemes. In particular, these chapters set out requirements regarding the acquisition of control over such entities.
- 3.4 Chapter 6CA sets out the continuous disclosure requirements for disclosing entities.
- 3.5 The corporate director of a CCIV is a public company (that is subject to the full regulatory requirements for public companies, including the provisions of Chapters 6 to 6CA).
- 3.6 CCIVs are intended to operate with a similar corporate structure to UCITS funds and OEICs. Relevantly, UCITS funds and OEICs are not subject to the requirements and regulations regarding takeovers in their corresponding jurisdictions.

Summary of new law

- 3.7 The acquisition of control in a CCIV will not be regulated by the provisions of Chapters 6 to 6C. This means that a person will not be restricted, or prohibited, from acquiring a certain level of control in a CCIV (through the acquisition of voting power in a CCIV).

3.8 This will not affect the restrictions on the acquisition of control in other entities under Chapters 6 to 6C. That is, if a CCIV seeks to acquire a certain level of control (or voting power) in another entity (that is regulated by Chapters 6 to 6C), then the CCIV must comply with the relevant requirements.

3.9 If a CCIV is a disclosing entity (as defined under section 111AC of the Act), it will be subject to the continuous disclosure requirements set out in Chapter 6CA in the same way as other disclosing entities.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
Chapters 6 to 6C will not apply to CCIVs for the purposes of regulating or restricting the acquisition of control in a CCIV.	No equivalent.
A CCIV that is a disclosing entity will be subject to the continuous disclosure requirements set out in Chapter 6CA.	No equivalent.

Detailed explanation of new law

3.10 The provisions of Chapters 6 to 6C of the Act (regarding takeovers, compulsory acquisitions and buy-outs) will not apply to CCIVs for the purposes of regulating or restricting the acquisition of control in a CCIV.

3.11 In particular, a person will not be prohibited from acquiring a certain level of control in a CCIV (by acquiring a relevant interest in voting shares of a CCIV).

3.12 If a CCIV seeks to acquire control in another entity (that is regulated by the provisions of Chapters 6 to 6C), it will be subject to the relevant requirements.

3.13 This approach is designed to be consistent with the UCITS and OEIC regimes: both UCITS funds and OEICs are not subject to the requirements and regulations regarding takeovers in their respective jurisdictions.

3.14 A CCIV that is a disclosing entity (as defined under section 111AC of the Act)⁵ will be subject to the continuous disclosure requirements in Chapter 6CA. The provisions of Chapter 6CA that apply to listed entities will not apply to CCIVs, as CCIVs are prohibited from being listed.

3.15 Chapters 6 to 6CA will continue to apply to corporate directors (as public companies) in the same way that these Chapters apply to other public companies.

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⁵ 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.

Chapter 4

Financial services and regulation

Outline of chapter

4.1 This Chapter explains the operation of Part 8B.17. This Part modifies the operation of Chapter 7 for CCIVs and sets out how markets and financial services regulation apply to CCIVs and corporate directors.

Context of amendments

4.2 The rules in Chapter 7 set out how financial markets and financial services are regulated, including disclosure requirements for certain financial products and services.

4.3 The provisions in Chapter 7 generally apply to CCIVs and corporate directors in the same way as they apply to other companies. However, certain modifications are required to account for the particular corporate structure of a CCIV, and to ensure that consumer protections and other provisions apply comparably to CCIVs as to registered schemes.

Summary of new law

4.4 The new law modifies Chapter 7 to ensure that the AFSL and PDS regimes apply appropriately to CCIVs and corporate directors. Part 8B.17 also includes a provision that sets out how and when a corporate director or CCIV is liable for the actions of another person.

4.5 For the purposes of Chapter 7 of the Act, any action undertaken by a CCIV relating to a financial service or financial services business is deemed to also be undertaken by its corporate director. This ensures that a corporate director is required to hold an AFSL for the financial services provided in relation to the CCIV. A CCIV is always exempt from the requirement to hold an AFSL.

4.6 Part 8B.17 also includes provisions that attribute liability and responsibility for conduct in specified circumstances to the CCIV where it is undertaken by an agent of the CCIV, or an employee, agent or officer of the corporate director. These modify the existing Chapter 7 provisions that assign liability for a body corporate.

4.7 Additionally, a corporate director is required to hold an AFSL that authorises it to provide the financial service of ‘operating the business and conducting the affairs of the CCIV’. Modifications apply to Part 7.6 (concerning licensing of providers of financial services) to ensure that the AFSL regime applies appropriately in the context of CCIVs.

4.8 As shares and debentures in a CCIV are defined as securities, they would ordinarily be subject to the prospectus requirements in Part 6D.2. However, modifications to Part 7.9 require that a PDS, rather than a prospectus, be given to retail clients who acquire a security in a CCIV. This approach ensures consistency with the disclosure arrangements that apply to registered schemes. Limited exceptions apply to the PDS requirements where a retail client is associated with a CCIV or corporate director, and in other circumstances as appropriate.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
A corporate director must have an AFSL to ‘operate the business and conduct the affairs of the CCIV’. A CCIV is not required to hold an AFSL.	No equivalent.
The client of the financial services of ‘operating the business and conducting the affairs of the CCIV’ and acting as a depositary of a CCIV is the members of the CCIV.	No equivalent.
The issuer of shares in a CCIV is the CCIV itself.	No equivalent.
A corporate director may have its AFSL suspended or cancelled if the CCIV or its members have suffered, or are likely to suffer, loss or damage because of a breach of the Act by the corporate director or the CCIV.	No equivalent.
A depositary of a CCIV may have its AFSL suspended or cancelled if the CCIV or its members have suffered, or are likely to suffer, loss or damage because the depositary has breached the Act.	No equivalent.
A CCIV that issues or redeems redeemable shares or redeemable preference shares does not make a market for the purposes of the Act.	No equivalent.

<i>New law</i>	<i>Current law</i>
A CCIV engages in conduct where: • an agent of the CCIV; or • a director, employee, or agent of the corporate director engages in conduct on behalf of the CCIV and within the scope of the person's actual or apparent authority to act for the CCIV.	No equivalent.
A CCIV is taken to have a certain state of mind in relation to its conduct where: • an agent of the CCIV; or • a director, employee or agent of the corporate director acting for the CCIV within the person's actual or apparent authority is shown to have that state of mind in relation to that person's conduct.	No equivalent.
A person who enters into an agreement with a CCIV can rescind that agreement if the CCIV's corporate director does not have an AFSL.	No equivalent.
The financial services disclosure provisions do not apply to a CCIV or its corporate director in respect of the operation of a CCIV.	No equivalent.
When a CCIV issues a security to a retail client it must provide that person with a PDS.	No equivalent.
A CCIV or corporate director who possesses inside information and acquires or disposes of certain financial products, or causes another person to acquire or dispose of relevant financial products, is in breach of the prohibition on insider trading. Limited defenses apply to the prohibition on insider trading.	No equivalent.

Detailed explanation of new law

4.9 Chapter 7 of the Act applies to a CCIV with the modifications that are set out in Part 8B.17. These modifications ensure that Chapter 7

applies appropriately to CCIVs, corporate directors and depositaries, consistent with the policy objective that the corporate director of a CCIV (and the CCIV's depositary), and not the CCIV itself, be required to have an AFSL. *[Schedule 1, item 1, section 1250]*

Treatment of financial services provided by a CCIV

4.10 For the purposes of Chapter 7, most actions relating to financial services that are legally undertaken by a CCIV are *also* attributed to the CCIV's corporate director. As a CCIV generally has no officers and employees other than its corporate director, it is the corporate director that operates the business and conducts the affairs of the CCIV. Treating the actions of a CCIV as also being actions of its corporate director provides a framework where the corporate director retains responsibility for the actions of the CCIV.

4.11 Any conduct in relation to financial services or a financial services business that is engaged in by or on behalf of a CCIV (for example, where an agent has been appointed) is to be treated as also being engaged in by or on behalf of the CD. *[Schedule 1, item 1, subsection 1250A(2)]*

4.12 Similarly, where conduct relating to a CCIV is engaged in by a third party (that is, not by the corporate director or the CCIV itself), then that conduct is taken to also have been engaged in in relation to the corporate director. *[Schedule 1, item 1, subsection 1250A(2)]*

4.13 However, these rules do not make the corporate director the issuer of securities in a CCIV (if the CCIV issues securities), and do not make the corporate director a participant in a licensed market or clearing and settlement facility. *[Schedule 1, item 1, subsections 1250A(4) and (5)]*

4.14 The regulations may also prescribe any other matters to which the deeming provision applies. The regulations may also exempt matters from the operation of the deeming provision. *[Schedule 1, item 1, subsections 1250A(1)(c) and (6)]*

Financial services licencing

4.15 The modifications to Chapter 7 made in Part 8B.17 do not substantively alter the operation of the AFSL regime. Rather, the modifications ensure that the existing provisions apply appropriately to corporate directors and CCIVs. A CCIV is exempt from the requirement to hold an AFSL for the provision of financial services. However, to ensure financial services that are provided by a CCIV are covered by the AFSL regime, the CCIV's corporate director is taken to also provide those financial services, and is therefore generally required to hold an appropriate AFSL (subject to any exemptions). See paragraphs 4.10 to

4.14 of these explanatory materials for further information on when a corporate director is taken to provide financial services otherwise provided by a CCIV.

Financial services provided by a CCIV

4.16 A CCIV may provide one or more financial services in the course of its operations. As a matter of practice, it is expected that a CCIV generally would provide the financial service of ‘dealing in a financial product’ (see Division 4 of Part 7.1 of the Act).

4.17 Notwithstanding that a CCIV may provide a financial service, a CCIV is exempted from the requirement to hold an AFSL. Modifications to provisions regarding authorised representatives of AFSL holders and others who provide financial services on behalf of AFSL holders ensure that a CCIV is never required to hold an AFSL for any financial services that it provides, and is not subject to regulation as a representative.

[Schedule 1, item 1, section 1250B]

Financial services provided by a corporate director

4.18 Chapter 7 is modified to create a new financial service (provided by the corporate director of a CCIV) of ‘operating the business and conducting the affairs of the CCIV’. This financial service reflects the obligation imposed on the corporate director of a CCIV under section 1237J of the Tranche 1 Exposure Bill. Each of the members of a CCIV is a ‘client’ of this financial service. *[Schedule 1, item 1, section 1250C]*

4.19 Where a corporate director provides financial services that relate to a CCIV, those services may be provided directly or as a result of the deeming provisions that treat a corporate director as also providing any financial services that are provided by the CCIV itself (see paragraphs 4.10 to 4.15 of these explanatory materials). A corporate director may need an AFSL for financial services provided by a CCIV, depending on the nature of those services.

4.20 For the avoidance of doubt, a provision is included clarifying that a single AFSL may cover operating the business and conducting the affairs of more than one CCIV. *[Schedule 1, item 1, subsection 1250G(1)]*

4.21 The requirements for corporate directors of CCIVs contained in Part 8B.17 are comparable to the AFSL obligations and exemptions that apply to responsible entities of registered schemes. For example, provisions that exempt an RSE licensee from certain AFSL obligations unless the RSE licensee is also a responsible entity of a registered scheme are replicated for corporate directors. *[Schedule 1, item 1, subsections 1250G(2)-(5)]*

4.22 It is open to a corporate director of a CCIV to provide other financial services (as defined in Division 4 of Part 7.1 of the Act) in

addition to the financial service of operating the business and conducting the affairs of the CCIV. The obligations that fall on a corporate director providing financial services that are not related to its corporate director role are unchanged by the Tranche 2 Exposure Bill.

Record keeping obligations of the corporate director

4.23 AFSL holders have particular record keeping obligations regarding the financial services they provide under Division 6 of Part 7.8 of the Act. A corporate director of a CCIV must keep these records so that the information required to be kept is clearly identifiable for each sub-fund of the CCIV. See paragraphs 9.18 to 9.21 of the Tranche 1 Explanatory Materials for more information on the financial records that must be kept for a CCIV. *[Schedule 1, item 1, section 1250M]*

Financial services provided by a depositary

4.24 A new kind of financial service is also created for acting as a depositary of a CCIV (see Chapter 4 of the Tranche 1 Explanatory Materials for more information on the depositary of a CCIV). *[Schedule 1, item 1, paragraph 1250C(1)(b)]*

When ASIC may suspend or cancel the AFSL of a corporate director or depositary

4.25 The Act requires that a person who provides a ‘financial service’ hold an AFSL that authorises the provision of that financial service (see section 911A of the Act). ASIC has corresponding powers under section 915B to suspend or cancel a person’s AFSL in certain circumstances.

4.26 ASIC’s suspension and cancellation powers are extended so that ASIC may suspend or cancel a corporate director’s AFSL where a CCIV or the members of a CCIV have suffered, or are likely to suffer, loss or damage as a result of a breach of the Act by the corporate director or the CCIV. Similarly, ASIC may suspend or cancel a depositary’s AFSL where a CCIV or the members of the CCIV have suffered, or are likely to suffer, loss or damage as a result of a breach of the Act by the depositary. These suspension and modification powers are similar to those applying for responsible entities of registered schemes. *[Schedule 1, item 1, section 1250H]*

Liability framework for Chapter 7 of the Act

4.27 Chapter 5 of these explanatory materials sets out the liability framework for CCIVs. Broadly, the framework provides that the corporate director of a CCIV is responsible for any contravention of the law by the CCIV, and is taken to have committed any offence or contravened the civil penalty provision instead of the CCIV.

4.28 Part 2.5 of the Criminal Code does not apply to Chapter 7, so Part 8B.17 provides bespoke modifications to Chapter 7 to accommodate this. In this way, section 1250F in Part 8B.17 operates in conjunction with Part 8B.19 to establish when a CCIV is taken to engage in conduct, or have a certain state of mind, and subsequently assigns liability to the corporate director if appropriate. *[Schedule 1, item 1, subsections 1250F(1)-(2)]*

4.29 Section 769B of the Act provides an alternative framework to Part 2.5 of the Criminal Code for determining when a person is responsible for the conduct of their agents, employees and other persons. Part 8B.17 disapplies those parts of section 769B that would otherwise apply to bodies corporate and includes alternative provisions for CCIVs. Tailored provisions are required for the CCIV regime as a CCIV does not have employees and its only director is a corporate director, rather than a natural person director. *[Schedule 1, item 1, subsections 1250F(1)-(2)]*

4.30 The following paragraphs describe how and when conduct is taken to also have been engaged in by a CCIV.

Conduct engaged in by an agent of the CCIV

4.31 Conduct undertaken by an agent of the CCIV is taken to also have been engaged in by the CCIV where the agent was acting within the scope of the agent's actual or apparent authority in relation to the CCIV. *[Schedule 1, item 1, paragraph 1250F(3)(a)]*

4.32 Conduct undertaken by a person in relation to an agent of the CCIV is also taken to have been undertaken in relation to the CCIV in the same circumstances as described above (for example, money given to an agent of the CCIV is also taken to have been given to the CCIV). *[Schedule 1, item 1, paragraph 1250F(4)(a)]*

Conduct engaged in by the corporate director of the CCIV

4.33 Conduct undertaken by the corporate director of the CCIV is taken to also have been engaged in by the CCIV where the corporate director is acting within the scope of their actual or apparent authority in relation to the CCIV. *[Schedule 1, item 1, paragraph 1250F(3)(a)]*

4.34 Conduct undertaken in relation to the corporate director of the CCIV is also taken to have been undertaken in relation to the CCIV in the same circumstances as described above. *[Schedule 1, item 1, paragraph 1250F(4)(a)]*

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

4.35 The actions of an employee of the corporate director of a CCIV are taken to also have been actions of the CCIV where the employee is acting within the actual or apparent scope of their employment, and within

the actual apparent authority of the corporate director in relation to the CCIV. *[Schedule 1, item 1, paragraph 1250F(3)(b)]*

4.36 Conduct undertaken by an agent or director of the corporate director is taken to also have been undertaken by the CCIV where the action is within the director or agent's actual or apparent authority in relation to the corporate director, and within the scope of the actual or apparent authority of the corporate director in relation to the CCIV. *[Schedule 1, item 1, paragraph 1250F(3)(b)]*

4.37 Conduct undertaken in relation to an employee, director or agent of the corporate director of a CCIV is also taken to have been undertaken in relation to the CCIV in the same circumstances as described above. *[Schedule 1, item 1, paragraph 1250F(4)(b)]*

Conduct engaged in by any other person

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

4.38 Conduct engaged in by another person is also taken to be undertaken by a CCIV when the conduct is undertaken at the direction of, or with the implied or explicit consent or agreement of, an agent of the CCIV, or the corporate director of the CCIV. However, the consent or agreement must be given within the scope of the actual or apparent authority of the agent or corporate director of the CCIV. *[Schedule 1, item 1, paragraph 1250F(3)(c)]*

4.39 Conduct undertaken in relation to another person with the consent or at the direction of an agent of the CCIV, or of the corporate director of the CCIV, is taken to have been undertaken in relation to the CCIV in the same circumstances as described above. *[Schedule 1, item 1, paragraph 1250F(4)(c)]*

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

4.40 Conduct engaged in by a person with the consent or agreement of an employee, director or agent of the corporate director of the CCIV is also taken to be undertaken by the CCIV where:

- the direction or consent is given within the actual or apparent scope of the employee's employment, or the director or agent's actual or apparent authority in relation to the corporate director; and
- the direction or consent is also given within the scope of the actual or apparent authority of the corporate director in relation to the CCIV.

[Schedule 1, item 1, paragraph 1250F(3)(d)]

4.41 Conduct undertaken in relation to a person with the consent or at the direction of an employee, director or agent of the corporate director of the CCIV is also taken to have been undertaken in relation to the CCIV in the same circumstances as described above. *[Schedule 1, item 1, paragraph 1250F(4)(d)]*

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

4.42 Modifications to section 769B apply to assign a certain state of mind to a CCIV where a proceeding under Chapter 7 requires establishing the state of mind of a CCIV in relation to conduct undertaken by the CCIV. These modifications provide that the CCIV's state of mind may be established by showing that one or more of the following people (who undertook the conduct) had that state of mind:

- an agent of the CCIV engaging in the conduct within the scope of their actual or apparent authority in relation to the CCIV;
- a director or agent of the corporate director of the CCIV engaging in the conduct within their actual or apparent authority and within the actual or apparent authority of the corporate director in relation to the CCIV; or
- an employee of the corporate director of the CCIV acting within the scope of their employment and within the scope of the actual or apparent authority of the corporate director in relation to the CCIV.

[Schedule 1, item 1, subsection 1250F(5)]

4.43 For the purposes of establishing the state of mind of the CCIV, a person who is acting under the direction of an agent of the CCIV or the corporate director of the CCIV is taken to be an agent of the CCIV. A person acting under the direction of an employee, agent or director of the corporate director is taken to be an agent of the corporate director of the CCIV. *[Schedule 1, item 1, section 1250F(6)]*

Disclosure requirements for CCIVs and corporate directors

4.44 Part 7.9 of the Act deals with the disclosure requirements for financial products. This part generally does not apply to securities, such as shares or debentures. However Part 7.9 does apply to interests in a registered scheme. To provide consistency with the disclosure requirements for registered schemes, the PDS regime in Part 7.9 applies to all securities in a CCIV, and in relation to the issue of all securities in a CCIV. *[Schedule 1, item 1, section 1250P]*

4.45 The disclosure requirements for securities in Chapter 6D do not apply to securities in a CCIV.⁶

Product Disclosure Statements

4.46 The CCIV, rather than the corporate director, is generally responsible for providing a PDS in relation to securities of the CCIV.

4.47 As the issuer of securities in the CCIV, the CCIV itself is a ‘regulated person’ (within the meaning of section 1011B of the Act). In addition, the CCIV is the ‘regulated person’ in place of its corporate director where the corporate director is the seller of a security in the CCIV and would otherwise be a ‘regulated person’ by virtue of the definitions in Division 2 of Part 7.9. *[Schedule 1, item 1, section 1250PJ]*

4.48 A corporate director of a CCIV continues to be a ‘regulated person’ for any other reason or in any other circumstance, other than where it is the seller of a security in a CCIV. *[Schedule 1, item 1, note 1 to subsection 1250P(3)]*

4.49 A PDS for a CCIV is subject to the same content requirements that ordinarily apply to PDSs for other financial products (see section 1013D of the Act). This includes the specific requirements applying to financial products that have an investment component (see paragraph 1013D(1)(l) of the Act and, where a security in a CCIV is an ED security, the same requirements applying to interests in registered schemes that are ED securities. *[Schedule 1, item 1, section 1250S]*

Financial products ‘of the same kind’

4.50 Sections 1012C and 1012D of the Act apply in certain circumstances to financial products, or financial products ‘of the same kind’ (for example, section 1012D provides exemptions to the PDS requirements for certain clients who already hold financial products ‘of the same kind’ as those being newly acquired). Given the unique structure of CCIVs, which may be made up of multiple sub-funds, a security in a CCIV is only ‘of the same kind’ as another security in the CCIV if it is referable to the same sub-fund and issued on the same terms and conditions as the first security. This ensures that a security in a CCIV cannot be ‘of the same kind’ as another security in the CCIV that is referable to a different sub-fund. *[Schedule 1, item 1, section 1250Q]*

When a PDS is not required

4.51 The Act sets out a number of circumstances where a PDS is not required. These provisions are modified as appropriate to also apply to CCIVs.

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⁶ The provisions disapplying the disclosure requirements for securities in Chapter 6D are still under development.

4.52 A PDS is not required in a recommendation, issue or sale situation where there is no consideration for the issue or sale of the security in a CCIV. This replicates the equivalent provision that applies for ‘managed investment products’, which includes interests in a registered scheme. *[Schedule 1, item 1, subsection 1250R(1)]*

4.53 A PDS is also not required where the client being issued or sold the security is ‘associated’ with the CCIV. A person is associated with a CCIV where they have a close relationship with the CCIV or its corporate director. This includes where they are the corporate director of the CCIV, a director, secretary, or senior manager of the corporate director, or a close relative of a director or senior manager of the corporate director. *[Schedule 1, item 1, subsections 1250R(2)-(3)]*

4.54 Section 1012DAA of the Act sets out when a PDS is not required for a rights issue. These provisions include the ability for ASIC to remove a regulated person from the exemption if it is satisfied that the person has breached specified sections of the Act. This section is modified to apply to CCIVs in the same way as it applies to registered schemes. *[Schedule 1, item 1, subsections 1250R(4)-(5)]*

4.55 A PDS is not required to be issued in relation to personal offers where the offer is made in accordance with section 1012E of the Act, which sets out when an offer is a small scale offering. This provision is extended to cover small scale offers of securities in a CCIV. *[Schedule 1, item 1, subsection 1250R(6)]*

Replacement PDSs for stapled securities

4.56 Subdivision DA of Division 2 of Part 7.9 allows a replacement PDS to be issued in certain circumstances where an interest in a managed investment scheme is offered as part of a ‘stapled security’ (that is, where the interest in the managed investment scheme is only able to be acquired or disposed of with a security). This subdivision is modified to also extend to CCIVs that are part of a stapled security arrangement. *[Schedule 1, item 1, section 1250T]*

When a PDS must be lodged with ASIC

4.57 In certain circumstances a PDS must be lodged with ASIC. This includes where an interest in a registered scheme is traded on a financial market or the PDS implies that it will be able to be traded on a financial market, or when a financial product is of a kind specified in regulations (see section 1015B). This provision is modified to also require the PDS for a security in a CCIV to be lodged with ASIC in the same circumstances. *[Schedule 1, item 1, section 1250U]*

Application forms

4.58 Section 1016A of the Act provides that the issuer or seller of a financial product may be prohibited from issuing or selling a financial

product to a retail client except following an eligible application from the recipient of the financial product. This provision is modified to ensure that it applies to the issue or sale of a security in a CCIV. *[Schedule 1, item 1, section 1250V]*

Ongoing disclosure and periodic statements for securities in a CCIV

4.59 Where a security in a CCIV is an ED security,⁷ the continuous disclosure provisions in Chapter 6CA will apply. These securities are not subject to the ongoing disclosure requirements in section 1017B. This provides the same treatment for securities in a CCIV that are ED securities as interests in a registered scheme that are ED securities. *[Schedule 1, item 1, subsection 1250W(1)]*

4.60 However, the issuer of securities in a CCIV must provide a periodic statement to holders of CCIV securities, as securities in a CCIV are considered financial products that have an investment component under section 1017D. *[Schedule 1, item 1, subsection 1250W(2)]*

Financial Services Guides

4.61 Under Part 7.7, an AFSL holder is generally required to provide a Financial Services Guide when they provide financial services to a retail client. However, a corporate director is not required to provide a Financial Services Guide when the financial service they are providing to the client consists only of operating the business and conducting the affairs of the CCIV. This mirrors the requirements for responsible entities of registered schemes. As a CCIV is not required to hold an AFSL, it is also not required to provide a Financial Services Guide to clients. *[Schedule 1, item 1, section 1250L]*

Consumer protections

Cooling-off periods

4.62 Retail clients who are issued or sold a security in a CCIV have the same statutory cooling-off rights under Division 5 of Part 7.9 as those that attach to interests in a registered scheme. This provides an important consumer protection for retail clients and ensures parity of treatment between registered schemes and CCIVs. *[Schedule 1, item 1, section 1250X]*

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⁷ Existing sections 111AE, 111AF, 111AFA, 111AG and 111AI set out when a security is an ED security. 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.

Unsolicited offers to purchase securities in a CCIV

4.63 Division 5A of Part 7.9, which applies to unsolicited offers to purchase financial products that are not made on a licensed market, also applies to offers to purchase securities in a CCIV. However, section 1019D (which determines the offers to which Division 5A applies) is modified so that Division 5A does not apply where an unsolicited offer to purchase securities is made to the corporate director of the CCIV. This is appropriate as Division 5A also does not apply when the offer to purchase securities is made to the CCIV (as issuer of the securities). *[Schedule 1, item 1, section 1250Y]*

Agreements with unlicensed corporate directors and their CCIVs

4.64 Division 11 of Part 7.6 deals with agreements with a person who does not hold an AFSL, but who is required to hold an AFSL (a ‘non-licensee’). Division 11 allows a person who enters into a contract with a non-licensee to rescind the contract in certain circumstances.

4.65 The Tranche 2 Exposure Bill modifications extend Division 11 so that it also applies where a person enters into an agreement with a CCIV that has a non-licensee corporate director. This modification accounts for the unique structure of a CCIV and its corporate director. In this way, a person who enters into a contract with a CCIV will have the same protections as a person who enters into an agreement with a non-licensee responsible entity. *[Schedule 1, item 1, section 1250K]*

Prohibition on hawking securities in a CCIV

4.66 The Act includes separate prohibitions on hawking for financial products, for managed investment products and securities (sections 992A(1), 992AA(1) and 736(1), respectively). The Tranche 2 Exposure Bill modifies the operation of these provisions so that only the section 992AA(1) prohibition of hawking managed investment products applies to securities in a CCIV. The exemptions to offers that are not made to retail clients, and offers made by an AFSL holder through which a client has acquired or disposed of an interest in a managed investment scheme are also replicated for securities in a CCIV. This modification ensures that the most relevant prohibition on hawking applies to securities in a CCIV. *[Schedule 1, item 1, section 1250N]*

Insider trading

4.67 The prohibition on insider trading in section 1043A of the Act applies to CCIVs and their corporate directors without modification, subject to the provisions that set out how and when a CCIV is taken to engage in conduct and have a certain state of mind.

4.68 A member of a CCIV who redeems their CCIV securities is not subject to the insider trading provisions. This mirrors the existing exception for a member of a registered scheme, and ensures that the insider trading provisions do not limit a member's ability to redeem their securities. *[Schedule 1, item 1, subsection 1250Z(1)]*

4.69 The exceptions to the prohibition on insider trading that apply in relation to a body corporate's knowledge of its own actions, or the knowledge of its actions by officers, directors and employees of the body corporate, are extended to also apply in relation to the knowledge of a CCIV's actions by the corporate director, or the officers, directors and employees of the corporate director. This is consistent with the approach for body corporates more generally, while ensuring that the provisions apply appropriately given that a CCIV is a separate legal entity to its corporate director, but is a passive investment vehicle without employees. *[Schedule 1, item 1, subsections 1250Z(2)-(3)]*

Miscellaneous and clarifying provisions

4.70 For the avoidance of doubt, and to bring CCIVs in line with registered schemes, a number of miscellaneous provisions in Chapter 7 are modified to clarify how the law applies to CCIVs.

4.71 Where a CCIV issues or redeems redeemable shares or redeemable preference shares, this facility does not constitute the financial service of 'making a market'. The issuers of interests in registered schemes and of certain other financial products are similarly excluded from this definition to ensure that a mere redemption facility is not considered a market and subject to additional regulation. *[Schedule 1, item 1, section 1250D]*

4.72 The Tranche 2 Exposure Bill clarifies that a CCIV, a corporate director or an entity that is a depository of a CCIV under Chapter 8B is not providing a custodial or depository service within the meaning of section 766E of the Act. This ensures that these entities are not subject to the regulation that applies to an entity that provides a custodial or depository service. *[Schedule 1, item 1, section 1250E]*

4.73 Section 923A also applies to prohibit a CCIV from using a restricted word or expression in relation to a financial service or financial services business. This confirms that the existing restrictions apply to CCIVs as well as to corporate directors and other companies. *[Schedule 1, item 1, section 1250J]*

4.74 The definition of 'financial services law' is directly amended (rather than modified) to also include Chapter 8B (the CCIVs chapter). This ensures that a breach of Chapter 8B will constitute a breach of the financial services laws. *[Schedule 2, item 1, section 761A definition of financial services law]*

Chapter 5

Corporate contraventions by CCIVs

Outline of chapter

5.1 Part 8B.19 establishes the liability framework for CCIVs, including the liability of the corporate director of the CCIV for contraventions of the law by the CCIV. It also supplements the principles for establishing a contravention of the law for the particular circumstances of a CCIV. Most of this does not apply to Chapter 7 (see paragraphs 4.27 to 4.29 of these explanatory materials for an overview of the liability framework for Chapter 7).

Context of amendments

5.2 A CCIV has corporate responsibility for contraventions of its legal obligations, in the same way that other companies do. However, unlike other companies, generally a CCIV's only officer is another company, its corporate director.⁸ Further, a CCIV does not have any employees.

5.3 The corporate director of a CCIV has overarching responsibility for the CCIV's operations. The corporate director is under an obligation to operate the business and conduct the affairs of the CCIV. The corporate director must also perform the functions conferred on it by the CCIV's constitution and the Act, as well as ensure the CCIV itself complies with its constitution and the Act (see paragraphs 5.53 to 5.68 of the Tranche 1 Explanatory Materials for more information on the powers and obligations of the corporate director).

5.4 The responsibilities of the corporate director are designed to be similar to those of the responsible entity of a registered scheme. The responsible entity (or trustee) of a scheme is directly responsible for any contravention of the law in relation to the scheme (given that the scheme is a trust).

5.5 Part 8B.17 establishes the liability framework for provisions of Chapter 7, and proceedings under Chapter 7. See paragraphs 4.27 to 4.43 of these explanatory materials for information on the liability framework that applies in Chapter 7.

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⁸ The primary exception to this is any liquidator, administrator or receiver appointed to the CCIV.

Summary of new law

5.6 Subdivisions A and B of Division 1 of Part 8B.19 augment the principles in the Criminal Code for establishing the commission of an offence against a Commonwealth law by a CCIV. These rules apply to all Commonwealth laws (including Commonwealth laws to which the Criminal Code does not apply, other than Chapter 7 of the Act as noted above).

5.7 Subdivisions A and B of Division 2 set out further principles for establishing the commission of a civil penalty by a CCIV. Again, these rules do not apply to Chapter 7 of the Act.

5.8 The new law also re-routes Commonwealth offences committed by the CCIV from the CCIV to the corporate director. Accordingly, if the CCIV contravenes the law, the corporate director is liable for the offence or any penalty. This applies to both criminal contraventions by the CCIV (Subdivision C of Division 1) and breaches of civil penalty provisions by the CCIV (Subdivision C of Division 2).

5.9 Rules dealing with the consequences of a CCIV's contravention of other laws (including State or Territory laws) are also under development. The intention is to establish a requirement for the corporate director to indemnify the CCIV from any loss or damage it sustains as a result of the CCIV's contravention of the law.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
<i>Establishing offences by a CCIV</i> When proving the physical element of an offence (that is not in Chapter 7 of the Act), the acts or omissions of the corporate director's employees, agents and officers are attributed to the CCIV.	No equivalent.
When proving the fault element of an offence (that is not in Chapter 7 of the Act), other than negligence, the corporate director's authorisation or permission of the offence is attributed to the CCIV.	No equivalent.
When proving the fault element of an offence that is negligence (that is not in Chapter 7 of the Act), the negligence of an employee, agent or officer of the corporate director is attributed to the	No equivalent.

<i>New law</i>	<i>Current law</i>
CCIV.	
<i>Establishing a contravention of a civil penalty provision by a CCIV</i> An element of a civil penalty provision outside Chapter 7 must be attributed to a CCIV if it is done by: • an agent or officer of a CCIV, acting within his or her actual or apparent authority in relation to the CCIV; or • an employee, agent or officer of the corporate director of a CCIV, acting within the actual or apparent scope of their employment or authority in relation to the corporate director, and in turn, within the corporate director's scope of its actual or apparent authority in relation to the CCIV.	No equivalent.
<i>Re-routing offences and contraventions of civil penalty provisions committed by the CCIV to the corporate director</i> The corporate director of a CCIV is responsible for a contravention of Commonwealth law by the CCIV. If a CCIV contravenes Commonwealth law, the corporate director is taken to have committed the offence or contravened the civil penalty provision instead of the CCIV.	No equivalent.
<i>Indemnity</i> The corporate director of a CCIV will be required to indemnify the CCIV for any loss or damage the CCIV sustains as a result of the CCIV's contravention of the law. These provisions are under development.	No equivalent.

Detailed explanation of new law

Establishing an offence or a civil contravention by a CCIV

5.10 Part 8B.19 provides an alternative pathway for establishing corporate criminal responsibility and civil contraventions by the CCIV. This is designed to address the unique circumstance of a CCIV. Unlike other companies, a CCIV's sole director is a body corporate and it has no employees (see paragraphs 5.50 to 5.52 of the Tranche 1 Explanatory Materials). Other pathways for establishing corporate criminal responsibility, such as the Criminal Code, continue to apply to CCIVs.

Criminal offences committed by the CCIV

5.11 The new principles for establishing the commission of an offence by a CCIV apply to all offences under Commonwealth law, including offences under laws to which Part 2.5 of the Criminal Code does not apply. The only exception to this is Chapter 7 of the Act. The specific principles that apply in Chapter 7 are discussed in paragraphs 4.27 to 4.43 of these explanatory materials. *[Schedule 1, item 1, subsection 1267A(1)]*

5.12 The provisions for establishing the commission of a criminal offence by a CCIV are largely modelled on Part 2.5 of the Criminal Code. These provisions augment the Criminal Code, and other Commonwealth laws establishing principles of corporate criminal responsibility, by ensuring that:

- when proving the physical element of an offence, the acts or omissions of the corporate director's employees, agents and officers are attributed to the CCIV; and
- when proving the fault element of an offence other than negligence, the corporate director's authorisation or permission of the offence is attributed to the CCIV; and
- when proving the fault element of an offence that is negligence, the negligence of an employee, agent or officer of the corporate director is attributed to the CCIV.

[Schedule 1, item 1, sections 1267D, 1267E and 1267F]

5.13 These provisions ensure that the physical elements of an offence and the fault element of negligence are attributed directly to the CCIV, without first attributing to the corporate director. Similarly, when proving other fault elements, it is only necessary to enquire whether the corporate director (rather than the CCIV) authorised or permitted the offence.

5.14 The corporate director of a CCIV may be the corporate director of more than one CCIV. Accordingly, in order to attribute to the CCIV a physical element or a fault element that relies on the acts, omissions, state

of mind or negligence of the corporate director's officers, employees or agents, that person must be acting both:

- within the actual or apparent scope of their employment, or authority, in relation to the corporate director; and
- within the scope of the actual or apparent authority of the corporate director in relation to the CCIV.

[Schedule 1, item 1, sections 1267D, 1267E and 1267F]

5.15 For strict liability offences, the defence of mistake of fact can be relied on by a CCIV if:

- the person carrying out the conduct had a mistaken but reasonable belief about facts that would have meant that the conduct would not have been an offence; and
- the corporate director proves that it exercised due diligence to prevent the conduct.

[Schedule 1, item 1, section 1267G]

5.16 The elements for mistake of fact are closely modelled on section 12.5 of the Criminal Code but they recognise that the conduct may be engaged in by:

- an agent or officer of the CCIV; or
- an employee, officer or agent of the corporate director of the CCIV.

5.17 The terms **conduct** and **engage in conduct** in Part 8B.19 have the same meaning as in the Criminal Code. Subsection 4.1(2) of the Criminal Code provides that 'conduct' means an act, omission or state of affairs and 'engage in conduct' means to do an act or omit to perform an act. *[Schedule 1, item 1, section 1267]*

Application of the Criminal Code to CCIVs

5.18 Most provisions in the Criminal Code continue to apply to CCIVs. One exception is section 12.5 of the Criminal Code (relating to mistake of fact). This section is disappplied and replaced with a bespoke provision which recognises that the physical element of the offence may be carried out by the CCIV's agent or officer, or the corporate director's agent, officer or employee (as noted above). *[Schedule 1, item 1, subsection 1267G(1)]*

5.19 In addition, for offences of absolute or strict liability, a CCIV is not entitled to rely on section 10.1 of the Criminal Code (regarding intervening conduct or events) if a physical element of the offence was brought about by another person who is an employee, agent or officer of the corporate director of the CCIV. *[Schedule 1, item 1, section 1267H]*

5.20 The new law makes it clear that nothing in Part 8B.19 impliedly limits the operation of the Criminal Code in relation to CCIVs or bodies corporate other than CCIVs (such as a corporate director), or any other provision of Commonwealth law that treats a body corporate as having engaged in conduct, or having a state of mind, that was actually the conduct or state of mind of another person. *[Schedule 1, item 1, subsections 1267A(2) and (3)]*

5.21 Some provisions in the Criminal Code may need to be applied with such other modifications as are made necessary by the fact that criminal liability is being imposed on a CCIV. This supplements the general principle in section 12.1 of the Criminal Code which provides for necessary modifications to be made in the context of bodies corporate generally. The new law recognises that some modifications may be needed for CCIVs but not for other bodies corporate. *[Schedule 1, item 1, section 1267B]*

5.22 As it is only Part 2.5 of the Criminal Code that does not apply to Chapter 7 of the Act, modifications to other provisions in the Criminal Code also apply in relation to offences in that Chapter.

Civil penalty provisions contravened by a CCIV

5.23 The new law supplements the principles for establishing corporate contravention of a civil penalty provision (in statute and at common law). It applies to a contravention of a civil penalty provision under all Commonwealth laws. The only exception to this is Chapter 7 of the Act (discussed in paragraphs 4.27 to 4.43 of these explanatory materials).

5.24 For the purposes of Division 2 of Part 8B.19, a ‘civil penalty provision’ is defined broadly to capture any provision that, if contravened, may attract a civil penalty. *[Schedule 1, item 1, section 1267K]*

5.25 An element of a civil penalty provision (other than a civil penalty provision in Chapter 7 of the Act) must be attributed to a CCIV if it is done by:

- an agent or officer of a CCIV, acting within his or her actual or apparent authority in relation to the CCIV; or
- an employee, agent or officer of the corporate director of a CCIV, acting within the actual or apparent scope of their employment or authority in relation to the corporate director, and in turn, within the corporate director’s scope of its actual or apparent authority in relation to the CCIV.

[Schedule 1, item 1, sections 1267L and 1267M]

5.26 These provisions are modelled on the terms of section 97 of the *Regulatory Powers (Standard Provisions) Act 2014*. The provision

relating to the CCIV's agents and officers is a CCIV-specific equivalent of section 97. The provision relating to the corporate director's agents, officers and employees departs from section 97 in two respects:

- the elements of the civil penalty provision are attributed directly to the CCIV rather than to the corporate director; and
- the person must be acting within the scope of both their authority in relation to the corporate director and the authority of the corporate director in relation to the CCIV (see paragraph 5.14 of these explanatory materials for why this departure is required).

Re-routing the consequences of a CCIV's contravention of Commonwealth law

5.27 If a contravention of a Commonwealth law by the CCIV is established, the offence or penalty is re-routed from the CCIV to the corporate director. This means that the corporate director of a CCIV is responsible for any contravention of a law of the Commonwealth by the CCIV (including a provision of Chapter 7 of the Act): the corporate director is taken to have committed the offence or breached the civil penalty provision (instead of the CCIV). *[Schedule 1, item 1, sections 1267J and 1267N]*

5.28 Similar to other companies, a CCIV has corporate criminal responsibility for any offence it commits under the law. However, unlike other companies, a CCIV has no officers or employees other than its corporate director (with some limited exceptions, such as a liquidator). If a CCIV contravenes its obligations under the law, it is because its corporate director or its agent has caused it to do so.

5.29 In addition, the corporate director has overarching responsibility for the CCIV's operations. The corporate director is under an obligation to operate the business and conduct the affairs of the CCIV. It is also under an obligation to ensure the CCIV complies with its constitution and the Act (see paragraphs 5.53 to 5.59 of the Tranche 1 Explanatory Materials).

5.30 Without the amendments contained in the Tranche 2 Exposure Bill, a CCIV would have sole and direct responsibility for any contravention of its obligations under the law and would be required to pay any fine or penalty out of the assets of the sub-fund (or sub-funds) of the CCIV, thereby reducing the pool of assets available to members. This is inconsistent with the position for registered schemes, where the responsible entity (or trustee) for the scheme is the only legal person, with responsibility for all of the obligations in relation to the scheme and, accordingly, responsibility for any contravention of these obligations.

5.31 The re-routing of offences or penalties from the CCIV to the corporate director only occurs after the offence or the contravention of the

law by the CCIV is established. In other words, there are two distinct steps:

1. establish the commission of the offence or the contravention of the civil penalty provision by the CCIV; and
2. if the law is a Commonwealth law, re-route the offence or penalty to the corporate director.

5.32 This means that the re-routing is disregarded for the purposes of determining whether an offence by the CCIV is established. [*Schedule 1, item 1, section 1267C*]

Consequences of contraventions of other laws by the CCIV

5.33 The new law will also establish rules relating to the consequences of a contravention of other laws (including State or Territory law).

5.34 The corporate director of a CCIV will be required to indemnify the CCIV from any loss or damage it sustains as a result of the CCIV's contravention of the law.

5.35 Provisions giving effect to this requirement are under development.

Contraventions of the law by the corporate director

5.36 Some obligations in the law are imposed on the corporate director, rather than the CCIV. For example, the corporate director owes obligations under Chapter 2D and Part 8B.3 and breaches of these obligations are civil and/or criminal offences by the corporate director.

5.37 Nothing in the new law alters the process for establishing contraventions of the law by the corporate director. In particular, Part 2.5 of the Criminal Code continues to apply in the usual way and the consequences of the contravention are borne by the corporate director.

5.38 Similarly, the usual processes and principles apply when establishing a contravention of a civil penalty provision by the corporate director.

APPENDIX: Penalties for a contravention of a provision of Chapter 8B

Provision	Reference	Penalty
Constitution of a CCIV	1232B(5)	Strict liability offence with a fine of 5 penalty units.
Contents of the constitution	1232G(1)	Strict liability offence with a fine of 5 penalty units.
	1232G(3)	Strict liability offence with a fine of 5 penalty units.
Redemption of redeemable shares to be provided for in constitution	1232J(2)	Strict liability offence with a fine of 5 penalty units.
Segregated operation of business of sub-funds	1233A	Strict liability offence with a fine of 50 penalty units. Ordinary offence with a fine of 200 penalty units, 2 years imprisonment, or both.
Assets of sub-funds to be clearly identified	1233G(1)	Strict liability offence with a fine of 5 penalty units. Civil penalty (corporations/scheme civil penalty provision).
	1233G(2)	Strict liability offence with a fine of 5 penalty units. Civil penalty (corporations/scheme civil penalty provision).
Segregated holding of assets of sub-funds	1233H(1)	Strict liability offence with a fine of 5 penalty units. Civil penalty (corporations/scheme civil penalty provision).
	1233H(2)(a)	Strict liability offence with a fine of 5 penalty units. Civil penalty (corporations/scheme civil penalty provision).

Provision	Reference	Penalty
	1233H(3)	Strict liability offence with a fine of 5 penalty units. Civil penalty (corporations/scheme civil penalty provision).
	1233H(4)	Strict liability offence with a fine of 5 penalty units. Civil penalty (corporations/scheme civil penalty provision).
Dealing with assets that are not automatically allocated to one sub-fund of the CCIV	1233K(5)	Offence with a fine of 100 penalty units, 2 years imprisonment, or both.
	1233K(7)	Offence with a fine of 100 penalty units, 2 years imprisonment, or both.
Segregated application of assets of sub-funds	1233L(1)	Strict liability offence with a fine of 50 penalty units. Ordinary offence with a fine of 200 penalty units, imprisonment for 2 years, or both.
Segregation of liabilities of sub-funds	1233N(1)	Strict liability offence with a fine of 5 penalty units. Civil penalty (corporations/scheme civil penalty provision).
	1233N(2)	Strict liability offence with a fine of 5 penalty units. Civil penalty (corporations/scheme civil penalty provision).
Dealing with liabilities that do not relate solely to the business of one sub-fund	1233Q(6)	Offence with a fine of 100 penalty units, 2 years imprisonment, or both.
Documenting the allocation of assets and liabilities to sub-funds	1233R(1)	Strict liability offence with a fine of 60 penalty units. Ordinary offence with a fine of 200 penalty units, imprisonment for

Provision	Reference	Penalty
		2 years, or both.
Using sub-fund name and ARFN on documents	1233T(1)	Strict liability offence with a fine of 60 penalty units.
Sub-fund changing its name	1233V(2)	Strict liability offence with a fine of 5 penalty units.
ASIC's power to direct CCIV to change a sub-fund's name	1233W(2)	Strict liability offence with a fine of 60 penalty units.
CCIV must transfer assets to depositary	1234	Strict liability offence with a fine of 50 penalty units. Ordinary offence with a fine of 200 penalty units, 2 years imprisonment, or both.
When a depositary must hold the assets of a CCIV	1234A(1)	Strict liability offence with a fine of 5 penalty units.
Depositary compulsory for retail CCIVs, optional for wholesale CCIVs	1234B(1)	Offence with a fine of 200 penalty units, 5 years imprisonment, or both.
Who can be a depositary	1234C	Strict liability offence with a fine of 5 penalty units.
Notifying ASIC when a depositary is first appointed	1234E	Strict liability offence with a fine to 60 penalty units.
Corporate director to provide depositary with reasonable assistance	1234F(1)	Offence with a fine of 25 penalty units, 6 months imprisonment, or both.
	1234F(3)	Offence with a fine of 25 penalty units, 6 months imprisonment, or both.
Functions of depositary	1234G	Strict liability offence with a fine of 5 penalty units.
Assets to be held in segregated manner and on	1234J(1)	Strict liability offence with a fine of 60 penalty units.

Provision	Reference	Penalty
trust	1234J(2)	Strict liability offence with a fine of 60 penalty units.
Depository to deal on instructions	1234K	Offence with a penalty of 200 penalty units, imprisonment for 5 years, or both.
Depository to have supervisory responsibility	1234L(1)	Offence with a penalty of 200 penalty units, imprisonment for 5 years, or both.
Depository to provide corporate director with reasonable assistance	1234M(1)	Offence with a fine of 25 penalty units, 6 months imprisonment, or both.
	1234M(3)	Offence with a fine of 25 penalty units, 6 months imprisonment, or both.
Duties owed by depository	1234N	Civil penalty (corporations/scheme civil penalty provision).
Depository must report breaches to ASIC	1234P(2)	Offence with a fine of 50 penalty units, 1 year imprisonment, or both.
Changes only take effect when ASIC alters record of registration	1235(3)	Strict liability offence with a fine of 5 penalty units.
Initiating retirement or removal of depository	1235B(2)	Strict liability offence with a fine of 5 penalty units.
Corporate director to initiate appointment of permanent depository	1235H(1)	Strict liability offence with a fine of 5 penalty units.
	1235H(2)	Strict liability offence with a fine of 5 penalty units.
Former depository to hand over books and provide reasonable assistance	1235K	Strict liability offence with a fine of 5 penalty units.
Duties owed by officers of CCIV	1237C(1)	Civil penalty (corporations/scheme civil penalty provision).
	1237C(2)	Civil penalty (corporations/scheme civil penalty provision).

Provision	Reference	Penalty
Duties owed by officers of corporate director	1237D(1)	Civil penalty (corporations/scheme civil penalty provision). Offence with a fine of 2,000 penalty units, imprisonment for 5 years, or both.
Duties owed by employees of corporate director	1237E(1)	Civil penalty (corporations/scheme civil penalty provision). Offence with a fine of 2,000 penalty units, imprisonment for 5 years, or both.
Powers and obligations of corporate director	1237J(1)	Strict liability offence with a fine of 5 penalty units.
Director to be public company and hold Australian financial services licence	1238E(1)	Strict liability offence with a fine of 5 penalty units.
Additional protection for retail clients—requirement for external directors of corporate director	1238H(3)	Offence with a fine of 100 penalty units, imprisonment for 2 years, or both.
	1238H(4)	Offence with a fine of 100 penalty units, imprisonment for 2 years, or both.
Retirement of corporate director	1238M(3)(a)	Strict liability offence with a fine of 5 penalty units.
	1238M(5)	Offence with a fine of 100 penalty units, or imprisonment for 2 years, or both.
Removal of corporate director by members	1238N(2)(a)	Strict liability offence with a fine of 5 penalty units.
	1238N(3)	Offence with a fine of 100 penalty units, or imprisonment for 2 years, or both.
Appointment of temporary corporate director by Court	1238Q(3)	Strict liability offence with a fine of 5 penalty units.
Temporary corporate director to take steps for	1238R(4)	Strict liability offence with a fine of 5 penalty units.

Provision	Reference	Penalty
appointment of new corporate director	1238R(6)	Offence with a fine of 100 penalty units, or imprisonment for 2 years, or both.
Former corporate director to hand over books and provide reasonable assistance	1238S	Strict liability offence with a fine of 5 penalty units.
Restrictions on engagement etc. of persons by a CCIV	1239(1)	Offence with fine of 100 penalty units, imprisonment for 2 years, or both.
	1239(2)	Offence with fine of 100 penalty units, imprisonment for 2 years, or both.
Contents of the compliance plan	1241B	Strict liability offence with a fine of 5 penalty units.
Directors must sign lodged copy of compliance plan	1241D	Strict liability offence with a fine of 5 penalty units.
ASIC may require further information about compliance	1241E	Strict liability offence with a fine of 25 penalty units.
Changing the compliance plan	1241F(2)	Strict liability offence with a fine of 5 penalty units.
	1241F(3)	Strict liability offence with a fine of 5 penalty units.
ASIC may require consolidation of compliance plan to be lodged	1241G(1)	Strict liability offence with a fine of 5 penalty units.
Engaging auditor	1241H(1)	Strict liability offence with a fine of 5 penalty units.
Audit and audit report	1241J(1)	Strict liability offence with a fine of 5 penalty units.
	1241J(3)	Strict liability offence with a fine of 25 penalty units.
	1241J(4)	Strict liability offence with a fine of

Provision	Reference	Penalty
		5 penalty units.
Contraventions by auditor	1241K(1)	Offence with fine of 50 penalty units, 1 year imprisonment, or both.
	1241K(2)	Offence with fine of 50 penalty units, 1 year imprisonment, or both.
	1241K(3)	Offence with fine of 50 penalty units, 1 year imprisonment, or both.
Removal and resignation of auditors	1241L(1)(a)	Strict liability offence with a fine of 5 penalty units.
Action on change of auditor of compliance plan	1241M	Strict liability offence with a fine of 5 penalty units.
Copy of the register of members—sub-funds	1244D(4)	Strict liability offence with a fine of 5 penalty units.
Consequences of contravening section 1245E	1245F(2)	Civil penalty (corporations/scheme civil penalty provision).
	1245F(3)	Offence with a fine of 2,000 penalty units, imprisonment for 5 years, or both.
Additional requirements for redemption of redeemable shares	1245H(1)	Strict liability offence with a fine of 25 penalty units.
Circumstances in which a dividend may be paid	1245Q(2)	Offence with fine of 100 penalty units, imprisonment for 2 years, or both.
Half-yearly report to ASIC about shares in a CCIV	1245S(2)	Strict liability offence with a fine of 60 penalty units.
	1245S(3)	Strict liability offence with a fine of 60 penalty units.
Resolution for winding up of a CCIV in respect of a sub-fund	1249M(4)	Strict liability offence with a fine of 60 penalty units.