

EXPOSURE DRAFT

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Treasury Laws Amendment (Corporate Collective Investment Vehicle) Bill 2018: Exposure draft

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Schedule 1 Independence requirement for depositary

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Independence requirement for depositary **Schedule 1**

1 **Schedule 1—Independence requirement for**
2 **depositary**
3

4 *Corporations Act 2001*

5 **1 In the appropriate position in Chapter 8B**

6 Insert:

7 **1234D Independence requirement**

8 (1) A depositary meets the independence requirement in this section in
9 relation to the corporate director of a CCIV unless an entity
10 covered by subsection (2) fails:

- 11 (a) the structural independence test in section 1234DA in
12 relation to the corporate director; or
13 (b) the voting/control test in 1234DB in relation to the corporate
14 director; or
15 (c) the independent director test in section 1234DC in relation to
16 the corporate director.

17 *Entities that perform depositary functions*

18 (2) This subsection covers the following entities:

- 19 (a) the depositary;
20 (b) an agent appointed, or a person otherwise engaged, by the
21 depositary under section 1234H, or an agent or person taken
22 under subsection 1234H(2) (about sub-agents) to be an agent
23 of the depositary;
24 (c) if an entity covered by paragraph (a) or (b) is a body
25 corporate—a related body corporate of that body corporate.

26 Note: As a result of this section, an agent, sub-agent or person otherwise
27 engaged, and any related bodies corporate, must be independent from
28 the corporate director. If this is not the case, the depositary itself will
29 not meet the independence requirement set out in subsection (1).

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Schedule 1 Independence requirement for depositary

1 **1234DA Independence requirement—structural independence test**

2 (1) An entity fails the structural independence test in this section in
3 relation to the corporate director of a CCIV if the entity is also an
4 entity covered by subsection (2) in relation to the CCIV.

5 Note 1: This test means that an entity cannot perform depositary functions in
6 relation to the CCIV and also direct investment decisions for the
7 CCIV.

8 Note 2: If an entity that performs depositary functions is also engaged to
9 perform only functions not covered by paragraph (2)(b) in relation to
10 the CCIV, the entity must comply with any requirements in
11 regulations made for the purposes of section 1234QA in performing
12 those functions.

13 *Entities that direct investments decisions for the CCIV*

14 (2) Each of the following is covered by this subsection in relation to a
15 CCIV:

- 16 (a) the corporate director;
- 17 (b) an agent appointed, or a person otherwise engaged, by the
18 corporate director under section 1237K, or an agent or person
19 taken under subsection 1237K(2) (about sub-agents) to be an
20 agent of the corporate director, if the agent or person is
21 authorised to perform any of the following functions in
22 relation to the CCIV:
- 23 (i) portfolio management functions;
- 24 (ii) investment risk management functions;
- 25 (c) if an entity covered by paragraph (a) or (b) is a body
26 corporate—a related body corporate of that body corporate.

27 (3) An entity is not covered by paragraph (2)(b) merely because the
28 entity performs, or is authorised to perform, the following
29 functions:

- 30 (a) managing foreign currency;
- 31 (b) managing bank deposits.

32 **1234DB Independence requirement—voting/control test**

33 (1) An entity fails the voting/control test in this section in relation to
34 the corporate director of a CCIV if:

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Independence requirement for depositary **Schedule 1**

- 1 (a) the voting percentage worked out under subsection (2) in
2 relation to the entity exceeds 20%; or
3 (b) if it is not possible to work out a voting percentage under
4 subsection (2) because there are no votes that might be cast at
5 a general meeting of the entity—an entity covered by
6 subsection 1234DA(2) in relation to the CCIV (about entities
7 that direct investment decisions for the CCIV) controls the
8 entity.

- 9 (2) The voting percentage in relation to an entity is the amount worked
10 out using the following formula, expressed as a percentage:

11
$$\frac{\text{Votes held by entities that direct investment decisions for the CCIV}}{\text{Total votes}}$$

12 where:

13 ***total votes***, in relation to an entity, means the total number of votes
14 that might be cast at a general meeting of the entity.

15 ***votes held by entities that direct investment decisions for the***
16 ***CCIV***, in relation to an entity, means the sum of the number of
17 votes that each entity covered by subsection 1234DA(2) in relation
18 to the CCIV is in a position to cast, or control the casting of, at a
19 general meeting of the entity.

20 ***Matters to be disregarded***

- 21 (3) Section 48 applies for the purposes of determining whether an
22 entity fails the voting/control test in the same way that section
23 applies for the purposes of determining whether a body corporate is
24 a subsidiary of another body corporate. For the purposes of that
25 application, treat:
26 (a) the entity as the “first body”; and
27 (b) each entity covered by subsection 1234DA(2) in relation to
28 the CCIV as an “other body”.

29 **1234DC Independence requirement—independent director test**

- 30 (1) An entity fails the independent director test in this section in
31 relation to the corporate director of a CCIV if:
-

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Schedule 1 Independence requirement for depositary

- 1 (a) the entity has fewer than 6 directors and there is no director
2 of the entity who is not also a director of an entity covered by
3 subsection 1234DA(2); or
4 (b) the entity has 6 or more directors and fewer than 2 of those
5 directors are not also a director of an entity covered by
6 subsection 1234DA(2).
- 7 (2) However, an entity that has no directors does not fail the
8 independent director test.

9 **1234QA Regulations may prescribe functional independence** 10 **requirements**

- 11 (1) The regulations may prescribe requirements to be complied with
12 by persons covered by subsection (2) in performing functions in
13 relation to a CCIV.
- 14 (2) A person is covered by this section if the person is both:
15 (a) an agent appointed, or a person otherwise engaged, by the
16 corporate director under section 1237K, or an agent or person
17 taken under subsection 1237K(2) (about sub-agents) to be an
18 agent of the corporate director; and
19 (b) any of the following:
20 (i) the depositary;
21 (ii) an agent appointed, or a person otherwise engaged, by
22 the depositary under section 1234H, or an agent or
23 person taken under subsection 1234H(2) (about
24 sub-agents) to be an agent of the depositary.
- 25 Note: The kinds of functions the person would be authorised to perform
26 would not include portfolio management functions or investment risk
27 management functions. Authorising the depositary or an agent of the
28 depositary to perform those kinds of functions would result in the
29 depositary failing to meet the independence requirement: see
30 section 1234DA.
- 31 (3) A person commits an offence of strict liability if the person fails to
32 comply with a requirement prescribed for the purposes of
33 subsection (1) that is applicable to the person.

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External administration **Schedule 2**
Main amendments **Part 1**

1 **Schedule 2—External administration**

2 **Part 1—Main amendments**

3 *Corporations Act 2001*

4 **1 In the appropriate position in Chapter 8B**

5 Insert:

6 **Part 8B.12—External administration**

7 **Division 1—Preliminary**

8 **12-000 Construing terms and expressions affected by substituted** 9 **references**

10 *Terms or expressions that have a particular meaning in relation to*
11 *a sub-fund*

12 (1) To avoid doubt, if:

- 13 (a) a term or expression has a particular meaning in this Act in
14 relation to a sub-fund of a CCIV; and
15 (b) the term or expression occurs in a provision, in relation to a
16 reference (including an implied reference) that is required by
17 this Part to be substituted with a reference to a sub-fund;

18 then the meaning the term or expression has in relation to the
19 sub-fund in the provision is the meaning referred to in
20 paragraph (a).

21 Note: Examples of terms or expressions that have a particular meaning in
22 relation to a sub-fund of a CCIV include the following:

- 23 (a) contributory (see section 9);
24 (b) creditor and secured creditor (see section 9);
25 (c) deregister (see Part 8B.13);
26 (d) extraordinary resolution (see section 9);
27 (e) member (see section 1233C);
28 (f) property (see subsection 51F(3));
29 (g) solvent and insolvent (see section 1246A);
30 (h) special resolution (see section 9).
-

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Schedule 2 External administration

Part 1 Main amendments

1 *Terms or expressions that do not have a particular meaning in*
2 *relation to a sub-fund*

3 (2) If:

4 (a) a term or expression has a particular meaning in this Act or in
5 a provision of this Act in relation to a company, corporation
6 or body corporate; and

7 (b) because of a reference (including an implied reference) that is
8 required by this Part to be substituted with a reference to a
9 sub-fund, it is necessary to determine the meaning of the
10 term or expression in relation to a sub-fund of a CCIV; and

11 (c) the term or expression does not have a particular meaning in
12 relation to a sub-fund of a CCIV;

13 then the meaning the term or expression has in relation to the
14 sub-fund is the meaning the term or expression would have in
15 relation to the CCIV if the CCIV had no other sub-funds.

16 Note: For example, the term *related entity* is defined in section 9 in relation
17 to a body corporate, and is not defined in relation to a sub-fund of a
18 CCIV. To determine whether a person is a related entity of a sub-fund:

19 (a) first, assume that the CCIV has no other sub-funds (this includes
20 disregarding any shares held by the CCIV that are assets of other
21 sub-funds of the CCIV); and

22 (b) then, apply the definition of *related entity* in section 9 to the
23 CCIV based on that assumption.

24 As a result, a member of the CCIV (paragraph (d) of the definition of
25 *related entity*) will only be a related entity of a sub-fund of the CCIV
26 if the person is a member of the sub-fund.

27 **Division 2—Arrangements and reconstructions of** 28 **sub-funds**

29 **12-005 Object of this Division**

30 The object of this Division is to provide for arrangements and
31 reconstructions of sub-funds of CCIVs to occur in the same way
32 that arrangements and reconstructions of Part 5.1 bodies occur.

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External administration **Schedule 2**
Main amendments **Part 1**

1 **12-010 Compromises etc. not to be made between 2 or more**
2 **sub-funds**

3 The Court may not approve a compromise or arrangement between
4 a CCIV and:

- 5 (a) the creditors of 2 or more sub-funds of a CCIV; or
6 (b) the members of 2 or more sub-funds of a CCIV.

7 Note: However, the Court may approve a further compromise or
8 arrangement between the CCIV and another sub-fund. If this is done
9 as part of a scheme for the amalgamation or reconstruction of a
10 sub-fund or sub-funds, the Court may make appropriate orders: see
11 section 12-025.

12 **12-015 Applying arrangements and reconstructions provisions to**
13 **sub-funds**

- 14 (1) If a compromise or arrangement is proposed between a CCIV and
15 the creditors of a sub-fund or any class of them, or between a
16 CCIV and the members of a sub-fund or any class of them, the
17 arrangements and reconstructions provisions referred to in
18 subsection (2) apply to the proposed compromise or arrangement
19 subject to:

- 20 (a) such modifications as are set out in this Division; and
21 (b) such other modifications as are made necessary by the fact
22 that the CCIV is proposing to enter into a compromise or
23 arrangement relating to only one sub-fund of the CCIV.

24 *Arrangements and reconstructions provisions*

- 25 (2) The provisions (the *arrangements and reconstructions provisions*)
26 are as follows:

- 27 (a) Part 5.1 (other than a provision excluded by subsection (3));
28 (b) the other provisions of this Act and the ASIC Act (other than
29 a provision excluded by subsection (3)) to the extent to which
30 they relate to the operation of the provisions referred to in
31 paragraphs (a) and (b).

- 32 (3) For the purposes of subsection (2), the provisions excluded from
33 the arrangements and reconstructions provisions are as follows:

- 34 (a) section 410;
35 (b) subsections 411(1A), (1B) and (1C);
-

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Schedule 2 External administration

Part 1 Main amendments

- 1 (c) paragraph 411(17)(a);
2 (d) a provision specified in regulations made for the purposes of
3 this paragraph.

4 *Translation rules*

- 5 (4) In the application of the arrangements and reconstructions
6 provisions, those provisions apply as if the substitutions set out in
7 the following table were made.
8

Substitutions to be made

Item	Column 1 If the provision ...	Column 2 substitute a reference to ...
1	refers to the Part 5.1 body (the <i>relevant body</i>) (whether the reference is express or implied, and (if the reference is express) whether the Part 5.1 body is referred to as a Part 5.1 body, a company, a body corporate, a corporation, or in some other way), and the reference is not covered by another item of this table	the sub-fund (but see subsections (5) and (6))
2	refers to the directors, or a director, of the relevant body	each of the following: (a) the corporate director; (b) a director of the corporate director
3	refers to an officer of the relevant body	(a) for a person covered by paragraph (a) or (b) of the definition of <i>officer</i> of a CCIV in section 9—a person covered by that paragraph in relation to the CCIV; or (b) for a person covered by any of paragraphs (c) to (e) of that definition—a person covered by that paragraph in relation to the sub-fund
4	refers to shares in the relevant body	shares referable to the sub-fund
5	refers to debentures of the relevant	debentures referable to the sub-fund

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External administration **Schedule 2**
Main amendments **Part 1**

Substitutions to be made

Item	Column 1 If the provision ...	Column 2 substitute a reference to ...
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body

1 Note: For item 2—for example, the draft explanatory statement provided for
2 in subsection 411(2) must state any material interests of the corporate
3 director and of the directors of the corporate director.

4 (5) Despite item 1 of the table in subsection (4), a reference covered
5 by column 1 of that item is taken to be a reference to the CCIV if
6 the context of the reference so requires (for example, because the
7 reference requires the legal capacity and powers of a company).

8 Note 1: For example, references to the Part 5.1 body, in the context of the
9 body as a party to a compromise or arrangement, are references to the
10 CCIV, because the CCIV is the legal person that is a party to, and that
11 is bound by, the compromise or arrangement.

12 Note 2: For example, references to the Part 5.1 body, in the context of
13 identifying a liquidator, is a reference to the sub-fund, because
14 winding up takes place at the sub-fund level.

15 (6) If a reference in a provision to the relevant body is, as a result of
16 subsection (5), taken to be a reference to the CCIV, the operation
17 of the provision in relation to the CCIV is confined, to the extent
18 possible, to the sub-fund.

19 **12-020 Persons not to be appointed to administer compromise or**
20 **arrangement**

21 Subsection 411(7) has effect in relation to a CCIV as if the persons
22 referred to in that subsection included the depositary of the CCIV.

23 **12-025 Provisions for facilitating reconstruction and amalgamation**
24 **of sub-funds within a CCIV**

25 (1) If:

26 (a) a compromise or arrangement is proposed for the purposes
27 of, or in connection with, a scheme for the reconstruction of a
28 sub-fund or sub-funds or the amalgamation of 2 or more
29 sub-funds; and

30 (b) under the scheme, the whole or any part of the undertaking or
31 of the property of a sub-fund concerned in the scheme (the

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Schedule 2 External administration

Part 1 Main amendments

1 *transferor sub-fund*) is to become a part of the undertaking
2 or of the property of another sub-fund of the same CCIV;
3 the Court may by order provide for any of the matters referred to in
4 subsection 413(1) as if the other sub-fund were the transferee
5 company referred to in that subsection.

6 (2) Nothing in this section limits the orders a Court may make under
7 section 413 if it approves a compromise or arrangement relating to
8 a sub-fund of a CCIV.

9 **12-030 Court may make order in relation to assets and liabilities of** 10 **sub-funds**

11 If a Court approves a compromise or arrangement between a CCIV
12 and the creditors of a sub-fund or any class of them, or between a
13 CCIV and the members of a sub-fund or any class of them, the
14 Court may also make any order it considers appropriate in relation
15 to the assets and liabilities of the sub-fund.

16 **Division 3—Receivers, and other controllers, of property of** 17 **sub-funds**

18 **Subdivision A—Preliminary**

19 **12-035 Object of this Division**

20 The object of this Division is to preserve the segregated application
21 of assets of sub-funds by requiring appointments of controllers to
22 be made separately for each sub-fund of the CCIV.

23 **12-040 Definitions**

24 In this Division:

25 *property*, in relation to a sub-fund of a CCIV, means property in
26 Australia or outside Australia.

27 *receiver*, in relation to property of a sub-fund of a CCIV, includes a
28 receiver and manager.

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External administration **Schedule 2**
Main amendments **Part 1**

1 **Subdivision B—Appointment of controllers**

2 **12-045 Appointment of a controller of property of a sub-fund of a**
3 **CCIV**

- 4 (1) An appointment covered by subsection (2):
5 (a) may not be made in relation to all the property of a CCIV;
6 and
7 (b) may be made only in relation to property of a CCIV that is
8 property of a particular sub-fund of the CCIV.
- 9 (2) The appointments covered by this subsection are appointments,
10 whether made under a power contained in an instrument, or by a
11 Court, of a person to act as a:
12 (a) receiver; or
13 (b) receiver and manager; or
14 (c) controller;
15 of property of the CCIV.

16 Note: A Court may appoint a receiver under section 233, 283HB, 1101B or
17 1323.

18 **12-050 Persons not to act as receivers**

- 19 (1) A person is not qualified to be appointed, and must not act, as
20 receiver of property of a sub-fund of a CCIV if the person:
21 (a) is a secured party in relation to any property (including PPSA
22 retention of title property) of the sub-fund; or
23 (b) is the corporate director of the CCIV; or
24 (c) is the depositary of the CCIV; or
25 (d) is an auditor of the CCIV or the sub-fund; or
26 (e) is a director, secretary, senior manager or employee of a body
27 corporate that is a secured party in relation to any property
28 (including PPSA retention of title property) of the sub-fund;
29 or
30 (f) is not a registered liquidator; or
31 (g) is a director, secretary, senior manager or employee of the
32 corporate director or of a body corporate related to the CCIV;
33 or
-

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Schedule 2 External administration

Part 1 Main amendments

- 1 (h) unless ASIC directs in writing that this paragraph does not
2 apply in relation to the person in relation to the CCIV—has
3 at any time within the last 12 months been:
- 4 (i) a corporate director or promoter of the CCIV; or
5 (ii) a director, secretary, senior manager, employee or
6 promoter of the corporate director or a related body
7 corporate of the CCIV.
- 8 (2) Paragraph (1)(f) does not apply in relation to a body corporate
9 authorised by or under a law of the Commonwealth, of a State or of
10 a Territory to act as receiver of property of the corporation
11 concerned.
- 12 (3) Section 418 does not apply to a CCIV.
- 13 (4) In this section:
14 *senior manager* does not include a receiver and manager.

15 **12-055 Notifying the depositary**

- 16 (1) A controller of property of a sub-fund of a CCIV that has a
17 depositary must, as soon as practicable, and in any event within 3
18 business days after the controller's appointment, notify the
19 depositary in writing of the controller's appointment.
- 20 (2) A person who ceases to be a controller of property of a sub-fund of
21 a CCIV that has a depositary must, within 7 business days after so
22 ceasing, notify the depositary in writing that the person has so
23 ceased.

24 **Subdivision C—Application of Part 5.2 to control of property** 25 **of sub-funds**

26 **12-060 Applying Part 5.2 etc. to sub-funds**

- 27 (1) The controller provisions referred to in subsection (2) apply to a
28 CCIV with:
29 (a) the modifications set out in this Division; and
30 (b) such other modifications as are made necessary by the fact
31 that the provisions are applying to a sub-fund instead of to a
32 corporation.
-

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External administration **Schedule 2**
Main amendments **Part 1**

Controller provisions

- 1
- 2 (2) The provisions (the *controller provisions*) are as follows:
- 3 (a) Part 5.2 and Division 2B of Part 5.7B (other than a provision
- 4 excluded by subsection (3));
- 5 (b) the other provisions of this Act and the ASIC Act (other than
- 6 a provision excluded by subsection (3)) to the extent to which
- 7 they relate to the operation of the provisions referred to in
- 8 paragraph (a).
- 9 (3) For the purposes of subsection (2), the provisions excluded from
- 10 the controller provisions are as follows:
- 11 (a) section 416;
- 12 (b) section 418;
- 13 (c) a provision specified in regulations made for the purposes of
- 14 this paragraph.

15 Note: Section 12-050 applies instead of section 418.

Translation rules

- 16
- 17 (4) In the application of the controller provisions, those provisions
- 18 apply as if the substitutions set out in the following table were
- 19 made.
- 20

Substitutions to be made

Item	Column 1 If the provision ...	Column 2 substitute a reference to ...
1	refers to the corporation (the <i>relevant corporation</i>) in relation to whose property a controller has been, or is to be appointed (whether the reference is express or implied, and (if the reference is express) whether the corporation is referred to as a corporation, a company, a body corporate, or in some other way), and the reference is not covered by another item of this table	the sub-fund (but see subsections (5) and (6))
2	refers to the directors, or a director,	the corporate director of the CCIV

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Schedule 2 External administration

Part 1 Main amendments

Substitutions to be made

Item	Column 1 If the provision ...	Column 2 substitute a reference to ...
	or the board of the relevant corporation	
3	refers to an officer of the relevant corporation	(a) for a person covered by paragraph (a) or (b) of the definition of <i>officer</i> of a CCIV in section 9—a person covered by that paragraph in relation to the CCIV; or (b) for a person covered by any of paragraphs (c) to (e) of that definition—a person covered by that paragraph in relation to the sub-fund
4	refers to shares in the relevant corporation	shares referable to the sub-fund
5	refers to debentures of the relevant corporation	debentures referable to the sub-fund

- 1 (5) Despite item 1 of the table in subsection (4), a reference covered
2 by column 1 of that item is taken to be a reference to the CCIV if
3 the context of the reference so requires (for example, because the
4 reference requires the legal capacity and powers of a company).
- 5 (6) If a reference in a provision to the relevant corporation is, as a
6 result of subsection (5), taken to be a reference to the CCIV, the
7 operation of the provision in relation to the CCIV is confined, to
8 the extent possible, to the sub-fund.

9 **Subdivision D—Modified duties and powers of receivers etc.**

10 **12-065 Liability of controller**

- 11 (1) Section 1237AA (about extended liability for acts of agents) does
12 not apply to a person who, as agent for the CCIV, enters into
13 possession or assumes control of any property of a sub-fund of the
14 CCIV for the purposes of enforcing any security interest.
- 15 (2) Subsection (1) does not affect the application of section 419.
-

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External administration **Schedule 2**
Main amendments **Part 1**

1 **12-070 Powers of receiver**

2 If the CCIV has a depositary, the powers conferred on a receiver of
3 property of a sub-fund under section 420 are taken to include the
4 power to instruct the depositary in relation to dealing with assets of
5 the sub-fund.

6 Note: See also section 1234R.

7 **12-075 Controller may require reports relating to other sub-funds if**
8 **necessary**

9 The affairs of a CCIV about which a controller of property of a
10 sub-fund of the CCIV may require a report under section 430
11 include:

- 12 (a) the affairs of the sub-fund; and
13 (b) the affairs of any other sub-fund, to the extent the
14 information about those affairs is required by the controller
15 for the purpose of attaining the objectives for which the
16 controller was appointed.

17 **12-080 Controller may inspect books of CCIV**

18 The books of a CCIV that a controller of property of a sub-fund of
19 the CCIV is entitled under section 431 to inspect at any reasonable
20 time include:

- 21 (a) the records kept by the corporate director under
22 section 1233R (about the allocation of assets and liabilities to
23 sub-funds); and
24 (b) any books of the CCIV, to the extent the inspection of those
25 books is necessary for the purpose of attaining the objectives
26 for which the controller was appointed.

27 Note: A person entitled to inspect a book may make copies or take extracts:
28 see subsection 1300(3).

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Schedule 2 External administration

Part 1 Main amendments

1 **Subdivision E—Other modifications**

2 **12-085 Application of sub-fund property to meet certain priority**
3 **payments**

4 If a receiver is appointed in respect of property of a sub-fund of a
5 CCIV, the assets of the sub-fund may be applied for the purposes
6 of paying debts or amounts that, under section 433, must be paid in
7 priority to any claim for principal or interest in respect of the
8 debentures referred to in that section.

9 **12-090 Transfer of books to ASIC etc.**

10 (1) Before ASIC destroys, in accordance with subsection 422D(9),
11 books relating to the control of property of a sub-fund of a CCIV,
12 ASIC must notify the CCIV that it intends to do so.

13 (2) Despite subsection 422D(9), if:

14 (a) ASIC retains books under subsection 422D(8) in relation to
15 the control of property of a sub-fund of a CCIV; and

16 (b) the retention period mentioned in that subsection ends; and

17 (c) the CCIV, by resolution of the corporate director, directs
18 ASIC not to destroy the books;

19 ASIC must, as soon as practicable, transfer possession or control of
20 those books to the CCIV.

21 **Division 4—Winding up of sub-funds**

22 **Subdivision A—Preliminary**

23 **12-095 Object of this Division**

24 The object of this Division is to preserve the segregated application
25 of assets of sub-funds by requiring a separate winding up
26 procedure for each sub-fund.

27 **12-100 No winding up of a CCIV**

28 A CCIV cannot be wound up, or placed in liquidation.

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1 Note: If a CCIV has no sub-funds, ASIC must deregister the CCIV: see
2 section 13-050.

3 **Subdivision B—Application of winding up provisions to**
4 **winding up of sub-funds**

5 **12-105 Applying winding up provisions to sub-funds**

- 6 (1) An application to wind up a sub-fund of a CCIV, and the winding
7 up of a sub-fund of a CCIV, are regulated:
8 (a) by the provisions of this Division; and
9 (b) by the winding up provisions referred to in subsection (2),
10 applying, so far as they are capable of so doing, subject to:
11 (i) such modifications as are set out in this Division; and
12 (ii) such other modifications as are made necessary by the
13 fact that the provisions are applying to a sub-fund
14 instead of to a company.

15 *Winding up provisions*

- 16 (2) The provisions (the *winding up provisions*) are as follows:
17 (a) sections 53 and 91, paragraph 233(1)(a), Parts 5.4, 5.4A,
18 5.4B, 5.5 and 5.6, Divisions 2 and 2A of Part 5.7B and
19 Schedule 2 to this Act (other than a provision excluded by
20 subsection (3));
21 (b) the other provisions of this Act and the ASIC Act (other than
22 a provision excluded by subsection (3)) to the extent to which
23 they relate to the operation of the provisions referred to in
24 paragraph (a).

25 Note 1: Parts 5.8 and 5.9 also apply to CCIVs with modifications: see
26 Divisions 4 to 6 of this Part.

27 Note 2: Part 5.4C does not apply to CCIVs or sub-funds of CCIVs.

- 28 (3) For the purposes of subsection (2), the provisions excluded from
29 the winding up provisions are as follows:
30 (a) section 459T;
31 (b) Division 8 of Part 5.6 (about pooling);
32 (c) a provision specified in regulations made for the purposes of
33 this paragraph.
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Translation rules

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- (4) In the application of the winding up provisions, those provisions apply as if the substitutions set out in the following table were made.

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Substitutions to be made		
Item	Column 1 If the provision ...	Column 2 substitute a reference to ...
1	refers to the company (the <i>relevant company</i>) that is being, is to be, or has been wound up, or is the subject of an application for a winding up order (whether the reference is express or implied, and (if the reference is express) whether the company is referred to as a company, a body corporate, a corporation, or in some other way), and the reference is not covered by another item of this table	the sub-fund (but see subsections (5) and (6))
2	refers to the directors, or a director, or the board of the relevant company	the corporate director of the CCIV
3	refers to an officer of the relevant company	(a) for a person covered by paragraph (a) or (b) of the definition of <i>officer</i> of a CCIV in section 9—a person covered by that paragraph in relation to the CCIV; or (b) for a person covered by any of paragraphs (c) to (e) of that definition—a person covered by that paragraph in relation to the sub-fund
4	refers to shares in the relevant company	shares referable to the sub-fund
5	refers to debentures of the relevant company	debentures referable to the sub-fund
6	refers to a general meeting, in relation to the relevant company	a members' meeting of the sub-fund (see section 1244B)

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Substitutions to be made

Item	Column 1 If the provision ...	Column 2 substitute a reference to ...
	(other than a reference to the company in general meeting)	
7	refers to the relevant company in general meeting	the members of the sub-fund at a members' meeting of the sub-fund

- 1 Note 1: Item 1—for example, in paragraph 459P(1)(b) there is an implied
2 reference to “of the company” after “a creditor”, and in
3 paragraph 459P(1)(c) there is an implied reference to “of the
4 company” after “a contributory”. For a CCIV, both these implied
5 references would be substituted with implied references to “of the
6 sub-fund”.
- 7 Note 2: Item 4—for example, if the winding up of a sub-fund of a CCIV
8 commences, section 468A will operate to void a transfer of shares in
9 the CCIV only if the shares are referable to the sub-fund.
- 10 Note 3: Item 7—for example, subsection 495(1) requires the members of the
11 sub-fund to appoint a liquidator or liquidators.
- 12 (5) Despite item 1 of the table in subsection (4), a reference covered
13 by column 1 of that item is taken to be a reference to the CCIV if
14 the context of the reference so requires (for example, because the
15 reference requires the legal capacity and powers of a company).
- 16 Note 1: For example, the references in paragraph 459P(1)(a) and 462(2)(a) to
17 “the company” are taken to be references to “the CCIV” because an
18 application to the Court would be made by the legal person that is the
19 CCIV.
- 20 Note 2: For example, the reference in subsection 461(2) to “A company must
21 lodge” is taken to be a reference to “The CCIV must lodge” because
22 the lodging of documents with ASIC would be done by the legal
23 person that is the CCIV.
- 24 Note 3: For example, the reference in section 493 to the “corporate state and
25 corporate powers of the company” is a reference to the “corporate
26 state and corporate powers of the CCIV”.
- 27 (6) If a reference in a provision to the relevant company is, as a result
28 of subsection (5), taken to be a reference to the CCIV, the
29 operation of the provision in relation to the CCIV is confined, to
30 the extent possible, to the sub-fund.
- 31 Note: For example, the first reference in paragraph 471B(a) to “the
32 company” is a reference to the CCIV, because only a legal person can
33 be a party to a proceeding in a court. However, the operation of

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1 section 471B to prevent proceedings against the CCIV is confined to
2 proceedings that relate to the sub-fund.

3 **12-110 References to debts etc. of a sub-fund**

4 For the purposes of the application of the winding up provisions, as
5 those provisions apply subject to item 1 of the table in
6 subsection 12-105(4):

- 7 (a) a debt of the CCIV is taken to be a debt of a sub-fund to the
8 extent (if any) that the debt is a liability of the sub-fund; and
9 (b) a claim against the CCIV is taken to be a claim against a
10 sub-fund of the CCIV to the extent (if any) that the claim is a
11 liability of the sub-fund.

12 Note: A reference to a liability of a sub-fund of a CCIV includes debts and
13 claims: see subsection 1233P(3).

14 **Subdivision C—Winding up of a sub-fund in insolvency**

15 **12-115 When a sub-fund is presumed to be insolvent**

16 Paragraph 459C(2)(a) is taken to be satisfied in relation to a
17 sub-fund of a CCIV if:

- 18 (a) the CCIV failed (as defined by section 459F) to comply with
19 a statutory demand; and
20 (b) the failure affects the sub-fund (see subsection 12-120(3)).

21 **12-120 Statutory demand—creditor may serve demand on CCIV**

22 (1) A person may serve a statutory demand on a CCIV under
23 section 459E.

24 (2) However, subsection 459E(2) applies to a statutory demand served
25 on a CCIV as if it also required the demand to specify, in relation
26 to each debt to which the demand relates:

- 27 (a) the sub-fund or sub-funds of the CCIV of which the debt is a
28 liability; and
29 (b) if the debt is a liability of 2 or more sub-funds of the CCIV—
30 the proportion of the debt allocated to each sub-fund.

31 (3) Whether a CCIV has failed to comply with a statutory demand is
32 determined under section 459F. If the CCIV has failed to comply

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1 with a statutory demand, the failure affects each sub-fund specified
2 in the demand.

3 **12-125 Statutory demand—CCIV may apply to set aside demand**

- 4 (1) A CCIV may apply to the Court under section 459G for an order
5 setting aside a statutory demand served on the CCIV.
- 6 (2) Division 3 of Part 5.4 applies in relation to the application subject
7 to the modifications set out in sections 12-130 to 12-145.

8 **12-130 Statutory demand—determining application to set aside** 9 **where there is a dispute or offsetting claim**

- 10 (1) Paragraph 459H(1)(b) applies in relation to a debt to which a
11 demand relates only if the CCIV has an offsetting claim that is an
12 asset of the sub-fund of which the debt or a proportion of the debt
13 (as the case requires) is a liability.
- 14 (2) Subsection 459H(2) has effect as if it required the Court to
15 calculate a separate substantiated amount in relation to each
16 sub-fund specified in the statutory demand.
- 17 (3) For the purposes of the calculation:
- 18 (a) the amount of the debt is to be determined having regard only
19 to a debt or a proportion of a debt (as the case requires) that
20 is a liability of the sub-fund; and
- 21 (b) the amount of an offsetting claim is to be determined having
22 regard only to so much of an offsetting claim as is an asset of
23 the sub-fund.

24 **12-135 Statutory demand—determining application to set aside** 25 **where there is a dispute about the sub-fund**

- 26 (1) This section applies if:
- 27 (a) a CCIV applies under section 459G for an order setting aside
28 a statutory demand served on the CCIV; and
- 29 (b) within the 21 days referred to in subsection 459G(3):
- 30 (i) a notice complying with section 12-140 is filed with the
31 Court; and
-

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- 1 (ii) a copy of the notice is served on the person who served
2 the demand on the CCIV; and
- 3 (c) the information specified in the notice about a debt is not the
4 same as the information specified in the demand about the
5 debt; and
- 6 (d) section 459H does not apply.
- 7 (2) The Court must determine the following information for the debt:
- 8 (a) the sub-fund or sub-funds of the CCIV of which the debt is a
9 liability;
- 10 (b) if the debt is a liability of 2 or more sub-funds of the CCIV—
11 the proportion of the debt allocated to each sub-fund.
- 12 (3) If the information determined by the Court under subsection (2) is
13 different from the information specified in the demand, the Court
14 may make an order:
- 15 (a) varying the demand as specified in the order; and
16 (b) declaring the demand to have had effect, as so varied, as from
17 when the demand was served on the CCIV.
- 18 The order may be made subject to conditions.
- 19 (4) This section has effect subject to section 459J.
- 20 (5) Section 459L has effect as if the orders referred to in that section
21 included an order under this section.

22 **12-140 Notice identifying sub-fund of which a debt is a liability**

23 A notice complies with this section in relation to a statutory
24 demand if the notice specifies the following information for each
25 debt to which the demand relates:

- 26 (a) the sub-fund or sub-funds of the CCIV of which the debt is a
27 liability;
- 28 (b) if the debt is a liability of 2 or more sub-funds of the CCIV—
29 the amount of the debt allocated to each sub-fund.

30 **12-145 Substitution of sub-fund where statutory demand not relied** 31 **on**

- 32 (1) This section applies if:
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- 1 (a) a creditor applies under section 459P for a sub-fund of the
2 CCIV to be wound up in insolvency; and
3 (b) the application does not rely on a failure by the CCIV to
4 comply with a statutory demand.
- 5 (2) The Court may by order substitute, in an application under
6 section 459P, the sub-fund or sub-funds of the CCIV in respect of
7 which the application is made.
- 8 (3) The Court may only make an order if:
9 (a) a notice complying with section 12-140 is filed with the
10 Court; and
11 (b) the Court thinks it is appropriate to do so.
- 12 (4) After the order is made, the application has effect, and may be
13 proceeded with, as if the substituted sub-fund or sub-funds had
14 been the original sub-fund or sub-funds.

12-150 Declaration of solvency

15 A written declaration under section 494 about the affairs of a
16 sub-fund may be made by the corporate director of the CCIV.
17

12-155 Requirement for corporate director to provide information to creditor about proportional allocation

- 18 (1) A creditor of a CCIV may, by notice in writing given to the
19 corporate director of the CCIV, require the corporate director to
20 provide the following information about the debt owing to the
21 creditor:
22 (a) the sub-fund or sub-funds of the CCIV of which the debt is a
23 liability;
24 (b) if the debt is a liability of 2 or more sub-funds of the CCIV—
25 the proportion of the debt allocated to each sub-fund;
26 to the creditor within the period (which must be at least 14 days
27 after the notice is given), and in the manner, specified in the notice.
- 28 (2) The notice must include sufficient information to enable the
29 corporate director to identify the debt, claim or property.
30
31

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- 1 (3) The corporate director commits an offence of strict liability if the
2 corporate director fails to comply with a notice given to the
3 corporate director under subsection (1).

4 **Subdivision D—Modified duties and powers of liquidator of a** 5 **sub-fund**

6 **12-160 Disqualification of liquidator**

7 Paragraph 532(2)(c) has effect in relation to a sub-fund of a CCIV
8 as if the persons referred to in that paragraph included the
9 following:

- 10 (a) a director of the corporate director of the CCIV;
11 (b) the depositary of the CCIV.

12 **12-165 Notifying the depositary**

13 (1) A liquidator of a sub-fund of a CCIV that has a depositary must, as
14 soon as practicable, and in any event within 3 business days after
15 the liquidator's appointment, notify the depositary in writing of the
16 liquidator's appointment.

17 (2) If a liquidator of a sub-fund of a CCIV that has a depositary resigns
18 or is removed from office, the liquidator must, as soon as
19 practicable, and in any event within 3 business days after the
20 resignation or removal, notify the depositary in writing of that fact.

21 (3) In this section:

22 *liquidator* includes a provisional liquidator.

23 **12-170 Duties and powers of liquidator**

24 *Liquidator's powers relate only to the sub-fund*

25 (1) The functions and powers of a liquidator of a sub-fund of a CCIV
26 extend only to matters that relate solely to the carrying on of the
27 business of the sub-fund.

28 (2) However, the books of a CCIV that a liquidator of a sub-fund is
29 entitled under subsection 477(3) to inspect at any reasonable time
30 include:

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- 1 (a) the records kept by the corporate director under
2 section 1233R (about the allocation of assets and liabilities to
3 sub-funds); and
4 (b) any other books of the CCIV, to the extent the inspection of
5 those books is necessary for the liquidator to perform or
6 exercise the functions or powers of that office.

7 Note 1: A person entitled to inspect a book may make copies or take extracts:
8 see subsection 1300(3).

9 Note 2: A provisional liquidator also has the power under subsection 477(3):
10 see paragraph 472(4)(b).

11 *Liquidator may instruct depositary*

- 12 (3) If the CCIV has a depositary, the powers conferred on a liquidator
13 of a sub-fund are taken to include the power to instruct the
14 depositary in relation to dealing with assets of the sub-fund.

15 Note: See also section 1234R.

16 *Liquidator does not have power to determine allocation of assets 17 and liabilities*

- 18 (4) The functions and powers of a liquidator of a sub-fund of a CCIV
19 do not include the power to:
20 (a) determine the proportion of an asset that is to be allocated to
21 a sub-fund of the CCIV under subsection 1233K(4); or
22 (b) determine the proportion of a liability that is to be allocated
23 to a sub-fund of the CCIV under subsection 1233Q(5).

24 Note: However, the liquidator may require the corporate director to record a
25 debt, claim or property in the records (see section 12-175), or may
26 apply to the Court for an order (see section 12-235).

27 *Liquidator may inspect certain books of the depositary*

- 28 (5) If the CCIV has a depositary, the liquidator is entitled to inspect at
29 any reasonable time books of the depositary relating to the CCIV,
30 to the extent the inspection of those books is necessary for the
31 liquidator to perform or exercise the functions or powers of that
32 office.

33 Note: A person entitled to inspect a book may make copies or take extracts:
34 see subsection 1300(3).

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1 *Definitions*

2 (6) In this section:

3 *liquidator* includes a provisional liquidator.

4 **12-175 Liquidator may require corporate director to record debt,**
5 **claim or property in allocation register**

6 (1) This section applies if:

7 (a) a debt payable by, or claim against, a CCIV (present or
8 future, certain or contingent, ascertained or sounding only in
9 damages) is not identified as a liability of any sub-fund of the
10 CCIV in records kept by the corporate director under
11 section 1233R; or

12 (b) property of the CCIV is not identified as an asset of any
13 sub-fund of the CCIV in the records kept by the corporate
14 director under that section.

15 (2) A liquidator of a sub-fund of the CCIV may, by notice in writing
16 given to the corporate director of the CCIV, require the corporate
17 director to update the records kept by the corporate director under
18 section 1233R within the period (which must be at least one
19 business day after the notice is given) specified in the notice.

20 Note: See also section 12-235 (about Court orders the liquidator can apply
21 for).

22 (3) The notice must include sufficient information to enable the
23 corporate director to identify the debt, claim or property.

24 Note 1: Only liabilities of a sub-fund of a CCIV are provable in a winding up
25 of the sub-fund: see section 12-215.

26 Note 2: If the asset or liability has to be allocated between sub-funds, the
27 corporate director will have to determine the allocation in order to
28 update the records: see sections 1233K and 1233Q.

29 **12-180 Retention and destruction of books**

30 (1) The following provisions do not apply in relation to a winding up
31 of a sub-fund:

32 (a) subsection 70-35(3) of Schedule 2 (about when an external
33 administrator is not required to retain books);

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- 1 (b) subsection 70-35(4) of Schedule 2 (about when an external
2 administrator may destroy books).

3 *Liquidator must transfer books to CCIV*

4 (2) If:

- 5 (a) books are retained under section 70-35 of Schedule 2 by a
6 liquidator of a sub-fund in relation to a winding up of the
7 sub-fund; and
8 (b) the retention period mentioned in subsection 70-35(1) of that
9 Schedule ends; and
10 (c) before the end of the retention period, the CCIV requests the
11 liquidator by notice in writing to transfer possession or
12 control of the books to the CCIV;

13 the liquidator must, as soon as practicable after the end of the
14 retention period, transfer possession or control of those books to
15 the CCIV.

- 16 (3) Otherwise, the books may be destroyed at the end of the retention
17 period.

18 *Offence*

19 (4) A person commits an offence if:

- 20 (a) the person is subject to a requirement under subsection (2);
21 and
22 (b) the person intentionally or recklessly fails to comply with the
23 requirement.

24 **Subdivision E—Modified duties and powers of officers of** 25 **corporate director and CCIV**

26 **12-185 Officers of corporate director to help liquidator**

- 27 (1) Section 530A applies as if each of the following were an officer of
28 a CCIV:
29 (a) an officer of the CCIV;
30 (b) an officer of the corporate director of the CCIV;
31 (c) an officer of a former corporate director of the CCIV.
32 (2) In this section:
-

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1 *officer* includes former officer.

2 **12-190 Corporate director may retain certain books**

3 (1) The corporate director of a CCIV is entitled, as against a liquidator
4 of a sub-fund of the CCIV, to retain possession of books of the
5 CCIV that relate to:

- 6 (a) the business or affairs of the CCIV as a whole; or
7 (b) the business or affairs of other sub-funds of the CCIV.

8 Note: Books that the corporate director is not entitled to retain must be
9 delivered to the liquidator: see section 530A.

10 (2) Subsection (1) applies despite subsection 530B(1).

11 (3) In this section:

12 *liquidator* includes a provisional liquidator.

13 **12-195 Corporate director may access certain books**

14 The corporate director of a CCIV is entitled to inspect at any
15 reasonable time books relating to the winding up of a sub-fund of
16 the CCIV, to the extent the inspection of those books is necessary
17 for the corporate director to perform or exercise the functions or
18 powers of that office.

19 Note: A person entitled to inspect a book may make copies or take extracts:
20 see subsection 1300(3).

21 **12-200 Corporate director may direct ASIC not to destroy books**

22 (1) Before ASIC destroys, in accordance with subsection 70-31(9) of
23 Schedule 2, books relating to the winding up of a sub-fund of a
24 CCIV, ASIC must notify the CCIV that it intends to do so.

25 (2) Despite subsection 70-31(9) of Schedule 2, if:

- 26 (a) ASIC retains books under subsection 70-31(8) of Schedule 2
27 in relation to the winding up of a sub-fund of a CCIV; and
28 (b) the retention period mentioned in that subsection ends; and
29 (c) the CCIV, by resolution of the corporate director, directs
30 ASIC not to destroy the books;
-

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1 ASIC must, as soon as practicable, transfer possession or control of
2 those books to the CCIV.

3 **12-205 Mandatory examination**

4 Section 596A applies in relation to a CCIV as if the following were
5 officers of the CCIV:

- 6 (a) a natural person who is an officer of the CCIV;
7 (b) a natural person who is a director of the corporate director of
8 the CCIV.

9 **12-210 Court may make order imposing liability on unlicensed** 10 **person operating CCIV**

11 Where:

- 12 (a) a sub-fund of a CCIV is being wound up; and
13 (b) within the period of 4 years ending before the relation-back
14 day, a person not meeting the requirements in
15 subsection 1238E(1) for the director of a CCIV operated the
16 business and conducted the affairs of the CCIV;

17 the Court may, on the application of the sub-fund's liquidator,
18 order that the person is personally liable for so much of the
19 sub-fund's debts and liabilities as does not exceed an amount
20 specified in the order.

21 **Subdivision F—Proof and ranking of claims**

22 **12-215 Liquidator must be satisfied debt or claim is a liability of the** 23 **sub-fund**

- 24 (1) The liquidator of a sub-fund must determine that the whole or a
25 part of a debt of the CCIV is not admissible to proof against the
26 sub-fund if the liquidator is satisfied that the debt or the part of the
27 debt (as the case requires) is not a liability of the sub-fund.
- 28 (2) Such a determination does not have the effect of extinguishing the
29 debt or the part of the debt.

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1 **12-220 Determination of debts and claims that relate to the business**
2 **of 2 or more sub-funds and are of uncertain value**

- 3 (1) This section applies if, in the winding up of a sub-fund, the
4 liquidator admits a debt or claim that:
5 (a) is a liability of the CCIV that does not relate solely to the
6 business of the sub-fund; and
7 (b) as at the relevant date, did not bear a certain value.

8 Note: If the liability relates solely to the business of the sub-fund but is of
9 uncertain value, the liquidator must estimate the value of the debt or
10 claim (paragraph 554A(2)(a)) or refer the question of the value of the
11 debt or claim to the Court (paragraph 554A(2)(b)).

- 12 (2) Section 554A applies in relation to the debt or claim as if the value
13 of the debt or claim that is to be estimated as at the relevant date
14 were the value of the whole of the debt or claim (not just the
15 proportion that is allocated to the sub-fund under section 1233Q).
- 16 (3) However, despite subsection 554A(8), for the purposes of
17 Division 6 of Part 5.6, the amount of the debt or claim that is
18 admissible to proof is the product of:
19 (a) the value as estimated or worked out under section 554A (as
20 modified by this section); and
21 (b) the proportion of the liability allocated to the sub-fund under
22 section 1233Q.

23 **12-225 Application of sub-fund property**

24 If a sub-fund of a CCIV is being wound up, the assets of the
25 sub-fund may be applied for the purposes of paying debts and
26 claims that, under section 556 as it applies in relation to the
27 winding up of the sub-fund, must be paid in priority to all other
28 unsecured debts and claims.

29 **Subdivision G—Powers of Courts**

30 **12-230 Warrant in relation to books**

- 31 (1) This section applies in relation to a warrant issued by a Court under
32 subsection 530C(2) on application by the liquidator or provisional
33 liquidator of a sub-fund of a CCIV.
-

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1 (2) The books of a CCIV that may be searched for under the warrant
2 are any books of the CCIV.

3 (3) The books of the CCIV that may be seized under the warrant are
4 books of the CCIV that relate to the sub-fund.

5 *Specified person to be in possession of warrant*

6 (4) When executing the warrant, the specified person must be in
7 possession of the warrant or a copy of the warrant.

8 *Notification of entry*

9 (5) Subsections (6) and (7) apply if:
10 (a) the warrant is being executed in relation to premises; and
11 (b) the occupier of the premises, or another person who
12 apparently represents the occupier, is present at the premises.

13 (6) Before entering the premises under the warrant, the specified
14 person must:
15 (a) announce that the person is authorised to enter the premises;
16 and
17 (b) show the occupier or other person evidence of the person's
18 identity.

19 (7) The specified person must, as soon as practicable:
20 (a) make a copy of the warrant available to the occupier or other
21 person; and
22 (b) inform the occupier or other person in writing of the rights
23 and responsibilities of the occupier or other person under this
24 section and section 530C.

25 *Books to be used only for purpose of liquidation*

26 (8) A book of the CCIV seized under the warrant may be used only for
27 the purpose for which it was seized.

28 *Return of seized things*

29 (9) Despite subsection 530C(4), and subject to any contrary order of
30 the Court, a person who has custody of property or a book because
31 of the execution of the warrant must take reasonable steps to return

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1 the property or book to the CCIV when the property or book is no
2 longer required to be retained for the purpose for which it was
3 seized.

4 **12-235 Orders the Court can make in relation to assets and** 5 **liabilities of sub-funds**

- 6 (1) The Court may, on an application under subsection (4), make any
7 of the following orders in relation to a CCIV:
8 (a) an order setting aside a determination made by the corporate
9 director under subsection 1233K(4) or 1233Q(5);
10 (b) an order requiring the corporate director to make one or more
11 determinations under subsection 1233K(4) or 1233Q(5);
12 (c) an order determining the proportion of an asset that is
13 allocated to each sub-fund of the CCIV under
14 subsection 1233K(2);
15 (d) an order determining the proportion of a liability that is
16 allocated to each sub-fund of the CCIV under
17 subsection 1233Q(2);
18 (e) an order requiring the corporate director to correct the
19 records kept by the corporate director under section 1233R;
20 (f) any other order the Court considers appropriate.
- 21 (2) However, the Court may not make an order under paragraph (1)(a)
22 if all of the sub-funds of the CCIV are being wound up.
- 23 (3) The Court may make an order under subsection (1) if either of the
24 following applies:
25 (a) the Court is satisfied that records kept by the corporate
26 director under section 1233R are incorrect or deficient;
27 (b) all of the CCIV's sub-funds are being wound up.
- 28 (4) An application for an order under subsection (1) may be made by
29 either of the following:
30 (a) a liquidator of a sub-fund of the CCIV;
31 (b) a controller of property of a sub-fund of the CCIV.
- 32 (5) If the Court makes an order under paragraph (1)(b) or (c), the
33 corporate director does not have the power under
-

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1 subsection 1233K(4) or 1233Q(5) (as the case requires) to
2 determine a different proportion unless:

- 3 (a) the order states that the corporate director does have the
4 power to determine a different proportion; or
5 (b) the corporate director first obtains the leave of the Court.

6 **Subdivision H—Recovering property**

7 **12-240 Presumptions to be made in recovery proceedings**

8 A reference in section 588E to financial records a company is
9 required by subsection 286(1) to keep is taken, in relation to a
10 winding up of a sub-fund of a CCIV, to be a reference to both of
11 the following:

- 12 (a) financial records that the CCIV is required to keep and retain
13 for the sub-fund under subsection 286(1), as that subsection
14 applies in relation to the sub-fund under section 1248A;
15 (b) financial records that the CCIV is required to keep and retain
16 for itself under subsection 286(1), as that subsection applies
17 to the CCIV under section 1248.

18 **12-245 Unreasonable director-related transactions**

19 Section 588FDA applies in relation to a sub-fund of a CCIV as if
20 each of the following were a director of a CCIV:

- 21 (a) the corporate director of the CCIV;
22 (b) a director of the corporate director of the CCIV.

23 **12-250 Vesting of PPSA security interests if collateral not registered 24 within time**

25 Section 588FL applies in relation to a PPSA security interest
26 granted by a CCIV if:

- 27 (a) an order is made, or a resolution is passed, for the winding up
28 of a sub-fund of the CCIV; and
29 (b) the PPSA security interest is in collateral that is an asset of
30 the sub-fund of the CCIV.

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1 **Division 5—Recovering property of sub-funds**

2 **12-255 Duties owed by directors of corporate director of a CCIV**

3 The object of this Division is to ensure that the officers of the
4 corporate director of a CCIV, instead of the corporate director
5 itself, owe the duties in Divisions 3, 4, 5 and 6 of Part 5.7B.

6 **12-260 Applying property recovery provisions to CCIVs**

- 7 (1) The property recovery provisions referred to in subsection (2)
8 apply to a CCIV subject to:
9 (a) such modifications as are set out in this Division; and
10 (b) such other modifications as are made necessary by the fact
11 that for a CCIV, solvency and insolvency are determined at
12 the level of a sub-fund, instead of at the level of the CCIV.

13 *Property recovery provisions*

- 14 (2) The provisions (the *property recovery provisions*) are as follows:
15 (a) Divisions 3, 4, 5 and 6 of Part 5.7B (other than a provision
16 excluded by subsection (3));
17 (b) the other provisions of this Act and the ASIC Act (other than
18 a provision excluded by subsection (3)) to the extent to which
19 they relate to the operation of the provisions referred to in
20 paragraph (a).
21 (3) For the purposes of subsection (2), the regulations may specify
22 provisions that are excluded from the property recovery provisions.

23 *Translation rules*

- 24 (4) In the application of the property recovery provisions, those
25 provisions apply as if the substitutions set out in the following
26 table were made.

27

Substitutions to be made

Item	Column 1 If the provision ...	Column 2 substitute a reference to ...
1	refers to the company (the <i>relevant</i>	the sub-fund (but see subsections (5))

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Substitutions to be made

Item	Column 1 If the provision ...	Column 2 substitute a reference to ...
	<i>company</i>) in relation to which the provision applies (whether the reference is express or implied, and (if the reference is express) whether the company is referred to as a company, a body corporate, a corporation, or in some other way), and the reference is not covered by another item of this table	and (6))
2	refers to the directors, or a director, or the board of the relevant company	the directors, or a director, or the board of the corporate director of the CCIV
3	refers to an officer of the relevant company	(a) for a person covered by paragraph (a) or (b) of the definition of <i>officer</i> of a CCIV in section 9—a person covered by that paragraph in relation to the corporate director of the CCIV; or (b) for a person covered by any of paragraphs (c) to (e) of that definition—a person covered by that paragraph in relation to the sub-fund
4	refers to shares in the relevant company	shares referable to the sub-fund

1

2 (5) Despite item 1 of the table in subsection (4), a reference covered
3 by column 1 of that item is taken to be a reference to the CCIV if
4 the context of the reference so requires (for example, because the
5 reference requires the legal capacity and powers of a company).

6 (6) If a reference in a provision to the relevant company is, as a result
7 of subsection (3), taken to be a reference to the CCIV, the
8 operation of the provision in relation to the CCIV is confined, to
9 the extent possible, to the sub-fund.

37

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Schedule 2 External administration

Part 1 Main amendments

1 **12-265 References to incurring debts**

2 For the purposes of the application of the property recovery
3 provisions, as those provisions apply subject to item 1 of the table
4 in subsection 12-260(3), a sub-fund is taken to incur a debt if:

5 (a) the CCIV incurs the debt; and

6 (b) the debt is, to any extent, a liability of the sub-fund.

7 The sub-fund incurs the debt at the time the CCIV incurs the debt.

8 **12-270 When debts arise in relation to redeemable shares**

9 (1) For the purposes of section 588G, if a CCIV takes action set out in
10 column 1 of the following table, it incurs a debt at the time set out
11 in column 2.

12

When debts are incurred		operative table
Item	Column 1 Action of company	Column 2 When debt is incurred
1	redeeming redeemable shares that are redeemable only at its option	when the company exercises the option
2	issuing redeemable shares that are issued on terms that they are liable to be redeemed otherwise than only at its option	when the shares are issued
3	converting under paragraph 1245B(1)(a) a share that is not a redeemable share into a share that is liable to be redeemed otherwise than only at its option	when the shares are converted

13

14 (2) This section has effect in relation to a CCIV in addition to the table
15 set out in subsection 588G(1A).

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External administration **Schedule 2**
Main amendments **Part 1**

1 **Division 6—External administration offences**

2 **12-275 Applying external administration offences to CCIVs**

3 (1) The external administration offences provisions referred to in
4 subsection (3) apply to a CCIV.

5 (2) In addition to the application referred to in subsection (1), the
6 external administration offences provisions apply to a CCIV
7 subject to:

- 8 (a) such modifications as are set out in this Division; and
9 (b) such other modifications as are necessary.

10 *External administration offences provisions*

11 (3) The provisions (the *external administration offences provisions*)
12 are as follows:

- 13 (a) Part 5.8 (other than a provision excluded by subsection (4));
14 (b) the other provisions of this Act and the ASIC Act (other than
15 a provision excluded by subsection (4)) to the extent to which
16 they relate to the operation of the provisions referred to in
17 paragraph (a).

18 (4) For the purposes of subsection (3), the regulations may specify
19 provisions that are excluded from the property recovery provisions.

20 *Translation rules*

21 (5) In the application of the external administration offences
22 provisions, those provisions apply as if the substitutions set out in
23 the following table were made.
24

Substitutions to be made

Item	Column 1 If the provision ...	Column 2 substitute a reference to ...
1	refers to the company (the <i>relevant company</i>) in relation to which the provision applies (whether the reference is express or implied, and (if the reference is express) whether the company is referred to as a	the sub-fund (but see subsections (6) and (7))

EXPOSURE DRAFT

Schedule 2 External administration

Part 1 Main amendments

Substitutions to be made

Item	Column 1 If the provision ...	Column 2 substitute a reference to ...
	company, a body corporate, a corporation, or in some other way), and the reference is not covered by another item of this table	
2	refers to the directors, or a director, or the board of the relevant company	the corporate director of the CCIV
3	refers to an officer of the relevant company	(a) for a person covered by paragraph (a) or (b) of the definition of <i>officer</i> of a CCIV in section 9—a person covered by that paragraph in relation to the CCIV; or (b) for a person covered by any of paragraphs (c) to (e) of that definition—a person covered by that paragraph in relation to the sub-fund
4	refers to shares in the relevant company	shares referable to the sub-fund

1

2 (6) Despite item 1 of the table in subsection (5), a reference covered
3 by column 1 of that item is taken to be a reference to the CCIV if
4 the context of the reference so requires (for example, because the
5 reference requires the legal capacity and powers of a company).

6 (7) If a reference in a provision to the relevant company is, as a result
7 of subsection (6), taken to be a reference to the CCIV, the
8 operation of the provision in relation to the CCIV is confined, to
9 the extent possible, to the sub-fund.

10 **12-280 Interpretation of ceased to carry on business**

11 Paragraph 589(3)(b) applies to a CCIV as if:

12 (a) the reference to subsection 601AB(1) were a reference to
13 subsection 13-005(1); and

40

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External administration **Schedule 2**
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1 (b) the reference to 2 months were a reference to 5 business
2 days.

3 Note: The interpretation of subsection 589(3) is also affected by
4 subsections 13-000(8) and 13-010(7).

5 **12-285 Frauds by officers**

6 Section 596 applies in relation to a CCIV as if the following were
7 officers of the CCIV:

- 8 (a) a natural person who is an officer of the CCIV;
9 (b) a natural person who is a director of the corporate director of
10 the CCIV.

11 **Division 7—Miscellaneous**

12 **12-290 Applying external administration miscellaneous provisions to** 13 **sub-funds**

- 14 (1) The external administration miscellaneous provisions referred to in
15 subsection (2) apply to a CCIV subject to:
16 (a) such modifications as are set out in this Division; and
17 (b) such other modifications as are necessary.

18 *External administration miscellaneous provisions*

- 19 (2) The provisions (the *external administration miscellaneous*
20 *provisions*) are as follows:
21 (a) Part 5.9 (other than a provision excluded by subsection (3));
22 (b) the other provisions of this Act and the ASIC Act (other than
23 a provision excluded by subsection (3)) to the extent to which
24 they relate to the operation of the provisions referred to in
25 paragraph (a).
- 26 (3) For the purposes of subsection (2), the regulations may specify
27 provisions that are excluded from the external administration
28 miscellaneous provisions.

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Schedule 2 External administration

Part 1 Main amendments

Translation rules

- 1
- 2 (4) In the application of the external administration miscellaneous
- 3 provisions, those provisions apply as if the substitutions set out in
- 4 the following table were made.
- 5

Substitutions to be made

Item	Column 1 If the provision ...	Column 2 substitute a reference to ...
1	refers to the corporation (the relevant corporation) in relation to which the provision applies (whether the reference is express or implied, and (if the reference is express) whether the corporation is referred to as a company, a body corporate, a corporation, or in some other way), and the reference is not covered by another item of this table	the sub-fund (but see subsections (5) and (6))
2	refers to the directors, or a director, or the board of the relevant corporation	the corporate director of the CCIV
3	refers to an officer of the relevant corporation	(a) for a person covered by paragraph (a) or (b) of the definition of officer of a CCIV in section 9—a person covered by that paragraph in relation to the CCIV; or (b) for a person covered by any of paragraphs (c) to (e) of that definition—a person covered by that paragraph in relation to the sub-fund
4	refers to shares in the relevant corporation	shares referable to the sub-fund

- 6
- 7 (5) Despite item 1 of the table in subsection (4), a reference covered
- 8 by column 1 of that item is taken to be a reference to the CCIV if

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External administration **Schedule 2**
Main amendments **Part 1**

- 1 the context of the reference so requires (for example, because the
2 reference requires the legal capacity and powers of a company).
- 3 (6) If a reference in a provision to the relevant corporation is, as a
4 result of subsection (5), taken to be a reference to the CCIV, the
5 operation of the provision in relation to the CCIV is confined, to
6 the extent possible, to the sub-fund.

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Schedule 2 External administration

Part 2 Other amendments

1 **Part 2—Other amendments**

2 *Corporations Act 2001*

3 **2 In the appropriate position in Chapter 8B**

4 Insert:

5 **1232P Change of name not allowed while sub-fund in liquidation**

6 No application may be lodged with ASIC under section 157A in
7 relation to a CCIV or a sub-fund of a CCIV.

8 **3 In the appropriate position in Chapter 8B**

9 Insert:

10 **1234R Powers and functions while sub-fund in liquidation or**
11 **receivership**

12 (1) If there is a conflict between a function or power of a liquidator of
13 a sub-fund of a CCIV, or a receiver of property of a sub-fund of a
14 CCIV, and a function or power of the depositary, the function or
15 power of the liquidator or receiver prevails.

16 Note: A depositary may be instructed in relation to dealing with assets of a
17 sub-fund by a liquidator (see section 12-170) or receiver (see
18 section 12-070).

19 (2) This section does not remove the depositary of a CCIV from office.

20 (3) Nothing in this section affects a secured creditor's right to realise
21 or otherwise deal with the security interest.

22 *Definitions*

23 (4) In this section:

24 *liquidator* includes a provisional liquidator.

25 **4 In the appropriate position in Chapter 8B**

26 Insert:

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External administration **Schedule 2**
Other amendments **Part 2**

1 **1237M Exercise of powers while sub-fund is in liquidation**

2 *Powers of corporate director while sub-fund in liquidation*

- 3 (1) The corporate director of a CCIV contravenes this subsection if:
4 (a) a sub-fund of the CCIV is being wound up, or a provisional
5 liquidator of a sub-fund of the CCIV is acting; and
6 (b) the corporate director purports to do any of the following:
7 (i) carry on the business of the sub-fund;
8 (ii) enter into a transaction or dealing on behalf of the CCIV
9 affecting the property of the sub-fund.
- 10 (2) However, subsection (1) does not apply to the extent that the
11 corporate director is acting:
12 (a) with the written approval of the liquidator of the sub-fund or
13 the Court; or
14 (b) in circumstances in which, despite the fact that the sub-fund
15 is being wound up, the corporate director is permitted by this
16 Act to act.
- 17 (3) Despite subsection 13.3(3) of the *Criminal Code*, in a prosecution
18 for an offence based on subsection (1) of this section, a defendant
19 does not bear an evidential burden in relation to the matter in
20 paragraph (2)(b).

21 *Fault-based offence*

- 22 (4) A person commits an offence if the person contravenes
23 subsection (1).

24 *Strict liability offence*

- 25 (5) A person commits an offence of strict liability if the person
26 contravenes subsection (1).

27 *Functions and powers of liquidator prevail in case of conflict*

- 28 (6) If subsection (2) applies and there is a conflict between a function
29 or power of the liquidator of the sub-fund and a function or power
30 of the corporate director in relation to the CCIV, the liquidator's
31 function or power prevails.

EXPOSURE DRAFT

Schedule 2 External administration

Part 2 Other amendments

1

Effect of section

2

(7) This section does not remove the corporate director of a CCIV from office.

3

4

(8) Nothing in this section affects a secured creditor's right to realise or otherwise deal with the security interest.

5

6

(9) Section 198G does not apply to a CCIV.

7

(10) A provision of this Act that applies despite section 198G also applies despite this section.

8

9

Definitions

10

(11) In this section:

11

liquidator includes a provisional liquidator.

12

5 In the appropriate position in Chapter 8B

13

Insert:

14

1248W Effect of winding up of sub-fund on office of auditor

15

Audit and auditor's report not required to cover a sub-fund in respect of which a CCIV is being wound up

16

17

(1) An auditor of a CCIV is not required by Division 3 of Part 2M.3, as it applies under subsection 1248H(1), to do a thing in relation to a sub-fund at a time if the sub-fund is being wound up at that time.

18

19

20

Auditor ceases to hold office if CCIV is being wound up in respect of all of its sub-funds

21

22

(2) An auditor of a CCIV ceases to hold office if an event mentioned in subsection (3) has occurred in relation to each sub-fund of the CCIV.

23

24

25

(3) The events are as follows:

26

(a) a special resolution is passed for the voluntary winding up of a sub-fund of the CCIV;

27

28

(b) an order is made by the Court for the winding up of a sub-fund of the CCIV.

29

EXPOSURE DRAFT

External administration **Schedule 2**
Other amendments **Part 2**

1 (4) Section 330 does not apply to a CCIV.

2 **6 Section 9 (after paragraph (a) of the definition of *Chapter 5***
3 ***body corporate*)**

4 Insert:

5 (aa) that is a CCIV of which one or more sub-funds is being
6 wound up; or

7 **7 Section 9 (at the end of the definition of *contributory*)**

8 Add:

9 ; and (d) in relation to a sub-fund of a CCIV—a person who is a
10 contributory of the CCIV under paragraph (a), if the person is
11 liable as mentioned in subparagraph (a)(i) as a member or
12 past member of the sub-fund, or is a holder of shares
13 referable to the sub-fund.

14 **8 Section 9**

15 Insert:

16 *creditor* of a sub-fund of a CCIV means a creditor of the CCIV, if
17 the debt or claim is, to any extent, a liability of the sub-fund.

18 **9 Section 9**

19 Insert:

20 *officer* of a CCIV means:

21 (a) the corporate director of the CCIV; or

22 (b) a person:

23 (i) who makes, or participates in making, decisions that
24 affect the whole, or a substantial part, of the business of
25 the CCIV; or

26 (ii) who has the capacity to affect significantly the CCIV's
27 financial standing; or

28 (iii) in accordance with whose instructions or wishes the
29 corporate director of the CCIV is accustomed to act
30 (excluding advice given by the person in the proper
31 performance of functions attaching to the person's
32 professional capacity or their business relationship with
33 the corporate director or the CCIV); or

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Schedule 2 External administration

Part 2 Other amendments

- 1 (c) a receiver, or receiver and manager, of the property of a
2 sub-fund of the CCIV; or
3 (d) a liquidator of a sub-fund of the CCIV; or
4 (e) a trustee or other person administering a compromise or
5 arrangement made between the CCIV and someone else.

6 **10 Section 9 (definition of *officer of a corporation*)**

7 After “of a corporation”, insert “(other than a CCIV)”.

8 **11 Section 51E (definition of *secured creditor*)**

9 Repeal the definition, substitute:

10 *secured creditor:*

- 11 (a) of a corporation means a creditor of the corporation, if the
12 debt owing to the creditor is secured by a security interest;
13 and
14 (b) of a sub-fund of a CCIV means a secured creditor of the
15 CCIV, if the debt owing to the creditor is, to any extent, a
16 liability of the sub-fund.

17 **12 At the end of section 51F**

18 Add:

19 *References to property of a sub-fund of a CCIV*

- 20 (3) A reference in a provision of this Act to property of a sub-fund of a
21 CCIV (including a substituted reference provided for by
22 Part 8B.12) is a reference to something that is:
23 (a) property of the CCIV (within the meaning of the provision);
24 and
25 (b) an asset of the sub-fund of the CCIV.

26 Note: For assets of a sub-fund of a CCIV, see section 1233J.

27 **13 At the end of subsection 233(1)**

28 Add:

29 Note: If the company is a CCIV there are modifications for
30 paragraphs (1)(a) and (h) (see section 1243 and Part 8B.12).

EXPOSURE DRAFT

External administration **Schedule 2**
Other amendments **Part 2**

1 **14 Part 5.1 (after the heading)**

2 Insert:

3 Note: This Part applies to CCIVs with modifications: see Division 2 of Part 8B.12.

4 **15 Part 5.2 (after the heading)**

5 Insert:

6 Note: This Part applies to CCIVs with modifications: see Division 3 of Part 8B.12.

7 **16 At the end of Division 1 of Part 5.3A**

8 Add:

9 **435D Part does not apply to CCIVs**

10 This Part does not apply to a CCIV or a sub-fund of a CCIV.

11 **17 Part 5.4 (after the heading)**

12 Insert:

13 Note: This Part applies to a sub-fund of a CCIV in a modified form: see Division 4 of
14 Part 8B.12.

15 **18 Part 5.4A (after the heading)**

16 Insert:

17 Note: This Part applies to a sub-fund of a CCIV in a modified form: see Division 4 of
18 Part 8B.12.

19 **19 Part 5.4B (after the heading)**

20 Insert:

21 Note: This Part applies to a sub-fund of a CCIV in a modified form: see Division 4 of
22 Part 8B.12.

23 **20 Part 5.4C (after the heading)**

24 Insert:

25 Note: This Part does not apply to a CCIV or a sub-fund of a CCIV: see Division 4 of
26 Part 8B.12.

27 **21 Part 5.5 (after the heading)**

28 Insert:

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Schedule 2 External administration

Part 2 Other amendments

1 Note: This Part applies to a sub-fund of a CCIV in a modified form: see Division 4 of
2 Part 8B.12.

3 **22 Part 5.6 (after the heading)**

4 Insert:

5 Note: This Part applies to a sub-fund of a CCIV in a modified form: see Division 4 of
6 Part 8B.12.

7 **23 At the end of subsection 530C(1)**

8 Add:

9 Note: This section applies to a CCIV in a modified form: see section 12-230.

10 **24 Part 5.7B (after the heading)**

11 Insert:

12 Note: This Part applies to a sub-fund of a CCIV in a modified form: see Division 5 of
13 Part 8B.12.

14 **25 Part 5.8 (after the heading)**

15 Insert:

16 Note: This Part applies to a sub-fund of a CCIV in a modified form: see Division 6 of
17 Part 8B.12.

18 **26 At the end of subsection 596(1)**

19 Add:

20 Note: This section applies to a CCIV in a modified form: see section 12-285.

21 **27 At the end of section 596A**

22 Add:

23 Note: This section applies to a CCIV in a modified form: see section 12-205.

24 **28 Part 5.9 (after the heading)**

25 Insert:

26 Note: This Part applies to a sub-fund of a CCIV in a modified form: see Division 7 of
27 Part 8B.12.

28 **29 At the end of subsection 70-35(3) of Schedule 2**

29 Add:

EXPOSURE DRAFT

Schedule 3 Deregistration

Part 1 Main amendments

1 **Schedule 3—Deregistration**

2 **Part 1—Main amendments**

3 *Corporations Act 2001*

4 **1 In the appropriate position in Chapter 8B**

5 Insert:

6 **Part 8B.13—Deregistration and transfer of**
7 **registration**

8 **Division 1—Deregistration of a sub-fund**

9 **13-000 Deregistration of a sub-fund—voluntary**

10 *Who may apply for deregistration*

11 (1) An application to deregister a sub-fund of a CCIV may be lodged
12 with ASIC by:

- 13 (a) the CCIV; or
14 (b) the corporate director of the CCIV; or
15 (c) a liquidator of the sub-fund.

16 If the CCIV lodges the application, it must nominate a person to be
17 given notice of the deregistration.

18 *Circumstances in which application can be made*

19 (2) A person may apply only if:

- 20 (a) the sub-fund has no assets or liabilities; and
21 (b) the CCIV is not a party to any legal proceedings that relate to
22 the sub-fund.

23 (3) The application must be in the prescribed form.

EXPOSURE DRAFT

Deregistration **Schedule 3**
Main amendments **Part 1**

1

ASIC may ask for information about officers

2

- (4) The applicant must give ASIC any information that ASIC requests about the following officers:

3

4

(a) the current and former officers of the CCIV;

5

(b) the current and former officers of the corporate director of the CCIV.

6

7

Deregistration procedure

8

- (5) If:

9

(a) ASIC decides to deregister the sub-fund under this section; and

10

11

(b) ASIC is not aware of any failure to comply with subsections (1) to (4);

12

13

ASIC must:

14

(c) give notice of the proposed deregistration on ASIC database; and

15

16

(d) publish notice of the proposed deregistration in the prescribed manner.

17

18

- (6) When 2 months have passed since the publication of the notice under paragraph (5)(d), ASIC may deregister the sub-fund.

19

20

- (7) ASIC must give notice of the deregistration to:

21

(a) the applicant; or

22

(b) the person nominated in the application to be given the notice.

23

24

Notices taken to have been given under section 601AA

25

- (8) For the purposes of the provisions of this Act (other than a provision of this Part):

26

27

(a) a notice given under paragraph (5)(c) is taken to have been given under paragraph 601AA(4)(c); and

28

29

(b) a notice published under paragraph (5)(d) is taken to have been published under subsection 601AA(4)(d).

30

EXPOSURE DRAFT

Schedule 3 Deregistration

Part 1 Main amendments

1 *ASIC must not deregister a sub-fund that is an Australian passport*
2 *fund if the fund has certain members*

3 (9) However, ASIC must not decide, under this section, to deregister a
4 sub-fund that is an Australian passport fund if:

5 (a) there are members of the fund who became members
6 (whether in this jurisdiction or any host economy for the
7 fund) after the fund became an Australian passport fund; or

8 (b) there are members of the fund who became members
9 (whether in this jurisdiction or any host economy for the
10 fund) on the expectation that the fund would become an
11 Australian passport fund.

12 (10) For the purposes of subsection (9), ignore any member of the fund
13 that:

14 (a) is, or has at any time been, the operator of the fund; or

15 (b) is a related party of an entity that is, or has at any time been,
16 the operator of the fund.

17 Note: See section 1216B for the circumstances in which a person becomes a
18 member of a fund on the expectation that it would become an
19 Australian passport fund.

20 **13-005 Deregistration of a sub-fund—ASIC initiated**

21 *Circumstances in which ASIC may deregister*

22 (1) ASIC may decide to deregister a sub-fund of a CCIV if:

23 (a) the CCIV has not lodged any documents that relate to the
24 sub-fund under this Act in the last 18 months; and

25 (b) ASIC has no reason to believe that the part of the business of
26 the CCIV that is registered as the sub-fund is being carried
27 on.

28 (2) ASIC may also decide to deregister a sub-fund of a CCIV if:

29 (a) the CCIV's review fee in respect of a review date has not
30 been paid in full at least 12 months after the due date for
31 payment; and

32 (b) the review fee is to any extent a liability of the sub-fund.

33 (3) ASIC may also decide to deregister a sub-fund of a CCIV if the
34 sub-fund is being wound up and ASIC has reason to believe that:

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Deregistration **Schedule 3**
Main amendments **Part 1**

- 1 (a) the liquidator of the sub-fund is no longer acting; or
2 (b) the sub-fund's affairs have been fully wound up and a return
3 that the liquidator should have lodged is at least 6 months
4 late; or
5 (c) the sub-fund's affairs have been fully wound up under
6 Part 5.4 (as modified by Part 8B.12) and the assets of the
7 sub-fund are not enough to cover the costs of obtaining a
8 Court order for the sub-fund's deregistration.
- 9 (4) However, ASIC must not decide, under this section, to deregister a
10 sub-fund that is an Australian passport fund if ASIC is of the
11 opinion that to do so would not be in the interests of:
12 (a) members of the fund who became members (whether in this
13 jurisdiction or any host economy for the fund) after the fund
14 became an Australian passport fund; and
15 (b) members of the fund who became members (whether in this
16 jurisdiction or any host economy for the fund) on the
17 expectation that the fund would become an Australian
18 passport fund.
- 19 (5) For the purposes of subsection (4), ignore any member of the fund
20 that:
21 (a) is, or has at any time been, the operator of the fund; or
22 (b) is a related party of an entity that is, or has at any time been,
23 the operator of the fund.
- 24 Note: See section 1216B for the circumstances in which a person becomes a
25 member of a fund on the expectation that it would become an
26 Australian passport fund.
- 27 *Show cause notice*
- 28 (6) Before deciding to deregister a sub-fund, ASIC must give the
29 CCIV a written notice that requires the CCIV to show cause, at a
30 hearing before a specified person, why the sub-fund should not be
31 deregistered.
- 32 (7) The notice must specify:
33 (a) the grounds on which it is proposed to deregister the
34 sub-fund; and
35 (b) a reasonable time and place at which the hearing is to be
36 held.
-

EXPOSURE DRAFT

Schedule 3 Deregistration

Part 1 Main amendments

- 1 However, if the CCIV consents, the person conducting the hearing
2 may fix a different time or place.
- 3 (8) The person conducting the hearing must:
- 4 (a) give the CCIV an opportunity to be heard at the hearing; and
- 5 (b) give ASIC:
- 6 (i) a report about the hearing; and
- 7 (ii) a recommendation about the grounds in the notice on
- 8 which it is proposed to deregister the sub-fund.
- 9 (9) After considering the report and recommendation, ASIC may
- 10 decide to:
- 11 (a) take no further action in relation to the matter and give
- 12 written advice of that decision to the CCIV; or
- 13 (b) deregister the sub-fund.
- 14 (10) Neither of the following is a legislative instrument:
- 15 (a) a notice under subsection (6);
- 16 (b) a report under subsection (8) (if it is in writing).

13-010 Process for ASIC initiated deregistration of a sub-fund

- 17
- 18 (1) If ASIC decides under section 13-005 to deregister a sub-fund of a
- 19 CCIV, it must:
- 20 (a) give notice setting out the date on which ASIC proposes to
- 21 deregister the sub-fund:
- 22 (i) to the CCIV; and
- 23 (ii) to the liquidator of the sub-fund (if any); and
- 24 (iii) to the corporate director; and
- 25 (iv) on ASIC database; and
- 26 (b) publish notice of the date on which ASIC proposes to
- 27 deregister the sub-fund in the prescribed manner.
- 28 (2) A notice under paragraph (1)(a) must be given at least 5 business
- 29 days before the sub-fund is deregistered.
- 30 (3) ASIC may deregister the sub-fund if:
- 31 (a) 5 business days have passed since the publication of the
- 32 notice under paragraph (1)(b); and
-

EXPOSURE DRAFT

Deregistration **Schedule 3**
Main amendments **Part 1**

- 1 (b) at the time ASIC deregisters the sub-fund, ASIC has reason
2 to believe that there are no assets of the CCIV to which
3 section 1233K (about assets that require proportional
4 allocation) applies.
- 5 (4) ASIC does not have to give a person notice under paragraph (1)(a)
6 if ASIC does not have the necessary information about the person's
7 identity or address.
- 8 (5) If ASIC deregisters a sub-fund of a CCIV under this section, ASIC
9 must give notice that the fund has been deregistered, and the date
10 on which it has been deregistered, to everyone who was notified of
11 the proposed deregistration under subparagraph (1)(a)(ii) or (iii).
- 12 (6) The notice must be given within 5 business days after the sub-fund
13 is deregistered.

14 *Notices taken to have been given under section 601AB*

- 15 (7) For the purposes of the provisions of this Act (other than a
16 provision of this Part):
- 17 (a) a notice given under paragraph (1)(a) is taken to have been
18 given under paragraph 601AB(3)(a); and
- 19 (b) a notice published under paragraph (1)(b) is taken to have
20 been published under subsection 601AB(3)(b).

21 **13-015 Deregistration of a sub-fund—following amalgamation or** 22 **winding up**

23 ASIC must deregister a sub-fund of a CCIV if the Court orders the
24 deregistration of the sub-fund under:

- 25 (a) paragraph 413(1)(d) (reconstruction and amalgamation of
26 Part 5.1 bodies); or
- 27 (b) paragraph 481(5)(b) (release of liquidator); or
- 28 (c) subsection 509(2) (deregistration after end of administration
29 return is lodged).

30 Note: These provisions apply to a sub-fund of a CCIV with modifications:
31 see Part 8B.12.

EXPOSURE DRAFT

Schedule 3 Deregistration

Part 1 Main amendments

1 **13-020 Effect of deregistration of a sub-fund**

2 *Effect on assets of the CCIV*

- 3 (1) Subsections 601AD(1A) to (4) and section 601AE apply in relation
4 to the deregistration of a sub-fund of a CCIV.

5 Note: Subsection 601AD(1) does not apply in relation to the deregistration
6 of a sub-fund of a CCIV. The CCIV will continue to exist until the
7 CCIV itself is deregistered.

- 8 (2) Those provisions apply as if a reference to property were instead a
9 reference to property of the sub-fund.

10 Note: For references to property of a sub-fund, see subsection 51F(3).

11 *Books*

- 12 (3) If a sub-fund of a CCIV is deregistered, the CCIV must keep the
13 CCIV's books that relate to the sub-fund (other than books that a
14 liquidator has to keep under subsection 70-35(1) of Schedule 2) for
15 3 years after the deregistration.

16 Note: If the CCIV itself is deregistered, the corporate director of the CCIV
17 immediately before it is deregistered is required to retain all books of
18 the CCIV including these books, see section 13-055.

- 19 (4) An offence based on subsection (3) is an offence of strict liability.

20 *Consequences of deregistration on status as an Australian passport*
21 *fund*

- 22 (5) If:

- 23 (a) a sub-fund of a CCIV is deregistered; and
24 (b) the sub-fund was an Australian passport fund;

25 ASIC must annotate the Register of Passport Funds to indicate that
26 the sub-fund is no longer an Australian passport fund, or cause that
27 annotation to be made on the Register.

28 **13-025 The Commonwealth's and ASIC's power to fulfil**
29 **outstanding obligations in relation to deregistered**
30 **sub-fund**

31 The Commonwealth or ASIC may do an act on behalf of the CCIV
32 of a deregistered sub-fund or the liquidator of the sub-fund if the

EXPOSURE DRAFT

Deregistration **Schedule 3**
Main amendments **Part 1**

1 Commonwealth or ASIC is satisfied that the CCIV or liquidator
2 would be bound to do the act if the sub-fund had not been
3 deregistered.

4 Note: This power is a general one and is not limited to acts in relation to
5 property vested in the Commonwealth under subsection 601AD(1A),
6 or ASIC under subsection 601AD(2). The Commonwealth or ASIC
7 has all the powers that automatically flow from the vesting of property
8 under that subsection (see subsections 601AD(3A) and (4)) and may
9 exercise those powers whether or not the CCIV was bound to do so.

10 **13-030 Claims against insurers in relation to deregistered sub-fund**

11 A person may recover from the insurer of a CCIV an amount that
12 was payable to the CCIV under the insurance contract if:

- 13 (a) a sub-fund of the CCIV is deregistered; and
14 (b) the CCIV has a liability to the person that was a liability of
15 the sub-fund; and
16 (c) the insurance contract covered that liability immediately
17 before the sub-fund was deregistered.

18 **13-035 Reinstatement of a sub-fund**

19 (1) The registration of a sub-fund of a CCIV may be reinstated under
20 section 601AH as if the sub-fund were a company.

21 Note: Notice of the reinstatement must be given, see section 13-045.

22 (2) If the registration of a sub-fund of a CCIV is reinstated under
23 section 601AH, the sub-fund is taken to have been registered
24 throughout the period it was deregistered.

25 (3) The Court's power to make an order under subsection 601AH(3)
26 includes the power to make an order in relation to the following:

- 27 (a) the assets or liabilities of a sub-fund of a CCIV whose
28 registration is reinstated;
29 (b) the assets or liabilities of any other sub-fund of the CCIV
30 which is affected by the reinstatement.

31 (4) If the registration of a sub-fund of a CCIV is reinstated under
32 section 601AH, any property of the CCIV that was property of the
33 sub-fund that is still vested in the Commonwealth or ASIC reverts
34 in the CCIV. If the CCIV held particular property subject to a

EXPOSURE DRAFT

Schedule 3 Deregistration

Part 1 Main amendments

1 security or other interest or claim, the CCIV takes the property
2 subject to that interest or claim.

3 Note: The CCIV must allocate the property to the sub-fund in accordance
4 with Subdivision C of Division 3 of Part 8B.2.

5 (5) Subsections 601AH(1A), (4), (4A) and (5) do not apply in relation
6 to the reinstatement of the registration of a sub-fund of a CCIV.

7 *Registration as an Australian passport fund not reinstated*

8 (6) The reinstatement of the registration of a sub-fund of a CCIV does
9 not result in the sub-fund's registration as a passport fund under
10 Part 8A.3 being reinstated, even if the sub-fund was an Australian
11 passport fund immediately before its deregistration.

12 **13-040 CCIV reinstated following reinstatement of a sub-fund**

13 (1) If a CCIV is deregistered and:

- 14 (a) ASIC reinstates the registration of a sub-fund of the CCIV
15 under subsection 601AH(1); or
16 (b) the Court makes an order that ASIC reinstate the registration
17 of the sub-fund under subsection 601AH(2);

18 ASIC must also reinstate the registration of the CCIV.

19 Note: Notice of the reinstatement of the registration of the CCIV must be
20 given, see section 13-045.

21 *Effect of reinstatement*

22 (2) If the registration of a CCIV is reinstated:

- 23 (a) the CCIV is taken to have continued in existence as if it had
24 not been deregistered; and
25 (b) subject to subsection (3), the corporate director of the CCIV
26 (the *former corporate director*) immediately before
27 deregistration becomes the corporate director of the CCIV
28 again as from the time when ASIC reinstates the registration
29 of the CCIV; and
30 (c) if the CCIV had a depositary—subject to subsection (4), the
31 depositary of the CCIV (the *former depositary*) immediately
32 before deregistration becomes the depositary of the CCIV
33 again as from the time when ASIC reinstates the registration
34 of the CCIV.
-

EXPOSURE DRAFT

Deregistration **Schedule 3**
Main amendments **Part 1**

1 Note: Any property of the CCIV that comprised assets of the sub-fund that is
2 still vested in the Commonwealth or ASIC reverts in the CCIV, see
3 subsection 13-035(4).

4 (3) If the former corporate director is a Chapter 5 body corporate or
5 does not meet the requirements of subsection 1238E(1):
6 (a) the former corporate director does not become the corporate
7 director of the CCIV; and
8 (b) ASIC must make an application to the Court for the
9 appointment of a temporary corporate director of the CCIV
10 under section 1238Q.

11 (4) If the former depositary is a Chapter 5 body corporate or does not
12 meet the requirements of section 1234C:
13 (a) the former depositary does not become the depositary of the
14 CCIV; and
15 (b) ASIC must make an application to the Court for the
16 appointment of a temporary depositary of the CCIV under
17 section 1235F.

18 **13-045 Notices relating to reinstatement of a sub-fund**

19 (1) If the registration of a sub-fund of a CCIV is reinstated under
20 section 601AH, ASIC must publish notice in the Gazette and give
21 notice to the persons in subsection (2) of the following:
22 (a) the reinstatement of the registration of the sub-fund;
23 (b) if as a result of reinstating the sub-fund the registration of the
24 CCIV is also reinstated under section 13-040—the
25 reinstatement of the registration of the CCIV.

26 (2) The following persons must be given notice under subsection (1):
27 (a) the corporate director of the CCIV or the person (if any) that
28 becomes the corporate director of the CCIV on the
29 reinstatement of the CCIV under paragraph 13-040(2)(b);
30 (b) if the CCIV has a depositary—the depositary of the CCIV.

EXPOSURE DRAFT

Schedule 3 Deregistration
Part 1 Main amendments

1 **Division 2—Deregistration of a CCIV**

2 **13-050 Deregistration of a CCIV**

3 *CCIV must be deregistered if it has no registered sub-funds*

4 (1) If, as the result of ASIC deregistering a sub-fund of a CCIV, the
5 CCIV has no registered sub-funds, ASIC must deregister the
6 CCIV.

7 Note: Subject to this Division, sections 601AD to 601AG apply in relation
8 to the deregistration of the CCIV.

9 (2) ASIC must give the corporate director of the CCIV written notice
10 that the CCIV has been deregistered and the date on which it has
11 been deregistered.

12 (3) The notice must be given within 5 business days after the date the
13 CCIV has been deregistered.

14 *CCIV may not be deregistered under section 601AA, 601AB or*
15 *601AC*

16 (4) ASIC may not deregister a CCIV under section 601AA, 601AB or
17 601AC.

18 **13-055 Books of the CCIV to be kept by former corporate director**

19 (1) If a CCIV is deregistered, the corporate director of the CCIV
20 immediately before the deregistration must keep the CCIV's books
21 (other than books that a liquidator has to keep under
22 subsection 70-35(1) of Schedule 2) for 3 years after the
23 deregistration.

24 (2) An offence based on subsection (1) is an offence of strict liability.

25 (3) Books that the corporate director of the CCIV is required to keep
26 under subsection (1) are taken to be books of the corporate director
27 for the purposes of subsections 601AD(5) to (7) as those sections
28 apply in relation to deregistration of the corporate director.

29 Note: If the corporate director is deregistered, the directors of the corporate
30 director immediately before deregistration must keep the corporate

EXPOSURE DRAFT

Deregistration **Schedule 3**
Main amendments **Part 1**

1 director's books for 3 years after the deregistration, see
2 subsection 601AD(5).

3 (4) Subsections 601AD(5) to (7) do not apply in relation to the
4 deregistration of a CCIV.

5 **13-060 A CCIV may not be reinstated under section 601AH**

6 The registration of a CCIV may not be reinstated under
7 section 601AH.

8 Note: If a CCIV has been deregistered and the registration of a sub-fund is
9 reinstated under section 601AH (as it applies under Division 1 of this
10 Part), ASIC must reinstate the registration of the CCIV, see
11 section 13-040.

12 **Division 3—Transfer of registration**

13 **13-065 Registration of CCIV cannot be transferred**

14 Part 5A.2 does not apply to a CCIV.

EXPOSURE DRAFT

Schedule 3 Deregistration

Part 2 Other amendments

1 **Part 2—Other amendments**

2 *Corporations Act 2001*

3 **2 Part 5A.1 (after the heading)**

4 Insert:

5 Note 1: This Part applies to the deregistration of CCIVs with modifications:
6 see Division 2 of Part 8B.13.

7 Note 2: For the deregistration of sub-funds of CCIVs: see Division 1 of
8 Part 8B.13.

9 **3 Part 5A.2 (after the heading)**

10 Insert:

11 Note: This Part does not apply to a CCIV or a sub-fund of a CCIV: see
12 Division 3 of Part 8B.13.

EXPOSURE DRAFT

Corporate control, disclosure and fundraising **Schedule 4**
Main amendments **Part 1**

1 **Schedule 4—Corporate control, disclosure**
2 **and fundraising**

3 **Part 1—Main amendments**

4 *Corporations Act 2001*

5 **1 In the appropriate position in Chapter 8B**

6 Insert:

7 **1247A Modified operation of section 283AA**

8 Paragraph 283AA(1)(a) has effect in relation to a CCIV as if an
9 offer of debentures was an offer of the kind referred to in that
10 paragraph if the offer gave rise to an obligation to give a Product
11 Disclosure Statement under Chapter 7 (as that Chapter applies to
12 securities in the CCIV under Part 8B.17).

13 **2 In the appropriate position in Chapter 8B**

14 Insert:

15 **Part 8B.14—Takeovers, compulsory acquisitions**
16 **and buy-outs**
17

18 **14-000 Meaning of *securities***

19 The term *securities* has the same meaning in this Part as it has in
20 Chapters 6 to 6CA (see subsection 92(3)).

21 **14-005 Takeovers—no prohibition on acquisitions of shares in a**
22 **CCIV**

23 (1) The prohibitions in subsections 606(1) and (2) do not apply to an
24 acquisition of a relevant interest in issued voting shares in a CCIV
25 (including an acquisition resulting from an acquisition of a legal or
26 equitable interest in securities).

EXPOSURE DRAFT

Schedule 4 Corporate control, disclosure and fundraising

Part 1 Main amendments

1 (2) Nothing in subsection (1) prevents an offer for securities in a CCIV
2 from constituting an off-market bid.

3 Note: In certain circumstances, securities issued under an off-market bid are
4 *ED securities*: see section 111AG.

5 (3) However, Chapter 6B does not apply in relation to an off-market
6 bid for securities in a CCIV.

7 **14-010 Takeovers Panel—declaration of unacceptable circumstances** 8 **may not be made in relation to a CCIV**

9 The Panel may not declare under section 657A circumstances in
10 relation to the affairs of a CCIV to be unacceptable circumstances.

11 **14-015 Compulsory acquisition—not available for securities in a** 12 **CCIV**

13 Securities in a CCIV may not be compulsorily acquired or bought
14 out under Chapter 6A.

15 **Part 8B.15—Continuous disclosure** 16

17 **15-000 Continuous disclosure—CCIVs**

18 Paragraph 675(2)(c) applies in relation to securities in a CCIV in
19 the same way the paragraph applies in relation to securities that are
20 managed investment products.

21 **Part 8B.16—Fundraising** 22

23 **16-000 Fundraising rules do not apply to CCIVs**

24 Subject to subsection 16-005(6), in Chapter 6D, *securities* does not
25 include a security in a CCIV.

26 **16-005 Offering securities of a CCIV or sub-fund that does not exist**

27 (1) A person must not offer securities of a CCIV that does not exist if
28 the offer would give rise to an obligation to give a Product

EXPOSURE DRAFT

Corporate control, disclosure and fundraising **Schedule 4**
Main amendments **Part 1**

- 1 Disclosure Statement under Chapter 7 (as that Chapter applies to
2 securities in a CCIV under Part 8B.17) if the CCIV did exist.
- 3 (2) A person must not offer securities of a CCIV that are referable to a
4 sub-fund of the CCIV that has not been established if the offer
5 would give rise to an obligation to give a Product Disclosure
6 Statement under Chapter 7 (as that Chapter applies to securities in
7 a CCIV under Part 8B.17) if the sub-fund were established.
- 8 Note 1: For when a sub-fund is established, see section 1233E.
- 9 Note 2: For when shares and debentures are referable to a sub-fund of a CCIV
10 see section 1245 (for shares) and section 1247 (for debentures).
- 11 (3) Subsections (1) and (2) apply even if it is proposed to incorporate
12 the CCIV or register the sub-fund.
- 13 (4) In this section, *securities* has the same meaning as it has in
14 Chapter 6D (apart from section 16-000).
- 15 (5) For the purposes of subsection (2), a security referred to in
16 paragraph (c) or (d) of the definition of *security* in section 761A is
17 taken to be referable to the sub-fund of the CCIV to which the
18 relevant security covered by paragraph (a) or (b) of that definition
19 is, or would be, referable.
- 20 Note: For example, an option to acquire by way of issue a share in a CCIV
21 (paragraph (d) of the definition) is referable to the sub-fund of the
22 CCIV to which the share (paragraph (a) of the definition) is referable.
- 23 (6) The following provisions apply in relation to this section in the
24 same way the provisions apply in relation to Chapter 6D:
25 (a) subsections 700(2), (3) and (4);
26 (b) sections 702, 703 and 703A.

EXPOSURE DRAFT

Schedule 4 Corporate control, disclosure and fundraising

Part 2 Other amendments

1 **Part 2—Other amendments**

2 *Corporations Act 2001*

3 **3 At the end of subsection 92(4)**

4 Add:

5 Note: However, in Chapter 6D, *securities* does not include securities in a
6 CCIV: see section 16-000.

7 **4 At the end of section 111AF**

8 Add:

9 (3) Securities (except debentures) in a class of securities of a CCIV are
10 *ED securities* if 100 or more people hold securities in that class as
11 a result of offers that gave rise to obligations to give Product
12 Disclosure Statements (whether or not all in the same terms) under
13 Chapter 7 (as that Chapter applies to those securities under
14 Part 8B.17).

15 **5 Chapter 6 (after the heading)**

16 Insert:

17 Note: This Chapter does not apply to acquisitions of interests in a CCIV: see
18 Part 8B.14.

19 **6 Subsection 616(1) (note)**

20 Omit “Note”, substitute “Note 1”.

21 **7 At the end of subsection 616(1)**

22 Add:

23 Note 2: Although the prohibition in section 606 does not apply to acquiring
24 relevant interests in voting shares in a CCIV, a takeover bid may be
25 made for securities in a CCIV: see subsection 14-005(2).

26 **8 Section 660A (note)**

27 Omit “Note”, substitute “Note 1”.

EXPOSURE DRAFT

Corporate control, disclosure and fundraising **Schedule 4**
Other amendments **Part 2**

1 **9 At the end of section 660A**

2 Add:

3 Note 2: This Chapter does not apply to the acquisition of securities in a CCIV:
4 see section 14-015.

5 **10 Chapter 6B (after the heading)**

6 Insert:

7 Note: This Chapter does not apply in relation to an off-market bid for
8 securities in a CCIV: see subsection 14-005(3).

9 **11 Section 671A (note)**

10 Omit “Note”, substitute “Note 1”.

11 **12 At the end of subsection 675(2)**

12 Add:

13 Note 5: Subsection (2) has a modified operation in relation to securities in a
14 CCIV: see section 15-000.

15 **13 At the end of subsection 700(1)**

16 Add:

17 Note: In this Chapter, *securities* also does not include a security in a CCIV:
18 see section 16-000.

EXPOSURE DRAFT

Schedule 5 Miscellaneous (Chapter 9)

Part 1 Main amendments

1 **Schedule 5—Miscellaneous (Chapter 9)**

2 **Part 1—Main amendments**

3 *Corporations Act 2001*

4 **1 In the appropriate position in Chapter 8B**

5 Insert:

6 **Part 8B.20—Miscellaneous**

7 **Division 1—Registers and registration of documents**

8 **20-000 Registers**

9 Paragraph 1274(2)(a) has effect as if it included the following
10 subparagraph:

- 11 (vi) a written report lodged with ASIC under section 1234P
12 (about breaches that must be reported by depository); or

13 **Division 2—Books**

14 **20-005 Inspection of books**

15 Section 1300 applies to a CCIV as if the CCIV were a proprietary
16 company.

17 **20-010 Falsification of books**

18 Subsection 1307(1) applies as if:

- 19 (a) each of the following were an officer of a CCIV:
20 (i) an officer of the CCIV;
21 (ii) an officer of the corporate director of the CCIV; and
22 (b) each of the following were a former officer of a CCIV:
23 (i) a former officer of the CCIV;
24 (ii) a former officer of the corporate director of the CCIV;
25 and
-

EXPOSURE DRAFT

Miscellaneous (Chapter 9) **Schedule 5**
Main amendments **Part 1**

- 1 (c) an employee of the corporate director of a CCIV were an
2 employee of the CCIV; and
3 (d) a former employee of the corporate director of a CCIV were
4 a former employee of the CCIV.

5 **Division 3—Offences**

6 **20-015 Application of Part 9.4**

- 7 Sections 1308, 1309 and 1317 apply as if:
8 (a) each of the following were a director of a CCIV:
9 (i) the corporate director of the CCIV;
10 (ii) a director of the corporate director of the CCIV; and
11 (b) each of the following were an officer of a CCIV:
12 (i) an officer of the CCIV;
13 (ii) an officer of the corporate director of the CCIV; and
14 (c) an employee of the corporate director of a CCIV were an
15 employee of the CCIV; and
16 (d) each of the following were an agent of a CCIV:
17 (i) an agent of the CCIV; and
18 (ii) an agent of the corporate director of the CCIV.

19 **Division 4—Review by Administrative Appeals Tribunal of** 20 **certain decisions**

21 **20-020 Excluded decisions**

- 22 Section 1317C has effect as if it included the following paragraph:
23 (gg) a decision by ASIC to make CCIV rules under section 1269,
24 or to vary or revoke such rules; or

25 **Division 5—Powers of Courts**

26 **20-025 Irregularities**

- 27 Subparagraph 1322(1)(b)(i) applies to:
-

EXPOSURE DRAFT

Schedule 5 Miscellaneous (Chapter 9)

Part 1 Main amendments

- 1 (a) a meeting of the members of a sub-fund of the CCIV in the
2 same way as it applies in relation to a meeting of a
3 corporation; and
4 (b) a joint meeting of creditors and members of a sub-fund of a
5 CCIV in the same way as it applies in relation to a joint
6 meeting of creditors and members of a corporation.

7 **Division 6—Fees imposed by the Corporations (Fees) Act**
8 **2001 and the Corporations (Review Fees) Act**
9 **2003**

10 **20-030 Fees payable to the Commonwealth**

11 Subsection 1351(4) has effect in relation to a fee imposed under
12 the *Corporations (Review Fees) Act 2003* payable to the
13 Commonwealth by a CCIV in relation to a review date in a year as
14 if the following paragraph were substituted for
15 paragraph 1351(4)(a):

- 16 (a) all of the following apply:
17 (i) ASIC has given notice of the proposed deregistration of
18 a sub-fund of the CCIV in accordance with
19 paragraph 13-000(5)(c), and published notice of the
20 proposed deregistration of the sub-fund in accordance
21 with paragraph 13-000(5)(d);
22 (ii) as a result of ASIC deregistering the sub-fund, ASIC
23 will be required to deregister the CCIV under
24 section 13-050;
25 (iii) the review date for that year falls in the 2 month period
26 before or after the publication of the notice published in
27 accordance with paragraph 13-000(5)(d); or

EXPOSURE DRAFT

Miscellaneous (Chapter 9) **Schedule 5**
Other amendments **Part 2**

1 **Part 2—Other amendments**

2 *Corporations Act 2001*

3 **2 After subsection 1274(2)**

4 Insert:

5 Note: This subsection applies in relation to CCIVs with modifications: see
6 section 20-000.

7 **3 After subsection 1300(2A)**

8 Insert:

9 Note: This section applies to a CCIV as if the CCIV were a proprietary
10 company, see section 20-005.

11 **4 After subsection 1307(1)**

12 Insert:

13 Note: This subsection applies in relation to CCIVs with modifications: see
14 section 20-010.

15 **5 After subsections 1308(12) and (13)**

16 Insert:

17 Note: This subsection applies in relation to information given to CCIVs with
18 modifications: see section 20-015.

19 **6 After subsections 1309(1) and (2)**

20 Insert:

21 Note: This subsection applies in relation to CCIVs with modifications: see
22 section 20-015.

23 **7 After subsections 1309(9) and (10)**

24 Insert:

25 Note: This subsection applies in relation to information given to CCIVs with
26 modifications: see section 20-015.

27 **8 After subsection 1317(1)**

28 Insert:

EXPOSURE DRAFT

Schedule 5 Miscellaneous (Chapter 9)

Part 2 Other amendments

1 Note: This section applies in relation to a defendant who is a CCIV with
2 modifications: see section 20-015.

3 **9 After subsection 1322(1)**

4 Note: This section applies in relation to CCIVs with modifications: see
5 section 20-025.

6 **10 Sections 1324A and 1324B**

7 Omit “or Part 7.10”, substitute “, Part 7.10 or Chapter 8B”.

8 **11 At the end of section 1351**

9 Insert:

10 Note: This subsection applies in relation to CCIVs with modifications: see
11 section 20-030.

Schedule 6—Asia Region Funds Passport

Corporations Act 2001

1 Section 9 (definition of *Australian passport fund*)

Repeal the definition, substitute:

Australian passport fund means:

- (a) a registered scheme that is registered as a passport fund under Part 8A.3; or
- (b) a sub-fund of a retail CCIV that is registered as a passport fund under Part 8A.3.

2 Section 9 (paragraph (a) of the definition of *expectation*)

After “managed investment scheme”, insert “or a sub-fund of a CCIV”.

3 Subsection 1212(1)

Repeal the subsection, substitute:

- (1) A person may lodge an application with ASIC to have a scheme or sub-fund in an item in column 1 of the following table (a *collective investment fund*) registered as a passport fund if the person is the entity mentioned in the corresponding item in column 2 of the table (the *proposed operator* of the fund).

Who may apply to be a passport fund

Item	Column 1 Collective investment fund	Column 2 Proposed operator
1	a managed investment scheme that is a registered scheme	the responsible entity of the scheme
2	a managed investment scheme in respect of which an application for registration under section 601EB has been made	the proposed responsible entity of the scheme
3	a sub-fund of a retail CCIV	the corporate director of the CCIV

EXPOSURE DRAFT

Schedule 6 Asia Region Funds Passport

1 **4 Paragraph 1212(2)(b)**

2 Omit “responsible entity for the scheme”, substitute “proposed operator
3 of the collective investment fund”.

4 **5 Subparagraph 1212(2)(b)(i)**

5 Omit “responsible entity”, substitute “proposed operator”.

6 **6 Subparagraph 1212(2)(b)(ii)**

7 Omit “scheme”, substitute “fund”.

8 **7 Subsection 1212(3)**

9 Omit “scheme is registered as an Australian”, substitute “fund is
10 registered as a”.

11 **8 Section 1212A (heading)**

12 Repeal the heading, substitute:

13 **1212A Registration of Australian passport funds**

14 **9 Subsection 1212A(1)**

15 Omit “a registered scheme”, substitute “a collective investment fund
16 that is a registered scheme or a sub-fund of a retail CCIV”.

17 **10 Paragraph 1212A(1)(a)**

18 Omit “responsible entity for the scheme”, substitute “proposed operator
19 of the fund”.

20 **11 Paragraph 1212A(1)(b)**

21 Omit “scheme”, substitute “fund”.

22 **12 Subsection 1212A(2)**

23 Omit “registered scheme”, substitute “a collective investment fund”.

24 **13 Section 1212B**

25 Omit “registered scheme”, substitute “collective investment fund”.

EXPOSURE DRAFT

Asia Region Funds Passport **Schedule 6**

1 **14 Section 1212B**

2 Omit “scheme’s”, substitute “fund’s”.

3 **15 Subsection 1213B(3)**

4 After “managed investment schemes”, insert “, or CCIVs,”.

EXPOSURE DRAFT

Schedule 7 Amendment of the Australian Securities and Investments Commission Act 2001

1 **Schedule 7—Amendment of the Australian**
2 **Securities and Investments**
3 **Commission Act 2001**
4

5 *Australian Securities and Investments Commission Act 2001*

6 **1 Subsection 5(1) (paragraph (a) of the definition of *eligible***
7 ***person*)**

8 After “body corporate”, insert “(other than a CCIV)”.

9 **2 Subsection 5(1) (after paragraph (a) of the definition of**
10 ***eligible person*)**

11 Insert:

12 (aa) if the first-mentioned person is a CCIV—is or has been:

13 (i) an officer of the CCIV; or

14 (ii) an officer of an officer of the CCIV; or

15 **3 Subsection 5(1) (at the end of the definition of *eligible***
16 ***person*)**

17 Add:

18 Note: For paragraph (aa), *officer* is defined in this subsection.

19 **4 Subsection 5(1) (at the end of the definition of *financial***
20 ***service*)**

21 Add:

22 Note: Some provisions of Chapter 7 of that Act have a modified meaning
23 when applying to CCIVs (see Part 8B.17 of that Act).

24 **5 After paragraph 12BAB(1)(g)**

25 Insert:

26 (ga) as the corporate director of a CCIV, operate the business and
27 conduct the affairs of the CCIV; or

28 (gb) act as the depositary of a CCIV; or

EXPOSURE DRAFT

1 **6 At the end of subsection 12BAB(1)**

2 Add:

3 Note: As paragraph (1)(ga) only applies to the corporate director of a CCIV,
4 another person will not be operating the business and conducting the
5 affairs of the CCIV if that other person:

- 6 (a) is acting as an agent or employee of the corporate director; or
7 (b) is taking steps to wind up the CCIV.

8 **7 After paragraph 12BAB(14)(d)**

9 Insert:

- 10 (da) operating as a CCIV;
11 (db) operating the business and conducting the affairs of a CCIV;
12 (dc) acting as the depositary of a CCIV;

13 **8 Section 12GH (heading)**

14 Repeal the heading, substitute:

15 **12GH Conduct by directors, employees or agents—general**

16 **9 After section 12GH**

17 Insert:

18 **12GHA Conduct by directors, employees or agents—CCIVs**

19 *Other rules for corporate contraventions do not apply*

- 20 (1) Part 8B.19 (other than sections 1267J and 1267N) of the
21 Corporations Act does not apply for the purposes of a provision of
22 this Division or a proceeding under this Subdivision.

23 Note 1: Sections 1267J and 1267N of that Act still apply. Those sections
24 re-route certain liabilities of a CCIV to the corporate director of the
25 CCIV.

26 Note 2: Part 8B.19 (about corporate contraventions by CCIVs) of that Act
27 applies for an offence against a provision outside of this Division.

- 28 (2) Subsections 12GH(1) and (2) do not apply in relation to a body
29 corporate that is a CCIV.

30 Note 1: Instead, subsections (3) to (7) of this section apply, because the CCIV
31 has a corporate director and does not have any employees.

EXPOSURE DRAFT

Schedule 7 Amendment of the Australian Securities and Investments Commission Act 2001

1 Note 2: Subsections 12GH(1) and (2) continue to apply in relation to the
2 corporate director of the CCIV.

3 *Attributing conduct to a CCIV*

- 4 (3) Any conduct engaged in on behalf of a CCIV:
- 5 (a) by an agent of, or the corporate director of, the CCIV acting
6 within the scope of that agent's, or corporate director's,
7 actual or apparent authority in relation to the CCIV; or
- 8 (b) by an employee, director or agent of the corporate director of
9 the CCIV acting:
- 10 (i) within the actual or apparent scope of that employee's
11 employment, or within that director's or agent's actual
12 or apparent authority, in relation to the corporate
13 director; and
- 14 (ii) within the scope of the actual or apparent authority of
15 the corporate director in relation to the CCIV; or
- 16 (c) by any other person at the direction, or with the consent or
17 agreement (whether express or implied):
- 18 (i) of an agent of, or the corporate director of, the CCIV;
19 and
- 20 (ii) that is given within the scope of the actual or apparent
21 authority of that agent, or corporate director, in relation
22 to the CCIV; or
- 23 (d) by any other person at the direction, or with the consent or
24 agreement (whether express or implied):
- 25 (i) of an employee, director or agent of the corporate
26 director of the CCIV; and
- 27 (ii) that is given within the actual or apparent scope of that
28 employee's employment, or within that director's or
29 agent's actual or apparent authority, in relation to the
30 corporate director; and
- 31 (iii) that is given within the scope of the actual or apparent
32 authority of the corporate director in relation to the
33 CCIV;

34 is taken, for the purposes of this Division, to have also been
35 engaged in by the CCIV.

EXPOSURE DRAFT

1

Attributing state of mind to a CCIV

2

(4) Subsection (5) applies if, in a proceeding under this Subdivision in respect of conduct:

3

4

(a) engaged in by a CCIV; and

5

(b) in relation to which this Division applies;

6

it is necessary to establish the state of mind of the CCIV.

7

(5) In the proceeding, it is sufficient to show that one or more of the following persons who engaged in that conduct had that state of mind:

8

9

10

(a) an agent of the CCIV who engaged in that conduct within the scope of the agent's actual or apparent authority in relation to the CCIV;

11

12

13

(b) a director, employee or agent of the corporate director of the CCIV who engaged in that conduct:

14

15

(i) within the actual or apparent scope of that employee's employment, or within that director's or agent's actual or apparent authority, in relation to the corporate director; and

16

17

18

19

(ii) within the scope of the actual or apparent authority of the corporate director in relation to the CCIV.

20

21

(6) For the purposes of subsection (5):

22

(a) a person acting as mentioned in paragraph (3)(c) is taken to be an agent of the CCIV; and

23

24

(b) a person acting as mentioned in paragraph (3)(d) is taken to be an agent of the corporate director of the CCIV.

25

26

(7) A reference in this section to the state of mind of a person includes a reference to:

27

28

(a) the knowledge, intention, opinion, belief or purpose of the person; and

29

30

(b) the person's reasons for the person's intention, opinion, belief or purpose.

31

32

10 Paragraph 12GI(2)(b)

33

After "body corporate", insert "(other than a CCIV)".

EXPOSURE DRAFT

Schedule 7 Amendment of the Australian Securities and Investments Commission Act 2001

1 **11 After paragraph 12GI(2)(b)**

2 Insert:

3 or (c) in the case of a defendant being a CCIV:

- 4 (i) an agent, or the corporate director, of the defendant; or
5 (ii) a director, employee or agent of the corporate director
6 of the defendant;

7 **12 Subsection 59(6)**

8 Repeal the subsection, substitute:

9 (6) A body corporate may be represented at a hearing by:

10 (a) unless paragraph (b) applies—an officer or employee of the
11 body corporate approved by ASIC; or

12 (b) if the body corporate is a CCIV—any of the following
13 persons approved by ASIC:

- 14 (i) an officer of the CCIV (other than the corporate director
15 of the CCIV);
16 (ii) an officer or employee of the corporate director of the
17 CCIV.

18 **13 Section 84**

19 Repeal the section, substitute:

20 **84 Requirement made of a body corporate**

21 If a provision of this Part empowers a person to make a
22 requirement of a body corporate, the provision also empowers the
23 person to make that requirement of a person who is or has been:

24 (a) unless paragraph (b) applies—an officer or employee of the
25 body corporate; or

26 (b) if the body corporate is a CCIV:

- 27 (i) an officer of the CCIV; or
28 (ii) an officer or employee of the corporate director of the
29 CCIV.

30 **14 Part 3A (heading)**

31 Repeal the heading, substitute:

EXPOSURE DRAFT

Amendment of the Australian Securities and Investments Commission Act 2001
Schedule 7

1 **Part 3A—Enforceable undertakings relating to**
2 **registered schemes or CCIVs**

3 **15 At the end of Part 3A**

4 Add:

5 **93B Undertakings by corporate director of a CCIV**

- 6 (1) ASIC may accept a written undertaking given by the corporate
7 director of a CCIV in connection with a matter:
8 (a) concerning the CCIV; and
9 (b) in relation to which ASIC has a power or function under the
10 corporations legislation (other than the excluded provisions).
- 11 (2) The corporate director may withdraw or vary the undertaking at
12 any time, but only with ASIC's consent.
- 13 (3) If ASIC considers that the corporate director has breached any of
14 the terms of the undertaking, ASIC may apply to the Court for an
15 order under subsection (4).
- 16 (4) If the Court is satisfied that the corporate director has breached a
17 term of the undertaking, the Court may make all or any of the
18 following orders:
19 (a) an order directing the corporate director to comply with that
20 term of the undertaking;
21 (b) an order directing the corporate director to transfer to the
22 CCIV an amount up to the amount of any financial benefit
23 that the corporate director has obtained directly or indirectly
24 and that is reasonably attributable to the breach;
25 (c) any order that the Court considers appropriate directing the
26 corporate director to compensate any person who has
27 suffered loss or damage as a result of the breach;
28 (d) any other order that the Court considers appropriate.
- 29 (5) ASIC must keep a record of the full text of the undertaking.

EXPOSURE DRAFT

Schedule 7 Amendment of the Australian Securities and Investments Commission Act 2001

- 1 (6) ASIC must make available to a person who asks for it a copy of the
2 text of the undertaking, but ASIC must delete from the copy
3 information:
4 (a) that the corporate director has asked it not to release; and
5 (b) that ASIC is satisfied:
6 (i) is commercial in confidence; or
7 (ii) should not be disclosed because it would be against the
8 public interest to do so; or
9 (iii) consists of personal details of an individual.
- 10 (7) If ASIC makes available a copy that has information deleted from
11 it, the copy must include a note stating that information has been
12 deleted.

13 **16 After section 243E**

14 Insert:

15 **243F Treat the corporate director of a CCIV as providing financial** 16 **services etc. being provided by the CCIV**

- 17 (1) This section applies to a provision of this Act that applies in
18 relation to:
19 (a) a service, or matter, that is a financial service for the
20 purposes of that provision; or
21 (b) a financial services business; or
22 (c) a matter that is prescribed by the regulations for the purposes
23 of this paragraph.
- 24 *General rule*
- 25 (2) For the purposes of that provision of this Act:
26 (a) treat any conduct engaged in by, or on behalf of, a CCIV as
27 also being engaged in by, or on behalf of, the corporate
28 director of the CCIV; and
29 (b) treat any conduct relating to the CCIV that is engaged in by a
30 person (other than the corporate director of the CCIV) as also
31 being engaged in by that person in relation to the corporate
32 director of the CCIV.

EXPOSURE DRAFT

1 (3) In subsection (2), *conduct* means an act, an omission to perform an
2 act or a state of affairs.

3 *Exceptions*

4 (4) If the CCIV issues a security in the CCIV, then subsection (2) does
5 not treat the corporate director of the CCIV as also being the issuer
6 of the security.

7 (5) If the CCIV is a participant (within the meaning of Chapter 7 of the
8 Corporations Act) in:

9 (a) a clearing and settlement facility; or

10 (b) a financial market;

11 subsection (2) does not treat the corporate director of the CCIV as
12 also being a participant (within the meaning of Chapter 7 of the
13 Corporations Act) in relation to the facility or market.

14 (6) Subsection (2) does not apply in any circumstances prescribed by
15 the regulations for the purposes of this subsection.

16

17