
TREASURY LAWS AMENDMENT (CORPORATE COLLECTIVE INVESTMENT
VEHICLE) BILL 2018: TAX TREATMENT

EXPOSURE DRAFT EXPLANATORY MATERIALS

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Glossary

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

<i>Abbreviation</i>	<i>Definition</i>
ABN	Australian business number
ABN Act	<i>A New Tax System (Australian Business Number) Act 1999</i>
AIV	Attribution investment vehicle
AIVMA statement	AIV member annual statement
AMIT	attribution managed investment trust
AMMA statement	AMIT member annual statement
ASF	attribution sub-fund
CCIV	corporate collective investment vehicle
CGT	capital gains tax
Commissioner	Commissioner of Taxation
Corporations Act	<i>Corporations Act 2001</i>
Regulatory Exposure Draft Bill	Treasury Laws Amendment (Corporate Collective Investment Vehicle) Bill 2018 — Exposure Draft
DIR	dividend, interest and royalties
GST	goods and services tax
ITAA 1936	<i>Income Tax Assessment Act 1936</i>
ITAA 1997	<i>Income Tax Assessment Act 1997</i>
Making Sure Foreign Investors Pay Their Fair of Tax in Australia Bill	Treasury Laws Amendment (Making Sure Foreign Investors Pay Their Fair of Tax in Australia and Other Measures) Bill 2018
MIT	managed investment trust
TAA 1953	<i>Taxation Administration Act 1953</i>
TFN	tax file number

Chapter 1

Tax treatment of corporate collective investment vehicles

Outline of chapter

1.1 This Exposure Draft Bill amends the taxation law to specify the tax treatment for a company that is a CCIV. The amendments ensure that the taxation treatment of CCIVs broadly aligns with the existing tax treatment of AMITs.

1.2 As a result, CCIVs will be taxed on a ‘character flow-through’ basis. Amounts of assessable income, exempt income, non-assessable non-exempt income and tax offsets received by the CCIV having a particular character are attributed to members. Those amounts will retain that character and be taxed in the hands of each member.

1.3 All legislative references in this Chapter are to the ITAA 1997 unless otherwise stated.

Context of amendments

Introduction of the CCIV

1.4 The CCIV is a new form of passive investment vehicle, intended to broaden the suite of investment vehicles available to Australian fund managers. It has been designed to be an internationally recognisable investment vehicle that can be marketed to foreign investors, including through the Asia Region Funds Passport.

1.5 The new CCIV tax regime complements the existing MIT tax regime. CCIVs will be subject to similar eligibility criteria as MITs, such as being widely-held and not closely-held, limited to passive income activities and being an Australian resident.

1.6 The CCIV tax regime is based on an attribution system of tax. The tax outcomes for an ASF of a CCIV are intended to broadly align with the tax outcomes for an AMIT. That is, an ASF will (in essence) be taxed like an AMIT. A sub-fund of a CCIV that does not satisfy the eligibility requirements for attribution will be subject to tax at the top corporate tax rate. A CCIV is not a franking entity.

1.7 A sub-fund of a CCIV will be treated as though it is a separate company for the purposes of applying the taxation law. Consequently,

sub-funds will have separate TFNs and ABNs. This sub-fund segregation approach will also extend to the dealings by a sub-fund of a CCIV with a third party and the Commissioner.

1.8 This Exposure Draft Bill and draft explanatory materials outline the tax regime for the CCIV and should be read in conjunction with the Regulatory Exposure Draft Bill and accompanying draft explanatory materials.

Summary of new law

1.9 This Exposure Draft Bill amends the taxation law to specify the tax treatment for a company that is a CCIV. The amendments ensure that the taxation treatment of CCIVs broadly aligns with the existing tax treatment of AMITs.

1.10 Broadly, a CCIV is a company registered under the Corporations Act that satisfies certain regulatory requirements.

1.11 A sub-fund of a CCIV that satisfies the requirements to be an ASF has access to an attribution or ‘character flow-through’ model of taxation. A sub-fund will be an ASF if:

- the sub-fund satisfies the widely-held requirements and closely-held restrictions in relation to the income year (or the alternative test);
- the sub-fund satisfies the trading business restrictions;
- the CCIV is an Australian resident during the whole of the income year; and
- the sub-fund is not an excluded sub-fund.

1.12 However, if a sub-fund fails the ASF requirements due to temporary circumstances that are outside the control of the CCIV, the sub-fund can continue to be treated as an ASF in relation to the income year if it is fair and reasonable to do so. This is consistent with the current approach for AMITs.

1.13 Under the attribution model, an ASF of a CCIV has the following features:

- for income tax purposes, the CCIV is able to attribute amounts of assessable income, exempt income, non-assessable non-exempt income and tax offsets to members of the ASF on a fair and reasonable basis;
- if the CCIV discovers a variance between the amounts actually attributed to members of an ASF for an income year, and the amounts that should have been attributed, the CCIV

can reconcile the variance in the year that it is discovered by using the ‘unders’ and ‘overs’ regime; and

- where an ASF has separate classes of membership interests and certain criteria are met, the CCIV may elect to treat those classes as separate ASFs for the purposes of applying the attribution rules.

1.14 In addition:

- the withholding tax provisions apply to CCIVs and their members in the same way that they apply to AMITs;
- CCIVs can elect deemed capital account treatment for ASFs; and
- CCIVs will be liable to pay income tax in certain circumstances.

1.15 Restructure roll-over relief will be available to AMITs that choose to transition into an ASF of a CCIV. The restructure relief is dependent on, among other things, an investor holding membership interests (shares) in the CCIV referable to the ASF in the same proportion as it owned membership interests in the AMIT.

1.16 A sub-fund that fails to satisfy the ASF criteria (and which does not qualify for relief under the temporary circumstances safe harbour provision) is subject to taxation at the top corporate tax rate and cannot frank distributions to members as it is not a franking entity.

1.17 This reflects the Government’s policy intent that the CCIV is a new form of passive investment vehicle and is not intended to be a hybrid investment vehicle that derives trading income. However, in response to industry comments on previous consultation drafts, this Exposure Draft Bill provides for CGT roll-over to facilitate a sub-fund that is not an ASF, to restructure into a new company that is not a CCIV.

1.18 The ‘character flow-through’ model ensures that amounts derived or received by the CCIV that are attributed to members retain the character they had in the hands of the CCIV for income tax purposes. Therefore, amounts derived or received by the CCIV referable to an ASF that are attributed to members will retain their original character and will not be treated as a dividend unless the amount had the character of a dividend when it was derived by the CCIV. This ensures that distributions from a CCIV in relation to an ASF will not be treated as a dividend for treaty purposes (unless the underlying character of the income is a dividend).

1.19 In addition, members can make upward and downward adjustments to the cost bases of their shares in the CCIV to prevent double taxation that might otherwise arise.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
<p>A sub-fund of a CCIV that satisfies the requirements to be an ASF has access to an attribution or ‘character flow-through’ model of taxation.</p> <p>A sub-fund will be an ASF if:</p> <ul style="list-style-type: none"> the sub-fund satisfies the widely held requirements and closely held restrictions in relation to the income year (or the alternative test); the sub-fund satisfies the trading business restrictions, the CCIV is an Australian resident during the whole of the income year; and the sub-fund is not an excluded sub-fund. <p>However, if a sub-fund fails the ASF requirements due to temporary circumstances that are outside the control of the CCIV, the sub-fund can continue to be treated as an ASF in relation to the income year if it is fair and reasonable to do so.</p> <p>Under the attribution model, an ASF of a CCIV has the following features:</p> <ul style="list-style-type: none"> for income tax purposes, the CCIV is able to attribute amounts of assessable income, exempt income, non-assessable non-exempt income and tax offsets to members of the ASF on a fair and reasonable basis; if the CCIV discovers a variance between the amounts actually attributed to members of an ASF for an income year, and the amounts that should have been attributed, the CCIV can reconcile the variance in the year that it is discovered by using the ‘unders’ and ‘overs’ regime; and where an ASF has separate classes of membership interests and 	<p>No equivalent.</p>

<p>certain criteria are met, the CCIV may elect to treat those classes as separate ASFs for the purposes of applying the attribution rules.</p> <p>In addition:</p> <ul style="list-style-type: none"> • the withholding tax provisions apply to CCIVs and their members in the same way that they apply to AMITs; • CCIVs will be liable to pay income tax in certain circumstances; and • CCIVs can elect deemed capital account treatment. 	
<p>Restructure roll-over relief will be available to AMITs that choose to transition into an ASF of a CCIV. The restructure relief is dependent on, among other things, an investor holding membership interests (shares) in the CCIV referable to the ASF in the same proportion as it owned membership interests in the AMIT.</p>	No equivalent.
<p>A sub-fund that fails to satisfy the ASF criteria (excluded sub-fund) is subject to taxation at the top corporate tax rate and cannot frank distributions to members as it is not a franking entity. CGT roll-over relief will be available to facilitate an excluded sub-fund to restructure into a new company that is not a CCIV.</p>	No equivalent.
<p>The ‘character flow-through’ model ensures that amounts derived or received by the CCIV that are attributed to members retain the character they had in the hands of the CCIV for income tax purposes. Therefore, amounts derived or received by the CCIV referable to an ASF that are attributed to members will retain their original character and will not be treated as a dividend unless the amount had the character of a dividend when it was derived by the CCIV.</p> <p>Members can make upward and</p>	No equivalent.

downward adjustments to the cost bases of their shares in the CCIV to prevent double taxation that might otherwise arise.	
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Detailed explanation of new law

1.20 This Exposure Draft Bill amends the taxation law to specify the tax treatment for a company that is a CCIV. The amendments ensure that the taxation treatment of CCIVs broadly aligns with the existing tax treatment of AMITs.

What is a CCIV?

1.21 Broadly, a CCIV is a company registered under the Corporations Act that is limited by shares and satisfies certain regulatory requirements, including having a single corporate director and at least one sub-fund at all times. The corporate director must be a public company that holds an Australian financial services licence authorising it to operate the CCIV. A CCIV is primarily a passive investment vehicle.

1.22 The CCIV is the legal entity and the sub-funds of a CCIV do not have legal personality. The assets and liabilities of a sub-fund are strictly segregated from the assets and liabilities of other sub-funds of the CCIV.

1.23 The allocation of assets and liabilities (which includes tax liabilities) to sub-funds are discussed in Chapter 6 of the Regulatory Exposure Draft Bill Explanatory Materials.

What is a sub-fund of a CCIV?

1.24 Broadly, a sub-fund of a CCIV is a segregated fund of assets to which a class or classes of shares in the CCIV are referable. The sub-fund does not have separate legal personality (see section 1222Q of the Regulatory Exposure Draft Bill).

1.25 Each CCIV must have at least one sub-fund, but may have more than one sub-fund (see paragraph 1222(d) of the Regulatory Exposure Draft Bill). Each sub-fund must relate to a separate part of the CCIV's business and, taken together, the business of all of the CCIV's sub-funds must comprise the entire business of the CCIV.

1.26 A person is a 'member of a sub-fund' if the person is a member of the CCIV and holds one or more shares referable to that sub-fund (see section 1222Q of the Regulatory Exposure Draft Bill). In this regard, a member of a sub-fund does not directly hold shares in the sub-fund; rather, they hold shares in the CCIV and those shares are referable to a particular sub-fund.

1.27 The concept of a sub-fund allows managed funds to operate with an ‘umbrella structure’, such that investors in respect of a particular sub-fund of a CCIV are quarantined from the consequences of activities in respect of other sub-funds of the CCIV. This is achieved through the strict segregation of assets and liabilities of each sub-fund. An ASF must meet eligibility rules that are similar to the eligibility rules that a MIT must satisfy to qualify as an AMIT.

CCIV treated as a separate company in relation to each sub-fund

1.28 Schedule 3 to the Exposure Draft Bill ensures that a CCIV is treated as if it were a separate company in relation to each sub-fund for the purposes of applying the taxation law.

1.29 Under the regulatory regime, a CCIV is a legal entity. A sub-fund of a CCIV does not have separate legal personality and the business of the CCIV is referable to its sub-funds.

1.30 As outlined in paragraph 6.12 of the Regulatory Exposure Draft Bill Explanatory Materials (see sections 1222Q and 1233B of the Regulatory Exposure Draft Bill):

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

1.31 The quarantining of the business of a particular sub-fund from the business of all the other sub-funds of the CCIV is achieved by strictly segregating the assets and liabilities of each sub-fund from the assets and liabilities of the other sub-funds of the CCIV (see Chapter 6 of the Regulatory Exposure Draft Bill Explanatory Materials).

1.32 Consistent with the segregation principle under the CCIV regulatory framework, a CCIV is treated as a separate company in relation to each sub-fund (a CCIV sub-fund company) for taxation purposes.

1.33 That is, the provisions of a taxation law are applied as if the CCIV were a separate company in relation to each sub-fund for the purposes of:

- ascertaining the existence or extent, under a taxation law, of an obligation (including a liability) and complying with that obligation; or
- ascertaining the existence or extent, under a taxation law, of an entitlement (including a right to act or a right not to act) and exercising that entitlement.

[Schedule 3, item 1, subsections 195-105(1) and (2)]

1.34 For these purposes, an obligation or an entitlement in relation to a particular CCIV sub-fund company is ascertained as if:

- the only business carried on by the CCIV were the part of the CCIVs business that is the business of the particular CCIV sub-fund; and
- any business of the CCIV that is not the business of that particular CCIV sub-fund were part of a business carried on by another company.

[Schedule 3, item 1, subsection 195-105(3)]

1.35 For the avoidance of doubt, any obligation or entitlement ascertained in relation to a particular CCIV sub-fund company is an obligation or entitlement of the CCIV (given it is the CCIV and not the sub-fund that has separate legal personality). Such liabilities or entitlements are separate from any other liability or entitlement of the CCIV under a taxation law. ***[Schedule 3, item 1, subsection 195-105(5)]***

1.36 The CCIV will need to separately work out the income tax position for each CCIV sub-fund company. Consequently, for example, where a provision of a taxation law provides for a choice or election to be made, the CCIV must make a separate choice or election for each CCIV sub-fund company.

1.37 The CCIV bears a separate tax liability for each CCIV sub-fund company. The separate tax liabilities for each CCIV sub-fund company cannot be aggregated (see section 1233L of the Regulatory Exposure Draft Bill).

1.38 The same principles that apply in working out the obligations or entitlements of the CCIV also extend to the Commissioner. ***[Schedule 3, item 1, subparagraphs 195-105(2)(a)(iii) and (c)(iii)]***

1.39 As the CCIV is treated as if it were a separate company in relation to each sub-fund, administrative obligations and entitlements of the CCIV will apply separately to each CCIV sub-fund company. That is, for each CCIV sub-fund company:

- the CCIV must have a separate TFN and ABN;
- the CCIV must lodge a separate income tax return; and
- a separate income tax assessment will be made.

1.40 In this regard, for the purposes of applying the ABN Act, each CCIV sub-fund company is taken as if it were an entity carrying on an enterprise in Australia. This will ensure that each sub-fund of a CCIV is entitled to its own ABN. ***[Schedule 9, items 1 and 2, section 5 of the ABN Act 1999]***

1.41 Further, a private ruling provided to the CCIV that relates to an ASF will also apply to the members of the ASF. *[Schedule 9, item 45, section 359-32 in Schedule 1 to the TAA 1953]*

1.42 A CCIV sub-fund company will also be a self-assessment taxpayer. *[Schedule 9, item 5, definition of full self-assessment taxpayer in subsection 6(1) of the ITAA 1936]*

Example 1.1: Applying taxation law to sub-funds

XYZ is a CCIV with two sub-funds, being Sub-fund 1 and Sub-fund 2. For the purposes of the applying the provisions of a taxation law, in relation to ascertaining the obligations or entitlements of the CCIV, two separate companies are taken to exist — CCIV Sub-fund Company 1 and CCIV Sub-fund Company 2.

Consequently:

- the income tax positions in relation to CCIV Sub-fund Company 1 and CCIV Sub-fund Company 2 will need to be ascertained separately; and
- the CCIV must give separate returns in relation to CCIV Sub-fund Company 1 and CCIV Sub-fund Company 2.

Members of a sub-fund

1.43 Every share in a CCIV must be referable to one, and only one, sub-fund of the CCIV. The sub-fund to which the share is referable is the sub-fund to which the rights attaching to the share relate (See section 1231 of the Regulatory Exposure Draft Bill).

1.44 Despite the fact that a sub-fund does not have separate legal personality, each member of a CCIV is deemed to be a member of a sub-fund of a CCIV if the person is a member of the CCIV and holds one or more shares that are referable to the sub-fund (See sections 1222Q and 1231 of the Regulatory Exposure Draft Bill). *[Schedule 11, item 16, definition of member in subsection 995-1(1)]*

1.45 Consequently, as the CCIV is treated as if it were a separate company in relation to each sub-fund, members of the CCIV that own shares referable to a particular sub-fund are treated as the shareholders of that separate CCIV sub-fund company for taxation purposes.

Example 1.2: Membership of a sub-fund

PHAN is a CCIV with two sub-funds — Sub-fund 1 and Sub fund 2.

Trinny owns shares in PHAN that are referable to Sub-fund 1 and Sally owns shares in PHAN that are referable to Sub-fund 2. Tom owns shares that are referable to both Sub-fund 1 and Sub-fund 2.

For the purposes of ascertaining the existence or extent of an obligation or entitlement of the CCIV or another entity:

- Trinny will be treated as a shareholder of the separate CCIV Sub-fund Company 1;
- Sally will be treated as a shareholder of the separate 'CCIV Sub-fund Company 2; and
- Tom will be treated as a shareholder of both the separate CCIV Sub-fund Company 1 and CCIV Sub-fund Company 2.

Dealings between sub-funds

1.46 As the CCIV is taken to be a separate company in relation to each sub-fund, the movement of an asset from one CCIV sub-fund company to another CCIV sub-fund company, or any other dealing between two or more CCIV sub-fund companies, is recognised for the purposes of working out the income tax positions of each CCIV sub-fund company.

1.47 As a consequence, for the purpose of determining whether an amount is included in assessable income or is an allowable deduction, or whether a capital gain or capital loss arises, in respect of, for example, the transfer of the asset:

- one CCIV sub-fund company is taken to have sold the asset immediately before the transfer for consideration equal to the asset's market value; and
- another CCIV sub-fund company is taken to have purchased the asset at the time of the transfer for consideration equal to the asset's market value.

Example 1.3: Disposal of assets between sub-funds in a CCIV

XYZ is a CCIV with two sub-funds — Sub-fund 1 and Sub-fund 2. XYZ owns 50 shares in BLT Co (which are allocated to Sub-fund 1) and 50 shares in EXO Co (which are allocated to Sub-fund 2). The 50 shares in BLT Co were bought for \$1,000 by XYZ in 2020.

In the 2022-23 income year, XYZ transfers the 50 shares in BLT Co from Sub-fund 1 to Sub-fund 2. The market value at the time of transfer of the 50 shares in BLT Co was \$2,000.

For the purposes of applying a taxation law, in relation to working out the liabilities or entitlements of the CCIV, the CCIV is treated as a separate company in relation to Sub-fund 1 and Sub-fund 2.

As a result, CCIV Sub-fund Company 1 is taken to have disposed of the 50 shares in BLT Co to CCIV Sub-fund Company 2. CGT event A1 will apply and a capital gain of \$1,000 will be recognised by CCIV Sub-fund Company.

In addition, CCIV Sub-fund Company 2 is taken to have acquired the 50 shares in BLT Co. The first element of the cost base and reduced cost base of the BLT Co shares will be \$2,000.

Obligations and entitlements of a third party

1.48 The same principles that apply in working out the obligations or entitlements of the CCIV also extend to another entity (e.g. third parties), if the obligation or entitlement of that entity is affected directly or indirectly by any matter relating to the CCIV or its sub-funds. That is, the entity will treat the CCIV as being a separate company in relation to each sub-fund as if the only business carried on by the CCIV was the business of the relevant sub-fund. *[Schedule 3, item 1, subparagraphs 195-105(2)(a)(ii) and (c)(ii)]*

1.49 Generally, a third party would be able to identify the relevant sub-fund because the CCIV must set out a sub-fund's name and Australian Registered Fund Number on all public documents. Further, each sub-fund of a CCIV will have its own TFN and ABN.

The AIV regime

1.50 Schedule 2 to the Exposure Draft Bill introduces a new concept into the income tax law — an AIV. An AIV may be either:

- an AMIT (section 276-10); or
- an ASF (section 276-20).

[Schedule 2, items 1 to 9, sections 276-1, 276-5 and 276-7]

1.51 The amendments apply the existing AMIT attribution or 'character flow-through' model to ASFs with modifications as required to take account of the corporate structure of CCIVs and the CCIV sub-fund model.

1.52 The amendments made by this Exposure Draft Bill do not alter the attribution taxation regime that currently applies to AMITs.

When is a sub-fund of a CCIV an ASF?

1.53 Schedule 1 to the Exposure Draft Bill sets out when a sub-fund of a CCIV will be an ASF.

- 1.54 A sub-fund of a CCIV will be an ASF for an income year if:
- the sub-fund satisfies the widely-held requirements and closely-held restrictions in relation to the income year (or the alternative test);
 - the sub-fund satisfies the trading business restrictions;
 - the CCIV is an Australian resident during the whole of the income year; and
 - the sub-fund is not an excluded sub-fund.

[Schedule 1, item 1, subsection 276-20(1)]

- 1.55 A sub-fund will be an excluded sub-fund if:
- the sub-fund was, and ceased to be, an ASF (because it fails to satisfy the ASF criteria in a particular income year); or
 - the sub-fund did not become an ASF by the end of the income year in which it was established or within such further period as the Commissioner allows.

[Schedule 1, item 1, subsection 276-20(4)]

1.56 The requirements for a sub-fund of a CCIV to qualify as an ASF are broadly consistent with the requirements that apply for a trust to be an AMIT, with modifications to reflect the sub-fund and corporate structure of a CCIV.

1.57 A sub-fund of a CCIV must meet the widely-held requirements and closely-held restrictions (or the alternative test) to be an ASF. This reflects the principle that each sub-fund is segregated and that the whole CCIV should be a genuine collective investment vehicle. *[Schedule 1, item 1, subsection 276-20(2)]*

Widely-held requirements

1.58 The widely-held requirements that need to be satisfied by the sub-fund will depend on whether or not the sub-fund has wholesale membership.

1.59 A sub-fund must satisfy the relevant widely held requirements at the time the first fund payment is made from the sub-fund for the income year. *[Schedule 1, item 1, paragraph 276-20(2)(a)]*

1.60 The meaning of *fund payment* is set out in the Schedule 1 to the TAA 1953. The amendments extend the current definition of fund payment that applies to AMITs so that it applies to all AIVs. *[Schedule 5, items 97 to 111, section 12A-110 in Schedule 1 to the TAA 1953]*

1.61 A sub-fund that has wholesale membership must satisfy certain requirements and have at least 25 members at the time the first fund payment is made from the sub-fund for the income year. *[Schedule 1, item 1, paragraph 276-22(1)(b)]*

1.62 The wholesale membership requirements for the sub-fund are that:

- the total number of persons that had become a member of the sub-fund because a financial product or a financial service was provided to, or acquired by, the person as a retail client (within the meaning of sections 761G and 761GA of the Corporations Act) is equal to or less than 20; and
- these retail clients collectively must have a total sub-fund participation interest in the sub-fund of not more than 10 per cent.

[Schedule 1, item 1, subsection 276-22(2)]

1.63 These requirements reflect the widely-held requirements under the AMIT regime for unregistered trusts with wholesale membership (see subparagraph 275-10(3)(e)(iii), sections 275-15 and 275-40), with modifications to remove inapplicable trust elements and apply the test to each sub-fund of the CCIV.

1.64 An entity has a ***sub-fund participation interest*** in the sub-fund if the entity, directly or indirectly:

- holds, or has the right to acquire, interests representing a percentage of the value of the interests in the sub-fund; or
- has the control of, or the ability to control, a percentage of the rights attaching to either or both of the following:
 - an interest, or set of interests, in the sub-fund; and/or
 - each right to receive a distribution, or set of such rights, in relation to the sub-fund.

[Schedule 1, item 1, subsection 276-28(1)]

1.65 The sub-fund participation interest that an entity has in a sub-fund is the greater of the percentages mentioned in paragraphs 276-28(1)(a) and (b). *[Schedule 1, item 1, subsection 276-28(2)]*

1.66 If the sub-fund does not have wholesale membership, the sub-fund must meet either or both of the following requirements:

- the sub-fund has at least 50 members; and/or
- one or more of the specified types of entities covered by subsection 275-20(4) (such as life insurance companies, foreign life insurance companies, complying superannuation funds, complying approved deposit funds, foreign superannuation funds, pooled superannuation trusts and other CCIVs) have a sub-fund participation interest of more than 25 per cent, and no other entity has a sub-fund participation interest of more than 60 per cent.

[Schedule 1, item 1, subsections 276-20(2) and 276-22(1) to (6)]

1.67 These requirements reflect the widely-held requirements under the AMIT regime for trusts without wholesale membership (see subparagraph 275-10(3)(e)(ii), subsection 275-20(2) and section 275-25), with modifications to remove inapplicable trust elements and apply the test to each sub-fund of the CCIV.

1.68 The amendments apply the existing AMIT provisions for determining the number of members of the trust (see subsections 275-20(3), (5), (7)) to CCIVs with modifications to remove

inapplicable trust elements and apply the tests to each sub-fund of the CCIV. *[Schedule 1, item 1, subsections 276-20(7) to (9)]*

Closely-held restrictions

1.69 The closely held restrictions for a sub-fund are met unless, at any time during the income year:

- for a sub-fund with wholesale membership — 10 or fewer persons have a total sub-fund participation interest in the sub-fund of 75 per cent or more;
- for a sub-fund without wholesale membership — 20 or fewer persons have a total sub-fund participation interest in the sub-fund of 75 per cent or more; or
- a foreign resident individual has a sub-fund participation interest in the sub-fund of 10 per cent or more.

[Schedule 1, item 1, section 276-24]

1.70 These requirements reflect the closely-held restrictions under the AMIT regime for trusts (see paragraph 275-10(3)(f) and section 275-30), with modifications to apply the test to each sub-fund of the CCIV.

Alternative test to satisfying the widely-held requirements and closely-held restrictions

1.71 If the sub-fund has all members that are either CCIVs, MITs or other specified widely-held entities covered by subsection 275-20(4) for an income year, the relevant sub-fund is taken to satisfy the widely-held requirements and closely-held restrictions. *[Schedule 1, item 1, paragraph 276-20(2)(b)]*

1.72 This requirement aligns with the AMIT regime alternative test for satisfying the widely-held requirements and closely-held restrictions (see paragraphs 276-10(1)(c) and 275-10(1)(b)).

Trading business restrictions

1.73 A sub-fund of a CCIV must satisfy the trading business restrictions — that is, the CCIV in relation to the sub-fund, must not wholly or partly:

- carry on a trading business (within the meaning of Division 6C of Part III of the ITAA 1936); or
- control, or be able to control, directly or indirectly, the affairs or operations of another person in respect of the carrying on by that other person of a trading business.

[Schedule 1, item 1, paragraph 276-20(1)(b) and subsection 276-26(1)]

1.74 A trading business is a business whose activities do not wholly consist of ‘eligible investment business’ (as defined in section 102M of

the ITAA 1936) — that is, broadly, passive investment activities. The permitted activities include, for example, investing in land primarily for the purpose of deriving rent, and investing or trading in secured and unsecured loans, bonds and other securities and foreign exchange contracts.

1.75 However, a sub-fund of a CCIV will not be taken to carry on a trading business during the income year, either wholly or partly if, for that year, no more than 2 per cent of the entity's gross revenue attributable to that sub-fund was income that was not eligible investment business income. *[Schedule 1, item 1, subsection 276-26(2)]*

1.76 The trading business restrictions for ASF's broadly align with the AMIT trading business restrictions (see paragraph 275-10(3)(b), subsections 275-10(4), (4A) and (5)).

Temporary circumstances test

1.77 A sub-fund of a CCIV that fails to meet one of the ASF requirements under the general test may still be treated as an ASF if it satisfies the following requirements:

- there is a particular temporary circumstance that arose outside the control of the CCIV; and
- it is fair and reasonable to treat the sub-fund as an ASF in relation to the income year having regard to a number of factors, including:
 - the nature of the circumstance;
 - actions taken to address the circumstance by the CCIV;
 - the speed with which such actions are taken;
 - the amount of tax that would otherwise be payable; and
 - any other relevant matter.

[Schedule 1, item 1, subsection 276-20(3) and section 276-30]

1.78 This test reflects the temporary circumstances test for MITs (see section 275-55).

Application of the AIV rules to ASFs

1.79 The AIV rules (Part 3-28) apply in relation to an ASF of a CCIV as if:

- an amount derived, received, made or paid by the CCIV that is attributable to a particular sub-fund was an amount derived, received, made or paid by that particular sub-fund;

- an amount of income of the CCIV that is attributable to a particular sub-fund was an amount of income of that particular sub-fund; and
- a tax offset of the CCIV that is attributable to a particular sub-fund was a tax offset of that particular sub-fund.

[Schedule 1, item 1, subsection 276-32(1)]

1.80 In addition, where an AIV is an ASF of a CCIV:

- a provision of the taxation law that imposes a liability or obligation on the AIV is taken to impose the liability or obligation on the CCIV; and
- a reference in the taxation law to the AIV doing a thing is taken to be a reference to the CCIV doing that thing.

[Schedule 1, item 1, subsection 276-32(2)]

1.81 These amendments reflect the fact that a CCIV is the legal entity that does things for the ASF (which is not a legal entity).

Attribution model for ASFs

1.82 The amendments in Schedule 2 to the Exposure Draft Bill apply the existing AMIT attribution or ‘character flow-through’ model (see sections 276-75 to 276-820) to an ASF of a CCIV with modifications to reflect the sub-fund and corporate structure of a CCIV. *[Schedule 2, items 11 to 246, sections 276-75 to 276-820]*

1.83 This is achieved by broadening the existing provisions that apply to AMITs to all AIVs (as appropriate). For example, changes are made so that the terminology in the attribution model refers to:

- an ‘AIV’ rather than an ‘AMIT’;
- an ‘operator’ rather than a ‘trustee’;
- the ‘determined AIV component’ rather than the ‘determined trust component’; and
- an ‘AIVMA statement’ rather than an ‘AMMA statement’.

1.84 Under the ASF attribution model, the operator (being the CCIV) of an ASF must:

- determine the overall amounts of particular characters of income for the ASF for an income year — that is:
 - calculate the total amounts associated with the various activities of the ASF that have a character relating to assessable income, exempt income, non-assessable non-exempt income and tax offsets — that is, the *AIV component* of each particular character; and

- determine the amount of the components of particular characters and create a document recording those amounts — that is, the *determined AIV component*; and
- attribute amounts with particular characters for that income year to members on a fair and reasonable basis in accordance with the constituent documents of the ASF — that is:
 - attribute the amount of an AIV component of a particular character to a member based on the member’s clearly defined interests in the ASF — that is, the *member component*;
 - determine the amount of the member component of particular characters that is attributed to each member — that is, the *determined member component*; and
 - issue an AIVMA statement to the member that records those amounts.

[Schedule 2, items 58 to 105, sections 276-200 to 276-270]

1.85 Existing AMITs are taken to comply with obligations relating to AIVMA statements under the ITAA 1997 where it has been in compliance with its obligations relating to AMMA statements under the existing law.

[Schedule 10, item 3, subsections 276-10(3) and (4) of the Income Tax (Transitional Provisions) Act 1997]

1.86 The amount that is recognised by the member for income tax purposes in relation to their investment in an ASF of a CCIV is the determined member component, which is generally the amount shown on the AIVMA statement issued by the CCIV. *[Schedule 2, item 228, sections 276-450 to 276-460]*

1.87 If a sub-fund of a CCIV is an ASF, then for the purpose of working out the assessable income, non-assessable non-exempt income, capital gains and net capital losses of a member of the ASF, amounts derived, received or made by the CCIV that are reflected in the determined member component are taken to have been derived, received or made by the member (rather than by the CCIV). *[Schedule 2, item 14, subsection 276-80(2)]*

1.88 In addition, for the purpose of working out the member’s entitlement to a tax offset or credit for withholding tax, amounts paid or received by the CCIV are taken to have been paid or received by the member (rather than by the CCIV). *[Schedule 2, item 18, subsection 276-80(5)]*

1.89 The attribution model provides flexibility for a CCIV in relation to its ASFs, to reconcile any variance between the amounts actually attributed to members for an income year and the amounts that should have been attributed to members (for example, as a result of incomplete information being available at the time of issuing the AIVMA statement)

in the year the variance is discovered utilising the ‘unders’ and ‘overs’ regime. *[Schedule 2, items 106 to 186, sections 276-300 to 276-350]*

1.90 In certain circumstances, the CCIV will be liable to pay shortfall or excess tax on certain amounts reflecting under-attribution of income or over-attribution of tax offsets to members of an ASF in an income year. *[Schedule 2, items 187 to 227, sections 276-400 to 276-425]*

Depository treated as the same entity

1.91 Where a CCIV has a depository, ordinarily a trust relationship for income tax purposes would arise because the depository holds the assets on trust for the CCIV. To ensure the attribution model provides for ‘character flow through’ of income, the amendments provide that Division 6 of Part III of the ITAA 1936 (about trust income) does not apply in relation to any trust estate that arises because of the relationship between a CCIV and its depository. *[Schedule 9, item 6, section 95AAE of the ITAA 1936]*

1.92 Where a CCIV has a depository, the CCIV and the depository (in that capacity) are taken to be the same entity for the purposes of applying the AIV attribution regime — that is, working out the CCIV’s ASF tax positions and AIV components. In this event, the same entity is taken to be an Australian resident. *[Schedule 2, item 96, subsection 276-260(5)]*

1.93 In addition, for the purposes of working out the AIV component of a particular character for the income year, any payments made by the CCIV to the depository (in its capacity as the CCIV’s depository) are disregarded. As a result, payments made by the CCIV to the depository in its personal capacity (such as fees paid by the CCIV for services rendered by the depository) will be recognised. *[Schedule 2, item 96, paragraph 276-260(5)(e)]*

Penalty for AIV — failure to take reasonable care

1.94 Under the AMIT attribution model, the trustee of an AMIT is liable to an administrative penalty if it has an ‘under’ or an ‘over’ for the base year which resulted from intentional disregard or recklessness of the law by the trustee. The penalty amount that applies is based on the existing framework for administrative penalties that arise to an individual taxpayer in relation to their own income tax affairs (Division 284 in Schedule 1 to the TAA 1953).

1.95 The amendments in Schedule 10 to the Exposure Draft Bill broaden the administrative penalty regime to operators of AIVs (or the operator’s agent), and insert an administrative penalty for an AIV ‘over’ or ‘under’ resulting from failure to take reasonable care to comply with a taxation law. This aligns the AIV administrative penalty regime with other taxpayers who are subject to the general administrative penalty scale.

1.96 In the case of an ‘under’ of a character relating to assessable income, exempt income, non-assessable non-exempt income, or of an ‘over’ of a character relating to a tax offset, the amount of the administrative penalty is:

- where the ‘under’ or ‘over’ resulted from *intentional disregard* of a taxation law (other than the Excise Acts, within the meaning of the *Excise Act 1901*) by the operator of the AIV or the operator’s agent — the highest marginal tax rate plus Medicare levy of the amount of the ‘under’ or ‘over’ multiplied by 75 per cent;
- where the ‘under’ or ‘over’ resulted from *recklessness* by the operator of the AIV or the operator’s agent as to the operation of a taxation law — the highest marginal tax rate plus Medicare levy of the amount of the ‘under’ or ‘over’ multiplied by 50 per cent;
- where the ‘under’ or ‘over’ resulted from *failure to take reasonable care* by the operator of the AIV or the operator’s agent — the highest marginal tax rate plus Medicare levy of the amount of the ‘under’ or ‘over’ multiplied by 25 per cent.

[Schedule 9, item 42, table item 3 in subsection 288-115(3) in Schedule 1 to the TAA 1953]

1.97 In the case of an ‘over’ of a character relating to assessable income, exempt income, non-assessable non-exempt income, or of an ‘under’ of a character relating to a tax offset, the amount of the administrative penalty is:

- where the ‘over’ or ‘under’ resulted from intentional disregard of a taxation law (other than the Excise Acts, within the meaning of the *Excise Act 1901*) by the operator of the AIV or the operator’s agent — the greater of:
 - the highest marginal tax rate plus Medicare levy of the amount of the ‘under’ or ‘over’ multiplied by 30 per cent;
 - or
 - 60 penalty units;
- where the ‘over’ or ‘under’ resulted from recklessness by the operator of the AIV or the operator’s agent as to the operation of a taxation law — the greater of:
 - the highest marginal tax rate plus Medicare levy of the amount of the ‘under’ or ‘over’ multiplied by 20 per cent;
 - or
 - 40 penalty units;

- where the ‘over’ or ‘under’ resulted from *failure to take reasonable care* by the operator of the AIV or the operator’s agent — the greater of:
 - the highest marginal tax rate plus Medicare levy of the amount of the under or over multiplied by 10 per cent; or
 - 20 penalty units.

[Schedule 9, items 42 and 43, paragraph 288-115(4)(c) and table item 3 in subsection 288-115(3) in Schedule 1 to the TAA 1953]

1.98 If multiple penalties apply to an ‘under’ or ‘over’, the penalty that produces the greatest penalty will apply. These penalties are consistent with other tax penalties that apply to all other taxpayers.

[Schedule 9, item 44, subsection 288-115(7) in Schedule 1 to the TAA 1953]

Classes of membership interests for an ASF

1.99 The amendments in Schedule 2 to the Exposure Draft Bill ensure that an AIV (including an ASF of a CCIV) with separate membership interests (such as separate units or classes of shares) may elect to treat separate classes of membership interests as separate AIVs for the purposes of Division 276, where certain criteria are met. *[Schedule 2, item 10, section 276-48]*

1.100 These criteria include:

- the rights arising from each of the membership interests in a particular class must be the same as the rights arising from every other membership interest in that class;
- each of those membership interests in a particular class must be distinct from each of the membership interests in another class; and
- the operator of the AIV must have made a choice to apply the attribution regime separately to each class of membership interests.

[Schedule 2, item 10, subsection 276-48(1)]

1.101 For AMITs, although the rules have been relocated, the operation of these rules is unchanged. For CCIVs, where membership interests of an ASF are divided into classes and the operator of the CCIV makes an irrevocable election, the CCIV may be able to apply the attribution regime separately to each class of membership interests in the ASF for that income year and every subsequent income year. *[Schedule 2, item 10, subsections 276-48(2), (4) and (5)]*

1.102 This means that each class will effectively be treated as a separate ASF for the purposes of the attribution regime. Assessable income, exempt income, non-assessable non-exempt income, tax losses,

net capital losses and other similar amounts derived by the ASF of a CCIV for an income year must be allocated between each class on a fair and reasonable basis. *[Schedule 2, item 10, subsection 276-48(3)]*

1.103 To the extent that assets and expenditure relate solely to a particular class of membership interests, the assessable income and deductions relating to that class will need to be identified by reference to the assets supporting that class.

1.104 To the extent that assets and expenditure relate to more than one class of membership interests, the related assessable income and deductions must be allocated to each class on a fair and reasonable basis.

Modification to the CGT rules for ASFs

1.105 The amendments in Schedule 4 to the Exposure Draft Bill modify the CGT rules for ASFs.

Discount capital gains calculation not applicable

1.106 Consistent with the operation of the CGT discount capital gains rules that apply to companies, ASFs of a CCIV are not entitled to discount capital gains that they make when working out their taxable income. This is also consistent with the Government's 2018-19 Budget measure to remove the CGT discount at the trust level for MITs and AMITs.

1.107 However, if an ASF receives an amount that meets the conditions to qualify for a discount capital gain, the amount will retain that tax character as it flows through the ASF to its members. If the member who receives the amount is entitled to discount capital gains, the member will be able to apply the discount to the capital gain when working out their net capital gain.

Deemed capital account treatment

1.108 The amendments allow AIVs including an eligible ASF to have deemed capital account treatment for certain assets allocated to the ASF (new Subdivision 276-JA).

1.109 The CCIV can elect to apply the CGT provisions to gains and losses made on the disposal of certain assets. The amendments broadly replicate the existing rules for MITs (Subdivision 275-B) for AIVs. *[Schedule 4, item 9, sections 276-600 to 276-620]*

1.110 As with the MIT rules, the election must be made in the first year that the sub-fund qualifies as an ASF. This election is irrevocable. If the CCIV does not make a capital account treatment election in respect of the ASF, it will generally be taxed on revenue account. *[Schedule 4, item 9, sections 276-615 and 276-620]*

Cost base adjustments for membership interests

1.111 If a non-assessable payment is made by a CCIV in respect of an ASF to members of that ASF, adjustments are made to the cost base or reduced cost base of the membership interests. *[Schedule 4, item 8, sections 104-600 and 104-605]*

1.112 The CCIV must calculate an ‘AIV cost base net amount’, which is specified in the AIVMA statement provided to members. This amount is the difference between the member’s AIV cost base reduction amount and AIV cost base increase amount. *[Schedule 4, item 8, sections 104-610 to 104-620]*

1.113 If the AIV cost base reduction amount exceeds the AIV cost base increase amount, the resulting AIV cost base net amount reduces the cost base or reduced cost base of the share. *[Schedule 4, item 8, section 104-600]*

1.114 If the AIV cost base net amount is greater than the cost base, the cost base of the shares will be reduced to nil. Any excess will give rise to a capital gain under CGT event M1. If the cost base of the CGT asset was nil at the start of the income year, a capital gain equal to the amount of the AIV cost base net amount will arise for the income year. *[Schedule 4, item 8, section 104-600]*

1.115 New CGT event M1 will apply to all AIVs (that is, both AMITs and ASFs) and replaces CGT event E10 (which currently applies only to AMITs).

1.116 This new CGT event broadly replicates CGT event E10. However, it adapts the provisions to account for ASFs of a CCIV. For an AMIT, CGT event M1 will apply and operate in the same way as CGT event E10 did previously. *[Schedule 4, item 8, sections 104-600 to 104-635]*

1.117 A number of consequential amendments are made to reflect the removal of CGT Event E10 and its replacement with CGT event M1. For example, consequential amendments ensure that CGT events E4 and G1 do not apply to AIVs. *[Schedule 4, items 1 to 7, sections 70-10, 104-5, 104-70, 104-107A to 104-107H, and 104-135]*

Prior year tax losses

1.118 As a CCIV is a company and each sub-fund is taken to be a separate company, the company tax loss rules (with a modification) will apply to determine the deductibility of prior year tax losses.

1.119 Generally, a company is able to deduct prior year tax losses if it satisfies the continuity of ownership test or the business continuity test.

1.120 Schedule 3 to the Exposure Draft Bill modifies the ordinary company tax loss rules so that each separate CCIV sub-fund company is taken to not satisfy the business continuity test. *[Schedule 3, item 1, paragraph 195-105(4)(a)]*

1.121 Consequently, a CCIV sub-fund company will be able to deduct prior year tax losses only if it satisfies the continuity of ownership test.

1.122 The modification to the company tax loss rules to switch-off the business continuity test ensures that the requirements that must be satisfied for a CCIV sub-fund company to be able to deduct prior year tax losses are broadly consistent with the requirements that must be satisfied by an AMIT when it seeks to deduct prior year tax losses.

1.123 In addition, Schedule 3 to the Exposure Draft Bill modifies the net capital loss rules so that each separate CCIV sub-fund company, provided the sub-fund is an attribution sub-fund, is not required to satisfy the continuity of ownership test. Consequently, it will be able to deduct prior year net capital losses. *[Schedule 3, item 1, paragraph 195-105(4)(b)]*

1.124 This modification to the net capital loss rules ensures that the rules are broadly consistent with the requirements that must be satisfied by an AMIT when it seeks to deduct prior year net capital losses.

Withholding tax on amounts paid or attributed for foreign resident members

1.125 Schedule 5 to the Exposure Draft Bill amends the withholding tax provisions in the income tax law for ASFs.

1.126 Under the withholding tax provisions (sections 128AF and 128B of the ITAA 1936, and sections 12-215, 12-250 and 12-285 of Schedule 1 to the TAA 1953), if a MIT or an AMIT receives an amount of dividends, interest or royalties which flows through the trust and is paid or attributed to a foreign resident, the foreign resident is liable to withholding tax. The MIT or AMIT has a Pay As You Go withholding obligation in relation to the dividends, interest or royalties that it pays to the foreign resident.

1.127 In the case of an AMIT, a Pay As You Go withholding obligation also arises in relation to the dividends, interest or royalties that are attributed to the foreign resident (the deemed payment withholding provisions in Division 12A of Schedule 1 to the TAA 1953).

1.128 Under the MIT and AMIT withholding tax provisions (Subdivision 12-H of Schedule 1 to the TAA 1953), a MIT or an AMIT that is a withholding MIT is required to withhold an amount from a fund payment that is made to an entity whose address, or place for payment, is outside Australia. A fund payment is, broadly, the amount of the MIT's or AMIT's Australian sourced income (other than dividends, interest or royalties). If the payment is made to another Australian resident entity, the MIT or AMIT must give a notice or make information available to the recipient outlining certain details in relation to the payment.

1.129 In the case of an AMIT, these same obligations arise in relation to the amounts of Australian sourced income that are attributed to the

foreign resident (the deemed payment withholding provisions in Division 12A of Schedule 1 to the TAA 1953).

1.130 A foreign resident beneficiary of a MIT, an AMIT, a custodian or other entity is liable to pay withholding tax on a fund payment, or a payment attributable to a fund payment, made by the MIT, AMIT, custodian or other entity (Subdivision 840-M). An amount on which withholding tax is payable is non-assessable non-exempt income of the foreign resident beneficiary.

1.131 The amendments ensure that the withholding tax outcomes for an ASF of a CCIV (and its members) are the same as those that arise for an AMIT (and its members).

1.132 That is, to ensure that the dividend, interest and royalty withholding provisions apply to an ASF of a CCIV (and its members) in the same way that they apply to an AMIT (and its members), section 128AF is amended so that it applies to an AMIT and CCIV that has an ASF. *[Schedule 5, items 1 and 2, section 128AF of the ITAA 1936]*

1.133 To ensure that the fund payment withholding provisions apply to an ASF of a CCIV (and its members) in the same way that they apply to an AMIT (and its members);

- Subdivision 840-M is modified so that it applies to a withholding CCIV in the same way that it applies to a withholding MIT — to achieve this, references to ‘MIT withholding tax’ will be changed to ‘investment vehicle withholding tax’; and
- Subdivision 12-H of Schedule 1 to the TAA 1953 is modified so that it applies to a withholding CCIV in the same way that it applies to a withholding MIT.

[Schedule 5, items 3 to 25 and 27 to 45, sections 840-800 to 840-815 of the ITAA 1997 and sections 12-375 to 12-395 in Schedule 1 to the TAA 1953]

1.134 An entity is a *withholding CCIV*, in relation to an income year, if:

- the entity is a CCIV that has one or more ASFs for the income year; and
- in relation to each ASF of the entity — a substantial proportion of the investment management activities carried out in respect of the following assets of the entity that are allocated to the sub-fund are carried out in Australia throughout the income year:
 - assets that are situated in Australia at any time in the income year;

- assets that are taxable Australian real property at any time in the income year; and
- assets that are shares, units or interests listed for quotation on an official list of an approved stock exchange in Australia at any time in the income year.

[Schedule 5, item 30, section 12-384 in Schedule 1 to the TAA 1953]

1.135 The definition of a *withholding CCIV* is the same as the definition of a *withholding MIT*, with appropriate adjustments for the CCIV and sub-fund structure. That is, the test relating to the investment management activities that are carried out in Australia applies in relation to each ASF of the CCIV. Each ASF must satisfy this test in order for the CCIV to be a withholding CCIV.

1.136 To ensure that the deemed fund payment withholding provisions apply to an ASF of a CCIV (and its members) in the same way that they apply to an AMIT (and its members):

- Subdivision 840-M is modified so that it applies to a withholding CCIV in the same way that it applies to a withholding MIT; and
- Division 12A of Schedule 1 to the TAA 1953 is modified so that it applies to a withholding CCIV (instead of a withholding MIT).

[Schedule 5, items 3 to 25 and 46 to 147, sections 840-800 to 840-815 of the ITAA 1997 and sections 12A-1 to 12A-220 in Schedule 1 to the TAA 1953]

1.137 The amendments insert new terminology to apply the withholding provisions under the AMIT attribution model to withholding AIVs. For example:

- ‘AIV dividend payment’ replaces ‘AMIT dividend payment’;
- ‘AIV interest payment’ replaces ‘AMIT interest payment’;
- ‘AIV royalty payment’ replaces ‘AMIT royalty payment’;
- ‘AIV DIR payment’ replaces ‘AMIT DIR payment’;
- ‘AIVMA statement’ replaces ‘AMMA statement’;
- ‘post-AIVMA actual payment’ replaces ‘post-AMMA actual payment’; and
- ‘pre-AIVMA actual payment’ replaces ‘pre-AMMA actual payment’.

Non-concessional investment vehicle income

1.138 Schedule 8 to the Exposure Draft Bill amends the income tax law for CCIVs to ensure that the amendments in the Making Sure Foreign

Investors Pay Their Fair of Tax in Australia Bill apply to CCIVs in the same way as they apply to AMITs.

1.139 The Making Sure Foreign Investors Pay Their Fair of Tax in Australia Bill was introduced into the Parliament on 20 September 2018. Schedule 1 to the Bill proposes to amend the taxation law to improve the integrity of the income tax law for arrangements involving stapled structures and to limit access to tax concessions by foreign investors by increasing the withholding rate on fund payments that are attributable to non-concessional MIT income to 30 per cent.

1.140 In essence, stapled structures have resulted in the unintended emergence of a dual corporate tax system that taxes foreign institutional investors in land-rich industries at rates anywhere between zero and 15 per cent.

1.141 Therefore, the amendments made by the Making Sure Foreign Investors Pay Their Fair of Tax in Australia Bill are being modified so that they apply to CCIVs in the same way as they apply to MITs.

1.142 To achieve this, key terms in the Bill are being relabelled so that they cover both MITs and CCIVs.

1.143 In particular, the 30 per cent investment vehicle withholding rate will apply to fund payments that are attributable to non-concessional investment vehicle income (instead of non-concessional MIT income). Non-concessional investment vehicle income consists of:

- investment vehicle cross staple arrangement income (instead of MIT cross staple arrangement income);
- investment vehicle trading trust income (instead of MIT trading trust income);
- investment vehicle agricultural income (instead of MIT agricultural income); and
- investment vehicle residential housing income (instead of MIT residential housing income).

[Schedule 8, items 13 to 15, 24, 27 to 42, 74 to 79, 83 to 86 and 90 to 94, definitions of ‘investment vehicle agricultural income’, ‘investment vehicle cross staple arrangement income’, ‘investment vehicle residential housing income’, investment vehicle trading trust income’ and ‘non-concessional investment vehicle income’ in subsection 995-1(1) of the ITAA 1997; sections 12-435, 12-437, 12-446, 12-448 and 12-450 in Schedule 1 to the TAA 1953]

1.144 Investment vehicle cross staple arrangement income is, broadly, the assessable income of a MIT or a CCIV (where the assessable income is referable to an ASF) that is attributable to a cross staple arrangement.

1.145 A cross staple arrangement is broadly an arrangement between an asset entity and an operating entity. A CCIV that has at least one ASF

for an income year will be an asset entity for that income year. However, a CCIV cannot be an operating entity. *[Schedule 8, items 25 and 26, subsections 12-436(1) and (2) in Schedule 1 to the TAA 1953]*

1.146 In this regard, it is important to note that the Regulatory Exposure Draft Bill prevents a sub-fund of a CCIV from being able to invest in another sub-fund of the same CCIV. In addition, as an entity cannot enter into a contract with itself, a CCIV cannot enter into a contract that involves an arrangement between two of its sub-funds. Consequently, a CCIV cannot create a cross staple arrangement between two of its sub-funds (see section 1231Z of the Regulatory Exposure Draft Bill and paragraphs 4.78 to 4.81 of the Regulatory Exposure Draft Bill Explanatory Materials).

1.147 The remaining amendments in Schedule 8 are of a technical nature to ensure that the non-concessional investment vehicle income provisions apply to CCIVs in the same way as they apply to MITs. *[Schedule 8, items 1 to 12, 16 to 23, 43 to 73, 80 to 82, 87 to 89 and 95 to 100, sections 25-115, 25-120, 275-610, 275-615, 276-441, 276-443, 880-105 and the definitions of 'excepted investment vehicle CSA income' and 'referable' in subsection 995-1 of the ITAA 1997; sections 12-385, 12-395, 12-438, 12-439, 12-440, 12-441, 12-442, 12-443, 12-444, 12-445, 12-447, 12-449, 12-451, and 12-453 in Schedule 1 to the TAA 1953; item 16 in Schedule 1 to the Making Sure Foreign Investors Pay Their Fair of Tax in Australia Bill; sections 1, 2A and 4 to the Income Tax (Managed Investment Trust Withholding Tax) Act 2008]*

1.148 The amendments in Schedule 8 will apply only if the Making Sure Foreign Investors Pay Their Fair of Tax in Australia Bill comes into effect.

Excluded sub-funds

1.149 A sub-fund will be an excluded sub-fund if:

- the sub-fund was, and ceased to be, an ASF (because it fails to satisfy the ASF criteria in a particular income year); or
- the sub-fund did not become an ASF by the end of the income year in which it was established or within such further period as the Commissioner allows.

[Schedule 1, item 1, subsection 276-20(4)]

1.150 As the attribution regime does not apply to an excluded sub-fund, income tax is imposed on the taxable income of an excluded sub-fund for an income year at the top corporate rate (30 per cent). *[Schedule 9, items 24 and 25, subsections 23(2) and (5A) of the Income Tax Rates Act 1986]*

1.151 Further, as a CCIV is not a franking entity, the CCIV cannot frank distributions to the members of the excluded sub-fund. *[Schedule 9, items 17 and 18, paragraphs 202-15(ba) and 202-45(k) of the ITAA 1997]*

1.152 This approach is consistent with the policy intent of the CCIV regime which is to introduce a tax framework for a more internationally recognisable primarily passive investment vehicle that provides flow-through taxation treatment.

1.153 To the extent a sub-fund of a CCIV fails to meet the ASF eligibility (i.e. it is not a flow-through vehicle), it is not appropriate to have a sub-fund of a CCIV being taxed like a trust.

1.154 Further, where a sub-fund ceases to be an ASF, it will not be able to qualify as an ASF again. *[Schedule 1, item 1, paragraph 276-20(1)(d)]*

Roll-over for excluded sub-funds

1.155 The policy objective of the CCIV tax framework is to apply a ‘character flow-through’ model of taxation so that amounts flow through the CCIV to its members retaining their character. This is achieved by applying the attribution regime to ASFs.

1.156 The attribution model does not apply to excluded sub-funds and reinforces the notion that the CCIV is a passive investment vehicle. While there are safe-harbour provisions designed to prevent genuine ASFs from becoming an excluded sub-fund, a CGT roll-over is available to facilitate the transfer of the assets of an excluded sub-fund of a CCIV to an ordinary company that is not a CCIV.

1.157 Schedule 6 to the Exposure Draft Bill inserts Subdivision 124-NA, which applies to an excluded sub-fund which restructures as a company that is not a CCIV.

1.158 Broadly, the restructuring relief relates to:

- CGT roll-over relief for the CCIV in relation to assets referable to the excluded sub-fund; and
- CGT roll-over relief for the owner of membership interests in the CCIV that are referable to the excluded sub-fund.

Requirements to qualify for restructuring relief

1.159 The restructuring relief will apply only where the restructure is on a ‘like for like’ basis. Therefore, to qualify for restructuring relief, shares in the company that is not a CCIV must be issued to the members in proportion to their holdings of shares referable to the excluded sub-fund of the CCIV.

1.160 The restructuring relief will be available if:

- under the restructure, the CCIV disposes of all of its assets referable to the excluded sub-fund to another company (except assets retained to pay debts of the excluded sub-fund);

- both the CCIV and the transferee choose to apply the Subdivision to the restructure; and
- the requirements for the CGT rollover are satisfied.

[Schedule 6, item 12, section 124-940]

Requirements for CGT roll-over

1.161 The restructuring relief under Subdivision 124-NA will be available only where all of the assets referable to the excluded sub-fund are disposed of to the transferee company during the excluded sub-fund restructuring period. This allows for a staggered transfer of the assets or a single transfer of all of the assets of the excluded sub-fund. Assets that are retained by the CCIV to pay existing or expected debts of the CCIV relating to the excluded sub-fund can be ignored. *[Schedule 6, item 12, subsection 124-945(1)]*

1.162 The excluded sub-fund restructuring period starts just before the first asset is disposed of to the transferee company and ends at the time the last asset is disposed of under the restructure. Therefore the assets that must be disposed of are all the assets owned by the CCIV referable to the excluded sub-fund, including any assets acquired during the restructure period. *[Schedule 6, item 12, subsection 124-945(2)]*

1.163 In addition, the transferee company must be a company that:

- has never carried on commercial activities;
- has no CGT assets other than small amounts of cash or debt, or rights under an arrangement that only facilitate the transfer of assets to the transferee company from the CCIV;
- has no losses of any kind; and
- is not a CCIV.

[Schedule 6, item 12, subsection 124-945(3)]

1.164 Further, it is a requirement that all interests in the CCIV referable to the excluded sub-fund are exchanged for shares in the transferee company in equivalent proportions.

1.165 At the end of the excluded sub-fund restructuring period, each entity that owned shares in the CCIV referable to the excluded sub-fund must own replacement shares in the transferee company. These replacement shares must be in the same proportion as the entity had owned those shares in that CCIV referable to the excluded sub-fund before the restructure occurred. *[Schedule 6, item 12, paragraph 124-945(4)(a)]*

1.166 In addition, the market value of the shares in the transferee company just after the excluded sub-fund restructuring period must be at least substantially the same as the market value of the interests in the shares in that CCIV referable to the excluded sub-fund at the start of the

excluded sub-fund restructuring period. *[Schedule 6, item 12, paragraph 124-945(4)(b)]*

CGT roll-over relief

1.167 Excluded sub-funds that choose to restructure to a company will have access to CGT roll-over relief at both the entity level (for assets) and the investor level (for members shares). A CGT roll-over provides relief on certain capital gains events, to ensure that funds and investors do not incur an income tax liability at the time of transfer and defers tax consequences for members.

Owner of shares referable to the excluded sub-fund

1.168 If an excluded sub-fund restructures and transfers its assets to a company, the original shares in the CCIV referable to the excluded sub-fund will be replaced with shares in the transferee company.

1.169 The owner of the shares will obtain a CGT roll-over in relation to those shares (with the exception of trading stock). As a result, the first element of the cost base and reduced cost base of the replacement shares will be the same as the first element of the cost base and reduced cost base for the original shares in the CCIV referable to the excluded sub-fund. In addition, the owner will be taken to have acquired the replacement shares at the same time as they acquired the original shares. *[Schedule 6, item 12, subsections 124-950(1) and (3)]*

1.170 The owner of the shares cannot make a capital loss from a CGT event that happens to their original shares (shares in the CCIV referable to the excluded sub-fund) during the excluded sub-fund restructuring period. *[Schedule 6, item 12, subsection 124-950(2)]*

CGT consequences for the CCIV and the transferee company

1.171 If both the CCIV and the transferee company choose the restructure relief, then:

- any capital gain or capital loss that arises from CGT event A1 happening to the CCIV under the restructure is disregarded;
- the first element of the cost base and reduced cost base of each CGT asset that the transferee acquires under the restructure is the same as the cost base and reduced cost base of that asset for the CCIV just before the restructure; and
- the transferee company will be taken to have acquired any pre-CGT assets held by the CCIV before 20 September 1985.

[Schedule 6, item 12, section 124-955]

1.172 However, the modified CGT consequences for the CCIV and transferee company do not apply to a CGT asset that is an item of trading stock. *[Schedule 6, item 12, subsection 124-955(4)]*

Ceasing to be an excluded sub-fund

1.173 Where an excluded sub-fund restructures under Subdivision 124-NA as another company that is not a CCIV, the company will need to continue to identify unders and overs relating to the period that the excluded sub-fund was an ASF that are discovered in later income years (the discovery year) by the company. *[Schedule 6, item 15, section 276-955]*

1.174 In these circumstances, the company will need to continue to work out unders and overs (as if the company was the excluded sub-fund) relating to an income year during which the excluded sub-fund was an ASF. *[Schedule 6, item 15, subsection 276-960(1)]*

1.175 Where an under or over of a character is discovered, the company will need to work out the extent to which the under and over increases or decreases the amount of the sub-fund's AIV component of that character for the discovery year. *[Schedule 6, item 15, subsection 276-960(2)]*

1.176 If the company discovers an under or over that has the effect of increasing the amount of a particular character for the discovery year (worked out on the basis that the excluded sub-fund continued to be an ASF), then:

- if the relevant character relates to assessable income, the company must include the amount of the increase as assessable income in the discovery year;
- if the relevant character relates to exempt income, the company must treat the amount of the increase as exempt income in the discovery year;
- if the relevant character relates to non-assessable non-exempt income, the company must treat the amount of the increase as non-assessable non-exempt income in the discovery year; or
- if the relevant character relates to a tax offset character, the company must include the amount of the increase as a tax offset of a kind corresponding to that character in the discovery year.

[Schedule 6, item 15, section 276-965]

1.177 If the company discovers an under or over that has the effect of decreasing the amount of a particular character (other than a tax offset) for the discovery year (worked out on the basis that the excluded sub-fund continued to be an ASF), then:

- if the relevant character relates to assessable income (other than a capital gain), the company can deduct the amount of the decrease in the discovery year

- if the relevant character relates to a capital gain, the company must treat the amount of the decrease as a capital loss in the discovery year;
- if the relevant character relates to exempt income, the company must reduce the amount of its exempt income by the amount of the decrease in the discovery year; or
- if the relevant character relates to non-assessable non-exempt income, the company must reduce the amount of its non-assessable non-exempt income by the amount of the decrease in the discovery year.

[Schedule 6, item 15, subsections 276-970(1) to (4)]

1.178 If the company discovers an under or over that has the effect of decreasing the amount of a particular character that is a tax offset for the discovery year (worked out on the basis that the excluded sub-fund continued to be an ASF), then, generally, the company must reduce the amount of the tax offsets of a kind corresponding to that character by the amount of the decrease in the discovery year. *[Schedule 6, item 15, subsections 276-970(1) and (5)]*

1.179 However, if the under or over that is discovered has the effect of decreasing the amount of a particular character that is a tax offset and the amount discovered exceeds the total of the company's existing tax offsets (before the reduction under subsection 276-970(5)), then:

- if the tax offset is not a foreign income tax offset, the company is liable to pay tax in the discovery year on the amount of the excess at a rate of 100 per cent; or
- if the tax offset is a foreign income tax offset, the company must include the amount worked out applying the following formula in its assessable income in the discovery year:

Amount of excess

+

(Amount of excess × Corporate tax gross-up rate)

[Schedule 6, item 15, subsections 276-970(1), (6) and (7)]

1.180 In this regard, the corporate tax gross-up rate is defined in subsection 995-1(1).

CCIV liable to tax in certain circumstances

1.181 A CCIV will be liable to tax in certain circumstances. Any tax liability incurred must be in respect of the sub-fund to which the liability relates.

1.182 If a sub-fund of a CCIV is an ASF, then for the purpose of working out the assessable income, non-assessable non-exempt income, capital gains and net capital losses of a member of the ASF, amounts derived, received or made by the CCIV that are reflected in the determined member component are taken to have been derived, received or made by the member (rather than by the CCIV). *[Schedule 2, item 14, subsection 276-80(2)]*

1.183 As members of the ASF are liable to pay income tax on amounts that are attributed to them by the CCIV, the CCIV will not be liable to pay income tax in respect to these amounts.

1.184 However, under the attribution model, a CCIV will be liable to tax in relation to an ASF:

- if a discrepancy occurs in attributing component amounts to members in some circumstances;
- on amounts attributed to a foreign resident member in some circumstances; and
- on non-arm's length income.

1.185 In addition, a CCIV will be liable to tax on the taxable income of an excluded sub-fund.

Discrepancy in component attribution of an ASF

1.186 The amendments in Schedule 2 to the Exposure Draft Bill adjust the current provisions which apply to AMITs to ensure that the same principles and outcomes apply for AIVs. *[Schedule 2, items 187 to 227, sections 276-400 to 276-425]*

1.187 That is:

- if the AIV is an ASF, the CCIV is liable to tax; and
- if the AIV is an AMIT, the trustee of the AMIT is liable to tax.

1.188 It is appropriate to tax the CCIV in these circumstances to ensure that taxable income derived by the CCIV for an income year does not escape taxation — that is, subject to the operation of the unders and overs regime, where the income is not attributed to members and taxed at the member level, it should be taxed at the CCIV level.

1.189 The Commissioner may also remit, in whole or in part, an income tax liability that arises from these types of discrepancies, if the Commissioner is satisfied that the remission would not result in a detriment to the revenue (see section 276-430).

1.190 Under the ASF attribution model, the CCIV may be liable to income tax where:

- a shortfall arises in the determined member component of a particular character that relates to assessable income;
- an excess arises in the determined member component of a particular character that relates to a tax offset;
- the determined member component of a particular character that relates to assessable income is less than the determined AIV component;
- ‘unders’ of a particular character that relate to assessable income are not properly carried forward; and
- ‘overs’ of a particular character that relate to a tax offset are not properly carried forward.

Amounts attributed to a foreign resident member of an ASF

1.191 Under the AMIT attribution model, the trustee of an AMIT that is not a withholding MIT is liable for income tax on certain amounts attributed to a foreign resident member. The applicable rate depends on what type of entity the member is. If the member is not a trustee, they are entitled to receive a refundable tax offset for the amount of tax paid by the trustee of the AMIT.

1.192 The amendments in Schedule 2 to the Exposure Draft Bill extend this rule so that it applies to AIVs — that is, the CCIV or the trustee of an AMIT is liable to income tax where certain amounts are attributed to a foreign resident member. *[Schedule 2, items 37 to 52, sections 276-105 and 276-110]*

Non-arm’s length income of an ASF

1.193 The amendments in Schedule 7 to the Exposure Draft Bill introduce an AIV specific arm’s length income rule which operates in the same way as the existing arm’s length income rule for MITs, including amounts specifically excluded from the rule (see Subdivision 275-L). The Commissioner may make a determination in writing that specifies an amount of non-arm’s length income for a specific AIV in relation to a specified income year. The CCIV, or the trustee of the AMIT, is liable to pay tax on the non-arm’s length income. *[Schedule 7, items 9 and 10, sections 276-437 to 276-443]*

1.194 An amount of non-arm’s length income is, broadly, an amount that is derived from a scheme where:

- the parties were not dealing with each other at arm’s length in relation to the scheme; and
- the amount exceeds the amount that the entity might have been expected to derive if the parties had been dealing with each other at arm’s length.

[Schedule 7, item 10, section 276-441]

1.195 As a consequence of inserting the separate arm's length income rule that applies to AIVs (including both ASFs of a CCIV and AMITs), other amendments ensure that the current arm's length income rules apply only to MITs. *[Schedule 7, items 1 to 8, sections 275-600 to 275-615]*

1.196 As a result, consequential amendments are made to the modification for the non-arm's length income rule in the *Income Tax (Transitional Provisions) Act 1997*. *[Schedule 10, item 2, subsection 275-605(2) of the Income Tax (Transitional Provisions) Act 1997]*

Taxable income of an excluded sub-fund

1.197 As the attribution regime does not apply to an excluded sub-fund, a CCIV will be liable to tax on the taxable income of an excluded sub-fund.

1.198 Income tax is imposed on the taxable income of an excluded sub-fund for an income year at the top corporate rate (30 per cent) *[Schedule 9, items 24 and 25, subsections 23(2) and (5A) of the Income Tax Rates Act 1986]*

AMITs restructuring as ASFs

1.199 Schedule 6 to the Exposure Draft Bill inserts Subdivision 276-I, which applies to an AMIT that restructures as an ASF of a CCIV. The AMIT and the CCIV must choose to apply the Subdivision to the restructure and ensure that the other requirements are satisfied.

1.200 Given the specific restructuring provisions provided under Subdivision 276-I, a roll-over under Subdivision 124-N is not available to AMITs that restructure into an ASF of a CCIV. *[Schedule 6, item 11, subsection 124-855(3)]*

1.201 Broadly, the restructuring relief relates to:

- roll-over for CGT assets and revenue assets for the AMIT;
- CGT roll-over relief for the owner of membership interests in the AMIT;
- transferring the AMIT's net capital losses, tax losses and unders and overs to an ASF of a CCIV; and
- carrying over the choices and elections of the AMIT to the ASF of a CCIV.

Requirements to qualify for restructuring relief

1.202 The restructuring relief will apply only where the restructure is on a 'like for like' basis. Therefore, to qualify for restructuring relief,

shares in the CCIV referable to the ASF must be issued to members in proportion to their holdings of the units in the AMIT.

1.203 In general terms, the restructuring relief will be available in relation to an ASF where:

- under the restructure, an AMIT disposes of all of its assets to the CCIV;
- both the AMIT and operator of the CCIV choose to apply the subdivision to the restructure;
- the AMIT's assets and liabilities meets certain requirements in relation to the ASF;
- the CCIV meets certain requirements in relation to the ASF; and
- all interests in the AMIT are exchanged for shares in the CCIV that are referable to the ASF in equivalent proportions.

[Schedule 6, item 14, section 276-472]

1.204 As all interests in the AMIT must be exchanged for interests in the CCIV in equivalent proportions, Subdivision 276-I does not permit the combining of different pools of assets from multiple AMITs into one ASF.

Choosing the roll-over

1.205 The restructuring relief under Subdivision 276-I will only be available for the AMIT and the CCIV if both the trustee of the AMIT and the CCIV have elected to apply the Subdivision to the restructure. However, to the extent that the AMIT and the CCIV choose to apply the special rules, it will be mandatory on members that own units or interests in the AMIT. This will prevent the selective treatment of these relief provisions (such as the crystallising of losses and rolling over of gains).

[Schedule 6, item 14, paragraph 276-472(1)(b)]

Disposal of AMIT assets

1.206 All of the assets of the AMIT must be disposed of to the CCIV during the AMIT restructuring period and immediately after the disposal, be referable to an ASF. This allows for a staggered transfer of the assets or a single transfer of all of the assets of the AMIT. However, assets that are specifically retained in the AMIT for the purposes of discharging existing or expected debts of the AMIT can be ignored. *[Schedule 6, item 14, subsection 276-472(2)]*

Transfer of AMIT liabilities

1.207 All of the liabilities of the AMIT must be transferred to the CCIV during the AMIT restructuring period and, immediately after the transfer, be referable to the ASF. This allows for a staggered transfer of

liabilities or a single transfer of all of the liabilities of the AMIT. However, liabilities that are to be discharged from the retained assets in the AMIT can be ignored. *[Schedule 6, item 14, subsection 276-472(3)]*

The AMIT restructuring period

1.208 The AMIT restructuring period starts just before the first asset is disposed of to the CCIV and ends at the time the last asset is disposed of under the restructure. Therefore the assets that must be disposed of are all the assets owned by the AMIT just before the disposal of the first asset to the CCIV, including any assets acquired by the AMIT up to and until the last asset is disposed of to the CCIV. *[Schedule 6, item 14, subsection 276-472(4)]*

Requirements of the CCIV in relation to the ASF

1.209 Subdivision 276-I contains certain requirements for the transferee ASF of a CCIV, which are consistent with requirements under existing roll-overs (see subsection 124-860(4)). As a result, at the start of the AMIT restructuring period:

- the CCIV must have no assets that are referable to the ASF other than small amounts of cash or debt, or rights under an arrangement that only facilitates the transfer of assets to the CCIV from the AMIT; and
- the CCIV must have no liabilities that are referable to the ASF.

[Schedule 6, item 14, subsection 276-472(5)]

1.210 The requirement that there are no CGT assets other than something nominal is consistent with existing requirements for disposals of assets by a trust to a company. (see subsection 124-860(4))

Proportional interest must be maintained

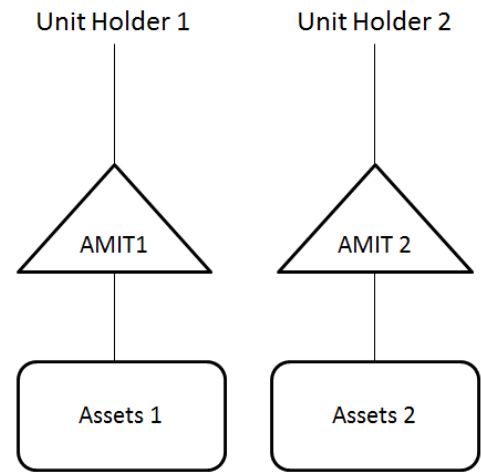
1.211 The requirement that members own their interests in the same proportions ensures that the restructuring relief is available only where an entity's economic ownership in the assets of the AMIT remains unchanged on the completion of the restructuring of the AMIT into an ASF of a CCIV — this is a fundamental principle of tax roll-over relief. This ensures that the tax status of membership interests is retained, including the asset cost base, the acquisition date and the member's tax history (including unrealised tax losses).

1.212 At the end of the trust restructuring period, each member that owned interests in an AMIT must own replacement shares in the CCIV that are referable to the relevant ASF of the CCIV. Further, the proportion of the replacement shares in the CCIV held by each member must be the same as the proportion of the interests the member held in the AMIT before the restructure occurred. *[Schedule 6, item 14, subsection 276-472(6)]*

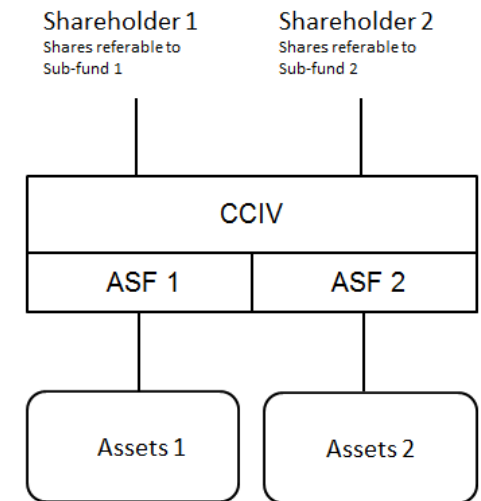
1.213 In addition, the market value of the shares in the CCIV that are referable to the ASF just after the AMIT restructuring period must be at least substantially the same as the market value of the interests in the AMIT just before the start of the AMIT restructuring period. [Schedule 6, item 14, paragraph 276-472(6)(b)]

Example 1.4: Multiple AMITs restructuring into an ASF of a CCIV

Before restructure



After restructure



AMIT 1 (which owns Assets 1) and AMIT 2 (which owns Assets 2) both choose to restructure into separate ASFs of a CCIV.

At the end of the restructuring period:

- AMIT 1 transfers its assets and liabilities to ASF 1 of the CCIV; and
- AMIT 2 transfers its assets and liabilities to ASF 2 of the CCIV.

Further, unit holders in AMIT 1 and AMIT 2 now own shares in the CCIV that are referable to ASF 1 and ASF 2 respectively.

Each entity that owned interests in AMIT 1 and AMIT 2 now owns shares in the CCIV referable to ASF 1 and ASF 2 respectively, in the same proportion as the entity owned those interests in AMIT 1 and AMIT 2 prior to the restructure.

Consequently, provided that other requirements are satisfied, the restructuring relief applies to:

- AMIT 1;
- AMIT 2; and
- each entity that owned interests in AMIT 1 and AMIT 2.

AMIT classes must be maintained

1.214 Consistent with the principle that an entity's economic ownership in the assets of the AMIT remains unchanged, where membership interests in the AMIT are divided into classes just before the start of the AMIT restructuring period, the membership interests in the CCIV referable to the ASF must also be divided into the same classes after the restructure. *[Schedule 6, item 14, paragraph 276-472(7)(a)]*

1.215 At the end of the trust restructuring period, each class of membership interests in the ASF must have the same owners as the corresponding class of membership interests in the AMIT had before the restructure occurred. *[Schedule 6, item 14, subsection 276-472(7)(b)]*

CGT roll-over relief

1.216 AMITs that choose to restructure to an ASF of a CCIV will have access to CGT rollover relief at both the entity level (for assets) and the investor level (for membership interests). This is achieved by adapting the existing CGT roll-over provisions for trust restructures under Subdivision 124-N for the purposes of AMITs and ASFs of a CCIVs.

1.217 A CGT roll-over provides relief on certain capital gains events, to ensure that funds and investors do not incur an income tax liability at the time of transfer and defers tax consequences for members.

Owner of units or interests in an AMIT

1.218 If an AMIT restructures and becomes an ASF of a CCIV, the original units or other interests (the original interests) that a member holds in the AMIT will be replaced with membership interests (the replacement interests) in the ASF of the CCIV.

1.219 If both the AMIT and the CCIV choose the restructure relief, the owner of the units or interest will obtain a CGT roll-over in relation to the membership interests. As a result, the first element of the cost base and reduced cost base of the replacement interests will be the same as the first element of the cost base and reduced cost base for the original interests. In addition, the owner will be taken to have acquired the replacement interests at the same time as they acquired the original interests.

[Schedule 6, item 14, section 276-474]

CGT consequences for the AMIT and the CCIV

1.220 If both the AMIT and the operator of the CCIV choose the restructure relief, then:

- any capital gain or capital loss that arises from CGT event A1 happening to the AMIT under the restructure is disregarded;
- the first element of the cost base and reduced cost base for the CCIV of each CGT asset under the restructure is the same as the cost base and reduced cost base of that asset for the AMIT just before the restructure; and
- the CCIV will be taken to have acquired any pre-CGT assets held by the AMIT before 20 September 1985 (unless CGT event J4 applies to the CCIV in relation to the asset).

[Schedule 6, item 14, section 276-476]

1.221 Consistent with the operation of Subdivision 124-N, CGT event J4 applies to a disposal of a CGT asset to a CCIV where the AMIT fails to cease to exist within 6 months after the start of the AMIT restructure period. *[Schedule 6, items 3 and 4, table in section 112-45]*

Depreciating assets

1.222 Provided that the general requirements for depreciating asset roll-over relief are satisfied, automatic roll-over relief is provided for depreciating CGT assets under an AMIT restructure where both the AMIT and the CCIV choose to apply the restructure and after the disposal, the asset is referable to the ASF. *[Schedule 6, item 1, table item 2B in subsection 40-340(1)]*

Transferring revenue assets

1.223 If both the AMIT and the operator of the CCIV choose the restructure relief, then restructure relief will apply to any revenue assets (as is defined in section 977-50) disposed of by the AMIT to the CCIV under the restructure.

1.224 In these circumstances, the AMIT is taken to have disposed of the revenue asset to the CCIV for an amount that would result in the

AMIT not making a profit or loss because of the disposal. This means that there is no effect on the AMIT's taxable income. *[Schedule 6, item 14, paragraph 276-478(1)(a)]*

1.225 In addition, the CCIV is taken to have paid the AMIT the amount to acquire the asset that resulted in that AMIT not making a profit or loss because of the disposal of the revenue asset. This amount is used by the CCIV to calculate future profits and losses on the subsequent disposal of the revenue asset. *[Schedule 6, item 14, paragraph 276-478(1)(b)]*

1.226 The roll-over for revenue assets also applies to realisations of revenue assets that involve ceasing to own the asset or realising it in another way besides a disposal. For the purpose of the revenue asset roll-over, such realisations are treated as disposals and accordingly benefit from the same treatment as outlined above. *[Schedule 6, item 14, subsection 276-478(2)]*

Transferring tax losses

1.227 The restructure relief under Subdivision 276-I also allows a restructuring AMIT to roll-over capital losses and revenue losses to the CCIV (referable to the ASF). The transfer of these losses prevents the value of the losses being extinguished upon the winding up of the restructuring AMIT and allows the value of the losses to be retained by members.

1.228 The losses that may be transferred, upon the restructuring AMIT ceasing to exist, are capital losses and revenue losses realised before the restructure – specifically:

- net capital losses for earlier income years than the transfer year to the extent that they were not utilised before the completion time;
- net capital losses for the transfer year, worked out as if the transfer year ended at the completion time;
- tax losses for earlier income years than the transfer year to the extent that they were not utilised before the completion time; and
- tax losses incurred for the transfer year, worked out as if the transfer year ended at the completion time.

[Schedule 6, item 14, subsections 276-480(1) and 276-482(1)]

Effect of transferring a capital loss

1.229 The previously realised net capital loss for an income year that is not the transfer year will be taken, if it is transferred, not to have been made by the AMIT and an amount equal to the loss will be taken to have been made by the CCIV for that income year. *[Schedule 6, item 8, subsection 276-480(2)]*

1.230 The AMIT can transfer net capital losses from the transfer income year to the CCIV by reducing these capital losses by the amount transferred. As a result, the AMIT's total capital losses are reduced by the amount transferred to the CCIV and the transferred amount of net capital losses from the transfer income year is taken to be a capital loss made by the CCIV for the transfer year. *[Schedule 6, item 14, subsection 276-480(3)]*

Effect of transferring tax losses

1.231 Similar to capital losses, an AMIT can transfer earlier year tax losses that have not been utilised before the completion time to the CCIV (including a loss that the AMIT would have incurred in the transfer year assuming that the transfer year ended at the completion time). *[Schedule 6, item 14, subsection 276-482(1)]*

1.232 To the extent that an earlier year tax loss is transferred to the CCIV:

- the AMIT will be taken not to have incurred the loss for that earlier income year;
- for the purposes of applying section 36-15, an amount equal to the transferred amount is taken to be a tax loss incurred by the CCIV (rather than the AMIT) for the income year immediately before the transfer year;
- for the purposes of applying the continuity of ownership test, the ownership period or the test period for the CCIV is taken to start at the start of the earlier income year in which the AMIT incurred the loss – as a consequence, the AMIT will need to give relevant ownership information to the CCIV; and
- for all other purposes, an amount equal to the transferred amount is taken to be a tax loss incurred by the CCIV (rather than the AMIT) for the transfer year.

[Schedule 6, item 14, subsection 276-482(2)]

1.233 In addition, to the extent that a tax loss which arises in the transfer year is transferred to a CCIV:

- the AMIT must reduce its transfer year deductions by an amount equal to the transferred amount; and
- an amount equal to the transferred amount is taken to be a tax loss incurred by the CCIV for the transfer year.

[Schedule 6, item 14, subsection 276-482(3)]

Unders and overs

1.234 If an AMIT restructures and becomes the sub-fund of a CCIV, then an under or over of a particular character may arise in relation to an

income year after the time of the restructure (the discovery year) in relation to an income year that is prior to the restructure (the base year).

1.235 If both the AMIT and the operator of the CCIV choose the restructure relief, then the sub-fund of a CCIV will be able to be recognise the under or over in the discovery year. *[Schedule 6, item 14, section 276-484]*

Carrying over choices and elections

1.236 A choice or election made by the AMIT under a taxation law before the AMIT ceases to exist under the restructure will be taken to be a choice or election made by the CCIV in relation to the ASF to which the AMIT restructure relates. *[Schedule 6, item 14, section 276-486]*

1.237 The choice or election made by the CCIV will also be taken to have been made at the start of the income year in which the AMIT restructuring period begins. *[Schedule 6, item 14, section 276-486]*

CCIVs interaction with GST

1.238 The provisions of a taxation law, in relation to ascertaining the existence or extent, under a taxation law (which includes the GST Act), of an obligation (including a liability) or entitlement of the CCIV, apply as if the CCIV were a separate company in relation to each sub-fund. *[Schedule 3, item 1, section 195-105]*

1.239 To determine whether the CCIV is required to be registered for GST in relation to a particular CCIV sub-fund company, the CCIV would separately ascertain the GST turnover in relation to that CCIV sub-fund company. Where more than one CCIV sub-fund company is required to be registered for GST, the CCIV will register in relation to each relevant CCIV sub-fund company.

Consequential amendments

Amounts paid by a CCIV are not dividends

1.240 Amounts derived or received by an ASF of a CCIV that are attributed to members retain their original character and therefore will not be treated as a dividend paid by CCIV (including for the purposes of applying Australia's double tax agreements). *[Schedule 9, items 4 and 26, definition of 'dividend' in subsection 6(1) of the ITAA 1936 and subsection 3(2B) of the International Tax Agreements Act 1953]*

1.241 Where the CCIV holds assets in an ASF that are shares which pay franked dividends, both the dividend and the franking credit will retain their character as they flow through the ASF to the member. *[Schedule 9, item 4, subsection 6(1) of the ITAA 1936]*

Interactions with the consolidation regime

1.242 Given that CCIVs are taxed as flow-through entities, a company that is a CCIV cannot be a member of a consolidated group or a multiple entry consolidated group. *[Schedule 9, item 23, table item 4 in subsection 703-20(2)]*

Interactions with the AMIT technical amendments

1.243 Schedule 13 to the Exposure Draft Bill amends provisions in this Exposure Draft Bill to account for the amendments made in Schedule 1 of the Treasury Laws Amendment (2018 Measures No. 5) Bill 2018 (AMIT technical amendments). *[Schedule 12]*

1.244 These amendments are contingent on the passage of the Treasury Laws Amendment (2018 Measures No. 5) Bill 2018.

Other technical amendments

1.245 Schedule 9 to the Exposure Draft Bill makes a number of minor consequential amendments to the ITAA 1936, ITAA 1997 and the TAA 1953 to reflect the principal amendments, including updating guidance material. *[Schedule 9, items 8 to 16, 21, 22 and 27 to 44, sections 170, 251S and 255 of the ITAA 1936, sections 11-55, 13-1, 67-23, 112-46 and 276-80 of the ITAA 1997, sections 10-5, 12-5, 15-15, 16-153, 16-157, 16-170, 16-195, 18-10, 18-30, 18-65, 18-70, and 288-115 in Schedule 1 to the TAA 1953]*

1.246 Schedule 10 to the Exposure Draft Bill also makes a number of minor consequential amendments, including the addition of a CCIV as a specified widely held entity. Further, where a CCIV sub-fund company invests in a unit trust, it is deemed that those units in the unit trust are held by the shareholders of the CCIV referable to that sub-fund. *[Schedule 9, items 7 and 20, subsection 102P(10B) of the ITAA 1936 and paragraph 275-20(4)(ea)]*

1.247 Schedule 12 to the Exposure Draft Bill updates the definitions in the ITAA 1936 and ITAA 1997. *[Schedule 11, items 1 to 25, definitions of ‘AIV’, ‘assessment’, ‘attribution sub-fund’, ‘CCIV’ and ‘sub-fund’ in subsection 6(1) of the ITAA 1936 and definitions of ‘AIV’, ‘AIV component’, ‘AIV component deficit’, ‘AIV cost base increase amount’, ‘AIV cost base net amount’, ‘AIV cost base reduction amount’, ‘AIV DIR payment’, ‘AIV dividend payment’, ‘AIV interest payment’, ‘AIVMA statement’, ‘AIV member annual statement’, ‘AIV royalty payment’, ‘AMIT restructuring period’, ‘attribution investment vehicle’, ‘attribution sub-fund’, ‘carry-forward AIV component deficit’, ‘CCIV’, ‘corporate collective investment vehicle’, ‘corporate director’, ‘depository’, ‘determined AIV component’, ‘excluded sub-fund’, ‘excluded sub-fund restructuring period’, ‘income tax law’, ‘investment vehicle withholding tax’, ‘member’, ‘non-arm’s length income’, ‘operator’, ‘post-AIVMA actual payment’, ‘pre-AIVMA actual payment’, ‘referable’, ‘sub-fund’, ‘sub-fund participation interest’, ‘withholding CCIV’ and ‘withholding tax’ in subsection 995-1(1) of the ITAA 1997]*

Application and transitional provisions

1.248 A revised application provision is being considered to apply the amendments prospectively. *[Schedule 10, item 1]*

1.249 If a choice is made under section 276-20 of the ITAA 1997 before the repeal of that section by the Treasury Laws Amendment (Corporate Collective Investment Vehicle) Act 2018 (the amending Act), the choice continues in effect after the repeal as if the choice had been made under section 276-48 of that Act as amended by the amending Act. *[Schedule 10, item 3, subsections 276-10(1) and (2) of the Income Tax (Transitional Provisions) Act 1997]*

1.250 Existing AMITs are taken to comply with obligations relating to AIVMA statements under the ITAA 1997 where it has been in compliance with its obligations relating to AMMA statements under the existing law. *[Schedule 10, item 3, subsections 276-10(3) and (4) of the Income Tax (Transitional Provisions) Act 1997]*