

EXPOSURE DRAFT

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Inserts for

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

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Schedule 1—Main amendments

Corporations Act 2001

1 Before Chapter 9

Insert:

Part 8B.12—External administration

Division 1—Winding up

1249A Object of this Part

The object of this Part is to preserve the segregated application of assets of sub-funds by requiring CCIVs to be wound up on a sub-fund-by-sub-fund basis.

1249B Separate winding up for each sub-fund

The provisions of this Act relating to the winding up of companies apply separately to a CCIV in respect of each sub-fund of the CCIV. For the purposes of that separate application the provisions apply:

- (a) subject to the separating assumptions for the sub-fund (see section 1249C), unless the contrary intention appears; and
- (b) subject to the other provisions of this Part; and
- (c) with such other changes as are made necessary by the fact that the CCIV is being wound up only in respect of the sub-fund.

Note 1: The term “this Act” includes the regulations and the Insolvency Practice Rules: see the definition of *this Act* in section 9.

Note 2: There are special rules about entering winding up: see sections 1249F to 1249M.

1249C Separating assumptions for a sub-fund

- (1) If a provision of this Act applies subject to the separating assumptions for a sub-fund of a CCIV, then the provision applies assuming that:

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- 1 (a) the only business carried on by the CCIV is the part of the
2 business of the CCIV that is the business of the sub-fund; and
3 (b) the only shares issued by the CCIV are shares referable to the
4 sub-fund; and
5 (c) the only property of the CCIV is property comprising assets
6 of the sub-fund; and
7 (d) the only debts payable by, and claims against, the CCIV are
8 debts and claims that are liabilities of the sub-fund.

9 Note 1: The separating assumptions for the sub-fund involve treating the
10 CCIV as a separate entity in respect of each sub-fund. For example, if
11 a CCIV has 2 sub-funds, the CCIV is treated as 2 separate entities: the
12 first comprising the CCIV with only the first sub-fund, and the second
13 comprising the CCIV with only the second sub-fund.

14 Note 2: See sections 1233J (about assets of a sub-fund) and 1233P (about
15 liabilities of a sub-fund).

16 Note 3: For example, a disposition of property of a CCIV that is being wound
17 up in respect of a sub-fund is void under section 468 only if the
18 property comprises assets of the sub-fund: see paragraph (c) of this
19 subsection.

20 *Meaning of defined terms affected by separating assumptions*

21 (2) If:

- 22 (a) a provision of this Act defines a term or expression; and
23 (b) the term or expression applies in a provision of this Act (the
24 **winding up provision**) that applies to a CCIV subject to the
25 separating assumptions for a sub-fund of the CCIV;

26 then, for the purposes of that application of the winding up
27 provision, the term or expression also applies subject to the
28 separating assumptions for the sub-fund.

29 Note 1: The terms and expressions affected by this subsection include
30 **contributory, holding company, insolvent, member, related body**
31 **corporate, relation-back day, relevant date, shareholder, solvent** and
32 **subsidiary**.

33 Note 2: For example, in a provision that applies subject to the separating
34 assumptions for a sub-fund, **contributory**, in relation to the CCIV,
35 means a person who would be a contributory of the CCIV if the only
36 members the CCIV has and has had were members of the sub-fund:
37 see paragraph (1)(b).

38 Note 3: For example, in a provision that applies subject to the separating
39 assumptions for a sub-fund, the question whether a body corporate is a
40 **subsidiary** of the CCIV is to be determined having regard only to
41 assets of the sub-fund: see paragraph (1)(c).

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Sub-fund meetings have effect as meetings of CCIV

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- 2 (3) If a provision of this Act applies to a CCIV subject to the
- 3 separating assumptions for a sub-fund of the CCIV, then, for the
- 4 purposes of that application of the provision:
- 5 (a) a meeting of the members of the sub-fund is taken to be a
- 6 meeting of the members of the CCIV; and
- 7 (b) a resolution passed by the members of the sub-fund is taken
- 8 to have been passed by the members of the CCIV.

9 Note 1: Part 2G.4 (about meetings of members of registered managed

10 investment schemes) applies in relation to a sub-fund of a CCIV and

11 the members of the sub-fund: see section 1244B.

12 Note 2: This subsection allows sub-fund meetings to have effect in provisions

13 modified by the separating assumptions as if they were meetings of

14 the CCIV (in respect of the sub-fund).

15 **1249D Winding up does not affect other sub-funds**

16 The provisions of this Act relating to the winding up of companies,

17 in their separate application to a CCIV in respect of a particular

18 sub-fund, are of no effect in relation to any of the following:

- 19 (a) the part of the business of the CCIV that is the business of the
- 20 other sub-funds;
- 21 (b) shares issued by the CCIV that are referable to the other
- 22 sub-funds;
- 23 (c) property of the CCIV comprising assets of the other
- 24 sub-funds (including proceedings in relation to such
- 25 property);
- 26 (d) debts payable by, and claims against, the CCIV that are
- 27 liabilities of the other sub-funds;
- 28 (e) proceedings (including prospective proceedings) in a court
- 29 against the CCIV relating solely to the business of the other
- 30 sub-funds.

31 Note: For the effect on the operation of the CCIV, and the powers and duties

32 of the corporate director, see sections 1249P and 1249Q.

33 **1249E Winding up does not affect allocation or segregation of assets**

34 **and liabilities**

35 Nothing in this Part, or the provisions of this Act relating to the

36 winding up of companies, affects the operation of the provisions of

37 Division 3 of Part 8B.2 that provide for determining:

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- 1 (a) the assets of a sub-fund of a CCIV at a particular time; and
2 (b) the liabilities of a sub-fund of a CCIV at a particular time;
3 and
4 (c) the purposes for which assets of a sub-fund may be applied.

5 **1249F Court may order winding up of a CCIV in respect of a** 6 **sub-fund**

- 7 (1) Section 1249B does not apply to section 233, Division 1 of
8 Part 5.4, Part 5.4A, and sections 459A, 459B, 461 and 467B.
- 9 (2) A provision of this Act that provides that the Court may order that
10 a company be wound up is taken, in its application to a CCIV, to
11 provide that the Court may order that a CCIV be wound up in
12 respect of a sub-fund of the CCIV.
- 13 (3) The Court may make an order under the provision that a CCIV be
14 wound up in respect of a sub-fund if, subject to the separating
15 assumptions for the sub-fund (see section 1249C), the Court could
16 (apart from subsection (2) of this section) make an order under the
17 provision that the CCIV be wound up.

18 Note 1: For example, in determining whether to make an order that a CCIV be
19 wound up in insolvency in respect of a sub-fund, the definition of
20 *insolvent* in section 95A is to be applied to the CCIV on the
21 assumption that the CCIV's only debts are debts that are liabilities of
22 the sub-fund (see paragraph 1249C(1)(d)) and the only property
23 available to meet those debts is property comprising assets of the
24 sub-fund (see paragraph 1249C(1)(c)).

25 Note 2: For paragraph 461(1)(a) (about when a company has resolved that it
26 be wound up by the Court), see subsection 1249M(3).

27 *Order must identify the sub-fund*

- 28 (4) An order that a CCIV be wound up must identify the sub-fund in
29 respect of which the CCIV is to be wound up.

30 **1249G Creditor may serve statutory demand on a CCIV**

- 31 (1) Section 1249B does not apply to section 459E (about statutory
32 demands).
- 33 (2) A statutory demand served on a CCIV is not required to identify a
34 sub-fund of the CCIV.

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1249H Failure to comply with a statutory demand affects all sub-funds

- (1) Section 1249B does not apply to section 459F (about failing to comply with statutory demand).

Note: However, if the CCIV applies to set aside the statutory demand, and files a notice identifying the affected sub-funds, section 459F applies subject to the separating assumptions for the affected sub-funds: see paragraph 1249K(5)(d).

- (2) Subject to subsection (3), any failure (as defined by section 459F) by a CCIV to comply with a statutory demand is taken to be:

- (a) if the CCIV has one sub-fund—a failure to comply with the statutory demand for the purposes of applying a provision of this Act that applies to the CCIV subject to the separating assumptions for that sub-fund; or
- (b) if the CCIV has 2 or more sub-funds—a failure to comply with the statutory demand for the purposes of applying a provision of this Act that applies to the CCIV subject to the separating assumptions for each such sub-fund.

- (3) However, if:

- (a) a CCIV failed (as defined by section 459F) to comply with a statutory demand; and
- (b) at a time before the Court makes an order under section 459A or 459B in relation to the demand, the CCIV serves a written notice that complies with section 1249J on the person who served the statutory demand on the CCIV;

the CCIV is taken to have failed to comply with the statutory demand for the purposes of applying a provision of this Act that applies to the CCIV subject to the separating assumptions only for those sub-funds identified in the written notice.

1249J Notice identifying sub-funds affected by statutory demand

A written notice made by a CCIV complies with this section in relation to a statutory demand if the notice sets out the following information for each debt to which the demand relates:

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

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1249K Application to set aside statutory demand

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2 (1) Section 1249B does not apply to Division 3 of Part 5.4 (about
3 applications to set aside statutory demands).

4 *Sub-funds not required to be identified for genuine disputes about*
5 *existence of debt*

- 6 (2) The Court must not make an order under subsection 459H(3)
7 unless the Court is satisfied that there is a genuine dispute between
8 the CCIV and the respondent (within the meaning of section 459H)
9 about the existence of all debts to which the demand relates.

10 *Sub-fund must be identified if genuine dispute is about amount of*
11 *debt*

- 12 (3) The Court is to dismiss an application made under section 459G if:
13 (a) the Court is satisfied that there is no genuine dispute between
14 the CCIV and the respondent (within the meaning of
15 section 459H) about the existence of the debt; and
16 (b) a written notice that complies with section 1249J in relation
17 to the statutory demand was not filed with the Court with the
18 affidavit referred to in subsection 459G(3).

- 19 (4) Subsection (5) applies if:
20 (a) the Court is satisfied that there is no genuine dispute between
21 the CCIV and the respondent (within the meaning of
22 section 459H) about the existence of the debt; and
23 (b) a written notice that complies with section 1249J in relation
24 to the statutory demand was filed with the Court with the
25 affidavit referred to in subsection 459G(3).

- 26 (5) If this subsection applies:
27 (a) the respondent is taken to have served, on the day the actual
28 statutory demand was served on the CCIV, a separate
29 statutory demand on the CCIV in respect of each sub-fund of
30 the CCIV identified in the notice; and
31 (b) if the debt is a liability of 2 or more sub-funds of the CCIV—
32 the amount of the debt specified in the separate statutory
33 demand taken by paragraph (a) to have been served on the
34 CCIV in respect of the sub-fund is the proportion set out in
35 the notice for that sub-fund; and

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- 1 (c) the CCIV is taken to have applied to the Court for an order
2 setting aside each of those separate statutory demands; and
3 (d) section 459F and Division 3 of Part 5.4 (apart from
4 section 459G) apply subject to the separating assumptions for
5 each sub-fund of the CCIV identified in the notice; and
6 (e) subsection 1249H(1) (failure to comply with a statutory
7 demand affects all sub-funds) does not apply.

8 **1249L Applications for a winding up order**

- 9 (1) Section 1249B does not apply to section 234, Division 4 of
10 Part 5.4, sections 462 and 464 and subsection 465A(1).
11 (2) An application under section 234, 459P, 462 or 464 in relation to a
12 CCIV is not required to identify the sub-fund in respect of which it
13 is made.

14 *Applications for leave to make an application*

- 15 (3) An application for leave to make an application under section 459P
16 in relation to a CCIV is not required to identify the sub-fund in
17 respect of which it is made.
18 (4) However, the Court may give leave under subsection 459P(3) only
19 if, subject to the separating assumptions for one or more sub-funds
20 of the CCIV (see section 1249C), the Court could give leave to
21 apply for the CCIV to be wound up.

22 **1249M Resolution for winding up of a CCIV in respect of a sub-fund**

- 23 (1) Section 1249B does not apply to sections 490 and 491.
24 (2) A CCIV may resolve that it be wound up, whether by the Court or
25 voluntarily, only in respect of a sub-fund.
26 (3) Whether a CCIV has resolved, or may resolve, that it be wound up
27 in respect of a sub-fund, is to be determined by applying the
28 provisions of this Act subject to the separating assumptions for the
29 sub-fund (but see subsection 1249C(3)).

30 Note 1: For the purposes of that application, a special resolution passed by the
31 members of the sub-fund is treated as if it had been passed by the
32 members of the CCIV: see subsection 1249C(3).

33 Note 2: For when a company may resolve that it be wound up voluntarily, see
34 sections 490 and 491.

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- 1 (4) Despite subsection (3) and paragraph 490(1)(a), the members of a
2 sub-fund of the CCIV may not resolve that the CCIV be wound up
3 voluntarily in respect of a sub-fund if an application for the CCIV
4 to be wound up in insolvency has been filed.

5 Note: Because an application for a CCIV to be wound up is not required to
6 identify the sub-fund in respect of which it is made (see
7 subsection 1249L(3)), it has effect to prevent a voluntary winding up
8 of all sub-funds of the CCIV.

- 9 (5) Section 494 applies in relation to a CCIV as if a reference in that
10 section to a director or directors of a company were a reference to a
11 director or directors of the corporate director of the CCIV.

12 **1249N Sub-fund name and ARFN to be used on written documents**

13 *Notification that CCIV is being wound up in respect of a sub-fund*

- 14 (1) Subject to this Part, if a person is required under a provision of this
15 Act to:

- 16 (a) give or send a notice or document in connection with the
17 winding up of a company; and
18 (b) set out in the notice or document the name of a company that
19 is being wound up;

20 then the provision has effect in relation to the winding up of a
21 CCIV as if it required the person also to set out, in the document or
22 notice:

- 23 (c) the name of the sub-fund, or of each sub-fund (as the case
24 requires) in respect of which the CCIV is being wound up;
25 and
26 (d) the ARFN of each such sub-fund.

- 27 (2) Section 541 has effect in relation to a CCIV that is being wound up
28 in respect of a sub-fund as if it also required the CCIV to set out, in
29 the relevant public document or negotiable instrument, the
30 following information:

- 31 (a) the name of the sub-fund, or of each sub-fund (as the case
32 requires) in respect of which it is being wound up;
33 (b) the ARFN of each such sub-fund.

34 *Other things done in writing also to set out name and ARFN of*
35 *relevant sub-fund*

- 36 (3) Subject to this Part, if:
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- 1 (a) a person does a thing not covered by subsection (1) or (2) in
2 writing for the purposes of a winding up of a CCIV; and
3 (b) the written document by which that thing is done sets out the
4 name of the CCIV;
5 then the document must also set out the name and ARFN of the
6 sub-fund in respect of which the thing is done.

7 **1249P Officers of the CCIV**

- 8 (1) If a CCIV is being wound up in respect of a sub-fund,
9 subsection 198G(1) has effect in relation to a function or power of
10 an officer of the CCIV only to the extent that the function or power
11 relates solely to that sub-fund.

12 *Corporate director to help liquidator*

- 13 (2) The books in the possession of a corporate director that the
14 corporate director is required by subsection 530A(1) to deliver to
15 the liquidator of a CCIV in respect of a sub-fund include only
16 books in the possession of the corporate director that relate solely
17 to the business of the sub-fund.

- 18 (3) Where a CCIV is being wound up in respect of a sub-fund, the
19 corporate director is entitled, as against the liquidator, to retain
20 possession of books of the CCIV that relate to:

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

23 *Right of corporate director to access books etc. from liquidator*

- 24 (4) The corporate director of a CCIV is entitled to inspect at any
25 reasonable time books relating to the winding up of the CCIV in
26 respect of a particular sub-fund, to the extent the inspection of
27 those books is necessary for the corporate director to perform or
28 exercise the functions or powers of that office.

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

- 31 (5) In this section:

32 *liquidator* includes a provisional liquidator.

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1249Q Liquidator

Liquidator's powers limited to sub-fund

- (1) A function or power of a liquidator of a CCIV in respect of a sub-fund is subject to the separating assumptions for the sub-fund (see section 1249C) and may not be performed or exercised in a manner that would be inconsistent with section 1249D (winding up does not affect other sub-funds).

Note 1: For example, the liquidator's power under paragraph 477(1)(a) to carry on the business of the CCIV is limited to the part of the business that is the business of the sub-fund: see paragraph 1249C(1)(a).

Note 2: For example, the property that a liquidator is to take into the liquidator's custody or control under section 474 is limited to property comprising assets of the sub-fund: see paragraph 1249C(1)(c).

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

- (2) Without limiting subsection (1), the functions and powers of a liquidator of a CCIV in respect of a sub-fund do not include the power to:
- (a) determine the proportion of an asset that is to be allocated to a sub-fund of the CCIV under subsection 1233K(4); or
 - (b) determine the proportion of a liability that is to be allocated to a sub-fund of the CCIV under subsection 1233Q(5).

Books

- (3) The books of a CCIV that a liquidator of a CCIV in respect of a sub-fund of the CCIV is entitled under subsection 477(3) to inspect at any reasonable time include any books of the CCIV, to the extent the inspection of those books is necessary for the liquidator to perform or exercise the functions or powers of that office.

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

Depositary

- (4) Subsections (5) to (8) apply in relation to a liquidator of a CCIV in respect of a sub-fund if the CCIV has a depositary.

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- 1 (5) The liquidator must, as soon as practicable, and in any event within
2 3 days after the liquidator's appointment, notify the depositary of
3 the liquidator's appointment.
- 4 (6) The powers conferred on a liquidator of a CCIV in respect of a
5 sub-fund under section 477 are taken to include the power to
6 instruct the depositary in relation to dealing with assets of the
7 sub-fund.
- 8 (7) If there is a conflict between an instruction given to the depositary
9 by the liquidator of a CCIV in respect of a sub-fund in relation to
10 assets of the sub-fund and an instruction given by the corporate
11 director in relation to those assets, the liquidator's instruction
12 prevails.
- 13 (8) The liquidator is entitled to inspect at any reasonable time books of
14 the depositary relating to the CCIV, to the extent the inspection of
15 those books is necessary for the liquidator to perform or exercise
16 the functions or powers of that office.
- 17 Note: A person entitled to inspect a book may make copies or take extracts:
18 see subsection 1300(3).
- 19 (9) In this section:
20 *liquidator* includes a provisional liquidator.

21 1249R Depositary

- 22 (1) This section applies to a CCIV that has a depositary.
- 23 (2) If a liquidator is appointed to a CCIV in respect of a sub-fund of
24 the CCIV and there is a conflict between a function or power of the
25 liquidator and a function or power of the depositary, the
26 liquidator's function or power prevails.
- 27 (3) Without limiting subsection (2), the depositary of a CCIV is not
28 required to hold an asset of the CCIV (see section 1234G) if doing
29 so would conflict with a provision of this Act relating to the
30 winding up of companies.
- 31 Note: The liquidator has power to instruct the depositary in relation to
32 dealing with assets of a sub-fund: see subsection 1249Q(6).
- 33 (4) In this section:
34 *liquidator* includes a provisional liquidator.
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1 **1249S Auditor**

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

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

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

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

13 (3) The events are as follows:

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

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

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

19 **1249T Application of sub-fund property to meet certain priority**
20 **payments**

21 If a CCIV is being wound up in respect of a sub-fund, the assets of
22 the sub-fund may be applied for the purposes of paying debts and
23 claims that, under section 556, must be paid in priority to all other
24 unsecured debts and claims.

25 Note: This section extends the purposes listed in paragraph 1233L(2)(a).

26 **1249U Certain provisions that do not apply to CCIVs**

27 (1) Part 5.4C (about winding up by ASIC) does not apply to a CCIV.

28 (2) Division 8 of Part 5.6 (about pooling) does not apply to a CCIV.

29 (3) Part 5.7 (about winding up bodies other than companies) does not
30 apply to a CCIV.

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Part 8B.17—Financial services and markets

1250 Application of Chapter 7 to CCIVs

Chapter 7 applies to a CCIV subject to the modifications set out in this Part.

1250A For Chapter 7, treat the corporate director as providing financial services etc. being provided by the CCIV

- (1) This section applies to a provision of Chapter 7 that applies in relation to:
- (a) a financial services licensee; or
 - (b) a financial service or a financial services business; or
 - (c) a matter prescribed by the regulations for the purposes of this paragraph.

General rule

- (2) For the purposes of that provision of Chapter 7:
- (a) treat any conduct engaged in by, or on behalf of, a CCIV as also being engaged in by, or on behalf of, the corporate director of the CCIV; and
 - (b) treat any conduct relating to the CCIV that is engaged in by a person (other than the corporate director of the CCIV) as also being engaged in by that person in relation to the corporate director of the CCIV.
- (3) In subsection (2), **conduct** means an act, an omission to perform an act or a state of affairs.

Exceptions

- (4) If the CCIV issues a security in the CCIV, then subsection (2) does not treat the corporate director of the CCIV as also being the issuer of the security.
- (5) If the CCIV is a participant (within the meaning of Chapter 7) in:
- (a) a clearing and settlement facility; or
 - (b) a financial market;

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

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

6 **1250B Certain licensing concepts do not apply to CCIVs**

7 (1) Subsection 911A(1) (about the requirement to be licensed to carry
8 on a financial services business) does not apply to a CCIV.

9 Note: That subsection will instead apply to the corporate director of the
10 CCIV in relation to any financial services business carried on by the
11 CCIV (see subsection 1250A(2)).

12 (2) Subsection 911B(1) (about requirements for providing financial
13 services on behalf of another person) does not apply to a CCIV.

14 Note: This subsection confirms that the CCIV is not subject to extra
15 requirements if it is viewed as providing financial services on behalf
16 of its corporate director.

17 (3) For the purposes of Chapter 7, treat a CCIV as not being a
18 representative (within the meaning of Part 7.6) of the corporate
19 director of the CCIV.

20 Note: Activities of the CCIV relating to a financial service etc. are instead
21 treated as activities of the corporate director (see
22 subsection 1250A(2)).

23 (4) For the purposes of Chapter 7, a CCIV cannot be authorised under
24 Division 5 (about authorised representatives of licensees) of
25 Part 7.6.

26 Note: Activities of the CCIV relating to a financial service etc. are instead
27 treated as activities of the corporate director (see
28 subsection 1250A(2)).

29 **1250C Extra kinds of financial services relating to CCIVs**

30 (1) Subject to paragraph 766A(2)(b), treat subsection 766A(1) as also
31 providing that:

32 (a) the corporate director of a CCIV provides a *financial service*
33 if the corporate director operates the business and conducts
34 the affairs of the CCIV; and

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1 (b) a person provides a *financial service* if the person acts as a
2 depository of a CCIV in accordance with Division 4 of
3 Part 8B.2.

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

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

9 (2) For the purposes of Chapter 7, each of the members of a CCIV
10 covered by paragraph (1)(a) or (b) is a client for the financial
11 service covered by that paragraph.

12 **1250D CCIV redemption facility does not make a market**

13 Subsection 766D(1) does not apply to a CCIV, nor to the corporate
14 director of a CCIV, for the issuing or redeeming by the CCIV of:

- 15 (a) redeemable shares in the CCIV; or
16 (b) redeemable preference shares in the CCIV.

17 **1250E Certain conduct relating to CCIVs is not providing a 18 custodial or depository service**

19 Treat subsection 766E(3) as also providing that none of the
20 following conduct constitutes providing a *custodial or depository
21 service*:

- 22 (a) operating as a CCIV;
23 (b) operating the business and conducting the affairs of a CCIV;
24 (c) acting as a depository of a CCIV in accordance with
25 Division 4 of Part 8B.2.

26 **1250F CCIV generally responsible for conduct of corporate 27 director's directors, employees etc.**

28 *Other rules for corporate contraventions do not apply*

29 (1) Part 8B.19 (other than sections 1267J and 1267N) does not apply
30 for the purposes of a provision of Chapter 7 or a proceeding under
31 Chapter 7.

32 Note: Sections 1267J and 1267N still apply. Those sections re-route certain
33 liabilities of a CCIV to the corporate director of the CCIV.

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1 (2) Subsections 769B(1) to (3), (9) and (10) do not apply in relation to
2 a body corporate that is a CCIV.

3 Note 1: Instead, subsections (3) to (8) of this section apply, because the CCIV
4 has a corporate director and does not have any employees.

5 Note 2: Subsections 769B(1) to (3), (9) and (10) continue to apply in relation
6 to the corporate director of the CCIV.

7 *Attributing conduct to a CCIV*

8 (3) Subject to subsections 769B(7) and (8), conduct engaged in on
9 behalf of a CCIV:

10 (a) by an agent of, or the corporate director of, the CCIV acting
11 within the scope of that agent's, or corporate director's,
12 actual or apparent authority in relation to the CCIV; or

13 (b) by an employee, director or agent of the corporate director of
14 the CCIV acting:

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

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

21 (c) by any other person at the direction, or with the consent or
22 agreement (whether express or implied):

23 (i) of an agent of, or the corporate director of, the CCIV;
24 and

25 (ii) that is given within the scope of the actual or apparent
26 authority of that agent, or corporate director, in relation
27 to the CCIV; or

28 (d) by any other person at the direction, or with the consent or
29 agreement (whether express or implied):

30 (i) of an employee, director or agent of the corporate
31 director of the CCIV; and

32 (ii) that is given within the actual or apparent scope of that
33 employee's employment, or within that director's or
34 agent's actual or apparent authority, in relation to the
35 corporate director; and

36 (iii) that is given within the scope of the actual or apparent
37 authority of the corporate director in relation to the
38 CCIV;

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1 is taken, for the purposes of a provision of Chapter 7, or a
2 proceeding under Chapter 7, to have also been engaged in by the
3 CCIV.

4 *Attributing conduct to a person in relation to a CCIV*

5 (4) Conduct engaged in by a person (for example, the giving of money
6 or property) in relation to:

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

35 is taken, for the purposes of a provision of Chapter 7, or a
36 proceeding under Chapter 7, to have also been engaged in in
37 relation to the CCIV.

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Attributing state of mind to a CCIV

- 1
- 2 (5) If, in a proceeding under Chapter 7 in respect of conduct engaged
3 in by a CCIV, it is necessary to establish the CCIV's state of mind,
4 it is sufficient to show that one or more of the following persons
5 who engaged in that conduct had that state of mind:
- 6 (a) an agent of the CCIV who engaged in that conduct within the
7 scope of the agent's actual or apparent authority in relation to
8 the CCIV;
- 9 (b) a director, employee or agent of the corporate director of the
10 CCIV who engaged in that conduct:
- 11 (i) within the actual or apparent scope of that employee's
12 employment, or within that director's or agent's actual
13 or apparent authority, in relation to the corporate
14 director; and
- 15 (ii) within the scope of the actual or apparent authority of
16 the corporate director in relation to the CCIV.
- 17 (6) For the purposes of subsection (5):
- 18 (a) a person acting as mentioned in paragraph (3)(c) is taken to
19 be an agent of the CCIV; and
- 20 (b) a person acting as mentioned in paragraph (3)(d) is taken to
21 be an agent of the corporate director of the CCIV.

Modifications and interpretation

- 22
- 23 (7) The regulations may provide that this section, or a particular
24 provision of this section, has effect for specified purposes subject
25 to modifications specified in the regulations. The regulations have
26 effect accordingly.
- 27 (8) Subsections 769B(7), (8) and (10) apply to this section in a
28 corresponding way to the way those subsections apply to
29 section 769B.

1250G Australian financial services licences

- 30
- 31 (1) For the purposes of Chapter 7, a single Australian financial
32 services licence can cover operating the business and conducting
33 the affairs of more than one CCIV.

34 Note: This confirms that a corporate director of several CCIVs could be
35 granted a single licence to operate the business and conduct the affairs
36 of those CCIVs.

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- 1 (2) Treat subsection 911A(4) as also providing for the following:
2 (a) that the corporate director of a CCIV is not exempt under any
3 paragraph of subsection 911A(2) for a financial service it
4 provides if the service is operating the business and
5 conducting the affairs of the CCIV;
6 (b) that a person is not exempt under any paragraph of
7 subsection 911A(2) for a financial service they provide if the
8 service is acting as a depositary of a CCIV in accordance
9 with Division 4 of Part 8B.2.
- 10 (3) Despite paragraph 912A(4)(b), paragraph 912A(1)(d) also applies
11 to an RSE licensee that is the corporate director of a CCIV.
- 12 (4) Despite subsection 912A(5), paragraph 912A(1)(h) also applies to
13 an RSE licensee that is the corporate director of a CCIV, except to
14 the extent that the risk relates solely to the operation of a regulated
15 superannuation fund by the RSE licensee.
- 16 (5) In this section:
- 17 *regulated superannuation fund* has the same meaning as in the
18 *Superannuation Industry (Supervision) Act 1993*.
- 19 *RSE licensee* has the same meaning as in the *Superannuation*
20 *Industry (Supervision) Act 1993*.

21 **1250H Immediate suspensions or cancellations of licences**

- 22 Subsection 915B(3) also applies as if each of the following
23 paragraphs were a paragraph of that subsection:
- 24 (a) is the corporate director of a CCIV, and:
25 (i) the CCIV; or
26 (ii) the members of the CCIV;
27 have suffered, or are likely to suffer, loss or damage because
28 the corporate director or the CCIV has breached this Act;
- 29 (b) is acting as a depositary (the *depositary*) of a CCIV in
30 accordance with Division 4 of Part 8B.2, and:
31 (i) the CCIV; or
32 (ii) the members of the CCIV;
33 have suffered, or are likely to suffer, loss or damage because
34 the depositary has breached this Act.

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1250J Restriction on use of certain words or expressions

Treat subsection 923A(1) as also providing that a CCIV contravenes that subsection if the CCIV assumes or uses, in this jurisdiction, a restricted word or expression in relation to a financial services business or financial service.

1250K Agreements with certain unlicensed persons

- (1) Subdivision B of Division 11 of Part 7.6 also applies to an agreement entered into by:
- (a) a CCIV (in that Subdivision called the *non-licensee*); and
 - (b) another person (in that Subdivision called the *client*) who is not a financial services licensee;
- that constitutes, or relates to, the provision of a financial service by the corporate director of the CCIV (in that Subdivision called the *corporate director*) if:
- (c) the agreement is entered into in the course of a financial services business carried on by the corporate director; and
 - (d) the corporate director does not hold an Australian financial services licence covering the provision of the financial service; and
 - (e) the corporate director is not exempt from the requirement to hold such a licence.

Note 1: A CCIV does not need to be licensed to provide a financial service, instead the CCIV's corporate director needs to be (see subsection 1250B(1)). This means section 924A will only work appropriately if the agreement mentioned in that section is between the corporate director and the client.

Note 2: This section works similarly to section 924A to ensure that the appropriate result happens if the agreement mentioned in section 924A is instead between the CCIV and the client.

Note 3: This section applies whether the financial service is provided to the client as a wholesale client or as a retail client.

- (2) Subdivision B of Division 11 of Part 7.6 applies to the agreement whether or not anyone else is a party to the agreement.
- (3) That Subdivision applies to the agreement as if subsections 925A(4) and (5) were replaced by the following:
- “(4) The client is not entitled to give a notice under this section if, within a reasonable period before the agreement was entered into,

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1 the non-licensee informed the client (whether or not in writing) that
2 the corporate director did not hold an Australian financial services
3 licence.

4 (5) If, at a time when an Australian financial services licence held by
5 the corporate director was suspended, the non-licensee informed
6 the client that the licence was suspended, the non-licensee is to be
7 taken for the purposes of subsection (4) to have informed the client
8 at that time that the corporate director did not hold the licence.”.

9 **1250L Financial services disclosure does not apply to operating the** 10 **business and conducting the affairs of CCIVs**

11 Part 7.7 does not apply to a financial service provided by the
12 corporate director of a CCIV if the financial service consists only
13 of operating the business and conducting the affairs of the CCIV.

14 **1250M Financial records of the corporate director of a CCIV**

15 When section 988E applies to a licensee because the licensee is the
16 corporate director of a CCIV, treat that section as requiring the
17 particulars of the matters in paragraphs 988E(a) to (g) to be shown
18 so that they are clearly identifiable for each sub-fund of the CCIV.

19 Note: Section 988E is about the categories of information to be shown in the
20 licensee’s financial records.

21 **1250N Prohibition on hawking of securities in a CCIV**

22 (1) Treat subsection 992A(2) as also providing that
23 subsection 992A(1) does not apply to the offering of securities in a
24 CCIV, hawking of which is prohibited by section 992AA (as
25 extended by this section).

26 (2) Subsection 992AA(1) also applies as if the reference in that
27 subsection to interests in managed investment schemes included a
28 reference to securities in a CCIV.

29 Note: Failure to comply with subsection 992AA(1) is an offence (see
30 subsection 1311(1)).

31 (3) Subsection 992AA(1), as it applies because of subsection (2) of
32 this section, does not apply to an offer of securities in a CCIV if:
33 (a) the offer is not to a retail client; or

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1 (b) the offer is made to a client by a financial services licensee
2 through whom the client has acquired or disposed of a
3 security in a CCIV in the previous 12 months.

4 Note: A defendant bears an evidential burden in relation to the matters in
5 this subsection (see subsection 13.3(3) of the *Criminal Code*).

6 (4) For the purposes of subsection 992AA(1), as it applies because of
7 subsection (2) of this section:

8 (a) a reference to offering securities in a CCIV for issue includes
9 a reference to inviting an application for the issue of
10 securities in the CCIV; and

11 (b) a reference to offering securities in a CCIV for sale includes
12 a reference to inviting an offer to purchase securities in the
13 CCIV.

14 (5) Subsection 736(1) (about prohibiting the hawking of securities)
15 does not apply to securities in a CCIV.

16 Note: A defendant bears an evidential burden in relation to the matter in this
17 subsection (see subsection 13.3(3) of the *Criminal Code*).

18 **1250P Part 7.9 applies to the issue or sale of securities in a CCIV**

19 (1) Despite subsection 1010A(1), Part 7.9 applies to securities in a
20 CCIV.

21 (2) Despite subsection 1010B(1), Part 7.9 applies in relation to the
22 issue of any security in a CCIV.

23 (3) If the corporate director of a CCIV is, apart from this subsection, a
24 regulated person (within the meaning of Division 2 of Part 7.9)
25 because it is the seller of a security in the CCIV, treat the CCIV as
26 being the regulated person for the purposes of that Part instead of
27 the corporate director.

28 Note 1: The corporate director of the CCIV will continue to be a regulated
29 person for any other case.

30 Note 2: The CCIV will also be the regulated person for an issue of securities
31 in the CCIV (see subsection 1250A(4) and section 1011B).

32 (4) If a reference in Part 7.9 to a seller of a financial product applies to
33 the corporate director of a CCIV as the seller of a security in the
34 CCIV, treat the reference as referring to the CCIV.

35 (5) Subsections (3) and (4) apply despite subsection 1250A(2).

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1 Note: This subsection confirms that the general rule in subsection 1250A(2)
2 does not affect subsections (3) and (4).

3 **1250Q Product Disclosure Statements—when a security in a CCIV** 4 **is of the same kind as another product**

5 For the purposes of sections 1012C and 1012D (as extended by this
6 section), a security in a CCIV is of the same kind as another
7 product only if the other product:

- 8 (a) is also a security in the CCIV; and
- 9 (b) is referable to the same sub-fund of the CCIV as the
10 first-mentioned security; and
- 11 (c) is issued on the same terms and conditions (other than price)
12 as the first-mentioned security.

13 **1250R Product Disclosure Statements—situations when not** 14 **required for CCIVs**

15 *No consideration to be provided*

- 16 (1) Paragraph 1012D(5)(b) also applies to the case where the financial
17 product is not an option and is a security in a CCIV.

18 *Client is associated with the CCIV*

- 19 (2) Treat section 1012D as also providing that, in a recommendation
20 situation, an issue situation or a sale situation, the regulated person
21 does not have to give the client a Product Disclosure Statement if:
22 (a) the financial product is a security in a CCIV; and
23 (b) the client is associated (within the meaning of subsection (3)
24 of this section) with the CCIV.
- 25 (3) For the purposes of subsection (2), the client is associated with the
26 CCIV if the client is:
27 (a) the corporate director of the CCIV; or
28 (b) a director or secretary of that corporate director; or
29 (c) a senior manager of the corporate director or of a related
30 body corporate of that corporate director; or
31 (d) a spouse, parent, child, brother or sister of a person who is a
32 director or senior manager of:
33 (i) that corporate director; or
34 (ii) a related body corporate of that corporate director; or

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1 (e) a body corporate controlled by a person referred to in
2 paragraph (a), (b), (c) or (d).

3 *Rights issues*

4 (4) Subsection 1012DAA(3) also applies to contraventions of the
5 following provisions:

- 6 (a) if the relevant product is a security in a CCIV—the
7 provisions of Chapter 2M as they apply to the CCIV;
8 (b) if the relevant product is a security in a CCIV—section 675
9 as it applies to the CCIV.

10 (5) Treat subsection 1012DAA(7) as:

- 11 (a) providing that paragraph 1012DAA(7)(d) only applies if the
12 relevant product is an interest in a registered scheme; and
13 (b) including the following extra paragraph:
14 “(da) if the relevant product is a security in a CCIV—states that, as
15 at the date of the notice, the CCIV has complied with the
16 provisions of Chapter 2M as they apply to the CCIV; and”.

17 *Small scale offerings*

18 (6) Section 1012E also applies to financial products that are securities
19 in a CCIV.

20 **1250S Product Disclosure Statements—content requirements**

21 *Main requirements*

22 (1) Treat subsection 1013D(2A) as also including securities in a CCIV.

23 *Extra requirements for ED securities in a CCIV*

24 (2) Section 1013I also applies as if:

- 25 (a) references in that section to managed investment products
26 included references to securities in a CCIV; and
27 (b) references in that section to a scheme included references to
28 the CCIV.

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1 **1250T Product Disclosure Statements—replacement statements**

2 Section 1014G also applies as if the reference in
3 paragraph 1014G(a) to an interest in a managed investment scheme
4 included a reference to an interest that is a security in a CCIV.

5 **1250U Product Disclosure Statements—lodging with ASIC**

6 Subsection 1015B(1) also applies as if a reference in that
7 subsection to a managed investment product included a reference
8 to a security in a CCIV.

9 **1250V Product Disclosure Statements—use of application forms**

10 Treat the definition of *relevant financial product* in
11 subsection 1016A(1) as also meaning a security in a CCIV.

12 **1250W Disclosure obligations of issuers of securities in CCIVs**

13 (1) Subsection 1017B(2) also applies in relation to a financial product
14 that is an ED security in a CCIV.

15 Note: A defendant bears an evidential burden in relation to the matter in
16 subsection 1017B(2), see subsection 13.3(3) of the *Criminal Code*.

17 (2) Paragraph 1017D(1)(b) also applies as if it referred to a product
18 that is a security in a CCIV.

19 **1250X Cooling-off periods**

20 Division 5 of Part 7.9 also applies as if securities in a CCIV were
21 another class of financial product covered by
22 paragraph 1019A(1)(a).

23 **1250Y Unsolicited offers to purchase securities in CCIVs off-market**

24 For financial products that are securities in a CCIV, treat
25 paragraph 1019D(1)(d) as also providing that the offer is not made
26 to the corporate director of the CCIV.

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1250Z Insider trading—exceptions

A member of a CCIV redeeming shares in the CCIV

- (1) Treat section 1043B as also providing that subsection 1043A(1) does not apply to a member of a CCIV in respect of the redemption of the member's shares in the CCIV if the amount paid to the member on redemption is calculated (so far as is reasonably practicable) by reference to:
- (a) the underlying value of the assets of the sub-fund to which the shares are referable; less
 - (b) any reasonable charge for that redemption.

Officer or employee is aware of certain transactions

- (2) Subsections 1043I(2) and (3) apply to a body corporate that is a CCIV as if:
- (a) the reference in subsection 1043I(2) to an officer of the body corporate included a reference to an officer of the corporate director of the CCIV acting:
 - (i) within the actual or apparent scope of that officer's actual or apparent authority in relation to the corporate director; and
 - (ii) within the scope of the actual or apparent authority of the corporate director in relation to the CCIV; and
 - (b) the reference in subsection 1043I(2) to an employee of the body corporate were a reference to an employee of the corporate director of the CCIV acting:
 - (i) within the actual or apparent scope of that employee's employment in relation to the corporate director; and
 - (ii) within the scope of the actual or apparent authority of the corporate director in relation to the CCIV; and
 - (c) the references to employee in subsection 1043I(3) were omitted.
- (3) If subsection 1043J(1) applies in relation to a second person that is a CCIV, subsection 1043J(2) also applies to a first person who:
- (a) is an officer of the corporate director of the CCIV acting:
 - (i) within the actual or apparent scope of that officer's actual or apparent authority in relation to the corporate director; and

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- 1 (ii) within the scope of the actual or apparent authority of
2 the corporate director in relation to the CCIV; and
3 (b) is an employee of the corporate director of the CCIV acting:
4 (i) within the actual or apparent scope of that employee's
5 employment in relation to the corporate director; and
6 (ii) within the scope of the actual or apparent authority of
7 the corporate director in relation to the CCIV.

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1 **Part 8B.19—Corporate contraventions by CCIVs**

2 **Division 1—Criminal contraventions**

3 **Subdivision A—Preliminary**

4 **1267 Definitions**

5 In this Division:

6 *conduct* has the same meaning as in the *Criminal Code*.

7 *engage in conduct* has the same meaning as in the *Criminal Code*.

8 **Subdivision B—Establishing the commission of an offence by a** 9 **CCIV**

10 **1267A Application**

- 11 (1) This Subdivision has effect for the purposes of establishing
12 whether a CCIV has committed an offence created by a law of the
13 Commonwealth (including an offence to which Part 2.5 of the
14 *Criminal Code* does not apply).

15 Note: For the purposes of offences based on provisions of Chapter 7,
16 corporate criminal responsibility is dealt with by sections 769B and
17 1250F, rather than by this Subdivision: see section 769A and
18 subsection 1250F(1).

19 *Part 2.5 of the Criminal Code etc. not limited*

- 20 (2) Nothing in this Part impliedly limits the operation of Part 2.5 of the
21 *Criminal Code* in relation to the following:

- 22 (a) CCIVs;
23 (b) bodies corporate other than CCIVs.

24 Note 1: Section 1267G expressly limits the operation of section 12.5 of the
25 *Criminal Code* in relation to CCIVs.

26 Note 2: Part 2.5 of the *Criminal Code* does not apply to offences against all
27 Commonwealth laws.

- 28 (3) Nothing in this Part limits:

- 29 (a) any provision of a law of the Commonwealth that, for any
30 purpose, has the effect of treating a body corporate as having
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1 engaged in conduct that was actually engaged in by another
2 person; or

- 3 (b) any provision of a law of the Commonwealth that, for any
4 purpose, has the effect of treating a body corporate as having
5 a state of mind (however described) that was actually the
6 state of mind of another person.

7 **1267B General principles for offences to which Part 2.5 of the**
8 **Criminal Code applies**

9 If section 12.1 of the *Criminal Code* applies to an offence, the
10 other modifications mentioned in that section, with which the *Code*
11 applies to a CCIV, include such modifications as are made
12 necessary by the fact that criminal liability is being imposed on a
13 body corporate that:

- 14 (a) has a sole director that is also a body corporate; and
15 (b) has no employees.

16 **1267C Effect of section 1267J to be disregarded**

17 In establishing whether a CCIV has committed an offence, the
18 effect of section 1267J is to be disregarded.

19 Note: Section 1267J transfers responsibility for offences committed by a
20 CCIV to the corporate director of the CCIV.

21 **1267D Physical elements**

22 If a physical element of an offence is committed by an employee,
23 agent or officer of the corporate director of a CCIV acting:

- 24 (a) within the actual or apparent scope of his or her employment,
25 or within his or her actual or apparent authority, in relation to
26 the corporate director; and
27 (b) within the scope of the actual or apparent authority of the
28 corporate director in relation to the CCIV;

29 that physical element must also be attributed to the CCIV.

30 **1267E Fault elements other than negligence**

- 31 (1) If intention, knowledge or recklessness is a fault element in
32 relation to a physical element of an offence, that fault element must
33 be attributed to a CCIV if the corporate director of the CCIV,
34 acting within the scope of the actual or apparent authority of the
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- 1 corporate director in relation to the CCIV, expressly, tacitly or
2 impliedly authorised or permitted the commission of the offence.
- 3 (2) The means by which such an authorisation or permission may be
4 established include:
- 5 (a) proving that the board of directors of the corporate director of
6 the CCIV, acting within the scope of the actual or apparent
7 authority of the corporate director in relation to the CCIV,
8 intentionally, knowingly or recklessly carried out the relevant
9 conduct, or expressly, tacitly or impliedly authorised or
10 permitted the commission of the offence; or
- 11 (b) proving that a high managerial agent of the corporate director
12 of the CCIV, acting within the scope of the actual or apparent
13 authority of the corporate director in relation to the CCIV,
14 intentionally, knowingly or recklessly engaged in the relevant
15 conduct, or expressly, tacitly or impliedly authorised or
16 permitted the commission of the offence; or
- 17 (c) proving that a corporate culture existed within the corporate
18 director of the CCIV that directed, encouraged, tolerated or
19 led to non-compliance with the relevant provision; or
- 20 (d) proving that the corporate director of the CCIV failed to
21 create and maintain a corporate culture that required
22 compliance with the relevant provision.
- 23 (3) Paragraph (2)(b) does not apply if the corporate director of the
24 CCIV proves that it exercised due diligence to prevent the conduct,
25 or the authorisation or permission.
- 26 (4) Factors relevant to the application of paragraph (2)(c) or (d)
27 include:
- 28 (a) whether authority to commit an offence of the same or a
29 similar character had been given by a high managerial agent
30 of the corporate director of the CCIV; and
- 31 (b) whether the employee, agent or officer of the corporate
32 director of the CCIV who committed the offence believed on
33 reasonable grounds, or entertained a reasonable expectation,
34 that a high managerial agent of the corporate director would
35 have authorised or permitted the commission of the offence.
- 36 (5) If recklessness is not a fault element in relation to a physical
37 element of an offence, subsection (2) does not enable the fault
38 element to be proved by proving that the board of directors, or a
39 high managerial agent, of the corporate director of the CCIV
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1 recklessly engaged in the conduct or recklessly authorised or
2 permitted the commission of the offence.

3 (6) In this section:

4 *board of directors* means the body (by whatever name called)
5 exercising the executive authority of the corporate director.

6 *corporate culture* means an attitude, policy, rule, course of conduct
7 or practice existing within the corporate director generally or in the
8 part of the corporate director in which the relevant activities takes
9 place.

10 *high managerial agent* means an employee, agent or officer of the
11 corporate director with duties of such responsibility that his or her
12 conduct may fairly be assumed to represent the corporate director's
13 policy.

14 **1267F Negligence**

15 (1) If an employee, agent or officer of the corporate director of a CCIV
16 acting:

17 (a) within the actual or apparent scope of his or her employment,
18 or within his or her actual or apparent authority, in relation to
19 the corporate director; and

20 (b) within the scope of the actual or apparent authority of the
21 corporate director in relation to the CCIV;

22 has the fault element of negligence in relation to a physical element
23 of an offence, that fault element must be attributed to the CCIV.

24 (2) The fault element of negligence in relation to a physical element of
25 an offence may exist on the part of a CCIV if the conduct of the
26 CCIV is negligent when viewed as a whole.

27 (3) In viewing the conduct of the CCIV as a whole as mentioned in
28 subsection (2), the conduct of any number of the following may be
29 aggregated:

30 (a) agents or officers of the CCIV, acting within their actual or
31 apparent authority in relation to the CCIV;

32 (b) employees, agent, or officers of the corporate director of the
33 CCIV, acting:

34 (i) within the actual or apparent scope of their employment
35 or authority in relation to the corporate director; and

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

1267G Mistake of fact (strict liability)

- (1) Section 12.5 of the *Criminal Code* does not apply to a CCIV.
- (2) A CCIV can only rely on section 9.2 of the *Criminal Code* (mistake of fact (strict liability)) in respect of conduct that would, apart from this section, constitute an offence on its part in the circumstances set out in this section.
- (3) A CCIV can rely on section 9.2 of the *Criminal Code* if:
- (a) an agent or officer of the CCIV carried out the conduct; and
 - (b) the agent or officer was under a mistaken but reasonable belief about facts that, had they existed, would have meant that the conduct would not have constituted an offence; and
 - (c) the corporate director of the CCIV proves that it exercised due diligence to prevent the conduct.
- (4) A CCIV can rely on section 9.2 of the *Criminal Code* if:
- (a) an employee, agent or officer of the corporate director carried out the conduct; and
 - (b) the employee, agent or officer was under a mistaken but reasonable belief about facts that, had they existed, would have meant that the conduct would not have constituted an offence; and
 - (c) the corporate director of the CCIV proves that it exercised due diligence to prevent the conduct.
- (5) A failure to exercise due diligence may be evidenced by the fact that the prohibited conduct was substantially attributable to:
- (a) inadequate corporate management, control or supervision of the conduct of:
 - (i) one or more of the CCIV's agents; or
 - (ii) one or more of the corporate director's employees, agents or officers; or
 - (b) failure to provide adequate systems for conveying relevant information to relevant persons in the corporate director or CCIV.

EXPOSURE DRAFT

1 1267H Intervening conduct or event

2 A CCIV cannot rely on section 10.1 (intervening conduct or event)
3 in respect of a physical element of an offence brought about by
4 another person if the other person is an employee, agent or officer
5 of the corporate director of the CCIV.

6 Subdivision C—Consequences of the commission of an offence 7 by a CCIV

8 1267J Corporate director, not CCIV, commits offences

9 An offence against a law of the Commonwealth that, apart from
10 this section, would be committed by a CCIV is taken instead to
11 have been committed by the corporate director of the CCIV.

12 Division 2—Civil contraventions

13 Subdivision A—Preliminary

14 1267K Definitions

15 In this Division:

16 *civil penalty provision*: a provision of a law of the Commonwealth
17 is a *civil penalty provision* if a civil penalty may be imposed in
18 relation to a contravention of the provision.

19 Subdivision B—Establishing the contravention of a civil penalty 20 provision by a CCIV

21 1267L Civil penalty provisions contravened by agents or officers of a 22 CCIV

23 If an element of a civil penalty provision is done by an agent or
24 officer of a CCIV acting within his or her actual or apparent
25 authority, the element must also be attributed to the CCIV.

26 Note: For the purposes of civil penalties based on provisions of Chapter 7,
27 corporate responsibility is dealt with by sections 769B and 1250F,
28 rather than by this Subdivision: see subsection 1250F(1).

EXPOSURE DRAFT

1 **1267M Civil penalty provisions contravened by employees, agents or**
2 **officers of the corporate director of a CCIV**

3 If an element of a civil penalty provision is done by an employee,
4 agent or officer of the corporate director of a CCIV acting:

5 (a) within the actual or apparent scope of his or her employment,
6 or within his or her actual or apparent authority, in relation to
7 the corporate director; and

8 (b) within the scope of the actual or apparent authority of the
9 corporate director in relation to the CCIV;

10 the element must also be attributed to the CCIV.

11 Note: For the purposes of civil penalties based on provisions of Chapter 7,
12 corporate responsibility is dealt with by sections 769B and 1250F,
13 rather than by this section: see subsection 1250F(1).

14 **Subdivision C—Consequences of the contravention of civil**
15 **penalty provisions by a CCIV**

16 **1267N Corporate director, not CCIV, contravenes civil penalty**
17 **provisions**

18 A civil penalty provision that, apart from this section, would be
19 contravened by a CCIV is taken instead to have been contravened
20 by the corporate director of the CCIV.

EXPOSURE DRAFT

Part 8B.21—Insolvency Practice Schedule (Corporations) for CCIVs

1270 Transfer of books to ASIC etc.

- (1) Before ASIC destroys, in accordance with subsection 70-31(9) of Schedule 2, books relating to the winding up of a CCIV in respect of a sub-fund, ASIC must notify the CCIV that it intends to do so.
- (2) Despite subsection 70-31(9) of Schedule 2, if:
 - (a) ASIC retains books under subsection 70-31(8) of Schedule 2 in relation to a winding up of a CCIV in respect of a sub-fund; and
 - (b) the retention period mentioned in that subsection ends; and
 - (c) the CCIV, by resolution of the corporate director, directs ASIC not to destroy the books;ASIC must, as soon as practicable, transfer possession or control of those books to the CCIV.

1270A Retention and destruction of books

- (1) The following provisions do not apply in relation to a winding up of a CCIV in respect of a sub-fund:
 - (a) subsection 70-35(3) of Schedule 2 (about when an external administrator is not required to retain books);
 - (b) subsection 70-35(4) of Schedule 2 (about when an external administrator may destroy books).

Liquidator must transfer books to CCIV

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

EXPOSURE DRAFT

1 the liquidator must, as soon as practicable after the end of the
2 retention period, transfer possession or control of those books to
3 the CCIV.

4 (3) Otherwise, the books may be destroyed at the end of the retention
5 period.

6 *Offence*

7 (4) A person commits an offence if:

8 (a) the person is subject to a requirement under subsection (2);
9 and

10 (b) the person intentionally or recklessly fails to comply with the
11 requirement.

12 Penalty: 50 penalty units.

EXPOSURE DRAFT

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Schedule 2—Other amendments

Corporations Act 2001

1 Section 761A (paragraph (a) of the definition of *financial services law*)

Before “; or”, insert “or 8B”.