

## PricewaterhouseCoopers (Australia)

Proposed Australian Corporate Collective  
Investment Vehicle – Part III

## PricewaterhouseCoopers Consulting (Philippines) Inc.

Anonymous no more: Knowing the Philippine  
Identification System

# *PwC International Business Reorganisations Network – Monthly Legal Update*

## Edition 9, September 2018

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### *Welcome*

Welcome to the ninth edition of the PwC  
International Business Reorganisations (**IBR**)  
Network Monthly Legal Update for 2018.

The PwC IBR Network provides legal services to  
assist multinational organisations with their cross-  
border reorganisations. We focus on post-deal  
integration, pre-transaction separation and carve  
outs, single entity projects, and legal entity  
rationalisation and simplification as well as  
general business and corporate and commercial  
structuring.

Each month our global legal network brings  
you insights and updates on key legal issues  
multinational organisations.

We hope that you will find this publication helpful,  
and we look forward to hearing from you.

### *In this issue*

In our September 2018 issue:

- PricewaterhouseCoopers (Australia) analyses the second tranche of the *Exposure Draft Treasury Laws Amendment Corporate Collective Investment Vehicle) Bill 2018*; and
- PricewaterhouseCoopers Consulting (Philippines) Inc. reports on the introduction of the national Philippine Identification System.

### *Contact us*

For your global contact and more information on PwC's  
IBR services, please contact:



#### *Richard Edmundson*

*Special Legal Consultant\**

*Managing Partner, ILC Legal,  
LLP*

+1 (202) 312-0877

richard.edmundson@ilclegal.com

*\*Mr. Edmundson is admitted as a solicitor in  
England and Wales and is licensed to practice in  
the District of Columbia as a Special Legal  
Consultant.*

## ***PricewaterhouseCoopers (Australia) – Proposed Australian Corporate Collective Investment Vehicle – Part III***

### ***At a glance***

On 19 July 2018 the Australian Government released for public consultation the second tranche of the *Exposure Draft Treasury Laws Amendment Corporate Collective Investment Vehicle) Bill 2018 (Tranche 2 Exposure Draft)*.

The first tranche Exposure Draft was released in August 2017, and updated following public consultation in the version released on 13 June 2018. Our first **LegalTalk** alert examined the basic features of the corporate collective investment vehicle (**CCIV**) regime and some of the issues raised by the first iteration of the new legislation's exposure draft. Our **second alert** considered the proposed duties of the CCIV's corporate director (**Corporate Director**) in greater depth. The Australian Government has also released exposure draft legislation on CCIV tax treatment, considered by the PwC Tax team in its **January 2018 alert**.

Here, we consider the key features of the Tranche 2 Exposure Draft and explanatory materials.

Consultation for the Tranche 2 Exposure Draft closed on 10 August 2018.

### ***In detail***

The Tranche 2 Exposure Draft sets out proposed provisions for some important features of the CCIV regime, being:

- a external administration of a CCIV in a wind up situation;
- b the application of the financial services regime to CCIVs;
- c disclosure obligations and consumer protection; and
- d the liability of the Corporate Director and contraventions by the CCIV.

Provisions relating to receivership, schemes of arrangement, and deregistration of sub-funds and CCIVs are under development.

### **External administration of a CCIV (winding up)**

The Tranche 2 Exposure Draft proposes the addition of a new Chapter 8B to the *Corporations Act 2001 (Cth)* (**Corporations Act**).

The proposed Chapter 8B provides that the external administration provisions in Corporations Act (relating to receivership, winding up and voluntary administration) apply separately in respect of each sub-fund of the CCIV. This is achieved by assuming in a winding up situation that:

The proposed Chapter 8B provides that the external administration provisions in Corporations Act (relating to receivership, winding up and voluntary administration) apply separately in respect of each sub-fund of the CCIV. This is achieved by assuming in a winding up situation that:

- a the only business carried on by the CCIV is the business of the sub-fund that is being wound up;
- b the only shares issued by the CCIV are the shares referable to that sub-fund;

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- c the only property of the CCIV is the property allocated to that sub-fund; and
- d the only debts and claims against the CCIV are the liabilities of that sub-fund,

**(Separating Assumptions).** This helps to preserve the strict segregation of assets and liabilities between sub-funds of a CCIV, and allows for the possibility of different sub-funds entering external administration at different times.

In the case of liquidation, the Separating Assumptions mean that:

- a a liquidator may only exercise a power or perform a function to the extent that it relates to the sub-fund being wound up and must not exercise a power in a way that affects another sub-fund's business; and
- b the liquidator is only entitled to access books relating solely to the sub-fund being wound up, and a Corporate Director need not deliver books relating to other sub-funds or the CCIV as a whole.

However, the Separating Assumptions do not apply in the case of statutory demands by creditors under Part 5.4 of the Corporations Act. Instead:

- a creditor serving a statutory demand on a CCIV is not required to identify the applicable sub-fund; and

- b the CCIV may then provide written notice identifying the sub-fund(s) of which the debt is a liability, and where it is a liability of more than one sub-fund, the proportion of the debt allocated to each sub-fund. Where there is a genuine dispute about the amount of a debt, this notice means the statutory demand is taken to have been served separately on each sub-fund identified in the notice, in the proportion identified in that notice.

### Application of the financial services regime

The Tranche 2 Exposure Draft proposes that the Australian Financial Services Licence (AFSL) and product disclosure statement (PDS) regulations in Chapter 7 of the Corporations Act will apply, with modifications, to CCIVs and Corporate Directors.

**AFSL regime:** CCIVs will be exempt from the requirement to hold an AFSL. Instead, the Corporate Director is responsible for the actions of the CCIV, and is the party who requires an AFSL with appropriate authorisations. The Tranche 2 Exposure Draft proposes that any action undertaken by a CCIV relating to financial services or a financial services business is deemed to also be undertaken by the Corporate Director.

**PDS regime:** in line with managed investment scheme structures, the Tranche 2 Exposure Draft proposes a PDS (as opposed to a prospectus) as the disclosure document for retail clients acquiring an interest in a CCIV. The obligation to provide a PDS is generally imposed on the CCIV as issuer of the securities, rather than the Corporate Director.

### Liability framework

The proposed Chapter 8B includes a liability framework for CCIVs, including the Corporate Director.

For criminal offences, excluding those under Chapter 7 of the Corporations Act, the Tranche 2 Exposure Draft provides a framework for attributing liability for Commonwealth criminal liability as follows:

- a in proving the physical element of an offence, the acts or omissions of the Corporate Director's employees, agents and officers are attributed to the CCIV;
- b in proving the fault element of an offence (except negligence), the Corporate Director's authorisation or permission for the offence is attributed to the CCIV; and
- c when proving the fault element for an offence of negligence, the negligence of an employee, agent or officer of the Corporate Director is attributed to the CCIV.

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Special provisions apply for certain offences, such as mistake of fact.

For civil penalty provisions, an element must be attributed to a CCIV if it is done by:

- a an agent or officer of a CCIV acting within his or her actual or apparent authority in relation to the CCIV; or
- b an employee, agent or officer of the Corporate Director, acting within the actual apparent scope of their employment or authority in relation to the Corporate Director and, in turn, the Corporate Director's scope of actual or apparent authority in relation to the CCIV.

Where a contravention of a Commonwealth law by the CCIV is established, any such penalty is 're-routed' to the Corporate Director.

### **Takeovers**

The takeover provisions for CCIVs are under development, however, the explanatory materials to the Tranche 2 Exposure Draft describe how the takeover, compulsory acquisition and buy-out provisions in Chapters 6 to 6C of the Corporations Act are proposed to apply.

Specifically, it is proposed that:

- a as a public company, the Corporate Director of a CCIV will be subject to the full regulatory requirements for public companies including Chapters 6 to 6C of the Corporations Act;
- b the acquisition of control in a CCIV will not be regulated by Chapters 6 to 6C of the Corporations Act;
- c if a CCIV is a disclosing entity it will be subject to continuous disclosure requirements under Chapter 6CA of the Corporations Act; and
- d the acquisition of control of another entity by a CCIV will be regulated by Chapters 6 to 6C of the Corporations Act.

### ***The takeaway***

Together with the updated draft Tranche 1 draft legislation released on 13 June 2018 following 2017's consultation, the Tranche 2 Exposure Draft is helping to resolve how some of the broader elements of the new CCIV structure will operate and be treated under the Corporations Act.

We look forward to the revised draft of the corresponding tax legislation to see the proposed new structure move closer to implementation.

### ***Who to contact***

For more information, please contact:

#### ***Natalie Kurdian***

*Partner, Sydney*

+61 2 8266 2763

natalie.kurdian@pwc.com

#### ***Andrew Wheeler***

*Partner, Sydney*

+61 2 8266 6401

andrew.wheeler@pwc.com

# *PricewaterhouseCoopers Consulting (Philippines) Inc. – Anonymous no more: Knowing the Philippine Identification System*

## *At a glance*

Republic Act No. 11055 (**R.A. No. 11055**) otherwise known as, the Philippine Identification System Act, was recently enacted into law and took effect on 25 August 2018.

The law operates to establish a single national identification system referred to as the “**Philippine Identification System**” or “**PhilSys**” for all citizens and resident aliens of the Philippines.

In this article, we discuss the background, purpose, features and implications of the Philippine Identification System.

## *In detail*

### **Background**

By virtue of the introduction of R.A. No. 11055, an individual’s record in the PhilSys shall be considered as an official and sufficient proof of identity which shall be honored and accepted in both public and private transactions, subject to appropriate authentication measures based on a biometric identification system.

More than two decades ago, the government sought to create a similar identification scheme known as the national computerized identification reference system. This governmental act was then embodied in an administrative order in the exercise of the President’s administrative power and designated as Administrative Order No. 308 (A.O. No. 308). This was, however, subsequently struck down by the Supreme Court for constitutional infirmity based on privacy encroachment and usurpation of legislative power.

### **Purpose and coverage of the law**

The unified identification system aims to provide a valid proof of identity for all citizens (i.e. dual citizens and citizens residing abroad) and resident aliens in the Philippines.

### **Features of the PhilSys**

Under R.A. No 11055, the PhilSys has the following key components:

- a PhilSys Number (**PSN**): All Filipino citizens and foreigners residing in the Philippines shall be assigned a PSN. The PSN is a randomly generated identification number which is unique and permanently assigned upon birth or registration with the Philippine Statistics Authority (**PSA**). The PSN shall serve as the standard number of the covered individual across all government agencies in the Philippines.
- b PhilSys Registry: PSA is the designated repository and custodian of the information of all registered individuals and data recorded in the PhilSys. As such, it is tasked to create and maintain the PhilSys Registry.

The information to be collected and stored in the Registry is limited to the following demographic and biometric information: full name, date and place of birth, blood type, residence address, citizen or resident of the Philippines, front-facing photograph, full set of fingerprints and iris scan. Other identifiable features of an individual, as may be determined necessary under implementing rules and regulations (**IRR**), shall be collected as well. However, information on marital status, mobile number and email address are merely optional.

- c PhilID – The PhilID is a non-transferable identification card which conveys personal information (i.e. full name, sex, date and place of birth, blood type, address of residence, front-facing photo) on the registered individual. For security purposes, the PhilID shall contain a Quick Response Code (QR Code) where biometric identification is stored. Moreover, the law does not discount the option of a mobile PhilID subject however to appropriate guidelines on the matter.

The presentation of the PSN or the PhilID shall constitute as a sufficient proof of identity in any or all transaction with the government including the private sector where identification is required. Subject to appropriate authentication measures, it shall be unlawful for any government agency or institution and private entities to refuse acceptance or recognition of the PSN or PhilID without any just and sufficient cause.

### Then and now

In 1996, A.O. No. 308 failed to pass judicial scrutiny due to its undefined parameters and severe lack of security measures which the Supreme Court found violative of the constitutionally enshrined right to privacy. Instead of delineating its own metes and bounds, it intended to rely on its implementing rules to perform this task contrary to the function and purpose of an IRR – to implement the policy of the law or order. Other than the issue of usurpation of legislative power, A.O. No. 308 would have hurdled strict judicial examination had it clearly identified a compelling state interest and narrowed down its application.

The deficiencies found in A.O. No. 308 may have been addressed in the passage of R.A. No. 11055 and the Data Privacy Act of 2012.

- a For one, R.A. No. 11055 is an act of Congress. As emphasized by the Supreme Court in the case of *Ople vs. Torres*, A.O. No. 308 involves a matter which is a proper subject of a law and not of an administrative order.
- b Two, it provides for safeguards on data security and confidentiality by criminalizing unlawful acts involving registered information and imposing severe penalties for government officials who are entrusted with the custody and maintenance of the PhilSys. It further provides that any information obtained as a result of the prohibited acts shall be inadmissible in any judicial, quasi-judicial or administrative proceedings.

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- c Three, a special law on the protection of data privacy has been in force in the Philippines prior to the effectivity of R.A. No. 11055. The Data Privacy Act of 2012 codifies the general principles of data protection and provides for the rights of the data subject and the duties of persons who *process* personal information. Thus, adequate safety measures for data privacy are reasonably expected.

### Breaking dawn

If the law remains unchallenged, the entire population is projected to benefit therefrom in terms of social and private service accessibility.

According to the Banko Sentral ng Pilipinas (BSP) about 77% Filipino adults remain unbanked which is partially attributed to lack of documentary requirements. This lack of documentary requirements operates as a restriction in pursuing financial services from banks and similar institutions which require at least two proofs of identification.

Meanwhile, the PSA reports show that there are more than 7 million Filipinos are still wanting the most basic record of identity (i.e. birth certificate) and are thus, inhibited from seeking legitimate employment and/or applying for other records of identification (e.g. passport).

With the PSN and the PhilID, proof of identification is readily available and trustworthy. It eliminates the inconvenience and insecurity normally involved in economic transactions and gives a sense of empowerment to registered persons in situations where identification is required.

### At the moment

All persons affected by R.A. No. 11055 may yet to appreciate the full impact of this innovation until the issuance of the IRR. Currently, the IRR is on the drawing board but should be ready in time for the mandatory registration of all covered individuals. One year following the effectivity date of the law, all covered individuals are required to register with designated registration centers that have the technological capability and facility to capture the necessary information. The law has been effective since 25 August 2018.

For 2018 alone, about Php 2 billion has been earmarked under the budget of the PSA for the implementation cost of the PhilSys. As for the five-year implementation, the cost is estimated at Php25 billion.

### Who to contact

For more information, please contact:

**Harold S. Ocampo**

*Partner, Makati City*

+63 2 845 2728

harold.s.ocampo@ph.pwc.com

**Faye Angela M. Pascua**

*Senior Consultant, Makati City*

+63 2 845 2728

faye.angela.pascua@ph.pwc.com

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