
Proposed Australian Corporate Collective Investment Vehicle – Part III

14 August 2018

Authors: Andrew Wheeler, Lynda Reid and Steph Baker

Explore more insights 

In brief

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* (Exposure Draft) (the 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 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, in particular proposed provisions relating to:

- external administration of a CCIV in a winding up situation
- the application of the financial services regime under Chapter 7 of the *Corporations Act 2001* (Cth) (Corporations Act) to CCIVs
- the liability of the Corporate Director and contraventions by the CCIV, and
- proposed application of the takeovers provisions in Chapters 6 to 6C of the Corporations Act to CCIVs.

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:

- external administration of a CCIV in a wind up situation
- the application of the financial services regime to CCIVs
- disclosure obligations and consumer protection, and

-
- 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.

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 only business carried on by the CCIV is the business of the sub-fund that is being wound up
- the only shares issued by the CCIV are the shares referable to that sub-fund
- the only property of the CCIV is the property allocated to that sub-fund, and
- the only debts and claims against the CCIV are the liabilities of that sub-fund

(the 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 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
- 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
- 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 AFSL and PDS regulations in Chapter 7 of the Corporations Act will apply, with modifications, to CCIVs and Corporate Directors.

AFS licensing: 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 product disclosure statement (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:

- 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
- 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
- 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.

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:

- an agent or officer of a CCIV acting within his or her actual or apparent authority in relation to the CCIV, or
- an employee, agent or officer of the Corporate Director, 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:

- 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
- the acquisition of control in a CCIV will not be regulated by Chapters 6 to 6C of the Corporations Act
- if a CCIV is a disclosing entity it will be subject to continuous disclosure requirements under Chapter 6CA of the Corporations Act, and
- 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.

Let's talk

For a deeper discussion of how these issues might affect your business, please contact:

Natalie Kurdian, Sydney
+61 2 8266 2763
natalie.kurdian@pwc.com

Andrew Wheeler, Sydney
+61 2 8266 6401
andrew.wheeler@pwc.com

Ken Woo, Sydney
+61 (2) 8266 2948
ken.woo@pwc.com

© 2018 PricewaterhouseCoopers. All rights reserved. In this document, "PwC" refers to PricewaterhouseCoopers a partnership formed in Australia, which is a member firm of PricewaterhouseCoopers International Limited, each member firm of which is a separate legal entity. This publication is a general summary. It is not legal or tax advice. Readers should not act on the basis of this publication before obtaining professional advice. PricewaterhouseCoopers is not licensed to provide financial product advice under the Corporations Act 2001 (Cth). Taxation is only one of the matters that you need to consider when making a decision on a financial product. You should consider taking advice from the holder of an Australian Financial Services License before making a decision on a financial product.

Liability limited by a scheme approved under Professional Standards Legislation.