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Corporate Collective Investment Vehicle and the Asia Region Funds Passport

Submissions to Treasury
25 September 2017

Corporate Collective Investment Vehicle (CCIV)

1. MANDATORY RETAIL DEPOSITARY

	Issue	Allens Comment
1.1	Competition with other ARFP jurisdictions	The ARFP Rules require a passport fund to have a separate custodian to hold fund assets, but there is no requirement that the custodian be subject to the supervisory duties and obligations that are imposed on depositaries under the draft CCIV legislation. In our view, the increased cost of engaging a depositary has the potential to make an Australian CCIV a less attractive structuring option for fund managers (compared to a registered scheme or a fund in another ARFP jurisdiction that does not require a depositary).
1.2	Australian experience	We understand that the depositary requirement has been modelled on the UCITS and AIFMD regimes that apply offshore. However, the explanatory materials do not refer to the similar two-tiered structured that applied in Australia under the prescribed interests regime before the introduction of the 'single responsible entity' concept under the Managed Investments Act in 1998. In its report on 'Collective Investments – Managing Other People's Money' in 1993, the Law Reform Commission explained the need for reform in the following terms: *'The law requires each scheme to have a manager and trustee or investors' representative. But it is far from clear which of them is responsible for which aspect of the scheme's operation. This not only leads to unnecessary confusion – it is inflexible, encourages unsatisfactory commercial practices and sometimes results in neither taking responsibility for compliance with the law because each can blame the other.'* It seems to us that by imposing supervisory duties on a depositary, these same risks are created, particularly as the legislation as drafted does not delineate clearly between the duties of the Corporate Director and those of the depository, or explain in unambiguous terms the precise role of the depositary. This is also discussed at item 2.1 below.

2. DEPOSITARY OBLIGATIONS

	Issue	Allens Comment
2.1	Appropriate delineation of responsibilities	A depositary will be required to take reasonable care to ensure that the Corporate Director conducts the following activities in a manner that complies with the CCIV's constitution and the provisions of the Corporations Act: • issuing, redeeming and cancelling shares in the CCIV; • valuing shares in the CCIV; • allocating assets and liabilities of the CCIV to sub-funds of the CCIV; and • allocating and distributing income of the CCIV. While the Corporate Director will have primary responsibility for ensuring that these activities are conducted consistently with the CCIV's constitution and the Corporations Act, the depositary must take 'reasonable care' to ensure that the Corporate Director is complying with these requirements. It is not clear from the draft legislation whether the depositary will be required to second-guess the Corporate Director before any transaction takes place, or whether the obligation is one that arises following a particular transaction or activity. It is also unclear whether the depositary would need to monitor the activities of the Corporate Director on an ongoing basis in 'real time' or whether it would be sufficient for the depositary to review the Corporate Director's activities and transactions of the CCIV on a backward-looking basis at periodic intervals. Without clarity on these matters, there is a risk that the uncertainties and problems that were encountered by the two-tier prescribed interest regime (see above) will be repeated. The obligation imposed on a depositary to deal with assets on instructions from the Corporate Director highlights this dilemma. While there are carve-outs for instructions that are not lawful or do not comply with the CCIV's constitution, it is unclear how this instruction regime is intended to operate together with the supervisory obligations. Is it expected that a depositary must make an assessment as to the lawfulness of an instruction that relates to a matter referred to above before acting on such instruction, to avoid the risk that it will be taken to have failed to supervise the Corporate Director? If there is any delay in acting on an instruction for this reason, will the depositary be in breach of its obligation to deal on instructions?

2. DEPOSITARY OBLIGATIONS

	Issue	Allens Comment
2.2	Breach reporting	We have the following concerns with the proposed breach reporting obligation imposed on depositaries, as set out in section 1164E of the draft legislation: • The draft legislation requires a depositary to notify ASIC within 10 business days from when the depositary becomes aware, or 'reasonably suspects', that a breach relating to an activity for which it has supervisory responsibilities has occurred. This is a material shift from the current position that applies to licensees under section 912D of the Corporations Act and we see very little justification for imposing a reporting obligation based on a depositary's mere suspicion (as opposed to actual awareness) of something that may turn out not to be a breach at all. A depositary should only need to report to ASIC when it has actual knowledge that a breach has occurred – that is, knowledge of both the facts in question and that, as a matter of law, the facts amount to a breach. After all, when will a depositary be taken to have a reason to suspect that a breach has occurred? The introduction of such a trigger is likely to create even more uncertainty in the industry. It is already difficult enough under the current test under section 912D to determine when a person (particularly a corporate entity) has knowledge of something; the need to determine when a person has or should reasonably have a suspicion about something would be even more difficult. • The draft legislation introduces a new (undefined) concept of 'serious breach'. By contrast, section 912D refers to a 'significant breach'. If these concepts are intended to be different, then this needs to be clarified. It would be most unhelpful if the Corporations Act contained separate concepts of 'serious breach' (for depositaries in relation to the conduct of Corporate Directors) and 'significant breach' (for licensees, including a Corporate Director). It is difficult enough to interpret either of these terms on a standalone basis. • Proposed section 1164E(2) requires a depositary to notify ASIC within 10 business days after becoming aware of, or reasonably suspecting, 'the breach'. This language gives rise to some ambiguity as it is not clear whether the 10 business days begin when a depositary becomes aware of, or reasonably suspects, any breach or whether it begins only when the depositary becomes aware of, or reasonably suspects, a breach of the kind described in paragraph (1)(b) of the section.
2.3	Change of depositary	The regime that has been proposed for changing a depositary (whether by removal or by retirement) mirrors the regime that has been proposed for the Corporate Director (which is in turn based on the regime that currently applies to registered managed investment schemes). In our view, it is unnecessary for a change of depositary to require a meeting of CCIV members to be convened and a resolution passed by CCIV members approving the change. In our view, the consumer benefits that would be gained through this level of member engagement would be outweighed by the cost and administrative complexity that would be involved (and ultimately borne by CCIV members). An alternative regime could be for the Corporate Director to notify the CCIV members of the proposed change of depositary and to give them an opportunity to convene a meeting of CCIV members to vote on the change (subject to specified thresholds, which could, for example, mirror the regime that currently applies (under ASIC class order relief) for changes of responsible entity within the same corporate group). The statutory novation provisions (proposed sections 1166A and 1166B) are helpful. However: • the concept of the depositary having a right to be indemnified out of the assets of the CCIV (referred to in s1166A(2)(d)) is not supported by any statutory right of indemnity. By contrast, proposed section 1155(1)(2) refers to the right of a Corporate Director to be indemnified out of the assets of a sub-fund of the CCIV for liabilities and expenses incurred in relation to the performance of its duties. In our view, section 1155(2) should be extended so that it also applies to the depositary); and • where the depositary has appointed a custodian to hold assets of the CCIV, and the custodian changes, the statutory novation regime is of limited utility because it does not extend to custodians. This is also an issue for the equivalent statutory novation regime that currently applies to responsible entities of registered schemes. It would be very helpful if sections 1166A and 1166B were extended so that they also applied to a change of any custodian appointed the depositary.

3. INDEPENDENCE REQUIREMENTS		
	Issue	**Allens Comment**
3.1	Independence of agents of the Corporate Director and Depositary	At the outset we submit that there is a conceptual question to be answered, namely whether it is in fact appropriate to refer to 'agents of the corporate director' at all. Unlike a responsible entity (for example), a director would not ordinarily him- or herself appoint 'agents' of the company of which he or she was a director – they are appointed by the company itself. The directors of a company acting together are simply a decision-making body of the company. This conceptual issue manifests itself in other provisions of the exposure draft – see paragraph 10.1 below. Leaving that conceptual point aside, we note the independence test is influenced by the best practice guidelines of the OEIC regime (but includes an additional requirement prohibiting practical control) and supplements the general AFSL obligations regarding managing conflicts of interest. We query the inclusion of references to 'associates' and 'agents' in the test, regardless of their role or relationship, as we submit that this will broaden the test in a way that does not assist to achieve the stated aim of independence between the corporate director and the depositary, given the latter's oversight function. In particular, we see a difficulty with the requirement that 'agents' of the corporate director and the depositary satisfy the independence test. We understand that, for instance, administrative functions may be performed by agents of the corporate director and custody may be performed by an agent of the depositary. We understand that at present, many funds have administrative and custody functions performed by the same entity (or within the same corporate group). The requirement to split services such as these, by introducing an independence requirement that extends to agents, seems arbitrary and will likely result in inefficiencies and increased cost to investors if separate service providers must be appointed and, for instance, the same records must be held in separate locations. The same issue would arise in respect of any service provider to the CCIV: if the depositary and corporate director cannot rely on the same expert advice (for instance, audited accounts), such advice will need to be obtained twice, with associated costs ultimately passed on to investors.
3.2	Independence of compliance plan auditor	We understand that the compliance plan auditor must be a registered company auditor, audit firm or authorised audit company who cannot be the corporate director, depositary, custodian (nor an associate of any of these entities), nor an auditor of the corporate director's financial statements (although they may be from the same audit firm in this instance). The reference to the auditor of the financial statements of the corporate director implies that the compliance plan auditor cannot generally be from the same audit firm as the auditor of the corporate director, depositary or custodian. We note that given the size and concentration of the Australian market it will likely be difficult to nominate a compliance plan auditor who satisfies the independence requirement. We submit that the prohibition on the auditor being from the same accounting firm should be removed in all cases. Further, we understand that these requirements are designed to ensure the auditor is independent of the corporate director. Given this intention, we would submit that the auditor should be able to be an associate of the depositary or custodian given they are already required to be independent from the corporate director.

4. SUB-FUND DESIGN

	Issue	Allens Comment
4.1	Conflicts of duty owed by the Corporate Director and its officers	It is proposed that the corporate director owe a number of statutory duties to the members of each sub-fund, including a duty to act in the best interests of the members of each sub-fund (section 1156(c)). The same statutory duty is imposed on the officers of the corporate director (section 1157(c)). This best interests duty has been considered mainly in the context of trusts, and it seems likely that some of that precedent could apply in this context as well. This would give rise to difficulties in the context of transactions between sub-funds (eg, where sub-fund A wishes to acquire an asset from sub-fund B), or in the context of transactions by one sub-fund which could affect another sub-fund (eg, where a decision by sub-fund A to redeem an investment in an asset, in which sub-fund B independently holds an interest, could affect the value of that asset). In the context of investment trusts, it has been held that 'When the purpose of the trust is to provide financial benefits for the beneficiaries...the best interests of the beneficiaries are normally their best financial interests. In the case of a power of investment...the power must be exercised so as to yield the best return for the beneficiaries...' (*Cowan v Scargill* [1985] 1 Ch 270 at 287, per Megarry V-C). It is possible that this approach would also apply to the sub-funds of a CCIV, which are, essentially, investment vehicles. In that case, these duties could place the corporate director and its officers in a position of conflict where they would not be able to satisfy their statutory duties to two or more sub-funds at the same time. In particular, the diametrically opposing interests of two sub-funds inherent in a simple transaction under which sub-fund A was acquiring an asset from sub-fund B (a single dollar higher purchase price is an unambiguously negative outcome for members of sub-fund A but an unambiguously positive outcome for members of sub-fund B, even if the final price is within an acceptable value range and supported by independent valuations and the overall transaction is in the best interests of members of both sub funds) would make it impossible for the corporate director and its officers to discharge their best interests duty in favour of the members of both sub-funds at the one time as required by its statutory duties. If the best interests duty is retained then we submit that safe harbours be provided to allow the efficient functioning of the sub-fund model. One such safe harbour may permit transfers between sub-funds where the transfer is at fair value and is fair and reasonable in all of the circumstances. A precedent for this may be found in section 45 of the Life Insurance Act 1945 (Cth), which deals with transfers of assets between statutory funds and provides as follows: *A life company may transfer an asset from one statutory fund (the losing fund) to another statutory fund (the gaining fund) if:* *(a) the company transfers from the gaining fund to the losing fund an amount equal to the fair value of the asset ; and* *(b) in relation to the owners of policies referable to the losing fund and the gaining fund, the transfer is fair and reasonable in all the circumstances.* A second safe harbour (where a decision in relation to sub-fund A may affect sub-fund B) may be to permit the corporate director (and its officers) to discharge their duties if separate teams (operating behind information barriers) have been established to act for each sub-fund, so that the decision by sub-fund A is made without regard to the interests of sub-fund B, and sub-fund B has its own team to look after its interests).

5. PASSIVE INVESTMENT REQUIREMENT AND NEED FOR FLOW-THROUGH TAX TREATMENT

	Issue	Allens Comment
5.1	Form of legislation	Although it is intended that there will be tax neutral outcomes between CCIVs and Attribution Managed Investment Trusts (***AMITs***), we are of the view that, rather than amend or add to the existing AMIT tax legislation CCIVs should be covered, because of the significant differences in the legal structures of CCIVs and AMITs, by separate tax legislation which reflects the flow-through concepts embodied in the AMIT tax rules and applies them specifically to CCIVs. This approach should minimise any ambiguities in applying the flow-through tax treatment.
5.2	Redemption at member's option	It is intended that the redemption price of shares in a CCIV will be required be ascertained either by reference to the net asset value of the sub-fund to which the shares are referrable or, in the case of a listed CCIV, by reference to the market price of the shares just before redemption. Because of the nature of certain underlying assets in which some sub-funds may invest (eg, highly rated bonds, cash deposits etc.), there may be some redeemable shares for which it will be difficult to assess whether it is 'substantially more likely than not' that a redemption of those shares will be at a price that is the same as or in excess of the initial investment in the shares for the purposes of applying the debt test in the debt/equity rules. It is, therefore, suggested that a clarificatory section be inserted into the debt/equity rules to make it clear that redeemable interests in CCIVs that comply with the above-mentioned requirements for the redemption price will not be treated as debt interests for income tax purposes.

6. SHARES AND REDEMPTIONS

	Issue	Allens Comment
6.1	Redeemable shares	Is it intended that a CCIV be able to issue redeemable shares only when they are redeemable at the option of the shareholder? The addition to section 124 in proposed section 1143 can be read that way.
6.2	Reductions of capital	• Is there any reason in principle why a CCIV should not be permitted to conduct a buy-back in the manner permitted by Division 2 of Part 2J.1? A CCIV may not want to have redeemable shares but still conduct a buy-back as a form of capital reduction. Perhaps buy-back rules could be included in the constitution under proposed section 1146D (see below)? • On its face, proposed section 1146D seems to allow capital reductions not otherwise permitted as long as the method of reduction is set out in the CCIV constitution. In other words, the constitution could in effect vary the requirements of Division 2 of Part 2J.1. Is this the intention? The draft EM suggests not (5.30). • For retail CCIVs, the draft legislation uses the liquid/non-liquid distinction developed under Chapter 5C. In the context of Chapter 5C that distinction has been notoriously difficult to apply and open to manipulation (see, for example, the discussion in Australian Managed Investment Law & Practice at [69-300]). Given that there will be a solvency threshold for redemptions, we submit that a liquidity test is less necessary. • Regarding the solvency test, in the context of reductions requiring shareholder approval, it appears that the corporate director will have to advise shareholders when convening a meeting that the reduction cannot proceed if the solvency test is not met immediately before the reduction is to occur. We assume this is intended and is a deliberate departure from the 'not materially prejudicial' test in section 256B. • Presumably, the right of shareholders to redeem shares is subject to the statutory solvency and liquidity requirements. This is not stated explicitly although we imagine the CCIV constitution could do so to remove any uncertainty.
6.3	Rules against self-acquisition and financial assistance	In the general company context, exemptions from Corporations Act requirements are required in some cases, for example where there are cross investments between investment vehicles managed by members of a corporate group. These situations could also be problematic for CCIVs, where, for example, the CCIV acquires units in a trust and that trust holds shares in the CCIV. It would be helpful, especially in the CCIV context, if it could be made clear that a beneficial interest in a trust did not constitute a 'unit' in a share (at least where the trustee of the trust is not a related body corporate of the corporate director). We accept that this may be an issue that can be left for ASIC to consider in the context of its powers in proposed section 1149B.

6. SHARES AND REDEMPTIONS

	Issue	Allens Comment
6.4	Rules against taking security over own shares	• The issue regarding 'units' of shares also arises here. • The prohibition extends to an entity that controls the CCIV (based on the section 50AA test). Given proposed section 1138A(1), should this not always be the corporate director? Having a general control test makes the scope of the prohibition uncertain and unclear.

7. NATURAL PERSON DIRECTOR (OEIC vs SICAV)

	Issue	Allens Comment
7.1	Section 1156A	Section 1156A does not appear to work as presently drafted. The section provides that a duty of the corporate director under section 1156 overrides any conflicting duty an officer or employee of the corporate director has under Part 2D.1. However, the duties of the corporate director are not those of the officers or employees.
7.2	Requirement for directors to be an individual who is at least 18 years old	We note that the draft legislation does not contain an equivalent of the section 201B requirement that a director must be an individual who is at least 18 years old, but we suspect that this will be dealt with as part of the consequential amendments.

8. TREATMENT OF WHOLESALE FUNDS

	Issue	Allens Comment
8.1	Suitability of the CCIV for wholesale funds	As a general observation, we think that the CCIV is likely to be less attractive as a vehicle for funds which may currently be set up as unregistered unit trusts, for the reasons set out in our client update on 7 September 2017: https://www.allens.com.au/pubs/fm/cufm7sep17.htm. The draft explanatory memorandum states in paragraph 1.18 that 'regulatory parity is maintained (to the extent possible) between the existing MIS framework and the CCIV framework'. This parity is not evident where wholesale funds are concerned – they are not required to register under Chapter 5C, but they will be required to register under Chapter 7A, and their corporate director will have more onerous duties than would apply to the trustee of an unregistered wholesale MIS.
8.2	Definition of 'retail CCIV'	Under section 1154A(2)(b), a CCIV is a retail CCIV if: *the CCIV was promoted by a person, or an associate of a person, who was, when the CCIV was promoted, in the business of promoting CCIVs to persons who are, or would be, retail clients...* We submit that this is misconceived and would cause CCIVs that would otherwise only have wholesale shareholders to be treated as retail CCIVs. For example, a property group that had a listed CCIV and which also operated wholesale funds structured as CCIVs would need to treat those wholesale funds as retail CCIVs. This is by no means an unlikely scenario – most of our listed real estate clients would find themselves in this position. *From paragraph 2.18 of the draft explanatory memorandum we understand that the intention is to:* *capture the situation where a person intends to sell shares in the CCIV to retail clients but has not yet done so. In this situation, the CCIV should be registered as a retail CCIV despite it not yet having any retail clients or indirect retail clients.* However this approach would also mean that a person who intends to sell shares in the CCIV only to wholesale clients, but who operates a separate retail CCIV, would be required to register the otherwise wholesale CCIV as a retail CCIV, which cannot be right. We submit that Chapter 7A should include an equivalent exception to that contained in section 601ED(2). If the person wishes to sell shares in their CCIV to a retail client they should not be able to do so unless the CCIV is registered as a retail CCIV. In this way retail clients are protected, and the promoter (and its associates) are able to operate both retail CCIVs and wholesale CCIVs.

9. ROLLOVER OF MANAGED INVESTMENT SCHEMES

	Issue	Allens Comment
9.1	Transitions of existing managed investment schemes	This issue is not dealt with in any of the draft legislation released to date nor is it referred to in the accompanying explanatory materials. The threshold question is whether transitioning from a registered scheme or wholesale unit trust to a CCIV should be facilitated. In our view, from a policy perspective it should, bearing in mind that the CCIV structure is being introduced so Australia has a form of internationally recognisable investment product. Responsible entities should have the option to transition if they consider it is in the best interest of their investors to do so. From a corporate law perspective, it would be possible to transition by a number of methods, for example, by a 'quasi-scheme' under which the scheme or trust constitution is amended to authorise: • units in the scheme or trust being exchanged for shares in the CCIV and the CCIV acquiring all the units (then removing the trustee and appointing a wholly-owned subsidiary as trustee); or • the assets of the trust being transferred to the CCIV (or depositary) in exchange for shares in the CCIV which are then distributed by the trustee or responsible entity to unitholders pro rata for their units which are then cancelled. It is highly likely that any proposal to transition would require investor approval. If the expense of a meeting could be avoided that would make transition more feasible. However, the key issue will be whether the transition has any adverse taxation or stamp duty consequences. Exemptions from capital gains tax and stamp duty imposts arising from the transition will be of fundamental importance, otherwise no transitions will be possible from a practical perspective.

10. OTHER

	Issue	Allens Comment
10.1	The status of the Corporate Director	Certain provisions of the exposure draft appear to confuse the corporate director with a responsible entity, with the result that the draft legislation is unclear. We have described one such instance in paragraph 3.1 above. In short whereas the responsible entity of a managed investment scheme structured as a trust itself enters into scheme contracts (as the trust does not have legal personality), the corporate director would not ordinarily do so, as the CCIV will have corporate personality. This apparent confusion means that the exposure draft is not always clear about the functions of or expectations on the corporate director. In addition to the instance referred to above, two other examples illustrate the point: • Section 1140A (*Rights, obligations and liabilities of former corporate director*). These so-called 'statutory novation' provisions mirror the corresponding provisions in Chapter 5C. However, it is not clear why they are needed outside the trust context. The relevant rights, obligations and liabilities will not be rights, obligations and liabilities of the corporate director but of the CCIV, and there should be no need to transfer them to the incoming corporate director. • Section 1140B (*Effect of change of corporate director on documents etc. to which former corporate director is a party*). The corporate director would not ordinarily enter into contracts in its personal capacity. The relevant contracting party should be the CCIV.
10.2	Amendments to constitutions	A corporate director of a retail CCIV will be able to amend the constitution where to do so is not adverse to members (proposed section 1155A), whereas it seems that a corporate director of a wholesale fund will not (and that the normal rules in section 136 will apply). This seems an anomalous result.

10. OTHER		
10.3	Meeting rules	It is suggested in the explanatory materials (page 14) that the meeting rules for registered schemes will apply to CCIVs. This is on the basis that CCIVs 'will generally be passive vehicles'. We submit that it is preferable that the meeting rules for CCIVs be the same as for companies (with any variations deemed necessary). First, given the key policy objective of producing an internationally recognisable investment product, it makes more sense for the rules to be as much like normal company rules as possible. Second, CCIVs are in fact companies. Third, Part 2G.4 differs in a number of respects from the company rules and several of these variations have proved problematic (see Australian Managed Investment Law and Practice [68-100-500]) or are anomalous (for example, compare section 249D and section 252B as well as section 250A and section 252Y).
10.4	ASX Listing Rules	For an entity to gain admission to the official list of the ASX it is necessary that the main class of securities in the entity be listed (see listing rule 1). Under listing rule 19, the 'main class' is the ordinary securities of the entity (or another class designated by the ASX). This rule does not apply to an ASX Debt Listing. To allow certain sub-funds of the CCIV to gain admission to the official list, the rules would need to be amended (or turned off, as they are for ASX Debt Listings) to allow the corresponding classes of shares in a CCIV – which are unlikely to be the CCIV's ordinary securities – to be listed.
10.5	Breach reporting by Corporate Director	Proposed section 1156 (para (l)) of the draft legislation requires a Corporate Director to report to ASIC any breach of the Corporations Act that relates to the CCIV and has had, or is likely to have, a materially adverse effect on the interests of members, as soon as practicable after it becomes aware of the breach. This mirrors section 601FC(1)(l) of the Corporations Act, which applies to responsible entities. Earlier this year, in its first Position and Consultation Paper, the ASIC Enforcement Review Taskforce recommended that section 601FC(1)(l) be removed, on the basis that responsible entities (being licensees) would already be subject to the broader breach reporting obligation in section 912D of the Corporations Act. On the same basis, we would suggest that paragraph (l) of proposed section 1156 is unnecessary and should be removed.

Asia Region Funds Passport (ARFP)

1. RULES AND TIMELINES FOR OUTGOING FUNDS

	Issue	Allens Comment
1.2	Timing of application process	• We note ASIC is not required to process the applications within any specific period of time. This will result in uncertainty and administrative difficulties, particularly when many fund operators will require some certainty to organise offering timelines and marketing trips. We suggest a 21 day process time for consistency with the consideration period that applies to incoming funds.

2. RULES AND TIMELINES FOR INCOMING FUNDS

	Issue	Allens Comment
2.1	Registration as a foreign company	The operator must be registered as a foreign company in Australia. This enables ASIC to make certain information publicly available and is a separate registration process that is additional to the passport application. We would submit that the additional requirement to register as a foreign company is not necessary given the information that ASIC will have access to as part of the ARFP application process, and that this additional administrative requirement and the associated disclosure obligations will limit the attractiveness of Australia as a market. If that submission is not accepted, we would submit that the application to register as a foreign company be processed by the same ASIC representative who is reviewing the ARFP application to avoid inefficiency and uncertainty in the application process.
2.2	Requirement to provide a PDS	The offshore fund is required to provide a PDS and we note that the short PDS regime is unavailable. Preparation of a long-form PDS requires a significant investment of time, is expensive, and, we submit, will act as a significant deterrent to an offshore fund considering passporting into Australia. This is further discussed in the section titled 'disclosure laws' below.
2.3	Additional 'consideration period'	We note the time for considering an application can be extended by 21 days when ASIC asks for further information. This appears to be in addition to the ability to request information missing from the application. We submit there should be a limit on the number of times this can be extended, and we would suggest that this be permitted to occur only once. Ultimately, we submit that the passport application for an incoming fund should be a largely mechanical process.
2.4	Application of FoFA	We assume (given the requirement to comply with Australian laws) that the Future of Financial Advice (FoFA) reforms will apply to offshore operators, given they will be providing advice to retail clients. We submit that this will make Australia a less competitive destination given most offshore operators likely do not need to comply with similar laws in their home jurisdiction (in particular the conflicted remuneration provisions).

3. ASIC POWERS

	Issue	Allens Comment
3.1	Subjective test for compliance	ASIC's decision whether to register a passport fund (incoming or outgoing) requires an assessment by ASIC of the fund's likelihood of complying with relevant law. For an outgoing fund, ASIC must determine that the fund is 'likely' to comply with the Corporations Act. For an incoming fund, ASIC must determine that the fund is 'not unlikely' to comply with Australia's laws or the relevant laws of the home country. These tests are ultimately subjective and there needs to be guidelines in place so that there is certainty about the process. In particular, it is unclear why ASIC should be making a determination about the incoming fund's compliance with laws in its home jurisdiction. We would submit that this should not be a matter for ASIC to opine on. We understand that the PDS which the outgoing or incoming fund must present to ASIC is a basis on which the opinion is formed. If it is the case that if the PDS complies with all requirements the 'likelihood' test will be satisfied, we submit this is better expressed as a requirement that the PDS contains all relevant information to remove some of the subjectivity inherent in this test.

3. ASIC POWERS		
	Issue	**Allens Comment**
3.2	Ability to reject an application when a fund name is already in use	ASIC can reject an application when the fund name is already in use. Is the limit on another passport fund having the same name or is the intention that the fund cannot have the same name as any Australian or registered foreign company, business or wholesale fund? Depending on the scope, ASIC should maintain a list of unavailable names so that potential funds are able to select a name (and accordingly documents, branding, accounts, etc. are not prepared in a name that is not available, resulting in significant expense and administrative burden for funds to amend).

4. OTHER		
	Issue	**Allens Comment**
4.1	Disclosure laws	We submit that a key issue is that there appears to be no harmonisation of the disclosure laws across participating economies (and we recognise that this is a feature of the ARFP framework itself, rather than the draft legislation). This means that operators will need to prepare separate disclosure documents in each jurisdiction they wish to market, which results in significantly increased costs and timing delays, particularly given many jurisdictions have extensive disclosure requirements (for instance, the PDS disclosure requirements in Australia, including the recent changes to fees and costs disclosure). We are of the opinion that this will be a significant deterrent to the operators whom we assume the passport is intended to be most beneficial for (eg, smaller operators without a global distribution network). We would submit that a key element of the passport working efficiently is for managers to be able to prepare the necessary documentation required to comply with the disclosure laws in their home jurisdiction and a supplement (e.g. a 'wrapper') for each relevant host economy that ensures the disclosure document, as a whole, satisfies the disclosure requirements of that host economy. If this approach were to be adopted, amendments Part 7.9 of the Corporations Act would need to be modified to facilitate the preparation of a disclosure document of this nature.
4.2	Definition of 'managed investment scheme'	It is proposed that a note will be included at the definition of 'managed investment scheme' in section 9 of the Corporations Act to confirm that 'a notified foreign passport fund is taken to be a managed investment scheme for the purposes of this Act'. We understand (from Treasury's note at s1213E of the draft legislation) that when the CCIV regime is introduced, any foreign passport funds that are constituted as bodies corporate will be treated as a CCIV for the purposes of the Corporations Act. Until then, we understand that the intention is for all foreign passport funds to be treated as managed investment schemes. If this is the intention during the interim period, then we believe an amendment to the definition of 'managed investment scheme' is required, and not simply a note. This is because bodies corporate are expressly excluded from the definition of 'managed investment scheme', so if a foreign passport fund is constituted as a body corporate, the note will be inconsistent with the actual definition (before the CCIV regime is introduced). This will create confusion as to whether the fund should properly be treated as a managed investment scheme or as a body corporate (for example, for disclosure, advertising and other purposes).
4.3	Other matters to be determined by the Host Economy	Annexure 1 of the Memorandum of Cooperation identified certain additional matters that would be determined by the Host Economy, which do not appear to have been addressed in the draft legislation. We consider it would be helpful for these matters to be addressed by the legislation, or otherwise an explanation provided as to why these matters do not need to be covered by the legislation. The relevant matters are: • restrictions on the labelling of a passport fund as an exchange-traded fund, index fund, capital guaranteed fund, money market fund or feeder fund; • member complaints (the manner in which complaints are received, processed and responded to by a passport fund or its operator and any requirement for membership of an external dispute resolution scheme); and • exclusions from the requirement for the foreign passport fund or its operator to hold an Australian financial services licence in connection with the distribution of the fund in Australia in the circumstances described in section 2(2) of Annexure 1 of the Memorandum of Cooperation.