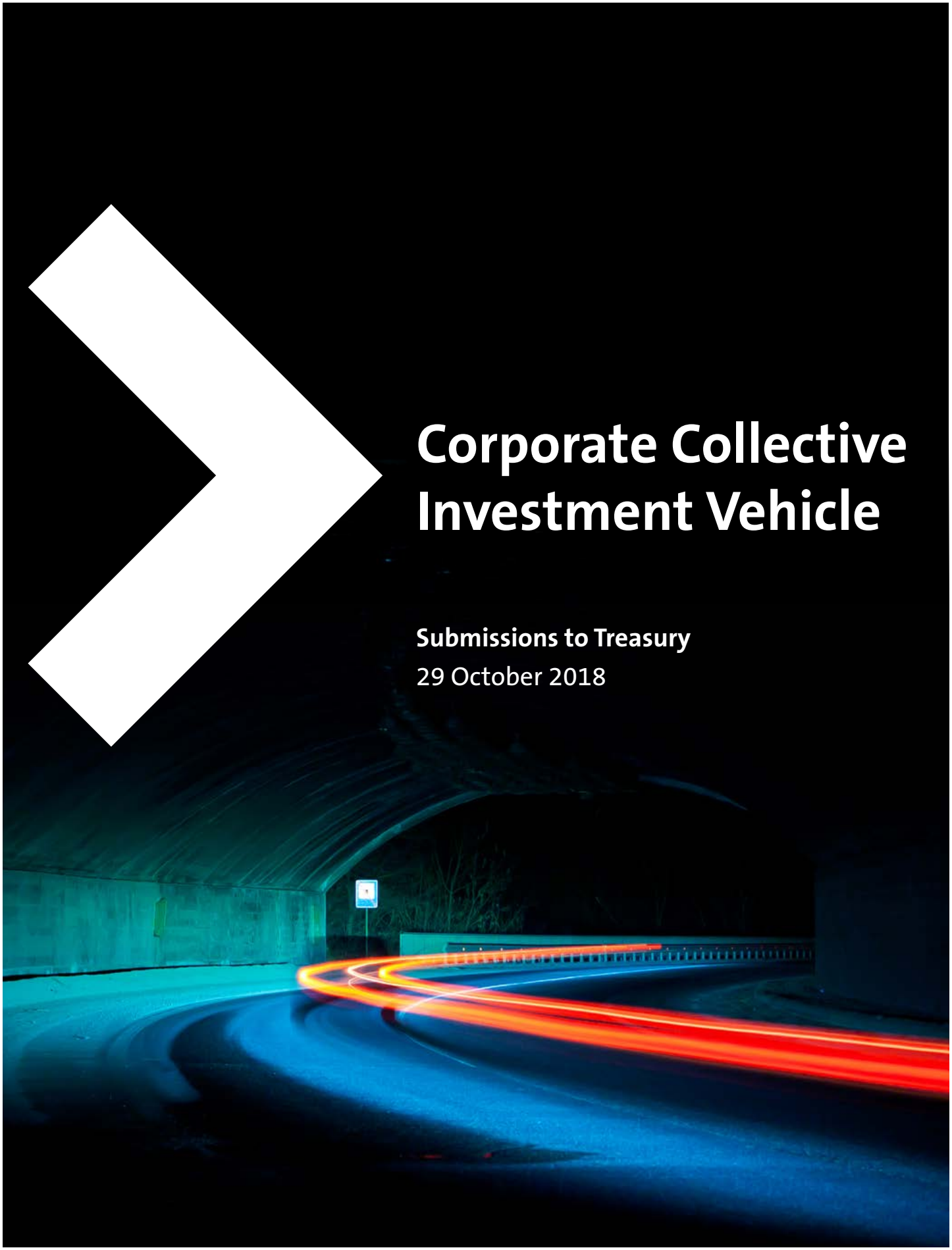
Allens › ‹ Linklaters

# Corporate Collective Investment Vehicle

**Submissions to Treasury**

29 October 2018



Allens welcomes the opportunity to provide comments on the exposure draft of the third tranche of the T*reasury Laws Amendment (Corporate Collective Investment Vehicle) Bill 2018: Exposure draft*, and the accompanying draft explanatory memorandum (together, the ***Exposure Draft***).

Set out below are our comments and recommendations on the proposed Exposure Draft.

# 1 INDEPENDENCE REQUIREMENT FOR DEPOSITARY

| | Section of Act | Issue | Allens Comment |
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| 1.1 | 1234D | Extension of independence requirement to agents, sub-agents and their related bodies corporate | We welcome the fact that independence will not be assessed with reference to the activities of associates.<br>However, the inclusion of agents (or persons otherwise engaged), sub-agents (or persons otherwise engaged) and their related bodies corporate means that the test remains extremely broad and could make it difficult to satisfy the independence test.<br>An agent appointed (or person otherwise engaged) under s 1234H is an agent or person appointed or engaged 'to do anything that [the depositary] is authorised to do in connection with the CCIV'. A depositary may be authorised to do a broad range of things (including giving 'any...assistance the corporate director reasonably requires for the purposes of fulfilling [the corporate director's responsibilities in relation to the CCIV' (s 1234M)). If, for example, a depositary is asked to assist a corporate director to keep records for the purpose of s 1233R, and appoints an agent or engages a person to provide this assistance on its behalf, is it the intention that the agent or person (and related bodies corporate of the agent or person) should be included in the assessment of the independence of the depositary requirements? We submit that if the role of the agent or person:<br>› is unrelated to the core functions of the depositary (being those set out in ss 1234J, K and L); or<br>› is purely administrative or 'execution-only' (ie, involving no or limited discretion),<br>then the agent or person engaged should be excluded from the operation of s 1234D. |
| 1.2 | 1232F | Meaning of a retail CCIV | We previously submitted that defining a retail CCIV only by reference to its promoter or an associate of its promoter – being in the business of promoting CCIVs to persons who are, or would be, retail clients – was misconceived and had suggested the inclusion of an equivalent exception to that contained in s 601ED(2).<br>In summary, a CCIV will be a retail CCIV and subject to additional regulatory requirements if the issuing of a security would give rise to the need to give a Product Disclosure Statement. We note that this definition tracks the exception to the need to register a managed investment scheme under s 601ED(2) but that the tests in s 601ED(1) do not seem to apply to CCIVs (ie, unlike an MIS, even if a CCIV has 20 members or less and is not promoted by a person or an associate of a person who is in the business of promoting CCIVs, it will still be a retail CCIV and subject to additional regulatory requirements). We propose that the test for whether a CCIV is as retail CCIV and therefore subject to the increased regulatory requirements should track the test for registration of an MIS (ie, a CCIV will be a retail CCIV if one of the tests in s 601ED(1) applies, unless the new s 1232F applies). |

# 2 EXTERNAL ADMINISTRATION

| | Section of Act | Issue | Allens Comment |
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| 2.1 | See, for example, Schedule 2, item 1, ss 12-060 of the Exposure Draft (To be inserted in the appropriate section of the Act) | Translation rules | We understand that the translation rules are an alternative to restating the Act's external administration provisions, as appropriately adjusted. We support this in principle as we understand that repeating all the relevant provisions in the Act as adjusted for CCIVs and sub-funds would not be feasible (in accordance with our previous submissions). However in practice, the translation rules (along with the allocation rules, as previously submitted) have the potential to further complicate the application of the external administration provisions to sub-funds.<br>By way of an example, we have sought to understand how the requirement in s 428(1) of the Act (to set out a statement in every public document and negotiable instrument after a company's name that a receiver or other controller has been appointed) would apply in the context of a receiver being appointed to a sub-fund.<br>We understand that the relevant translation rules would at first instance apply to require that this statement be included after the sub-fund's name (see s 12-060(4)). However, applying s 12-060(5), the context of s 428(1) likely requires that the statement be included after the CCIV's name where used in public documents or negotiable instruments (each as defined in s 9 of the Act) given the CCIV is the legal entity (see paragraph 3.20 of the Explanatory Memorandum (***EM***) – in particular, the example of executing a document or instrument). Applying s 12-060(6), the operation of s 428(1) would therefore be confined to the particular sub-fund. This is akin to how s 428(1) applies to a corporate trustee appointed as a receiver in respect of property that the corporate trustee holds on trust (see s 428(2A) of the Act). However, it is unclear whether the statement that refers to the CCIV may also refer to the particular sub-fund (in the same way that the trustee company's statement may refer to the particular trust in s 428(2A) of the Act). Given the object of the translation rules to 'preserve the segregated application of assets of a sub-fund', the practical approach would seem to be that the statement refers to the CCIV and the sub-fund as: '*Sub-Fund of CCIV (Receivers and Managers Appointed)*.'<br>This example highlights the high level of engagement required between all (proposed and existing) provisions of the Act as a result of the translation rules, notwithstanding the absence of a clear and practical outcome of applying the translation rules in this case. |
| 2.2 | Schedule 2, item 1, s 12-120 of the Exposure Draft (To be inserted in the appropriate section of the Act) | Statutory demand | We note that, under s 12-120(2), a creditor must specify the sub-fund(s) to which a statutory demand that it serves on a CCIV relates. We understand that the main amendments in Schedule 2 of the Exposure Draft are to be placed in the 'appropriate position within Chapter 8B' of the Act. We therefore assume that s 12-120(2) will override s 1249G which, as set out in Tranche Two, provides that a statutory demand served on a CCIV is not required to identify a sub-fund of the CCIV.<br>We further note that s 12-155 provides a creditor of a CCIV with the power to require the corporate director to provide information to them to identify the sub-fund(s) of which a debt owing to a creditor is a liability and proportional allocation of debt between two or more sub-funds where applicable. We recognise that this enables the creditor to identify the sub-fund in the statutory demand and, in the event that the creditor incorrectly does so, the CCIV may challenge the identity of the sub-fund(s) and the Court has powers, including to vary the statutory demand to specify the correct sub-fund(s) and proportional allocation of debt between sub-funds (ss 12-125 and 12-135). We welcome this change in light of our previous submissions that the lack of clarity surrounding the allocation of co-owned assets and liabilities between sub-funds could flow through to s 1249G. |

| | Section of Act | Issue | Allens Comment |
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| 2.3 | Schedule 2, item 1, s 12-235 of the Exposure Draft (To be inserted in the appropriate section of the Act) | Liquidator's power to challenge corporate director's allocation determination | We understand that the Exposure Draft provides a liquidator with power to challenge the corporate director's allocation determination of assets and liabilities between sub-funds (s 12-235). We further understand that the Court may then effectively substitute the corporate director's allocation determination for its own. We welcome this provision, noting that it is more likely to be relied upon compared to receivers and other controllers' similar powers.<br>The possible bases for a liquidator's challenge appear to be where the corporate director has either not made an allocation determination or where the liquidator believes that a reasonable person in the corporate director's position would not have made the same allocation determination as the corporate director (paragraphs 3.121–3.122 of the EM). However, as a liquidator will only be delivered books that 'relate solely' to the sub-fund (see ss 1249P(2)–(3) in Tranche Two and our previous submissions), it is unclear how the liquidator will be able to form an objective belief that a particular allocation determination is miscarried in order to challenge the determination. |
| 2.4 | s 435D | Voluntary administration to not apply | We note that Treasury's explanation for the non-application of voluntary administration in the CCIV context is grounded on the view that CCIVs are less likely to benefit from the moratorium imposed during voluntary administration given CCIVs do not carry on active businesses (paragraph 3.69 of the EM).<br>In this context, it is necessary to highlight that the purpose of voluntary administration is not focussed on or limited to the moratorium on creditors' enforcement rights during which a corporate entity may continue trading. To the contrary, voluntary administration is designed to enable creditors to consider and vote on restructuring options to lead the corporate entity to a better outcome for creditors compared to immediate liquidation. Such options may include, without limitation, recapitalisation, a partial sale or debt for equity swap. We are interested to understand why Treasury is seeking to exclude these (and other) restructuring options in the CCIV context beyond concerns around the moratorium, noting that the exclusion appears to conflict with Treasury's approach to apply other external administration options such as arrangements, reconstructions and receivership in the CCIV context. |
| 2.5 | Schedule 2, item 1, ss 12-105, 12-245 and 12-255 of the Exposure Draft (To be inserted in the appropriate section of the Act) | Voidable transactions and insolvent trading | We welcome the application of voidable transactions in the CCIV context (s 12-105(2)).<br>As we understand from paragraph 3.155 of the EM, the translation rules limit the application of the voidable transactions provisions to where a transaction affects the assets and liabilities allocated to the sub-fund (presumably as a result of s 12-105(6)). As submitted above, this may cause difficulties in practice where there are co-owned assets and liabilities.<br>The translation rules also provide that the regulations may exclude the applicability of provisions in the 'winding up provisions' as defined in s 12-105(2), including Division 2 of the Act, in the CCIV context (see s 12-105(3)(c)). We assume that regulations will not be made to exclude any voidable transactions given their importance in protecting creditors.<br>We note that the EM refers to two modifications of the voidable transactions provisions in the CCIV context. We remain unclear as to the first modification seeking to apply a presumption of insolvency if the CCIV's or sub-fund's financial records are missing, noting that s 12-204 as referenced in paragraph 3.157 of the EM does not appear to be included in the Exposure Draft. We support the second modification – to s 588FDA of the Act (unreasonable director-related transactions) – to apply to transactions with natural person directors of the corporate director (as well as the corporate director), as outlined in s 12-245 and paragraph 3.158 of the EM.<br>In relation to insolvent trading, we support the amendment of the translation rules to ensure that the directors of the corporate director, being natural persons, owe duties to prevent insolvent trading (among other duties). |

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| 2.6 | | *Personal Property and Securities Act 2009* (Cth) | In light of the limited amendments to the *Personal Property and Securities Act 2009* (Cth) (***PPSA***) included in the Exposure Draft (see paragraphs 3.159–3.161 of the EM), we query whether further amendments remain under development and will be released for consultation at a later date.<br>In particular, we note that the amendments included in the Exposure Draft (particularly the translation of Division 2A of Part 5.7B of the Act) do not address how to register a security interest against a sub-fund under the PPSA. An application for registration of a security interest requires a 'financing statement' containing the information specified in s 153 of the PPSA and Schedule 1 of the *Personal Property Securities Regulations 2010* (Cth) (***PPS Regulations***). In the CCIV context, it would seem that the Australian registered fund number (ARFN) of the relevant sub-fund should be specified where the grantor of a security interest is a CCIV. This would ensure that the security interest references the specific sub-fund, rather than the CCIV generally. This approach would align with the approach for trusts where the relevant trust's ABN, ACN or ARBN or name must be specified in the financing statement where the grantor is a trustee (see Schedule 1, clause 1.5 of the PPS Regulations). We welcome Treasury's confirmation as to whether the PPSA and PPS Regulations will be amended to contemplate a registration against a sub-fund as suggested above as well as confirmation of other consequential amendments of the establishment of CCIVs in the PPSA and PPS Regulations. |

## 3 DEREGISTRATION

| | Section of Act | Issue | Allens Comment |
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| 3.1 | Schedule 3, Div 1, s13-035(6) | Reinstatement of a sub-fund that was an Australian Passport Fund | In circumstances where ASIC has initiated the deregistration of a sub-fund that was an Australian Passport Fund prior to its deregistration, and the sub-fund is reinstated pursuant to s 601AH (ie that ASIC is satisfied that the sub-fund should not have been deregistered or the Court orders its reinstatement), we think that the sub-fund should not be required to make a new application to become an Australian Passport Fund as currently proposed. This appears to be unduly burdensome and costly process for the sub-fund. We suggest that in such instances, the sub-fund should automatically be reinstated as an Australian Passport Fund. |

## 4 CORPORATE CONTROL, DISCLOSURE AND FUNDRAISING

| | Section of Act | Issue | Allens Comment |
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| 4.1 | Schedule 4, item 2<br>(To be inserted into Part 8B.14 of the Corporations Act) | Takeovers | Chapter 6 will apply to acquisitions by CCIVs (5.18 of the EM). It seems that the exposure bill does not address whether acquisitions in interests by different sub-funds will be aggregated for Chapter 6 purposes (relevant interests, association, substantial interests and the 20% threshold). We expect that, by virtue of section 12, there would also be an aggregation across CCIVs controlled by the one corporate director (or corporate group with several corporate directors). |
| 4.2 | Schedule 4, item 2, s 14-015 of the Exposure Draft<br>(To be inserted into Part 8B.14 of the Corporations Act) | Compulsory acquisitions | We understand that the 20% rule in s 606 of the Corporations Act will not apply to acquisitions of interests in a CCIV, but that it will still be possible to make a takeover bid for a CCIV without compulsorily acquiring securities. We do not follow why a prospective acquirer would make a takeover bid unless doing so allowed them to mop up minority interest holders after they acquired more than 90% of the interests in the CCIV. |

## 5 AMENDMENT TO ASIC ACT

| | Section of Act | Issue | Allens Comment |
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| 5.1 | s 5(1) | Amendment to definition of 'eligible person' | Will there be any officers of a CCIV other than the corporate director? |
| 5.2 | s 5(1) | Note regarding effect of Part 8B.17 of the Corporations Act | Given that the ASIC Act is a separate piece of legislation from the Corporations Act, consider a substantive provision regarding the effect of Part 8B.17 rather than a note. |