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Corporate Collective Investment Vehicle

Submissions to Treasury – Allens, August 2018

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

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

1. EXTERNAL ADMINISTRATION			
	Section of Act	**Issue**	**Allens Comment**
1.1	1249B	Voidable transactions and insolvent trading	At first instance, it is not clear to us whether Treasury intends that the provisions of Chapter 5 addressing voidable transactions and insolvent trading would also apply to a CCIV in respect of a sub-fund, subject to the separating assumptions. We assume these provisions are intended to be covered under s 1249B given its broad drafting (see paragraphs 2.12 – 2.14 of the Explanatory Memorandum (***EM***)). Given the importance of the voidable transactions provisions to provide protection to creditors of an insolvent company (in this case, an insolvent sub-fund) and the relationship between a sub-fund, CCIV and corporate director, we submit that a liquidator's powers to investigate insolvent trading, breaches of duties, uncommercial transactions and preferences (and any other powers for the benefit of creditors) should be more explicitly stated. While we appreciate that repeating all the relevant Corporations Act provisions as adjusted for CCIVs would not be feasible, we consider that doing so is necessary for voidable transactions and insolvent trading as it is unclear from the current approach, for example: • how insolvency is determined in respect of a sub-fund given it is not a separate legal entity yet all voidable transactions involve an element of proving insolvency; and • who would be liable for insolvent trading of a sub-fund (noting that we presume that the corporate director as officer of the CCIV would be)?
1.2	1249E and 1249Q(2)	Winding up to not affect allocation rules	We understand that s 1249E seeks to link the external administration provisions to the allocation rules in Tranche 1. Our concern is that there is no provision for when the allocation or segregation of assets and liabilities (as expanded by Tranche 2 in paragraph 2.22 of the EM) is not clear cut between sub-funds. For example, what will happen if an allocation has not been made and s 1233K (for assets) or s 1233Q (for liabilities) applies requiring a 'fair and reasonable' allocation? As previously submitted, flexibility is needed to recognise where two or more sub-funds may have an interest in the same underlying asset. Part of this flexibility requires that, to the extent that two or more sub-funds directly co-own an asset or liability, there must be an understanding of: • the liquidator's ability to realise the co-owned asset for the benefit of creditors of the sub-fund being wound up; and • creditors' rights in respect of the co-owned liability, including the amount of debt that they should prove against the sub-fund being wound up, whether they are aware that their liability is shared with other sub-funds and whether creditors can claim against such other sub-funds. Where there is co-ownership, the above matters are further

			complicated by the liquidator's role being subject to the corporate director's identification of assets (s 1233G) and segregation of liabilities (s 1233N) between sub-funds as well as the liquidator's powers being limited under s 1249Q(2) such that it cannot determine the proportion of assets and liabilities to be allocated to the sub-fund being wound up (see paragraph 2.53 of the EM). The lack of clarity surrounding the allocation of co-owned assets and liabilities for a particular sub-fund also flows through to other provisions in the Exposure Draft. For example, under s 1249G, a creditor may serve a statutory demand for debt on a CCIV without identifying the relevant sub-fund(s). The CCIV then identifies which sub-fund(s) are liable for the debt claimed, as allocated proportionately if there are two or more sub-funds. If the proportionate allocations were clear from the outset, then creditors could easily identify the relevant sub-fund(s) in their statutory demand. In order to address the above issues, we suggest that Treasury mandate that there must be an express provision in all CCIV constitutions addressing the allocation of assets and liabilities that are co-owned by two or more sub-funds in the event that one sub-fund is liquidated.
1.3	1249P(2)–(4) and 1239Q(3)	Access to books	In emphasising the separation principles, the corporate director's obligations under ss 1249P(2)–(3) to provide books to the liquidator are narrower than Chapter 5 as this provision requires only the books that 'relate solely' to the sub-fund being wound up to be delivered to the liquidator, as opposed to the books that simply 'relate' to the sub-fund (see, in contrast, s 530A(1) in Chapter 5). Presumably it is anticipated that the liquidator will be able to inspect other documents relating to the sub-fund being wound up under s 1249Q(3). In this context, it is interesting to note that the corporate director retains access to inspect the books that it delivers to the liquidator (s 1249P(4)) to the extent relevant to the corporate director's functions with respect to the other sub-funds that continue to operate. It is unclear to us how books that relate solely to the sub-fund being wound up can also potentially impact other sub-funds and, if such overlap exists, it is unclear why the liquidator should not receive the comparable treatment to the corporate director in not being delivered books that do relate to the sub-fund being wound up, but do not 'solely relate' to that sub-fund.
1.4		Receivership, schemes of arrangement, deregistration under Chapter 5C and PPSA	We are pleased to see that provisions are under development to address the application of receivership, schemes of arrangements, Chapter 5C deregistration procedures in respect of sub-funds and amendments to the *Personal Properties Securities Act 2009* (Cth). We strongly encourage Treasury to engage with the industry on these provisions, particularly given their interaction with the external administration provisions provided to date.
1.5		Voluntary administration to not apply	We are interested to understand Treasury's reasoning for not making voluntary administration available to sub-funds of a CCIV. Given its purpose to provide an ability for entities to restructure their future direction, we query whether the non-application of voluntary administration would therefore limit the restructuring options for sub-funds.

2. TAKEOVERS AND CONTINUOUS DISCLOSURES

	Section of Act	Issue	Allens Comment
2.1	-	Takeovers,	In our view, the proposal that Chapters 6-6C not apply to CCIVs is

		compulsory acquisitions and buy-outs of a CCIV	reasonable. This is subject to there being listed CCIVs / sub-funds, which would be in an anomalous situation (with listed managed investment schemes (***MIS***) being subject to Chapters 6-6C). We are interested to receive further guidance on this point.
2.2	-	Continuous disclosure obligations	We assume that if a CCIV is to be a disclosing entity, it will be at a sub-fund level. This is so it is clear at which level the accounting and continuous disclosure requirements will apply. In this case, we would be grateful if Treasury could please confirm.

3. PDS

	Section of Act	Issue	Allens Comment
3.1	1250P	Requirement to prepare a PDS	It is not clear whether it is intended that the PDS requirements apply at the CCIV level, or at the sub-fund level. In our view, it would be more difficult but far from impossible for a corporate director to prepare a PDS that is 'clear, concise and effective' while still capturing each of the sub-funds available within the CCIV (which could be a significant number), with varying investment strategies, application prices, fees, and investment managers. We suggest that it should be permissible to offer a PDS in relation to one or more sub-funds and that this be made clearer. We accept that if an issuer chooses to issue a PDS in relation to more than one sub-fund then it may be necessary to issue a supplementary or replacement PDS to all shareholders **even** when the changes are only applicable to a specific sub-fund.
3.2	1250P	Short-form PDSs	It is unclear whether there will be short form PDS requirements similar to those in schedule 10E of the Corporations Regulations for a CCIV / sub-fund of a CCIV. For regulatory parity between the MIS regime and the CCIV regime, we would expect for the short-form PDS requirements to apply to a sub-fund of a CCIV which meets requirements similar to that of a simple MIS. We would be grateful if Treasury could please confirm.
3.3	1250R	PDS exemptions	It is also not clear whether the PDS exemptions similarly apply at the sub-fund level. In this case, we recommend that they should – otherwise the availability of the exemption will depend on activities that are not relevant to investors in a particular sub-fund. For example, where the corporate director makes personal offers for a specific sub-fund, it should be eligible for the small scale offerings exemption in s1012E even where it is not relying on the exemption for other sub-funds (so long as for those sub-funds it complies with applicable disclosure requirements for the other sub-funds).
3.4	1250Z	Insider trading exemptions	We would be grateful if Treasury could please clarify whether the other insider trading exceptions that apply to MISs and companies (such as the exception for underwriters of securities or MIS products in s 1043C or the Chinese walls exception for body corporates in s 1043F) also apply to shares in a CCIV / directors of a corporate director.

4. CORPORATE CONTRAVENTIONS

	Section of Act	Issue	Allens Comment
4.1	1267B	Application of s 12.1 of the *Criminal Code*	Strictly, it is the *Criminal Code* that applies by reason of s 12.1 (rather than s 12.1 of the *Criminal Code* 'applying'). In addition, it is potentially confusing to refer to s 12.1 applying to 'an offence', given an assessment under Part 2.5 of the *Criminal Code* determines

			whether an offence has in fact been committed. In those circumstances, we suggest amending the proposed s 1267B to read: If the *Criminal Code* applies to a CCIV by reason of s 12.1 of the *Code*, the other modifications mentioned in that section include such modifications as are made necessary by the fact that criminal liability is being imposed on a body corporate that: (a) has a sole director that is also a body corporate; and (b) has no employees.
4.2	1267F	Negligence	Consistent with s 12.4(1) of the *Criminal Code*, the proposed s 1267F should expressly state that the test for negligence for a CCIV is the test set out in s 5.5 of the *Criminal Code*. The proposed subsection (2) departs from s 12.4(2) of the *Criminal Code*, which provides that a body corporate's conduct is negligent when viewed as a whole even if no individual employee, agent or officer of the body corporate has that fault element. We are not aware of any policy reason to exclude this from the provisions applying to CCIVs and recommend that it be included. The proposed subsection (3)(a) appears to depart from the existing position in s 12.4(2) of the *Criminal* Code, by taking into account the conduct of agents or officers of the CCIV (in addition to the conduct of employees, agents and officers of the corporate director of the CCIV) when aggregating the conduct of CCIV as a whole. Our understanding is that the only officer of the CCIV will be the corporate director. We would be grateful if the policy basis for this departure can be clarified. We are not aware of any policy reason why s 12.4(3) of the *Criminal Code* (which outlines what may evidence negligence) is not expressly set out in relation to CCIVs in the proposed section. Finally, we note that subsection (3)(b) should read: 'employees, agents, or officers...'.
4.3	1267H	Intervening conduct or event	For clarity, we note that this section should read: 'A CCIV cannot rely on s 10.1 (intervening conduct or event) of the *Criminal Code*'.
4.4	1267J	Corporate director, not CCIV commits offence	We assume that the intention is that, if an offence is 're-routed' to the corporate director of the CCIV, then defences that may be available to the CCIV would be available to the corporate director of the CCIV. Given the conduct of employees, agents and officers of the corporate director of the CCIV will be attributed to the CCIV, for abundance of caution it may assist if the proposed legislation expressly confirms that any defences to an alleged offence (including as modified in the exposure draft) also apply in relation to that employee, agent or officer (rather than simply applying to the CCIV).
4.5	1267N	Corporate director, not CCIV, contravenes civil penalty provisions	As above, for abundance of caution, it may be useful to expressly confirm that any defences to an allegation that a CCIV contravened a civil penalty provision apply in respect of the corporate director of the CCIV.