

25 January 2022

Market Conduct Division  
Treasury  
Langton Cres  
Parkes ACT 2600

By email: [CIVreform@treasury.gov.au](mailto:CIVreform@treasury.gov.au)

Dear Sir/Madam,

### Consultation on Corporate Collective Investment Vehicles - Regulations

1. This submission relates to consultation by Treasury on the exposure draft *Corporations and Other Legislation Amendment (Corporate Collective Investment Vehicle Framework) Regulations 2001* (Cth) (**Draft Regulations**) and the accompanying Explanatory Statement (**Draft ES**) issued by Treasury on 21 December 2021.
2. This submission has been prepared by the Financial Services Committee of the Business Law Section (**BLS**) of the Law Council of Australia (**Committee**) in consultation with the BLS Taxation and Corporations Committees.
3. The Committee thanks Treasury for the opportunity to comment on the Draft Regulations and the Draft ES and for a short extension of time to respond.

### Content of the Draft Regulations

4. The Draft Regulations propose amendments to the *Corporations Regulations 2001* (Cth) (**Corporations Regulations**).
5. Overall, the Committee agrees that the Draft Regulations are necessary to ensure that the future Chapter 8B<sup>1</sup> of the *Corporations Act 2001* (Cth) (**Corporations Act**) and other provisions relating to corporate collective investment vehicles (**CCIVs**) operate effectively and enable the objectives of the CCIV reforms to be achieved.
6. The Committee notes that the proposed Part 8B.5 of the Corporations Regulations would seek to impose specific requirements on the corporate director of a CCIV with respect to asset holding in a similar manner to modifications made by the Australian Securities and Investments Commission (**ASIC**) to the Corporations Act, which apply to responsible entities of registered managed investment schemes, contained in ASIC Class Order [CO 13/1409] *Holding assets: Standards for responsible entities* (**Class Order 13/1409**).

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<sup>1</sup>Chapter 8B will be introduced into the Corporations Act if the *Corporate Collective Investment Vehicle Framework and Other Measures Act 2021* (Cth) comes into force.

7. The Committee generally supports the concept of stating the CCIV asset holding requirements in the Corporations Regulations from the beginning rather than having a separate ASIC legislative instrument created.
8. The Committee also generally supports incorporating existing modifications of the Corporations Act made by ASIC legislative instruments such as Class Order 13/1409 into the Corporations Regulations.
9. Further, the Committee notes that amendments may be made to the *Corporate Collective Investment Vehicle Framework and Other Measures Act 2021* (Cth) (**CCIV Act**) before it is passed by both Houses of Parliament. If amendments are made to the CCIV Act, the Committee recommends that the Draft Regulations are reviewed against the final CCIV Act, to ensure that the relevant parts of the Corporations Act and the Corporations Regulations will ultimately fit together properly.

### **Content of the Draft ES**

10. The Draft ES makes reference to the “CCIV Act” when in fact it is referring to what will be substantive provisions of the Corporations Act (once the CCIV Act has been passed). In the Committee’s view, the expression “under the CCIV Act” as used in the Draft ES should be avoided, because the CCIV Act is a piece of ephemeral amending legislation that seeks to amend the Corporations Act and other legislation, after which its work will be done..
11. The Committee considers that the fourth paragraph under the sub-heading “*Voting rights arising from cross-investment between sub-funds of a CCIV*” on page 5 of the Draft ES should be redrafted to:
  - a. replace the reference to a “Regulation 8B.4.1” (which does not exist in the Draft Regulations), with proposed regulation 8B.4.15; and
  - b. replace the “acquiring sub-fund” and “issuing sub-fund” language (which is the terminology used in proposed regulation 8B.4.10 but not in proposed regulation 8B.4.15) with the “first sub-fund” and “second sub-fund” language that proposed regulation 8B.4.15 uses.
12. The erroneous “Regulation 8B.4.1” reference also appears on page 6 of the Draft ES.
13. The sub-heading “***Division 4 – Financial reports and audit of CCIVs***” on page 103 should commence on a new line.

### **More general considerations – implementation of the CCIV regime**

14. The Committee anticipates that the CCIV regime will need further refinements, as is invariably the case when a significant new regime is introduced.
15. The Committee welcomes the announcement on page 2 of the Draft ES about further consequential amendments to regulations which are foreshadowed.

16. The Committee believes that there are a number of other aspects of the CCIV regime which will require refinement, either by regulations or ASIC legislative instruments, in order to ensure that it operates effectively and fulfils its objectives. In the absence of appropriate regulations, and noting the time and process involved in promulgating them, it is important that ASIC has the requisite power to make any necessary legislative instruments.
17. The aspects of the current form of the CCIV regime which concern the Committee include:
- a. inconsistencies between the treatment of CCIVs and managed investment schemes that the Committee believes will create complexity for companies that are currently responsible entities of registered managed investment schemes and may seek to become corporate directors, including:
    - i. the proposed ability for ASIC to direct a corporate director to make changes to the constitution;
    - ii. the requirement for a majority of external directors, with no alternative to appoint a compliance committee if the board does not have a majority of external directors;
    - iii. comparatively narrower availability of exemptions from the requirement to give a PDS;
    - iv. differences in processes for changing the corporate director versus changing the responsible entity; and
    - v. the imposition of the whistleblower protection legislation on the investment vehicle rather than just its operator;
  - b. the more onerous proposed regulatory treatment of wholesale CCIVs compared with the current regulatory arrangements for unregistered managed investment schemes whose investors are all wholesale clients; and
  - c. a lack of assurance as to whether amendments made to the Corporations Act since the preparation of the exposure draft CCIV legislation in July 2021 have been taken into account in the CCIV Act. For example, in October 2021 changes to the hawking provisions in Part 7.8 of the Corporations Act were made, yet the form of proposed section 1244M and the corresponding part of the Explanatory Memorandum to the CCIV Act have not been altered since the exposure draft CCIV legislation was released for consultation.
18. Representatives of the Committee would be happy to engage with Treasury to explain any of the above concerns in more detail and help to develop a solution.

19. The Committee has also consulted with the BLS Taxation Committee and received feedback strongly recommending that regulations be made to facilitate the ability of a CCIV to make distributions to members irrespective of whether they are sourced from share capital or profits.
20. Finally, the Committee also anticipates that, despite the hard work and best efforts of all involved in the legislative process, some problems with the CCIV regime may only be identified post commencement and potential corporate directors begin to attempt to apply the regime in practice. The Committee understands that there will also be an appetite for future amendments to address these kinds of issues post commencement of the CCIV reforms and welcomes this approach.<sup>2</sup> The Committee is willing to continue to engage with the process to ensure that the CCIV reforms can be implemented to produce appropriate outcomes and reduce unintended adverse consequences.
21. Please contact the Chair of the Financial Services Committee Pip Bell at [pbell@pmclegal-australia.com](mailto:pbell@pmclegal-australia.com), if you would like to discuss any aspect of this submission.

Yours faithfully



**Philip Argy**  
**Chairman**  
**Business Law Section**

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<sup>2</sup> Transcript of Senate Economics Legislation Committee Public Hearing on Corporate Collective Investment Vehicle Framework and Other Measures Bill 2021 [Provisions] Inquiry held on 17 January 2022:  
<https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;db=COMMITTEES;id=committees%2Fcommsen%2F25368%2F0000;query=Id%3A%22committees%2Fcommsen%2F25368%2F0000%22>