

IN GOOD COMPANY?



PERPETUAL CORPORATE TRUST

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Australian investment funds extensively rely on unit trust structures, as has traditionally been the case across most jurisdictions that were once British colonies. Unit trusts have served Australian investment managers well over the decades and are the cornerstone structure that underpin Australia's \$2.7 trillion pool of superannuation investments. This represents one of the largest pools of defined contribution investment savings in the world.

With increasing internationalisation of capital markets and global investment flows, the lack of an alternative to the unit trust for setting up an investment fund has been perceived as one of the barriers to Australia's ability to export its funds management expertise, particularly to jurisdictions that do not have British common law as a foundation pillar for their legal systems. Trust concepts, including the role of the trustee and the trustee's limitation of liability (or exoneration clause), have been known to occasionally confound investors wanting to understand not only the nature of the investment strategy on offer, but the legal structure that sets out their rights, obligations and protections.

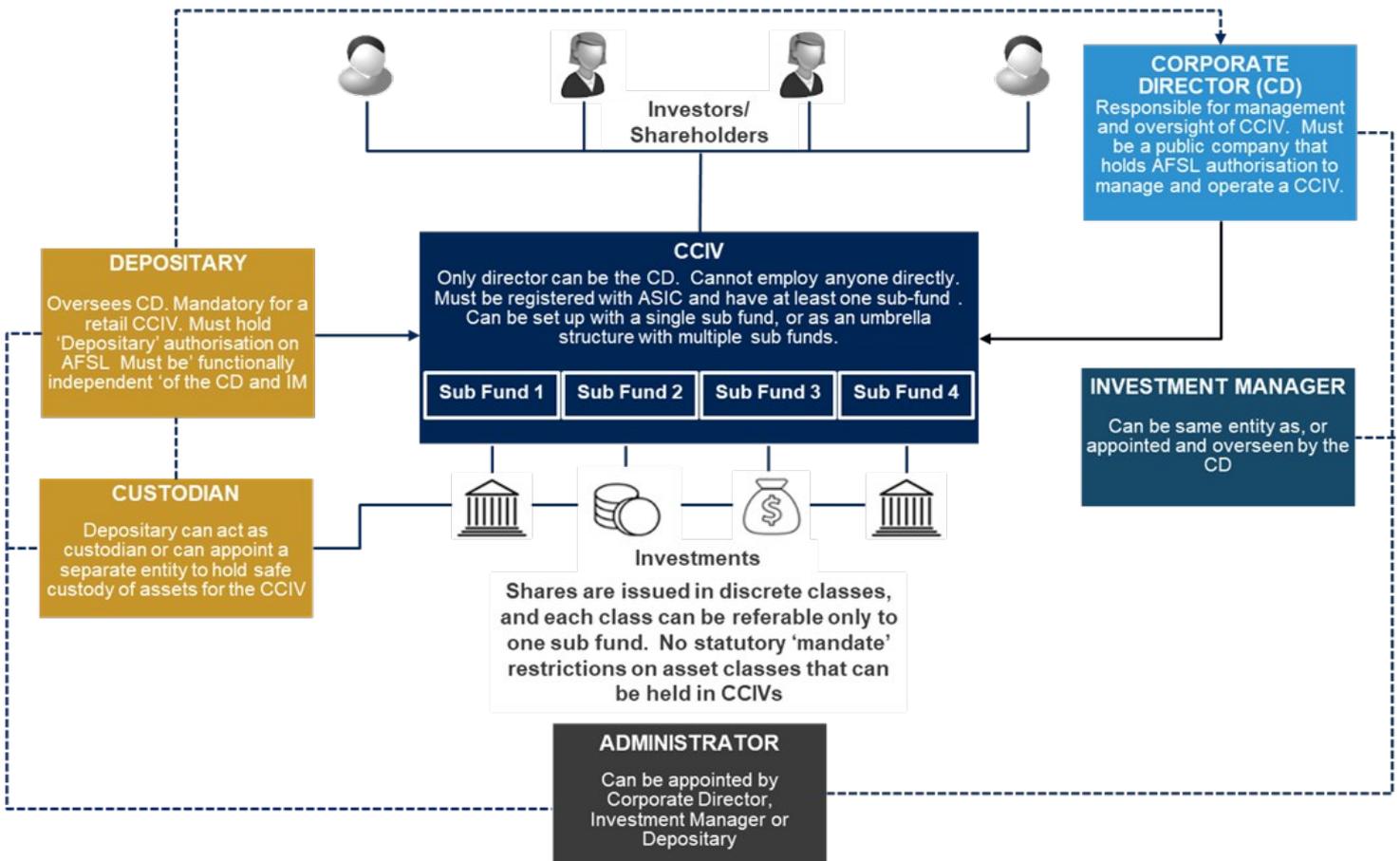
This is where the Corporate Collective Investment Vehicle (CCIV) comes in to play. The CCIV is Australia's proposed equivalent to the UK Open Ended Investment Company (OEIC), Luxembourg's Société d'Investissement à Capital Variable (SICAV) and their more recent cousin, Hong Kong's Open Ended Fund Company (OEFC). Singapore too is part way through regulatory implementation of its Variable Capital Company (VCC), with the entirety of the VCC regulatory framework expected to be in place for a 1 October 2019 launch. These vehicles all adopt a form of a limited liability company as the basis for the structure, modified to enable creation and cancellation of shares in the ordinary course of business, so as open-ended funds can be effectively operationalised.

In Australia, the Financial Services Council has been advocating for the introduction of a regulatory framework to enable investment funds to be offered through a company structure for nearly two decades. In 2008, the then Federal Government commissioned an expert panel to examine impediments to boosting Australia's trade in financial services. One of the recommendations, arising from what is now known as the Johnson Report¹, was that the Board of Taxation examine the scope for providing a broader range of Australian tax flow -through collective investment vehicles. The Board of Taxation concluded its review of tax arrangements applying to collective investment vehicles in December 2011², which recommended the introduction of a broader suite of Australian CCIVs. In May 2016, the Australian Government announced its commitment to implementing the

regulatory framework for CCIVs as part of the FY16-17 Budget.

The CCIV model being proposed will be familiar to those that have experience of structuring or investing in company-based fund structure that are available offshore. Being structured as a company, there is no Trustee or Responsible Entity involved in operating and overseeing a CCIV. Rather, a Corporate Director that holds the appropriate Australian Financial Services License authorisation acts as the Director of a CCIV. The Corporate Director can be the same, or a different entity as the investment manager. A CCIV includes a mandatory depository for retail managed funds. The Depository's role is part custody, part supervisory and provides enhanced investor protection by validating that the Corporate Director is performing key duties. These key duties include, valuing assets and striking prices for shares in the CCIV, accurately recording assets and liabilities, processing applications and redemption and paying distributions.

AUSTRALIAN CORPORATE COLLECTIVE INVESTMENT VEHICLE – PROPOSED MODEL
(Based on Tranche 4 Legislative Package released January 2019)



Perpetual Corporate Trust has been working with industry and regulatory stakeholders on the development of the regulatory framework for CCIVs since the 2016-17 Budget Announcement. We have advocated for a regulatory framework that delivers an internationally competitive structuring option for investment funds. Our objective has been to seek to ensure that the framework can be widely deployed by Australian Fund Managers, irrespective of underlying assets, geographic domicile of target investors and whether target investors are retail, wholesale and/or institutional clients.

So where are we up to now? With the fourth tranche of legislative materials issued for consultation in January 2019, there have been some substantial improvements compared to the initial proposals that were released for consultation nearly two years ago. Retail fund managers should note that, whilst a retail CCIV will be required to appoint a Depository, Treasury has fortunately taken on board industry's feedback and removed the requirement for the Depository to be strictly structurally independent from the Corporate Director and Investment Manager, replacing this with a functional independence requirement that is more in line with the UCITs directive. Treasury has also simplified the rules around replacing a Depository, so that the Depository for a CCIV is not locked in with the only option available for replacement being through a special resolution of members. Treasury has also acknowledged that the Administrator acts on instructions and is not a decision maker in relation to key strategic and operational matters of the CCIV. Unlike the earlier iterations of the core model exposed for consultation, the fourth tranche materials provide the flexibility for the administrator to be appointed by the Corporate Director, Depository or Investment Manager.

We believe some further refinements are required to the CCIV rules framework and have made a submission to Treasury outlining our views. Specifically, the rules framework currently contemplates a prohibition on listing of a CCIV or sub fund and a sub fund

investing in shares of another sub fund in the same CCIV. We believe this is unnecessarily restrictive and out of alignment with emerging practice from other jurisdictions, particularly Singapore.

For a wholesale CCIV, the latest draft rules have provided some further carve outs in terms of the application of the same rules as a retail CCIV. However, we believe that some further clarifications and/or streamlining of the rules framework for a wholesale CCIV are required. This is to ensure that the total regulatory burden is no different between a wholesale CCIV and unregistered managed investment scheme. For example, and as highlighted in our submission to Treasury, the rules framework does not make it clear whether discrete 'retail' and 'wholesale' Australian Financial Services License Authorisations will be made available to 'manage the affairs of and operate a CCIV'. The rules framework also does not provide for the retirement and replacement of the Corporate Director for a wholesale CCIV via a simple Deed of Retirement and Appointment.

From a tax perspective, the draft rules contemplate eligibility requirements and flow through tax treatment, modeled on the Attribution Managed Investment Trust rules. Importantly, for a CCIV structured as an umbrella fund (with multiple sub funds), each sub fund is considered a discrete taxpaying entity, effectively creating a tax firewall between sub funds. A simple transitions framework is provided to enable AMITs to transition into sub funds within a CCIV without crystallising any tax consequences, provided that the members' interests and the underlying assets remain broadly unchanged. Unfortunately, the draft tax rules do not provide any tax incentives for adoption of CCIV structures and retain the complicated withholding tax rules for foreign investors.

Whilst the model has been significantly refined since the first iteration, the regulatory framework for CCIVs remains a work in progress. The journey towards a legislated framework continues, albeit it will pause for a while as Australia goes to the polls before the end of May 2019. Hopefully, momentum in getting the CCIV framework finalised and legislated will gain traction following on from the Federal Election and before the end of 2019.

1. Australian Financial Services Centre Forum *Australia as a Financial Centre, Building on our Strengths* November 2009.

2. The Board of Taxation *Review of Tax Arrangements Applying to Collective Investment Vehicles* December 2011.