

## **New Australian corporate collective investment vehicle – an attractive option for offshore investors in Australian Property?**

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### **1 Background**

- 1.1 The Australian Government has recently released draft legislation for public comment (**CCIV Regime**) for a new corporate collective investment vehicle (**CCIV**). This new vehicle is intended to be an alternative to the Australian domiciled unit trust which is currently the most common form of investment structure used by Australian property fund managers and by offshore institutional investors seeking exposure (direct or indirect) to Australian property.
- 1.2 The Australian Government also has indicated that in the near future it will release draft legislation dealing with a new Australian domiciled limited partnership CIV structure which is intended to be another alternative investment vehicle.
- 1.3 The proposed introduction of a broad range of investment vehicles is a recent demonstration by the Australian Government of its ongoing strategic commitment to position Australia as a global financial centre in the Asian time zone.
- 1.4 This article examines whether the proposed CCIV regime is likely to change the way Australian property fund managers and offshore institutional investors make their decisions about investing in Australian property.

### **2 CCIV Regime**

- 2.1 The specific driver behind the CCIV proposal is a concern that offshore investors are dissuaded from investing in Australian funds because they do not fully understand unit trusts (the most common legal structure for an Australian fund), and that access to a broader range of collective investment vehicles would support Australian fund managers to remain competitive with foreign jurisdictions.
- 2.2 The CCIV regime will adopt a 'corporate model' that offshore institutional investors and managers are more familiar with, but it will also incorporate features of the existing regulatory regime applicable to unit trusts (and other managed investment schemes) under Chapter 5C of the Corporations Act.

### **3 Attractive Features of a CCIV**

The current vehicle of choice for offshore institutional investors and Australian property fund managers is the wholesale (private) unit trust which operates as an unregistered managed investment scheme.

It is the current preferred choice because a wholesale unit trust is generally more tax efficient and is only subject to "light touch" regulation in Australia it is also flexible enough to accommodate the often bespoke deal terms and governance model expectations of institutional investors and managers.

More draft legislation is to be released dealing with changes to the Australian tax laws so as to allow the CCIV to be treated in the same way as a managed investment trust for tax purposes. Fundamentally this means tax 'pass through' treatment and access to the withholding (**MIT**) tax concession, subject to meeting the existing MIT requirements including being widely held.

If the tax treatment of a corporate CCIV and wholesale unit trust are to be aligned as planned, then the question is whether a wholesale CCIV can otherwise compete with the wholesale unit trust as a viable alternative structure through which offshore institutional investors can invest to gain exposure to Australian property. A diagrammatic representation of the two different investment structures appears at the end of this article.

The wholesale CCIV does have some attractive features for sure. Firstly a corporate fund structure is simple and indeed globally recognisable. Unit trusts on the other hand are not so well known outside common law jurisdictions and the fact a trust is not a separate legal entity can sometimes complicate transactions for the trustee, overseas investors and trust creditors.

Secondly, investors in a CCIV will, as shareholders, benefit from a statutory limitation of liability which is not available to unitholders of a unit trust. Thirdly, a wholesale CCIV may establish sub funds which are intended to operate in a similar way to a protected cell regime in other jurisdictions. This segregation of assets and liabilities between different sub funds will create product flexibility for managers and investors alike.

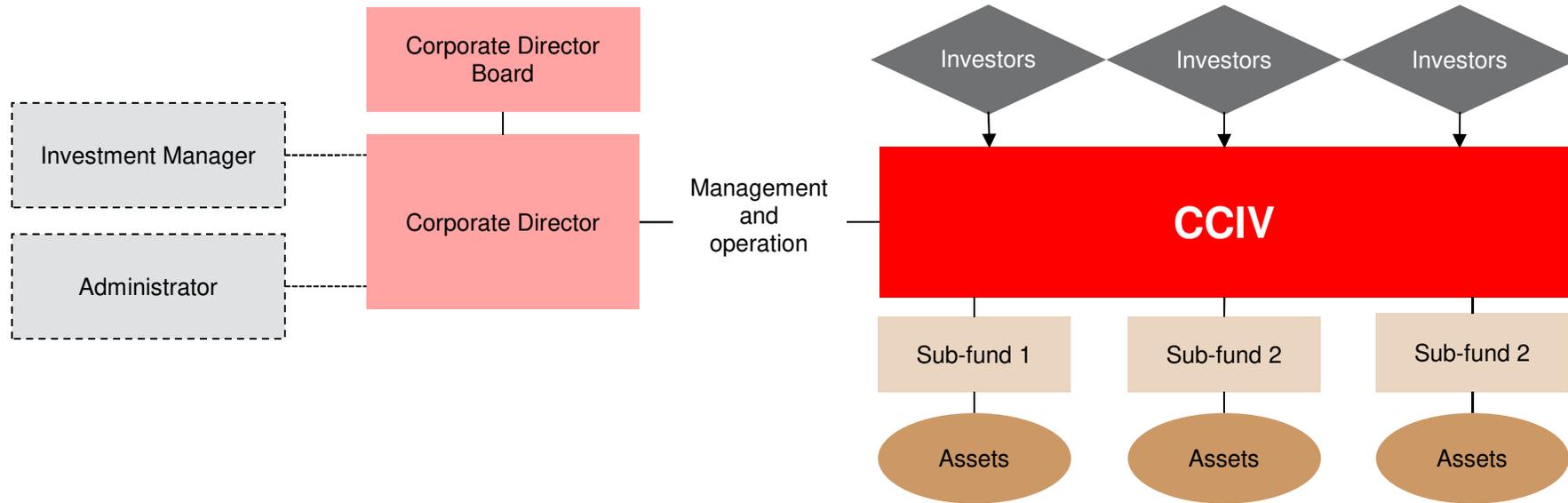
#### **4 Wholesale CCIV compared to wholesale Unit Trust – Preliminary Conclusion**

Despite these positive features of a wholesale CCIV, based on the draft legislation as it stands, it appears that the wholesale CCIV is intended to be subject to more ASIC regulation and regulatory scrutiny than a wholesale unit trust is currently subject to. Of course the draft legislation for the CCIV regime is likely to change before it is finalised. In addition, ASIC will be given wide powers to modify the CCIV regime as it applies to a particular wholesale CCIV, which will help. So it will be important to wait until the final legislation (and related ASIC regulatory policy) is in place before making any final decisions on which might be the preferable investment structure.

Extra regulation and ASIC scrutiny will make a wholesale CCIV more complicated, less flexible and more expensive and time consuming to set up and then operate. Some key features of the proposed CCIV regime for wholesale CCIVs which will likely be seen as unattractive by offshore institutional investors and Australian managers include:

- the wholesale CCIV must be operated by a single corporate director which must be a public company which holds an Australian Financial Services Licence. Whilst the operator is the equivalent of the trustee of a wholesale unit trust, a trustee of a wholesale unit trust can be a private company and need not have an AFSL as often it can rely upon available licence exemptions;
- the operator of a wholesale CCIV is statutorily liable for the acts and omissions of its agents and delegates (including the investment manager). This is so even if they act fraudulently or outside the scope of their authority. This strict liability is unfortunate and is an unnecessary “overreach” by the CCIV regime;
- the operator (corporate director) of a wholesale CCIV can be removed from that role by shareholders for no cause by a shareholder vote of at least 50% by value;
- The operator of a CCIV cannot install a successor operator without prior shareholder approval;
- shareholders by special resolution may modify or replace the CCIV constitution;
- the capital maintenance rules applicable to all companies will apply to a wholesale CCIV with modifications, however potential restrictions and complications can still arise;
- the CCIV constitution (and all amendments to it from time to time) must be lodged with ASIC. This may result in it being disclosed to the public.

**The proposed wholesale CCIV model**



**Current wholesale unit trust model**

