In this article, associate Elliott Stumm explains key aspects of the second tranche of the Federal Government’s regulatory framework for Corporate Collective Investment Vehicles (CCIVs) which was recently released for public consultation.

The second tranche covers:
- the external administration of a CCIV in a winding up situation
- the application of the financial services regime to CCIVs
- the liability of the corporate director for contraventions of the law by the CCIV.

The first tranche of the framework was released for consultation on 13 June 2018. For more background on CCIVs, we provided an overview of the regulatory framework (as originally proposed) in the December 2017 edition of Fundamental.

EXTERNAL ADMINISTRATION

The external administration provisions aim to preserve the segregation of assets between sub funds. This is achieved by requiring CCIVs to be wound up on a “sub-fund-by-sub-fund” basis, as if a CCIV were only comprised of the sub fund affected by the winding up. The winding up provisions operate for each sub fund by applying four assumptions:

1. The only business carried on by the CCIV is the business of the sub fund for which the CCIV is being wound up.
2. The only shares issued by the CCIV are the shares referable to that sub fund.
3. The only property of the CCIV is the property allocated to that sub fund.
4. The only debts and claims of the CCIV are the liabilities of that sub fund.

The draft provisions draw on the approach adopted for the external administration of health benefits funds which, like CCIV sub funds, do not have a separate legal personality. The approach in the exposure draft contrasts with that adopted in the United Kingdom, where sub funds are deemed to have a separate legal personality for the purposes of external administration only.

FINANCIAL SERVICES AND REGULATION

The draft Bill proposes modifications to the rules about the regulation of financial
BROADLY, THE FINANCIAL SERVICES REGULATIONS APPLY TO CCIVs AND CORPORATE DIRECTORS IN THE SAME WAY THEY APPLY TO OTHER COMPANIES. HOWEVER CERTAIN MODIFICATIONS ARE REQUIRED TO ACCOUNT FOR THE PARTICULAR CORPORATE STRUCTURE OF A CCIV.

Markets and services to accommodate CCIVs. Broadly, the financial services regulations apply to CCIVs and corporate directors in the same way they apply to other companies. However, certain modifications are required to account for the particular corporate structure of a CCIV. For example, any conduct engaged in by a CCIV is treated as also being engaged in by the corporate director of the CCIV. This ensures the corporate director retains responsibility for the actions of the CCIV. However, one exception is the corporate director is not taken to be the issuer of securities in a CCIV.

While a CCIV itself is not required to hold an AFS licence, the Bill provides for the creation of two new financial services to accommodate the CCIV framework:

- The corporate director of a CCIV provides a financial service if the corporate director operates the business and conducts the affairs of the CCIV. Each member of a CCIV is a ‘client’ of this financial service. As for responsible entities (REs), the AFS licence of a corporate director may cover operating the business and conducting the affairs of more than one CCIV and a corporate director may be authorised to provide other financial services under its licence.
- A person provides a financial service if the person acts as a depositary of a CCIV. To avoid unintended regulatory consequences, the exposure draft provides corporate directors and depositaries are not providing a custodial or depository service in performing their functions.

As shares and debentures in a CCIV are defined as securities, they would ordinarily be subject to the prospectus requirements. However, for consistency with the disclosure arrangements for registered schemes, the draft Bill requires a PDS, rather than a prospectus, be given to retail clients who acquire a security in a CCIV. Under the draft Bill, a PDS for a CCIV is subject to the same content requirements ordinarily applying to PDSs for other financial products.

LIABILITY OF THE CORPORATE DIRECTOR FOR CONTRAVENTIONS

Recognising that the corporate director operates the business and conducts the affairs of the CCIV, the Bill makes the corporate director responsible for any contravention of the law by the CCIV and is taken to have committed any offence or contravened the civil penalty provision instead of the CCIV. This is consistent with the position for registered schemes, with the RE being responsible for all obligations in relation to the scheme.

The explanatory materials also contemplate a provision requiring the corporate director to indemnify the CCIV for any loss or damage the CCIV sustains as a result of the CCIV’s contravention of the law.

CONSULTATION

Submissions to the Federal Government on the second tranche exposure draft closed on 10 August.

If you require further information or have any queries about the proposed reforms, please contact a member of our Funds Management team.