

13 April 2022

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By email: CCIVconsultation@asic.gov.au

Dear Ms Rickard,

ASIC Consultation Paper 360 *Corporate collective investment vehicles: Preparing for the commencement of the new regime (CP 360)*

1. This submission is made by the Financial Services Committee of the Business Law Section of the Law Council of Australia (the **Committee**) and relates to CP 360, which was released by the Australian Securities and Investments Commission (**ASIC**) on 11 March 2022.
2. The Committee thanks ASIC for the opportunity to make a submission on CP 360, which relates to Australian financial services licence (**AFSL**) authorisations for financial services which are to be provided in connection with corporate collective investment vehicles (**CCIVs**) and other inter-related matters and will involve:
 - (a) making updates to the following ASIC regulatory guides:
 - (i) Regulatory Guide 2 AFS Licensing Kit: Part 2 – Preparing your AFSL licence or variation application (**RG 2**);
 - (ii) Regulatory Guide 3 AFS Licensing Kit: Part 3 – Preparing your additional proofs (**RG 3**);
 - (iii) Regulatory Guide 105 AFS Licensing: Organisational competence (**RG 105**);
 - (iv) Regulatory Guide 126 Compensation and insurance arrangements for AFS licensees (**RG 126**); and
 - (v) Regulatory Guide 166 *AFS licensing: Financial requirements* (**RG 166**); and
 - (b) updating Pro Forma 209 *Australian financial services licence conditions* to reflect new conditions that are specific to corporate directors of CCIVs;

- (c) releasing an information sheet to provide guidance for corporate directors on registering a CCIV and a sub-fund; and
 - (d) updating existing legislative instruments, including implementing the financial resources requirements for corporate directors of CCIVs.
3. The Committee's responses to the various proposals made in CP 360 are set out below, using the same headings as used by ASIC in CP 360.

AFSL authorisations for corporate directors (Proposals B1 and B2)

Proposal B1 – Updates to RG 2 with respect to authorisations that a licensee proposing to be a corporate director of a CCIV must seek

- 4. The Committee considers that “operate the business and conduct the affairs of a CCIV” is an appropriately worded authorisation for a company seeking to be the corporate director of a CCIV.
- 5. The Committee considers that it would be appropriate for ASIC to make available the following forms of authorisations for corporate directors:
 - (a) operate the business and conduct the affairs of retail and wholesale CCIVs; or
 - (b) operate the business and conduct the affairs of wholesale CCIVs only.
- 6. An authorisation to operate the business and conduct the affairs of retail CCIVs only appears somewhat redundant. If the bar is higher for retail CCIVs, then a company which has satisfied the requirement to operate retail CCIVs should automatically be given the authorisation to also operate wholesale CCIVs.
- 7. The Committee notes that generally licensees are authorised to provide other kinds of financial services either to “retail and wholesale clients” or to “wholesale clients only”, so a consistent approach for CCIVs would be welcomed. The Committee notes that the existing authorisation for a responsible entity to operate a registered managed investment scheme does not draw any distinction between whether the relevant scheme is offered to retail clients or only to wholesale clients which means that, by implication, those schemes can be offered to both retail and wholesale clients (provided, in the case of retail clients, that the responsible entity holds authorisations to provide any associated financial services to retail clients).
- 8. The Committee generally agrees that the authorisation should specify the asset types for retail CCIVs, which would be consistent with the approach currently taken for registered managed investment schemes.
- 9. The Committee notes that currently the trustee of an unregistered managed investment scheme offered only to wholesale clients is not required to hold AFSL authorisations limiting the specific types of assets which that scheme will invest in.
- 10. If the policy intention is for wholesale CCIVs to be treated in a similar manner to wholesale unregistered managed investment schemes, then the Committee submits that the corporate director of a wholesale CCIV should be able to operate wholesale CCIVs that hold any kind of assets. Otherwise they will be potentially more restricted in their activities than the trustee of a wholesale unregistered managed investment scheme.

Proposal B2 – Update to RG 2 to provide that ASIC may limit a corporate director to operating one CCIV with a single sub-fund if it has not demonstrated organisational competence and capacity to conduct broader operations

11. The Committee is comfortable with the concept of ASIC restricting new corporate director entrants to operating retail CCIVs with a single named sub-fund where they are at an early stage of their business and are yet to establish the requisite operational systems and resources to operate multiple CCIVs and/or multiple sub-funds. The Committee believes this is broadly consistent with the approach that ASIC takes for licensees seeking to be the responsible entity of a registered managed investment scheme for the first time.
12. The Committee submits that this restriction should not apply to an operator of wholesale CCIVs only. This is because trustees of wholesale unregistered managed investment schemes do not need permission from ASIC to establish and operate individual funds or kinds of funds. If they have the requisite authorisations for the relevant kinds of financial services (such as issuing interests in a managed investment scheme), they can proceed to establish an unregistered scheme that invests in any kind of asset.

Advising on and/or dealing in CCIV securities (Proposal B3)

13. The Committee agrees that there is no requirement for an AFSL holder with authorisations to provide financial product advice about and/or deal in securities to vary its AFSL in order to provide such financial services in respect of securities in a CCIV.
14. The Committee commends the efficient and pragmatic approach which ASIC is proposing to adopt for existing AFSL holders with authorisations to provide financial product advice about and/or deal in managed investment schemes to be able to “opt in” to have those authorisations extended to securities in CCIVs without needing to submit any proofs or pay an application fee.
15. The Committee assumes that, at a practical level:
 - (a) if a licensee has authorisations to provide advice about and/or deal in managed investment schemes for retail and wholesale clients, then the licensee can “opt in” to provide the same types of advice and dealing services with respect to securities in retail CCIVs and securities in wholesale CCIVs; and
 - (b) if a licensee has authorisations to provide advice about and/or deal in managed investment schemes for wholesale clients only, then the licensee can “opt in” to provide the same types of advice and dealing services with respect to securities in wholesale CCIVs only.
16. It would be useful for ASIC to clearly spell this out when contacting affected licensees and also specify the length of time for the opt-in period. To this end, the Committee would welcome a 12-month period.

Additional proofs for corporate directors (Proposals C1 and C2)

17. The Committee agrees with ASIC’s proposal to require a company seeking to be authorised to be a CCIV corporate director under its AFSL to provide C13 CCIV Operating Capacity Statement (Proposal C1) and the C13 CCIV Asset Statement

(Proposal C2) proofs with its application and to make corresponding updates to RG 3.

18. The Committee notes that this proposal is inter-related to new provisions to be inserted in to the *Corporations Regulations 2001* (Cth) relating to asset holding requirements (Part 8B.5) under the *Corporations and Other Legislation Amendment (Corporate Collective Investment Vehicle Framework) Regulations 2022* (Cth), which were made on 31 March 2022 (after the release date of CP 360), and are due to commence on 1 July 2022.

Organisational competence requirements for CCIVs – Updates to RG 105 (Proposals D1 to D5)

Proposal D1 – responsible manager requirements to demonstrate competence of a corporate director to operate and conduct the affairs of a CCIV

19. In principle, the Committee agrees with ASIC's proposed requirements for assessing competence. However, as the CCIV regime is brand new, initially there will be no responsible managers with knowledge and skills of operating the business and conducting the affairs of a CCIV. Therefore the Committee assumes that other knowledge and skills relating to registered schemes (in the case of retail CCIVs) or wholesale unregistered schemes (in the case of wholesale CCIVs) will be taken into account and treated as analogous to the requisite CCIV experience.
20. Ideally, the Committee would like to see some streamlining to enable existing responsible managers whom ASIC has previously assessed as competent for registered schemes or wholesale unregistered schemes to be automatically treated as competent for retail CCIVs and wholesale CCIVs, respectively.
21. The Committee considers that this would assist in a smoother, more efficient transition to the CCIV regime and enable it to be used earlier by licensees who currently have authorisations to operate registered and/or unregistered schemes.
22. It would also result in less delays for ASIC in granting CCIV authorisations to new or existing AFSL holders.

Proposal D2 – assessment of responsible managers' knowledge and skills

23. The Committee agrees that it is appropriate for ASIC to take into consideration qualifications and prior experience of responsible managers in:
 - (a) operating a registered scheme or retail CCIV (or similar overseas experience) – for the retail CCIV (or retail and wholesale CCIV) authorisation;
 - (b) operating a registered scheme, wholesale unregistered scheme, or retail or wholesale CCIV – for the wholesale only CCIV authorisation; and
 - (c) managing the same types of assets – for the CCIV assets.
24. As noted above, the Committee requests that ASIC seek to avoid unnecessarily reassessing responsible managers' qualifications and experience. It would be preferable if ASIC requested proofs from a licensee's existing responsible managers on an exceptions only basis (for example, if the licensee wishes to be authorised for retail CCIVs which invest in a particular kind of asset and that licensee is not currently

authorised to operate registered schemes that invest in that kind of asset, then it would be appropriate for ASIC to request evidence of responsible managers' experience in that asset type). Relevantly, adopting this approach would help reduce the associated costs.

25. Also, for existing AFSL holders seeking to vary their AFSL to include new authorisations (whether those authorisations are to operate a CCIV or any other new financial service), the Committee submits that ASIC should only request people proofs for the purposes of the fit and proper test (bankruptcy check, criminal history check and statement of personal information) for any new responsible managers that are to be appointed in connection with the variation. The fit and proper person declaration provided by the licensee will, of course, cover all existing and proposed new responsible managers.
26. The Committee is of the view that, unless there are particular concerns independently arising about a licensee, in assessing an AFSL variation application, ASIC should primarily focus on assessing the licensee's capacity to carry out the proposed new financial services, not re-examine its existing business. If ASIC approaches AFSL variation applications relating to CCIV related authorisations in this manner, it will reduce the time required to processing the applications and allow the CCIV regime to commence without unreasonable delay.

Proposal D3 – update RG 105 to reflect Proposals D1 and D2

27. The Committee agrees that ASIC regulatory guidance should be updated to reflect ASIC's current policy.

Responsible manager's competence to advise on and/or deal in CCIV securities (Proposals D4 and D5)

28. The Committee agrees with Proposals D4 (assessment of responsible managers' qualifications and experience) and D5 (updating RG 105 to reflect Proposal D4).
29. The Committee notes that, initially, responsible managers will not be able to demonstrate past experience relating to financial services provided with respect to retail or wholesale CCIVs. It may be at least three years before any responsible managers could meet some of the five options for experience specific to CCIVs.
30. If experience with respect to managed investment schemes is relevant to assessing competence for authorisations for CCIVs, then for future purposes ASIC should also consider whether, in assessing an application for an authorisation relating to advice and/or dealing relating to managed investment schemes:
 - (a) experience with respect to advice and/or dealing in retail CCIVs should be taken into account in assessing experience in providing advice and/or dealing in managed investment schemes for retail clients; and
 - (b) experience with respect to advice and/or dealing in wholesale CCIVs should be taken into account in assessing experience in providing advice and/or dealing in managed investment schemes for wholesale clients only.
31. If ASIC intends to adopt the above methodology then this should also be reflected in RG 105.

Compensation and insurance requirements for corporate directors – Updates to RG 126 (Proposals E1 to E3)

32. The Committee agrees with ASIC that responsible entities and corporate directors will perform functionally similar roles as operators of retail collective schemes and managers of retail client money.
33. The Committee anticipates that some licensed responsible entities will seek to vary their AFSL to become authorised to be a corporate director of a retail CCIV and, with this in mind, is of the view that there should therefore be a single, aggregated and consistent PI insurance requirement applicable across registered managed investment schemes and retail CCIVs, rather than two separate parallel requirements.
34. If a corporate director has insurance arrangements in place that satisfy its obligations as a responsible entity of registered schemes, then these compensation arrangements should also be able to simultaneously satisfy the requirements for retail CCIVs.
35. The Committee submits that the compensation requirements for registered schemes and retail CCIVs ought to be structure agnostic - a responsible entity of a registered scheme that seeks to establish retail CCIVs should be regulated in the same manner for compensation arrangements as if it were establishing another registered scheme. This recognises that, going forward, some licensees may choose to set up CCIVs in circumstances where they would previously have simply set up a further registered scheme.
36. The amount of cover required should therefore be for claims in the aggregate which are the lesser of:
 - (a) \$5 million; and
 - (b) the combined value of scheme property of all registered schemes and the value of CCIV assets of all retail CCIVs that the licensee operates.
37. The difference between the proposed ASIC approach and the Committee’s preferred approach are illustrated in the table below:

Licensee business	Required cover under ASIC approach	Required cover under Committee’s proposed approach
<i>Licensee A –</i> Operates two registered schemes with scheme property worth \$20 million	\$5 million	\$5 million

Licensee business	Required cover under ASIC approach	Required cover under Committee's proposed approach
<p><i>Licensee B –</i></p> <p>Operates a registered scheme with scheme property worth \$10 million</p> <p>Operates a retail CCIV with assets worth \$10 million</p>	<p>\$10 million</p> <p>(\$5 million for the registered scheme and \$5 million for the retail CCIV)</p>	<p>\$5 million</p>
<p><i>Licensee C –</i></p> <p>Operates two retail CCIVs with assets worth \$20 million</p>	<p>\$5 million</p>	<p>\$5 million</p>

In each of the above examples, the aggregate value across CCIV assets and scheme property is always \$20 million. However, the cover required is doubled where two types of structure (registered scheme and retail CCIV in the case of Licensee B) are used rather than when all investment vehicles are of the same kind (just registered schemes in the case of Licensee A or just retail CCIVs in the case of Licensee C). It is the Committee's view that this outcome is neither logical nor fair.

38. If ASIC does not adopt the Committee's suggested approach, we consider that this will be a deterrent to existing licensed responsible entities who might otherwise wish to establish and operate CCIVs as a corporate director.
39. Further, as a practical matter, the requisite PI insurance cover for retail CCIVs needs to be available in the market in order for licensees to be in a position to address the requirement. It is important that the insurance industry is aware of the upcoming regulatory changes so that policy offerings can be tailored appropriately. The Committee believes that affected licensees would welcome any educational assistance that ASIC can provide to insurers to facilitate the desired regulatory outcome (having appropriate insurance cover which satisfies ASIC's requirements made available to corporate directors of retail CCIVs).

Financial resource requirements for corporate directors – Updates to RG 166 (Proposal F1)

40. The Committee agrees with ASIC's proposal that a corporate director of a wholesale CCIV should only be required to meet the base level financial requirements.
41. As noted above:
 - (a) the Committee also agrees with ASIC that responsible entities of registered schemes and corporate directors of retail CCIVs perform functionally similar roles (as noted above); and
 - (b) the Committee anticipates that some existing licensed responsible entities may seek to become licensed to be the corporate director of a CCIV.

42. The Committee is of the view that ASIC should apply a single, consistent and structure agnostic net tangible assets (**NTA**) requirement which applies across registered schemes and retail CCIV sub-funds, rather than two separate NTA requirements.
43. The Committee submits that NTA requirements for licensees with authorisations to operate registered schemes as responsible entity and/or retail CCIVs as corporate director should be as follows:

How assets are held	NTA requirement
<p>A person other than the licensee holds all assets of the retail CCIV(s) / registered schemes(s) that the licensee operates, and that person holds at all times a minimum NTA of the greater of:</p> <ul style="list-style-type: none"> <input type="checkbox"/> \$10 million; or <input type="checkbox"/> 10% of their average revenue. <p>or</p> <p>All CCIV assets and scheme assets are special custody assets.</p>	<p>The licensee must hold at all times a minimum NTA of the greater of:</p> <ul style="list-style-type: none"> <input type="checkbox"/> \$150,000; <input type="checkbox"/> 0.5% of the average value of the CCIV assets of all retail CCIV(s) and all registered scheme(s) that the licensee operates, up to \$5 million NTA; or <input type="checkbox"/> 10% of average corporate director and responsible entity revenue
<p>All retail CCIV assets are “Tier \$500,000 class assets” (these assets are subject to concessional NTA requirements).</p>	<p>The licensee must hold at all times a minimum NTA of the greater of:</p> <ul style="list-style-type: none"> <input type="checkbox"/> \$500,000; <input type="checkbox"/> 0.5% of the average value of CCIV assets of all retail CCIV(s) and registered scheme(s) that the licensee operates, up to \$5 million NTA; or <input type="checkbox"/> 10% of average corporate director and responsible entity revenue.
<p>The retail CCIV or registered scheme assets are not all held by a person that meets the NTA requirements, nor are the assets all Tier \$500,000 class assets.</p> <p><i>Note:</i> ASIC has used this wording in CP 360:</p> <p>“No CCIV assets are held by a person that meets the NTA requirements, nor are the assets Tier \$500,000 class assets”</p>	<p>The licensee must at all times hold a minimum NTA of the greater of:</p> <ul style="list-style-type: none"> <input type="checkbox"/> \$10 million; or <input type="checkbox"/> 10% of average corporate director and responsible entity revenue.

44. Here is an illustrative example of the differences between ASIC’s proposed approach and the Committee’s proposed approach in different scenarios where the licensee has a total of \$200 million in assets under management and is holding some of those assets in its own name:

Licensee business	Required NTA under ASIC’s proposed approach	Required NTA under the Committee’s proposed approach
<i>Licensee A</i> Operates two registered schemes with scheme property worth \$200 million	\$10 million	\$10 million
<i>Licensee B</i> Operates a registered scheme with scheme property worth \$100 million Operates a retail CCIV with assets worth \$100 million	\$20 million (\$10 million for the registered scheme and \$10 million for the retail CCIV)	\$10 million
<i>Licensee C</i> Operates two retail CCIVs with assets worth \$200 million	\$10 million	\$10 million

45. It is unclear to the Committee why, where all three licensees have \$200 million in assets under management, the licensee that operates both registered scheme and retail CCIV vehicles needs to hold double the level of NTA as compared to those licensees with the same amount of assets under management which are only operating one type of investment vehicle.
46. The Committee submits that its proposal is fairer and more proportionate. It is less likely to deter existing licensed responsible entities from adopting a CCIV structure for new collective investment vehicles. It would also be consistent with ASIC’s existing approach in RG 166 which states, for example, in paragraph 166.6(b) that “If you are required to have assets to meet one requirement, you can also count those assets for another applicable requirement”.

Other comments

47. The Committee appreciates the transparency that ASIC has provided in announcing its two-phased approach to the CCIV regime.

48. The Committee would also welcome transparency from ASIC as to:
- (a) when it will be possible for ASIC to begin assessing applications for authorisations relating to CCIVs – in particular, whether it will be possible to submit any applications before the regime commences on 1 July 2022 (on the basis that ASIC could not be in a position to grant any such authorisations prior to 1 July 2022);
 - (b) how long applicants might reasonably expect to wait for ASIC to consider any new AFSL application or variation application with respect to CCIV related authorisations;
 - (c) whether applications which seek CCIV related authorisations will be afforded any priority as an interim measure; and
 - (d) whether there will be any transitional arrangements – for example, if applications are submitted to ASIC by a particular date, whether licensees may provide certain financial services relating to CCIVs under their analogous authorisations for managed investment schemes before obtaining the relevant AFSL authorisation.
49. The Committee would be pleased to discuss any aspect of this submission with you.
50. Please contact the Chair of the Committee, Pip Bell, at pbell@pmclegal-australia.com if you would like to do so.

Yours faithfully



Philip Argy
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Business Law Section