Law Council
OF AUSTRALIA

Business Law Section

24 September 2021

Market Conduct Division
Treasury
Langton Cres
Parkes ACT 2600

By email: CIVreform@treasury.gov.au

Dear Sir/Madam,

Consultation on Corporate Collective Investment Vehicles - Regulatory and Tax Frameworks

1. This submission relates to consultation by Treasury on exposure draft legislation and explanatory materials issued on 27 August 2021 with respect to the following draft Bills:
    a. *Treasury Laws Amendment (Corporate Collective Investment Vehicle) Bill 2021: Regulatory framework* (**Regulatory Framework Bill**); and
    b. *Treasury Laws Amendment (Corporate Collective Investment Vehicle) Bill 2021: (Tax treatment)* (**Tax Framework Bill**).

2. The content of the submission relating to the Regulatory Framework Bill has been prepared by the Financial Services Committee of the Business Law Section of the Law Council of Australia (**Financial Services Committee**) and the content relating to the Tax Framework Bill has been prepared by the Taxation Committee of the Business Law Section of the Law Council of Australia (**Taxation Committee**).

3. The Business Law Section thanks Treasury for the opportunity to comment on the Regulatory Framework Bill and the Tax Framework Bill, and also for taking the time to conduct a virtual meeting with members of the Financial Services Committee and the Taxation Committee.

Submissions on the Regulatory Framework Bill (prepared by the Financial Services Committee)

4. The Financial Services Committee acknowledges that the amendments to the *Corporations Act 2001* (Cth) (**Corporations Act**) required to implement the corporate collective investment vehicle (**CCIV**) regime are both significant and complex in nature. The Committee wishes to congratulate Treasury for producing comprehensive draft documents which adequately deal with a number of the challenges that this legislative proposal presents.

5. However, the Financial Services Committee is of the view that a number of the proposals in the Regulatory Framework Bill ought to be further refined in order to ensure that the CCIV regime achieves its intended purpose.

6. The Financial Services Committee is respectfully requesting further refinements to the Regulatory Framework Bill with a view to, as far as possible and where appropriate:

    a. aligning the regulatory treatment of CCIVs with the treatment of managed investment schemes under Chapter 5C and related provisions of the Corporations Act (the **MIS Regime**);
    b. treating a separate sub-fund of a CCIV consistently with a managed investment scheme under the MIS Regime;
    c. treating a wholesale sub-fund of a CCIV consistently with an unregistered managed investment scheme that is offered only to wholesale clients; and
    d. addressing other technical anomalies, some of which are drafting errors.

7. The table at **Annexure 1** sets out each of these matters in detail.

8. The Financial Services Committee also recommends that the effectiveness of the Regulatory Framework Bill be reviewed following the three year anniversary of its commencement date, and that the terms of reference for that review also cover whether anything in the MIS Regime ought to be amended (for example, if it would be preferable for the MIS Regime to be modified to more closely match the legislation specific to CCIVs).

Submissions on the Tax Framework Bill (prepared by the Taxation Committee)

9. The Taxation Committee also acknowledges the significant improvement to the proposed tax treatment of a CCIV.

10. The greater alignment with the tax treatment of an attribution managed investment trust (**AMIT**) is a significant improvement and we believe is likely to improve the potential take up the new regime.

11. The acceptance of look through taxation if the CCIV fails the widely held test is also a critical improvement. We believe that this outcome can be achieved through a simpler and more effective means than relying on the application of Division 6 concept.

12. The use of Division 6 concepts to a corporate form does not achieve an effective alignment to the default treatment which applies to an AMIT.

13. The Taxation Committee is of the view that a number of aspects of the tax treatment ought to be further refined in order to ensure that the CCIV regime achieves its intended purpose.

14. The Taxation Committee is respectfully requesting the following further refinements to the Tax Framework Bill:

    a. There are a number of amendments which should be made to the deeming rules within the tax legislation to ensure that the attribution regime can properly operate to a sub-fund of a CCIV.

    b. We believe the default tax rules which apply to a sub-fund of a CCIV in the event of the sub-fund ceasing to be widely held should be simplified. They should not rely on concepts within Division 6 but rather restrict some of the

concessional elements which may otherwise be available to an AMIT, such as the deemed capital gains tax status of a sub-fund.

c. If the default tax system is to be operated based on Division 6 concepts, there are a number of important changes which should be made to the rules to ensure they effectively achieve an appropriate outcome.

d. The rules which regulate the circumstances in which distributions may be made by a sub-fund of a CCIV should not be dependent upon dividend concepts.

e. Addressing other technical anomalies, some of which are drafting errors.

15. The table at **Annexure 2** sets out each of these matters in detail.

16. The success of the new regime is likely to be heavily dependent on the scope of the transitional relief which is afforded to schemes to move into the regime. We recognise this is beyond the scope of the first tranche of reform. We wish to emphasise that a clear indication of the support of transitional relief and its timely introduction will have a significant impact on the success of the regime.

17. The Taxation Committee strongly supports the recommendation for a periodic review of the tax treatment of the new regime to maximise take up of the new regime.

Conclusion and further contact

18. The Financial Services Committee would be pleased to discuss any aspect of this submission as it relates to the Regulatory Framework Bill. Please contact the Chair of the Financial Services Committee Pip Bell at pbell@pmclegal-australia.com, if you would like to do so.

19. The Taxation Committee would be pleased to discuss any aspect of this submission as it relates to the Tax Framework Bill. Please contact the Chair of the Taxation Committee Angela Lee at angela.lee@vicbar.com.au, if you would like to do so.

Yours faithfully

Greg Rodgers
Chair, Business Law Section

Annexure 1 – Regulatory Framework Bill submissions
Prepared by the Financial Services Committee, Business Law Section, Law Council of Australia

No	Bill Section	EM paragraph	Issue	Comment
a. Provisions that require further alignment with the MIS Regime				
1.1	1222Y	2.97	The name of a sub-fund can only be changed if members pass a special resolution or ASIC directs the name change.	This differs from the MIS Regime. Under reg 5C.1.02 of the *Corporations Regulations 2001* (Cth), the responsible entity (**RE**) lodges a notice with the Australian Securities and Investments Commission (**ASIC**) nominating the new name for the scheme and ASIC updates the record. The name of a scheme might be changed if, for example, there is a rebranding, the scheme's investment manager or RE changes its name or there is a change in investment manager or RE. In these situations the RE will seek to change the scheme name to ensure it remains aligned with the branding / investment manager / RE as applicable. As both managed investment schemes and sub-funds are passive investment vehicles, there should ideally be consistency on the process to change the name and it would be preferable if in both cases it was not necessary to call a meeting of members to vote on a non-controversial matter such as a name change, which has no impact whatsoever on the members' / shareholders' rights. Therefore we submit that sub-fund name change regulation should be aligned with the MIS Regime rather than the companies regime under the Corporations Act.
1.2	1223C	3.74	ASIC can direct changes to fund constitution	This power does not exist in the MIS Regime, and product issuers would be very concerned about the lack of certainty for their products if there was a risk that ASIC could intervene and effectively alter the terms of issue upon which product features and pricing have been developed. A scheme constitution sets the terms on which investors have subscribed, and those arrangements should not be able to be unilaterally altered at

No	Bill Section	EM paragraph	Issue	Comment
				the instigation of the corporate director (**CD**), the shareholders or the regulator. In our view the MIS Regime offers sufficient protection for members and the CCIV regime should therefore do no more than replicate it.
1.3	1223H(2)(a)	3.71	A retail CCIV constitution must specify a "period within which such a redemption must be satisfied while section 1231H (about when a sub-fund is liquid) applies to the sub-fund to which the share is referable"	There is a disconnect between the draft Explanatory Memorandum (**EM**) and the draft Bill. The EM says: "This provision must meet certain requirements – including that it specifies the period within which redemptions can be made (while the sub-fund is liquid), be fair and reasonable to the members of the sub-fund of the CCIV to which the share is refereable and be consistent with the provisions in Part 8B.4 regarding the redemption of shares." The EM is closer to the necessary flexibility afforded by Chapter 5C of the Corporations Act in relation to registered schemes, in referring to "can", but to be clear that the CD can offer funds where the nature of the assets means that a black-and-white redemption obligation is not appropriate, we submit that the provisions should reflect subsection 601GA(4). That provision in the MIS Regime leaves it to the scheme constitution to specify the parameters for redemption. Importantly, s601GA(4) begins with "**If** members are to have a right to withdraw from the scheme, the scheme's constitution must specify the right …" It is also important for the CD to be able to suspend redemptions from a sub-fund if a freeze or other dislocation in the market for sub-fund assets means that it is not possible to accurately price the shares for applications and redemptions. There should be a requirement for the constitution to make provision for redemption of redeemable shares, but it should be flexible so as to

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				adapt to the type of assets in the sub-fund, and allow the CD to fulfil its duties by managing the sub-fund in the best interests of members.
1.4	1224D	3.86	Consultation question 2: Paragraph 1224D(2)(f) currently requires a director of a retail CCIV to ensure that assets of a sub-fund of the CCIV are valued at regular intervals appropriate to the nature of the assets. Treasury is considering whether further requirements should be in place to ensure these valuations are independently reviewed or audited as an integrity measure. a. How would such a requirement be implemented in practice? b. Do any particular considerations need to be taken into account in settling these requirements?	We do not support the regulation of a retail CCIV going beyond the requirements imposed on a registered scheme. Therefore we don't support the proposed integrity measures. The existing regime for registered schemes provides adequate protection to investors. ASIC has provided guidance about valuations for registered scheme depending on the types of assets they hold. We submit that the ASIC guidance ought to be applied to sub-funds of retail CCIVs that hold the corresponding types of assets. This would maintain parity between registered schemes and CCIVs.
1.5	1224D(2)(a)	3.86	A duty is imposed on the director of a retail CCIV to ensure that the CCIV's constitution complies "with the requirements of this Act"	The corresponding MIS Regime provision is paragraph 601FC(1)(f) of the Corporations Act and the obligation is to ensure that the scheme constitution complies with sections 601GA and 601GB. The CD's duty should be limited to ensuring the constitution complies with specified provisions that actually impose specific requirements on

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				constitutions so that the extent of the duty is clear rather than ambiguous.
1.6	1224G	3.104	There is a requirement for at least half the directors of the CD to be external directors	The MIS Regime is different. If the RE does not have a majority of external directors, it must appoint a compliance committee. We have no reason to believe that REs which have a compliance committee are less effective in achieving compliance outcomes than those with a majority of external directors who do not have a compliance committee. For many issuers, it would be preferable to have the compliance committee option available to CCIVs as well as registered schemes. If this option is not available, existing REs with a compliance committee will need to restructure their board if they want to be a CD of a CCIV.
1.7	1224T and 1224U	3.148	Replacement of a CD requires a special resolution of members of a CCIV	This differs from the MIS Regime, and the treatment of CCIVs should be largely aligned with the MIS Regime, though not in every respect, for the reasons explained below. The two issues are mechanics and voting threshold. **Mechanics.** The current draft Bill only allows a change of CD at the level of whole CCIV, not at the individual sub-fund level. This is a departure from the MIS Regime because there is no specific provision for members of a sub-fund to vote for change of CD for just their sub-fund. Obviously this would involve not only a change of CD for that sub-fund, but also "moving" the sub-fund to another CCIV. This could be achieved by making it possible for a vote to select a new CD to also allow members of the sub-fund to choose a new CCIV to which their membership, and the assets referable to their sub-fund, would be "novated" in a similar way as currently proposed under the Bill for the whole CCIV. This ability to vote to move a sub-fund would be of particular significance where members of the sub-fund are unhappy with the CD and want to vote to remove it. Unless the Bill is amended, if members of one sub-fund want a change of CD, they will be unable to achieve it unless a sufficient majority of members of other sub-funds in

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				the same CCIV vote in favour of removing the CD. Members of registered schemes have the opportunity to changethe RE of just their scheme, so a change to this would align the regimes. **Threshold.** 20 years of experience since the introduction of the MIS Regime has revealed that the threshold of an extraordinary resolution to change the RE is both good and bad, depending on the circumstances. An extraordinary resolution requires a vote in favour of the change of RE by persons entitled to vote and holding at least 50% of the interests on issue held by members eligible to vote. This means that **where the RE wants to retire**, for example in favour of another company in their group for a restructure, the combined effect of section 253E excluding associates of the RE from voting, the practice of investment platforms not voting, and investor apathy makes the threshold of 50% of interests on issue held by all members eligible to vote (not of votes actually cast) impossible to achieve in many cases. The change to a special resolution threshold in the draft Bill would be welcome for these circumstances. Particularly in registered schemes with thousands of small investors who may not bother to vote, a threshold of 75% of those who do vote still gives appropriate consumer protection to allow people to object to a change, but makes the change realistic to achieve. The wasteful process of seeking ASIC relief for an internal restructure of the RE group to change the RE to a related body corporate, for example, could be avoided. However, the position is different where it is the **members who want to remove the RE**. It seems likely that the threshold for registered schemes was set at extraordinary resolution to prevent a lone competitor or activist with inappropriate motives from removing the RE and taking over management of schemes which the RE has spent considerable resources establishing, growing and managing. For these reasons, in a CCIV, the incumbent CD will have a legitimate commercial interest in not being too easily removed from office. Under Part 2G.4, which will apply to CCIVs, a member or members who own 5% of interests in the CCIV (or the sub-fund if the above change is made)

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				would be able to request a meeting to consider a resolution to remove the RE. If the threshold for removal is a special resolution, one member holding 5% of shares on issue who is a competitor of the incumbent CD could convene a meeting and, if few other members bothered to vote, carry a resolution to replace the CD with their own associated company. The incumbent CD and its associates would be unable to defend themselves from removal by also buying 5% of the units, because their votes would be excluded under the equivalent of section 253E. This would leave unlisted CCIV sub-funds highly vulnerable to "takeover" by a competitor, despite the fact that takeover laws are only intended to apply to listed CCIVs, where there is more publicity and transparency. It would make the CCIV regime unattractive for building a funds management business. Accordingly, we propose that subsection 1224T(1) should continue to refer to a special resolution, but that subsection 1224U(1) should be changed to refer to an extraordinary resolution as per section 601FL, and that each section should provide for the change at a sub-fund level and refer to a vote to choose a new CCIV along with the new CD. Moving both operator and members of a part of an entity has a parallel in the successor fund transfer provisions that apply to superannuation funds. If the winding up provisions for a CCIV's sub-fund would also allow an improperly motivated competitor or activist holding 5% of shares to terminate a sub-fund by a requisitioned meeting with a special resolution threshold in which the incumbent CD cannot vote, those provisions should similarly be amended to address the problem.
1.8	1227	3.199	A retail CCIV must have a compliance plan	Under the MIS Regime each registered scheme can have its own scheme compliance plan. Paragraph 3.205 of the Explanatory Memorandum states that the compliance plan "must be tailored to suit the nature, scale, complexity and assets of the CCIV". The sub-funds within a CCIV may not be

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				homogeneous. What is appropriate for one sub-fund within a CCIV may not be appropriate for other. One possible solution is that there is a compliance plan for the CCIV which has separate schedules for separate sub-funds. We would welcome ASIC providing guidance on this.
1.9	1228E	3.242	An agent of the CCIV or the CD is treated as a related party	This differs from the position under the related party definition applicable to registered schemes in section 228 as modified by Part 5C.7, and we do not understand the basis for the difference. It may be a 'left over' in the Bill from a prior version where there were concerns about services provided by agents of the depositary. It does not make sense to us why an independent third party custodian or administrator appointed by a CD to provide services to the CCIV which shares no common ownership with the CD or CCIV should be treated as a related party of the CD. In section 601LC of the Corporations Act, section 208 is modified so that approval of members is needed to give a benefit to an agent of the RE in certain circumstances. This does not make the agent a related party and section 228, as it applies to the RE of a registered scheme (which section 1228E is purporting to replace), does not purport to make the agent a related party of the RE.
1.10	1228L	3.250	ASIC must be notified of divisions of shares in the CCIV into classes and conversions of shares into different classes	There is no equivalent obligation in the MIS Regime. Unless there is a clear rationale for differential treatment of CCIVs, CCIVs and managed investment schemes should be subject to the same rules.
1.11	1231F(1)	4.32 – 4.34	Redemption must be in accordance with "terms of issue" (unclear) and potential penalty is unduly harsh.	It is unclear to us what is meant by the requirement for redemptions to be "on the terms on which shares are on issue".

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				We are concerned that a hefty maximum penalty of 5 years' imprisonment could apply where a mistake in the processing of a redemption (for example, price calculation error) was made. We would like to see more consistency with section 601KA of the Corporations Act, which requires the RE to allow a member to withdraw from a registered scheme "in accordance with the scheme's constitution". We note that this requirement does not apply to a wholesale unregistered scheme.
1.12	1231G	4.37	Where a retail CCIV sub-fund is liquid, shares must be redeemable for a price determined by reference to the net asset value of the sub-fund to which it is referable	This is more prescriptive than the regime for withdrawals from liquid schemes for registered schemes under the MIS Regime. To avoid unnecessary complexity, the retail CCIV regime should track the MIS Regime unless there is a compelling reason justifying a departure. We have no reason to believe that the MIS Regime is not working well. We also note that there are ASIC class orders relating to these matters which modify the operation of the Corporations Act to registered schemes.
1.13	1231S	4.92	Making an **"unauthorised reduction" in capital** has serious consequences	There are no corresponding provisions about unauthorised capital reductions in the MIS Regime. The essence of an open ended fund is that withdrawals are allowed. We question whether it makes sense to impose restrictions on capital reduction on a CCIV when it has an open ended fund structure and, by its nature, will have variable capital, particularly when the maximum penalty is a 5 year term of imprisonment. The MIS Regime seems more appropriate for a CCIV than the company regime in this respect.
1.14	1231T	4.97	Buy-back prohibition doesn't accommodate on market buy backs or internal market making	Listed registered schemes buy back their own units on market and cancel them, and exchange traded managed funds (**ETFs**) on the

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				AQUA and Chi-X undertake internal market-making to provide liquidity for investors. This should not be prohibited for a CCIV. ASIC has given relief to facilitate buy-backs by listed registered schemes and market making for ETFs. This should be replicated for listed CCIVs to ensure consistent treatment. We also consider that there should be greater flexibility allowed for wholesale CCIVs, as a wholesale unregistered scheme is not currently subject to Corporations Act regulation (the Corporations Act only regulates the activities of the trustee as the holder of an Australian financial services licence (**AFSL**), rather than the operation of the scheme).
1.15	1231Y	4.103	The members of a sub-fund must approve a cancellation of forfeited shares	Registered scheme constitutions ordinarily allow the RE to cancel forfeited interests in specified circumstances and this does not require member approval. For CCIVs the position should also be governed by the constitution so that there is parity of regulatory treatment. If partly paid shares are issued and a member fails to pay a call when due, the CD should not have to call a meeting of members of the sub-fund in order to cancel the shares. Rather than taking the approach of saying that Part 2J applies to CCIVs with modification, a more sensible approach would be to set out the provisions as they apply to CCIVs in full and use the MIS regime as a reference point rather than Part 2J, bearing in mind that sub-funds of CCIVs are passive investment vehicles like managed investment schemes.
1.16	1231Z	4.105 – 4.108	A CCIV is generally prohibited from acquiring	As above, it seems preferable for capital preservation rules not to apply to a CCIV. The particular concerns with this section include a requirement that a buy-back of shares should be a capital reduction authorised by law. The logic for this is the same as that provided in

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			shares (or units of shares) in itself. Restriction on directly acquiring own shares also contrary to market making and buy-backs, and holding forfeited shares pre sale	paragraph 4.109 of the Explanatory Memorandum (dealing with why the prohibition on financial assistance should not apply to a CCIV) – "a CCIV is not a trading company". There should, on the other hand, be a provision similar to section 601FG that provides the CD or CCIV can only acquire shares in the sub-fund for the same or better price than anyone else.
1.17	1233A(1)(c)		The reference to liabilities of a CCIV in the Corporations Act is to include contingent liabilities of the CCIV	Contingent liabilities of the CCIV should only be included in the CCIV's liabilities for the purpose of Part 8B.5, not for the purposes of the Corporations Act as a whole. The concept of "liabilities" is used in calculating share prices for applications and redemptions, and in that case should be determined according to accounting standards, which would not include contingent liabilities.
1.18	1233ZA, 1233ZC	6.89 – 6.94	A person other than the CCIV who holds money or property of the CCIV is taken to hold it on trust Assets of a sub-fund must be held separately from other property	We note that ASIC has modified the application of the law for registered schemes and unregistered scheme asset holders. Members of a retail CCIV should have the same degree of protection as members of a registered scheme and members of a wholesale CCIV should have the same degree of protection as members of a wholesale unregistered scheme. One important modification applies where assets located offshore are held by a custodian. There are a number of civil law jurisdictions that do not recognise trusts, so the requirement is impossible, and it is also difficult in some foreign markets to have custodians/subcustodians agree to hold on trust. ASIC's Class Orders (eg [CO 13/1410]) allow for this. A modification, or at least the facility to modify, this 'on trust' requirement is needed. We also note that there is no section 1233ZB and we are not sure why.
1.19	1244Q	9.33 – 9.39	The product disclosure statement (**PDS**) exemptions for retail CCIVs appear to be less extensive than those	We suggest that a more comprehensive analysis of PDS exemptions available to interests in a registered scheme is conducted and that all of the exemptions are replicated for shares in a sub-fund of a retail CCIV.

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			which are currently available for registered schemes We note that PDS exemptions for additional investments in the same sub-fund, continuous disclosure and secondary sales have not been provided	Examples of PDS exemptions which we consider ought to apply equally to shares of a sub-fund within a retail CCIV include: – subsection 1012D(2) - where the client already has all information that would need to be provided in the PDS (for subsequent applications by existing investors); - section 1013F – where the information that would need to be provided in the PDS is already available eg through continuous disclosure announcements; and As listing of a retail CCIV is now permitted, subsection 1012D(7) and section 1012DA should also be extended to a listed CCIV to align with the listed registered scheme regime.
1.20	1245D(3)	11.19	The whistleblowing policy of the CD must contain certain information relating to the CCIV (for example, how it will support whistleblowers)	A CCIV is not a trading entity. Under the MIS Regime, the scheme does not have its own whistleblowing policy, nor is there any whistleblowing policy specific to the scheme. We are not sure how any whistleblowing policy of a CCIV would be different from the CD's whistleblowing policy and question whether anything will be achieved by imposing these obligations.
1.21	1246B	12.2	ASIC is given certain powers with regard to CCIVs	ASIC is given the power to grant exemptions or modify the application of some of the Chapter 8B provisions. We would be interested in what analysis was done to ensure that ASIC has no less and no more power than it has to grant exemptions or make modifications under Chapter 5C of the Corporations Act and provisions relating to companies where it has such powers.

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				ASIC should not be able to grant any relief from the application of a Corporations Act provision to a CCIV or sub-fund if it does not have a corresponding power to grant relief from that provision for a scheme. Under section 601QA(4) of the Corporations Act, ASIC must publish notice of an exemption or declaration in the Gazette. We are not sure why this is not replicated in section 1246B.
1.22	-	-	Under the MIS Regime, it is possible for a fund to commence as an unregistered scheme and be offered only to wholesale clients. It is sometimes the case that after a period of time, the fund will then become registered with ASIC, regulated under Chapter 5C and made available to retail clients.	While wholesale CCIVs and retail CCIVs can convert from one to the other, the issue is that a sub-fund cannot. What if there is a wholesale CCIV with a number of sub-funds and the CD or investment manager decides that one of the sub-funds should then be offered to retail clients? The only option seems to be to set up a new retail sub-fund in a retail CCIV which might then invest its assets in the wholesale CCIV or mirror the investment portfolio of the wholesale CCIV. This is not efficient compared to the ease of the transition process from wholesale (unregistered scheme) to retail (registered scheme) under the MIS Regime. If the CD has a wholesale CCIV and a retail CCIV set up, there should be a mechanism in place for sub-funds to transition from the wholesale CCIV to the retail CCIV – and without needing to hold a meeting of members to obtain approval. Without these changes, there is a disconnect between the MIS Regime and the CCIV regimes and the product flexibility of sub-funds is constrained.

No	Bill Section	EM paragraph	Issue	Comment
b. Provisions that require amendment to apply appropriately to sub-funds				
2.1	1223D(2)(a)	3.65	A special resolution of the members of a retail CCIV is required to modify the constitution.	If there is a part of the constitution that is only relevant to one sub-fund of a retail CCIV, then the amendment should not require the approval of members of the retail CCIV as a whole. Only the members of the sub-fund who are affected by the amendment should be eligible to vote on it. We recommend amending this provision to align it better with section 601GC of the Corporations Act so that members of a sub-fund are treated like members of a registered scheme.
2.2	1224D	3.86	Consultation question 1. c: The draft provisions generally set out duties in respect of the 'members of the CCIV' as a whole and not the members of each sub-fund of the CCIV. Should any additional duties be set out in respect of members of each sub-fund of the CCIV?	A sub-fund should, as far as possible, be treated like a registered scheme. The duties should therefore apply at the sub-fund level rather than at the CCIV level because the interests of members of the different sub-funds will not always be the same. The RE of a registered scheme only has to consider the best interests of members of that scheme (not members of other schemes of which it is RE) when it makes decisions impacting that scheme. Therefore in our view it would be more appropriate for the duties to apply at the sub-fund level rather than the CCIV level.
2.3	1225(1)(c)	3.175	A duty is imposed on the CD of a CCIV to act in the best interests of members of the CCIV	It would be more appropriate for the duty to require the CD to act in the best interests of the members of each sub-fund. This would better align the CCIV regime with the MIS Regime. The sub-funds of a CCIV are separate and made up of different bodies of investors, which means the best interests of different sub-funds are not necessarily aligned. Therefore the duty should apply separately to

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				each sub-fund, reflecting that in reality decisions are made by the CD on a sub-fund by sub-fund basis.
2.4	1229H	3.271	A bespoke rule applies for determining how to calculate the value of a person's shares, for the purposes of determining that person's voting power at a meeting of the CCIV or of the sub-fund.	Where a vote on a resolution concerns the whole CCIV, cross-invested shares (shares held by one sub-fund in another sub-fund) should be disregarded to avoid double counting.
2.5	1232F(1)	5.26	Section 302 does not apply to a CCIV that is a disclosing entity except as set out in section 1232F.	It appears that, conceptually, disclosing entity status should apply at the sub-fund rather than the CCIV level. Under the MIS Regime, a registered scheme is treated as a disclosing entity if interests in the scheme are ED securities, so it should be the sub-fund of the CCIV and not the CCIV which is treated as a disclosing entity (based upon whether shares in the sub-fund are ED securities). A CCIV can have multiple sub-funds and shares in some sub-funds might be ED securities while shares in others are not. Therefore the "disclosing entity" status should attach to the sub-fund rather than the CCIV to avoid contradictory outcomes.
2.6	1244N	9.26	Part 7.9 does not (with limited exceptions) apply to securities, but it applies to securities in a CCIV It should be clear that a share in a sub-fund is not an interest in a managed investment scheme	The express application of the PDS regime under this section suggests that without this provision, the shares in a CCIV sub-fund would be considered to be securities for which the disclosure would otherwise be regulated under Chapter 6D. However this is not clearly stated. A share in a company is, in concept, an interest (issued by the company) in the capital of the company[1]. An interest in a managed investment scheme is an interest (issued by a company, the RE or trustee) in a pool of assets held by the RE or trustee for the investors. It is arguable that each sub-fund is a pool of assets held for the investors, and that the interest issued is not in the overarching capital of the company but rather in that pool. Unless a share in a CCIV falls squarely into the exemption in the definition of managed investment scheme for a body corporate, it will be

[1] Section 761A defines a security to include a share IN a body, including a body corporate (not a share issued by a body corporate).

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				an interest in a managed investment scheme as well as a share, and a provision expressly disapplying the MIS Regime would be needed.
2.7	1244N	-	PDS should be prepared for an offer of shares in a sub-fund, not the CCIV as a whole	It should be made clear that a PDS does not need to include information about all the sub-funds in a CCIV, just the relevant class of shares referable to the sub-fund.
2.8	-	-	A contract requires two separate parties and a single entity therefore cannot enter into a contract with itself.	A CCIV needs to be given statutory authority to contract with itself, especially for cross investment (where it invests the assets of one sub-fund into another sub-fund within the CCIV), or where one sub-fund wants to sell an asset to another, or give consideration for a sub-fund merger.
c. Provisions that require amendment to apply appropriately to wholesale CCIVs				
3.1	1224D	3.86	Consultation question 1. a: Are the duties broadly equivalent to fiduciary duties owed by the trustee of an unregistered MIS?	We submit that the duties to act in the best interests of the members and the duties to treat members of a sub-fund equally for a wholesale CCIV go beyond the duties of the trustee of a wholesale unregistered scheme. Although, for example, the duty of loyalty to beneficiaries in equity has some parallel in the statutory best interests duty, and the duty of impartiality has a degree of correspondence with the duty to treat members of a scheme equally, they are not identical in scope. Importantly, subect to an "irreducible core" of trustee obligations (primarily to hold trust assets for the beneficiaries), trustee duties at law can be attenuated by the terms of the trust instrument. Examples of this include a trustee's rights to be paid fees and to be in certain positions of conflict such as to act as trustee of other trusts. The duties that would be appropriate to impose on the CD of a wholesale CCIV are probably limited to complying with the constitution and acting honestly in dealing with sub-fund property.

No	Bill Section	EM paragraph	Issue	Comment
				In a wholesale fund context where terms are negotiated with large investors, it will for example actually be very important for the fund's operator (whether the structure is a CCIV or a managed investment scheme) to be able to treat them differently according to their size and bargaining power.
3.2	1224D	3.86	Consultation question 1. b: Should any of the duties that are only owed by the corporate director of a retail CCIV in subsection 1224D(2), as discussed at paragraph 3.86, also apply to the corporate director of a wholesale CCIV?	No. The CD of a wholesale CCIV should as far as possible be in the same position as the trustee of an unregistered scheme offered only to wholesale clients.
3.3	1224T	3.140 – 3.147		This section covers all CCIVs – wholesale as well as retail. This is a departure from the MIS Regime, where wholesale unregistered schemes are not subject to regulation when it comes to changing the trustee and the constitution governs the process. Section 1224T should allow for retirement and replacement of the CD of a wholesale CCIV either on a period of notice to members, or as provided in the constitution.
3.4	1229G	3.269	If an associate of a CCIV (including the CD), or an associate of the CD has an interest in the resolution other than in their capacity as a member of the CCIV, they are not entitled to vote at either a meeting of the members of the CCIV or a sub-fund of the CCIV.	This provision should only apply to retail CCIVs. In the context of a wholesale CCIV, whether the CD and its associates are to have a right to vote any shares they may hold is a matter for commercial negotiation.

No	Bill Section	EM paragraph	Issue	Comment
3.5	1232 1232V	5.18	Wholesale CCIVs are subject to financial reporting rules The CD of a wholesale CCIV, and its natural person directors, are liable to the extent that they fail to take all reasonable steps to comply with Part 2M.2 of the Act, as modified by Division 4 of Part 8B.4.	Currently unregistered wholesale schemes are not subject to equivalent obligations.
3.6	1244K	9.46	Part 7.7 does not apply where the financial service is the CD operating the CCIV	Technically only the operation of a retail CCIV needs to be exempted, because Part 7.7 of the Corporations Act is applicable only to providing financial services to retail clients and by definition there will be no retail clients in a wholesale CCIV. So “CCIV” could be changed to “retail CCIV”.
3.7	This could be added as 1244EA or in Schedule 2 as an amendment of section 761G		Regarding cross investment (and more generally) a section is needed that provides that a CCIV is always a wholesale client for the purposes of section 761G	When a managed investment scheme makes an investment, the RE or trustee is the investor and as they hold an AFSL, they are a wholesale client. A CCIV has a licensed CD, so it should have wholesale client status in the same way as does a managed investment scheme with a licensed RE. This will be important for cross investments in start-up wholesale structures that have not yet accumulated the minimum $10 million in net assets to qualify as wholesale under that test, and where any CCIV invests in an external fund that only admits wholesale client investors.

No	Bill Section	EM paragraph	Issue	Comment
d. Other provisions to which technical amendments would be desirable				
4.1		1.78	Typographical error: "If a CCIV is a disclosing entity (listed or otherwise), then it must comply with the continuous disclosure requirements in Chapter 6CA of the Act in a manner consistent with a registered schemes that is a disclosing entity."	Change "registered schemes" to "registered scheme"
4.2		2.18	Typographical error: "However, other CCIVs (being retail CCIVs with more than on sub-fund and wholesale CCIVs) are prohibited from doing so."	Change "on" to "one"
4.3		2.57	Typographic error: "This difference reflects the fact that only corporate directors and related parties are carved out from the special protections that apply when a registered scheme is an Australian passport funds in sections 1216A and 1216C of the Act."	Change "funds" to "fund"

No	Bill Section	EM paragraph	Issue	Comment
4.4		2.63	Typographical error: "A wholesale CCIV that fails to notify that is a retail CCIV within two business days of meeting the retail CCIV test commits a strict liability offence punishable by a fine of up to 20 penalty units."	Should say: "A wholesale CCIV that fails to notify that it is a retail CCIV within two business days …"
4.5		2.67	Grammatical error: "Nevertheless, a CCIV must not notify ASIC that they are a wholesale CCIV if they meet the retail CCIV test."	Should say: ""Nevertheless, a CCIV must not notify ASIC that it is a wholesale CCIV if it meets the retail CCIV test."
4.6	1222S	2.82	Notifying ASIC who members are	As part of the registration process, the CCIV must notify ASIC of the name and address of each person who consents to become a member of a sub-fund. This equates with the company registration process. However, trading companies are required to notify ASIC of certain changes to its shareholders, so it makes sense to have this requirement for that type of company. If a CCIV is not required to notify ASIC of every change in the member register of every sub-fund, then it is not clear what purpose the proposed requirement in this section would serve.
4.7	1224D	3.85	Breach of any CD CCIV duty is a civil penalty provision	Any breach of a retail CCIV compliance plan will attract a civil penalty, and this will mean that it is captured as an automatic "significant breach" that must be reported to ASIC. This has been picked up as an unintended consequence of the breach reporting regime under Part 7.6 of the Corporations Act (which commences on 1 October). We understand some changes may be made once the legislation is amended to allow modification of paragraphs as opposed to whole sections by Regulation, and if they are

No	Bill Section	EM paragraph	Issue	Comment
				made, at the time the CCIV regime comes into effect, the CD's position should be the same as the RE of a registered scheme.
4.8	1224J	3.118	The Explanatory Memorandum states: "The corporate director has the power to exercise all the powers of the CCIV except those powers that the Act or the CCIV's constitution requires the CCIV to exercise in a general meeting. One example of a power that can only be exercised in a general meeting is amending the constitution."	It is technically incorrect to say that amending the constitution is a power that can only be exercised in a general meeting. This is because under section 1223D(2), the CD of a CCIV may amend the constitution without approval of a special resolution of the members if it reasonably believes that the amendment will not adversely affect members' rights (this is mentioned in paragraph 3.65 of the Explanatory Memorandum). It would be preferable for there to be internal consistency both within the Explanatory Memorandum and also between the Explanatory Memorandum and the legislation.
4.9	1227K	3.231	The time within which ASIC must be notified of a change in the auditor of the compliance plan is 7 days.	Under the MIS Regime, section 601HI requires the notice to be given to ASIC "as soon as practicable". In the absence of a clear rationale for the inconsistency, we submit that the time for notifying ASIC should be the same for both retail CCIVs and registered schemes. Financial service providers who are REs of registered schemes and CDs of retail CCIVs should not be burdened with unnecessary complexity in addition to their substantive compliance obligations.

No	Bill Section	EM paragraph	Issue	Comment
4.10	1228 – 1228E	3.233 – 3.244	Nature of drafting – unnecessary complexity should be avoided	For both registered schemes and retail CCIVs, ideally we would like to improve the clarity of the related party provisions. Rather than referring to Chapter 2E provisions and describing how they apply apply differently in the CCIV context, it would be preferable to have standalone sections which set out the full set of obligations in one place rather than having to cross-refer between two separate chapters of the Corporations Act to ascertain what the actual obligations are. In an ideal world we would also like to see a similar approach taken in the current Chapter 5C provisions, which are less clear about the application of Chapter 2E in a registered scheme context than these retail CCIV provisions.
4.11	1229A – 1229H	3.261	The rules for meetings of registered schemes apply to CCIV meetings and sub-fund meetings as if modified in certain ways	From a drafting perspective, it would be preferable to spell out all the rules in one place to avoid unnecessary complexity rather than describe how Chapter 2G provisions apply differently to CCIVs and sub-funds. We also note that these rules apply to all CCIVs / sub-funds, whereas only meetings of members of registered schemes are regulated by the Corporations Act. Imposing these requirements on a wholesale CCIV seems unnecessarily prescriptive. Wholesale CCIVs should be subject to a level of oversight which is not dissimimlar to wholesale unregistered schemes. Another thing to note is that these Corporations Act provisions have recently been temporarily amended to allow for virtual meetings, and may be permanently amended by March 2022. It is important to ensure that when the CCIV provisions come into force, they are aligned with the then current provisions governingn companies and registered schemes as applicable.

No	Bill Section	EM paragraph	Issue	Comment
4.12	1232 – 1232W		There is a long list of how the provisions of Chapter 2M are modified in their application to CCIVs and sub-funds	It would be better to have all the provisions in one place without the need to cross-refer between different Chapters. For example, section 1232H says: "Subject to the modifications set out in this section, Division 3 of Part 2M.3 applies in relation to the sub-fund, and in relation to the following documents relating to a sub-fund of the retail CCIV: (a) a financial report prepared under subsection 1232D(1); (b) a financial report prepared under paragraph 302(a) as applied by section 1232F; as if the sub-fund were the CCIV." This degree of complexity should be avoided. It would be preferable to disapply Chapter 2M and spell out exactly what the requirements are for sub-funds. That way a CD could read it once with a degree of confidence that they understand it.
4.13	Part 8B.6	Chapter 7	There is a lengthy explanation of how Chapter 5 applies to sub-funds of CCIVs	As noted in points already made, this approach adds unnecessary complexity and it may be preferable to set out in full the tailored regime as it applies to sub-funds. It could either be done by disapplying Chapter 5 and setting out the provisions within Chapter 8B, or there could be a schedule setting out what Chapter 5 looks like in the context of a sub-fund (with the modifications showing within the Chapter 5 provisions). Given that the Australian Law Reform Commission has been tasked with simplifying the Corporations Act and financial services legislation, it seems counterintuitive to be introducing legislation presented in a way

No	Bill Section	EM paragraph	Issue	Comment
				that is only going to make create more work for the Commission at a time when it is clear that the overall direction in which legislation should be moving is towards simplification. However, if the provisions are to remain, we suggest a further clarification of the translational rules in sections 1236B (arrangements and reconstructions), 1237E (receivers and other controllers), 1238B (winding up provisions),1239A (recovery provisions including insolvent trading), 1240 (external administration offences) and 1241 (miscellaneous). Each set of rules is similar but not identical. For example, in some cases director includes a director of the CCIV's CD. See section 1239A. These rules contain 2 very important specific provisions: **a.** A provision requiring that when the rule requires reference to a sub-fund, it may need to be taken as a reference to the CCIV because the reference requires 'the capacity and powers of a company' tracking the language in section 124. This is a very neat way of gap filling. The reference to 'powers' is sufficiently wide to capture both a head of power as well as the exercise of power. So much is clear from the examples in section 124(1). See also Bill section 1223. **b.** If a reference is made to company, then it is to be confined as far as possible to the CCIV and the relevant sub-fund. The rules appear to work but may result in differing 'translations,' depending on how one applies the rules but that said there may be no substantive differences. The Bill and the EM cite different applications of the translation rules in relation to Corporations Act section 471B as follows:

No	Bill Section	EM paragraph	Issue	Comment
				EM (page 172): *"While a **sub-fund** is being wound up in insolvency or by the Court, or a provisional liquidator of a **sub-fund** is acting, a person cannot proceed or begin with:* *(a) A proceeding against the company"* Bill, note to subsection 1238B(6): *While a **CCIV** is being wound up in insolvency or by the Court or a provisional liquidator of a **sub-fund*** (common to both) *is acting, a person cannot proceed or begin with:* *(a) A proceeding against the **CCIV**[2] or in relation to the sub-fund* To address this issue, it may be a useful direction to insert a rule stating that where a reference to CCIV is substituted it shall be made consistently through the section where the context so requires together with any minor consequential amendments. As seen below a similar issue arises in relation to insolvent trading and the unfair preference rules.
4.14	-	8.6	Typographical error: Reference is made to the "Takeover Panel" in the Explanatory Memorandum	The name of the body is the "Takeovers Panel" and this should be corrected.
4.15	Part 8B.7 Division 1	8.11 – 8.22	Statements of how provisions in Chapters 6 to 6CA apply as if modified	All the provisions should be located in one place rather than separate chapters.

[2] This is our translation because it is odd to refer to a CCIV in one place and to the company in another even though a CCIV is a company. In both cases, and applying the second translational rule referred to above, the reference to CCIV should be read 'in relation to the sub-fund' or words to that effect. The Bill also generally uses the term CCIV when referring specifically to that type of company

No	Bill Section	EM paragraph	Issue	Comment
				In this instance it might make sense to modify the provisions of Chapters 6 to 6CA to include a relatively small number of amendments dealing with the altered application for CCIVs.
4.16	1243D	8.24	Describes how paragraph 675(2)(c) applies to CCIVs	In this case we consider it would be simpler to just state this in section 675 as section 675 will contain the operative provisions for CCIV disclosure.
4.17	1243E	8.26	Subject to subsection 1243F(6), in Chapter 6D "securities" does not include a security in a CCIV	We consider that it would be preferable to express this in Chapter 6D to say that only subsections 700(2), (3) and (4) and sections 702, 703 and 703A are applicable to CCIV securities This would be consistent with the current approach taken in Part 7.9 of the Corporations Act, which states in section 1010A that only specified provisions of Part 7.9 are applicable to securities.
4.18	Part 8B.7, Division 4	9.14 – 9.25	Modifications are made to Chapter 7	It would be more efficient and easier to comprehend the legislation if amendments were made to the operative provisions of Chapter 7. For example, section 1244B says that subsection 911A(1) does not apply to a CCIV. It would make more sense to amend subsection 911A(2) (which lists AFSL exemptions) to state that a CCIV is exempt from the requirement to hold an AFSL. Another example is section 1244E which relates to section 766E. It would make more sense to amend section 766E so that all of the exemptions from providing a custodial or depository service are all in the same place. These examples are not exhaustive.

No	Bill Section	EM paragraph	Issue	Comment
4.19	1244F	9.21	Typographical error: "For example, provisions that exempt an RSE licensee from certain AFSL obligations unless the RSE licensee is also a responsible entity of a registered scheme are replicated for corporate directors. Additionally, the breach reporting requirements in the Act apply to the corporate director of a CCIV (as the holder of the AFSL) in the same manner as they would apply to the responsibility entity of a registered scheme."	Correction should be made so that "responsibility entity" is "responsible entity"
4.20	1224M	9.52	The hawking provisions are modified to treat CCIVs in the same way as MIS.	We note that amendments to the hawking provisions are coming into force in October 2021. The CCIV provisions should take account of the law in force as at the time the CCIV provisions commence. We believe that it would be clearer to amend the actual hawking provisions to include the application to CCIVs.
4.21	-	-	Drafting comment	We are not sure why there is no section 1244O Should the provisions be renumbered?

No	Bill Section	EM paragraph	Issue	Comment
4.22	Part 8B.8	Chapter 11	There are descriptions of how parts of other legislation would apply to a CCIV.	It would be more efficient and easier to comprehend the legislation if amendments were made to the operative provisions, which the CD inevitably will need to look at in the context of the CCIV.
4.23	N/A		Drafting comment	We are not sure why there is no section 1245E Should the provisions be renumbered?

Annexure 2
Prepared by the Taxation Committee, Business Law Section, Law Council of Australia

Tax Framework Bill Provision	Concern	Recommendation
Subsection 195-120 - Deeming rule for a beneficiary's fixed entitlement to income and capital of the CCIV sub-fund trust **Subsection 195-125 -** Deeming rule for when a beneficiary is presently entitled to the income of the Division 6 CCIV sub-fund trust	**Concept of dividend** It is not appropriate to include a concept of "dividends" as the relevant basis for dealing with an entitlement to the income of the fund. Corporate concepts should not be introduced to Division 6 of the *Income Tax Assessment Act 1936* (Cth) (**ITAA36**) because this raises potential ambiguity as to whether an amount must be *paid from profits* in order for it to constitute a dividend which adds unnecessary complexity. The key to an AMIT is its ability to make distributions of amounts whether from capital or income. As sub-funds are to be assessed like AMITs, sub-funds are likely to use the aggregate of the tax component of the relevant income of the sub-fund as a benchmark for periodic distribution. The introduction of differential treatment between capital and income raises the question as to whether, in order for dividends to be paid, they must be paid from the profits of the sub-fund. The suggestion that the concept of a dividend implies that it must be sourced from profits was examined in detail when the proposed revisions to section 254T were to be undertaken. The view of Senior Counsel to the Australian Taxation Office (**ATO**), who provided an advice which was published by the ATO,	We make the following recommendations in relation to subsections 195-120 and 195-125: ▪ The specific allocation mechanism to create fixed income and capital entitlements is unnecessary and should be removed. Instead, the proposed sections dealing with fixed entitlements should simply deem that there are fixed entitlements to income and capital to be determined by reference to the constitution. ▪ The deemed present entitlement concept, if retained, should only operate for periods when the sub-fund is assessed under Division 6.

Tax Framework Bill Provision	Concern	Recommendation
	was that the concept of dividend imputed that it was sourced from the profits of the company. **Creation of clearly defined rights to income and capital** A critical aspect of the attribution regime is that there are clearly defined rights to income and capital in the relevant constitution. This ensures that there is a reasonable attribution of each of the tax components to the members of the sub-fund. The terms of the constitution should determine the basis upon which: ▪ the shares of the sub-fund may be issued or redeemed; and ▪ the distributions of capital income of the sub-fund may be made to a member. There is no standard basis upon which unit prices and income entitlements are determined for sub-funds. Therefore, the basis on which these entitlements exist will vary significantly between sub-funds. The prescriptive manner in which the entitlements are expressed to apply in proposed subsections 195-120 and 195-125 are not necessarily consistent with the basis upon which these entitlements would exist under the relevant constitutions. It is not appropriate to create a specific form of deeming which does not relate to the entitlement under the constitution.	

Tax Framework Bill Provision	Concern	Recommendation
	Our concern if this provision of the Tax Framework Bill is retained is that it will undermine the basis upon which a sub-fund would otherwise allocate income and capital between members.	
Removal of the Division 6 default position where a sub-fund does not meet the AMIT requirements	The default position for a CCIV or relevant sub-fund should not automatically go to the general tax framework in Division 6 ITAA36. Instead, it should depend on the nature of the failure.	We make the following recommendations in relation to the default position for CCIVs and sub-funds:
	Trading activity If the relevant default is associated with the conduct of a trading activity, then it is appropriate for the CCIV or relevant sub-fund to be assessed under the provisions of Division 6C ITAA36. This maintains a consistent outcome with the same failure by an AMIT.	▪ If the relevant default is associated with the conduct of a trading activity, then the CCIV or sub-fund should be assessed under Division 6C ITAA36.
	Widely held requirement If the relevant default is associated with a failure to meet the widely held requirement, then the policy outcome should be to provide for a continued look through tax outcome. This could be achieved by either: ▪ Division 6 ITAA36 deeming; or ▪ applying the differential penalty outcome under the AMIT regime.	▪ If the relevant default is associated with a failure to meet the widely held requirement then the differential penalty outcome under the AMIT regime should be applied which will allow for consistent attribution pass through treatment.

Tax Framework Bill Provision	Concern	Recommendation
	We believe it is significantly simpler to adopt the second model. However, we discuss both in turn below. <u>Division 6 deeming</u> The application of Division 6 on a deeming basis to the CCIV or relevant sub-fund would, in our view, achieve the outcome. However, it would have some significant disadvantages: ▪ it could adversely affect the marketability of the CCIV regime, particularly overseas; ▪ it is more complex to enact; ▪ it requires unnecessary complication in the preparation of the constitution in order to deal with the default tax outcome; and ▪ it may cause problems with the application of tax treaties. <u>Differential penalty outcome</u> The application of a differential penalty outcome under the AMIT regime will achieve a consistent attribution pass through treatment. We believe this should be relatively easy to achieve under the existing regime as follows: ▪ **Gateway to AMIT rules:** the CCIV or relevant sub-fund being treated as an AMIT derives from section 276-10(1) of the *Income Tax Assessment Act 1997* (Cth) (**ITAA97**). It is through the recognition of the CCIV or relevant sub-	

Tax Framework Bill Provision	Concern	Recommendation
	fund as an AMIT or equivalent body. This could be achieved without the requirement for a CCIV or sub-fund to meet the widely held test to obtain the consequent look through tax treatment. This would ensure that there is a consistent and appropriate treatment for members even when the widely held test is not met. ▪ **Gateway to CGT concessions / reduced withholding tax rates:** to retain parity treatment with AMITs that fail the widely held requirements, this would mean: - the removal of the concessional deemed capital gains tax status for CCIVs; and - the removal of concessional AMIT withholding rates. These could be achieved through the gateway provision which applies to the concessional deemed capital gains tax status in section 275-10 ITAA97. These provisions could include an additional requirement of the equivalent widely held provisions which currently exist for AMITs to be able to take advantage of the concessional capital gains status. In suggesting this approach, we are not seeking to alter the tax treatment which would apply to an existing or new trust which failed to satisfy the widely held requirements in order to be an AMIT. While we consider there are good	

Tax Framework Bill Provision	Concern	Recommendation
	policy reasons to have the same treatment, we recognise that it may be beyond the scope of the current review.	
Issues to be considered if the Division 6 default position is retained	If the Division 6 ITAA36 default position is to be applied should a sub-fund fail to meet the AMIT requirements, a number of complex areas in relation to the application of Division 6 to CCIVs would need to be addressed.	We make the following recommendations if the default position is retained:
	Present entitlement – Dividends should not be limited to those paid within the income year Proposed subsection 195-125 indicates that: *"A *beneficiary of a *CCIV sub-fund trust is taken to be presently entitled to a share of particular income of the trust estate. That share consists of so much of each *dividend (if any) that the *CCIV has paid to the beneficiary as represents any of that income."* Paragraph 1.83 of the Exposure Draft Explanatory Materials (**EM**) notes in relation to subsection 195-125: *"If there is income in the CCIV sub-fund trust in an income year, and a legal form dividend is paid to a member before or at year end out of that income [year], then under subsection 195-125(1) and Division 6, the beneficiary will be deemed to be presently entitled to a share of income of the trust in relation to that income year" (emphasis added).* The EM sets out a requirement for when dividends must be paid in order to be	▪ A specific addition should be made to subsection 195-125 to allow for the creation of a present entitlement to income for a particular period if the relevant income is distributed within a prescribed period following the end of the income year. The time for this payment should be equivalent to the existing time in relation to which an AMIT annual statement needs to be made.

Tax Framework Bill Provision	Concern	Recommendation
	considered for the application of present entitlement – we note this is not reflected in the proposed subsection 195-125, so there is no reference to dividends being required to have been paid within the relevant income year in considering this application. The limitation for a present entitlement to arise only when a dividend is paid effectively undermines the aim of creating flow through tax treatment. It will not be practical for a sub-fund to make a distribution of all income for a relevant year of income *prior to the end of the year.* It is usual for managed funds to determine the final distribution at year end *and then pay out this amount after year end.* However, this amount would still be considered as part of the trust's income for the income year that members may be presently entitled to. Section 97 of ITAA36 does not confine consideration of present entitlement to income arising within the relevant income year. The restriction would make the position set out in the EM at paragraph 1.84 that *"later year distributions of trust income from a CCIV sub-fund trust would be taken for trust purposes to be distributions of capital where sections 99 or 99A of Part III of the ITAA 1936 have applied because no beneficiary had been presently entitled to the income",* a particularly onerous outcome. If considered necessary, a specific addition should be made to the section to provide that dividends paid after year end will be considered in determining present entitlements	

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	to the extent that they reflect income of the previous income year.	
	Ability to create specific entitlements to particular classes of income Under the existing rules, the determination of the basis upon which a beneficiary may be assessed depends not only on whether a present entitlement is created, but also, in some cases, on whether a specific entitlement to the relevant income has been created. This is critical to ensure that the relevant streaming provisions which were introduced following the High Court decision in *Federal Commissioner of Taxation v Bamford* (2010) 240 CLR 481 are effective.	▪ It is critical that a sub-fund be able to create a specific entitlement to either franked dividends or capital gains for the purposes of applying Division 6 in a default situation.
	Retention of character of capital gains and income by a sub-fund The tax treatment of amounts derived by a trust depends upon the retention of the status of those amounts when distributed to beneficiaries (see the High Court decision in *Charles v Federal Commissioner of Taxation* (1954) 90 CLR 598). The retention of character is an essential element of an actual trust relationship existing. The deeming of certain characteristics for the application of the tax rules will not of itself create this essential character and enable the amounts to retain their character when derived	▪ The legislation should confirm that in applying Division 6 to a sub-fund, the tax treatment of amounts derived by the sub-fund are able to retain their character when amounts are distributed to beneficiaries.

Tax Framework Bill Provision	Concern	Recommendation
	by a beneficiary. It is therefore critical that there be confirmation that in applying Division 6 in relation to a member of a sub-fund in a CCIV, the relevant amounts retain their character. This is particularly important in relation to the treatment of characters of income which are liable to withholding tax. It is important that the character retention exists in order for the appropriate withholding tax regime to apply in a default circumstance.	
	Recognition of tax components where Division 6 is deemed to apply The EM notes at paragraphs 1.67 and 1.69 that where a sub-fund meets the requirements of an AMIT, the amounts derived by the attribution CCIV sub-fund will retain their character in the hands of the member, in line with the specific AMIT provisions that achieve this purpose. There is no confirmation that this treatment extends to situations where the AMIT requirements are not met by a sub-fund and Division 6 applies outside of proposed subsection 195-125(1), which indicates that a beneficiary of a CCIV sub-fund is taken to have an individual interest in a share of the trust's exempt income and non-assessable non-exempt income. We ask for confirmation that dividends distributed to members will be considered to reflect their tax component character for Australian tax purposes rather than being	▪ A specific deeming provision should be added which facilitates the retention of the character of that income when provided to beneficiaries.

Tax Framework Bill Provision	Concern	Recommendation
	recognised as a legal form dividend (or at least confirmation that in these circumstances taxpayers will assess this outcome based upon the application of Division 6 and other relevant legislation). This will be important in the application of a number of areas including the following: ▪ **Determination of non-resident withholding tax:** e.g. application to interest, franked dividend components etc. ▪ **Completion of member tax statements:** so that those members can meet their Australian tax obligations in relation to their investment in the sub-fund. ▪ **Treatment of tax offsets:** allocation to members of franking credits and foreign income tax offsets.	
	Section 100BA – recognition of the status of a sub-fund of a CCIV It is important that a sub-fund of a CCIV be excluded from the operation of these provisions in the same way that managed investment trusts are currently excluded.	▪ Sub-funds of CCIVs should be excluded from the operation of Division 6.