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Dear Michelle

CP 296 – released 26 October 2017

Thank you for giving us the opportunity to provide submissions in respect of the recently issued draft consultation paper, CP 296 *Funds Management*. We note that many of the issues arising in respect of regulatory requirements described in the guidance relate to the similar issues which we have raised previously in conjunction with the Financial Services Council (FSC) in respect of the related draft legislation.

As it appears to us that there are still fundamental issues which need to be resolved with respect to the draft legislation before this draft guidance may be finalised, we have focused our attention on providing submissions in respect of those key issues as well as our preliminary views in respect of certain of the audit requirements in the guidance.

Our high level comments are as follows:

1. RG 000 – Funds Management: Establishing and registering a fund

1. The definition of "retail" for a CCIV is too broad. We consider it should mirror the same definition which applies to a managed investment scheme (MIS) in the Corporations Act.
2. The requirement for a wholesale CCIV to have a public company director appears onerous and does not mirror with what is required for a wholesale MIS. We suggest a wholesale CCIV should be able to have a proprietary limited company as a corporate director.
3. The requirement for a wholesale CCIV to lodge its constitution with ASIC appears onerous and does not mirror what is required for a wholesale MIS. We suggest a wholesale CCIV should not have to lodge its constitution with ASIC.
4. The requirement for a wholesale CCIV to have 50% external directors appears onerous and does not mirror what is required for a wholesale MIS. We suggest a wholesale CCIV should be entitled to constitute its corporate director board as it sees fit.
5. The requirement for a wholesale CCIV to have a compliance management system appears onerous and does not mirror what is required for a wholesale MIS. In our view, this additional compliance burden should not apply to a wholesale CCIV where it does not apply to a wholesale MIS.

6. The "independence" test for a depositary for a retail CCIV (to be "independent of the corporate director and its agents and associates") in the legislation is too strict and in our view, uncompetitive, in particular, having regards to:
   (i) the role of depositaries in other jurisdictions, eg UK/ Europe, and how independence is described in accordance with guidance materials which provide greater flexibility as to how independence can be achieved for the different services provided by large integrated groups (i.e., between a corporate director and depositary) rather than through inflexibly drafted strict legislation; and
   (ii) the integrated service offerings of custodians in the smaller Australian market who perform the role of custodian and administrator as well as the integrated services offerings of large financial groups where the roles of corporate director and depositary may be provided by connected companies. We suggest that in such circumstances, independence may be achieved by companies in the same group having external directors on their respective boards.
7. In our view, a retail CCIV should also have the option of having a compliance committee, if there are not equal external directors on the board, which is what is permitted for a retail MIS.
8. There appears to be an inequity in that a compliance plan for a retail MIS is reviewed by ASIC to check it conforms to regulatory requirements whereas ASIC does not perform this checking function for a retail CCIV. Instead, ASIC may request information about a retail CCIV's compliance plan. The role of ASIC in making such requests appears too discretionary and creates ambiguity as to what requirements a retail CCIV may be requested to meet in respect of its compliance plan, particularly in the initial period.
9. In our view, it should be considered for a CCIV whether the retail/wholesale classification should occur at the sub-fund level rather than at the whole of CCIV level.
10. In respect of the proposed asset classes – ASIC should consider including asset classes for: (i) credit/ loans; (ii) cryptocurrency; (iii) property-multi-family (or built-to-rent).

2. RG 134 – Constitutions

1. Section C: We consider that each sub-fund of a CCIV should have a separate legal personality and be recognised as a separate legal person. This is particularly important for the management of insolvency of a sub-fund and the ability to appoint and administrator/ controller to a sub-fund (rather than the CCIV as a whole).
2. Section F: We suggest that it should be stated that if an amendment to a CCIV constitution only impacts a sub-fund (or some but not all sub-funds), then only a special resolution of the members in the affected sub-funds should be required to be passed to implement those amendments (rather than a special resolution of all members in the CCIV)
3. Section F: RG 134.170: In this section it states that ASIC may "suggest or require amendments to be made" to an investment fund operator's constitution. We suggest this guidance should make it clear that ASIC may only make such suggestions or requirements so as to ensure compliance with the regulatory guidance or legislative requirements.
4. Section G: RG 134.215 – In our view, the application and redemption processes for a CCIV should mirror those of a MIS. For example:
   - shares should be able to be redeemed partly paid; and
   - shares should be able to be redeemed by the corporate director without a request by the holder (as provided in the CCIV's constitution and disclosed to members) for recovering expenses or debts (including tax liabilities)).

3. RG 132 - Compliance and Oversight

1. In our view, the depositary for a retail CCIV should not have an oversight role. We suggest that the depositary should be merely the custodian of the assets, offering safeguarding of the assets under the terms of an appropriate custody agreement (which is then subject to the existing guidance set out in RG 133). We suggest that the oversight role described in draft section 1164B of the Corporations Act should be removed.
2. We suggest the corporate director should have the right to remove the depositary itself if it considers this is in the best interests of investors (rather than a requirement for a special resolution of members).
3. We consider there should not be any requirement upon the depositary to only trade if the trade is lawful and in accordance with the CCIV's constitution. We consider the depositary should be entitled to act upon the instructions of the corporate director, except where the depository reasonably considers that the instructions are not lawful or do not comply with the CCIV's constitution
4. In section C, there appears to be confusion between the different functions which compliance management and risk management have in an organisation. Compliance management should be regarding the compliance systems and framework which the relevant MIS or CCIV puts in place to meet its compliance obligations. One of those compliance obligations is to have a risk management policy and risk management procedures. We suggest that:
    - business risks should be dealt firstly within the scope and framework of a risk management policy, with further guidance as to when a business risk may link (where applicable) into a compliance issue; however, we do not consider that business risks should be described as compliance issues; and
    - more guidance is provided on the nexus between risk management systems under RG 259 and compliance management systems under RG 132.
5. Please also see our comments in section 1 above regarding compliance issues.

4. RG 132 – Audit requirements

1. Per RG 132.14 "*The appointment of a compliance plan auditor, who audits the compliance plan annually, serves as an independent external oversight of the investment fund operator's compliance arrangements to ensure the compliance plan is current at all times.*" We do not consider that an annual audit will ensure that the plan is current at all times. This wording could imply that the compliance plan auditor is checking the compliance plan on a continuous basis. We suggest removal of "to ensure the compliance plan is current at all times"
2. RG 132.184 "*While the auditor's report as to the investment fund operator's compliance with the compliance plan covers the relevant financial year, the compliance plan's continued adequacy to meet the requirements of the Corporations Act is an ongoing requirement and the auditor's assessment of adequacy must apply at the time the auditor provides the report.*" Paragraph 22 of Guidance Statement 013 *Special Considerations in the Audit of Compliance Plans of Managed Investment Schemes* (GS 013), states "*The second part of the auditor's opinion as stated in (b) above, is to be expressed "as at" the date of the end of the financial year.*" Footnote 4 says "*As the wording in section 601HG(3)(c)(ii) is ambiguous, the AUASB believes that the expression "continues to meet" may be interpreted to mean "as at" the end of the scheme's financial year.*"
   The wording in the draft guide would extend the timing and scope of audit procedures on the continued adequacy of the plan up to the date of signing the audit opinion which is inconsistent with the guidance in GS 013. We suggest the existing wording is replaced with "is to be assessed as at the investment fund's year end."
3. RG 132.189 "*In our view, s601HG and draft s1162A require the auditor to consider whether the compliance plan complied with the Corporations Act in all material respects during the relevant financial year*." Same observation as point 2 above. We suggest the existing wording is replaced with "as at the investment fund's year end."

4. RG 132.152(d) "*What procedures ensure that the audit of the compliance plan will provide an independent verification of the robustness of the asset holding arrangements in relation to material compliance risks, particularly any risks that apply more specifically to self-custody? We expect this to include, where applicable, procedures to ensure that the investment fund operator's risk management arrangements adequately address operational risks arising in relation to holding assets or scheme property.*" While compliance plan controls for asset holding arrangements are subject to the compliance plan audit, this wording implies a higher level of assurance on overall asset holding arrangements established by the investment fund operator. We suggest paragraph (d) is deleted.

Yours sincerely

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