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Dear Ms Reid

Consultation Paper 296: Funds management

We welcome the opportunity to provide comments on ASIC's proposals to update its guidance on funds management under ASIC Consultation Paper 296 (**CP 296**).

Our comments are made in light of the proposed framework for corporate collective investment vehicles (**CCIVs**) as set out in the exposure draft *Treasury Laws Amendment (Corporate Collective Investment Vehicle) Bill 2017* (**Draft Bill**) and accompanying exposure draft explanatory materials (**Draft EM**) released on 25 August 2017 for which we have made separate submissions to Treasury.

We have set out below our comments on various aspects of a number of the regulatory guides under CP 296.

ASIC Regulatory Guide: Funds management: Establishing and registering a fund

We do not agree with the breadth of the statement in paragraph 000.75 that the appointment of a depositary must be carried out before any marketing of the CCIV to investors. It is common to carry out pre-marketing of a fund before its launch to retail investors and such marketing is usually limited to institutional investors. We submit ASIC's statement should be removed or appropriately qualified.

ASIC Regulatory Guide 133

Our comments relate to ASIC's proposed guidance in relation to wholesale CCIVs.

The Draft EM states that the assets of a wholesale CCIV may be held:

- by the CCIV itself;
- on trust by a depositary; or
- on trust by a person other than the CCIV¹.

This is consistent with section 1142A(2) of the Draft Bill. We note that under section 1142A(3), the provision relating to wholesale CCIVs does not apply to an asset of a class of assets determined by the CCIV rules.

ASIC's proposed guidance in draft RG 133.21 provides that for wholesale CCIVs, ASIC considers a corporate director may:

¹ See paragraph 4.37 of the Explanatory Materials.
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- hold the assets of the CCIV under a licence to do so;
- appoint a depositary; or
- engage a licensed custody provider.

We consider that ASIC's proposed guidance is inconsistent with the Draft Bill and Draft EM. They contemplate that for wholesale CCIVs that have not appointed a depositary, the CCIV itself rather than the corporate director may hold the assets of the wholesale CCIV. This is consistent with the CCIV as a corporate vehicle.

A wholesale CCIV is a separate legal entity to the corporate director, unlike the position for the trustee of a wholesale unregistered scheme holding assets, where the scheme itself is not a separate legal entity.

Therefore, where a wholesale CCIV holds the assets of the CCIV itself (as contemplated by the Draft Bill and Draft EM), the corporate director will not be the entity holding the assets and the CCIV will not need a licence to hold the assets. This is because it is a corporate vehicle and is not holding assets on trust for members.

It is also not clear what ASIC means in draft RG 133.21(d) by saying the corporate director may "*engage a custodian to hold the assets under the corporate director's licence*", as the custodian will hold the assets on trust for the CCIV (as reflected in section 1142A(2) of the Draft Bill) and not the corporate director.

We submit the proposed guidance should be changed to be consistent with the position for wholesale CCIVs in the Draft Bill.

ASIC Regulatory Guide 134

Redemption of shares in a retail CCIV

Draft RG 134 appears to summarise the provisions of the Draft Bill relating to redemption of shares in a retail CCIV but does not appear to provide guidance on the content of constitutions for retail CCIVs in relation to redemptions. It does not state whether ASIC's guidance on constitutions of registered schemes also applies to retail CCIVs, which we note have similar content requirements in relation to withdrawals. It would be useful if ASIC provided this guidance in RG 134 or stated its position explicitly in RG 134, so as to avoid requisitions being made on retail CCIV constitutions after registration.

Establishment of sub-funds

Section 1155(1)(c) of the Draft Bill requires the constitution of a retail CCIV to make adequate provision for the establishment of sub-funds, and classes of shares referable to sub-funds.

We do not agree that with ASIC's approach in RG 134.120 that the constitution should also set out any rights that apply to members of a sub-fund or class of shares referable to a sub-fund that differ from others. We submit this goes further than the requirement to make adequate provision to establish the sub-fund or class of shares.

There may also be practical difficulties with ASIC's approach, as it could mean constitutions need to be amended for new sub-funds or share classes to be established. We submit this approach is not practical, in light of the umbrella nature of a CCIV which is intended to facilitate multiple sub-funds being established, generating efficiencies and economies of scale.

An example where the approach may create uncertainty is where a constitution specifies a maximum fee, with the ability to charge lower fees for different sub-funds and share classes. If ASIC's approach means the lower fee should be specified in the constitution, we consider this impractical and unnecessary. We consider ASIC should clarify its position or remove the statement altogether.

Wholesale CCIVs

We question the utility of the guide being applicable to wholesale CCIVs, given that there are no prescribed constitution content requirements for wholesale CCIVs under the Draft Bill and there are very few references to wholesale CCIVs in draft RG 134.

The references to wholesale CCIVs in draft RG 134 are as follows:

- There is a statement in a footnote in RG 134.10 to the effect that the constitution of a wholesale CCIV does not need to meet the content requirements in draft s1155 but that if the corporate director is to have any powers these should be set out in the constitution.

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- Table 1 at RG 134.22 states that section G applies to "investment funds" and "wholesale CClVs".
- However, Section G makes no reference to wholesale CClVs.

As RG 134.214-215 seem to be the only paragraphs of Section G that are relevant to wholesale CClVs and do not impose content requirements for constitutions, we would suggest either:

- removing the reference to wholesale CClVs to avoid confusion; or
- clarifying in Section G that those are the only paragraphs applicable to wholesale CClVs and they do not impose content requirements.

We would happy to elaborate on any of our comments if that would be of assistance.

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