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Dear Stephanie

## Consultation Paper 360

Baker McKenzie welcomes the opportunity to provide comment on the proposals raised in Consultation Paper 360: *Corporate collective investment vehicles: Preparing for the commencement of the new regime (CP 360)*.

Being a multinational law firm with 77 offices in 46 countries, Baker McKenzie is one of the largest law firms in the world and is the go-to firm for Australian companies, multinationals and financial institutions. Although we do not operate managed funds ourselves, we regularly advise domestic and foreign investment fund sponsors, investors and other market participants in the private funds space about the licensing and regulatory issues associated with funds management in Australia.

### 1. Focus on a fair, efficient and competitive regime

- 1.1 Overall, we support and value ASIC's consultative approach to its proposed guidance on Corporate Collective Investment Vehicles (CCIVs), including how it will:
  - (a) assess Australian Financial Services (AFS) licence applications from corporate directors seeking to operate a CCIV;
  - (b) assess AFS licence applications from persons seeking to provide financial product advice on and/or deal in CCIV securities; and
  - (c) administer the licensee obligations that will apply to corporate directors.
- 1.2 We appreciate that ASIC has taken particular legislative design principles into account in issuing CP 360, including to increase the competitiveness of Australia's managed funds industry internationally to attract offshore investment.<sup>1</sup>

<sup>1</sup> As detailed in paragraphs 5 and 6 of CP 360.



In addition to these principles, we propose that ASIC adopts an additional objective that was used to develop the regulatory regime for CCIVs in developing the corresponding AFS licence application process - being, to establish a regulatory framework for forming and operating CCIVs in a way that is *fair, efficient and competitive* and to promote confident and informed investors in CCIVs.<sup>2</sup> By focusing on this, we submit that ASIC will help provide a real alternative to the existing regime of managed investment schemes (MIS) and thereby increase the competitiveness of Australia's managed funds industry internationally.

- 1.3 Below we provide our specific feedback to the various sections (Section B to Section F) discussed in CP 360.

**2. Preparing your AFS licence or variation application for CCIVs (Section B in CP 360)**

**AFS licence authorisations for corporate directors**

- 2.1 We generally support ASIC's proposal that corporate directors must apply for a separate AFS licence authorisation to operate the business and conduct the affairs of a CCIV.
- 2.2 We propose, however, that:
- (a) for a responsible entity of a registered MIS, the entity should be able to "opt in" to an ASIC-initiated licence variation to add an "operate the business and conduct the affairs of a retail CCIV" authorisation on the entity's existing AFS licence without submitting any proofs or paying an application fee; and
  - (b) for a trustee of an unregistered MIS (where such a trustee is a public company or converts to become a public company), the entity should be able to "opt in" an ASIC-initiated licence variation to add an "operate the business and conduct the affairs of a wholesale CCIV" on the entity's existing AFS licence without submitting any proofs or paying an application fee. We propose that ASIC initiates this variation by writing to AFS licensees that currently hold an AFS licence authorising them to both:
    - (i) provide financial product advice for securities and interests in MISs and/or deal in securities and interests in MISs; and
    - (ii) provide custodial services incidentally,to explain the "opt in" process for ASIC to add an authorisation to "operate the business and conduct the affairs of a wholesale CCIV" onto the entity's existing AFS licence.

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<sup>2</sup> Paragraph 1.102 of the Explanatory Memorandum to the *Corporate Collective Investment Vehicle Framework and Other Measures Bill 2021*.



- 2.3 This proposed "opt-in" process is akin to ASIC's proposed process for AFS licensees authorised to provide financial product advice on and/or deal in MISs to "opt in" to provide financial product advice on and/or deal in CCIV securities. In this way, our proposal helps further recognise the similarities between CCIVs and MISs and reduce costs associated with the implementation and early adoption of the CCIV regime by operators of MISs.
- 2.4 While we support ASIC's proposal that a condition could limit the number of sub-funds that a corporate director of a CCIV can operate, we do not support ASIC's proposal that such limit should be based on the corporate director's general organisational competence and capacity to conduct broader operations.
- 2.5 Instead, we propose that the limit should relate to the type of CCIV being operated - specifically:
  - (a) in relation to wholesale CCIVs, there should be no limit on the number of sub-funds it can operate; and
  - (b) in relation to retail CCIVs, the number of sub-funds should be limited by the asset kinds held in the sub-funds. For example, where a retail CCIV has an authorisation to run a kind of sub-fund (e.g. financial assets), the retail CCIV should be able to operate as many sub-funds of this kind as it chooses to. However, if the retail CCIV were to seek to operate a sub-fund of a differed kind of asset (e.g. direct real property) it would need to apply for authorisation for that asset kind.
- 2.6 Alternatively or additionally, we propose that ASIC's guidance specify the type of entity that ASIC considers would be competent and capable enough to operate an unlimited number of sub-funds.

#### **Advising on and/or dealing in CCIV securities**

- 2.7 We support ASIC's proposal that existing AFS licensees authorised to advise on and/or deal in securities should be able to rely on their existing authorisations to provide financial advice on and/or deal in CCIV securities.
- 2.8 Further, we generally support ASIC's proposal that existing AFS licensees authorised to advise on and/or deal in a MIS should also be able to rely on their existing authorisations through the ASIC-initiated "opt in" process that does not require submitting any proofs or paying an application fee.
- 2.9 We propose, however, that the "opt in" process has a clear deadline imposed of two years.<sup>3</sup> This would provide AFS licensees who are potentially interested in seeking to transition to the CCIV regime with better clarity on the opportunity and enough time to seek legal and/or other advice, where necessary.

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<sup>3</sup> Our suggestion of two years aligns with and replicates the two-year transitional period introduced under the *Managed Investments Bill 1997* (Cth) for management companies and trustees to become responsible entities under the MIS regime.



**3. Additional proofs for corporate directors (Section C in CP 360)**

3.1 We generally support ASIC's proposal of requiring additional proofs for corporate directors.

3.2 While the additional proofs would be appropriate for new entities seeking to become a corporate director of a CCIV, we propose that these proofs should not apply to the entities described in paragraph 2.2 (i.e., certain entities that are currently licensed to operate MISs and that now seek to operate CCIVs). We propose this because it should be recognised that entities that operate MISs are essentially authorised to operate one type of fund structure under their AFS licence and, if choosing to transition to the CCIV regime, would just be applying to operate another type of fund structure. Consequently, the AFS licensing application process for these entities should be more efficient and competitive. Therefore, we propose that:

- (a) where an entity is authorised to operate a wholesale MIS, it should be able to "opt in" to the ASIC-initiated licence variation process proposed in paragraph 2.2 and be authorised to operate a wholesale CCIV; and
- (b) where an entity is authorised to operate a retail MIS, it should be able to "opt in" to the ASIC-initiated licence variation process proposed in paragraph 2.2 and be authorised to operate either a retail CCIV or a wholesale CCIV.

3.3 We submit that requiring additional proofs for such entities would be administratively burdensome and unnecessary and could lead to a reluctance by such entities to adopt the CCIV regime, opting instead to continue with the MIS regime. Instead, the process should be as streamlined as possible to facilitate the ease of transition into the CCIV regime with minimal implementation costs.

**4. Organisational competence requirements for CCIVs (Section D in CP 360)**

4.1 We generally support ASIC's proposed organisational competence requirements for corporate directors.

4.2 We submit, however, that these requirements should not apply to entities who are already licensed to operate a MIS and now seek to operate a CCIV (see paragraph 2.2).

4.3 Similarly, we generally support ASIC's proposed competence requirements for responsible managers. We believe, however, that such requirements should not apply to entities who are already licensed to advise on and/or deal in securities or MISs (see paragraphs 2.7 and 2.8).

**5. Compensation and insurance arrangements for corporate directors (Section E in CP 360)**

5.1 We support ASIC's proposal for professional indemnity insurance requirements for corporate directors of retail CCIVs, noting that these should be consistent with



and equivalent to those required under the MIS regime (to enable early adoption by entities who are already licensed to operate a MIS and now seek to operate a CCIV).

**6. Financial resource requirements for corporate directors (Section F in CP 360)**

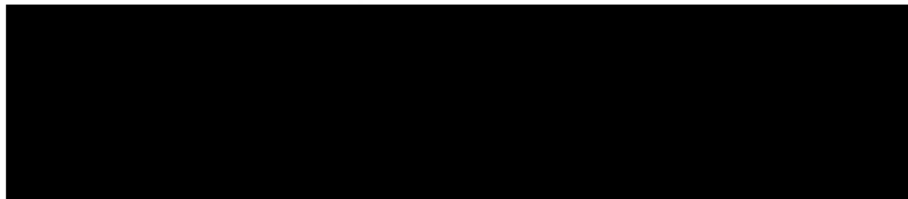
- 6.1 We support ASIC's proposals for financial resource requirements for corporate directors, noting that these should be consistent with and equivalent to those required under the MIS regime.
- 6.2 We submit that regard should be had to seeking to simplify RG 166 where possible.
- 6.3 Additionally, we agree with the proposal that the value of cross-invested shares should be excluded when calculating a corporate director's net tangible assets requirement as this will prevent double counting.

**7. Feedback to list of questions in CP 360**

- 7.1 We have cross-referenced our feedback to the list of questions in CP 360 in the annexed schedule.

If you have any questions about our submission or would like to discuss our comments, please contact us.

Yours sincerely



Lewis Apostolou  
Partner



Thalia Dardamanis  
Special Counsel





**Schedule – Feedback to list of questions in CP 360**

<b>Section B: Preparing your AFS license or variation application for CCIVs</b>	
<b>B1Q1</b>	<b>Do you intend to apply for an AFS licence authorisation to ‘operate the business and conduct the affairs of a CCIV’?</b>
	No.
<b>B1Q2</b>	<b>Are there any practical problems associated with our proposal, or is any additional guidance required? Please give details.</b>
	Yes. Please see paragraphs 2.1 to 2.2(b).
<b>B1Q3</b>	<b>Are there any additional costs associated with the implementation of our proposal? Please give details and, if possible, quantify these costs.</b>
	Not applicable.
<b>B2Q1</b>	<b>Do you agree with our proposal? If not, why not?</b>
	No. Please see paragraphs 2.4 to 2.5.
<b>B2Q2</b>	<b>Do you consider a condition that limits the operations of either a retail CCIV or a wholesale CCIV in certain circumstances is appropriate? Please provide reasons.</b>
	No. Please see paragraphs 2.4 to 2.5.
<b>B2Q3</b>	<b>Is there an alternative way that we could restrict a corporate director’s operations (e.g. imposing a limit on the assets under management)? If so, please provide details.</b>
	Please see paragraph 2.6.
<b>B3Q1</b>	<b>Do you intend to provide financial product advice on and/or deal in CCIV securities?</b>
	No.



<b>B3Q2</b>	<b>Are there any practical problems associated with our proposal or is any additional guidance required? Please give details.</b>
	Yes. Please see paragraphs 2.7 to 2.9.
<b>B3Q3</b>	<b>Are there any additional costs associated with the implementation of our proposal? Please give details and, if possible, quantify these costs.</b>
	Not applicable.
<b>Section C: Additional proofs for corporate directors</b>	
<b>C1Q1</b>	<b>Do you agree with our proposal? If not, why not?</b>
	No. Please see paragraphs 3.1 to 3.3.
<b>C1Q2</b>	<b>Do you consider the items that must be covered in the new C13 proof: CCIV Operating Capacity Statement are appropriate? If not, please give reasons.</b>
	No. Please see paragraphs 3.1 to 3.3.
<b>C1Q3</b>	<b>Are there any practical problems associated with our proposal, or a need for additional guidance? Please give details.</b>
	Please see paragraph 3.3.
<b>C1Q4</b>	<b>Are there any additional costs associated with the implementation of our proposal? Please give details and, if possible, quantify these costs.</b>
	Not applicable.
<b>C2Q1</b>	<b>Do you agree with our proposal? If not, why not?</b>
	No. Please see paragraphs 3.1 to 3.3.



C2Q2	Do you consider the items that must be covered in the new C13 proof: CCIV Asset Statement are appropriate? If not, please give reasons.
	No. Please see paragraphs 3.1 to 3.3.
C2Q3	Are there any practical problems associated with our proposals, or a need for additional guidance? Please give details.
	Please see paragraph 3.3.
C2Q4	Are there any additional costs associated with the implementation of our proposals? Please give details and, if possible, quantify these costs.
	Not applicable.
<b>Section D: Organisational competence requirements for CCIVs</b>	
D1Q1	Do you agree with our proposal? If not, why not?
	No. Please see paragraphs 4.1 to 4.3.
D1Q2	Are there any practical problems associated with our proposal? Please give details.
	Please see paragraphs 4.1 to 4.3.
D1Q3	Are there any additional costs associated with the implementation of our proposal? Please give details and, if possible, quantify these costs
	Not applicable.
D2Q1	Do you agree with our proposal? If not, why not?
	Not applicable.
D2Q2	Are there any practical problems associated with our proposal? Please give details.



	Please see paragraphs 4.1 to 4.3.
<b>D2Q3</b>	<b>Are there any additional costs associated with the implementation of our proposal? Please give details and, if possible, quantify these costs.</b>
	Not applicable.
<b>D3Q1</b>	<b>Do you agree with our proposal? If not, why not?</b>
	No. Please see paragraphs 4.1 to 4.3.
<b>D3Q2</b>	<b>Is any additional guidance required? Please give details.</b>
	Not applicable.
<b>D4Q1</b>	<b>Do you agree with our proposal? If not, why not?</b>
	No. Please see paragraphs 4.1 to 4.3.
<b>D4Q2</b>	<b>Are there any practical problems associated with our proposal? Please give details.</b>
	Please see paragraphs 4.1 to 4.3.
<b>D4Q3</b>	<b>Are there any additional costs associated with the implementation of our proposal? Please give details and, if possible, quantify these costs</b>
	Not applicable.
<b>D5Q1</b>	<b>Do you agree with our proposal? If not, why not?</b>
	No. Please see paragraphs 4.1 to 4.3.
<b>D5Q2</b>	<b>Is any additional guidance required? Please give details</b>
	Not applicable.



Section E: Compensation and insurance arrangements for corporate directors	
E1Q1	Do you agree with our proposal? If not, why not?
	Yes. Please see paragraph 5.1.
E1Q2	Are there any practical problems associated with our proposal? Please give details (including details of any issues that you consider will arise in relation to acquiring PI insurance, based on relevant experience and engagement with insurers).
	No.
E1Q3	Are there any additional costs associated with the implementation of our proposal? Please give details and, if possible, quantify these costs
	Not Applicable.
E2Q1	Do you agree with our proposal? If not, why not?
	Yes. Please see paragraph 5.1.
E2Q2	Do you agree with our proposal to use the assets of all sub-funds in calculating a corporate director's PI insurance requirement? If not, why not?
	Yes. Please see paragraph 5.1.
E2Q3	Do you agree with our proposal to exclude the value of cross-invested shares in a CCIV for the purposes of calculating a corporate director's PI insurance requirement? Please give reasons for your response
	Yes. Please see paragraph 5.1.
E2Q4	Are there any practical problems associated with our proposal? Please give details.
	Please see paragraph 5.1.



<b>E2Q5</b>	<b>Are there any additional costs associated with the implementation of our proposal? Please give details and, if possible, quantify these costs.</b>
	Not Applicable.
<b>E3Q1</b>	<b>Do you agree with our proposal? If not, why not?</b>
	Yes. Please see paragraph 5.1.
<b>E3Q2</b>	<b>Is any additional guidance required? Please give details.</b>
	Not applicable.
<b>Section F: Financial resource requirements for corporate directors</b>	
<b>F1Q1</b>	<b>Do you agree with our proposals? If not, why not?</b>
	Yes. Please see paragraph 6.1.
<b>F1Q2</b>	<b>Are there any practical problems associated with our proposals, or is any additional guidance required? Please give details, including details of whether any additional changes are required to the categories of 'Tier 500,000 class assets' (see RG 166.189 of draft updated RG 166) and 'special custody assets' (see RG 166.188 of draft updated RG 166) to reflect the CCIV assets of a retail CCIV</b>
	Yes. Please see paragraph 6.1.
<b>F1Q3</b>	<b>Do you agree with our proposal (see Table 2) to use the assets of all sub-funds in the retail CCIVs operated by a corporate director in calculating a corporate director's NTA requirement? If not, why not?</b>
	Yes. Please see paragraph 6.3.
<b>F1Q4</b>	<b>Do you agree with our proposal (see Table 2) to exclude the value of cross-invested shares for the purposes of calculating a corporate director's NTA requirement? Please give reasons for your response.</b>
	Yes. Please see paragraph 6.3.



F1Q5	Are there any additional costs associated with the implementation of our proposals? Please give details and, if possible, quantify these costs.
	Not applicable.