FSC FINANCIAL SERVICES COUNCIL

ASIC Consultation Paper 360 on Corporate Collective Investment Vehicles

FSC Submission

12 April 2022

1. Contents

1. About the Financial Services Council

The FSC is a peak body which sets mandatory Standards and develops policy for more than 100 member companies in one of Australia's largest industry sectors, financial services.

Our Full Members represent Australia's retail and wholesale funds management businesses, superannuation funds, life insurers and financial advice licensees. Our Supporting Members represent the professional services firms such as ICT, consulting, accounting, legal, recruitment, actuarial and research houses.

The financial services industry is responsible for investing $3 trillion on behalf of more than 15.6 million Australians. The pool of funds under management is larger than Australia's GDP and the capitalisation of the Australian Securities Exchange, and is the fourth largest pool of managed funds in the world.

2. Key issues

2.1. Introduction and summary

The FSC thanks the Australian Securities and Investments Commission (**ASIC**) for the opportunity to provide comments on Consultation Paper 360 (**CP 360**) *Corporate collective investment vehicles: Preparing for the commencement of the new regime*.

While the FSC generally supports ASIC's proposals for the licensing of corporate directors of Corporate Collective Investment Vehicles (**CCIVs**), we have several concerns which, if not addressed, are likely to inhibit the uptake of the new structure.

Our key concerns, as set out in more detail below, are:

- the financial requirements and insurance requirements for licensees should be determined in the aggregate across the funds they operate, whether managed investment schemes or CCIV sub funds; and
- applications for licence variations for existing operators of managed investment schemes, whether retail or wholesale, should be streamlined by limiting the required "proofs" to the incremental information ASIC requires in relation to CCIVs, and not revisiting the organisational competence for the licensee's existing business.

Addressing these concerns will ensure the licensing regime operates consistently with the Government's significant efforts to make the CCIV regime viable.

The FSC also requests ASIC provide information on the timing of applications, so that industry participants know whether they can apply for a licence or variation before 1 July and, when they do apply, how long the process is likely to take.

3. B Preparing your AFS licence or variation application for CCIVs – Updates to RG 2

Proposal

B1 We propose to update RG 2 to include guidance that when completing Form FS01 or Form FS03, the proposed corporate director must:
(a) select the new authorisation 'operate the business and conduct the affairs of a CCIV';
(b) specify whether it will be operating a retail CCIV, a wholesale CCIV, or both; and
(c) specify the CCIV's asset type(s) (e.g. financial assets, direct real property).

B1Q2 Are there any practical problems associated with our proposal, or is any additional guidance required? Please give details.

The FSC submits that Form FS01 and Form FS03 require a considerable amount of time and resources to prepare, and therefore we recommend seeking to reduce the time and resources required to complete them, where this is practicable and can balance the interests of industry on the one hand and sound regulation on the other.

The FSC is aware that while industry is interested in exploring the possibilities provided by the new CCIV regime, there will inevitably be a level of caution and a reluctance to be in the first group of businesses choosing to embark on a new and untested process. To encourage industry to embrace the new CCIV regime, the FSC believes that it is important to make the application process as straight forward and user friendly as possible.

One suggestion is to reduce the amount of supporting documentation that needs to be provided to ASIC, where it has already been provided within a certain recent time period for the purposes of a managed investment scheme that is operated by the same person (or a related body corporate of that person).

For example, where "core proofs" have been provided for the purposes of an existing managed investment scheme (**MIS**), and the proposed corporate director of the CCIV is part of the same corporate group as the responsible entity of such existing MIS, we would suggest that providing core proofs would in many instances simply be providing to ASIC the same information that has recently been provided and approved.

ASIC could adopt an approach that "deems" such recently provided and approved documentation to have been provided and approved for the purposes of the new proposed CCIV. This would save considerable time and resources in many instances, for example in connection with the provision of "People Proofs", where an applicant would otherwise have to obtain the same police certificates and bankruptcy certifications for the same senior staff members.

If ASIC requires applications and documentation to be provided again, this will have a material impact on time and resource requirements of applicants and discourage some businesses from adopting the CCIV.

A second suggestion would be to implement some sort of "fast track" process for applications submitted by licensees with a proven track record of operating managed investment schemes in compliance with the regulatory regime. This would help address some of the serious concerns about the length of time it takes for ASIC to process applications once they are lodged. Even before lodgement, the extent of technical and detailed information ASIC requires about responsible managers and their experience means that the licensee must expend considerable time and cost, often including external legal advice because the requirements are difficult to understand .

B1Q3 Are there any additional costs associated with the implementation of our proposal? Please give details and, if possible, quantify these costs.

See our response to the above question.

Proposal

B3 We propose to update RG 2 to make it clear that, from 1 July 2022, any person that is seeking to provide financial product advice on and/or deal in CCIV securities will need to apply for an AFS licence or variation to be authorised to provide financial product advice on and/or deal in 'securities'.

B3Q2 Are there any practical problems associated with our proposal or is any additional guidance required? Please give details.

The FSC supports the proposal to enable existing licensees authorised to advise on and/or deal in securities to rely on their existing authorisations, on the basis that CCIV securities are legally defined as "securities".

We welcome the ASIC-initiated licence variation and the proposal that before the commencement of the CCIV regime, ASIC will write to the AFS licensees that currently hold a relevant authorisation (i.e. authorised to advise on and/or deal in managed investment schemes) and explain the process for ASIC to add an authorisation for "securities in a CCIV" where a licensee chooses to opt-in (paragraph 29).

The FSC notes that ASIC has indicated it aims to provide further details of the content of the letter and process well ahead of 1 July 2022 so that industry is able to prepare efficiently and we look forward to receiving this in due course.

The FSC also notes that ASIC does not propose to require the submission of any proofs or the payment of any application fee in the context of this ASIC-initiated licence variation. We agree that not requiring with any proofs is a sensible approach here, and would suggest that dispensing with proofs other than the new C13 proofs should also be extended where

possible to licence variation processes that are initiated by the licensee – see previous section.

There will be licensees who hold both (a) an authorisation to advise on and/or deal in securities, and (b) an authorisation to advise on and/or deal in managed investment schemes. We would suggest that the guidance make it clear that in this situation, the licensee does not need to take any action with respect to (a), and would only need to respond to the letter it receives from ASIC as part of the ASIC-initiated licence variation process.

4. C Additional Proofs for corporate directors – Updates to RG 3

Proposal

C1 We propose to update RG 3 to introduce the new C13 proof: CCIV Operating Capacity Statement.

C1Q1 Do you agree with our proposal? If not, why not?
C1Q2 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.
C1Q3 Are there any practical problems associated with our proposal, or a need for additional guidance? Please give details.

The FSC considers that the proposed C13 proofs are a sensible measure, but recommends a "streamlining" process for existing responsible entities and operators of wholesale funds, which would generally mean that the "core proofs" A5 (overall business description) and B1 (organisational competence) should not be required. Rather, if any information beyond the C13 proofs is needed it should be limited to the incremental information required to show that the licensee will be able to properly carry out the additional activity of operating a CCIV. The regulatory regimes for MISs and CCIVs are so similar (aside from purely the legal form) that competence in one should be a strong indicator of competence in the other.

For the operators of wholesale-only funds, their current authorisations do not refer to operating wholesale trusts. Rather, they would be authorised to deal in various financial products, in particular to issue MIS interests and in many cases hold a custodial or depository services authorisation. The fact that these authorisations are different from the specific fund-operation authorisation for responsible entities of retail funds should not mean that they are any less entitled to streamlined treatment for a licence variation. Similarly, they should only have to submit proof of the additional matters relating to the CCIV, not re-prove existing competence.

Making the process of a variation to operate CCIVs difficult could drive managers who want to try out the new regime to engage external corporate directors, and too great a concentration of funds in the hands of such providers may not be desirable.

The FSC submits that the principle of this approach of requiring only incremental information about new activities could usefully be applied to all licence variations, saving time and money for both ASIC and licensees without materially diminishing regulatory oversight. If ASIC has any concerns about a licensee's competence or conduct, it can always request information separately.

Proposal

C2 We propose to update RG 3 to introduce the new C13 proof: CCIV Asset Statement.

C2Q1 Do you agree with our proposal? If not, why not?
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.
C2Q3 Are there any practical problems associated with our proposals, or a need for additional guidance? Please give details.

Please see our response to Proposal C1 above.

5. D Organisational competence requirements for CCIVs – Updates to RG 105

Proposal

D1 We propose that, when we assess a corporate director's competence to 'operate the business and conduct the affairs of a CCIV', we will require that:
(a) the corporate director must have at least one responsible manager with knowledge and skills in relation to the financial service (i.e. operating the business and conducting the affairs of a CCIV);
(b) the corporate director must have at least one responsible manager with knowledge and skills in relation to the CCIV assets; and
(c) each responsible manager must meet one of the five options in Table 1 of RG 105.

D1Q1 Do you agree with our proposal? If not, why not?

The FSC broadly agrees with the proposal, subject to comments below.

D1Q2 Are there any practical problems associated with our proposal? Please give details.

The FSC suggests that the scope of the requirements in Proposal D1 be clarified.

The wording currently states:

"the corporate director must have at least one responsible manager with knowledge and skills in relation to the financial service (i.e. operating the business and conducting the affairs of a CCIV)."

We note that on 1 July 2022, it will of course not be possible for any applicant to have a responsible manager with experience of "operating the business and conducting the affairs of a CCIV".

Presumably, ASIC would accept knowledge and skills in relation to (a) a managed investment scheme, and/or (b) comparable overseas vehicles. This would appear to be the intent of the guidance (see for example paragraphs 42 and 43 of the CP) and we suggest that the wording of Proposal D1 be similarly clarified.

Proposal

D4 We propose that, when assessing:
(a) a responsible manager's competence to provide financial product advice on and/or deal in CCIV securities, each responsible manager must meet one of the five options in Table 1 of RG 105

(see RG 105.55 of draft updated RG 105); and
(b) whether a responsible manager meets the knowledge and skills component (i.e. experience) of Options 1 to 5 in Table 1 of RG 105, we will consider the following as relevant:
(i) qualifications and prior experience in providing financial product advice on and/or dealing in securities, including CCIV securities;
(ii) qualifications and prior experience in providing financial product advice on and/or dealing in interests in a managed investment scheme; and/or
(iii) similar overseas experience

D4Q1 Do you agree with our proposal? If not, why not?

The FSC is broadly supportive of this proposal.

D4Q2 Are there any practical problems associated with our proposal? Please give details.

See above our reply to question D1Q1.

We suggest that ASIC take a commercial and pragmatic approach to assessing what qualifies as similar overseas experience, particularly during the early stages of developing the CCIV industry.

6. E Compensation and insurance arrangements for corporate directors – Updates to RG 126

Proposal

E1 We propose to impose a specific PI insurance requirement for corporate directors of retail CCIVs through a condition on their AFS licence, similar to the current requirements for responsible entities. The licence condition will require a corporate director to:
(a) maintain an insurance policy covering professional indemnity and fraud by officers;
(b) ensure that the PI insurance is adequate, taking into account the nature of the activities it carries out under its AFS licence; and
(c) ensure that the PI insurance covers claims amounting in aggregate to whichever is the lesser of:
(i) $5 million; or
(ii) the value of the CCIV assets of all retail CCIVs it operates.

E1Q1 Do you agree with our proposal? If not, why not?

The FSC broadly agrees with the proposal, subject to below.

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).

The FSC has concerns about the scope and availability of appropriate Professional Indemnity (PI) insurance at an acceptable cost, notably on day one of the CCIV regime.

We understand that ASIC has undertaken considerable research and investigation concerning this issue, and the FSC request that ASIC share some of its findings with industry.

The FSC is concerned that this requirement could potentially be a material problem on day one, given that PI insurance for CCIVs will never have been required before, and accordingly the FSC would question whether it has been the focus of any substantive consideration by the insurance industry, whether domestically or internationally. And if there are only a small number of insurers making such a product available, the lack of choice for industry could further discourage new market participants.

The issue is of particular concern given that the CP states at paragraph 51 that

"the proposed PI insurance requirement for corporate directors will be a separate, standalone compliance obligation. That is, a corporate director cannot satisfy this licence condition by relying on compensation arrangements for another financial service."

Making this requirement a separate, standalone compliance obligation is likely to be a material disincentive for industry for which we do not see any basis in principle. We recommend that ASIC should set the requirement on an amalgamated basis, taking into account both corporate (CCIV) investment structures and managed investment scheme structures that are operated by the same corporate group.

E1Q3 Are there any additional costs associated with the implementation of our proposal? Please give details and, if possible, quantify these costs.

For the reasons stated above, unless amalgamated, and also the subject of no-action for a transitional period while the insurance industry prepares for this new type of product, the FSC submits that the PI insurance requirement proposed by the CP will be difficult to obtain and a new material cost to industry participants wanting to enter the CCIV market. Our concern is that this additional cost will be a disincentive to businesses considering entering the market.

7. F Financial resource requirements for corporate directors – Updates to RG 166

Proposal

F1 We propose to update RG 166 to include:
(a) a tailored cash needs requirement for corporate directors of retail CCIVs;
(b) a tailored audit requirement for corporate directors of retail CCIVs;
(c) an NTA requirement for corporate directors of retail CCIVs (see Table 2 for our proposed application of the NTA requirements to corporate directors of retail CCIVs); and
(d) a requirement that corporate directors of a wholesale CCIV must meet the base level financial requirements and any other financial requirements that may apply in the provision of a financial service, including the surplus liquid fund requirement (set out in Sections B–D of RG 166).

F1Q1 Do you agree with our proposals? If not, why not?

F1Q2 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.

F1Q3 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?

F1Q4 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.

F1Q5 Are there any additional costs associated with the implementation of our proposals? Please give details and, if possible, quantify these costs.

The FSC has a serious concern with the NTA requirement for corporate directors being a separate obligation from other financial requirements. We cannot see a reason for this burden of duplicating the financial requirements, given the strong similarity of the MIS and CCIV regimes. Under existing policy, if a licensee is required to have assets to meet one requirement, it can also count those assets for another applicable requirement (Regulatory Guide 166 paragraph 6).

As we understand it, the proposal would mean that a CCIV holds any investor assets itself and does not use a custodian, and the corporate director is also the responsible entity of other managed investment schemes, it would need to effectively double its minimum NTA from $10 million to $20 million (see Table 2). Even for a small operator that uses a qualifying external custodian to hold all MIS and CCIV assets, the minimum NTA requirement would double from a minimum of $150,000 to $300,000 just by the addition of one new start-up fund.

The FSC submits that this would be 'deal breaker' for many businesses that would be considering setting up a CCIV for the first time.

To impose this major disincentive to use of the CCIV regime, when so much has been done to put it on a level playing field with managed investment schemes, would be deeply disappointing.

The FSC would strongly urge ASIC to reconsider this proposal. In our view, CCIV and non-CCIV funds should be considered in the aggregate for financial requirements purposes, and not separately assessed in this way.