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Australia

New Australian corporate collective investment vehicle – an attractive option for offshore investors in Australian property?

Background

The Australian Government has recently released draft legislation for public comment (**CCIV Regime**) for a new corporate collective investment vehicle (**CCIV**). This new vehicle is intended to be an alternative to the Australian domiciled unit trust which is currently the most common form of investment structure used by Australian property fund managers and by offshore institutional investors seeking exposure (direct or indirect) to Australian property.

The Australian Government also has indicated that in the near future it will release draft legislation dealing with a new Australian domiciled limited partnership CIV structure which is intended to be another alternative investment vehicle.

The proposed introduction of a broad range of investment vehicles is a recent demonstration by the Australian Government of its ongoing strategic commitment to position Australia as a global financial centre in the Asian time zone.

This article examines whether the proposed CCIV regime is likely to change the way Australian property fund managers and offshore institutional investors make their decisions about investing in Australian property.

CCIV Regime

The specific driver behind the CCIV proposal is a concern that offshore investors are dissuaded from investing in Australian funds because they do not fully understand unit trusts (the most common legal structure for an Australian fund), and that access to a broader range of collective investment vehicles would support Australian fund managers to remain competitive with foreign jurisdictions.

The CCIV regime will adopt a 'corporate model' that offshore institutional investors and managers are more familiar with, but it will also incorporate features of the existing regulatory regime applicable to unit trusts (and other managed investment schemes) under Chapter 5C of the Corporations Act.

Attractive Features of a CCIV

The current vehicle of choice for offshore institutional investors and Australian property fund managers is the wholesale (private) unit trust which operates as an unregistered managed investment scheme.

It is the current preferred choice because a wholesale unit trust is generally more tax efficient and is only subject to "light touch" regulation in Australia it is also flexible enough to accommodate the often bespoke deal terms and governance model expectations of institutional investors and managers.

More draft legislation is to be released dealing with changes to the Australian tax laws so as to allow the CCIV to be treated in the same way as a managed investment trust for tax purposes. Fundamentally this means tax 'pass through' treatment and access to the withholding (**MIT**) tax concession, subject to meeting the existing MIT requirements including being widely held.

If the tax treatment of a corporate CCIV and wholesale unit trust are to be aligned as planned, then the question is whether a wholesale CCIV can otherwise compete with the wholesale unit trust as a viable alternative structure through which offshore institutional investors can invest to gain exposure to Australian property. A diagrammatic representation of the two different investment structures appears at the end of this article.

The wholesale CCIV does have some attractive features for sure. Firstly a corporate fund structure is simple and indeed globally recognisable. Unit trusts on the other hand are not so well known outside common law jurisdictions and the fact a trust is not a separate legal entity can sometimes complicate transactions for the trustee, overseas investors and trust creditors.

Secondly, investors in a CCIV will, as shareholders, benefit from a statutory limitation of liability which is not available to unitholders of a unit trust. Thirdly, a wholesale CCIV may establish sub funds which are intended to operate in a similar way to a protected cell regime in other jurisdictions. This segregation of assets and liabilities between different sub funds will create product flexibility for managers and investors alike.

Wholesale CCIV compared to wholesale Unit Trust – Preliminary Conclusion

Despite these positive features of a wholesale CCIV, based on the draft legislation as it stands, it appears that the wholesale CCIV is intended to be subject to more ASIC regulation and regulatory scrutiny than a wholesale unit trust is currently subject to. Of course the draft legislation for the CCIV regime is likely to change before it is finalised. In addition, ASIC will be given wide powers to modify the CCIV regime as it applies to a particular wholesale CCIV, which will help. So it will be important to wait until the final legislation (and related ASIC regulatory policy) is in place before making any final decisions on which might be the preferable investment structure.

Extra regulation and ASIC scrutiny will make a wholesale CCIV more complicated, less flexible and more expensive and time consuming to set up and then operate. Some key features of the proposed CCIV regime for wholesale CCIVs which will likely be seen as unattractive by offshore institutional investors and Australian managers include:

- the wholesale CCIV must be operated by a single corporate director which must be a public company which holds an Australian Financial Services Licence. Whilst the operator is the equivalent of the trustee of a wholesale unit trust, a trustee of a wholesale unit trust can be a private company and need not have an AFSL as often it can rely upon available licence exemptions;

- the operator of a wholesale CCIV is statutorily liable for the acts and omissions of its agents and delegates (including the investment manager). This is so even if they act fraudulently or outside the scope of their authority. This strict liability is unfortunate and is an unnecessary "overreach" by the CCIV regime;

- the operator (corporate director) of a wholesale CCIV can be removed from that role by shareholders for no cause by a shareholder vote of at least 50% by value;

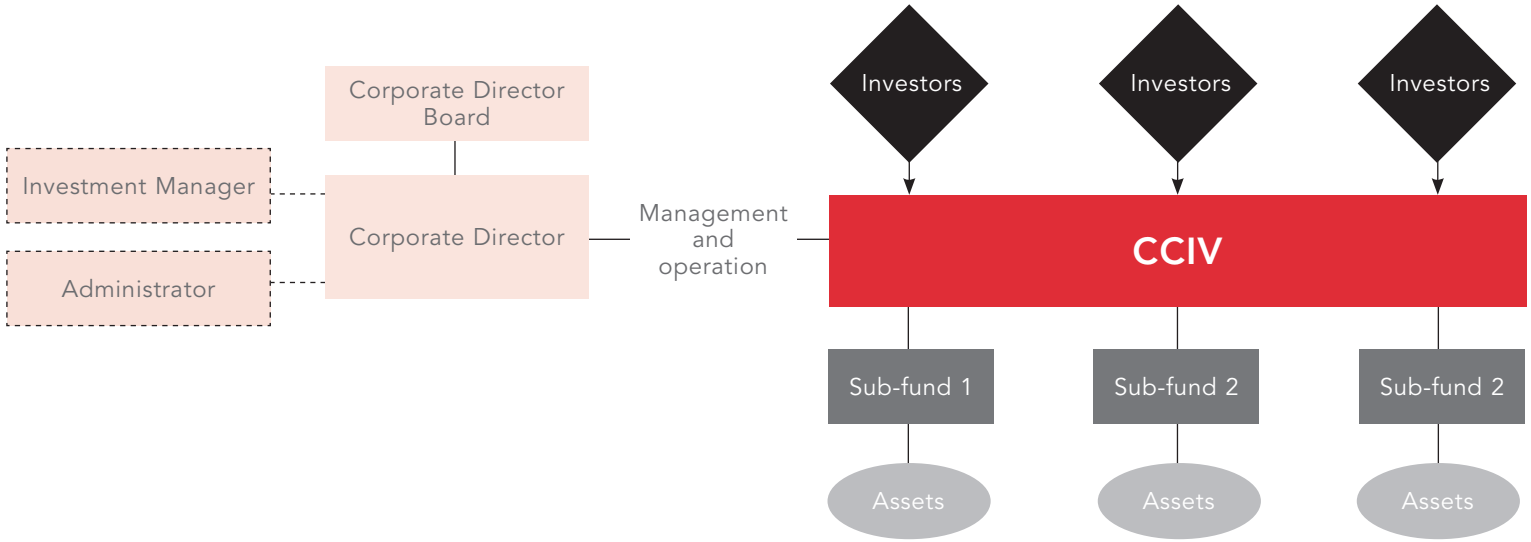
- The operator of a CCIV cannot install a successor operator without prior shareholder approval;

- shareholders by special resolution may modify or replace the CCIV constitution;

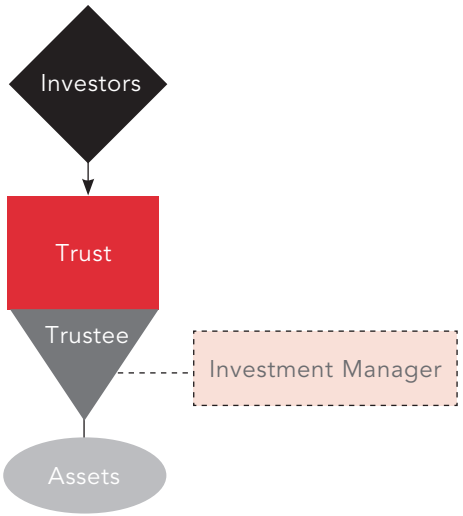
- the capital maintenance rules applicable to all companies will apply to a wholesale CCIV with modifications, however potential restrictions and complications can still arise;

- the CCIV constitution (and all amendments to it from time to time) must be lodged with ASIC. This may result in it being disclosed to the public.

The proposed wholesale CCIV model



Current wholesale unit trust model



For details, please click **here**.

Source: Norton Rose Fulbright, November 2017

For more information contact **John Moutsopoulos**

China

China releases guidelines on outbound investment

Following a surge in China's outbound investment in 2016, the Chinese government has taken steps to tighten outbound capital controls and increase regulatory scrutiny of M&A transactions.

In late 2016, the NDRC, MOFCOM, PBOC and SAFE enhanced the administration of outbound investments, supporting genuine transactions, while increasing supervision of "irrational" investments.

In August 2017, several ministries issued the Notice on Further Guiding and Regulating the Direction of Outbound Investment (**Guidelines**) , classifying investments into encouraged, restricted and prohibited categories.

The encouraged category includes infrastructure investments under the Belt and Road initiative, investments promoting the development of high-tech manufacturing and those in agriculture, trade, culture, logistics, energy and resources.

Investments which do not align with State foreign policy and those in real estate, hotels, cinemas, entertainment or sports clubs or made by certain investment funds are restricted.

Prohibited investments include those involving the export of technologies prohibited for export, those prohibited by international treaties, and those which may harm State interests.

The Guidelines require an initial assessment of investment authenticity, guidance during the investment process and a post-investment enforcement regime, while also providing for favorable policies for encouraged investments, guidance for restricted investments and effective control of prohibited investments.

While providing welcome clarity, the Guidelines still only provide high level guidance and leave many outstanding questions requiring further clarification. The State Council is reportedly leading an initiative to draft new rules to replace the existing ministerial level guidance. In the meantime advance consultation with regulators will be important.

For details, please click **here**.

Source: Herbert Smith Freehills, August 2017

Interim Regulations on the Administration of Privately Placed Investment Funds issued by the Legislative Affairs Office of the State Council on August 30, 2017

On 30 August 2017, the Legislative Affairs Office of the State Council issued a consultation draft of Interim Regulations on the Administration of Private Investment Funds (**Draft Regulations**) for public comments. The Draft Regulations are intended to regulate purely domestic private investment fund managers (**Private Managers**) and to a large extent, have restated the existing rules previously issued by the China Securities Regulatory Commission (**CSRC**) or the Asset Management Association of China (**AMAC**) in respect of the registration/filing of the Private Managers and private investment funds (**Private Funds**), investor eligibility, marketing, custodian, information disclosure, etc. (collectively, the **Existing Rules**).

In terms of new content, key noteworthy points include:

- categorizing Private Funds into private securities investment funds and private equity/venture capital investment funds, and thereby excluding private investment funds investing in non-standardized debt assets;
- imposing new eligibility requirements on the key shareholders/partners, directors, supervisors and senior management of a Fund Manager, in particular such persons cannot have substantial debts;

- adding new circumstances on which a Fund Manager can be de-registered, e.g., lack of necessary place of business, staff, other facilities or required policies, failing to file a new Private Fund within 12 months upon the liquidation of all prior AMAC filed Private Funds under management;

- allowing an AMAC registered Fund Manager to provide investment advisory services to other AMAC registered Fund Managers;

- extending the record keeping period to 20 years from a Private Fund's liquidation;

- including the integrity information of the participants in the private funds sector in the capital markets integrity database, which might be shared with the relevant governmental departments and/or the public in accordance with the relevant rules; and

- strengthening and detailing sanctions for various noncompliance and violations of the Draft Regulations, e.g., confiscation of illegal gains, fines up to RMB1 million or 5 times of illegal gains, warning to the key personnel, etc.

For foreign-invested Private Managers, CSRC will separately formulate relevant administrative measures and therefore it is still premature to determine the impact of the Draft Regulations on international managers.

Source: Clifford Chance

For more information please contact **Ying White** and **Angela Liu**

Hong Kong

SFC publishes conclusions on asset management regulation and point-of-sale transparency alongside further consultation on disclosure requirements for discretionary accounts

The Securities and Futures Commission (**SFC**) has published conclusions from its November 2016 consultation on proposals to enhance asset management regulation and point-of-sale transparency, and launched a further consultation on disclosure requirements for discretionary accounts.

Overall, the conclusions set out that the SFC will implement the enhancements to the Fund Manager Code of Conduct (**FMCC**) with certain modifications and clarifications. The key enhancements under the FMCC are in respect of securities lending and repurchase agreements, custody of fund assets, liquidity risk management and disclosure of leverage by fund managers.

To address conflicts of interest in the sale of investment products, the SFC will also implement its proposed approach to govern the use of the term 'independent' by intermediaries and to enhance the disclosure of trailer fees, commissions and other monetary benefits. Enhancements to the Code of Conduct for Persons Licensed by or Registered with the SFC (**Code of Conduct**) are intended to address conflicts of interest in the sale of investment products and enhance disclosure at the point-of-sale by:

- restricting an intermediary from representing itself as 'independent' or using any term(s) with a similar inference when distributing an investment product if the intermediary receives:

    - commissions or other monetary benefits in relation to distributing such investment product; or

    - any non-monetary benefits from any party or has close links or other legal or economic relationships with product issuers which are likely to impair its independence; and

- requiring an intermediary to disclose the maximum percentage of any monetary benefits received or receivable that are not quantifiable prior to or at the point of sale.

The revised FMCC and the amendments to the Code of Conduct have been gazetted on 17 November 2017. The revised FMCC will become effective twelve months later and the Code of Conduct amendments will become effective nine months after the gazettal. The SFC intends to publish frequently asked questions to provide further guidance to the industry on the implementation of its proposals.

The SFC has also launched a two-month consultation on proposed requirements for disclosure of monetary and non-monetary benefits by licensed or registered persons to discretionary account clients. The consultation sets out draft amendments to the Code of Conduct to give effect to the proposals are set out in Appendix C to the conclusions paper.

Comments on the consultation are due by 15 January 2018.

For more details, click **here**

Source: Clifford Chance Alert, November 2017

SFC identifies irregularities in private funds and discretionary accounts

The SFC has issued a circular expressing its concerns about the management of some private funds and discretionary accounts. During the SFC's supervision of licensed corporations engaged in the asset management business, a number of private funds and discretionary accounts with concentrated, illiquid and interconnected investments were found to have irregular features.

Among the irregularities cited in the circular, discretionary account holders held sizeable concentrated stock positions in their accounts and asset managers acted solely at the direction of their clients without exercising investment discretion. Additionally, some cases were found to involve related-party acquisition or disposal of listed company shares by bought and sold notes.

The SFC also identified instances where fund investors or discretionary account holders were substantial shareholders, directors or affiliates of the listed companies invested by the funds or the discretionary accounts. In one case, a director of an asset manager was also a director or chief executive officer of listed companies in which funds under the management of the asset manager were invested.

The SFC expects the board and other senior management (including the managers-in-charge of core functions) of all asset managers to maintain adequate oversight of their firm's business activities. In particular, they should bear primary responsibility for ensuring the maintenance of appropriate standards of conduct, including but not limited to acting fairly and in the best interests of their clients and the integrity of the market, as well as for ensuring adherence to proper procedures and the maintenance of proper risk management measures. They are advised to review the areas of concern discussed in the circular and give priority to strengthening their supervisory and compliance programmes to ensure compliance with all applicable regulatory requirements.

The SFC has further reminded asset managers to report any material breach, infringement or non-compliance with the market misconduct provisions of the SFO Securities and Futures Ordinance (SFO) which they reasonably suspect may have been committed by their clients.

The SFC has also reminded investors to take precautionary measures before investing in a private fund.

For details, please click **here** for the press release and **here** for the circular.

Source: Clifford Chance Alert, July 2017

FSDC releases report on promoting Hong Kong's private equity fund businesses, 26 July 2017

The Financial Services Development Council (**FSDC**) has released a report entitled 'Proposals to Extend Offshore Private Equity Fund Tax Exemption to Hong Kong Businesses'. The report sets out some key recommendations with an aim of harmonising the existing offshore private equity fund tax exemption regime.

The report analyses the limitations of the current offshore private equity fund tax exemption regime and proposes a number of refinements, with the objective of reinforcing Hong Kong's role as the largest international asset management centre in the region. The refinements include:

- extending the tax exemption to cover investment in Hong Kong private companies and non-Hong Kong private companies with substantial operations in Hong Kong, subject to certain exceptions;
- removing certain tax implications relating to tainting; and
- expanding the scope of allowable activities of a special purpose vehicle which can be tax exempted.

For details please click **here** for the press release and **here** for the report.

Source: Clifford Chance Alert, July 2017

Korea

The Ministry of Strategy and Finance announced Korea's 2017 Tax Revision Proposal

The Korean government has issued proposals to make a number of amendments to the Korean tax code. These include a proposal to raise the top rate of tax (for companies with taxable income exceeding KRW 2 billion) to 25% and proposals to reduce the amount of losses that large corporations can offset to 50% of taxable profits. The government also proposes to take a number of actions in line with the OECD BEPS initiative, including introducing restricting interest deductions to 30% of adjusted taxable income and restricting deductions for hybrid financial instruments that are not subject to tax in an overseas jurisdiction.

For more details please click here.

Singapore

MAS responds to feedback on review of competency requirements for representatives conducting regulated activities under the SFA and FAA

The Monetary Authority of Singapore (**MAS**) has published its response to the feedback it received on its December 2016 public consultation on its review of the competency requirements for representatives conducting regulated activities under the Securities and Futures Act (SFA) and Financial Advisers Act (**FAA**).

Amongst other things, the MAS has confirmed that:

- for greater consistency in professional standards, it will work with the Institute of Banking and Finance (**IBF**) and Singapore College of Insurance (**SCI**) to incorporate relevant content from the industry codes of other professional bodies into the Rules, Ethics and Skills (**RES**) modules;
- instead of offering only one add-on module for trading on securities exchanges and another for derivatives exchanges, MAS will introduce an add-on exchange module for each approved exchange;
- in consultation with IBF, MAS will provide appointed representatives of non-exchange member firms the option of taking a combined RES module on securities and derivatives;
- under the proposed amendments to the SFA, appointed representatives dealing in options on equity index will be deemed as 'dealing in derivatives';
- MAS will introduce four additional combined product knowledge modules to give appointed representatives who wish to deal in multiple products the option to sit for fewer examinations;
- the IBF and SCI will provide administrative details of the revised Capital Markets and Financial Advisory Services Examination (CMFAS) examinations, including the costs and waiting time, in due course;
- MAS will be reducing the accredited continuing professional development (**CPD**) training hours for appointed representatives under the FAA from 12 hours to 6 hours, and will no longer prescribe a minimum number of hours for ethics or rules and regulations; and
- MAS will introduce a total of 9 hours of CPD training requirements for SFA appointed representatives, which will take effect on 1 January 2019.

For more details please click **here**.

MAS consults on changes to notification requirements in relation to representatives of financial institutions serving only non-retail customers

The MAS (MAS) has launched a public consultation on proposed changes to the notification requirements in relation to representatives of financial institutions serving only non-retail customers.

The MAS proposes to streamline the Representative Notification Framework (**RNF**) and apply the notification requirements only in respect of representatives who serve retail customers. The RNF was introduced in 2010 to allow financial institutions to lodge notifications with the MAS for their representatives conducting regulated activities under the SFA and FAA.

Under the proposal, financial institutions will not be required to submit notifications for their representatives who serve only non-retail customers, as such customers are generally better able to protect their own interests. The proposed procedural change is intended to reduce the administrative burden of financial institutions, by reducing the number of notifications they have to lodge.

In particular, the MAS seeks views on the following:

- the proposal not to require financial institutions to lodge notifications for representatives who serve only non-retail customers; and
- whether to consider 'expert investors' as retail or non-retail customers for the purposes of the proposed changes to the RNF framework.

Comments on the consultation are due by 27 October 2017.

For more details please click **here**.