

The logo for Dentons, consisting of the word "DENTONS" in a bold, white, sans-serif font, enclosed within a white arrow-shaped graphic pointing to the right. The background of the entire page is a close-up photograph of purple flowers, with a large, dark purple, semi-transparent shape in the upper left corner that serves as a backdrop for the logo and title.

DENTONS

Managed investment schemes

Grow | Protect | Operate | Finance

2024

Managed investment schemes

1. Managed investment schemes

A managed investment scheme is an investment structure which allows individuals or companies to pool funds for a common purpose to make a profit. Generally, only investment structures which are 'collective' and 'managed' are managed investment schemes. They are governed by the Corporations Act and have three particular features:

- Investors contribute money or money's worth as consideration to acquire rights (interests) to benefits that are produced by the scheme.
- All contributions from investors are pooled or used for a common purpose to further produce benefits. Benefits may be financial or consist of rights or interests in property.
- The members of the scheme (investors) are not active in controlling the scheme's day-to-day operations.

Most managed investment schemes established in Australia are established in the form of a unit trust to provide for tax flow-through for investors. However, a managed investment scheme can also take other forms such as a bare trust, discretionary trust, syndicate or other contractual arrangement. There are certain things which are excluded from being a managed investment scheme, such as a franchise, a regulated superannuation fund, a body corporate and the issue of debentures and convertible notes by a body corporate. Accordingly, a share, debenture or convertible note in a company can never be an interest in a managed investment scheme and neither can a limited partnership interest in an early stage venture limited partnership or a venture capital limited partnership (as these entities are required to be incorporated partnerships under the *Venture Capital Act 2002* Cth which is a body corporate).

A managed investment scheme can be registered or unregistered. If a scheme has 20 or more members or if it is promoted by a person who is in the business of promoting managed investment schemes, except where interests in the scheme are only available only to wholesale investors, the scheme must be registered with ASIC.

As at 30 June 2023, there were 3,605 registered managed investment schemes in Australia.

Registered schemes are governed under Chapter 5C of the Corporations Act and have additional compliance, governance, product governance and disclosure responsibilities. Registered schemes are identified by an Australian Registered Scheme Number (ARSN). They must have a compliant constitution, appoint a 'responsible entity' (a regulated trustee), which must be a public company, hold an Australian Financial Services Licence (AFSL) with the appropriate authorisations to act as a responsible entity and operate the managed investment scheme. The responsible entity must meet a minimum net asset (i.e. capital) requirements and/or appoint a custodian to hold scheme assets. The responsible entity must also create and lodge a compliance plan with ASIC to ensure compliance with the scheme constitution and the Corporations Act and lodge audited accounts. If the board of the responsible entity does not have a majority of independent, external directors, then the responsible entity board must appoint a compliance committee with a majority of external members.

Any disclosure document issued by a responsible entity for a registered managed investment scheme must be notified to ASIC and the responsible entity must also create a target market determination identifying the target retail investors for the scheme. Periodic and annual reporting must be made to investors in accordance with the Corporations Act, in addition to meeting continuous disclosure reporting obligations. A registered managed investment scheme is an entity eligible to be listed on the Australian Securities Exchange.

An unregistered managed scheme is not subject to the same compliance, disclosure and governance regulatory requirements as a registered scheme (since an unregistered scheme is not regulated under Chapter 5C of the Corporations Act and need not meet the product governance obligations under the design and distribution obligations in the Corporations Act). However, a trustee of an unregistered scheme is generally required to be appropriately authorised under an AFSL, subject to any relevant exemptions. Further, a trustee of an unregistered scheme may be subject to certain compliance requirements as a

result of being licensed, such as the requirement to have a compliance management system (ASIC Regulatory Guide 132) and meet financial requirements if providing incidental custody (ASIC Regulatory Guide 166).

2. Corporate Collective Investment Vehicles

The CCIV regime was introduced in July 2022. The objective of the regime was to create a new type of Australian investment vehicle in the form of a company with fund characteristics, including sub-funds. It was created with the intention of being a form of collective investment vehicle in Australia which would be similar to other corporate funds vehicles in other jurisdictions such as Luxembourg (SICAV), the United Kingdom (ICVC) and Singapore (VCC). The CCIV is also a vehicle that may be 'passport' under the Asia Region Funds Passport to participating Asian economies.

The CCIV must be operated or directed by a corporate director which must be a public company. The corporate director must be appropriately licensed with an AFSL to operate a CCIV. A CCIV may operate as a retail CCIV or a wholesale CCIV. A retail CCIV with a single sub-fund or a single sub-fund of a CCIV is able to be listed on the Australian Securities Exchange.

One of the key features of a CCIV is that the assets and liabilities of a CCIV are allocated to distinct sub-funds of the CCIV. Each sub-fund of a CCIV is registered separately with ASIC, and the clear identification and segregation of the assets and liabilities ensures the business of each sub-fund is protected from the business of other sub-funds, including in an insolvency context.

There are other structural, regulatory, compliance and governance requirements applicable to CCIVs, some of which are similar and some of which are different to the managed investment scheme regime. For example, wholesale CCIVs are subject to greater regulation and regulator oversight than unregistered managed investment schemes because they must be registered with ASIC. In particular, the corporate director of a wholesale CCIV must be a public company (rather than a proprietary company) and a wholesale CCIV constitution must be lodged with ASIC (although it is not publicly available). Further, a responsible entity of a registered scheme must seek a variation of its AFSL to be able to act as a corporate director of a CCIV.

It appears to be due to these differences and the fact that there is no transitional regime for existing funds to convert to a CCIV including in relation to tax (rollover relief) and regulatory (to facilitate amendments to existing fund constitutions), that the take-up of CCIVs in Australia by responsible entities and Australian fund managers since commencement of the regime in July 2022 has been limited. It is expected that the CCIV regime may be more attractive to foreign fund managers establishing operations in Australia who will be more familiar with the corporate funds' vehicle with sub-funds structure and who will not be restricted by existing license and fund arrangements.



3. Regulatory developments

During 2023, the Australian Government conducted a review and consultation process (**MIS Review**) to review the efficacy of the regulations for managed investment schemes in Australia and the determinative tests for wholesale investors under the Corporations Act.

The MIS Review consisted of 24 groups of questions interrogating the following key regulatory aspects of the operation and governance of registered managed investment schemes in Australia, including:

1. 'Wholesale' investor thresholds: Whether the current wealth test thresholds that determine whether an investor is a 'retail' or 'wholesale' client remain appropriate.
2. Suitability of scheme investments: Whether certain managed investment schemes should be marketed and sold to 'retail' investors.
3. Scheme governance and the role of the responsible entity: Whether the governance, compliance and risk management frameworks for managed investment schemes under Chapter 5C of the Corporations Act are appropriate.
4. Right to replace the responsible entity: Whether 'investor rights' for people who invest in managed investment schemes are appropriate.
5. Right to withdraw from a scheme: Liquidity requirements for managed investment schemes.
6. Winding up insolvent schemes: Whether an insolvency regime is required for managed investment schemes.
7. Commonwealth and state regulation of real property investments: The interaction between Commonwealth and State laws when regulating real estate investments by managed investment schemes including issues relating to the failed SIT and Sterling Group.

It is expected that draft revised legislation addressing each of these issues will be issued later in 2024 for review and further consultation. Based on the submissions provided, it is expected (amongst other things) the wealth tests for determining wholesale investors will be increased and a new legislative regime for the insolvency of managed investment schemes may be introduced.

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