



Compliance Committee Forum

October 2022



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COMPLIANCE COMMITTEE
FORUM WEBINAR

Advertising and
Marketing of Products:
Tips and Traps

Presented by Selina Nutley
Partner, McMahon Clarke

19 October 2022

Overview

- Sources of obligations regarding advertising
- Recent actions from the regulator regarding advertising
- Possible consequences of breach
- Case examples
 - ASIC v La Trobe
 - ASIC v Mayfair
 - Latitude Finance and Harvey Norman
 - Fawkner Properties – stop order



Selina Nutley

Partner, Litigation and Funds Management

Selina leads our Litigation team and has extensive experience in all aspects of commercial litigation and dispute resolution, from general civil litigation, particularly in the funds management, financial services, real estate, and corporate sectors, to class actions. In the funds management and financial services area, Selina is focused on assisting clients with managing contentious relationships between trustees, investment managers and investors, regulatory investigations (including with AFCA) and disputes arising from the licensee/authorised representation relationship. In the property arena, Selina advises clients in disputes concerning contracts, development agreements, resumption of land and also represents clients in the Planning and Environment Court.



Obligations regarding advertising

General principles

- The catch-all: section 912A(1)(a) Corporations Act – AFS licensee has an obligation to do all things necessary to ensure financial services are provided ‘efficiently, honestly and fairly’
- Most ASIC guidance on marketing and promotional material is tailored to ‘retail’ investors
- However, you need to ensure you are not making false or misleading statements or engaging in misleading or deceptive conduct

Sources of obligations

- The general law (common law) and IM
- Corporations Act
 - Section 1041E—False or misleading statements
 - Section 1041H—Misleading and deceptive conduct
- ASIC Act 2001
 - Section 12DA—Misleading or deceptive conduct
 - Section 12BB—Misleading representations with respect to future matters
- ASIC Regulatory Guide 234—Advertising financial products and services (including credit): Good practice guidance (RG 234)
- ASIC Regulatory Guide 170—Prospective financial information (applies to conduct under s 1041H of Act)

Recent ASIC actions regarding advertising

ASIC's "true to label" project

- Shortlisted products from over 350 funds with \$65bn+ in assets
- Targeted surveillance of 37 funds operated by 20 REs with \$21bn in assets
- Funds identified through
 - Data analysis
 - Assessment of product names
 - Labelling practices
- Two significant concerns identified
 - Confusing and inappropriate product labels (mostly cash funds)
 - Redemption features not matching liquidity of underlying assets



ASIC's expectations – on labelling

'cash' (Media release 20-218MR)

Fund should not use terms such as "cash" or "cash enhanced" unless its assets are predominantly cash and cash equivalents

'Capital stable' (www.moneysmart.gov.au)

"A fund that invests across a range of asset classes but with a significant portion in defensive assets such as fixed interest investments and cash and a small portion in growth assets such as shares and property. This type of fund aims to provide a moderate level of income with some capital growth"

Redemption terms (Media release 20-218MR)

Mismatch between redemption terms and underlying assets – revise redemption terms or move to less frequent redemptions

Extract from ASIC media release 20-137MR

ASIC Deputy Chair, Karen Chester said, 'Following our review, we directly raised concerns with seven REs about their advertising and disclosure in relation to 13 investment funds. Collectively, these funds have approximately \$2.5 billion under management. All seven REs have now taken corrective action'.

The seven REs have:

- ceased advertising of funds and reviewed advertising content;
- ceased issuing interests in funds until ASIC's concerns are addressed;
- withdrawn and replaced product disclosure statements;
- provided more balanced and prominent disclosure of investment risks and disclaimers;
- clarified actual withdrawal terms
- stopped comparing funds to other (lower risk) products on webpages.

Financial Review coverage

ASIC targets funds for misleading investors



Jonathan Shapiro
Senior reporter

Jun 15, 2020 - 3.01pm



The corporate regulator has forced 13 investment firms with \$2.5 billion of assets to change disclosures or modify their offerings amid concerns about how they were marketed to the public.

The unnamed funds were targeted as [part of a crackdown on investment products](#) that gave an impression that they were safer than they actually were or that investors could easily get their funds back at short notice.



Source: <https://www.afr.com/companies/financial-services/asic-targets-funds-for-misleading-investors-20200615-p552ph>

Three fund REs revealed in ASIC marketing crackdown

Aleks Vickovich and Jonathan Shapiro

Sep 9, 2020 - 4.07pm



Australian Unity, Skyring Asset Management and Tasmanian Perpetual Trustees have been identified as three of the seven responsible entities targeted by the regulator in a crackdown of marketing material relating to fixed income funds.

The identities of the fund REs is revealed in freedom of information documents requested by *The Australian Financial Review* [after the regulator announced in June](#) it had forced corrective disclosures from 13 funds overseen by seven REs.

Source: <https://www.afr.com/companies/financial-services/three-fund-res-revealed-in-asic-marketing-crackdown-20200909-p55tu>

ASIC's 2022 advertising project

- Targeting misleading performance and risk representations
- Traditional and digital media, including search engine advertising
- Retail investors and unsophisticated wholesale investors
eg retirees

Examples

- No disclaimers/risk information
- Use of “up to”
- Strong headline claims
- Different size/colour font
- Prominence of qualifications



Extract from ASIC media release 22-249MR



ASIC
Australian Securities &
Investments Commission

Attachment to 22-249MR Managed funds amend their marketing following ASIC surveillance

The table below lists the 18 funds (including their Australian Registered Scheme Number (ARSN), where appropriate) and the responsible entities or trustees that have taken action to address ASIC concerns about their marketing material and practices. These funds represent a broad cross-section of investment strategies, and include 9 registered funds and 9 unregistered funds, with approximately \$1.4 billion in assets under management.

Table 1: Summary of responses to ASIC concerns about fund advertising and websites

Responsible entity or trustee	Product	ASIC concerns	Actions to address ASIC's concerns
AMAL Trustees Pty Limited (ACN 609 737 064)	The OTG Capital Asset Backed Investment Trust	We were concerned that: <ul style="list-style-type: none"> › advertising and the website presented current and future returns ambiguously › past returns on the website were presented with inconsistent annualisation › warnings on the website were not sufficiently clear, prominent or close to the claim they were about. 	In consultation with the trustee, the investment manager withdrew the advertisements pending a review to address all concerns. The investment manager made changes to the website to address all concerns.

Source: Funds amend marketing follow ASIC surveillance (Attachment to 22-249MR)

Australian Finance Review coverage

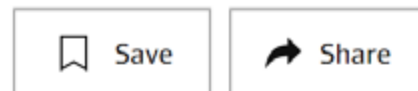
13 funds named and shamed over dodgy ads



Aleks Vickovich

Wealth editor

Sep 8, 2022 - 2.30pm



Perpetual, BetaShares and Collins St Asset Management are among 13 investment firms rebuked by the corporate regulator after surveillance of managed fund marketing materials found they failed to properly disclose risks and investment performance metrics.

The Australian Securities and Investments Commission on Thursday released a list of 13 managed fund providers and trustees who “voluntarily” amended website or other marketing and advertising material after ongoing monitoring sparked a “number of concerns”.

Source: 13 fundies named and shamed over dodgy ads (afr.com)

Possible consequences of breach

- Claims by investors (damages)
- Civil penalty proceedings e.g. Section 1041E, 1041H
- Imposing of licence restrictions by ASIC
- Adverse publicity
- Insurance issues
- Stop order



Recent judicial decisions

- Per ASIC Deputy Chair Karen Chester, these cases are:
 - *“a warning that ASIC will not only take action where investments are marketed as safer, lower risk, or more liquid when they are not, but when search engines are used in a misleading or deceptive way to entice investors to products they are not searching for”*
- ASIC has established a cross-team advertising working group to help identify products or services that are unsuitable, inappropriate or may be seeking to exploit investors
- Seeking to protect expanding cohort of investors who meet wholesale test, but lack financial savviness or experience

ASIC v La Trobe

- Between 2017 to 2020, La Trobe heavily promoted the (retail products) 48 Hour Fund and 90 Day Fund in newspapers and on the internet – both mortgage funds
- Advertising represented investors could withdraw funds within 48 hours and 90 days respectively when constitutions allowed up to 12 months (if liquid)
- Also represented the investments were “stable” – no real risk of losing principal
- In 2017 ASIC raised concerns about the advertising; La Trobe made amendments and understood ASIC was happy
- ASIC commenced Federal Court proceedings alleging misleading and deceptive conduct under the ASIC Act and Corporations Act
- La Trobe admitted to contraventions and the parties agreed a penalty of \$750,000 (max penalty of \$15m)
- Justice O’Byrne had extreme reservations; said it needed to be more than just cost of doing business
- Relevant factors: general deterrence, potential scale of loss to investors, public interest, cooperation with ASIC, compliance culture, penalties in similar cases
- Accepted agreed penalty was appropriate

ASIC v Mayfair

- Mayfair marketed promissory notes (wholesale products) through websites and newspaper advertisements
- Configured online search terms to ensure products seen by investors seeking low-risk investments – Mayfair websites were first and second listed results
- Found four key misrepresentations
 - Investments comparable to bank term deposits with similar risk profile
 - No risk of default
 - On maturity, principal would be repaid in full
 - Fully secured financial products
- Imposed \$30m penalty across four Mayfair companies
- Relevant factors
 - Conduct deliberate
 - No remorse
 - Investors suffered great loss
- James Mawhinney (director) banned from promoting financial products for 20 years – overturned on appeal
- Companies permanently restrained from using certain terms in future advertising – overturned on appeal
- Adverse publicity orders

Latitude Finance and Harvey Norman

- ASIC filed proceedings over promotion of interest free payment methods
- Alleges failure to disclose availability conditions and misrepresented costs

Harvey Norman

60 MONTHS INTEREST FREE*

NO DEPOSIT NO INTEREST

with 60 equal monthly payments until April 2025. Minimum financed amount \$1000.

Offer ends 28/04/20. Apply in stores only. Available for in-store and selected online purchases. Approved applicants only. Fees & charges apply. Interest applies if you do not comply with terms and conditions.

PLUS BONUS GIFT CARD*

up to \$300 on 60 Months Interest Free* purchases

\$50 GIFT CARD <small>when you spend \$1,000+</small>	\$100 GIFT CARD <small>when you spend \$2,000+</small>	\$150 GIFT CARD <small>when you spend \$3,000+</small>	\$200 GIFT CARD <small>when you spend \$4,000+</small>	\$250 GIFT CARD <small>when you spend \$5,000+</small>	\$300 GIFT CARD <small>when you spend \$6,000+</small>
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- INTEREST FREE OFFER ENDS TUESDAY -

Harvey Norman* is available in store, online and over the phone to help with the essentials for daily life.

STORES OPEN ACROSS THE COUNTRY

*1 *2 See back page for Interest Free and Gift Card terms and conditions.

Source: <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2022-releases/22-270mr-asic-sues-latitude-finance-australia-and-harvey-norman-holdings-for-allegedly-misleading-interest-free-advertising/>

Fawkner Properties – stop order

- ASIC issued interim stop orders against Fawkner Property
- Prevents it from offering, issuing, selling or transferring units in a product marketed as “Essential Services Trust No. 20”
- Alleged misleading and deceptive statements in marketing and PDS
 - Inadequate explanation of calculation of forecasted returns
 - Inadequate risk disclaimers
 - Use of term “covid-proof”
 - Inappropriate comparison to lower risk investments
 - Use of outdated performance numbers
- Also alleged TMD did not meet DDO requirements



Key takeaways and tips

- Ensure material complies with RG234
- Adequacy of disclosure is qualitative not quantitative test
- Avoid words or phrases that can convey different meanings
- Use clear and accurate language
- Consider target audience in preparing promotional material
- General disclosure of risks not sufficient
- Disclaimers can be effective, but must be prominent and tailored
- Consider overall impression conveyed
- Use up to date information

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The New Corporate Collective Investment Vehicle (CCIV)

Presented by Elliott Stumm
Partner, McMahon Clarke

19 October 2022

What is a trust?

A trust is an obligation imposed on a person to hold property for the benefit of other people



What is a company?

A company is a legal person separate to its owners and managers



What is a CCIV?

A CCIV is a special type of company that is like a trust and is designed for collective investment

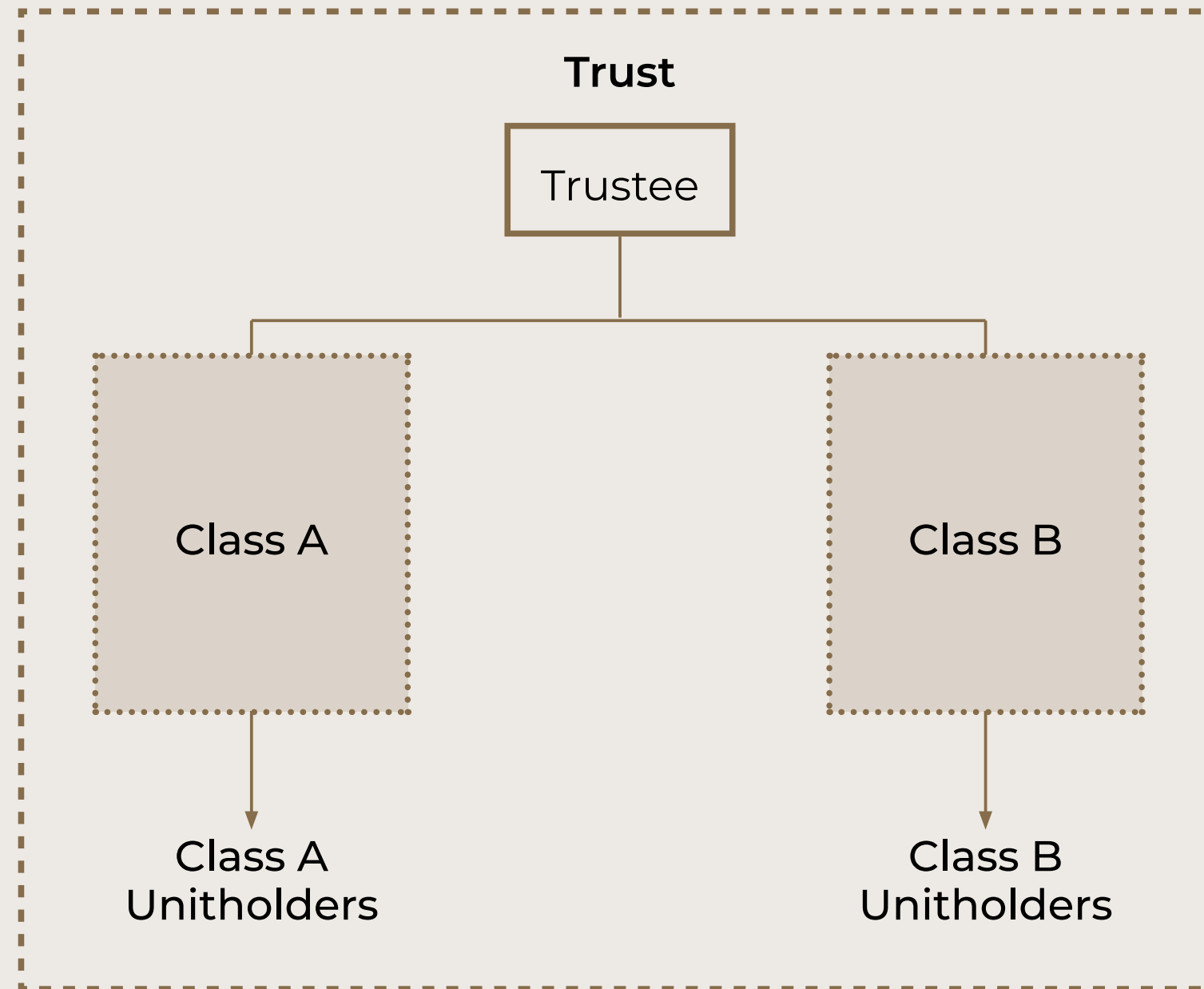


Key concepts

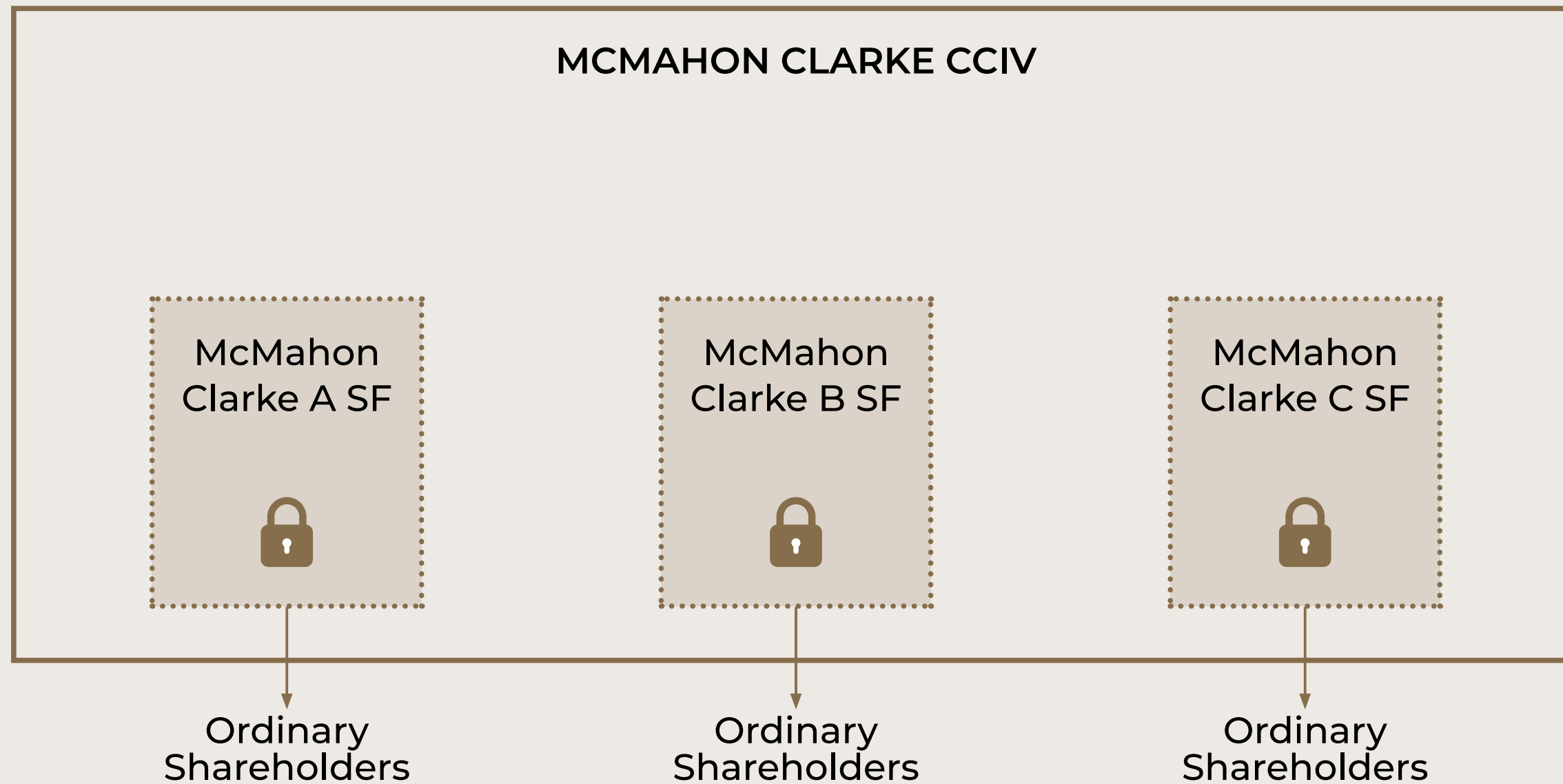
- Corporate director
- Sub-funds



'Multi-class fund'



'Multi-class fund'



Licensing and regulation

- Retail and wholesale CCIVs
- Eligibility to be a corporate director
- Licensing
- Incorporation and registration





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Thank you



Compliance Committee Forum

Update on current tax issues for managed funds

Brenton Chan | Client Director, Tax Advisory

October 2022

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What we are covering today



ATO activity

Update on recent activity



MIT Capital Account Election

Why fund operators should pay attention to the MIT status throughout the fund term



New Corporate Collective Investment Vehicle (CCIV) regime

Where are we at with tax, including potential benefits and key watchouts

Recent ATO activity

What are the key ATO review focus areas?



Focus on property funds and transactions



Pre-lodgement engagements

Push towards **voluntary** pre-lodgement engagements

Offered by the ATO via 2 streams

- Early engagement advice
- Early engagement assurance



Keys to successful engagement

- Tax governance framework
- Appropriate support for positions taken on transactions

Managed Investment Trust – capital account election

Why should fund operators pay attention throughout the fund term?



MIT capital account election



Where certain conditions are met, a MIT can elect to treat assets held on "capital account"

Whether a "valid MIT election" has been made remains a key question in ATO reviews dealing with the capital versus revenue treatment of asset disposals.

Managed Investment Trust – capital account election

Equity and property funds



Equity funds

Critical for equity fund operators to assess their ability to satisfy MIT criteria **at the time of fund establishment** as they may be precluded from making the election in future



Property funds

Critical for property fund operators to assess and monitor their ability to satisfy the MIT criteria and the 'primary purpose test' for property funds **prior to the year of sale**

Must prove property held for the 'primary purpose' of generating rental income in the year of sale



Corporate collective investment vehicle (CCIV) regime ***Where are we at with tax?***

CCIV regime commenced from
1 July 2022

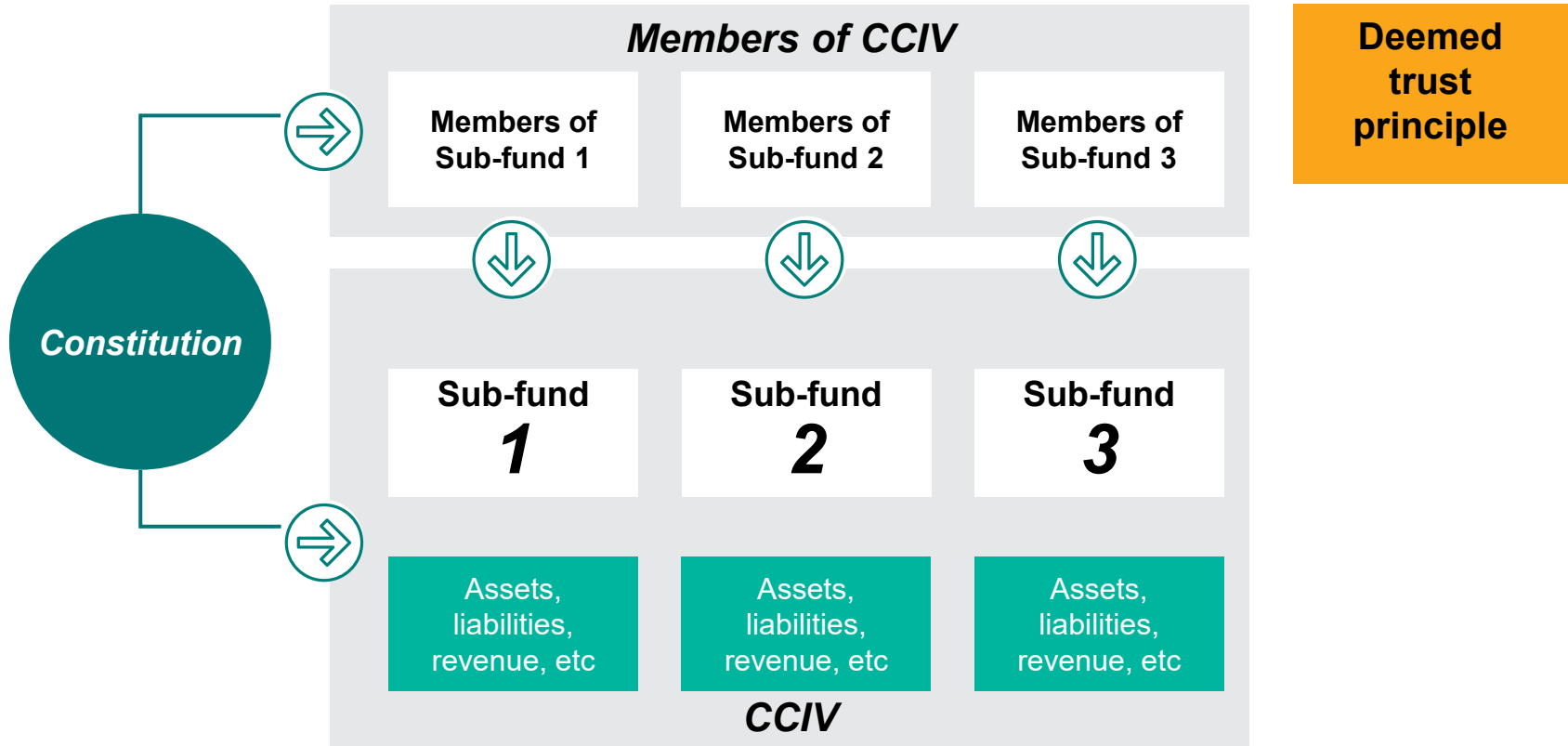
Legal form company instead of
trust, whilst maintaining tax
flow-through status

Residual tax issues will require
further practical guidance from
the ATO and State Revenue
authorities



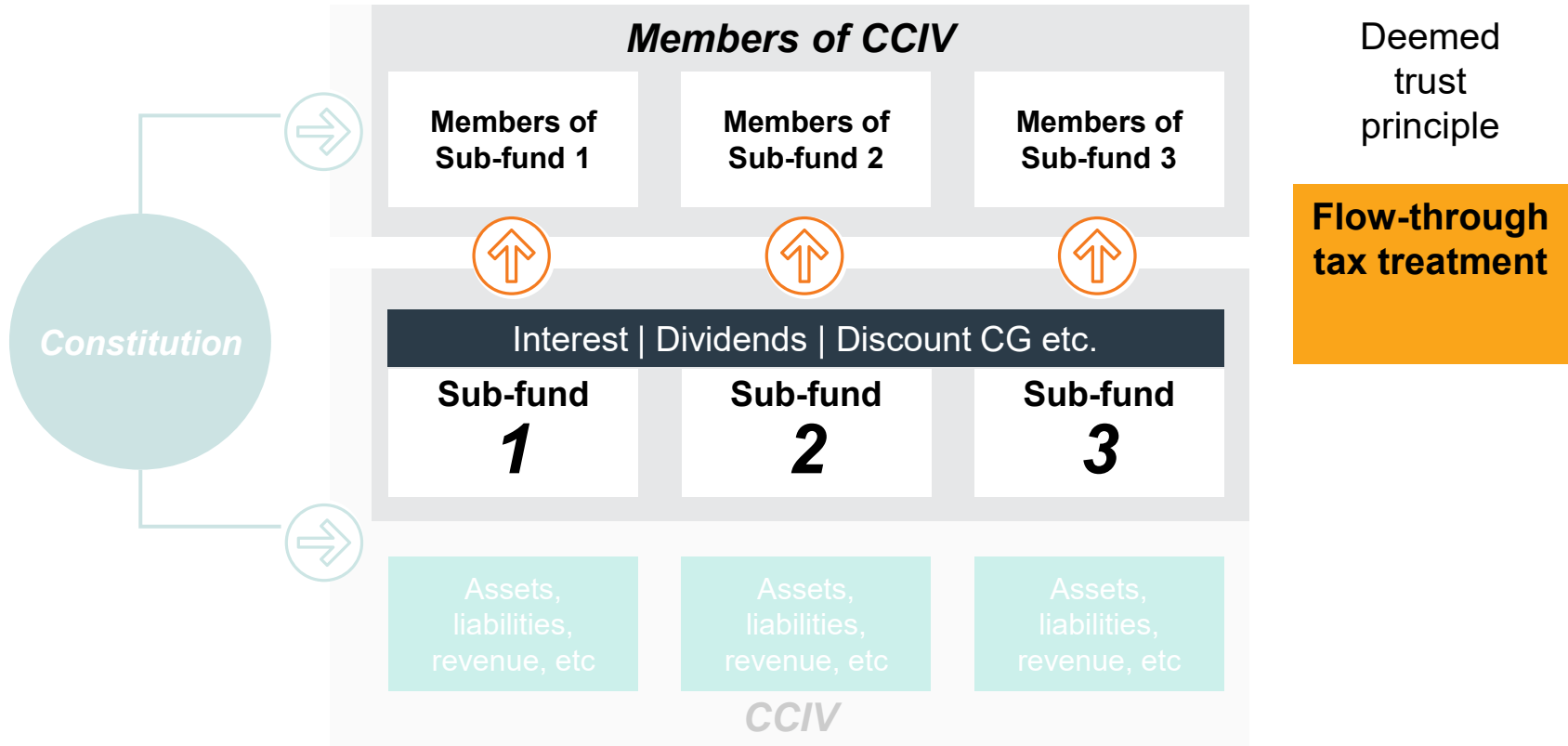
Corporate collective investment vehicle (CCIVs)

Where are the key tax features?



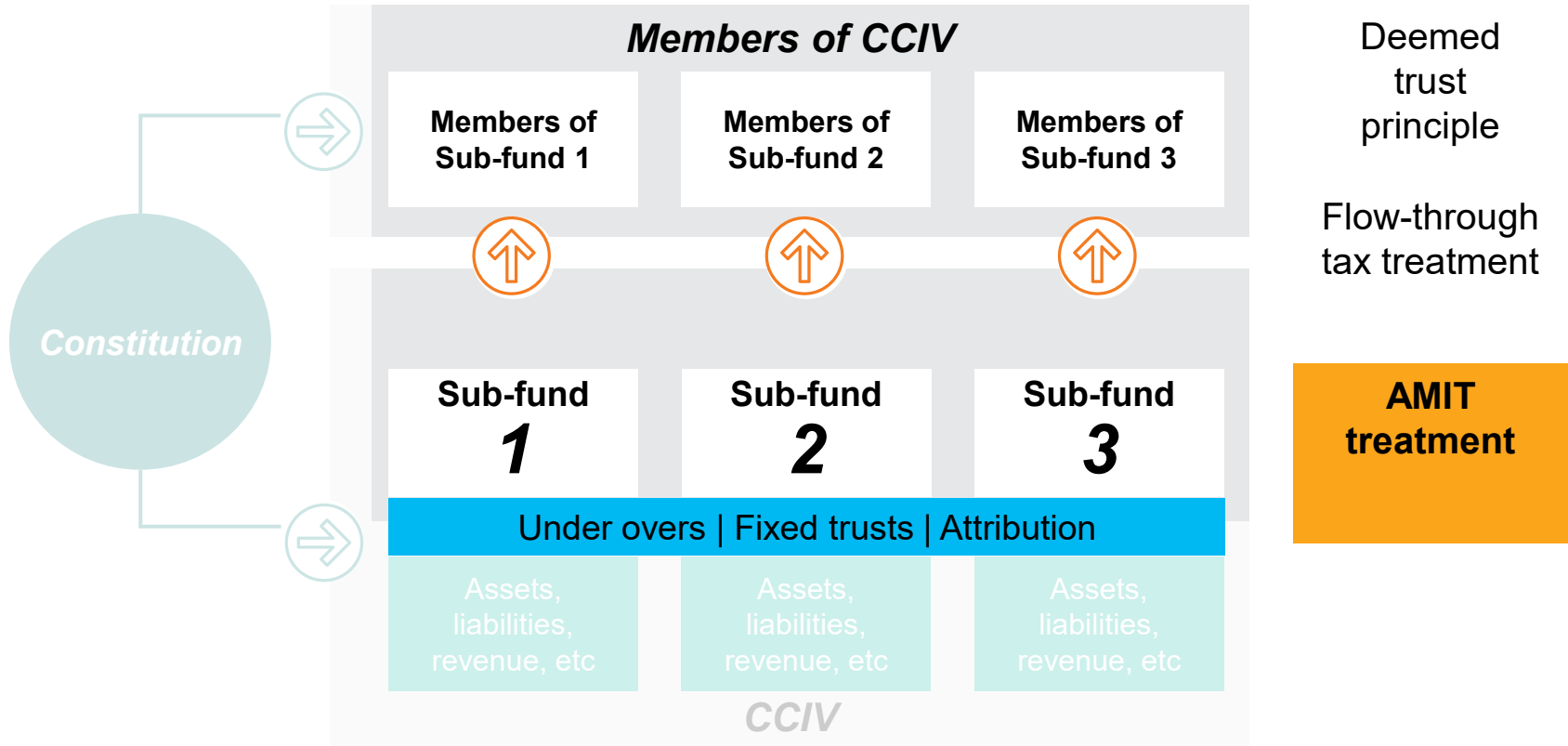
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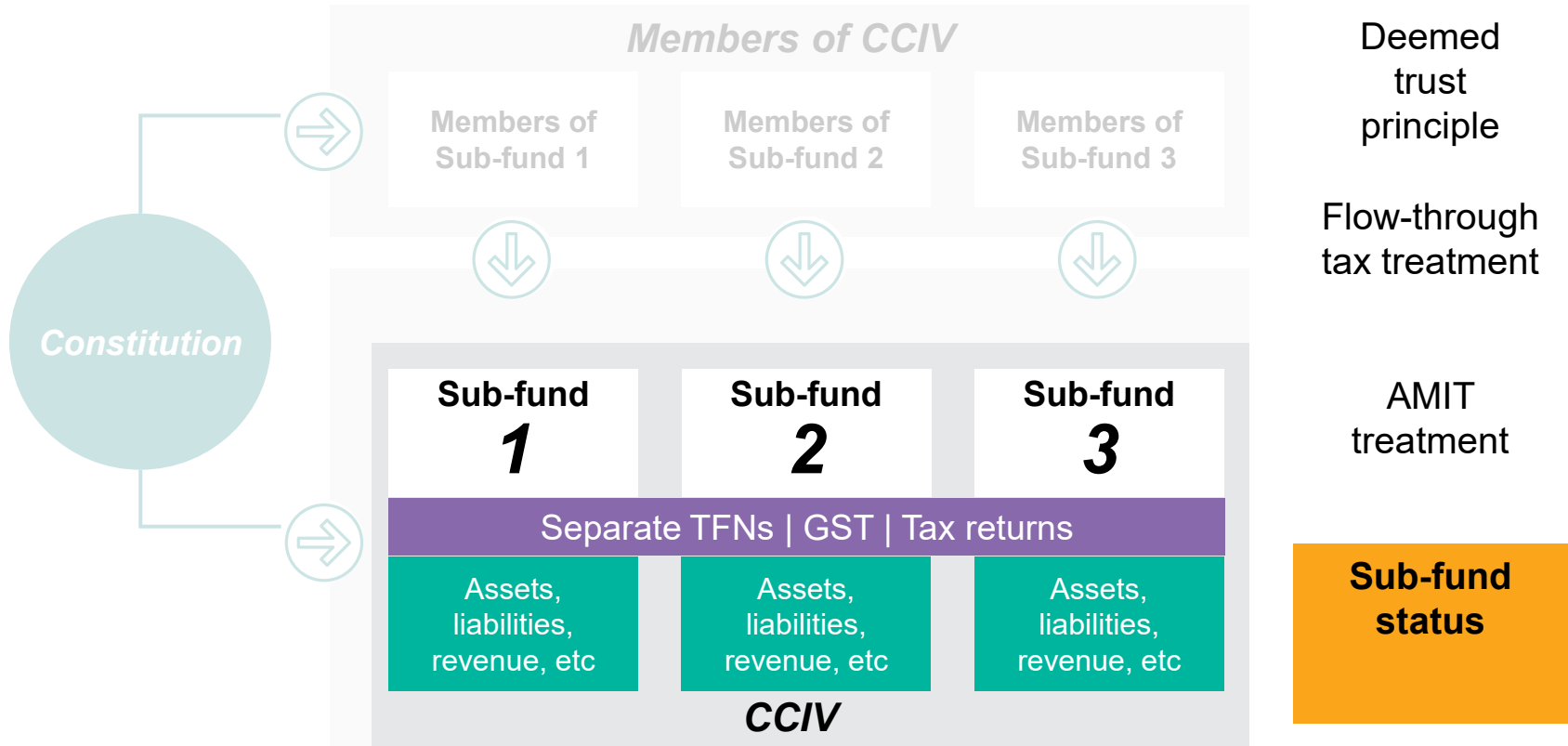
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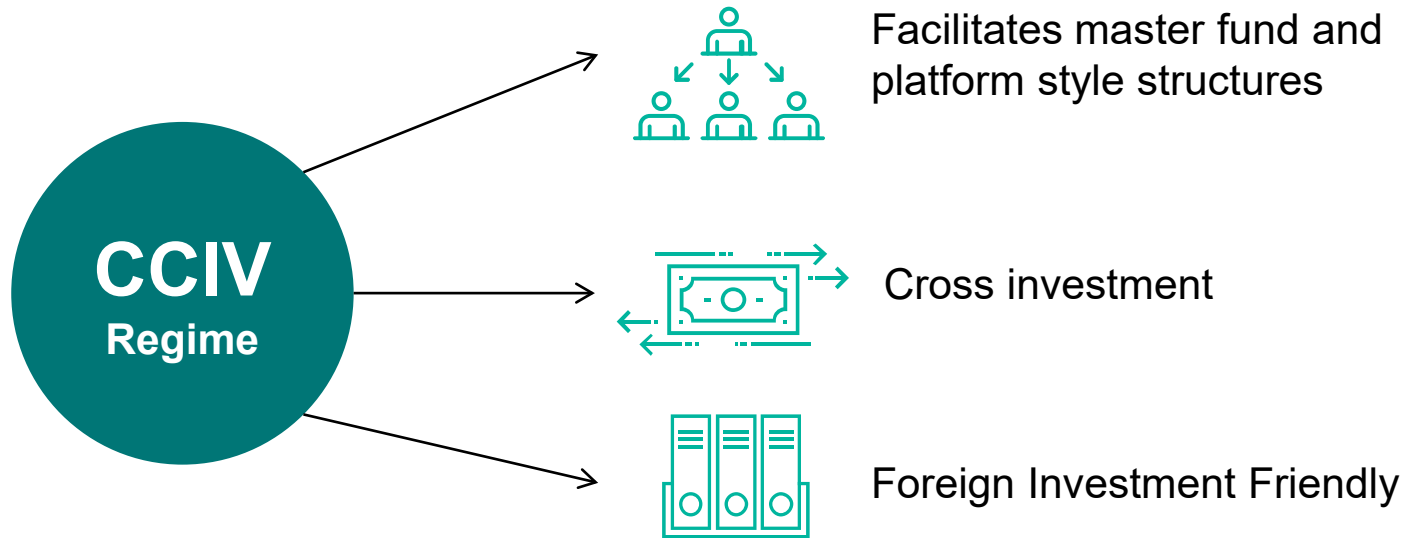
Corporate collective investment vehicle (CCIVs)

Where are the key tax features?



Corporate collective investment vehicle (CCIVs)

What are the key benefits and opportunities?



Key tax watchouts for CCIVs



Risk of tax at top marginal rate to CCIV where sub-fund does not qualify as an AMIT



State taxation regimes need to accommodate CCIVs



No transitional rules for existing AMITs looking to convert to CCIVs

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