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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

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CORPORATIONS AMENDMENT (SIMPLE CORPORATE BONDS AND OTHER  
MEASURES) BILL 2013 (NO. )

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EXPOSURE DRAFT

EXPLANATORY MEMORANDUM

(Circulated by the authority of the  
Deputy Prime Minister and Treasurer, the Hon Wayne Swan MP)



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## ***Glossary***

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The following abbreviations and acronyms are used throughout this explanatory memorandum.

<b><i>Abbreviation</i></b>	<b><i>Definition</i></b>
AGD	Attorney-General's Department
ASIC	Australian Securities and Investments Commission
The Bill	The Corporations Amendment (Simple Corporate Bonds and Other Measures) Bill 2013
Corporations Act	<i>Corporations Act 2001</i>
DI	Depository interest
DN	Depository nominee



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## **General outline and financial impact**

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### **Outline**

The Corporations Amendment (Simple Corporate Bonds and Other Measures) Bill 2013 (the Bill) amends the Corporations Act 2001 (the Corporations Act) to facilitate improved trading of retail corporate bonds in Australia.

***Date of effect:*** Sections 1 to 3 of the Bill have effect the day after the Act receives the Royal Assent. Schedule 1 of the Bill has effect on a day fixed by Proclamation or the day after 6 months after Royal Assent.

***Proposal announced:*** The measure was announced in a media release titled ‘A competitive and sustainable banking system’ by the Deputy Prime Minister and Treasurer, dated 12 December 2010 and included in the 2011/12 Budget.

***Financial impact:*** No financial impact

***Human rights implications:*** This Bill does not raise any human rights issue. See *Statement of Compatibility with Human Rights* — Chapter 2, paragraphs 2.3 to 2.6.

***Compliance cost impact:*** This Bill reduces the compliance costs faced by issuers of certain retail corporate bonds.

### **Summary of regulation impact statement**

#### **Regulation impact on business**

***Impact:*** The Office of Best Practice Regulation has confirmed that the amendments do not require a regulation impact statement.

# **Chapter 1**

## **Retail Corporate Bonds**

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### **Outline of chapter**

1.1 The Bill amends the Corporations Act to facilitate increased trading in retail corporate bonds in Australia, through both direct and indirect processes.

### **Context of amendments**

1.2 The proposed measures to facilitate increased trading of retail corporate bonds in Australia are one of the initiatives undertaken by the Government to promote a competitive and sustainable financial system. The overall objective of the measures are to improve the attractiveness for corporations of issuing corporate bonds to retail investors while ensuring effective consumer protections are maintained.

1.3 In 2012, as part of its broader commitment to foster a deep and liquid corporate bond market, the Government facilitated retail trading in Commonwealth Government Securities (CGS). Making CGS accessible to retail investors through financial markets is a crucial element of the Government's commitment. CGSs provide retail investors with a visible pricing benchmark for investments they may wish to make in corporate bonds.

1.4 The measures in this Bill continue the Government's commitment to establishing a strong and liquid retail debt market in Australia by facilitating increased offerings of corporate bonds to retail investors in Australia through:

- a streamlined disclosure regime;
- changes to the civil liability provisions in respect to corporate bonds issued to retail investors; and
- clarifying the application of the defences in respect to misleading and deceptive statements and omissions in disclosure documents relating to corporate bonds issued to retail investors.



1.5 The Corporations Act governs the fundraising practices of corporate entities in Australia. The provisions in the Corporation Act that relate to fundraising, particularly those that relate to the obligation to prepare a disclosure document (generally a prospectus) and its content are contained in Chapter 6D.

1.6 Currently, the Corporations Act requires a corporation to prepare a full prospectus for the offer of corporate bonds to retail investors. In a full prospectus a corporation is required to disclose all of the information that investors and their professional advisors may reasonably require to make an informed assessment of:

- the rights and liabilities attaching to the securities offered; and
- the assets and liabilities, financial position and performance, profits and losses and prospects of the body that is to issue the securities.

1.7 The prospectus must contain this information to the extent to that relevant persons involved in the preparation of the prospectus actually know the information or ought reasonably to have obtained the information by making inquiries. In addition to the general disclosure requirement, the Act also sets out a number of specific requirements for particular information to be disclosed.

1.8 While the issue of corporate bonds to retail investors requires a full prospectus, the issue of corporate bonds to sophisticated or professional investors (commonly referred to as 'wholesale investors') does not require a disclosure document such as a prospectus, on the basis that wholesale investors are considered to have sufficient resources and bargaining power to evaluate investments.

1.9 The Corporations Act also sets out a number of prohibitions in connection with the offering of securities including the:

- offer of securities in a body that doesn't exist;
- offer of securities without a current disclosure document; and
- offer of securities under a disclosure document that contains a misleading or deceptive statement or has an omission of material which required under the Corporations Act.

1.10 A contravention of the prohibitions could lead to both criminal and civil liability. Chapter 6D of the Corporations Act currently includes a special civil liability regime under which the company making the offer, each current or proposed director of the company and an underwriter to the issue may all be held liable in respect of a misstatement or omission in a prospectus. A person who suffers loss or damage as a result of such a contravention may recover the amount of that loss or damage from any of those persons even if they did not commit and were not involved in the particular contravention.

1.11 There are a number of defences that apply in relation to both civil and criminal liability for a misstatement or omission in a disclosure document. The most important is the due diligence defence for prospectuses. It provides that a person will not be liable because of a misleading or deceptive statement in a prospectus or an omission from a prospectus if a person can prove that:

- they made all inquiries (if any) that were reasonable in the circumstances; and
- after doing so believed, on reasonable grounds, that either the statement was not misleading or deceptive or that there was no omission from the prospectus in relation to a particular matter.

1.12 Stakeholders have indicated that the current requirements under the Corporations Act in respect to issuances of corporate bonds to retail investors create a regulatory bias for companies to structure their fundraising either solely to wholesale investors or only to retail investors in the form of a rights issue or share purchase plan in order to avoid the obligation to prepare a disclosure document and reduce the criminal liability concerns of directors of issuing corporations. This Bill contains measures to address this perceived regulatory bias.

## **Summary of new law**

1.13 The amendments in this Bill introduce a mandatory, two-part prospectus for certain bond issuances to simplify the disclosure obligations for companies. While the framework for the two-part prospectus will be contained in the Corporations Act (in particular, the eligibility criteria for using a two-part prospectus), the content and structure of the two-part prospectus will be specified by regulations.

1.14 The two-part prospectus will be structured in the following manner:

- **Base:** The base part would have a life of three years. The base prospectus would have general information about the issuer and the issue that is unlikely to change significantly over three years. Issuers would have the option of releasing a base prospectus in anticipation of making an actual offer of bonds. Issuers would not need to update the base document.
- **Offer specific:** For each fund raising tranche, issuers will need to release a second document outlining the key details of the offer, that being the offer specific prospectus. The offer specific prospectus would have similarities with the cleansing notice regime for other offerings whereby it would include a statement outlining that the issuer has complied with their continuous disclosure obligations. Issuers would need to disclose in the second part any matters material to a consideration of an investment in the bonds which have not already been the subject of continuous disclosure.

1.15 To ensure that the new two part prospectus regime is sufficiently streamlined, certain material (as prescribed in regulations) will be able to be incorporated by reference in both the base prospectus and the offer specific prospectus.

1.16 The amendments in the Bill to the directors' liabilities have been designed to reduce the burden on directors when issuing corporate bonds to retail investors under the two part prospectus regime and will provide directors with greater clarity on the steps required as part of the due diligence process in relation to certain criminal liability offences.

## Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
The issuance of certain corporate bonds to retail investors will require the provision of a 2 part simple corporate bond prospectus.	The issuance of corporate bonds to retail investors requires the provision of a full prospectus.
Simple corporate bonds will be able to be traded using simple retail corporate bonds depository interests.	Simple retail corporate bonds like other bonds can be traded directly, but are not able to be traded as depository interests.

No civil liability will be incurred by: <ul style="list-style-type: none"><li>• the directors of a body making an offer if the offer is made by a body; or</li><li>• a person named in a disclosure document with their consent as a proposed director of a body whose securities are being offered.</li><li>• for any contravention of subsection 728(1) which relates to misstatement in, or omission from, a disclosure document.</li></ul>	Directors of a body making an offer, if the offer is made by a body and proposed directors of a body whose securities are being offered are civilly liable for any misstatement in or omission from, the disclosure document under subsection 728(1).
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## Detailed explanation of new law

### Retail Corporate Bonds

#### Part 1 General Amendments

1.17 The amendments to the Corporations Act provide a new disclosure regime for body corporates undertaking a fundraising by making an ‘offer of simple corporate bonds’ (as provided in new section 713A). The subject of the offer, that is the ‘simple corporate bonds’ debt securities that satisfy the conditions prescribed in new section 713A. *[Schedule 1, items 3 and 5, subsection 9]*

1.18 The new disclosure regime will require body corporates to issue a 2 part simple corporate bonds prospectus (as outlined in new section 713B). The 2 part simple corporate bonds prospectus will consist of two elements, a base prospectus (as outlined in new section 713C) and an offer-specific prospectus (as outlined in new section 713D). *[Schedule 1, items 1,2 and 4, subsection 9]*

1.19 Simple corporate bonds can be traded using simple corporate bonds depository interest (which is a beneficial interest in the simple corporate bonds) if the simple corporate bonds are issued by a person that owns legally or would own beneficially (apart from the issue of those interests) or has a beneficial interest in simple corporate bonds, where they have the agreement of the body that issued those bonds. *[Schedule 1, items 6 and 7, subsection 9]*

***Offer of simple corporate bonds***

1.20 If a body corporate makes an offer of debt securities where the debt securities are taken to be ‘simple corporate bonds’ (as they satisfy the conditions set out in the Corporations Act) the offer will be considered to be an ‘offer of simple corporate bonds’. *[Schedule 1, item 21, paragraphs 713A(1)(a) and(b)]*

***Simple corporate bonds***

1.21 To ensure that the streamlined disclosure regime does not reduce the current amount of information provided to retail investors to enable effective investment decisions the type of debt securities to which the new streamlined disclosure applies is restricted to debt securities that satisfy the following conditions:

- The securities must be debentures as defined in section 9 of the Corporations Act. *[Schedule 1, item 21, subsection 713A(2)]*
- The securities must be quoted on a prescribed financial market. *[Schedule 1, item 21, subsections 713A(3) and (4)]*
- The securities must be denominated in Australian currency. *[Schedule 1, item 21, subsection 713A(5)]*
- A minimum subscription amount of \$50 million must be raised under the offer in respect to the securities. *[Schedule 1, item 21, subsection 713A(6)]*
  - When working out whether the minimum subscription amount has been raised, the underwriter is taken to have applied for those securities.
    - a. An underwriter guarantee’s a certain price for a certain number of securities to the issuer of securities (in exchange for a fee).
- The fixed term of the securities cannot exceed 10 years. *[Schedule 1, item 21, subsection 713A(7)]*
- The principal investment amount and any accrued interest payable in respect of the must be repaid to the holder at the end of fixed term of the security. *[Schedule 1, item 21, subsection 713A(8)]*

- The interest rate at which the interest is payable must be either a fixed or floating rate. A floating rate is comprised of a reference rate (to which the issuer has no direct control) and a fixed margin set by the issuer. *[Schedule 1, item 21, subsection 713A(9)]*
- The securities can be subject to an increase in the fixed rate or the fixed margin in respect to the interest payable but cannot be subject to a decrease in the interest payable. *[Schedule 1, item 21, subsections 713A(10) and (11)]*
- Interest payments under the security must be paid periodically and cannot be deferred or capitalised by the issuing body. *[Schedule 1, item 21, paragraphs 713A(12)(a), (b) and (c)]*
- The face value for the security cannot exceed \$1,000. *[Schedule 1, item 21, subsection 713A(13)]*
- Securities can only be redeemed at the end of the fixed term unless they are redeemed:
  - at the option of the holder of the security;
  - as a result of the acceptance of an offer made to the holder by the issuing body to buy back the security;
  - due to a change in a law, or in the application or interpretation of a law, if that change, application or interpretation reduces the potential tax benefits for the issuer associated with issue of the debt security;
  - when there is a change of control of the issuing body (as defined in the terms of the security) and the redemption does not take effect unless all securities in the class are redeemed; and
  - when fewer than 10% of the securities issued under the offer remain on issue and the redemption does not take effect unless all securities in the class are redeemed.

*[Schedule 1, item 21, subsection 713A (14)]*

- The holders of the securities must have a priority to unsecured creditors of the issuing body, if the issuing body is wound up. In effect this condition ensures that subordinated

debt securities are not able to be considered to be simple corporate bonds. *[Schedule 1, item 21, subsection 713A(15)]*

- The repayment of the principle and the interest generated in respect of the securities must be guaranteed by or an agreement to guarantee the securities has been given by the parent company of the issuing body if the issuing body is a wholly owned subsidiary of the parent company. *[Schedule 1, item 21, subsection 713A(16)]*
- The securities must not be able to be converted into another class of securities. *[Schedule 1, item 21, subsection 713A(17)]*
- The price payable for the securities must be the same irrespective of the class of persons who accept the offer. *[Schedule 1, item 21, subsection 713A(18)]*
- The body offering the securities must have continuously quoted securities, or is a wholly owned subsidiary of a parent company that has continuously quoted securities.
  - The trading in the continuously quoted securities must not have been suspended for more than a total of 5 days during the 12 month period preceding the offer.
  - If at a particular time there is no prospectus, to determine whether a body has continuously quoted securities it can be assumed that a prospectus exists and the date of that prospectus is the first day of the offer made under that prospectus

*[Schedule 1, item 21, subsection 713A(19)and (20)]*

- The most recent auditor's report on the most recent financial statements (either the yearly or half yearly statements) for the body issuing the securities must not include:
  - a statement stating that the auditor is of the opinion that the report is not in accordance with this Act; or
  - a description of a defect or an irregularity in the financial report; or
  - a description of a deficiency, failure or shortcoming in respect of the matters referred to in paragraph 307(b), (c) or (d).

- an emphasis of a matter paragraph related to going concern.
  - a. an auditor is required to include in their report an emphasis of a matter paragraph if they conclude that a material uncertainty exists that leads to significant doubt about the ability of the company to continue as a going concern (continue to operate) and that uncertainty has been adequately disclosed in the financial reports. The purpose of the inclusion of an “emphasis of matter” paragraph is to draw the readers of the report attention of to the relevant disclosures relating to the particular matters.

*[Schedule 1, item 21, subsection 713A(21)]*

1.22 In addition to satisfying the above conditions, the securities and the offer of the securities and the body issuing the securities, must comply with any other conditions or requirements as set out in regulation.

*[Schedule 1, item 21, subsections 713A(25), (26) and (27)and (28)]*

1.23 The Australian Securities and Investment Commission (ASIC) has the power to exclude securities from being simple corporate bonds issued by a body, if ASIC in the previous 12 months has a determination is in force in respect to the body. The determination must be published by ASIC in the Gazette. *[Schedule 1, item 21, subsections 713A(22), (23) and (24)]*

### ***2-Part prospectus for simple corporate bonds***

1.24 When investing in debt securities it is important that retail investors receive all relevant information to enable them to make effective investment decisions. In respect to debt securities this is facilitated through the requirement for issuers to provide a full prospectus in respect to an offering of debt securities. However, in recognition of the ability for issuers to structure debt securities in such a way that they can be seen to be relatively simple, a 2-part prospectus is the appropriate vehicle to ensure retail investors receive the relevant information.

1.25 A 2 part simple corporate bonds prospectus is a type of prospectus in the Corporations Act. In accordance with Division 3 of Chapter 6D a prospectus is a type of disclosure document. As such, a 2 part simple corporate bonds prospectus will be taken to be a disclosure document of chapter 6D for all related purposes. *[Schedule 1, item 21, subsection 713B(2)]*



1.26 A 2 part simple corporate bonds prospectus for an offer of simple corporate bonds for issue by a body is a combination of a base prospectus for the period during which the offer is made and an offer specific prospectus for the offer. As a 2 part simple corporate bonds prospectus is a combination of a base and offer specific prospectus, the base prospectus and the offer specific prospectus are not seen to be prospectuses in their own right and as such are not taken to be prospectuses or a disclosure document for chapter 6D purposes. *[Schedule 1, item 21, paragraphs 713B(1)(a) and (1)(b), subsections (3) and (4)]*

1.27 The life of a 2 part simple corporate bonds prospectus for an offer of simple corporate bonds commences on the day the relevant offer specific prospectus for the offer is lodged with ASIC and the expiry of a 2 part simple corporate bonds prospectus for a simple corporate bond offer is the expiry date for the offer specific prospectus for the offer. *[Schedule 1, item 21, subsections 713B(5) and (6)]*

### **Example 1.1**

On 1 August 2013, Marley Ltd lodged a base prospectus with ASIC for the purpose of offering simple corporate bonds. At the time of lodging the base prospectus, Marley Ltd also lodged with ASIC an offer specific prospectus for simple corporate bonds. Under the offer of the simple corporate bonds Marley Ltd disclosed in the offer specific that the offer ended on 30 September 2013. After the initial success of the first offering of the simple corporate bonds, Marley Ltd undertook a second tranche. In respect to the second tranche Marly Ltd lodged an offer specific prospectus with ASIC on 1 March 2014 and disclosed that the offer would end on the 31 April 2014.

Under the initial offering (the first tranche) the life of the 2 part-prospectus was 2 months (1 August to 30 September) and under the second tranche the life of the 2 part simple corporate bonds prospectus was 2 months (1 March to 31 April)

1.28 To further facilitate consumer outcomes the use of electronic communication in the form of website publication of the 2-part prospectus is required. In this regard, the base prospectus lodged for the purpose of offering simple corporate bonds must be available on the issuing body's website throughout its life of 3years (which begins the date on which the base prospectus is lodged with ASIC). For an offer specific prospectus the issuing body must make their offer-specific prospectus available on their body's website throughout the application period of the offer. *[Schedule 1, item 21, subsections 713B(7) and (8)]*

***Base prospectus***

1.29 A document prepared and lodged with ASIC for the purpose of making an offer of debt securities (that satisfy the conditions that establish the debt securities as simple corporate bonds) is a base prospectus for simple corporate bonds if the following requirements are satisfied:

- The document is expressed such that is to be taken to be the base prospectus for all offers of simple corporate bonds made by the body during the 3 year life of the document.
- The document must state that there will be an offer specific prospectus for each offer of simple corporate bonds during the 3 year life of the document; and
- The document must state that the 2-part simple corporate bond prospectus for each such offer will consist of the base prospectus and an offer specific prospectus for the particular offer.

*[Schedule 1, item 21, subsections 713C(1) and (2), paragraphs 713C(3)(a), subparagraphs 713C(3)(b)(i) and (ii)]*

1.30 In addition to satisfying the above conditions for the document to be taken to be the base prospectus, the document must also contain any information or statements specified in the regulations. *[Schedule 1, item 21, subsections 713C(4) and (5)]*

1.31 If the base prospectus is replaced with a new base prospectus (the replacement document), the period to which the replacement document applies commences at the time at which it is lodged with ASIC and ends at the time the original base prospectus was to end. *[Schedule 1, item 21, sections 713C(6)]*

1.32 When setting out information in the base prospectus, information contained in documents lodged with ASIC does not need to be incorporated into the base prospectus instead it can be incorporated by reference. When referring to a document lodged with ASIC the base prospectus must identify the document or the part of the document that contains the information that was lodged with ASIC. The reference must also inform people of their right to obtain a copy of the document lodged with ASIC. *[Schedule 1, item 21, paragraphs 713E(1)(a) and (b)]*

1.33 Further, the reference must have sufficient information about the contents of the document (to which the reference is being made) to allow

a person to decide whether they wish or need to obtain a copy of the document or the part of a document. [*Schedule 1, item 21, paragraph 713E(2)(b)*]

1.34 If the information referred to is primarily of interest to professional analysts, advisors or investors with specialist information needs, the reference must also include a description of the document or part of the document and must include a statement indicating that the information is primarily of interest to those people. [*Schedule 1, item 21, paragraph 713E(2)(a)*]

1.35 The document or part of a document to which the reference is being made must be lodged with ASIC. In addition to documents required by the Corporations Act to be lodged with ASIC, other supplementary documents to which references are being made can be lodged with ASIC for this purpose. [*Schedule 1, item 21, subsections 713E(3) and (4)*]

1.36 The issuer of the proposed offer must provide any documents lodged with ASIC, to which references are being made in the base prospectus, free to retail investors during the life of the base prospectus which is the 3-year period beginning on the date that the base prospectus was lodged with ASIC. [*Schedule 1, item 21, subsection 713E(5)*]

#### ***Offer-specific prospectus***

1.37 A document that is prepared and lodged with ASIC for the proposed making of a particular offer of debt securities (that satisfy the conditions that establish the debt securities as simple corporate bonds) is an offer-specific prospectus if the following requirements are satisfied:

- The document must state that it is the offer specific prospectus for the offer.
- The document must state that no securities will be issued under the offer after the expiry date specified in the document.
  - The expiry date must not be later than 13 months after the date the document is lodged with ASIC. If a replacement document is provided the expiry date of the replacement document must be the same as that of the original document.
- The document must state that there is a base prospectus that is applicable to the offer of the simple corporate bond and that the disclosure document for the offer consists of both the

offer specific prospectus for the offer and the base prospectus.

*[Schedule 1, item 21, subsections 713D(2) and (3), paragraphs 713D(1)(a), (b) and 317D(4)(a) and (b)]*

1.38 In addition, to satisfying the above conditions for the document to be taken to be the offer specific prospectus, the document must also contain any information or statements specified in the regulations.  
*[Schedule 1, item 21, subsections 713C(5) and (6)]*

1.39 To ensure all relevant information is available for retail investors in respect of a particular offer, the offer-specific prospectus may include material that modifies or supplements the base prospectus. *[Schedule 1, item 21, subsection 713C(7)]*

1.40 Consistent with the base prospectus, when setting out information in the offer specific prospectus information contained in documents lodged with ASIC does not need to be incorporated into the offer specific prospectus instead it can be referred to. When referring to a document lodged with ASIC the offer specific prospectus must identify the document or the part of the document that contains the information that was lodged with ASIC. The reference must also inform people of their right to obtain a copy of the document lodged with ASIC. *[Schedule 1, item 21, paragraphs 713E(1)(a) and (b)]*

1.41 Further, the reference must have sufficient information about the contents of the document (to which the reference is being made) to allow a person to decide whether they wish or need to obtain a copy of the document or the part of a document. *[Schedule 1, item 21, paragraph 713E(2)(b)]*

1.42 If the information referred to is primarily of interest to professional analysts, advisors or investors with specialist information needs, the reference must also include a description of the document or part of the document and must include a statement indicating that the information is primarily of interest to those people. *[Schedule 1, item 21, paragraph 713E(2)(a)]*

1.43 The document or part of a document to which the reference is being made must be lodged with ASIC. In addition to documents required by the Corporations Act to be lodged with ASIC, documents to which references are being made can be lodged with AISC for this purpose. *[Schedule 1, item 21, subsections 713E(3) and (4)]*

1.44 The issuer of the proposed offer must provide any documents lodged with ASIC to which references are being made in the offer specific

prospectus free during the application period of the offer specific prospectus. *[Schedule 1, item 21, paragraph 713E(5)(a)]*

***Supplementary or replacement document***

1.45 When an issuer becomes aware of a misleading or deceptive statement in the 2-part simple corporate bond prospectus or an omission from the document of information required for the document to be compliant with the 2-part prospectus regime (where there is a material adverse impact on an investor), the issuer may, if the document is the base prospectus, include material in the offer specific prospectus to supplement or modify the base prospectus or lodge a supplementary or replacement document with ASIC. If the document is the offer specific the person is only able to lodge a supplementary or replacement document with ASIC. *[Schedule 1, item 30, paragraphs 729A(1)(a), (b), (d) and (e)]*

1.46 In addition, when a particular circumstance has arisen since the disclosure document was lodged with ASIC and that particular circumstance would have been required to be disclosed in the document to be compliant with the 2 part simple corporate bonds prospectus regime the person is able to include material in the offer specific prospectus to supplement or modify the base prospectus or lodge a supplementary offer specific prospectus or a replacement base prospectus or offer specific prospectus. *[Schedule 1, item 30, paragraphs 719A(1)(c), (d) and (e)]*

1.47 In recognition of the fact that both the base prospectus and the offer specific prospectus are taken ‘in totality’ to be the disclosure document in respect to a particular offer of simple corporate bonds the requirement for the base prospect and the offer specific prospectus to be presented in a clear concise and effective manner will apply in such a way that both the base prospectus and the offer prospectus will need to, when read together, be clear concise and effective. *[Schedule 1, item 30, subsection 719A(2) and (3)]*

1.48 While it may be considered that any inconsistencies between the base and offer specific prospectuses would potentially result in the simple corporate bond 2-part prospectus being not clear concise and effective, the regime provides that it is appropriate to include material to supplement and modify the base document. As such any information outlined in the offer specific prospectus that supplements and or modifies the base document, provided it is presented in a clear concise and effective manner, would not result in a breach of the clear concise and effective requirement in the Corporations Act if it has been included for the purpose of supplementing or modifying the base prospectus.

1.49 If an issuer is required to or wishes to lodge a supplementary offer specific prospectus, the issuer must provide, at the beginning of the document, a statement that the document is a supplementary document, a reference to the offer specific prospectus to which the document supplements and references to any other previous supplementary documents lodged in respect of the particular offer are identified. *[Schedule 1, item 30, paragraphs 719A(4)(a), (b) and (c)]*

1.50 In order to ensure that consumers are provided with all the required information to make an effective decision, a statement that indicates that the supplementary document should be read together with the offer specific prospectus and any other supplementary documents lodged with ASIC is also required to be provided at the start of the document. *[Schedule 1, item 30, paragraphs 719A(4)(d)]*

1.51 Once a supplementary document has been lodged with ASIC, it is taken in conjunction with the offer specific prospectus to which it supplements to be the relevant offer specific for the issuance from the time of lodgement. *[Schedule 1, item 30, subsection 719A(7)]*

1.52 If an issuer is required to or wishes to lodge a replacement document for a base or offer specific prospectus the issuer must provide, at the beginning of the document, a statement indicating that the document is a replacement document and that it is the replacement document for the previous offer specific prospectus document. *[Schedule 1, item 30, subsection 719A(5) and (6)]*

1.53 Once the replacement document is lodged with ASIC, it is taken to be:

- If the replacement document is replacing the offer specific prospectus, the replacement document is taken to be offer the specific prospectus for the issuance from that time.
- If the replacement document is replacing the base prospectus, the replacement document is taken to be the base prospectus for the issuance from that time.

*[Schedule 1, item 30, subsection 719A(8)and (9)]*

## **Part 2 Amendments relating to directors' liability**

### ***Liability to pay compensation***

1.54 The Corporations Act prohibits a person from offering securities under a disclosure document if, among other things, there is a misleading

or deceptive statement, an omission of required material, or a new circumstance has arisen.

1.55 If a person suffers loss or damage because an offer of securities under a disclosure document as a result of among other things, a misleading or deceptive statement, an omission of required material, or where a new circumstance had arisen, the person has the right to recover compensation for a loss or damage from a range of persons including each director of the body making the offer.

1.56 However, the range of persons to which the person has the right to recover compensation for a loss or damage does not include directors of the body making the offer unless the director is directly involved in, among other things, the misleading or deceptive statement, the omission of required material, or where new circumstances have not been reflected in the disclosure document as required by the Corporations Act.

#### ***Reasonable steps obligations***

1.57 In chapter 6D of the Corporations Act, a person must not make false or misleading statements in a disclosure document prepared under Chapter 6D. Under chapter 6D, a person is taken not to have breached this requirement if they make reasonable inquiries (section 731) or place reasonable reliance on information provided by others (section 733).

1.58 Similarly in Part 9.4 – Offences of the Corporations Act, subsection 1308(4), which relates to false and misleading statements and 1309(2) which relates to false statements a person is required to take reasonable steps to ensure that information provided is not false or misleading.

1.59 In respect to the requirement to take reasonable steps in Part 9.4 of the Corporations Act, the person will be taken to have taken reasonable steps to ensure that:

- A statement or information was not false or misleading in a material particular
  - if the person proves that all inquiries (if any) that were reasonable in the circumstances were made and after making those inquiries the person believed on reasonable grounds that the statement or information was not misleading in a material particular. [*schedule 1, items 48 and 49, subsection 1308(10) and 1309(7)*]

- if the person proves that they relied on information provided to the person by somebody other than a director, employee or agent of the body (if the person is a body) or someone other than an employee or agent of the individual (if the person is an individual) and the reliance placed on the information by the person was reasonable in the circumstances. *[schedule 1, items 48 and 49, subsection 1308(12) and 1309(9)]*
- The information in a document did not omit or have omitted from it any matter or thing that without which the document would be misleading or deceptive in a material respect:
  - if the person proves that all inquiries (if any) that were reasonable in the circumstances were made and after making those inquiries the person believed on reasonable grounds that there was not such omission. *[schedule 1, item 48, subsection 1308(11)]*
  - if the person proves that they relied on information pervaded to the person by somebody other than a director, employee or agent of the body (if the person is a body) or someone other than an employee or agent of the individual (if the person is an individual) and the reliance placed on the information by the person was reasonable in the circumstances. *[Schedule 1, items 48, subsection 1308(13)]*
- The information in the document did not omit or have omitted from it any matter or thing that would render the information in the document misleading in a material particular:
  - if the person that all inquiries (if any) that were reasonable in the circumstances were made and after making those inquiries the person believed on reasonable grounds that there was not such omission. *[schedule 1, item 49, subsection 1309(8)]*
  - if the person proves that they relied on information provided to the person by somebody other than a director, employee or agent of the body (if the person is a body) or someone other than an employee or agent of the individual (if the person is an individual) and the reliance placed on the information by the person was reasonable in the circumstances. *[Schedule 1, item 49, subsection 1309(10)]*



## Application and transitional provisions

1.60 The amendments in Sections 1 to 3 of the Bill have effect the day after the Act receives the Royal Assent. Schedule 1 of the Bill has effect on a day fixed by Proclamation. However, if the provisions do not commence with the period of 6 months beginning on the day the Act receives Royal Assent, they will commence on the day after the end of that period.

## Consequential amendments

1.61 The content requirements under division 2 of part 6.5 in respect to the contents of a bidders statement if the any securities (other than managed investment products) are offered as consideration under the bid the bidder is the body that has issued or will issue the securities, or a person who controls that body all material that would be required in the prospectus for the offer of those securities by the bidder will be either the material required by 710 to 713 or 713C to 713E. *[Schedule 1, item 8, paragraph 636(1)(g)]*

1.62 A security for the purpose of Chapter 6D does not include a simple corporate bonds depository interest in simple corporate bonds, where the simple corporate bonds were issued under a 2 part simple corporate bonds prospectus as defined in section 761A. *[Schedule 1, item 9, paragraph 700(1)]*

1.63 To ensure the appropriate outcomes are provided in respect to the issue of simple corporate bonds depository interests the definition of security in section 761A has been modified to include a simple corporate bonds depository interest. *[Schedule 1, item 43 and 44, section 761A]*

1.64 The table in section 705 that shows what disclosure documents are to be used if an offer of securities needs disclosure to investors under part 6D.2 has been amended to include 2 part simple corporate bonds (as well are the relevant sections).

1.65 Further, to ensure that the ability for an issuer of simple corporate bonds can continue to offer simple corporate bonds for 2 years after commencement a note has been added to section 705 to clarify that in accordance with 709(1) a prospectus other than a 2 part simple corporate bonds prospectus can be issued for retail corporate bonds for 2 years after commencement. *[Schedule 1, item 10, section 705]*

1.66 The ability for issuers to not provide investors with disclosure in respect to offers that are made to existing debenture holders does not extend to the offer of simple corporate bonds or the offer of debentures if the offer is made to holders of simple corporate bonds. *[Schedule 1, item 12, subsection 708(14)]*

1.67 To remove the requirement for a prospectus to be prepared for an offer of simple corporate bonds an amendment has been made to provide that a prospectus or short form prospectus disclosure document will not include an offer of securities that is an offer of simple corporate bonds. *[Schedule 1, item 13, subsection 709(1)]*

1.68 To provide flexibility for issuers of simple corporate bonds for the period of two years after commencement, an issuer will:

- if the offer of simple corporate bonds needs disclosure under Part 6D.2 and the offer begins during the 2 year period:

either prepare:

- a prospectus in accordance with section 701 and 711 (the ability for the prospectus to simply refer to material already lodged with ASIC instead providing a prospectus will remain); or
  - a 2 part simple corporate bonds prospectus in accordance with sections 713B to 713E.
- however, if an offer of simple corporate bonds needs disclosure under Part 6D.2 and the offer begins after the 2 year period the issuer must prepare a 2 part simple corporate bonds prospectus.
  - *[Schedule 1, item 14, subsection 709(1)]*

1.69 Under chapter 6D and issuer may be able to provide a profile statement for an offer of corporate bonds. However, an issuer is not able to provide a profile statement for an offer of simple corporate bonds. *[Schedule 1, item 15, subsection 709(2)]*

1.70 An issuer is not able to provide an information statement for an offer of simple corporate bonds after the 2 year period after commencement has ended. Prior to the 2 year period ending an issuer will be able to use an information statement if they satisfy subsection 709(4). *[Schedule 1, item 16, section 709(4)]*

1.71 The general disclosure test for content and the specific disclosure requirements that apply to prospectuses do not apply to a 2 part simple corporate bonds prospectuses. *[Schedule 1, items 17 and 18, sections 710 and 711]*

1.72 Further, the content requirements for short-from prospectuses and the special content rules for continuously quoted securities do not apply to 2 part simple corporate bonds prospectuses. *[Schedule 1, items 19 and 20, sections 712 and 713]*

1.73 The table in section 717 that provides an overview of the procedure for offering securities has been amended to include references for the preparation of a 2 part simple corporate bonds disclosure document and to include a reference for when it is found that the 2 part simple corporate bonds prospectus is deficient. *[Schedule 1, items 23 and 24, section 717]*

1.74 The general requirement for lodging a disclosure document for an offer of securities does not apply to the 2 part simple corporate bonds prospectus, as the requirement for the lodging of the 2 part simple corporate bonds prospectus is located in section 713B. *[Schedule 1, items 25 and 26, section 718]*

1.75 The table in section 720 that outlines the consent required for the lodgement of a document has been amended to remove offers of simple retail corporate bonds from offers of securities for issue and has been amended such that the consent requirements for an offer of simple corporate bonds are outlined separately.

1.76 In this regard for an offer of simple corporate bonds under the 2 part simple corporate bonds prospectus requires the consent of:

- every director of the body; every person named in the document as a proposed director of the body; and
- if the simple corporate bond is in a managed investment scheme made available:
  - by the body every director of that body; or
  - by an individual that individual.

*[Schedule 1, items 31 and 32, section 720]*

1.77 The inclusion of references to the 2 part simple corporate prospectus disclosure documents have been made to ensure that the

issuers have choices open to them where there is an omission from the disclosure document of information or where a person becomes aware of a new circumstance that would have been required to be included in the 2 part simple corporate bond prospectus. *[Schedule 1, item 33, subparagraphs 724(1)(c)(ii) and (d)(ii)]*

1.78 The note to subsection 724(2) has been amended to provide a reference to new section 719A in respect to the lodging of supplementary or replacement disclosure documents for 2 part simple corporate bonds prospectuses. *[Schedule 1, item 34, subsection 724(2)]*

1.79 The table in subsection 724(3) has been amended to exclude 2 part simple corporate bonds prospectuses from a prospectus in row 3 and inserts a new circumstance that being the disclosure document is a 2 part simple corporate bonds prospectus. The document requirements for this new circumstance that of a supplementary or replacement document that corrects deficiencies or changes the terms of the offer is also inserted. *[Schedule 1, items 35 and 36, subsection 724(3)]*

1.80 Under a 2 part simple corporate bond prospectus an issuer is able to lodge a base prospectus with ASIC and use that base prospectus for a period of 3 years. In order to make an offer of simple corporate bonds the issuer is required to provide an offer specific prospectus that with the base prospectus forms the disclosure document for the offer. As the base document can be used for a period of 3 years the issuer may wish to offer subsequent tranches of the simple corporate bonds. When the issuers makes additional offers no waiting period will apply after the lodgement of the offer specific prospectus before the processing of applications for the simple corporate bonds provided they are the same class as existing securities that are quoted on a prescribed market immediately before the application period with the exception of differences in respect to the :

- fixed term of the securities.
- rate at which the interest is payable under the securities.
- date on which the holders are to be paid interest under the securities.

*[Schedule 1, item 37, Section 727]*

1.81 To ensure that the provisions dealing with misstatement in, or omission from, disclosure documents apply to simple corporate bonds prospectuses, references to the 2 part simple corporate prospectus disclosure documents have been made to cover an omission from the

disclosure document of information or where a new circumstance has arisen that would have been required to be included in the 2 part simple corporate bond prospectus. *[Schedule 1, items 38 and 39, paragraph 728(1)(b) and subparagraph 728(1)(c)(ii)]*

1.82 The table in subsection 729(1) has been amended such that the liability for loss or damage for a contravention of subsection 728(1) for each director or person named as a proposed director of a body making an offer if the offer is made by the body does not apply in respect to a 2 part simple corporate bond prospectus. *[Schedule 1, item 40, section 729]*

1.83 The inclusion of references to the 2 part simple corporate prospectus disclosure documents have been made to ensure that people that are liable on a disclosure document to inform a person making an offer about deficiencies in the disclosure document where there is a material omission from the disclosure document of information or where a person becomes aware of a material new circumstance that would have been required to be included in the 2 part simple corporate bond prospectus. *[Schedule 1, items 41 and 42, paragraph 730(1)(b) and subparagraph 730(1)(c)(ii)]*

1.84 To ensure that ASIC is not prevented from making a determination under new section 713A (19) a reference to the new subsection has been inserted into the provisions relating to the effect of a failure to comply with an infringement notice in Chapter 9 of the Corporations Act. *[Schedule 1, item 45 paragraph 1317DAG(5)(a)]*

1.85 Materiality is taken into consideration when considering whether reasonable steps have been taken in respect to whether a statement was false or misleading, or if an omission of a thing that without that thing the document would be misleading. *[Schedule 1, items 46 and 47 subsection 1308(4)]*



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## **Chapter 2**

# **Statement of Compatibility with Human Rights**

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**Prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011***

***Corporations Amendment (Simple Corporate Bonds and Other Measures) Bill 2013 (No. )***

2.1 This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

### **Overview**

2.2 The Corporations Amendment (Simple Corporate Bonds and Other Measures) Bill 2013 amends the Corporations Act 2001 (the Corporations Act) to facilitate increased trading of corporate bonds to retail investors in Australia.

### **Human rights implications**

2.3 This Bill does not engage any of the applicable rights or freedoms.

### **Conclusion**

2.4 This Bill is compatible with human rights as it does not raise any human rights issues.

**The Hon Wayne Swan MP, Deputy Prime Minister and Treasurer**