



Law Council  
OF AUSTRALIA

*Business Law Section*

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22 February 2013

Dear Sir or Madam,

### **Corporations Amendment (Simple Corporate Bonds and Other Measures) Bill 2013**

This submission by the Corporations Committee of the Business Law Section of the Law Council of Australia ("**the Committee**") is made in response to the Exposure Draft issued on Friday, 11 January 2013 of the *Corporations Amendment (Simple Corporate Bonds and Other Measures) Bill 2013* ("**the Bill**").

The Committee has previously made submissions in response to The Treasury's discussion paper released in December 2011 titled *Development of the retail corporate bond market: streamlining disclosure and liability requirements* ("**the Discussion Paper**"). The Committee commends the Government's efforts to encourage the development of a corporate bond market in Australia which can be effectively accessed by retail investors by reforms aimed at improving the quality of disclosure to retail investors and which remove some of the burden of compliance from issuers. However, the Committee maintains its position that there are structural issues (unrelated to the standards of disclosure and liability for an offer) that may continue to prohibit the development of a strong Australian corporate bond market. Those issues are outside the scope of this submission.

### **SUBMISSIONS ON THE APPROACH TO A STREAMLINED DISCLOSURE REGIME**

1. The Committee considers that Treasury should reconsider whether a cleansing statement model (similar to that used under section 708AA for rights issues of continuously quoted securities) would be more effective to achieve its objectives than the streamlined disclosure model contemplated by the Bill (ie a prospectus based model).
2. The cleansing statement model is more likely to help achieve the objectives of facilitating increased offerings of corporate bonds to retail investors in Australia because the use of cleansing statements to raise capital:
  - is a streamlined process which is well understood and accepted in Australian equity capital markets; and
  - enables an issuer to rely on its continuous and periodic disclosure announcements made in advance of the offer.

3. In addition, the liability regime which applies to the raising of capital by a cleansing statement is consistent with Treasury's objectives and would mean that no specific amendments would be required to the Corporations Act to change the prospectus liability provisions for directors of the issuer.
4. If Treasury proceeds with the prospectus model, the Committee does not consider that the use of a 2-part simple corporate bond prospectus should be compulsory after the two year transitional period.
5. The Committee considers that not all issuers of simple corporate bonds will want or need to set up a 2-part simple prospectus structure as they may be issuing bonds only as a one off capital raising or may seek to have different series of bonds with different terms on issue.
6. We understand that making the use of a 2-part prospectus compulsory is intended to ensure that all offers of simple bonds are made pursuant to disclosure documents that are of a consistent format. In the Committee's view, the amendments to section 705 and new section 709(1A)-(1C) are unlikely to achieve that aim as issuers may still undertake offers of bonds using a section 710 prospectus if:
  - (a) an issuer is unable to satisfy the condition in proposed section 713A(19) (ie trading in the issuer's continuously quoted securities has not been suspended for more than 5 trading days in the relevant period, etc); and
  - (a) the bonds do not satisfy each and every condition in section 713A (eg they have a term of 10 years and 1 month).

## **LIABILITY REGIME**

7. The prospectus liability regime is seen as creating a regulatory bias for issuers to structure fundraising activities in order to avoid the obligation to prepare a prospectus, for example, by making the offer solely to wholesale investors or by making a rights issue using a cleansing statement. The Bill seeks to address this by removing the deemed liability for directors and persons named in the 2-part prospectus as a proposed director.
8. However because Treasury is using a prospectus model, under section 720 directors are still required to consent to the lodgement of a 2-part simple corporate bonds prospectus. The director consent requirement together with deemed liability for the issuer and others involved in the process, means a due diligence process will still need to be undertaken and therefore there is unlikely to be any streamlining of the necessary investigations undertaken to prepare a prospectus. In any event, any desire to streamline the process undertaken by an issuer needs to be carefully counterbalanced against the necessity of investors being provided with appropriate reliable information to make their investment decisions.
9. As noted above, there would be greater clarity and a more streamlined process if a disclosure regime based on section 708AA were to be adopted (ie the cleansing statement model).
10. If, contrary to our submission, the director consent requirement in section 720 is retained for a 2-part simple corporate bond prospectus, the extent of expected director involvement in its preparation needs to be clarified.

11. Further underwriters will have deemed liability under section 729 for a defective 2-part simple corporate bonds prospectus. It is not appropriate for an underwriter to be exposed to this liability when directors of the issuer are not. Again, the Committee submits that the practice of section 708AA offers is instructive. Imposing deemed liability on underwriters is not necessary to ensure that underwriters apply their expertise when advising issuers in proposed equity capital raisings.

## **ABILITY TO RELY ON CONTINUOUS AND PERIODIC DISCLOSURE**

12. Under the Bill, an offer-specific prospectus can be lodged up to three years from the date a base prospectus is first lodged. To ensure that the offer-specific prospectus is not long and complex, an issuer should be entitled to rely on disclosures made to ASX pursuant to its continuous and periodic disclosure obligations. It is not clear from the draft Bill that this is the case (although it may be a matter dealt with in the Regulations which are not yet available). Proposed section 719A (lodging supplementary or replacement documents) should be amended to recognise this principle.
13. Again, as noted above, the Committee considers that using a cleansing statement model will neatly accommodate disclosures made to the market between the issue of the base prospectus and the cleansing statement.

## **NO SUBORDINATION**

14. Proposed section 713A(15) provides that in a winding up of the issuing body, holders of the securities must have a higher priority than unsecured creditors of the issuing body. As drafted, proposed section 713A(15) will require the simple corporate bonds to be secured over assets of the issuer.
15. We understand that Treasury is currently considering the drafting of this proposed section with the intention that simple corporate bonds rank at least equally with all other unsecured unsubordinated debt obligations of the issuer.
16. In the Committee's view, there is no need to limit the proposed new regime to unsubordinated securities. Subordination is not a characteristic that distinguishes "simple" from "complex" bonds. Prohibiting offers of subordinated bonds, is likely to reduce the number and quality of issuers that will view this market as an attractive funding alternative. Further, an issue of *subordinated* simple corporate bonds by a large Australian ASX-listed corporation with significant balance sheet strength and profitability is likely to be a more conservative investment than an issue of *unsubordinated* corporate bonds by an entity of lesser substance. In the current environment of low interest rates, many retail investors are looking for the higher yields that subordinated debt offers.
17. Practices have developed to assist users of prospectuses to understand the implications of differences in ranking of securities<sup>1</sup>. The Committee considers that the same approach can be extended to the disclosure standards applying to simple corporate bonds disclosure documents.
18. If Treasury considers that subordinated corporate bonds should be excluded from the new regime at least initially, it is recommended that the condition providing that holders of bonds cannot be subordinated to the claims of unsecured creditors of the issuer be included in the regulations rather than the legislation itself.

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<sup>1</sup> eg see ASIC Regulatory Guide 228 (at 228.142) and ASIC Regulatory Guide 69

## **SUBMISSIONS ON OTHER ASPECTS OF THE BILL**

### ***Incorporation by reference***

19. Proposed new section 713E (*prospectus may refer to other material lodged with ASIC*) appears unnecessary given current section 712, which permits information lodged with ASIC to be incorporated by reference in a prospectus<sup>2</sup>.
20. It is unclear to the Committee why this approach has been taken given proposed new section 713E is in almost identical language to section 712 and under proposed new section 713B(2), a 2-part simple corporate bonds prospectus is taken to be a "prospectus" for the purposes of the Act.
21. Concerns have been raised in the past with the operation of section 712 and the onus placed on the issuer to identify whether information is primarily of interest to professional analysts or advisers or investors with similar specialist information needs or not. The Committee considers it would not be helpful to replicate this language in the new section 713E.

### ***Offers by responsible entities of a listed managed investment schemes***

22. There is a reference in section 32 of the Bill to amending the table in section 720 to refer to simple corporate bonds made available in a managed investment scheme. It is however unclear whether it is intended that a responsible entity, in its capacity as responsible entity of a listed managed investment scheme, will be able to undertake an offer of simple corporate bonds. Given that a number of ASX-listed entities (particularly in the property sector) are structured as managed investment schemes, it should be made clear whether it is intended to facilitate the issue of simple corporate bonds by managed investment schemes.

### ***Proposed amendments to section 1308 and 1309***

23. The Committee supports the proposed amendments to sections 1308 and 1309.

## **CONCLUSION AND FURTHER CONTACT**

24. The Committee would be pleased to discuss any aspect of this submission.
25. Please contact the chair of the Committee, Marie McDonald on (03) 9679 3264 or Sarah Dulhunty on (02) 9258 6643, if you would like to do so.

Yours faithfully



Frank O'Loughlin  
**Section Chairman**

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<sup>2</sup> We note item 19 of the Bill includes a new sub-section 712(6) providing that section 712 does not apply to a 2-part simple corporate bonds prospectus.