

## **Requirements in prospectuses**

**Question** — Does the government intend to include specific prospectus content requirements in the regulations similar to those set out in the Class Order produced by ASIC?

**Answer** — Treasury is currently engaging in targeted consultation with key stakeholders to develop content requirements for the disclosure documents that will strike an appropriate balance between streamlining disclosure for issuers, and ensuring that the documents are comprehensible and effective to retail investors. Treasury will publicly consult on the draft regulations to ensure the content requirements achieve these goals.

## **Civil liability provisions**

**Question** — Can you clarify how the civil liability provisions will apply? Does it attach only to the person who issues the bond or will it attach to any person subsequently associated with the contract?

**Answer** — Directors will no longer be subject to the deemed civil liability for offers of simple corporate bonds. As such, directors will not be ‘deemed’ liable for a contravention in respect to misstatements in, or omissions from, disclosure documents provided for simple corporate bond offers. However, any person ‘involved’ in a contravention will continue to face liability for that contravention.

**Question** — Does the Bill propose to amend the *Corporations Act 2001* (Corporations Act) such that deemed civil liability only applies to those directors that are involved in a material misstatement or omission in relation to simple corporate bonds?

**Answer** — The amendments in the Corporations Amendments (Simple Corporate Bonds and Other Measures) Bill 2013 (the Bill) provide that a director will be liable for a misstatement in, or omission from, a disclosure document if they are ‘involved’ in the misstatement or omission. In addition, directors will continue to be liable if they become aware of a misstatement or omission and fail to bring it to the attention of the person making the offer.

**Question** — If that is the case, what does ‘involved’ mean, and what will constitute evidence for involvement in material misstatement or omission?

**Answer** — Involved (as defined in section 79 of the Corporations Act) means that the person has:

- aided, abetted, counselled or procured a contravention; or
- induced a contravention; or
- been in anyway, by act or omission, directly or indirectly, knowingly concerned in, or party to a contravention; or
- conspired with others to effect a contravention.

Relevant evidence to establish this contravention will be evidence which, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of a fact which establishes whether a director was involved in a misstatement or omission, consistent with what constitutes relevant evidence under general law.

**Question** — Why are the liabilities for directors being eased with regard to the issuing of simple corporate bonds?

**Answer** — Market participants have indicated that the liability provisions in the Corporations Act are hindering the offer of corporate bonds to retail investors in Australia. The deemed liability placed on directors when an offer of corporate bonds is made to retail investors requires a level of director engagement in the due diligence process that is onerous.

However, while the development of a deep and liquid corporate bond market is a widely supported policy goal, it is also important that consumers continue to receive adequate regulatory protection. For this reason, the liabilities for directors have been eased only for simple corporate bonds.

Simple corporate bonds are relatively safe securities, as they must satisfy the conditions set out in the Bill. These conditions restrict the type of bonds that can be classified as simple corporate bonds to senior debt that is issued by high quality corporate entities (most likely the top 100 to 200 companies).

**Question** — Why is a separate set of liability requirements being introduced in relation to the offer of simple corporate bonds when COAG are aiming to harmonise director liabilities across jurisdictions?

**Answer** — The COAG harmonisation of director liability is aimed at making director liability comply with a specific set of agreed-upon principles (the COAG Principles). These principles include the removal of deemed liability of directors for corporate fault where it is not appropriate, and that where derivative liability is imposed, it should be imposed in accordance with principles of good corporate governance. The reforms in the Bill are not directly in the scope of the type of director liabilities that COAG are considering, however, the proposed changes are consistent with the COAG principles.

**Context** — The Law Council of Australia has argued that there should be a broader debate on civil liability provisions relating to directors' disclosure obligations rather than focussing—as this bill does—specifically on liability in relation to simple corporate bonds.

**Question** — Can you explain why it is important to have specific civil liability provisions relating to simple corporate bonds?

**Answer** — It is important to ensure that an appropriate balance is struck between the development of the corporate bond market and retail investor protection. As such, it was considered that the removal of directors' civil liability should be limited to bonds that are simple to understand and are relatively low risk.

**Question** — To what extent does proposed section 713A setting out the criteria for simple corporate bonds contingent on the deemed civil liability provisions in section 728?

**Answer** — Section 713A sets out the conditions for offering a simple corporate bond, and the definition of a simple corporate bond. For the amendments in section 728 to apply, the offer must be in relation to simple corporate bonds, so section 713A must be satisfied.

**Question** — If the criteria in proposed section 713A are made more flexible, what impact would this have on the broader debate on deemed civil liability?

**Answer** — If the criteria in section 713A are made more flexible, this would increase the level of risk associated with the bonds. In the event such changes were contemplated, it is likely that further review and consultation on directors' deemed liability would be undertaken.

## QUESTIONS FROM NAB'S SUBMISSION

**Question** — Please clarify how 'among other things' in section 1.67 will be defined as well as whether subsection 713A(8) is restricted to BBSW or are the issuers allowed to reference a range of indices?

**Answer** — In section 1.67, the reference to 'among other things' is intended to be inclusive. It is not defined in the legislation. When creating a prospectus, there a number of provisions of the Corporations Act where a director may be 'involved in' a contravention and face accessorial liability.

Section 713A(8) does not refer to the BBSW, or any other specific index. Under the current law, issuers may reference 'a floating rate that is comprised of a reference rate and a fixed margin'.

**Question** — What are the consequences if subsequent to issuance, the issuer is removed from listed status on an appropriate exchange.

**Answer** — Treasury understands that the consequences of a company delisting will be provided for in the individual bond instruments. Treasury has not mandated that a particular consequence flows from delisting because this may affect commercial outcomes. For example, if a company is taken over and subsequently delists, the bidding company may wish to honour the debt obligations of the target company.

**Question** — In regards to section 1.26 which states that a 'regulation making power has been inserted into Chapter 2L so that the requirement for a trust deed and trustee is able to be removed for the making of the specified offer of debentures or a specified class of offers of debentures' (EM, p. 10), we seek clarification as to how this will intersect with ASIC's

recent consultation paper 199 which proposes reforms to the regulation of the debenture sector, including increasing the role of trustees for issues of Simple Corporate Bonds.

*Answer* — ASIC’s discussion paper was released prior to public industry consultation on this point earlier this year. Consultation revealed that there are a number of existing issues with trustees, so a regulation making power was inserted which would allow regulations to be made in future if required. Treasury has not formed a final view on this issue.

### **The 'reasonable steps' provisions**

*Question* — Does the clarification of due diligence and reasonable steps relate to all aspects of misleading statements under the Corporations Act, or just to those that relate specifically to simple corporate bonds?

*Answer* — The proposed amendments that clarify what is meant by ‘reasonable steps’ in sections 1308 and 1309, apply across the entire Corporations Act.

*Context* — It appears that the reasonable steps provisions have been tacked on to the end of Schedule 1 without any explanation of the context being made in the EM.

*Question* — What is the rationale for the ‘reasonable steps’ provisions?

*Answer* — While the current law provides a defence of ‘reasonable steps’ to the offences in sections 1308 and 1309, it does not provide guidance on what constitutes ‘reasonable steps’. The purpose of the amendment is to provide greater clarity as to what ‘reasonable steps’ means.

The amendments provide that a person should be deemed to have taken ‘reasonable steps’ if they make reasonable inquiries or place reasonable reliance on information provided by others. The proposed amendments reflect the practical application of the criminal liability provisions in the Corporations Act and are consistent with stakeholder views.

*Question* — Is the addition of the reasonable steps predicated on removing the deemed civil liability for directors in the issuance of simple corporate bonds?

*Answer* — No, the ‘reasonable steps’ clarifications merely provide increased guidance on the application of the defences for criminal liability for deceptive and misleading statements.

*Question* — Why was there no explanation for the ‘reasonable steps’ provisions in the EM?

*Answer* — Paragraph 1.17 states “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 2 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”.

As the proposed changes to the operation of sections, 1308 and 1309 of the Corporations Act merely clarify what ‘reasonable steps’ mean, additional commentary to that provided in paragraph 1.17 was not required. Stakeholders, including the Australian Securities and Investments Commission, provided detailed comments on the wording of the Explanatory Memorandum; the comments did not indicate that there was any issue with the extent of commentary on the ‘reasonable steps’ amendments.

**Question** — What was the Treasury consultation process on ‘reasonable steps’?

**Answer** — Treasury has had extensive public and targeted consultation on the Bill and the measures within the Bill (including the clarification of the meaning of ‘reasonable steps’ in sections 1308 and 1309 of the Corporations Act) since 2011. Below is a summary of that consultation:

- On 13 December 2011 the discussion paper “Development of the retail corporate bond market: streamlining disclosure and liability requirements” was released for public consultation. Submissions on the discussion paper closed on Friday 10 February 2012.
- On 24 January 2012, Treasury held a roundtable meeting in Sydney with over 30 market participants including the G100 and the Australian Shareholders Association to discuss aspects of the December 2011 discussion paper.
- Throughout 2012 and 2013, a number of small targeted consultations (comprising between 2-10 attendees) were held with various market participants.
- On 11 January 2013, exposure draft legislation was released for public consultation. Submissions on the exposure draft legislation closed on Friday 15 February 2013.

**Question** — Did Treasury have any discussion with the Institute of Company Directors or with any representatives of shareholder organisations regarding the changes?

**Answer** — The Australian Institute of Company Directors did not make a submission to either of Treasury’s public consultations (the 2011 discussion paper, and the exposure draft of the legislation).

A representative from the Australian Shareholders Association attended the 24 January 2012 roundtable. At the roundtable, a comprehensive discussion took place on the issue of the proposed removal of directors’ civil liability and the proposed clarification to what is meant by ‘reasonable steps’.

**Question** — Is Treasury aware of any evidence that shows that company directors are being unfairly punished at present under the current regulations?

**Answer** — During the consultation process, a number of stakeholders indicated that the current liability regime was placing an unwarranted level of liability on company directors wishing to make offers of corporate bonds to retail investors in Australia. While stakeholders

indicated that the current liability regime imposed significant liability on company directors, there was no indication that the current regulation was punishing company directors. The proposed amendments to sections 1308 and 1309 are intended to provide greater clarity to the law and reflect their practical application.

**Question** — Are the ‘reasonable steps’ a clarification or a dilution of director liability?

**Answer** — The amendments to sections 1308 and 1309 clarify the criminal liability provisions. The proposed amendments reflect the practical application of the criminal liability provisions and are consistent with current market practice. The proposed amendments are not intended to and do not dilute the criminal liability of directors.

### **Vanilla bonds**

**Question** — Are the disclosure requirements for vanilla bonds and simple corporate bonds the same?

**Answer** — “Vanilla bonds” refers to the bonds covered by ASIC’s current class order relief. The disclosure requirements for vanilla bonds are not considered, by industry, to go far enough to provide for more streamlined disclosure documentation. As such, for the simple corporate bonds measures to be effective, the disclosure requirements of simple corporate bonds will need further refinement from the disclosure requirements of vanilla corporate bonds under ASIC class order relief.

The final disclosure requirements for simple corporate bonds have not been finalised. Treasury is currently undertaking targeted industry consultation to develop draft regulations for public consultation that will set out the disclosure requirements for simple corporate bonds. These regulations will aim to strike the right balance between reducing compliance costs for industry, and ensuring that disclosure is appropriate and effective for retail investors.

**Question** — Does Treasury hold the view that changes to directors’ deemed civil liability and the ‘reasonable steps’ provisions are necessary features of the bill given that ASIC’s May 2010 Class Order was unsuccessful in increasing the use of vanilla bonds?

**Answer** — Treasury has engaged in consultation with stakeholders since 2011 to understand stakeholder needs. The measures in the Bill are a result of this consultation. As such, the proposed changes to directors’ liabilities, further streamlining disclosure documentation and the introduction of the framework for the parallel trading of simple corporate bonds will all contribute to ensure successful take-up of the simple corporate bonds measures.