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Committee Secretary
Parliamentary Joint Committee on Corporations and Financial Services
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Canberra ACT 2600
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Dear Dr Grant,

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

The Australian Bankers' Association (ABA) welcomes the opportunity to provide comments to the Joint Committee on the *Corporations Amendments (Simple Corporate Bonds and Other Measures) Bill 2013* and accompanying Explanatory Memorandum (EM).

We offer the following high level comments on the Bill.

Schedule 1 – Simple Corporate Bonds

1. Introductory comments

The ABA supports the Government's commitment to develop a deep and liquid corporate bond market as part of the Government's 'Competitive and Sustainable Banking System Package'. A retail corporate bond market offers an important alternative funding source for banks and may result in reduced reliance on offshore markets.

Banks will be an important driver of growth in the retail corporate bond market by offering bonds and arranging corporate issues. Initiatives aimed at promoting a retail corporate bond market will benefit corporate issuers, banks and investors. For example, a functional retail corporate bond market offers investors more choice and an opportunity to diversify investments and helps banks free up their balance sheet to help support sectors, such as small and medium enterprises. However, in order for the retail corporate bond market to develop, incentives need to exist for issuers to raise debt capital in retail as opposed to wholesale markets.

In our previous submissions to Treasury the ABA noted a number of regulatory barriers to the development of the Australian retail corporate bond market. We suggested that a reduction in the regulatory burden and associated compliance costs (without compromising appropriate consumer safeguards and protections) would promote debt capital raising and provide retail investors with opportunities to participate in capital raising activities.

Specifically, we noted that the prospectus rules for bond issuances to retail investors presented a significant barrier, and amendments to this regime were required to reduce compliance costs and make the issuance of retail corporate bonds suitably attractive. The ABA, therefore, strongly supports the Government's proposed reforms to streamline the disclosure regime for the offer of simple corporate bonds (SCBs), modify director's liability in respect of SCBs and clarify defences. However, the ABA submits that the Bill could benefit from some further amendments to ensure that costs of SCB issuances are effectively reduced and the Government's objectives are achieved.

While legislative reform is a significant and important first step in the development of a deep and liquid retail bond market, market forces such as pricing and demand play a pivotal role.

2. Specific comments

2.1. Eligibility Criteria

The ABA believes that the eligibility criteria for a 'simple corporate bond' (SCB) under proposed section 713A is fairly prescriptive. While we agree that the criteria should be limited given that investors will not receive a full prospectus for these types of offerings, the conditions should not be unnecessarily restrictive.

The ABA believes that a maximum tenor limitation of 10 years[1] and a maximum security price of A$1000[2] (a condition not required by ASIC Class Order 10/321) are unnecessary and problematic. A range of investment opportunities should be provided to investors and regulation should therefore not dictate the commercial characteristics which affect the marketability of bonds. Restricting the characteristics of bonds able to be issued under the new prospectus rules will unnecessarily dissuade issuers and undermine efforts to build the retail corporate bond market.

The ABA also supports the amendment to Section 713A(14) which clarifies that holders of SCBs cannot be subordinated to any other unsecured creditors of the issuer i.e. SCBs rank at least equally with all other unsubordinated and unsecured debt obligations of the issuer. We note this is consistent with the intention of the EM and is equivalent to the eligibility requirement for vanilla bonds under ASIC CO 10/321. This clarification is also in line with the established Australian wholesale bond market and burgeoning retail bond market where bonds are typically senior unsecured obligations.

2.2. Two part prospectus

In order to simplify the disclosure requirements for the issue of simple corporate bonds, the Bill introduces a two-part prospectus regime. Issuers must lodge a base prospectus with ASIC, which contains general information about the issuing company. A shorter offer-specific prospectus must be lodged with ASIC each time the issuer makes an offer of SCBs to retail investors.

The ABA is pleased that the Bill as introduced clarifies that offer-specific prospectuses may modify or supplement the information contained in the base prospectus. This offers an effective means to update a base prospectus. Nevertheless, the ABA has concerns with the compulsory use of the two-part prospectus regime after the two year transitional period.

2.2.1 Form

The proposed legislation introduces a streamlined two-part prospectus for SCBs which will be compulsory for issuers after a two year transitional period.

[1] Section 713A(6)
[2] Section 713A(12)

The ABA recognises that regulatory requirements for bond issuances to retail clients should promote consumer protection and transparency by ensuring that investors, and the market more broadly, are fully informed and investment risks associated with debt securities are well understood by retail investors. However, this must be balanced with the need for banks and other corporates to be able to take advantage of market opportunities and participate in a cost effective and efficient issuance to market.

The ABA believes that to minimise distortions between different forms of capital raising activities and in order to attract issuers to the retail market and debt securities, the disclosure costs for retail issues must not exceed other means of raising debt or capital. Current processes and documentation adopted by the wholesale market provide a useful model upon which SCB disclosure could be based.

The ABA recommends that:

- The two-part prospectus should not be compulsory for issuers of SCBs;
- While content requirements should be mandated to ensure consistency, issuers of SCBs should have the flexibility to use a form that is most suitable to the type, and frequency, of the raising and remain eligible for concessions under the proposed reforms such as directors' prospectus liability. For example the following could be utilised: a two-part prospectus, single prospectus or adoption of the process used for equity rights issues i.e. cleansing notices[3];
- The two-part prospectus should consist of a base prospectus (which allows information disclosed to ASIC to be incorporated by reference) and a short termsheet style document[4]. This will help ensure the disclosure cost is reduced and the proposed regime is of benefit to potential issuers;
- The base prospectus should be valid for five years instead of three years to facilitate repeat issuances; and
- The base prospectus proposed in the Bill should be able to be utilised for wholesale bond issues (while remaining exempt from the proposed prospectus liability regime).

2.2.2 Content requirements

The ABA believes that it is important for retail investors to have access to key information about the issuer and the security, including the risks of investing in debt, however onerous legal obligations should not be unnecessarily imposed.

The ABA has previously emphasised to Treasury the manner in which prospectus content requirements (and liability provisions) create a regulatory barrier for corporate issuers. We note that CO 10/321 currently allows companies to issue 'vanilla bonds' to retail clients under a simplified two part prospectus. Only one issuer has issued retail bonds under this class order, since the class order was introduced. This may suggest that the content requirements are too onerous for issuers. The content requirements are therefore an essential component of determining the effectiveness of the proposed reforms in achieving a deep and liquid corporate bond market.

The ABA notes that the specific content disclosure requirements for the two-part prospectus (base and offer-specific prospectus) will be prescribed by regulations. It is therefore unclear precisely what information must be contained in the two-part prospectus. The ABA submits that it is important for the Committee to note that the usefulness of the disclosure regime is dependent on the content requirements.

[3] This would enable processes and documentation adopted by the wholesale market to be used and create greater consistency between liability regimes by allowing due diligence to be dealt with at a management rather than board level, thereby reducing the costs with debt capital raisings in the retail market.

[4] This is in line with a wholesale market program memorandum with a pricing supplement for each deal.

Until the industry has seen the proposed regulations it is difficult for the industry to provide detailed comments on the proposed regime. Given, the importance of the content requirements the Government must consult with the industry on the draft regulations prior to their finalisation.

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2.2.3 Reliance on continuous disclosure

We note that both the base prospectus and offer-specific prospectus may incorporate information by reference to documents which have been previously lodged with ASIC. This is in alignment with the process for equity securities.

The ABA submits that more flexible incorporation by reference is required to include the ability to incorporate future documents by reference. This would cover the most recent financial statements of the issuer. The continuous disclosure regime should also be leveraged as much as possible.

It is currently unclear how the proposed prospectus regime will work with issuer's continuous disclosure obligations. For example, Section 713E(3) makes it unclear whether these document are subject to full prospectus liability.

The ABA submits that:

- Listed issuers should be able to rely on the disclosure of information about the company which is required to be made under the continuous disclosure regime more broadly;
- Documents incorporated by reference that are issued under the continuous disclosure regime or otherwise disclosed by issuers (including banks) should not be captured by the prospectus liability regime; and
- Listed issuers should be clear as to when and what information is required to be included in an offer specific document (as opposed to the need for an issuer to possibly face a continuous disclosure obligation).

2.3. Amendments to the prospectus liability regime

The ABA supports the Government's proposal to reduce the liability standard on directors in respect to retail corporate bonds by removing strict liability for directors named in (a defective[5]) two-part prospectus as a proposed director under section 729 of the *Corporations Act 2001*. As a result directors will only have civil liability for a defective two-part prospectus if personally "involved" in the defective statements. "Involvement" of directors in a prospectus is inferred from the continued requirement for all of the directors of an issuing company to consent to the issue of a two-part prospectus. Directors, therefore, also remain criminally liable under sections 1308 and 1309[6] of the *Corporations Act 2001* if a prospectus is false or misleading unless a director can prove they have made reasonable enquires, and after doing so, believed on reasonable grounds that the prospectus was not defective (due diligence defence) or placed reasonable reliance on information provided by other people (reasonable reliance defence)[7].

[5] Misleading or deceptive statements in a prospectus or omissions from a prospectus.
[6] Currently, the existing reasonable care element of the offence means that directors who authorise the issue of a misleading or deceptive disclosure document may be presumed guilty of an offence if they fail to take reasonable care to ensure that the document is not misleading or deceptive.
[7] Consequently, if a director is able to establish either of these defences in respect of a defective prospectus, the director also has a defence to sections 1308 and 1309 of the *Corporations Act 2001.*

While we support the proposal to align the civil liability and criminal liability framework by providing a due diligence or reasonable reliance defence to both, the existence of prospectus liability for directors is problematic due to the regulatory bias for corporates to structure fundraising in a manner which does not require the preparation of a prospectus. The ABA does not agree this perceived regulatory bias has been addressed[8].

So long as directors are required to be involved in the issuance and directors' prospectus liability remains, there continues to be a greater legal risk, administrative complexity and more costly burden involved in issuing retail corporate bonds than wholesale corporate bonds. In practice, directors will continue to be required to conduct due diligence processes rather than these processes being conducted by senior management and treasury functions. The ABA submits it is important for the proposed reforms to address the need for a director to be personally involved in the due diligence process.

The proposed two-part prospectus needs to make the SCB regime sufficiently attractive to issuers by ensuring that the issuance of corporate bonds to the retail market is a viable issuance option and not associated with greater risks or costs. In our previous submission, the ABA recommended a business judgment exception (safe harbour or reasonable steps defence) for directors making good faith decisions. This is consistent with developments to review corporate sanctions and highlighted the importance of directors having confidence that the law affords adequate defences and protections for directors acting in good faith.

Alternatively, directors' liability should be removed altogether and issuers should be liable for the preparation and content of a prospectus[9].

Schedule 2 – Use of the expression "financial planner" and "financial adviser"

The ABA supports the Government's efforts to implement law reforms intended to improve the quality of financial advice, the regulation of financial planners, and the professionalism of the financial planning industry. We have contributed extensively to many of the consultations on the Future of Financial Advice (FOFA) reforms.

The ABA supports the intention of the proposed legislative amendments to enshrine the terms 'financial planner' and 'financial adviser'. The Bill proposes that "a person must not use the terms 'financial adviser', 'financial planner' or terms of like import, in relation to a financial services business or a financial service, unless the person is able under the Licence regime to provide personal financial advice on designated financial products"[10].

Nevertheless, the ABA submits there should be certainty around the use of the terms where it may be used to describe the persons' professional capacity or the persons' operation within a financial services business. Furthermore, terms that are deemed to be classified as "any other word or expression that is of like import" should not prevent banks or banking groups explaining bank staff functions in well understood terms, such as bank teller, bank specialist, bank adviser, insurance specialist, wealth manager, corporate adviser, institutional manager, business adviser etc.

The ABA recommends that there is a 12 month transition period to enable the financial services industry to make the necessary changes including business structures and job titles, workplace and employment arrangements, documentation (internal and external), marketing materials, websites etc.

[8] Paragraph 1.12, page 7, Explanatory Memorandum, *Corporations Amendment (Simple Corporate Bonds and Other Measures) Bill 2013.*
[9] For example, under sections 1041E or 1041H of the *Corporations Act 2001.*
[10] Paragraph 2.4, page 27, , Explanatory Memorandum, *Corporations Amendment (Simple Corporate Bonds and Other Measures) Bill 2013.*

Finally, the ABA supports a 'designated financial product' as 'Tier 1 products' i.e. a financial product other than a general insurance product (other than a sickness and accident insurance product), a consumer credit insurance product, a basic deposit product, a non cash payment product, or a First Home Saver Account (FHSA) deposit account.

For any further information on the comments raised please contact me on or

Yours sincerely,

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