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AUSTRALIA**

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Retail Investor Division  
The Treasury  
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Dear Treasury

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

Chartered Secretaries Australia (CSA) is the peak body for over 7,000 governance and risk professionals in Australia. It is the leading independent authority on best practice in board and organisational governance and risk management. Our accredited and internationally recognised education and training offerings are focused on giving governance and risk practitioners the skills they need to improve their organisations' performance.

Our members are all involved in governance, corporate administration, legal practice and compliance with the *Corporations Act 2001* (the Act) with their primary responsibility being the development and implementation of governance frameworks in public listed and public unlisted companies, private companies, and not-for-profit organisations.

CSA welcomes the opportunity to comment on the Exposure Draft of the Corporations Amendment (Simple Corporate Bonds and Other Measures) Bill 2013 (the bill). CSA Members have been providing feedback on issues of disclosure and reporting, as well as personal liability for corporate fault, over many years.

***General comments***

***Director liability***

CSA strongly supports the proposed changes to the civil liability provisions in respect to corporate bonds issued to retail investors. CSA is of the view that the bill may reduce the current 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, given the current provisions attach potential criminal liability to the directors of corporations issuing a disclosure document.

CSA has been a longstanding supporter of the principle that, where companies contravene statutory requirements, personal criminal liability of a corporate officer for the misconduct of the corporation should be limited to situations where the officer knowingly encourages or assists the commission of the offence or is reckless in attending to their duties as a corporate officer, thus allowing the offence to occur (accessorial liability).

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The proposed changes ensure that personal criminal sanctions are not imposed on directors for corporate breach by reason of their office or role within the company (rather than their actual acts or omissions).

### **Regulations**

While CSA also supports, in principle, the changes to the disclosure regime proposed in the bill, we note that the draft regulations have not yet been released. CSA recommends that the regulations be issued as soon as possible and be subject to public consultation, as without clarity as to the law, there is a disincentive for corporations to move to issuing corporate bonds. This in turn means that the policy intent will not be facilitated. Any 'grey' areas in the legal framework are an impediment to the policy objectives being achieved.

### **Specific comments**

#### **Interaction with continuous disclosure regime**

Australia has a robust continuous disclosure regime, yet the draft legislation does not clarify that it can be relied on in relation to the disclosure requirements attached to the issue of corporate bonds.

**CSA recommends** that the legislation should be explicit that documents or a part of documents to which reference is made in a prospectus that are lodged with ASIC or which are required by the Corporations Act to be lodged with ASIC include documents lodged with ASX or other exchanges. That is, issuing corporations need certainty that they need not lodge relevant documents twice.

Should an alternative approach be favoured, CSA suggests that this issue could be addressed through class order relief.

#### **Minimum subscription offer**

The draft legislation provides that a minimum subscription amount of \$50 million must be raised under the offer in respect to the securities. A document prepared and lodged with ASIC for the purpose of making an offer of debt securities is to be taken to be the base prospectus for all offers of simple corporate bonds made by the body during the three-year life of the document.

It is not clear if the first tranche on offer must consist of \$50 million, or whether a number of tranches of, say, \$10 million each, aggregating to at least \$50 million, can be offered during the three years.

**CSA recommends** that the legislation be revised to clarify whether the \$50 million applies to each tranche or the aggregate of the tranches offered under the one base document. CSA notes again that the legislation must provide certainty in order to facilitate a corporate bond fundraising regime.

#### **Paragraph 1.19**

Paragraph 1.19 on page 8 states that:

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.

CSA Members are unclear as to the exact meaning of this statement and its implications for the application of the bill.

CSA queries whether the policy intent is to attempt to facilitate:

- the issuance of corporate bonds, or
- the growth of a secondary market in depository interests.

CSA notes that questions attach to the two-step process of issuing bonds and depository receipts as outlined in paragraph 1.19 as follows:

- How is a secondary market intended to function? If a convertible note is not convertible, then it can be argued that it is a bond.
- How can the trading mechanism of the ASX (and any other exchanges that may exist in the future) be utilised to trade debt securities as well as equities securities?

CSA Members note that retail investors will more readily deal with corporate bonds if the mechanisms for doing so are familiar. That is, the policy objectives will be more readily fulfilled if investment is facilitated by providing familiarity to retail investors.

The use of familiar or existing mechanisms will also introduce efficiencies that benefit not only the investment community, but also the issuing corporations, which in turn benefits shareholders.

**CSA recommends** that additional explanation is required as to how a secondary market in bonds (rather than depository receipts) is intended to function.

### **Conclusion**

CSA Members note that there are commercial impediments to facilitating a corporate bond market which cannot be dealt with in legislation. Notwithstanding this, a regulatory framework that assists in overcoming the commercial impediments is required in order to fulfil the broader policy objectives of fostering a deep and liquid corporate bond market.

CSA Members note that it is difficult for retail investors to invest in corporate debt securities, although they can easily invest in equity securities issued by the same companies. CSA is of the view that any changes to the regulatory framework that are designed to make corporate bonds accessible to retail investors through financial markets will only achieve this goal if, as is currently largely the case with equity securities, an appropriate balance is struck between investor protection and minimising red tape and onerous compliance requirements.

Yours sincerely



Tim Sheehy  
CHIEF EXECUTIVE