15 February 2012

Ms Michelle Calder
Manager
Financial Services Unit
Retail Investor Division
The Treasury
Langton Crescent
Parkes ACT 2600

E-Mail: RetailCorporateBonds@treasury.gov.au

Dear Michelle,

Discussion Paper: Development of the retail corporate bond market: streamlining disclosure and liability requirements

Thank you for the opportunity to comment on the discussion paper concerning the development of the retail corporate bond market: streamlining disclosure and liability requirements.

The Property Council is the peak body for owners and investors in Australia's $600 billion property investment sector. The Property Council represents members across all four quadrants of property investment, debt, equity, public and private.

The industry welcomes the Government's initiative to reduce the regulatory requirements for listed companies that issue corporate bonds to retail investors.

Property companies make up a significant proportion of the top 50 Australian listed companies and the property sector is a prominent user of the Australian capital markets.

Streamlining the disclosure and liability requirements for these companies will further encourage the use of corporate debt to the burgeoning retail market.

The overall aim should be to make the purchase of corporate debt products as simple, efficient and cost effective as possible for issuers and investors.

Currently, it is burdensome and costly for companies to issue corporate bonds to retail investors compared to other fund raising avenues. Lengthy offer documents also detract from highlighting critical information to investors.

Simplicity, efficiency and cost effectiveness can be achieved by utilising the continuous disclosure regime for retail corporate bond issuance.

The Property Council recommends that for listed entities, the offer document contain brief information about the issuer, terms of the issue, risks, financial position of the issuer and how to apply for the bond offer.

Any other information can be obtained via links from the offer document to an issuer's web page on the ASX website. This approach leverages the use of the continuous disclosure process already in place.

Unlisted entities should be required to issue a full prospectus as these entities are not required to comply with continuous disclosure and financial reporting provisions.

In line with our approach to improve the effectiveness of bond offers, we also recommend that:

- Subordination is permitted provided risks associated with the bond issue are adequately disclosed to investors;
- Terms longer than 10 years are permitted so that entities seeking to issue longer dated securities are not disadvantaged;
- "Vanilla bonds" have a naming convention (e.g. "subordinated" in their title) so it is clear to investors what they are purchasing;
- ASIC investigate ways in which credit ratings for bonds can be provided to retail investors;
- Deemed director's liability should remain as it is a core assurance for investors; and
- A transition period is not necessary given the consultation with capital markets participants.

The attached submission addresses the questions raised in the discussion paper.

We are keen to discuss our recommendations with you further at your convenience.

Please do not hesitate to contact Darren Davis on (02) 9033 1936 or myself to discuss the issue.

Yours sincerely

Andrew Mihno

Executive Director International & Capital Markets

Property Council of Australia

0406 45 45 49

Response to Treasury Discussion Paper: development of the retail corporate bond market: streamlining disclosure and liability requirements

Property Council of Australia
February 2012

The Market

The retail corporate bond market at the current time is seeing relatively sporadic issuance of senior bonds. Issuers of senior bonds to retail investors over the last 18 months include Primary Health Care, CBA, and Australian Unity. An increase in the number of hybrid/subordinated securities issues has emerged more recently with issues from high profile, trusted names including Woolworths, ANZ and Origin Energy. Each of these subordinated issues has utilised a more detailed prospectus as required for more structured issuance.

Driving the demand for these issues is a weak and volatile equities market. This is supporting a greater allocation of investment funds towards fixed interest opportunities.

New investors entering the market since the GFC have not witnessed a long-term positive equities market and so have no real sense of the long-term returns traditionally seen in equities. As a consequence of this and weak global economic conditions, a greater allocation to fixed interest asset classes is resulting. Combined with the growth in self-managed super funds (SMSF's), the demand for what investors consider 'safe yield' has grown rapidly.

Demand from retail investors for access to corporate bond issues is expected to continue to grow this year with both senior and subordinated structures of interest.

With property companies making up a significant proportion of the Australian top 50 listed companies, the changes being proposed by Treasury regarding documentation for, and development of, the retail corporate bond market are important for this industry.

Property companies have been prominent users of the Australian capital markets and a burgeoning retail market is a focus of attention for the industry.

Property Council's Position

The Property Council's responses to the questions below should be read in the context of our key recommendation for more extensive use of the current "continuous disclosure" regime which is in place with the ASX for listed companies.

The key to achieving simple, efficient and cost effective corporate bond issuance to retail investors is to have links from an offer document to information available via ongoing continuous disclosure. This approach provides for a very short single offer document to be prepared when issuing senior vanilla instruments to retail investors. Subordinated transactions may require appropriate additional information to cover the extent of subordination and clarify the additional risks. However, a streamlined approach utilising continuous disclosure should ultimately extend to subordinated issues as well as senior transactions.

If an offer document with links to a company's webpage on the ASX website (ie. utilising continuous disclosure) cannot be agreed, the next best alternative is for a slightly longer offer document incorporating information that would have been obtained through links to continuous disclosure.

A further (but less efficient) alternative would be to have a two part prospectus. A base document would cover most of the more detailed information about the issuer and likely bond issue types. A secondary offer document would be very short (potentially one or two pages) covering the terms of the offer.

We support the use of prescribed titles for offer documents to achieve consistency and comparison of different offers.

Tailoring/Replacement of Current Prospectus Rules

Should the short form prospectus be compulsory for issuers and bond issues that meet the eligibility requirements set out below, or should it be optional?

A short form prospectus should be compulsory for issuers and bond issues, provided a prospectus meets the eligibility conditions set out in the discussion paper. If a short form prospectus is not compulsory, there is a risk of "prospectus creep" – prospectuses becoming longer and longer – and therefore one of the main reasons for the reforms will not be achieved.

Greater consistency between issuers is also more likely to be achieved with a short form prospectus as long as there are prescriptive content requirements.

Should the use of a two part prospectus be permitted?

Subject to the comments contained in the "Property Council's Position" above, a two part prospectus should be permitted as this will provide a degree of flexibility for issuers. This is particularly the case for frequent issuers which can take advantage of the base prospectus as a program-like document. Issuers in the institutional market currently issue from "program documents" set up with the purpose of describing the company and their business. Program documents remain current for many years and are updated periodically. For two part prospectus arrangements to be widely acceptable, a longer period of availability for the base document (beyond the current two years) would be required.

Should broad use of continuous disclosure be accepted, the need for a two part prospectus would not exist.

Proposed Entry Requirements/Eligibility – Conditions Related to the Issuer

Are these proposed conditions appropriate? Are there any other additional or alternative conditions that should be imposed?

The Property Council supports the conditions contained in the discussion paper.

Should unlisted entities with listed securities on issue be allowed to use the shorter prospectus? If so, what, if any, additional requirements would need to be imposed to ensure that investors are informed about the entity's financial position.

Unlisted entities should issue a full prospectus as these entities are not required to comply with the relevant continuous disclosure and financial reporting provisions. The market would therefore not have received relevant information from unlisted entities.

Should eligibility extend to a wholly-owned subsidiary of a body which has continuously quoted securities where the business of the subsidiary is to act as a financing company for the group?

Yes. It is common for some companies to use a wholly-owned subsidiary as a financing arm of the head company. Provided a subsidiary has the same guarantor structure (which includes

the parent company) as any senior debt that is on foot, issues from the subsidiary should be permitted. Complexities linked to structural subordination can create confusion for investors as to where they actually rank in a winding-up.

Proposed Entry Requirements/Eligibility – Conditions Related to the Bond

Are the proposed conditions set out above appropriate? Is there a case for adopting any of the alternative conditions? In particular:

• Should subordination be allowed? If so, is disclosure of the fact of subordination sufficient to protect investors?

• Should terms longer than 10 years be permitted? If so, how long should the permitted maximum be, or should there be no maximum?

• Should deferral of interest be permitted, or would this be inconsistent with the notion that bonds provide a regular income stream?

• If eligibility is extended to bonds that have conditions such as subordination, very long terms or deferral of interest, will far more risk disclosure be required and would this undermine the utility of shorter disclosure for these products?

Subordination should be permitted providing it is properly disclosed to investors. Flexibility in this area is required for real estate entities.

Terms longer than 10 years should be permitted so that entities seeking to issue longer dated securities (such as infrastructure entities) are not disadvantaged.

Both vanilla bonds and hybrid securities should be permitted to defer interest as flexibility is required. In recent hybrid issues, we have seen the capacity for deferral of interest although deferral brings punitive restrictions on the issuer such as an inability to pay dividends to ordinary shareholders. These 'dividend stoppers' are typical in hybrid issues and over the past 12 years, not one has ever been activated. In practical terms, the inclusion of deferability has been inclusion of the risk of deferral. This should be allowable as the issuers quite often seek to include this for alternative purposes, such as equity credit from ratings agencies – a vital precursor to issuance of yielding investment products to the market.

If eligibility is extended to bonds that have conditions, this will not undermine the utility of shorter disclosure as the risks can be disclosed to investors. For subordinated issues, more information can be added to the shorter prospectus detailing the subordination and associated risks.

Is there a risk that investors may confuse more complex products with vanilla bonds, if both types of investment are able to take advantage of simplified disclosure? Is it important that the bonds be correctly described? For example, if an issuer offers subordinated bonds or hybrid-type securities, should it be obligatory that the name of the securities not suggest to retail investors that vanilla bonds are being offered?

There should be a naming convention for "vanilla bonds" so that it is clear to investors what they are purchasing. Recent subordinated note issues have been required to use the term 'subordinated' in their title. This practice should continue.

Use and Availability of Credit Ratings

Should the entity or the bond issue be required to have an investment grade rating (if available)? If so, how would an investment grade rating be defined and mandated?

What other measures could the Government or ASIC take to enable the provision of credit ratings to retail investors?

The Property Council believes it is important that an issuing entity has a credit rating. However, some unrated companies would be considered investment grade if they were rated. Preventing such companies from issuing would be undesirable.

The cost of obtaining a rating is nominal. The lack of an Australian Financial Services License (AFSL) by ratings agencies is preventing mainstream agencies from rating retail issues. More work could be done by ASIC to enable the provision of credit ratings to retail investors. If the bulk of ratings agencies are not willing to be licenced to rate retail distributed transactions, then a government rating agency could be set up (as a non-profit organisation) to provide this service.

We note that retail investors have been content to purchase investment products without credit ratings over the last three years. We would expect most sophisticated investors to know the ratings of the issuer (if they are rated), regardless of whether it is specifically stated in the prospectus or not.

General Approach to Content Requirements and Prospectus Length

Should the prospectus contain prescribed headings and/or prescribed content?

Should there be a maximum prospectus length (possibly with ASIC having discretion to increase this)? If so, what should be the maximum length for (a) a standalone prospectus; (b) each part of a two-part prospectus? Could a two-part prospectus be restricted to a maximum total of, say, 40 pages?

The prospectus should contain prescribed headings so there is consistency between prospectuses.

It would be useful to have a maximum prospectus length so that "prospectus creep" referred to above is prevented.

Prescribed Headings/Sections

Assuming that headings are appropriate, are the above headings suitable? Would other headings be preferable?

Would an investment summary be a useful inclusion?

The prescribed headings are appropriate. It would however be useful to include a summary of the entity's business operations and their "track record".

Detailed Contents

Are the content requirements suggested below appropriate?

Yes, although the content requirements could be significantly shortened by direct use of links to continuous disclosure on the ASX website.

Are there alternative or additional content requirements that should be adopted?

As noted above, linking to continuous disclosure (which listed companies provide to the ASX) would be very useful.

Is it appropriate to require the inclusion of information on the capacity of the issuer to meet its obligations under the bonds? Would this require the issuer to provide forecasts which should not be required for bond transactions?

Forecasts should not be required as they are not factual but indicative. Hypotheses on capacity to meet obligations should be left to the investor based on factual information in the prospectus or other issue documentation.

If ratios are to be included, should the formulae to calculate the ratios be prescribed and, if so, what formulae should be used?

Ratios and related formulae should be included if they are required in the terms. For example, use of a debt to EBITDA ratio in describing a company's gearing should be clearly able to be understood by potential investors. The ratios should not be prescribed however as they are likely to be specific to each issuer.

If the abovementioned metrics are not useful given the nature of the issuer or the industry they are in, could the issuer be permitted to use other metrics?

Yes.

Would other content requirement reforms, be desirable, for example:

• A statement of general principles, including that the complexity of prospectuses is to be minimised, repetition is to be minimised and the focus of disclosure is on matters material to a consideration of an investment in the bonds;

These are worthwhile aims and are supported.

• Inclusion of the terms of the bonds and the trust deed (if applicable) on the issuer's website rather than in the prospectus;

The terms of the bond should be readily available and are the core of any offering document. The Trust Deed could be available elsewhere and would not represent a crucial requirement in any prospectus.

• Inclusion of a summary of the tax consequences of the bonds for investors rather than a full opinion from a tax advisory firm;

The tax consequences for investors should be briefly referred to in the offering document although we note these usually simply stated that each investor should get their own tax advice.

• Requiring issuers to refer to other sources of information about themselves such as their Annual Reports and websites; and

This can be a simple statement that other information is available for investors to assist with their decision to invest. The more information that can be referred to in this way, the more likely issuing can be made more efficient.

• Publication by the Government, ASIC and other relevant bodies of relevant general information for investors, including in relation to the calculation and relevance of key ratios. Issuers could be required to refer to this independent information rather than to attempt to provide this advice to investors.

Reference to this type of information rather than including it in an issuer's offer document would be more likely to assist issuance of corporate bonds.

Using a Multi-Part Prospectus

Do you agree with a two-part prospectus approach, or do you consider it would be preferable to have a prospectus followed by a term sheet and cleansing statement? What is the basis for your view?

The two part prospectus with the base acting like a bond program is reasonable. However, it is not as efficient as utilisation of continuous disclosure and a simple term sheet.

What should be the maximum life of a base prospectus?

We would prefer to see a minimum life of 5 years rather than the current maximum of two years.

Is it feasible and/or appropriate to specify what information should be included in each part of a two-part prospectus, or alternatively in a short prospectus, term sheet and cleansing statement? If so, what should that content be?

It is feasible and reasonable. A base document should act like a bond program document and include as much information about the issuing entity as is pertinent at the time. If the base document is able to refer as much as possible to continuous disclosure via website addresses (or hyperlinks if the offer is made on-line) then greater efficiency would be achieved. The secondary document should include the terms of the issue, relevant dates etc and should be a very short document.

The two-part prospectus structure may be redundant if more efficient use of continuous disclosure with the ASX is utilised as a surrogate base document.

Incorporation of Information by Reference

Should there be scope to have information that is 'otherwise referred to', for example the issuer's annual and half-yearly reports, or information such as ASIC's MoneySmart website?

Should it be made clear what the effect of referring to such information will be since it does not form part of the prospectus (for example, could it satisfy prospectus content requirements even though there is no prospectus liability for this information)?

There should be scope to refer to other information available from other sources and not included in the offer document. Hyperlinks could be used in electronic copies of the offer document. This would be the primary method of reducing the size of the document and simplifying the issue process. Any capacity to more readily utilise the continuous disclosure regime already in place for the ASX is recommended.

The continuous disclosure process should be the standard information base for issues, with offer documentation focused on terms and risks of investment.

Liability for Prospectus Content

Should directors' deemed civil and/or liability for prospectus content be removed?

Deemed director's liability is a core assurance for investors and it is recommended that it remain. Investors should have confidence that directors of the issuer have liability for the information provided at the time of issue. Issuers should undertake their own due diligence process before making issuing to investors.

Exemption for Prudentially Regulated Entities

Should subsection 708(19) be amended in the context of these proposed reforms?

As subsection 708(19) does not relate to potential property industry issuers specifically, it is less relevant from our perspective. However, given the level of prudential regulation of financial institutions in Australia, maintaining the exemption for these issuers is appropriate bearing in mind the aim to reduce barriers to issuing bonds.

Application and Transitional Arrangements

Is there a need for a transitional period and, if so, what should that period be?

Considering the due process that is being followed by consulting with the industry and capital market participants, a transition period would not be necessary.