

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

*Introduced into the House of Representatives on 20 March 2013*

*Portfolio: Financial Services and Superannuation*

### **Summary of committee view**

1.21 The committee seeks further information on the compatibility of these measures with the right to freedom of expression and the right to be presumed innocent.

### **Overview**

1.22 This bill amends the *Corporations Act 2001* to:

- require body corporates to issue a two-part simple corporate bonds prospectus when certain bond issuances occur;
- enable simple corporate bonds to be traded using simple retail corporate bonds depository interests;
- provide that directors have liability for any misinformation in a disclosure document in certain circumstances; and
- provide that the use of the terms 'financial planner' and 'financial adviser' are restricted to those with licences to provide advice on designated financial products.

### **Compatibility with human rights**

1.23 The bill is accompanied by a brief, self-contained statement of compatibility which states that the bill does not engage any human rights.

1.24 The committee, however, notes that the bill may give rise to human rights concerns with regard to the right to freedom of expression and the presumption of innocence.

#### *Freedom of expression*

1.25 The bill will restrict the use of the terms 'financial adviser' and 'financial planner' to persons authorised to provide personal advice on designated financial products.<sup>1</sup> The restrictions will also apply to terms of 'like import',<sup>2</sup> and any other

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1 Schedule 2, item 1, subsections 923C(1) and 923C(4)(a)(i).

2 Schedule 2, item 1, subsection 923C(4)(a)(iii). The meaning of the phrase 'like import' is not defined in the bill but the explanatory memorandum explains that:

terms prescribed by regulation.<sup>3</sup> Only persons who hold a relevant Australian financial services licence or persons who provide personal advice on designated products on behalf of a relevant licence-holder will be able to use the restricted terms.<sup>4</sup> It will be an offence for a person to use a restricted term without meeting the statutory criteria for its use.<sup>5</sup>

1.26 These provisions engage the right to freedom of expression in article 19 of the International Covenant on Civil and Political Rights (ICCPR). The right to freedom of expression includes the 'freedom to seek, receive and impart information and ideas of all kinds' and extends to commercial expression. The right to freedom of expression, however, may be subject to permissible limitations, where those restrictions are provided by law and are necessary for one (or more) of the purposes listed in article 19(3) of the ICCPR.<sup>6</sup> This essentially involves demonstrating that the limitation is (i) for one of the legitimate purposes defined in article 19(3) and is reasonable, necessary and proportionate to that purpose. The statement of compatibility does not address these issues.

### *Presumption of innocence*

1.27 It is a criminal offence under the *Corporations Act 2001* for a person to make or authorise false or misleading statements or information.<sup>7</sup> However, a person will not be liable if they have taken reasonable steps to determine whether any false or misleading information was being provided.<sup>8</sup>

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'Terms which would be considered to be of like import would be terms such as 'financial planning adviser' and 'financial advising agent'. It is important that provision be made to prescribe other words or expressions by regulation, as persons wishing to avoid the application of this measure may refer to themselves in new terms that are similarly misleading to consumers.' (para 2.15)

3 Schedule 2, item 1, subsection 923C(4)(a)(ii).

4 Schedule 2, item 1, subsection 923C(2).

5 Schedule 2, item 1, subsection 923C(3). The penalty for individuals who contravene the requirement will be 10 penalty units per day or part day for each day the offence is committed. The penalty for corporations will be 50 penalty units per day or part day for each day the offence is committed.

6 These are: (a) for respect of the rights or reputations of others; or (b) for the protection of national security, public order, or public health or morals.

7 *Corporations Act 2001*, sections 1308(4) and 1309(2).

8 *Corporations Act 2001*, sections 1308(4) and 1309(2).

1.28 The bill will provide specific tests for determining when a person has taken reasonable steps to ensure that a statement or information was not false or misleading. Broadly, to satisfy these tests, a person must prove that:<sup>9</sup>

- they believed on reasonable grounds that the statement or information was not misleading after making all reasonable inquiries; or
- they relied on information provided by another person that was reasonable in the circumstances.

1.29 Requiring a person to prove the existence (or non-existence) of particular facts to avoid criminal liability would appear to involve requiring the person to discharge a reverse legal burden. These provisions may therefore engage the right to be presumed innocent in article 14(2) of the ICCPR.

1.30 Generally, consistency with the presumption of innocence requires the prosecution to prove each element of a criminal offence beyond reasonable doubt. An offence provision which requires the defendant to carry an evidential or legal burden of proof with regard to the existence of some fact will engage the presumption of innocence because a defendant's failure to discharge the burden of proof may permit their conviction despite reasonable doubt as to their guilt. However, reverse burden offences will not necessarily be inconsistent with the presumption of innocence provided that they are within reasonable limits which take into account the importance of the objective being sought and maintain the defendant's right to a defence. In other words, the reverse burden must pursue a legitimate aim and be reasonable, necessary and proportionate to that aim. The statement of compatibility does not address these issues.

**1.31 Before forming a view on the human rights compatibility of the bill, the committee intends to write to the Minister for Financial Services and Superannuation to request further information as to:**

- **whether the provisions in Schedule 2 of the bill are compatible with the right to freedom of expression in article 19 of the ICCPR; and**
- **whether the provisions in items 52 and 53 of the bill are compatible with the right to be presumed innocent in article 14(2) of the ICCPR.**

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9 Schedule 1, items 52 and 53.