

AUSTRALIAN BUSINESS SECURITISATION FUND BILL 2018

EXPOSURE DRAFT EXPLANATORY MATERIALS

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Glossary

The following abbreviations and acronyms are used throughout this explanatory memorandum.

<i>Abbreviation</i>	<i>Definition</i>
Acts Interpretation Act	<i>Acts Interpretation Act 1901</i>
ABSF	Australian Business Securitisation Fund
Bill	Australian Business Securitisation Fund Bill 2018
PGPA Act	<i>Public Governance, Performance and Accountability Act 2013</i>
SME	Small and medium enterprises

Chapter 1

Preliminary

Outline of chapter

1.1 The Bill establishes the ABSF and the ABSF Special Account and credits the ABSF Special Account with \$2 billion between 1 July 2019 and 1 July 2023.

Context of amendments

1.2 The Bill gives effect to the Government's decision to establish the ABSF, which is aimed at boosting competition in the SME lending market and improving access to, and the price of, finance available to these businesses.

1.3 The focus of the ABSF's activities will be investing in warehouses and the securitisation market, which will support the ability of smaller lenders to grow and provide credit to underserved segments of the SME lending market, by improving the ability of these lenders to obtain funding from markets at a competitive price.

1.4 Securitisation is a method of funding whereby the cash flows from illiquid assets, such as loans, are packaged in tranches into tradeable debt securities, with each tranche having different risk characteristics. The cash flows from the underlying loans are used to make interest and principal payments to investors. Unlike a normal bond, these securities only have recourse to the underlying assets; there is no recourse to the originator of the assets. Warehouses are short-term finance facilities that allow a lender to write loans until they have built up a large enough pool to securitise.

1.5 Securitisation has been an important source of funding for non-bank lenders and has been an important driver of competition for residential mortgages. Unlocking the securitisation market for SME loans will allow smaller lenders and non-bank lenders to compete more effectively and increase the availability of lending and reduce prices in the market.

Summary of new law

1.6 Part 1 of the Bill sets out the objects of the Act, arrangements for commencement, application to the Crown, key definitions, extension

to external territories and extra-territorial application. This Part also contains a simplified outline of the Act.

1.7 Part 2 of the Bill:

- establishes the ABSF and the ABSF Special Account;
- provides for the types of investments that can be made by the ABSF; and
- credits \$2 billion into the ABSF Special Account between 1 July 2019 and 1 July 2023;

1.8 Part 3 of the Bill sets out the constitutional limits of the ABSF, provides for the Treasurer to delegate his powers and provides for regular reporting and a review of the fund.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
The Bill establishes the ABSF and ABSF Special Account to increase the availability, and reduce the cost, of credit to small and medium enterprises by investing in debt securities.	No equivalent.

Detailed explanation of new law

Part 1 – Preliminary

Short title

1.9 This section provides that the Bill, when enacted, may be cited as the *Australian Business Securitisation Fund Act 2018*. [Section 1]

Commencement, objects and simplified outline

1.10 The Bill will apply from commencement, that is, on the day after Royal Assent. [Section 2]

1.11 The object of the Bill upon enactment is to increase the availability, and reduce the cost, of credit provided to small and medium enterprises by the Commonwealth investing in debt securities in accordance with the Act. [Section 3]

1.12 The Bill contains a simplified outline that summarises its operation. The simplified outline is intended to assist users of the Bill to

understand the substantive provisions but is not otherwise comprehensive. For a detailed understanding users of the Bill need to refer to the substantive provisions and explanation in this Explanatory Memorandum. *[Section 4]*

Definitions

1.13 The Bill defines a number of terms used through the Bill. The ‘Finance Minister’ is defined as the Minister administering the PGPA Act. *[Section 5]*

1.14 The Bill also refers to the definitions of ‘amount of credit’, ‘credit’ and ‘debtor’ which are defined in the ‘National Credit Code’ which is defined in section 5 of the *National Consumer Credit Protection Act 2009*.

Crown to be bound, extension to external territories and extra-territorial application

1.15 The Crown will be bound in each of its capacities but is not liable to prosecution for an offence. *[Section 6]*

1.16 This Bill once enacted would extend to every external territory. *[Section 7]*

1.17 This Bill once enacted would extend to acts, omissions, matters and things outside Australia. *[Section 8]*

Part 2 – The ABSF and the ABSF Special Account

1.18 A simplified outline of the Part is included to summarise its operation. The simplified outline is intended to assist users of the Bill to understand the substantive provisions but is not otherwise comprehensive. For a detailed understanding users of the Bill need to refer to the substantive provisions and explanation in this Explanatory Memorandum. *[Section 9]*

Establishment of the ABSF and ABSF special account

1.19 The Bill establishes the ABSF and the ABSF special account. The ABSF consists of the ABSF special account and the investments of the fund. The ABSF special account is a special account for the purposes of the PGPA Act. *[Sections 10 and 11]*

1.20 The purpose of the ABSF special account is for the Commonwealth to buy authorised debt securities.

Investments of the ABSF

1.21 The Minister is given the power to invest amounts in the ABSF special account on behalf on the Commonwealth in authorised debt

securities. These investments are investments of the ABSF. *[Subsections 12(1) and (2)]*

1.22 Authorised debt securities include debt securities that:

- are issued by a trustee of a trust;
- are expressed in Australian dollars;
- relate to one or more amounts of credit provided to one or more debtors wholly or predominantly for businesses purposes where each amount of credit provided is less than \$10 million or any other amount prescribed in the rules; and
- meet any other requirements prescribed in the rules.

[Subsections 12(4)]

1.23 Restricting authorised debt securities to those issued by a trustee of a trust reflects the standard legal structure used for warehouses and the issuance of termed out securitisations. Reflecting the ABSF's objective of supporting access to finance for SMEs, authorised debt securities are also limited to securities where the underlying credit provided to each business is less than \$10 million. This approach is designed to reduce compliance costs that may otherwise arise with the addition of other criteria, such as the number of employees, for which data may not be readily available and may be challenging to align with lenders' current financing structures.

1.24 The Bill sets out the outer limits on the types of debt securities the Minister or authorised delegate can invest in. The rules have the flexibility to prescribe other limitations as required depending on how the market develops. It is appropriate for the rules to have the flexibility to further constrain the types of debt securities the Minister or authorised delegates can invest in.

1.25 As the Bill provides for the investment of amounts in the ABSF in authorised debt securities, the standard restrictions on investments by the Commonwealth provided for in section 58 of the PGPA do not apply. *[Subsection 12(5)]*

1.26 The Minister is able to authorise re-investments in authorised debt securities in writing. This ensures that once an investment matures, it can be reinvested in authorised debt securities in the same entity without the proceeds having to first be credited back into the ABSF special account. *[Subsection 12(3)]*

Directions about the investments of the Fund

1.27 The Minister is authorised to make directions via legislative instrument about the exercise of powers under the Act. *[Subsection 13(1)]*

1.28 The directions power is necessary to allow the Minister to provide an investment mandate and give other directions to a person the

Minister has delegated any functions or powers to. As such, there is a requirement for the Minister, and consequently any authorised delegates, to comply with any direction. *[Subsection 13(2)]*

1.29 The rules may include directions relating to

- strategies and policies to be followed for making investments;
- decision-making criteria for making investments;
- limits on making investments;
- risk and return relating to investments;
- any other matters the Minister thinks appropriate.

[Subsection 13(3)]

1.30 The direction cannot have the purpose of directly or indirectly requiring the Minister or authorised delegate to make a particular investment. *[Paragraph 13(4)(a)]*

1.31 The direction cannot be inconsistent with the Act (including the objectives of the Act). *[Paragraph 13(4)(b)]*

1.32 The Minister's direction is not subject to disallowance or sunseting under the *Legislation Act 2003* as it forms part of a class of legislative instruments to which disallowance and sunseting does not apply - see regulations made for the purposes of paragraphs 44(2)(b) and 54(2)(b) of that Act. *[Note to subsection 13(1)]*

Credits to and withdrawals from the ABSF special account

1.33 The ABSF special account will be credited with \$2 billion between 1 July 2019 and 1 July 2023. The 2 billion will be credited to the ABSF as follows:

- \$250 million on 1 July 2019;
- \$250 million on 1 July 2020;
- \$500 million on 1 July 2021;
- \$500 million on 1 July 2022;
- \$500 million on 1 July 2023.

[Paragraphs 14(1)(a)-(e)]

1.34 The ABSF special account will also be credited with any income derived from the fund's investments, capital returns or other financial distributions relating to the fund's investments and the proceeds of the realisation of the fund's investments. This will allow the ABSF to reinvest its capital and earnings. *[Paragraphs 14(f)-(h)]*

1.35 Additional amounts can be credited to the account as determined by the Minister in a notifiable instrument following agreement with the Finance Minister. These amounts are to be credited to the ABSF special account on the date provided for in the determination but that date must be on or after the date on which the instrument is made. The determination must also be expressed to be for a specified budget year.

[Subsections 14(2)-(5)]

1.36 The Minister is able to make a written direction to withdraw specified amounts from the ABSF on a specified day. The date of withdrawal must be on or after the date on which a direction is made and a copy of the direction must be given to the Finance Minister. The direction is not a legislative instrument within the meaning of subsection 8(1) of the *Legislation Act 2003*. *[Section 16]*

Purpose of the ABSF special account

1.37 The purpose of the ABSF special account is:

- paying the cost of making an investment in authorised debt securities as per section 12;
- paying or discharging any other costs, expenses and other obligations incurred by the Commonwealth exclusively in connection with the ABSF; and
- reducing the balance of the ABSF.

[Section 15]

Part 3 – Miscellaneous

1.38 A simplified outline of the Part is included to summarise its operation. The simplified outline is intended to assist users of the Bill to understand the substantive provisions but is not otherwise comprehensive. For a detailed understanding users of the Bill need to refer to the substantive provisions and explanation in this Explanatory Memorandum.

[Section 17]

Constitutional limits

1.39 The Bill ensures that it is not implied that the Minister (or authorised delegates) can perform functions that exceed the Commonwealth's legislative power under the Constitution. The Bill expressly enables the Minister (and authorised delegates) to exercise power or functions under the Bill only for purposes related to specific constitutional powers. The Minister's powers can only be exercised:

- in relation to trade or commerce:
 - between Australia and places outside Australia; or

- among the States; or
- within a Territory, between a State and a Territory or between two Territories; or
- with respect to a Territory; or
- with respect to the implied power of the Parliament to make laws with respect to nationhood; or
- with respect to the executive power of the Commonwealth.

[Section 18]

Delegation

1.40 The Minister has the power to delegate in writing the powers or functions provided for in the Bill except for the power to issue directions in section 13, the power to credit additional amounts into the ABSF in section 14 and the power to make rules under section 22. The delegation can be to an official of the Department of the Treasury or entity prescribed by the rules who:

- is an SES employee; or
- is an APS employee who holds or performs the duties of an Executive Level 2, or equivalent position; or
- occupies an office or position that is the equivalent level to that of an SES employee or an Executive Level 2.

[Subsections 19(1) and (2)]

1.41 Prior to delegating a function or power to a person holding a particular office or position, the Minister is required to take into account whether the delegation is to a person who holds an office or position that is sufficiently senior to exercise the power or perform the function or duty. *[Paragraph 19(3)(a)]*

1.42 Where the Minister is delegating a power or function to a particular person, the Minister must consider if the person has the appropriate qualifications or expertise to exercise the power or perform the function. *[Paragraph 19(3)(b)]*

1.43 Authorised delegates are required to comply with any written directions given by the Minister. The directions cannot be inconsistent with the rules made under the Act. *[Subsections 19(4) and (5)]*

Annual reporting and review

1.44 There will be a yearly update on the operation of the ABSF as part of the Treasury annual report. *[Section 20]*

1.45 The Bill requires the Minister to commence a review into the ABSF as soon as possible two years after the fund commences (the day

after Royal Assent). The review must include a review of the effectiveness of the ABSF in meeting its objectives. A written copy of the review must be given to the Minister who must then table a copy in each House of the Parliament within 15 sitting days of that House after receiving it.

[Section 21]

Rules

1.46 The Minister has the power to make rules as required or permitted or that are necessary or convenient to give effect to provisions in the Bill. The rule making power will allow the Minister to prescribe additional restrictions on the types of debt securities that can be acquired (see section 13 above). *[Subsection 22(1)]*

1.47 To avoid doubt, the rule making power cannot:

- allow the creation of an offence or civil penalty;
- provide powers of arrest, detention, entry, search or seizure;
- impose a tax;
- set an amount to be appropriated from the Consolidated Revenue Fund under an appropriation in the Bill; or
- directly amend the text of the Bill.

[Subsection 22(2)]