MULTISOURCE FINANCING: MAKING MULTIPLE OPTIONS WORK

In an environment where Australian issuers, especially from the infrastructure sector, are actively seeking diversified funding options, two **Allens** partners – **James Darcy** and **Scott McCoy** – discuss the key structuring considerations for issuers and sponsors wishing to establish debt platforms to access longer-term financing options.

How are borrowers looking to incorporate the range of funding opportunities into their funding platforms?

■ **DARCY** Increasingly, we are seeing Australian corporates looking to adopt flexible debt platforms that facilitate access to multiple sources of debt. This is in part being driven by issuers and sponsors looking at longer-term funding options, and wanting to ensure they can access domestic and offshore institutional investors as and when the opportunity arises.

The ability to take up these opportunities relies heavily on understanding the needs of different markets and investors, and how they can live together from an intercreditor perspective.

■ **MCCOY** The focus on multisourced debt platforms has been particularly evident in the infrastructure and acquisition space, but the need to consider such a platform can be varied. Often the borrower is transitioning from a wholly bank-funded position to a multisourced debt platform. To make an effective transaction, the key to is to get documents set up correctly in the first place, effectively looking to future-proof the structure to enable treasury teams to execute in different markets when the opportunity arises.

How does the investor mix affect structuring?

■ **DARCY** Understanding investor dynamics is of key importance. The requirements of banks vary from those of US private placement (USPP) investors, which again vary from those of AMTN, EMTN or other public bond investors. So does the behaviour of different debt classes when dealing with amendments, waivers or other issues.

These dynamics and behaviours should influence an issuer's decision as to the nature and extent of the covenants made available to each type of creditor. This particularly needs to be borne in mind when deciding what provisions should be included in common documents that sit across creditor groups and how voting arrangements are to be structured.

To deal with this, intercreditor or common-creditor documents such as security trust deeds should contain only those provisions that are intended to be made available to all creditor groups.

■ **MCCOY** A key consideration is the potential mix of debt classes, and understanding as best you can how this might change over time. For a borrower transitioning into a multisourced debt platform, it's important to bear in mind that while its bank group may initially form a majority of creditors the banks may subsequently find themselves in a minority position with limited veto rights. This adds to the complexity of setting appropriate voting structures and any standstill arrangements.

What approach should issuers have around ensuring they can obtain consents and waivers?

■ **DARCY** A well-structured debt platform balances the protection of creditor interests with the flexibility a borrower needs to run its business now and in the future. Despite best efforts, however, amendments and consents may be required from time to time.

Where a company has expanded its sources of debt beyond bank debt into

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capital markets, seeking amendments or waivers can be slower and more cumbersome than would otherwise be the case. Issuers get concerned about the ability to influence the decision making of a more disparate group of investors. This needs to be recognised in the documentation platform, setting the right levels for voting majorities and the right response periods.

■ **MCCOY** When you introduce capital markets debt into a structure it is important to focus on matters that cannot be amended without the consent of all creditors – to avoid the 'tail wagging the dog'. This should be a focus not only of the borrower, but importantly also for majority creditor groups – they should not want to be frustrated in their attempts to work through issues with a borrower.

In this regard, it is important for the debt platform clearly to identify the separate classes of creditors and to specify whether they are to vote as a block or on the basis of each individual creditor's exposure. Block voting can be advantageous for a borrower seeking a positive response for an amendment or waiver as, if the relevant majority of a group votes in favour, 100 per cent of the debt of that group is counted as being in favour of the decision.

On the other hand, counting each individual's exposure – so-called 'dollar-for-dollar' voting – may be preferable in certain circumstances such as acceleration and enforcement matters.

Do individual creditor groups typically have a right to enforce unilaterally?

■ **MCCOY** Whether each class, or only one of them, can independently exercise acceleration rights following an event of default, or whether this decision must be undertaken jointly across all debt classes, will be a key issue for both the borrower and creditor groups. Ideally, a borrower will look to ensure individual creditor groups cannot immediately take direct acceleration or enforcement action unless they themselves constitute a majority of the overall debt.

This is also a key point for core creditor groups themselves, such as banks, that will not want other groups taking precipitous action while they might be working through an issue with a borrower.

■ **DARCY** There are a number of ways in which acceleration and enforcement rights can be structured, such as the inclusion of standstill periods as well as step-downs in majorities, where the requisite number of votes needed to take an enforcement action reduces according to the length of time the relevant default has subsisted.

Clearly, certain urgent circumstances need to be acted upon quickly – for instance enforcement upon insolvency or appointment of an administrator. In these cases, individual creditor groups are often able to instruct the security trustee to enforce, even where they do not form a majority of creditors.

Common-terms platforms have been a feature of the Australian bank market for some time. What role do you see for bank and bond structures?

■ **DARCY** Common-terms platforms can work very well for issuers in the bank-debt market. There are also benefits to them, including 'locking down' standard financing terms and facilitating the entry into bilateral arrangements with individual banks or institutional lenders to enable different currencies, tenors and pricing.

But there are some significant impediments to creating a common-terms deed structure for all classes of debt, particularly bondholders. Terms offered to bondholders are lighter than those contained in bank documentation and if a common-terms deed is made available to all creditors, including bondholders, the bondholders will in effect be given a broader set of covenants than they would usually require. This increases the risk of bondholders blocking decision-making with respect to amendments, consents and waivers.

■ **MCCOY** In addition to being useful in the context of bank-debt funding, we have seen common-terms platforms accommodating direct debt investments from funds.

Documentation and market practice for the loan market has been developed in a bank environment, so if a borrower wishes to use its common-terms platform to bring in funds as lenders there are a number of issues to bear in mind, including veto rights over core terms, assignment rights, prepayments and indemnities.

Do you have any final thoughts?

■ **DARCY** Creating the right legal structure is essential to a cohesive multisource funding package. Future-proofing documents to ensure they can accommodate different sources of debt is clearly simpler than retro-fitting. Putting the right structure in place early can have significant time and cost benefits, avoiding lengthy and potentially costly amendments and reducing unnecessary tension with financiers. •

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