



Law Council
OF AUSTRALIA

Office of the President

22 June 2021

Senator Anthony Chisholm
Chair
Senate Economics References Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

By email: economics.sen@aph.gov.au

Dear Chair

Questions on notice: Treasury Laws Amendment (2021 Measures No. 1) Bill 2021

The Law Council of Australia appreciates the opportunity to have appeared before the Senate Economics References Committee (**the Committee**) on 10 June 2021 in relation to the Treasury Laws Amendment (2021 Measures No. 1) Bill 2021 (**the Bill**).

In the course of the Law Council's appearance, there were several questions from Senator McAllister that were taken on notice, relating to:

- a meeting between the Department of the Treasury (**the Treasury**) and the Corporations Committee of the Law Council's Business Law Section (**Corporations Committee**) on 21 September 2020; and
- the views of the Insurance Council of Australia (**ICA**) regarding the impact of continuous disclosure obligations on insurance premiums.

Responses to these questions are set out below and have been prepared with the assistance of the Corporations Committee.

It is noted that Senator McAllister also invited further submissions to be made by the Class Actions Committee of the Law Council's Federal Litigation and Dispute Resolution Section (**Class Actions Committee**), acknowledging that this group was unable to attend the public hearing on 10 June 2021. While this invitation is welcome, the Class Actions Committee is content to rely on its primary submissions made in relation to the Bill.

Meeting of 21 September 2020

Senator McAllister asked a series of questions regarding the Law Council's engagement with the Treasury on the development of the measures contained within the Bill. Specifically, Senator McAllister sought further details regarding a meeting between the Treasury and the Corporations Committee on 21 September 2020.

It is understood that at 1.00pm on 21 September 2020, the Corporations Committee held one of its regularly scheduled meetings via Zoom. There is generally over 30 people in

attendance. This meeting covered multiple topics ranging from the administration of the Committee through to a discussion of recent and upcoming consultations and reform priorities. Reforms to continuous disclosure laws were discussed at this meeting, with an update on the reform agenda and discussion of recent public statements in this regard. It is likely that there would have been some discussion among members of the Committee of the nature of possible changes that could address issues with the law at that time.

The Corporations Committee advises that it is common for its meetings to include observers from a range of Government departments and regulators, including the Treasury. Other observers at meetings of the Corporations Committee may include representatives from bodies such as the Australian Securities and Investments Commission, Australian Takeovers Panel, Australian Prudential Regulation Authority, and Australian Securities Exchange.

It is understood that at the meeting on 21 September 2020, a representative from the Treasury was in attendance as an observer for at least part of the meeting. While minutes are not recorded at these meetings, the Corporations Committee would be happy to attempt to provide further details of the meeting, should it assist the Committee. However, it is important to recognise that monthly meetings of the Corporations Committee provide a forum for its members to openly and frankly discuss various or possible developments in the law with a particular emphasis on the corporations front.

Impact of continuous disclosure obligations on insurance premiums

In the course of the hearing, Senator McAllister asked the Law Council to consider the submissions put forward by the ICA and provide further views as to whether there is a sufficient link between continuous disclosure thresholds and the costs of directors and officers (**D&O**) insurance. Specifically, the Law Council has been asked to respond to the assertion from the ICA that the reforms to continuous disclosure will:

- in the short to medium term at best stem the rate of increase in D&O premiums, but will quite likely have no discernible effect; and
- in the medium to long term may lead to some reduction in D&O premiums, but quite likely will have no discernible effect.¹

The Corporations Committee appreciates the above perspective, however, indicates that in the experience of its members (who routinely advise entities subject to continuous disclosure requirements, and who seek to take out D&O insurance), there is strong anecdotal feedback to suggest that corporations are facing increasingly escalating D&O insurance costs with the likely impact being a reduction in overall cover and reticence by appropriate candidates to seek a directorship role.

The Corporations Committee submits that this escalation is likely to be influenced by continuous disclosure obligations that promote uncertainty in the market and are out of step with international frameworks. The Australian framework underpins the increase over time in the level of regulatory investigation of continuous disclosure matters (whether or not such matters lead to litigation), class action threats, and regulatory and class action litigation, exacerbated by a range of factors which have been explored at some length in the Australian Law Reform Commission (**ALRC**) review. It is noted that the ALRC review

¹ Insurance Council of Australia, *Inquiry into Treasury Laws Amendment (2021 Measures No. 1) Bill 2021* (Submission No 16), 3.

recommended an examination of the continuous disclosure and misleading and deceptive conduct laws.

The Law Council trusts this additional information is of assistance to the Committee. The Law Council would be pleased to provide any further assistance the Committee may require. Should you wish to speak with me directly, I am contactable on 0438 301 956 or Jacoba.Brasch@lawcouncil.asn.au.

The responsible officer within the Law Council Secretariat, Dr Natasha Molt, Director of Policy, is also available to assist the Committee Secretariat or Committee members' offices and is contactable on (02) 6246 3754 or Natasha.Molt@lawcouncil.asn.au.

Yours faithfully

A handwritten signature in blue ink, appearing to read 'Jacoba Brasch QC'.

Dr Jacoba Brasch QC
President