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Senate Standing Committees on Economics
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Treasury Laws Amendment (2021 Measures No.1) Bill 2021

The Property Council welcomes the opportunity to provide comments to the Senate Economics Legislation Committee on the *Treasury Laws Amendment (2021 Measures No.1) Bill* (the Bill).

The Property Council of Australia champions the industry that employs 1.4 million Australians and shapes the future of our communities and cities. Property Council members invest in, design, build and manage places that matter to Australians: our homes, retirement villages, shopping centres, office buildings, industrial areas, education, research and health precincts, tourism and hospitality venues and more.

Importance of the temporary relief measures

The Property Council notes that the reporting date for the Committee was **extended to 30 June 2021** but that the temporary relief measures related to virtual annual general meetings (AGMs), electronic documents, and continuous disclosure **expire on 21 March 2021**. We are concerned about the temporary relief measures ceasing to apply and urge immediate action be taken to ensure the temporary relief measures are extended to September 2021 until a more permanent solution is provided.

While we have some concerns with aspects of the Bill, the Property Council supports the broad goals of the Bill in modernising business practices and would encourage the Parliament to adopt the proposed legislation, unamended if necessary, to ensure the existing COVID temporary relief measures do not lapse inadvertently. Our concerns are detailed below.

Virtual Annual General Meetings (AGMs)

We welcome the introduction of the Bill which continues emergency reforms around virtual AGMs. Allowing virtual AGMs creates more flexibility for business, greater engagement with stakeholders, investors, and shareholders, and reduce costs. The emergency powers enacted by the Government in May 2020 allowed business to conduct AGMs in a COVID safe manner and their extension allows business to continue to embrace technology to improve efficiencies and support sustainability initiatives.

The proposed sunset date of 16 September 2021 falls within the main 2021 AGM season and may lead to uncertainty for many companies. Many listed entities will have already commenced planning for September and October AGMs including but not limited to managing bookings for event and technology providers and venues that can accommodate appropriate social distancing. We propose that virtual AGMs become a permanent option for companies. Alternatively, the

extension of temporary measures could encompass the entire duration of the proposed pilot scheme (discussed further below).

Clarity on “reasonable participation”

We note the addition of the phrase “reasonable participation” in subsection 253Q(2) which was not included in the exposure draft. The Property Council fully supports all security holders having an opportunity to participate in AGMs, but clarity is required on the implications of the phrase “reasonable participation”. For example, the phrase requires companies to provide the “right to speak” orally – can a question be taken on the phone and written down for consideration? Can questions of a similar nature be grouped? Certainty around practices is needed so companies invest in technology and processes that ensure compliance with the legislation and consistency of experience for participants.

Further consultation on virtual AGMs

Regarding the Government’s proposed 12-month “hybrid” pilot scheme for companies to hold AGMs, the Property Council supports a solution that gives companies maximum flexibility (in terms of meeting format and associated technology) to determine the optimal approach for their securityholders and circumstances. Hybrid meetings are complex, requiring not only venues and the associated set-up costs but also online participation and broadcasting involving further costs of procurement and implementation. This is particularly pertinent with a narrow market of three main registry service providers and a small number of experienced online voting providers. Making fully virtual AGMs permanent will give certainty to members, allowing them to confidently make investments to ensure everyone can exercise their right to participate. The Property Council requests further consultation to explore fully virtual AGMs alongside the proposed hybrid AGM pilot scheme.

Electronic Documents

The electronic signing and sending reforms allow more flexibility for business, greater engagement with stakeholders, investors, and shareholders, and reduce costs both in time and spend. Bringing permanency to these reforms is an important step towards technology neutrality.

We support the Government’s intent to reduce business costs and better reflect the way Australians want to engage and communicate digitally. There is a need for businesses and consumers to meet obligations electronically, whilst being assured of security, authenticity, and reliability.

Elections to receive documents in hard copy only

The Property Council has concerns with 253RB/C related to electing to receive documents in hard copy only. It is stated that “a company/registered scheme must give a person notice in writing setting out the person’s rights under this section within two months”. It seems antithetical to the intent of the bill to have companies and registered schemes write to members to advise them of their right to receive documents in hard copy only. This is a significant regulatory and administrative burden for companies when the provisions are likely to be in place only until September 2021.

Reforms to Continuous Disclosure

We have previously advocated for changes to continuous disclosure obligations as they apply a strict liability on directors. We welcome the amendments that make companies and their officers liable for civil penalty proceedings only in respect of continuous disclosure obligations where they have acted with ‘knowledge, recklessness or negligence’. This change protects against honest mistakes and unintentional withholding of information.

The Property Council welcomes balance between ensuring shareholders and the market are informed, whilst allowing companies to operate without facing the undue risk of class actions.

Australia has become the second biggest litigation funding market, second only to the United States.¹ While class actions play an important role in ensuring we have a robust and transparent corporate governance regime, our interest is in ensuring the industry is balanced and well regulated.

Directors and Officers' insurance

The relative ease with which class actions can be brought against a company has contributed to Directors and Officers' (D&O) insurance policy pricing increasing almost 1000% between 2016 and 2020, according to figures provided by insurance broker Marsh. Several of our largest members have reported premium costs in excess of \$20m for FY 2020/21 with increases of over 500% on the previous year alone. Many have reported forecast costs amounting to more than a 2000% increase on 2016 premiums. These premiums are predominantly being paid to offshore insurance companies and are not being reinvested in the Australian economy.

We note that the Bill's Explanatory Memorandum explores the impact of continuous disclosure on the price of premiums, indicating that the annual increase in premiums would be an average of 10% growth, versus 5% growth if the reforms go ahead. Our feedback from members, who have renewed their policies within the last three months or are currently seeking to renew their policy, is of figures ranging between 40 and 150% increases with only a marginal forecast of prices cooling if the reforms do not go ahead. The general consensus is increases of over 100% generally for the same level of cover, whilst anything lower than a 100% increase generally related to a reduction in cover.

It is worth noting here that even if the market pricing does moderate down to the suggested 10% increases, the cumulative increases over the past five years means such lower rate of increases are on massively higher base costs. The Explanatory Memorandum would benefit from using a multi-year timeframe to provide broader context.

Side C cover

The Property Council is concerned about uncertainty in the market and volatility in pricing. We have had reports of D&O insurance being the second most expensive fixed overhead cost for companies. However, D&O policies are made up of three key sections and there are more elements to consider than price. For example, we understand some companies are contemplating removing Side C (Securities Entity Coverage) from their D&O programs which will mean a reduced premium pool for insurers. At present, our members estimate the total premium pool for D&O in Australia is approximately \$1 billion.

Side C cover is an important mechanism to protect companies' balance sheets, especially in a volatile market where disclosure issues have become increasingly difficult. In addition, removal of Side C results in companies taking on greater risk by self-insuring because something that has been a fundamental part of a listed company's insurance framework has become uneconomic as a result of current class action landscape in Australia.

Broader economic implications

The high prevalence of class action activity in Australia will continue to have a broader economic impact on Australian businesses and companies, including:

- Discouraging experienced and capable professionals from becoming board directors – which could have detrimental impacts for corporate governance in the longer term.
- Making it less attractive for companies to be headquartered and listed in Australia, given the greater resources and costs of having to respond to and manage litigation compared

¹ Allianz Global Corporate & Speciality, *Director and Officers Insurance Insights 2020*, November 2019, p.5.

to non-ASX listed companies that are not subject to the Australian continuous disclosure obligations.

The immediate prospect of significant insurance cost increases against the backdrop of economic recovery calls for urgent action on this matter.

Yours sincerely

Belinda Ngo
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