

Senate Standing Committee on Economics
ANSWERS TO QUESTIONS ON NOTICE
Treasury Portfolio

**Inquiry into the Financial Accountability Regime Bill 2021 [Provisions] and Financial Services
Compensation Scheme of Last Resort Levy Bill 2021 [Provisions] and related bills**

2021 - 2022

Division: Financial System Division
Topic: Legislative amendments to CSLR
Reference: Spoken (27 January 2022)
Senator: Louise Pratt

Question:

Senator PRATT: I put to you that there is a reasonable likelihood that there will be a cohort of numbers there to see the legislation amended. What are you able to tell me about how to go about doing that in the context of not just bringing in managed investment schemes but also addressing things like the DH Flinders issue, where the company that took payment for financial services then argued in court that they were nevertheless not responsible because they hadn't given authority to their officers and advisers?

Ms Zaheed: There are probably two slightly different answers. I'll start with the first part of your question: what would be the process to bring in a subsector like managed investment schemes, for examples, and issuing products in the managed investment schemes? Obviously advice in relation to managed investment schemes is already in scope. We would then work with OPC around the existing definitions in the Corporations Act and look at how best to incorporate that into the existing structure of the legislation.

The question of DH Flinders is a bit different. That is around retrospective application of how things work within AFCA. AFCA isn't a government body; it operates by contract between it and its members. That is a much more complicated question because it has two elements. One is the contractual agreement between AFCA and its counter party. The government is not a party to that contract. The second part of that is it's talking about retrospective application of jurisdiction. That gets really complex and legally technical. We would need to really work that through in terms of what is feasible and how to do that. That one is a much more difficult answer. Obviously once a court has taken decision around an interpretation of a contract you get into all sorts. I am not a lawyer, so I will not profess a view around contracts law and how the parliament should go about amending a contract retrospectively.

Senator PRATT: I would, if possible, like you to take that question on notice so that we can be advised about how to do that, noting that it was, of course, the assumption as to how those contracts would work. While it looks retrospective, it was always assumed that this was the way the act worked and, in addition, the company that then argued they weren't responsible was nevertheless receiving significant sums of money for the provision of those services, which I think sheds a different light on when it might be just or unjust to have something changed retrospectively.

Ms Zaheed: Again, a court has looked at these matters. It has issued its statements. I'm happy to take it on notice, but it is probably one where we are not going to be able to come back with something particularly helpful to the committee in the time available. As I've said, we are getting into complex areas of contracts law and it's unlikely that we are going to be able to do that. We are happy to take it on notice and look at what we can provide, but I don't want to sit here and say we will take it on notice and then come back with something unhelpful.

Answer:

Developing legislation to nullify the 26 November 2020 decision in *D H Flinders Pty Ltd v Australian Financial Complaints Authority Limited* [2020] NSWSC 1690 requires careful consideration of how the rights and interests of relevant AFCA complainants and members would be impacted. Treasury would need to undertake significant further work to provide advice on whether and how such an outcome may be achieved through enacting legislation.