



5 November, 2018

Committee Secretary  
Senate Economics Legislation Committee  
PO Box 6100  
Parliament House  
Canberra ACT 2600

Dear Secretary

**QUESTIONS ON NOTICE - PUBLIC HEARING - THURSDAY 1 NOVEMBER 2018 - TREASURY LAWS  
AMENDMENT (DESIGN AND DISTRIBUTION OBLIGATIONS AND PRODUCT INTERVENTION POWERS) BILL  
2018**

Thank you for the opportunity to appear before the Committee's inquiry into the *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Bill 2018* on Thursday 1 November 2018. In response to questions taken on notice at the hearing, Treasury provides the following responses:

**Question 1**

**CHAIR:** That sounds like quite an extensive process. I know that these are far-reaching and significant legislative change and reforms that are being made. Has there been any equivalent legislation that's gone through in the last few years that's had that level of consultation from Treasury?

**Ms O'Rourke:** I might take that on notice, because we haven't been involved in the other ones to the same level. We haven't run those other ones. There are other very substantial reforms that Treasury has consulted on, so it's possible that there will be ones.

**CHAIR:** I meant coming out of the FSI.

**Ms O'Rourke:** Again, I might take it on notice, because I'm not as familiar with some of the other substantial reforms that people in Treasury have worked on.

**Response:** Several legislative projects developed in response to the Financial System Inquiry have involved similar amounts of consultation to the bill being considered by the Committee. Examples include the *Corporations Amendment (Professional Standards of Financial Advisers) Act 2017* and *Treasury Laws Amendment (Putting Consumers First – Establishment of the Australian Financial Complaints Authority)*.

**Question 2**

**Senator KETTER:** What about where ASIC is not able to seek a remedy on behalf of consumers who are non-parties to legal proceedings?

**Ms O'Rourke:** There are an extensive range of offences in civil penalty provisions that apply, but I think quite a few of them are things that ASIC will have to bring in its own right as the regulator. As Matthew said, with some of them there are provisions for particular consumers to bring action; so there is a mix there. But there are offences attached to a wide range of conduct there, and it may be that ASIC needs to take that in its own right.

**Senator KETTER:** I am talking about people who should be compensated for an historical matter. They are part of the evidence base in an action.

**Ms O'Rourke:** We might take that one on notice, if that is okay, Senator.

**Response:** The consequences of contravening most obligations in the Bill fall into two categories: liability to the state through civil penalties and criminal prosecution; and liability to private individuals who suffer loss or damage from contraventions through civil action. The availability of both civil and criminal penalties allows the Regulator to take a proportional response to offending conduct. Civil liability to individuals permits the Court to order compensation for loss or damage caused by the offending conduct.

These consequences are designed to be consistent with those for breaching related regulatory regimes in the Corporations Act. For example, the civil cause of action is modelled on that which arises for breach of the disclosure regime for financial products.

Providing additional causes of action, or removing causes of action, is the kind of reform that would ordinarily be considered in the context of the broader regulatory framework. We note that a holistic review of the enforcement framework has been undertaken as part of the ASIC enforcement review. The review did not recommend that ASIC be empowered to bring civil action on behalf of individuals who have suffered loss or damage. Recommendation 42 did, however, recommend that Courts prioritise the payment of compensation over payment of pecuniary penalties to the State.

### Question 3

**Senator KETTER:** What systems and processes do you have to make sure the bill is appropriate to outsource? Are there some sort of criteria?

**Ms O'Rourke:** I think Matthew just described what some of the criteria are, but there is information about the process that we'd be happy to provide on notice.

**Response:** Treasury considers a number of factors in determining whether a measure is suitable for alternative drafting including the Government's current legislation priorities, the measure's likely complexity and sensitivity, whether the use of alternative drafting may raise issues of conflict of interest, and the skills and experience of those that would draft the measure.

### Question 4

**Senator KETTER:** I presume this bill passed those criteria. What systems and processes do you have to manage possible conflicts of interest with the external provider?

**Ms O'Rourke:** Again, we'll take that on notice. We'd be happy to provide everything that we can in relation to this drafting process.

**Response:** Treasury's specific arrangements with each alternative drafter explicitly require conflicts of interest to be identified and managed as part of the trial.

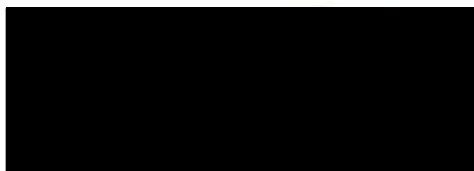
The Commonwealth's Legal Services Multi-Use List, administered by the Attorney-General's Department, expressly provides that the alternative drafters are required to actively identify and, in consultation with the Commonwealth, manage any potential conflicts of interest.

The obligation to identify actual and potential conflicts of interest rests with the alternative drafters.

Law firms are regulated under the legal profession regulation of each state and territory. This requires them to identify and manage conflicts of interest to comply with those professional obligations.

Alternative drafters do not make policy decisions and their work is overseen and reviewed by Treasury and is subject to a quality assurance process undertaken by the Office of Parliamentary Counsel.

Yours sincerely



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