

1 March 2021

Mr Mark Fitt
Committee Secretary
Senate Economics Legislation Committee
Parliament House
Canberra ACT 2600

Dear Mr Fitt

Inquiry into Treasury Laws Amendment (2021 Measures No.1) Bill 2021

Thank you for your letter of 22 February inviting the Insurance Council of Australia¹ (**Insurance Council**) to make a submission in relation to the Senate Economics Legislation Committee inquiry into the *Treasury Laws Amendment (2021 Measures No.1) Bill 2021* (**Bill**).

The insurance industry is a foundation stone of a successful economy and resilient communities. Insurance affordability and accessibility are central to building a resilient economy with all the benefits that entails. Our members recognise that having access to an appropriate level of insurance cover is a crucial tool to support national economic recovery and growth.

The COVID-19 pandemic has caused disruption for individuals, businesses, and governments and driven the need for more adaptable and flexible communication. In this context, the ICA welcomes reforms by the government to decrease regulatory burden and increase flexibility for businesses and their customers with likely lowering of costs and time

¹ The Insurance Council of Australia is the representative body of the general insurance industry in Australia. Our members represent approximately 95 percent of total premium income written by private sector general insurers. Insurance Council members, both insurers and reinsurers, are a significant part of the financial services system.

Insurance Council members provide insurance products ranging from those usually purchased by individuals (such as home and contents insurance, travel insurance, motor vehicle insurance) to those purchased by small businesses and larger organisations (such as product and public liability insurance, professional indemnity insurance, commercial property, and directors and officers insurance).

September 2020 Australian Prudential Regulation Authority statistics show that the general insurance industry generates gross written premium of \$51.8 billion per year and has total assets of \$136.5 billion. The industry employs approximately 60,000 people and on average pays out about \$171.4 million in claims each working day. Over the 12 months to September 2020 the industry's net profit after tax (NPAT) was \$0.9 billion - a 73 per cent decrease from the prior year's NPAT of \$3.4 billion. The industry's underwriting result was \$1.6 billion, falling by 16 per cent from \$1.9 billion in the prior year.

savings for business and consumers. Broadly, the Insurance Council supports the measures within the Bill which are to:

- Temporarily extend changes to meeting and electronic execution requirements that otherwise would have expired on 21 March until 15 September; and
- Make temporary changes to continuous disclosure laws, introduced in response to the COVID-19 pandemic, permanent.

In relation to the temporary extension of changes to meeting and electronic execution requirements, we recognise that the Government intention after the end of the temporary extension is to make permanent this temporary relief (Second reading speech, Assistant Treasurer Michael Sukkar).² The Insurance Council recognises that the relief is in line with the Government's broader deregulation agenda and has made a submission to the Treasury's Modernising Business Communication Consultation process providing its support for regulatory flexibility recognising new and evolving methods of communication between businesses as well as with their customers.

The Insurance Council makes some discrete comments in relation to Schedule 2 of the Bill in Attachment A in relation to the changes to the continuous disclosure laws. Notably, while our members welcome the reforms, the benefits may be overstated at present.

We trust that our observations are of assistance. If you have any questions or comments in relation to our submission please contact Aparna Reddy, the Insurance Council's General Manager, Regulatory Policy, on telephone: 02 9253 5176 or email: areddy@insurancecouncil.com.au.

Yours sincerely



Andrew Hall
Executive Director and CEO

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<https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansard%2F14059f01-aa4f-4143-a7dc-fa5f407d6e45%2F0017%22>

Schedule 2 – Continuous disclosure obligations

Impact on the pricing of Directors and Officers' Insurance (D&O Insurance)

The summary of the regulation impact statement in the Explanatory Memorandum to the *Treasury Laws Amendment (2021 Measures No. 1) Bill 2021 (Bill)* makes the following statement:

Impact: Entities and officers will face reduced regulatory costs in complying with the continuous disclosure regime. This will be because they do not face the same level of financial risk where they allegedly fail to comply with the continuous disclosure rules, unless they do so with 'knowledge, recklessness or negligence'. This will reduce the amount of time entities and officers must spend on assurance that they have complied, as well as the legal fees associated with assuring compliance. **It will also lead to significant savings on the cost of directors and officers insurance. (emphasis added)**

In the industry's view, the statement highlighted that the proposed changes in Schedule 2 of the Bill to the *Corporations Act 2001* and *Australian Securities and Investments Commission Act 2001* "will ... lead to significant savings on the cost of [D&O insurance]" overstates the likely effect of this particular reform.

Industry's expectation is that on its own the proposed legislative change 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.

This is not to say that the industry considers the proposed legislative change to be without merit. It is clear that the existing regulatory settings have helped facilitate the growth in class actions for alleged breach of the continuous disclosure rules. This has been a significant driver in the increase of D&O premiums over recent years. It therefore makes sense to tighten the regulatory settings by increasing the threshold requirements to establish a breach of the continuous disclosure rules.

However, the extent to which the threshold requirements are to be tightened, by inclusion of a fault element, is only to a level which broadly aligns the Australian threshold more closely with that of other developed nations. Globally securities class actions increased 13% in 2020, as compared to 2019, with 133 settlements totally US\$5.84bn (which is a 61% increase in dollar value as compared to the 2019 equivalent). Therefore, even with this legislative amendment one might reasonably expect that Australia will continue to see double digit growth in class actions for breach of the continuous disclosure rules, as has occurred overseas.

Further, alleged breach of the continuous disclosure rules is not the only source of class actions which impact D&O policies. The business of funding and prosecuting class actions in Australia is well-developed and profitable. It can be reasonably expected that these businesses will look for other opportunities for class actions against companies, to replace

any possible diminution in their revenue stream arising from this particular rule change, and noting Victoria's support for their industry.

Ultimately, the current hardening in the Australian D&O insurance market (through premium increases and exclusion extensions) and its thinning out (as insurers exit, and continue to exit, the market) is a function of claims history. Until such a time as insurers can observe on a consistent basis:

- a decrease in the frequency of shareholder class actions;
- an increase in the proportion of successful defences to these actions; and
- a reduction in the settlements paid or damages awarded

there will likely be little change to the level of D&O insurance premiums.