

# PHI FINNEY MCDONALD

1 March 2021

Senator Slade Brockman  
Chair, Senate Standing Committee on Economics  
PO Box 6100, Senate  
Parliament House  
CANBERRA ACT 2600

By email: [economics.sen@aph.gov.au](mailto:economics.sen@aph.gov.au)

Dear Senator Brockman

## **Treasury Laws Amendment (2021 Measures No. 1) Bill 2021**

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1. Phi Finney McDonald welcomes the opportunity to make a submission in relation to the Treasury Laws Amendment (2021 Measures No. 1) Bill 2021 (**Bill**).
2. Noting the tight deadline for making a submission, our comments are restricted to the aspect of the Bill which is of greatest concern, in particular the proposed watering-down of continuous disclosure laws contained within Schedule 2.

### **Changes to continuous disclosure laws will jeopardise retail investors**

3. Phi Finney McDonald strongly opposes the proposed changes to continuous disclosure laws. The watered-down laws contained within the Bill will allow dishonest companies and their directors to escape liability for failing to disclose price sensitive information by simply turning a blind eye to adverse developments in the company's affairs.
4. Retail investors will pay the price if the Government weakens continuous disclosure laws. The retail investors who stand to lose under the Government's proposed changes include many of the Prime Minister's own 'Quiet Australians', such as Mum and Dad investors, Australians who invest in shares through their self-managed super funds and self-funded retirees who are turning to shares to, among other things, generate dividend income to maintain their standard of living in the current environment of rock-bottom interest rates. These are the same 'Quiet Australians' the Government promised to defend when the Coalition campaigned against proposed changes to the tax treatment of franking credits during the last Federal election campaign.
5. Unlike institutional investors, retail investors do not have an army of expert advisers at their fingertips, and nor do they have access to an advanced array of financial information enabling them to conduct their own independent analysis of a company's fortunes.
6. Rather, retail investors rely on the information companies disclose to the market when making investment decisions. Retail investors will be placed in a highly vulnerable position if the Government's proposed watering-down of continuous disclosure obligations becomes law. The Government's proposal will give companies a perverse incentive to fail to disclose information to the market, leaving retail investors in the dark.

7. As ASIC warned in advice to the Treasurer released under Freedom of Information laws, continuous disclosure is 'particularly important during times of market uncertainty and volatility', for example, in the current circumstances as the nation continues to recover from the economic shock of the COVID-19 pandemic. Phi Finney McDonald agrees with ASIC that 'in Australia, there are a large number of investors that rely on market information to make their investment decisions. Trading volumes are extremely high and it is paramount that these trades occur on the basis of an informed market'.
8. Worse still, under the Government's proposed changes to continuous disclosure laws, retail investors may be left without a viable cause of action to pursue in the Courts and no ability to obtain compensation when they suffer losses because companies fail to keep the market properly informed. In Phi Finney McDonald's submission, this would be a very poor public policy outcome.
9. A large number of Australians invest in the share market. According to the [ASX Australian Investor Study 2020](#), 9 million Australians are currently invested in securities, outside of superannuation. A further 900,000 Australians are planning on investing in securities in the future and an additional 2.6 million Australians have previously been investors. These Australians stand to lose if the Government's proposed weakening of continuous disclosure rules becomes law.

#### **Damage to capital markets and the ability to attract foreign capital**

10. The Government's proposal to water-down continuous disclosure laws will also cause significant damage to Australia's capital markets and make Australia a less attractive destination for foreign capital.
11. [According to the Australian Securities Exchange](#), 2,199 entities are listed on the ASX alone, with a total market capitalisation of more than \$2.25 trillion. ASIC data released under FOI reveals that trillions of dollars of equity trades take place across Australian securities exchanges every month, with more than \$25 trillion in trades occurring across the ASX and CHI-X in March 2020 alone.
12. Continuous disclosure laws are a key driver of the success of Australia's securities markets. As ASIC noted in its own advice to Government, the current continuous disclosure laws, which were enacted by the Howard Government, are both a '**bedrock of market integrity**' and a '**fundamental tenet of fair and efficient capital markets in Australia**'.
13. As ASIC observed, 'the continuous disclosure provisions exist to protect shareholders, market integrity and the good reputation of Australia's financial markets. In ASIC's experience the provisions are working well and **operate to increase the attractiveness of Australian markets for investors**'.
14. The Government's proposal to neuter the current continuous disclosure provisions can only serve to reduce the attractiveness of Australian markets. In particular, it will make Australian markets less attractive to foreign institutions, who currently comprise a significant proportion of the market. As ASIC remarked in its advice to Government:

*North America represented the second largest source of ownership in the ASX 200 at 14.5 per cent, a 21 per cent increase from 2014 (12%). Almost all of these gains have come through US-based index funds, which now account for more than 60 per cent of US investment in the ASX 200, and of which more than 90 per cent is managed by three firms – Vanguard, BlackRock and State Street Global Advisors.*

*Norway's Norges Bank and the Government Pension Investment Fund of Japan (GPIF), the two largest sovereign wealth funds in the world, have greatly increased their direct investment in the ASX 200 over the last five years. Norges and GPIF have increased their investments in the ASX 200 by 71 and 73 per cent over the last five years to \$20.7 billion and \$11.4 billion respectively.*

### **No evidence to justify weaker continuous disclosure laws**

15. The Government has not provided any compelling evidence or convincing policy rationale to justify watering-down the current continuous disclosure laws, which are working well. If the disturbing revelations of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry taught us anything, it is that corporate Australia needs greater scrutiny and greater standards of accountability, not less.
16. Almost 90 percent of company executives did *not* rely on the temporary changes to continuous disclosure laws introduced during the height of the pandemic, and almost 80 percent of company executives said those temporary changes should not be made permanent, according to a survey of 195 senior Australian executives by commercial law firm King Wood Mallesons. A number of groups representing institutional and retail investors have also made comments opposing the proposed changes to continuous disclosure laws in the media; no doubt they will make their own submissions to this inquiry.
17. Further, the claim that weakening continuous disclosure laws is necessary to address the number of shareholder class actions does not withstand scrutiny. Once again, as ASIC observed in its advice to Government:

*The number of shareholder class actions in Australia has historically been **relatively low with only 82 filed in Australia over the last 16 years. This is compared to the United States which had 441 securities class actions filed in 2018 alone**...the value of these shareholder claims is small when compared to the value of the fund raising and trading activity that occurs in the Australian market.*

18. In our submission, the financial security of retail investors and the integrity of Australia's capital markets should not be jeopardised simply to satisfy a small but vocal minority who complain about the relatively low number of shareholder class actions filed in Australia. Once again, as ASIC has explained in its advice to Government:

*Shareholder class actions can play an important and complementary role in improving shareholder access to justice and fostering accountability.  
The Corporations Act provides clear avenues for shareholders and consumers to take legal action to enforce their rights. It was clearly not intended that the regulator should have a monopoly on legal action. Where private action can achieve a similar outcome to that which action by ASIC could achieve, it allows ASIC to allocate its regulatory resources to other priorities.*

**The economic significance of fair and efficient capital markets dwarfs any exposure to class action damages.** *Continuous disclosure and misleading or deceptive provisions anchor many other elements of the regulatory regime for financial markets, including low document capital raisings.*

## **Defences**

19. The claim that a director's state of mind or moral culpability is irrelevant to determining liability under the current continuous disclosure rules is at best inaccurate and at worst dishonest. A number of defences currently exist for directors who, despite failing to meet the continuous disclosure obligations, nonetheless acted reasonably and honestly.
20. Section 674(2B) of the *Corporations Act 2001* provides that a person who is involved in a company's contravention of continuous disclosure requirements will not be held personally liable if they can prove they took all steps (if any) that were reasonable in the circumstances to ensure the company complied with its obligations, and after doing so, believed on reasonable grounds the company was complying with its obligations.
21. Under section 1317S(2) of the *Corporations Act 2001*, Courts also have the power to exonerate persons involved in a contravention of continuous disclosure obligations, if the Court is satisfied the defendant acted honestly and ought fairly to be excused (either wholly or in part) from liability for the contravention.

## **Greater consultation needed**

22. 1 March 2021 was fixed as the deadline for providing a written submission to this inquiry. This affords the many Australians who will lose under the proposed changes to continuous disclosure laws **just 12 days** to consider the Bill and prepare a submission to the Committee.
23. In our view, this timing affords insufficient time for stakeholders to take notice of the Bill and prepare a submission to the Committee, particularly retail investors. The group of Australians who may be deprived of a hearing because of the truncated consultation timetable include, once again, many of the Prime Minister's own 'Quiet Australians' such as Mum and Dad investors, Australians with shares in their self-managed super funds and self-funded retirees.
24. The Committee itself was originally provided just 3 weeks to conduct an inquiry and prepare its report in relation to this important Bill, until the reporting date was extended to 30 June 2021. Phi Finney McDonald welcomes this extension to the reporting date.
25. We recommend that the Committee might like to consider extending the time for making a submission beyond the 1 March 2021 deadline. This would afford Australians who stand to lose under the proposed changes to continuous disclosure laws fair opportunity to consider the Bill and make a fully considered submission to the Committee about this important legislation.
26. Phi Finney McDonald's submission was prepared to meet the of 1 March 2021 deadline. Given the limitations imposed by this tight deadline, we have restricted our submission to briefly addressing our top line concerns about the proposed changes to continuous disclosure laws.

27. We would be pleased to expand upon any of the information contained within this submission and provide supplementary information about other aspects of the Bill if this would be of interest.
  
28. Thank you once again for affording Phi Finney McDonald the opportunity to make a submission in relation to the Bill.

Yours sincerely

Ben Phi  
Managing Director  
**PHI FINNEY MCDONALD**