



Australian Government
Attorney-General's Department

2 December 2021

Mr Patrick Hodder
Committee Secretary
Parliamentary Joint Committee on Corporations and Financial Services

Dear Mr Hodder

I refer to the question on notice (CQoN21-CFS-01) the Attorney-General's Department received following the Parliamentary Joint Committee on Corporations and Financial Services public hearing on the Corporations Amendment (Improving Outcomes for Litigation Funding Participants) Bill 2021, held on 12 November 2021.

The department has reviewed the information provided to the Committee in responding to this question on notice and wishes to correct the answer provided. A revised response is enclosed as an attachment to this correspondence.

The revised response includes a further two advices sought by the Attorney-General's Department on the constitutionality of the Bill prior to the public hearing. The list provided in this revised response reflects those legal advices received as at the time the Department's initial response to the Question on Notice was provided (18 November 2021).

I apologise for the oversight in not providing a comprehensive list in the first instance. I appreciate the opportunity to rectify our answer.

Should you wish to discuss this matter further, my phone number is [REDACTED]

Yours sincerely

[REDACTED]
Dr Albin Smrdel
Assistant Secretary
Legal System Branch

ATTACHMENT A

Parliamentary Joint Committee on Corporations and Financial Services

CORPORATIONS AMENDMENT (IMPROVING OUTCOMES FOR LITIGATION FUNDING PARTICIPANTS) BILL 2021

Attorney-General's Department

Hearing date: 12 November 2021

Question date: 15 November 2021

Question type: Written

Senator Deborah O'Neill asked the following questions:

With reference to the constitutionality of the bill:

1. On what date did the Attorney-General's Department / the Treasury / the Government first obtain legal advice on the constitutionality of the bill?
 - a. Who did it obtain that advice from?
 - b. Who sought the advice?
 - c. Did the advice conclude that the bill is constitutional?
2. If the Attorney-General's Department / the Treasury / the Government sought subsequent legal advice on the constitutionality of the bill, please provide:
 - a. who provided that advice / those advices;
 - b. who sought that advice / those advices;
 - c. on what date was that advice / those advices sought; and
 - d. did the advice / those advices conclude that the bill was constitutional.
3. How much did the Commonwealth spend on advice on the constitutionality of this bill?
4. Has the current Solicitor General reviewed, and provided an opinion in response to, Mr Justin Gleeson SC's legal opinion in relation to this bill? If not, will the Solicitor-General be asked to do so?

The response to the Senator's questions are as follows:

1. It is a standard practice in the legislative process for the Government to seek advice on the constitutionality of a Bill.

Advice on the constitutionality of the Bill was first sought by the Attorney-General's Department from the Australian Government Solicitor (AGS) on 20 August 2021. This

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advice was received on 2 September 2021. In accordance with the long-standing practice of successive Australian governments, it is against the public interest to disclose confidential legal advice. It is in the public interest that Government can engage fully and frankly with its legal advisers and access such advice confidentially, which as a practical matter is critical to the development of sound Commonwealth policy and robust law-making.

The Government is confident in the constitutionality of the Bill.

2. Subsequently, the Attorney-General's Department and the Attorney-General's Office sought advice on the constitutionality of the Bill on the following dates:
 - sought advice from the AGS on 6 September 2021 (received on 8 September 2021)
 - sought advice from the AGS on 9 September 2021 (received on 10 September 2021)
 - sought advice from Perry Herzfeld SC and Jackson Wherrett on 30 September 2021 (received on 11 October 2021)
 - sought advice from the Solicitor-General on 10 September 2021 (received on 26 October 2021).

The Department of the Treasury sought advice on the constitutionality of the Bill from the AGS on 10 September 2021. This advice was received on 13 September 2021.

In accordance with the long-standing practice of successive Australian governments, it is against the public interest to disclose confidential legal advice. It is in the public interest that Government can engage fully and frankly with its legal advisers and access such advice confidentially, which as a practical matter is critical to the development of sound Commonwealth policy and robust law-making.

The Government is confident in the constitutionality of the Bill.

3. For the period 25 August 2021 to 30 September 2021, the Attorney-General's Department spent \$26,910.00 on AGS advice relating to class action and litigation funding reforms. We are unable to separate out the amount that was spent on advice relating specifically to the constitutionality of the Bill. A further invoice is anticipated for work performed by the AGS in October.

The Department of the Treasury spent \$3,768.00 on AGS advice relating to the constitutionality of the Bill.

4. In accordance with the long-standing practice of successive Australian governments, it is against the public interest to disclose confidential legal advice.

Any decision to seek advice from the Solicitor-General is a matter for the Government to determine.