Investor Claim Partner Pty Ltd

SUBMISSION TO THE

SENATE ECONOMICS LEGISLATION COMMITTEE

INQUIRY INTO TREASURY LAWS AMENDMENT (2021 MEASURES NO.1) BILL 2021

The Potential Downside From this Bill Dwarfs the Potential Upside

30 March 2021

Level 13, 115 Pitt Street, Sydney NSW 2000 Australia
P +61 1800 262 600 **E** enquiries@icp.net.au W www.icp.net.au

1. Introduction

1.1. Investor Claim Partner Pty Ltd (**ICP**) is thankful to the Senate Economics References Committee (the **Committee**) for the opportunity to make this submission to the Committee's Inquiry into Treasury Laws Amendment (2021 Measures No.1) Bill (the **Bill**).

1.2. I am the Chief Executive Officer and founder of ICP, Managing Director of ICP Capital Pty Ltd (**ICP Capital**), ICP Funding Pty Ltd (**ICP Funding**) and the Chair and co-founder of the Association of Litigation Funders of Australia (**ALFA**).

1.3. After obtaining a Bachelor of Commerce from the University of Melbourne and a Bachelor of Laws from the University of Sydney, I practiced law predominantly in the area of commercial litigation for 10 years.

1.4. In 1996, I founded Insolvency Management Fund Pty Ltd (**IMF**) to fund insolvency claims around Australia.

1.5. In 2001, I co-founded and was an inaugural director of IMF (Australia) Ltd (now Omni Bridgeway Ltd) and remained a director until 2015 (being the Managing Director between 2004 and 2008).

1.6. In 2014, I was appointed Managing Director of Bentham Europe Limited, now called Innsworth Advisors Ltd, which manages the funding of, amongst other claims, shareholder claims in the United Kingdom and Germany for shareholders of Tesco and Volkswagen, respectively with the Volkswagen claim being for in excess of €2.3bn; an amount greater than the total compensation paid in Australian shareholder claims to date. I left the board of Innsworth in 2015 but was reappointed to that board in 2016; an appointment I continue to hold.

1.7. In 2016, I founded ICP to design, develop and manage shareholder claims. In 2017 and 2018, I founded ICP Capital and ICP Funding, respectively to fund shareholder claims.

1.8. I joined the board of Public Interest Advocacy Centre in 2015; an appointment I continue to hold.

2. Stated Purpose of Schedule 2 to the Bill

2.1. ICP solely seeks to address Schedule 2 to the Bill which it is proposed will amend our continuous disclosure laws to limit the liability of companies and their officers for civil penalty proceedings where they have acted with knowledge, recklessness or negligence with respect to updates on price sensitive information to the market.

2.2. The second reading speech identifies the following policy objectives to be achieved by the Bill:

(a) regulatory relief for businesses;

(b) safeguarding against the prospect of opportunistic class actions;

(c) increasing the amount of information available to investors (an objective unlikely to be achieved and limited to quantity of information rather than its quality);

(d) allowing business to reallocate resources towards improving efficiency and output; and

(e) businesses being able to pursue commercial growth without being impeded by legal actions that undermine their capacity to focus on their core operations.

3. Policy Objective of the Continuous Disclosure Provisions

3.1. The Australian Government, when introducing CLERP Paper No.9 Proposal for Reform-Corporate Disclosure on 18 September 2002 stated the following in respect of continuous disclosure:

> "*The primary rationale for continuous disclosure is to enhance confident and informed participation by investors in secondary securities markets. This can be expected to enhance the depth, liquidity and efficiency of these markets.*
>
> *Continuous disclosure of materially price sensitive information should ensure that the price of securities reflects their underlying economic value. It should also reduce the volatility of securities prices, since investors will have access to more information about a disclosing entity's performance and prospects and this information can be more rapidly factored into the price of the entity's securities.*
>
> *An effective continuous disclosure regime should also minimise the potential for insider trading and other forms of market abuse that may arise as a result of entities withholding or selectively disclosing materially price sensitive information."*

4. The Law and its Enforcement

4.1. The Australian Securities and Investments Commission's submission to the Australian Law Reform Commission's Inquiry into Class Action Proceedings and Third-Party Litigation Funders stated:

> *"The continuous disclosure obligations are critical to protecting shareholders, promoting market integrity and maintaining the good reputation of Australia's financial markets ($1.8 trillion market capitalisation with an average turnover of $5.9 billion a day).* ***The economic significance of fair and efficient capital markets dwarfs any exposure to class action damages****."*

4.2. ASX listed companies number over 2,000 and yet there have only been 57 shareholder class actions filed and completed since 1999; averaging about 2.5 shareholder class actions per year or about two-tenths of one percent in number.

4.3. **The legal fees and expenses and funder's fees for these 57 cases** would be about 40 percent of the $2.25bn recovered in compensation, **being about $0.9bn**, which **is dwarfed by**

the drop in market capitalisation of the 57 companies in question of over $40bn upon disclosures correcting the ill-informed market in the shares of these 57 companies.

5. Intended Consequences

5.1. It is usual to seek to identify unintended consequences when seeking to manage risks that may arise from the passage of bills.

5.2. Here, the Bill has the intention of safeguarding against class actions by watering down the strength of our continuous disclosure laws despite the known economic cost of disclosure failures.

6. Submission – Inquiry Prior to Passage of Bill

6.1. Prior to the passage of the Bill there needs to be an analysis of the cost to the Australian capital market and its participants that many flow from its passage; cost being measured by reference to:

(a) any likely diminution in:

(i) timely and equal access to materially price sensitive information;

(ii) any confidence in the market and informed participation; and

(iii) market depth, market liquidity and market efficiency; and

(b) any likely increase in:

(i) volatility; and

(ii) insider trading.

6.2. Without such an inquiry to provide an evidence basis for Corporation Act reforms, we could run the risk of diminished capital supply and for the capital provided being at higher cost and misallocated in an uninformed and inefficient market; all for the relatively small objective of diminishing class actions.

John Walker

Director

Investor Claim Partner Pty Ltd

30 March 2021