

Senate Economics Legislation Committee

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

Attorney-General's Department

Hearing date: 17 January 2022

Hansard page: 21

Question type: Spoken

Senator Deborah O'Neill asked the following question:

Senator O'NEILL: Neither the bill nor the explanatory memorandum identified the source of constitutional power for measures in this bill. We've referred, in evidence this afternoon, to the advice of former Solicitor-General Justin Gleeson. I'll repeat just a brief section of his submission which states that insufficient attention has been given to the source of the Commonwealth legislative power to sustain the bill. Could the Attorney-General's Department please tell this committee: what is the source of the Commonwealth legislative power for the measures in the bill? What part or parts of the Constitution are you relying on? And I ask you to be comprehensive in your answer.

Dr Smrdel: As explained to the chair, we would still consider ourselves to be covered by the terms of the Attorney's public interest immunity claim. I fully comprehend the discussion that has gone on beforehand and the committee's concerns with that, but I'm not in a position to provide an answer to this hearing. I will need to take further advice in relation to the public interest immunity claim.

Senator O'NEILL: To be clear: you're refusing to provide this committee with an answer to its question about the fundamental constitutionality of this bill. Despite 11 advices—perhaps now 12, if we add in the evidence you've just given me—seven of which were constitutional legal advices, you still cannot point to a head of power. Are you making a public interest immunity claim?

Dr Smrdel: I can't make a public interest immunity claim; that's a matter for the Attorney-General. As we've discussed previously, this department has interpreted the public interest immunity claim the Attorney-General had previously put in to cover not only the content of the legal advice but also the heads of power. So we haven't been able to provide that up till now. I can't suddenly turn around and provide those heads of power; we consider that to be still covered by the terms of the—

Senator O'NEILL: Whatever you might consider, the reality is: in your opening statement you acknowledged that you understood that the committee that received that public interest immunity claim from Senator Cash, as the Attorney-General, rejected it. That's a fact. You can't rely on a claim that was rejected by another committee. You may come here with directions from the Attorney-General, but this is the economics committee of the Senate inquiring into access to justice through litigation funding. It is a very complex piece of legislation. You are representing the Attorney-General and you should be able to answer basic questions. Is this bill constitutional and on what head of power are you relying?

Dr Smrdel: In response to what the parliamentary joint committee said, it also said it did not intend to press the claim. That's why I've asked this committee what the status of the Attorney's public interest immunity claim is. I'll need to take that on notice, because our current position is the Attorney-General's public interest immunity claim still covers the heads

of power. If the Attorney-General's current public interest immunity claim is no longer extant, I'll need to take it on notice to see what the Attorney-General's position is so that the Attorney-General can make a public interest immunity claim.

The response to the Senator's question is as follows:

The heads of power on which the Corporations Amendment (Improving Outcomes for Litigation Funding Participants) Bill 2021 (the Bill) relies are unable to be disclosed as all legal advices in relation to the Bill are subject to a public interest immunity claim made by the Attorney-General on 24 November 2021.

Committee edit: the committee notes the Parliamentary Joint Committee on Corporations and Financial Services did not accept the Attorney-General's claim of public interest immunity, as disclosed to the committee by the Attorney-General's Department (Dr Albin Smrdel, Assistant Secretary, Legal System Branch, Attorney General's Department, Committee Hansard, 17 January 2022, p. 19).