



**THE HON JOSH FRYDENBERG MP
TREASURER
DEPUTY LEADER OF THE LIBERAL PARTY**

Senator Helen Polley (Chair)
Senate Scrutiny of Bills Committee
Suite 1.111
Parliament House
CANBERRA ACT 2600

Dear Senator,

I am writing to provide a response to the request for information from the Senate Scrutiny of Bills Committee (the Committee) outlined in the Committee's *Scrutiny Digest 13 of 2018* regarding the Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Bill 2018 (the Bill). The Committee inquired about the reversal of the evidential burden in the offence specific defences in proposed subsections 922M(2), 952E(3) and (4), 1020A(3) and 1021E(3) of the Bill.

I appreciate the Committee's consideration of the Bill. A response to the issues raised by the Committee is in the Attachment to this letter.

I hope this information will be of assistance to the Committee.

THE HON JOSH FRYDENBERG MP

21 / 11

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Reversal of the evidential burden

The Committee has requested advice in relation to the reversal of the evidential burden in the offence specific defences in proposed subsections 922M(2), 952E(3) and (4), 1020A(3) and 1021E(3) of the Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Bill 2018 (the Bill).

The Attorney-General's Department's *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011 edition (the Guide) suggests that a matter should only be included in an offence specific defence where:

- it is peculiarly within the knowledge of the defendant; and
- it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish.

It follows that the defendant should generally have the evidential burden of proof regarding the matters relevant to the defence.

Section 922M

Proposed subsection 922M(1) makes it an offence to fail to lodge a notice under a notice provision. Proposed subsection 922M(2) provides an offence specific defence for when the offence does not apply.

The Bill does not seek to amend the primary offence or the offence specific defence. Rather, the Bill modernises the drafting of the offence and inserts provisions so that the obligations in section 922M are subject to civil penalties for non-compliance.

A defence is available if the information has already been provided by another licensee. A defendant who wishes to rely on this defence has the burden of adducing evidence in relation to those matters. It is appropriate for the evidential burden to be placed on the defendant because:

- licensees would have knowledge of, and access to, all events and documents relating to the matters in the defence, including those not publicly available;
- licensees are the only ones in the position to tender documents and records that are not publicly available and would assist the defence;
- it is difficult for the prosecution to prove a negative when it cannot be aware of the existence of evidence not publicly available;
- the prosecution would have no reason to consider the matters of the defence exist when it has exhausted investigating the matter;
- it would be highly unlikely that a prosecution would be brought where information about the matters of the defence have been lawfully made available to the public; and

- the defence strikes an appropriate balance in providing defendants a fair trial while not being unduly or unjustly onerous on the prosecution so as to make prosecutions in the public interest impossible.

Sections 952E and 1021E

Proposed subsections 952E(1) and (2) make it an offence for a financial services licensee, or an authorised representative, to give a defective disclosure document or statement. Proposed subsections 952E(3) and (4) provide offence specific defences for when the offences do not apply.

Proposed subsections 1021E(1) and (2) make it an offence for the preparer of a financial product disclosure document or statement to prepare a defective document or statement. Proposed subsection 1021E(3) provides an offence specific defence for when these offences do not apply.

The Bill does not seek to amend the primary offences or the offence specific defences. Rather, the Bill modernises the drafting of the offences, removes the offences from being ones of strict liability, and inserts provisions so that the obligations are subject to civil penalties for non-compliance.

Defences are available if reasonable steps were taken to ensure the disclosures would not be defective or, in the case of the offences in proposed section 952E only, the person who made the disclosure was an authorised representative and received defective disclosure documents or statements from the licensee.

A defendant who wishes to rely on these defences has the burden of adducing evidence in relation to those matters. It is appropriate for the evidential burden to be placed on the defendant in the 'reasonable steps' defences because:

- the steps taken to ensure the disclosure would not be defective would be solely and entirely within the knowledge of licensees and their authorised representatives who made the disclosures;
- the prosecution would have no reason to consider the matters of the defence exist when it has exhausted investigating the matter;
- it would be an extremely onerous task for the prosecution to disprove the existence of every combination of reasonable steps that could be taken, especially when these are peculiarly within the knowledge of defendants;
- requiring the prosecution to disprove the existence of every combination of reasonable steps that could be taken would significantly risk successful prosecutions and affect the deterrent effect of the offence; and
- it would be highly unlikely that a prosecution would be brought where information about the matters of the defence are available to the prosecution.

It is appropriate for the evidential burden to be shifted to the defendant in the authorised representatives defence because:

- information relating to the representative's relationship with the licensee, communications with the licensee, and content of any notices given for the representative to publicly disclose would be peculiarly within the knowledge of the representative;
- the prosecution would have no reason to consider the matters of the defence exist when it has exhausted investigating the matter;
- requiring the prosecution to prove matters relating to the relationship between two private parties could risk successful prosecutions and affect the deterrent effect of the offence, especially when the representative has peculiar knowledge of relevant matters; and
- it would be highly unlikely that a prosecution would be brought where information about the matters of the defence are available to the prosecution.

Section 1020A

Proposed subsection 1020A(1) makes it an offence to engage in certain conduct in relation to certain unregistered managed investment schemes. Proposed subsection 1020A(3) provides an offence specific defence for when the offence does not apply.

The Bill does not seek to amend the primary offence or the offence specific defence. Rather, the Bill modernises the drafting of the offence, and inserts provisions so that obligations under section 1020A are subject to civil penalties for non-compliance.

A defence is available in certain situations, such as if prospective clients were aware of certain information, information was not required, consideration was not provided for the financial product, or the client is already associated with the offeror of the product.

A defendant who wishes to rely on this defence has the burden of adducing evidence in relation to those matters. It is appropriate for the evidential burden to be placed on the defendant in these situations because:

- information relevant to each of the situations, and to which a defendant could rely on as a defence, would be peculiarly within the knowledge of the defendant as the matters relevant to the defence include transactions between private parties. Information on these transactions would usually not be made publicly available;
- the prosecution would have no reason to consider the matters of the defence exist when it has exhausted investigating the matter;
- requiring the prosecution to prove matters relating to the relationship between two private parties could risk successful prosecutions and affect the deterrent effect of the offence; and
- it would be highly unlikely that a prosecution would be brought where information about the matters of the defence are available to the prosecution.