



Parliamentary Joint Committee on Corporations and Financial Services

**Litigation funding and the regulation of the class
action industry**

Opening Statement:

**Tom Lunn, Senior Policy Manager,
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(via videoconference)**

E&OE

Introduction

Thank you for the invitation to give evidence to the Committee.

The Insurance Council of Australia is the representative body of the general insurance industry.

My name is Tom Lunn. I am senior policy manager at the Insurance Council.

I am appearing today with Mr Ewen McKay.

Mr McKay is the Chair of the ICA's Professional Indemnity Insurance Committee and Product Leader – Management Liability – Asia Pacific at AXA XL.

The Insurance Council supports the role that class actions have in providing access to justice for Australians.

The landscape in which the class action regime in Australia operates has changed dramatically since the current regime was introduced in 1992 when there were no litigation funders operating in Australia and the current financial regulatory system under the Corporations Act did not exist.

Given the changed landscape the ICA supports some changes to the class action regime to ensure it remains fit for purpose.

These include:

- Support for a licensing regime for litigation funders to provide a greater level of oversight of the industry and protection to class members.
- Reforms to address inefficiencies and unnecessary administrative expenses such as multiple competing closed class actions.

The ICA welcomes the Commonwealth's recent decision to require litigation funders to hold an AFS licence.

Additional oversight and licensing requirements may also help ensure the interests of class members are upheld.

Other measures, such as introducing a more robust certification process may also help address core issues and inefficiencies that impact both class members, defendants and the judicial system more broadly.

The ICA also strongly supports the Law Reform Commission's recommendation 24 that there be a separate review into the legal and economic impacts of the Continuous Disclosure obligations of the Corporations Act.

Our submissions have highlighted the impact increasing securities class actions continue to have on the availability and affordability of Directors and Officers 'Side C' insurance in Australia.

These actions are based on an alleged breach of the Corporations Act's continuous disclosure obligations.

The continuous disclosure obligations are essentially applied with a strict liability on directors. This means these actions are exceedingly difficult and costly to defend. This is highlighted by the fact that the vast majority of securities class actions are resolved by settlement with only one matter proceeding to judgment with an adverse finding against the company.

Consequently, Australia has become a highly attractive and profitable market for litigation funders and the most likely jurisdiction outside the United States in which a company may face significant class action litigation.

The result has been a steep increase in the cost of Directors and Officers insurance in Australia and a sharp contraction and hardening of this section of the insurance market. Fewer insurers are now willing to provide this cover. Those insurers who are willing to provide cover are increasing their premiums. They are also reducing coverage limits.

In 2018, premiums rose an average of 88 per cent. Last year they rose by at least 75 per cent.

This is making D&O insurance very expensive, and for many smaller listed companies the premiums may be close to unaffordable.

Increasing securities class actions also have broader impact on the economy. The inability to obtain affordable or adequate insurance coverage will deter talented workers from taking on director positions and is a handbrake on emerging companies and hefty burden on larger companies.

It is for this reason the ICA strongly supports the ALRC's recommendation that there be a separate review undertaken into the legal and economic impacts of the continuous disclosure obligations. The case for this review to be undertaken is clear and it should proceed with some urgency.

We are happy to take questions from members of the Committee.

Thank you.