Insurance Council of Australia

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Treasury Laws Amendment (Measures for Consultation) Bill 2021: Litigation Funders

The Insurance Council of Australia (ICA) welcomes the opportunity to comment on the *Treasury Laws Amendment (Measures for Consultation) Bill 2021* (the **Bill**).

The Insurance Council is the representative body of the general insurance industry in Australia and represents approximately 95 percent of private sector general insurers. As a foundational component of the Australian economy the general insurance industry employs approximately 60,000 people, generates gross written premium of $55.9 billion per annum and on average pays out $169.2 million in claims each working day ($42.4 billion per year).

ICA is broadly supportive of the proposed reforms in the Bill and the objectives behind it to ensure a fair and reasonable distribution of class action proceeds in proceedings involving third party litigation funders.

However, the ICA and insurers are concerned that the Bill, as it is currently drafted, inadvertently captures insurer subrogated recovery actions within the scope of what is defined under the Bill as a 'class action litigation funding scheme'. This will have a serious unintended consequence of inhibiting insurer's ability to conduct efficient subrogated insurer recovery actions.

The ICA therefore request the Bill be amended accordingly to ensure insurer recovery actions are exempt and/or carved out.

Specific concerns

Under the Bill a *'class action litigation funding scheme'* is defined (in draft s 9AAA) by reference to five required characteristics (**definition**). It is this definition which gives rise to the ICA's concern as to unintended overreach of the Bill. It appears to inadvertently extend the reach of the Bill well beyond class actions.

The definition appears to re-characterise any legal proceeding in which a non-lawyer third party provides financial assistance to a litigant as *'class action litigation funding schemes'*. On the face of it, that includes an action commenced on instructions from an insurer exercising rights of subrogation to commence legal proceedings in the insured's name in order to recover damages from a third party.

Consider, by way of illustration, the Parkerville Bushfire litigation in the Supreme Court of Western Australia[1], the Garvoc and Terang bushfire cases in the Supreme Court of Victoria, the Forcett/Dunalley

[1] *Herridge v. Electricity Networks Corporation* [2019] WASC 94; *Herridge v. Electricity Networks Corporation* [2021] WASCA 111.

Bushfire case in the Supreme Court of Tasmania[2], and the current Tathra Bushfire litigation in the Supreme Court of New South Wales.

In such mass tort recovery actions, general insurers (including Allianz, QBE, IAG and CommInsure) issue proceedings in which multiple insured plaintiffs are named in a single proceeding under a conventional writ (not by way of a group proceeding or class action). By agreement, the proceedings are funded by the insurers and the insureds are indemnified for the risk of adverse costs orders. In addition to seeking compensation for subrogated (insured) losses in these actions, insurers seek compensation for their customers' uninsured or underinsured losses. Agreements are entered into as to the priority of distribution of any recovered compensation. These actions are conducted for the mutual benefit of the insurers and their insureds, but are funded entirely by the insurers, who also carry all the risk of adverse costs liability.

Our concern is that such actions appear to satisfy all five elements of the draft s 9AAA definition of *'class action litigation funding scheme'*, in that:

(a) the dominant purpose of such a legal proceeding (or *'scheme'*) is to seek remedies to which one or more persons (the **claimants**) may be legally entitled arising out of similar circumstances (for e.g. property losses caused by a bushfire) that give rise to common issues of law and fact; and

(b) the possible entitlement of each of the claimants to remedies relates to circumstances (for e.g. the bushfire causing property losses) that occurred before or after the first funding agreement is finalised.

Next steps

The ICA would like to meet with Treasury to discuss this issue in more detail and to develop a solution. We expect that the easiest way to resolve the issue would be to explicitly exempt/carve out all insurer recovery actions from the Bill.

If you have any queries please contact Tom Lunn, Senior Policy Manager by email at tlunn@insurancecouncil.com.au or on 0418 251 326.

We trust this feedback is useful and look forward to hearing from you.

Kind regards

Andrew Hall
Executive Director and CEO

[2] *Prestage v. Barrett* [2021] TASSC 27.