

## Directors fight back against lawsuits

*The AICD says that many class actions are driven by lawyers and litigation funders, leaving companies facing potentially significant costs and disruption.*

**THE nation's most powerful company directors are demanding a regulatory crackdown on litigation funders and are urging the government to investigate whether regimes encouraging a "proliferation" of class actions against major companies are a drain on the economy.**

In a submission to the Productivity Commission, the Australian Institute of Company Directors says that increasingly, major lawsuits against companies are being funded by professional litigation funders subject to "little or no regulation".

The group says that many class actions are driven by lawyers and litigation funders, leaving companies facing potentially significant costs and disruption.

It is calling for measures to prevent law firms from setting up companies that finance class actions, as well as subjecting litigation funders to capital adequacy requirements so they have enough assets to pay costs where companies and directors are successful in defending claims.

"In addition, little attention has been paid to the impact of these claims on Australian productivity and the economy as a whole," the submission says.

The demands come as federal Attorney-General George Brandis criticised the involvement of law firms in companies that finance class action, saying he was concerned about "wildcat and opportunistic" class actions.

The AICD declares the "excessive cost" and distraction to companies of "unmeritorious" claims should not be underestimated and the economic considerations of "allowing litigation funders to initiate litigation with a view to forcing settlements for profit should not be ignored".

"The commercial reality is that directors may feel that it is prudent to settle this type of litigation because it distracts the board and employees from focusing on core business

## Contingency fees 'would lower costs', says Maurice Blackburn's Andrew Watson

**PLAINTIFF law firm Maurice Blackburn has declared that competition in the litigation funding market would be increased - driving down costs for the consumer - if law firms could charge contingency fees or become involved in litigation funding vehicles.**

The principal of the firm's class-action practice, Andrew Watson, has also blasted as "little more than hysteria" warnings of a US-style proliferation of class actions.

Mr Watson said the government now had "opportunities" to open litigation funding to new competition.

"The economic benefits of allowing greater access to justice are obvious - already there is undeniable proof that costs to the consumer have been driven down with increased competition in the litigation funding arena," he said.

The remarks come after the powerful Australian Institute of Company Directors demanded a regulatory crackdown on litigation funders - including measures to prevent law firms from setting up companies that bankroll class actions, and prudential requirements - and an advocacy group linked to the US Chamber of Commerce stepped up its warnings of an "unchecked acceleration in litigation".

The comments also come just a week after Attorney-General George Brandis strongly criticised the involvement of law firms in companies that finance class actions, voiced concern about "wildcat and opportunistic" class actions, and made clear that he was opposed to the introduction of contingency fees allowing lawyers to take a slice of a settlement or damages win for clients.

Senator Brandis's position poses a setback to Maurice Blackburn, which has links to a separate litigation funding vehicle known as Claims Funding Australia.

But in a new submission to the Productivity Commission's 15-month inquiry on access to justice, the firm has said: "If CFA is allowed to fund, consumers will benefit."

<p>activities," the submission says.</p> <p>"The cost and time involved in defending these actions is extensive and there are still many unsettled areas of Australian class action law, particularly in relation to actions commenced by shareholders, which adds to the level of uncertainty for companies.</p> <p>"The commencement of a large scale shareholder class action can itself place pressure on the target entity's share price."</p> <p>Because of the size and scale of class action litigations, the company directors say, the cases can hit tax revenues by hitting company profits.</p> <p>The company directors' arguments are echoed by an advocacy group linked to the US Chamber of Commerce, the world's largest business federation.</p> <p>The US Chamber Institute for Legal Reform has told the Productivity Commission that Australia has the potential to become "the jurisdiction of choice for plaintiffs, lawyers and funders promoting class actions. This unchecked acceleration in litigation has implications for Australia's civil justice system, cost of doing business and global reputation as an investment destination."</p> <p>In a paper it has put before the PC, the institute warns that the growth in funded class actions and lawsuits has increased the cost of doing business in Australia and this is "a trend which will continue if the current situation remains unchanged".</p> <p>While the big class action law firms like Maurice Blackburn and Slater &amp; Gordon have yet to make submissions to the Productivity Commission's 15-month inquiry on access to justice, they have previously rejected concerns about the growing litigation risk facing Australian companies.</p> <p>Class action law firms have argued that class actions backed by litigation funders results in recoveries for victims of wrongs and that there has not been a surge of litigation or of unmeritorious claims as there is a loser-pays rule for costs in civil cases.</p> <p>Law firm King &amp; Wood Mallesons recently estimated that securities class actions settlements in 2012 totalled \$480 million after the record \$200m settlement in the Centro class actions.</p> <p>This is almost half the total of such settlements</p>	<p>In the submission, the firm says that the nation's litigation funding market is dominated by sharemarket-listed IMF (Australia) and that commissions are between 25 per cent and 45 per cent of any successful outcome.</p> <p>"The outcomes for consumers of litigation funding are likely to be improved by increasing competition in the market, such as improved transparency and a reduction in commissions," the submission says.</p> <p>"It follows that regulation of litigation funding should aim to enhance competition. It also follows that competition will be increased if law firms are permitted to fund litigation either by way of the provision of funds to separate litigation funding vehicles or by means of contingency fees."</p> <p>CFA has charged commissions "at the bottom end of the commercial range", ranging from 24.5 per cent (in the shareholder class action against Allco Finance Group) to 30 per cent, the submission says.</p> <p>Slater &amp; Gordon has also defended the use of litigation funding. It told the Productivity Commission that litigation funding "allows cases to proceed where they otherwise would not for lack of resources, it does not increase the volume of unmeritorious litigation".</p> <p>The firm has also told the Productivity Commission that because litigation funders take on the risks of adverse costs orders, expensive up-front legal costs and security for costs, they are "motivated to examine potential costs thoroughly to ensure that they are making good investment decisions and that claims being pursued have considerable merit".</p> <p>Both plaintiff law firms have disputed that litigation funding leads to a surge in unmeritorious claims, dismissing one of the chief complaints of the company directors.</p> <p>The AICD has argued that the costs of unmeritorious class actions should not be under-estimated and that directors may settle this type of claim because it is such a distraction from core business activities.</p> <p>In a statement yesterday, Mr Watson said: "Quite simply, if directors and corporations fulfil their proper duties and act lawfully in their transactions on behalf of shareholders, then they will have nothing to fear from a robust class-actions regime."</p>
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<p>over the past 20 years, when the class actions regime in the Federal Court started.</p> <p>The Productivity Commission has raised the prospect of changing Labor's light-touch regulation of the litigation funders.</p>	<p>While the AICD wants the government to investigate whether class actions are a drag on productivity, Mr Watson asserts that they boost it by encouraging proper corporate disclosure.</p> <p>On contingency fees, the firm wants the ban on lawyers charging percentage-based fees wiped from the Legal Profession Act in each jurisdiction or for the proposed national legal profession law to not include such a ban.</p> <p>It says this could be modelled on the systems in Britain or Ontario, where there are limits on the percentage recovered and the loser-pays costs rule stays in place.</p> <p>The firm says if lawyers can charge contingency fees, the overall costs to the consumer are likely to be "substantially less" than the combined cost of a third-party funder (with commissions of between 25 per cent and 40 per cent) and lawyer's fees that average 12 per cent.</p>
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