

CHANGE IN D&O MARKET CONDITIONS

13 April 2017 | Australia

Legal Briefings – By **Ruth Overington** and **Guy Narburgh**

For many companies whose D&O insurance programs expire on 30 June, the renewal process is about to begin or is already underway.

As a result of developments in the class action landscape over the last 12 months, policyholders are likely to encounter less favourable conditions in the market than at previous renewals, particularly around securities class action coverage (colloquially referred to as ‘Side C’ coverage).

DEVELOPMENTS IN CLASS ACTION LANDSCAPE

In summary, these developments include:

1. the possibility of more and larger class action being pursued in the wake of the *Money Max v QBE* decision,¹ in which a Court accepted that participating class members could be compelled to contribute to a litigation funder absent entering into a funding agreement;
2. the potential for a reduced evidentiary burden on plaintiffs foreshadowed in the *HIH Insurance Limited (In Liquidation) and others* decision,² in which an Australian Court confirmed for the first time the ability of plaintiffs to establish causation in relation to a misrepresentation simply by showing that they purchased shares on the market at an inflated price – commonly referred to as ‘indirect market based causation’ – as opposed to requiring evidence of direct reliance on the misrepresentation;
3. the growth of litigation funding (buoyed, at least in part, by judicial developments such as those referred to above) and the increasingly sophisticated approach taken by plaintiff law firms to identifying and bringing claims; and

4. the settlement of a number of claims which may have involved some contribution by D&O insurers (although the confidential nature of settlements and policies themselves makes it difficult to determine the quantum of such contributions).

HOW IS THE AUSTRALIA D&O INSURANCE MARKET REACTING?

While D&O insurance premiums have not increased significantly during the last 10 years (despite the increase in the number of securities class actions) and the scope and availability of coverage offered has been reasonably stable, the market appears to have now reached a tipping point.

D&O insurers are more carefully considering their general exposure to class action risk, as well as the accumulation of risk across D&O and IPO policies for the same policyholder, with a view to reducing their exposure to future claims. As a result, local D&O insurers may take steps at renewal to:

- reduce the policy limits offered, or impose sub-limits or exclusions for particular risks;
- increase premiums (in some cases, very significantly); and/or
- in some cases, cease to offer cover at all.

WHAT CAN YOU DO?

Preparation and messaging around the renewal will be key. The focus of D&O insurers is shifting to matters such as internal risk controls and compliance, organisational values, risk culture and the composition of the Board. Policyholders will need to focus on marketing their strength in these areas in order to militate against the risk of increased premiums and reduced coverage. Alternatively, corporates may have to accept the prospect of carrying a greater proportion (and perhaps all) of the costs and liabilities of securities class actions on their balance sheets.

ENDNOTES

1. *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Limited* [2016] FCAFC 148; see, [“Common funds” in Australia - the Court has its say on litigation funding.](#)

2. *HIH Insurance Limited (In Liquidation) and others* [2016] NSWSC 482.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



GUY NARBURGH
SPECIAL COUNSEL,
SYDNEY
+61 2 9322 4473
Guy.Narburgh@hsf.com

LEGAL NOTICE

The contents of this publication, current at the date of publication set out above, are for reference purposes only. They do not constitute legal advice and should not be relied upon as such. Specific legal advice about your specific circumstances should always be sought separately before taking any action based on this publication.

© Herbert Smith Freehills 2020

SUBSCRIBE TO STAY UP-TO-DATE WITH LATEST THINKING, BLOGS, EVENTS, AND MORE

Close