

**ASIC CORPORATIONS (AMENDMENT) Instrument 2016/476**  
**EXPLANATORY STATEMENT**

Prepared by the Australian Securities and Investments Commission  
*Corporations Act 2001*

The Australian Securities and Investments Commission (**ASIC**) makes ASIC Corporations (Amendment) Instrument 2016/476 under paragraphs 601QA(1)(b), 926A(2)(a), 992B(1)(a) and 1020F(1)(a) of the *Corporations Act 2001* (the **Act**).

Paragraph 601QA(1)(b) of the Act provides that ASIC may declare that Ch 5C of the Act apply to a person as if the provisions were omitted, modified or varied in a certain way.

Paragraph 926A(2)(a) of the Act provides that ASIC may exempt a person from a provision of Pt 7.6 of the Act (other than Divs 4 and 8).

Paragraph 992B(1)(a) of the Act provides that ASIC may exempt a person from a provision of Pt 7.8 of the Act.

Paragraph 1020F(1)(a) of the Act provides that ASIC may exempt a person from a provision of Pt 7.9 of the Act.

**1. Background**

On 20 October 2009, the Full Federal Court held in *Brookfield Multiplex Ltd v International Litigation Funding Partners Pte Ltd* [2009] FCAFC 147 that a funded representative action and solicitors' retainers for two representative proceedings against Brookfield Multiplex Ltd in the Federal Court were a managed investment scheme that should have been registered for the purposes of the Act.

Section 9 of the Act provides that, subject to certain exemptions, a managed investment scheme includes a scheme that has the following features:

- (a) people contribute money or money's worth as consideration to acquire rights to benefits produced by the scheme
- (b) any of the contributions are to be pooled, or used in a common enterprise, to produce financial benefits, or benefits consisting of rights or interests in property, for the people (members) who hold interests in the scheme
- (c) the members do not have day to day control over the operation of the scheme.

Section 601ED of the Act requires that a managed investment scheme must be registered with ASIC including where it has more than 20 members or is promoted by a professional promoter in certain circumstances.

Section 601MB of the Act provides that contracts are voidable at the option of a member of a scheme where an invitation or offer is made and the offeror has failed to comply with s601ED or Div 2 of Pt 7.9.

Section 911A of the Act requires that a person carrying on a business of providing financial services must hold an Australian financial services licence (AFSL) that authorises them to provide that financial service.

Section 911B of the Act requires that a person must only provide a financial service on behalf of another person who carries on a financial services business where certain conditions are satisfied.

Section 992A of the Act prohibits a person from offering financial products in the course of, or because of, an unsolicited meeting or telephone call. Section 992AA prohibits such conduct in relation to interests in managed investment schemes.

Part 7.9 of the Act imposes various disclosure obligations on the issuer of a financial product, including to give a Product Disclosure Statement and provide ongoing disclosure in certain circumstances.

Regulations had not been made to exempt representative proceedings and proof of debt arrangements that are subject to a conditional costs agreement from:

- (a) the definition of managed investment scheme in s9 of the Act; and
- (b) Pts 7.6, 7.7, 7.8 and 7.9 of the Act.

On 11 July 2013 ASIC executed Class Order [CO 13/898] to provide time for the Government to consider this new legislative reform. Class Order [CO 13/898]:

1. provides for Ch 5C to apply as if the definition of a “managed investment scheme” in s9 of the Act were varied to exclude a litigation funding scheme and a proof of debt funding scheme funded by conditional costs agreements.
2. exempts persons from the requirements to hold an Australian financial services licence or act as an authorised representative of a licensee to provide financial services associated with a litigation funding scheme and a proof of debt funding scheme that is funded by conditional costs agreements.
3. exempts persons from the requirement to comply with the hawking prohibitions in ss992A and 992AA in relation to a litigation funding scheme and a proof of debt funding scheme that is funded by conditional costs agreements.
4. exempts persons from the requirement to comply with the disclosure provisions in Pt 7.9 of the Act in relation to interests in a litigation funding scheme and a proof of debt funding scheme that is funded by conditional costs agreements.

Relief equivalent to that referred to paragraphs 2 to 4 is also given in relation to arrangements that are financial products but not interests in managed investment schemes that are similar to litigation funding schemes and proof of debt funding schemes that are funded by conditional costs agreements.

This is to allow a lawyer or law firm providing a financial service in relation to a litigation scheme or proof of debt scheme that is funded by a conditional costs agreement to operate without compliance with the requirements of the Act while the Government considers making regulations in this area.

On 1 July 2014 ASIC made Class Order [CO 14/571] to extend the operation of [CO 13/898] to 12 July 2016 to enable the Government more time to consider its position on litigation funding. It will be a matter for the incoming government whether or not to make regulations to deal with these issues.

## **2. Purpose of ASIC Corporations (Amendment) Instrument 2016/476**

This class order will extend the relief in Class Order [CO 13/898] to enable representative proceedings and proof of debt arrangements that are subject to a conditional costs agreement from:

- (a) the definition of managed investment scheme in s9 of the Act; and
- (b) Pts 7.6, 7.7, 7.8 and 7.9 of the Act.

until 12 July 2017. This is to allow further time for the Government to consider its position on whether to exempt litigation funding arrangements and proof of debt funding arrangements under similar terms as those in Class Order [CO 13/898].

## **3. Operation of ASIC Corporations(Amendment) Instrument 2016/476**

ASIC Corporations (Amendment) Instrument 2016/476 amends Class Order [CO 13/898] by replacing "12 July 2016." in paragraph 9 with "12 July 2017.".

## **4. Consultation**

ASIC consulted with Treasury in relation to making this instrument. ASIC did not undertake wider consultation with respect to ASIC Corporations (Amendment) Instrument 2016/476 as it is minor and machinery in nature and provides relief only for a short period pending the Government's decision.

## **Statement of Compatibility with Human Rights**

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011*

### **ASIC Corporations (Amendment) Instrument 2016/476**

This class order is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

#### **Overview of the class order**

ASIC Corporations (Amendment) Instrument 2016/476 extends the relief in Class Order [CO 13/898] to enable the temporary operation of representative proceedings and proof of debt arrangements funded by conditional costs agreements without compliance with the requirements of the Act until 12 July 2017. The objective of Class Order [CO 13/898] is to allow a lawyer or law firm providing a financial service in relation to a litigation scheme or proof of debt scheme that is funded by conditional costs agreements to operate without compliance with the requirements of the Act while the Government considers making regulations in this area.

#### **Human rights implications**

This class order does not engage any of the applicable rights or freedoms.

#### **Conclusion**

This class order is compatible with human rights as it does not raise any human rights issues.