

ASIC CREDIT (AMENDMENT) Instrument 2016/632
EXPLANATORY STATEMENT
Prepared by the Australian Securities and Investments Commission
National Credit Code

The Australian Securities and Investments Commission (*ASIC*) makes ASIC Credit (Amendment) Instrument 2016/632 under subsection 6(17) of the National Credit Code (the *Code*), which is found in Schedule 1 to the *National Consumer Credit Protection Act 2009* (the *Credit Act*).

Subsection 6(17) the Code provides that ASIC may exclude from the application of the Code the provision of credit of a specified class.

1. Background

The High Court of Australia held in *International Litigation Partners Pte Ltd v Chameleon Mining NL (Receivers and Managers Appointed)* [2012] HCA 45 that the litigation funding agreement in that matter was a “credit facility” within the meaning of regulation 7.1.06 of the *Corporations Regulations 2001* (the *Regulations*) and specifically excluded from the definition of a “financial product” under subparagraph 765A(1)(h)(i) of the *Corporations Act 2001* (the *Act*).

Accordingly, the litigation funder was exempt from the requirement to hold an Australian financial services licence. The High Court considered the definition of “credit” in subregulation 7.1.06(3) of the Regulations and held that this litigation funding agreement was “credit” because it was a form of financial accommodation provided by the litigation funder to the litigant and its provision “for any period” will be a “credit facility”. Under the litigation funding agreement, the litigation funder had agreed to pay the litigant’s legal bills within 28 days of receiving written notification. The litigant in turn agreed to reimburse the litigation funder if the proceedings were resolved in its favour.

The decision of the High Court has highlighted that, depending on the terms of a litigation funding agreement, a litigation funding arrangement or a proof of debt funding arrangement may amount to the provision of “credit” to which the Credit Act and Code applies.

On 9 January 2013, ASIC made Class Order [CO 13/18] to enable the temporary operation of a litigation funding arrangement and a proof of debt funding arrangement without compliance with the requirements of the Credit Act and Code until 12 July 2013. This was to allow time for the Government to consider its policy position on the regulation of litigation funding arrangements and proof of debt funding arrangements.

On 11 July 2013 ASIC made Class Order [CO 13/897] to extend the operation of [CO 13/18] to 12 July 2014 to enable the Government more time to consider its position on litigation funding.

On 1 July 2014 ASIC made Class Order [CO 14/569] to extend the operation of [CO 13/18] to 12 July 2016 to enable the Government more time to consider its position on litigation funding.

2. Purpose of the class order

ASIC Credit (Amendment) Instrument 2016/632 will extend the relief in Class Order [CO 13/18] to further enable the temporary operation of a litigation funding arrangement and a proof of debt funding arrangement without compliance with the requirements of the Credit Act and Code until 12 July 2017. This is to allow further time for the Government to consider its position to exempt litigation funding arrangements and proof of debt funding arrangements from the Credit Act.

3. Operation of the class order

ASIC Credit (Amendment) Instrument 2016/632 amends [CO 13/18] by replacing "12 July 2016." in paragraph 5 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 Credit (Amendment) Instrument 2016/632 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 Credit (Amendment) Instrument 2016/632

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 Credit (Amendment) Instrument 2016/632 will extend the temporary operation of a litigation funding arrangement and a proof of debt funding arrangement without compliance with the requirements of the Credit Act and Code until 12 July 2017. The objective of ASIC Credit (Amendment) Instrument 2016/632 is to allow time for the Government to consider its policy position on the regulation of litigation funding arrangements and proof of debt funding arrangements under the Credit Act and Code.

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.