

ASIC CORPORATIONS (AMENDMENT) INSTRUMENT 2017/642
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 2017/642 (**Legislative Instrument**) 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; and
- 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 the obligation to give a Product Disclosure Statement and provide ongoing disclosure in certain circumstances.

With effect from 12 July 2013, reg 5C.11.01 of the *Corporations Regulations 2001* declares that a litigation funding scheme is not a managed investment scheme. Regulation 5C.11.01(b) defines a 'litigation funding scheme' as a scheme, which amongst other things, has the following features:

- a) a person (the Funder) provides funds, indemnities or both under a funding agreement (including an agreement under which no fee is payable to the funder or lawyer if the scheme is not successful in seeking remedies) to enable the general members of the scheme to seek remedies;
- b) the Funder is not a lawyer or legal practice that provides a service for which some or all of the fees, disbursements or both are payable only on success;

An action that is funded pursuant to a conditional cost agreement (i.e. an arrangement between the member or members and lawyer under which the payment of some or all fees is contingent on whether the outcome of the action is successful) may not be excluded from being a managed investment scheme because of the limb of the definition of a 'litigation funding scheme' extracted above at para (b).

On 11 July 2013, ASIC made ASIC Class Order [CO 13/898]. Class Order [CO 13/898]:

- a) 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.
- b) 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.
- c) 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.
- d) 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 in paragraphs b) to d) 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.

ASIC Class Order [CO 13/898] provides relief 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 until 12 July 2017.

2. Purpose of the Legislative Instrument

The Legislative Instrument will extend the relief in Class Order [CO 13/898] until 12 July 2019 to exclude 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.

This is to provide certainty for lawyers and members of a litigation funding scheme and a proof of debt funding scheme that is funded by a conditional costs agreement.

3. Operation of the Legislative Instrument

The Legislative Instrument amends Class Order [CO 13/898] by replacing "12 July 2016." in paragraph 9 with "12 July 2019.".

4. Consultation

ASIC consulted with Treasury in relation to making the Legislative Instrument. ASIC did not undertake wider consultation with respect to the Legislative Instrument because it is minor and machinery in nature and provides relief only for a short period.

Statement of Compatibility with Human Rights

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

ASIC Corporations (Amendment) Instrument 2017/642

ASIC Corporations (Amendment) Instrument 2017/642 (***Legislative instrument***) 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

The Legislative Instrument 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 2019. 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 *Corporations Act 2001*.

Human rights implications

The Legislative Instrument does not engage any of the applicable rights or freedoms.

Conclusion

The Legislative Instrument is compatible with human rights as it does not raise any human rights issues.