

EXPLANATORY STATEMENT

Issued by authority of the Treasurer

Corporations Act 2001

Corporations Amendment (Litigation Funding) Regulations 2020

Section 1364 of the *Corporations Act 2001* (the Corporations Act) provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

The purpose of the *Corporations Amendment (Litigation Funding) Regulations 2020* (the Regulations) is to give effect to the Government's announcement on 22 May 2020 that litigation funders would be required to hold an Australian Financial Services Licence (AFSL) and comply with the managed investment scheme (MIS) regime to ensure they are subject to greater regulatory oversight and accountability.

Currently, the *Corporations Regulations 2001* exempts litigation funding schemes and arrangements from the definition of a MIS. Financial services or products in relation to such schemes and arrangements are also exempt from AFSL requirements, anti-hawking provisions and the application of Part 7.9 of the Corporations Act. The anti-hawking provisions regulate the making of unsolicited offers to issue or sell financial products. Part 7.9 is about product disclosure and other provisions relating to the issue, sale and purchase of financial products.

The Regulations remove the exemptions that apply for litigation funding schemes used in class actions. These litigation funding schemes involve an entity that is not a party to the litigation (a third party litigation funder) paying the costs of litigation or indemnifying parties from adverse costs orders in return for a percentage share of the proceeds if the litigation is successful. The Regulations do not remove the effect of other exemptions that currently apply to certain litigation funding schemes in the insolvency context and litigation funding arrangements (which are used in actions involving a single plaintiff). Consistent with the current law, the Regulations also clarify that an interest in a litigation funding scheme or arrangement is a 'financial product' under the Corporations Act.

Following the removal of the exemption from AFSL requirements for class action litigation funding schemes, third party litigation funders will generally need to obtain an AFSL in order to deal in, or provide financial product advice in relation to, an interest in a litigation funding scheme because such an interest is a 'financial product'. A person may not be required to hold an AFSL if another exemption applies, such as if the person is appropriately authorised by the holder of an AFSL. Following the removal of the exemptions from the anti-hawking provisions and application of Part 7.9 of the Corporations Act, compliance with these provisions will be required, as an interest in a class action litigation funding scheme is a financial product.

Class actions funded by a third party litigation funder are generally understood to fall within the general definition of a MIS (see *Brookfield Multiplex Limited v International Litigation Funding Partners Pte Ltd* (2009) 260 ALR 643 (the *Brookfield* case)). Therefore, the removal of the exemption from the definition will mean that such class action structures will be required to be registered if they meet the registration requirements. In such a case, regulatory requirements applying to registered MISs will apply and any person that could be considered to be operating the scheme will need to ensure that a responsible entity operates the scheme. The responsible entity must be a public company holding an AFSL authorising it to operate a MIS of this kind.

The amendments apply in relation to schemes or arrangements entered into on or after 22 August 2020. This gives effect to the Government's announcement on 22 May 2020 that the amendments would take effect three months from the Government's announcement. The amendments do not apply in relation to schemes or arrangements entered into before 22 August 2020. This approach seeks to limit any potential disruption to existing contractual arrangements and litigation proceedings that are on foot on 22 August 2020.

The Australian Securities and Investments Commission (ASIC) may need to consider whether it is appropriate for exemptions and modifications to be granted under an ASIC instrument to supplement these changes and manage transition issues.

The Corporations Act does not specify any conditions that need to be met before the power to make the Regulations may be exercised.

Consultation has been undertaken with ASIC, the Australian Taxation Office and the Attorney-General's Department.

Details of the Regulations are set out in [Attachment A](#).

The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

The Regulations commenced on the day after registration.

A summary of the Regulatory Impact Statement is at [Attachment B](#).

A statement of Compatibility with Human Rights is at [Attachment C](#).

Details of the Corporations Amendment (Litigation Funding) Regulations 2020

Section 1 – Name of the Regulations

This section provides that the name of the Regulations is the *Corporations Amendment (Litigation Funding) Regulations 2020* (the Regulations).

Section 2 – Commencement

Schedule 1 to the Regulations commences on the day after the instrument is registered on the Federal Register of Legislation.

Section 3 – Authority

The Regulations are made under the *Corporations Act 2001*.

Section 4 – Schedule

This section provides that each instrument that is specified in the Schedules to this instrument will be amended or repealed as set out in the applicable items in the Schedules, and any other item in the Schedules to this instrument has effect according to its terms.

Schedule 1 – Amendments Corporations Amendment (Litigation Funding) Regulations 2020

Item 1 (Amendments to regulation 5C.11.01) – Removing the carve-out from definition of a MIS for litigation funding schemes used in class actions and restructuring remaining carve-outs

Item 1 removes the carve-out from the definition of a MIS for litigation funding schemes used in class actions, which prior to these amendments were mentioned in paragraph 5C.11.01(1)(b) of the *Corporations Regulations 2001*.

Class actions funded by a third party litigation funder are understood to fall within the general definition of a MIS (see *Brookfield Multiplex Limited v International Litigation Funding Partners Pte Ltd (2009) 260 ALR 643*). Therefore, the removal of the carve-out from this definition will mean that such class action litigation funding schemes will constitute a MIS and be required to be registered under the Corporations Act if they meet the registration requirements under section 601ED. In such a case, the litigation funding scheme will be subject to the regulatory requirements applying to registered MISs set out in Chapter 5C of the Corporations Act. Whether a particular class action structure needs to be registered depends on the facts and circumstances of each structure.

The Full Federal Court in the *Brookfield* case considered that either the litigation funder or the law firm (or both) was operating the relevant MIS. Lawyers have legal professional obligations under some State and Territory laws that prevent them from operating a MIS. Affected entities may need to consider their own obligations and seek advice as appropriate.

It is noted that exemptions from the Corporations Act requirements and definitions that are parallel to those contained the *Corporations Regulations 2001* are provided by the *ASIC Corporations (Conditional Costs Schemes) Instrument 2020/38*. This legislative instrument excludes class actions and proof of debt arrangements that are funded by conditional costs agreements (such as an agreement under which a lawyer agrees to act on a no win, no fee basis) from the definition of a MIS. The legislative instrument also provides exemptions from the Corporations Act requirements (such as the need to hold an AFSL, the anti-hawking provisions and product disclosure requirements).

The amendments preserve the effect of other exemptions that currently apply for litigation funding schemes involved in insolvency litigation and litigation funding arrangements (which are used in actions involving a single plaintiff). Prior to these amendments, such schemes and arrangements were mentioned in paragraphs 5C.11.01(1)(c) and (d) of the *Corporations Regulations 2001*.

The amendments rename the scheme that is mentioned in paragraph 5C.11.01(1)(c) (as in force prior to these amendments) as an 'insolvency litigation funding scheme'. The new nomenclature assists to differentiate these schemes from litigation funding schemes used in class actions, which will be regulated differently pursuant to these amendments.

The amendments also restructure the content of paragraph 5C.11.01(1)(d) (as in force prior to these amendments), such that the content is split across two subregulations. This assists readers of the regulations and ensures those regulations operate as intended by separately dealing with arrangements where the dominant purpose is to seek remedies for a general member and those where the dominant purpose is to prove claims made by an individual under Division 6 of Part 5.6 of the Corporations Act (about proof and ranking of claims in the winding up context).

Item 4 (Amendments to paragraph 7.6.01(1)(x)) – Removing exemption from AFSL requirements for services in relation to litigation funding schemes used in class actions

Item 4 removes the exemption from holding an AFSL for financial services in relation to litigation funding schemes used in class actions.

This means that a person will need to obtain an AFSL in order to deal in interests in a litigation funding scheme used in a class action (unless another exemption applies, such as they are acting as a representative of a licensee). For example, a third party litigation funder will be required to hold a licence in order to make a funding agreement available to plaintiffs who want to participate in a class action. A person will also generally need to obtain an AFSL in order to provide financial product advice in relation to an interest in a class action litigation funding scheme.

Where the litigation funding scheme is a MIS meeting the requirements to be registered, the responsible entity will also need an AFSL to operate the registered scheme.

The exemption from holding an AFSL is preserved for financial services in relation to insolvency litigation funding schemes and litigation funding arrangements (refer above for information on insolvency litigation funding schemes and litigation funding arrangements).

Item 11 (Amendments to paragraph 7.8.26(a)) – Removing exemption from anti-hawking provisions for financial products for sale or issue in relation to litigation funding schemes used in class actions

Item 11 removes the exemption from the anti-hawking provisions for financial products for issue or sale in relation to a litigation funding scheme used in a class action. The anti-hawking provisions regulate the making of unsolicited offers to issue or sell financial products.

The exemption from the anti-hawking provisions is preserved for financial products for issue or sale in relation to insolvency litigation funding schemes and litigation funding arrangements (refer above for information on insolvency litigation funding schemes and litigation funding arrangements).

Item 12 (Amendments to subparagraphs 7.9.98A(a)(i), (b)(i), (c)(i) and (d)(i)) – Removing exemption from application of Part 7.9 of the Corporations Act for litigation funding schemes used in class actions

Item 12 removes the exemption from the application of Part 7.9 of the Corporations Act for litigation funding schemes used in class actions. Part 7.9 of the Corporations Act contains product disclosure and other provisions relating to the issue, sale and purchase of financial products.

From 22 August 2020, a person that offers, issues or recommends an interest in a litigation funding scheme used in a class action (such as a third party litigation funder) will be subject to obligations in Part 7.9 in relation to the interest.

The exemption from the application of Part 7.9 of the Corporations Act is preserved in relation to insolvency funding schemes and litigation funding arrangements (refer above for information on insolvency funding schemes and litigation funding arrangements).

Items 2 and 3 (Amendments to regulation 7.1.04N and subregulations 7.1.06(2A) and (2B)) – Consequential amendment ensuring interests in litigation funding schemes, insolvency litigation funding schemes and litigation funding arrangements continue to be considered ‘financial products’

Item 2 ensures that consistent with the current law, interests in litigation funding schemes, insolvency litigation funding schemes and litigation funding arrangements continue to be specifically included as ‘financial products’ under the Corporations Act.

The amendments to regulation 7.1.04N preserve the provisions existing effect. However, consequential amendments have been made to regulation 7.1.04N reflecting:

- the renaming of litigation funding schemes previously mentioned in paragraph 5C.11.01(1)(c) as ‘insolvency litigation funding schemes’; and
- the fact that litigation funding schemes previously mentioned in paragraph 5C.11.01(1)(b) will no longer be mentioned in that regulation.

Item 3 ensures that consistent with the current law, litigation funding schemes, insolvency litigation funding schemes and litigation funding arrangements are not ‘credit facilities’ for the purposes of the definition of a ‘financial product’ under the Corporations Act. Subparagraph 765A(1)(h)(i) of the Corporations Act specifically excludes credit facilities from the definition of a ‘financial product’. If a specific exclusion applies then an interest will not be considered a ‘financial product’ under the Corporations Act even it would otherwise be captured within the general definition or the list of specific inclusions.

Without these amendments, litigation funding schemes, insolvency litigation funding schemes and litigation funding arrangements could be considered to be credit facilities and be excluded from being treated as a financial product under the Corporations Act (see *International Litigation Partners Pte Ltd v Chameleon Mining NL (Receivers and Managers Appointed)* [2012] HCA 45 (the *Chameleon* case)).

It is noted that the *ASIC Credit (Litigation Funding - Exclusion) Instrument 2020/37* is the latest of a series of temporary ASIC legislative instruments made in response to the *Chameleon* case. This ASIC legislative instrument currently provides an exemption from the application of the National Credit Code in relation to arrangements for participating in, conducting and funding legal proceedings brought by or on behalf of a person or persons and proof of debt funding arrangements. This legislative instrument applies until 31 January 2023, preventing the dual regulation of interests in these arrangements under both the National Credit Code and the Corporations Act.

Items 7 and 9 (Amendments to subregulation 7.6.01AB(1) and paragraph 7.6.01AB(2)(a) – Consequential amendment removing conflict of interest requirements that attach to AFSL exemption for services in relation to litigation funding schemes used in class actions

Items 7 and 9 remove the bespoke conflict of interest requirements that attach to the AFSL exemption for financial services in relation to litigation funding schemes used in class actions. Currently, providers of such services are required to maintain adequate arrangements for managing conflicts of interest and follow certain procedures in relation to the litigation funding scheme. The AFSL exemption for these services will be removed by the Regulations. AFSL holders are subject to similar obligations in relation to managing conflicts of interest (refer paragraph 912A(1)(aa) of the Corporations Act).

The conflict of interest requirements that attach to the AFSL exemption for services in relation to insolvency litigation funding schemes and litigation funding arrangements are preserved.

Item 10 (Amendments to note in subregulation 7.6.01AB(2)) – Consequential amendment to update note

Item 10 makes a consequential amendment to ensure the accuracy of a note following the amendments made by these Regulations. The note is updated to reflect that paragraph 7.6.01(1)(x) of the *Corporations Regulations 2001* provides an exemption from AFSL requirements for insolvency litigation funding schemes (rather than litigation funding schemes).

Items 5, 6 and 8 (Amendments to subregulations 7.6.01AB(1) and (2)) – Renumbering subsections

Items 5, 6 and 8 renumber subsections and update references in regulation 7.6.01AB (which prior to these amendments inserted a new subsection 911A(5B) of the Corporations Act) to reflect that there is already an existing subsection 911A(5B) in the Corporations Act.

Item 13 (Inserting new regulation 10.38.01) – Application provision

Item 13 ensures that the amendments will apply in relation to litigation funding schemes, insolvency litigation funding schemes and litigation funding arrangements entered into on or after 22 August 2020.

This gives effect to the Government’s announcement on 22 May 2020 that the amendments would take effect three months from the Government’s announcement. This means that from 22 August 2020, a person (such as a third party litigation funder) will need to have an AFSL in order to deal in interests in a litigation funding scheme used in a class action and ensure that such schemes meeting the requirements for registration are registered and able to comply with the MIS.

The amendments do not apply for schemes entered into before 22 August 2020. It is expected that this will mean that the amendments only apply for funding agreements entered into on or after 22 August 2020. This approach seeks to limit any potential disruption to existing contractual and other arrangements. It is also intended to prevent disruption to legal proceedings that are on foot on 22 August 2020. Third party litigation funders that enter into funding agreements on or after the 22 August 2020 will be expected to comply with the new regulatory requirements from 22 August 2020.

Summary of Regulation Impact Statement

Policy objective

Third-party class action litigation funders (hereafter litigation funders) are currently exempt from the requirement to hold an AFSL and comply with the related obligations under Part 7.9 of the Act. They are also exempt from being defined as a MIS, meaning they don't have to comply with its regulatory framework. This means that litigation funders are not held to the same standards as other financial service providers, decreasing the protections for consumers compared to what would normally be provided for in relation to financial products being offered to retail investors.

The objective of the policy is to subject litigation funders to greater regulatory oversight by removing this exemption, in order to ensure that they meet appropriate standards beyond those imposed by the courts on a case-by-case basis.

Implementation options

The Regulation Impact Statement considered two options:

1. Maintain the status quo; and
2. Repeal the exemptions for litigation funders from the MIS and AFSL regimes.

Assessment of impacts

Option 1: Maintain the status quo

Litigation funders

The exemption for litigation funders from financial services licensing regulation means that litigation funders face considerably fewer regulatory obligations and are subject to less oversight than entities that sell other financial products and services to retail investors.

Risks to customers are likely to arise from:

- The continued influx of a large number of litigation funders – including those based outside Australia – that have shown insufficient transparency and accountability regarding their business models, competence and finances, alongside increasingly diverse and opaque funding arrangements;
- Inconsistent product disclosure that may see some class action claimants not aware of the potential risks of their litigation funding scheme, such as facing an adverse cost order if the class action fails and the litigation funder does not hold enough capital to meet that order; and
- Unaligned interests of litigation funders and class action claimants. This may lead to claimants being encouraged to settle a dispute before trial, even if doing so is not in their best interests.

Class action plaintiff members

Recent evidence suggests that the returns for plaintiffs in third-party funded class action litigation may be less favourable than returns for plaintiffs whose actions have not been underwritten by litigation funders. In its report on its inquiry into class action proceedings and third party litigation funders, the Australian Law Reform Commission (ALRC) found that:

- The median return to group members in funded matters was just 51 per cent, whereas in unfunded matters the median return was 85 per cent of the settlement award; and
- Litigation funded actions are more likely to be resolved by settlement than unfunded proceedings.

Under the current exemptions plaintiffs do not have the same level of protections regarding disclosure, security, regulatory oversight or redress in respect of the cost of a litigation funder's service that they would have for other financial products.

Defendant entities

The status quo is not operating in the best interests for entities who are, or may be, the subject of litigation funded class action proceedings. Defendants have a proper interest in the conduct of litigation funders to the actions that are brought against them, especially as many entities subject to class actions are highly regulated corporate entities themselves. It is proper that all parties involved in an action, including the funders, are subject to appropriate and consistent regulatory standards.

Option 2: Repeal of exemption for litigation funders from the MIS and AFSL regimes

Litigation funders

The regulatory burden of this change will fall on litigation funders, who will be required to obtain AFSLs and comply with the related obligations. These include a requirement to act honestly, efficiently and fairly, maintain an adequate level of competence, submit to regulatory oversight by ASIC and provide dispute resolution and redress mechanisms to customers.

For those litigation funders whose schemes meet the requirements of a registered MIS, there will be additional obligations. Responsible entities will have to provide Product Disclosure Statements to prospective members and meet other requirements for operating a registered MIS. While there may be some transitional uncertainty, the additional requirements are not expected to reduce competition or significantly elevate the compliance burden on litigation funding businesses to a level that is not commensurate with their capacity given the scale of their operations. The impact will be to regulate compliance and ensure that these businesses are operating under similar regulatory conditions to other enterprises providing financial services.

Class action plaintiffs

As highlighted above, the changes should not impose undue burdens on individuals or groups using litigation funding services. These consumers will benefit from increased ASIC oversight of the entities funding their litigation, improved and formalised disclosure of the risks involved in engaging third-party litigation funding, and reinforced confidence that funders will act in consumers' best interests, with access to dispute resolution and redress in circumstances where they do not.

Defendant entities

Entities that may be the defendants in class action proceedings could also benefit from the removal of the exemption for litigation funders from the AFSL and MIS regimes, because AFSL and MIS requirements could raise the standard of litigation funders' conduct in relation to class action funding. In addition, greater transparency and oversight by ASIC will mean that litigation funders who do not meet particular standards face disciplinary action, including being barred from the market.

Analysis of costs and benefits

The average annual regulatory cost of Option 2 is estimated to be \$3.19 million across the litigation funding sector. The primary risk of this change is that the compliance costs for litigation funders are passed on as either higher costs to consumers, when some litigation funding businesses exit the market and the reduced competition allows the remaining firms to increase their prices, or that they are passed on as a lower risk appetite in litigation funding, as the funders only take on actions with a greater chance of success and some actions at the margin are not funded.

However, a decision to not remove the relevant regulatory exemptions risks consumer harm through:

- misconduct by litigation funding entities not being discovered because of inadequate regulatory oversight,
- litigation funders not being required to comply with consistent product disclosure standards, and
- limited access to appropriate redress where there has been harm.

In this instance, the benefits to consumers and other entities of greater transparency and oversight of litigation funders have been assessed to exceed the costs for litigation funders of regulatory compliance. On balance, this approach should ensure that litigation funders involved in class actions pursue higher standards and more transparent dealings with prospective claimants. This will in turn increase the confidence of claimants when dealing with funders and may lead to a greater willingness to engage with their services. It is unlikely that the changes will result in otherwise meritorious proceedings being abandoned outright.

Other issues – consultation

In settling its approach, the Government has been informed by the submissions that the ALRC received from key stakeholders, including ASIC, the litigation funding industry, business groups, law firms and other representative groups. Of particular note were submissions regarding the ALRC proposal in their discussion paper to introduce a licensing regime for litigation funders similar to the AFSL regime.

Additionally, the Government has undertaken targeted consultation with stakeholders on the impacts of regulating litigation funders under the MIS and AFSL regimes, including on the scope of the changes and any transitional arrangements that are necessary to ensure that class actions commenced prior to the changes are not interrupted. The Government has taken this feedback into account when designing the new regulations.

Conclusion and recommended option

With regard to the inequities and risk of consumer harm posed by the existing exemption of litigation funders from the MIS and AFSL regimes, the decision has been made to remove the exemption. This will require litigation funders to hold an AFSL and, where necessary, comply with the MIS regulatory framework.

Bringing litigation funders into the MIS and AFSL regimes will enhance oversight and establish a regulatory treatment equivalent to that under which comparable financial services firms operate. It will ensure that consumers retain the ability to engage the services of litigation funders when pursuing justice through class actions whilst providing confidence that funders will conduct themselves in a way that is transparent and accountable.

Statement of Compatibility with Human Rights

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

Corporations Amendment (Litigation Funding) Regulations 2020

The *Corporations Amendment (Litigation Funding) Regulations 2020* (the Regulations) 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 *Corporations Amendment (Litigation Funding) Regulations 2020*

The Regulations remove the exemptions that apply for litigation funding schemes used in class actions under the *Corporations Act 2001* (the Corporations Act).

Class action litigation funding schemes involve a person or entity that is not a party to the litigation (a third party litigation funder) paying some or all of the costs associated with the legal action and indemnifying parties from adverse costs orders in return for a percentage share of the proceeds if the action is successful.

The Regulations do not remove the effect of other exemptions that currently apply to certain litigation funding schemes in the insolvency context and litigation funding arrangements (which are used in actions involving a single plaintiff).

Following the removal of the exemption from Australian Financial Services License (AFSL) requirements for class action litigation funding schemes, third party class action litigation funders will generally need to obtain an AFSL in order to deal in, or provide financial product advice in relation to, an interest in a litigation funding scheme because such an interest is a 'financial product'. Following the removal of the exemptions from the anti-hawking provisions and application of Part 7.9 of the Corporations Act, those provisions will need to be complied with, as an interest in a class action litigation funding scheme will continue to be a financial product.

Class action litigation funding schemes are generally understood to fall within the general definition of a MIS in section 9 of the Corporations Act (see *Brookfield Multiplex Limited v International Litigation Funding Partners Pte Ltd* (2009) 260 ALR 643). Therefore, the removal of the exemption for class actions funded by third party litigation funders from the definition of a MIS will mean that litigation funding schemes which relate to class actions may be classified as a MIS and will be required to be registered under Chapter 5C of the Corporations Act if they meet the registration requirements. In such a case, the regulatory requirements applying to registered MISs will apply and any person that could be considered to be operating the scheme will need to ensure that a responsible entity operates the scheme. The responsible entity must be a public company holding an AFSL authorising it to operate a MIS of this kind.

Human rights implications

The Regulations may engage, the right to a fair trial and hearing contained in Article 14 of the International Covenant on Civil and Political Rights (ICCPR).

The right to a trial and hearing

Article 14 of the ICCPR recognises the right to a trial and hearing. This is a fundamental part of the rule of law and the proper administration of justice. This provides that all persons are equal before the courts and tribunals and have access to justice. This right applies to both criminal and civil proceedings.

Under this right, all people are to have equal access to courts. No one should be barred from accessing courts or tribunals (except in limited exceptions). The United National Human Rights Committee (UNHRC) has stated that the right to a fair trial and fair hearing rights may only be limited in strict circumstances.

Under the current regime, third party litigation funders are not required to hold an AFSL or register a class action as a MIS. As a result, third party litigation funders do not face the same regulatory scrutiny and accountability as other financial services and products under the Corporations Act.

The removal of these exemptions mean that third party litigation funders that deal in an interest in a litigation funding scheme used in a class action will need to obtain an AFSL. The AFSL regime puts obligations on licence holders to act honestly, efficiently and fairly, maintain an appropriate level of competence to provide financial services and have adequate organisational resources to provide the financial services covered by the licence.

Under Article 14(1), the UNHRC has noted that the imposition of fees on the parties to proceedings that would de facto prevent their access to justice might give rise to issues.¹ While this amendment does not impose fees on the parties, there is a risk that by imposing license obligations on third party litigation funders there may be a reduction in competition amongst third party litigation funders, increasing the cost of funding, and thereby engaging the right to a fair trial by limiting the availability of funding.

However, fees for an AFSL are reasonable and it is not expected that the fees alone will deter third parties from funding class action litigation meaning that it is unlikely to negatively affect or prevent access to remedies for class action group members. It is also considered that the additional requirements will not significantly elevate the compliance burden on litigation funding businesses to a level that is not commensurate with their capacity given the scale of their operations. It is noted that the decision for a third party litigation funder to provide capital for a class action remains a commercial decision.

The amendments are necessary to provide greater regulatory oversight of litigation funders, by ensuring they meet appropriate standards beyond those imposed by the courts on a case-by-case basis. This is expected to provide greater protections for plaintiffs.

¹ Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (2007).

The holder of an AFSL (including the operator of a registered MIS) is required to meet certain competence and financial requirements, ensuring there will be a minimum standard for litigation funding businesses to operate in the Australian market.

A registered MIS is required to have a constitution, a compliance plan and a compliance plan auditor. These features are designed to ensure the scheme is operated transparently and in the interests of members of the scheme.

The removal of exemptions from Part 7.9 of the Corporations Act would result in more consistent product disclosure for plaintiffs. This is likely to mitigate the risk that a class action claimant will be unaware of the potential risks of becoming a member of a litigation funding scheme, such as facing an adverse cost order if the class action fails and the litigation funder does not hold enough capital to meet that order.

The removal of exemptions from the anti-hawking provisions provides greater protection for potential class action members by ensuring that how such members may be contacted in relation to an interest in a litigation funding scheme is regulated consistently with the regime that applies for other financial products.

Therefore, the Regulations are reasonable and necessary to bring third party litigation funders into the AFSL regime and the MIS regime (where registration requirements are met), as well as requiring them to comply with anti-hawking provisions and relevant product disclosure requirements that apply for other financial products. This is in the pursuit of a legitimate objective for greater transparency for class action group members and greater accountability for third party litigation funders.

In this regard, to the extent that the Regulations may result in a decrease in available funding for class actions, this is reasonable, necessary and proportionate to achieve greater protection for the parties involved in these actions.

Conclusion

The Regulations are consistent with Article 14 of the UNHRC, as to the extent that the Regulations impact on a factor associated with the right to a fair trial, this is reasonable, necessary and proportionate in the pursuit of a legitimate objective.