



ASIC
Australian Securities &
Investments Commission

Litigation Funding Roundtable

Tuesday 4 August 2020, 2pm-3:30pm

Joanna Bird – Executive Director, Wealth Management

Rhys Bollen – Senior Executive Leader, Investment Managers, Wealth Management

Peng Lee – Senior Executive Leader, Licensing

Agenda

| Item | |
|--|-------------------------------------|
| 1. Introduction | Joanna Bird (5 mins) |
| 2. The new regulations | Rhys Bollen (5 mins) |
| 3. ASIC implementation a. Licensing b. Managed Investment Scheme registration | Peng Lee / Rhys Bollen (20 mins) |
| 4. Potential 'Day 1' relief a. PDS and application form b. Member registers c. Withdrawals d. Valuations | Rhys Bollen (45 mins) |
| 5. ASIC's ongoing role | Peng Lee / Rhys Bollen (10 mins) |
| 6. Next steps | Joanna Bird (5 mins) |
| Close | |



The Regulations and the new regime

- The *Corporations Regulations 2001* currently exempt various litigation funding schemes and arrangements from the definition of a managed investment scheme (MIS).
- The Corporations Amendment (Litigation Funding) Regulations 2020 were made and registered (published) on 23 July.
- The current exemption for third-party funded litigation funding schemes will cease.
- The existing exemptions for insolvency litigation funding schemes and single-plaintiff litigation funding arrangements will continue.
- The Amendment Regulations apply to new litigation funding schemes entered into on or after 22 August 2020.
- From 22 August 2020
 - operators of litigation funding schemes must hold an Australian financial services licence (AFSL), and
 - the schemes will need to comply with the MIS regime.



ASIC implementation – AFS Licensing

- Assessment timing: allocated a dedicated team
- Litigation funding scheme authorisations:
 - operator: “kind authorisation”
 - intermediary
 - financial product advice
- Key documents:
 - A5: Business activity description and B5: Financial resources
 - B3: Conflicts of interest
- ASIC will apply current assessment policies including:
 - Competence (knowledge and experience):
 - Operating a scheme
 - Legal multi-party litigation experience (no specific underlying ‘asset’ experience)
 - Probity: fit and proper officers and controllers: criminal, solvency checks and personal information



ASIC implementation – scheme registration

- ASIC is applying existing regulatory policy to scheme registrations.
- Generally, a MIS must be registered if it has more than 20 members or is promoted by a person who is *in the business of promoting MISs*.
- The normal requirements will apply in relation to constitutions and compliance plans.
- Operators of a registered MIS are subject to a range of obligations under the Corporations Act including holding an AFS licence to operate a MIS as the responsible entity.
- Further information is available on the ASIC website (www.asic.gov.au) under [Litigation Funding](#). See Home > Regulatory resources > Funds management > Litigation funding.
- Questions?



ASIC implementation – potential ‘day 1’ relief

- As contemplated by the Explanatory Statement to the Regulations, ASIC may need to consider whether any exemptions and modifications are appropriate.
- ASIC is considering possible ‘Day 1’ relief to deal with immediate practical issues with the new regime.
- The Commission has not made a decision yet on any of the following examples of possible relief.
- The examples below are based on issues raised with Treasury and ASIC, as well as issues raised through the current PJC Inquiry.



Measure No 1: PDS and application form relief

- ASIC is *considering* conditional relief from:
 - the requirement to provide a **PDS**; and
 - the requirement to only issue an interest in a scheme in response to an eligible application (via an **application form**).
- The *proposed* relief would have the following limitations / conditions:
 - applies to open class action schemes only
 - the PDS will be required to be made publicly available (i.e. published on a website) for general transparency
 - the PDS must be given to any active participants in the open class action (e.g. any plaintiffs who have signed a retainer or funding agreement)
- Questions:
 - Should the operator have to give a PDS to all participants unless it is not “reasonably practicable” or “unduly expensive” to do (based on the language of the notice requirements in the Court Rules)?
 - Should the operator have to give a PDS to any passive participants in the open class action who can be readily identified (e.g. shareholders on the company register for a shareholder class action)?



Measure No 2: PDS content relief

- ASIC is aware that some PDS content requirements may be difficult to comply with or potentially confusing for clients.
- For example, the requirement to:
 - set out a prescribed warning about the impact that fees and costs may have on a client's investment, and
 - include a worked example showing the impact of fees and costs on a hypothetical \$50,000 investment.
- ASIC is considering exempting litigation funding schemes from the prescribed fees and cost regime in Schedule 10. This would mean that the fees and costs would still need to be disclosed, but only under the general rules in Part 7.9.
- Questions:
 - Is the above exemption from the Schedule 10 fees and costs rules appropriate ?
 - Are there any other PDS content requirements that are not possible to comply with?



Measure No 3: Member register

- ASIC is considering a class no-action position in relation the obligation under sections 168 and 169 to maintain a register of members' names and addresses.
- The no-action position would be limited to open class action schemes.
- Questions:
 - Should the operator have to list the active participants in the open class action in the register (e.g. the plaintiffs who have signed a retainer / funding agreement)?
 - Should the operator have to list any passive participants in the open class action who can be readily identified in the register (e.g. shareholders on the company register for a shareholder class action)?



Measure No 4: Withdrawal from litigation funding schemes

- ASIC is considering granting relief from the requirement that withdrawal by a member from a litigation funding scheme must comply with the requirements of Part 5C.6.
- Without relief, a non-liquid scheme may only permit its members to withdraw in accordance with the prescribed procedure set out under Part 5C.6.
- The PDS will still need to explain how a person can withdraw from the class action scheme under the proposed relief.
- Questions?



Measure No 5: Valuations

- ASIC is considering granting relief from the requirement that the operator of a litigation funding scheme must value the property of the scheme at regular intervals.
- Questions:
 - Are there any other valuation issues that need to be resolved as a ‘Day 1’ issue?



Other potential issues

- ASIC acknowledges that ASIC and Treasury have received submissions from industry participants in relation to:
 - financial resources requirements
 - complaints handling
 - periodic statements
 - meetings of members
- ASIC will continue to monitor these issues but does not propose any exemption or modification in relation to these issues at this stage.
- Questions ?



ASIC's ongoing role

- ASIC has made basic information available on our website under [Litigation funding](#). This includes how to apply for the relevant licence and register a litigation funding MIS. We will continue to update this information and encourage you to monitor it.
- ASIC will review its proposed 'Day 1' relief based on regulatory experience with the sector in due course.
- ASIC will deal with relief applications on a case-by-case basis.
- We will continue to consider whether any broader exemptions, modifications or guidance are required.
- ASIC will deal with complaints, breach reports and reports of misconduct based on our normal regulatory principles.
- Questions?

Thank you

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