



**ASIC**  
Australian Securities &  
Investments Commission

CONSULTATION PAPER 345

# Litigation funding schemes: Guidance and relief

July 2021

## About this paper

This consultation paper seeks feedback from litigation funding industry participants and other stakeholders.

It sets out ASIC's proposals about:

- providing guidance on key definitions; and
- relief for litigation funding schemes.

### About ASIC regulatory documents

In administering legislation ASIC issues the following types of regulatory documents.

**Consultation papers:** seek feedback from stakeholders on matters ASIC is considering, such as proposed relief or proposed regulatory guidance.

**Regulatory guides:** give guidance to regulated entities by:

- explaining when and how ASIC will exercise specific powers under legislation (primarily the Corporations Act)
- explaining how ASIC interprets the law
- describing the principles underlying ASIC's approach
- giving practical guidance (e.g. describing the steps of a process such as applying for a licence or giving practical examples of how regulated entities may decide to meet their obligations).

**Information sheets:** provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

**Reports:** describe ASIC compliance or relief activity or the results of a research project.

### Document history

This paper was issued on 9 July 2021 and is based on the legislation as at the date of issue.

### Disclaimer

The proposals, explanations and examples in this paper do not constitute legal advice. They are also at a preliminary stage only. Our conclusions and views may change as a result of the comments we receive or as other circumstances change.

# Contents

<b>The consultation process</b> .....	<b>4</b>
<b>A Background to the proposals</b> .....	<b>6</b>
Regulation of litigation funding schemes .....	6
Parliamentary Joint Committee inquiry .....	9
Our proposals and objectives .....	9
<b>B Proposed guidance on how definitions apply to litigation funding schemes</b> .....	<b>11</b>
Relevant Corporations Act definitions .....	11
When a litigation funding scheme is a managed investment scheme .....	12
Who are the members of a managed investment scheme .....	16
What is the scheme property of a managed investment scheme .....	18
Our proposal for guidance on how definitions apply to litigation funding schemes .....	19
Applying the definition of ‘special custody assets’ to litigation funding schemes .....	20
Our proposal for guidance on ‘special custody assets’ .....	22
<b>C Proposals about relief for litigation funding schemes</b> .....	<b>23</b>
Relief from the equal treatment duty .....	23
Our proposal to grant equal treatment relief .....	24
Relief from the dollar disclosure requirements .....	27
Our proposal to extend the dollar disclosure relief .....	29
ASIC’s pre-August 2020 instruments .....	31
Our proposal not to remake the pre-August 2020 instruments .....	33
<b>D Regulatory and financial impact</b> .....	<b>35</b>
<b>Key terms</b> .....	<b>36</b>
<b>List of proposals and questions</b> .....	<b>39</b>

## The consultation process

You are invited to comment on the proposals in this paper, which are only an indication of the approach we may take and are not our final policy.

As well as responding to the specific proposals and questions, we also ask you to describe any alternative approaches you think would achieve our objectives.

We are keen to fully understand and assess the financial and other impacts of our proposals and any alternative approaches. Therefore, we ask you to comment on:

- the likely compliance costs;
- the likely effect on competition; and
- other impacts, costs and benefits.

Where possible, we are seeking both quantitative and qualitative information. We are also keen to hear from you on any other issues you consider important.

Your comments will help us develop our policy on the regulation of litigation funding. In particular, any information about compliance costs, impacts on competition and other impacts, costs and benefits will be taken into account if we prepare a Regulation Impact Statement: see Section D, 'Regulatory and financial impact'.

### Making a submission

You may choose to remain anonymous or use an alias when making a submission. However, if you do remain anonymous we will not be able to contact you to discuss your submission should we need to.

Please note we will not treat your submission as confidential unless you specifically request that we treat the whole or part of it (such as any personal or financial information) as confidential.

Please refer to our privacy policy at [www.asic.gov.au/privacy](http://www.asic.gov.au/privacy) for more information about how we handle personal information, your rights to seek access to and correct personal information, and your right to complain about breaches of privacy by ASIC.

Submissions are due by 20 August 2021 to:

Litigation Funding Consultation  
Investment Managers  
Australian Securities and Investments Commission  
GPO Box 9827  
Brisbane QLD 4001  
email: [litigation.funding.consultation@asic.gov.au](mailto:litigation.funding.consultation@asic.gov.au)

## What will happen next?

<b>Stage 1</b>	9 July 2021	ASIC consultation paper released
<b>Stage 2</b>	20 August 2021	Comments due on the consultation paper
<b>Stage 3</b>	Late 2021	Amendments to relevant ASIC instruments implemented
<b>Stage 4</b>	To be advised	Relevant revised regulatory guidance released

## A Background to the proposals

### Key points

On 22 August 2020, a new legislative framework for litigation funding schemes and associated providers of financial services came into effect. These entities are now generally subject to the managed investment scheme, Australian financial services (AFS) licensing and product disclosure regimes provided for under the *Corporations Act 2001* (Corporations Act).

This consultation paper seeks feedback on our proposals about:

- providing guidance on key definitions; and
- relief for litigation funding schemes.

Our proposals seek to ensure that the legislative framework applicable to litigation funding schemes operates effectively and consistently with the policy intent for the regulation of litigation funding activities.

## Regulation of litigation funding schemes

### Pre-2020 position

- 1 Class actions funded by a third-party litigation funder were found to fall within the general definition of a managed investment scheme in *Brookfield Multiplex Limited v International Litigation Funding Partners Pte Ltd* (2009) 260 ALR 643 (Brookfield).
- 2 The High Court of Australia held that the litigation funding agreement in *International Litigation Partners Pte Ltd v Chameleon Mining NL (Receivers and Managers Appointed)* [2012] HCA 45 (Chameleon) constituted a ‘credit facility’ within the meaning of reg 7.1.06 of the then Corporations Regulations 2001 (Corporations Regulations). Given the Chameleon decision, litigation funding arrangements generally could amount to the provision of credit to which the *National Consumer Credit Protection Act 2009* (National Credit Act) and the National Credit Code (at Sch 1 to the National Credit Act) applies.
- 3 In 2013, the then Australian Government excluded litigation funding schemes and proof of debt schemes from the definition of ‘managed investment scheme’ in the Corporations Act (under an exemption in the Corporations Regulations in force at that time). Persons providing financial services in connection with litigation funding schemes and proof of debt schemes were also exempt from the requirements to:
  - (a) hold an AFS licence;

- (b) comply with the statutory requirements under Ch 7 of the Corporations Act; and
- (c) register the litigation funding scheme as a managed investment scheme under Ch 5C of the Corporations Act.

Note: To qualify for those exemptions, litigation funding schemes and proof of debt schemes were required to maintain adequate practices for managing any conflicts of interest that may arise regarding the scheme. [Regulatory Guide 248](#) *Litigation schemes and proof of debt schemes* (RG 248) sets out our expectations for compliance with these requirements.

4 At the time of the 2013 amendments to the Corporations Regulations, industry stakeholders raised concerns that some aspects of litigation funding were not covered by the new exemption. To support the new exemption, in consultation with the then Australian Government, we gave the following relief:

- (a) to litigation funding arrangements generally—relief from the National Credit Code (see [Class Order \[CO 13/18\]](#) *Funded representative proceedings and funded proof of debt arrangements exclusion from the National Consumer Credit Protection Act 2009*); and
- (b) to litigation funding arrangements and proof of debt arrangements that are funded by a conditional costs arrangement (conditional costs schemes)—relief from the managed investments, AFS licensing, product disclosure and anti-hawking requirements (see [Class Order \[CO 13/898\]](#) *Representative proceedings and proof of debt arrangements funded by conditional costs agreements*).

Note: A conditional costs agreement is a costs agreement between a client and a lawyer. Under the agreement, the client's payment of some or all of the legal costs is conditional on the successful outcome of the matter to which those costs relate.

5 The relief in [CO 13/18] and [CO 13/898] expired in July 2019. We reinstated it in January 2020: see [ASIC Credit \(Litigation Funding—Exclusion\) Instrument 2020/37](#) and [ASIC Corporations \(Conditional Costs Schemes\) Instrument 2020/38](#) (the pre-August 2020 instruments).

## 2020 reforms

6 In May 2020, the Australian Government announced its decision to regulate litigation funding under the Corporations Act: see The Hon. Josh Frydenberg MP, Treasurer, [Litigation funders to be regulated under the Corporations Act](#), media release, 22 May 2020.

7 In July 2020, the Corporations Amendment (Litigation Funding) Regulations 2020 amended the Corporations Regulations to implement this announcement. From 22 August 2020:

- (a) litigation funding schemes are financial products if they have all of the features set out in reg 7.1.04N(3) of the Corporations Regulations;

- (b) litigation funding schemes are generally subject to the managed investments regime under the Corporations Act;
- (c) providers of financial services for litigation funding schemes are generally required to hold an AFS licence; and
- (d) litigation funding schemes must comply with the product disclosure requirements and anti-hawking provisions in the Corporations Act.

8 Whether a particular litigation funding scheme constitutes a managed investment scheme (as defined in s9 of the Corporations Act) will depend on the nature of the scheme and how the relevant definitions in s9 apply to it.

Note: The Corporations Regulations also exempt insolvency litigation funding schemes and litigation funding arrangements (as defined in reg 5C.11.01 of the Corporations Regulations) from the definition of managed investment schemes in s9 of the Corporations Act.

### **ASIC action to implement the 2020 reforms**

9 To support the new requirements commencing on 22 August 2020, we made [ASIC Corporations \(Litigation Funding Schemes\) Instrument 2020/787](#) to manage the transition to the new regulatory regime for litigation funding. This instrument provides relief to the responsible entity of a registered litigation funding scheme from:

- (a) the obligation to give a Product Disclosure Statement (PDS) to passive general members of open litigation funding schemes—on the condition the PDS is available on the scheme operator’s website and referred to in advertising material;

Note: A passive general member is any general member who is not an active general member.

- (b) the obligation to regularly value scheme property;
- (c) the statutory withdrawal procedures for members who withdraw from a class action under court rules; and
- (d) the requirement to disclose detailed fees and costs information and information about labour standards or environmental, social or ethical considerations.

10 At the same time, we issued a no-action position in relation to the obligation under Ch 2C of the Corporations Act to set up and maintain a register of members of a registered litigation funding scheme: see [Media Release \(20-192MR\)](#) *ASIC manages transition to new regulatory regime for litigation funding schemes* (21 August 2020).

11 We have also recently amended [ASIC Corporations \(Litigation Funding Schemes\) Instrument 2020/787](#) and [ASIC Corporations \(Disclosure in Dollars\) Instrument 2016/767](#) to provide exemptions from the dollar disclosure provisions relevant to litigation funding schemes.



## Parliamentary Joint Committee inquiry

- 12 In 2020, the Parliamentary Joint Committee on Corporations and Financial Services (PJC) conducted an [inquiry into litigation funding and the regulation of the class action industry](#). The [final report](#), released in December 2020, made 31 recommendations on changes to the legislative framework for litigation funding schemes and persons who provide financial services for such schemes.
- 13 On 28 May 2021, the Australian Government announced plans to consult on the recommendations in the final report that can be implemented by the Australian Government: see the Hon. Josh Frydenberg MP, Treasurer, and Senator the Hon. Michaelia Cash, Attorney-General, [Consulting on the recommendations of the Parliamentary Joint Committee report on litigation funding and class actions](#), joint media release, 28 May 2021. Following this, on 1 June 2021, the Treasury and the Attorney-General's Department jointly published a consultation paper on Recommendation 20 (guaranteeing a minimum return of class action proceeds to class members): see [Guaranteeing a minimum return of class action proceeds to class members](#), June 2021.
- 14 We will monitor the Australian Government's response to the PJC recommendations and will reassess our approach to the matters in this consultation paper in light of any further developments. We aim to ensure our regulatory approach to these matters remains consistent with the policy intent for regulation of litigation funding activities, and continues to facilitate the effective operation of the legislative framework.

## Our proposals and objectives

### Proposed guidance on how we apply definitions to litigation funding schemes

- 15 We are seeking feedback on a proposal to provide guidance on how the following definitions apply to litigation funding schemes:
- (a) 'managed investment scheme';
  - (b) 'member'; and
  - (c) 'scheme property'.

These definitions are set out in s9 of the Corporations Act.

- 16 We are also seeking feedback on proposals to provide guidance to explain how we apply the definition of 'special custody assets' to scheme property of litigation funding schemes. This definition is set out in notional s912AA(11) of the Corporations Act (as inserted by [Class Order](#)

[\[CO 13/760\]](#) *Financial requirements for responsible entities and operators of investor directed portfolio service*).

- 17 The proposed guidance represents our views on the application of relevant concepts to litigation funding. We are proposing to provide this guidance to help industry participants and relevant stakeholders understand their rights and obligations under the current legislative framework, as well as our regulatory approach. Guidance on how the law applies is also consistent with ASIC's statutory objective to maintain, facilitate and improve the performance of the financial system, and the entities within that system, in the interests of commercial certainty: see s1(2)(a) of the *Australian Securities and Investments Commission Act 2001* (ASIC Act).
- 18 See Section B for these proposals.

### **Proposals on current and new relief**

- 19 We are seeking feedback on our proposal to grant limited relief to responsible entities of registered litigation funding schemes from the obligation to treat members who hold interests of the same class equally: see s601FC(1)(d) of the Corporations Act. This relief would be limited to how the responsible entity distributes the settlement or judgment sum to scheme members. The money must be:
- (a) obtained in class action proceedings seeking remedies for members of a litigation funding scheme; and
  - (b) distributed in accordance with court orders or a determination by a court-appointed resolution administrator.
- 20 We are also seeking feedback on our proposal to extend our interim relief from the requirement to disclose certain information as dollar amounts in the PDS for interests in a registered litigation funding scheme. Our interim relief is provided by [ASIC Corporations \(Disclosure in Dollars\) Instrument 2016/767](#).
- 21 Finally, we are seeking feedback on our proposals not to remake the pre-August 2020 instruments when these two instruments expire on 31 January 2023. These instruments provide exemptions from the application of the National Credit Code and various Corporations Act requirements relevant to litigation funding: see paragraph 4.
- 22 See Section C for these proposals.

## B Proposed guidance on how definitions apply to litigation funding schemes

### Key points

This section summarises our proposed guidance on how the following definitions apply to litigating funding schemes:

- ‘managed investment scheme’ (see paragraphs 28–39);
- ‘member’ (see paragraphs 40–45); and
- ‘scheme property’ (see paragraphs 46–51).

See proposal B1 for our feedback questions and rationale.

We are also proposing to provide guidance on how the definition of ‘special custody assets’ applies to scheme property of litigation funding schemes: see paragraphs 54–62 and proposal B2.

### Relevant Corporations Act definitions

- 23 The managed investments regime and other key requirements of the Corporations Act may apply to a litigation funding scheme. This will depend on how the following definitions in s9 of the Corporations Act are understood regarding that scheme:
- (a) ‘managed investment scheme’;
  - (b) ‘member’; and
  - (c) ‘scheme property’.
- 24 The actual features of a particular litigation funding scheme will determine whether it constitutes a managed investment scheme, who the members of that scheme are, and what the scheme property of that scheme comprises.
- 25 However, we consider that there are generally applicable principles for determining how the Corporations Act definitions apply to a litigation funding scheme. We have set out an overview of our general approach in paragraphs 28–51.
- 26 In developing this approach, we have considered (where relevant) the Brookfield decision. We note, however, that Brookfield concerned a ‘closed’ class action. All members in the class had entered into a funding agreement with the litigation funder, and the decision did not consider all definitional issues relevant to litigation funding schemes.
- 27 Throughout this consultation paper, we use the term ‘general member’, which is defined as a ‘member of the scheme who is not the litigation funder,

or a lawyer providing services for the purposes of the scheme’: see reg 7.1.04N(4) of the Corporations Regulations. We consider that ‘general member’ includes those persons who are pursuing remedies to which they may be entitled through the litigation funding scheme. In the context of representative proceedings or a class action that has commenced, general members include the representative member and group or class members.

Note: See Table 1 for guidance on who is a member of the litigation funding scheme before the commencement of legal proceedings.

## When a litigation funding scheme is a managed investment scheme

### Definition of ‘managed investment scheme’

- 28 A ‘managed investment scheme’ is defined in s9 of the Corporations Act as follows:
- (a) a scheme that has the following features:
    - (i) people contribute money or money’s worth as consideration to acquire rights (interests) to benefits produced by the scheme (whether the rights are actual, prospective or contingent and whether they are enforceable or not);
    - (ii) 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 (the members) who hold interests in the scheme (whether as contributors to the scheme or as people who have acquired interests from holders);
    - (iii) the members do not have day-to-day control over the operation of the scheme (whether or not they have the right to be consulted or to give directions) ...
- 29 Paragraphs (b)–(n) of the definition of ‘managed investment scheme’ specify certain types of schemes or arrangements that constitute, or do not constitute, a managed investment scheme. These categories will not typically apply to litigation funding schemes, except for arrangements constituting an ‘insolvency litigation funding scheme’ or ‘litigation funding arrangement’. These arrangements are excluded from the definition of ‘managed investment scheme’ under paragraph (n) of the definition and reg 5C.11.01 of the Corporations Regulations.
- 30 A litigation funding scheme (other than an insolvency litigation funding scheme or a litigation funding arrangement) will, therefore, constitute a managed investment scheme if it satisfies all three of the elements set out in paragraphs (a)(i)–(a)(iii) of the definition: see paragraph 28. We provide guidance on how a litigation funding scheme will satisfy these elements in paragraphs 31–35.

### **Contribution of money or money's worth**

31 The definition requires that 'people contribute money or money's worth as consideration to acquire rights to benefits produced by the scheme': see paragraph (a)(i) of the definition. We consider that:

- (a) there must be more than one contributor, as paragraph (a)(i) requires 'people' to have made contributions;
- (b) the respective promises given by each general member and the litigation funder when entering into a litigation funding agreement with one another constitute a relevant contribution of 'money's worth'; and
- (c) as the requirement to 'contribute' requires a positive act, this requirement is not satisfied if a person has merely registered their interest in entering a litigation funding agreement.

Note: See paragraphs 40–45 for a discussion of who are the members of a litigation funding scheme, once a scheme has come into being.

### **Pooling of contributions, or use of contributions in a common enterprise**

32 The definition requires contributions to be pooled or used in a common enterprise: see paragraph (a)(ii) of the definition. We consider that this requirement is satisfied for a litigation funding scheme that has all of the features set out in reg 7.1.04N(3) of the Corporations Regulations:

- (a) the dominant purpose of the scheme is for each of its general members to seek remedies to which they may be legally entitled;
- (b) the possible entitlement of each of its general members to remedies arises out of:
  - (i) the same, similar or related transactions or circumstances that give rise to a common issue of law or fact; or
  - (ii) different transactions or circumstances, but the claims of the general members can be appropriately dealt with together;
- (c) the possible entitlement of each of its general members to remedies relates to transactions or circumstances that occurred before or after the first funding agreement (dealing with any issue of interests in the scheme) is finalised;
- (d) the steps taken to seek remedies for each of its general members include a lawyer providing services in relation to:
  - (i) making a demand for payment in relation to a claim;
  - (ii) lodging a proof of debt;
  - (iii) commencing or undertaking legal proceedings;
  - (iv) investigating a potential or actual claim;

- (v) negotiating a settlement of a claim; or
- (vi) administering a deed of settlement or scheme of settlement relating to a claim;
- (e) 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; and
- (f) 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.

33 This is because the members of the scheme have made their individual promises available for the purposes and benefit of the scheme, and there is a shared purpose of pursuing general members' claims successfully. This shared purpose would then benefit the scheme members, including the litigation funder.

#### **Day-to-day control of the scheme**

34 The definition requires that 'the members do not have day-to-day control over the operation of the scheme': see paragraph (a)(iii) of the definition. We consider that this requirement:

- (a) *may not be satisfied* when there are only two scheme members, comprising a litigation funder and a general member who have entered into a litigation funding agreement with one another. This is because the members of the scheme would in that scenario have day-to-day control over the operation of the scheme; and
- (b) *is satisfied* when at least one member of the scheme does not have day-to-day control over the operation of the scheme. For example, if two separate general members have each signed a litigation funding agreement with the litigation funder, so that there are three scheme members, scheme members as a whole may not have day-to-day control over the operation of the scheme.

#### **Arrangements that meet the definition of 'managed investment scheme'**

35 We consider that the s9 definition of 'managed investment scheme' is likely to be satisfied in the following scenarios:

- (a) a 'closed' class action where all general members have entered a litigation funding agreement with the litigation funder; and

Note: A class action is commonly described as 'closed class' if the ability to be a member of the class action is restricted to people who have retained a particular law

firm and/or entered into an arrangement with a particular litigation funder. In contrast, an open class action is not limited in this way.

- (b) an ‘open’ class action, or a ‘closed’ class action where not all general members have entered a funding agreement. However, the litigation funder and some of the general members must have made a contribution that satisfies the requirement in paragraph (a)(i) of the definition (see paragraph 31).

### When a managed investment scheme commences

36 We consider that a managed investment scheme generally comes into existence when the relevant contributions of money or money’s worth are made (e.g. by the litigation funder and two or more general members entering into litigation funding agreements). This is only the case if the requirement in paragraph (a)(iii) of the definition (for members to not have day-to-day control) is also satisfied: see paragraph 34.

37 The point at which members cease to have day-to-day control will depend on the circumstances of each scheme. In our view, as a practical matter, as more general members join the scheme, they are likely to cease to have day-to-day control.

38 We have set out our view in the following examples.

#### Example 1: A scheme with a litigation funder and one general member, when no class action has commenced

No managed investment scheme is likely to be in existence when:

- only the litigation funder and one general member have entered a litigation funding agreement; and
- a class action seeking remedies for the general member and other persons has not yet commenced.

Although the required contributions of money or money’s worth will have been made in this scenario, it is likely that the two scheme members would have day-to-day control over the operation of the scheme. Therefore, the requirement in paragraph (a)(iii) of the definition would not be satisfied.

#### Example 2: A scheme with a litigation funder and two or more general members

In most circumstances, a managed investment scheme would come into existence when:

- additional general members sign a litigation funding agreement with a litigation funder; and
- at least one of the general members does not have day-to-day control over the operation of the scheme.

**Example 3: A scheme with a litigation funder and a general member, once the class action has commenced**

A managed investment scheme would likely come into existence when:

- a class action seeking remedies for a general member and other persons commences; and
- at the time of commencement, only the litigation funder and a single general member have entered into a funding agreement.

In this scenario, the required contributions of money or money's worth will have been made. As a class action necessarily requires a class of seven or more persons with common questions, such a class is established by virtue of the commencement of the class action. This is sufficient for all such persons to be considered members of the scheme, not all of whom could be said to have day-to-day control of the scheme.

- 39 Except for the scenario set out in Example 3, we consider that the timing of commencement of the managed investment scheme will not generally turn on the commencement of the scheme's legal proceedings.

## Who are the members of a managed investment scheme

### Definition of 'member'

- 40 A 'member' of a managed investment scheme is defined in s9 of the Corporations Act as 'a person who holds an interest in the scheme'.
- 41 An 'interest' in a managed investment scheme is defined in s9 to mean 'a right to benefits produced by the scheme (whether the right is actual, prospective, contingent and whether it is enforceable or not)'.
- 42 In our view, all that is necessary for a person to be a member of a managed investment scheme is that they hold some right (even if prospective, contingent and/or unenforceable in nature) to a benefit produced by the scheme. The person is a member whether or not they have themselves made a contribution of money or money's worth to the scheme.

Note: The remainder of this section assumes the scheme has commenced, which requires at least two people to have made contributions to the scheme and at least one member to be a person who does not have day-to-day control of the scheme—see paragraphs 31 and 36–39.

### Members of a litigation funding scheme

- 43 We have set out who we consider to be members of a litigation funding scheme that is a managed investment scheme in Table 1.



**Table 1: Members of a litigation funding scheme that is a managed investment scheme**

Scenario	Who is a member
The managed investment scheme has come into existence, but the scheme's legal proceedings have not commenced	<ul style="list-style-type: none"> <li>• Litigation funder</li> <li>• Each general member who has entered into a litigation funding agreement with the funder</li> <li>• Any person, other than a general member, who holds an interest in the benefits produced by the scheme (e.g. in some cases, the lawyers for the general members—see paragraph 44)</li> </ul>
Only the litigation funder and a single general member have entered into a litigation funding agreement, but a class action seeking remedies for the general member and other persons has commenced	<ul style="list-style-type: none"> <li>• Litigation funder</li> <li>• Each general member who has entered into a litigation funding agreement with the funder</li> <li>• Any person, other than a general member, who holds an interest in the benefits produced by the scheme (e.g. in some cases, the lawyers for the general members—see paragraph 44)</li> <li>• Any person that is a general member in the class action (by reason of the relevant pleadings and/or court rules) but who have not entered into a litigation funding agreement with the funder</li> </ul>

- 44 In some circumstances, the lawyers representing the general members of the scheme will have a right to the benefits produced by the scheme. This right will mean they are a member of the scheme. We consider that the lawyers:
- (a) will be a member of the scheme if they have agreed to defer payment of part or all of their professional fees in return for an increased amount (or uplift). This amount is to be paid when a settlement sum or judgment award is obtained in the scheme's legal proceedings; and
  - (b) will not be a member of the scheme if the amount of their professional fees and their right to receive such fees do not depend on the outcome of the scheme's legal proceedings.

- 45 We do not consider that an insurer providing 'after the event' insurance would be a scheme member. 'After the event' insurance indemnifies the scheme against an adverse costs order being made in the scheme's legal proceedings. In our view, such insurance arrangements are too far removed from the scheme for the premium to be characterised as the insurer receiving a benefit 'produced by' the scheme.

## What is the scheme property of a managed investment scheme

### Definition of ‘scheme property’

- 46 ‘Scheme property’ of a registered managed investment scheme is defined in s9 of the Corporations Act to mean:
- (a) contributions of money or money’s worth to the scheme; and
  - (b) money that forms part of the scheme property under provisions of this Act or the ASIC Act; and
  - (c) money borrowed or raised by the responsible entity for the purposes of the scheme; and
  - (d) property acquired, directly or indirectly, with, or with the proceeds of, contributions or money referred to in paragraph (a), (b) or (c); and
  - (e) income and property derived, directly or indirectly, from contributions, money or property referred to in paragraph (a), (b), (c) or (d).
- 47 ‘Property’ is defined in s9 to mean ‘any legal or equitable estate or interest (whether present or future and whether vested or contingent) in real or personal property of any description and includes a thing in action’.

### Scheme property of a registered litigation funding scheme

- 48 The s9 definition of ‘scheme property’ is broad, particularly in light of paragraph (e) of the definition.
- 49 Accordingly, we consider that the scheme property of a registered litigation funding scheme will include all of the following:
- (a) any settlement sum or judgment award obtained in the scheme’s legal proceedings (resolution sum);
  - (b) promises by scheme members to pay a certain portion of any resolution sum to a litigation funder or lawyer;
  - (c) promises by the litigation funder to pay the costs associated with conducting the scheme’s legal proceedings. This includes promises to indemnify the lead plaintiff against any adverse costs order made in the proceeding;
  - (d) promises by the lawyer to conduct the case partly or wholly on a conditional costs or contingency costs basis;
  - (e) promises by an insurer, to provide indemnification against any adverse costs order made in the scheme’s legal proceedings. The promise must be made under an insurance arrangement with the litigation funder, the lawyers, or any general member of the scheme; and

- (f) any float or running account created for the purpose of the scheme, into which the litigation funder or others puts funds to be used for costs during the life of the scheme.

50 We do not consider it necessary for the resolution sum to have been paid, or to have been received into any particular account, for the ‘scheme property’ definition to be satisfied. It is sufficient that the entitlement to the resolution sum has arisen.

51 However, we do not consider that any of the individual claims or choses in action of the general members of the scheme (i.e. their right to sue the defendant) pursued through the scheme’s legal proceedings would constitute ‘scheme property’. Our view is that, although members have contributed money’s worth to the scheme by their promises to share the proceeds of any resolution sum, this does not necessarily involve the provision of the individual choses in action to the scheme. Those choses in action are retained by each individual general member of the scheme.

## Our proposal for guidance on how definitions apply to litigation funding schemes

### Proposal

**B1** We propose to update RG 248 to provide guidance on how we apply the following definitions to litigation funding scheme:

- (a) ‘managed investment scheme’;
- (b) ‘member’; and
- (c) ‘scheme property’.

Note: These definitions are set out in s9 of the Corporations Act

Our guidance in RG 248 will be consistent with the summary guidance in paragraphs 23–51.

#### *Your feedback*

**B1Q1** Do you agree we should provide guidance on how the ‘managed investment scheme’, ‘member’ and ‘scheme property’ definitions apply to litigation funding schemes?

**B1Q2** Do you agree that we should include our proposed guidance in an update to RG 248 or elsewhere? Please give reasons.

**B1Q3** Do you agree with our guidance on the definitions of ‘managed investment scheme’, ‘member’ and ‘scheme property’ to litigation funding schemes? If not, why not? Please provide specifics of any changes you consider should be made.

- B1Q4 Is further detail or clarification needed about how the relevant definitions apply? If so, please provide specifics of the additional information you consider should be provided.
- B1Q5 Are there other issues relating to definitions or interpretations of definitions, relevant to litigation funding schemes, on which you consider that guidance is necessary? If so, please provide specifics of the additional issues you consider should be addressed.

## Rationale

- 52 The proposed guidance seeks to help industry participants, recipients of litigation funding and other stakeholders. It aims to help them understand their rights and obligations under the current legislative framework applicable to litigation funding schemes. It will do this by providing clarity about how the Corporations Act definitions of ‘managed investment scheme’, ‘member’ and ‘scheme property’ apply to litigation funding schemes.
- 53 We consider that providing guidance on how the law applies is consistent with ASIC’s statutory objective to maintain, facilitate and improve the performance of the financial system, and the entities within that system, in the interests of commercial certainty: see s1(2)(a) of the ASIC Act.

## Applying the definition of ‘special custody assets’ to litigation funding schemes

### Definition of ‘special custody assets’

- 54 ‘Special custody assets’ are defined in notional s912AA(11) of the Corporations Act (as inserted by [\[CO 13/760\]](#)). Whether the scheme property of a litigation funding scheme constitutes ‘special custody assets’ is relevant to determining which net tangible asset requirements apply to the AFS licensee that operates the managed investment scheme as a responsible entity under notional s912AA(4)–(5) of the Corporations Act.
- 55 We have set out what we consider to be included in the definition of ‘scheme property’ at paragraph 49.
- 56 Paragraph (d) of the definition of ‘special custody assets’ at notional s912AA(11) includes:
- cash held for up to 3 months in an account with an Australian ADI styled as a trust account that is audited at least once every 6 months by a registered company auditor where the auditor’s report states that in the auditor’s opinion the account has been operated in accordance with the trust:
- (i) pending payment to members of the scheme; or

- (ii) to meet expected expenses (not including investments) over a 3 month period; ...

57 The definition of ‘special custody assets’ at notional s912AA(11) also includes the following:

- (a) contractual, lease or licence rights that are not assignable except with the consent of the member or client, or that it would not be reasonably practicable to assign. This also includes any documents evidencing those contractual, lease or licence rights (see paragraph (e) of the definition);
- (b) any chose in action that is:
  - (i) not a financial product; and
  - (ii) not reasonably practicable to assign other than to the relevant member or members of the scheme or clients of the investor directed portfolio service (IDPS) (as applicable), or together with other property that is covered by any of the other categories of special custody assets in paragraphs (a)–(m) of the definition (see paragraph (n) of the definition).

### **Scheme property that does not constitute ‘special custody assets’**

58 We consider that a litigation funding scheme’s resolution sum described in paragraph 49(a) does not constitute ‘special custody assets’.

59 Our understanding is that, even in circumstances where the resolution sum is paid into a trust account, its distribution to scheme members is often not concluded within three months of the sum being received into the account. For this reason, we consider that the resolution sum would not meet the notional s912AA(11)(d) definition. We also do not consider that any other aspect of the notional s912AA(11) definition of ‘special custody assets’ would apply to a resolution sum.

60 We consider that the float or running account described in paragraph 49(f) also does not constitute ‘special custody assets’.

### **Scheme property that does constitute ‘special custody assets’**

61 We consider that the scheme property of a litigation funding scheme described in paragraph 49(b)–49(e) do constitute ‘special custody assets’. This is because they are in the nature of contractual rights that meet the notional s912AA(11)(e) definition.

62 We consider that the individual choses in action of the general members of the litigation funding scheme pursued through the scheme’s legal

proceedings are not scheme property: see paragraph 51. On this basis, such choses in action do not constitute ‘special custody assets’. However, the ‘right to proceeds’ assigned to a responsible entity to hold on behalf of members are a type of chose in action that would be a ‘special custody asset’ under notional s912AA(11)(n), but only if the rights are held by the responsible entity and are not assignable.

## Our proposal for guidance on ‘special custody assets’

### Proposal

**B2** We propose to update [Regulatory Guide 166 Licensing: Financial requirements](#) (RG 166) to provide guidance on how the ‘special custody assets’ definition in notional s912AA(11) of the Corporations Act applies to litigation funding schemes.

Our guidance in RG 166 will be consistent with the summary guidance in paragraphs 58–62.

#### *Your feedback*

**B2Q1** Do you agree with our guidance on the application of the definition of ‘special custody assets’ to scheme property of litigation funding schemes? If not, why not?

### Rationale

63 The proposed guidance seeks to reduce uncertainty for industry participants and other stakeholders. It will also help responsible entities of litigation funding schemes understand their financial requirements under the AFS licensing regime and how the definition of ‘special custody assets’ applies to scheme property of litigation funding schemes.

64 We consider that providing guidance on how the definition of ‘special custody assets’ applies to scheme property of litigation funding schemes is consistent with ASIC’s statutory objective to maintain, facilitate and improve the performance of the financial system, and the entities within that system, in the interests of commercial certainty: see s1(2)(a) of the ASIC Act.

## C Proposals about relief for litigation funding schemes

### Key points

We are proposing to grant relief to responsible entities of registered litigation funding schemes from the equal treatment duty. This relief would be limited to the distribution of a resolution sum to general members of litigation funding schemes: see proposal C1.

We have granted interim relief from the dollar disclosure requirements for PDSs for interests in a registered litigation funding scheme under [ASIC Corporations \(Disclosure in Dollars\) Instrument 2016/767](#). We are proposing to extend the relief under the instrument, which is currently due to expire on 28 April 2022, until 22 August 2025: see proposal C2.

We have previously provided relief:

- to litigation funding arrangements and proof of debt arrangements from the National Credit Code (see [ASIC Credit \(Litigation Funding—Exclusion\) Instrument 2020/37](#)); and
- to conditional costs schemes from the managed investments, AFS licensing, product disclosure and anti-hawking requirements (see [ASIC Corporations \(Conditional Costs Schemes\) Instrument 2020/38](#)).

We are proposing not to remake these two instruments when they expire on 31 January 2023: see proposals C3–C4.

### Relief from the equal treatment duty

- 65 Chapter 5C of the Corporations Act imposes duties on responsible entities of registered schemes, including registered litigation funding schemes. Relevantly, the ‘equal treatment duty’ provides that in exercising its powers and carrying out its duties, the responsible entity of a registered scheme must treat the members who hold interests of the same class equally: see s601FC(1)(d).

#### Resolution sums

- 66 Where the scheme’s legal proceeding takes the form of a class action, a resolution sum can be obtained by:
- (a) judgment, where the court decides the outcome of the proceedings; or
  - (b) a settlement reached between the parties, which the court will be required to consider and approve.
- 67 In the event of a settlement in a class action, we understand that a court will typically appoint a resolution administrator to distribute the resolution sum

in accordance with the court's orders. The resolution administrator is usually the lead plaintiff's lawyer. This generally requires the administrator to assess or calculate each general member's entitlement to a portion of the resolution sum. This calculation is based on the member's compensable loss, determined by particular criteria arising from the circumstances of their individual legal claim.

- 68 A large range of possible factors may be taken into account in determining member entitlements when distributing a resolution sum. For example, the circumstances giving rise to the class action, as well as a general member's individual circumstances may be taken into account. In most cases, each general member will be assessed as being entitled to a different dollar amount to other general members.
- 69 The scheme's legal proceeding can also take the form of a multi-claimant action that is not a class action. This may similarly be resolved by judgment or settlement. However, unlike class actions, settlements of multi-claimant actions do not typically require court approval. The payment and distribution of the resolution sum may not be the subject of court orders unless such orders are sought by a party to the proceeding.

### **Application of the equal treatment duty to distribution of a resolution sum**

- 70 The interests held in a litigation funding scheme may be divided into different classes of interests.
- 71 A resolution sum forms part of the scheme property of a litigation funding scheme. A responsible entity must ensure that, when distributing the resolution sum to general members of the scheme, it complies with the equal treatment duty.
- 72 The legal position as to the application of the equal treatment duty in this distribution context is not settled. In the absence of relief, we are aware that there are different interpretations of this duty. Some stakeholders understand the equal treatment duty to mandate that the resolution sum be distributed equally (in dollar terms) among general members of the scheme.

## **Our proposal to grant equal treatment relief**

### **Proposal**

- c1 We propose to grant industry-wide relief from the equal treatment duty to responsible entities of registered litigation funding schemes. This relief will be limited to enabling the distribution of a resolution sum obtained in a class action seeking remedies for scheme members to the



general members of the scheme. The resolution sum must be distributed in accordance with:

- (a) court orders or a determination by a court-appointed resolution administrator; and
- (b) the scheme constitution.

The proposed relief will expire on 22 August 2025.

#### *Your feedback*

C1Q1 Do you agree with the proposed relief? If not, why not?

C1Q2 Do you foresee any difficulties arising from the proposed condition that the distribution of the resolution sum must be in accordance with court orders or a determination by a court-appointed resolution administrator? If so, please provide specifics of the nature of any such difficulties, and how frequently these difficulties are likely to arise.

C1Q3 Is there a need for relief from the equal treatment duty (in relation to the distribution of a resolution sum) for responsible entities of registered litigation funding schemes that relate to multi-claimant actions that do not take the form of a class action? If so, please provide details of:

- (a) the matters giving rise to a need for relief; and
- (b) the nature of the conditions which would be appropriate to attach to the relief.

C1Q4 Do you consider any other related relief may be required? If so, please provide specifics of the nature of the relief and the reasons why the relief is required.

## Rationale

### Reasons for proposed relief

73 The general members of a litigation funding scheme may hold interests in the same class in the scheme. However, each general member's individual legal claim, pursued through the class action, underlies their respective interests in the scheme. The value of that legal claim will, in most circumstances, vary from member to member. The amount to be distributed to each general member from any resolution sum obtained in the class action may quite properly be informed by various factors that are individual to each member. These factors include the circumstances of the member's legal claim.

74 There is no settled legal position as to the application of the equal treatment duty in the context of a resolution sum distribution. Given this context of legal uncertainty, the proposed relief ensures that the equal treatment duty does not mandate equal distributions of a resolution sum to general members of a registered litigation funding scheme. The proposed relief also seeks to prevent the duty from unduly restricting the factors that responsible entities

can take into account when making such distributions. This will provide certainty to both scheme members and responsible entities.

75 The proposed relief is also consistent with our existing approach to the equal treatment duty. We have granted relief from the duty when we considered that the characteristics of scheme members warranted differential treatment: see, for example, [ASIC Corporations \(Hardship Withdrawals Relief\) Instrument 2020/778](#) and [ASIC Corporations \(Registered Schemes: Differential Fees\) Instrument 2017/40](#).

76 The proposed relief is limited to the distribution of a resolution sum obtained in a class action seeking remedies for scheme members. It is not intended to apply to any other aspect of the conduct of the class action, or the operation of the scheme.

77 We consider that the proposed relief is a technical modification to the statutory framework for managed investment schemes. Its purpose is to enable it to operate effectively in relation to litigation funding schemes.

#### **Reasons for the proposed conditions of relief**

78 The proposed relief enables general members to receive distributions from the resolution sum determined in accordance with court orders or by a court-appointed administrator. However, the distribution must accord with the member's entitlements under the scheme constitution.

79 The relief essentially preserves what we understand to be the current practices adopted by Australian courts when distributing a resolution sum in a class action. Our view is that the court overseeing the class action is best placed to consider and determine the appropriate manner of distribution of any resolution sum.

80 The relief also expressly preserves the existing obligation on the responsible entity to ensure that all payments out of scheme property are made in accordance with the scheme constitution.

#### **Reasons for the proposed duration of relief**

81 We have proposed granting the relief for a period ending on 22 August 2025. In settling on this time period, we have considered the five-year duration of our litigation funding related relief in [ASIC Corporations \(Litigation Funding Schemes\) Instrument 2020/787](#). This would mean that both sets of relief would lapse in August 2025. We consider that this provides adequate time for the Australian Government to consider any legislative changes to incorporate some or all of the relief in the Corporations Act or Corporations Regulations.

## Relief from the dollar disclosure requirements

### Dollar disclosure requirements for litigation funding schemes

- 82 The dollar disclosure provisions in the Corporations Act require various costs, fees, charges, expenses, benefits and interests to be stated as amounts in dollars in the PDS. The exceptions to this requirement are:
- (a) the responsible person for the PDS does not know the amounts;
  - (b) a retail client would not reasonably expect to find the amounts in the PDS; or
  - (c) we have provided relief.
- 83 The dollar disclosure provisions are designed to help consumers better understand information about costs, fees, charges, expenses and benefits.
- 84 A responsible entity will generally be required to give a PDS to prospective members of a registered litigation funding scheme who are retail clients.
- 85 We consider that the dollar disclosure requirements may require certain amounts to be disclosed in the PDS for interests in a registered litigation funding scheme. We refer to these amounts as the ‘relevant information’: see Table 2.

**Table 2: Summary of the relevant information**

Amount	Explanation
The scheme’s funding budget	The dollar amount up to which the litigation funder has agreed to provide funds, indemnities or both, to enable the general members of the scheme to seek remedies to which the general members may be legally entitled
The scheme’s legal costs budget	The dollar amount up to which the funder has agreed to provide funds, indemnities, or both, in relation to legal costs
Adverse costs insurance premiums	The premiums payable under an insurance policy which operates to indemnify a person against the risk of an adverse costs order being made against them in the scheme’s legal proceedings
The amount of funding required	The total amount of funds, indemnities, or both, that will or may be provided by the litigation funder to enable the general members of the scheme to seek remedies to which the general members may be legally entitled
The amount of legal costs	The total amount of fees, disbursements or both that will or may be charged by a lawyer or legal practice providing services for the purposes of the scheme

Amount	Explanation
The claim proceeds	The amount for which the claims being or to be pursued in the scheme's legal proceedings will or may be settled (including by way of any agreement, compromise, discontinuance, withdrawal, dismissal or waiver of all or part of the claims), or for which judgment is or may be given

### Interim dollar disclosure relief given by ASIC

- 86 As explained in [Regulatory Guide 182 Dollar disclosure](#) (RG 182), we will sometimes grant relief from the dollar disclosure requirements. We must be satisfied that, for compelling reasons, compliance would be impossible, unreasonably burdensome, or not in the interests of consumers.
- 87 In November 2020, we received a relief application from the Association of Litigation Funders of Australia. The association requested conditional relief from the requirement to disclose the relevant information in dollar terms in the PDSs of registered litigation funding schemes.
- 88 In April 2021, we granted this relief for a period of 12 months: see [ASIC Corporations \(Disclosure in Dollars\) Instrument 2016/767](#), as amended by [ASIC Corporations \(Amendment\) Instrument 2021/292](#). The interim relief exempts the responsible person for a PDS for a registered litigation funding scheme from the requirement to disclose the relevant information as an amount in dollars in the PDS. There are certain conditions that apply to this relief: see paragraph 91.
- 89 There was an immediate need for this relief, to help issuers preparing PDSs for registered litigation funding schemes. In light of this, we provided this relief in the interim pending further consultation on the proposal.
- 90 It appeared to us that disclosure of the relevant information in a PDS, which is a public document, would not be in the interests of scheme members. We considered the sensitive nature of the relevant information and the adverse strategic implications such disclosure may have for the scheme members of litigation funding schemes.
- 91 To ensure general members still receive the relevant information, our interim relief was granted subject to the following conditions:
- (a) The responsible entity must separately disclose the relevant information to each active general member of the litigation funding scheme. The disclosure may be made in writing or electronically.

Note: See key terms for a definition of 'active general member'.

- (b) The responsible entity must notify active general members of any material changes to the relevant information. They must be notified either:
- (i) 30 days before the change takes effect (in the case of changes to the adverse costs insurance premiums); or
  - (ii) before, or as soon as practicable after, the change occurs (for any other relevant information).

92 The relief is limited to PDS disclosure in dollar terms of the relevant information. It does not exempt disclosure of the relevant information in other documents where required or required disclosures of any other information.

## Our proposal to extend the dollar disclosure relief

### Proposal

c2 We propose to extend the dollar disclosure relief for registered litigation funding schemes provided under [ASIC Corporations \(Disclosure in Dollars\) Instrument 2016/767](#) on substantially the same terms. The relief would continue until 22 August 2025.

#### *Your feedback*

C2Q1 Do you agree with our proposal to continue the relief until 22 August 2025? If not, why not? Please provide specifics of any changes you consider should be made to the current terms of that relief.

C2Q2 Is there other information that would be required to be disclosed in dollar terms in a PDS for a registered litigation funding scheme that should not be included in the PDS? If so, please identify this information and provide specifics as to why dollar disclosure relief is warranted.

### Rationale

#### Reasons for granting relief

93 We considered the policy objective of the dollar disclosure provisions in developing proposal C2. In our opinion, any regulatory detriment in continuing the relief is likely to be outweighed by the benefits to litigation funding scheme members of not publicly disclosing the relevant information.

94 Disclosure of the relevant information (other than the adverse costs insurance premiums) in dollar terms benefits scheme members. It enables them to be informed of how well funded the scheme's legal proceeding will be.

95 In the case of claim proceeds, it also informs members of the amount the scheme can expect to receive if the proceeding is successful. Sometimes competing litigation funding schemes can arise from the same circumstances and involve different sets of funders and lawyers. When this occurs, dollar amounts may enable potential scheme members to better understand and compare different schemes and decide which scheme to join.

96 Disclosure of the adverse costs insurance premium would also benefit scheme members. As this information will generally be contained in the litigation funding agreement, legal retainer or costs agreement, it will be known to any active general member who has signed these agreements. This disclosure would ensure that potential scheme members were informed of a material cost that would be deducted from any resolution sum before distribution to scheme members. As with disclosure of the other amounts comprising the relevant information, disclosure of the premium would also help potential scheme members' compare competing schemes.

97 However, we consider that *public* disclosure of the relevant information could also disadvantage the members of the litigation funding scheme. The relevant information is strategically sensitive for general members of the scheme. The information represents, or enables inferences to be drawn as to:

- (a) the amount of litigation funding available for the legal action;
- (b) the estimated legal costs of pursuing the scheme's legal proceedings; and
- (c) the expected claim proceeds.

98 Public disclosure of the relevant information in the PDS may also provide a tactical advantage to opposing parties to the scheme's legal proceedings. Knowledge of these funding and costs amounts may enable opposing parties to:

- (a) adopt litigation strategies that deplete the funding available;
- (b) run up costs for the funded parties beyond the funding budget and legal costs budget for the scheme;
- (c) negotiate with the funded parties taking into account the adverse costs insurance policy limit; or
- (d) otherwise compromise the funded parties' position.

Such outcomes would not be in the interests of the members of the litigation funding scheme.

99 A number of Australian courts have also expressly recognised the appropriateness of non-disclosure of certain information that might reasonably be expected to confer a tactical advantage on another party to the scheme's legal proceedings. This includes information related to the budget or estimate of costs of the litigation, the funds available to the applicants,

and information that might reasonably be expected to indicate an assessment of the risks or merits of a claim.

Note: See, for example, paragraph 6.4 of [Class Actions Practice Note](#), Federal Court of Australia, 20 December 2019, and paragraph 13.7 of [Practice Note SC GEN 10 Conduct of group proceedings \(class actions\)](#), second revision, Supreme Court of Victoria, 13 October 2020.

### Reasons for the proposed conditions of relief

100 Members of registered litigation funding schemes have an interest in receiving the relevant information, including updates to that information. We consider the conditions currently in place (as summarised in paragraph 91) adequately recognise that interest. We do not consider that this information must be provided in the PDS.

101 We note that passive general members of a litigation funding scheme will not be provided with the relevant information. We do not consider it possible to provide passive general members with the relevant information in a way that does not result in the information being disclosed publicly.

### Reasons for the proposed duration of relief

102 We are proposing to continue the interim dollar disclosure relief for until 22 August 2025. In settling on this time period, we have considered the five-year duration of ASIC's litigation funding related relief in [ASIC Corporations \(Litigation Funding Schemes\) Instrument 2020/787](#). This would mean both sets of relief would lapse in August 2025. We consider that this provides adequate time for the Australian Government to consider any legislative changes to incorporate one or both sets of relief in the Corporations Act or Corporations Regulations.

## ASIC's pre-August 2020 instruments

### Relief from the National Credit Code

103 We provided temporary relief excluding a litigation funding arrangement or a proof of debt arrangement from the application of the National Credit Code. This relief enables the temporary operation of a litigation funding arrangement or proof of debt funding arrangement without compliance with the requirements of the National Credit Code: see [\[CO 13/18\]](#). This relief was subsequently replicated in [ASIC Credit \(Litigation Funding—Exclusion\) Instrument 2020/37](#).

- 104 ASIC Credit (Litigation Funding—Exclusion) Instrument 2020/37 defines:
- (a) a ‘litigation funding arrangement’ as an arrangement for participating in, conducting and funding legal proceedings brought by or on behalf of a person or persons; and
  - (b) a ‘proof of debt funding arrangement’ as an arrangement for proving claims made by a person or persons under Division 6 of Part 5.6 of the Corporations Act.

105 The instrument is due to expire on 31 January 2023.

### **Relief for conditional costs schemes**

106 The Full Federal Court held in *Brookfield* 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 Corporations Act.

107 ASIC provided temporary relief excluding conditional costs schemes from compliance with the requirements of the managed investments, AFS licensing, product disclosure and anti-hawking regimes in the Corporations Act: see [\[CO 13/898\]](#). This relief was subsequently replicated in [ASIC Corporations \(Conditional Costs Schemes\) Instrument 2020/38](#).

108 The instrument is due to expire on 31 January 2023.

### **Concerns with continuation of relief**

109 In February 2020, the Senate Standing Committee for the Scrutiny of Delegated Legislation raised concerns about the continuation of the exemptions provided under ASIC Credit (Litigation Funding—Exclusion) Instrument 2020/37 and ASIC Corporations (Conditional Costs Schemes) Instrument 2020/38. The committee assesses all legislative instruments subject to disallowance, disapproval or affirmative resolution by the Senate.

110 The committee stated its general preference that ‘exemptions from primary legislation by delegated legislation do not continue in force for such time as to operate as a de facto amendment to the principal Act’.

Note: See Letter from Senator the Hon. Concetta Fierravanti-Wells, Chair, Senate Standing Committee for the Scrutiny of Delegated Legislation to Senator the Hon. Jane Hume, Assistant Minister for Superannuation, Financial Services and Financial Technology, [Re: ASIC Credit \(Litigation Funding—Exclusion\) Instrument 2020/37 and ASIC Corporations \(Conditional Costs Schemes\) Instrument 2020/38](#) (PDF 3.92 MB), 27 February 2020.

111 The Committee also noted that the exemptions were expressed as interim in nature, to enable the Australian Government to consider relevant legislative changes. However, no such changes had been implemented in the time since the making of those instruments.



## Our proposal not to remake the pre-August 2020 instruments

### Proposal

- c3 We propose not to remake [ASIC Credit \(Litigation Funding—Exclusion\) Instrument 2020/37](#) when it expires on 31 January 2023.

Note: For certainty, we would formally repeal this instrument in advance. This repeal would take effect when the instrument expires on 31 January 2023.

#### *Your feedback*

C3Q1 Do you agree with our proposal not to remake this instrument? If not, why not?

- c4 We propose not to remake [ASIC Corporations \(Conditional Costs Schemes\) Instrument 2020/38](#) when it expires on 31 January 2023.

Note: For certainty, we would formally repeal this instrument in advance. This repeal would take effect when the instrument expires on 31 January 2023.

#### *Your feedback*

C4Q1 Do you agree with our proposal not to remake this instrument? If not, why not?

### Rationale

- 112 The temporary relief under the pre-August 2020 instruments was provided to allow the Australian Government to consider and finalise its policy position on the regulation of litigation funding arrangements.
- 113 The Australian Government has now resolved its broader approach to litigation funding: see the amendments to the Corporations Regulations, as implemented by the Corporations Amendment (Litigation Funding) Regulations 2020. While the [Explanatory Statement](#) to the amending regulations noted the existence of the pre-August 2020 instruments, it was silent as to whether the Australian Government intended that this relief continue in the future.
- 114 Further, litigation funding schemes are now generally subject to the managed investments and AFS licensing regimes under the Corporations Act. Therefore, the regulatory treatment of actions funded by way of conditional costs schemes arrangements (as a result of the operation of the ASIC Corporations (Conditional Costs Schemes) Instrument 2020/38) is no longer in line with that applicable to non-lawyer litigation funders.
- 115 Our proposal not to renew the temporary relief provided under the pre-August 2020 instruments also acknowledges the concerns raised by the Senate Standing Committee for the Scrutiny of Delegated Legislation (set out at paragraphs 109–110).

- 116 We are not currently minded to rollover or further extend the pre-August 2020 instruments when they expire in January 2023. It is a matter for the Australian Government to consider whether either or both exemptions should be replicated in the relevant Act or regulations at that time.

## D Regulatory and financial impact

117 In developing the proposals in this paper, we have carefully considered their regulatory and financial impact. On the information currently available to us we think they will strike an appropriate balance between:

- (a) providing AFS licensees and their advisers with clarity about their compliance obligations;
- (b) ASIC's regulatory role in promoting confident and informed participation by investors and consumers in the financial system;
- (c) promoting confident participation in the financial system; and
- (d) improving the performance of the financial system and the licensees in it.

118 We note that Treasury have prepared a Regulation Impact Statement (RIS) for the regulation of litigation funders but given the assessment by the Office of Best Practice Regulation (OBPR) of the RIS process for the proposal to regulate litigation funders, a post-implementation review is required to be completed within two years of its implementation.

119 Before settling on a final policy, we will comply with the Australian Government's regulatory impact analysis requirements by:

- (a) considering all feasible options, including examining the likely impacts of the range of alternative options which could meet our policy objectives;
- (b) if regulatory options are under consideration, notifying the OBPR; and
- (c) if our proposed option has more than minor or machinery impact on business or the not-for-profit sector, preparing a RIS.

120 All RISs are submitted to the OBPR for approval before we make any final decision. Without an approved RIS, ASIC is unable to give relief or make any other form of regulation, including issuing a regulatory guide that contains regulation.

121 To ensure that we are in a position to properly complete any required RIS, please give us as much information as you can about our proposals or any alternative approaches, including:

- (a) the likely compliance costs;
- (b) the likely effect on competition; and
- (c) other impacts, costs and benefits.

See 'The consultation process', p. 4.

## Key terms

Term	Meaning in this document
active general member	<p>A person who is a general member of a litigation funding scheme and who:</p> <ul style="list-style-type: none"> <li>• is party to any of the following agreements in relation to the scheme: <ul style="list-style-type: none"> <li>– a funding agreement with the litigation funder;</li> <li>– a retainer or costs agreement with the lawyer or legal practice providing services for the purposes of the scheme; or</li> </ul> </li> <li>• has notified the funder, lawyer or legal practice that the person agrees to, or wishes to, participate in the scheme</li> </ul>
ADI	<p>An authorised deposit-taking institution—a corporation that is authorised under the <i>Banking Act 1959</i>. ADIs include:</p> <ul style="list-style-type: none"> <li>• banks;</li> <li>• building societies; and</li> <li>• credit unions</li> </ul>
AFS licensee	<p>An Australian financial services licence under s913B of the Corporations Act that authorises a person who carries on a financial services business to provide financial services</p> <p>Note: This is a definition contained in s761A.</p>
AFS licensee	A person who holds an AFS licence under s913B of the Corporations Act
ASIC	Australian Securities and Investments Commission
ASIC Act	<i>Australian Securities and Investments Commission Act 2001</i>
Brookfield	<i>Brookfield Multiplex Ltd v International Litigation Funding Partners Pte Ltd</i> (2009) 180 FCR 11
Chameleon	<i>International Litigation Partners Pte Ltd v Chameleon Mining NL (Receivers and Managers Appointed)</i> [2012] HCA 45
chooses in action	A person's right to sue the defendant
class action	A legal proceeding where the claims of a group or class of persons are brought by one or a small number of named representatives

Term	Meaning in this document
closed class action	A class action where the ability to be a member is restricted to people who have retained a particular law firm and/or entered into an arrangement with a particular litigation funder
[CO 13/18] (for example)	An ASIC class order (in this example numbered 13/18) Note: Legislative instruments made from 2015 are referred to as ASIC instruments.
conditional costs schemes	Litigation funding schemes in which legal costs are wholly or substantially funded by conditional cost agreements
Corporations Act	<i>Corporations Act 2001</i> , including regulations made for the purposes of that Act
Corporations Regulations	Corporations Regulations 2001
Div 2 (for example)	A division of the Corporations Act (in this example numbered 2), unless otherwise specified
equal treatment duty	The duty of a responsible entity, in exercising its powers and carrying out its duties, to treat the members who hold interests of the same class equally (and members who hold interests of different classes fairly) Note: See s601FC(1)(d) of the Corporations Act
general member (of a litigation funding scheme)	A member of the scheme who is not the litigation funder, or a lawyer providing services for the purposes of the scheme, as defined in reg 7.1.04N(4) of the Corporations Regulations.
IDPS	An investor directed portfolio service as defined in <a href="#">Class Order [CO 13/763]</a> <i>Investor directed portfolio services</i> or any instrument that amends or replaces that class order
litigation funder	Has the meaning given in reg 7.1.04N(3)(e) of the Corporations Regulations
litigation funding scheme	Has the meaning given in reg 7.1.04N(3) of the Corporations Regulations
managed investment scheme	Has the meaning given in s9 of the Corporations Act
National Credit Act	<i>National Consumer Credit Protection Act 2009</i>
National Credit Code	National Credit Code at Sch 1 to the National Credit Act
OBPR	Office of Best Practice Regulation
open class action	A class action where the ability to be a member is not restricted to people who have retained a particular law firm and/or entered into an arrangement with a particular litigation funder

Term	Meaning in this document
passive general member	A person who is a general member of a litigation funding scheme and who is not an active general member
PDS	A Product Disclosure Statement—a document that must be given to a retail client for the offer or issue of a financial product in accordance with Div 2 of Pt 7.9 of the Corporations Act  Note: See s761A for the exact definition.
PJC	Parliamentary Joint Committee on Corporations and Financial Services
pre-August 2020 instruments	<a href="#">ASIC Credit (Litigation Funding—Exclusion) Instrument 2020/37</a> and <a href="#">ASIC Corporations (Conditional Costs Schemes) Instrument 2020/38</a>
Pt 7.1 (for example)	A part of the Corporations Act (in this example numbered 7.1), unless otherwise specified
reg 25 (for example)	A regulation of the Corporations Regulations (in this example numbered 25), unless otherwise specified
registered scheme	A managed investment scheme that is registered under s601EB of the Corporations Act
relevant information	Certain amounts that may need to be disclosed in the PDS for interests in a registered litigation funding scheme under the dollar disclosure requirements: see Table 2
resolution sum	A settlement sum or judgment award obtained in a legal proceeding seeking remedies for members of a litigation funding scheme pursued in connection with the scheme
responsible entity	A responsible entity of a registered scheme as defined in s9 of the Corporations Act
retail client	A client as defined in s761G of the Corporations Act and Div 2 of Pt 7.1 of the Corporations Regulations
RIS	Regulation Impact Statement
s25 (for example)	A section of the Corporations Act (in this example numbered 25), unless otherwise specified
Sch 1 (for example)	A schedule to the National Credit Act (in this example numbered 1)
scheme's legal proceedings	Legal proceedings seeking remedies for members of a litigation funding scheme
scheme member	A member of a managed investment scheme under s9 of the Corporations Act

## List of proposals and questions

Proposal	Your feedback
<p>B1 We propose to update RG 248 to provide guidance on how we apply the following definitions to litigation funding scheme:</p> <ul style="list-style-type: none"> <li>(a) 'managed investment scheme';</li> <li>(b) 'member'; and</li> <li>(c) 'scheme property'.</li> </ul> <p>Note: These definitions are set out in s9 of the Corporations Act</p> <p>Our guidance in RG 248 will be consistent with the summary guidance in paragraphs 23–51.</p>	<p>B1Q1 Do you agree we should provide guidance on how the 'managed investment scheme', 'member' and 'scheme property' definitions apply to litigation funding schemes?</p> <p>B1Q2 Do you agree that we should include our proposed guidance in an update to RG 248 or elsewhere? Please give reasons.</p> <p>B1Q3 Do you agree with our guidance on the definitions of 'managed investment scheme', 'member' and 'scheme property' to litigation funding schemes? If not, why not? Please provide specifics of any changes you consider should be made.</p> <p>B1Q4 Is further detail or clarification needed about how the relevant definitions apply? If so, please provide specifics of the additional information you consider should be provided.</p> <p>B1Q5 Are there other issues relating to definitions or interpretations of definitions, relevant to litigation funding schemes, on which you consider that guidance is necessary? If so, please provide specifics of the additional issues you consider should be addressed.</p>
<p>B2 We propose to update Regulatory Guide 166 Licensing: Financial requirements (RG 166) to provide guidance on how the 'special custody assets' definition in notional s912AA(11) of the Corporations Act applies to litigation funding schemes.</p> <p>Our guidance in RG 166 will be consistent with the summary guidance in paragraphs 58–62.</p>	<p>B2Q1 Do you agree with our guidance on the application of the definition of 'special custody assets' to scheme property of litigation funding schemes? If not, why not?</p>

Proposal	Your feedback
<p>C1 We propose to grant industry-wide relief from the equal treatment duty to responsible entities of registered litigation funding schemes. This relief will be limited to enabling the distribution of a resolution sum obtained in a class action seeking remedies for scheme members to the general members of the scheme. The resolution sum must be distributed in accordance with:</p> <p>(a) court orders or a determination by a court-appointed resolution administrator; and</p> <p>(b) the scheme constitution.</p> <p>The proposed relief will expire on 22 August 2025.</p>	<p>C1Q1 Do you agree with the proposed relief? If not, why not?</p> <p>C1Q2 Do you foresee any difficulties arising from the proposed condition that the distribution of the resolution sum must be in accordance with court orders or a determination by a court-appointed resolution administrator? If so, please provide specifics of the nature of any such difficulties, and how frequently these difficulties are likely to arise.</p> <p>C1Q3 Is there a need for relief from the equal treatment duty (in relation to the distribution of a resolution sum) for responsible entities of registered litigation funding schemes that relate to multi-claimant actions that do not take the form of a class action? If so, please provide details of:</p> <p>(a) the matters giving rise to a need for relief; and</p> <p>(b) the nature of the conditions which would be appropriate to attach to the relief.</p> <p>C1Q4 Do you consider any other related relief may be required? If so, please provide specifics of the nature of the relief and the reasons why the relief is required.</p>
<p>C2 We propose to extend the dollar disclosure relief for registered litigation funding schemes provided under ASIC Corporations (Disclosure in Dollars) Instrument 2016/767 on substantially the same terms. The relief would continue until 22 August 2025.</p>	<p>C2Q1 Do you agree with our proposal to continue the relief until 22 August 2025? If not, why not? Please provide specifics of any changes you consider should be made to the current terms of that relief.</p> <p>C2Q2 Is there other information that would be required to be disclosed in dollar terms in a PDS for a registered litigation funding scheme that should not be included in the PDS? If so, please identify this information and provide specifics as to why dollar disclosure relief is warranted.</p>
<p>C3 We propose not to remake ASIC Credit (Litigation Funding—Exclusion) Instrument 2020/37 when it expires on 31 January 2023.</p> <p>Note: For certainty, we would formally repeal this instrument in advance. This repeal would take effect when the instrument expires on 31 January 2023.</p>	<p>C3Q1 Do you agree with our proposal not to remake this instrument? If not, why not?</p>



Proposal	Your feedback
<p>C4 We propose not to remake ASIC Corporations (Conditional Costs Schemes) Instrument 2020/38 when it expires on 31 January 2023.</p> <p>Note: For certainty, we would formally repeal this instrument in advance. This repeal would take effect when the instrument expires on 31 January 2023.</p>	<p>C4Q1 Do you agree with our proposal not to remake this instrument? If not, why not?</p>