



SENATOR THE HON JANE HUME
ASSISTANT MINISTER FOR SUPERANNUATION,
FINANCIAL SERVICES AND FINANCIAL TECHNOLOGY

Ref: MS20-000502

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation
Room S1.111
Parliament House
Canberra ACT 2600

27 MAR 2020

Dear Senator Fierravanti-Wells

I am writing in response to your letter of 27 February 2020, on behalf of the Senate Standing Committee for the Scrutiny of Delegated Legislation (the Committee), requesting further information in relation to the *ASIC Corporations (Conditional Costs Schemes) Instrument 2020/38* [F2020L00034] (Conditional Costs Instrument) and the *ASIC Credit (Litigation Funding – Exclusion) Instrument 2020/37* [F2020L00035] (Litigation Funding Instrument).

The Committee has requested advice as to whether there is an intention to amend the *Corporations Act 2001* (Corporations Act) or the *National Credit Code Protection Act 2009* (Credit Act) to incorporate the exemptions set out in the Instruments because it is unclear from the explanatory statement about why the necessary legislative changes have not been implemented in the seven years since the original exemption instrument commenced.

By way of background, the instruments allow a lawyer or law firm providing a financial service in relation to a litigation scheme that is funded by a conditional costs agreement to operate without compliance with the requirements of the Corporations Act and, enable the temporary operation of a litigation funding scheme without compliance with the requirements of the Credit Act and the National Credit Code.

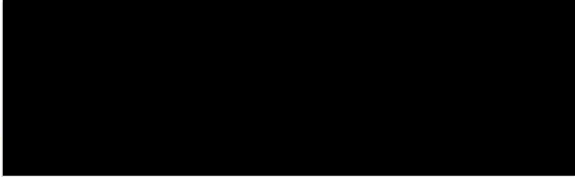
As pointed out by the Committee, both of these instruments extend the application of *ASIC Class Order [CO 13/18]* and *ASIC Class Order [CO 13/898]* that had effect until 12 July 2019.

The Litigation Funding Instrument reflects the findings of *International Litigation Partners Pte v Chameleon Mining NL (Receivers and Managers Appointed)* [2012] 246 CLR 455 which found that a litigation funding agreement in that matter was a “credit facility” within the meaning of the *Corporations Regulations 2001* and specifically excluded from the definition of a “financial product” under the Corporations Act.

The Conditional Costs Instrument reflects the findings of *Brookfield Multiplex Ltd v International Litigation Funding Partners Pte Ltd* [2009] 180 FCR 11 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 Chapter 5C of the Corporations Act. The instrument temporarily exempts conditional costs schemes from the definition of “managed investment scheme” in the Corporations Act, therefore, also exempting these schemes from related restrictions that apply to managed investment schemes under the Corporations Act.

As you may be aware, on 5 March 2020, the Attorney-General announced that a Parliamentary Joint Committee on Corporations and Financial Services (Joint Committee) will be asked to examine the litigation funding industry. As part of the terms of reference, the Joint Committee has been asked to consider the Australian financial services regulatory regime and its application on the litigation funding. This inquiry follows the release of a report by the Australian Law Reform Commission on class action proceedings and third-party litigation funders. The final report was released in December 2018. The Joint Committee was expected to table its final report by 9 November 2020 but the timing of this must now be highly uncertain given the onset of COVID-19.

Yours sincerely



Senator the Hon Jane Hume