CP 345 Litigation funding schemes: Guidance and relief

Australian Securities & Investments Commission

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Telephone +61 2 6246 3788 • *Fax* +61 2 6248 0639
Email mail@lawcouncil.asn.au
GPO Box 1989, Canberra ACT 2601, DX 5719 Canberra
19 Torrens St Braddon ACT 2612
Law Council of Australia Limited ABN 85 005 260 622
www.lawcouncil.asn.au

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2021 Executive as at 1 January 2021 are:

- Dr Jacoba Brasch QC, President
- Mr Tass Liveris, President-Elect
- Mr Ross Drinnan, Treasurer
- Mr Luke Murphy, Executive Member
- Mr Greg McIntyre SC, Executive Member
- Ms Caroline Counsel, Executive Member

The Chief Executive Officer of the Law Council is Mr Michael Tidball. The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council is grateful to the following bodies for contributing to this submission:

- the Business Law Section's Corporations Committee, Financial Services Committee and Insolvency & Restructuring Committee;
- the Federal Litigation and Dispute Resolution Section's Class Actions Committee;
- the Legal Practice Section's Australian Consumer Law Committee; and
- the Law Society of South Australia.

Introduction

1. The Law Council of Australia welcomes the opportunity to provide feedback to the Australian Securities & Investments Commission (**ASIC**) *Consultation Paper 345: Litigation funding schemes: Guidance and Relief* (**Consultation Paper**).

2. The Consultation Paper sets out ASIC's proposals to:

   - provide guidance on how key definitions in the Corporations Act *2001* (Cth) (**Corporations Act**) apply to litigation funding schemes;
   - grant legislative relief from the equal treatment duty of responsible entities of registered litigation funding schemes to enable the distribution of a resolution sum to members;
   - extend relief granted for litigation funding schemes under the *ASIC Corporations (Disclosure in Dollars) Instrument 2016/767* to 22 August 2025; and
   - not remake relief granted under *ASIC Credit (Litigation Funding-Exclusion) Instrument 2020/37* and *ASIC Corporations (Conditional Costs Schemes) Instrument 2020/38* when these instruments expire on 31 January 2023.

3. On the first of the above points, the Law Council agrees that it is helpful for ASIC to give guidance on how it applies key statutory definitions to litigation funding schemes. More detailed submissions in relation to other proposals within the Consultation Paper are set out below, with a particular emphasis on the intention to not remake relief granted under *ASIC Credit (Litigation Funding-Exclusion) Instrument 2020/37* and *ASIC Corporations (Conditional Costs Schemes) Instrument 2020/38* when these instruments expire on 31 January 2023.

Response to Consultation Paper proposals

Proposal to grant equal treatment relief

4. The Law Council considers that the proposed relief will provide certainty to responsible entities of registered litigation funding schemes and therefore supports this proposal.

ASIC Corporations (Disclosure in Dollars) Instrument 2016/767

5. The Law Council supports the proposed continuation of the *ASIC Corporations (Disclosure in Dollars) Instrument 2016/767* until 22 August 2025.

ASIC Credit (Litigation Funding-Exclusion) Instrument 2020/37

6. It is acknowledged that ASIC is proposing to not remake ASIC Credit (Litigation Funding-Exclusion) Instrument 2020/37 when it expires on 31 January 2023 primarily as a result of the Senate Standing Committee for the Scrutiny of Delegated Legislation's express preference not to have delegated legislation effectively modifying existing law.[1]

[1] See, Letter from the Senate Standing Committee for the Scrutiny of Delegated Legislation to the 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* (27 February 2020).

7. Regardless of whether any future exemption is determined by Parliament or through a continuation of the existing approach, the Law Council makes the following observations in relation to the substance of the exemption.

8. As a result of the *ASIC Credit (Litigation Funding-Exclusion) Instrument 2020/37*, litigation funding arrangements and proof of debt arrangements are currently excluded from the application of the *National Credit Code*. This relief was initially implemented in response to the High Court's decision in *International Litigation Partners Pte Ltd v Chameleon Mining NL (Receivers & Managers Appointed)* [2012] HCA 45 where the High Court found that litigation funders did not require an Australian Financial Services Licence (**AFSL**) because litigation funding was not a 'financial product' within the meaning of Chapter 7 of the Corporations Act.

9. The basis of the High Court's decision was a carve-out from financial products for credit facilities under subparagraph 765A(1)(h)(i) of the Corporations Act. At the time of the High Court's decision, the then government wished to exempt litigation funding from unnecessarily heavy-handed regulation and so, provided certain conflict of interest measures were put in place, along with providing an exemption from the requirement to hold an AFSL and to be subject to the managed investment scheme provisions, it also exempted litigation funding from the *National Credit Code* (see Class Order 13/18).

10. Subsequently, in July 2020, the exemptions from the requirement to hold an AFSL and to register litigation funding schemes as managed investment schemes were revoked. Part of making litigation funding arrangements subject to Chapter 7 included the implementation of Regulation 7.1.06(2A) of the *Corporations Regulations 2001* (Cth) (**Corporations Regulations**) declaring that litigation funding schemes were not credit facilities. However, the relationship between this regulation and the *National Credit Code* remains unclear. Declaring that litigation funding arrangements are not credit facilities for the purposes of avoiding the carve-out that would otherwise apply under section 765A of the Corporations Act does not necessarily mean that the *National Consumer Credit Protection Act 2009* (Cth) (**NCCP Act**) and *National Credit Code* do not apply to them.

11. The NCCP Act applies to businesses undertaking credit activities which, based on *International Litigation Partners Pte Ltd v Chameleon Mining NL (Receivers & Managers Appointed)* [2012] HCA 45, may well incorporate litigation funding. Without the implementation of the *ASIC Credit (Litigation Funding-Exclusion) Instrument 2020/37*, litigation funding schemes might therefore be subject to three sets of regulation: (1) AFSL licensing; (2) managed investment scheme registration; and (3) *National Credit Code* regulation.

12. Apart from concerns about delegated legislation implementing carve-outs from primary legislation which are not reflected in relation to the vast swathe of other carve-outs from Chapter 7 nor from the carve-outs from the *National Credit Code*, ASIC offers no compelling rationale for this extraordinary amount of ill-fitting regulation. Arguments in favour of retaining the exemption are as follows:

    (a) The managed investment scheme provisions of the Corporations Act are unsuitable for regulating litigation funding because they are premised on investors pooling funds to obtain an interest in a profit-making scheme and do not readily apply to classes made up of funded and non-funded members where scheme property (comprised of the pool of claims) cannot be readily valued. To make Chapter 5C's provisions workable apropos litigation funding, there are a significant number of exemptions and carve outs (which are set out in the Consultation Paper) from the responsibilities generally imposed. Adding another layer of regulation only exacerbates the current regulatory complexity.

(b) The original reason for exempting credit facilities from Chapter 7 was that they were then regulated by state-based consumer codes (now superseded by the *National Consumer Credit Code*). Hence, at the time of implementation, the legislature was of the view that there was no good reason for imposing two overlapping regulatory frameworks.[2]

(c) The view outlined in (b) remains pertinent. Much of the regulation under the *National Consumer Credit Code* replicates the duties imposed under Chapter 7 of the Corporations Act. There appears to be little consumer benefit in making litigation funding schemes subject to both regimes other than to impose additional compliance costs that will act as a barrier to entry. Under the NCCP Act, all entities providing consumer credit must hold an Australian Credit Licence (**ACL**). Licences are dispensed by ASIC, and ASIC must be satisfied that the entity is a fit and proper person to hold the licence. Licensees have general obligations of ensuring that:

(i) they act honestly, efficiently and fairly;

(ii) they comply with the *National Consumer Credit Code* and ensure that their representatives also comply with the Code;

(iii) they comply with standards and requirements as approved by ASIC;

(iv) they implement an approved internal dispute resolution scheme;

(v) they are a member of an approved external dispute resolution scheme;

(vi) they have relevant compensation arrangements in place;

(vii) their employees and representatives are competent and adequately trained;

(viii) they have appropriate and documented compliance systems in place;

(ix) they have adequate resources (financial, technological and human); and

(x) they have adequate risk management systems.

The conditions for holding an AFSL are similar to those outlined above. ACL holders are also subject to strict information disclosure requirements, are bound by responsible lending obligations, and must not provide credit if it would be unsuitable for a consumer. The terms of credit contracts may be subject to judicial scrutiny and variation if found unjust.

(d) The same concerns apply to dovetailing of the obligations under the managed investment provisions of Chapter 5C of the Corporations Act.

13. It is likely that law firms conducting cases on a conditional costs basis, whether class actions or individual claims, are not either dealing in a financial product, providing a credit facility within the meaning of regulation 7.1.06 of the Corporations Regulations, or providing credit within the meaning of the *National Consumer Credit Code*. If this is correct, the repeal of the *ASIC Credit (Litigation Funding-Exclusion) Instrument 2020/37* does not present an issue for law firms.

[2] See in this regard Australia, Senate, Financial Services Reform Bill 2001, Revised Explanatory Memorandum at [6.91]-[6.92].

ASIC Corporations (Conditional Costs Schemes) Instrument 2020/38

14. Similar to the above comments in relation to ASIC Credit (Litigation Funding-Exclusion) Instrument 2020/37, it is acknowledged that ASIC is proposing not to remake ASIC Corporations (Conditional Costs Schemes) Instrument 2020/38 when it expires on 31 January 2023 as a result of the Senate Standing Committee for the Scrutiny of Delegated Legislation's express preference not to have delegated legislation effectively modifying existing law.

15. Regardless of whether any future relief is determined by Parliament or through a continuation of the existing approach, the Law Council makes the following observations in relation to the substance of the instrument.

16. The category 'litigation funding scheme' is not homogenous. There are at least two different models of funding class action litigation: they comprise professional litigation funders whose business model is the funding of legal and other costs and law firms conducting class actions on a conditional or contingent costs basis. While it may be that law firm-based funding is not a managed investment scheme, that issue is not settled.

17. The Explanatory Statement dated 23 July 2020 to the *Corporations Amendment (Litigation Funding) Regulations 2020* (Cth) said of the Conditional Costs Schemes Instrument:

    > *This legislative instrument excludes class actions and proof of debt arrangements that are funded by conditional costs agreements (such as an agreement under which a lawyer agrees to act on a no win, no fee basis) from the definition of a MIS. The legislative instrument also provides exemptions from the Corporations Act requirements (such as the need to hold an AFSL, the anti-hawking provisions and product disclosure requirements).*

18. The rationale proffered by ASIC for extending the managed investment scheme and AFSL requirements imposed on litigation funders to lawyers operating on a conditional fee basis is to ensure that lawyers are subject to the same regulation as non-lawyers. However, there are good reasons for treating the regulation of funding schemes differently from the regulation of law firm cost agreements. This and other problems raised by this proposal are outlined below.

    (a) There is an assumption underpinning the current Instrument that *Brookfield Multiplex Ltd and Another v International Litigation Funding Partners Pte Ltd and Others* (2009) 180 FCR 11 (***Brookfield***) dictates that law firm conditional retainer agreements with class members fall within Chapter 5C of the Corporations Act. That is a debatable proposition since *Brookfield* dealt with a closed class of claim holders who had all signed interlocking funder and retainer agreements, whereas the Conditional Costs Schemes Instrument only exempts non-funded conditional fee agreements. Moreover, the reasoning in *Brookfield* has been superseded by changes to Corporations Regulations, regulation 5C.11.01 and regulation 7.1.04N(3). Accordingly, although it is far from clear that Chapter 5C applies to conditional fee retainers between class law firms and class members, the Instrument aims to provide a degree of certainty for class law firms acting without the support of a litigation funder. Removing the Instrument will therefore lead to costly satellite litigation to determine the extent of the application of the reasoning in *Brookfield* beyond the special circumstances of that case.[3]

(b) More importantly, there will be negligible regulatory benefit if *Brookfield's* reasoning is extended to a scheme comprised of some class members and a law firm acting under conditional retainer agreements without the support of a funder. Unlike funders, legal practitioners are subject to extensive regulation under the *Legal Profession Uniform Law* (New South Wales, Victoria and, from 1 January 2022, Western Australia) and other State and Territory legislative counterparts. There are high barriers to entry – only fit and proper persons with recognised qualifications and training may be admitted to the legal profession. When granted a practising certificate, legal practitioners are subject to a raft of ethical and regulatory obligations as well as high levels of mandatory indemnity insurance. Class law firms owe strict fiduciary duties to their clients which funders do not owe to class members. Class law firms also owe duties to act for the benefit of class members with whom they do not have retainer agreements. By contrast with funders, legal practitioners are subject to ongoing regulation overseen by regulatory bodies designated under legal profession laws. In all States, consumer complaints and disciplinary matters are the responsibility of statutory independent bodies. Failure to comply with the legal profession laws and maintain appropriate standards of professional conduct may lead to disciplinary proceedings, including before independent disciplinary Tribunals and Supreme Courts in each jurisdiction. Adding another layer of regulation from ASIC would not add any value to the work of these bodies and may be counter-productive by introducing a level of complexity that works against effective regulation.

Legal costs agreements are subject to broad levels of regulation including an overarching requirement that costs be fair and reasonable and further requirements including the provision of a written costs agreement accompanied by costs estimates, and limits on uplift fees. Legal services consumers who dispute costs may have those costs reviewed by legal profession regulatory authorities or by way of court-based cost assessments. Furthermore, in class proceedings legal costs are heavily scrutinised when settlements are submitted for Court approval or following judgment, and a representative proceeding cannot be settled or discontinued without the approval of the Court.

Additionally, group members are required to be notified of certain matters in relation to a representative proceeding, including the right to opt out. In practice, it is commonplace for notices to group members to include extensive information in relation to the terms on which a given proceeding is funded.

Given these safeguards, it appears that class member interests are already adequately protected and that making conditional fee agreements subject to managed investment regulation would only act to inhibit class law firms from offering this kind of fee arrangement.

(c) If a law firm were to promote or operate a managed investment scheme, it would be acting unlawfully under section 258 of the *Legal Profession Uniform Law*.[4]

[3] Satellite litigation will take, it is estimated, over 2 years to resolve the issues during which time many conditional fee class actions will either not be commenced or will be stayed pending the outcome for fear that the lawyers conducting the actions will be in breach of the Corporations Act and the *Legal Profession Uniform Law*.

[4] In Victoria and NSW. Each other jurisdiction in Australia has a similar proscription against lawyers "promoting or operating" a managed investment scheme and rule 41.1 of the *Legal Profession Uniform Law*

Currently, temporary relief from section 258 is provided by Legal Profession Uniform General Rules, rule 91BA, however this only applies to litigation funding schemes where a funder is involved under Corporations Regulations, regulation 7.1.04N(3).[5] Accepting instructions and acting on the record in a class action for the representative plaintiff may be considered 'operating' a managed investment scheme,[6] whether it be funded by a third party or funded by the law practice on a conditional fee basis.[7]

(d) It appears unlikely that group costs orders made under section 33ZDA of the *Supreme Court Act 1986* (Vic) will fall within Chapter 5C of the Corporations Act. Nonetheless, arguments have been put (applying *Brookfield's* reasoning) that such orders would also be caught by the managed investment scheme provisions.[8] Revoking the Conditional Costs Schemes Instrument will not resolve that uncertainty.

(e) The rationale for extending the regulation of litigation funding schemes to law practices was expressed by the Parliamentary Joint Committee (**PJC**) report at [14.183].[9] However, the PJC call for extended regulation was in anticipation of law firms being paid on a contingency fee basis, not a conditional fee basis.[10] A contingency fee is a percentage of the damages pool. A conditional fee is a fee based on the firm's usual hourly rates plus an uplift. Contingency fees are prohibited in all Australian jurisdictions save for the recently introduced s33ZDA.

(f) Whether a conditional fee or contingency fee is charged, to impose the AFSL/ managed investment scheme regime on a law firm (assuming the prohibition against conducting a managed investment scheme was lifted) will not put it in the same position as a litigation funder at all. On the contrary, it would put the law firm at a fundamental disadvantage because not only is a litigation funder not subject to the requirements in [18(b)] above but the reward flowing to a law firm on the successful conclusion of a class action will be far less than the payment that a funder would expect on court approval.

An analysis prepared by the Law Council of most Australian class action proceedings resolved in the period from 2001 to 2020 reveals that (i) approved legal costs and disbursements totalled 15.14% of the gross settlement amount; (ii) the commissions earned by funders totalled 26.9% of the gross settlement

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Australian Solicitors' Conduct Rules 2015 provides that solicitors must not operate a managed investment scheme as part of their law practice

[5] The Legal Services Council has resolved to remove the temporary nature of rule 91BA

[6] "A person operates a managed investment scheme if they do 'acts which constitute the management of or the carrying out of the activities which constitute the managed investment scheme.' Operate is to be given its ordinary English meaning. It has included a person who had formulated and directed the scheme, was actively involved in the scheme's day to day operations, and supervised others in their performance: Information sheet for legal practitioners, June 2018, Legal Services Council

[7] Rule 91B of the Legal Profession Uniform General Rules permits a law practice to provide legal services in relation to a managed investment scheme despite an associate having an interest in the scheme if the legal services are provided to the operator of the scheme or no associate has a substantial interest in the scheme

[8] See: Second Supplementary Submission by Omni Bridgeway Limited, Inquiry into Litigation Funding and Regulation of the Class Action System (Nov, 2020).

[9] Parliamentary Joint Committee on Corporations and Financial Services report into litigation funding and the regulation of the class action industry: December 2020.

[10] *". . . if a law firm undertakes to run a class action on a contingency fee basis, they should be subject to similar regulatory arrangements. To that end, the committee endorses the application of the same financial services regulation that applies to litigation funders. The committee considers that lawyers who undertake class actions on a contingency fee basis should hold an AFSL.*" [14.183]

sum; and (iii) funders recovered costs as well as commissions making their total recovery 41.4% of the gross settlement sum.[11]

Law firms acting on a conditional fee basis without third party funding may be given court approval to recover an uplift on their fees although this is by no means guaranteed. These fees will in all cases be significantly less than funders are paid as funders recover all costs and disbursements paid, plus they charge a substantial commission on the gross settlement sum.

Law firms that are paid by way of a group costs order will not be paid a percentage of a gross sum that includes solicitor client costs, nor will they recover solicitor client costs as funders do. So even when a law firm is paid a contingency fee, the recovery will be far less than the third-party funding competitor. Also, by dint of statute, the law firm is required to provide all defendants with an indemnity against adverse costs and provide security for costs. The same obligations are not statutorily imposed on litigation funders.

(g) If the Conditional Costs Schemes Instrument is revoked without more, law firms will be unwilling to accept instructions on a conditional fee basis to conduct class actions due to the risk of being found guilty of professional misconduct for operating a managed investment scheme, due to the very broad interpretation of such schemes in *Brookfield*.[12]

(h) If each jurisdiction in Australia lifted the ban on law firms operating managed investment schemes, the repeal of the Conditional Costs Schemes Instrument may see one or two law firms obtaining an AFSL and taking the expensive steps to comply with the managed investment scheme regime but very few will be willing or able to do that. The cost of compliance will render conditional fee class actions unviable for most firms.

(i) If *Brookfield* is not overturned and the broad interpretation of a managed investment scheme captures conditional fee class actions, then the consequence will be that most law firms, if not all, will no longer conduct such class actions. Certainly, community legal centres and Legal Aid Commissions[13] will be forever excluded. As such, the most socially advantageous class actions for consumers and those seeking compensation for human rights abuses and environmental destruction will either cease to exist or will be very rare.[14]

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[11] Paragraph [14] of the submission by the Law Council of Australia dated 16 June 2020 to the Parliamentary Joint Committee on Corporations and Financial Services inquiry into Litigation funding and the regulation of the class action industry. It should be noted that the “legal fees” identified in Attachment A to the report will include uplift in some of the actions for which there was no funder

[12] This is because the promise given to the practice to pay costs from the benefits produced by the class action can be seen to be a “contribution” of “money or moneys worth” that is “pooled, or used in a common enterprise” with the group members to “produce financial benefits”. Sundberg and Dowsett JJ agreed with Jacobson J’ in concluding that “promises given by the group members … may properly be described as “money’s worth”” (at [51]). Jacobson J at [238] stated that it was not possible “… to exclude a contractual promise to pay a sum of money from the concept of “money’s worth”.

[13] See for example *Fernandez v NSW* (No 2) [2021] NSWSC 471 that was conducted by Legal Aid NSW.

[14] For example: *Giles v Commonwealth of Australia* [2011] NSWSC 582; *Konneh v State of NSW* (No 3) [2011] NSWSC 235; *Gray v Cash Converters International Limited and others (No.2)* [2015] FCA 1109; *Duval-Comrie v Commonwealth of Australia* [2016] FCA 1523; *Stanford v DePuy International Ltd (No 6)* [2016] FCA 1452; *McAlister v State of NSW (No 3)* [2018] FCA 636; *Wotton v State of Queensland (No 10)* [2018] FCA 915; *Simpson v Thorn Australia Pty Ltd trading as Radio Rentals (No 5)* [2019] FCA 2196; *Pearson v State of Queensland (No 2)* [2020] FCA 619; *Lynch v Cash Converters Personal Finance Pty Limited (No 5)* [2020] FCA 389; *Gill v Ethicon Sàrl (No 7)* [2020] FCA 700; *Jenkings v Northern Territory of Australia (N0 4)* [2021] FCA 839; *Sharma & Others v Minister for the Environment* [2021] FCA 560; *Fernandez v NSW (No 2)* [2021] NSWSC 471;

(j) As well, unless there is a clear promise to protect current conditional fee class actions from the AFSL/managed investment scheme regime by way of a grandfathering instrument, it would be understandable if law firms were to stop accepting instructions to conduct class actions on a conditional fee basis now. This is because class actions often take a number of years to conclude and a firm does not want to find after two years of speculating on fee recovery that it not only has to abandon the action on the revocation of the Conditional Costs Schemes Instrument but it may also be liable to pay the defendant's costs for discontinuing the class action. It is likely that the safest course will be to advise their clients to enter into a litigation funding arrangement with a licenced litigation funder. The likely outcome of such regulatory shift will be to decrease the net returns to group members in class actions (see above). This is the very opposite of what the Federal Government has stated its intent to be.

(k) If the Instrument is retained, it will need to be revised to ensure coherence with the definitions of litigation funding schemes verses litigation funding arrangements and insolvency litigation funding arrangements incorporated in current regulation 5C.11.01 and regulation 7.1.04N(3) of the Corporations Regulations. The Law Council previously identified the concern of adverse impacts in the conduct of recovery litigation in the insolvency industry in general.[15] The Law Council is happy to work with ASIC and/or Treasury to ensure that a coherent regime is in place.

Timing of revocation of relief instruments

19. As noted above, ASIC has proposed not to remake the ASIC Credit (Litigation Funding-Exclusion) Instrument 2020/37 and ASIC Corporations (Conditional Costs Schemes) Instrument 2020/38 when they expire on 31 January 2023 on the basis that, on an ongoing basis, these matters should ideally be dealt with in legislation.

20. While there an assumption has been made that the relevant legislation would be in place by 31 January 2023, it is possible that this may not be the case.

21. In order to factor in the possibility of any relevant replacement legislation not being ready by 31 January 2023, we would suggest that it may be more prudent for ASIC to leave the instruments as they currently stand and then:

    (a) if legislation which supersedes these instruments comes into effect before they expire on 31 January 2023 – revoke each respective instrument with effect from the commencement of the relevant legislation which effectively supersedes it; and

    (b) if no legislation dealing with these matters is made on or before 31 January 2023 - further extend the relief for a further three year (or other) period on the basis that it will be revoked earlier if and when legislation dealing with the relevant matter is made.

22. This suggestion is made as in the Law Council's experience the timing for law reform can take significantly longer than anticipated. By way of example, ASIC Class Order [CO 14/1262] *Relief for 31 day notice term deposits* was made in 2014, initially for an 18 month period, on the basis that this would allow sufficient time for the Federal

[15] Law Council of Australia, *Litigation funding and the regulation of the class action industry*, Submission to the Parliamentary Joint Committee on Corporations and Financial Services (16 June 2020) < https://www.lawcouncil.asn.au/resources/submissions/litigation-funding-and-the-regulation-of-the-class-action-industry>.

Government to consider making legislation governing whether certain term deposits could be treated as 'basic deposit products' in circumstances where customers are required to give 31 days' notice of early withdrawal. This relief is still in place after being extended a number of times because no such legislation has been forthcoming – most recently on 28 June 2021 the expiry date was amended from 30 June 2021 to 30 June 2024 (ASIC Corporations (Amendment) Instrument 2021/500).

Not-for-profit litigation funders

23. The Consultation Paper sets out a range of proposals, which include providing guidance as to the application of key definitions within the Corporations Act to litigation funding schemes. Of particular relevance was Recommendation 28 of the Final Report of the PJC, which suggested consultation on the best way to exempt not-for-profit litigation funders who:

    - held charitable status at the time the regulations were issued;
    - have run no more than three class actions in the past five years; and
    - exist solely to support and protect the members of the associated charitable entity.

24. The Law Council has received advice in relation to one such not-for-profit litigation fund, namely the Litigation Assistance Fund which is currently operated by the Law Society of South Australia (**LSSA**). This is a not-for-profit litigation funder which has consistently suggested the regulation of litigation funders should indeed exempt/distinguish the not-for-profit funders, noting that the regulatory regime which commenced in 2020 did not do this.

25. The LSSA's Litigation Assistance Fund was successful in individually applying to ASIC for a level of exemption and is grateful to ASIC for that decision. However, the LSSA notes that as ongoing regulation of the sector occurs, a broader exemption/distinction for the non-profit funders would provide clarity and certainty and potentially avoid the need for litigation funders such as that operated by the LSSA to engage in individual applications for exemption.