

**ASIC CLASS ORDER [CO 11/942]
EXPLANATORY STATEMENT**

Prepared by the Australian Securities and Investments Commission
Corporations Act 2001

The Australian Securities and Investments Commission (*ASIC*) makes [CO 11/942] under paragraphs 601QA(1)(b), 926A(2)(a), 992B(1)(a) and 1020F(1)(a) of the *Corporations Act 2001* (the *Act*).

Paragraph 601QA(1)(b) of the Act provides that the Australian Securities and Investments Commission may declare that Ch 5C of the Act apply to a person as if the provisions were omitted, modified or varied in a certain way.

Paragraph 926A(2)(a) of the Act provides that ASIC may exempt a person from a provision of Pt 7.6 of the Act (other than Divs 4 and 8).

Paragraph 992B(1)(a) of the Act provides that ASIC may exempt a person from a provision of Pt 7.8 of the Act.

Paragraph 1020F(1)(a) of the Act provides that ASIC may exempt a person from a provision of Pt 7.9 of the Act.

Background

On 20 October 2009, the Full Federal Court held in *Brookfield Multiplex Ltd v International Litigation Funding Partners Pte Ltd* [2009] FCAFC 147 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 Act.

On 4 May 2010, the Government announced that it would make regulations exempting representative proceedings and proof of debt arrangements from:

- (a) the definition of managed investment scheme in s9 of the Act; and
- (b) Pts 7.6, 7.7, 7.8 and 7.9 of the Act as long as there are appropriate arrangements in place to manage conflicts of interest.

ASIC executed [CO 10/333] on 5 May 2010. [CO 10/333]:

1. provides for Ch 5C to apply as if the definition of a managed investment scheme in s9 of the Act were varied to exclude a litigation funding scheme and a proof of debt funding scheme.
2. exempts funders, lawyers and their representatives and other persons from the requirements to hold an AFSL or act as an authorised representative of a licensee to provide financial services associated with a litigation funding scheme and a proof of debt funding scheme.
3. exempts from the requirement comply with the disclosure provisions in Pt 7.9 of the Act in relation to interests in a litigation funding scheme and a proof of debt funding scheme.

On 15 March 2011, the New South Wales Court of Appeal held in *International Litigation Partners Pte Ltd v Chameleon Mining NL* [2011] NSWCA 50 that a litigation funding agreement was a financial product under s763A of the Act because it is a facility through which financial risk is managed.

On 23 June 2011, ASIC executed [CO 11/555]. [CO 11/555] varied [CO 10/333] to exempt a person from the requirements in the Act for a litigation funding arrangement or a proof of debt funding arrangement to the extent the arrangement, or an interest in the arrangement, is otherwise characterised as a financial product, or an interest in a financial product, including an interest in a single member arrangement that is characterised as a financial product.

The relief in [CO 10/333] originally had effect until 30 September 2010. [CO 11/555] extended the transitional relief to 30 September 2011.

Purpose of [CO 11/942]

[CO 11/942] will further enable the temporary operation of a litigation funding scheme and a proof of debt funding scheme that is characterised as a managed investment scheme under the Act without compliance with the requirements of the Act until 29 February 2012.

[CO 11/942] will also extend the transitional relief from the requirements in the Act for a litigation funding arrangement and a proof of debt funding arrangement that is otherwise characterised as a financial product, or an interest in a financial product, until 29 February 2012.

This is to allow additional time for the Government to implement the legislative reform for litigation funding schemes and proof of debt schemes.

Operation of [CO 11/942]

[CO 11/942] varies [CO 10/333] by replacing 30 September 2011 in paragraph 10 with 29 February 2012.

Consultation

ASIC did not undertake consultation with respect to [CO 11/942] as it provides relief only for a short period pending implementation of the Government's decision by regulation.