

**ASIC CLASS ORDER [CO 12/158]  
EXPLANATORY STATEMENT**

Prepared by the Australian Securities and Investments Commission  
*Corporations Act 2001*

The Australian Securities and Investments Commission (*ASIC*) makes Class Order [CO 12/158] 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 ASIC may declare that Chapter 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 Part 7.6 of the Act (other than Divisions 4 and 8).

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

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

**1. 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 section 9 of the Act; and
- (b) Parts 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 Class Order [CO 10/333] on 5 May 2010. This class order:

- 1. provides for Chapter 5C to apply as if the definition of a "managed investment scheme" in section 9 of the Act were varied to exclude a litigation funding scheme and a proof of debt funding scheme; and
- 2. exempts funders, lawyers and their representatives and other persons from the requirements to hold an Australian financial services licence 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; and

3. exempts persons from the requirement to comply with the disclosure provisions in Part 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 section 763A of the Act because it is a facility through which financial risk is managed.

On 23 June 2011, ASIC executed Class Order [CO 11/555]. This class order varied Class Order [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, including an interest in a single member arrangement that is characterised as a financial product.

The relief in Class Order [CO 10/333] originally had effect until 30 September 2010. The transitional relief was extended to 29 February 2012.

## **2. Purpose of [CO 12/158]**

Class Order [CO 12/158] 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 30 September 2012.

Class Order [CO 12/158] 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 until 30 September 2012.

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

## **3. Operation of [CO 12/158]**

Class Order [CO 12/158] varies [CO 10/333] by replacing 29 February 2012 in paragraph 10 with 30 September 2012.

## **4. Statement of Compatibility with Human Rights**

This statement is prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* because it does not engage any of the applicable rights or freedoms.

## **5. Consultation**

ASIC consulted with the Department of the Treasury before making the class order. ASIC did not undertake further consultation with other stakeholders because the class order provides relief only for a short period pending implementation of the Government's decision by regulation.