

**ASIC CLASS ORDER [CO 12/1301]
EXPLANATORY STATEMENT**

Prepared by the Australian Securities and Investments Commission
Corporations Act 2001

The Australian Securities and Investments Commission (*ASIC*) makes Class Order [CO 12/1301] 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 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.

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 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 Class Order [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 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.
3. exempts persons from the requirement to 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 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.

On 12 July 2012, the Corporations Amendment Regulation 2012 (No.6) (the Regulations) were made. The Regulations:

1. clarify that litigation funding schemes and proof of debt funding schemes are not managed investment schemes under the Act;
2. exempt a person from the licensing, conduct and disclosure requirements in Ch7 of the Act in relation to a litigation scheme or proof of debt scheme; and
3. address conflicts of interest in litigation schemes and proof of debt schemes.

The Regulations were registered on 13 July 2012 and commences on the day that is six months after it is registered.

The relief in [CO 10/333] (as varied) had effect until 30 September 2012.

2. Purpose of [CO 12/1301]

Class Order [CO 12/1301] 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 13 January 2013.

Class Order [CO 12/1301] 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 13 January 2013.

This is to allow a person providing a financial service in relation to a litigation scheme or proof of debt scheme to smoothly transition to the requirements of the Regulations which include establishing and maintaining adequate arrangements to manage conflicts of interest.

3. Operation of [CO 12/1301]

Class Order [CO 12/1301] varies [CO 10/333] by replacing “30 September 2012” in paragraph 10 with “13 January 2013”.

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 Treasury in relation to making this instrument. ASIC did not undertake wider consultation with respect to [CO 12/1301] as it extends existing relief for a short period pending the commencement of the Regulations.