**ASIC CLASS ORDER [CO 13/19]**

**EXPLANATORY STATEMENT**

Prepared by the Australian Securities and Investments Commission

*Corporations Act 2001*

The Australian Securities and Investments Commission (***ASIC***) makes Class Order [CO 13/19] 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 applies to a person as if the specified provisions were omitted, modified or varied in a certain way.

Paragraph 926A(2)(a) of the Act provides that ASIC may exempt a class of persons from all or specified provisions 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 class of persons from all or specified provisions of Part 7.8 of the Act.

Paragraph 1020F(1)(a) of the Act provides that ASIC may exempt a class of persons from all or specified provision of Part 7.9 of the Act.

**1. Background**

On 20 October 2009, the Full Court of the 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.

On 5 May 2010, ASIC made Class Order [CO 10/333] (the ***principal class order***).

The principal class order:

(a) 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.

(b) 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.

(c) 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 the litigation funding agreement in that matter 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 varied the principal class order 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 ***amending regulations***) were made. The amending regulations:

(a) clarify that litigation funding schemes and proof of debt funding schemes are not managed investment schemes under the Act;

(b) exempt a person from the licensing, conduct and disclosure requirements in Chapter 7 of the Act in relation to a litigation scheme or proof of debt scheme; and

(c) address conflicts of interest in litigation schemes and proof of debt schemes.

The amending regulations will commence on 13 July 2013.

On 6 December 2012, the *Corporations Amendment Regulation 2012 (No. 6) Amendment Regulation 2012 (No. 1)* was made to address matters arising from the *Corporations Amendment Regulation 2012 (No. 6)*. The *Corporations Amendment Regulation 2012 (No. 6) Amendment Regulation 2012 (No. 1)* will commence on 12 July 2013.

 **2. Purpose of this class order**

The purpose of the class order is to allow a person providing a financial service in relation to these kinds of schemes and arrangements to smoothly transition to the requirements of the amending regulations which include establishing and maintaining adequate arrangements to manage conflicts of interest.

**3. Operation of the class order**

This class order amends the principal class order.

This class order will extend until 12 July 2013 the transitional relief under the principal class order from the requirements in the Act for a litigation funding scheme and a proof of debt funding scheme that is characterised as a managed investment scheme under the Act.

The class order will also extend until 12 July 2013 the transitional relief under the principal class order 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.

**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 before making this class order. ASIC did not undertake wider consultation with respect to the class order as it extends existing relief for a short period pending the commencement of the amending regulations.