

ASIC CREDIT (AMENDMENT) INSTRUMENT 2017/641
EXPLANATORY STATEMENT

Prepared by the Australian Securities and Investments Commission
National Credit Code

The Australian Securities and Investments Commission (*ASIC*) makes ASIC Credit (Amendment) Instrument 2017/641 (*Legislative Instrument*) under subsection 6(17) of the National Credit Code (the *Code*), which is found in Schedule 1 to the *National Consumer Credit Protection Act 2009* (the *Credit Act*).

Subsection 6(17) of the Code provides that ASIC may exclude from the application of the Code the provision of credit of a specified class.

1. Background

The High Court of Australia held in *International Litigation Partners Pte Ltd v Chameleon Mining NL (Receivers and Managers Appointed)* [2012] HCA 45 that the litigation funding agreement in that matter was a “credit facility” within the meaning of regulation 7.1.06 of the *Corporations Regulations 2001* (the *Regulations*) and specifically excluded from the definition of a “financial product” under subparagraph 765A(1)(h)(i) of the *Corporations Act 2001* (the *Act*).

Accordingly, the litigation funder was exempt from the requirement to hold an Australian financial services licence. The High Court considered the definition of “credit” in subregulation 7.1.06(3) of the Regulations and held that the litigation funding agreement was “credit” because it was a form of financial accommodation provided by the litigation funder to the litigant and its provision “for any period” was a “credit facility”. Under the litigation funding agreement, the litigation funder had agreed to pay the litigant’s legal bills within 28 days of receiving written notification. The litigant in turn agreed to reimburse the litigation funder if the proceedings were resolved in its favour.

The decision of the High Court has highlighted that, depending on the terms of a litigation funding agreement, a litigation funding arrangement or a proof of debt funding arrangement may amount to the provision of “credit” to which the Credit Act and Code applies.

ASIC Class Order [CO 13/18] provides relief to enable the temporary operation of a litigation funding arrangement and a proof of debt funding arrangement without compliance with the requirements of the Credit Act and Code until 12 July 2017.

2. Purpose of the Legislative Instrument

The Legislative Instrument will extend the relief in ASIC Class Order [CO 13/18] to further enable the operation of a litigation funding arrangement and a proof of debt funding arrangement without compliance with the requirements of the Credit Act and Code until 12 July 2019. This is to provide certainty for litigation funders, lawyers and members of a litigation funding arrangement and a proof of debt funding arrangement.

3. Operation of the Legislative Instrument

The Legislative Instrument amends ASIC Class Order [CO 13/18] by replacing "12 July 2017." in paragraph 5 with "12 July 2019."

4. Consultation

ASIC consulted with Treasury in relation to making the Legislative Instrument. ASIC did not undertake wider consultation on extending the operation of ASIC Class Order [CO 13/18] because the extension is a transitional measure and is minor and machinery in nature.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

ASIC Credit (Amendment) Instrument 2017/641

ASIC Credit (Amendment) Instrument 2017/641 (***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*.

Overview of the class order

The purpose of the Legislative Instrument is to amend ASIC Class Order [CO 13/18]. ASIC Class Order [CO 13/18] allows the temporary operation of a litigation funding arrangement and a proof of debt funding arrangement without compliance with the requirements of the Credit Act and Code until 12 July 2017. The Legislative Instrument extends the operation of ASIC Class Order [CO 13/18] until 12 July 2019.

Human rights implications

The Legislative Instrument does not engage any of the applicable rights or freedoms.

Conclusion

The Legislative Instrument is compatible with human rights as it does not raise any human rights issues.