



ASIC
Australian Securities &
Investments Commission

Explanatory Statement

ASIC Credit (Litigation Funding—Exclusion) Instrument 2020/37

This is the Explanatory Statement for *ASIC Credit (Litigation Funding—Exclusion) Instrument 2020/37*.

The Explanatory Statement is approved by the Australian Securities and Investments Commission (*ASIC*).

Summary

1. A litigation funding arrangement or a proof of debt funding arrangement may, depending on the terms of the arrangement, amount to the provision of “credit” to which the National Credit Code (the *Code*) applies. The Code is found in Schedule 1 to the *National Consumer Credit Protection Act 2009* (the *Credit Act*).
2. The legislative instrument excludes, until 31 January 2023, “litigation funding arrangements” and a “proof of debt funding arrangements” from the application of the Code. The instrument also has the effect that the Credit Act does not apply to such arrangements. This temporary exclusion for a 3-year period is to provide certainty for litigation funders, lawyers and members of a litigation funding arrangement and a proof of debt funding arrangement while the Government considers legislative changes.

Background

3. 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*).
4. 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.

5. 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.
6. On 13 July 2013, ASIC made ASIC Class Order [CO 13/18] 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.
7. The objective was to allow further time for the Government to consider its policy position on the regulation of litigation funding arrangements and proof of debt funding arrangements under the Credit Act and Code.
8. The class order had effect until 12 July 2019.

Purpose of the legislative instrument

9. Further time is required for the Government to consider any legislative changes to the Credit Act and Code in relation to litigation funding arrangements and proof of debt funding arrangements. The legislative instrument provides temporary relief until 31 January 2023 on the same terms as [CO 13/18] with changes to reflect current drafting practice.
10. The legislative instrument provides certainty for industry that compliance with the requirements of the Credit Act and Code is not required until 31 January 2023.

Consultation

11. ASIC consulted with the Department of the Treasury in relation to making the legislative instrument. ASIC did not undertake wider consultation with respect to the legislative instrument because it is minor and machinery in nature.
12. The full application of the Code and Credit Act to litigation funding arrangements and proof of debt funding arrangements could be considered to be an unintended application of consumer protection legislation, subject to the Government reaching a considered and final policy position on how such arrangements ought to be regulated.

Operation of the instrument

13. Section 4 of the instrument excludes from the application of the Code the provision of credit constituted by a *litigation funding arrangement* or a *proof of debt funding arrangement* as defined in the section.

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14. The instrument commences on the day after it is registered on the Federal Register of Legislation and continues until 31 January 2023.

Legislative authority

15. Subsection 6(17) of the Code provides the legislative authority for this instrument. Subsection 6(17) states that ASIC may, by legislative instrument, exclude from the application of the Code, the provision of credit of a class specified in the instrument.
16. The instrument is a disallowable legislative instrument.

Statement of Compatibility with Human Rights

17. The Explanatory Statement for a disallowable legislative instrument must contain a Statement of Compatibility with Human Rights under subsection 9(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011*. A Statement of Compatibility with Human Rights is in the Attachment.

Statement of Compatibility with Human Rights

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

ASIC Credit (Litigation Funding—Exclusion) Instrument 2020/37

Overview

1. The legislative instrument provides temporary relief to enable the operation of a litigation funding arrangement and a proof of debt funding arrangement without having to comply with the requirements of the National Credit Code and the *National Consumer Credit Protection Act 2009* until 31 January 2023.
2. The relief is intended to provide certainty for litigation funders, lawyers and members of a litigation funding arrangement and a proof of debt funding arrangement while the Government considers making legislative changes to the consumer credit legislation.

Assessment of human rights implications

3. This instrument does not engage any of the applicable rights or freedoms.

Conclusion

4. This 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*.