



ASIC
Australian Securities &
Investments Commission

ASIC Corporations (Amendment) Instrument 2021/292

This is the Explanatory Statement for *ASIC Corporations (Amendment) Instrument 2021/292*.

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

Summary

1. The dollar disclosure provisions in the *Corporations Act 2001 (Act)* require various costs, fees, charges, expenses, benefits and interests to be stated as amounts in dollar terms in Product Disclosure Statements (**PDSs**) and other types of documents.
2. *ASIC Corporations (Disclosure in Dollars) Instrument 2016/767 (Dollar Disclosure Instrument)* provides exemptions from the dollar disclosure provisions in circumstances where ASIC considers that compliance with the provisions would be impossible, unreasonably burdensome or not in the interests of clients.
3. A person that offers, issues or recommends an interest in a registered litigation funding scheme is subject to the dollar disclosure requirements. The instrument amends the Dollar Disclosure Instrument to exempt the following information from disclosure in dollar terms in a PDS for a registered litigation funding scheme:
 - (a) the funding budget;
 - (b) the legal costs budget;
 - (c) adverse costs insurance premiums;
 - (d) funding required;
 - (e) legal costs; and
 - (f) claim proceeds,where the conditions set out in the instrument regarding separate disclosure of this information to active general members of the scheme are met.
4. The exemption granted by the instrument operates for a period of 12 months.

Purpose of the instrument

5. The purpose of the instrument is to remove the requirement to disclose the relevant information as dollar amounts in the PDS for a registered litigation funding scheme as:
 - (a) dollar disclosure in the PDS is not in the interests of scheme members who are group members or parties to the legal proceeding seeking remedies for scheme members pursued in connection with the scheme, having regard to the sensitive nature of the information;
 - (b) Australian courts have permitted the non-disclosure of this information to opposing parties in the context of representative proceedings; and
 - (c) active general members of the scheme will still receive the relevant information, and be informed of material changes to the information, given the conditions attaching to the exemption provided under the instrument.
6. The information the subject of the exemption is strategically sensitive for scheme members who are group members or parties to a legal proceeding seeking remedies for scheme members pursued in connection with the scheme, as the information represents, or enables inferences to be drawn as to, the amount of litigation funding available for the legal action, the estimated legal costs of pursuing the legal action, and the expected claim proceeds. Public disclosure of this information by way of a PDS may provide a tactical advantage to opposing parties to the legal action and place the scheme members at a strategic disadvantage.
7. The Federal Court of Australia has accepted that such information need not be disclosed to opposing parties, setting out in paragraph 6.4 of its Class Actions Practice Note (GPN-CA) dated 20 December 2019 that a litigation funding agreement being disclosed to other parties to the proceeding may:
 - (b) be redacted to conceal any information which might reasonably be expected to confer a tactical advantage on another party to the proceeding being:*
 - (i) the budget or estimate of costs for the litigation or the funds available to the applicants, in total or for any step or stage in the proceeding (so-called “war chest” information);*
 - (ii) which might reasonably be expected to indicate an assessment of the risks or merits of the proceeding or any claim in, or aspect of, the proceeding.*
8. The Supreme Court of Victoria in paragraph 13.7 of its Practice Note SC GEN 10 Conduct of Group Proceedings (Class Actions) (Second Revision) dated 13 October 2020 likewise permits such redaction of a litigation funding agreement when it is disclosed to other parties to the proceeding.
9. The exemption from the PDS dollar disclosure requirement operates where separate written disclosure of the relevant information is made to active general members of the scheme. These scheme members are also required to be

informed of any material change to any of these amounts. These conditions ensure that these scheme members will continue to receive this information.

10. Under subsection 1013C(2) of the Act, PDS dollar disclosure is only necessary where the information required to be disclosed is “actually known” to the responsible person (or other category of person specified in subsection 1013C(2)). As the dollar disclosure provisions are not applicable where the information is not actually known to the responsible person, this instrument will not be operative in respect of any of the relevant amounts which are not actually known to the responsible person.

Consultation

11. ASIC undertook consultation with the Association of Litigation Funders of Australia (**ALFA**), an industry body representing a range of litigation funders operating in Australia, in relation to its application to ASIC for the relief provided under the instrument. Consultation was also undertaken with another litigation funder which is not a member of ALFA.
12. ASIC also consulted with the Department of the Treasury regarding the effect of the instrument.
13. ASIC did not undertake wider consultation because it was not considered reasonably practicable given the timeframe in which the relief was required to be implemented.
14. ASIC has provided the relief for a 12-month period, pending expected forthcoming public consultation as to the continuation of the exemption provided under the instrument.

Operation of the instrument

15. The instrument, other than Schedule 2, commences on the day after it is registered on the Federal Register of Legislation. Schedule 2 to this instrument commences 12 months after the day the instrument is registered on the Federal Register of Legislation.

Schedule 1

16. Item 1 amends section 4 of the Dollar Disclosure Instrument to insert definitions that are specifically relevant to litigation funding schemes, including definitions for each type of information that are exempt from PDS dollar disclosure. Item 2 omits section 8 and substitutes new section 8 into the Dollar Disclosure Instrument.
17. Under the new subsection 8(1), a responsible person for a PDS for a registered litigation funding scheme does not have to comply with paragraph 1013D(1)(m) of the Act in relation to the following information to be disclosed in accordance with paragraphs 1013D(1)(b), (d) and (e) of the Act:
 - (a) funding budget;
 - (b) legal costs budget;

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- (c) adverse costs insurance premiums;
 - (d) funding required;
 - (e) legal costs;
 - (f) claim proceeds,

subject to subsection 8(2) of the instrument.

18. The new paragraph 8(2)(a) requires a responsible person for a PDS for a registered litigation funding scheme relying on the exemption in subsection 8(1) to disclose in writing or electronically to any active general member of the scheme the following:

- (a) in the case of the information specified in paragraphs 8(1)(a) to (c) – that information; and
- (b) in the case of the information specified in paragraphs 8(1)(d) to (f) – an estimate of that information, expressed as an amount in dollars or a range of amounts in dollars,

before, or as soon as practicable after, that person becomes an active general member.

19. The new paragraph 8(2)(b) requires, as a further condition of the exemption in subsection 8(1), a responsible person to notify, in writing or electronically, each active general member of the scheme of any material change to the information referred to in paragraph 8(2)(a) as follows:

- (a) in the case of an increase in adverse costs insurance premiums that would be required to be disclosed in accordance with paragraphs 1013D(1)(d) or (e) if the exemption in subsection 8(1) did not apply, the responsible person must notify the active general member of the change 30 days before the change takes effect;
- (b) in the case of any other change, the responsible person must notify the active general member of the change before, or as soon as practicable after, but not more than 3 months after, the change occurs.

20. At the end of the new subsection 8(2), Note 1 is inserted which refers to the relief that ASIC has provided in relation to litigation funding schemes under *ASIC Corporations (Litigation Funding Schemes) Instrument 2020/787*.
21. Following Note 1, Note 2 is inserted stating that section 8 will be repealed by Schedule 2 of this instrument 12 months after the day this instrument is registered on the Federal Register of Legislation.
22. Item 3 inserts a note at the end of section 11 of *ASIC Corporations (Litigation Funding Schemes) Instrument 2020/787* which refers to the PDS dollar disclosure relief for interests in a registered litigation funding scheme that ASIC has provided in the Dollar Disclosure Instrument.

Schedule 2

23. Schedule 2 to the instrument repeals the amendments in Schedule 1 12 months after the instrument is registered on the Federal Register of Legislation.

Legislative authority

24. The instrument is made under subsections 601QA(1), 926A(2), 951B(1) and 1020F(1) of the Act. Under subsection 601QA(1), ASIC may exempt a person from a provision of Chapter 5C of the Act, or ASIC may declare that Chapter 5C applies to a person as if specified provisions were omitted, modified or varied as specified in the declaration. Under subsection 926A(2), ASIC may grant an exemption from, or omit, modify or vary, a provision of Part 7.6 of the Act (other than Divisions 4 and 8). Under subsection 951B(1), ASIC may exempt a person or a financial product or class of persons or financial products from all or specified provisions of Part 7.7 of the Act, or declare that Part 7.7 of the Act applies in relation to a person or a financial product or class of persons or financial products as if specified provisions were omitted, modified or varied. Under subsection 1020F(1), ASIC may grant an exemption from, or omit, modify or vary, a provision of Part 7.9 of the Act.
25. Under subsection 33(3) of the *Acts Interpretation Act 1901* (as in force as at 1 January 2005 and as applicable to the relevant powers because of section 5C of the Act), where an Act confers a power to make any instrument, the power is to be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to amend any such instrument.
26. The instrument is a disallowable legislative instrument.

Legislative instrument and primary legislation

27. The Explanatory Statement to the *Corporations Amendment (Litigation Funding) Regulations 2020 (Litigation Funding Regulations)* contemplates that ASIC may need to grant exemptions or modifications to facilitate the operation of the regulatory framework for litigation funding schemes established by the Litigation Funding Regulations.
28. The instrument provides minor and technical relief appropriate to be addressed by a legislative instrument rather than primary legislation.

Regulation Impact Statement

29. The relief contained in the instrument is expressly contemplated by the Explanatory Statement to the Litigation Funding Regulations. ASIC makes the instrument to facilitate the amendments made by the Litigation Funding Regulations.
30. ASIC considers that the relief in the instrument is within the scope of the Regulation Impact Statement (**RIS**) prepared by Treasury for the Litigation Funding Regulations and is relying on that RIS for the instrument. No separate RIS has been prepared for the instrument.

Statement of Compatibility with Human Rights

31. 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 Corporations (Amendment) Instrument 2021/292

Overview

1. The legislative instrument amends the *ASIC Corporations (Disclosure in Dollars) Instrument 2016/767* to provide an exemption from the requirement to disclose as dollar amounts the funding budget, legal costs budget, adverse costs insurance premiums, funding required, legal costs and claim proceeds in the Product Disclosure Statements for registered litigation funding schemes, subject to the conditions in the instrument.

Assessment of human rights implications

2. The instrument does not engage any of the applicable rights or freedoms.

Conclusion

3. The 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*.