



ASIC
Australian Securities &
Investments Commission

Explanatory Statement

ASIC Corporations & Credit (Amendment and Repeal) Instrument 2022/1032

This is the Explanatory Statement for *ASIC Corporations & Credit (Amendment and Repeal) Instrument 2022/1032* (the **instrument**).

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

Summary

1. *ASIC Credit (Litigation Funding-Exclusion) Instrument 2020/37* excludes litigation funding arrangements and proof of debt funding arrangements from the application of the National Credit Code in Schedule 1 to the *National Consumer Credit Protection Act 2009* (the **Code**).
2. *ASIC Corporations (Conditional Costs Schemes) Instrument 2020/38* provides exemptions for litigation funding arrangements or proof of debt funding arrangements funded under a conditional cost agreement (an arrangement between the member or members and a lawyer under which the payment of some or all fees is contingent on whether the outcome of the action is successful) from the requirements in Chapters 5C (managed investment schemes) and 7 (financial services licensing and disclosure) of the *Corporations Act 2001* (**Act**).
3. The instrument amends *ASIC Credit (Litigation Funding-Exclusion) Instrument 2020/37* and *ASIC Corporations (Conditional Costs Schemes) Instrument 2020/38* to continue the relief until 31 January 2026.
4. *ASIC Corporations (Disclosure in Dollars) Instrument 2016/767* provides exemptions from the dollar disclosure provisions in the Act where compliance with the relevant provisions would be impossible, unreasonably burdensome or not in the interests of clients.
5. *ASIC Corporations (Litigation Funding Schemes) Instrument 2020/787* provides exemptions to responsible entities of litigation funding schemes from certain provisions in Chapter 7 and Chapter 5C of the Act to facilitate the regulation of litigation funding schemes as managed investment schemes.

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6. The *Corporations Amendment (Litigation Funding) Regulations 2022* exempts litigation funding schemes from the managed investment scheme and disclosure regimes in the Act. The instrument revokes redundant relief for litigation funding schemes in section 8 of *ASIC Corporations (Disclosure in Dollars) Instrument 2016/767* and *ASIC Corporations (Litigation Funding Schemes) Instrument 2020/787*.

Purpose of the instrument

7. The purpose of the instrument is to extend the relief in *ASIC Credit (Litigation Funding-Exclusion) Instrument 2020/37* and *ASIC Corporations (Conditional Costs Schemes) Instrument 2020/38* that has been provided since 17 January 2020 so that the relief continues to operate until 31 January 2026. The instrument revokes the relief for litigation funding schemes in *ASIC Corporations (Disclosure in Dollars) Instrument 2016/767* and *ASIC Corporations (Litigation Funding Schemes) Instrument 2020/787*.

Consultation

8. In July 2021, ASIC sought feedback from litigation funding industry participants and other stakeholders on ASIC's proposal not to re-make the *ASIC Credit (Litigation Funding-Exclusion) Instrument 2020/37* and *ASIC Corporations (Conditional Costs Schemes) Instrument 2020/38*. Submissions generally disagreed with ASIC's proposal and supported the need for relief.
9. In November 2022, ASIC sought feedback from responsible entities of registered schemes that are litigation funding schemes on ASIC's proposal to revoke the relief for litigation funding schemes in section 8 of *ASIC Corporations (Disclosure in Dollars) Instrument 2016/767* and *ASIC Corporations (Litigation Funding Schemes) Instrument 2020/787*. Submissions supported ASIC's proposal to revoke the relief should Government proceed to implement its proposals in the draft *Corporations Amendment (Litigation Funding) Regulations 2022*.
10. ASIC consulted with the Department of the Treasury regarding the effect of the instrument.
11. The Office of Impact Analysis confirmed that ASIC is not required to prepare an Impact Statement for the instrument.

Operation of the instrument

12. The instrument commences on the day after it is registered on the Federal Register of Legislation.

Schedule 1

13. Item 1 removes relevant definitions and item 2 revokes relief for litigation funding schemes in section 8 of *ASIC Corporations (Disclosure in Dollars) Instrument 2016/767*.

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14. Item 3 amends subsection 5(2) of the *ASIC Credit (Litigation Funding-Exclusion) Instrument 2020/37* to provide that the exclusions contained in subsection (1) apply until 31 January 2026.
 15. Items 4, 5 and 6 amend subsection 5(b) of the *ASIC Corporations (Conditional Costs Schemes) Instrument 2020/38* to correct a duplicated cross-reference in the definition of a *managed investment scheme*. Item 7 amends section 10 to provide that the exemptions in Part 3 of the instrument have effect until 31 January 2026.

Schedule 2

16. Item 1 revokes *ASIC Corporations (Litigation Funding Schemes) Instrument 2020/787*.

Legislative authority

17. The instrument is made under subsections 601QA(1), 926A(2), 992B(1) and 1020F(1) of the Act and subsection 6(17) of the Code.
18. Under subsection 601QA(1) of the Act, 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) of the Act, 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 992B(1) of the Act, ASIC may exempt a person, class of persons or financial product or class of financial products from all or specified provisions of Part 7.8 of the Act or declare that Part 7.8 of the Act applies to a person, class of persons or financial product or class of financial products as if specified provisions were omitted, modified or varied. Under subsection 1020F(1) of the Act, ASIC may grant an exemption from, or omit, modify or vary, a provision of Part 7.9 of the Act.
19. Under subsection 33(3) of the *Acts Interpretation Act 1901* (in the case of the relevant Corporations Act powers, as in force as at 1 January 2005 and as applicable to those 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.
20. 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.
21. The instrument is a disallowable legislative instrument.

Legislative Instrument

22. The relief provided in *ASIC Credit (Litigation Funding-Exclusion) Instrument 2020/37* and *ASIC Corporations (Conditional Costs Schemes) Instrument*

2020/38 gives administrative relief in circumstances where strict compliance with the primary legislation produces an unintended or unforeseen result.

23. The extensions of the relief provided in *ASIC Credit (Litigation Funding-Exclusion) Instrument 2020/37* and *ASIC Corporations (Conditional Costs Schemes) Instrument 2020/38* are intended to provide the Government with further time to consider its policy position in relation to the regulation of litigation funding arrangements and proof of debt funding arrangements under the *National Consumer Credit Protection Act 2009* and the Code and the Government's policy position on the regulation of litigation funding schemes or a proof of debt funding schemes that are funded under a conditional costs agreement. The temporary relief is being extended to 31 January 2026, unless revoked prior.
24. It will be a matter for the Government and for Parliament as to whether the Act or Regulations may be amended in future to include the relief in the Instrument.

Statement of Compatibility with Human Rights

25. 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*.

Overview

1. The legislative instrument
 - (a) revokes the relief for litigation funding schemes in the *ASIC Corporations (Disclosure in Dollars) Instrument 2016/767* as this relief is redundant;
 - (b) extends the relief in *ASIC Credit (Litigation Funding-Exclusion) Instrument 2020/37* to enable the temporary 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 in Schedule 1 to the *National Consumer Credit Protection Act 2009* until 31 January 2026;
 - (c) extends the relief in *ASIC Corporations (Conditional Costs Schemes) Instrument 2020/38* to enable the temporary operation of conditional costs schemes without having to comply with the financial services provisions of the *Corporations Act 2001* until 31 January 2026; and
 - (d) revokes *ASIC Corporations (Litigation Funding Schemes) Instrument 2020/787* as the relief in this instrument is redundant.

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*.