



AUSTRALIAN
SENATE

**Senate Standing Committee for the
Scrutiny of Delegated Legislation**

Parliament House, Canberra ACT 2600
02 6277 3066 | sdlc.sen@aph.gov.au
www.aph.gov.au/senate_sdlc

11 June 2020

Senator James Paterson
Chair
Parliamentary Joint Committee on Corporations and Financial Services
Parliament House
CANBERRA ACT 2600

via email: corporations.joint@aph.gov.au

Dear Chair

**ASIC Corporations (Conditional Costs Schemes) Instrument 2020/38 [F2020L00034]
ASIC Credit (Litigation Funding—Exclusion) Instrument 2020/37 [F2020L00035]**

Thank you for your letter of 21 May 2020 in relation to the above instruments.

I can confirm that the Senate Standing Committee for the Scrutiny of Delegated Legislation has no objection to the committee's letter to you dated 23 April 2020 being published as a part of the evidence to your committee's inquiry on litigation funding and the regulation of the class action industry.

I also take this opportunity to update the information set out in the committee's previous letter. In particular, since the letter was written in April the Senate has held further sittings which were not scheduled at the time and, as a result, the time for lodging a disallowance notice in the Senate for these instruments expired on 14 May 2020.

I can also confirm that the committee has no objection to this letter being published.

Should you have any questions, please contact the committee's secretariat on (02) 6277 3066, or by email to sdlc.sen@aph.gov.au.

Yours sincerely

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation



23 April 2020

Senator James Paterson
Chair
Parliamentary Joint Committee on Corporations and Financial Services
Parliament House
CANBERRA ACT 2600

via email: corporations.joint@aph.gov.au

cc: Senator the Hon Jane Hume, Assistant Minister for Superannuation,
Financial Services and Financial Technology
Senator.Hume@aph.gov.au

Dear Chair

**ASIC Corporations (Conditional Costs Schemes) Instrument 2020/38 [F2020L00034]
ASIC Credit (Litigation Funding—Exclusion) Instrument 2020/37 [F2020L00035]**

I write on behalf of the Senate Standing Committee for the Scrutiny of Delegated Legislation which assesses all legislative instruments subject to disallowance, disapproval or affirmative resolution by the Senate against the scrutiny principles outlined in Senate standing order 23.

Since 4 December 2019, standing order 23(4) has required the committee to scrutinise each instrument to determine whether the attention of the Senate should be drawn to the instrument on the ground that it raises significant issues or otherwise gives rise to issues that are likely to be of interest to the Senate. These may include instruments which contain significant policy matters or significant elements of a regulatory scheme, instruments which amend primary legislation, and instruments which have a significant impact on personal rights and liberties.

Noting that the above instruments appear to contain significant policy matters relating to the regulation of litigation funding schemes, and the Attorney-General has foreshadowed that your committee will be asked to inquire into this matter, the committee has resolved to draw these instruments to the attention of your committee pursuant to standing order 23(4).

Should your committee decide to further examine these instruments, I note the time for lodging a disallowance notice in the Senate expires on 13 August 2020.

To assist in your committee's consideration of this matter, please find attached a copy of the instruments, together with the relevant explanatory statements. These documents are also published on the Federal Register of Legislation at:

- <https://www.legislation.gov.au/Details/F2020L00034>; and
- <https://www.legislation.gov.au/Details/F2020L00035>.

I also draw to your attention correspondence between the committee and the Assistant Minister for Superannuation, Financial Services and Financial Technology in relation to these instruments published at:

- https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Index.

Please note that in the interests of transparency this correspondence will be published on the Scrutiny of Delegated Legislation Committee's website.

Should you have any questions, please contact the committee's secretariat on (02) 6277 3066, or by email to sdlc.sen@aph.gov.au.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Concetta Fierravanti-Wells', written in a cursive style.

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation



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27 February 2020

Senator the Hon Jane Hume
Assistant Minister for Superannuation, Financial Services and Financial Technology
Parliament House
CANBERRA ACT 2600

Via email: Senator.Hume@aph.gov.au

CC: Shelby.Brinkley@treasury.gov.au; CommitteeScrutiny@treasury.gov.au


Dear Assistant Minister,

**ASIC Corporations (Conditional Costs Schemes) Instrument 2020/38 [F2020L00034]
ASIC Credit (Litigation Funding—Exclusion) Instrument 2020/37 [F2020L00035]**

The Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee) assesses all legislative instruments subject to disallowance, disapproval or affirmative resolution by the Senate against the scrutiny principles outlined in Senate standing order 23. The committee has identified scrutiny concerns in relation to the above instrument, and seeks your advice about this matter.

Exemptions to primary legislation

Senate standing order 23(3)(j) requires the committee to consider whether an instrument contains matters more appropriate for parliamentary enactment (that is, matters that should be enacted via primary rather than delegated legislation). This may include instruments which provide continuing exemptions to primary legislation.

Part 3 of the ASIC Corporations (Conditional Costs Schemes) Instrument 2020/38 (conditional costs schemes instrument) provides exemptions to litigation funding or proof of debt schemes, which are funded by a conditional cost agreement, from certain requirements set out in Chapters 5C and 7 of the *Corporations Act 2001* until 31 January 2023.

Part 2 of the ASIC Credit (Litigation Funding—Exclusion) Instrument 2020/37 (litigation funding instrument) provides that litigation funding arrangements and proof of debt funding arrangements are exempt from the application of the National Credit Code, set out in Schedule 1 to the *National Consumer Credit Protection Act 2009*.

Together, these instruments extend the exemption initially provided by ASIC Class Order [CO 13/898] (original exemption instrument), which commenced on 11 July 2013. The explanatory statement to that instrument notes that the exemption was an interim measure to provide the government with additional time to consider legislative changes in

response to the Full Federal Court decision in *Brookfield Multiplex Ltd v International Litigation Funding Partners Pte Ltd* (2009) 180 FCR 11.

The committee generally prefers that exemptions from primary legislation by delegated legislation do not continue in force for such time as to operate as a de facto amendment to the principal Act. In this instance, the explanatory statements to the instruments state that it is necessary to extend the exemption via delegated legislation as further time is required for the government to consider future legislative changes. However, in the absence of additional information, it is unclear to the committee why the necessary legislative changes have not been implemented in the seven years since the original exemption instrument commenced.

The committee would therefore appreciate your advice as to when the government intends to pursue the changes to primary legislation necessary to replace the exemptions provided for by these instruments.

The committee's expectation is to receive a response in time for it to consider and report on the instrument while it is still subject to disallowance. If the committee has not concluded its consideration of an instrument before the expiry of the 15th sitting day after the instrument has been tabled in the Senate, the committee may give notice of a motion to disallow the instrument as a precautionary measure to allow additional time for the committee to consider information received.

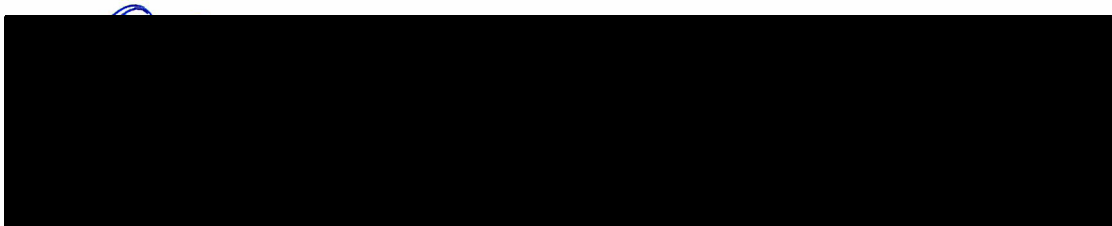
Noting this, and to facilitate the committee's consideration of the matters above, the committee would appreciate your response by **12 March 2020**.

Finally, please note that, in the interests of transparency, this correspondence and your response will be published on the committee's website.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email to sdlc.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely,



Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation



SENATOR THE HON JANE HUME
ASSISTANT MINISTER FOR SUPERANNUATION,
FINANCIAL SERVICES AND FINANCIAL TECHNOLOGY

Ref: MS20-000502

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation
Room S1.111
Parliament House
Canberra ACT 2600

27 MAR 2020

Dear Senator Fierravanti-Wells

I am writing in response to your letter of 27 February 2020, on behalf of the Senate Standing Committee for the Scrutiny of Delegated Legislation (the Committee), requesting further information in relation to the *ASIC Corporations (Conditional Costs Schemes) Instrument 2020/38* [F2020L00034] (Conditional Costs Instrument) and the *ASIC Credit (Litigation Funding – Exclusion) Instrument 2020/37* [F2020L00035] (Litigation Funding Instrument).

The Committee has requested advice as to whether there is an intention to amend the *Corporations Act 2001* (Corporations Act) or the *National Credit Code Protection Act 2009* (Credit Act) to incorporate the exemptions set out in the Instruments because it is unclear from the explanatory statement about why the necessary legislative changes have not been implemented in the seven years since the original exemption instrument commenced.

By way of background, the instruments allow a lawyer or law firm providing a financial service in relation to a litigation scheme that is funded by a conditional costs agreement to operate without compliance with the requirements of the Corporations Act and, enable the temporary operation of a litigation funding scheme without compliance with the requirements of the Credit Act and the National Credit Code.

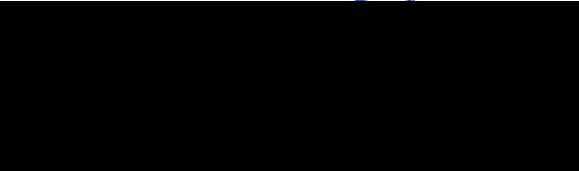
As pointed out by the Committee, both of these instruments extend the application of *ASIC Class Order [CO 13/18]* and *ASIC Class Order [CO 13/898]* that had effect until 12 July 2019.

The Litigation Funding Instrument reflects the findings of *International Litigation Partners Pte v Chameleon Mining NL (Receivers and Managers Appointed)* [2012] 246 CLR 455 which found that a litigation funding agreement in that matter was a “credit facility” within the meaning of the *Corporations Regulations 2001* and specifically excluded from the definition of a “financial product” under the Corporations Act.

The Conditional Costs Instrument reflects the findings of *Brookfield Multiplex Ltd v International Litigation Funding Partners Pte Ltd* [2009] 180 FCR 11 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 Chapter 5C of the Corporations Act. The instrument temporarily exempts conditional costs schemes from the definition of “managed investment scheme” in the Corporations Act, therefore, also exempting these schemes from related restrictions that apply to managed investment schemes under the Corporations Act.

As you may be aware, on 5 March 2020, the Attorney-General announced that a Parliamentary Joint Committee on Corporations and Financial Services (Joint Committee) will be asked to examine the litigation funding industry. As part of the terms of reference, the Joint Committee has been asked to consider the Australian financial services regulatory regime and its application on the litigation funding. This inquiry follows the release of a report by the Australian Law Reform Commission on class action proceedings and third-party litigation funders. The final report was released in December 2018. The Joint Committee was expected to table its final report by 9 November 2020 but the timing of this must now be highly uncertain given the onset of COVID-19.

Yours sincerely



Senator the Hon Jane Hume



23 April 2020

Senator the Hon Jane Hume
Assistant Minister for Superannuation, Financial Services and Financial Technology
Parliament House
CANBERRA ACT 2600

Via email: Senator.Hume@aph.gov.au
CC: Shelby.Brinkley@treasury.gov.au

Dear Assistant Minister,

ASIC Corporations (Conditional Costs Schemes) Instrument 2020/38 [F2020L00034]

ASIC Credit (Litigation Funding—Exclusion) Instrument 2020/37 [F2020L00035]

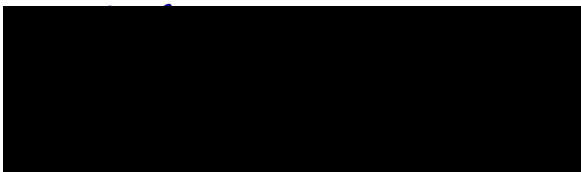
Thank you for your response of 27 March 2020 to the Senate Standing Committee for the Scrutiny of Delegated Legislation, in relation to the above instruments. The committee considered your response at its private meeting on 22 April 2020. On the basis of your advice, the committee has concluded its examination of the instrument.

While the committee makes no further comment about the technical scrutiny issues raised by the instruments, the committee considers that the instruments relate to significant policy matters that exceed this committee's remit. Accordingly, the committee has resolved to draw the instruments to the attention of the Senate and the Joint Standing Committee on Corporations and Financial Services, pursuant to Senate standing order 23(4).

In the interests of transparency, I note that this correspondence and future correspondence drawing the instruments to the attention of the Senate will be published on the committee's website and recorded in the *Delegated Legislation Monitor*.

Thank you for your assistance with this matter.

Yours sincerely,



**Senator the Hon Concetta Fierravanti-Wells
Chair**

Senate Standing Committee for the Scrutiny of Delegated Legislation