ALFA
Association of Litigation Funders of Australia

5 July 2022

Kate Metz, Senior Executive Leader
Paul Eastment, Senior Manager
Australian Securities and Investments Commission
Level 20, 240 Queen Street, Brisbane, 4000

By email

Dear Kate and Paul,

ASIC Consultation Paper 345: Litigation Funding Schemes: Guidance and relief dated 7 July 2021 (Consultation Paper)

I write concerning proposals C3 and C4 of the Consultation Paper, namely that ASIC proposes not to remake:

- ASIC Credit (Litigation Funding – Exclusion) Instrument 2020/37 (the **Credit Instrument**); and
- ASIC Corporations (Conditional Costs Schemes) Instrument 2020/38.

Both regulations expire on 31 January 2023. To our knowledge, ASIC has not yet finally determined its position in relation to both proposals.

Developments since the Consultation Paper was issued

Since the issue of the Consultation Paper twelve months ago, there have been a series of major developments relevant to proposals since. These include:

- the election of a new Australian Government in May 2022;
- that it is apparent that the new Australian Government intends to take a markedly different approach to the regulation of litigation funding than that taken by the former Coalition Government, though having only recently been elected, is yet to fully detail its proposed reforms[1];
- the decision of the Full Court of the Federal Court of Australia in *LCM Funding Pty Ltd v Stanwell Corporation Limited* [2022] FCAFC 103 which found that a litigation funding scheme relating to a class action does not fall within the description of a Managed Investment Scheme.

These developments are directly relevant to the rationale in paragraphs 112 to 116 of the Consultation Paper, which outlines the basis for ASIC's intention, at the time, not to remake each instrument. In fact, these developments appear contrary to the stated rationales in the following respects:

[1] "Labor to scrap class action funding regulations", Australian Financial Review, 20 June 2022.

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- The stated position of the new Australian Government appears consistent with the rationale for the pre-August 2020 instruments, which is to allow the new government time to consider and finalise its policy position on the regulation of litigation funding arrangements (see [112] of the Consultation Paper). The new Australian Government appears to be considering its position at present and it ought not be forced to legislate, one way or another.
- The new Australian Government appears likely to take an alternative approach to the regulation of litigation funding to the prior government and such approach is not yet settled because the current Australian Government has only been office for two months (see [113] of the Consultation Paper).
- The regulatory status of litigation funding schemes has evolved, and they are not considered Managed Investments Schemes. This appears to challenge ASIC's concern of differential treatment caused by the ongoing existence of the ASIC Corporations (Conditional Costs Scheme) Instrument 2020/38 (see [114] of the Consultation Paper).
- At [111] of the Consultation Paper, ASIC stated that the Senate Standing Committee's concern regarding the scrutiny of Delegated Legislation was a significant factor. Such concerns appeared to be that an instrument is only appropriate as an interim measure, pending more permanent legislative changes (see [111] of the Consultation Paper). It seems the new Australian Government intends to make such changes in due course. Therefore, it would seem to be <u>appropriate</u> rather than <u>inappropriate</u> that the instruments remain in place. Furthermore, two members of the Senate Committee have retired, including the chair, which is likely to result in an evolved viewpoint. We also submit that altering a legal position which has existed since the creation of the instruments in July 2013 would appear to be overreach; as ASIC would be, in effect, pre-empting government legislation by disrupting a legal position which has existed for almost a decade.

A More Appropriate Way Forward

We respectfully submit that ASIC reconsider its position on not remaking the instruments. It is our opinion that the more appropriate way forward would appear to be for ASIC to maintain the status-quo, by remaking the instruments for a further period of 2 to 3 years, pending the Australian Government making its further legislative changes.

The litigation funding and related legal sector has faced more regulatory change in the past two years than in the past two decades. It seems clear that at some stage during its term, the current government will enact legislation regulating litigation funding. It is not appropriate for ASIC to force more regulatory change upon the sector, which may prove to be undone by subsequent legislation. If the instrument is not remade, litigation funders will need to undertake significant work on an urgent basis to ensure they can (if at all) operate consistently with the *National Consumer Credit Protection Act* 2009; work that may quickly be rendered redundant. ASIC may recall the considerable expense and challenge associated with the now redundant application of Managed Investment Scheme law to litigation funding arrangements.

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I look forward to receiving your response as soon as possible.

Warm regards

John Walker
Chairman

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