AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION
CONSULTATION PAPER 345
LITIGATION FUNDING SCHEMES: GUIDANCE AND RELIEF

SUBMISSION OF LITIGATION CAPITAL MANAGEMENT LIMITED
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PART A: LITIGATION CAPITAL MANAGEMENT LTD

1. Litigation Capital Management Limited and its subsidiaries ("LCM") is a provider of litigation finance products and from that perspective makes the following submission in response to questions raised by the Australian Securities & Investments Commission ("ASIC") Consultation Paper "Litigation Funding Schemes: Guidance and Relief" ("Consultation Paper"), which addresses the changes to litigation funding regulation introduced by the *Corporations Amendment (Litigation Funding) Regulations 2020* (Cth) ("Amending Regulations").

2. Founded in 1998, LCM was one of the first professional litigation funders in Australia, and it is one of the longest-standing litigation funders globally. LCM holds an Australian Financial Services Licence and is a publicly listed Australian company, headquartered in Sydney and with offices in Melbourne, Brisbane, Singapore and London.

3. Since its inception, LCM has continued to assist claimants to pursue meritorious claims and recover funds from the legal avenues and actions available to them. LCM funds commercial, insolvency and arbitral proceedings, as well as representative actions.

PART B: RESPONSES TO SELECTED CONSULTATION PAPER QUESTIONS

B1Q1: Do you agree we should provide guidance on how the 'managed investment scheme', 'member' and 'scheme property' definitions apply to litigation funding schemes?

4. LCM support's ASIC's stated objectives in proposing to provide guidance, including to "*help industry participants, recipients of litigation funding and other stakeholders… understand their rights and obligations under the current legislative framework applicable to litigation funding schemes*".

5. LCM also agrees that, in many respects, it is difficult to understand precisely how the current legislative framework applies to litigation funding products and participants; there is a real incongruence between those products and participants and the inapposite regulations that are being imposed on them.

6. Nevertheless, LCM submits that, in the circumstances, the guidance proposed by ASIC cannot and will not provide genuine certainty or comfort for industry stakeholders at this time. In particular, LCM highlights the following.

7. *Firstly*, LCM submits that much of the uncertainty associated with the Amending Regulations will not be resolved by guidance and can only be managed by further amendments to the *Corporations Act 2001* (Cth) ("Act") or *Corporations Regulations 2001* (Cth) ("Regulations"), or by the development of clear jurisprudence on all related issues.

8. *Secondly*, the proposed guidance would, by its nature, only address how ASIC may approach the relevant definitions and concepts. Although LCM acknowledges that this may be useful for parties engaging with ASIC in relation to the relevant issues, LCM highlights that litigation funding schemes exist in the context of contested litigation, in which a defendant that is unrelated to ASIC is motivated to exploit any uncertainty in the current legislative framework for a tactical advantage. In at least the following matters, defendants have already sought to weaponise the changes made by the

Amending Regulations, and LCM submits that these tactics will continue to be implemented with or without ASIC guidance:

8.1. Stanwell Corporation Limited v LCM Funding Pty Ltd and another, QUD201/2021; and

8.2. White v UGL Operations and Maintenance Pty Ltd, WAD 41 of 2021 (see *White v UGL Operations and Maintenance Pty Ltd* [2021] FCA 587).

9. *Thirdly*, LCM highlights that there is no legislative provision that deems all litigation funding schemes to be managed investment schemes. The only authority connecting the applicability of the managed investment scheme ("MIS") regime to class actions is *Brookfield Multiplex Limited v International Litigation Funding Partners Pte Ltd* (2009) 260 ALR 643 ("*Brookfield*"). That case was decided on its own facts, including on the basis that it was a "closed class" representative action. It was also not a unanimous decision.

10. In light of the above, LCM submits that it is premature to issue detailed guidance on the proposed matters in unequivocal terms, particularly before the issues are comprehensively explored by the Courts.

11. By way of example, LCM highlights that it is presently open to a superior Court to find that the MIS regime does not apply to any litigation funding scheme, or only applies to particular types of arrangements and actions. It is also open to Courts to come to conclusions that differ from *Brookfield* if a case is distinguishable from that authority on its facts. Once such judgments are handed down, ASIC's contrary guidance, unless it is sufficiently flexible, would only serve to exacerbate the uncertainty associated with the Amending Regulations.

B1Q2: Do you agree that we should include our proposed guidance in an update to RG 248 or elsewhere? Please give reasons.

12. LCM does not comment on this question.

B1Q3: Do you agree with our guidance on the definitions of 'managed investment scheme', 'member' and 'scheme property' to litigation funding schemes? If not, why not? Please provide specifics of any changes you consider should be made.

<u>"Managed Investment Scheme"</u>

13. LCM submits that the application of open-textured terms such as "money's worth", "pooling", "use" in a "common enterprise" and "day-to-day control" cannot be categorically applied to all litigation funding schemes in the way suggested by the Consultation Paper.

14. As noted above, LCM submits that at this early stage and with such limited authority on the issues, it is erroneous to conclude that "there are generally applicable principles for determining how the Act definitions apply to a litigation funding scheme"[1]. Rather, LCM agrees with the Consultation Paper conclusion at paragraph 24, namely that "the actual features of a particular litigation funding scheme will determine whether it

[1] Paragraph 25 of the Consultation Paper

constitutes a managed investment scheme, who the members of that scheme are, and what the scheme property of that scheme comprises".

15. Litigation funding schemes can take many different forms, and the analysis of whether each iteration meets the MIS definition in the Act is nuanced and multifaceted.

16. By way of illustration, even if it is accepted that the group members' and funders' respective promises are "money's worth", it is nevertheless far from obvious that a litigation funding scheme also necessarily involves those promises being "contributed" by group members, "pooled" or "used" in a "common enterprise" within the statutory meaning.

17. LCM therefore submits that broad and inflexible conclusions such as those made in paragraph 31(b) ("money's worth"), 32 and 33 ("pooling"), and 34(b) ("day to day control") of the Consultation Paper go too far in fixing a blanket approach to a variety of arrangements that must be considered on their own facts, with a detailed review of all the circumstances.

18. LCM highlights that even in the *Brookfield* case, Finkelstein J at first instance did not find that the scheme was an MIS. On appeal, Jacobson J also found that the relevant scheme was not an MIS, as the contractual undertakings of group members were not "pooled" or "used" in any "common enterprise". Rather, His Honour's dissenting reasons concluded the scheme involved the "use by a promoter of the scheme, namely the Funder, of its own funds to obtain a financial benefit for the members". Further, the decision of the High Court in *International Litigation Partners Pte Ltd v Chameleon Mining NL (Receivers and Managers Appointed)* [2012] HCA 45 found that a litigation funding scheme was a credit facility.

19. This clearly indicates that the conclusions in the Consultation Paper are not free from doubt.

<u>"Members"</u>

20. By paragraph 42, the Consultation Paper concludes that "the person (that holds some right to a benefit produced by the scheme) is a member whether or not they have themselves made a contribution of money or money's worth to the schemes".

21. Table 1 on page 17 then confirms that this conclusion means that all class members of an open class action are scheme members, even if they were not even aware of the scheme.

22. However, LCM notes that the Act's definition of managed investment schemes only contemplates schemes where:

> *"…**people contribute** money or money's worth **as consideration to acquire rights (interests)** to benefits produced by the scheme (whether the rights are actual, prospective or contingent and whether they are enforceable or not)"* (our emphasis)

23. The Act's definition does not contemplate people acquiring interests in the scheme without "contributing". Further, paragraph (b) of the Act's definition requires that "contributions" by members must be pooled or used in common enterprise to provide benefits to the members who hold interests in the scheme. There is no "pooling" if there is no "contributing".

24. In light of this, LCM submits that it is entirely possible for a Court to conclude that people cannot, contrary to paragraph 42 of the Consultation Paper, be a member of the scheme without making a contribution to it. This question was also not fully explored in *Brookfield*, as that matter related to a closed class proceeding, where all class members had signed funding agreements and positively contributed their promises.

Summary

25. LCM submits the guidance offered must be in flexible terms that acknowledge the prospect of Courts reaching different conclusions to those in *Brookfield*, and to those presently set out in the Consultation Paper, when applying the relevant definitions in the Act to future litigation funding schemes.

B1Q4: Is further detail or clarification needed about how the relevant definitions apply? If so, please provide specifics of the additional information you consider should be provided.

26. LCM submits that further clarity would assist in relation to the following:

    26.1. The scope of the "scheme" and what it includes;

    26.2. The meaning of "operation of the scheme".

        26.2.1. The question of whether a member has day-to-day control of the operation of the scheme cannot be addressed without sufficient clarity on what that "operation" entails;

        26.2.2. LCM submits that due to the nature of litigation funding schemes, the scheme's operation is likely to mean the provision of instructions to the legal team progressing the claim.

    26.3. The meaning of the "float or running account created for the purpose of the scheme" referred to at paragraph 49(f) of the Consultation Paper, to clarify that this reference is directed at the cash balance of a bank or other account that has been set up for the purpose of the funder depositing funds for use in funding the relevant litigations.

B1Q5: Are there other issues relating to definitions or interpretations of definitions, relevant to litigation funding schemes, on which you consider that guidance is necessary? If so, please provide specifics of the additional issues you consider should be addressed.

27. LCM does not wish to comment on this question.

B2Q2: Do you agree with our guidance on the application of the definition of 'special custody assets' to scheme property of litigation funding schemes? If not, why not?

28. LCM submits that the conclusion at paragraph 58 of the Consultation Paper that a litigation funding scheme's resolution sum does not constitute 'special custody assets' is simplistic and does not allow for any flexibility in the way that litigation funding scheme proceeds are likely to be managed and distributed. It also leads to nonsensical practical outcomes for the operation of such schemes.

29. Paragraph 59 of the Consultation Paper notes that "distribution to scheme members is ***often*** not concluded within three months of the sum being received into the account". By this statement, the Paper appears to acknowledge that there are situations in which distribution will (and can) be concluded within this time.

30. Despite the above, and instead of allowing for flexibility in scheme structuring that may achieve this result, ASIC proceeds to state that "for this reason, we consider that the resolution sum ***would not*** meet the notional s912AA(11)(d) definition".

31. LCM highlights that:

    31.1. Funders do not receive or hold the full proceeds of any action. They only receive the sums that they are entitled to under a Funding Agreement as their own share of proceeds[2];

    31.2. Each resolution of a class action must be approved by the relevant Court. As part of its approval, the Court approves not only the resolution itself, but also a scheme for the distribution of the resolution's proceeds; and

    31.3. Historically, the proceeds of the class action were held by the scheme administrator who was appointed by the Court to distribute them. This was often the firm of solicitors that was acting in the matter or an external accounting firm.

32. In light of the above, LCM submits that it is possible to structure litigation funding schemes so that the resolution sum can and would meet the 'special custody assets' definition. For example, the scheme could:

    32.1. Establish a trust account with an Australian authorised deposit-taking institution from which proceeds would be distributed ("Trust Account");

    32.2. Proscribe that any claim proceeds are paid into Court and not released into the Trust Account (with the scheme consequently having no entitlement to it) until such time as the distribution administrator satisfies the Court that each sum to be released into the Trust Account is ready to be paid to the class members and/or to meet scheme expenses within three months;

    32.3. Then have the proceeds distributed in accordance with the distribution scheme approved by the Court with the assistance of the Court-appointed administrator; and

    32.4. In the event that the Trust Account is in operation for over six months, have the account audited every six months by a registered company auditor to verify whether the account had been operated in accordance with the distribution scheme ordered by the Court.

33. LCM therefore submits that any guidance that is offered must be issued in flexible terms that acknowledge the alternative ways in which a scheme can be structured, some of which may well result in recovery sums meeting the 'special custody assets' requirements.

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[2] Unless the funder is also the Court-approved scheme administrator, a role which LCM has never sought to perform.

34. LCM further highlights that in light of the Court-supervised process for the distribution of claim proceeds, the practical effect of categorically stating that the resolution sum would not meet the definition of 'special custody assets' will have the effect of Responsible Entities being required to appoint custodians to serve no purpose (other than charge fees adding to the cost to be borne by the members of the scheme). This is not in the class members' interests and, as such, LCM submits that it is incumbent on ASIC not to preclude funders from structuring schemes in more effective ways.

We propose to grant industry-wide relief from the equal treatment duty to responsible entities of registered litigation funding schemes. This relief will be limited to enabling the distribution of a resolution sum obtained in a class action seeking remedies for scheme members to the general members of the scheme. The resolution sum must be distributed in accordance with: (a) court orders or a determination by a court-appointed resolution administrator; and (b) the scheme constitution. The proposed relief will expire on 22 August 2025.

C1Q1 Do you agree with the proposed relief? If not, why not?

35. The proposed relief from the equal treatment duty is premised on the assumptions that:

    35.1. The Responsible Entity will be involved in the distribution of a resolution sum obtained in a class action; and

    35.2. The equal treatment duty would require each member of a class action to receive the same dollar sum from the resolution amount.

36. In relation to the first assumption, as ASIC notes at paragraph 67 of the Consultation Paper:

    "*In the event of a settlement in a class action, we understand that a court will typically appoint a resolution administrator to distribute the resolution sum in accordance with the court's orders. The resolution administrator is usually the lead plaintiff's lawyer. This generally requires the administrator to assess or calculate each general member's entitlement to a portion of the resolution sum. This calculation is based on the member's compensable loss, determined by particular criteria arising from the circumstances of their individual legal claim."*

37. LCM agrees with this description of how the resolution sum will be distributed and notes that it does not include any opportunity for the Responsible Entity to exercise any judgement regarding the amount that each member will receive from that resolution sum and as such, there is little risk of it contravening the equal treatment duty in this context.

38. In relation to the second assumption, LCM does not believe that without the granting of relief the equal treatment duty would require each member of a class action to receive the same dollar sum from the resolution amount. Clearly, in many managed investment schemes, the amounts paid to members will differ based on the amount of their investment. Similarly, in a class action, the amount paid to members will differ based on the size and nature of their claims.

39. Despite the fact that we do not agree with the two assumptions underpinning the proposed relief, LCM agrees that it is prudent to grant the proposed relief from the equal treatment duty so as to avoid any argument that a Responsible Entity was somehow "involved" in the unequal treatment of members in the distribution of a resolution sum.

C1Q2 Do you foresee any difficulties arising from the proposed condition that the distribution of the resolution sum must be in accordance with court orders or a determination by a court-appointed resolution administrator? If so, please provide specifics of the nature of any such difficulties, and how frequently these difficulties are likely to arise.

40. In a class action conducted in accordance with the rules of the Federal Court or a Supreme Court of a State or Territory, distribution of a resolution sum must be made in accordance with Court orders (including by orders to appoint a resolution administrator) and so in that context we do not foresee any difficulties with the requirement with the proposed condition.

C1Q3 Is there a need for relief from the equal treatment duty (in relation to the distribution of a resolution sum) for responsible entities of registered litigation funding schemes that relate to multi-claimant actions that do not take the form of a class action? If so, please provide details of: (a) the matters giving rise to a need for relief; and (b) the nature of the conditions which would be appropriate to attach to the relief.

41. As ASIC notes at paragraph 69, "unlike class actions, settlements of multi-claimant actions do not typically require court approval". As such, if a multi-claimant action falls within the definition of a 'managed investment scheme', then in order to obtain the benefit of the proposed relief, the Responsible Entity would need to procure that the solicitors for the plaintiff obtain Court orders in relation to the proposed resolution.

42. ASIC's comments at paragraph 69 suggests that it takes the view that a multi-claimant action (which is not a class action) will attract all of the regulatory requirements of a registered managed investment scheme. With respect, we do not agree.

43. Some examples of 'multi-claimant actions' which are not class actions include the following:

    43.1. An insolvency claim where there are two claimants, namely the liquidator and the company in liquidation;

    43.2. Any commercial claim where there may be more than one plaintiff (for example, two unrelated joint venture parties); and

    43.3. An action where a number of persons have claims arising out of the same or similar circumstances, and all of those persons are named plaintiffs.

44. Although a multi-claimant action can be construed as falling within the definition of a 'litigation funding scheme' within the meaning of Regulation 7.1.04N, this only has the effect of deeming a multi-claimant action to be a financial product; it does not deem it to be a managed investment scheme.

45. A multi-claimant action will only be a managed investment scheme if it satisfies the relevant definition at section 9 of the Act.

46. If a multi-claimant action has only a number of named plaintiffs, those plaintiffs are likely to retain day-to-day control of the action as they will be giving instructions to the lawyers and can communicate directly with the funder about their interest. LCM submits, therefore, that it is the wrong approach to make policy (or issue regulatory guidance) based on an assumption that a multi-claimant action is necessarily a managed investment scheme. If a multi-claimant action does not satisfy the definition

at section 9 of the Act and is not a managed investment scheme, then no relief from the equal treatment obligation is necessary.

47. Nevertheless, LCM agrees that if a multi-claimant action does satisfy the definition of a managed investment scheme, then the proposed relief will not assist that action, as any distribution of a resolution amount will not be by Court order.

48. LCM submits that in order to deal with this situation the condition which will be placed on the relief from the equal treatment duty should be revised so that the distribution of the resolution sum need to be made either:

    48.1. In accordance with Court orders; or

    48.2. By determination by a Court-appointed resolution administrator; or

    48.3. By consent of all scheme members.

C1Q4 Do you consider any other related relief may be required? If so, please provide specifics of the nature of the relief and the reasons why the relief is required.

49. In our view, ASIC must recognise that, absent an amendment of the Regulations, there is a class of funding arrangements for multi-claimant actions which are financial products but are not managed investment schemes and as such, ASIC should provide guidance on the appropriate licensing for the funding of these multi-claimant actions.

We propose to extend the dollar disclosure relief for registered litigation funding schemes provided under ASIC Corporations (Disclosure in Dollars) Instrument 2016/767 on substantially the same terms. The relief would continue until 22 August 2025.
C2Q1 Do you agree with our proposal to continue the relief until 22 August 2025? If not, why not? Please provide specifics of any changes you consider should be made to the current terms of that relief.

50. LCM submits that the first point to consider is what would need to be disclosed to members of a litigation funding scheme pursuant to dollar disclosure provisions of the Act if the relief were not in place. Pursuant to sections 1013D(1)(b), 1013D(1)(d) and 1013D(1)(e) of the Act, the following information must be disclosed in dollars in a Product Disclosure Statement ("PDS"):

    (b) information about any significant benefits to which a holder of the product will or may become entitled, the circumstances in which and times at which those benefits will or may be provided, and the way in which those benefits will or may be provided.

    (d) information about:

        (i) the cost of the product; and

        (ii) any amounts that will or may be payable by a holder of the product in respect of the product after its acquisition, and the times at which those amounts will or may be payable; and

        (iii) if the amounts paid in respect of the financial product and the amounts paid in respect of other financial products are paid into a common fund--any amounts that will or may be deducted from the fund by way of fees, expenses or charges; and

(e) if the product will or may generate a return to a holder of the product--information about any commission, or other similar payments, that will or may impact on the amount of such a return.

51. At paragraph 85 of the Consultation Paper (in Table 2), ASIC concludes that the following dollar amounts must be disclosed in the PDS for a litigation funding scheme:

    51.1. The scheme's funding budget (amount agreed to be paid by the funder);

    51.2. The scheme's legal costs budget (amount agreed to be paid by the funder);

    51.3. Adverse costs insurance premiums;

    51.4. The amount of funding required;

    51.5. The total amount of legal costs;

    51.6. The claim proceeds (the amount for which the claim may be settled)

    (together the "Funding Information").

52. LCM assumes that ASIC takes the view that the Funding Information should be disclosed to group members as these amounts will "impact upon the amount of the return" to group members and/or will be deducted from the resolution sum before payment to group members. This is strictly correct, however there are a number of significant issues with requiring the Funding Information to be disclosed to class members. These issues may be summarised as follows:

    52.1. Most of the Funding Information will not be able to be disclosed as a dollar figure, as that dollar figure will be unknown as at the time of the issue of the PDS;

    52.2. Even if the Funding Information is able to be disclosed as at the time of the issue of the PDS, such information is going to have little utility in assisting a class member to understand the impact on their return; and

    52.3. Disclosure of the Funding Information is likely to give a defendant to a class action a tactical advantage.

53. LCM addresses each of these issues below.

Dollar amount not known

54. The Responsible Entity will not (and can not) know the amount of the claim proceeds as at the time of the issue of the PDS. Until it knows how many members have registered for the class action and the nature of their claims, it cannot make an assessment of the amount for which the claim may be settled or resolved.

55. In terms of a premium for adverse costs, the Responsible Entity will also not know this as a dollar figure as the amount of this premium is generally tied to the point in time at which the resolution amount is received. It is a staged rather than a flat premium and therefore this could only be disclosed as a range.

56. LCM submits that, assuming each of the matters in Table 2 at paragraph 85 of the Consultation Paper need to be disclosed, the Funding Information should be able to

be disclosed as a range rather than as a fixed dollar amount, as the fixed dollar amount may not be known to the Responsible Entity at the time of the preparation of the PDS.

Little utility in understanding impact on return

57. Members are unlikely to know the quantum of their own claims at the time of the issue of the PDS as they will not yet have received any advice on this issue.

58. Even if a Member knows the quantum of their own claim, they cannot know the quantum of the claims of the other group members and without that, they cannot know how much the class action is likely to resolve for. It is also not possible for the Responsible Entity to disclose the amount of the claim proceeds as at the time of the issue of the PDS (see para 54).

59. As a Member cannot be informed as to the likely claim proceeds of a class action (as this information is simply unknown at the time of the PDS), there is little utility in providing them with the remainder of the Funding Information because without an understanding of the likely claim proceeds or the quantum of the claim the Funding Information is meaningless.

60. A practical example of this is as follows. If a) the total legal costs for a class action will be $10million, and b) a funder has agreed to pay all of that, and c) a group member has a claim which they know is worth $5,000 (for example in a shareholder class action where the loss may ascertainable), they nevertheless cannot yet know:

    60.1. The size of the claims of the other members;

    60.2. The likely claim proceeds; and

    60.3. The dollar amount of the funding commission (as this will likely be linked to the amount of the settlement).

61. Without the additional information set out above (which it is not possible to provide in a PDS), a group member has no way of estimating how much of their $5,000 claim amount they may recover from any resolution.

Tactical advantage for defendant

62. LCM submits that the relief which has been granted by ASIC in relation to dollar disclosure is inadequate to meet the stated objective. At paragraph 90, ASIC noted that the reason for the exemption being granted was as follows:

    "disclosure of the relevant information in a PDS, which is a public document, would not be in the interests of scheme members. We considered the sensitive nature of the relevant information and the adverse strategic implications such disclosure may have for the scheme members of litigation funding schemes."

63. The reason this information is sensitive is that it can be used by a defendant to a class action to gain a tactical advantage. For example:

    63.1. A defendant may use the budget for the claim in order to craft its own security for costs application at a similar level;

63.2. If a defendant knows the amount of the funding, it may use this in combination with the budget to seek to settle the claim on unfavourable terms for the class members at the time that the funding may be close to being exhausted;

63.3. If a defendant knows at what level the Responsible Entity has indicated the claim could be settled, it will be impossible for the class members to negotiate a settlement in excess of this level even if the circumstances of the case change so as to make the earlier settlement expectation unreasonable.

64. The Federal Court Practice Note for Class Actions[3] recognises this issue and at paragraph 6.4 provides that the litigation funding agreement which is to be filed and served as part of the "Notice of Disclosure - Litigation Funding Agreements" may be redacted to conceal any information which might reasonably be expected to confer a tactical advantage on another party to the proceeding, being:

64.1. 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); and

64.2. Information 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.

65. The relief which has been granted by ASIC does not adequately deal with this issue of tactical advantage for a defendant which may arise from the disclosure of the Funding Information, for the reason that the relief contains a condition that:

"The responsible entity must separately disclose the relevant information to each active general member of the litigation funding scheme. The disclosure may be made in writing or electronically."

66. It is not possible to keep information confidential from a defendant if it is to be disclosed to "each active general member" of a litigation funding scheme. Class member numbers can be very significant. For example, LCM is funding a class action with in excess of 50,000 members. Information that is provided to this number of people is likely to lose its character as confidential and there is considerable risk of it falling into the hands of a defendant.

67. In LCM's view, the relief which has been granted is inadequate to meet its stated objective and should be re-crafted so that the relief is conditional upon the following:

"The responsible entity must separately disclose the relevant information to each general member of the litigation funding scheme that is also the named plaintiff or applicant in the underlying claim. The disclosure may be made in writing or electronically."

68. Disclosure of the Funding Information to the representative applicant would meet the objective of avoiding the risk of the Funding Information being disclosed to the defendant and the defendant thus achieving a tactical advantage. This is consistent with the class actions regime, where the role of the representative applicant is to protect the interests of class members[4].

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[3] https://www.fedcourt.gov.au/law-and-practice/practice-documents/practice-notes/gpn-ca

[4] See for example section 33T of the *Federal Court Act 1976* (Cth).

69. If ASIC is not minded to change the scope of the relief in relation to dollar disclosure, LCM agrees the current relief should be continued.

C2Q2 Is there other information that would be required to be disclosed in dollar terms in a PDS for a registered litigation funding scheme that should not be included in the PDS? If so, please identify this information and provide specifics as to why dollar disclosure relief is warranted.

70. In addition to the Funding Information, other information which may be required to be disclosed in dollar terms in a PDS is:

    70.1. Any separate amount which may be payable to the representative applicant ("Representative Payment"); and

    70.2. The amount attributable to any uplift on fees which the lawyers may charge for the proportion of their fee budget not paid by the funder ("Lawyers' Uplift").

71. In relation to any Representative Payment, the amount of this is often not known at the time of the PDS and rather, is determined when the class action is resolved and is dependent on the terms of such resolution. The payment of the Representative Payment is also subject to approval by the Court and it is possible that the Court may approve payment of only a part or none of the Representative Payment. Due to the fact that the amount of such payment is unknown as at the time of the PDS, there should be relief from the requirement to disclose it in dollar terms.

72. In relation to the Lawyers' Uplift, the amount of this is also not known in dollar terms at the time the PDS is issued. This is because the Lawyer's Uplift is tied to the amount of fees which are not paid at the time they are incurred; either because the lawyers have agreed to a risk share arrangement with the funder, or because the funded budget has been exceeded and the lawyers have agreed to risk their fees above that funded budget. The payment of the Lawyers' Uplift is also subject to approval by the Court and it is possible that the Court may approve payment of only a part or none of the Lawyers' Uplift. Due to the fact that the amount of such payment is unknown as at the time of the PDS there should be relief from the requirement to disclose it in dollar terms.

We propose not to remake ASIC Credit (Litigation Funding—Exclusion) Instrument 2020/37 when it expires on 31 January 2023. Note: For certainty, we would formally repeal this instrument in advance. This repeal would take effect when the instrument expires on 31 January 2023.
C3Q1 Do you agree with our proposal not to remake this instrument? If not, why not?

73. LCM notes that pursuant to Regulation 7.1.06(2A), a litigation funding scheme is not a 'credit facility' for the purposes of the Act.

74. It is also not clear that without ASIC Credit *(Litigation Funding—Exclusion) Instrument 2020/37* the National Credit Code would necessarily apply to contracts which make up a litigation funding scheme. A litigation funding scheme is not a "credit contract" within the meaning of the *National Consumer Credit Protection Act 2009.* A funder of a class action provides a non-recourse facility to the class member which that class member will only be obliged to pay back a part of to the extent that they receive a successful award in their favour. This is not a "credit contract".

75. Nevertheless, LCM submits that the National Credit Code has been developed for a wholly different purpose to the funding of class actions, and it would be unworkable to

have it apply to class actions, particularly in circumstances in which an entirely new body of regulation has just been applied to the funding of class actions (that of licencing and MIS). Litigation funding schemes are now subject to regulation pursuant to Chapter 7 of the Act. They should not also be subject to the National Credit Code (which is inconsistent with Chapter 7). It is clear that it was not intended that both Chapter 7 and the National Credit Code would apply to the same product, which is why credit facilities are excluded from the definition of 'financial product' by Regulation 7.1.06(2A).

76. LCM strongly disagrees with the proposal not to remake Instrument 2020/37, and submits that the Instrument should be renewed when it expires.

We propose not to remake ASIC Corporations (Conditional Costs Schemes) Instrument 2020/38 when it expires on 31 January 2023. Note: For certainty, we would formally repeal this instrument in advance. This repeal would take effect when the instrument expires on 31 January 2023.
C4Q1 Do you agree with our proposal not to remake this instrument? If not, why not?

77. LCM understands that the *ASIC Corporations (Conditional Costs Schemes) Instrument 2020/38* was made to avoid any confusion associated with arrangements where claimants' legal costs are wholly or substantially funded under a conditional cost agreement ("Conditional Costs Agreement"), and whether the law firm providing that service may be providing a financial service or the arrangement is a managed investment scheme within the meaning of section 9 of the Act.

78. Such confusion could only arise by reason of the Amending Regulations if a Conditional Costs Agreement falls within the definition of a "litigation funding scheme" under Regulation 7.1.04N. In LCM's view, it is clear that a Conditional Costs Agreement does not fall within the definition of "litigation funding scheme" for the reason that this definition includes the following condition:

"the funder is not a lawyer or legal practice that provides a service for which some or all of the fees, disbursements or both are payable only on success".

79. Therefore, LCM submits that it is clear that Conditional Costs Agreements are not "litigation funding schemes" within the meaning of regulation 7.1.04N. Further, LCM is of the view that Conditional Costs Agreements do not fall within the definition of an managed investment scheme under section 9 of the Act, including because the decision in *Brookfield* did not relate to a Conditional Costs Agreement (on its own) but rather related to the funding of a closed class action by a third party funder.

80. As such, LCM submits that the *ASIC Corporations (Conditional Costs Schemes) Instrument 2020/38* should be extended so as to be consistent with the Regulations and to avoid any confusion in relation to Conditional Costs Agreements.

PART D: CONSULTATION PROCESS

81. LCM would appreciate an opportunity to discuss the above in further detail. To that end and/or to allow us to address any queries, please contact our Chief Executive Officer, Patrick Moloney, at pmoloney@lcmfinance.com.
