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FOI 3180
Document 1



Australian Government
The Treasury



Ministerial Brief
MB22-000154

FOR ACTION – Post-implementation review of 2020 litigation funding regulations

TO: Assistant Treasurer - The Hon Stephen Jones MP
CC: Treasurer – The Hon Jim Chalmers MP

TIMING

By 17 June 2022, to meet the deadline for commencing consultation and concluding the review by 31 August 2022.

Recommendation

- That you **note** Treasury is commencing consultation, including releasing a consultation paper, to support its post-implementation review of recent regulatory changes affecting litigation funding schemes.

Noted / Please discuss

- That you **sign** the letter to the Attorney-General at Attachment B.

Signed / Not signed

Signature

Date: 5/6/2022

OFFICIAL: SENSITIVE

KEY POINTS

- The Office of Best Practice Regulation (OBPR) requires Treasury to complete a post-implementation review of changes to the regulation of litigation funding schemes introduced by the former Government in July 2020.
- The relevant regulations resulted in litigation funding schemes used in class actions being required to comply with the Australian Financial Services Licence (AFSL) and managed investment scheme (MIS) regimes.
 - Cross bench members in the previous Parliament who supported the regulations included Pauline Hanson's One Nation.
 - Further background on recent regulatory changes to the class action litigation funding sector is at [Attachment A \(Additional Information\)](#).
- One feature of post-implementation reviews is that they are conducted by relevant departments rather than by Ministers. We will keep you informed of progress throughout the review.
- Our review will assess the appropriateness, effectiveness and efficiency of these regulations. This would support Government consideration of their performance, including consideration of whether they should be changed or reversed.
- A review is not required for legislation that was introduced to regulate returns to litigation funders because the Bill lapsed.
 - A review is also not required for separate regulations introduced in 2021 that strengthen protections against conflicts of interest which may arise when plaintiff lawyers have material financial interests in funders. We are considering the appropriateness of these regulations separately and will provide advice concurrent with the outcomes of the review.
- If the Government was considering reversing the regulations before the review deadline, a regulatory impact statement (RIS) would be required instead. The RIS is substantively the same as a post-implementation review. As such, we recommend proceeding with the review as planned.
 - We understand some consideration may be given to exempting election commitments from RIS requirements; however, we are not aware of specific election commitments related to these regulations.
- OBPR's guidelines outline several questions to be addressed in the review and included in a public consultation paper.
 - Further detail on the substance of the paper is at [Attachment A \(Additional Information\)](#).

- The Attorney-General has general policy responsibility for the litigation funding system and the class action regime. Ongoing engagement with the Attorney and his department will ensure the review supports any consideration of potential future reforms to the litigation funding system.
 - We understand that the Hon Mark Dreyfus QC MP has previously indicated a willingness to progress some recommendations of the Australian Law Reform Commission (ALRC) in its 2019 inquiry into litigation funding and class actions. Further detail on the ALRC inquiry is at [Attachment A \(Additional Information\)](#).
- We recommend that you write to the Attorney-General to advise him of the review process. A draft letter to this effect is at [Attachment B](#).

Next steps

- We will provide you with a final version of the consultation paper before it is released on 4 July 2022.
- Following a one-month consultation, we will provide you with a summary of submissions received.
- We aim to finalise the review by mid-August, and will provide it to you as soon as possible.
 - The review will also be sent to the Treasurer and Prime Minister in line with OBPR requirements.
- The review must be assessed by OBPR and published by 31 August 2022.

Clearance Officer
Tom Dickson
Assistant Secretary
Market Conduct Division
10 June 2022

Contact Officer
s 22
Director
Market Conduct Division
Ph: s 22

CONSULTATION

Attorney-General's Department, OBPR

ATTACHMENTS

- A: Additional Information
- B: Letter to the Attorney-General

ATTACHMENT A – ADDITIONAL INFORMATION

Post-implementation review – consultation paper

- The consultation paper to support the review will seek stakeholder feedback on:
 - the problem the regulatory changes sought to address, including its magnitude
 - the case for government intervention at the time of the final decision
 - how the regulations were implemented
 - the outcomes and impact of the regulations, including on market competition and regulatory burden
 - the costs and benefits of the regulations.
- The paper will also canvas stakeholder views on the likely regulatory impact if the regulations were removed. Consultation on this question would support future regulatory impact analysis on any proposed amendment to, or reversal of, the measures.
- We expect a wide cross section of stakeholders to participate in the consultation, including litigation funders and litigation funding associations, regulators, law firms, industry organisations, legal representatives and academics.

Background to the regulations

- On 22 May 2020, the former Treasurer announced the then Government would require litigation funders to comply with the MIS and AFSL regimes. The announcement specified the changes would take effect from three months from the date of the announcement.
- The Corporations Amendment (Litigation Funding) Regulations 2020 were registered on 23 July 2020 and came into effect on 22 August 2020.
 - The 2020 Regulations resulted in litigation funding schemes used in class actions (and involving a third party litigation funder) being required to comply with the AFSL and MIS regimes.
 - Exemptions from the AFSL and MIS regimes were introduced in 2013, following the decision of the Federal Court in *Brookfield Multiplex Ltd* (2009), in which the court found the litigation funding scheme in that case was a MIS that had to be registered under the *Corporations Act 2001*.
- As the measures in the 2020 Regulations were likely to have major impacts on affected businesses and individuals, the final decision should have been supported by a Regulation Impact Statement (RIS).
 - A RIS was not completed and assessed by OBPR prior to the final decision. As a result, OBPR assessed the RIS process for the proposal as insufficient. This triggered a requirement for Treasury to complete a PIR within two years of implementation of the measures.
- On 25 November 2021, the former Government made the Corporations Amendment (Litigation Funding) Regulations 2021, introducing a new AFSL condition which has the effect

of preventing legal representatives of class action claimants from having or obtaining a material financial interest in the litigation funder for the action.

- The additional requirement is intended to strengthen protections against conflicts of interest which may arise when plaintiff lawyers have material financial interests in funders.
- These changes are not subject to the post-implementation review, but their operation relies on the requirement for litigation funders to hold an AFSL.

Previous inquiries into class action litigation funding

- The ALRC's final report on *Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* was provided to the then Government in December 2018, and tabled in Parliament on 24 January 2019.
 - The ALRC understood its inquiry to require consideration of two overarching issues: the integrity of third party funded class actions, and the efficacy of the class action system.
 - The ALRC recognised the wide and evolving range of funding models in the third party litigation funding market. It examined the case for establishing a licensing regime similar to the AFSL for litigation funders, but ultimately recommended a court based approach to the oversight of litigation funding agreements and reducing financial risks to consumers.
- In May 2020, the then Attorney-General referred to the Parliamentary Joint Committee on Corporations and Financial Services (PJC) an inquiry into whether the level of regulation of the class action industry impacted fair and equitable outcomes for plaintiffs.
 - The PJC's report was tabled in Parliament on 21 December 2020. The majority of the PJC regarded the 2020 Regulations as 'a step in the right direction' which 'appropriately aligned' the regulation of class action litigation funding with the regulation of other financial services.
 - On 19 October 2021, the former Government's response to the PJC and ALRC reports was tabled in Parliament.
- Some recommendations from the PJC's report were progressed through the Corporations Amendment (Improving Outcomes for Litigation Funding Participants) Bill 2021. This Bill lapsed with the end of the last Parliament. This Bill would have established a new process for court approval of returns to litigation funders and lawyers involved in class actions.



THE HON STEPHEN JONES MP
ASSISTANT TREASURER AND MINISTER FOR FINANCIAL SERVICES

Ref: MB22-000154

Dear Attorney-General

I am writing to advise that Treasury will soon commence a public consultation exercise to support its review of recent regulatory changes that require selected litigation funding schemes to comply with the Australian Financial Services Licence and managed investment scheme regimes.

These changes were not supported by a regulatory impact statement (RIS) prior to a final decision of the previous government. Accordingly, the Office of Best Practice Regulation assessed the RIS process for the proposal as insufficient and requires Treasury to complete a post-implementation review of the measures by 31 August 2022.

I am aware that this review intersects with your interest in the regulatory framework for litigation funding and class actions, and the potential for future reform potentially along those lines recommended by the Australian Law Reform Commission in its report *Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders*.

I look forward to working constructively with you in anticipation that the outcomes of this review may feed into any considerations you may have regarding the broader regulatory framework for this sector. In light of this, and your wider policy responsibility for the federal court system and Australia's law and justice framework, Treasury will consult with your Department before releasing the consultation paper, and continue to work collaboratively as the review progresses.

I have copied this letter to the Treasurer.

Yours sincerely

The Hon Stephen Jones MP

CC: The Hon Dr Jim Chalmers, Treasurer



Australian Government
The Treasury



Ministerial Submission
MS22-001108

FOR ACTION – Reversing the litigation funding regulations made in 2020

TO: Assistant Treasurer and Minister for Financial Services - The Hon Stephen Jones MP
CC: Treasurer - The Hon Jim Chalmers MP

TIMING

By 13 July 2022, in order for Treasury to obtain agreement from the Prime Minister to commence work on reversing the effect of the litigation funding regulations made in 2020.

Recommendation


- That you agree to progress regulations that remove litigation funders from the managed investment scheme regime and no longer require funders to hold an Australian Financial Services License or comply with related obligations.

Agreed / Not agreed

- That you sign the letter to the Prime Minister at Attachment B seeking policy authority.

Signed / Not signed

Signature 	Date: 9/7/22 / /2022
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* Please note - I agree w the recommendation on conflict of i. and think we should pursue w the A.G. 

KEY POINTS

- Since we last briefed you on this topic ([MB22-000154](#)) the Full Federal Court handed down its judgment in *LCM Funding Pty Ltd v Stanwell Corporation Limited* [2022] FCAFC 103 (LCM).

s 42

- We recommend you seek the Prime Minister's agreement to reverse these regulations and set aside the requirement to undertake a post-implementation review of them, because the MIS regime is not fit for purpose and the most significant aspect of these regulations no longer has effect.
 - The Office of Best Practice Regulation advised they would support this request.
- Reversing the regulations would also have the effect of removing the requirement for litigation funders to hold an AFSL, and related anti-hawking and product disclosure requirements.
- Reversing the regulations in full, including removing the AFSL requirement, would avoid confusion about the operation of these regulations following the removal of the MIS requirement.
 - ASIC has advised that removing the MIS requirement without removing the AFSL requirement would create confusion for regulators and litigation funders. It is uncertain how the AFSL requirements would apply in relation to litigation funding arrangements given they do not have the characteristics generally attributable to financial products for which the AFSL requirements were designed.
 - The Australian Law Reform Commission (ALRC) rejected the option that litigation funders be required to hold an AFSL in its final report on *'Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders'*, provided to the then Government in December 2018. In its submission to the ALRC, ASIC noted that 'there is no evidence to indicate that Parliament intended third-party litigation funders to be regulated as a financial product under the Corporations Act.'
 - If the Government was inclined to retain some professional requirements on litigation funders, this would be best progressed by the Attorney-General in the form of more targeted legislation. This recognises that the AFSL regime is better suited to financial

services providers and financial products and was not designed to regulate a broader set of professions and activities.

- PM&C has advised that Prime Minister approval is the appropriate authority required in order to reverse the effect of the 2020 Regulations.
- OBPR has advised that reversing the 2020 regulations is unlikely to have a more than minor regulatory impact, and therefore the preparation of a Regulation Impact Statement (RIS) is not required.
- If you and the Prime Minister agree to reverse the effect of the 2020 Regulations, we recommend progressing towards the Executive Council meeting on 24 November 2022.
 - This timeline would enable us to meet the PM&C lodgement deadlines and satisfy the minimum public consultation period of four weeks on the draft regulations.
 - Further detail on timing is available at [Attachment A \(Additional Information\)](#).

Next Steps

- Subject to your agreement, a letter from you to the Prime Minister seeking to have the post-implementation review set aside and to progress regulations which reverse the policy outcomes of the 2020 Regulations is at [Attachment B](#).
- Once the letter is signed we will liaise with the Office of Parliamentary Council to arrange drafting of the necessary regulations with a view to providing you with further briefing in early August, including draft regulations for consultation and an accompanying media release.

Clearance Officer
Tom Dickson
Assistant Secretary
Market Conduct Division
29 June 2022

Contact Officer
s 22
Assistant Director
Ph: s 22

CONSULTATION

OBPR, PM&C, Attorney General's Department, Law Division, ASIC, AGS

ATTACHMENTS

- A: Additional Information
- B: Letter to Prime Minister

ATTACHMENT A – ADDITIONAL INFORMATION

Background to the regulations

- On 22 May 2020, the former Treasurer announced the then Government would require litigation funders to comply with the MIS and AFSL regimes. The announcement specified the changes would take effect from three months from the date of the announcement.
- The Corporations Amendment (Litigation Funding) Regulations 2020 were registered on 23 July 2020 and came into effect on 22 August 2020.
 - The 2020 Regulations resulted in litigation funding schemes used in class actions (and involving a third party litigation funder) being required to comply with the AFSL and MIS regimes.
 - Exemptions from the AFSL and MIS regimes were introduced in 2013, following the decision of the Federal Court in *Brookfield Multiplex Ltd* (2009), in which the court found the litigation funding scheme in that case was a MIS that had to be registered under the *Corporations Act 2001*.
- There are currently 11 entities which have an AFSL authorisation to deal in, issue and provide advice on the financial product that is an interest in the litigation funding scheme.
 - Seven of those 11 licensees also have an authorisation to be the responsible entity of a litigation funding scheme as a specific type of MIS, and 32 such MISs have been registered to date.
 - We understand that ASIC is considering the impact of the recent LCM decision on the existing registered MIS and whether any class order relief should be provided.

On 25 November 2021, the former Government introducing a new AFSL condition which has the effect of preventing legal representatives of class action claimants from having or obtaining a material financial interest in the litigation funder for the action.

- The additional requirement strengthens protections against conflicts of interest which may arise when plaintiff lawyers have material financial interests in funders.
- These changes are not subject to the post-implementation review.

Treasury recommends you retain the protections against conflicts of interest. This would be achieved by removing the AFSL requirement while ensuring that litigation funding schemes have a broadly equivalent conflict of interest test.

Stakeholder views

- Stakeholder views on the proposed approach would be tested during consultation on the regulations. We anticipate support for removing the MIS requirement and some debate on the merits of also removing the AFSL requirement. We believe that if any concerns about the removing the AFSL requirement are raised, these could be managed noting that, in the ALRC's view, the AFSL requirement is inferior to a court-based approach.

Timeline to meet the 24 November 2022 Executive Council meeting

Date due	Action
July 2022	Obtain policy authority through exchange of letters with Prime Minister
Early August 2022 – Mid-September 2022	Assistant Treasurer to provide approval for release of consultation products (exposure draft regulations and explanatory materials)
Mid- September 2022 – 9 October 2022	Post-consultation drafting (four weeks)
10 October 2022	Finalise legislation and associated documents including notification letter to Legislative and Governance Forum on Corporations (LGFC) and provide to Program Governance Unit Executive Council and ASIC Quality Assurance of documents
14 November 2022	Assistant Treasurer to provide text approval of regulation package and sign letter to LGFC
15 November 2022	Cut off for documents due to Executive Council Letter to be sent to LGFC notifying of intention to make regulations
24 November 2022	Executive Council meeting

Legislative and Governance Forum on Corporations (LGFC) approval

- In order to amend the *Corporations Act 2001*, the Commonwealth must consult the states and territories via the LGFC, including seeking approval in some cases based on the subject matter of the relevant amendments.
 - The LGFC is a forum comprised of the Minister from each State, Territory and the Commonwealth who has responsibility for matters relating to corporations or business names or consumer credit within their jurisdictions.
- In relation to these proposed regulations the *Corporations Agreement 2002* requires LGFC notification only (not approval) of the intention to make draft regulations.
 - LGFC notification must occur prior to regulations being made at the targeted Executive Council meeting.
- Where the planned public consultation on draft regulations is less than four weeks or is to be dispensed with entirely then this also requires LGFC notification.



THE HON STEPHEN JONES MP
ASSISTANT TREASURER AND MINISTER FOR FINANCIAL SERVICES

Ref: MS22-001108

The Hon Anthony Albanese MP
Prime Minister
Parliament House
CANBERRA ACT 2600

Dear Prime Minister

I am writing to seek your agreement to progress new regulations relating to litigation funders which would have the effect of reversing requirements introduced by the former Government in July 2020 to comply with the Managed Investment Scheme Regime (MIS) and hold an Australian Financial Services License (AFSL).

These regulations are not fit for purpose for regulating litigation funding as the MIS and AFSL regimes are better suited to financial services providers and financial products and were not designed to regulate the litigation funding profession.

In addition, the regulations no longer have their full legal effect. On 16 June 2022, the Federal Court handed down its decision in *LCM Funding Pty Ltd v Stanwell Corporation Limited [2022] FCAFC 103* (the LCM decision) that a litigation funding scheme relating to a class action did not satisfy the definition of a MIS for the purposes of the *Corporations Act 2001* and that a previous court case on analogous matters was wrongly decided. The impact of this decision is that it is unlikely that a court would find that other litigation funding schemes satisfy the MIS definition, and consequently would not be required to comply with the MIS regime.

The requirement to comply with the MIS regime was the most significant aspect of the 2020 Regulations. The separate requirement for litigation funders to hold an AFSL still remains in effect, along with related obligations to comply with the anti-hawking provisions and Part 7.9 of the Corporations Act (about product disclosure).

In this context I propose to progress new regulations to fully reverse the policy outcomes of the 2020 Regulations. The proposed regulations would ensure litigation funders are not subject to regulation under the MIS regime and thus are regulated in line with the Federal Court's recent decision.

The proposed changes would also remove the regulatory requirement for litigation funders to hold an AFSL and related obligations to comply with the anti-hawking provisions and product disclosure requirements, consistent with Government's views and public messaging on this matter when in opposition, including as expressed in the Parliamentary Joint Committee on Corporations and Financial Services report on 'Litigation funding and the regulation of the class action industry' tabled in December 2020.

Finally, the proposed regulations would also ensure that any bespoke conflict of interest requirements to be attached to the AFSL exemption would be consistent with those currently imposed on insolvency litigation funding schemes and litigation funding arrangements.

A regulatory impact statement (RIS) was not completed and assessed by OBPR prior to the decision of the former Government to implement the 2020 Regulations. As such, OBPR assessed the RIS process for the proposal as insufficient. This triggered a requirement for Treasury to complete a post-implementation review within two years of implementation of the measures in the 2020 Regulations (by 22 August 2022). As the most significant aspect of the 2020 Regulations is no longer operable due to the LCM decision, I seek your agreement to set aside the requirement to complete a post-implementation review. The Office of Best Practice Regulation has advised Treasury that they would support setting aside the post-implementation review requirement and that a RIS is not required for the proposed regulations set out in this letter.

It is my intention to progress towards having the regulations made in late 2022 after appropriate consultation.

I have copied this letter to the Attorney General given his wider policy responsibility for the federal court system and Australia's law and justice framework.

Any questions about the matters raised in this letter should be directed to ^{s 22} of the Market Conduct Division, Treasury (^{s 22} @Treasury.gov.au).

Yours sincerely

The Hon Stephen Jones MP

CC: Treasurer - The Hon Jim Chalmers MP, Attorney-General - The Hon Mark Dreyfus MP



Ministerial Submission
MS22-001556

FOR ACTION – Litigation funding 2020 regulations - approval for release of exposure draft regulations and explanatory materials

TO: Assistant Treasurer and Minister for Financial Services - The Hon Stephen Jones MP
CC: Treasurer - The Hon Jim Chalmers MP

TIMING

By 24 August 2022, to allow the draft regulations and explanatory materials to be publicly exposed for four weeks and progressed towards the Executive Council meeting on 24 November 2022.

Recommendation


- That you agree to release for public consultation the exposure draft regulations at Attachment A and associated draft explanatory material at Attachment B.

Agreed Not agreed

- That you agree to release the draft media release at Attachment C.

Agreed / Not agreed

Please discuss details of media release with my office

Signature 	Date: <i>25/8/22</i> / /2022
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KEY POINTS

- On 25 July 2022 the Prime Minister provided his agreement to reverse the effect of regulations that require litigation funding schemes to comply with the managed investment scheme (MIS), Australian Financial Services Licence (AFSL), product disclosure, and anti-hawking provisions of the *Corporations Act 2001* ([MS22-001108](#) refers).
 - The Prime Minister also agreed to your request to set aside the requirement to undertake a post-implementation review of these regulations.
- The attached exposure draft regulations are ready to be released publicly as part of the usual consultation process for these instruments.

s 34(3)



Next steps

- Subject to your approval, we will release the regulations ([Attachment A](#)) and explanatory statement ([Attachment B](#)) on the Treasury website as soon as possible for an exposure period of four weeks.
- A draft media release to accompany the release of the draft regulations and explanatory materials is at [Attachment C](#).
- Following the close of public consultation, we will send you advice on its outcomes, whether we recommend any changes be made to the draft regulations and the process for finalising the regulations towards their anticipated consideration at the Executive Council meeting on 24 November 2022.



Clearance Officer
Tom Dickson
Assistant Secretary
Market Conduct Division
8 August 2022

Contact Officer
s 22
Assistant Director
Ph: s 22

CONSULTATION

Law Division, Office of Parliamentary Counsel, The Department of the Prime Minister and Cabinet,
Attorney-General's Department, ASIC

ATTACHMENTS

- A: Exposure draft regulations
- B: Exposure draft explanatory statement
- C: Draft media release

EXPOSURE DRAFT



EXPOSURE DRAFT (03/08/2022)

Corporations Amendment (Litigation Funding) Regulations 2022

I, General the Honourable David Hurley AC DSC (Retd), Governor-General of the Commonwealth of Australia, acting with the advice of the Federal Executive Council, make the following regulations.

Dated 2022

David Hurley
Governor-General

By His Excellency's Command

Stephen Jones [DRAFT ONLY—NOT FOR SIGNATURE]
Assistant Treasurer
Minister for Financial Services

EXPOSURE DRAFT

EXPOSURE DRAFT

Contents

1	Name.....	1
2	Commencement	1
3	Authority.....	1
4	Schedules	1
	Schedule 1—Amendments	2
	<i>Corporations Regulations 2001</i>	<i>2</i>

EXPOSURE DRAFT

1 Name

This instrument is the *Corporations Amendment (Litigation Funding) Regulations 2022*.

2 Commencement

- (1) Each provision of this instrument specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Commencement information		
Column 1	Column 2	Column 3
Provisions	Commencement	Date/Details
1. The whole of this instrument	The day after this instrument is registered.	

Note: This table relates only to the provisions of this instrument as originally made. It will not be amended to deal with any later amendments of this instrument.

- (2) Any information in column 3 of the table is not part of this instrument. Information may be inserted in this column, or information in it may be edited, in any published version of this instrument.

3 Authority

This instrument is made under the *Corporations Act 2001*.

4 Schedules

Each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

EXPOSURE DRAFT

Schedule 1—Amendments

Corporations Regulations 2001

1 After subregulation 5C.11.01(2)

Insert:

- (2A) A scheme (a *litigation funding scheme*) that has all of the following features is declared not to be a managed investment scheme:
- (a) the dominant purpose of the scheme is for each of its general members to seek remedies to which the general member may be legally entitled;
 - (b) the possible entitlement of each of its general members to remedies arises out of:
 - (i) the same, similar or related transactions or circumstances that give rise to a common issue of law or fact; or
 - (ii) different transactions or circumstances but the claims of the general members can be appropriately dealt with together;
 - (c) the possible entitlement of each of its general members to remedies relates to transactions or circumstances that occurred before or after the first funding agreement (dealing with any issue of interests in the scheme) is finalised;
 - (d) the steps taken to seek remedies for each of its general members include a lawyer providing services in relation to:
 - (i) making a demand for payment in relation to a claim; or
 - (ii) lodging a proof of debt; or
 - (iii) commencing or undertaking legal proceedings; or
 - (iv) investigating a potential or actual claim; or
 - (v) negotiating a settlement of a claim; or
 - (vi) administering a deed of settlement or scheme of settlement relating to a claim;
 - (e) a person (the *funder*) provides funds, indemnities or both under a funding agreement (including an agreement under which no fee is payable to the funder or lawyer if the scheme is not successful in seeking remedies) to enable the general members of the scheme to seek remedies;
 - (f) 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.

2 Subregulation 5C.11.01(3)

Omit “an *insolvency*”, substitute “a”.

3 Paragraph 5C.11.01(4)(e)

Repeal the paragraph, substitute:

- (e) the arrangement is not a litigation funding scheme.

4 Paragraph 5C.11.01(5)(e)

Repeal the paragraph, substitute:

- (e) the arrangement is not a litigation funding scheme.

5 Subregulation 5C.11.01(6) (definition of *general member*)

Repeal the definition, substitute:

general member:

- (a) in relation to a litigation funding scheme—means a member of the scheme who:
 - (i) is not the funder; and
 - (ii) is not a lawyer providing services for the purposes of the scheme; and
- (b) in relation to a litigation funding arrangement—means the party to the arrangement who:
 - (i) is not the funder; and
 - (ii) is not a lawyer providing services for the purposes of the arrangement.

6 Regulation 7.1.04N (heading)

Omit “funding schemes and arrangements relating to insolvency and litigation”, substitute “litigation funding schemes and arrangements”.

7 Subregulation 7.1.04N(2) (heading)

Repeal the heading.

8 Paragraph 7.1.04N(2)(a)

Omit “an insolvency”, substitute “a”.

9 Subregulations 7.1.04N(3) and (4)

Repeal the subregulations.

10 Paragraph 7.1.06(2A)(a)

Omit “an insolvency”, substitute “a”.

11 Paragraph 7.1.06(2A)(b)

Omit “5C.11.01;”, substitute “5C.11.01.”.

12 Paragraph 7.1.06(2A)(c)

Repeal the paragraph.

13 Paragraph 7.6.01(1)(x)

Omit “an insolvency”, substitute “a”.

14 Subregulation 7.6.01AB(1) (paragraph 911A(5C)(a) of the *Corporations Act 2001*)

Omit “an insolvency”, substitute “a”.

15 Paragraph 7.6.01AB(2)(a)

Omit “insolvency”.

16 Subregulation 7.6.01AB(2) (note)

Omit “an insolvency”, substitute “a”.

EXPOSURE DRAFT

Schedule 1 Amendments

17 Sub-subparagraph 7.6.04(1)(k)(ii)(B)

Omit “licence;”, substitute “licence.”.

18 Paragraph 7.6.04(1)(l)

Repeal the paragraph.

19 Subregulation 7.6.04(2A)

Repeal the subregulation.

20 Paragraph 7.8.21A(g)

Omit “scheme:”, substitute “scheme that is in the nature of a litigation funding scheme, or a litigation funding arrangement, mentioned in regulation 5C.11.01;”.

21 Subparagraphs 7.8.21A(g)(i) and (ii)

Repeal the subparagraphs.

22 Subparagraphs 7.9.98A(a)(i), (b)(i), (c)(i) and (d)(i)

Omit “an insolvency”, substitute “a”.

23 In the appropriate position in Chapter 10

Insert:

Part 10.48—Application provisions relating to the Corporations Amendment (Litigation Funding) Regulations 2022

10.48.01 Application of amendments relating to litigation funding

The amendments made by the *Corporations Amendment (Litigation Funding) Regulations 2022* apply in relation to:

- (a) a litigation funding scheme mentioned in regulation 5C.11.01(2A) entered on or after the commencement of those regulations; and
- (b) a litigation funding scheme mentioned in regulation 5C.11.01(2A) entered before that commencement, but only in relation to so much of the duration of the scheme that occurs on or after that commencement.

EXPOSURE DRAFT EXPLANATORY STATEMENT

Issued by authority of the Assistant Treasurer

Corporations Act 2001

Corporations Amendment (Litigation Funding) Regulations 2022

The *Corporations Act 2001* (the Act) provides for the regulation of corporations and financial services.

Section 1364 of the Act provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

The purpose of the *Corporations Amendment (Litigation Funding) Regulations 2022* (the Regulations) is to amend the *Corporations Regulations 2001* (the Corporations Regulations) to provide litigation funding schemes with an explicit exemption from the Act's managed investment scheme (MIS) regime, Australian Financial Services Licence (AFSL) requirements, product disclosure regime and anti-hawking provisions (i.e. unsolicited sales of financial products).

Litigation funding schemes and arrangements involve an entity that is not a party to the litigation (a third-party litigation funder) paying the costs of litigation or indemnifying parties from adverse costs orders in return for a percentage share of the proceeds if the litigation is successful.

The regulatory regime in the Act for regulating litigation funding schemes is not fit for purpose. Specifically, the MIS and ASFL regimes were not designed or intended to regulate the litigation funding industry.

The amendments clarify in the Corporations Regulations the status of the law following the Full Federal Court's decision in *LCM Funding Pty Ltd v Stanwell Corporation Limited [2022] FCAFC 103* (the LCM case). In the LCM case, the Full Federal Court found the Court's earlier decision in *Brookfield Multiplex Ltd v International Litigation Funding Partners Pty Ltd (2009) 180 FCR 11* (the Brookfield case), that litigation funding schemes are subject to the MIS regime, was fundamentally wrong.

The Regulations bring arrangements for litigation funding schemes in line with arrangements for other types of litigation funding schemes (i.e. insolvency litigation funding schemes) or litigation funding arrangements defined in the Corporations Regulations, which are already exempt from the Act's MIS regime, AFSL requirements, Part 7.9 product disclosure requirements and anti-hawking provisions. This also brings the arrangements in line with the law before 22 August 2020 (in effect reversing the effect of amendments made by the *Corporations Amendment (Litigation Funding) Regulations 2020*).

The Act does not specify any conditions that need to be met before the power to make the Regulations are exercised.

Details of the Regulations are set out in Attachment A.

The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

The Regulations commence on the day after the instrument is registered on the Federal Register of Legislation.

The Regulations have been assessed as having no more than a minor regulatory impact (OBPR Reference Number OBPR22-02113). Accordingly, no Regulatory Impact Statement has been prepared.

Details of the Corporations Amendment (Litigation Funding) Regulations 2022

Section 1 – Name of the Regulations

This section provides that the name of the Regulations is the *Corporations Amendment (Litigation Funding) Regulations 2022* (the Regulations).

Section 2 – Commencement

Schedule 1 to the Regulations commences on the day after the instrument is registered on the Federal Register of Legislation.

Section 3 – Authority

The Regulations are made under the *Corporations Act 2001* (the Act).

Section 4 – Schedule

This section provides that each instrument that is specified in the Schedules to this instrument will be amended or repealed as set out in the applicable items in the Schedules, and any other item in the Schedules to this instrument has effect according to its terms.

Schedule 1 – Amendments Corporations Amendment (Litigation Funding) Regulations 2022

Item 1 (Subregulation 5C.11.01(2A)) – Adding an exemption from Managed Investment Scheme (MIS) regime for litigation funding schemes

Item 1 provides an explicit exemption for litigation funding schemes from meeting the definition of a managed investment scheme (MIS) in section 9 of the Act.

The exemption ensures the Corporations Regulations reflect the status of the law following the Full Court of the Federal Court's decision in *LCM Funding Pty Ltd v Stanwell Corporation Limited [2022] FCAFC 103* (the LCM case). In the LCM case, the Full Federal Court found the earlier decision in *Brookfield Multiplex Ltd v International Litigation Funding Partners Pty Ltd (2009) 180 FCR 11* (the Brookfield case) that litigation funding schemes are subject to the MIS regime, was fundamentally wrong.

The explicit exemption provides greater certainty for industry, as well as implementing the Government's policy that litigation funding schemes should not be subject to the MIS regime.

Providing an explicit exemption is also consistent with the existing approach for other litigation funding schemes (labelled 'insolvency litigation funding schemes' prior to the Regulations) and litigation funding arrangements (defined in regulation 5C.11.01 of the Corporations Regulations). This approach is also consistent for class actions and proof of debt arrangements that are funded by conditional costs agreements (such

as an agreement under which a lawyer agrees to act on a no win, no fee basis). Class actions and proof of debt arrangements that are funded by conditional costs agreements are afforded explicit exemptions from the MIS regime under *ASIC Corporations (Conditional Costs Schemes) Instrument 2020/38*. The legislative instrument also provides exemptions from Corporations Act requirements (such as the need to hold an Australian Financial Services Licence (AFSL), the anti-hawking provisions and product disclosure requirements).

Item 2 (Subregulation 5C.11.01(3)) – Removing separate label for ‘insolvency litigation funding schemes’

Item 2 removes the separate label for insolvency litigation funding schemes, as such schemes are to be treated the same as other litigation funding schemes.

Prior to the Regulations, litigation funding schemes were not exempt from MIS regime requirements, whereas insolvency litigation funding schemes were exempt. As both litigation funding schemes and insolvency litigation funding schemes are now subject to the same rules and obligations under the Act, it is unnecessary for them to have separate labels (i.e. to be labelled as either a litigation funding scheme or an insolvency litigation funding scheme). This item simplifies the law by removing an unnecessary term.

Item 9 (Subregulations 7.1.04N(3) and (4)) – Ensuring interests in litigation funding schemes continue to be ‘financial products’

Item 9 simplifies regulation 7.1.04N while maintaining the status of interests in litigation funding schemes as financial products. It is necessary for such interests to be declared as financial products so they can be provided with explicit exemptions from the Act’s AFSL requirements, product disclosure requirements and anti-hawking provisions. The item is required because the effect of item 2 is to remove the distinction between litigation funding schemes and insolvency litigation funding schemes.

Item 13 (Paragraph 7.6.01(1)(x)) – Adding exemption from AFSL requirements for services in relation to litigation funding schemes

Item 13 provides an explicit exemption for litigation funding schemes from the Act’s requirement to hold an AFSL. This brings the treatment for all litigation funding schemes in line with requirements for litigation funding arrangements with respect to AFSL requirements.

Items 14, 15, 16, 18 and 19 (Subregulation 7.6.01AB(1) (paragraph 911A(5C)(a) of the *Corporations Act 2001*); Paragraph 7.6.01AB(2)(a); Subregulation 7.6.01AB(2) (note); Paragraph 7.6.04(1)(l); Subregulation 7.6.04(2A)) – Changing the way bespoke conflict of interest requirements apply in relation to AFSLs

The combined effect of items 14, 15, 16, 18 and 19 is to remove the bespoke conflict of interest requirements that attached to AFSLs for litigation funding schemes.

As litigation funding schemes are now expressly exempt from the requirement to hold an AFSL, attaching the bespoke conflict of interest requirements to AFSLs is no longer an appropriate means of imposing these requirements.

However, similar bespoke conflict of interest requirements will continue to apply to litigation funding schemes through subregulation 7.6.01AB(2).

Subregulation 7.6.01AB(2) requires persons providing financial services to comply with similar conflict of interest requirements as a condition of their paragraph 7.6.01(1)(x) exemption from holding an AFSL.

Items 20 and 21 (Paragraph 7.8.21A(g) and subparagraphs 7.8.21A(g)(i) and (ii)) – Adding exemption from anti-hawking provisions for litigation funding schemes

Item 20 exempts litigation funding schemes from the Act's anti-hawking provisions. This means all litigation funding schemes and litigation funding arrangements are treated the same for the purposes of the Act's anti-hawking provisions. The amendment is required because litigation funding schemes and insolvency litigation funding schemes are no longer subject to different requirements.

Item 21 is a consequential amendment to repeal provisions which are now unnecessary due to the changes made by item 20.

Item 22 (Subparagraphs 7.9.98A(a)(i), (b)(i), (c)(i) and (d)(i)) – Adding exemption from Part 7.9 of the Act for litigation funding schemes

Item 22 exempts litigation funding schemes from the Act's Part 7.9 disclosure obligations. This means all litigation funding schemes and litigation funding arrangements are treated the same for the purposes of the Act's Part 7.9 disclosure obligations. The amendment is required because litigation funding schemes and insolvency litigation funding schemes are no longer subject to different requirements.

Item 23 (Part 10.48—Application provisions relating to the Corporations Amendment (Litigation Funding) Regulations 2022) – Application of the amendments to litigation funding schemes

Item 23 provides for the application of the Regulations to litigation funding schemes.

- Litigation funding schemes entered into on, or after, the commencement of the Regulations, are explicitly exempt from meeting the definition of a MIS, AFSL requirements, the Act's Part 7.9 product disclosure requirements and anti-hawking provisions.
- Litigation funding schemes entered into before the commencement of the Regulations, are explicitly exempt from meeting the definition of a MIS, AFSL requirements, the Act's Part 7.9 product disclosure requirements and anti-hawking provisions for the duration of the scheme that occurs on or after the Regulations commence.

ASIC may need to consider whether it is appropriate for exemptions and modifications to be granted under an ASIC instrument to supplement these changes

and manage transitional issues that may have arisen in the period between the LCM decision and the commencement of the Regulations.

ASIC may also need to consider whether modifications granted under instruments, such as the *ASIC Corporations (Litigation Funding Schemes) Instrument 2020/787*, are appropriate to retain or whether they could now be revoked.

Instrument 2020/787 provides exemptions to litigation funding schemes from certain requirements in the Corporations Act. The instrument was originally made to facilitate litigation funders complying with the MIS regime.

Items 3, 4, 5, 6, 7, 8, 10, 11 and 17 (Paragraphs 5C.11.01(4)(e) and (5)(e), Subregulation 5C.11.01(6) (definition of *general member*), heading of regulation 7.1.04N, heading of subregulation 7.1.04N(2) and paragraph 7.1.04N(2)(a), paragraph 7.1.06(2A)(a), paragraph 7.1.06(2A)(b) and sub-subparagraph 7.6.04(1)(k)(ii)(B)) – Consequential amendments due to removal of the ‘insolvency litigation funding scheme’ label

Items 3, 4, 5, 6, 7, 8 and 10 are consequential amendments required as a result of removing the distinction between litigation funding schemes and insolvency litigation funding schemes.

Items 11 and 17 are consequential amendments to punctuation required due to the removal of the ‘insolvency litigation funding scheme’ label.

Item 12 (Paragraph 7.1.06(2A)(c)) – Consequential amendment due to repeal of subregulation 7.1.04N(3)

Item 12 is a consequential amendment required as a result of the repeal of subregulation 7.1.04N(3), which is repealed due to the removal of the ‘insolvency litigation funding scheme’ label.



The Hon Stephen Jones MP
Assistant Treasurer and Minister for Financial Services

MEDIA RELEASE

xx August 2022

REDUCED REGULATORY BURDEN FOR LITIGATION FUNDERS

The Albanese Government has today released for public consultation draft regulations to reverse the effect of the litigation funding regulations implemented in 2020 by the former government.

The new regulations will reinstate exemptions from the Australian Financial Services Licence (AFSL), managed investment scheme (MIS) and other corporate regulatory regimes for litigation funders that existed prior to the August 2020 changes.

Removal of these costly regulatory regimes that are not fit for purpose will enhance access to justice for claimants and make funded class actions more attractive by reducing the regulatory burden for litigation funders. Court oversight and scrutiny will continue to promote fair and efficient litigation funding arrangements.

The exposure draft regulations and explanatory statement are available on the Treasury website. Submissions open today and conclude on [21] September 2022.

Ends

Non-Revenue ABUMs – DO NOT PROCEED

Litigation Funders – Rate of return (TSY/46/562)			
Measure description and justification to reverse	<p>This measure would ensure that litigation funders structure litigation funding agreements so that they are fair and reasonable, assuming a return to class members of less than 70 percent of the net proceeds is not fair and reasonable.</p> <p>This measure was introduced in the Corporations Amendment (Improving Outcomes for Litigation Funding Participants) Bill 2021, which lapsed when the 46th Parliament was dissolved.</p> <p>The Government is progressing regulations to reverse the effect of this measure and the 2020 regulations made by the former Government.</p>		
Budget / MYEFO Year	N/A		
Other announcement details	<p>Media release by the former Treasurer (the Hon Josh Frydenberg MP) on 30 September 2021. Source: https://ministers.treasury.gov.au/ministers/josh-frydenberg-2018/media-releases/ensuring-fair-and-reasonable-returns-class-action</p> <p>This measure was introduced in the Corporations Amendment (Improving Outcomes for Litigation Funding Participants) Bill 2021, which lapsed when the 46th Parliament was dissolved.</p>		
Risks / Sensitivities	N/A		
Affected Entities / Stakeholders	<p>AGD and ASIC. Litigation funders, class members, representatives of the legal profession and law firms, and representatives of companies and their directors. Stakeholder views were mixed, including some stakeholders supporting some elements of the Bill but not others.</p>		
Regulatory impacts	<p>The OBPR was consulted and a regulatory impact analysis was prepared and published. If this measure were to proceed it would have an average annual regulatory cost of \$68,000 to \$95,000 per annum. OBPR ID: 43504.</p>		
Division and contacts	MCD Policy SES: Tom Dickson Policy lead: s 22		
Approximate Financial Implications over the Forward Estimates	Nil		
MS/PDMS References	N/A		
Treasurer decision	Agree	Not Agree	Please Discuss

s 22



From: s 22 @TREASURY.GOV.AU>
Sent: Friday, 2 September 2022 12:15 PM
To: s 22 @TREASURY.GOV.AU>; s 22 @TREASURY.GOV.AU>
Cc: s 22 @TREASURY.GOV.AU>; s 22 @TREASURY.GOV.AU>; s 22 @TREASURY.GOV.AU>; s 22 @TREASURY.GOV.AU>; s 22 @TREASURY.GOV.AU>; s 22 @TREASURY.GOV.AU>; s 22 @TREASURY.GOV.AU>
Subject: RE: For action: Media release for consultation on litigation funding 2020 regulations
~~[SEC PROTECTED, CAVEAT - SH.CABINET]~~

~~PROTECTED//CABINET~~

Hi s 22

Looks good to us.

Thanks
Kind Regards

s 22 — Assistant Director (CBR)
Financial Reporting and Insolvency Unit

P, s 22
s 22

~~PROTECTED//CABINET~~

From: s 22 @TREASURY.GOV.AU>
Sent: Friday, 2 September 2022 12:12 PM
To: s 22 @TREASURY.GOV.AU>; s 22 @TREASURY.GOV.AU>
Cc: s 22 @TREASURY.GOV.AU>; s 22 @TREASURY.GOV.AU>;
s 22 @TREASURY.GOV.AU>; s 22 @TREASURY.GOV.AU>;
s 22 @TREASURY.GOV.AU>; s 22 @TREASURY.GOV.AU>;
s 22 @TREASURY.GOV.AU>
Subject: RE: For action: Media release for consultation on litigation funding 2020 regulations
[SEC-PROTECTED, CAVEAT-SH.CABINET]

PROTECTED//CABINET

Slight change in language from us highlighted in yellow

UNFAIR HURDLES TO CLASS ACTION FUNDING UNWOUND

The Albanese Government has today released draft regulations which unwind the previous government's unfair treatment of class action plaintiffs.

The decision to reverse the earlier regulations follows a June 2022 decision by the Full Federal Court which held that the notion that funded class actions are managed investment schemes is "plainly wrong".

The proposed new regulations are drafted to facilitate access to justice rather than the previous Treasurer's cynical efforts to hamper Australians' access to funding for class actions which he ushered through under the cover of COVID-19.

The draft regulations would reinstate the longstanding exemptions from the Australian Financial Services Licence (AFSL), managed investment scheme (MIS) and other corporate regulatory regimes for litigation funders that existed prior to the August 2020 changes.

The Albanese Government is also considering recommendations by the Australian Law Reform Commission to clarify and strengthen the powers of the Federal Court to ensure fair and reasonable returns to class action members.

The exposure draft regulations and explanatory statement are available on the Treasury website.

Submissions open today and conclude on 30~~27~~ September 2022.

Kind regards,

s 22 — Senior Media Advisor
Office of Stephen Jones, Assistant Treasurer
s 22

The Treasury acknowledges the traditional owners of country throughout Australia, and their continuing connection to land, water and community. We pay our respects to them and their cultures and to elders both past and present.

PROTECTED//CABINET

From: s 22 @TREASURY.GOV.AU>
Sent: Friday, 2 September 2022 11:30 AM
To: s 22 @TREASURY.GOV.AU>
Cc: s 22 @TREASURY.GOV.AU>; s 22 @TREASURY.GOV.AU>;
s 22 @TREASURY.GOV.AU>; s 22 @TREASURY.GOV.AU>;
s 22 @TREASURY.GOV.AU>; s 22 @TREASURY.GOV.AU>;

s 22 [redacted] @TREASURY.GOV.AU>; s 22 [redacted]

[redacted] @TREASURY.GOV.AU>

Subject: RE: For action: Media release for consultation on litigation funding 2020 regulations
[~~SEC PROTECTED, CAVEAT - SH: CABINET~~]

~~PROTECTED//CABINET~~

Great, thank you.

And yes all compliant for the Corporations Agreement.

Kind Regards

s 22 [redacted] — Assistant Director (CBR)

Financial Reporting and Insolvency Unit

P>s 22 [redacted]

s 22 [redacted]

~~PROTECTED//CABINET~~

From: s 22 [redacted] @TREASURY.GOV.AU>

Sent: Friday, 2 September 2022 11:26 AM

To: s 22 [redacted] @TREASURY.GOV.AU>

Cc: s 22 [redacted] @TREASURY.GOV.AU>; s 22 [redacted]

[redacted] @TREASURY.GOV.AU>; s 22 [redacted] @TREASURY.GOV.AU>;

s 22 [redacted] @TREASURY.GOV.AU>; s 22 [redacted] @TREASURY.GOV.AU>;

s 22 [redacted] @TREASURY.GOV.AU>; s 22 [redacted]

[redacted] @TREASURY.GOV.AU>

Subject: RE: For action: Media release for consultation on litigation funding 2020 regulations
[~~SEC PROTECTED, CAVEAT - SH: CABINET~~]

~~PROTECTED//CABINET~~

Yep – as long as that meets our corporations act requirements!

Thanks,

s 22 [redacted] — Senior Adviser to the Assistant Treasurer

M s 22 [redacted]

s 22 [redacted]

From: s 22 @TREASURY.GOV.AU>
 Sent: Friday, 2 September 2022 8:24 AM
 To: s 22 @TREASURY.GOV.AU>
 Cc: s 22 @TREASURY.GOV.AU>; s 22 @TREASURY.GOV.AU>; s 22 @TREASURY.GOV.AU>; s 22 @TREASURY.GOV.AU>; s 22 @TREASURY.GOV.AU>; s 22 @TREASURY.GOV.AU>; s 22 @TREASURY.GOV.AU>

Subject: RE: For action: Media release for consultation on litigation funding 2020 regulations
 [SEC PROTECTED, CAVEAT SH.CABINET]

~~PROTECTED//CABINET~~

Hi s 22

Thanks – can you fact check this release? It’s been revised by AGO – see below.

THE HON MARK DREYFUS QC MP
 Attorney-General
THE HON STEPHEN JONES MP
 Assistant Treasurer

MEDIA RELEASE
UNFAIR HURDLES TO CLASS ACTION FUNDING UNWOUND

The Albanese Government has today released draft regulations which unwind the previous government’s unfair treatment of class action plaintiffs.

The decision to reverse the earlier regulations follows a June 2022 decision by the Full Federal Court which held that the notion that funded class actions are managed investment schemes is “plainly wrong”.

The proposed new regulations are instead drafted with the best interests of plaintiffs guiding them, rather than the previous Treasurer’s cynical efforts to hamper Australians’ access to funding for class actions which he ushered through under the cover of COVID-19.

The draft regulations would reinstate the longstanding exemptions from the Australian Financial Services Licence (AFSL), managed investment scheme (MIS) and other corporate regulatory regimes for litigation funders that existed prior to the August 2020 changes.

The Albanese Government is also considering recommendations by the Australian Law Reform

Commission to clarify and strengthen the powers of the Federal Court to ensure fair and reasonable returns to class action members.

The exposure draft regulations and explanatory statement are available on the Treasury website.

Submissions open today and conclude on ~~30²⁷~~ September 2022.

Thanks,

s 22 — Senior Adviser to the Assistant Treasurer

Ms 22

s 22



Measure Title	Announcement	Start date	Treasury Portfolio Minister recommendation	Supporting explanation	Financial Implications:	
					Original announced financial impact	Costed impact for change (if applicable)

s 22



<p>26. Litigation Funders – Rate of return</p> <p><i>Non-revenue measure</i></p>	<p>Former Government announcement to implement recommendations from the Parliamentary Joint Committee on Corporations</p>	<p>The start date was the day after Royal Assent.</p>	<p><input type="checkbox"/> Proceed as is <input type="checkbox"/> Proceed with date change <input checked="" type="checkbox"/> Not Proceed</p>	<p>This measure was introduced in the Corporations Amendment (Improving Outcomes for Litigation Funding Participants) Bill 2021, which lapsed when the 46th Parliament was dissolved.</p> <p>The Government is progressing regulations to reverse the effect of the 2020 regulations made by the former Government.</p> <p>Treasury certified independent reviews from the Australian Law Reform Commission and Parliamentary Joint Committee on</p>	<p>Nil</p>	<p>Nil</p>
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Measure Title	Announcement	Start date	Treasury Portfolio Minister recommendation	Supporting explanation	Financial Implications:	
					Original announced financial impact	Costed impact for change (If applicable)
	and Financial Services on its report on litigation funding			Corporations and Financial Services, together with the supporting analysis, as a process and analysis equivalent to a Regulation Impact Statement.		

s 22





OFFICE OF THE HON STEPHEN JONES MP
ASSISTANT TREASURER AND MINISTER FOR FINANCIAL SERVICES

Ref: MC22-007106

s 47F

Dear s 47F

Thank you for your email raising issues concerning litigation funding schemes. The Assistant Treasurer has asked me to respond on his behalf. As you have noted, the Assistant Treasurer is consulting with Treasury on the regulatory regime in respect of litigation funding.

I understand that Treasury has referred your correspondence to ASIC for its consideration. I note your comments regarding the suggested provision of regulatory relief by ASIC. As ASIC is an independent statutory authority, whether this or other regulatory relief is provided is a matter for ASIC.

Thank you again for your letter.

Yours sincerely

Julianne Merriman
Chief of Staff

From: [Assistant Treasurer](#)
To: [Min Processing](#)
Cc: [Jones DLO](#)
Subject: MCD - s 47F Litigation funding schemes - CoS reply
Date: Wednesday, 29 June 2022 4:51:48 PM
Attachments: [image001.png](#)

OFFICIAL

Hi team,

Please process for a CoS reply.

Cheers,

s 22

s 22 — **Departmental Liaison Officer**

Office of the Hon Stephen Jones MP

Assistant Treasurer and Minister for Financial Services

P +61 2 s 22 M s 22 ES @treasury.gov.au

M1.27, Parliament House, Canberra, ACT 2600

OFFICIAL

From: s 47F

Sent: Thursday, 23 June 2022 2:50 PM

To: Assistant Treasurer <AssistantTreasurer@TREASURY.GOV.AU>

Subject: Litigation funding schemes [JWSDOCS-DOCUMENTS.FID437352]

Dear Assistant Minister

I refer to the *Stanwell* case handed down by the FCAFC last Thursday. It held that litigation funding schemes (**LFS**) are not managed investment schemes. I also refer to your comments, quoted by Ron Mizen in Monday's AFR, to the effect that you believe that all AFS regulation should cease to apply to LFS and you would consult with Treasury on this.

The purpose of this email is to request that, while your consultation with Treasury is being carried out, steps be taken by either Treasury or ASIC to provide certainty on the regulatory position of existing LFS and class actions that are about to be commenced. Uncertainty exists because it appears that some actions for multiple applicants will satisfy the definition of LFS in Regulation 7.1.04N, and therefore, these actions will be financial products. However, it is unclear when the LFS (that is a financial product) is issued and which party is the issuer of the LFS. This leads to uncertainty as to which person has the obligation to prepare a target market determination (**TMD**) and a product disclosure statement (**PDS**). (As an aside, note that Corporations Regulation 7.1.04N is not restricted only to class actions, contrary to the applicable Explanatory Statement, which is another source of uncertainty, quite apart from the *Stanwell* case.)

There are also uncertainties for some existing AFSL holders that, prior to *Stanwell*, had the authorisation on their AFSL to operate LFS and to deal and advise in these financial products. This uncertainty arises because some of these AFSL holders only have LFS noted on their AFSL under the authorisation to operate a scheme; the authorisations for dealing and advising list the more general financial product of managed investment scheme, not LFS specifically. The result is that, even if there is clarity on the identity of the issuer of the LFS and who, if anyone, must prepare a TMD and PDS, some of the existing AFSL holders that are currently authorised to operate a LFS will not have the authorisation on their AFSL to deal in, or advise on, LFS, and therefore, they will be unable to authorise funders to enable these cases to be pursued during the time that it takes to consult with Treasury.

In our view, the most expedient way to address the uncertainties during the consultation is for ASIC to make a declaration under section 765A(2) of the Corporations Act that LFS are not financial products. This would have the effect of overriding Regulation 7.1.04N, given that this Regulation was made under section 764A of the Corporations Act, and section 764A is expressly stated to be subject to section 765A. I appreciate that ASIC may decide to put a sunset date on the effectiveness of its declaration, but presumably the declaration could persist for a sufficiently long period to enable the consultation with Treasury to be finalised.

I support your view that AFS regulation is unsuitable to regulate LFS. The courts are much better placed to supervise funders that will give applicants whatever protection is required. To the extent

that any protection is required for applicants prior to a case being filed and before a court is involved, the professional duties imposed on lawyers, together with the "market" is likely to provide the requisite level protection for applicants in these limited circumstances. More specifically, lawyers will be engaged by the representative to advise the representative or applicant at the stage that a funder is to be selected and engaged (prior to a court being involved), and lawyers are unlikely to recommend a funder that will not pay the legal fees or that the lawyers think will not be in the interest of their client.

I impress upon you the importance of immediate measures being taken to provide much needed clarity to these issues which are unnecessarily clouded in confusion. While my area of practice focuses on financial services and funds management, I, and any of my litigation partners, would be pleased to discuss this issue with you further if that would be of assistance.

I would be grateful for a response to address the issues raised in this email if no action is to be taken immediately to address them.

Yours faithfully

s 47F





PRIME MINISTER

25 JUL 2022

Reference: MC22-049159

The Hon Stephen Jones MP
Assistant Treasurer and Minister for Financial Services
Parliament House
CANBERRA ACT 2600

Dear Minister Jones

A handwritten signature in blue ink that reads "Stephen," written over the printed name "Dear Minister Jones".

Thank you for your letter dated 5 July 2022 seeking agreement to progress new regulations relating to litigation funders to remove requirements to comply with the Management Investment Scheme Regime and hold an Australian Financial Services Licence, and to set aside the post-implementation review of the current requirements.

I agree with your proposal as outlined in your letter.

s 34(3)

I have copied the Hon Dr Jim Chalmers MP, Treasurer, and the Attorney-General to this letter.

Yours sincerely

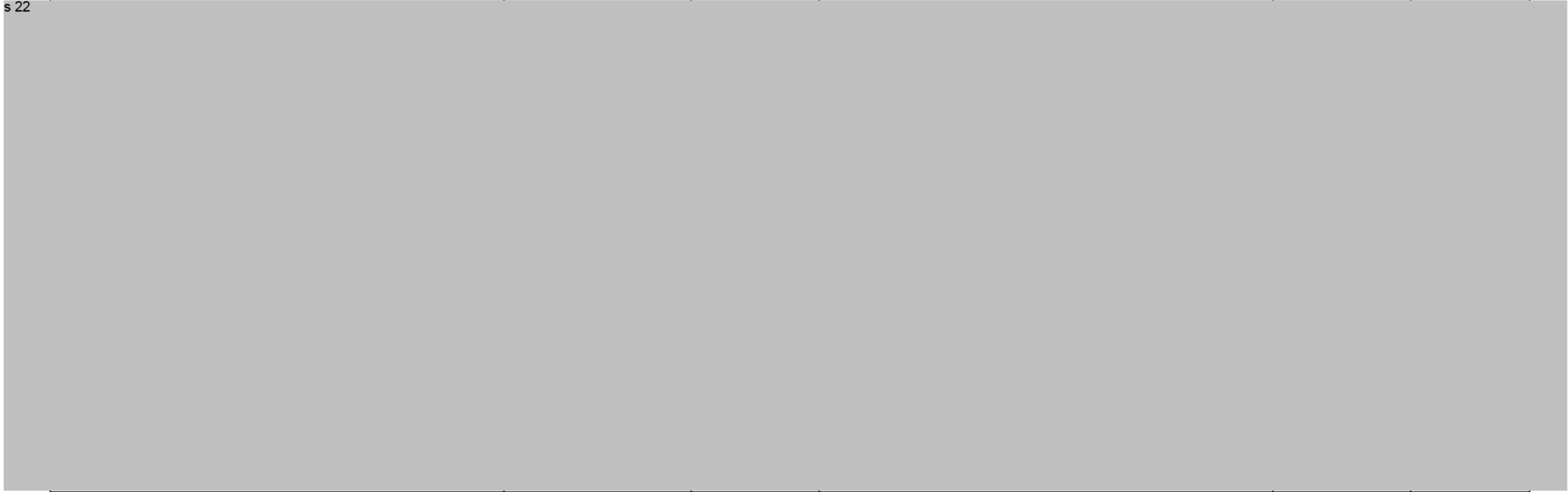
A handwritten signature in blue ink that reads "Anthony Albanese", written over the printed name "ANTHONY ALBANESE".

ANTHONY ALBANESE

~~PROTECTED/CABINET~~

Measure description and policy context	Initiative Type	Proposed law effect date	Additional background and implementation timeframes	Proposed Executive Council	Division and contacts
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s 22



11. Reinstating exemptions from AFSL and other corporate regulatory regimes for litigation funders (TSY/47/0041)

<p>This measure will reinstate exemptions for litigation funding schemes from AFSL requirements, the MIS regime, product disclosure obligations and anti-hawking provisions. This reverses the effect of regulations made in 2020 (the <i>Corporations Amendment (Litigation Funding) Regulations 2020</i>).</p>	<p>Government Policy Initiative</p>	<p>The day after registration</p>	<p>The Government (as the then Opposition) opposed the 2020 regulations on the basis that they were 'not fit-for-purpose' and were introduced without warning, evidence or public consultation.</p>	<p>24 November 2022</p>	<p>Market Conduct Division Policy Contact: Tom Dickson 6263 2868 Law Contact: Erin Wells 6263 4809</p>
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s 22



~~PROTECTED/CABINET~~