



Corporations Amendment (Litigation Funding) Regulations 2020

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 23 July 2020

David Hurley
Governor-General

By His Excellency's Command

Josh Frydenberg
Treasurer

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>

1 Name

This instrument is the *Corporations Amendment (Litigation Funding) Regulations 2020*.

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.	24 July 2020

Note: This table relates only to the provisions of this instrument as originally made.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Each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

Schedule 1—Amendments

Corporations Regulations 2001

1 Regulation 5C.11.01

Repeal the regulation, substitute:

5C.11.01 Certain schemes not managed investment schemes

- (1) This regulation is made for the purposes of paragraph (n) of the definition of *managed investment scheme* in section 9 of the Act.
- (2) An approved benefit fund (within the meaning of subsection 16B(1) of the *Life Insurance Act 1995*) is declared not to be a managed investment scheme.
- (3) A scheme (an *insolvency litigation funding scheme*) that has all of the following features is declared not to be a managed investment scheme:
 - (a) the scheme relates to a Chapter 5 body corporate;
 - (b) the creditors or members of the body corporate provide funds (including through a trust), indemnities or both to the body corporate or external administrator;
 - (c) the funds, indemnities or both enable the external administrator or the body corporate to:
 - (i) conduct investigations; or
 - (ii) seek or enforce a remedy against a third party; or
 - (iii) defend proceedings brought against the body corporate in relation to the external administration of the body corporate (other than in relation to allegations, made by creditors or members of the body corporate, of negligence or non-performance of duties by the external administrator).
- (4) An arrangement (a *litigation funding arrangement*) that has all of the following features is declared not to be a managed investment scheme:
 - (a) the dominant purpose of the arrangement is proving claims made by a general member who is an individual under Division 6 of Part 5.6 of the Act (which may include the funding of the preparation and the lodgement of the proofs);
 - (b) the steps taken under the arrangement 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;
 - (c) 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 arrangement is not successful in proving claims) to enable the general member to prove the claims;

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- (d) 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;
 - (e) the arrangement is not:
 - (i) an insolvency litigation funding scheme; or
 - (ii) a litigation funding scheme mentioned in subregulation 7.1.04N(3).
- (5) An arrangement (a **litigation funding arrangement**) that has all of the following features is declared not to be a managed investment scheme:
- (a) the dominant purpose of the arrangement is for a general member to seek remedies to which the general member may be legally entitled;
 - (b) the steps taken to seek remedies 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;
 - (c) 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 arrangement is not successful in seeking remedies) to enable the general member to seek remedies;
 - (d) 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;
 - (e) the arrangement is not:
 - (i) an insolvency litigation funding scheme; or
 - (ii) a litigation funding scheme mentioned in subregulation 7.1.04N(3).
- (6) In this regulation:

external administrator includes an administrator, a liquidator (including a provisional liquidator) and a controller.

general member, in relation to a litigation funding arrangement, means the party to the arrangement who:

- (a) is not the funder; and
- (b) is not a lawyer providing services for the purposes of the arrangement.

2 Regulation 7.1.04N

Repeal the regulation, substitute:

7.1.04N Specific things that are financial products—funding schemes and arrangements relating to insolvency and litigation

- (1) This regulation is made for the purposes of paragraph 764A(1)(m) of the Act.

Insolvency litigation funding schemes and litigation funding arrangements

- (2) The following are declared to be financial products:
- (a) an interest in an insolvency litigation funding scheme mentioned in regulation 5C.11.01;

- (b) an interest in a litigation funding arrangement mentioned in that regulation.

Litigation funding schemes

- (3) An interest in a scheme (a **litigation funding scheme**) that has all of the following features is declared to be a financial product:
 - (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
 - (i) 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.
- (4) In this regulation:

general member, in relation to a litigation funding scheme, means a member of the scheme who:

- (a) is not the funder; and
- (b) is not a lawyer providing services for the purposes of the scheme.

3 Subregulations 7.1.06(2A) and (2B)

Repeal the subregulations, substitute:

- (2A) The following are not credit facilities:
 - (a) an insolvency litigation funding scheme mentioned in regulation 5C.11.01;
 - (b) a litigation funding arrangement mentioned in regulation 5C.11.01;
 - (c) a litigation funding scheme mentioned in subregulation 7.1.04N(3).

4 Paragraph 7.6.01(1)(x)

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

5 Subregulation 7.6.01AB(1)

Omit “(5A)”, substitute “(5B)”.

6 Subregulation 7.6.01AB(1) (subsection 911A(5B) of the *Corporations Act 2001*)

Omit “(5B)”, substitute “(5C)”.

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

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

8 Subregulation 7.6.01AB(2)

Omit “subsection 911A(5B)”, substitute “subsection 911A(5C)”.

9 Paragraph 7.6.01AB(2)(a)

Omit “litigation funding scheme or arrangement”, substitute “insolvency litigation funding scheme or litigation funding arrangement”.

10 Subregulation 7.6.01AB(2) (note)

Omit “a litigation” (first occurring), substitute “an insolvency litigation”.

11 Paragraph 7.8.26(a)

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

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

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

13 In the appropriate position in Chapter 10

Insert:

Part 10.38—Application provisions relating to the Corporations Amendment (Litigation Funding) Regulations 2020

10.38.01 Application of amendments relating to litigation funding

(1) The amendments made by the *Corporations Amendment (Litigation Funding) Regulations 2020* apply in relation to litigation funding schemes, insolvency litigation funding schemes and litigation funding arrangements entered into on or after 22 August 2020.

(2) In this regulation:

insolvency litigation funding scheme means an insolvency litigation funding scheme mentioned in regulation 5C.11.01 (as in force on 22 August 2020).

litigation funding arrangement means a litigation funding arrangement mentioned in regulation 5C.11.01 (as in force on 22 August 2020).

litigation funding scheme means a litigation funding scheme mentioned in subregulation 7.1.04N(3) (as in force on 22 August 2020).