



**CONSULTATION ON EXPOSURE DRAFT OF *CORPORATIONS AMENDMENT  
(LITIGATION FUNDING) REGULATIONS 2022***

**SUBMISSION OF LITIGATION CAPITAL MANAGEMENT LIMITED  
30 September 2022**

**Litigation Capital Management Limited** ABN 13 608 667 509

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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 consultation on the exposure draft of the *Corporations Amendment (Litigation Funding) Regulations 2022* (“Exposure Draft”), which proposes changes to the regulation of litigation funding schemes under the *Corporations Act 2001* and the *Corporations Regulations 2001* (“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 arbitration proceedings, as well as representative actions.

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## **PART B: SUMMARY**

4. By this submission, LCM responds to the Exposure Draft as follows:
  - 4.1. Subject to the below reservation, LCM supports each of the Regulations amendments proposed by the Exposure Draft;
  - 4.2. LCM submits that the proposed amendment to Regulation 7.6.01 (and related changes) ought not be made, such that the Regulations continue to require litigation funders to hold an Australian Financial Services Licence (“AFSL”) for the provision of services in relation to litigation funding schemes.

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## **PART C: AFSL REQUIREMENTS**

5. LCM has long advocated for increased regulation of Australia’s litigation funding market and championed the introduction of a relevant licensing regime as an added means of ensuring continued integrity within the industry.
6. LCM acknowledges that the AFSL regime is not perfectly tailored to litigation funding products and providers. Nevertheless, LCM submits that:
  - 6.1. With the assistance of the Australian Securities and Investments Commission, litigation funders have been able to obtain, and have obtained, AFS Licences that include authorisations for litigation funding schemes;
  - 6.2. The above AFS Licences carry with them conditions and compliance obligations (including insurance, capital, ‘fit and proper person’ and other tests) which, unlike some of the obviously ill-fitting requirements associated with the managed investment scheme regime, are relevant and applicable to the services offered by litigation funders;

- 6.3. By contract with the AFSL regime, LCM did oppose the treatment of litigation funding schemes as managed investment schemes, including by bringing that challenge before the Full Court of the Federal Court in the *Stanwell* class action. LCM took this approach because, as Lee J summarised in *LCM Funding Pty Ltd v Stanwell Corporation Limited* [2022] FCAFC 103 (at [7]), “the characterisation of litigation funding arrangements as managed investment schemes is a case of placing a square peg into a round hole”.
  - 6.4. LCM submits that the above statement does not translate or apply to the AFSL regime – reputable litigation funders are able to comply with AFS obligations and have now been complying with them for some time;
  - 6.5. Therefore, LCM submits that the status quo of AFSL compliance for litigation funding schemes ought not be disturbed, unless and until this regime can be replaced with a better, more bespoke, set of regulations;
  - 6.6. Taking the positive, and unnecessary, step of again exempting funders from AFSL requirements will mean that, outside of Court supervision, the industry will receive no regulatory oversight.
7. LCM further notes that licensing of litigation funders has previously received support, including:
    - 7.1. In 2014, the Productivity Commission recommended that litigation funders should be licensed to ensure that they ‘hold adequate capital relative to their financial obligations and properly inform clients of relevant obligations and systems for managing risks and conflicts of interest’; and
    - 7.2. Although it did not ultimately recommend the AFSL regime, in 2018 the Australian Law Reform Commission:
      - 7.2.1. “Initially supported a licence regime”; and
      - 7.2.2. Noted that “licensing of litigation funders was strongly supported by submissions”.
8. LCM submits that the above offers added support for maintaining the status quo of AFSL regulation until such time as a more appropriate regime is devised and is able to be implemented.
  9. In summary, LCM submits that removing the need for AFS Licences would not be an improvement. Although these requirements are not perfect, they are already in place, they are already being complied with, and they are better than nothing.
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