

Question No: QoN 020
Topic: Regulation of litigation funders
Committee Member: Senator O'Neill
Reference: Hansard page 16

Question

CHAIR: The committee will now resume. I think we still have all officers and committee members with us—that appears to be the case. Senator O'Neill, I understand you're seeking the call.

Senator O'NEILL: Thank you very much. I was prosecuting a line of questioning with regard to the litigation funders and their being captured by managed investment schemes. I have some more technical questions. Will they have to have a constitution that complies with sections 601GA and 601G of the Corporations Act; and a compliance plan that complies and convinces ASIC before they build book that the criteria of section 601EB of the act is satisfied?

Mr Day: In relation to the first two questions, the answer is yes. In relation to the last question, I'd have to take that finer point on notice; I haven't got it in front of me.

Answer

The exact obligations imposed on litigation funding schemes will depend on a number of factors. A key issue will be whether the scheme registration requirements have been triggered under s601ED(1), and who is operating the scheme.

Registration requirements

A scheme must be registered:

1. If the scheme has more than 20 members (s601ED(1)(a));
2. If the scheme is one that is promoted by a person who is in the business of promoting schemes, or whose associate is in the business of promoting schemes (s601ED(1)(b));
or
3. ASIC determines that there are a number of closely related schemes and the total number of members of all of the schemes exceeds 20 (s601ED(1)(c)).

However, if none of the issue of the interests in the scheme requires a PDS, the scheme is exempt from registration (s601ED(2)) – for example, wholesale schemes do not need to be registered.

The need for a complying constitution and compliance plan arises when the scheme is being registered. These documents are provided to ASIC as part of the registration application (s601EA).

If a litigation funding scheme needs to be registered, then it needs to have a compliant constitution and compliance plan. Whoever is applying for it to be registered needs to attach those documents to the application for registration.

ASIC will assess whether the application complies with s601EB and we must register the scheme within a 14 day period *unless it appears to ASIC* that the application does not meet one or more of the requirements under s601EB, which includes having a complying constitution and compliance plan. We note that assessment of the documents is made against a limited set of requirements set out in s601GA, s601GB & s601HA of the Act and supported by our guidance in ASIC Regulatory Guide 134 *Managed investments: Constitutions* and ASIC Regulatory Guide

132 *Funds management: Compliance and oversight*. The registration process does not involve ASIC assessing the merits of a scheme.

The application will be made by the proposed responsible entity (operator) of the scheme. If the funder were to be the operator, they would need to register the scheme and have a constitution and compliance plan. However, it may not always be the case that the funder is the operator, as there is the possibility of using another third party to act as the RE.

Book build

We assume by book build you are referring to the process of identifying, contacting and signing up parties to a proposed class action to gauge interest before filing proceedings, and to see how many potential class members are willing to agree to participate in the potential class action.

At some point in this process a proposed class action may trigger the above registration requirements (ie more than 20 retail clients). It is a matter for the operator to determine the time they complete the registration step, but they must do so once the litigation funding scheme meets the mandatory registration stage.