



11 August 2006

Mr Laurie Glanfield  
Secretary, Standing Committee of Attorneys-General  
Level 19, 8-12 Chifley Square  
SYDNEY NSW 2000

Dear Mr Glanfield,

## Discussion Paper: Litigation Funding In Australia

### 1 Introduction

As you are aware, IMF (Australia) Ltd (“IMF”) is not opposed to regulation of litigation funding.<sup>1</sup>

In the United Kingdom, litigation funding has been addressed in a policy framework under the banner of Access to Justice.<sup>2</sup> This is appropriate given that demand for funding results from cost, delay, inequality of arms and risk issues inherent in the adversarial process.

Lord Woolf in his report which culminated in the Access to Justice legislation in the UK said of the UK civil justice system:

*“...it is too expensive and the costs often exceed the value of the claim; too slow in bringing cases to a conclusion and too unequal; there is a lack of equity between the powerful, wealthy litigant and the under-resourced litigant. It is too uncertain: the difficulty of forecasting what litigation will cost and how long it will last induces the fear of the unknown; and it is incomprehensible to many litigants. Above all it is too fragmented in the way it is organised since there is no one with clear overall responsibility for the administration of civil justice; and too adversarial as cases are run by the parties, not by the courts and the rules of the court, all too often, are ignored by the parties and not enforced by the court.”<sup>3</sup>*

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<sup>1</sup> IMF is the only funder who has applied for and obtained an Australian Financial Services Licence. A list of other licences held by IMF is at **Attachment 1**.

<sup>2</sup> Legislation was enacted called the *Access to Justice Act 1999* (UK).

<sup>3</sup> Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor on the civil justice system in England and Wales* (1996).

Many reports in Australia have sounded the same concerns over cost, delay and complexity in our litigation system.<sup>4</sup>

In a response to these issues, the *Civil Procedure Act 2005* (NSW), section 56, identifies the overriding purpose of the Court is to achieve just, quick and cheap resolution of the real issues between the parties (the “Overriding Purpose”).

Effective access to the enforcement of rights and delivery of remedies depends on an accessible and effective system of civil litigation.<sup>5</sup> Indeed, access to justice is now regarded as a fundamental human right which ought to be readily available to all.<sup>6</sup>

Martin CJ recently echoed these concerns and energetically noted likely reform when speaking of the Justice system of Western Australia:

*“It is a very good system, the envy of many countries in the world. Every conceivable process is available to ensure that no stone is left unturned in the search for a just resolution. It is the Rolls Royce of justice systems in the sense that it is the best that money, a lot of money, can buy, but there isn’t much point in owning a Rolls Royce if you can’t afford the fuel to drive it where you want to go. You can polish it, admire it and take pride of ownership from it but it doesn’t perform its basic function sitting in the garage.*

*The community owns the justice system of this state but very few of its citizens can afford to engage in its processes. It might be time to consider trading our Rolls Royce for a lighter, more contemporary and more fuel efficient vehicle which we can actually afford to drive and which will get us where we need to go just as effectively and perhaps more quickly. Improving the access of all Western Australians to the Courts of this state is at the forefront of my objectives and will guide the specific proposals which I hope to present to my judicial colleagues and, where appropriate, to government.”<sup>7</sup>*

In addition:

*“The need to promote ‘equality of arms’ in civil litigation, where practical, may be seen as a necessary adjunct to the need to afford access to the Courts in pursuit of genuine claims. The point is recognised by the principle, set out in Civil Procedure Rule 1.1 (2)(a), that dealing with a case justly includes, so far as practical, ensuring that the parties are on an equal footing.”<sup>8</sup>*

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<sup>4</sup> See, for example, Senate Standing Committee on Legal and Constitutional Affairs, *The Cost of Justice: Foundations for Reform*, AGPS Canberra 1993; AJAC Report, Attorney-General’s Department, *The Justice Statement*, AGPS Canberra 1995.

<sup>5</sup> *Interim Report to the Lord Chancellor on Civil Justice in England and Wales*, Lord Woolf, June 1995 (Chapter 1, paragraph 2).

<sup>6</sup> Per Millett LJ in *Thai Trading v Taylor* [1998] QB 781 at [786].

<sup>7</sup> Welcome to the Honourable Chief Justice Martin, transcript of proceedings, The Supreme Court of Western Australia, 1 May 2006.

<sup>8</sup> Lord Justice Brown in *Hamilton v Al Fayad* 3 All ER 641 at 664, paragraph 65. *Civil Procedure Rule 1.1(2)(a)* is the UK equivalent of section 56 of the *Civil Procedure Act 2005* (NSW).

In the report, *Access to Justice*, Lord Woolf wrote in 1996:

*“It is now generally recognised, by judges, practitioners and consumer representatives, that there is a need for a new approach both in relation to Court procedures and legal aid. The new procedures should achieve the following objectives: (a) provide access to justice where large numbers of people have been affected by another’s conduct, but individual loss is so small that it makes an individual action economically unviable; (b) provide expeditious, effective and proportionate methods of resolving cases, where individual damages are large enough to justify individual action but where the number of claimants and the nature of the issues involved mean that the cases cannot be managed satisfactorily in accordance with normal procedure; (c) achieve a balance between the normal rights of claimants and defendants, to pursue and defend cases individually, and the interests of a group of parties to litigate the action as a whole in an effective manner.”*<sup>9</sup>

This passage has been cited with approval by the English Court of Appeal.<sup>10</sup> The New South Wales Court of Appeal also recently endorsed these principles as reflective of goals consonant with the Overriding Purpose and contemporary attitudes to civil litigation.<sup>11</sup>

Costs and delays in our adversarial system are at the centre of the relevant policy considerations. The high demand for funding is a symptom of the problem, not the cause. Any assessment of public policy ought not lose sight of the detriment to society caused by a civil justice system that for most Australians is inaccessible and thereby incapable of fulfilling its Overriding Purpose.<sup>12</sup>

It is within this environment that the demand for litigation funding, being the funding of claimants legal costs and disbursements and the payment of any quantified adverse cost orders, grows.

## **2 Misconceptions in the Discussion Paper**

Before directly addressing the issues raised in the Discussion Paper, it is necessary to address some of the misconceptions which may be created by the Discussion Paper that ought not be the basis for regulatory intervention.

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<sup>9</sup> Ch 17 §2

<sup>10</sup> *Sayers v Merck SmithKline Beecham Plc* [2003] 3 All ER 631 at 634[2].

<sup>11</sup> *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* [2005] NSWCA 83 at [101].

<sup>12</sup> Gleeson CJ stated at the national Access to Justice and Pro Bono Conference on 11 August 2006: “*We often refer to the “civil justice system”, but to describe it as a system may be misleading. In most court cases, to think that the judge, the parties and their lawyers are all working towards a common objective would be naïve. Provided their objections are not unlawful, litigants are entitled to pursue their individual interests. Judges have a certain capacity to control the pace and direction, and hence the expense, of litigation, but it is far from complete.*” Other Judicial Officers are less prepared to accept lack of control. For example, Martin CJ issued Supreme Court of Western Australia Practice Direction No. 4 of 2006 on 9 August 2006, thereby creating the *Commercial and Managed Cases List*, which states: “*The general objective of the new List will be to bring cases to the point where they can be resolved by mediation or tried in the quickest, most effective way, consistently with the need to provide a just outcome. The principle of proportionality will be applied, and in due course the Rules of Court amended to make proportionality the principle which governs all rules and procedures of the Court.*”

- 2.1 The funder's share is not typically between one third and two thirds of the proceeds.<sup>13</sup> In the last five years, IMF's average share of recoveries, based on about 15,000 separate funding agreements, is 27 percent. Although the agreed share of the funder in respect of some individual funding agreements will be greater than one third due to the perceived risks associated with the cause of action, these occurrences are statistically negligible.<sup>14</sup>
- 2.2 Although there are only five or six "for profit" litigation funding companies ("LFCs")<sup>15</sup> a significant number of claims are funded by individuals or syndicates that do not fund litigation systemically, but rather identify the opportunity due to being a part of the relevant factual matrix or by being related in some way to the claimant. This source of funding will also be the subject of any regulation.
- 2.3 It is unlikely that most litigation funding is still conducted under the statutory exception for insolvencies, as is stated on page 4 of the Discussion Paper.<sup>16</sup> Since IMF commenced funding non insolvency related claims in 2001, Court decisions have recognised that third party funding is desirable in order to facilitate access to justice.<sup>17</sup> There have been numerous decisions not relying on the statutory exception permitting funding from people who did not have any pre-existing interest or any connection with the claimant in return for a percentage of the recovery.<sup>18</sup> IMF estimates that less than 30 percent of current funding is in respect of insolvency claims.
- 2.4 The statutory exception for insolvency claims arose well before 1995.<sup>19</sup>
- 2.5 Appendix 1 to the Discussion Paper does not identify the structure of a typical insolvency-litigation funding agreement.<sup>20</sup> It identifies the structure that involved

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<sup>13</sup> The Discussion Paper at page 4 states: "*The share of the proceeds (of the funder) is as agreed with the client, and is typically between one-third and two thirds of the proceeds*".

<sup>14</sup> Only three of IMF's 15,000 funding agreements entitle IMF to a fee greater than 40 percent, with no agreement entitling a fee greater than 50 percent. A list of some of the percentage fees considered by the Courts is at **Attachment 2**.

<sup>15</sup> The Discussion Paper at page 4 infers these LFCs are the only source of funding.

<sup>16</sup> IMF's research indicates that the proportion of significant commercial litigation that is attributable to insolvency related claims is about 20 percent. IMF only commenced funding non insolvency related claims five years ago and already non insolvency claims account for about two thirds of funded claims and over 75 percent of claim value.

<sup>17</sup> For example, see *Gulf Azov Shipping Co Ltd v Idisi* [2004] EWCA Civ 292 at [36] and *Gore v Justice Corporation Pty Ltd* (2002) 119 FCR 429 at [59].

<sup>18</sup> *Gore v Justice Corporation Pty Ltd* (2002) 119 FCR 429, *R (Factortame Ltd) v The Secretary for Transport, Local Government and the Regions (No 8)* [2003] QB 381, *Arkin v Borchard Lines* [2003] EWHC 2844, *Gulf Azov Shipping Co Ltd v Idisi* [2004] EWCA Civ 292, *Clairs Keeley (A Firm) v Treacy* [2004] WASCA 277, *Price Waterhouse Coopers Inc v National Potato Co-Operative Ltd* [2004] ZASCA 64, *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* [2005] NSWCA 83, *Spatialinfo Pty Ltd v Telstra Corporation Ltd* [2005] FCA 455, *QPSX Ltd v Ericsson Australia Pty Ltd* [2005] FCA 933; (2005) ALR 1, *Trendlen v Mobil Oil* [2005] NSWSC 741, *Dorajay Pty Ltd v Aristocrat Leisure Ltd* [2005] FCA 1483.

<sup>19</sup> The statement inferring the contrary is on page 5 of the Discussion Paper. The exception in fact dates back to the nineteenth century. *Seear v Lawson* (1880) 15 Ch 426 at 427, *Re Park Gate Waggon Works* (1881) 17 Ch 234 at 239, *Guy v Churchill* (1888) 40 Ch D 481 at 489, *Ogdens Ltd v Weinberg* (1906) 95 LT 567 at 568, *Ramsey v Hartley* [1977] 1 WLR 686 at 684, *Groewood Holdings plc v James Capel & Co Ltd* [1995] Ch 80 at 86, *Movitor Pty Ltd v Sims* (1996) 64 FCR 380, *Re Tosich Construction Pty Ltd* (1997) 73 FCR 219, *Re Moage Limited (in liq)*; *Sheahan v Pitterino* (1997) 77 FCR 81, *Re William Felton & Co Pty Ltd* (1998) 145 FLR 211, *Re Oasis Merchandising Services Ltd*; *Ward v Aitkin* [1998] Ch 170 at 179, *Domson Pty Ltd v Zhu* [2005] NSWSC 1070.

<sup>20</sup> Since at least 2001:

- (a) insolvency practitioners do not borrow any money and accordingly no interest is payable; and
- (b) no insurance policy is involved and accordingly no premium is payable.

A typical litigation funding agreement involves the funder agreeing to pay the costs (including quantified adverse costs) in return for a percentage of the recoveries plus reimbursement of costs paid from the recoveries, if any.

underwriting by insurers which ceased over five years ago when GIO left the New South Wales litigation funding market.

Litigation funders provide two separate kinds of service:

- (a) financial services being the provision of funding and indemnification for any adverse costs orders; and
- (b) litigation management services including the provision of strategic, investigative and project management services.

2.6 It is misleading to state insolvency practitioners are under an obligation to retain control of the proceedings,<sup>21</sup> although complete abdication of control over the proceedings or an abdication of control over key aspects, such as settlement, have been found by the Courts to be objectionable.<sup>22</sup> Insolvency practitioners are entitled to delegate responsibility for the day to day conduct of the litigation process.<sup>23</sup> In the exercise of their statutory powers, insolvency practitioners may contract with third parties such as lawyers, auctioneers, funders and other service providers for the provision of services that assist in the achievement of the purpose for which the power was granted.<sup>24</sup>

2.7 The analysis of the decisions in *Marston v Statewide Independent Wholesalers Ltd* [2003] NSWSC 816 and *Clairs Keeley (A Firm) v Treacy* [2003] WASCA 229 at page 9 of the Discussion Paper is misleading in certain respects. *Marston* was a representative proceeding in which solicitors do not necessarily enter a solicitor client relationship with members of the group other than the representative, whether or not funding is involved.

Conversely, *Clairs Keeley* was a group proceedings in which all members of the group were named as plaintiffs and, accordingly, the solicitors necessarily entered a solicitor client relationship with all group members. The fiduciary duties owed by the solicitors to the group members was a product of their relationship rather than any common law retainer.

2.8 Liquidators are not obliged to obtain Court approval for litigation funding agreements. Nor is it the character of the agreement being a litigation funding agreement that requires the liquidator to seek approval from the creditors, the committee of inspection or the Court.<sup>25</sup> The relevant character of agreements which trigger the requirement of a liquidator to obtain approval for his or her entry into an agreement by any of the three bodies noted above is that the agreement may extend for more than three months.<sup>26</sup>

2.9 The Discussion Paper under the heading “Identifying criteria for evaluation” on page 10 commences with a statement of the ‘critical question’ being “*whether – and which – LFC activities should be authorised by legislation*”. This question assumes that some or all LFC activities are illegal and need to be authorised to be legal. This is simply not the case.

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<sup>21</sup> As is said at page 8 to the Discussion Paper and Appendix 1.

<sup>22</sup> *Groewood Holdings PLC v James Capel & Co Ltd* [1995] 72 2 WLR at 79 and *Anstella Nominees Pty Ltd v St George Motor Finance Ltd* [2003] FCA 466.

<sup>23</sup> Refer to section 477 (2)(b) and (k) of the *Corporations Act*, which permit liquidators to appoint solicitors and agents, respectively.

<sup>24</sup> See for example *Elfic v Mack* (2001) QCA 219 where the Court approved a litigation funding agreement that enabled the litigation funder to *inter-alia*, give approval in relation to the trial date, briefing counsel, settling or discontinuing the action and appealing against any final judgment.

<sup>25</sup> The statements to the contrary are made on page 12 of the Discussion Paper.

<sup>26</sup> Refer to *Corporations Act 2001* (Cth) s477 (2B).

### 3 Issues for Discussion

#### Issue 1: **Should laws against maintenance and champerty be repealed in those jurisdictions where the tort or crime continues to exist (WA, QLD, TAS and the NT)?**

This issue is raised in the context of:

- (a) preventing defendants using ‘collateral’ or ‘satellite’ litigation to stymie proceedings;
- (b) clarifying the legal status of non insolvency litigation funding agreements; and
- (c) creating uniformity throughout Australia.

A modern attempt to define ‘maintenance’ and ‘champerty’ published in the NSW Law Reform Commission, *Barratry, Maintenance and Champerty*, Discussion Paper<sup>27</sup> has been adopted in these submissions: “*Maintenance is the ancient common law crime and tort of assisting a party in litigation without lawful justification*” and “*Champerty is an aggravated form of maintenance, in which the maintainer receives something of value in return for the assistance given.*”

Over a decade ago the New South Wales Law Reform Commission observed in its Discussion Paper, *Barratry, Maintenance and Champerty*:<sup>28</sup>

*“The considerations of public policy which once found maintenance and champerty so repugnant have changed over the course of time. The social utility of assisted litigation is now recognised and the provision of legal and financial assistance viewed favourably as a means of increasing access to justice.”*

Maintenance and champerty have been abolished as crimes and civil wrongs in New South Wales,<sup>29</sup> the Australian Capital Territory,<sup>30</sup> Victoria,<sup>31</sup> South Australia,<sup>32</sup> (“the Abolition States”) and in the United Kingdom.<sup>33</sup> The states and territories in which the common law of maintenance and champerty is unaffected by legislation, subject to the codification of crimes in Western Australia and Queensland referred to in footnote 40 below, are: Queensland, Tasmania, Western Australia and the Northern Territory (“the Non Abolition States”).

In New South Wales the *Maintenance, Champerty and Barratry Abolition Act 1993* (NSW) (“the Abolition Act”) “...does not affect any rule of law as to the cases in which a contract is to be treated as contrary to public policy or as otherwise illegal”.<sup>34</sup>

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<sup>27</sup> No 36 (1994) at 7, para 2.7.

<sup>28</sup> DP 36, May 1994 at §2.55.

<sup>29</sup> Sec 4 *Maintenance, Champerty and Barratry Abolition Act 1993* (NSW).

<sup>30</sup> Sec 68 of the *Law Reform (Miscellaneous Provisions) Act 1955* (ACT) and sec 221 of the *Civil Law (Wrongs) Act 2002* (ACT).

<sup>31</sup> Sec 322A of the *Crimes Act 1958* (VIC) and sec 32 of the *Wrongs Act 1958* (VIC).

<sup>32</sup> Sub-ss 1(3) and 3(1) of Sch 11 *Criminal Law Consolidation Act 1935*.

<sup>33</sup> Secs 13 and 14 of the *Criminal Law Act 1967* (UK).

<sup>34</sup> Section 6 of the *Abolition Act*.

Mason P in *Fostif* said:

“Section 6 means that litigation funding arrangements made without express statutory authority are still subject to scrutiny if the validity of the contractual arrangements are challenged. But for reasons discussed below, it is not correct in this State to conflate the principles of maintenance/champerty with those touching abuse of process, or view them as arming a defendant with a right to stay proceedings because they are maintained even champertously.”<sup>35</sup>

There is alignment between:

- (a) the current legislative provisions in the Abolition States; and
- (b) the common law as identified by Mason P in *Fostif*.

IMF supports the legislative provisions in the Non Abolition States being made uniform with the legislative provisions of the Abolition States.

The aligned policy of the law would be reflected in legislation that:

- (a) acknowledges that the policy of the law is now to look favourably on funding agreements so long as any tendency to abuse of process is controlled;<sup>36</sup>
- (b) assigns the relevance of the common law concerning maintenance and champerty exclusively to consumer protection and in particular the enforceability or otherwise of litigation funding agreements;<sup>37</sup>
- (c) makes clear it is simply no business of a defendant to be taking up the cudgels ostensibly on behalf of funded litigants but in reality in their own interest in stay applications<sup>38</sup> as satellite proceedings have the capacity to divert resources and attention from the real issues;<sup>39</sup>
- (d) creates uniformity between Abolition and Non Abolition States;<sup>40</sup> and
- (e) clearly facilitates access to justice through an opportunity to achieve equality of arms.

Collateral or satellite litigation by defendants will not cease simply as a result of the abolition of the rules against maintenance and champerty in the Non Abolition States.

It will be necessary to ensure the relevance of the existence and character of litigation funding agreements is limited to consumer protection issues and stated in the legislation to be unavailable to be relied upon by defendants in abuse of process applications.

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<sup>35</sup> *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* [2005] NSWCA 83 at [93].

<sup>36</sup> *Fostif* at [105].

<sup>37</sup> Refer to section 6 of the *Abolition Act* and *Fostif* at [105].

<sup>38</sup> *Fostif* at [119].

<sup>39</sup> *Fostif* at [105] and [119] and the *Civil Procedures Act 2005* (NSW), section 56.

<sup>40</sup> In this respect it is important to note that in the two most populated Non Abolition States, being Western Australia and Queensland, both criminal codes have abolished all common law crimes and misdemeanours. Accordingly, in these states there is no longer a criminal liability for maintenance and champerty.

**Issue 2: Should a direct contractual agreement between the solicitor and the plaintiff/s be required in all funded actions?**

This issue is raised in the Discussion Paper in the context of ensuring that the lawyers fiduciary obligations to the plaintiff are explicitly engaged in any funded proceedings and, in particular would:

- (a) “*guarantee that the broad consumer protections set out in the Uniform Legal Profession laws apply to the lawyer-plaintiff relationship*”; and
- (b) “*promote full disclosure to the plaintiff by the lawyer for the matter and allow them to make informed decisions regarding the conduct of proceedings.*”<sup>41</sup>

IMF’s direct response to Issue 2 is that the mere existence of arrangements between solicitors and their clients is irrelevant to solicitors’ fiduciary obligations which arise from their fiduciary relationship.

The statutory benefits for consumers arising from the Uniform Legal Profession laws, however, do justify an obligation to create direct contractual agreements.

As will be seen from IMF’s response to Issue 3 below, IMF considers there is no policy consideration which relevantly distinguishes plaintiffs’ lawyers from defendants’ lawyers. Any regulatory obligation for the creation of direct contractual agreements should also require defendants’ solicitors funded by insurers to create direct contractual agreements with their defendant clients.

**Issue 3: Should the criteria for legally acceptable funding agreements be formalised?**

The stated objectives of ‘authorising’ legislation are:

- (a) to greatly lessen the likelihood of common law challenges to specific LFC activities;
- (b) to prevent unnecessary collateral litigation;
- (c) to increase proceeds going to plaintiffs as a result of lower legal costs; and
- (d) to create greater contractual certainty which would:
  - (i) reduce premiums; and
  - (ii) result in a deepening of the funding market.

In principal, IMF supports seeking to achieve these objectives and supports regulations which will assist in this respect. However, IMF is concerned that setting formalised criteria for legally acceptable funding agreements may in fact increase the likelihood of common law challenges to specific LFC activities, foster unnecessary collateral litigation and not achieve any benefits for consumers.<sup>42</sup>

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<sup>41</sup> At page 10 of the Discussion Paper.

<sup>42</sup> The abolition of maintenance and champerty as crimes and torts in the Abolition States did not diminish collateral litigation in respect of funding agreements in the Abolition States.

A clear and unequivocal warning may be found in the creation and revocation of the United Kingdom *Conditional Fee Regulations*, the purpose of which was to create a regulatory standard for solicitors' conditional fee agreements and thereby enhance consumer protection.<sup>43</sup> Rather than consumers relying upon these statutory protections, defendants and their insurers grasped the opportunity in large numbers to rely upon the regulations in their attempts not to pay the plaintiffs solicitors' success fees and after the event insurance premiums that they were liable to pay under the *Access to Justice Act* if the conditional fee agreements met the regulatory standard.

After a deluge of this satellite litigation,<sup>44</sup> the conditional fee regime was reviewed,<sup>45</sup> having regard to the Principles of Good Regulation enunciated by the Better Regulation Taskforce<sup>46</sup> which emphasised the need:

- (a) to target regulation effectively;
- (b) to carefully examine the costs and benefits of regulation;
- (c) to consider the desirability of allowing citizens to make their own decisions about the risks associated with their transactions; and
- (d) to avoid unintended consequences<sup>47</sup> (including satellite litigation).

The review:

- (a) concluded that the conditional fee regulations unnecessarily replicate professional conduct rules and provided limited consumer protection; and
- (b) resulted in the revocation of the regulations.<sup>48</sup>

IMF opposes the formalisation of criteria for validating litigation funding agreements other than the regulatory imposition of common law criteria applicable to insurers in their funding and control of insured defendant litigation referred to below. If criteria are to be imposed, it must be done in a way which ensures defendants and their insurers do not abuse the process created for the benefit of funded parties.

It is clear that insurance against risk has been an enormous advantage to society. This is so despite the fact that every insurance contract savours of maintenance. This is especially the case with professional indemnity, directors and officers, legal expense and after the event insurance where the insurable event is or likely involves disputation or litigation and the insurer has absolute control of any litigation which eventuates. By the

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<sup>43</sup> *Conditional Fee Agreements Order 1995* (SI 1995/1674); *Conditional Fee Agreements Regulations 1995* (SI 1995/1675).

<sup>44</sup> Refer to *Hollins v Russell* [2003] 1WLR 2487 at [46].

<sup>45</sup> United Kingdom, Department of Constitutional Affairs, *Simplifying CFA's*, Consultation Paper June 2003; United Kingdom, Department of Constitutional Affairs, *Making Simple CFA's a Reality*, Consultation Paper June 2004; United Kingdom, Department of Constitutional Affairs, *New Regulation for Conditional Fee Agreements Responses to Consultation*, 10 August 2005.

<sup>46</sup> Refer to <http://www.brc.gov.uk/publications/principlesentry.asp>.

<sup>47</sup> Such as the costly and time consuming satellite litigation utilised by the defendants and their insurers

<sup>48</sup> *Conditional Fee Agreements Regulations 2005*.

typical insurance contract the insurer agrees to fund any litigation in relation to the risk and the insured agrees to give over complete control of the litigation to the insurer.

The Court of Appeal in *Clairs Keeley (A Firm) v Treacy* stated that:<sup>49</sup>

*“...in terms of risk of abuse, there may be no difference between a litigation funder with an eye to maximising profits and an insurance company with an eye to minimising losses. Indeed, it may be said that the litigation funder has a greater incentive to ensure that he conducts himself properly. Not only are the funder’s activities likely to be the subject of close scrutiny, but any transgression is likely to have a markedly deleterious effect on the funder’s ability to conduct business in the future. By contrast, only a small portion of an insurer’s business is likely to lead to litigation.”*

In addition, litigation funders are always able to assess the actual risks before they eventuate whereas insurers, other than after the event insurers, rely upon statistical data. Austin J in *ACN 076 673 875 Ltd* said:<sup>50</sup>

*“... there is the commercial reality that IMF would not, acting rationally, prosecute litigation at its expense unless there were a reasonable prospect of a verdict or settlement ...”*

The insurance analogy also illustrates the regularity of informed arrangements whereby solicitors represent both insurer and insured as principals, even though conflicts of interest may arise.<sup>51</sup> In cases of conflict of interest, the law prescribes the duties of the various parties including the solicitors involved.<sup>52</sup> The law assumes that a lawyer-client relationship exists between the solicitor appointed by the insurer and the insured, but not necessarily to the exclusion of a similar relationship with the insurer. Both insurers and the solicitors they appoint owe a duty to the insured to conduct the proceedings with due regard to the latter’s interests and an action for damages will lie for breach of that duty.<sup>53</sup> Additionally, insurers have the right to decide upon the proper tactics to pursue in the conduct of the litigation, provided that they do so in what they *bona fide* consider to be in the interests of themselves and the insured.<sup>54</sup> When the insurer takes over the conduct of the insured’s defence, each party comes under an obligation, as a matter of contractual implication, to act in good faith with due regard to the interests of the other.<sup>55</sup>

The common law rules that have been formulated to deal with insurance contracts are readily adaptable to the regulation of litigation funders presently under consideration.<sup>56</sup>

Indeed, there seems no reason in principle or policy for a funder’s involvement in litigation to be regulated differently to insurers. At the extreme, if funders are regulated

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<sup>49</sup> (2003) 28 WAR 139 at [72].

<sup>50</sup> [2002] NSWSC 578; (2000) 42 ACSR 296.

<sup>51</sup> See generally *Mercantile Mutual Insurance (NSW Workers Compensation) Ltd v Murray* [2004] NSWCA 151, 13 ANZ Ins Cas 61-612, *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* [2005] NSWCA 83 at [82].

<sup>52</sup> See generally C Leigh-Jones, MacGillivray *On Insurance Law*, 10<sup>th</sup> ed, (2002) at para 28-35.

<sup>53</sup> *Groom v Crocker* [1939] 1 KB 194 at 202-203.

<sup>54</sup> *Groom v Crocker* [1939] 1 KB 194 at 203.

<sup>55</sup> *K/S Merc-Scandia XXXXII v Lloyd’s Underwriters* [2001] 2 Lloyd’s Rep 563 at 572-574.

<sup>56</sup> Indeed, the New South Wales Court of Appeal in *Project 28 v Barr* at [69] [70] said: “*The insurance context provides a useful example of how the law copes adequately with a situation where control over litigation is given to a person who is not a party to the litigation itself.*”

in an environment where insurers remain unregulated, there will be a tendency to worsen the inequality of arms between claimants and insurers presently so clearly in existence.

Accordingly, if criteria for legally acceptable funding agreements are considered necessary, they should be equally applicable to insurance contracts. These criteria could usefully be segregated between:

- (a) financial and insurance services where criteria could almost exclusively focus on consumer protection, having regard to existing regulation; and
- (b) litigation management services by funders and insurers which at present are not regulated.

In particular, despite funders and insurers having a greater capacity than most parties to systematically assist or retard the Court in achieving just, quick and cheap resolution of the real issues in dispute,<sup>57</sup> only the Court,<sup>58</sup> the Parties<sup>59</sup> and the lawyers<sup>60</sup> have duties in respect of achieving this Overriding Purpose.

IMF submits that the Overriding Purpose ought to be the overriding purpose of all Australian Courts, with a requirement for:

- (a) parties to inform the Court, at the commencement of proceedings, if the conduct of their case is to be funded in whole or in part by a third party and, if so, to identify that party; and
- (b) parties and any person paying any part of the legal costs of a party to civil proceedings to be under a duty to assist the Court to achieve just, quick and cheap resolution of the real issues in the proceedings.

The utilisation of our Courts by the insurance industry for much of its large claims management function is, in my respectful submission, not subject to adequate regulation or accountability. This inquiry into litigation funding should be sufficiently broad to address not only consumer protection issues but also focus on the reasons for such high consumer demand for litigation funding. Such an inquiry would inevitably identify the costs and delays involved in our adversarial processes as the most important reason.

Making funders, including insurers, accountable for their involvement in the Court process in the same way as the parties themselves, seems an obvious means of better protecting and promoting the interests of the Courts as well as the interests of the consumers of the Courts' services.

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<sup>57</sup> Refer to the Courts' Overriding Purpose in the *Civil Procedure Act 2005* (NSW), section 56.

<sup>58</sup> Section 56(2).

<sup>59</sup> Section 56(3).

<sup>60</sup> Section 56(4).

**Issue 4: Should the legislation:**

- (a) **list relevant criteria for courts to consider; or**
- (b) **set out legislatively required terms and disclosure requirements; or both?**

It is important to clearly differentiate between the separate regulatory objectives which are sought to be achieved in order to address this issue.

In the United Kingdom, litigation funding has been addressed within the framework of the Access to Justice legislation.

This seems logical as the regulatory issues concerning the means to achieve any objective should be addressed having due regard to the objective itself. In this frame of reference, the demand for litigation funding is a by product of the costs and delays involved in our adversarial process.

Litigation management services could usefully be further analysed by segregated reference to criteria relevant to:

- (a) consumer protection issues; and
- (b) the protection of the Courts' processes that Courts may have regard to when addressing abuse of process issues arising from the litigation management conduct of funders or insurers.

Harsh and exploitative funding agreements as between the funder and the litigant are able to be addressed due to section 6 of the *Abolition Act* which preserves the effect of any (modern) rule of law as to the cases in which the contract is to be treated as contrary to public policy or otherwise illegal. Doubtless the arrangements are also capable of engaging the *Contract Review Act 1980* and other bases of jurisdiction concerned to prevent unconscionable exploitation of the vulnerable.<sup>61</sup>

The preservation of any rule of law as to the cases in which a contract is to be treated as contrary to public policy or as otherwise illegal has no direct application to stay applications as no issue arises as to the enforceability of the funding agreement in a stay application.<sup>62</sup>

It is not correct to conflate public policy considerations focused on consumer protection with those touching abuse of process, or view then as arming a defendant with a right to stay proceedings because they are maintained (even champertously).<sup>63</sup>

Accordingly, any regulation seeking consumer protection ought not be able to be relied upon by defendants in an application to stay proceedings, where the Court's basal inquiry is whether the role of the funder has corrupted or is likely to corrupt the process

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<sup>61</sup> Refer to *Fostif* at [117].

<sup>62</sup> Refer to *Fostif* at [92].

<sup>63</sup> Refer to *Fostif* at [93].

of the Court to a degree that attracts the extraordinary jurisdiction to dismiss or stay permanently for abuse of process.<sup>64</sup>

The arrangements between the plaintiff and a funder are only relevant to this inquiry in so far as they touch upon the Court's basal inquiry.<sup>65</sup>

Having regard to the above, IMF is of the view that:

- (a) the common law rules identified on page 10 of these submissions referable to the solicitors representing both insurer and insured as principals ought to be made applicable to litigation funding arrangements by regulation;
- (b) these rules would be sufficient when supplemented with the existing disclosure requirements referred to in Issue 8 below; and
- (c) if it is considered further regulatory intervention is necessary which is opposed, the narrow approach of a set of legislatively required terms and disclosure requirements is preferable to a list of relevant criteria for courts to consider when a funding agreement is challenged, with the terms and requirements:
  - (i) created to achieve consumer protection objectives not currently addressed by regulation on the condition that they do not detrimentally affect achievement of the principle objective, being access to justice;
  - (ii) created to achieve the stated objectives listed on page 8 of these submissions; and
  - (iii) segregated into terms and requirements referable to consumer protection, which can only be relied upon by the recipient of the protection (and not by defendants in funded proceedings), and terms and requirements referable to protection of the Court's processes, if any.

Any terms and conditions referable to protection of the Court's processes must have as their sole objectives those objectives listed on page 8 of these submissions.

**Issue 5: Should disclosure and other requirements be imposed on LFC's when they enter into non insolvency funding agreements?**

**Issue 6: If so, what should the requirements be?**

These issues are raised with the following stated objectives in mind:

- (a) better oversight of funding arrangements;
- (b) improved competition in the legal services and litigation funding markets, perhaps resulting in lower prices; and

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<sup>64</sup> Refer to *Fostif* at [132]. Otherwise, collateral litigation by defendants and their insurers will not be curtailed but will centre on whether the relevant 'criteria' have been satisfied.

<sup>65</sup> Refer to *Fostif* at [114].

- (c) protecting consumers from oppression by imposing probity requirements, by for example, capping LFCs' percentage fees and requiring disclosure of all obligations or liabilities imposed on a consumer in a contract.

If consumers were asked about their perceptions of litigation funding, I consider they would see it as part of the solution rather than the problem based on IMF's experience of:

- (a) having funded about 15,000 parties since listing in 2001; and
- (b) not having received one complaint in that time.

In the older insolvency market, there are sufficient funders to create competitive tension where tenders are the usual method by which insolvency practitioners establish the identity of the funder and the terms upon which funding will be provided.

Currently there is limited competition in the non insolvency market, but as the market grows, so will the competition.

Parties seeking funding do have limited capacity to negotiate on the terms of funding, as is prevalent with most financial services, but their capacity will grow as:

- (a) consumers become more systemic users of litigation funding;
- (b) they negotiate collectively; and
- (c) the competitive tensions prevalent in the insolvency market flow into the non insolvency markets.

The potential for funding on usurious terms or terms otherwise not in the public interest is currently under the supervision of:

- (a) insolvency practitioners, committees of inspection, creditors meetings and the Courts pursuant to section 477(2B) of the *Corporations Act* in respect of the insolvency market, and
- (b) the Courts in respect of multi party actions<sup>66</sup> and in respect of commercial actions exercising their inherent power to ensure the processes of the Courts are not abused.

The concern that the percentage of any settlement or judgment received by the funded party, after legal costs and financing costs, might be too low caused IMF to cease providing funding for single party claims with values less than \$2 million.

This decision merely acknowledges that the defects in our civil justice system make litigating for less than \$2 million rarely commercially viable.

These defects are similar to those identified by Lord Woolf in 1996 noted in the introduction to these submissions and may be listed as follows:

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<sup>66</sup> The Court has the power to impose conditions upon granting permission for the representative proceedings to go forward which includes the power to cause the modification of a litigation funder's agreement.

- (a) not being able to obtain a budget from the solicitor, let alone a set fee;
- (b) not being able to predict how long the litigation process will take with any degree of certainty;
- (c) a pricing policy by the lawyers requiring payment by reference to hourly rates;
- (d) the legal costs of conducting the case blowing out (in some cases to exceed the claim size);
- (e) confronting:
  - (i) well resourced and determined defendants with the capacity to obtain the best legal and expert advice; and
  - (ii) legal advice that many plaintiffs find difficult to understand or which does not properly identify the risks, including that the claim may fail, with the result that the plaintiff will not receive any money by way of judgment, will not receive reimbursement of the legal costs paid and will have to pay the other parties' costs; and
- (f) no capacity to predict how much the potential adverse costs order may be in dollar terms (the "Litigation Risks").

As a result of potential plaintiffs' justifiable concerns about the Litigation Risks:

- (a) speculative actions are minimised (a positive result) but meritorious actions may not be pursued; and
- (b) demand for litigation funding is high and will remain high until the Litigation Risks are better managed by the legislature, the Courts and the legal profession.

Any regulatory influence to ensure a minimum percentage of any settlement or judgment proceeds finds its way into the hands of the consumer will:

- (a) not permit the fee charged by the funder to reflect the risks inherent in each individual case; and
- (b) simply cause funding for some cases, where that minimum percentage is unviable from a funders point of view, to not be available.

When seen in this light, the objective of access to justice will be better achieved by focusing upon minimising costs and delays and managing the Litigation Risks so that smaller claims become viable.

As a provider of financial services, IMF is licensed pursuant to Chapter 7 of the *Corporations Act*. **Attachment 3** is a copy of IMF's Australian Financial Services Licence Number 286906 ("Financial Services Licence"). At the time IMF offers to fund legal proceedings, prospective clients are provided with a Financial Services Guide and Product Disclosure Statement, which sets out how IMF is paid for its services and how consumers who are dissatisfied with IMF's service can pursue a complaint (refer to **Attachment 4**).

All prospective clients of IMF are referred to Chapter 5 of IMF's Corporate Governance Manual, which outlines IMF's dispute resolution process. This process provides for internal review of any complaint, at no charge to the complainant, and, if necessary, referral to an external body, the Banking and Financial Services Ombudsman scheme.

Remarkably, IMF has not received any complaints from its 15,000 clients. There is a clear and unequivocal demand that is being serviced.

Obligations are imposed on IMF by virtue of the conditions which attach to IMF's Financial Services Licence and by virtue of the provisions of the *Corporations Act*. These obligations ultimately offer protection to parties seeking and obtaining funding from IMF.

The conditions attaching to IMF's licence are largely financially related and include prudential requirements that are identified in Issue 7 below.

The obligations imposed by the *Corporations Act*<sup>67</sup> are broader and encompass matters including an obligation to:

- (a) do all things necessary to ensure that the financial services are provided efficiently, honestly and fairly;
- (b) have in place adequate arrangements for the management of conflicts of interest;
- (c) have available adequate resources to provide the financial services; and
- (d) have adequate risk management systems.

Other provisions in the *Corporations Act* provide protection to consumers dealing with IMF in that:

- (a) they provide for a cooling off period;
- (b) provide that the licensee (i.e. IMF) must not (in relation to the provision of a financial service) engage in unconscionable conduct;
- (c) prohibit hawking of financial products; and
- (d) prohibit false or misleading statements, misleading or deceptive conduct and dishonest conduct.

ASIC has a supervisory role in relation to the conduct of IMF's business pursuant to IMF's licence, with powers which include the power to suspend or cancel IMF's licence and to make a banning order prohibiting IMF from providing a financial service, permanently or for a specified period.

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<sup>67</sup> A list of the regulatory obligations imposed on IMF is at **Attachment 5**.

Given IMF has been issued with a Financial Services Licence, administered by the Commonwealth, it is clear that the financial services provided by litigation funders are regulated by the Commonwealth. Any State regulation could only add value by:

- (a) ensuring funders obtain AFS Licences (or, alternatively, regulate through a uniform State system consistently with AFS licensing); and
- (b) supplementing the Commonwealth regulation where inadequacies are identified.

One striking inadequacy is that funders, including insurers are currently under no duty to assist the Court to achieve its overriding purpose, stated in section 56(1) of the *Civil Procedure Act 2005* (NSW) as being to facilitate the just, quick and cheap resolution of the real issues in proceedings.

Section 56 also:

- (a) obliges the Court to seek to give effect to that overriding purpose when it exercises power or interprets any provision of the *Act* or *Rules* (sec 56(2));
- (b) obliges the parties to civil procedures to assist the Court to further that overriding purpose (sec 56(3)); and
- (c) prohibits lawyers from causing their clients to breach their duty to the Court (sec 56(4)).

Litigation funders, including insurers, have a greater capacity than most to systematically assist or retard the Court in achieving just, quick and cheap resolution of the real issues.

With these concerns in mind, IMF submits there is a need to require:

- (a) parties to inform the Court and the other party/parties, at the commencement of proceedings, if the conduct of their case is to be funded in whole or in part by a third party and, if so, to identify that party; and
- (b) any person paying any part of the legal costs of a party to civil proceedings to be under a duty to assist the Court to achieve just, quick and cheap resolution of the real issues in the proceedings.

The utilisation of our Courts by the insurance industry for much of its claims management function is, in my respectful submission, not subject to adequate regulation or accountability. The Standing Committee of Attorneys-General should focus not only on consumer protection but also on the reasons for such high consumer demand for litigation funding. Such an inquiry would inevitably identify the costs and delays involved in our adversarial processes as the most important.

Making funders, including insurers, accountable for their involvement in the Court process in the same way as the parties themselves, seems an obvious means of better protecting and promoting the interests of the Courts as well as the interests of the consumers of the Courts' services.

**Issue 7: Should LFCs be subject to prudential regulation?**

The simple answer is that litigation funders are subject to prudential regulation as evidenced by IMF's Financial Services Licence at **Attachment 3**.

The prudential requirements are in conditions 4, 6, 7, 8, 9 and 10 of the Financial Services Licence.

Compliance with these prudential requirements must be certified by audit opinion in accordance with condition 11.

Any State regulation would require:

- (a) an opinion that the Commonwealth prudential requirements are inadequate;
- (b) unsuccessful attempts to seek the Commonwealth to address the inadequacies; and
- (c) a preparedness by the States to create an additional prudential regime.

**Issue 8: Should LFCs be subject to mandatory disclosure requirements?**

The simple answer is that litigation funders are subject to mandatory disclosure requirements.

Litigation funders are required to hold a Financial Services Licence and accordingly must give a Financial Services Guide<sup>68</sup> to retail clients.<sup>69</sup> In addition, litigation funders must give a Product Disclosure Statement<sup>70</sup> to retail clients.<sup>71</sup>

IMF's Combined Financial Services Guide and Product Disclosure Statement is **Attachment 4**.

Any State regulation would require:

- (a) an opinion that the Commonwealth disclosure requirements in the *Corporations Act* concerning financial services and financial products are inadequate;
- (b) unsuccessful attempts to seek the Commonwealth to address the inadequacies; and
- (c) a preparedness by the States to create an additional disclosure regime

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<sup>68</sup> Which must include the statements and information required by the *Corporations Act 2001* (Cth) s942B.

<sup>69</sup> *Corporations Act 2001* (Cth) s941A.

<sup>70</sup> Which must include the statements and information required by the *Corporations Act 2001* (Cth) s1013C.

<sup>71</sup> *Corporation Act 2001* (Cth) s1012B.

**Issue 9: Should explicit measures to ensure independence of lawyers from LFCs be introduced?**

IMF does not oppose this measure, although it seems unnecessary as:

- (a) lawyers have legislative protection against non lawyers providing legal services;
- (b) lawyers are restricted legislatively from providing legal services for a share of the recovery disabling lawyers from competing against litigation funders;
- (c) lawyers refer funding opportunities to litigation funders;
- (d) funders refer litigation opportunities to lawyers; and
- (e) no referrer would agree to referrals being exclusive unless market forces cease to operate or the legislature entitles lawyers to charge a share of the recovery.

In identifying these economic imperatives, IMF does not wish to belittle the policy of segregation. In fact, IMF supports it.

Australia, unlike the United States of America (the “USA”), has the opportunity to develop funded litigation by the private sector without any degradation of the fiduciary relationship between lawyer and client.

The alternative options are:

- (a) publicly funded litigation which in essence is legal aid; and
- (b) contingency fees charged by lawyers as in the USA.

IMF does not consider public funding will ever be allocated to fund, let alone compete with private funding of, civil proceedings of the commercial nature funded by IMF.<sup>72</sup>

The legislature may in the future permit lawyers to charge contingency fees, although currently there does not seem to be any impetus, let alone justification, to move towards the USA model.

Accordingly, not only is any alternative option unlikely to develop, the current third party funding option currently existing in Australia leaves an untainted fiduciary relationship between lawyers and their clients creating fiduciary duties unfettered by who is paying the bill.

As a result, the simple answer to the question is that the lawyers’ unfettered fiduciary duties disentitles the lawyers from profiting from an interest in the business of the LFC.

If this is not clear under equitable principles, the requirement to disclose the interest in the business of an LFC would make the interest commercially unviable given the cross referral market referred to earlier.<sup>73</sup>

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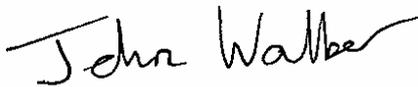
<sup>72</sup> These proceedings are described in the Discussion Paper as “...usually limited to commercial litigation with large claims (over \$500,00, or for some LFCs, over \$2 million). An exception is for class actions, where a large number of smaller claims can be processed economically (e.g. petrol or tobacco refunds). LFCs are generally not involved in personal injury type claims, as the associated costs and risks make them unviable”.

**Issue 10: Should explicit measures to ensure independence of lawyers from LFCs be in the form of:**

- (a) **prohibitions on certain dealings between LFCs and lawyers?**
- (b) **standard terms in contracts between LFCs, lawyers and plaintiffs? or**
- (c) **some other form?**

For the reasons noted in respect of Issue 8, I do not consider there is any current need for regulatory intervention to ensure independence of lawyers from LFCs. If any are considered necessary, they ought to equally apply to insurers, lawyers and defendants.

Yours sincerely,



**John Walker**  
**Managing Director**

Encl.

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<sup>73</sup> The only example evidencing the need for legislative intervention provided in the Discussion Paper is cited as *Clairs Keely (A Firm) v Treacy* [2003] WASCA 22 at [171], where the lawyers agreed:  
(a) to hourly rates in the middle of their normal range of rates;  
(b) to maintain those rates during the litigation period (currently five years and continuing);  
(c) to accept 80% of their invoices during the course of the litigation; and  
(d) to receive 25% above their normal fees in consideration for agreeing to (b) and (c).  
After full disclose, not one of the 3000 plaintiffs expressed any concern with the lawyer's retainer. In addition, the Court did not find a conflict of interest but the potential for such a conflict.

**CURRENT LICENCES HELD BY IMF (AUSTRALIA) LTD AND INSOLVENCY LITIGATION FUND PTY LTD  
IN RESPECT OF ITS LITIGATION MANAGEMENT SERVICES**

Licence Names	Name currently held under	Act to which they are under	State licence held under	Licence Number	Last known Renewal date	Expiry date of licence	Powerdocs No. where scanned
Private Inquiry Sub- Agent	Alastair Mackay	Commercial Agents and Private Inquiry Agents Act 1963	NSW	123/05	4/01/2005	21/09/2006	46517
Private Inquiry Sub- Agent	Charlie Gollow	Commercial Agents and Private Inquiry Agents Act 1963	NSW	124/05	4/01/2005	21/09/2006	46516
Private Inquiry Agent	Clive Bowman	Commercial Agents and Private Inquiry Agents Act 1963	NSW	25/06	18/01/2006	11/02/2007	48040
Private Inquiry Agent	Hugh McLernon	Commercial Agents and Private Inquiry Agents Act 1963	NSW	195/05	12/04/2006	20/04/2007	49598
Commercial Agent	IMF (Australia) Ltd	Commercial Agents and Private Inquiry Agents Act 1963	NSW	395/05	6/07/2005	11/07/2006	45557
Private Inquiry Agent	IMF (Australia) Ltd	Commercial Agents and Private Inquiry Agents Act 1963	NSW	385/05	6/07/2005	11/07/2006	45536
Private Inquiry Agent	James Eyers	Commercial Agents and Private Inquiry Agents Act 1963	NSW	194/05	12/04/2006	20/04/2007	49599
Private Inquiry Agent	John Walker	Commercial Agents and Private Inquiry Agents Act 1963	NSW	191/05	12/04/2006	20/04/2007	49596
Commercial Agent	Paul Rainford	Commercial Agents and Private Inquiry Agents Act 1963	NSW		1/07/2006		
Private Inquiry Agent	Paul Rainford	Commercial Agents and Private Inquiry Agents Act 1963	NSW		1/07/2006		
Private Inquiry Agent	Robert Sommerville	Commercial Agents and Private Inquiry Agents Act 1963	NSW	24/06	18/01/2006	11/02/2007	48041
Private Inquiry Agent	Steven Foale	Commercial Agents and Private Inquiry Agents Act 1963	NSW	23/06	18/01/2006	11/02/2007	48039
Commercial Agent	Clive Bowman	Private Agents Regulations 1990	VIC	L460	1/12/2005	31/12/2006	47565
Private Security Business Licence	ILF Pty Ltd	Private Security Act 2004	VIC	72005670S		6/01/2009	49888
Debt Collector's Licence	ILF Pty Ltd	Debt Collectors Licensing Act 1964	WA	5107		29/07/2007	50872
Investigator's Licence	Hugh McLernon	Security and Related Activities (Control) Act 1996	WA	IN11070	11/10/2005	1/11/2008	46728
Investigator's Licence	Charlie Gollow	Security and Related Activities (Control) Act 1996	WA	IN22861		6/11/2008	45986
Inquiry Agent's Licence	Paul Rainford	Security and Related Activities (Control) Act 1996	WA	IA00963	5/05/2004	28/04/2007	45988
Investigator's Licence	Paul Rainford	Security and Related Activities (Control) Act 1996	WA	IA00963	5/05/2004	28/04/2007	45989
Private Investigator	Paul Rainford	Security Providers Act 1993	QLD	42570		11/01/2008	45845

## THE COST OF FUNDING

- In the matter of *ACN 076673875 Ltd (2002) NSWSC 578* (26 June 2002) - 40%
- *QPSX Ltd -v- Ericsson Australia Pty Ltd* (2005) FSA933 (6 July 1995) - 24%
- *Clairs Keeley (A Firm) -v- Treacy and others* (2004) WASCA 277 (25 November 2004) - 30%
- *Cornelius -v- Coplex Resources NL* (2002) FCA 1378 (18 October 2002) - 40%
- *Green Re Oz – US Film Productions Pty Ltd* (2005) NSWSC 249 (31 March 2005) – 40%
- *Buiscecx Ltd -v- Panfida Food Ltd* (1998) 28ACSR357 – 75%
- *Bandwill Pty Ltd -v- Spencer – Laitt* (2000) WASC 210 (24 August 2000) – 55%
- *Jarbin Pty Ltd -v- Clutha Ltd* (2004) NSWSC 28 (25 February 2004) – 44%
- *Elfic Ltd v Macks* (2001) QCA 219 (6 June 2001) – 35%
- *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* (2005) NSWCA 83 (31 March 2005) – 33%
- *Re Addstone Pty Ltd* (1998) 83FSR 583 – 35%
- *Claim direct test cases* (2003) 4ALLER 528 – 30%
- *The Bell Group Ltd v Westpac Banking Corporation* (1993) 18 WAR 21 – 66%
- *Hawke v Efrat Consulting Services* (1999) MSA 412 (13 April 1999) – 30%
- *Re Tosich Construction Pty Ltd* (1997) FCA 115 – 50%
- *Re William Felton and Co Pty Ltd* (1998) 28ACSR 228 – 30%
- *Stocznia Gdanska SA v Latreefers* (2000) EWCA Civ 36 – 55%

# Australian Financial Services Licence

IMF (AUSTRALIA) LTD.

ABN: 45 067 298 088

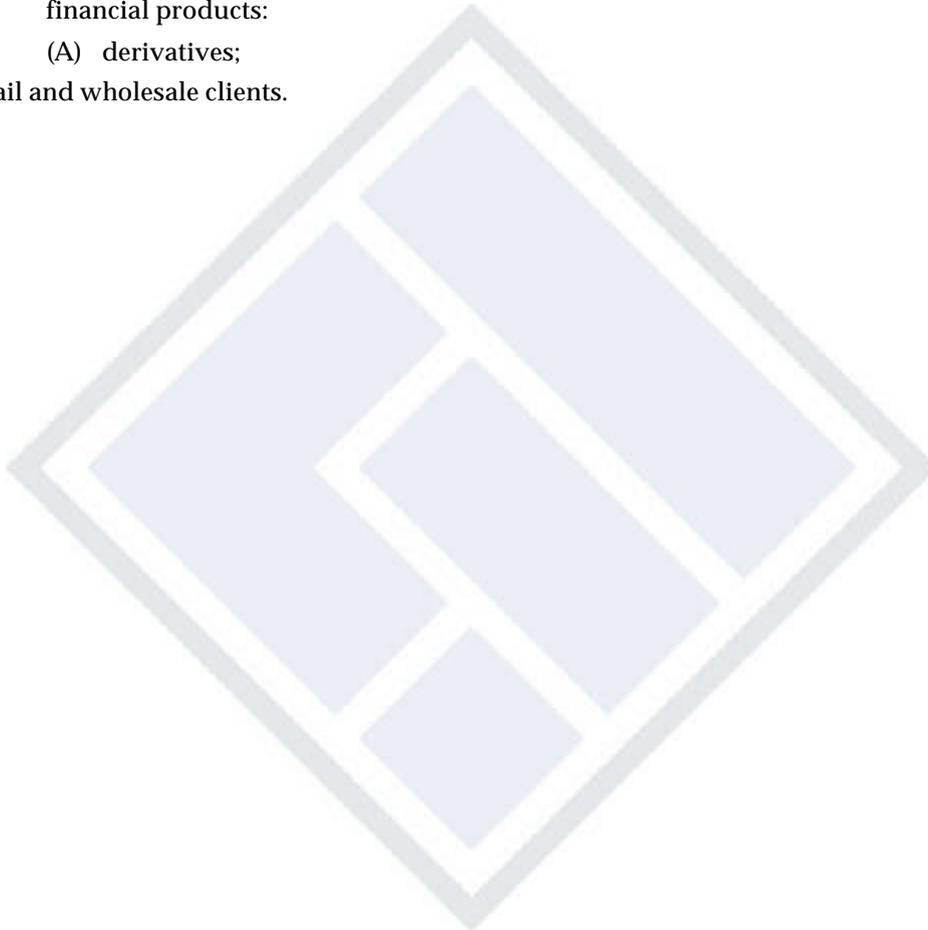
Licence No: 286906

is hereby licensed as an Australian Financial Services Licensee pursuant to section 913B of the Corporations Act 2001 subject to the conditions and restrictions which are prescribed, and to the conditions contained in this licence and attached schedules.

Effective 4 July 2005

## Authorisation

1. This licence authorises the licensee to carry on a financial services business to:
    - (a) deal in a financial product by:
      - (i) issuing, applying for, acquiring, varying or disposing of a financial product in respect of the following classes of financial products:
        - (A) derivatives;
- to retail and wholesale clients.



# Australian Financial Services Licence

IMF (AUSTRALIA) LTD.

ABN: 45 067 298 088

Licence No: 286906

Effective 4 July 2005

## Schedule of Conditions

### Compliance Measures to ensure Compliance with Law and Licence

2. The licensee must establish and maintain compliance measures that ensure, as far as is reasonably practicable, that the licensee complies with the provisions of the financial services laws.

### Financial Requirements for Market Participants and Clearing Participants

3. Where the licensee is a market participant in a licensed market, or a clearing participant in a licensed CS facility, conditions 4 to 10 (inclusive) do not apply to the licensee.

### Base Level Financial Requirements

4. The licensee must:
  - (a) be able to pay all its debts as and when they become due and payable; and
  - (b) have total assets that exceed total liabilities, or adjusted assets that exceed adjusted liabilities, as shown in the licensee's most recent balance sheet (ie: Statement of Financial Position) lodged with ASIC; and
  - (c) have no reason to suspect that both the licensee's total assets would not exceed its total liabilities and its adjusted assets would not exceed its adjusted liabilities on a current balance sheet (ie: Statement of Financial Position); and
  - (d) meet the cash needs requirement by complying with either:
    - (i) the reasonable estimate projection plus cash contingency basis ("Option 1"); or
    - (ii) the contingency based projection basis ("Option 2"); or
    - (iii) a requirement that an eligible provider being an APRA regulated entity or prudentially regulated entity in accordance with the Basel Committee Guidelines, as at the date of this licence, gives the licensee an enforceable and unqualified commitment to pay an unlimited amount on demand to the licensee, the licensee's creditors or a trustee for the licensee's creditors, that will apply for at least three months, taking into account all commercial contingencies the licensee should reasonably plan for; or
    - (iv) a requirement that the licensee:
      - (A) is a subsidiary of an Australian ADI or a corporation approved in writing for the purpose of this condition;
      - (B) reasonably expects that (based on access to cash from its related bodies corporate) it will have adequate resources (when needed) to meet its liabilities for at least the next three months (including any additional liabilities that the licensee might incur during that period), taking into account all adverse commercial contingencies for which the licensee should reasonably plan; and
      - (C) ensures that a responsible officer of the licensee has documented that the officer has the reasonable expectation for at least the following three month period together with the reasons for forming the expectation, the contingencies for which the licensee considers it is reasonable to plan, the assumptions made concerning the contingencies and the basis for selecting those assumptions; or
  - (v) a requirement that the licensee ensure that:



# Australian Financial Services Licence

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## Schedule of Conditions

- (A) the cash flows of the licensee and each of its related bodies corporate other than any body regulated by APRA ("licensee group") are managed on a consolidated basis;
- (B) there is a body corporate within the licensee group of which all members of the licensee group are subsidiaries that is not a body regulated by APRA ("parent entity");
- (C) the parent entity complies with Option 1 or Option 2 as if it were the licensee, cash flows of any member of the licensee group were cash flows of the licensee and any cash held by a member of the licensee group other than as trustee or as trustee of a relevant trust were so held by the licensee;
- (D) a report by the parent entity's auditor that is a registered company auditor is given to ASIC with the licensee's annual audit report under condition 11 of this licence in relation to each financial year of the licensee and for any other period that ASIC requests by a date that ASIC requests with respect to compliance by the parent entity with Option 1 or Option 2 as they would apply in accordance with subparagraph (C), reflecting the report that would be required from the auditor of a licensee for that period purporting to comply with Option 1 or Option 2; and
- (E) either of the following applies:
  - Alternative A - the parent entity has provided an enforceable and unqualified commitment to pay on demand an unlimited amount to the licensee or to meet the licensee's liabilities which the licensee reasonably expects will apply for at least the next three months taking into account all adverse commercial contingencies for which the licensee should reasonably plan; or
  - Alternative B - the licensee reasonably expects that (based on access to cash from members of the licensee group), it will have adequate resources to meet its liabilities (including any additional liabilities that the licensee might incur while the commitment applies) for at least the next three months taking into account all adverse commercial contingencies for which the licensee should reasonably plan and a responsible officer of the licensee has documented that the officer has the reasonable expectation in respect of at least the following three months together with the reasons for forming the expectation, the contingencies for which the licensee considers it is reasonable to plan, the assumptions made concerning the contingencies and the basis for selecting those assumptions; and
- (F) the licensee has no reason to believe that the parent entity has not complied with the requirement at subparagraph (C) or has failed to comply in a material respect with its obligations under Chapter 2M of the Act or, if the parent entity is not a company, under any other laws (whether law in Australia or not) relating to financial reporting that apply to it.

For 5 years after the end of the last financial year that includes a part of the period to which any document prepared for subparagraph (d)(iv)(C) or Alternative B in subparagraph (d)(v)(E) relates, the licensee must keep the document and give it to ASIC if ASIC requests.

## Financial Requirements for Holding Client Money or Property

5. If at any time the licensee:

- (a) is required to hold money in a separate account under Division 2 of Part 7.8 of the Act; or



# Australian Financial Services Licence

IMF (AUSTRALIA) LTD.

ABN: 45 067 298 088

Licence No: 286906

Effective 4 July 2005

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- (b) holds money or other property on trust for a client or is required to do so under Regulation 7.8.07(2) of the Corporations Regulations or otherwise; or
- (c) has the power to dispose of a client's property under power of attorney or otherwise;  
the licensee must ensure that the licensee has at least \$50,000 in surplus liquid funds ("SLF") unless the value of the money and property is less than \$100,000 excluding:
  - (d) money that has satisfied a client's liability on an insurance contract where the licensee is acting under a binder or section 985B of the Act applies, or property acquired by investment of that money; or
  - (e) the value of property where the licensee merely holds a document of title, and the client has legal title to the property.

## Financial Requirements for Licensee's Transacting with Clients

6. If the actual or contingent monetary liabilities that the licensee incurred in providing a financial service by entering into a transaction with a client(s), are equal to or greater than \$100,000 in total excluding a liability or a contingent liability (that if crystallized would be in the calculation of adjusted liabilities) that:
- (a) is a contingent liability that is neither a derivative nor a liability from underwriting securities or managed investment products; or
  - (b) the licensee reasonably estimates has a probability of less than 5% of becoming an actual liability; or
  - (c) is covered by money or property that the licensee holds in a separate account under Part 7.8 of the Act or on trust for clients; or
  - (d) is adequately secured;
  - (e) is a liability incurred by entering into a transaction on a licensed market that is to be settled using a clearing and settlement facility, the operation of which is authorised by an Australian CS facility licence;
  - (f) is under a foreign exchange contract and you are required to have \$10 million of tier one capital under another condition of this licence because the licensee has entered a foreign exchange contract as principal;
  - (g) is under a derivative where:
    - (i) the licensee does not make a market in derivatives;
    - (ii) the licensee entered into the dealing for the purposes of managing a financial risk;
    - (iii) either the licensee's dealing in derivatives are not a significant part of its business or the business of it and its related bodies corporate taken together; and
    - (iv) the licensee did not enter into the dealing on the instructions of another person; or
  - (h) is under a foreign exchange contract where the licensee:
    - (i) does not make a market in foreign exchange contracts;
    - (ii) entered into the contract for the purposes of enabling a payment in one of the currencies under the foreign exchange contract; and
    - (iii) did not enter into the foreign exchange contract on the instruction of another person;
- the licensee must have adjusted surplus liquid funds ("ASLF") of the sum of :



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- (i) \$50,000; plus
- (j) 5% of adjusted liabilities between \$1 million and \$100 million; plus
- (k) 0.5% of adjusted liabilities for any amount of adjusted liabilities exceeding \$100 million, up to a maximum ASLF of \$100 million.

In this condition, a reference to a client includes a person who acquires or disposes of financial products in a transaction that the licensee entered into at a price the licensee stated in the course of making a market.

## Reporting Triggers and Requirements for Financial Requirement Conditions of this Licence

7. The licensee must ensure the reporting requirements under conditions 8 and 9 of this licence are met where either paragraph (a) or paragraph (b) applies:
  - (a) the trigger points described in paragraphs (i) and (ii) below occur:
    - (i) the licensee has adjusted liabilities of more than \$1 million and less than or equal to \$100 million; and
    - (ii) the licensee has an ASLF of less than 5.5% of adjusted liabilities;
  - (b) the trigger points described in paragraphs (i), (ii) and (iii) below occur:
    - (i) the licensee has adjusted liabilities of more than \$100 million;
    - (ii) the licensee does not have \$100 million ASLF; and
    - (iii) the licensee has an ASLF that is less than \$500,000 above the minimum ASLF required under condition 6 of this licence
8. Where the licensee's ASLF is below the trigger points, the licensee must not enter into any transactions with clients that could give rise to further liabilities, contingent liabilities or other financial obligations until the licensee's board or governing body has certified in writing that, having conducted reasonable enquiry into its financial position, there is no reason to believe that the licensee will fail to comply with its obligations under section 912A of the Act.
9. Where the licensee's board or other governing body has made the certification required under condition 8, the licensee must ensure that the licensee's board or other governing body certifies in writing at least monthly that, having conducted reasonable enquiry into its financial position, there is no reason to believe that the licensee will fail to comply with its obligations under section 912A of the Act until the licensee's ASLF continuously exceeds the trigger point for a period exceeding one month.
10. The licensee must keep each certification issued by the licensee's board or other governing body under condition 8 and 9 of this licence for at least 5 years from the date of such certification. The licensee must provide ASIC with a copy of each certification within 3 business days of the date of each certification.



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### Audit Opinion on Financial Requirements

11. The licensee must lodge with ASIC an opinion by a registered company auditor ("the audit opinion") addressed to the licensee and ASIC for the following periods:

- (a) for each financial year, at the same time the licensee is required to lodge a balance sheet (ie: Statement of Financial Position) under Part 7.8 of the Act; and
- (b) for any period of time that ASIC requests, by the date ASIC requests the audit opinion to be lodged; that states whether during:
- (c) any part of the period for which the licensee:
  - (i) relied on being a market participant, on a positive assurance basis, the licensee was a participant in the market conducted by:
    - (A) ASX; or
    - (B) SFE, that restricted its financial services business to participating in the market and incidental business supervised by SFE; and
  - (ii) relied on being a body regulated by APRA, on a positive assurance basis, the licensee was a body regulated by APRA; and
- (d) any remaining part of the period:
  - (i) in the auditor's opinion, the licensee:
    - (A) complied with all the financial requirements under conditions 4 to 10 (inclusive) of this licence other than paragraph 4(d) of this licence, except for paragraph (e) of the definition of Option 1 under this licence if the licensee purports to comply with Option 1; and
    - (B) except for any period stated in the report when the licensee purports to comply with subparagraph 4(d)(iii), (iv) or (v), had at all times a projection (covering at least the following 3 months) that purports to, and appears on its face to comply with, paragraph (a) of the definition of Option 1 or paragraph (a) of the definition of Option 2 under this licence (depending on which option the licensee purports to be complying with); and
    - (C) except for any period stated in the report when the licensee purports to comply with subparagraph 4(d)(iii), (iv) or (v), correctly calculated the projections on the basis of the assumptions the licensee adopted for the projections described in subparagraph (d)(i)(B) of this condition; and
    - (D) for any period when the licensee relied on subparagraph 4(d)(iii) of this licence, has obtained from an Australian ADI or a foreign deposit-taking institution approved in writing by ASIC as an eligible provider an enforceable and unqualified commitment (applying for at least the following 3 months) to pay an unlimited amount, or, up to the amount that the licensee may from time to time be liable, taking into account all commercial contingencies the licensee should plan for, on demand to the licensee, the licensee's creditors or a trustee for the licensee's creditors; and
    - (E) for any period when the licensee relied on subparagraph 4(d)(iv), following an examination of the documents prepared for subparagraph 4(d)(iv)(C), the licensee complied with subparagraph 4(d)(iv)(A) and subparagraph 4(d)(iv)(C) for documents prepared for the period to which the report relates;



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- (F) for any period when the licensee relied on subparagraph 4(d)(v), the licensee complied with subparagraph 4(d)(v)(A) and (B); and
- (G) for any period when the licensee relied on Alternative A in subparagraph 4(d)(v)(E), the licensee has complied with Alternative A.
- (ii) except for any period stated in the report when the licensee purports to comply with subparagraph 4(d)(iii), (iv) or (v), following an examination of the documents the licensee relies on in complying with Option 1 or Option 2 as defined under this licence, the auditor has no reason to believe that:
  - (A) the licensee did not satisfy the requirements of paragraph 912A(1)(h) of the Act for managing the risk of having insufficient financial resources to comply with the conditions of this licence; or
  - (B) the licensee failed to comply with the cash needs requirement using either Option 1 or Option 2 as defined under this licence (as applicable) except for:
    - (1) paragraphs (a), (c) and (e) of the definition of Option 1 as defined under this licence; or
    - (2) paragraphs (a) and (c) of the definition of Option 2 as defined under this licence; or
  - (C) if the licensee relied on Option 1 as defined under this licence, the assumptions the licensee adopted for its projection were unreasonable; or
  - (D) if the licensee relied on Option 2 as defined under this licence, the basis for the selection of assumptions to meet the requirements for its projection adopted was unreasonable; and
- (iii) for any period when subparagraph (d)(i)(D) of this condition applies, following an examination of the documented assumptions that the licensee relies on in forming the reasonable expectation referred to in subparagraph 4(d)(iii), the auditor has no reason to believe that:
  - (A) the licensee did not satisfy the requirements of paragraph 912A(1)(h) for managing the risk of having insufficient financial resources to comply with the conditions in this licence; and
  - (B) the basis for the selection of the assumptions adopted was unreasonable; and
- (iv) for any period when the licensee relied on subparagraph 4(d)(iv), following an examination of the documents prepared for subparagraph 4(d)(iv)(C), the auditor has no reason to believe that:
  - (A) the licensee did not satisfy the requirements of paragraph 912A(1)(h) for managing the risk of having insufficient financial resources to comply with the conditions in this licence; and
  - (B) the basis for the selection of the assumptions adopted was unreasonable; and
- (v) for any period when the licensee relied on subparagraph 4(d)(v) under Alternative B, following an examination of the documents prepared for Alternative B, the auditor has no reason to believe that:
  - (A) the licensee did not satisfy the requirements of paragraph 912A(1)(h) for managing the risk of having insufficient financial resources to comply with the conditions in this licence; or
  - (B) the basis for the selection of the assumptions adopted was unreasonable.

## External Disputes Resolution Requirements

12. Where the licensee provides financial services to retail clients, the licensee must be a member of one or more External Disputes Resolution Scheme(s) ("EDRS") which covers, or together cover, complaints made by retail



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clients in relation to the provision of all of the financial services authorised by this licence.

13. Where the licensee ceases to be a member of any EDRS, the licensee must notify ASIC in writing within 3 business days:
- (a) the date the licensee ceases membership of the EDRS(s);
  - (b) the reasons the licensee's membership of the EDRS(s) has ceased (including circumstances where the EDRS is no longer operating, failure by the licensee to renew their membership of the EDRS or where the EDRS has terminated the licensee's membership of the EDRS);
  - (c) details of the new EDRS(s) the licensee intends to or has joined (including the date the membership commences and the name of the EDRS); and
  - (d) details that provide confirmation that the licensee is covered by EDRS(s) covering complaints made by retail clients in relation to the provision of all of the financial services authorised by this licence.

### Prohibition to Operate Managed Discretionary Account Service

14. The licensee must not provide an MDA service to a retail client except when operating a registered scheme.

### Retention of Financial Services Guides, Statements of Advice and material relating to personal advice

15. Where the licensee provides financial product advice to retail clients, the licensee must ensure that copies (whether in material, electronic or other form) of the following documents are retained for at least the period specified:
- (a) each FSG (including any supplementary FSG) given by or on behalf of the licensee, or by any authorised representative of the licensee while acting in that capacity - for a period commencing on the date of the FSG and continuing for at least 7 years from when the document was last provided to a person as a retail client;
  - (b) a record of the following matters relating to the provision of personal advice to a retail client (other than personal advice for which an SOA is not required or for which a record of the advice is kept in accordance with section 946B(3A) ):
    - (i) the client's relevant personal circumstances within the meaning of section 945A(1)(a)(i);
    - (ii) the inquiries made in relation to those personal circumstances within the meaning of section 945A(1)(a)(ii);
    - (iii) the consideration and investigation conducted in relation to the subject matter of the advice within the meaning of section 945A(1)(b); and
    - (iv) the advice, including reasons why advice was considered to be "appropriate" within the meaning of section 945A(1)(a) - (c)for a period of at least 7 years from the date that the personal advice was provided;
  - (c) any SOA provided by or on behalf of the licensee, or by any authorised representative of the licensee while acting in that capacity - for a period of at least 7 years from the date the document was provided to the client.



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16. The licensee must establish and maintain measures that ensure, as far as is reasonably practicable, that it and its representatives comply with their obligation to give clients an FSG as and when required under the Act. The licensee must keep records about how these measures are implemented and monitored.

### Terms and Definitions

In this licence references to sections, Parts and Divisions are references to provisions of the Act unless otherwise specified. Headings contained in this licence are for ease of reference only and do not effect interpretation. Terms used in this licence have the same meaning as is given to them in the Act and the following terms have the following meanings:

**adequately secured** means:

- (a) secured by an enforceable charge over financial products (other than financial products issued by the licensee or its associate) if:
- (i) the financial products are:
    - (A) regularly traded on:
      - (1) a financial market (as defined in sub-section 767A(1) of the Act and disregarding sub-section 767A(2) of the Act) operated by a licensee other than the licensee or its associate that in the reasonable opinion of the licensee produces sufficiently reliable prices to assess the value of the security provided by the charge;
      - (2) an ASIC-approved foreign exchange under ASIC Policy Statement 72 "Foreign securities prospectus relief" as at the date of this licence; or
      - (3) a foreign market approved in writing for the purpose by ASIC; or
    - (B) interests in a registered scheme for which withdrawal prices are regularly quoted by the responsible entity and the licensee believes on reasonable grounds that withdrawal may be effected within 5 business days; and
  - (ii) the market value of these financial products equals not less than 120% of the particular amount owing or not less than 109% of the particular amount owing if the financial products are debt instruments; or
- (b) secured by a registered first mortgage over real estate that has a fair market valuation at least equal to 120% of the amount owing; or
- (c) owing from an eligible provider; or
- (d) secured by an enforceable charge over amounts owing to another licensee which themselves are adequately secured.

**adjusted assets** means the value of total assets:

- (a) minus excluded assets; and
- (b) minus any receivable of the licensee if the licensee has excluded a liability from adjusted liabilities on the basis that there is an enforceable right of set off with that receivable; and



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- (c) minus the value of any assets that are encumbered as a security against liability to a person that provides a security bond to ASIC up to the amount of the bond; and
- (d) minus the value of any assets that may be required to be applied to satisfy a liability under a credit facility that is made without recourse to the licensee to the extent that the liability is excluded from adjusted liabilities; and
- (e) plus the value of any eligible undertaking that is not an asset; and
- (f) for calculating ASLF, plus the value of any assets of any trust (other than a registered scheme) of which the licensee is trustee except to the extent the value exceeds the sum of:
  - (i) the liabilities of the trust; and
  - (ii) any increase in the amount of ASLF that is a result of assets, liabilities and contingent liabilities of the trust for accounting purposes being included in calculating ASLF.

**adjusted liabilities** means total liabilities:

- (a) minus any subordinated debt approved by ASIC; and
- (b) minus any liability that is the subject of an enforceable right of set off if the corresponding receivable is excluded from adjusted assets; and
- (c) minus any liability under a credit facility that is made without recourse to the licensee, to the extent that the assets to which recourse may be made under the credit facility are excluded from adjusted assets; and
- (d) for calculating ASLF, plus liabilities of any trust (other than a registered scheme) of which the licensee is trustee.

**adjusted surplus liquid funds or ASLF** means surplus liquid funds minus the following adjustments or such other adjustments as ASIC may from time to time consent to in writing:

- (a) the following amounts against the values used for assets:
  - (i) 8% for obligations to pay the licensee a certain sum maturing beyond 12 months unless the interest rate applicable is reset to reflect market interest rates at least annually; and
  - (ii) 16% for any assets other than:
    - (A) an obligation to pay the licensee a certain sum;
    - (B) a derivative;
    - (C) the rights to moneys held by another licensee in an account under section 981B of the Act; and
    - (D) property held in trust by another licensee under Division 3 of Part 7.8 of the Act; and
- (b) 8% of the value (if applicable as affected by paragraph (a) of this definition) of assets that are amounts owing to the licensee except where the asset is:
  - (i) adequately secured; or
  - (ii) a right against a licensee in respect of money or property held by the licensee in the account under section 981B or that is secured by property held in trust under Division 3 of Part 7.8 of the Act; or



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- (iii) owing from a client in the ordinary course of its financial services business for financial products that the client has agreed to buy, if the money is required to be - and in the reasonable estimation of the licensee probably will be - paid no more than 5 business days after the client became liable; and
- (c) the following amounts for contingent liabilities and contingent liabilities of any trust (other than a registered scheme) of which the licensee is trustee:
  - (i) 5% of any contingent liabilities that can be quantified under an underwriting or sub-underwriting of financial products (ie: an enforceable commitment) except during the 5 business days after the commitment is assumed or to the extent that the underwriter holds funds from persons seeking to acquire the financial products subject to the underwriting; and
  - (ii) 5% of the potential liability of any contingent liabilities that can be quantified under a derivative other than to the extent there is an offsetting position in:
    - (A) the "something else" for the purposes of paragraph 761D(1)(c) of the Act; and/or
    - (B) another derivative relating to that something else; and/or
    - (C) a thing that is so similar to the something else as to make the risk of net loss trivial; except to the extent that the risk is trivial that they will become liabilities (or become liabilities to a greater extent than taken into account for the purposes of applying the adjustment) because of a change in the price or value of the something else; and
  - (iii) 20% of the potential liability of any contingent liabilities that can be quantified under a guarantee or indemnity; and
- (d) the amounts that is the relevant percentage as set out in paragraphs (c)(ii) to (c)(iii) of this definition of the amounts that is the maximum amount that the licensee may be liable for in relation to a contingent liability referred to in paragraph (c)(ii) or (iii) of this definition where the maximum liability cannot be quantified disregarding any trivial risk that the amount may be higher; and
- (e) where the licensee has agreed to sell an asset that it does not hold, the amount of the adjustment that would apply if it held that asset.

For paragraph (c) and (d) of this definition, a risk may be treated as trivial if the probability that this will occur is less than 5% in the reasonable and documented opinion of the licensee.

The amount of the adjustment for a contingent liability under paragraph (c)(i) or (c)(iii) of this definition may be reduced (as to 100% or less) by the amount that is the applicable percentage as set out in paragraphs (c)(i) and (iii) of this definition of the value of any assets that would be acquired in return for paying the contingent liability after making an adjustment if required by paragraphs (a) or (b) of this definition.

**clearing participant** means a Clearing Participant in the licensed clearing and settlement facility ("CS Facility") as defined in the operating rules of the licensed clearing and settlement facility operated by Australian Clearing House ("ACH") as at the date of this licence, that complies with the operating rules of the CS facility operated by ACH, as at the date of this licence, relating to financial requirements, taking into account any waiver by ACH.



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**derivative** means "derivatives" as defined in section 761D of the Act (including regulation 7.1.04 of the Corporations Regulations) excluding "derivatives" that are "foreign exchange contracts" as defined in this licence.

**eligible provider** means:

- (a) an Australian ADI; or
- (b) an entity (other than a registered scheme of which the licensee or the licensee's associate is the responsible entity):
  - (i) whose ordinary shares are listed on a licensed market or an ASIC-approved foreign exchange under ASIC Policy Statement 72 "Foreign securities prospectus relief" as at the date of this licence that has net assets (excluding intangible assets) of:
    - (A) more than \$50 million; or
    - (B) at least 4 times the amount of the commitment;whichever is the greater, as shown in the most recent audited financial statements of the provider lodged with ASIC; and
  - (ii) that the licensee has no reason to believe no longer has net assets of at least that amount; or
- (c) an Australian government (ie the Commonwealth or a State or Territory government) or a foreign government of an OECD country; or
- (d) a foreign deposit-taking institution approved in writing by ASIC for this purpose; or
- (e) a CS facility licensee; or
- (f) an entity approved by ASIC in writing for this purpose.

**eligible undertaking** means the amount of a financial commitment (disregarding any part previously paid), provided by an eligible provider in the form of an undertaking to pay the amount of the financial commitment to the licensee, that:

- (a) is an enforceable and unqualified obligation to pay on written demand by the licensee; and
- (b) remains operative (even if, for example, the licensee ceases to hold an AFS licence) until ASIC consents in writing to the cancellation of the undertaking.

**excluded assets** means:

- (a) intangible assets (ie: a non-monetary asset without physical substance); and
- (b) except when allowed under paragraphs (f) or (g) of this definition, receivables from or assets owing from ("receivables"), or invested in, any person who:
  - (i) is an associate of the licensee; or
  - (ii) was an associate of the licensee at the time the liability was incurred or the investment was made; or
  - (iii) became liable to the licensee because of, or in connection with, the acquisition of interests in a managed investment scheme the licensee operates; and



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- (c) except when allowed under paragraph (h) of this definition, any:
- (i) beneficial interest; or
  - (ii) interest in a managed investment scheme; or
  - (iii) superannuation product;
- in respect of which the licensee or its associates may exercise any form of power or control; and
- (d) except when allowed under paragraphs (f) or (g) of this definition or required to be included by paragraph (f) of the definition of adjusted assets in this licence, a receivable from the trustee of any trust in respect of which the licensee or its associate may exercise any form of power or control; and
- (e) assets that secure any current or future liability of another person to the extent of that liability; and:
- (f) despite paragraphs (b) and (d) of this definition, a receivable is not excluded to the extent that:
- (i) it is adequately secured; or
  - (ii) the following apply:
    - (A) it is receivable as a result of a transaction entered into by the licensee in the ordinary course of its business on its standard commercial terms applicable to persons that are not associated with the licensee on an arm's length basis; and
    - (B) no part of the consideration in relation to the transaction is, in substance, directly or indirectly invested in the licensee; and
    - (C) the total value of such assets (before any discount is applied) is not more than 20% of the assets less liabilities of the licensee; and
    - (D) for the purposes of calculating ASLF, the amount is further discounted by 10% of the value after any adjustment required by paragraph (a) or (b) of the definition "adjusted surplus liquid funds" of the licence; or
  - (iii) the following apply:
    - (A) it is receivable from an insurance company that is a body regulated by APRA and results from a transaction entered into by the licensee in the ordinary course of its business on its standard commercial terms applicable to persons that are not associated with the licensee on an arm's length basis; and
    - (B) there is no reason to believe that any amount invested in the licensee would not have been invested if the transactions that caused the receivable had not taken place or were not at the time of the investment expected to take place; and
    - (C) there is no reason to believe that the recoverability of the receivable will materially depend on the value of an investment by any person in the licensee; and
    - (D) disregarding this subparagraph (f)(iii), the total value of the receivables under this subparagraph (f)(iii) before any discount is applied is not more than 60% of the adjusted liabilities of the licensee; or
  - (iv) ASIC consents in writing to the licensee treating the amount owing as not being an excluded asset; and



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- (g) despite paragraphs (b) and (d) of this definition, the licensee can include a receivable amount to the extent that it is owing by way of fees from, or under rights of reimbursement for expenditure by the licensee out of property of, a superannuation scheme, an IDPS or a registered scheme ("Scheme") to the extent that that receivable:
- (i) exceeds amounts invested by the Scheme in or lent (other than by way of a deposit with an Australian ADI in the ordinary course of its banking business) directly or indirectly by the Scheme to the licensee, a body corporate the licensee controls, a body corporate that controls the licensee or a body corporate that the licensee's controller controls;
  - (ii) if the receivable for fees represents no more fees than are owing for the last 3 months; and
  - (iii) if the receivable is under rights of reimbursement for expenditure by the licensee, has not been receivable for more than 3 months; and
- (h) despite paragraph (c) of this definition, the licensee does not have to exclude a managed investment product unless any part of the amount invested is, in substance, directly or indirectly, invested in the licensee.

**foreign exchange contracts** means "foreign exchange contracts" as defined in section 761A of the Act (including regulation 7.1.04 of the Corporations Regulations) and includes "derivatives", as defined in section 761D of the Act, that are foreign exchange contracts.

**market participant** means:

- (a) a participant as defined in the operating rules of the licensed market operated by the Australian Stock Exchange Limited ("ASX"), as at the date of this licence, (other than a Principal Trader, unless the Principal Trader is registered as a Market Maker) who complies with the ASX's operating rules that relate to financial requirements, taking into account any waiver by ASX; or
- (b) a participant in the licensed market operated by Sydney Futures Exchange Ltd ("SFE") that:
  - (i) restricts its financial services business to participating in the licensed market and incidental business supervised by SFE; and
  - (ii) complies with the SFE's operating rules, as at the date of this licence, that relate to financial requirements, taking into account any waiver by SFE.

**MDA service** means a service with the following features:

- (a) a person ("the client") makes contributions; and
- (b) the client agrees with another person that the client's portfolio assets will:
  - (i) be managed by that other person at their discretion, subject to any limitation that may be agreed, for purposes that include investment; and
  - (ii) not be pooled with property that is not the client's portfolio assets to enable an investment to be made or made on more favourable terms; and
  - (iii) be held by the client unless a beneficial interest but not legal interest in them will be held by the client; and



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- (c) the client and the person intend that the person will use client contributions of the client to generate a financial return or other benefit from the person's investment expertise.

**net tangible assets or NTA** means adjusted assets less any adjusted liabilities and must be calculated on the basis of assets and liabilities valued and recognised as they would appear if a balance sheet (ie: Statement of Financial Position) were made up for lodgement as part of a financial report under Chapter 2M of the Act at the time of calculation on the basis that the licensee is a reporting entity.

**old law securities options contracts** means "options contracts" as defined under section 9 in the Corporations Act immediately prior to 11 March 2002 which were "securities" as defined under section 92(1) of the Corporations Act immediately prior to 11 March 2002.

**Option 1** means the reasonable estimate projection plus cash contingency basis where the licensee is required to:

- (a) prepare a projection of the licensee's cash flows over at least the next 3 months based on the licensee's reasonable estimate of what is likely to happen over this term; and
- (b) document the licensee's calculations and assumptions, and describe in writing why the assumptions relied upon are the appropriate assumptions; and
- (c) update the projection of the licensee's cash flows when those cash flows cease to cover the next 3 months or if the licensee has reason to suspect that an updated projection would show that the licensee was not meeting paragraph (d) of this definition; and
- (d) demonstrate, based on the projection of the licensee's cash flows, that the licensee will have access when needed to enough financial resources to meet its liabilities over the projected term of at least 3 months, including any additional liabilities the licensee projects will be incurred during that term; and
- (e) hold (other than as trustee) or be the trustee of a relevant trust that holds, in cash an amount equal to 20% of the greater of:
  - (i) the cash outflow for the projected period of at least 3 months, adjusted to produce a 3-month average; or
  - (ii) the licensee's actual cash outflow for the most recent financial year for which the licensee has prepared a profit and loss statement (ie: Statement of Financial Performance), adjusted to produce a 3-month average.

For the purposes of this definition references to the licensee's cash flow include the licensee's own cash flow and any cash flow of a relevant trust but do not include cash flows of any other trust.

For the purposes of paragraph (e) of this definition, "cash" means

- (A) current assets valued at the amount of cash for which they can be expected to be exchanged within 5 business days; or



# Australian Financial Services Licence

IMF (AUSTRALIA) LTD.

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Licence No: 286906

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- (B) a commitment to provide cash from an eligible provider that can be drawn down within 5 business days and has a maturity of at least a month;

but does not include any cash in a relevant trust if the licensee has reason to believe that the cash will not be available to meet all of the projected cash flows of the licensee.

**Option 2** means the cash needs requirement on the contingency-based projection basis where the licensee is required to:

- (a) prepare a projection of the licensee's cash flows over at least the next 3 months based on the licensee's estimate of what would happen if the licensee's ability to meet its liabilities over the projected term (including any liabilities the licensee might incur during the term of the projection) was adversely affected by commercial contingencies taking into account all contingencies that are sufficiently likely for a reasonable licensee to plan how they might manage them; and
- (b) document the licensee's calculations and assumptions, and describe in writing why the assumptions relied upon are the appropriate assumptions; and
- (c) update the projection of the licensee's cash flows when those cash flows cease to cover the next 3 months or if the licensee has reason to suspect that an updated projection would show that the licensee was not meeting paragraph (d) of this definition; and
- (d) demonstrate, based on the projection of the licensee's cash flow, that the licensee will have access when needed to enough financial resources to meet its liabilities over the projected term of at least 3 months, including any additional liabilities the licensee might incur during that term.

For the purposes of this definition references to the licensee's cash flow include any cash flow of a relevant trust.

**regulated trust account** means:

- (a) a trust account maintained by an authorised trustee corporation under the law of a State or Territory; or
- (b) a solicitor's trust account; or
- (c) a real estate agent's trust account; or
- (d) a trust account maintained by an entity other than the licensee which provides protections similar to the accounts described in paragraphs (a) to (c) and is approved by ASIC for the purpose in writing.

**relevant trust** means, for the purposes of the definitions of "Option 1" and "Option 2" of this licence, a trust:

- (a) where substantially all of the financial services business carried on by the licensee is carried on as trustee of a trust; and
- (b) that it is not a registered scheme or a superannuation entity as defined in subsection 10(1) of the Superannuation Industry (Supervision) Act 1993.



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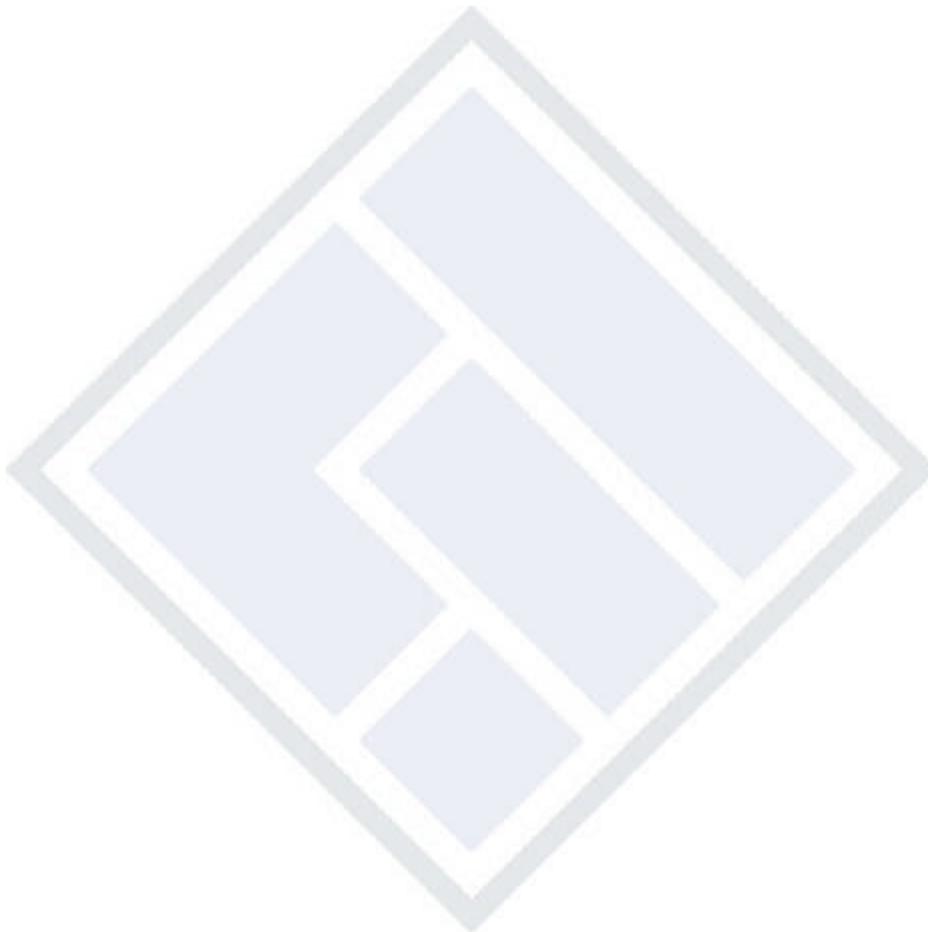
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**surplus liquid funds or (SLF)** means total adjusted assets less total adjusted liabilities calculated on the basis of assets disregarding non current assets and liabilities disregarding non current liabilities valued and recognised as they would appear if a balance sheet (ie: Statement of Financial Position) were made up for lodgement as part of a financial report under Chapter 2M of the Act at the time of calculation on the basis that the licensee is a reporting entity.

**trigger point** means either of the trigger points described in condition 7 of this licence.





**IMF (Australia) Ltd**

**Combined Financial Services Guide and  
Product Disclosure Statement**

**Dated the 12<sup>th</sup> day of December 2005**

## **1. Introduction**

- 1.1 This document is provided to you by IMF (Australia) Ltd which is referred to as “IMF”, “us” or “we”.
- 1.2 It is provided to you pursuant to sections 941A and 1012B of the Corporations Act (“the Act”) because you have sought litigation funding services from us and is divided into the following two parts:
- (a) a Financial Services Guide; and
  - (b) a Product Disclosure Statement.

## **2. Financial Services Guide**

- 2.1 This guide is to help you decide whether to use our litigation funding services.
- 2.2 The guide is given to people who ask us to fund their claims and litigation. It explains:
- (a) what money we might receive if you enter into a litigation funding agreement with us; and
  - (b) how you can complain about our service.
- 2.3 We provide litigation funding services pursuant to written litigation funding agreements. If we decide to fund your claim, we will negotiate the terms of a written agreement with you. If you execute a litigation funding agreement, you will become one of our clients.
- 2.4 Our litigation funding agreement is a “financial product” as that term is used in the Act. For the purposes of the Act, if we offer to enter into a litigation funding agreement with you and you accept our offer, we:
- (a) have “issued” a financial product to you; and
  - (b) are providing a “financial service” to you (as that term is used in the Act).
- 2.5 You are dealing with a company, IMF (Australia) Ltd, whose ABN is 45 067 298 088. Our shares are listed for quotation on the Australian Stock Exchange (“ASX”) under the stock code “IMF”. Our contact details are set out on the last page of this document. We also maintain a web site at [www.imf.com.au](http://www.imf.com.au).
- 2.6 Our web site contains the following information which may help you to decide whether to use our financial services:
- (a) our audited accounts;
  - (b) our Corporate Governance Manual;
  - (c) our Privacy Policy;
  - (d) public announcements made by us to the ASX; and
  - (e) general information about litigation funding.
- 2.7 Our chairman is Robert Ferguson and our managing director is John Walker. Both may be contacted by telephone on +61 2 8223 3567.

- 2.8 No other companies, entities or persons (other than our officers and employees) are involved in any way in the provision of our financial services. Our wholly owned subsidiary, Insolvency Litigation Fund Pty Ltd, is a licensed investigator and carries out investigations for us.
- 2.9 A litigation funding agreement is a contract which both you and IMF may enforce.
- 2.10 We hold Australian Financial Services Licence No. 286906 and are lawfully entitled to enter into litigation funding agreements with retail and wholesale clients pursuant to the provisions of the Act and the conditions of that licence.
- 2.11 A copy of the licence will be made available to you upon request.
- 2.12 When we enter into litigation funding agreements, we are acting on our own behalf and not on behalf of you or anyone else. We cannot and do not make any recommendations as to whether you should enter into a litigation funding agreement with us. We will not provide you with any advice on the meaning, effect or content of the litigation funding agreement. Since we are the other party to the agreement, it would not be appropriate for us to provide you with such advice. We recommend that you obtain your own independent advice on the meaning, effect and content of the litigation funding agreement before you decide whether to execute it.
- 2.13 Once the litigation funding agreement is executed, you and IMF will have similar interests because we both stand to benefit from a successful resolution of your claim.
- 2.14 Our litigation funding agreements are entered into on a “no win, no fee” basis. This means that we will not be paid any money unless and until:
- (a) you have executed a litigation funding agreement;
  - (b) your claim has been settled or concluded by a judgment in your favour; and
  - (c) you have received at least some of the settlement or judgment moneys. (You will never be asked to pay more than you have actually received.)
- 2.15 The litigation funding agreement explains how any money we will be paid is calculated.
- 2.16 Clause 5 of our Corporate Governance Manual, which can be found on our website, explains how our dispute resolution process works.
- 2.17 IMF is also a member of the Banking and Financial Services Ombudsman scheme. You can contact the Ombudsman, Colin Neave, by ringing 1300 780 808 (within Australia) or +61 3 9613 7333 (outside Australia) or by sending a fax to +61 3 9613 7345.

### **3. Product Disclosure Statement**

- 3.1 We have prepared this Product Disclosure Statement.
- 3.2 In general terms, we will decide whether we want to enter into a litigation funding agreement with you by assessing:
- (a) the strength of your claim;
  - (b) the type of claim;
  - (c) when your claim arose;
  - (d) the jurisdiction in which your claim will be heard;

- (e) the amount of your claim;
  - (f) any legal or factual difficulties;
  - (g) the ability of the proposed defendant to pay you if you are successful; and
  - (h) how much documentary evidence there is to support your claim.
- 3.3 To assist us in making our initial assessment, we may require you to provide us with documents and other information. We will treat this information as confidential.
- 3.4 We do not charge anything for our initial assessment.
- 3.5 If we decide not to fund your claim, we will return your documents to you promptly.
- 3.6 If we decide to fund your claim, we will offer to enter into a litigation funding agreement with you.
- 3.7 The litigation funding agreement will cover three major areas:
- (a) investigation;
  - (b) funding; and
  - (c) other services.
- 3.8 If we enter into a litigation funding agreement with you, we will continue to investigate your claim.
- 3.9 We will pay the following costs:
- (a) your reasonable legal fees;
  - (b) expenses reasonably incurred by your solicitors;
  - (c) court costs;
  - (d) out of pocket expenses; and
  - (e) counsel and witnesses fees.
- 3.10 You will remain liable to your solicitors for these amounts but we will pay them on your behalf.
- 3.11 We will also provide any other non-legal assistance which you or your solicitors may reasonably request.
- 3.12 If in any litigation you are required to provide security for the other side's legal costs, we will provide that security on your behalf by:
- (a) paying money into court or providing a bank guarantee if required to do so by order of the court; or
  - (b) providing our guarantee to the defendant or to the court.
- 3.13 You will remain in control of your claim. The solicitors will be acting for you, not for us.
- 3.14 In most cases you will be able to choose your own solicitors and counsel. We have particular expertise in that area and may be able to help you with your choice.

- 3.15 If your claim is unsuccessful and you are ordered to pay the other side's costs, we will pay those costs on your behalf. If your claim is settled or successfully concluded by judgment in your favour, we will be entitled to:
- (a) repayment of all money we have paid on your behalf; and
  - (b) an agreed percentage of the amount you recover.
- 3.16 We will not charge for any non-financial assistance we provide to you during the course of any litigation.
- 3.17 Only you can decide whether to settle your claim. We may, however, ask you to obtain senior counsel's opinion on any settlement offer. If we do, we will pay for that opinion.
- 3.18 After you execute a litigation funding agreement, you will have a 21 day "cooling off" period. During that period you may tell us that you wish to terminate the litigation funding agreement. You may tell us by letter, email or fax.
- 3.19 If you decide to terminate the litigation funding agreement during that period, we will not charge you anything.
- 3.20 After the 21 day "cooling off" period has ended, you will only be able to terminate the litigation funding agreement in accordance with its terms.
- 3.21 We may terminate the litigation funding agreement at any time by giving you 7 days written notice.
- 3.22 If you enter into a litigation funding agreement and your claim goes to trial, you may be required to give evidence in court. You may also be required to provide copies of all your relevant documents to the other side. We do not pay you to give evidence, to gather and supply your documents to your solicitors or to help with the case generally.
- 3.23 If other people have the same or similar claims as you, we may decide to fund their claims too. This may mean that you and they become claimants in the same litigation.

#### **4. Risks**

- 4.1 The most obvious risk is that you may commence litigation and lose. If that happens, and subject to paragraph 4.4, you will not be required to pay any money. You will, however, lose the time and effort you have put into the litigation.
- 4.2 Even if you are successful with your litigation, the other side may not be able to pay all of the judgment sum. As we only get paid from any money you actually receive, we are always careful to investigate whether the other side will be able to pay you. Of course, we can never guarantee that they will have enough money to do so.
- 4.3 As explained in paragraph 3.21, we may terminate the litigation funding agreement. If that happens, we may lose all the money we have paid and will receive nothing for any work we have put into your claim. If we terminate the litigation funding agreement and you later receive some money in respect of your claim, you must still reimburse us from that money for the legal and other expenses we have paid on your behalf. Extremely few litigation funding agreements are terminated by us.
- 4.4 As your claim proceeds, we will pay your legal costs, court costs and other funded expenses on a monthly basis. As a company, however, we could become insolvent and be unable to meet any order that you pay the other side's legal costs. You will need to

make your own assessment of our financial position. Audited accounts of the company are contained on our web site.

- 4.5 We are not aware of any taxation implications for you if you enter into a litigation funding agreement with us. You should obtain your own independent taxation advice in this regard.

## **5. Dispute Resolution**

- 5.1 If you are unhappy with any part of our service, please see Clause 5 of the Corporate Governance Manual which can be found on our web site. That clause explains our internal complaint resolution procedure.
- 5.2 If you have a complaint, you should raise it first with the case manager who has been responsible for your litigation funding agreement. Any complaints will then be dealt with in accordance with the procedure set out in Clause 5.
- 5.3 If we cannot resolve your complaint ourselves, you can use the external dispute resolution procedure provided by the Banking and Financial Services Ombudsman - see paragraph 2.17 above.
- 5.4 Your complaints will be dealt with by the Ombudsman at no cost to you.
- 5.5 This Product Disclosure Statement has been provided by us because we may offer to enter into a litigation funding agreement with you. Our contact details are:

IMF (Australia) Ltd  
Level 5, 32 Martin Place  
SYDNEY NSW 2000

Attention: John Walker

Tel: +61 2 8223 3567  
Fax: +61 2 8223 3555  
Email: [jwalker@imf.com.au](mailto:jwalker@imf.com.au)

Dated the 12th day of December 2005

## **CORPORATIONS ACT OBLIGATIONS OF LITIGATION FUNDERS**

1. Section 911A – a person who carries on a financial services business must hold an Australian Financial Services License covering the provision of those financial services.
2. Section 761D – a litigation funding agreement is a derivative under this section and is therefore a financial product pursuant to sections 764A (1) (c). The issue of such financial products is the provision of a financial service and this service cannot be provided without a license under section 911A.
3. Section 913B (1) provides that ASIC must not grant a license unless it has no reason to believe that the applicant will not comply with its obligations under the Corporations Act and that the responsible officers of the corporation applying for the license are of good faith and character.
4. Section 912A – once a corporation becomes the holder of an Australian Financial Services license it must:
  - i. do all things necessary to ensure that the financial services covered by the license are provided efficiently, honestly and fairly;
  - ii. have in place adequate arrangements for the management of conflicts of interest;
  - iii. comply with the conditions of the license;
  - iv. comply with the financial services laws (by section 761A these laws include the provisions of the Corporations Act, the ASIC Act and all Commonwealth and State Legislation which covers the conduct involved in the provision of the financial services);
  - v. take all reasonable steps to ensure that its representatives comply with the financial services laws;
  - vi. have available adequate resources;
  - vii. maintain the competence of those who provide the financial services;
  - viii. ensure that all representatives are adequately trained and are competent;
  - ix. have a dispute resolution system;
  - x. have adequate risk management systems; and
  - xi. comply with all regulations.

5. Section 912B – the holder of a licence must have arrangements for compensating clients who suffer loss or damage because of any breach of the relevant obligations of the licensee.
6. Section 917A – the licensee is responsible for the conduct of its representatives that relate to the provision of the financial service on which the client relies.
7. Section 925A – a client may rescind any agreement made with an unlicensed provider of a financial service.
8. Section 925F – a person who provides a financial service without being licensed cannot recover any commission or other payment for that service.
9. Section 941A – a financial services licensee must provide retail clients a financial services guide which must include the following:
  - i. a statement setting out the name and contact details of the licensee;
  - ii. a statement setting out how the client may provide instructions;
  - iii. information about the financial services;
  - iv. information regarding who the licensee acts for when providing the services;
  - v. information about the remuneration of the licensee, directors, associates and other parties connected with the licensee;
  - vi. information about any relationships which may influence the licensee; and
  - vii. information about the dispute resolution system adopted by the licensee.
10. Section 1012B – imposes an obligation on the issuer of financial products to give a product disclosure statement for that product which covers the following matters:
  - a. a statement setting out the name and contact details of the issuer;
  - b. information about any significant benefits which the holder of the product will become entitled;
  - c. information about any significant risks associated with the product;
  - d. information about the cost of the product;
  - e. information about any commission or other similar payments;
  - f. information about any significant characteristics or features of the product or the rights, terms, conditions and obligations attaching to the product;
  - g. information about the dispute resolution system put in place by the licensee;
  - h. general information about any significant taxation implications;
  - i. information about the cooling off regime put in place by the licensee;

- j. a statement as to how information in relation to the product may be accessed;  
and
  - k. any other statement or information required by the regulations made under the corporations act.
11. Section 1013J – a product disclosure statement must be lodged with ASIC as must any change to the original product disclosure statement.
  12. Section 1017A – a licensee must provide further information requested by the client.
  13. Section 1018A – all advertising and promotional material for the financial product must refer to the product disclosure statement.
  14. Section 1019A – a 21 day cooling off period to be made available by the licensee to the client in relation to the financial product. This enables the client to cancel the litigation funding agreement within that period.
  15. Section 1021H – a licensee commits an offence if a product disclosure statement is delivered which does not comply with the provisions of the Corporations Act. It is also an offence if the licensee does not provide any additional information requested by the client – Section 1021N.
  16. Section 1022B – any person who suffers loss in circumstances where a product disclosure statement has not been delivered may recover damages against the licensee.