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New South Wales Law Reform Commission

Submission by IMF (Australia) Ltd

Security for Costs and Associated Costs Orders

June 2011

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Table of Contents

1. Executive Summary

IMF (Australia) Ltd ("**IMF**") is Australia's largest litigation funder which, together with its other attributes noted in section 2.1 below, enables it to comment on the Litigation Funding for Profit, Conditional Costs Agreements and Representative Proceedings sections of the Security for Costs and Associated Costs Orders Consultation Paper of the NSW Law Reform Commission (the "**LRC**").

Issues relevant to defining "litigation funder" are whether insurers are funders[1] and whether there needs to be reference to "control" or at least "influence" in order to exclude bank overdraft funding for example and require direct involvement in the costs incurred by the other party.[2]

Fundamental to assessing appropriate change to the status quo in respect of costs and security is an assurance that access to justice through equality of arms will not be diminished by recommendations of the LRC.[3]

Whilst the court ought to have the power to grant cost orders directly against Litigation Funders[4], which accordingly requires compulsory disclosure of funding agreements and insurance contracts,[5] security for costs ought only be required if the Litigation Funder does not provide a Direct Undertaking[6] to the opposing party and there is reason to believe that the Litigation Funder will be unable to pay the costs of the opposing party if ordered to do so.

Integral to the Courts decision as to whether to grant security ought to be whether the Litigation Funder is subject to capital adequacy regulations. [7]

Further, security orders in respect of funded representative proceedings ought not be granted where:

(a) there is insufficient reason to believe that the Litigation Funder will be unable to pay the costs of the defendant if ordered to do so[8]; and

(b) the Litigation Funder:

(i) is subject to capital adequacy regulatory requirements; and
(ii) has provided a Direct Undertaking to the opposing party.[9]

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[1] Refer to Section 2.2.
[2] Refer to Sections 2.5 and 3.1.
[3] Refer to Sections 2.3 and 2.4.
[4] As defined in Section 2.5.
[5] Refer to Section 3.2.
[6] Refer to Section 3.1 and Attachment "A".
[7] Refer to Section 3.4.
[8] Refer to Rule 42.21 (1) of the UCPR 2005 (NSW).
[9] Refer to Section 3.6.

2. Background

2.1. Introducing IMF (Australia) Ltd

IMF:

(a) is an ASX listed public company which provides funding for commercial, insolvency and multi-party claims where the claim size is over $2 million under an Australian Financial Services Licence ("AFSL") granted by Australian Securities and Investments Commission ("ASIC");

(b) is the largest litigation funder in Australia and the first to be listed on the Australian Securities Exchange;

(c) has a market capitalisation of around $200 million and a website address at www.imf.com.au;

(d) has facilitated access to the civil justice system in State and Territory courts and in the Federal courts for about 30,000 claimants since listing in 2001; and

(e) has done so by addressing one of the principal barriers to access to justice in Australia – namely the high costs and financial risks faced by persons who wish to pursue their legal rights.[10]

In the cases it funds, IMF meets the claimants' legal costs and disbursements, provides any required security for costs and covers any adverse cost order risk. In return, IMF is reimbursed its outlays and receives a percentage of any damages or settlement if the claim is successfully resolved.

IMF expends about $2 million per month, primarily on the funding of large commercial, insolvency and group claims (including class actions). Many of these claims are pursued in the Supreme Court of New South Wales.

IMF's objectives are closely aligned with those of the claimants it funds and the civil justice system itself; namely to achieve the just, quick, inexpensive and efficient resolution of claims.

These submissions are limited to the consultation issues on which IMF feels qualified to comment.[11]

[10] These litigation risks are more fully addressed in section 2.5 below.
[11] Namely Questions 3.1 to 3.6, inclusive.

2.2. Insurers are Third Party Litigation Funders

The focus of these submissions is upon:

(a) claimant funding by litigation funders; and

(b) defendant funding by insurers pursuant to policies of indemnity (for example motor vehicle, product liability, professional indemnity and directors and officers insurance).

Insurers and litigation funders are referred to collectively in this submission as "Litigation Funders"[12] (and, IMF submits, should be so considered by the LRC) as:

(i) both enter into tripartite contractual relations with the funded client / insured and their lawyers;

(ii) both assume day to day responsibility for the provision of instructions to the lawyers with the carriage of the matter;

(iii) both pay for the conduct of the litigation; and

(iv) both pay any adverse cost orders, although the insurance industry currently considers their liability capped at a limit agreed to with the insured without regard to the costs they cause to the claimant or to the NSW Civil Justice System (the "**System**").

It is within this frame of reference that security for costs issues are addressed in these submissions.

[12] The term "Litigation Funders" is specifically defined in these submissions by reference to the provisions of the *Courts and Crimes Legislation Further Amendment Act 2010* (NSW) – see section 2.5.

2.3. Access to Justice

The second contextual matter IMF wishes to address are the policy considerations concerning funded litigation (and related security for costs orders), through a focus on access to justice (as has occurred explicitly in the United Kingdom[13]).

This is appropriate given that demand for funding results from cost, delay, inequality of arms and risk issues inherent in the adversarial process.

Effective access to the enforcement of rights and delivery of remedies depends on an accessible and effective civil justice system[14]. Indeed, access to justice is now regarded as a fundamental human right which ought to be readily available to all.[15]

Chief Justice Martin recently and energetically noted the need for reform to improve access to justice when speaking of the Civil Justice System of Western Australia. His Honour said:

> "*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."*[16]

Costs, delays and inequality of arms in the System are at the centre of relevant policy considerations concerning security for costs orders. 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 is for most people inaccessible and thereby incapable of fulfilling its Overriding Purpose.[17]

Any additional requirements concerning security for costs that potentially add to a plaintiff's costs or increase a plaintiff's sense that they suffer from an inequality of arms will diminish access to justice. The general rule, "*that poverty is no bar to a litigant*"[18] ought not be diluted by a plaintiff's pursuit of equality of arms through accessing litigation funding.

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[13] Legislation was enacted called the Access to Justice Act 1999 (UK).
[14] Interim Report to the Lord Chancellor on Civil Justice in England and Wales, Lord Woolf, June 1995 (Chapter 1, paragraph 2).
[15] Per Millett LJ in Thai Trading v Taylor [1998] QB 781 at [786].
[16] Welcome to Honourable Chief Justice Martin, transcript of proceedings, The Supreme Court of Western Australia, 1 May 2006.
[17] See for example the Civil Procedure Act 2005 (NSW), section 56, which identifies the Overriding Purpose of the Court as being to achieve the just, quick and cheap resolution of the real issues between the parties.
[18] Cowell v Taylor (1885) 31 Ch D 34-38.

2.4. Assessing, Assuming and Managing the Risks of Litigation

The risks of embarking on litigation are enormous and the System does little to assist consumers in the System to properly assess, manage and minimise those risks. In essence, uncertainty around the risks involved is a principal barrier to accessing the System.

The risks are mostly financial, but are also reflective of what economists would call "information asymmetry", where parties are not able to access the same information as a result of a power imbalance, typically between plaintiff and defendant, but also between client and lawyer.

The litigation risks for a claimant include:

(a) not being able to obtain an accurate budget from the solicitor;

(b) not being able to negotiate with the solicitor to provide their service for a fixed fee and thereby being subject to a pricing policy where the lawyer charges by the hour;

(c) not being able to predict how long the process will take with any degree of certainty;

(d) embarking on litigation before the true nature of the dispute has been identified, and therefore not being able to define the project or assess its outcome with any degree of certainty;

(e) not being able to predict how much the other side will spend on legal costs, and hence the potential exposure to costs if the case is unsuccessful, let alone being able to assess any obligation to provide security for this unknown potential exposure; and

(f) confronting a well resourced defendant, often defending the action with the aid of an insurer;

(g) running out of the capacity to pay for the litigation at a point before it concludes; and

(h) not knowing whether the defendant has the economic capacity to pay any judgment sum or is insured or whether the policy will respond to the claim in question or the level of cover if it does (the "**Litigation Risks**").

The Litigation Risks add significantly to the uncertainty which many claimants consider to be the major barrier to enforcing their rights. As a result, the rights themselves are debased, together with the System itself.

For many users of the System, the decision to litigate will be one of the biggest decisions of their life. The decision is made more difficult because the subject of the legal dispute, the defendant, typically acts in a way so as to drain the claimant's financial resources.

The Litigation Risks will never be completely eliminated but there must be an expectation created in the mind of Australians about to embark on litigation that the System can design and deliver a process that will fulfil their legitimate expectations, make the Overriding Purpose practically achievable in relation to their dispute and be accessible. Otherwise the rule of law and the System, as its custodian, will become less relevant to our society.

Any proposal concerning imposing additional security for costs' requirements on claimants that adds to the Litigation Risks ought to be rejected.

2.5. Recent Relevant Law Reform

The Victorian Law Reform Commission in its 2008 Civil Justice Review Report 14 (the "**VLRC Report**") outlined the VLRC's key recommendations as including:

> "*the overriding obligations should be owed by the parties, lawyers and their legal practices and "any person providing any financial or other assistance to any party to a civil proceeding, including an insurer or a provider of funding or financial support, insofar as such person exercises any direct or indirect control or influence over the conduct of any party in a civil proceeding*".[19]

This recommendation reflects the fact that litigation funders, including insurers, have a greater capacity than most to systematically assist or retard the Court in achieving its overriding purpose.

In December 2010, the New South Wales Parliament passed the *Courts and Crimes Legislation Further Amendment Act 2010* (NSW), which amends the *Civil Procedure Act 2005* (NSW) (the "**CPA**"). The new provisions impose obligations on a person who provides financial assistance to any party to the proceedings and who exercises control over the conduct of the proceedings.

Under the new law, "any person with a relevant interest in the proceedings commenced by the party to litigation" will have an obligation not to cause a party to breach its duty to:

- assist the court to further the overriding purpose and, to that effect, to participate in the processes of the court and to comply with directions and orders of the court; and
- take reasonable steps to resolve or narrow the issues in dispute.[20]

A person has a relevant interest in civil proceedings if the person:

(a) provides financial assistance or other assistance to any party to the proceedings; and

(b) exercises any direct or indirect control, or any influence, over the conduct of a party in respect of the proceedings."[21] ("**Litigation Funders**")

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[19] Recommendation 16.3 (2)

[20] Courts and Crimes Legislation Further Amendment Act 2010 (NSW) sch 6 [3]-[6].

[21] Courts and Crimes Legislation Further Amendment Act 2010 (NSW) sch 6 [7]. The Act states: "Examples of person who may have a relevant interest are insurers and persons who fund litigation."

3.1 Is Litigation Funding a Relevant Factor to the Making of Cost Orders?

Question 3.1

(1) Should the *Uniform Civil Procedure Rules 2005* (NSW) (the "**UCPR**") be amended to include, as part of a list of discretionary factors relevant to the court's exercise of the power to order security, the consideration that the plaintiff is receiving funding from a litigation funder? (the "**First Question**")

(2) If so, how should "litigation funder" be defined? (the "**Second Question**")

The simple answer to the First Question is that it is the wrong question. The reference to the plaintiff ought to be a reference to the plaintiff and/or defendant receiving litigation funding from a Litigation Funder.[22]

The relationship between each question (the relevance of funding and the definition of funder) is predominately to do with the need for equality of arms in an adversarial process in order for justice to be achieved. In other words, if the plaintiff's funding is relevant to a security for costs application, then so should be the defendant's funding. If both parties' exposure to adverse cost orders is "covered", why ought only the plaintiff's cover be relevant? Any legislative amendment to the status quo adversely affecting plaintiffs' capacity to claim against defendants, who are "covered" for adverse cost orders because they cover themselves before any potential wrong doing (i.e. by taking out insurance before the event), ought not be contemplated. This would not be in the interests of justice, principally because it would detrimentally affect the imbalance in the equality of arms equation which already exists in favour of defendants. Let's not go there.

If the LRC accepts this proposition, then the substantive question becomes: whether plaintiff funding ought to be relevant to a security for costs application when the defendant is not funded?

IMF's submission, against interest, is yes. The real question is "what relevance"? As discussed below, in certain circumstances the existence of a funder may be a powerful reason why a security for costs order ought not to be made (in other words there should not be an assumption that "relevance" means relevant in favour of making an order and any legislative amendment should ensure there is no such bias).

[22] A person who has a relevant interest in civil proceedings pursuant to schedule 6 [7] of the Courts and Crimes Legislation Further Amendment Act 2010 (NSW).

The decision of the Court of Appeal in *Green (as liquidator of Arimco Mining Pty Ltd) v CGU Insurance*[23] (the "Green Case") records Hodgson J as stating that "*courts should be particularly concerned that persons whose involvement in litigation is purely for commercial profit should not avoid responsibility for costs if the litigation fails.*"[24] Campbell J concurred and said: "*the very fact of private profit from the litigation, and lack of satisfaction that there are available assets from which an unfavourable costs order against the liquidator would be met, are enough to show that some order of security costs should be made*."[25]

In the Green Case, the liquidator argued that as the funder had agreed to indemnify the plaintiff against adverse cost orders, security for costs was not appropriate. However, Hodgson J, in rejecting this argument, said that in practice it would be difficult for the defendant to enforce the funder's cost indemnity because the funder is not an insurer who could be sued pursuant to s6 of the Law Reform (Miscellaneous Provisions) Act 1946 (NSW). [26]

It is for this reason that IMF routinely provides defendants with a Deed Poll in the form of **Attachment "A"** to these submissions in which IMF submits to the jurisdiction of the court and undertakes to pay the amount of any adverse cost order directly to the defendant (a "**Direct Undertaking**").

Accordingly, whilst funding ought to be a relevant factor to the exercise of court's discretion, security for costs ought not be granted if the party can prove that the Litigation Funder has provided a Direct Undertaking and there is insufficient "*reason to believe that the* Litigation Funder *will be unable to pay the costs of the [*opposing party] *if ordered to do so*."[27]

The Direct Undertaking removes any concerns over enforcement of a costs order against a Litigation Funder. If there is insufficient reason to believe a funder, who is indemnifying the plaintiff for adverse costs, will be unable to pay the costs if ordered, then there is no justification to make an order for security for costs. In this case the presence of the funder is relevant to the discretion in the sense that it militates against an order being made.

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[23] [2008] NSWCA 148
[24] [61]
[25] [88]
[26] [52]
[27] One of the five grounds for which a court may order security for costs is where "there is a reason to believe that a plaintiff, being a corporation, will be unable to pay the costs of the defendant if ordered to do so" – Rule 42.21(1) of the Uniform Civil Procedure Rules 2005 (NSW).

The Second Question (definition of “litigation funder”) ought to be answered by referring to the definition of a person with a relevant interest in the proceedings in Schedule 6 [7] of the *Courts and Crimes Legislation Further Amendment Act 2010* (NSW) and define Litigation Funder as: “*a person who provides financial assistance to any party and exercises any direct or indirect control, or any influence, over the conduct of a party in respect of the proceedings*.”

3.2 Should Litigation Funding Agreements be Disclosed?

Question 3.2

(1) Should legislation be adopted to provide that, at the initial stage of a case management process, each party should disclose any agreement by which a litigation funder is to pay or contribute to the costs of the proceeding, any security for costs or any adverse costs order?

(2) If so, should the client legal privilege be expressly abrogated in relation to the disclosure requirement?

The VLRC Report recommended:

(a) that the parties should be required to disclose the identity of an insurer or litigation funder that exercises control or influence over the conduct of the insured or assisted party in the course of the proceeding; and
(b) the court should have discretion to order disclosure of a party's insurance policy or funding arrangement if it thinks such disclosure is appropriate.[28]

Further, in a recent Federal Court of Australia Practice Note,[29] the Federal Court requires, amongst other things, that:

"*At or prior to the initial case management conference each party will be expected to disclose any agreement by which a litigation funder is to pay or contribute to the costs of the proceeding, any security for costs or any adverse costs order. Any funding agreement disclosed may be redacted to conceal information which might reasonably be expected to confer a tactical advantage on the other party*."[30]

It may be readily noted that the Practice Note refers to "each party" having the disclosure requirement, potentially ensuring insurers' policies and funders' agreements respectively are disclosed.

IMF considers disclosure by funders and insurers of their funding arrangements ought to be routine in the civil justice system rather than discretionary. This would facilitate the collection and analysis of data concerning funders' and insurers' involvement in, and impact on, the civil justice system. Given the utilisation by funders and insurers of a subsidised court system, Australian legislatures and courts should consider collecting relevant data to ensure the funder/insurer interface with the civil justice system is properly understood and appropriately regulated and managed. This data could include:

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[28] Recommendation 86.
[29] Practice Note CM17 – Representative Proceedings Commenced under Part IVA of the Federal Court of Australia Act 1976, 3 July 2010.
[30] [3.6]

(a) the number, type and value of claims funded by each funder and the number, type and value of defended claims funded by each insurer;

(b) the cost of the litigation to the funders, insurers, the parties and the courts;

(c) the levels at which the parties were prepared to settle the claims relative to the initial claim values;

(d) the value of settlements or judgments and the time each proceeding took to resolve;

(e) the value of any security for costs filed with the court and by and to whom it is paid; and

(f) the value of any adverse costs orders made by the court and by and to whom they are paid.

This data may provide some surprising statistics. For example, it is acknowledged by the insurance industry that about 75 cents in every dollar paid out by insurers on directors and officers policies goes in defending the claims, with only 25 cents going to the claimants.

This type of statistical data was powerfully used in the recent tort reform debate and must be relevant in any security order reform.

Mandatory disclosure of all funding arrangements by Litigation Funders (as defined in these submissions), [without being restricted by any claim for client legal privilege over the document] ought to be required in the public interest for the reasons noted in **Attachment B**.

3.3 Should Courts have Power to Make Cost Orders against Funders?

Question 3.3

(1) Should legislation be adopted to give courts the power to order costs against litigation funders?

(2) If so, should the legislation provide the circumstances under which the power may be exercised, or should the case law be allowed to identify such circumstances?

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. Costs orders directly against the funders and insurers of unsuccessful parties in respect of the period during which funding was provided would add to their (funders', insurers') accountability.[31]

Funders and insurers ought to build into their pricing the risk of having to pay an adverse cost order if the litigation they fund is unsuccessful. Requiring security has, however, totally different policy considerations.

[31] cf. *Arkin v Borchard Lines Ltd & Ors* [2005] EWCA Civ 655 where the English Court of Appeal ordered the funder (as a non-party) to pay £1.3m as a contribution towards the costs of the successful defendants. The Court capped the funder's liability for adverse costs at the amount it had paid in the case for its client's own legal costs and disbursements. The Court observed at [42] that making funders liable for adverse costs means that: "Professional funders will also have to consider with even greater care whether the prospects of the litigation are sufficiently good to justify the support that they are asked to give. This also will be in the public interest."

3.4 Should Courts Have Power to Require Security From Litigation Funders?

Question 3.4

(1) Should legislation be adopted giving courts the power to make security for costs [orders] against litigation funders?

The funder's promise to meet all adverse cost orders which may be made in favour of the defendant may turn out to be illusory if the funder lacks adequate capital or insurance leaving the litigant, unexpectedly, with a very substantial liability to meet, or the hapless defendant with a significant loss.

The Court of Appeal in New South Wales recently decided that litigation funding in the matter before it was a financial product requiring the funder to be licensed.[32]

If all litigation funders in Australia were licensed, without being granted exemptions by ASIC, their Australian Financial Services Licence ("AFSL") would subject them to prudential regulation and certification by audit opinion.

IMF's AFSL is at **Attachment "C"**.

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

Compliance with these prudential requirements must be certified by audit opinion in accordance with condition 11 of IMF's AFSL.

Legislation should be adopted to ensure courts have the power to make security for costs orders against Litigation Funders that are not subject to prudential requirements where there is reason to believe that the Litigation Funder will be unable to pay the costs of the other party if ordered to do so.

If, on the other hand, Litigation Funders are required to provide security where they are able to rebut an application based on their manifest capacity to pay, then access to justice through equality of arms will be diminished. There could be no justification for imposing such an order.

The balancing of the two competing policy considerations would become unbalanced in favour of defendants at the unjustifiable expense of diminishing access to justice.

Insurers are not, by regulation, required to hold liquid assets to the extent of all risks assumed by them pursuant to the policies they write. Capital adequacy levels are identified in their regulatory regime as a percentage of the risk they underwrite based on their claim histories. Similarly, IMF is required to hold a level of liquid assets commensurate with its funding levels.

The history of cost orders adverse to IMF's funded clients may be understood by reference to concluded claims IMF has funded in the ten years to 31 December 2010 during which period:

[32] *International Litigation Partners Pte Ltd v Chameleon Mining NL* [2011] NSWCA 50.

(a) IMF has funded claims which returned to claimants in excess of $832 million and cost IMF $91.2 million to prosecute and resolve; and

(b) IMF has only become liable to pay (and has paid) $2.8 million in adverse cost orders in that period (which is included in the $91.2 million).

Accordingly, IMF's adverse cost order history is about 3% percent of the funding it provides.

To require Litigation Funders to provide security for costs without regard to their capacity to pay and adverse cost order history would greatly diminish access to justice in a manner disproportionate to any related benefit to defendants. Accordingly, any capacity of the Court to impose security for cost orders on Litigation Funders should be discretionary having regard to factors that include capacity to pay.

3.5 Should Conditional Cost Agreements be Relevant to Security Applications?

Question 3.5

(1) Should the court, in determining applications for security for costs, be able to take into account the fact that the plaintiff's lawyer is acting pursuant to a conditional costs agreement?

Lawyers entering into conditional cost agreements (CCAs) are providing financial assistance and accordingly are likely to come within the definition of Litigation Funder proposed in paragraphs 2.5 and 3.1 above.

IMF does not consider there is any policy consideration that requires lawyers to be distinguished from funders or insurers in respect of costs or security for costs matters.

3.6 Should Courts Have Power to Require Security From Representatives?

Question 3.6

(1) Should courts have power to order security for costs against representative plaintiffs?

(2) If so, should such power be expressed in legislation or should it be left for the case law to develop?

The simple answer to these questions is that the Court does have power to order security for costs against representative plaintiffs.

Section 33ZG(c)(v)[33] provides that, except as otherwise provided in Part IVA, nothing in Part IVA affects the operation of any law relating to security for costs.

The Federal Court of Australia in *Bray v F Hoffman – La Roche Ltd*[34] ("**Bray**") did not hold that ordering security against representative plaintiffs was inconsistent with the immunity conferred on represented claimants by s43(1A). In fact Carr J, with whom Branson and Finkelstein JJ concurred, stated:[35]

"*Depending on the circumstances, I don't think that an order providing reasonable security for costs necessarily operates indirectly to remove the effect of the immunity provided by s43(1A). It is one thing for a group member to be saddled with an order for what might be joint and several liability for a very substantial costs order at the end of the hearing of a representative proceeding, but it is another thing to have the choice of contributing what might be a modest amount to a pool by which the applicant might provide security for costs.*"

The power of the Supreme Court of New South Wales to grant security orders against representatives ought to be left for the case law to develop, other than where the representative is funded by a Litigation Funder.

In this circumstance, legislation ought make clear that security ought not be granted in respect of funded representative proceedings where:

(a) there is insufficient reason to believe that the Litigation Funder will be unable to pay the costs of the defendant if ordered to do so; and

(b) the Litigation Funder:

  (i) is subject to capital adequacy regulatory requirements; and

  (ii) has provided a Direct Undertaking to the opposing party.

John Walker
Executive Director

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[33] *Federal Court of Australia Act* 1976 (Cth). There does not seem to be any similar provision in the *Courts and Crimes Legislation Further Amendment Act* 2010 (NSW).
[34] Bray v F Hoffman – La Roche Ltd (2003) 130 FCR 317.
[35] At [141]

ATTACHMENT A

DEED POLL

PARTY	NAME	IMF (AUSTRALIA) LIMITED ("IMF")
	ACN	067 298 088
	ADDRESS	LEVEL 5, 32 MARTIN PLACE, SYDNEY NSW 2000
	TELEPHONE	02 8223 3567
	ATTENTION	JOHN WALKER
	E-MAIL	jwalker@imf.com.au

DEFINITIONS

ADVERSE COST ORDER	Means any costs order made in favour of the Respondent against the Applicant in the Proceedings in respect of costs incurred during the term of the LFA.
APPLICANT	*[Insert]
COURT	The Court where the Proceedings are conducted.
LFA	The litigation funding agreement which commenced on *[Insert] between IMF and the Applicant.
PROCEEDINGS	*[Insert]
RESPONDENT	*[Insert]
GOVERNING LAW	The law of New South Wales.

BY THIS DEED POLL, IMF, for the benefit of the Court and the Respondent:

(a) submits to the jurisdiction of the Court in relation to any order the Court may decide to make directly against IMF in the Proceedings that IMF pay any Adverse Costs Order;

(b) agrees not to oppose any joinder application made by the Respondent in the Proceedings for the purpose of seeking an order that IMF pay any Adverse Cost Order, and agrees, in circumstances where the rules of the Court prevent that joinder, at the Respondent's request, to itself apply to be joined to the Proceedings to enable such an order to be made against it;

(c) agrees to pay to the Respondent the final, quantified amount of any Adverse Cost Order such that the Respondent may enforce payment of that amount as a debt due and owing by IMF to the Respondent;

(d) agrees to notify the Respondent in writing of any termination of the LFA within 7 days of it so terminating; and

(e) acknowledges having received valuable consideration for this Deed Poll.

DATED this day of 2011.

Executed as a Deed Poll
By IMF (Australia) Limited

_____ _____

Director **Director (Secretary)**

ATTACHMENT B

REASONS FOR MANDATORY DISCLOSURE OF LITIGATION FUNDING AGREEMENTS

1. Relevant Similarities of Funders and Insurers

The role of insurers and litigation funders in our civil justice system are relevantly comparable given:

(a) both enter into tripartite contractual relations with the funded client/insured and their lawyers;
(b) both assume day to day responsibility for the provision of instructions to the lawyers with the carriage of the matter;
(c) both pay for the conduct of the litigation; and
(d) both pay any adverse cost orders.

2. The Federal Civil Justice System and the Overarching Purpose

In 2006, His Honour Mr. Gleeson stated:[1]

> *"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 naive. 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."*

Parties in the Federal Court must now conduct the proceeding and related negotiations in a way that is consistent with facilitating the overarching purpose of the Civil Practise and Procedure Provisions[2] and Judges have had their capacity to control the proceeding made more certain.[3]

The Victorian Law Reform Commission in 2008 in its Civil Justice Review Report 14, when referring to overriding obligations, made the following key recommendation:

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[1] Opening Speech at the National Access to Justice and Pro Bono Conference (11 August 2006).
[2] Section 37N of the Federal Court of Australia Act 1976, with the overarching purpose being stated in section 37M as facilitating the just resolution of disputes according to law and as quickly, inexpensively and efficiently as possible.
[3] Section 37P of the Federal Court of Australia Act 1976

> "The overriding obligations should be owed by the parties, lawyers and their legal practices and any person providing any financial or other assistance to any party to a civil proceeding, including an insurer or a provider of funding or financial support, insofar as such person exercises any direct or indirect control or influence over the conduct of any party in civil proceeding."

The recommendation reflects the fact that litigation funders, including insurers, have a systemic capacity to assist or retard the court in achieving the overarching purpose.

Recommendation 1.
The duty to act consistently with the overriding purpose in section 37N (1) of the Federal Court Act ought to be extended to any person providing any financial assistance to any party in a civil proceeding.

Enabling the Court to be made aware of the involvement of funders, including insurers, would enable other information to be collected and analysed referable to whether or not they are facilitating quick, inexpensive and efficient resolution of claims.[4]

3. A Disclosure Obligation Has 40 Years of Precedent

Recommendation 2.
The arrangements between any party to a civil proceeding and a third party involving financial assistance in respect of the proceeding must be disclosed to the Court and the parties at the first return date.

This reform also has the benefit of precedent for 40 years in the United States Federal Rules of Civil Procedure which mandate disclosure by defendants of any relevant insurance policy.

Prior to 1970, courts in the United States were divided as to whether policies ought to be discoverable when the plaintiff's sole interest was to ascertain whether a judgment would be collectible. Many Courts allowed discovery[5] often on the basis that it would encourage settlement[6] and many refused

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[4] Refer to page 5 – "Policy Issues in Litigation Funding," a paper presented at the Supreme and Federal Court Judges Conference in January 2009.

[5] Novak v Good Will Grange No. 127, Patrons of Husbandry, Inc., D.C. Conn. 1961, 28 F.R.D. 394. Johanek v Aberle, D.C. Mont.1961, 27 F.R.D. 272, noted 1961, 22 Ohio St. L.J. 760, 1962, 22 Md.L.Rev. 79, 48 Va.L.Rev. 122. This opinion by Judge William J. Jameson, a former president of the American Bar Association, was quite fully reasoned and was heavily relied on by other federal courts reaching the same result. Szarmack v Welch, 1974, 318 A.2d 707, 456 Pa. 293. Walls v Horbach, 1973, 203 N.W.2d 490, 491, 189 Neb. 479, citing Wright & Miller. This case overrules a 1964 decision to the contrary.

[6] "In many cases where the insured is not otherwise financially responsible early pre-trial disclosure of insurance limits could help eliminate congested trial court dockets by encouragement of out of court settlements." Conerly v. Flower, C.A.8th, 1969, 410 F.2d 941, 943 n.3. Awareness of the defendant's policy limits "can, and in many instances does, facilitate the settlement and disposition of litigation. Verified knowledge of low limits from a reliable source will encourage plaintiffs to seriously consider settlement in cases, which otherwise would probably require a trial. Where a judgment-proof defendant has limited or no coverage, the value of a prospective judgment takes on a new dimension in the form of a realistic evaluation leading to an equitable settlement." Deveau v Millis Transp. Co., D.C. conn. 1967, 43 F.R.D. 505, 507-508.

to allow it[7]. The commentators were similarly dividend[8].

In 1970, the rule makers chose to permit discovery of the existence and contents of insurance agreements[9]. The policy considerations for the new rule were enunciated as follows:
:

> *"Disclosure of insurance coverage will enable counsel for both sides to make the same realistic appraisal of the case, so that settlement and litigation strategy are based on knowledge and not speculation. It will conduce to settlement and avoid protracted litigation in some cases, though in others it may have an opposite effect."*[10]

In 1993, the 1970 discovery provision was replaced by Rule 26(a)(1)(d) which requires mandatory disclosure of relevant insurance policies at the commencement of proceedings.

The Victorian Law Reform Commission Civil Justice Review Report recommended that the court should have discretion to order disclosure of a party's insurance policy or funding agreement if it thinks such disclosure is appropriate.[11]

It is submitted that disclosure ought to be mandatory rather than discretionary, consistent with the United States Federal Rules of Civil Procedure.

This would facilitate the collection and analysis of data concerning funders and insurers' claims management involvement in our civil justice system. Given the utilisation by funders and insurers of our subsidised system, our legislatures and courts should consider collecting relevant data to ensure the funder/insurer interface with our civil justice system is properly understood and appropriately regulated. This data could include:

(a) the number, type and value of claims funded by each funder and the number, type and value of defended claims funded by each insurer;
(b) the cost of the litigation to the funders, insurers and the courts;

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[7] Childers v Nicolopoulos, D.C.Okl.. 1969, 296 F.Supp.547. Beal v Zambelli Fireworks Mfg. Co., D.C.Pa.1969, 46 F.R.D. 449, 451. Wood v. Todd Shipyards, D.C.Tex. 1968, 45 F.R.D. 363. After a powerful statement of the arguments in favour of discovery, Judge Mansfield "with reluctance and with the desire that the Rules be amended to permit such discovery," held that it was not now permissible. Clauss v. Danker, D.C.N.Y. 1967, 264 F.Supp. 246, 249.

[8] **Discovery should be allowed** Wright, Minnesota Rules, 1954, pp.162-165. Jenkins, Discovery of Automobiles Insurance Limits: Quillets of the Law, 1965, 14 Kan.L.rev.59. Williams, Discovery of Dollar Limits in Liability Policies in Automobile Tort Cases, 1958, 10 Ala.L.Rev.355. Thode, Some Reflections on the 1957 Amendments to the Texas Rules of Civil Procedure Pertaining to Witnesses at Trial, Depositions, and Discovery, 1958, 37 Tex.L.Rev. 33, 40-42. **Discovery should not be allowed.** Frank, Discovery and Insurance Coverage, 1959 Ins.L.J.281. Fournier, Pre-Trial Discovery of Insurance Coverage and Limits, 1959, 28 Ford.L.Rev. 215. LaVorci, Disclosure of Insurance Policy Limits, 1957, 6 DePaul L.Rev.225.

[9] As adopted in 1970, Rule 26(b)(2) provided as follows: "A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For the purposes of this paragraph, an application for insurance shall not be treated as an insurance agreement."

[10] 48 F.R.D. at 499.

[11] Recommendation 86

(c) the levels at which the parties were prepared to settle the case relative to the initial claim values; and

(d) the value of settlements or judgments and the time each proceeding took to resolve.

This data may provide some surprising statistics. For example, it is acknowledged by the insurance industry that about 75 cents in every dollar paid out by insurers on directors and officers policies goes in defending the claims, with only 25 cents going to the claimants. This type of statistical data was powerfully used in the recent tort reform debate and must be relevant in any litigation funding debate.

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 court as well as the other stakeholders in our civil justice system. Cost orders directly against unsuccessful funders and insurers, including the Court's costs, would add to this accountability.[12]

[12] In Arkin v Borchard Lines Ltd & Ors [2005] EWCA Civ 655 the Court of Appeal ordered the funder (as a non-party) to pay £1.3m as a contribution towards the costs of the successful defendants. The Court capped the funder's liability for adverse costs at the amount it had paid in the case for its client's own legal costs and disbursements. The Court observed at [42] that making funders liable for adverse costs means that: "Professional funders will also have to consider with even greater care whether the prospects of the litigation are sufficiently good to justify the support that they are asked to give. This also will be in the public interest."

Australian Financial Services Licence

IMF (AUSTRALIA) LTD.

ABN: 45 067 298 088 Licence No: 286906

was licensed as an Australian Financial Services Licensee pursuant to section 913B of the Corporations Act 2001. The conditions of the licence are hereby varied from the date hereunder. The licensee shall continue to be licensed as an Australian Financial Services Licensee subject to the conditions and restrictions which are prescribed, and to the conditions contained in this licence and attached schedules.

Effective 1 April 2011

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;
         (B) interests in managed investment schemes excluding investor directed portfolio services; and
         (C) financial products limited to:
            (1) miscellaneous financial risk products limited to litigation funding arrangements;

   to retail and wholesale clients.

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Effective 1 April 2011

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) either:
      (i) have total assets that exceed total liabilities as shown in the licensee's most recent balance sheet lodged with ASIC and have no reason to suspect that the licensee's total assets would currently not exceed its total liabilities; or
      (ii) have adjusted assets that exceed adjusted liabilities calculated at the balance date shown in the licensee's most recent balance sheet lodged with ASIC and have no reason to suspect that the licensee's adjusted assets would currently not exceed its adjusted liabilities; and
   (c) meet the cash needs requirement by complying with one of the following five options:
      (i) Option 1 (reasonable estimate projection plus cash buffer)—refer to definition of "Option 1" under this licence; or
      (ii) Option 2 (contingency based projection)—refer to definition of "Option 2" under this licence; or
      (iii) Option 3 (financial commitment by an Australian ADI or comparable foreign institution)—a requirement that an Australian ADI or a foreign deposit-taking institution approved in writing by ASIC as an eligible provider gives the licensee an enforceable and unqualified commitment to pay on demand from time to time an unlimited amount to the licensee, or the amount for which the licensee is liable to its creditors at the time of the demand to the licensee's creditors or a trustee for the licensee's creditors, that the licensee reasonably expects will apply for at least three months, taking into account all commercial contingencies for which the licensee should reasonably plan; or
      (iv) Option 4 (expectation of support from an Australian ADI or comparable foreign institution)—a requirement that the licensee:
         (A) is a subsidiary of an Australian ADI or a corporation approved by ASIC in writing for the purpose of this condition; and
         (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

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Australian Securities & Investments Commission

(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) Option 5 (parent entity prepares cash flow projections on a consolidated basis)—a requirement that the licensee ensures that:

(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; and

(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"); and

(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; and

(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 from time to time 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.

ASIC
Australian Securities & Investments Commission

IMF (AUSTRALIA) LTD.

ABN: 45 067 298 088 Licence No: 286906

Effective 1 April 2011

Schedule of Conditions

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 (c)(iv)(C) or Alternative B in subparagraph (c)(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
   (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 total value of the money and property for all clients 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 Transacting with Clients

6. If the licensee incurs actual or contingent liabilities of the relevant kind by entering into a transaction with a client(s) in the course of providing a financial service to the client(s), the licensee must have adjusted surplus liquid funds ("ASLF") of the sum of:
   (a) $50,000; plus
   (b) 5% of adjusted liabilities between $1 million and $100 million; plus
   (c) 0.5% of adjusted liabilities for any amount of adjusted liabilities exceeding $100 million,

   up to a maximum ASLF of $100 million.

   This condition does not apply to the licensee if:
   (d) the total of:
      (i) the current liabilities that would be included in the calculation of the licensee's adjusted liabilities; and
      (ii) the contingent liabilities that if crystallised would be a current liability and be included in the calculation of the licensee's adjusted liabilities,

      is less than $100,000; or
   (e) the licensee has no:
      (i) liabilities to clients that would be included in calculating its adjusted liabilities; or
      (ii) contingent liabilities to clients which if crystallised would be included in calculating its adjusted liabilities,

      other than under debentures the licensee issued under Chapter 2L of the Act.

ASIC
Australian Securities & Investments Commission

IMF (AUSTRALIA) LTD.

ABN: 45 067 298 088 Licence No: 286906

Effective 1 April 2011

Schedule of Conditions

For the purpose of paragraphs (d) and (e), the licensee may disregard a liability or a contingent liability that:

(f) is a contingent liability that is neither a derivative nor a liability from underwriting securities or managed investment products; or

(g) the licensee reasonably estimates has a probability of less than 5% of becoming an actual liability; or

(h) 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

(i) is adequately secured as defined in paragraph (a) or (b) of the definition of "adequately secured" under this licence; or

(j) 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; or

(k) is under a foreign exchange contract and the licensee is 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; or

(l) is under a derivative where:

  (i) the licensee does not make a market in derivatives; and

  (ii) the licensee entered into the dealing for the purposes of managing a financial risk; and

  (iii) either the licensee's dealings in derivatives are not a significant part of its business or of 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

(m) is under a foreign exchange contract where the licensee:

  (i) does not make a market in foreign exchange contracts; and

  (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; or

(n) occurs in circumstances where a licensee agrees to provide credit to another person under a margin lending facility and the credit remains undrawn or a portion of the credit remains undrawn.

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; or

(b) the trigger points described in paragraphs (i), (ii) and (iii) below occur:

  (i) the licensee has adjusted liabilities of more than $100 million; and

ASIC
Australian Securities & Investments Commission

(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 other 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 conditions 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.

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 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 or a clearing 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(c) 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(c)(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(c)(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(c)(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 to pay on demand from time to time an unlimited amount to the licensee, or the amount for which the licensee is liable to its creditors at the time of demand to the licensee's creditors or a trustee for the licensee's creditors; and

(E) for any period when the licensee relied on subparagraph 4(c)(iv), following an examination of the documents prepared for subparagraph 4(c)(iv)(C), the licensee complied with subparagraph 4(c)(iv)(A) and subparagraph 4(c)(iv)(C) for the period to which the report relates; and

(F) for any period when the licensee relied on subparagraph 4(c)(v), the licensee complied with subparagraph 4(c)(v)(A) and (B); and

(G) for any period when the licensee relied on Alternative A in subparagraph 4(c)(v)(E), the parent entity has provided an enforceable and unqualified commitment to pay on demand from time to time an unlimited amount to the licensee or to meet the licensee's liabilities.

(ii) except for any period stated in the report when the licensee purports to comply with subparagraph 4(c)(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 the licensee relied on subparagraph 4(c)(iv), following an examination of the documents prepared for subparagraph 4(c)(iv)(C), 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 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(c)(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) of the Act 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.

Security Bond Compensation Requirements

12. The licensee must lodge and maintain with ASIC a security approved by ASIC for the amount of $20,000.

External Disputes Resolution Requirements

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

14. 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); and

(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); and

(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

15. 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

16. 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 Financial Services Guide ("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; and

(b) a record of the following matters relating to the provision of personal advice to a retail client (other than personal advice for which a Statement of Advice ("SOA") is not required or for which a record of the advice is kept in accordance with subsection 946B(3A)):

(i) the client's relevant personal circumstances within the meaning of subparagraph 945A(1)(a)(i); and

(ii) the inquiries made in relation to those personal circumstances within the meaning of subparagraph 945A(1)(a)(ii); and

(iii) the consideration and investigation conducted in relation to the subject matter of the advice within the meaning of paragraph 945A(1)(b); and

(iv) the advice, including reasons why advice was considered to be "appropriate" within the meaning of paragraphs 945A(1)(a) to (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.

17. 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 Corporations Act 2001 ("the Act") unless otherwise specified. Headings contained in this licence are for ease of reference only and do not affect interpretation. Terms used in this licence have the same meaning as is given to them in the Act (including, if relevant, the meaning given in Chapter 7 of the Act) and the following terms have the following meanings:

actual or contingent liabilities of the relevant kind means:

(a) an actual or contingent monetary liability; or

(b) an actual or contingent liability under a non-standard margin lending facility, in the circumstances determined under the terms of the facility, to transfer marketable securities to the client.

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 subsection 767A(1) of the Act and disregarding subsection 767A(2) of the Act) operated by a market licensee or 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 market under ASIC Regulatory Guide 72 (formerly referred to as Policy Statement 72) 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 amount owing or not less than 109% of the 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 as they would appear on a balance sheet at the time of calculation made up for lodgement as part of a financial report under Chapter 2M of the Act if the licensee were a reporting entity:

(a) minus the value of excluded assets that would be included in the calculation; and

(b) minus the value of any receivable of the licensee that would be included in the calculation, up to the amount that the licensee has excluded from adjusted liabilities on the basis that there is an enforceable right of set-off with that receivable; and

(c) minus the value of any assets that would be included in the calculation 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 would be included in the calculation that may be required to be applied to satisfy a liability under a credit facility that is made without recourse to the licensee up to the amount of that liability excluded from adjusted liabilities; and

(e) plus

(i) the amount of any eligible undertaking that is not an asset; or

(ii) if the eligible undertaking is for an unlimited amount, an unlimited amount;

provided that if the eligible undertaking is given by a person who is an eligible provider only because of paragraph (b) of the definition of "eligible provider" under this licence, the amount added may be no more than one quarter of the eligible provider's net assets (excluding intangible assets) as shown in the most recent audited financial statements lodged with ASIC; and

(f) for calculating ASLF, plus the value of any current assets of any trust (other than a registered scheme) of which the licensee is trustee as if they would appear on the balance sheet as assets of the licensee except to the extent the value exceeds the sum of:

(i) the current liabilities of the trust as if they would appear on the balance sheet as assets of the licencee; and

(ii) any adjustments to ASLF that are a result of current assets, liabilities and contingent liabilities of the trust for accounting purposes being included in calculating adjustments; and

(g) for calculating ASLF, plus the value of the applicable percentage as set out in paragraphs (c)(i) and (iii) of the definition of "standard adjustments" under this licence of the value of any current assets that would be acquired in return for paying a contingent liability as set out in paragraphs (c)(i) and (iii) of the definition of "standard adjustments" under this licence up to the value of the applicable percentage of the relevant contingent liability.

adjusted liabilities means the amount of total liabilities as they would appear on a balance sheet at the time of calculation made up for lodgement as part of a financial report under Chapter 2M of the Act if the licensee were a reporting entity:

(a) minus the amount of any liability under any subordinated debt approved by ASIC; and

(b) minus the amount of 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 the amount of any liability under a credit facility that is made without recourse to the licensee; and

(d) for calculating ASLF, plus the amount of the total current liabilities of any trust (other than a registered scheme) of which the licensee is trustee as if they would appear on the balance sheet as liabilities of the trustee; and

(e) plus the value of any assets that are encumbered as a security against another person's liability where the licensee is not also liable, but only up to the amount of that other person's liability secured or the value of the assets encumbered after deducting any adjustments under this licence, whichever is lower.

adjusted surplus liquid funds or ASLF means surplus liquid funds minus either:

(a) the standard adjustments (refer to the definition of "standard adjustments" under this licence); or

(b) such other adjustments as ASIC may from time to time consent to in writing.

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

derivative means "derivatives" as defined in section 761D of the Act (including regulation 7.1.04 of the Corporations Regulations) and:

(a) includes "managed investment warrants" as defined in this licence; and

(b) excludes "derivatives" that are "foreign exchange contracts" as defined in this licence.

ASIC
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Effective 1 April 2011

Schedule of Conditions

eligible custodian means:

(a) an Australian ADI; or

(b) a market participant or a clearing participant; or

(c) a subcustodian appointed by a person of the kind referred to in (a) or (b) of this definition.

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 Regulatory Guide 72 (formerly referred to as Policy Statement 72) as at the date of this licence; and

(ii) that had net assets (excluding intangible assets) of more than $50 million, as shown in the most recently audited financial statements of the provider lodged with ASIC; and

(iii) that the licensee has no reason to believe no longer has net assets of at least that amount; or

(c) an Australian government (i.e. the Commonwealth or a State or Territory government) or a government of a country that is a member of the Organisation for Economic Co-operation and Development ("OECD country government"), or an agency or instrumentality of an Australian or OECD country government; or

(d) a foreign deposit-taking institution that is regulated by an ASIC - approved regulator; or

(e) a foreign deposit-taking institution approved in writing by ASIC for this purpose; or

(f) an Australian CS facility licensee; or

(g) an entity approved by ASIC in writing for this purpose.

eligible undertaking means the amount of a financial commitment that is:

(a) payable on written demand by the licensee (disregarding any part previously paid or any amount that would be repayable as a current liability or, for calculating NTA, as a liability by the licensee if money were paid), provided by an eligible provider in the form of an undertaking to pay the amount of the financial commitment to the licensee, and that:

(i) is an enforceable and unqualified obligation; and

(ii) 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; or

(b) approved in writing by ASIC as an eligible undertaking.

excluded assets means:

(a) intangible assets (i.e. non-monetary assets without physical substance); and

(b) except when allowed under paragraphs (e) or (f) of this definition, assets owing or receivables ("receivables") from or assets invested in, any person who:

(i) is an associate of the licensee; or

ASIC
Australian Securities & Investments Commission

(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

(c) except when allowed under paragraph (g) of this definition, assets:

(i) held as a beneficial interest or an interest in a managed investment scheme; or

(ii) invested in any superannuation product, in respect of which the licensee or its associate may exercise any form of power or control; and

(d) except when allowed under paragraphs (e) or (f) of this definition, receivables 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) 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 of "adjusted surplus liquid funds" in this 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) the total value of the receivables under this subparagraph (iii) before any adjustment required by paragraph (a) or (b) of the definition of "adjusted surplus liquid funds" in this licence is applied is not more than 60% of the adjusted liabilities of the licensee disregarding this subparagraph (iii); or

(iv) ASIC consents in writing to the licensee treating the amount owing as not being an excluded asset; and

(f) 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 entity as defined in the Superannuation Industry (Supervision) Act 1993, an IDPS or a registered scheme ("scheme") to the extent that the 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; and

(ii) if receivable by way of fees, represents no more fees than are owing for the last 3 months; and

(iii) if receivable under rights of reimbursement for expenditure by the licensee, has not been receivable for more than 3 months; and

(g) 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.

litigation funding arrangements means an arrangement where a person provides funds under a funding agreement to a person or persons with the predominant purpose of enabling that person or those persons to seek remedies to which they may be legally entitled.

managed investment warrant means a financial product:

(a) that is a financial product of the kind referred to in subparagraph 764A(1)(b)(ii) or 764A(1)(ba)(ii); and

(b) would be a derivative to which section 761D applies apart from the effect of paragraph 761D(3)(c); and

(c) that is transferable.

market participant means:

(a) a participant as defined in the operating rules of ASX 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 Limited ("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 client 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 a legal interest in them will be held by the client; and
(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.

miscellaneous financial risk products means a facility:
(a) through which, or through the acquisition of which, a person manages financial risk as defined in the section 763C of the Act; and
(b) that is not otherwise a financial product under section 764A of the Act.

net tangible assets or NTA means adjusted assets minus adjusted liabilities.

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

Option 1 means the reasonable estimate projection plus cash buffer 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 (if the projection covers a period longer than 3 months, the cash outflow may be 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, adjusted to produce a 3-month average.

IMF (AUSTRALIA) LTD.

ABN: 45 067 298 088 Licence No: 286906

Effective 1 April 2011

Schedule of Conditions

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

(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 and that provides protections similar to the accounts described in paragraphs (a) to (c) of this definition, and is approved by ASIC for the purpose in writing.

ASIC
Australian Securities & Investments Commission

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.

standard adjustments means:

(a) discounts as follows:

  (i) 8% for the values that reflect 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 the values that reflect any assets other than:

    (A) an obligation to pay the licensee a certain sum; or

    (B) a derivative; or

    (C) an interest in property held in trust by another licensee under Division 3 of Part 7.8 of the Act or the rights to money held by another licensee in an account under section 981B of the Act; and

(b) 8% of the values that reflect others' obligations to pay the licensee a certain sum except to the extent that the asset is adequately secured or is a right against another licensee in respect of money or property held by that other licensee in an account under section 981B or held in trust under Division 3 of Part 7.8 of the Act; 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 except:

    (A) during the 5 business days after the commitment is assumed; and

    (B) during any period it is unlawful to accept applications for the financial products to which the underwriting relates (such as under subsection 727(3) or section 1016B) and the period ending 5 business days after the first day on which it becomes lawful to accept applications; and

    (C) 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 any of the following or a combination of the following:

    (A) the "something else" for the purposes of paragraph 761D(1)(c) of the Act; and

    (B) another derivative relating to that something else; and

    (C) a thing that is so similar to the something else as to make the probability of net loss from the liability under the derivative exceeding any increase in the value of the thing less than 5% in the reasonable and documented opinion of the licensee,

except to the extent that the licensee is of the reasonable opinion that the risk 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 is trivial; and

(iii) 20% of the potential liability of any contingent liabilities that can be quantified under a guarantee or indemnity;

(d) the relevant percentage as set out in subparagraphs (c)(ii) and (c)(iii) of the amounts that in the licensee's reasonable opinion is the maximum amount that the licensee may be liable for in relation to a contingent liability referred to in paragraph (c) where the maximum liability cannot be quantified; 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 is to be applied against adjusted assets.

For the purposes of this definition, the risk that a contingent liability will become a liability may be treated as trivial if the probability that this will occur is reasonably estimated by the licensee as less than 5%.

For the purposes of paragraphs (a) and (b) of this definition, discounts apply against the value of current assets:

(f) used in calculating "adjusted assets" in this licence; and

(g) of any trust (other than a registered scheme) of which the licensee is a trustee (see subparagraph (f)(ii) of the definition of "adjusted assets" in this licence); and

(h) that are deducted under paragraph (c) of the definition of "adjusted assets" in this licence as assets to which recourse may be had for a liability of the licensee where the licensee's liability is limited to those assets but the total discounts applied to those assets shall not exceed any excess of the value of the licensee's assets to which recourse may be taken over the amount of the liability; and

(i) that is the applicable percentage of the current assets that would be acquired in return for paying a contingent liability referred to in subparagraph (c)(i) or (iii) of this definition including rights against a sub-underwriter (see paragraph (g) of the definition of "adjusted assets" in this licence).

The licensee does not have to apply the discounts to the value of amounts payable 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.

surplus liquid funds or SLF means adjusted assets minus adjusted liabilities:

(a) plus any non-current liabilities that were used in calculating adjusted liabilities and the value of any assets that are encumbered (where the licensee is not liable and the assets do not secure another person's current liability) that were deducted when calculating the licensee's adjusted liabilities; and

(b) minus any non-current assets that were used in calculating adjusted assets; and

(c) if the licensee is an eligible provider under paragraph (b) of the definition of "eligible provider" under this licence—plus one quarter of the value of the licensee's non-current assets minus any intangible assets and the amount of its non-current liabilities.

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