

## DISCLOSURE STATEMENT

### 1. Introduction

1.1. This Disclosure Statement is provided to you by IMF Bentham Limited which is referred to as “IMF”, “us”, “we” or “our”. “ASIC” refers to the Australian Securities and Investments Commission. The “Regulations” refers to the following provisions of the *Corporations Regulations 2001* (Cth) in their application to a “litigation funding scheme” or a “litigation funding arrangement” as defined in those provisions, and as amended from time to time:

- (a) regulation 5C.11.01;
- (b) regulation 7.6.01(1)(x) and (y); and
- (c) regulation 7.6.01AB.

1.2. This document provides:

- (a) information about IMF;
- (b) information about our litigation funding agreements and risks;
- (c) disclosure of circumstances in which conflict of interests may arise and the methods for dealing with them if they do arise; and
- (d) information about resolution of any complaints and disputes.

### 2. About IMF

2.1. IMF provides financial services for funded litigation schemes and proof of debt schemes.

2.2. In doing so, IMF is exempt from the requirements that would otherwise apply under Chapter 7 (Financial Services and Markets) of the *Corporations Act 2001* (Cth) (“**Corporations Act**”) **provided** IMF complies with the Regulations and maintains adequate practices for managing any conflicts of interest that may arise in relation to any funded litigation.

2.3. IMF has a conflicts management policy which stipulates the principles, practice and procedures to be followed by IMF in relation to identifying and managing any conflicts of interest that may arise in relation to, and as a result of, IMF’s funding of litigation (“**Policy**”). You can also learn more about the Policy by going to <https://portal.imf.com.au/login>. This will enable you to read the Policy in full. If you do not have access to the Internet, you can obtain a copy of the Policy by calling IMF on the telephone number provided in paragraph 2.6 below.

2.4. Conflicts of interest are dealt with in section 4 of this Disclosure Statement.

2.5. IMF’s shares are listed for quotation on the Australian Securities Exchange (“ASX”) under the code “IMF”. Announcements to the ASX made by IMF can be viewed on IMF’s website or on the ASX website.

2.6. Our contact details are:

Risk Officer  
IMF Bentham Limited  
Level 6  
37 St George's Terrace  
Perth WA 6000  
Telephone: +61 8 9225 2300  
Email: [legal@imf.com.au](mailto:legal@imf.com.au)

2.7. IMF has a website at [www.imf.com.au](http://www.imf.com.au) which contains the following information which may help you to decide whether to use our financial services:

- (a) our audited accounts;
- (b) our Corporate Governance Manual;
- (c) our Privacy Policy;
- (d) public announcements made by us to the ASX; and
- (e) general information about litigation funding.

2.8. Our Chairman is Michael Kay. Our Managing Director is Andrew Saker. Both may be contacted by telephone on +61 2 8223 3567.

### **3. The Funding Agreement and Risks**

3.1. We provide litigation funding services pursuant to written litigation funding agreements. We do not provide legal advice.

#### *Assessment of Your Claim*

3.2. In general terms, we will decide whether we want to enter into a litigation funding agreement with you by assessing:

- (a) the strength of your claim and any legal or factual difficulties with it;
- (b) the type of claim;
- (c) when your claim arose;
- (d) the court in which your claim will be heard;
- (e) the amount of your claim;
- (f) the estimated legal costs of pursuing your claim;
- (g) the ability of the proposed defendant or defendants to pay you if you are successful (note that in the Federal Court, a defendant is called a "respondent"); and
- (h) the documentary evidence available to support your claim.

3.3. To assist us in assessing your claim, we may require you to provide us with documents and other information. We may enter into a confidentiality agreement with you.

3.4. You are not required to pay us anything for our initial assessment of your claim.

3.5. If we decide not to fund your claim, at your request we will return your documents to you.

*The Funding Agreement*

- 3.6. If we decide to fund your claim, we will enter into a funding agreement with you.
- 3.7. If we do decide to fund your claim, we are acting on our own behalf and not on behalf of you or anyone else. We cannot and do not make any recommendation as to whether you should enter into a funding agreement with us. We will not provide you with any advice on the meaning, effect or content of the funding agreement. Since we are the other party to the agreement, it would not be appropriate for us to do so. We recommend that you obtain your own independent legal advice on the meaning, effect and content of the funding agreement before you sign it.
- 3.8. Our funding agreements are entered into on a “no win, no fee” basis. This means that we will not be paid any money or receive any other property unless and until:
- (a) you have signed a funding agreement with us;
  - (b) your claim has been settled or concluded by a judgment in your favour; and
  - (c) there is a “Resolution Sum” (the Resolution Sum is defined in the funding agreement and, in broad terms, means the money or other property that is recovered in respect of your claim).

- 3.9. The funding agreement explains the costs we will pay, which include:
- (a) paying all or a proportion of the lawyers’ legal fees and expenses incurred during the term of the funding agreement in pursuing your claim;
  - (b) providing security for the other side’s legal costs; and
  - (c) paying any costs of the other side (incurred during the term of the funding agreement) which you may be required to pay if your litigation is unsuccessful.

Where we pay only a portion of the lawyers’ fees and expenses, the funding agreement will specify the proportion of the fees and expenses we will pay and will provide for the lawyers’ unpaid fees (plus interest) to be paid out of any Resolution Sum if your claim is successful.

- 3.10. When you sign your funding agreement with us you assign to us a share of any Resolution Sum which might arise if your claim is successful, in return for our funding of your claim. That is, you and us will each own a share of any Resolution Sum. We are entitled to receive a return under the funding agreement by virtue of the assignment only. You cannot assign to us more than you actually recover on your claim.
- 3.11. How our share of the Resolution Sum (that is assigned to us) is calculated is set out in the funding agreement. It usually comprises:
- (a) all amounts we have paid to fund your claim (including the lawyers’ fees and expenses and any costs we have incurred in providing security for costs or in paying the other side’s costs);
  - (b) a Project Management Fee calculated as a percentage of the lawyers’ fees and expenses we have paid (this compensates us for our project management services); and
  - (c) a percentage of the Resolution Sum.
- 3.12. Our percentage of the Resolution Sum will be increased if:
- (a) we agree to fund any appeals from any judgment a court may give on your claim (whether the appeal is brought by you or the other side), in which case an additional 5% will be added to our percentage for each appeal we fund; and/or
  - (b) additional parties join the proceedings on the defendant’s side. As we may become liable to pay those parties’ costs if they are successful, an additional 2.5% will be added to our percentage for each additional party that is represented by different lawyers, up to a maximum of an additional 7.5%.

- 3.13. The funding agreement records our joint preference for your claim to be resolved for cash and for IMF to receive its share of any Resolution Sum in cash. This is the fairest and most efficient approach. However, we may agree that any Resolution Sum may consist, in whole or in part, of specified property that is not money. If we do so, and if the Resolution Sum ultimately contains such specified property, then the lawyers are instructed to hold that property on trust for you and us, sell it for a fair market value and pay the cash proceeds into their trust account to be divided between you and us.
- 3.14. If the Resolution Sum does not include enough cash even after the lawyers have endeavoured to sell any specified property, then you agree with us that we will both use our best endeavours to agree on the way in which any remaining the non-cash property is to be valued and shared so that we receive our full entitlements under the funding agreement.
- 3.15. We will appoint the lawyers to work for you on the terms of an agreement, known as the Standard Lawyers Terms, between us and the lawyers. The lawyers may also have a retainer agreement directly with you. The lawyer's retainer agreement explains in detail how the lawyers are paid and how their fees are calculated.
- 3.16. The funding agreement may provide that we will give the lawyers day to day instructions. In that case, you (or in the case of a class action, the representative) will be able to override those instructions. Potential conflicts that may arise in relation to the giving of instructions are dealt with in the funding agreement and are described in section 4 below.
- 3.17. As well as providing funding for your claim we will usually also investigate your claim and provide project management services, which include discussing strategy with the lawyers and monitoring their costs and budgets. We will also provide any other non-legal assistance which you or your lawyers may reasonably request.
- 3.18. The funding agreement provides for any money recovered in respect of your claim to be paid into the solicitor's trust account and to be paid to IMF to the extent of the entitlements which have been assigned to IMF in the funding agreement with the balance to be paid to you, subject to any other obligations you may have to the lawyers. The funding agreement and the Standard Lawyers Terms take precedence over the terms of the lawyers' retainer agreement.

#### *"Cooling Off" Period and Termination*

- 3.19. After you sign a funding agreement, you will have a "cooling off" period if this is stipulated in the funding agreement. The length of that period (if applicable) will be identified in the funding agreement. During that period you may tell us that you wish to terminate the funding agreement. You may tell us by letter, email or fax.
- 3.20. If you decide to terminate the funding agreement during that period, we will not charge you anything.
- 3.21. After the "cooling off" period has ended, you will only be able to terminate the funding agreement in accordance with its terms.
- 3.22. We may terminate the funding agreement at any time by giving you written notice for the period that is specified in the funding agreement.

#### *Your Obligations under the Funding Agreement*

- 3.23. The funding agreement also sets out your obligations in relation to the funded litigation. You must co-operate with IMF and the lawyers in relation to the litigation and, subject to the terms of the funding agreement, accept and follow the lawyers' reasonable advice. You must also keep all documents you have which relate to your litigation and provide those documents to the lawyers if they ask you. The lawyers may also ask you to give them a written statement in relation to your litigation.
- 3.24. If you sign a funding agreement and your claim goes to trial, you may be required to give evidence in court. You may also be required to provide copies of all your relevant documents to the other side. We do not pay you to give evidence, to gather and give your

documents to your lawyers or to help with the case generally.

- 3.25. If other people have the same or similar claims as you, we may decide to fund their claims too. This may mean that you and they become claimants in the same litigation or that you become a representative party or are represented by another claimant (usually in a class action). You will not become a representative party without your consent.

#### *Risks*

- 3.26. The most obvious risk is that you may lose the litigation. If that happens then, subject to paragraph 3.29, you will not be required to pay any money (other than any amount IMF has not agreed to pay under the funding agreement). You will, however, lose the time and effort you have put into the litigation. There may be other risks you face in relation to the litigation itself or the funding agreement (and in this respect we repeat what we have said at paragraph 3.7 above).
- 3.27. Even if you are successful with your litigation, the other side may not be able to pay all of the judgment sum. As we only get paid from any money you actually recover, we are always careful to investigate whether the other side will be able to pay you. Of course, we can never guarantee that they will have enough money to do so.
- 3.28. As explained above, we may terminate the funding agreement. If that happens, we may lose all the money we have paid and will receive nothing for the work we have put into your claim. If we terminate the funding agreement and you later receive some money or other property in respect of your claim, you must still reimburse us from that money or property for the legal fees and other expenses and costs we have paid on your behalf. Few funding agreements are terminated by us.
- 3.29. As your claim proceeds, we will pay your legal costs, court costs and other funded expenses. As a company, however, we could become insolvent and be unable to meet any order that you pay the other side's legal costs. You will need to make your own assessment of our financial position. Audited accounts of the company are on our website.
- 3.30. We cannot comment on the taxation implications for you if you enter into a funding agreement with us. You should obtain your own independent tax advice in this regard.
- 3.31. We have a Privacy Policy which can be found on our website. From time to time we may make contact with you regarding other litigation in which you may wish to become involved. If you do not wish to receive these communications you should tell us.

#### **4. Identifying and dealing with conflicts of interest**

##### *Identification of conflicts of interest*

- 4.1. ASIC considers that a conflict of interest may arise where there is a divergence between the interests of IMF, you and the lawyers in relation to your funded litigation. The conflicts may be actual or potential, present or future.
- 4.2. ASIC considers that a divergence of interests may arise because:
- (a) IMF wishes to keep the legal and administrative costs of the funded litigation low to maximise its return;
  - (b) the lawyers have an interest in maximising their fees; and
  - (c) you have an interest in minimising the returns of both IMF and the lawyers.
- 4.3. In many instances your interests and ours will be aligned. This is because we do not receive any payment unless you recover damages or a settlement and our return is normally a percentage of any Resolution Sum. It is not in our interests for your claim to be resolved for an amount that does not reflect a reasonable settlement or to be pursued in a way which does not maximise the chances of successfully resolving it.
- 4.4. Nevertheless, in some cases a conflict may arise. We have set out below a description of the main circumstances in which conflicts may occur and the way in which we deal with

them. If we identify a conflict which arises during the course of your funded litigation which has not been disclosed to you, we will bring it to your attention.

*Potential conflicts arising out of the conduct of the litigation*

- 4.5. The lawyers may face conflicting loyalties to IMF and to you. This may be because:
- (a) the lawyers are appointed by IMF;
  - (b) the lawyers have a retainer agreement with you and you are their client;
  - (c) IMF is paying the lawyers' fees and expenses;
  - (d) IMF is providing day-to-day instructions to the lawyers;
  - (e) the lawyers may have a pre-existing relationship with IMF or with you or another client in the litigation; or
  - (f) the lawyers may see IMF as a future source of work.
- 4.6. Further, the interests of IMF and you may differ with respect to strategy in the litigation and over which claims to pursue. You may want to instruct the lawyers differently to IMF. This may arise because of (for example):
- (a) different views as to how the funding is to be spent; or
  - (b) different views as to whether to pursue a claim and its prospects of success.
- 4.7. These potential conflicts are addressed in the funding agreement which:
- (a) informs you of any pre-existing relationships between IMF and the lawyers and the remuneration to be paid to the lawyers;
  - (b) specifies that the lawyers are to enter into a retainer agreement with you and to act for you in the litigation (and you should be aware that the lawyers owe fiduciary and ethical duties to their clients);
  - (c) states that any claimant, including you, or any representative in a class action can override any instruction given by IMF to the lawyers;
  - (d) states that in any situation in which the lawyers think they may be in a position of conflict (except in relation to a potential settlement, which is dealt with separately) they may:
    - (i) take instructions from you or any other claimant, whose instructions will override those of IMF and may be contrary to IMF's interests;
    - (ii) give advice to you or any other claimant, even though the advice may be contrary to IMF's interests; and
    - (iii) not give IMF advice or act on IMF's instructions where that advice or those instructions may be contrary to a funded claimant's interests;
  - (e) requires the lawyers to disclose (confidentially) to IMF information and documents relating to the litigation, including those relevant to the prospects of success of your claim; and
  - (f) sets out procedures to resolve disputes between IMF and you or other funded claimants.

*Potential conflicts concerning settlements*

- 4.8. IMF may want your claim to settle and you may not, or vice versa. This may happen because:

- (a) IMF and you have different views about the prospects of success of your claim;
- (b) IMF is financially exposed if your claim is lost (because IMF has paid the legal costs and has agreed to pay any adverse costs order) but you are not so exposed;
- (c) IMF wants to make a return on the money it has invested in the litigation;
- (d) you may have other motives for settling your claim that are non-monetary, such as preserving a relationship with the defendant;
- (e) you may consider the return to you (after paying IMF's fee and the legal costs) to be inadequate; or
- (f) the fee provisions in the funding agreement provide for a higher return to IMF if the litigation resolves at a later point in time.

4.9. These potential conflicts are addressed in the funding agreement which provides:

- (a) for the independent and conclusive resolution of any disputes in relation to settlement by referring the dispute to the most senior counsel (barrister) retained in the litigation to decide whether the proposed settlement is fair and reasonable or not; and
- (b) in the case of a funded class action where proceedings have not yet started, that a settlement cannot occur unless at least 50% of funded claimants by value who are affected by the settlement vote in favour of it and counsel gives an opinion that the settlement is fair and reasonable in all of the circumstances.

4.10. In addition, in funded class actions where proceedings have commenced, settlement cannot occur without the Court's approval.

4.11. The lawyers are authorised by the funding agreement to sign any document and take any step on your behalf that is necessary to give effect to a settlement which is reached in accordance with the funding agreement (and approved by the Court, if applicable).

#### *Potential conflicts around the termination of the funding agreement*

4.12. IMF may not want to continue funding your claim even though you want us to, or vice versa (you may want to terminate the funding but IMF does not). This may arise because (for example):

- (a) IMF does not consider your claim to be commercially viable for it to continue to fund; or
- (b) IMF does not consider that the prospects of success or chances of recovery of any judgment sum are sufficient to warrant continued funding.

4.13. This potential conflict is addressed in the following way:

- (a) the funding agreement specifies the rights which IMF and you have to terminate the funding agreement and the consequences of any of those rights being exercised;
- (b) the funding agreement provides dispute resolution procedures in the event a dispute arises between IMF and you; and
- (c) the funding agreement may include the cost of any appeals as part of the funding or may state that IMF is not obliged to fund any appeal unless IMF decides, in its absolute discretion, to do so.

#### *Potential conflicts in relation to multi-party funding agreements*

4.14. There are potential conflicts which are peculiar to multi party cases (i.e. proceedings with multiple claimants (a group action) or a class action with a representative and group member claimants).

- 4.15. In a class action, hundreds and sometimes thousands of claimants are members of a defined class and are all represented by one person or entity, referred to as the representative. Class actions funded by IMF may include persons who have not entered into a funding agreement with IMF, as well as persons who have done so.
- 4.16. Common questions of law or fact are answered for the benefit of all members of the class and then, in a second set of proceedings, the separate claim of each member is determined (if there is no earlier settlement) in light of these findings.
- 4.17. The legal costs in class actions are paid by IMF pursuant to the funding agreement and any reimbursement of costs (paid from settlement or judgment proceeds) is divided between the clients on a pro rata basis according to the size of their claim (as determined by the lawyers). As with a single party claim, claimants in a class action who enter into a funding agreement with IMF assign a share of any Resolution Sum that might be received in relation to their claims to IMF.
- 4.18. In this way, if the costs paid by IMF in a class action are, say, \$4M and a client's claim represents, say, 1% of the total claim, then the amount deducted from the payment to that client in respect of their share of the costs is \$40,000.
- 4.19. Because of the large number of class members it is not possible to permit each client to appoint a separate firm of lawyers. The lawyers appointed to act for the representative will enter a retainer with each funded group member.
- 4.20. If there is a lump sum settlement of the class action then the distribution to each funded client is determined on a pro rata basis depending on the size of their claim. Settlement of class actions can only occur with the consent of the Court.
- 4.21. You may be given the opportunity to opt out of a class action in which you are either the representative or a group member, with the consequence that you will no longer be included in the action. If you opt out, the funding agreement provides that you will still be obliged to pay to IMF its entitlements from any recovery you may make in respect of your claim that was included in the class action. If you do not make any recovery, then you will have no obligation to pay anything to IMF.
- 4.22. Usually in class actions control of the proceedings at the common issues stage is in the hands of the representative, the lawyers and IMF. Control of the second part of the proceedings is in the hands of each individual client and the lawyers.
- 4.23. Because of the expense involved in class actions, funding will not occur unless sufficient numbers of claimants agree to become members of the class and sign funding agreements with IMF.
- 4.24. In some cases large groups of clients are joined together in what is known as a group action where each client is a party to the proceedings (in a class action only the representative is a party during the common issues or first stage). Group actions have the advantage that all questions of liability and damage are answered in the one hearing.
- 4.25. In group actions, all clients will be required to provide documentation and give evidence relating to their claims to the lawyers. IMF pays all legal costs and expenses and pays the defendant's costs, if the group action is not successful, incurred during the term of the funding agreement.
- 4.26. In group actions a committee of claimants may be formed to make decisions on behalf of all claimants in respect of the day-to-day conduct of the case.
- 4.27. Conflicts specific to multi-party cases might arise where:
  - (a) the claims of some group members or group claimants are stronger than those of others which:
    - (i) might make a global settlement of all claims more attractive to some group members or claimants than others; and
    - (ii) because the costs are allocated between group members or claimants on a pro rata basis, will result in group members or claimants with stronger claims bearing a share of the costs of the weaker claims;

- (b) not all group members or claimants have the same claims and some group members or claimants do not have a claim which others do; and
  - (c) it may not be in the interests of existing funded group members or claimants for further group members (or claimants) to be added in the proceedings (whether they are funded or not).
- 4.28. To a degree these issues are inherent in the conduct of multiple claims and are part and parcel of receiving the benefits of conducting all claims through one proceeding (particularly from the point of view of saving costs). These potential conflicts are addressed in the following ways:
- (a) the funding agreement provides for processes for dealing with settlements (see paragraph 4.9 above);
  - (b) the lawyers are to determine the value of each claim for the purposes of cost allocation and global settlement sum allocation; and
  - (c) all claimants should understand that IMF will act in its own interests in determining whether to enter into funding agreements with additional persons. It may be necessary for IMF to do so in order to ensure that the funded litigation is viable to fund or to improve the prospects of the litigation settling.

#### *Dealing with conflicts*

- 4.29. ASIC requires that, in the event of a conflict between IMF's interests and yours, IMF ensures that your interests are adequately protected.
- 4.30. The way in which IMF addresses potential conflicts is set out above. Further details are available in the Policy. In summary, we seek to ensure that your interests are adequately protected by:
- (a) recommending to you that you seek independent advice on the funding agreement before you sign it and by providing you with a cooling off period within which you are able to withdraw from the funding agreement once you have signed it;
  - (b) complying with this Policy;
  - (c) appointing a Risk Officer of IMF who is responsible for implementing, monitoring and managing the Policy. The Risk Officer is currently Jeremy Sambrook and his contact details are set out in paragraph 2.6 above;
  - (d) seeking to identify actual or potential conflicts in relation to your litigation in a timely manner, disclosing them to you and, where appropriate, seeking to deal with them in the funding agreement;
  - (e) making clear, in the funding agreement, that the professional and fiduciary duties owed to you by the lawyers (being funded by IMF to pursue your claim) take precedence over any duties or obligations those lawyers may owe to IMF;
  - (f) informing you of all fees, percentages, reimbursements or other income IMF and the lawyers may receive in relation to your funded litigation and where these entitlements will come from;
  - (g) informing you of any important pre-existing relationships between IMF and the lawyers or any claimant in accordance with the Policy;
  - (h) setting out, in the funding agreement, the procedure to decide whether to accept any settlement offer in relation to your claim;
  - (i) setting out, in the funding agreement, fair dispute resolution procedures (as discussed in section 5 below);

- (j) providing you with a right to terminate the funding agreement if we do not comply with the Regulations; and
- (k) ensuring that the funding agreement complies with the law on unjust and unfair contracts and unconscionability.

## **5. Resolution of complaints and disputes**

- 5.1. If you are unhappy with any part of our service, please see clause 5 of our Corporate Governance Manual which can be found on our website. That clause explains our internal complaint resolution procedure.
- 5.2. If you have a complaint, you should raise it first with the investment manager who has been managing the funding of your litigation. Any complaints will then be dealt with in accordance with the procedure set out in clause 5 of our Corporate Governance Manual.
- 5.3. If we cannot resolve your complaint ourselves, you can use the external dispute resolution procedure provided by the Australian Financial Complaints Authority ("AFCA"), if you are a "retail client" as defined in the Corporations Act. IMF is a member of AFCA.
- 5.4. In addition, as you have entered into a funding agreement with us, the funding agreement contains dispute resolution procedures which may be applicable. In particular, the funding agreement may provide:
  - (a) (as noted above) that if IMF wishes to settle your claim you (or, in a class action, the representative) do not wish to do so or vice versa, then if the dispute cannot be resolved it is referred to the most senior counsel retained by the lawyers (or, if no counsel has been retained, one appointed by the lawyers with the agreement of IMF and you or representative or, failing this, the President of the New South Wales Bar Association, or other specified Bar Association) for counsel's binding decision; and
  - (b) in respect of any other dispute in relation to, or arising out of, the funding agreement (including any dispute in relation to any conflict of interest) between IMF and you, you and us are to (in summary):
    - (i) meet to discuss and try to resolve the dispute in good faith;
    - (ii) submit the dispute, if it cannot be resolved, to a mediation run independently by the Australian Centre for International Commercial Arbitration ("ACICA"); and
    - (iii) if it cannot be resolved by mediation, resolve the dispute through a binding arbitration independently conducted by ACICA.
- 5.5. In addition, in some cases the lawyers are authorised by the funding agreement to decide on the value of your claim and the other funded claims, how costs are to be allocated between funded claimants and how any non-cash Resolution Sum is to be valued and converted into cash.
- 5.6. In some circumstances you will have the right to terminate the funding agreement. These rights are set out in the funding agreement. You will always have the right to terminate the funding agreement if IMF fails to comply with the Regulations.

**13 December 2016**