

Our Ref: SGH.HZC.150457



11 March 2015

Attention Mark Clifton
Partner
Herbert Smith Freehills
ANZ Tower
161 Castlereagh Street
SYDNEY NSW 2000

By email Mark.Clifton@hsf.com

Dear Sir

Retail Adventures Pty Ltd (RAPL) (In Liquidation)
Supreme Court Proceedings No. 2014/376655
Sperling Enterprises Pty Ltd (ACN 001 882 364) (Plaintiff)
Retail Adventures Pty Limited (In Liquidation) (ACN 135 890 845)
(First Defendant)
Vaughan Strawbridge, John Lethbridge Greig and David John Frank Lombe in
their capacities as joint and several liquidators of the First Defendant
(Second Defendant)
TNW Australia Limited (ACN 072 775 529) (Third Defendant)

We refer to the above matter and **attach**, by way of service, Plaintiff's Outline of Submissions dated 11 March 2015.

Yours faithfully

A handwritten signature in black ink, appearing to read 'Scott Hedge'.

Scott Hedge
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In the matter of Retail Adventures Pty Limited (in liquidation)

Supreme Court of NSW Proceedings No. 2014/376655

Plaintiff's Outline of Submissions

Background

1. The plaintiff is an unsecured creditor of Retail Adventures Pty Limited (in liquidation) (RAPL).
2. On 19 April 2013, the plaintiff entered into a funding agreement with IMF Bentham Limited (IMF) to finance proceedings seeking orders to set aside a resolution that RAPL execute a deed of company arrangement and to wind RAPL up (clause 12 of the IMF Funding Agreement at pages 38 to 39 of exhibit PH-1 to the affidavit of Mr Rainford sworn on 18 December 2014) (the IMF Funding Agreement). 131 other unsecured creditors of RAPL entered into identical funding agreements with IMF¹ (see [6] to [8] of the affidavit of Ms Khouri sworn on 27 February 2015 and Tab 1 of exhibit SMK-1). A copy of the plaintiff's IMF Funding Agreement is attached to these submissions.
3. The proceedings were successful before Robb J and on appeal: see *Helenic Pty Ltd as trustee of the Mastrantonis Family Trust v Retail Adventures Pty Ltd (Administrators Appointed)* [2013] NSWSC 1973; and *DSG Holdings Australia Pty Ltd & Anor v Helenic Pty Ltd & Ors* [2014] NSWCA 96 (collectively 'the Proceedings'). RAPL was wound up by order of Robb J on 3 February 2014.
4. The liquidator of RAPL has recovered approximately \$21 million as a result of pursuing claims only available to a liquidator. That money is now to be distributed to creditors. When that happens, under the IMF Funding Agreement, the IMF Funded Creditors are required to pay money to IMF.

¹ The plaintiff and those 131 other unsecured creditors are collectively referred to as "the IMF Funded Creditors".

This has the practical effect that the IMF Funded Creditors will receive a significantly smaller return than the creditors who did not enter into a funding agreement with IMF.

5. Had the resolution for entry into the proposed deed of company arrangement ('DOCA') not been set aside, the fund available for distribution to creditors under that deed would have been RAPL's cash at bank (of approximately \$4.6 million; see p. 64 of exhibit SGH-1 to the affidavit of Mr Hedge sworn on 22 December 2014) and a possible contribution of \$5.5 million. The DOCA released the director (Ms Cameron), the former directors and related parties (DSG and Bicheno) from any cause of action the company had against them (Administrators' report at pages 60 and 62 of exhibit SGH-1 to the affidavit of Mr Hedge sworn on 22 December 2014). In any event the claims under part 5.7B of the Corporations Act would not have been available to the Deed Administrator.
6. In the liquidation, to date, the sum of \$21.231 million has been received by the liquidators in settlement of claims: under s588FE of the Corporations Act; for insolvent trading; and for preference payments (Affidavit of Vaughan Neil Strawbridge sworn on 27 February 2015 at [11]; [13] to [23]; and [25] to [35]). In addition to providing funds for distribution to creditors, the terms of those settlements have significantly reduced the pool of creditors because Ms Cameron, the former directors of RAPL, the associated entities of Ms Cameron and (except in one case where the preferential payment was repaid in full) the recipients of the preferential payments have each agreed not to prove in the liquidation of RAPL (Strawbridge Affidavit at [31] and [34]).
7. The liquidators now intend to make an interim distribution to creditors of the sum of \$17 million (Strawbridge Affidavit at [60]). The liquidators calculate that, from this distribution, the IMF Funded Creditors are obliged to pay between \$1,561,778 and \$1,881,271 (depending on the total creditor pool after

the final adjudication of proofs of debt) to IMF under the IMF Funding Agreements (Strawbridge Affidavit at [64])².

8. The orders sought, if made, will have the effect that the amounts due to IMF will be paid from the \$17 million interim dividend amount before distribution of the balance is made to all creditors on a pari passu basis. By this means, all creditors (other than priority creditors under s. 556(1), will bear equally the cost of funding the Proceedings. If the orders are not made, the creditors who did not enter into a funding agreement will effectively receive a windfall.
9. The liquidators calculate that if the orders sought are not made (Strawbridge affidavit at [65] and [66]):
 - a. The interim dividend paid to creditors will be in the range of 10.44 cents in the dollar to 14.17 cents in the dollar.
 - b. From this dividend, the IMF Funded Creditors must pay the amounts due to IMF (of between 5.01 cents in the dollar and 6.04 cents in the dollar).
 - c. the IMF Funded Creditors will actually receive the net amount (after payment to IMF) of between 5.43 and 8.13 cents in the dollar, whilst the non funding creditors will receive a net amount of between 10.44 cents and 14.17 cents in the dollar.
10. If the orders sought are made all the unsecured creditors will each receive the same interim dividend in the range of 9.48 cents and 12.60 cents in the dollar.

² There are immaterial differences between the list of IMF Funded Creditors set out in the confidential exhibit to Mr Strawbridge's Affidavit and that at Tab 1 of exhibit SMK-1 to Ms Khouri's affidavit. In particular, the liquidator erroneously records Knight Frank Tasmania as an IMF Funded Creditor.

s. 564

11. Section 564 of the Corporations Act is in the following terms.

Power of Court to make orders in favour of certain creditors

Where in any winding up:

- (a) property has been recovered under an indemnity for costs of litigation given by certain creditors, or has been protected or preserved by the payment of money or the giving of indemnity by creditors; or
- (b) expenses in relation to which a creditor has indemnified a liquidator have been recovered;

the Court may make such orders, as it deems just with respect to the distribution of that property and the amount of those expenses so recovered with a view to giving those creditors an advantage over others in consideration of the risk assumed by them.

12. The provision has a long lineage in companies legislation. It existed in almost identical form as s. 450 of the Companies (New South Wales) Code and s. 292(10) of the Companies Act 1961. Earlier analogous provisions include s. 297(7) of the Companies Act 1936 and s. 10 of the Bankruptcy Acts Amendment Act 1896 (NSW) (*Jarbin Pty Ltd v Clutha Ltd (in liq)* [2004] NSWSC 28 per Campbell J at [50] to [57]).
13. There are many cases dealing with the operation of the section. Because of the recent surge in litigation funding, none of them deal with a situation where some creditors have procured a funding agreement. The usual basis for an application under the section is that some creditors have directly funded and/or indemnified a liquidator whilst others have not.
14. The locus classicus of the approach to be taken in s. 564 cases remains as stated by Brownie J in *Household Financial Services Pty Ltd v Chase Medical*

Centre Pty Ltd (1995) 18 ACSR 294 in the following passage at pp.296-7 (approved by the Court of Appeal in *State Bank of New South Wales v Brown* (2001) 38 ACSR 715):

The last words s 564 provide for, and the authorities accent the need to assess the risk run by the indemnifying creditors, for whose benefit an application is made, but the authorities show that it is also appropriate to look to the sum recovered (or the value of the property recovered), the failure of other creditors to provide the indemnity, the proportions between the debts of the indemnifying creditors and the other debts, the public interest in encouraging creditors to provide indemnities so as to enable assets to be recovered, and, generally, the totality of the circumstances; and there has been a tendency in recent times to adopt a more liberal approach, in favour of indemnifying creditors. See *Re Bavistock* (1946) 14 ABC 30; *Re Ivernee; Ex parte Official Receiver* (1974) 36 FLR 187; *Re Passmore; Ex parte Official Receiver (in liq)* (1984) 56 ALR 181 at 186; *Re Kyra Nominees Pty Ltd (in liq)* (1987) 11 ACLR 767; 5 ACLC 811 at 819; *Re Ken Godfrey Pty Ltd (in liq)* (1994) 14 ACSR 610; 12 ACLC 1071.

See also *In the matter of Proficient Building Company Pty Ltd* [2011] NSWSC 1540 per Barrett J at [15]; and *In the matter of Babcock & Brown Limited (in Liquidation)* [2012] FCA 107 per Emmett J at [51].

15. Ultimately, under s. 564, the Court must decide what is 'just' and this requires consideration of a wide range of circumstances. The comprehensive nature of the relevant inquiry has long been recognised: see *State Bank of New South Wales v Brown* per Spigelman CJ at [30] and *Parbery & Anor re Lecan Constructions Pty Ltd* [2006] NSWSC 662 per Barrett J at [18].
16. There are a number of preconditions to the jurisdiction conferred by s. 564. In the present case the preconditions for both of the prescribed alternatives under s. 564(a) are satisfied, being that 'where in any winding up':

- a. 'property has been recovered under an indemnity for costs of litigation given by certain creditors'; or
- b. property 'has been protected or preserved by the payment of money or the giving of indemnity by creditors' .

'property'

17. The relevant 'property' that has been protected, preserved or recovered by the IMF Funded Creditors was the choses in action which gave rise to the settlement funds. It is accepted that choses in action comprise 'property' for the purposes of s. 564 (*In the matter of Shepherds Producers Co-operative Ltd (in liq)* [2012] NSWSC 390 per Black J at [9]). Those choses in action have now merged into the settlement funds.

'in the winding up'

18. It has been held (at least by implication) that for s. 564 to apply, it needs to be demonstrated that, relevantly, each of the recovery of property, the 'protection or preservation of property' and the 'payment of money' must occur during the winding up. The period of the winding up has been held to be that period beginning on the appointment of the liquidators (*Fuji Xerox Australia Pty Ltd v Tolcher & Ors* [2004] NSWCA 284 per Spigelman CJ at [13] with whom Sheller and Tobias JJA agreed at [16] and [17] respectively).

'by'

19. The word 'by' in subsection 564(a) directs attention to a causative link between the payment of money and the relevant protection, preservation or recovery.

'under an indemnity'

20. The promise to pay IMF money, at least in part, was to reimburse IMF for money it outlaid for the purpose of the litigation (clause 12.1.1 of the IMF Funding Agreement and the definition of Project Costs in clause 1.1 at pages 29 and 38 of exhibit PH-1 to Mr Rainford's affidavit). This is an indemnity by the creditors to IMF for those outgoings. That indemnity, although given during a period before the winding up, was a continuing promise and obligation. It continued through the winding up. The obligation to indemnify is contingent upon funds being received. Without that contingent indemnity, the company would not have been wound up and the funds would not be available.
21. Whilst historically such indemnities have been given by creditors directly to a liquidator, there is nothing in the words of the statute that in any way limits who the indemnity is provided to. All that is necessary is a causal connection between the indemnity and the recovery of property that is apparent in this case.
22. Thus 'property has been recovered in the winding up under an indemnity for the costs of litigation given by certain creditors'.

'payment of money'

23. Jurisdiction under s. 564 is also enlivened because the IMF Funded Creditors' obligations to pay money under the IMF Funding Agreement will arise only upon receipt by them of the interim distribution in the liquidation (clause 12 and the definition of 'Resolution' and 'Resolution Sum' in clause 1.1 of the IMF Funding Agreement at pages 38 and 30 of exhibit PH-1 to Mr Rainford's affidavit). This payment by the IMF Funded Creditors arises by virtue of a series of contingent obligations contained in the IMF Funding Agreement, which was entered into when RAPL was in administration. The contingency is fulfilled once the interim dividend is paid, and the IMF Funded Creditors' obligations will become actual at that time. The relevant 'payment of money' will occur 'in the winding up'.

'protected and preserved'

24. The relevant property was both 'protected and preserved' by the promise to pay the money in the winding up because prior to the winding up order the company's status was in a state of flux. It did not then possess the choses in action which led to the settlement funds but it had the prospect of those causes of action depending on its status. If RAPL had proceeded to a DOCA, such prospective claims would have been forever lost to it. By the winding up order itself those claims were protected and preserved in the sense that they became available to the liquidators for the benefit of creditors.
25. The payment of money to IMF 'protected' or 'preserved' the choses in action because it will occur by the performance of the contingent promise made by each of them which funded the Proceedings to wind up the company. Without those promises, the settlement sums would not ultimately have been received by the liquidators. It is not possible to disentangle the contingent promise from the payment itself. Thus, the 'payment of money' will have had the effect of preserving or protecting the property within the meaning of the section.
26. On this analysis, it is the payment of money that protected or preserved the asset notwithstanding payment will happen at a point in time that the protection or preservation has worked to benefit all creditors.

'just'

27. There being jurisdiction under s. 564 established, the question then arises as to whether it is just that all creditors bear the burden of the amounts owed under the IMF Funding Agreements. The relevant facts include:
 - a. The creditors as a body were given the opportunity to join in the IMF funded proceedings: see the affidavit of Mr Rainford at [8] and [9]; and the affidavit of Ms Khouri at [13].

- b. IMF stated that it would not fund any proceedings unless there were a sufficient number of unsecured creditors who wished to retain their services (being creditors owed in the region of \$50 million); see p. 18 of exhibit PH-1 to Mr Rainford's affidavit.
- c. IMF Funded Creditors, under the IMF Funding Agreements, were not exposed to any orders for costs which may have arisen in the Proceedings and were not obliged to make payment to IMF other than out of any proceeds they received.
- d. Without the IMF funded Proceedings, the settlement sums of \$21,231,000.00 would not have been received for the benefit of creditors. The underlying causes of action would have been released. Even if the deed contribution of \$5.5 million had been made (which was not compulsory under the proposed deed of company arrangement), the amount available for distribution to creditors would have been substantially less.
- e. Of the formal proofs of debt received by the liquidators to date there are 109 IMF Funded Creditors who have claimed the total sum of \$25,098,859 and 397 unfunded creditors who have claimed the total sum of \$102,271,154 (see the table set out in Mr Strawbridge's affidavit at [48]).
- f. If the orders sought are not made, the IMF Funded Creditors will receive approximately half the interim dividend of the creditors who did not fund the Proceedings (see Strawbridge Affidavit at [65] and [66]).
- g. If the orders sought are made, the creditors who did not fund the Proceedings will receive a dividend in the likely range of 9.44 cents to 12.53 cents, rather than in the range of 10.44 cents to 14.17 cents.

h. There is no evidence to suggest that the Proceedings to set aside the resolution could have been brought by any one or more creditors without IMF's involvement (or without the involvement of any other funder).

28. The current circumstances are unusual in that the IMF Funded Creditors did not assume litigation risk in the sense of exposure to costs or funding obligation. Nor do they seek any 'uplift' on their return as is common in applications under s. 564 of the Corporations Act. Had one or more creditors funded the Proceedings directly then the usual application would be for the return of costs plus an uplift referable to the rates of litigation funding.

'risk'

29. The risk assumed by the IMF Funded Creditors was that, as a consequence of entering into the IMF Funding Agreement, they would receive less from the ultimate proceeds of any chose in action than creditors who chose not to engage IMF. Unless the orders sought are made, that is what will occur in this case. As a matter of principle such a risk is no different from a risk assumed to indemnify or pay a liquidator.

30. Where all creditors will share in the dividend derived from the Proceedings to set aside the resolution, and in light of the underlying policy of insolvency law that classes of creditors share rateably in distribution, it is just that all creditors bear the burden of the IMF funding. It would be unjust, and contrary to the policy of the legislation, for the creditors who did not engage IMF to enjoy a windfall at the expense of the IMF Funded Creditors.

Equitable Lien

31. Alternatively, by reason of the effect of the IMF Funding Agreements, the IMF Funded Creditors are entitled to an equitable lien over the proceeds of

settlement in accordance with the authorities and principles collated in *Stewart v Atco Controls Pty Ltd (in liq)* [2014] HCA 15.

Dated: 11 March 2015

Robert Newlinds

Vanessa Whittaker

Counsel for the Plaintiff



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15 APR 2019

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RETAIL ADVENTURES
INVESTIGATION, MANAGEMENT & FUNDING AGREEMENT

IMF (AUSTRALIA) LTD
ABN 46 067 200 000
AFSL 200008
www.imf.com.au

1. APPLICANT'S DETAILS (PLEASE PRINT IN CAPITAL LETTERS)

Full Name of Applicant: (Controller of Retail Adventures Pty Ltd) **SPERLING ENTERPRISES PTY LTD**

Street Address: **16 HELLES AVE.**

Suburb/Town: **MOORE BANK.** State: **NSW** Postcode: **2170**

Country: **AUSTRALIA**

2. CONTACT DETAILS (PLEASE PRINT IN CAPITAL LETTERS)

(This is the party to whom all correspondence will be sent, including any cheques)

Contact Name: **MR. PETER SPERLING.**
(TITLE) (FIRST NAME) (SURNAME)

Address: **16 HELLES AVE.**

Suburb/Town: **MOORE BANK.** State: **NSW** Postcode: **2170**

Country: **AUSTRALIA**




Contact Email: **Peter@Sperling.com.au**
(Our preferred method of correspondence is by email. Please keep IMF informed of your current email address)

Phone: **(02) 9821 1444** Mobile: **0418 406 573**

SIGNING OF THE RETAIL ADVENTURES INVESTIGATION, MANAGEMENT & FUNDING AGREEMENT

Signing below operates as the Applicant's agreement to this Retail Adventures Investigation, Management & Funding Agreement and is subject to the cooling off period referred to in clause 3. It also verifies that the Applicant is a creditor of Retail Adventures for at least \$10,000 which amount has not been paid as at the date of execution of this IMF Agreement by the Applicant.

SIGNED by or on behalf of and with the written authority of, the Applicant

 SIGNATURE PETER SPERLING. PRINT NAME DATE: / /	SIGNATURE PRINT NAME DATE: / /
 Hugh McLernon MANAGING DIRECTOR DATE: 19/4/13	 Diana Jones COMPANY SECRETARY DATE: 19/4/13

PLEASE PROVIDE THE FOLLOWING DETAILS

Type of goods/services provided:

consumer home ware and car
care products - Rags to Air FreshnersDates between which
goods/services were provided:

1st June 2012

to

3rd October 2012

Amount currently outstanding:

174125

Person(s) you dealt with at Retail
Adventures:

If there is not sufficient space on this page for all of your relevant information, please attach additional pages.

Please RETURN the signed Funding Agreement to:

**IMF (Australia) Ltd
PO Box Z5106
St George's Terrace
PERTH WA 6831**

**RETAIL ADVENTURES
INVESTIGATION, MANAGEMENT & FUNDING AGREEMENT**

1. APPLICANT'S DETAILS PLEASE PRINT IN CAPITAL LETTERS

Full Name of Applicant:
(Creditor of Retail Adventures Pty Ltd)

Street Address:
(Not PO Box)

Suburb/Town: State: Postcode:

Country:

2. CONTACT DETAILS PLEASE PRINT IN CAPITAL LETTERS

(This is the party to whom all correspondence will be sent, including any cheques)

Contact Name:
(TITLE) (FIRST NAME) (SURNAME)

Address:

Suburb/Town: State: Postcode:

Country:

Contact Email:
(Our preferred method of correspondence is by email. Please keep IMF informed of your current email address)

Phone: () Mobile:

SIGNING OF THE RETAIL ADVENTURES INVESTIGATION, MANAGEMENT & FUNDING AGREEMENT

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SIGNED by or on behalf of and with the written authority of, the **Applicant**

_____ SIGNATURE	_____ SIGNATURE
_____ PRINT NAME	_____ PRINT NAME
DATE: / /	DATE: / /

SIGNED by IMF (Australia) Ltd

_____ Hugh McLemon MANAGING DIRECTOR	_____ Diane Jones COMPANY SECRETARY
DATE: / /	DATE: / /

PLEASE PROVIDE THE FOLLOWING DETAILS

Type of goods/services provided:	<input type="text"/>	
Dates between which goods/services were provided:	<input type="text"/>	to <input type="text"/>
Amount currently outstanding:	<input type="text"/>	
Person(s) you dealt with at Retail Adventures:	<input type="text"/>	

If there is not sufficient space on this page for all of your relevant information, please attach additional pages.

Please RETURN the signed Funding Agreement to:

**IMF (Australia) Ltd
PO Box 25106
St George's Terrace
PERTH WA 6831**

OVERVIEW

- A. IMF is the holder of Australian Financial Services Licence Number 286806.
- B. The Applicant is owed at least \$10,000 by Retail Adventures and has one or more Claims and other persons have claims which are the same or similar to the Claims.
- C. Subject to IMF forming the view that there are sufficient Funded Persons to make Proceedings commercially viable then, unless the Claims and the Other Claims have already been resolved, Pre-Proceedings Steps and/or Proceedings may be commenced against all or any of the Respondents in respect of some or all of the Claims and the Other Claims in order to prosecute and resolve the Claims and the Other Claims.
- D. The Applicant has requested IMF to provide the management and funding components of the Project. The Applicant consents to IMF conducting such investigations as IMF may consider appropriate.
- E. IMF is prepared to conduct the Project Investigation and Project Management and pay the Project Costs pursuant to the terms of this IMF Agreement and the Other Funding Agreements.
- F. The Applicant has agreed, in return, to assign to IMF a share of the Resolution Sum (if any) on the terms of this IMF Agreement.
- G. IMF proposes to enter into an agreement with the Lawyers in the terms set out in Schedule 1 to this IMF Agreement.
- H. The Applicant is aware that IMF will also provide funding to Other Funded Persons which funding may be in the same or different terms to this IMF Agreement, and IMF may fund other actions against the Respondents unrelated to the Claims.
- I. The Applicant is aware that where the Applicant has more than one Claim against more than one Respondent, it is possible that separate Proceedings may be instituted against different Respondents in relation to those Claims.
- J. The Applicant is aware that his, her or its Claims may be pursued in common with some or all of the Other Claims and may be against one or more of the Respondents and that any Class Action may include (as members of the class) persons who have not entered into a funding agreement with IMF.
- K. The Applicant and IMF acknowledge that each has, by virtue of their respective contributions, obligations and entitlements (including each to receive a share of any Resolution Sum) set out in this IMF Agreement, an interest in the Claims, the Proceedings and any Resolution Sum.
- L. The Applicant acknowledges that IMF's funding under this IMF Agreement is likely to increase the amount of any dividend or payment made to the Applicant in respect of the debt owed to the Applicant in the administration of Retail Adventures.

AGREEMENT**1. Definitions**

- 1.1. In this IMF Agreement, in addition to the terms in bold which are defined elsewhere in this IMF Agreement (including the Schedules) and unless the context requires otherwise, the following terms have the meanings set out below:

"Acquisition" has the same meaning as in the GST Act

"Adverse Costs Order" means any costs order made in favour of the Respondents (or any of them) against any Funded Person and/or IMF in the Pre-Proceedings Steps or the Proceedings in respect of costs of the Respondents or any of them incurred during the term of this IMF Agreement or any Other Funding Agreement.

“Alternative Dispute Resolution Process” means any form of negotiation, discussions, mediation, conciliation, expert determination or other form of consensual dispute resolution process (other than arbitration) which seeks to Settle the Claims and/or the Other Claims and/or the Pre-Proceedings Steps or the Proceedings.

“Alternative Liquidator” means a liquidator of Retail Adventures other than officers of Deloitte Touche Tohmatsu. For the avoidance of doubt, neither an Alternative Liquidator nor any Liquidator is an Other Funded Person.

“Applicant” means the individual whose details appear on the front page of this IMF Agreement and the successors or assigns of that individual.

“Applicant’s Share” means the share borne by the Applicant calculated by reference to the proportion that the amount of the Claims the subject of the Proceedings or the Settlement concerned bears to the total amount of the claims of all Funded Persons the subject of the Proceedings or the Settlement concerned. Where there are no other claims so subject, then the Applicant’s Share is 100%. The amount of the Claims and the claims of all Funded Persons and the Applicant’s Share will be determined by the Lawyers.

“Claims” means the claims the Applicant has or may have against some or all of the Respondents under section 588M(3) of the Corporations Act for loss and damage caused to the Applicant arising out of the supply by the Applicant of goods and/or services to Retail Adventures worth at least \$10,000 (including GST) for which payment remains outstanding as at the Date of Commencement.

“Class Action” means proceedings commenced, or to be commenced under Part IVA of the *Federal Court of Australia Act 1976 (Cth)* against any of the Respondents.

“Consideration” has the same meaning as in the GST Act.

“Corporations Act” means the Corporations Act 2001 (C’th).

“Costs Order” means an order made by a Court requiring one or more parties to any of the Proceedings and/or IMF to pay the costs incurred by another party to the Proceedings.

“Court” means the court in which the Proceedings are conducted.

“Date of Commencement” means the date this IMF Agreement is signed by IMF.

“DOCA” means any Deed of Company Arrangement in respect of Retail Adventures.

“Eligible Applicant” has the same meaning as in section 9 of the Corporations Act.

“Examinations” means any examinations conducted under the provisions of the Corporations Act in relation to the examinable affairs of Retail Adventures.

“External Controller” means:

- (a) in relation to an individual, the Official Trustee in Bankruptcy, an Official Receiver in Bankruptcy, a trustee in bankruptcy and a controlling trustee.
- (b) in relation to a body corporate, an administrator (including a voluntary administrator or an administrator under a deed of company arrangement, scheme of arrangement, compromise or other arrangement), a provisional liquidator and a liquidator and includes a Liquidator.

“Funded Person” means the Applicant and any person who has entered or enters into an Other Funding Agreement. For the avoidance of doubt, Funded Person does not include any Liquidator.

“GST” has the same meaning as in the GST Act.

“GST Act” means the *A New Tax System (Goods and Services Tax) Act 1999 (Cth)*.

“IMF” means IMF (Australia) Ltd (ACN 067 298 088).

"IMF Agreement" means this agreement (including Schedules 1, 2 and 3) between the Applicant and IMF and, if amended, this agreement as amended.

"Input Tax Credit" has the same meaning as in the GST Act.

"Investigation Product" means all Information, documentation, analyses, results and conclusions obtained, conducted or reached (as the case may be) by IMF in or as a result of the Project Investigation.

"Judgment" means any judgment of a competent Court against any Respondent in respect of any Claim or Other Claim or any part of any Claim or Other Claim.

"Lawyers" means Colin Biggers and Paisley of Level 42, 2 Park Street, Sydney, New South Wales, 2000, or any other solicitors appointed in their place as agreed between IMF and, if one has been appointed, the Representative.

"Legal Work" means advice and other legal services which the Lawyers consider reasonably necessary to prosecute and resolve the Claims and the Other Claims and the Proceedings (other than any Proceedings brought by an Alternative Liquidator, unless the Lawyers are also retained to act for the Alternative Liquidator).

"Liquidator" means any liquidator from time to time of Retail Adventures, including an Alternative Liquidator.

"Liquidator's Funding Agreement" means any agreement between IMF and any Liquidator under which IMF agrees to fund proceedings to be brought by the Liquidator seeking recovery under section 588M(2) of the Corporations Act.

"Other Claims" means claims Other Funded Persons have or may have against some or all of the Respondents for loss and damage caused to those Other Funded Persons by the conduct of one or more of the Respondents which claims are the same or similar to the Claims.

"Other Funding Agreement" means any agreement for the provision of funding by IMF to a person with Other Claims.

"Other Funded Persons" means all persons who enter into or have entered into Other Funding Agreements.

"Overarching Purpose" means to facilitate the just resolution of the Claims, the Other Claims, the Pre-Proceeding Steps and the Proceedings according to law and as quickly, inexpensively and efficiently as possible with the aim of maximising any Resolution Sum net of Project Costs and minimising all risks including, in particular, the risk of the Proceedings being unsuccessful.

"PPSA" means the Personal Property Securities Act 2009 (Cth).

"Privilege" unless the context otherwise requires, means legal professional privilege and includes any joint privilege and common interest privilege.

"Pre-Proceedings Steps" means all or any of the following steps to be conducted in accordance with the Overarching Purpose and to the extent necessary to investigate, prosecute and resolve the Claims and the Other Claims prior to or in preparation for the Proceedings:

- (a) opposing any extension of the convening period for the second meeting of creditors of Retail Adventures;
- (b) applying to the Court for the appointment of a special purpose administrator;
- (c) applying to the Australian Securities and Investments Commission for authorisation of a nominated person to apply, as an Eligible Applicant, to the Court for an order to conduct Examinations;
- (d) the conduct of any Examinations ordered by the Court;

- (e) an assessment by the Lawyers of the strength and value of the Claims and the Other Claims in the light of information and documents obtained as a result of the Examinations;
- (f) an application to the Court to set aside any DOCA which fails, in the reasonable opinion of the Lawyers, to give adequate value for the Claims and the Other Claims;
- (g) an application to the Court to appoint an Alternative Liquidator on any DOCA being set aside;
- (h) the offer by IMF to enter into a Liquidator's Funding Agreement and, if agreement can be reached, the entry by IMF into any Liquidator's Funding Agreement; and
- (i) all other actions and matters necessary or incidental to any of the above steps.

"Proceedings" means:

- (a) any and all Class Actions or other legal proceedings brought to prosecute all or some of the Claims and all or some of the Other Claims, a test case that might assist in resolving any part of the Claims or Other Claims, proceedings (other than the Pre-Proceedings Steps) brought in contemplation of, or in aid of, a Class Action or other legal proceedings including, without limitation, proceedings to access any insurance policy, for preliminary discovery, and any other proceedings or process (including any Alternative Dispute Resolution Process); and
- (b) if any Respondent (or any property, assets or liabilities of a Respondent) is or comes under the control of an External Controller, all relevant methods of pursuing some or all of the Claims and/or all or some of the Other Claims in the external administration of that Respondent, including through the lodgement of proofs of debt.

"Project" means the Project Investigation, the Project Management, the Pre-Proceedings Steps and the conduct of the Proceedings in order to achieve Resolution of the Claims and the Other Claims consistently with the Overarching Purpose.

"Project Estimates and Time Line" means the cost estimates (inclusive of any GST payable) and time line for the Pre-Proceedings Steps and, separately, for the Proceedings prepared by IMF and the Lawyers at the Commencement of the Standard Lawyers Terms in the format of Schedule 2 and any amended or varied Project Estimate and Time Line from time to time accepted in writing by IMF.

"Project Costs" means the following costs and expenses incurred prior to the termination of this IMF Agreement (whether or not incurred prior to the Date of Commencement):

- (a) the costs and expenses (other than the Lawyers' legal costs and disbursements) associated with the Project Investigation, the Project Management and the Pre-Proceedings Steps;
- (b) the costs involved in the provision by IMF of any security for costs;
- (c) any Adverse Costs Order paid by IMF;
- (d) the costs incurred by IMF in quantifying any Adverse Costs Order;
- (e) the reasonable legal costs and disbursements of the Lawyers incurred for the sole purpose of preparing, prosecuting and resolving the Claims and the Other Claims, the Pre-Proceedings Steps and the Proceedings;
- (f) any costs paid by IMF pursuant to sub-clauses 13.10 and 13.13 of this IMF Agreement and/or the Other Funding Agreements;
- (g) all of IMF's out of pocket costs and expenses paid, payable or incurred in relation to the Project, including in relation to any consultants engaged by IMF and including in relation to complying with or utilising the PPSA (other than those costs and expenses already referred to in this definition); and

- (h) any GST payable on any Supply made by any entity as a result of the above costs or expenses being incurred.

“**Project Investigation**” means the investigation referred to in sub clause 4.1.

“**Project Management**” means the management described in clause 7.

“**Project Management Fee**” means a fee, payable as Consideration for the Project Management, calculated as 20% of the Project Costs paid or payable by IMF as at Resolution.

“**Related Entity**” has the same meaning as in section 9 of the Corporations Act.

“**Representative**” means any Funded Person (and there may be more than one) selected by the Lawyers and who consents to being a representative party in any Class Action.

“**Resolution**” means when all or any part of the Resolution Sum is received and where the Resolution Sum is received in parts, or where there is more than one Proceeding, a “Resolution” occurs each time a part is received and in respect of each Proceeding.

“**Resolution Sum**” means the amount or amounts of any:

- (a) payment under a DOCA and any dividend or distribution by an External Controller of Retail Adventures in respect of the debt owed to the Applicant by Retail Adventures;
- (b) money or the value of any goods, services or benefits for which all or any of the Claims (including in the Pre-Proceedings Steps and/or the Proceedings) are Settled or for which Judgment is given in favour of the Applicant in any Proceedings, and includes any interest and costs recovered by the Applicant pursuant to a Costs Order or by agreement;
- (c) ex gratia payment made by any Respondent in respect of all or any of the Claims; and
- (d) payment made in respect of all or any of the Claims where any Respondent (or any property, assets or liabilities of any Respondent) is, or comes under, the control of an External Controller.

“**Respondents**” means Jan Cameron and any others in respect of whom IMF accepts, in its absolute discretion and in writing, an exposure to an Adverse Costs Order.

“**Retail Adventures**” means Retail Adventures Pty Ltd (Administrators Appointed) (ACN 135 890 845) and, for the avoidance of doubt, if that company enters into a DOCA or into liquidation, then that company subject to the DOCA or liquidation.

“**Security Interest**” has the same meaning as that term is given in the PPSA.

“**Settlement**” means any resolution of any of the Claims or the Other Claims by admission of a proof of debt in any external administration of a Respondent, any payment under any DOCA, any dividend or distribution and any payment by an External Controller of a Respondent and any agreement, compromise, discontinuance, waiver, payment, release, understanding or any other arrangement whatsoever (and whether before or after any Proceedings have been commenced) where money, value or a benefit passes from or on behalf of a Respondent to any Funded Person in respect of some or all of the Claims and/or some or all of the Other Claims in circumstances where the Proceedings do not commence or, if commenced, do not continue, as against that Respondent in respect of those Claims and/or Other Claims as a result of, or in connection with, the passing of that money, value or benefit and “Settle”, “Settles” and “Settled” have corresponding meanings.

“**Standard Lawyers Terms**” means the terms and conditions attached as Schedule 1.

“**Supply**” has the same meaning as in the GST Act.

“**Taxable Supply**” has the same meaning as in the GST Act.

“**Termination**” means:

- (a) a termination in accordance with clauses 18.2, 19 or 20; and
- (b) any completion, failure, avoidance, rescission, annulment or other cessation of effect of this IMF Agreement.

“Trust Account” means the account to be maintained by the Lawyers referred to in clause 9.1.2.

2. General

- 2.1. The written terms of this IMF Agreement constitute the entire agreement between the parties.
- 2.2. Neither the Applicant nor IMF intend to be partners or fiduciaries with or to each other. Nothing in this IMF Agreement shall constitute the Applicant and IMF as partners or fiduciaries.
- 2.3. There will be no variation or amendment to the terms of this IMF Agreement except either:
 - 2.3.1 in writing signed by the Applicant and IMF; or
 - 2.3.2 where the variation or amendment is notified in writing to the Applicant by IMF and the Applicant does not notify IMF in writing, within 21 days of having received IMF’s notification, that the Applicant objects to the variation or amendment.
- 2.4. A facsimile transmission of this IMF Agreement signed by any party to it will be treated as an original signed by that party.
- 2.5. If any provision of this IMF Agreement, or the application thereof to any person or circumstances, shall be or become invalid or unenforceable, the remaining provisions shall not be affected and each provision shall be valid and enforceable to the full extent permitted by law.
- 2.6. The Applicant and IMF will promptly execute all documents and do all things that either of them from time to time reasonably requires of the other to effect, perfect or complete the provisions of this IMF Agreement and any transaction contemplated by it.
- 2.7. The singular includes the plural in this IMF Agreement and vice versa.
- 2.8. All references to clauses, sub-clauses and paragraphs are references to clauses, sub-clauses and paragraphs in this IMF Agreement.
- 2.9. A reference in this IMF Agreement to any legislation or legislative provision includes any statutory modification, amendment or re-enactment of that legislation or legislative provision, and includes any subordinate legislation or regulations issued under that legislation or legislative provision.

3. Cooling Off Period

- 3.1. The Applicant may, by written notice given to IMF at the address referred to in sub-clause 23.6 within 7 days after signing this IMF Agreement, withdraw from this IMF Agreement. Such withdrawal will cause this IMF Agreement to terminate but will not be treated as a Termination. Time is of the essence.
- 3.2. If the Applicant withdraws in accordance with sub-clause 3.1, the Applicant shall have no continuing or further obligation to IMF save for any obligations of confidence arising in respect of information received by the Applicant prior to the withdrawal. Nothing in sub-clause 3.1 shall derogate from any obligations in relation to Privilege attaching to any information received by the Applicant or IMF prior to the withdrawal.

4. Project Investigation

- 4.1. The Applicant acknowledges that by virtue of the terms of this IMF Agreement, IMF has an interest in the outcome of the Pre-Proceedings Steps and the Proceedings and hereby agrees to IMF, at IMF’s discretion:
 - 4.1.1. Investigating the evidentiary basis for the Claims and the Other Claims (documentary and oral);

- 4.1.2. collating material documents relating to the Claims and the Other Claims;
- 4.1.3. investigating the capacity of any Respondent to pay any judgment, award or order which may be made against that Respondent relating to the Claims and the Other Claims;
- 4.1.4. Investigating the interest of any Respondent to resolve the Claims and the Other Claims by any Alternative Dispute Resolution Process;
- 4.1.5. investigating any other matter that IMF determines is relevant to the Claims, the Other Claims, the Pre-Proceedings Steps, the Proceedings or its obligations under this IMF Agreement; and.
- 4.1.6. designing and implementing any Alternative Dispute Resolution Process for the resolution of the Claims and the Other Claims, other than through legal proceedings.
- 4.2. The Applicant will provide, or procure the provision of, all information, documents and assistance as IMF may reasonably request for the Project Investigation (including all documents relating to the supply of goods and/or services by the Applicant to Retail Adventures which are the basis of the Claims) on the basis that the information and documentation is confidential in accordance with sub-clause 14.3, provided for the purpose of resolving the Claims, remains the exclusive property of the Applicant and will be returned by IMF at the conclusion of the Project.
- 4.3. Notwithstanding sub-clause 4.2 the Applicant agrees that any information or documents provided to IMF may be used by IMF in the Project Investigation and may be disclosed by IMF for the purposes of the Pre-Proceedings Steps and the Proceedings.
- 4.4. The Applicant hereby authorises IMF to seek and obtain any information and documentation which IMF believes may be relevant to the Claims from any person or entity.
- 4.5. The Applicant consents to IMF providing a copy of this IMF Agreement to third parties who request evidence of the authority granted to IMF pursuant to sub-clause 4.4.
- 4.6. IMF may, in its absolute discretion, communicate with the Applicant from time to time about the progress and results of the Project Investigation.
- 4.7. Without derogating from anything else in this clause 4, IMF may use the Investigation Product:
 - 4.7.1 to assist IMF in the preparation or prosecution of any proceedings to which this IMF Agreement or Other Funding Agreements apply;
 - 4.7.2 to monitor its actual and potential obligations under this IMF Agreement and Other Funding Agreements;
 - 4.7.3 to review whether it provides or continues to provide funding in respect of the Claims and the Other Claims or some of the Claims or the Other Claims and the Project;
 - 4.7.4 to obtain legal or financial advice, or financial services, in connection with or in support of its performance of this IMF Agreement and Other Funding Agreements; and
 - 4.7.5 in any Alternative Dispute Resolution Process.
- 4.8. IMF may retain and use the Investigation Product as set out in sub-clause 4.7 notwithstanding any Termination or withdrawal by the Applicant pursuant to sub-clause 3.1.
- 4.9. IMF may, in its absolute discretion, provide the Lawyers with some or all of the Investigation Product.
- 5. Proceedings**
- 5.1. The Applicant agrees that:
 - 5.1.1 in the event IMF decides to fund a Class Action, the Representative will determine, in consultation with the Lawyers and IMF, what Claims and Other Claims will be pursued in the Class Action;

- 5.1.2 subject to clause 13, IMF will give day-to-day instructions to the Lawyers on all matters concerning the Claims and the Other Claims in the Pre-Proceedings Steps and the Proceedings and may give binding instructions to the Lawyers and make binding decisions on behalf of the Applicant and the Other Funded Persons in relation to the Claims and the Other Claims; and
- 5.1.3 the Lawyers may determine the amount of the Claims and the Other Claims and the Applicant's Share of the amounts referred to in paragraphs 12.1.1, 12.1.2, 12.1.3 and 9.1.4.
- 5.2 Nothing in sub-clause 5.1 will be taken to fetter or qualify in any way IMF's rights to terminate this IMF Agreement under clause 19.
- 6. The Applicant's Obligations**
- 6.1. For the duration of this IMF Agreement, the Applicant must:
- 6.1.1 subject to this IMF Agreement, follow all reasonable legal advice given by the Lawyers and by counsel retained by the Lawyers in relation to the Pre-Proceedings Steps, the Proceedings and the Claims and in the case of conflicting advice, will follow the advice of the most senior counsel retained;
- 6.1.2 promptly provide full, frank and honest instructions to the Lawyers and counsel and provide the Lawyers with all documents in the Applicant's possession, custody or power that are relevant to the Claims, the Pre-Proceedings Steps or the Proceedings;
- 6.1.3 provide a signed, written witness statement to the Lawyers on their request for use in the Pre-Proceedings Steps and/or the Proceedings, attend the Court to give evidence in person if required by the Lawyers to do so and actively participate in any Alternative Dispute Resolution Process;
- 6.1.4 diligently prosecute the Pre-Proceedings steps and the Proceedings and any appeals and do all things necessary to enable the Lawyers to ensure that the Pre-Proceedings Steps and the Proceedings and any appeals are conducted consistently with the Overarching Purpose;
- 6.1.5 comply with all orders of the Court and all statutory provisions, regulations, rules and directions which apply to the Applicant in relation to the Claims, the Other Claims, the Pre-Proceedings Steps and the Proceedings;
- 6.1.6 provide IMF and the Lawyers with full contact details, including an email address, and immediately inform the Lawyers and IMF of any change in contact details;
- 6.1.7 immediately inform the Lawyers and IMF of any information, circumstance or change in circumstances likely to affect the Claims, any issue in any Pre-Proceedings Steps or Proceedings or the recoverability of any Resolution Sum;
- 6.1.8 promptly take all appropriate actions, at IMF's expense and with IMF's written agreement, to tax or assess any costs claimed by the Respondent in an Adverse Costs Order; and
- 6.1.9 take all appropriate action to diligently enforce any judgment obtained in the Proceedings against the Respondents.
- 6.2. For the duration of this IMF Agreement, the Applicant must not, without the prior written consent of IMF:
- 6.2.1 commence the Pre-Proceedings Steps and the Proceedings (if they have not been commenced prior to the Date of Commencement);
- 6.2.2 discontinue, abandon, withdraw or Settle the Pre-Proceedings Steps or the Proceedings or the Claims against any Respondent or make any admission in relation to the Claims or the Other Claims;
- 6.2.3 reject any Settlement offer made by any Respondent;

- 6.2.4 reject any offer made by any Respondent to engage in any form of Alternative Dispute Resolution Process; and
 - 6.2.5 terminate the retainer of the Lawyers or retain any other solicitors in place of the Lawyers.
- 6.3. For the duration of this IMF Agreement, the Applicant instructs the Lawyers to:
- 6.3.1 subject to sub-clauses 13.3 and 13.4, comply with all instructions given by IMF;
 - 6.3.2 comply with all orders of the Court and all statutory provisions, regulations, rules and directions which apply to the Applicant in relation to the Claims, the Other Claims and the Pre-Proceedings steps and the Proceedings;
 - 6.3.3 conduct the Pre-Proceedings Steps and the Proceedings efficiently and effectively, within the Project Estimates and Time Line and in accordance with the Overarching Purpose;
 - 6.3.4 keep IMF fully informed of all material developments in the Pre-Proceedings Steps and the Proceedings and in relation to the Claims, including immediately informing IMF if, in the Lawyers' opinion, any Funded Person's prospects of achieving success in the Pre-Proceedings steps or the Proceedings or any Respondent's capacity to pay any judgment is or is likely to be impaired;
 - 6.3.5 provide IMF with a copy of all advice given by the Lawyers or counsel to the Applicant in relation to the Pre-Proceedings Steps and the Proceedings and the Claims and, if requested to do so by IMF, a copy of all documents obtained from, or provided to, any Respondent in the Pre-Proceedings Steps and the Proceedings;
 - 6.3.6 immediately inform IMF of all Settlement offers or offers to engage in an Alternative Dispute Resolution Process received from any Respondent and allow IMF the opportunity to attend any Alternative Dispute Resolution Process agreed with any Respondent;
 - 6.3.7 immediately inform IMF of any application for security for costs made by any Respondent;
 - 6.3.8 immediately inform IMF of any Adverse Costs Order or of any circumstances which might reasonably give rise to an Adverse Costs Order;
 - 6.3.9 obtain, at IMF's expense and with IMF's written agreement, a taxation or assessment of any Respondent's costs comprising any Adverse Costs Order and provide a copy of all documents relating to the taxation or assessment to IMF; and
 - 6.3.10 provide full assistance and co-operation to IMF in relation to opposing, taxing, assessing or resolving any application for security for costs or any Adverse Costs Order.
- 6.4. The Applicant agrees to keep and preserve any documents relating to the Respondents, the Pre-Proceedings Steps, the Proceedings and/or the Claims and/or the Other Claims that the Applicant has in his, her or its possession, custody or control and the Applicant:
- 6.4.1 will provide to the Lawyers all information and documents relevant to the Pre-Proceedings Steps and the Proceedings, the Claims and the Other Claims if and when so requested by the Lawyers;
 - 6.4.2 authorises the Lawyers, without waiving privilege, to provide the information and documents referred to in paragraph 6.4.1 to IMF; and
 - 6.4.3 if ordered to do so by a Court in any the Pre-Proceedings Steps and Proceedings relating to the Claims, authorise the Lawyers to provide the information and documents to any Respondent and to any third party the subject of a Court order.

- 6.5. The Applicant's and the Lawyers' obligations under sub-clauses 6.1 to 6.4 inclusive do not extend to any Proceedings or Alternative Dispute Resolution Process that relate solely to proceedings being conducted by a Liquidator under a Liquidator's Funding Agreement.
- 6.6. The Applicant:
- 6.6.1 will immediately notify IMF if the Applicant is requested or required to disclose any information relating to the negotiation, existence, terms or performance of this IMF Agreement and if so requested by IMF will take such steps as may reasonably be available to prevent disclosure of such parts of the information as IMF may nominate;
- 6.6.2 will not disclose to any person, other than to its legal and financial advisors for the purpose of obtaining confidential legal or financial advice, or to IMF, any information:
- 6.6.2.1 to which Privilege or obligations of confidence attach; or
- 6.6.2.2 which is or may be protected from disclosure by reason that disclosure would or may provide any Respondent with a strategic or tactical advantage in any of the Pre-Proceedings Steps or the Proceedings;
- unless the disclosure is in accordance with advice from the Lawyers and is necessary for the purposes of the prosecution of those Pre-Proceedings Steps and Proceedings.
- 6.7. The obligations in sub-clause 6.6 are continuing obligations and survive the Termination of this IMF Agreement.
- 6.8. The Applicant will not, during the period of this IMF Agreement, have any communication with any Respondent, or any officer, employee or agent of any Respondent relating to the Claims and/or the Other Claims, or relating to any Settlement of the Claims and/or the Other Claims, other than through the Lawyers or upon their reasonable advice.

7. Project Management

- 7.1. IMF will provide the following management services in respect of the Project:
- 7.1.1 liaising with the Applicant, Other Funded Persons and other persons with claims or potential claims against the Respondents;
- 7.1.2 advising the Applicant and Other Funded Persons on strategy;
- 7.1.3 seeking compliance with the Project Estimates and Time Line;
- 7.1.4 considering the advice of the Lawyers and providing day-to-day instructions to the Lawyers subject to clause 13;
- 7.1.5 database and document management;
- 7.1.6 facilitating periodic meetings between Project participants and reporting to the Applicant and Other Funded Persons in respect of progress;
- 7.1.7 facilitating any Alternative Dispute Resolution Process; and
- 7.1.8 carrying out IMF's other obligations, duties and functions under this IMF Agreement and the Other Funding Agreements.
- 7.2. IMF may cause its investigators to carry out further or other investigations during the course of the Project.
- 7.3. Subject to sub-clauses 7.4 to 7.7 the Applicant hereby appoints Hugh McLernon and Paul Rainford of IMF ("the IMF Appointees"), and the IMF Appointees hereby accept such appointment, jointly and severally, as:

7.3.1 if the Applicant is an individual, his or her attorneys; or

7.3.2 if the Applicant is a body corporate, its representatives pursuant to section 250D of the Corporations Act;

in each case to do all or any of the acts and/or exercise all or any of the powers referred to in sub-clause 7.4.

7.4 The IMF Appointees are authorised in their absolute discretion, to do all or any of the following:

7.4.1 prepare, complete, sign and lodge any claim and any formal proofs of debt or claim on the Applicant's behalf in respect of the Claims and any matters incidental to the Claims with any External Controller appointed by or to any Respondent or in respect of any property, assets or liabilities of any Respondent;

7.4.2 attend, speak and vote on behalf of the Applicant at any and all meetings of creditors of any Respondent in relation to any matter then before the meeting; and

7.4.3 generally exercise any of the rights and powers of the Applicant in respect of the matters referred to paragraphs 7.4.1 and 7.4.2;

and the Applicant acknowledges and agrees that in so doing IMF may benefit, directly or indirectly, in a manner that is contemplated by this IMF Agreement.

7.5 The appointment in sub-clause 7.3 is a standing appointment that ceases upon termination of this IMF Agreement.

7.6 The Applicant undertakes, if requested by IMF, to ratify and confirm in writing the validity of any act or exercise of power by the IMF Appointees done in good faith purportedly pursuant to sub-clauses 7.3 to 7.5.

7.7 Nothing in sub-clauses 7.3 to 7.6 authorises or permits the IMF Appointees to do any act or exercise any power in a manner or with an effect which is contrary to or inconsistent with the terms of this IMF Agreement.

8. Project Costs

8.1 IMF will pay the Project Costs on the terms of this IMF Agreement. However, IMF is not obliged to pay any Project Costs that relate to any step referred to in (c), (d) (g) and (h) of the definition of Pre-Proceeding Steps unless the Lawyers' advice is that that step has good prospects of success.

8.2 IMF will not seek reimbursement from the Applicant or Other Funded Persons of any internal overheads incurred as part of the Project Costs, other than through the Project Management Fee.

8.3 On the request of the Lawyers, IMF will, after the expiry of the period referred to in sub-clause 3.1, sign a Deed Poll in the form set out in Schedule 3 and deliver a copy of it to each Respondent and to the Court.

8.4 If any Respondent makes any payment by way of costs during the course of any Pre-Proceedings Steps or any Proceedings then the payment will be paid into the Trust Account on trust for IMF and may be utilized by IMF in paying or reimbursing any Project Costs. The Lawyers will pay such monies in accordance with this IMF Agreement as directed by IMF from time to time.

8.5 IMF will pay any Adverse Costs Order. If there is any Resolution Sum or other monies in the Trust Account at the time an Adverse Costs Order is payable then those monies will first be employed to pay the Adverse Costs Order and IMF will pay any balance outstanding after such payment. The Lawyers will pay those monies from the Trust Account as directed by IMF.

8.6 If the Court orders any Funded Person to provide any security for the costs of any Respondent even though IMF has provided the Deed Poll, then IMF will provide the security for costs in the Pre-Proceedings Steps and/or the Proceedings, in such other form that IMF determines and the Respondents or the Court accept, relating to costs incurred during by a Respondent the term of this IMF Agreement.

- 8.7 IMF's obligations in sub-clauses 8.1 to 8.6 under this IMF Agreement do not arise before the expiry of the 7 day period referred to in sub-clause 3.1. However, if this IMF Agreement is not terminated by operation of sub-clause 3.1, IMF's obligations in sub-clauses 8.1 to 8.6 will have effect from the Date of Commencement.
- 9. Receipt of the Resolution Sum**
- 9.1 The Applicant and IMF agree that the Lawyers will (and are hereby directed to):
- 9.1.1 receive any Resolution Sum;
 - 9.1.2 immediately pay any Resolution Sum into a trust account to be kept for that purpose;
 - 9.1.3 maintain separate records for each Resolution Sum arising from the Pre-Proceedings Steps and/or the Proceedings; and
 - 9.1.4 forthwith pay out of the Trust Account all payments referred to in sub-clauses 8.4, 8.5, and 12.1 upon cleared funds becoming available.
- 9.2 The Applicant consents to the Resolution Sum being combined in the Trust Account with the resolution sums under Other Funding Agreements.
- 9.3 The Lawyers will hold that part of the Resolution Sum assigned or otherwise due to IMF under this IMF Agreement on trust for IMF and the balance on trust for the Applicant with the former to be dispensed in accordance with paragraph 9.1.4 and the latter to be dispensed in accordance with the Applicant's directions.
- 9.4 The Applicant acknowledges that:
- 9.4.1 the conduct of the Pre-Proceedings Steps and the Proceedings will or may encourage some or all of the Respondents to seek to compromise the Claims, and/or the Other Claims and will or may encourage a higher payment to be made to the Applicant under any DOCA; and
 - 9.4.2 the Pre-Proceedings Steps and the Proceedings may have the effect set out in paragraph 9.4.1 notwithstanding that the Applicant may have terminated this IMF Agreement and terminated his, her or its involvement in those proceedings.
- 9.5 If, in spite of sub-clause 9.1, the Applicant directly or indirectly receives all or any part of the Resolution Sum or if any part of the Resolution Sum is not money, then the Applicant will pay it and/or the reasonable market value of any non-monetary component of the Resolution Sum to the Lawyers to be paid into the Trust Account and dealt with on the terms of this IMF Agreement. If there is a dispute about the monetary value of any non-monetary component, then the dispute shall be conclusively resolved in accordance with the opinion of the most senior counsel retained by the Lawyers in the Proceedings or, if no counsel has been retained, the opinion of Lawyers.
- 9.6 The obligation in sub-clause 9.5 is a continuing obligation and survives any Termination of this IMF Agreement other than a Termination pursuant to sub-clause 20.1.
- 10. Payment of the Resolution Sum by the Lawyers**
- 10.1 Subject to any Court order, if a lump sum amount is received in Settlement of the Claims and/or the Other Claims or as an ex gratia payment, then after deducting all amounts required to be paid by this IMF Agreement and the Other Funding Agreements and any amounts required to be paid by the Standard Lawyers Terms and any retainer agreement entered into between the Lawyers and the Applicant and/or any Other Funded Persons, the balance will be distributed to the Applicant and Other Funded Persons (whose Other Claims are the subject of the Settlement or payment) on a pro rata basis by reference to the value of the Claims and the Other Claims the subject of the Settlement or payment, such value to be determined in each case by the Lawyers in their absolute discretion.
- 10.2 The obligations in relation to payments out of the Trust Account imposed by sub-clauses 8.4 and 8.5 and clauses 9 and 12 are to be met prior to the payment from the Resolution Sum of any

other expenses, obligations or entitlements of the Applicant or the Lawyers, including any other fees or costs.

- 10.3. If all or any part of the Resolution Sum is not money the Applicant will, as soon as the part or all of it is received, pay to the Lawyers for deposit in the Trust Account an amount equal to the reasonable market value of the non-monetary component of the Resolution Sum so received.

11. Appeals

- 11.1. If there is a final judgment in the Pre-Proceedings Steps or the Proceedings which is not in favour of the Applicant and IMF wishes an appeal to be lodged, then the Applicant will cause the Lawyers to lodge and prosecute the appeal in the name of the Applicant. The Applicant and the Lawyers will take all reasonable steps to expeditiously prosecute the appeal. IMF will pay the legal costs and disbursements in connection with the appeal and will pay any Adverse Costs Order if the appeal is unsuccessful.
- 11.2. If there is a final judgment in the Pre-Proceedings Steps or the Proceedings in favour of the Applicant and the Respondent appeals, then IMF may elect to fund the legal costs and disbursements of the Applicant's defence of the appeal. If IMF so elects, the Applicant will cause the Lawyers to defend the appeal in the name of the Applicant. The Applicant and the Lawyers will take all reasonable steps to expeditiously prosecute the defence of the appeal. IMF will pay any Adverse Costs Order if the appeal is lost by the Applicant.
- 11.3. If IMF funds an appeal pursuant to sub-clauses 11.1 or 11.2 then an additional 5% will be added to the percentages referred to in paragraph 12.1.4 in respect of each appeal so funded and "Proceedings" will be read as including each appeal.

12. IMF's Entitlements

- 12.1. Upon Resolution the Applicant will pay, and hereby directs the Lawyers to pay to IMF from the Resolution Sum in accordance with clauses 9 and 10:
- 12.1.1 an amount equal to the Applicant's Share of the Project Costs (reduced by an amount equal to the sum of any Input Tax Credits received by IMF on Acquisitions made in incurring the Project Costs, including pursuant to sub-clause 12.4) paid by IMF in relation to the Claims and/or the Other Claims the subject of the Pre-Proceedings Steps, the Proceedings or Settlement to which the Resolution Sum relates;
- 12.1.2 an amount equal to the Applicant's Share of the Project Management Fee;
- 12.1.3 an additional amount, on account of GST, being the amount obtained by multiplying the prevailing rate of GST (currently 10%) by an amount equal to the Consideration to be received by IMF for any Taxable Supply made to the Applicant by IMF under or in connection with this IMF Agreement (apart from any Consideration to be provided pursuant to this paragraph 12.1.3; and
- 12.1.4 an amount, as Consideration for IMF's agreement to finance the Claims, the Pre-Proceedings Steps and the Proceedings, being:
- (a) 0% of the Resolution Sum if sub-clause 12.5 applies;
- (b) 20% of the Resolution Sum if the Applicant is unable to sue under section 588M of the Corporations Act by virtue of the Corporations Act and there is a recovery by the Liquidator under section 588M (which forms the basis for a distribution to the Applicant and thereby becomes part of the Resolution Sum under this IMF Agreement), but is not the result of any funding by IMF of the Liquidator;
- (c) in all other cases 20% of the Resolution Sum if Resolution occurs on or before 8 months of the Date of Commencement, 30% of the Resolution Sum if Resolution occurs after 8 months but on or before 18 months from the Date of Commencement and 35% of the Resolution Sum if Resolution occurs after 18 months from the Date of Commencement (in each case increased in accordance with sub-clause 11.3 if it applies).

- 12.2. Subject to sub-clause 12.4, no fees, commissions or other payments will become due or owing by the Applicant to IMF unless and until Resolution and then will not exceed the Resolution Sum.
- 12.3. The Applicant assigns to IMF, as Consideration for the funding of the Claims, the Pre-Proceedings Steps and the Proceedings, that part of the Resolution Sum equal to:
- 12.3.1 the amount referred to in paragraph 12.1.4; and
- 12.3.2 the total of the amounts referred to in paragraphs 12.1.1 to 12.1.3 inclusive, but where the total is greater than the remaining amount of the Resolution Sum after the assignment referred to in paragraph 12.3.1 has been deducted, then limited to the remaining amount.
- 12.4. The Applicant will, at IMF's request, pay to IMF any Input Tax Credit to which the Applicant is entitled under the GST Act in respect of the incurrence of the Project Costs. If IMF makes a request, any such amount is payable at the earliest time the Applicant can claim the benefit of the Input Tax Credit from the Commissioner of Taxation. If upon Resolution there is any Input Tax Credit not paid to IMF, that is payable or would be payable if IMF had made a request under this clause, then IMF will be entitled to receive payment under sub-clause 12.1 of the GST (paid by IMF) to which that Input Tax Credit relates or would relate.
- 12.5. In the event that:
- (a) IMF enters into a Liquidator's Funding Agreement in addition to this IMF Agreement; and
- (b) as a result of the Liquidator's claims funded under the Liquidator's Funding Agreement and the operation of the Corporations Act, the Applicant cannot pursue any of the Claims; and
- (c) IMF is entitled to payments in respect of any Resolution Sum under this IMF Agreement and any resolution sum under the Liquidator's Funding Agreement,
- then IMF agrees that it shall be entitled to receive payments pursuant to the Liquidator's Funding Agreement and paragraphs 12.1.1 to 12.1.3 inclusive, but not paragraph 12.1.4, of this IMF Agreement.
- 13. The Lawyers' Retainer and Settlement**
- 13.1. The Applicant acknowledges and accepts that the Lawyers have entered, or will enter, into an agreement with IMF in the same or similar terms to the Standard Lawyers Terms.
- 13.2. The Applicant agrees that if there is any inconsistency between the terms of any retainer agreement between the Applicant and the Lawyers and this IMF Agreement or the Standard Lawyers Terms, the terms of this IMF Agreement or the Standard Lawyers Terms, as applicable, will prevail. This sub-clause does not apply to any Proceedings commenced by a Liquidator pursuant to a Liquidator's Funding Agreement.
- 13.3. Subject to the terms of any Liquidator's Funding Agreement, IMF will give day-to-day instructions to the Lawyers on all matters concerning the Claims, the Other Claims, the Pre-Proceeding Steps and the Proceedings, however the Applicant may override any instruction given by IMF in relation to the Claims by the Applicant giving instructions to the Lawyers.
- 13.4. Except in relation to Settlement, which is dealt with below, if the Lawyers notify IMF and the Applicant that the Lawyers believe that circumstances have arisen such that they may be in a position of conflict with respect to any obligations they owe to IMF and those they owe to the Applicant or any Liquidator under a Liquidator's Funding Agreement, the Applicant and IMF agree that, in order to resolve that conflict, the Lawyers may:
- 13.4.1 seek instructions from the Applicant or Liquidator (as the case may be), whose instructions will override those that may be given by IMF;
- 13.4.2 give advice to the Applicant or Liquidator and take instructions from the Applicant or Liquidator, even though that advice is, and instructions are, or may be, contrary to IMF's interests; and

- 13.4.3 refrain from giving IMF advice and from acting on IMF's instructions, where that advice is, or those instructions are, or may be, contrary to the Applicant's or the Liquidator's interests.
- 13.5. Nothing in sub-clauses 13.3 or 13.4 entitles the Applicant to breach, or authorises the breach, of any terms of this IMF Agreement.
- 13.6. The Applicant acknowledges that he, she or it will be bound by an order of the Court made in any Class Action in which the Applicant is a Representative or is represented approving the Settlement of that Class Action (unless the Applicant has opted out of the Class Action).
- 13.7. In recognition of the fact that IMF has an interest in the Resolution Sum, if the Representative or the Application (as the case may be):
- 13.7.1 wants to Settle the Class Action, for less than IMF considers appropriate; or
- 13.7.2 does not want to Settle the Class Action, when IMF considers it appropriate to do so;
- then the Applicant agrees that IMF and the Representative must seek to resolve their difference of opinion by referring it to counsel for advice on whether, in counsel's opinion, Settlement of the Class Action on the terms and in the circumstances identified by either IMF or the Representative or both, is reasonable in all of the circumstances.
- 13.8. In the first instance counsel will be the most senior counsel of those retained by the Lawyers, in respect of the Class Action concerned. If no counsel has been retained then the Lawyers in consultation with the Representative and IMF, will appoint senior counsel for that purpose. If IMF and the Representative are unable to agree on the selection of a senior counsel then the senior counsel will be appointed by the President of the New South Wales Bar Association for that purpose.
- 13.9. Counsel may proceed as he or she sees fit to inform himself or herself before forming and delivering his or her opinion. If Counsel's opinion is that the Settlement is reasonable then the Applicant and IMF agree that the Lawyers are hereby instructed to do all that is necessary to Settle the Class Action, provided that the approval of the Court to the Settlement is sought and obtained.
- 13.10. IMF will pay the costs of counsel in providing the opinion referred to in sub-clause 13.9 as part of the Project Costs.
- 13.11. Subject to clause 13.12, the procedure set out in sub-clauses 13.7 to 13.10 will also apply where the Applicant:
- 13.11.1 wants to Settle any Claim not yet the subject of Pre-Proceedings Steps or Proceedings for less than IMF considers appropriate; or
- 13.11.2 does not want to Settle any Claim not yet the subject of Pre-Proceedings Steps or Proceedings when IMF considers it appropriate to do so.
- 13.12. Where there is a proposed Settlement of any Claims to which sub-clause 13.11 applies, which also involves the Settlement of Other Claims, the Applicant agrees to be bound by that proposed Settlement, and the Lawyers are authorised and instructed to settle the Claims as part of that proposed Settlement, provided more than 50% by value of Funded Persons whose claims are the subject of that proposed Settlement vote in favour of it and advice is received from either counsel retained by the Lawyers, or by the Lawyers themselves, that the proposed Settlement is reasonable in all of the circumstances. The Lawyers will determine the value of each claim for the purposes of this sub-clause. This sub-clause does not apply to any Proceedings commenced by a Liquidator pursuant to a Liquidator's Funding Agreement.
- 13.13. IMF may at its discretion require that the Lawyers submit any one or more of their invoices forming part of the Project Costs to taxation or assessment. If required to do so by IMF, the Applicant will take all steps necessary to achieve the commencement, processing and conclusion of that taxation or assessment. Any costs of taxation or assessment will be paid by IMF as part of the Project Costs.

13.14. IMF and the Applicant agree that, should any conflict arise as between the interests of IMF and the interests of the Applicant, then the Lawyers may continue to provide the Legal Work to the Applicant and IMF will raise no objection to them doing so.

14. Confidentiality and Provision of Documents

14.1. In providing to IMF any documents or information about the Claims, the Other Claims and the Proceedings, the Applicant does not intend to waive any Privilege that may attach to such documents or information.

14.2. Unless specifically prohibited by the terms of a court order or other professional obligation, the Lawyers will provide to IMF a copy of any document obtained in the Proceedings by way of discovery, subpoena or any other coercive power of the Court, subject to IMF's, and its officers' and employees', implied undertaking given to the Court.

14.3. IMF and the Applicant agree that all information, communications and documents provided to or acquired, exchanged or generated by or between either of them or the Lawyers in relation to the Project ("the Project Information") are provided, acquired, exchanged or generated in circumstances where the Applicant is contemplating or conducting litigation against the Respondents. As a result, IMF and the Applicant acknowledge that:

14.3.1 all the Project Information is confidential;

14.3.2 the Project Information may be subject to a claim of legal privilege by the Applicant; and

14.3.3 the communications are "confidential communications" and the documents are "confidential documents" within the meaning of Part 3.10 of the Evidence Act 1995 (*Cth*);

unless any part of the Project Information is already in the public domain through no breach of this IMF Agreement.

14.4. IMF and the Applicant agree to maintain the confidentiality of, and any legal privilege attaching to, the Project Information that is not in the public domain unless the disclosure of any part of that Project Information is:

14.4.1 agreed to be made by the Applicant and IMF; or

14.4.2 authorised by this IMF Agreement; or

14.4.3 subject to sub-clause 14.5, otherwise required by law.

14.5. Unless agreed under paragraph 14.4.1 or authorised under paragraph 14.4.2, the Applicant agrees that the Applicant will not authorise the disclosure of any Project Information as contemplated by section 275(7)(c) of the PPSA.

15. No Charge or Other Encumbrance

15.1. The Applicant warrants that, as at the Date of Commencement there is no Security Interest, charge, lien or other encumbrance or right in, over or otherwise attaching to the Resolution Sum or the Claims nor is there any creditor holding security over property of the Applicant other than as has been disclosed to IMF in writing.

15.2. The Applicant will not dispose of or cause, permit or assert any Security Interest, charge, lien or other encumbrance or right in, over or otherwise attaching to the Claims or the Resolution Sum after the Date of Commencement, except with the prior written consent of IMF which consent may be withheld by IMF in its absolute discretion.

15.3. The Applicant must not, without the prior written consent of IMF, consent to any arrangement or enter into any agreement which permits any person or entity to register a Security Interest, under the PPSA or otherwise, in or over the Resolution Sum which could have priority over the rights IMF has in the Resolution Sum under this IMF Agreement.

16. Disclosure of Information

- 16.1. The Applicant warrants that, to the best of the Applicant's knowledge, at the Date of Commencement there is no information in the custody, possession or control of the Applicant materially relevant to the Claims or the outcome of any Pre Proceedings Steps or Proceedings or the potential for any judgment sum to be recovered in respect of the Claims, which has not been disclosed to IMF.
- 16.2. If, after the Date of Commencement of this IMF Agreement, the Applicant becomes aware of any information which has or may have a material impact on the Claims, the Pre-Proceedings Steps, the Proceedings or the potential for any judgment sum to be recovered, the Applicant will immediately inform IMF of that information.
- 16.3. If the Applicant is a trustee of a trust then the Applicant warrants that:
- 16.3.1 the Applicant has power to enter into this IMF Agreement and, in particular, to make the assignments referred to in sub-clause 12.3; and
- 16.3.2 the Applicant is entitled, as trustee, to an indemnity from the trust fund sufficient to make the payments referred in clause 12.
- 17. Miscellaneous**
- 17.1. The Applicant and IMF will not do or permit to be done, save as provided in this IMF Agreement, any thing likely to deprive any party of the benefit for which the party entered into this IMF Agreement.
- 17.2. The Applicant will use his, her or its best endeavours to cause any Resolution Sum to be received or recovered as quickly as possible, particularly after any Settlement or judgment in respect of the Claims.
- 17.3. If this IMF Agreement or any part thereof is annulled, avoided or held to be unenforceable the Applicant will forthwith do everything necessary, including without limitation executing any further or other agreement or instrument, to ensure that IMF receives any remuneration, entitlement or other benefit to which this IMF Agreement refers or is contemplated by this IMF Agreement. The Applicant irrevocably agrees that production of a copy of this IMF Agreement shall be conclusive evidence of the Applicant's undertaking as set out in this clause.
- 17.4. The Applicant will not seek any order from any court which may detrimentally affect IMF's rights under this IMF Agreement other than with the consent of IMF and other than as arises out of any serious breach by IMF of its obligations under this IMF Agreement.
- 17.5. If the Applicant acts in breach of this IMF Agreement, clauses 9, 10 and 12 will continue to apply to any consideration received by the Applicant in respect of the Claims.
- 17.6. The Applicant and IMF will keep the contents of this IMF Agreement confidential in so far as it concerns the terms of the relationship between the Applicant and IMF, except where disclosure to the Australian Securities Exchange, a Court or IMF's auditors or insurers is required or disclosure is, in IMF's absolute discretion, made by IMF to any Respondent or its agents.
- 17.7. The Applicant acknowledges and accepts that:
- 17.7.1 IMF has either entered into or will enter into Other Funding Agreements and that the Applicant and all Other Funded Persons are responsible to each meet their share of the Project Costs payable to IMF on Resolution out of any Resolution Sum;
- 17.7.2 IMF may have funded and may fund other claims and proceedings against the Respondents which are unrelated to the Claims;
- 17.7.3 IMF may fund Proceedings under a Liquidator's Funding Agreement; and
- 17.7.4 if any Respondent or any of a Respondent's property, assets or liabilities come under the control of an External Controller, IMF may fund claims of the Respondent and the External Controller for consideration additional to that IMF may receive from Funded Persons.

- 17.8. The Applicant accepts that it is possible that if the Proceedings are conducted as a Class Action there may be members of the class who have not entered into a funding agreement with IMF.
- 17.9. Termination of this Agreement will not affect IMF's right to do anything authorised or contemplated by any Other Funding Agreement.
- 17.10. The Applicant may not assign this IMF Agreement or the Applicant's rights under it without IMF's written consent.

18. Duration of this Agreement

- 18.1. Subject to clauses 3 and 5.1, 19 and 20, this IMF Agreement commences on the Date of Commencement and continues in operation until:
- 18.1.1 all Proceedings, and any appeals funded by IMF, have concluded; and
- 18.1.2 IMF has complied with all of its obligations under to this IMF Agreement and the Other Funding Agreements,
- and the Resolution Sum (if any) under this IMF Agreement and the resolution sums under the Other Funding Agreements and/or any Liquidator's Funding Agreement (if any) have all been disbursed in accordance with all of those agreements.

19. Termination by IMF

- 19.1. IMF is entitled, in its sole discretion, to terminate its obligations under this IMF Agreement, other than its accrued obligations, by giving 21 days' written notice to the Applicant that this IMF Agreement and IMF's obligations under it are terminated.
- 19.2. If IMF terminates this IMF Agreement pursuant to sub-clause 19.1 then the property referred to in paragraph 12.3.1 will, on the termination taking effect, be reassigned to the Applicant and IMF will not be entitled to any amount pursuant to paragraph 12.1.4 but IMF will continue to be entitled to receive amounts pursuant to paragraphs 12.1.1 to 12.1.3 inclusive and paragraph 12.3.2. The Applicant must notify IMF upon receipt by the Applicant of any Resolution Sum.
- 19.3. All obligations of IMF under this IMF Agreement cease on the date IMF's termination under sub-clause 19.1 becomes effective, save for obligations accrued to that date, and IMF shall account to the Applicant for any money held by IMF on behalf of the Applicant which is payable to the Applicant pursuant to the terms of this IMF Agreement.
- 19.4. The accrued obligations of IMF referred to in sub-clauses 19.1 and 19.3 comprise payment of any outstanding Project Costs incurred up to the date the notice of termination takes effect.

20. Termination by the Applicant and Termination of the Standard Lawyers Terms

- 20.1. If IMF commits a serious breach of this IMF Agreement and does not remedy the breach within 30 days after receiving written notice from the Applicant, the Applicant may terminate this IMF Agreement forthwith by written notice to IMF.
- 20.2. If this IMF Agreement is terminated by the Applicant pursuant to sub-clause 20.1 then:
- 20.2.1 IMF remains liable for the obligations referred to in sub-clause 19.4; and
- 20.2.2 the Applicant will not be required to make any payment to IMF under clause 12 and the property referred to in paragraphs 12.3.1 and 12.3.2 will, on the termination taking effect, be reassigned to the Applicant.
- 20.3. If the Proceedings are conducted as a Class Action and the Applicant exercises a right to opt out of the Proceedings, then upon the exercise of that right this IMF Agreement will terminate. If there is a Resolution of the Claims at that time (of the termination) or at any later time, clauses 9, 10 and 12 will continue to apply and the Applicant will be liable to pay to IMF, from any Resolution Sum, the amounts set out in clause 12. The obligations in this clause are continuing obligations and survive any Termination of this IMF Agreement.

- 20.4. If the Standard Lawyers Terms are terminated pursuant to terms 8.1 or 8.2 of the Standard Lawyers Terms, IMF will inform the Applicant as to whether IMF and the Representative have agreed to other solicitors becoming the Lawyers in the place of the Lawyers.
- 20.5. If sub-clause 20.4 applies and IMF informs the Applicant that IMF and the Representative have agreed to other solicitors becoming the Lawyers in the place of the Lawyers, provided those solicitors agree with IMF to terms the same as or substantially the same as the Standard Lawyers Terms, those solicitors will become the Lawyers for the purposes of this IMF Agreement in place of the existing Lawyers.
- 20.6. Replacement of any of the Lawyers under sub-clause 20.5:
- 20.6.1 will not result in a Termination of this IMF Agreement; and
- 20.6.2 will not result in the replacement solicitors assuming any obligations of the Lawyers accrued to the date the appointment of the Lawyers is terminated.
- 20.7. If sub-clause 20.4 applies and IMF informs the Applicant that it is not proposed to replace the Lawyers, then this IMF Agreement will terminate as at the date of such notice. If this occurs then:
- 20.7.1 IMF remains liable for the obligations referred to in sub-clause 19.4; and
- 20.7.2 clauses 9, 10 and 12 will continue to apply except that where the termination occurs before the Proceedings have resolved the Applicant will only be liable to account to IMF, from any Resolution Sum, for the amounts set out in paragraphs 12.1.1 to 12.1.3 inclusive and paragraph 12.3.2 and the property referred to in paragraph 12.3.1 will, on the termination taking effect, be reassigned to the Applicant.

21. Governing Law

- 21.1. This IMF Agreement is entered into in New South Wales and is to be construed in accordance with and governed by the laws of New South Wales.
- 21.2. Subject to clause 22, the parties submit to the exclusive jurisdiction of the Supreme Court of New South Wales or the Federal Court of Australia, as relevant.

22. Dispute Resolution

- 22.1. Any dispute, controversy or claim in relation to or arising out of this IMF Agreement, including any question about its existence, validity, meaning, performance or termination or the rights, duties and liabilities of any party to it ("Dispute") must be resolved in accordance with this clause 22.
- 22.2. If any party wishes to raise a Dispute then that party must promptly give a written notice of the Dispute to the other party ("Notice"). The Notice must briefly identify the Dispute, the main arguments of the party giving the notice, an assessment of the monetary value of the Dispute and the remedy sought by that party.
- 22.3. In the case of a Dispute raised by the Applicant, the Notice under sub-clause 22.2 must be given to IMF within 21 days of the first occurrence of the event, circumstance, act, omission, fact, matter or thing which gave rise to the Dispute.
- 22.4. The parties agree to meet to discuss, and endeavour in good faith to resolve, the Dispute within 28 days of the Notice being received.
- 22.5. The parties may agree, within the time period referred to in sub-clause 22.4, to submit the Dispute to mediation and, if they do, the mediation will be:
- 22.5.1 held in Sydney, New South Wales, Australia;
- 22.5.2 administered by the Australian Centre for International Commercial Arbitration ("ACICA"); and

- 22.5.3 conducted in accordance with the ACICA Mediation Rules.
- 22.6. The parties shall have 5 days from the date of agreeing to submit the Dispute to mediation within which to agree on the name of the mediator, failing which the mediator will be appointed by ACICA.
- 22.7. The parties will agree a timetable with the mediator, which is not to exceed 6 weeks from the date of appointment of the mediator, within which to hold the mediation and seek to resolve the Dispute.
- 22.8. The parties agree that any information, documents or communications, including any information, documents or communications from, to or by any third parties created, exchanged or used in relation to any discussions or mediation under this clause 22 ("**Dispute Resolution Process**"), and the facts of the Dispute and of the Dispute Resolution Process, shall be confidential to the parties, their legal advisers, and any mediator (as applicable) and shall not be disclosed without the prior agreement of all of the relevant parties unless:
- 22.8.1 disclosure is required by law; or
- 22.8.2 disclosure is for the purpose of either party applying to a court to enforce any award or settlement agreement or, without waiving any party's rights under this clause 22, to seek any order reasonably required to facilitate the Dispute Resolution Process or to protect the party's rights on an interim basis pending the outcome of the Dispute Resolution Process; or
- 22.8.3 the information, documents, communications and facts are otherwise in the public domain through no breach of this IMF Agreement.
- 22.9. If the Dispute is not resolved within 28 days of the Notice being received (or, if the parties have agreed in writing to mediate, within 70 days of the Notice being received), then either party may issue a notice referring the Dispute to arbitration. In any arbitration under this clause:
- 22.9.1 the arbitration will be conducted in accordance with the ACICA Arbitration Rules, which Rules are deemed to be incorporated into this IMF Agreement except where this IMF Agreement expressly provides otherwise;
- 22.9.2 the arbitration will be final and binding;
- 22.9.3 there shall be three arbitrators unless otherwise agreed;
- 22.9.4 the language of the arbitration shall be English;
- 22.9.5 the seat of the arbitration shall be Sydney, New South Wales, Australia and all arbitration hearings shall occur there;
- 22.9.6 the proper law of the arbitration agreement embodied in this clause 22 shall be the governing law of this IMF Agreement as specified in sub-clause 21.1;
- 22.9.7 the arbitration shall be administered by ACICA;
- 22.9.8 Sections 23C, 23D, 23E, 23F, 23G and 24 of the *International Arbitration Act 1974* (Cth) will apply to any international arbitration held under this clause 22 which is subject to that Act; and
- 22.9.9 Sections 27E, 27F, 27G, 27H, 27I and 34A of the *Commercial Arbitration Act 2010* (NSW) will apply to any domestic arbitration held under this clause 22 which is subject to that Act.
- 22.10. In the case of a Dispute raised by the Applicant, if the Applicant fails to comply with:
- 22.10.1 sub-clause 22.3;

22.10.2 the time limit for referring the Dispute to arbitration under sub-clause 22.9; or

22.10.3 an order by the Arbitral Tribunal under rule 42 of the ACICA Arbitration Rules for each party to pay a deposit as an advance for the costs of the arbitration, then, to the extent permitted by law.

22.10.4 IMF will not be liable upon any claim by the Applicant; and

22.10.5 the Applicant will be absolutely barred from making any claim against IMF;

arising out of or in any way in connection with the event, circumstance, act, omission, fact, matter or thing (as the case may be) in respect of which the Dispute arose. Any dispute in relation to or arising out of sub-clauses 22.10 and 22.11 must also be determined in accordance with this clause 22.

22.11. Nothing in sub-clauses 22.1 to 22.10 inclusive affects any right the Applicant may have, if the Applicant is a "retail client" as defined in the Corporations Act, to lodge a complaint (in relation to any Dispute) with the Financial Ombudsman Service ("FOS").

22.12. Unless and until this IMF Agreement is validly terminated under clauses 19 or 20, each party shall continue to perform its obligations under this IMF Agreement notwithstanding the existence of the Dispute and without prejudice to any adjustment to each party's rights, duties and liabilities as may be required on the resolution of the Dispute.

22.13. Sub-clauses 22.1 to 22.12 inclusive survive the Termination of this IMF Agreement.

23. NOTICES AND COMMUNICATIONS

23.1. All notices given under this IMF Agreement must be in writing and have to be served personally, by post, by facsimile or by email.

23.2. The parties agree that the most efficient way for them to communicate with each other is by email and that, wherever possible, written communications between them will be by email.

23.3. IMF will, at the Date of Commencement and subsequently if necessary, provide the Applicant with the email address of the IMF Investment Manager responsible for managing the Project. All notices and other communications the Applicant needs to serve on or have with IMF may be communicated to this email address or, if any email to that address is unsuccessful, to the email address specified in sub-clause 23.6.

23.4. The Applicant will, at the Date of Commencement, provide IMF with an email address for the Applicant and will, consistently with paragraph 6.1.6, immediately notify IMF of any change to that email address.

23.5. The parties agree that, for the duration of this IMF Agreement, they will take all reasonable steps to ensure that their respective email addresses remain fully operational, allow unimpeded access to each party's inbox for the emails of the other party, and are checked daily.

23.6. The address for service of IMF is:

Level 10
39 Martin Place
Sydney NSW 2000
Email: djones@imf.com.au
Facsimile: (02) 8223 3555.

The address for service of the Applicant is as set out on page 1 of this IMF Agreement or as subsequently notified to IMF by the Applicant.

23.7. Notices shall be deemed to be received on the day after they are posted and on the day they are transmitted by facsimile or email (unless the sender receives notification that the transmission was unsuccessful). If either Party receives notification that an email or facsimile transmission to the other Party's notified address was unsuccessful, the Party must make all reasonable efforts to contact the other Party by telephone or mail. Neither Party shall be responsible to the other for

any loss or damage of any nature arising out of any failure to notify or communicate with the other Party if the Party attempting to make the notification or communication has fully complied with all of the provisions to clause 23.

24. Acknowledgement

By executing this IMF Agreement the Applicant acknowledges that IMF recommended to the Applicant that the Applicant first obtain legal advice as to its meaning and effect.

25. Personal Property Securities Law

25.1. In this clause:

- (a) 'Collateral' means that part of the Resolution Sum referred to in sub-clause 12.3; and
- (b) 'Amendment Demand' has the meaning given that term in the PPSA.

25.2. A Security Interest in the Resolution Sum arises pursuant to sub-clause 12.3 in favour of IMF on the Date of Commencement. The effect of the assignment of a part of the Resolution Sum to IMF in accordance with sub-clause 12.3 is that the Collateral is, from the Date of Commencement, owned by IMF.

25.3. The Applicant must do anything (such as obtaining consents, signing and producing documents, producing receipts, getting documents completed and signed and supplying information) which IMF reasonably requests and considers necessary:

- (a) to provide more effective security over the Collateral;
- (b) to ensure that the Security Interest in favour of IMF is enforceable, perfected and otherwise effective; and
- (c) to enable IMF to apply for any registration, or give any notification, in connection with the Security Interest in the Collateral in favour of IMF so that the Security Interest has the priority IMF is entitled to have under this IMF Agreement.

25.4. The Applicant acknowledges that IMF may apply for registration under the PPSA in relation to IMF's Security Interest in the Resolution Sum specifying in the registration the class of collateral IMF thinks appropriate and the Applicant will raise no objection to IMF doing so. Any costs incurred by IMF in seeking to comply with or utilise the PPSA are part of the Project Costs.

25.5. The Applicant agrees not to make any Amendment Demand under the PPSA for so long as IMF has any Security Interest in any Resolution Sum under this IMF Agreement.

25.6. To the extent that the law permits, the Applicant agrees that:

- (a) IMF need not comply with any provisions of the PPSA that section 115 of the PPSA permits the parties to contract out of in relation to the Collateral;
- (b) the Applicant may not exercise any rights under sections 142 and 143 of the PPSA; and
- (c) IMF need not give the Applicant any notice required by the PPSA (including a notice of verification statement).

SCHEDULE 1

IMF (AUSTRALIA) LTD
ABN: 45 067 298 088
FSL 26
www.imf.com.au

IMF (AUSTRALIA) LTD

STANDARD LAWYERS TERMS

This agreement is made the [] day of [] 2013

Between: **Colin Biggers and Palsley** of Level 42, 2 Park Street, Sydney, New South Wales, 2000 ("the Lawyers")

And: **IMF (Australia) Ltd** (ABN 45 067 298 088) of Level 6 37 St George's Terrace, Perth, Western Australia 6000 ("IMF")

RECITALS

- A. IMF has entered into or proposes to enter into the IMF Agreements.
- B. The IMF Agreements are all in the same, or substantially the same, terms.
- C. The Lawyers are aware of the terms of the IMF Agreements and have agreed to act consistently with, and in accordance with, their terms and these Standard Lawyers Terms.

1. DEFINITIONS

1.1. In these Terms, unless the contrary intention appears:

"**Claims**" means the claims each Funded Person has or may have against some or all of the Respondents for loss and damage caused by the conduct of one or more of the Respondents.

"**Funded Persons**" means all persons who have entered into or do enter into a Retail Adventures Investigation, Management and Funding Agreement with IMF with respect to their Claims and "**Funded Person**" means a person who has entered into or does enter into a Retail Adventures Investigation, Management and Funding Agreement with IMF with respect to his, her or its Claims.

"**IMF Agreements**" means all Retail Adventures Investigation, Management and Funding Agreements with IMF.

"**Terms**" means this agreement and "**Term**" means a clause of this agreement.

1.2. Unless the contrary intention appears or unless specifically defined above, the definitions of words in the IMF Agreements will apply to define the meaning of words used in these Terms.

2. THE IMF AGREEMENTS

2.1. The Lawyers will:

- (a) act consistently with the terms of the IMF Agreements; and
- (b) do all things which the IMF Agreements contemplate the Lawyers will do.

- 2.2. The Lawyers agree that if there is any inconsistency between the IMF Agreements and/or these Terms and the terms of any retainer between the Lawyers and any Funded Person, the IMF Agreements and/or these Terms shall prevail as appropriate.

3. COMMENCEMENT OF THE PROJECT

- 3.1 The Lawyers will inform IMF in writing of:
- (a) the names of the lawyers who it is proposed will provide the Legal Work to be performed by the Lawyers, for the purposes of Term 5.2;
 - (b) the hourly rates of those lawyers (inclusive of GST), for the purposes of Term 5.1;
 - (c) the Lawyers' estimate of fees and disbursements to prosecute the Claims and the Other Claims in the Proceedings (separately identifying the estimated fees of the Lawyers, the barristers and the experts if any, by reference to each event in the Project Estimate and Time Line).

4. REPORTING

- 4.1 The Lawyers will keep IMF fully informed of all matters concerning the Claims, the Other Claims and the Proceedings, including any mediation and settlement discussions. The Lawyers will ensure that IMF is given all necessary information and advice in order to facilitate informed instructions and to enable IMF to provide the Project Management.
- 4.2 Without limiting Term 4.1 if, after the date of these Terms, the Lawyers becomes aware of any information which has or may have a material impact on the Claims, the Other Claims, the Proceedings, or the potential for any judgment sum to be recovered, the Lawyers will immediately inform IMF of that information.
- 4.3 Unless otherwise agreed in writing, the Lawyers will provide a quarterly report at the end of March, June, September and December to any Representative and to IMF which:
- (a) identifies any change to the previous quarterly report and any significant developments;
 - (b) reviews the issues relevant to liability and quantum; and
 - (c) provides advice in respect of any proposed changes to the Claims' and the Other Claims' percentage chance of success and any changes to the Project Estimate and Time Line dates and costs.

5. COSTS AND DISBURSEMENTS

- 5.1 The Lawyers will charge for the Legal Work provided by reference to the time reasonably and properly spent at the hourly rates notified to IMF pursuant to Term 3.1, subject to an annual revision in those rates which is acceptable to IMF, the Representative and the Lawyers. Detailed time records must be kept to facilitate time details being provided in accordance with Term 6 of these Terms.
- 5.2 No fee will be charged by the Lawyers for any fee earners, other than those notified to IMF pursuant to Term 3.1(a), without the prior written consent of IMF. IMF will not be liable to pay the fees of any barristers or experts other than those notified to IMF pursuant to Term 3.1 or those briefed with IMF's written consent. IMF will not unreasonably refuse to provide its written consent.

5.3 The Lawyers will only seek reimbursement from IMF for expenditure reasonably incurred by the Lawyers in progressing the Proceedings being:

- (a) photocopying and scanning at the rates detailed in the current IMF/LitSupport Price List.

If TGB choose not to utilise LitSupport for these services, they will ensure that:

- (i) all photocopying and scanning services are provided at prices commensurate with LitSupport pricing; and
 - (ii) the basis for their pricing policy is identified on their accounts.
- (b) mobile, local, STD and ISD telephone calls and facsimiles at cost; and
 - (c) other reasonable expenditure supported by invoices.

6. INVOICES

6.1 The Lawyers will render monthly invoices to IMF, with a copy to any Representative, by the 20th day of each month, accompanied by:

- (a) the details contemplated by Term 6.5 of these Terms;
- (b) a summary of the time details by their total cost (in a single dollar figure) allocation to each relevant event in the proceedings; and
- (c) invoices from barristers, experts (both also being allocated to each event as in Term 6.1(b)) and for any other significant disbursements (\$500 or above).

6.2 The monetary details in the monthly invoices will include a charge for the time detailed at the hourly rates notified to IMF pursuant to Term 3 including any GST.

6.3 IMF will pay:

- (a) the reasonable legal fees of the Lawyers incurred during the term of the IMF Agreements for the sole purpose of prosecuting and resolving the Proceedings; and
- (b) the reasonable disbursements incurred during the term of the IMF Agreements for the sole purpose of prosecuting and resolving the Proceedings;

in so far as those costs and disbursements form part of the Project Costs.

6.4 Provided invoices from the Lawyers comply with these Terms, IMF will pay them within 30 days from the end of the month in which the Lawyer's invoice is received by IMF.

6.5 The time details for fees of the Lawyers must be on a separate document to each invoice and must include, for each time entry:

- (a) the date upon which the time was spent;
- (b) which solicitor or paralegal who spent the time; and
- (c) the time spent in six minute units.

6.6 IMF may at its discretion require that the Lawyers submit any one or more of their invoices to taxation.

6.7 The Lawyers will not seek to recover any of their fees and disbursements from any Funded Person.

7.

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8. TERMINATION OF THE TERMS

8.1 The Lawyers may terminate these Terms on 7 days' written notice to IMF in the following circumstances:

- (a) if IMF fails to pay any costs in accordance with these Terms after IMF has been given 30 days written notice to do so; or
- (b) If the Lawyers terminate all retainers between the Lawyers and Funded Persons relating to the Proceedings in accordance with their right to do so.

8.2 IMF may terminate these Terms:

- (a) by agreement with the Lawyers;
- (b) upon 7 days written notice to the Lawyers in the event of professional misconduct or negligence by the Lawyers that has or is reasonably likely to cause material loss to a Funded Person or to IMF.

8.3 If these Terms are terminated pursuant to either Term 8.1 or 8.2, the Lawyers remain liable for all obligations under these Terms accrued by them to the date of termination of their appointment, but thereafter all obligations and entitlements of the Lawyers cease except:

- (a) the obligations to do those things set out in clauses 9 and 10 of the IMF Agreements, where the Lawyers are not replaced by other solicitors to provide the Legal Work;
- (b) those entitlements under Term 6 (in respect of Legal Work up to the date of termination) unless the termination of the Lawyers is under Term 8.2(b); and
- (c) the Lawyers shall continue to maintain any legal professional privilege attaching to, and the confidentiality of, all confidential communications or confidential documents referred to in clause 14.3 of the IMF Agreements.

8.4 If the Lawyer's appointment to provide Legal Work to a Funded Person is terminated pursuant to Term 8.2(b) the Lawyers shall be entitled only to payment under Term 6 (in respect of Legal Work up to the date of termination) of these Terms subject to a deduction of the amount of the loss caused by the Lawyer's professional misconduct or negligence.

8.5 These Terms will terminate when all of the IMF Agreements are terminated, such termination to take effect upon the last date on which the last IMF Agreement is terminated. If there is a termination pursuant to this Term each party will remain liable for its obligations accrued to the date of termination. Nothing in these Terms shall affect or limit IMF's rights to terminate all or any of the IMF Agreements.

9. PRIORITIES, LIEN AND INSURANCE

9.1 The Lawyers agree not to seek payment of any amounts outstanding to them in excess of that for which IMF is liable under these Terms and the IMF Agreements.

- 9.2 The Lawyers are not entitled to claim a lien in respect of documents in their possession relevant to the Proceedings if there are no fees payable pursuant to Term 6.3.
- 9.3 The Lawyers will maintain professional indemnity insurance of at least \$10 million for the duration of these Terms plus three years.
- 9.4 The Lawyers will provide evidence of the insurance to IMF on IMF's request from time to time.

10. ADDRESS FOR SERVICE

- 10.1 IMF's address for service will be as set out in the IMF Agreements.
- 10.2 The Lawyer's address for service will be that address identified above (in identifying the parties to these Terms), or otherwise notified to IMF in writing if that address changes.

11. VARIATION

- 11.1 These Terms may only be varied in writing signed by the Lawyers and IMF.

SIGNED by Colin Biggers and Paisley

.....
Name	Name
Date	Date

SIGNED by IMF (Australia) Ltd

.....
Hugh McLernon	Diane Jones
Managing Director	Secretary
Date	Date

SCHEDULE 2

SCHEDULE 2

RATES AND CONTACT DETAILS - LAWYERS / BARRISTERS MEDICAL VISION
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NAME OF LAWYER	TITLE	EMAIL ADDRESS	TELEPHONE NO.	HOURLY RATE

NAME OF BARRISTER	TITLE	EMAIL ADDRESS	TELEPHONE NO.	HOURLY RATE	DAILY RATE

PROJECT ESTIMATE					
Event	Solicitor's Fees (incl GST)	Jnr Barrister's Fees (incl GST)	Snr Barrister's Fees (incl GST)	Expert Fees (incl GST)	TOTAL (incl GST)
Post Funding / Pre-Drafting Claim					\$ -
Draft Claim & Filing					\$ -
Particulars, Defence & Closing Pleadings					\$ -
Discovery					\$ -
Statements					\$ -
Subpoena					\$ -
Mediation					\$ -
Preparation for Hearing					\$ -
Hearing					\$ -
Multi-Party Function					\$ -
Interlocutory Applications					\$ -
Miscellaneous					\$ -
	\$ -	LAWYERS FEES FOR THE TRIAL (INCL. GST) PAYABLE BY IMF			\$ -
TOTALS:	\$ -	\$ -	\$ -	\$ -	\$ -

SCHEDULE 3

DEED POLL

<u>PARTY</u>	NAME	IMF (AUSTRALIA) LTD ("IMF")
	ACN	067 298 088
	ADDRESS	LEVEL 6, 37 ST GEORGE'S TERRACE, PERTH WA 6000
	TELEPHONE	08 9225 2300
	ATTENTION	HUGH McLERNON
	E-MAIL	hmclernon@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 201 .

Executed as a Deed Poll
By IMF (Australia) Ltd

Director

Director (Secretary)