

3/1998

ENFORCEABLE UNDERTAKING

AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION

SECTION 93 AA

The commitments in this undertaking are offered to the Australian Securities & Investments Commission ("ASIC") by:

**Wayne John Molloy ("Molloy")
1/74 The Esplanade,
Terrigal
NSW 2260**

1. BACKGROUND

- 1.1 Molloy was at all relevant times as described in this Undertaking a director of :
- (a) Software on Demand Australia Pty Ltd ("SODA");
 - (b) Ten Star Entertainment Pty Ltd ("Ten Star");
 - (c) Demaca Pty Ltd ("Demaca");
 - (d) Molloy International Trading Pty Ltd ("MIT") (until 12 November 1996)
- 1.2 SODA was placed into liquidation on 10 April 1997. It was in the business of distributing pre-recorded video tapes to retail outlets.
- 1.3 Ten Star was deregistered on 24 June 1993. It was in the business of video tape sales.
- 1.4 Demaca was deregistered on 7 July 1995. It was in the business of video tape sales.
- 1.5 MIT is currently trading as a wholesaler of sunglasses. Molloy resigned as director on 12 November 1996. His wife Michelle Anne Molloy is the only current director.

Conduct of Molloy in relation to SODA

- 1.6 On 11 February 1997 SODA entered into an Agreement for Sale of Business ("Agreement") with Excel Pty Ltd ("Excel") for the consideration of \$28,321.38. The Agreement included payment of consideration of \$1 for the right to use 'Software on Demand' as a business name. Some \$17,236.00 of the sale proceeds was used to pay a debt that SODA owed to Film and Tape Sales Pty Ltd ("Film and Tape"). That company had a lien over master video tapes owned by MIT. The payment of the debt in question, in preference to others, was made to facilitate the release of the said master tapes to the new owners, Excel.

- 1.7 On 11 April 1997 Excel deposited an amount of \$12,482.00 into the National Australia Bank account of MIT. This money represented a payment of \$8,802.00 for SODA stock purchased by Excel pursuant to the Agreement.
- 1.8 Molloy failed to take relevant steps to cause SODA to notify the National Australia Bank ("NAB"), which had a fixed & floating charge over the assets of SODA, of the Agreement.
- 1.9 Molloy failed to notify the liquidator of SODA that an amount of \$8,802.00 had been paid for the sale of SODA stock to MIT, a day after the liquidator's appointment.
- 1.10 SODA failed to lodge annual returns for 1995 and 1996 as required by Section 335 of the Corporations Law. Molloy failed to take relevant steps to prevent SODA from breaching Section 335.
- 1.11 Molloy failed to satisfy a penalty notice issued to him, as director of SODA at his residential address dated 31 July 1996 in accordance with Section 1313 of the Corporations Law, for failure to lodge with ASIC an annual return for the calendar year 1995.
- 1.12 On 31 January 1997 in accordance with Section 572 of the Corporations Law, ASIC sent a warning letter stating that it had reason to believe that SODA was no longer carrying on business. The notice requested SODA to show cause to the contrary or the company's registration would be cancelled. SODA failed to reply to the warning letter.
- 1.13 SODA failed to reply a further warning letter from ASIC dated 10 April 1997 advising that SODA's registration would be cancelled and that it would be dissolved at the end of three months from the date of the notice unless cause was shown to the contrary.
- 1.14 Molloy failed to notify ASIC of changes in his personal details relevant to his office with SODA as required by Section 242(8) of the Corporations Law.
- 1.15 SODA failed to keep a cash book, general ledger or worksheet, financial accounts, and bank statements. Molloy failed to take relevant steps to cause SODA to keep such books & records.

Conduct of Molloy in relation to Ten Star

- 1.16 Ten Star failed to lodge Annual Returns for 1990 and 1991 as required by Section 335 of the Corporations Law. Molloy failed to take relevant steps to prevent Ten Star from breaching Section 335.
- 1.17 Ten Star failed to satisfy a penalty notice issued on 17 December 1991 in accordance with Section 1313 of the Corporations Law for failure to lodge with ASIC an annual return for the calendar year 1990. Molloy failed to take relevant steps to cause Ten Star to satisfy the notice issued under Section 1313.

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- 1.18 On 27 November 1992 in accordance with Section 572 of the Corporations Law, ASIC sent a warning letter stating that it had reason to believe that Ten Star was no longer carrying on business. The notice requested Ten Star to show cause to the contrary or the company's registration would be cancelled. Ten Star failed to reply to the warning letter.
- 1.19. Ten Star failed to reply to a further letter issued by ASIC to Ten Star dated 12 February 1993 in accordance with Section 572 of the Corporations Law advising that the company's registration would be cancelled and that it would be dissolved within three months unless cause was shown to the contrary.
- 1.20. On 24 June 1993 ASIC deregistered Ten Star as a result of its failure to show cause that it should not continue to be registered.

Conduct of Molloy in relation to Demaca

- 1.21 Demaca failed to lodge Annual Returns from 1990 to 1994 inclusive, as required by Section 335 of the Corporations Law. Molloy failed to take relevant steps to prevent Demaca from breaching Section 335.
- 1.22 ASIC sent a warning letter to Demaca at its registered office dated 12 September 1991 for failure to lodge with ASIC an annual return for 1990. The letter advised that failure to lodge the annual return within one month of the warning letter would render the company liable to a penalty notice.
- 1.23 Demaca failed to satisfy a penalty notice issued to it on 27 November 1991 in accordance with Section 1313 of the Corporations Law for failure to lodge with ASIC an annual return for the 1990 calendar year. Molloy failed to take relevant steps to prevent Demaca from breaching Section 1313.
- 1.24 Molloy failed to reply to a further warning letter issued to him at his residential address dated 12 March 1992 advising him the 1990 annual return for Demaca was overdue and failure to lodge the return within one month may result in legal proceedings being commenced.
- 1.25 Molloy failed to reply a warning letter issued to him at his residential address dated 29 September 1994 advising of Demaca's failure to lodge its annual return for 1993. The letter warned that failure to lodge the return may result in legal proceedings and lead to the deregistration of the company. The letter issued to also advised that information available to ASIC indicated that either no secretary was acting for Demaca or the secretary's address provided to ASIC was no longer current. The company was required under Section 242(7) of the Corporations Law to lodge the relevant form to either appoint a secretary or notify the current address of the secretary. The company was notified that failure to comply with the notice may result in court action being taken under Section 232, s240 or s1274 of the Corporations Law.

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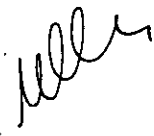
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- 1.26 On 29 December 1994 in accordance with Section 572 of the Corporations Law, ASIC sent a warning letter stating that it had reason to believe that Demaca was no longer carrying on business. The notice requested Demaca to show cause to the contrary or the company's registration would be cancelled. Demaca failed to reply to the warning letter.
- 1.27 Demaca failed to reply to a further letter issued to Demaca on 16 March 1995 by ASIC advising the company that failing a reply showing cause to the contrary the company would be deregistered at the end of three months. Molloy failed to take relevant steps to cause Demaca to reply to ASIC's letter.

Investigation

- 1.28 ASIC has conducted an investigation into the conduct of the directors of SODA and MIT relating to the proceeds of the sale of assets of those companies to Excel (Australia) Pty Ltd prior to the liquidation of the first mentioned company.
- 1.29 ASIC has also conducted an investigation into Ten Star and Demaca.
- 1.30 In relation to SODA Molloy was a relevant person for the purposes of Sections 230(1)(b) and 230(1)(c) of the Corporations Law at all relevant times.
- 1.31 In relation to Ten Star Molloy was a relevant person for the purposes of Section 230(1)(c) of the Corporations Law at all relevant times.
- 1.32 In relation to Demaca Molloy was a relevant person for the purposes of Section 230(1)(c) of the Corporations Law at all relevant times.
- 1.33 SODA, Ten Star and Demaca failed to lodge the annual returns for the relevant periods as described in this Undertaking. This failure amounts to an offence under Sections 335 and 1311 of the Corporations Law. Molloy being a 'relevant person' in relation to these companies failed to take reasonable steps to ensure lodgement of such annual returns.
- 1.34 SODA experienced difficulty in meeting its debts throughout 1996. As well the company was at risk of not being able to import videos through MIT because the NAB were refusing to extend funds beyond the agreed overdraft limit to enable SODA to finance MIT for the importation of videos.
- 1.35 When SODA was placed into liquidation on 10 April 1997 the petitioning creditor was Genesis Art Pty Ltd along with NAB and some 12 unsecured creditors. The total deficiency was estimated at \$558,027.27.
- 1.36 ASIC has formed the view that SODA was insolvent at the time it entered into the Agreement and that the transaction was an 'insolvent transaction' which had the effect of defeating the claims of creditors pursuant to Section 588FC of the Corporations Law.

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- 1.37 ASIC has formed the view that the payment of the debt to Film and Tape Sales, at a time when SODA was insolvent, was an unfair preference as defined by Section 588FA of the Corporations Law.
- 1.38 At all times Molloy has admitted that he was the 'driving force' behind the sale of the business assets of SODA to Excel. It is the view of ASIC that Molloy, by his actions, has breached Section 232(6) of the Corporations Law in that he made improper use of his position as an officer of SODA to gain an advantage for himself and for MIT.
- 1.39 ASIC is also of the view that Molloy's failure to disclose that \$8,802.00 had been paid for the sale of SODA stock to MIT on the day following the liquidator's appointment, is a breach of Section 590(1)(a) of the Corporations Law.
- 1.40 Following ASIC's investigation into the affairs of SODA, it has formed the view that Molloy, in failing to cause SODA to keep proper books and records during the period 2 years immediately prior to its liquidation, has contravened Section 591 of the Law. ASIC has also formed the view that Molloy has breached Section 242(8) of the Corporations Law.

2. UNDERTAKINGS

- 2.1 Pursuant to Section 93AA of the Australian Securities and Investments Commission Act ("ASIC Act") Molloy undertakes;
- (a) that he will not in any way (whether directly or indirectly) be concerned in the management of a corporation and/or take part in the management of a corporation and/or promoting a corporation for a period of 3 years, commencing 11 August 1998;
 - (b) that he will not apply to ASIC to be a director of any corporation for a period of 3 years commencing 11 August 1998;
 - (c) that he will not apply to ASIC to be a company secretary of any corporation for a period of 3 years commencing 11 August 1998;
 - (d) that prior to commencing the management of a corporation or making any application to ASIC to be a director or secretary of a corporation, he will provide certification to ASIC that he has satisfactorily completed a corporate management training course which has been pre-approved by ASIC as being a suitable course.

3. ACKNOWLEDGMENTS

- 3.1 Molloy acknowledges that ASIC:
- (a) may issue a media release on execution of this Undertaking referring to its terms and the concerns of ASIC which led to its execution;


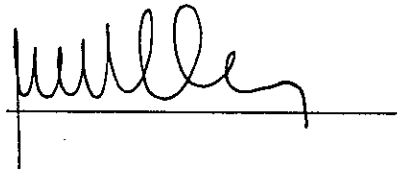
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- (b) may from time to time publicly refer to this Undertaking; and
- (c) will make this Undertaking available for public inspection.

- 3.2 Molloy acknowledges that this undertaking in no way derogates from the rights and remedies available to any other person arising from any conduct described in this Undertaking.
- 3.3 Molloy acknowledges that this Undertaking has no operative force until accepted by ASIC.
- 3.4 If a clause of this Undertaking is invalid or unenforceable, then that clause to the extent of the invalidity or unenforceability must be ignored in the interpretation of this Undertaking. All the other clauses of this Undertaking remain in full force and effect.

Signed by Wayne John Molloy)
in the presence of:)


Signature

PEZZY HUME
Name (printed)

ASIC 135 KING ST SYDNEY
Address

**ACCEPTED BY THE AUSTRALIAN SECURITIES & INVESTMENTS
COMMISSION PURSUANT TO ASIC ACT S93AA BY ITS DULY
AUTHORISED DELEGATE:**



Rose Webb
General Counsel

This 11th day of August 1998.