



**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION ACT 1989**  
**Undertaking to the Australian Securities and Investments Commission**  
**given for the purpose of section 93AA by**  
**D & D Tolhurst Ltd (ACN 004 456 053)**

**1. BACKGROUND**

- 1.1 D&D Tolhurst Ltd ACN 004 456 053 ("Tolhurst") is the holder of Security Dealers Licence number 12551 (the "Licence") under the Corporations Law ("the CL").
- 1.2 In 2000 Tolhurst reported to the Australian Securities and Investments Commission ("ASIC") trading irregularities, possible fraudulent activities and lack of compliance with the CL and the Australian Stock Exchange Limited ("ASX") Business Rules ("the ASX Business Rules"), by two former proper authority holders employed by Tolhurst in its Perth office.
- 1.3 Following Tolhurst's report to ASIC in 2000, ASIC commenced investigations into the actions of Tolhurst's two former proper authority holders ("the Investigations"). Arising from the Investigations ASIC also conducted a surveillance on the operations of Tolhurst's Perth office ("the Surveillance").
- 1.4 At all times Tolhurst co-operated and assisted ASIC during the Investigations and the Surveillance. Tolhurst fully and frankly disclosed its practices and procedures to ASIC.
- 1.5 The Investigations found that conduct by the two former proper authority holders indicated that accounts could be opened for clients and trading undertaken on those accounts without the knowledge or authority of those clients. Procedures were not in place to ensure client authority in order to establish an account with Tolhurst.
- 1.6 The Investigations found that former proper holders opened and operated accounts in which they held an interest. These interests were not disclosed to Tolhurst. Procedures for the opening and audit of these accounts enabled the accounts to be operated without knowledge by Tolhurst of the authority holder's interest.
- 1.7 During the course of the Investigations and the Surveillance, procedures at Tolhurst in respect of the receipt and payment of money on client accounts were found to be deficient. Procedures did not ensure proper client authority for either the deposit or withdrawal of moneys from client accounts.
- 1.8 Tolhurst has informed ASIC that a range of procedures relating to compliance, training, account opening procedures, record-keeping and supervision are ineffective.

- 1.9 As a result of the Investigations and the Surveillance, ASIC considers that the compliance and supervisory procedures in place are inadequate to ensure compliance with the CL, the Corporations Regulations ("the Regulations"), the ASIC Act 1989 (C'th) ("the ASIC Law"), the Licence Conditions and the ASX Business Rules (together, "the Legal Requirements") with regard to its proper authority holders, designated trading representatives and other staff.
- 1.10 As a result of the Investigations, ASIC considers that Tolhurst's initial and ongoing training procedures currently in place are inadequate to ensure that its proper authority holders, designated trading representatives and other staff are adequately trained with respect to their obligations and those of Tolhurst arising under the Legal Requirements.
- 1.11 While Tolhurst does not agree with all aspects of ASIC's concerns as set out in this enforceable undertaking, it acknowledges them and has on its own initiative agreed to establish a number of compliance measures (including the specific requirements set out below) in order to ensure best practice in complying with the Legal Requirements.
- 1.12 Tolhurst has informed ASIC that it has reviewed and initiated action to address ASIC's concerns arising from the Investigations and referred to in this enforceable undertaking.
- 1.13 Pursuant to CL section 786, ASIC may, at any time, subject to a hearing, impose conditions and restrictions on a security dealer's licence in addition to those prescribed by the CL and may take appropriate action under Division 2, Part 2 of the ASIC Law.
- 1.14 Compliance by Tolhurst of the terms and conditions contained in this enforceable undertaking is intended by the parties to be an alternative to the action referred to in clause 1.13 above.

## 2. UNDERTAKINGS

- 2.1 (a) Tolhurst will, by 19 February 2001, engage an external independent compliance consultant ("the Compliance Consultant"), to review, assess, make recommendations and report in writing ("the Consultant's Report") on the changes that are required to be made to Tolhurst's compliance systems, supervision systems, administrative procedures and training programs in order to:
- (i) prevent and eliminate, and, if necessary, remedy, breaches or likely breaches of the Legal Requirements by its proper authority holders, designated trading representatives and other staff; and
  - (ii) promote a culture of compliance within Tolhurst.

- (b) The Compliance Consultant's appointment and terms of reference must be approved by ASIC prior to any appointment being made.
- (c) Tolhurst will ensure that the Consultant's Report is given to ASIC no later than 30 April 2001.

2.2 The compliance assessment will include, but not be limited to, the identification and recommendations for further changes with respect to compliance to ensure a level of full compliance with the requirements of the CL, the Regulations, the ASIC Law, the Conditions and the ASX Business Rules, including, but not limited to, such matters as:

- a) structure, status, autonomy, independence and reporting lines of the compliance function;
- b) supervisory procedures to ensure that representatives obtain relevant personal information from clients to form a reasonable basis on which to make recommendations;
- c) supervisory procedures to ensure that, should representatives not obtain relevant personal information from clients, clear warnings are given and documented about the limitation of representatives to give personal securities advice and the clients' obligations to form their own opinion as to the suitability of any investment;
- d) supervisory procedure to ensure disclosures of relevant interests;
- e) supervisory procedures for opening new client accounts, including verification of identity;
- f) supervisory procedures to ensure that staff trading complies with the CL, the Regulations, the ASIC Law, the Conditions, the ASX Business Rules and Tolhurst's internal policies;
- g) supervisory procedures with respect to the activities of all designated trading representatives;
- h) record-keeping;
- i) operational procedures to ensure the segregation of back and front office functions; and
- j) internal and external complaints resolution procedures; and initial and on-going training of representatives relating to their obligations with respect to the CL, the Regulations, the ASIC Law, the Conditions, the ASX Business Rules and Tolhurst's internal policies; assessment of representatives' understanding of that training; and remedial training in the event that a representative is found to have breached an obligation.

2.3 The Compliance Consultant's terms of reference must also include a determination as to whether Tolhurst's compliance systems meet with Australian Standard AS 3806-1998 "Compliance programs" and, if not, whether any differences are justifiable and should be maintained.

- 2.4 By 29 June 2001, Tolhurst will develop and provide to ASIC an action plan ("the Action Plan") setting out the steps Tolhurst will follow in order to:
- a) remedy any deficiencies identified in the Consultant's Report; and
  - b) give effect to any recommendations made in the Consultant's Report.
- 2.5 Tolhurst will commence implementation of the Action Plan no later than 29 June 2001 with the objective of completing all actions as soon as reasonably practicable but in any event no later than 28 December 2001 ("the Completion Date"). The Completion Date may be extended by ASIC on good and sufficient cause being shown by Tolhurst having regard to the nature and complexity of the recommendations made by the Compliance Consultant and the time reasonably required to implement them.
- 2.6 Tolhurst will further instruct the Compliance Consultant to review, assess and report in writing to both Tolhurst and ASIC ("the Audit Report") as at both 28 December 2001 and 28 June 2002 on:
- a) the extent to which Tolhurst has implemented the Action Plan;
  - b) the extent to which Tolhurst, its proper authority holders, designated trading representatives and other staff have complied with the Legal Requirements;
  - c) the extent to which Tolhurst has a compliance system that will prevent, and where necessary, identify and respond to, breaches or likely breaches of the Legal Requirements by itself, its proper authority holders, designated trading representatives and other staff and promote a culture of compliance with Tolhurst; and
  - d) any action necessary to be taken by Tolhurst to remedy any deficiencies in its compliance systems identified in the course of the review by the Compliance Consultant.
- 2.7 The Audit Report will be provided to ASIC and Tolhurst within 2 months of the date to which it relates.
- 2.8 Tolhurst will provide to the ASX on a "not for release" basis a copy of all documents provided to ASIC pursuant to this enforceable undertaking contemporaneously with those documents being provided to ASIC.

### 3. ACKNOWLEDGEMENTS

- 3.1 Tolhurst acknowledges that ASIC:
- (a) may from time to time publicly refer to this enforceable undertaking;

- (b) may issue a media release on execution of this enforceable undertaking referring to its terms and the concerns of ASIC which led to its execution; and
  - (c) will place a copy of the executed enforceable undertaking on a Public Register.
- 3.2 Tolhurst acknowledges that ASIC's acceptance of this enforceable undertaking does not preclude or fetter ASIC's power to investigate a contravention or a suspicion of a contravention arising from future conduct, pursue a criminal prosecution, lay charges, or seek a pecuniary penalty order.
- 3.3 Notwithstanding clause 1.14 above, Tolhurst acknowledges that ASIC's acceptance of this enforceable undertaking does not preclude or fetter ASIC's power to take the action outlined in clause 1.13 above by reason of its concerns set out in clauses 1.1 to 1.10 of this enforceable undertaking.
- 3.4 Tolhurst acknowledges that this enforceable undertaking does not derogate from the rights and remedies available to any person or entity arising from any conduct referred to in this enforceable undertaking.
- 3.5 Tolhurst acknowledges that this enforceable undertaking has no operative force and effect unless and until executed by ASIC.
- 3.6 Tolhurst and ASIC each acknowledge that the terms of this enforceable undertaking can be varied only with the prior written consent of each party to the enforceable undertaking by its duly authorised representative.

The common seal of D & D Tolhurst Ltd  
ACN 004 456 053 was duly affixed to this  
enforceable undertaking on 6 March 2001  
in the presence of:

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\_\_\_\_\_  
Director

  
\_\_\_\_\_  
Director / Secretary

Accepted by the Australian Securities and Investments Commission on 9 March 2001  
pursuant to the ASIC Act section 93AA by its duly authorised delegate:

  
\_\_\_\_\_  
Stephen J Howell  
Director Enforcement  
Delegate of the Australian Securities and Investments Commission

Dated this 9<sup>th</sup> day of March 2001.