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**UNDERTAKING TO THE
AUSTRALIAN SECURITIES AND
INVESTMENT COMMISSION**

**GIVEN FOR THE PURPOSES OF
SECTION 93AA OF THE
AUSTRALIAN SECURITIES AND
INVESTMENT COMMISSION ACT
1989**

**by TWU Nominees Pty Ltd as
Trustee for the TWU Superannuation
Fund**

ABN 67 002 835 412

ENFORCEABLE UNDERTAKING
AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION
SECTION 93AA

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

TWU Nominees Pty Ltd ("TWU Nominees") ABN 67 002 835 412 of Level 2, 388 - 390 Sussex Street, Sydney, New South Wales as Trustee for the TWU Superannuation Fund

1 BACKGROUND

- 1.1 TWU Nominees Pty Ltd ("TWU Nominees") is the Trustee of the TWU Superannuation Fund ("the Fund").
- 1.2 The Fund was established by a Trust Deed dated 4 October 1984 (as amended) to provide individual personal retirement and insurance benefits for its members.
- 1.3 Prior to October 1995, the Fund was administered by AM Corporation Limited. From October 1995 to November 2000, the Fund was administered by Transport Superannuation Services Pty Ltd. Since November 2000, the administration of the Fund has been progressively transferred to Australian Administration Services Pty Ltd. The full transfer of administration of the Fund will be completed by 30 June 2001.
- 1.4 From 1 July 1995 to 31 July 1998, TWU Nominees engaged Prudential Corporation Australia Limited - now known as Colonial Mutual Life Assurance Society Limited ("Colonial") - to provide insurance cover for members of the Fund.
- 1.5 During this period, Fund documentation, which included brochures and the Fund's magazine *Gearing Up*, promised members basic disablement insurance cover comprising Total and Permanent Disablement ("TPD") lump sum benefits or Total Disablement ("TD") instalment benefits, depending on the degree of their disablement.
- 1.6 In general terms, a TPD benefit was a lump sum payable to a member who, in the opinion of the Fund's insurer:
- (a) was so incapacitated because of sickness or injury that he/she was prevented from ever engaging in his/her occupation or any occupation for which he/she was reasonably suited by education, training or experience; or
 - (b) lost the use of both hands or feet or the sight in both eyes or any two.
- 1.7 In general terms, a TD benefit was payable if, in the opinion of the Fund's insurer, a member was so incapacitated through sickness or injury that he/she was completely and continuously prevented from engaging in his/her own occupation for at least one year and was not working. The maximum TD benefit was 20% of the TPD lump sum paid annually for up to 5 years or until the member was deemed fit to return to work.
- The TD benefit was offset by other disability income (e.g. workers compensation or government disability pension) received by the member so that the member's total post disability income would not exceed 75% of his or her pre-disability income.

- 1.8 On 1 August 1998, the Fund ceased providing disablement benefits as part of basic insurance cover.
- 1.9 The Superannuation Complaints Tribunal ("SCT") referred to ASIC several complaints received from members of the Fund that related to the basic disablement insurance cover in place between 1 July 1995 and 31 July 1998.
- 1.10 Following an investigation into the matter, ASIC had the following concerns which it raised with TWU Nominees :
- (a) certain documentation sent to members (including the documentation referred to in 1.5 above) was likely to mislead members about the type of disability cover that was in place for them during the period 1 July 1995 to 31 July 1998;
 - (b) many members who became disabled during the period 1 July 1995 to 31 July 1998 were assessed only for TD, when they should also have been assessed for TPD and, where applicable, have been paid a lump sum benefit;
 - (c) the Fund had failed to give any or any adequate notice to members about the Fund's decision to cease offering basic disablement cover from 1 August 1998; and
 - (d) some members who became disabled after 1 August 1998 may not have had time to arrange alternate disability insurance cover.
- 1.11 TWU Nominees asserts that it responded to concerns raised by ASIC and referred to in 1.10 by:
- (a) initiating an investigation into the circumstances surrounding the issues raised by ASIC;
 - (b) resolving to ensure that all members who became disabled during the period 1 July 1995 to 31 July 1998 received the benefits to which they were entitled;
 - (c) resolving to honour disablement claims from members who would otherwise be disadvantaged by the late notice of cessation of disablement cover on 1 August 1998.
- 1.12 ASIC was concerned that TWU Nominees had not implemented the resolution referred to in 1.11(b) and had not adequately informed members of the circumstances giving rise to the ASIC investigation. On 1 November 2000, ASIC initiated proceedings against TWU Nominees in the Federal Court seeking declarations that TWU had engaged in misleading conduct and seeking corrective notices and advertisements ("ASIC Federal Court Proceedings"). TWU Nominees is defending the proceedings.
- 1.13 TWU Nominees asserts that, under a contract of insurance with Colonial, Colonial agreed to provide TD and TPD insurance cover to members of the Fund in respect of claims relating to the period 1 July 1995 to 31 July 1998. TWU Nominees had previously (on 15 September 2000) initiated proceedings against Colonial in the Federal Court seeking damages for statutory breaches and for breaches of contract. Colonial is defending the proceedings.
- 1.14 TWU Nominees further asserts that:
- (a) it relied on the advice of former service providers in relation to the preparation and content of documentation referred to in 1.10 (a) above;
 - (b) it relied on the advice of former service providers in relation to the steps taken to notify members about the Fund's decision to cease offering basic disablement insurance cover from 1 August 1998 referred to in 1.10 (c) above; and
 - (c) it has been assessing and paying claims made by members who became disabled after 1

August 1998, as referred to in 1.10 (d) above.

- 1.15 TWU Nominees has committed to ensuring that its members;
- (a) are notified of the circumstances that gave rise to the ASIC Federal Court proceedings, and
 - (b) receive, and continue to receive all the benefits to which they are entitled.
- 1.16 TWU Nominees acknowledges ASIC's concerns as set out in 1.10 above and, while it does not agree with the allegations of ASIC in the Federal Court proceedings, has offered this Enforceable Undertaking in relation to those concerns.
- 1.17 TWU Nominees has offered, and ASIC has agreed, to settle the ASIC Federal Court proceedings on the basis of Court Orders made by consent and without admission, and by offering the commitments in this Enforceable Undertaking on the same basis.
- 1.18 This Enforceable Undertaking is to be read and interpreted together with the Court Orders.

2. DEFINITIONS

- 2.1 "*Basic disablement insurance cover*", when referred in this section 2 of this undertaking, means the insurance cover asserted by TWU Nominees in 1.13.
- 2.2 "*Court Orders*" means the Court Orders in the ASIC Federal Court proceedings annexed to this Enforceable Undertaking and marked "A".
- 2.3 "*Claim in respect of the First Period*" means a disablement claim made by a member in respect of disablement:
- (a) that arose during the period 1 July 1995 to 31 July 1998 ("the First Period");
 - (b) where the member has been admitted as TD by Colonial but has not received a lump sum TPD benefit or all 5 TD instalment benefits up front without any offsets.
- 2.4 "*Claim in respect of the Second Period*" means a claim made by a member in respect of disablement:
- (a) that arose during the period 1 August 1998 to 31 January 1999 ("the Second Period"); and
 - (b) where the member became disabled less than 30 days after the notice of cessation of basic disablement insurance cover was posted to the member or, if the date of posting cannot be established, became disabled on or before 31 January 1999.
- 2.5 "*Member*" means:
- (a) in respect of the First Period, a member or former member of the Fund who had basic disablement insurance cover when he/she became disabled; or
 - (b) in respect of the Second Period, a member or former member of the Fund who had basic disablement insurance cover on 31 July 1998 and would have had such cover when he or she became disabled but for the cessation of basic disablement insurance cover on 1 August 1998.
- 2.6 "*The notice of cessation of disablement insurance cover*" means the article entitled "Changes to insurance cover for members" advising cessation of basic disablement cover on 1 August 1998. This article appeared in Edition 6 of the Fund's magazine "Gearing Up" which was distributed with 1998 year end member statements and to members who joined the Fund from 1 July 1998.

3. UNDERTAKINGS

TWU Nominees undertakes the following for the purposes of section 93AA of the ASIC Act.

Court Orders and Member Notification

- 3.1 The parties will, as soon as practicable, but in any event within 7 days of the execution of this Enforceable Undertaking execute the Court Orders in relation to publication of corrective notices and advertising and take all steps necessary to have the Court Orders filed and entered in the Federal Court.

Assessment/Reassessment of Claims

- 3.2 TWU Nominees will by 30 April 2001 engage National Australia Financial Management Ltd ("NAFM") whose engagement and terms of reference are to be approved in writing by ASIC, to:

- (a) reassess Claims in Respect of the First Period to determine whether any member is entitled to TPD benefits,
- (b) assess Claims in Respect of the Second Period to determine whether any member is entitled to TPD or TD benefits.

- 3.3 TWU Nominees will not remove, replace or vary the terms of reference of NAFM without the prior written approval of ASIC, such approval not to be unreasonably withheld.

- 3.4 The reassessment by NAFM referred to in 3.2 (a) will be conducted in a manner consistent with the terms of the Reassessment Protocol attached to this Enforceable Undertaking and marked "B" ("First Period Protocol").

- 3.5 The assessment by NAFM referred to in 3.2 (b) will be conducted in a manner consistent with the terms of the Assessment Protocol attached to this Enforceable Undertaking and marked "C" ("Second Period Protocol").

- 3.6 Where, following reassessment conducted in a manner consistent with the First Period Protocol, NAFM determines that a member is entitled to TPD benefits, TWU Nominees will;

- (a) adopt the determination as its decision; and
- (b) within 28 days notify the member and send him or her a Deed of Release in a form approved by ASIC;
- (c) subject to the member properly executing the approved Deed of Release, pay the member within 28 days of the receipt by TWU Nominees of the Deed of Release the difference between any disability payment previously paid to the member in respect of the claim and the applicable TPD lump sum as defined in the First Period Protocol plus interest at the rate of 5% per annum.
- (d) calculate the interest referred to in sub-paragraph 3.6(c) from 60 days after the date that the member was sent a letter by TWU Nominees informing the member that his or her disablement claim had been admitted as TD for the first time.

- 3.7 Where, following reassessment or assessment in accordance with the Second Period Protocol, NAFM determines that a member is entitled to TPD benefits, TWU Nominees will;

- (a) adopt the determination as its decision, and
- (b) within 28 days notify the member and send him or her a Deed of Release in a form

approved by ASIC;

- (c) subject to the member properly executing the approved Deed of Release, pay the member within 28 days of the receipt by TWU Nominees of the Deed of Release the lump sum TPD benefit to which they are entitled.
- 3.8 Where, following reassessment or assessment in accordance with the Second Period Protocol, NAFM determines that a member is entitled to TD benefits, TWU Nominees will:
- (a) adopt the determination as its decision, and
 - (b) within 28 days notify the member and send him or her a Deed of Release in a form approved by ASIC;
 - (c) subject to the member properly executing the approved Deed of Release, pay the member within 28 days of the receipt by TWU Nominees of the Deed of Release the TD instalment benefit to which they are entitled.
- 3.9 Where NAFM determines that a claim is not a "Claim in respect of the First Period" or a "Claim in respect of the Second Period", as the case may be, TWU Nominees will adopt the determination as its decision and will write to the member within 14 days of receiving NAFM's written reasons and inform the member of:
- (a) the reasons why the claim is not a such a Claim,
 - (b) the member's right to make a complaint to the Trustee about the decision, and
 - (c) the member's right to take the matter to the Superannuation Complaints Tribunal if the Trustee does not resolve the member's complaint to the satisfaction of the member.
- 3.10 Where, following reassessment in accordance with the First Period Protocol, NAFM determines that a member is not entitled to TPD benefits, TWU Nominees will adopt the determination as its decision and will write to the member within 14 days of receiving NAFM's written reasons and inform the member of:
- (a) the reasons why the member was not reassessed as TPD,
 - (b) the member's right to make a complaint to the Trustee about the decision, and
 - (c) the member's right to take the matter to the Superannuation Complaints Tribunal if the Trustee does not resolve the member's complaint to the satisfaction of the member.
- 3.11 Where, following assessment in accordance with the Second Period Protocol, NAFM determines that a member is not entitled to TPD or TD benefits as the case may be, TWU Nominees will adopt the determination as its decision and will write to the member within 14 days of receiving NAFM's written reasons and inform the member of:
- (a) the reasons why the member was not assessed as TPD or TD,
 - (b) the member's right to make a complaint to the Trustee about the decision, and
 - (c) the member's right to take the matter to the Superannuation Complaints Tribunal if the Trustee does not resolve the member's complaint to the satisfaction of the member.
- 3.12 TWU Nominees undertakes that a member who is reassessed or assessed under the First Period Protocol or the Second Period Protocol:
- (a) will not be required to contribute towards the cost of reassessment, with the exception of

reasonable costs incurred by the member in travelling to and from medical or other examinations and the cost of any cancellation fee incurred by reason of the member's failure to advise his/her inability to attend a medical or other examination.

- (b) will not be required to repay any monies already received by that member in connection with the member's disability claim, and
- (c) will not suffer any reduction or diminution of the member's existing benefits or entitlements under the member's existing disability claim at the date of this Enforceable Undertaking.

Reporting to ASIC

3.13 On or by 1 July 2001, 1 September 2001, 1 March 2002, 1 September 2002 and 1 March 2003 TWU Nominees will provide to ASIC a report containing the following information concerning the status of the assessments/ reassessments conducted by NAFM. TWU Nominees agrees that the report will contain a separate breakdown for claims relating to each of the First and Second Periods and will provide information for the previous 6 months as well as a cumulative total. The report will include:

- (a) the number of claims that have been referred to NAFM for assessment/reassessment;
- (b) the number of claims known to TWU Nominees that have not yet been referred to NAFM for assessment/reassessment;
- (c) the number of new claims;
- (d) (First Period only) the number of claims that have been paid in full on a TPD basis where previously the claim was admitted as TD;
- (e) (First Period only) the number of claims where NAFM have determined that the member was not TPD where previously the claim was admitted as TD;
- (f) (Second Period only) the number of claims that have been paid in full on a TPD basis;
- (g) (Second Period only) the number of claims where NAFM has determined that the member is TD;
- (h) (Second Period only) the number of claims where NAFM has determined that the member is neither TPD or TD and, where ASIC requests it, a brief explanation of the reason for each rejection.

3.14 TWU Nominees will on or before 31 July 2001 provide a report to ASIC detailing its compliance with the Consent Orders.

Compliance and Training

3.15 TWU Nominees will on or before 1 September 2001, will engage at its cost an external independent professional compliance consultant (the "Compliance Consultant") - whose appointment and terms of reference are to be approved in writing by ASIC - to assess, make recommendations and provide two written reports to TWU Nominees ("Compliance Reports") on TWU's compliance arrangements. TWU Nominees will not remove, replace or vary the terms of reference of the Compliance Consultant without the prior written approval of ASIC, such approval not to be unreasonably withheld.

3.16 In conducting the assessments and preparing the reports referred to in 3.15, the Compliance Consultant will cover:

- (a) TWU Nominees compliance with:
 - (i) the *Superannuation Industry (Supervision) Act* ("SIS Act") and Regulations in so far as they relate to member disclosure, complaints and claims handling;
 - (ii) the terms of this Enforceable Undertaking;
 - (b) the following matters whether they are performed by TWU Nominees or its agent or contractor:
 - (i) the procedures for processing member claims;
 - (ii) the procedures for handling member complaints including whether the complaints handling system complies with Australian Standard on Complaints Handling AS 4269/1995;
 - (iii) the compliance reporting arrangements insofar as they relate to member disclosure, complaints and claims handling including but not limited to compliance reporting from the administrator of the Fund to the Board of TWU Nominees;
 - (iv) whether additional training should be provided to staff in relation to any of the matters referred to in the Compliance Reports, including but not limited to the areas of training required, when the training should be conducted and by whom;
 - (c) TWU Nominees' procedures for monitoring the performance of any agent or contractor in performing the compliance tasks set out in sub-clause (b).
- 3.17 TWU Nominees will ensure that:
- (a) the first Compliance Report is completed and a copy provided to ASIC by 31 December 2001; and
 - (b) the second Compliance Report is completed and a copy provided to ASIC by 1 September 2002.
- 3.18 TWU Nominees will:
- (a) ensure that the Compliance Consultant is provided with access to its books and records and the books and records of the Fund, including any books and records of any agent or contractor relating to or concerning the performance of the tasks set out in sub-clause 3.16(b);
 - (b) as requested by the Compliance Consultant, give the Compliance Consultant information about, or an explanation of, any aspect of TWU Nominees' operation of the Fund for the purpose of the compliance review, assessment and reporting; and
 - (c) otherwise assist the Compliance Consultant in conducting the reviews and assessment referred to in 3.15 and 3.16.
- 3.19 TWU Nominees will implement the recommendations made in the Compliance Reports as soon as practicable but in any event, by no later than:
- (a) 1 April 2002 in respect of the first Compliance Report;
 - (b) 1 December 2002 in respect of the second Compliance Report.

- 3.20 TWU Nominees will notify ASIC in writing of the details of the implementation of all of the recommendations in each Compliance Report referred to in 3.19 within 30 days of completion of such implementation.

General

- 3.21 Where TWU Nominees fails to comply with any term of this Enforceable Undertaking, ASIC will be entitled to take such action as it deems appropriate and/or require that TWU Nominees correct or rectify the failure to comply.
- 3.22 Where ASIC, on a reasonable basis, has concerns about TWU Nominee's compliance with this Enforceable Undertaking, at the written request of ASIC, TWU Nominees will provide ASIC officers with access to its books and records so as to enable ASIC to determine whether or not TWU Nominees has complied with this Enforceable Undertaking.

4. ACKNOWLEDGEMENTS

- 4.1 TWU Nominees acknowledges that ASIC:

- (a) may issue a media release on execution of this Enforceable Undertaking and the granting of the Court Orders referring to the terms of the Enforceable Undertaking and the concerns of ASIC which led to its execution;
- (b) may from time to time publicly refer to this Enforceable Undertaking; and
- (c) will make this Enforceable Undertaking available for public inspection.

- 4.2 TWU Nominees acknowledges that:

- (a) this undertaking in no way derogates from the rights and remedies available to any other person or entity arising from any conduct described in this undertaking;
- (b) ASIC's acceptance of this undertaking does not affect ASIC's power to investigate a contravention arising from conduct other than conduct referred to in the ASIC Federal Court proceedings, or pursue a criminal prosecution or its power to lay charges or seek a pecuniary civil order; and
- (c) this undertaking has no operative force until accepted by ASIC.

- 4.3 ASIC acknowledges that nothing in this Enforceable Undertaking or the Court Orders constitutes any admission to ASIC or any other person or entity by TWU Nominees.

- 4.4 TWU Nominees and ASIC acknowledge that:

- (a) if substantial changes are made to the existing law by the Financial Services Reform Bill or other relevant legislation, then that legislation will take precedence over any paragraph in these undertakings that is inconsistent with that legislation.
- (b) subject to sub-paragraph (c), the obligations assumed by TWU Nominees upon the acceptance of this Enforceable Undertaking will expire on 1 July 2003 or upon the completion by NAFM (or any entity that replaces NAFM in accordance with paragraph 3.3) of the assessment of member disablement claims conducted in a manner consistent with the First Period Protocol and the Second Period Protocol, whichever is the later;
- (c) ASIC will be entitled at any time to take action in respect of any breach of these undertakings that occurred prior to the expiry of the period referred to in 4.4(b).

Executed by TWU Nominees Pty Ltd
(ACN 002 835 412) in accordance with
section 127 of the *Corporations Law* in
the presence of:

Bill Neenan . 14.3.01

(Signature of director/sole director)

Peter Joel 14/3/01

(Signature of secretary/director)

ACCEPTED BY THE AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION
PURSUANT TO SECTION 93AA OF THE ASIC ACT BY ITS DULY AUTHORISED DELEGATE

JAN REDFERN.

[name/title] NSW GENERAL COUNSEL

14th MARCH 2001

Date