

AUSTRALIAN COMMERCIAL
PROPERTY SYNDICATIONS PTY LTD

ENFORCEABLE UNDERTAKING

ACN: ~~010 622 991~~
055117765

**pursuant to section 93AA of the
Australian Securities and Investments Commission Act 2001 (Cth)**

1. The commitments in this Enforceable Undertaking are offered to the Australian Securities and Investments Commission (ASIC) by:

- 1.1 Brighton RV Syndication Pty Ltd (ACN 091 506 035);
- 1.2 Australian Commercial Property Syndications Pty Ltd (ACN ~~010 622 991~~);
- 1.3 Brighton RV Holdings Pty Ltd (ACN 091 506 044); and
- 1.4 William Lionel Lewski of Level 2, 613 St Kilda Road, Melbourne, Victoria.
(collectively, the Lewski Parties).

2. **Background**

Formation and transactions of the Scheme

2.1 A joint venture known as the "Brighton Aged Care Hostel Joint Venture" (the **Head Joint Venture**) was formed pursuant to a "Joint Venture Agreement" dated 10 February 2000 between Brighton RV Syndication Pty Ltd (**BRVS**) as Joint Venture Custodian, and Brighton RV Holdings Pty Ltd (**BRVH**) as Investor in its capacity as Custodian for the following joint ventures:

2.2

- (a) Brighton Aged Care Hostel Joint Venture No 1;
 - (b) Brighton Aged Care Hostel Joint Venture No 2;
 - (c) Brighton Aged Care Hostel Joint Venture No 3;
 - (d) Brighton Aged Care Hostel Joint Venture No 4;
 - (e) Brighton Aged Care Hostel Joint Venture No 5;
 - (f) Brighton Aged Care Hostel Joint Venture No 6;
 - (g) Brighton Aged Care Hostel Joint Venture No 7; and
 - (h) Brighton Aged Care Hostel Joint Venture No 8
- (together, the **Sub Joint Ventures**).

- 2.3 Each of the Sub Joint Ventures referred to in paragraphs 2.2(a) to 2.2(d) above was formed pursuant to separate "Joint Venture Agreements" dated 10 February 2000, between BRVS as Joint Venture Custodian, BRVH as Custodian, and the investors identified in the agreements (including their execution pages).
- 2.4 The Sub Joint Ventures referred to in paragraphs 2.2(e) to 2.2(h) above were formed pursuant to a single "Joint Venture Agreement" dated 10 February 2000, between BRVS as Joint Venture Custodian, BRVH as Custodian, and the investors identified in the agreement (including its execution pages).
- 2.5 Pursuant to a Contract of Sale of Real Estate dated 10 February 2000 between Primelife (Heathfield) Pty Ltd (ACN 090 815 320) (PLH) as vendor and BRVS as purchaser, PLH agreed to sell and BRVS agreed to buy the land together with any improvements thereon known as 29 Heathfield Road, East Brighton in the State of Victoria (the Property).
- 2.6
- (a) Pursuant to two Business Sale Agreements, each dated 10 February 2000 between PLH as vendor, BRVS as purchaser and Primelife Corporation Limited (ACN 010 622 901) (PLC), PLH agreed to sell and BRVS agreed to buy the business of an aged care hostel situated at the Property.
 - (b) Pursuant to a Marketing and Management Agreement dated 10 February 2000 between Primelife Management Services Pty Ltd ("PLMS"), PLH, PLC and BRVS (as Principal), PLMS and BRVS agreed that PLMS would provide marketing and management services.
 - (c) Pursuant to a Profit Share Agreement dated 10 February 2000 between PLH as Vendor, PLC and BRVS as Purchaser, it was agreed that PLH would receive a share of profits from the business.
 - (d) Pursuant to two Construction Agreements both dated 10 February 2000, PLH as Vendor, BRVS as Purchaser and PLC agree that PLH would procure the construction of the building on the property.

2.7 Each of the Agreements referred to in subparagraphs (a) to (d) was varied by Heads of Agreement dated 13 May 2005 between BRVS, PLH, PLMS and PLC.

2.8 As at the date of this undertaking, settlement of the transactions referred to in paragraphs 2.5 and 2.6 above has not yet occurred.

Federal Court proceedings

2.9 By originating process dated 23 September 2004, ASIC commenced proceeding No V1184 of 2004 in the Federal Court of Australia in respect of the Head Joint Venture. By five originating processes each dated 23 September 2004, ASIC commenced proceedings No V1179, V1193, V1198, V1205 and V1209 of 2004 in the Federal Court of Australia in respect of the Sub Joint Ventures.

2.10 By order made by the Honourable Justice Middleton on 13 December 2006, the proceedings referred to in paragraph 2.9 above were consolidated and continued thereafter as proceeding No V1184 of 2004 (the **Proceeding**). BRVS, Australian Commercial Property Syndications Pty Ltd (ACPS) and BRVH are the fourth, fifth and sixth defendants, respectively, to the Proceeding. William Lionel Lewski (Mr Lewski) is the sole director and secretary of each of those companies.

2.11 In the Statement of Facts and Contentions (SFC) filed and relied upon by ASIC in the Proceeding, ASIC alleged that the Head Joint Venture and the Sub Joint Ventures together constituted a managed investment scheme which was required by the *Corporations Law* and/or the *Corporations Act 2001 (Cth)* to be registered and was not so registered (the **Scheme**). ASIC alleged that all of the investors in the Sub Joint Ventures (the **Investors**) were members of the Scheme. ASIC sought orders in the Proceeding, amongst others, that the Scheme be wound up pursuant to section 601EE of the *Corporations Act*.

2.12 The parties to the Proceeding have agreed to resolve the Proceeding by asking the Federal Court to make orders (the **Consent Orders**) including:

- (a) a declaration that the Scheme is a managed investment scheme which was and is required to be registered under the *Corporations Law* and the *Corporations Act* but was not registered;

- (b) an order that the Scheme be wound up pursuant to s 601EE(1) of the *Corporations Act*;
- (c) orders appointing an independent accountant to inquire into and report to the Court about certain matters (**Disclosure Report**), and ancillary orders facilitating that inquiry and report; and
- (d) orders enabling parties to the proceeding or investors in the Scheme to make submissions to the Court as to the manner in which the Scheme ought be wound up.

Transfer of Investors' interests

- 2.13 By letter dated 16 January 2006 from Mr Lewski as Director of BRVS addressed to "Dear Syndicate Participant", each of the Investors was invited to transfer or redeem their interests in the Scheme in consideration for being paid the amount of their original investment. The letter enclosed a "Standard Transfer Form" for Investors to complete and return to BRVS if they wished to accept this offer.
- 2.14 Consequently, a significant majority of the Investors (the **Sellers**) transferred their interests in the Scheme to BRVH on various dates between January and August 2006.
- 2.15 The transfers referred to in paragraph 2.14 above (the **Transfers**) caused ASIC to hold a number of concerns, namely:
- (a) the Transfers occurred in circumstances where the Proceeding had already been instituted for the winding up of the Scheme;
 - (b) the sending of the 16 January 2006 letter to Investors by BRVS may have amounted to operation of the Scheme;
 - (c) the Investors, and the Sellers in particular, were not provided by BRVH or BRVS with any information as to the true value of their interests in the Scheme as at 16 January 2006 or the date that each Seller agreed to transfer their respective interest;
 - (d) it is possible that the value of each Seller's interest as at the time of its transfer to BRVH was greater than the amount that the Seller received from BRVH in consideration for the Transfer; and

- (e) BRVH acquired the Sellers' interests in circumstances where it occupied the position of Custodian of the Sub Joint Ventures.

2.16 As part of the resolution of the Proceeding, and in order to address ASIC's concerns as set out above:

- (a) the Lewski Parties have agreed to offer the undertakings set out in this document; and
- (b) ASIC has agreed to accept the undertakings set out in this document.

3. Undertakings by the Lewski Parties

Preparation of the Valuation Report

3.1 The Lewski Parties shall, within 28 days of the date of this undertaking, appoint as valuer an independent person (the **Valuer**) with appropriate valuation qualifications and at least 10 years' valuation experience.

3.2 The identity of the Valuer and the terms of his or her engagement shall be approved by ASIC before he or she is engaged to undertake any work.

3.3 The Valuer shall be engaged to:

- (a) determine the value of the net assets of the Scheme as at 16 January 2006 (the **2006 Net Asset Value**);
- (b) determine the value of the net assets of the Scheme as at [the date of this undertaking] (the **2007 Net Asset Value**); and
- (c) provide a report stating the 2006 Net Asset Value and the 2007 Net Asset Value and the basis upon which they have been determined (the **Valuation Report**).

3.4 If the Valuer considers it necessary, for the purpose of determining the 2006 Net Asset Value and the 2007 Net Asset Value, for a valuation of the Property to be carried out by another valuer:

- (a) the Valuer shall give written notice to the Lewski Parties to that effect;

- (b) within 28 days of receiving such notice, the Lewski parties shall appoint an independent person to value the Property (the **Property Valuer**) with appropriate real property valuation qualifications and at least 10 years' real property valuation experience;
- (c) the Property Valuer shall carry out such valuation of the Property as the Valuer considers necessary; and
- (d) the Property Valuer shall provide a report to the Valuer and to the Lewski Parties containing the valuation referred to in paragraph 3.4(c) above.
- 3.5 The identity of the Property Valuer and the terms of their engagement shall be approved by ASIC before they are engaged to undertake any work.
- 3.6 The Lewski Parties shall provide ASIC with a copy of:
- (a) the Valuation Report; and
- (b) any report prepared pursuant to paragraph 3.4 above
- within 7 days of receipt of the same.
- 3.7 All remuneration and costs of the Valuer and any Property Valuer shall be paid by the Lewski Parties and the Lewski Parties will not seek to fund or recover those payments, whether directly or indirectly, from the Scheme or from any of its investors.
- 3.8 The Lewski Parties will provide the Valuer and any Property Valuer with all documents and information reasonably required by them for the purposes of paragraphs 3.3 and 3.4 above, to the extent that:
- (a) such documents are within the possession, custody or control of the Lewski Parties; and
- (b) such information is within the knowledge of the Lewski Parties.

Payments to Sellers

- 3.9 Within 30 days of the date (the **Calculation Date**) which is the later of:
- (a) the date on which the Lewski Parties receive the Valuation Report; and

(b) the date on which the Disclosure Report is provided to parties to the Proceeding pursuant to paragraph 4 of the Consent Orders,

the Lewski Parties will calculate a sum (the **Seller Sum**) for each Seller in accordance with the following equation:

$$\text{Seller Sum} = A \times \left(\frac{C}{B} \right) - D$$

3.10 In the equation in paragraph 3.9 above:

- (a) "A" is the 2006 Net Asset Value or the 2007 Net Asset Value, whichever is higher;
- (b) "B" is the total amount invested in the Scheme by all Investors, as reported in the Disclosure Report;
- (c) "C" is the amount invested in the Scheme by the particular Seller, as reported in the Disclosure Report; and
- (d) "D" is the amount which the particular Seller received in consideration for the Transfer.

3.11 Within 35 days of the Calculation Date, the Lewski Parties will notify ASIC in writing of the Seller Sum calculated for each Seller and the details of the calculation of each such Seller Sum.

3.12 In the event that the Seller Sum for a Seller is greater than zero, the Lewski Parties will pay each such Seller their respective Seller Sum within 45 days of the Calculation Date.

3.13 In the event that the Seller Sum for a Seller is less than or equal to zero:

- (a) the Lewski Parties shall not be required to make any payment to such Seller pursuant to this undertaking; and
- (b) for the avoidance of doubt, the Lewski Parties shall not seek to recover any amount paid to such Seller in connection with the Transfers.

Proposal in relation to the manner in which the Scheme should be wound up

3.14 The Lewski Parties will submit a proposal as contemplated by, and in accordance with, paragraphs 10 and 14 of the Consent Orders ("Lewski Proposal"). The Lewski Proposal will, as a minimum, provide for the following:

- (a) the Lewski Parties (or one of them) will acquire the interests of each of the remaining Members (as that term is defined in the Consent Orders) of the Scheme; and
- (b) the Lewski Parties will pay each of the remaining Members, in consideration for the acquisition of their interests in the Scheme, an amount not less than the greater of:
 - (i) the sum (the **Remaining Member Sum**) calculated in accordance with the following equation:

$$\text{Remaining Member Sum} = A \times \left(\frac{C}{B} \right)$$

where:

- A. "A" bears the same meaning as in paragraph 3.10(a) above;
 - B. "B" bears the same meaning as in paragraph 3.10(b) above;
 - C. "C" is the amount invested in the Scheme by the particular remaining Member, as reported in the Disclosure Report; and
- (ii) the amount invested in the Scheme by the particular remaining Member, as reported in the Disclosure Report.

4. Acknowledgments

4.1 The Lewski Parties acknowledge that ASIC:

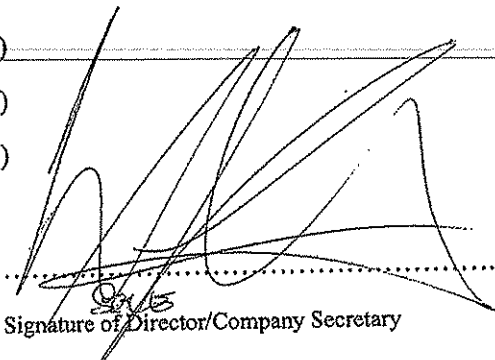
- (a) may issue a media release on execution of this undertaking referring to its terms including the concerns of ASIC referred to in paragraph 2.14;

(b) may from time to time refer publicly to this undertaking; and

(c) will make a copy of this undertaking available for public inspection.

- 4.2 The Lewski Parties acknowledge that this undertaking in no way derogates from the rights and remedies available to any person or entity arising from any conduct described in this undertaking, except that the Lewski Parties reserve the right to submit that any payments made pursuant to paragraph 3.12 above operate in mitigation of any loss or damage which any Seller may allege that he, she or it has suffered and save and except for releases already given.
- 4.3 The Lewski Parties acknowledge that ASIC's acceptance of this undertaking does not affect ASIC's power to pursue a criminal prosecution or its power to lay charges or seek a pecuniary civil order, or its power to investigate a contravention arising from future conduct.
- 4.4 The Lewski Parties acknowledge that this undertaking has no operative force until accepted by ASIC.
- 4.5 The Lewski Parties acknowledge that should ASIC form the view that any of them has failed to comply with this undertaking, ASIC may take additional action including (without limitation) seeking Court orders under section 93AA of the *Australian Securities and Investments Commission Act* that the Lewski Parties comply with the terms of this undertaking.

Executed by Brighton RV Syndication Pty Ltd ACN 091 506 035 pursuant to section 127 of the Corporations Act 2001 (Cth) by:


Signature of Director/Company Secretary

Signature of Director/Company Secretary

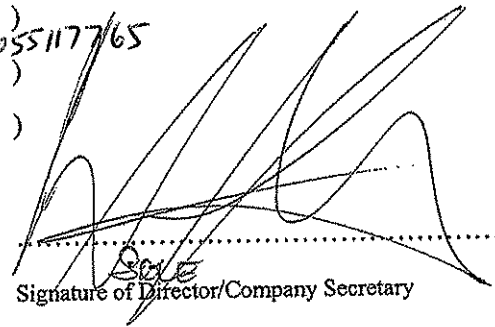


Name of Director/Company Secretary

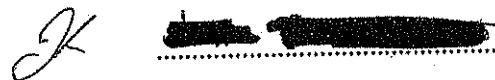
William Lionel Lewski

Name of Director/Company Secretary

Executed by Australian Commercial Property Syndications Pty Ltd ACN 000 055 117 765 pursuant to section 127 of the Corporations Act 2001 (Cth) by:


Signature of Director/Company Secretary

Signature of Director/Company Secretary

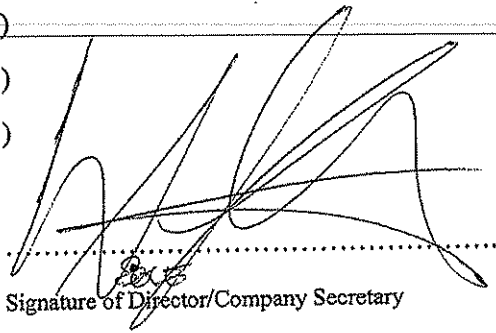


Name of Director/Company Secretary

William Lionel Lewski

Name of Director/Company Secretary

Executed by Brighton RV Holdings Pty)
Ltd ACN 091 506 044 pursuant to section)
127 of the Corporations Act 2001 (Cth) by:)



Signature of Director/Company Secretary

Signature of Director/Company Secretary

Name of Director/Company Secretary

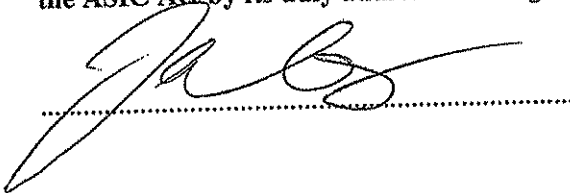
Name of Director/Company Secretary

Executed by William Lionel Lewski

William Lionel Lewski

William Lionel Lewski

Accepted by the Australian Securities and Investments Commission under s93AA of
the ASIC Act by its duly authorised delegate:



Delegate of Australian Securities and Investments Commission

Date: 25 September 2007