

ENFORCEABLE UNDERTAKING

AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION

Section 93AA *Australian Securities & Investments Commission Act 2001*

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

Perpetual Plantations of Australia Pty Ltd ACN 008 013 447 ("the Company")
Level 7
14-20 Blackwood Street
NORTH MELBOURNE VIC 3051

And its directors:

Dee Dee FLEMING ("MD Fleming")
(formerly known as Margaret Dianne Fleming)
43 Sir John Marks Drive
WEST LAKES SA 5021



and

Donald Brownlie FLEMING ("DB Fleming")
43 Sir John Marks Drive
WEST LAKES SA 5021

Background

1. **Perpetual Plantations of Australia Pty Ltd ACN 008 013 447 ("the Company")** was incorporated on 26 May 1983 as South Australian Perpetual Jobjoba Plantations Ltd, changed its name to Perpetual Plantations of Australia Ltd on or about 11 December 1986, and converted from a public company to a private company and changed its name to its present name on or about 11 February 2000. DB Fleming and MD Fleming (together, "the Directors") were appointed as directors of the Company on 10 June 1999, and are currently the only directors of the Company.
2. In the mid 1980's United Tree Farmers Ltd ("UTF"), now under external administration, entered into Development Agreements to sell pistachio tree seedlings to investors (also referred to as growers) ("Investors"), who then independently leased land from a third party, being the Company, near Pinaroo in South Australia. These arrangements became known as the **Peebinga Pistachio Plantations** project ("PPP Scheme"). The PPP Scheme constituted a prescribed interest scheme under the *Corporations Law* and its antecedents. The PPP Scheme was not registered as a prescribed interest scheme, in contravention of requirements under the *Corporations Law* and its antecedents.

3. In the mid 1990's the Company took over the management of the PPP Scheme. Shortly after this event the Company and the Investors cancelled the agreements comprising the PPP Scheme. The Investors immediately entered into new agreements with the Company (being a 50 year Occupational Licence Agreement, with a further 50 year right or option, and a 12 month renewable Plantation Maintenance Agreement). Under the new agreements, the Investors obtained a right to the produce from the pistachio trees and the income from the marketing of such produce, whilst ownership of the land and the pistachio trees remained with the Company. The new arrangements ("New PPP Scheme") constituted a prescribed interest scheme under the *Corporations Law* and, following the commencement of the *Managed Investments Act 1998*, a managed investment scheme under subsequent corresponding legislation. The New PPP Scheme was not registered as a prescribed interest scheme or a managed investment scheme under relevant legislation, in contravention of requirements under the relevant legislation.
4. The Directors only became aware that the scheme was required to be registered as a managed investment scheme, and had not been so registered, some time after they were appointed as Directors.
5. During May and June 2000, the Company made efforts to have the New PPP Scheme registered and a Responsible Entity appointed to the scheme. These efforts were unsuccessful.
6. In August 2001, the Company commenced discussions with a third party with the initial purpose of that party being appointed as the Responsible Entity to the New PPP Scheme. This led to the third party being appointed to independently review the structure and commercial viability of the New PPP Scheme and to report back to the Company and Investors with its findings and recommendations. As part of this review, **Schofield Robinson Horticultural Services Pty Limited** ("Schofield Robinson") was engaged to provide specialist horticultural advice. A copy of the report of the review dated 22 February 2002 ("the Review Report"), which set out a number of options in relation to the future of the New PPP Scheme, was mailed to all Investors on 27 February 2002.
7. In March 2002, negotiations commenced between the Company and representatives of the **Peebinga Pistachio Small Investors Group** ("PPSIG"), which represents a large proportion of the remaining Investors. As a result of these discussions and based on the Review Report's recommendations, the Company and PPSIG entered into a Memorandum of Understanding on 20 June 2002, a copy of which was provided to ASIC on 3 July 2002 ("MOU"). The MOU provided that Investors would be asked to cancel their interests in the New PPP Scheme in consideration for the Company providing an amount of cash or issuing a number of shares in the Company to be calculated in accordance with a prescribed formula, and that the Company would take necessary steps to have what remained of the New PPP Scheme wound up, following completion of these arrangements.

8. ASIC has formed the view, and the Company and the Directors, acknowledge that:
 - 8.1. the New PPP Scheme is a managed investment scheme that, as from 1 July 1998, was required to be registered as a managed investment scheme under subsection 601ED(1) of the *Corporations Law* and the *Corporations Act 2001* ("the Act"), and that the New PPP Scheme was not so registered; and
 - 8.2. the Company has, since 1 July 1998, operated the New PPP Scheme in contravention of sub-section 601ED(5) of the *Corporations Law* and the Act.
9. ASIC is concerned that, because the New PPP Scheme is not registered as a managed investment scheme and does not comply with relevant provisions of the Act relating to managed investment schemes, the Investors' interests are not adequately protected.
10. Section 1324 of the Act relevantly provides that where a person has engaged or is engaged in conduct that constituted or constitutes a contravention of the Act, ASIC may seek an injunction restraining the person from engaging in that conduct and requiring that person to do any act or thing. Pursuant to section 601EE of the Act ASIC may apply to the Court to wind up a managed investment scheme which is operated in contravention of sub-section 601ED(5) of the Act.
11. The Company and the Directors acknowledge the concerns of ASIC set out in paragraph 9 above and have offered the undertakings (as applicable) set out in paragraphs 12 and 12.1 to 12.10 inclusive hereof. ASIC has agreed to accept the commitments set out in this enforceable undertaking as an alternative to the actions referred to in paragraph 10 above.

Undertakings

12. Pursuant to section 93AA of the *Australian Securities and Investments Commission Act 2001* ("the ASIC Act"), the Company and each of the Directors provide the undertakings set out below.
 - 12.1 The Company and each of the Directors will not operate a managed investment scheme that is required to be registered under section 601ED of the Act unless:
 - (a) the scheme is so registered; or
 - (b) in the case of the New PPP Scheme, the actions of the Company or of the Directors are undertaken for the purpose of winding up the scheme within the meaning of section 601ED(6)(b).

- 12.2 Within 21 days after the date of this undertaking, the Company will take all such action as is necessary to enable the Company to change its type to a public company limited by shares, in accordance with Part 2B.7 of the Act.
- 12.3 The Directors will, within 2 days after the day on which the change of company type referred to in paragraph 12.2 takes effect, appoint an auditor for the Company if an auditor has not already been appointed by the Company in general meeting;
- 12.4 The Company will, within 30 days after the change of company type referred to in paragraph 12.2 takes effect, make an offer ("Offer") for an issue of ordinary shares in the Company ("Shares") to each Investor ("Offeree"), which complies with the requirements of Parts 6D.2 and 6D.3 of the Act and which includes the following terms and conditions:
- (a) the number of Shares offered to each Offeree shall be calculated in accordance with the formula set out in paragraphs 1.13 to 1.15 of the MOU ("Share Offer");
 - (b) the Company will, upon the election of an Offeree who accepts the Offer, instead of issuing Shares to the Offeree in accordance with the term referred to in paragraph 12.4(a), provide a cash payment to the Offeree calculated in accordance with the formula set out in paragraph 2.1 of the MOU ("Cash Offer");
 - (c) in consideration for the issue of Shares or the payment of cash referred to in paragraphs 12.4(a) and 12.4(b) respectively, the Offeree must:
 - (i) consent to the cancellation of all of the Offeree's interests in the New PPP Scheme ("Interests");
 - (ii) agree to take all steps necessary to cancel the Offeree's Interests; and
 - (iii) irrevocably appoint the Company as the Offeree's attorney to take all steps necessary to cancel the Offeree's Interests;
 - (d) the Offer is capable of being accepted by each Offeree for a period of not less than one month ("the Offer Period");
 - (e) the Company will:
 - (i) issue the appropriate number of Shares to those Offerees who have accepted the Share Offer; or
 - (ii) provide the appropriate cash payment to those Offerees who have accepted the Cash Offer;
- no later than 14 days after the end of the Offer Period.
- 12.5 If the Company uses an offer information statement for the Offers instead of a prospectus, the Company must ensure that in addition to the information specified in section 715 of the Act, the offer information statement also includes the following information:

- (a) an explanation of the effect of this enforceable undertaking and the circumstances in which, and the reasons for which, the Company and the Directors have entered into the enforceable undertaking;
- (b) a pro forma balance sheet as at 15 days after the end of the Offer Period, prepared using the assumption that each of the Offerees has accepted the Cash Offer;
- (c) an explanation of how the financial position of the Company, as disclosed in the pro forma balance sheet referred to in paragraph 12.5(b) may vary, depending upon the number of Offerees who:
 - (i) accept the Share Offer;
 - (ii) accept the Cash Offer;
 - (iii) do not accept either the Share Offer or the Cash Offer;
- (d) a statement that following the end of the Offer Period, the Company will apply to the Court to have the New PPP Scheme wound up, and an estimate of the return that each Offeree would receive if the New PPP Scheme is so wound up;
- (e) a general explanation of the taxation consequences which may arise for Offerees in the event that they:
 - (i) accept the Share Offer;
 - (ii) accept the Cash Offer;
 - (iii) do not accept either the Share Offer or the Cash Offer.

12.6 The Company shall include in any disclosure document for the Offers the Review Report dated 22 February 2002;

12.7 The Company will, no later than 2 days after the Offers are sent in accordance with paragraph 14.4, provide written confirmation to ASIC that the Offers have been despatched to each Offeree;

12.8 The Company will, no later than 1 month after the end of the Offer Period, provide to ASIC and the Company's members:

- (a) notification of the number of Offerees who accepted the Offer and the number of Offerees who did not accept the Offer; and
- (b) an unaudited balance sheet of the Company as at 14 days after the close of the Offer Period;

12.9 If one or more Offerees does not accept the Offer, then within 1 month after the end of the Offer Period, the Company or the Directors, as appropriate, will apply to the Court under section 601EE of the Act to have the New PPP Scheme wound up.

12.10 The Directors each undertake that they will do all things necessary to ensure compliance by the Company with paragraphs 12.1 to 12.8.

Acknowledgements

- 13 The Company and the Directors acknowledge that ASIC:
- 13.1 may issue a media release on execution of this undertaking referring to its terms and to the concerns of ASIC which led to its execution;
 - 13.2 may from time to time publicly refer to this undertaking; and
 - 13.3 will make this undertaking available for public inspection.
- 14 The Company and the Directors acknowledge that this undertaking in no way derogates from the rights and remedies available to ASIC or any other person or entity arising from any conduct described in this undertaking.
15. The Company and the Directors acknowledge that ASIC's acceptance of an enforceable undertaking does not affect ASIC's power to investigate a contravention arising from future conduct, or pursue a criminal prosecution, or its power to lay charges or seek a pecuniary civil order.
16. The Company and the Directors acknowledge that this undertaking has no operative force until accepted by ASIC.

FW
The Common Seal of Perpetual)
Plantations of Australia Pty Ltd)
ACN 008 013 447 was duly *FW*)
affixed to this undertaking on the *19th*)
day of ~~November 2002~~ in the presence of:)



February 2003
.....
Director/Secretary

Donald B Fleming
.....
Print Name

Signed by:
Donald Brownlie FLEMING

In the presence of:

Lawson
.....

Witness

Lynn RANSON
.....
Print Name

Signed by: *Dee Dee Fleming*
.....
Dee Dee FLEMING

and

In the presence of:

Lynn Ranson
.....
Witness

Lynn Ranson
.....
Print Name

Accepted by the **Australian Securities**)
and Investments Commission pursuant)
to the ASIC Act section 93AA by its)
duly authorised delegate:)

Jamie Orchard
.....
Jamie Orchard
Director of Enforcement South/West
Delegate of the Australian Securities and Investments Commission

Dated this *10th* day of *February 2003*
~~November 2002~~