

**Enforceable Undertaking  
Australian Securities and Investments Commission Act 2001**

**Section 93AA**

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

**National Investment Institute Pty Ltd  
(ACN 098 189 863)  
Level 3, 210 Kings Way  
South Melbourne Vic 3205**

**Henry Kaye  
Level 3, 210 Kings Way  
South Melbourne Vic 3205**



**Novasource Consulting Pty Ltd  
(ACN 095 682 787)  
Level 2, 210 Kings Way  
South Melbourne Vic 3204**

**and**

**Alan Meagher  
Level 6, 185 Victoria Square  
Adelaide SA 5000**

**1. Background**

- 1.1 National Investment Institute Pty Ltd ("NII") was first registered in September 2001. NII was fully owned by Investmentsource Corporation Pty Ltd ("Investmentsource Corporation"), which, in turn, was fully owned by Henry Kaye ("Kaye"). At all relevant times Kaye was the sole director and secretary of NII. NII, and before it, Investmentsource Corporation, have been providers of investment education products and services. Relevantly, NII conducts educational seminars ("the seminars") so as to assist its clients to pursue property and business investment strategies and opportunities put together, promoted and developed by Kaye and NII.
- 1.2 Novasource Consulting Pty Ltd ("Novasource"), as the authorised licensee and distributor for Victoria and Tasmania for NII, sources clients to participate in the seminars, strategies and opportunities. Novasource employs a number of sales persons and consultants for this purpose.

- 1.3 At relevant times Alan Meagher ("Meagher") was a consultant employed by Novasource.
- 1.4 On 14 December 2001, NII was registered as a Registered Training Organisation with the National Training Information Service.
- 1.5 NII and Kaye have provided training courses, advice, strategies and consultancy services in connection with, inter alia, investment in mezzanine mortgage lending products being those products identified in paragraph 6 of the ~~Further Amended Statement of Claim~~ dated 30 June 2003 ("the MML products"). <sup>ASIC alleges that</sup> Novasource has sourced clients for NII and has provided consultancy services in connection with the MML products. *see.*
- 1.6 ASIC has taken the view that each of the MML products were and are financial products, as that term is defined in the Corporations Act and the ASIC Act, and that advice in relation to them was and is financial product advice, as that term is defined in the *Corporations Act 2001* ("the Corporations Act") and *Australian Securities and Investments Act 2001* ("the ASIC Act"). NII, Novasource and Kaye acknowledge ASIC's concerns in this regard, but deny any contravention.
- 1.7 ASIC has further taken the view that in giving such advice NII, Novasource and Kaye have carried on a financial services business without an Australian financial services licence. NII, Novasource and Kaye acknowledge ASIC's concerns in this regard, but deny any contravention.
- 1.8 In April 2002 NII had printed a brochure which it used in the promotion and conduct of the seminars concerning mezzanine finance education ("the brochure"). The brochure stated that seminar attendees would be introduced to the representative of a licensed securities dealer, who would profile a number of mezzanine mortgage lending opportunities that seminar attendees "can take advantage of immediately". The brochure then went on to state:
- "Having survived rigorous selection criteria and ASIC approval, these investment opportunities will only be available to a select number of clients." ("the product statement").*

- 1.9 In the course of the seminars and face to face meetings held by NII and its representatives, including Kaye and Meagher, with clients or potential clients, brochures have been distributed which state in relation to the MML products that they have survived rigorous selection criteria and have ASIC approval. Representatives of NII have stated orally to clients that the MML products of NII are or have been approved or authorised by ASIC. The fact is, and NII, Novasource, Kaye and Meagher acknowledge, that neither the MML products nor the training have been approved or authorised by ASIC.
- 1.10 The brochure was last used by NII in August 2002, and was then withdrawn, prior to the commencement of the ASIC investigation.

## 2. **The Commencement of the Proceeding**

- 2.1 On or about 5 February 2003 a complaint was made to ASIC. ASIC subsequently commenced an investigation. NII, Kaye, Novasource and Meagher have at all times fully cooperated with ASIC's inquiries.
- 2.2 ASIC has taken the view that NII, Kaye, Novasource and Meagher have engaged in, or been a party to, misleading and deceptive conduct in connection with the supply and/or promotion of certain financial services, namely:
- (a) services to be provided in connection with investment opportunities styled as mezzanine mortgage lending; and
  - (b) training courses, advice and strategies in connection with those investments.
- 2.3 On 3 March 2003, ASIC commenced civil proceedings in the Federal Court of Australia against NII, Kaye, Novasource and Meagher ("the defendants") in relation to its concerns ("the proceedings"). In the proceedings, ASIC was seeking declarations from the court that the defendants had contravened provisions of the *ASIC Act*, alternatively the *Corporations Act* or the *Trade Practices Act 1974* ("the *Trade Practices Act*"). Injunctions were also sought to restrain the defendants from making statements or representations to the effect that the training, or other services provided, supplied or promoted by the defendants, or the mezzanine lending facilities, or any other financial services or financial products promoted,

recommended or supplied by the defendants, had been approved or otherwise authorised by ASIC, in circumstances where they had not.

- 2.4 In an amended process ASIC also later sought a declaration that the defendants, in the provision of financial product advice relating to the MML products, had contravened the Corporations Act and sought an injunction restraining the defendants from carrying on a financial services business without an Australian financial services licence. ASIC also sought an order requiring the defendants to publish, at their expense, a corrective advertisement.
- 2.5 On 13 March 2003, whilst denying the breach of any relevant law and without making any admissions, the defendants by their respective Counsel provided undertakings to the court in the proceedings that they would not make any statement or representation in any form whatsoever to the effect that the seminars or any investment opportunities that might be promoted, recommended or supplied by the defendants have been approved, endorsed, authorised or vetted by ASIC.
- 2.6 In view of the above and to resolve this matter, NII, Kaye, Novasource and Meagher have agreed to offer this Enforceable Undertaking to ASIC. ASIC has agreed to accept this Enforceable Undertaking as an alternative to continuing to seek relief in the proceedings. In doing so, NII, Kaye, Novasource and Meagher acknowledge that this Enforceable Undertaking is in connection with matters in relation to which ASIC has a function or power under the ASIC Act.

### 3. **Undertakings**

Pursuant to s.93AA of the ASIC Act, NII, Kaye, Novasource and Meagher offer the following undertakings to ASIC:

Note: In this Undertaking –

"ASIC approval statement" means any statement or representation that the training or any financial product is or has been approved authorised or vetted by ASIC.

"mezzanine mortgage lending product" means any facility or investment by or through which an investor invests or contributes funds for use by a property developer in connection with a property development as top-up finance, that is, as

finance additional to finance obtained by the property developer from a financial institution.

"the training" means any training course, seminar, workshop, conference, consultation or coaching session which relates directly or indirectly to any mezzanine mortgage lending product or any other financial product.

"financial product", "financial product advice" and "deal" have the meanings respectively given to those terms in Chapter 7 of the Corporations Act 2001.

Unless the context otherwise requires, a reference to "NII" or "Novasource" includes a reference to any servant, agent or representative of that company.

### **No Representation of ASIC Approval**

- 3.1 NII, Kaye, Novasource and Meagher undertake that they will not, by themselves, their servants or agents –
- (a) make any statement or representation in any form whatsoever, to the effect that the training, or other services provided, supplied or promoted by them, or any of them, have been approved, endorsed, authorised or vetted by ASIC; and
  - (b) make any statement or representation in any form whatsoever, to the effect that the MML products or any mezzanine mortgage lending product or any other services or products promoted, recommended or supplied by them or any of them, have been approved, endorsed, authorised or vetted by ASIC.

### **No Provision of Financial Products or Financial Product Advice Without a Licence**

- 3.2 NII, Kaye and Novasource undertake that they will not, by themselves, their servants or agents supply, promote and/or provide any financial product or financial product advice without first obtaining an Australian financial services licence or being an authorised representative of an Australian financial services licensee.
- 3.3 Without limiting the generality of the undertaking set out in paragraph 3.2, NII, Kaye and Novasource undertake that except as authorised by an Australian financial services licence or as an authorised representative of

an Australian financial services licensee, they will not, by themselves, their servants or agents or otherwise howsoever, make any recommendation, express any opinion, or give any advice, whether orally or in writing and whether to a person or to a group of persons, in relation to the following, and shall not deal in –

- (a) any mezzanine mortgage lending product; or
- (b) any other financial product; or
- (c) a decision by any person whether or not to invest in any product referred to in (a) or (b).

3.4 In the event that NII, Kaye and Novasource wish to supply, promote and/or provide any financial product or financial product advice they will first seek to obtain an Australian financial services licence or be authorised by an Australian financial services licensee and comply with all licensing requirements relevant thereto.

### **Compensation**

- 3.5 NII will, not later than 28 days from the date of this Enforceable Undertaking, send to any client who enrolled in any training program with NII between 1 March and 31 December 2002 and who has paid or incurred a liability to pay to NII a sum in excess of \$1,000, a letter in the form that is annexed to this Enforceable Undertaking and marked "A".
- 3.6 In the case of any such client for whom NII does not possess a current address or other means to contact them, NII will be taken to have complied with this undertaking if NII uses its reasonable endeavours to locate that client.
- 3.7 If NII receives a claim supported by way of statutory declaration ("**compensation claim**") from a client ("**claimant**") for a refund of monies paid in relation to a seminar, training and/or consultation by or with NII, its employees, representatives and/or agents, (including any amount received by NII, its employees and/or agents as a result of any financing arrangement between a client and any third party) and/or for interest on any moneys borrowed to finance such payment, NII will (subject to clause 3.10)

accept and pay the compensation claim, within 28 days of receiving the compensation claim.

- 3.8 Within 30 days of entering into this Enforceable Undertaking, NII will appoint an independent person ("**claims reviewer**") to conduct the review of compensation claims pursuant to the process outlined in clauses 3.10-3.13. NII may appoint alternative claims reviewers from time to time. A claims reviewer shall be:
- (a) legally qualified and with not less than 5 years experience; and
  - (b) a person whose appointment is approved by ASIC.
- All remuneration and costs associated with the claims reviewer shall be borne by NII.
- 3.9 The terms of engagement of the claims reviewer are to be approved by ASIC, and must include provision for the claims reviewer to provide written reasons for the rejection of claims referred to the reviewer.
- 3.10 NII may reject so much of any compensation claim as, in its reasonable opinion, does not establish that the claimant:
- (a) has paid, or incurred a liability to pay, monies to NII in reliance on an ASIC approval statement; and
  - (b) if the claim includes interest on money borrowed in order to make any payment to NII, that he/she incurred interest on such borrowing.
- 3.11 NII will refer any claim which it rejects in whole or in part under 3.10 to the claims reviewer within 28 days of receiving the compensation claim. Otherwise NII will pay the claim made within 28 days.
- 3.12 The claims reviewer will determine the compensation claim on the basis of the claimant's application within 28 days of receiving the compensation claim. NII agrees to be bound by the decision of the claims reviewer and to pay a claim within 28 days if so determined by the claims reviewer.
- 3.13 If a compensation claim is rejected by the claims reviewer, then within 7 days of rejecting the claim, NII will -

- (a) subject to receipt by NII of written reasons from the claims reviewer as to why the compensation claim was rejected, provide those reasons to the claimant; and
- (b) provide to the claimant a written notice in the form contained in Annexure B.

### **Corrective Advertisement**

- 3.14 NII and Novasource will, within 7 days of the date of this Enforceable Undertaking, cause to be published on a single occasion in *The Australian*, the *Australian Financial Review* and a major daily newspaper circulating in the capital city of each State and Territory, the corrective advertisement, in the form that is annexed to this Enforceable Undertaking and marked "C" ("corrective advertisement"). In each case the advertisement is to be prominently displayed and to be no smaller than a quarter page in size.
- 3.15 NII has established a website with the domain name [www.nationalinvestmentinstitute.com.au](http://www.nationalinvestmentinstitute.com.au) ("the website"). NII will, within 7 days of the date of this Enforceable Undertaking, post on its website a copy of the corrective advertisement attached to this Enforceable Undertaking and marked "C".

### **Compliance Program**

- 3.16 NII and Novasource will each implement an appropriate compliance program to monitor compliance with any relevant obligations under the *ASIC Act*, the *Corporations Act*, and/or the *Trade Practices Act* by any of their employees, servants, agents or representatives ("the compliance program"). These programs will involve the following:

#### **Review and Report to ASIC by Independent Party**

- (a) Not later than 28 days from the date of this Enforceable Undertaking, NII will, subject to the approval of ASIC, appoint an independent party to review and monitor compliance by NII and Kaye with their respective undertakings as set out in paragraphs 3.1-3.4, 3.14 and 3.15.
- (b) Not later than 28 days from the date of this Enforceable Undertaking, Novasource will, subject to the approval of ASIC,



appoint an independent party to review and monitor the compliance by Novasource with its undertakings as set out in paragraphs 3.1-3.4 and 3.14.

- (c) In each case, the independent party will report his or her findings as to compliance to the Director, Enforcement (South-West), ASIC, on or before each of the following dates -
- 1 September 2003;
  - 31 December 2003;
  - 30 April 2004.
- (d) At the conclusion of the compensation process referred to above, the independent party appointed by NII shall report to ASIC the outcome of that process.
- (e) Each independent party must keep confidential all information which he or she receives in the course of performing these duties which would identify any of the clients.
- (f) Each report of an independent party is to be provided to the directors of the relevant company who will implement and comply with all reasonable recommendations made by the independent party.

#### **Appointment of NII and Novasource Compliance Officer**

- (g) Within 28 days of the date of this Enforceable Undertaking, NII and Novasource will each appoint and retain a Compliance Officer. In each case, the Compliance Officer will be responsible for monitoring compliance by the company with its obligations under the *ASIC Act*, the *Corporations Act* and the *Trade Practices Act*.
- (h) Each Compliance Officer is to be a qualified lawyer who has been practising for at least the past 5 years; or has not less than 3 years experience in the finance and/or securities industries in a supervisory or compliance role and who is a member of the

Australian Compliance Institute or, with the approval of ASIC, another appropriate professional association.

### **Education and Training of Employees and Representatives**

- (i) Each Compliance Officer will institute a program of education and training of relevant employees or representatives of the company about their legal obligations under the *ASIC Act*, the *Corporations Act* and the *Trade Practices Act*.

### **Payment of Costs**

- 3.17 Apart from the costs referred to in clause 3.19, the parties will not make any claim for costs against one another in the proceeding.

### **Undertakings to the Court**

- 3.18 Within 7 days of the acceptance of this undertaking, NII, Novasource, Kaye and Meagher will each give undertakings to the Court in the form of paragraphs 3.1 to 3.4 (as respectively applicable to them).
- 3.19 As soon as practicable after the acceptance of this undertaking, the parties will seek orders by consent that, upon NII, Kaye, Novasource and Meagher giving the undertakings set out in paragraphs 3.1 to 3.4 above:
  - (a) the proceedings be dismissed; and
  - (b) the first, second and third defendants pay the plaintiff's costs fixed in the sum of \$50,000.

## **4. Acknowledgments**

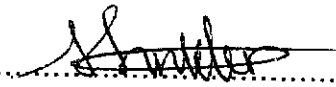
- 4.1 NII, Kaye, Novasource and Meagher acknowledge that ASIC:
  - (a) may issue a media release on execution of this Enforceable Undertaking referring to its terms and to the concerns of ASIC which led to its execution;
  - (b) may from time to time publicly refer to this undertaking; and
  - (c) will make this undertaking available for public inspection.

4.2 NII, Kaye, Novasource and Meagher further acknowledge that:

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

The Common Seal of )  
 National Investment Institute )  
 Pty Ltd (ACN 098 189 863) was )  
 duly affixed to this undertaking on )  
 this 30 day of July 2003 in the )  
 presence of: )




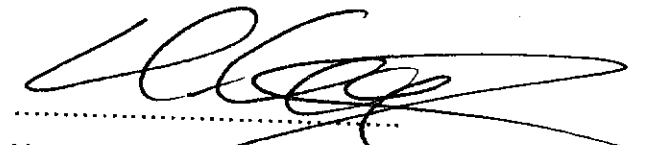
  
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 Witness

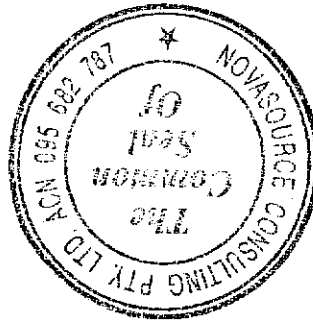
  
 .....  
 Director/Secretary

SIGNED by HENRY KAYE )  
 this 30 day of July 2003 in the )  
 presence of: )



  
 .....  
 Witness

  
 .....  
 Henry Kaye



The Common Seal of Novasource )  
Consulting Pty Ltd (ACN 095 682 787) )  
was duly affixed to this undertaking on )  
this 30<sup>th</sup> day of July 2003 in the )  
presence of: )

*[Signature]*  
.....

Witness  
SIGNED by ALAN MEAGHER )  
this 30<sup>th</sup> day of July 2003 in the )  
presence of: )

*[Signature]*  
.....  
Director/Secretary

*[Signature]*  
.....  
Witness HELEN STAVRIDIS  
A Commissioner for taking Affidavits  
in the Supreme Court of South Australia

*[Signature]*  
.....  
Alan Meagher

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

*[Signature]*  
.....  
Mark Steward  
Director, Enforcement (South-West)

Dated: this 30<sup>th</sup> day of July 2003

## ANNEXURE A

### Letter to training course enrollees on NII letterhead

[Date/Addressee]

Dear

#### Offer of Refund

I am writing concerning your enrolment for, or attendance at, a seminar conducted by National Investment Institute Pty Ltd (NII). At the seminar, or in other training programs or consultations, statements were made orally and in a brochure which suggested that the Australian Investments and Securities Commission (ASIC) had approved investment opportunities made available by NII. Statements may also have been made that the training courses provided by NII were approved or otherwise endorsed by ASIC (collectively, **the ASIC approval statements**).

The ASIC approval statements may also have been repeated by a sales consultant retained by one of NII's associated companies.

ASIC has a number of concerns, including that the ASIC approval statement was misleading and deceptive. ASIC issued proceedings in the Federal Court against NII and three other defendants. Whilst denying any breach of the law, NII and the other defendants acknowledge ASIC's concerns. Indeed, it is accepted that whilst certain disclosure documents such as prospectuses are required to be lodged with ASIC pursuant to the Corporations Act, ASIC takes no responsibility for the contents of a prospectus and does not register or otherwise approve such documents. Further, ASIC has no statutory authority and no policy to approve, authorise or licence investment opportunities or investment seminars or courses such as the kind conducted by NII.

In a resolution of the matter, ASIC has agreed to accept an Enforceable Undertaking from NII and the other defendants. The Enforceable Undertaking, dated [insert], sets out the relevant circumstances in much greater detail and may be read by accessing ASIC's website at [insert]. Particularly, the Undertaking provides for NII to refund monies in excess of \$1,000 paid to enrol in a training program and/or interest paid on monies so paid in accordance with the compensation regime provided for in paragraphs 3.5 to 3.13 inclusive of the Enforceable Undertaking.

If you wish to make a claim to NII in accordance with the Enforceable Undertaking please do so by [date] in writing to:

[NII officer, address, telephone, etc.]

In support of your compensation claim you must deliver to NII a statutory declaration verifying your claim and establishing:-

- (a) that you relied on the ASIC approval statements; and
- (b) if you borrowed money in order to make any payment to NII, that you incurred interest on such borrowing.

All claims must be made in accordance with the above procedure within 60 days of receipt of this letter. Failure to make a claim within this time will mean you are ineligible for a refund in accordance with the Enforceable Undertaking but does not otherwise affect your legal rights, in particular, your right to seek compensation in the courts. We suggest that if you have concerns with this matter you seek your own legal advice.

Yours faithfully,

[NII Director]

**Annexure B**

**NOTICE OF REJECTION OF COMPENSATION CLAIM**

You have made a claim for compensation in response to a notice provided to you by National Investment Institute Pty Ltd ("NII").

Your compensation claim is for a refund of monies you paid to NII and/or interest on monies you may have borrowed to make that payment by reason of statements ("**the Statements**") made by NII in brochures or training courses that the investment opportunities of NII and training offered by NII were approved by the Australian Securities and Investments Commission.

- NII has considered your compensation claim and had it reviewed by an independent claims reviewer.

Your compensation claim has been rejected by the independent claims reviewer and the reasons for the rejection by the independent claims reviewer are attached.

The rejection of your compensation claim does not prevent you from taking legal action to pursue your claim if you are not satisfied with the reasons attached. You should seek your own legal advice in those circumstances. If you wish to discuss the rejection you may contact NII on [**contact details**].

### Annexure C – Corrective Advertisement

During 2002, National Investment Institute Pty Ltd (NII) published a brochure that was used to promote its mezzanine finance seminars. The brochure, and oral statements, may have created the impression that the Australian Securities and Investments Commission (ASIC) had approved certain investment opportunities and the NII training programs.

Earlier this year ASIC commenced proceedings in the Federal Court of Australia alleging, in part, that the above statements were misleading or likely to mislead consumers. While NII took a different view to ASIC, it acknowledges that

- ASIC has no statutory authority or policy to approve, authorise or licence investment opportunities, seminars or training courses; and
- ASIC has not approved, authorised nor vetted any investment opportunities or training programs offered or promoted by NII; and
- NII now acknowledges that ASIC has never approved, authorised or vetted any training or investment opportunities offered or promoted by NII

The brochure was withdrawn from use before ASIC's intervention.

The matter before the Federal Court has now been resolved by ASIC's acceptance of an Enforceable Undertaking which can be viewed at [www.asic.gov.au].

NII regrets any confusion that may have been caused and is willing to refund seminar costs to any person who paid monies or incurred liability to pay monies to NII in reliance upon any of the ASIC approval statements. NII invites any customer with such concerns to call it on [dedicated number].

NII will be writing to all affected persons by ..... 2003.

This advertisement has been placed by NII pursuant to the terms of the Enforceable Undertaking.

*in excess of \$1000*

*OK*  
~~\_\_\_\_\_~~  
*MS*

~~\_\_\_\_\_~~  
*[Signature]*