



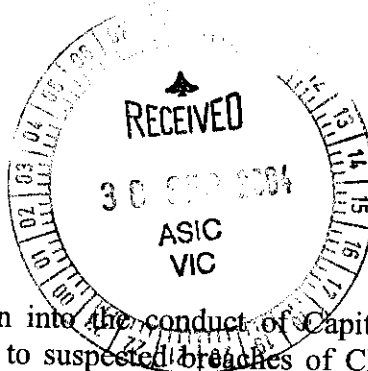
Enforceable Undertaking

Australian Securities & Investments Commission Act 2001

Section 93AA

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

Capital Intelligence Ltd
ACN 091 509 849
Level 1 130 Hay Street
Subiaco WA 6008



1 BACKGROUND

1.1 ASIC has conducted an investigation into the conduct of Capital Intelligence Ltd (ACN 091 509 849) ("CI"), relating to suspected breaches of CI's Dealers Licence and/or Australian Financial Services Licence and misleading and deceptive conduct during the period 1 January 2002 to 31 December 2003.

1.2 CI was registered on 8 February 2000 as Hometrader Pty Ltd. On 31 March 2000 Hometrader Pty Ltd became a public company and then changed its name to CI on 4 March 2003. "Hometrader" continues to be the brand name used by CI.

1.3 Between 3 December 2001 and 10 April 2003, CI carried on a securities business under a Dealers Licence issued pursuant to section 784 of the old Corporations Act ("Old Corporations Act"), as defined in section 1410 (1) of the Corporations Act 2001 ("Dealers Licence"). Condition 1 of the Dealers Licence states:

"The licensee must limit its operation to demonstrating how to use *The Bourse System* and *Metastock* software and the technique of analysing historical stock market data and the application of technical analysis theory"

1.4 On 10 April 2003, CI was issued with an Australian Financial Services Licence ("AFSL") pursuant to section 913B of the Corporations Act 2001. CI now carries on its securities business pursuant to the AFSL. The Authorisation attached to the AFSL states:

"The licence authorises the licensee to, only through:

- a. the demonstration and provision of the Bourse System and Metastock software ("the Products"); and
- b. the production of reports which contain factual information on, and analysis of, entities listed on prescribed financial markets, as generated by the products;

carry on a financial services business to provide general financial product advice for the following classes of financial products:

A. securities;

to retail clients."

- 1.5 CI has offices in most of Australia's capital cities. Each office conducts regular "point of sale" seminars. These seminars are advertised in major newspapers and are available to the public. CI uses the "point of sale" seminars to introduce people to their membership structure and the educational seminars that are available to people, if and when they become "members".
- 1.6 The educational seminars offered by CI range from education on the use of Microsoft Word and Excel through to the development and implementation of trading systems¹ for various securities, including options and shares.
- 1.7 Membership also entitles people to access the CI websites and various CI publications such as newsletters and promotional material.

System Pack 2002

- 1.8 In or about early 2002, CI commenced giving their members a document known as "System Pack 2002" ("SP2"). SP2 contains four pre-prepared trading systems², including the codes necessary to implement the trading systems on the Metastock software, that CI is licensed to demonstrate and provide.
- 1.9 SP2 was given to CI members free of charge as part of their membership entitlements. It contains the four trading systems and a description of the "types" of investor that each trading system would be suited to.
- 1.10 ASIC has expressed concerns to CI that:
 - (a) the trading systems contained in SP2 could reasonably be interpreted as securities recommendations of a kind that CI is not authorised to make;
 - (b) as the trading systems contained in SP2 could reasonably be interpreted as securities recommendations, CI has not made appropriate disclosures in relation to SP2 as required by section 849 of the Old Corporations Act;
- 1.11 ASIC is concerned that SP2 constituted a breach of CI's obligations arising under the Old Corporations Act, the Corporations Regulations and/or the conditions of CI's Dealers Licence.
- 1.12 Specifically, ASIC is concerned that by providing SP2 to its members, CI may have:

¹ A trading system is a set of rules that define trading actions when certain circumstances arise. Trading systems remove the need for an investor to make the subjective decision about when to buy or sell the security being traded, as the trading system does this for the investor.

² The Trading Systems are pre-prepared in that they are complete trading systems that can be easily adopted and used by the members of CI. Each Trading System provides a summary of the system, a description of the type of trader to whom the system would be suited, the composition of the system and its properties; the entry, exit and risk management conditions of the system as well as a description of the testing which has been conducted in relation to each system.

- (a) contravened section 786 of the Old Corporations Act which states that a licence is subject to such conditions and restrictions as are prescribed;
- (b) contravened regulation 7.3.02D of the Corporations Regulations (to the Old Corporations Act) by failing to provide adequate warnings in relation to SP2 as general advice to retail clients;
- (c) breached the conditions of CI's Dealers Licence, namely;
 - (i) condition 1 as noted at paragraph 1.3 above;
 - (ii) condition 3 which obliges CI to maintain adequate compliance procedures to ensure that CI only provide factual information or the Bourse System or Metastock software and the technique of analysing historical stock market data and the application of technical analysis theory and does not make any personal securities recommendations;
- (d) contravened section 787 of the Old Corporations Act, by failing to notify ASIC within one day of an event constituting a contravention of a licence condition;
- (e) by virtue of the contraventions and breaches noted in paragraph 1.12 (a) – (d) failed to act efficiently, honestly and fairly pursuant to section 826 (1) (j) of the Old Corporations Act;
- (f) by virtue of the contraventions and breaches noted in paragraph 1.12 (a) – (d) given ASIC reason to believe that it will not act efficiently, honestly and fairly in the future, pursuant to section 826 (1) (k) of the Old Corporations Act.

Acknowledgements Regarding System Pack 2002

1.13 CI acknowledges:

- (a) ASIC's concerns and views in paragraphs 1.8 to 1.12 above, however, CI does not admit that it has breached any law. CI has agreed to give ASIC the undertakings set out in this Enforceable Undertaking; and
- (b) that in doing any or all of the things contained in paragraphs 2.1 and 2.2 below, ASIC may produce this Enforceable Undertaking as evidence.

System Pack 2003

- 1.14 Similar to SP2, System Pack 2003 ("SP3") is a document which contains pre-prepared trading systems³, including the codes necessary to implement the trading systems on the Metastock software, that CI is licensed to demonstrate and provide.
- 1.15 During 2003, SP3 was sold to CI members for a fee of \$484. Like SP2, SP3 contains four trading systems and describes the "types" of investor that each trading system would be suited to.

³ Ibid.

- 1.16 The flyer distributed to members to promote SP3 claimed that the system known as RLSCFD 1 "produces a 4,151% return over 7 years (that's 41.5 x your money)". Although this statement appears to be an indication of future results, it is in fact only a statement of what the system has produced when applied to historical data.
- 1.17 ASIC has expressed concerns to CI that:
- (a) the promotional flyer used in relation to SP3 is misleading and deceptive;
 - (b) the trading systems contained in SP3 constitutes providing a financial service that CI is not authorised to provide;
 - (c) the trading systems in SP3 could reasonably be interpreted as general securities advice and as such, CI has made insufficient disclosures in the document.
- 1.18 ASIC is concerned that SP3 and the flyer used to promote it constitutes a breach of CI's obligations arising under the Corporations Act 2001, Australian Securities and Investments Commission Act 2001 ("ASIC Act"), and/or the conditions of CI's AFSL.
- 1.19 Specifically, ASIC is concerned that by selling SP3 to its members, CI may have:
- (a) contravened section 12DA of the ASIC Act which states that a person must not, in trade or commerce, engage in conduct in relation to financial services that is misleading or deceptive or is likely to mislead or deceive;
 - (b) contravened section 911A of the Corporations Act 2001 by carrying on a financial services business without holding an AFSL covering the provision of the financial services;
 - (c) contravened section 912A (1) (b) of the Corporations Act 2001 which states that the holder of an AFSL must comply with the conditions on the licence, namely:
 - (i) the authorisation as noted at paragraph 1.4 above;
 - (ii) condition 3 which requires that the licensee establish and maintain compliance measures that ensure, as far as reasonably practicable, that the licensee complies with the provisions of the financial services laws;
 - (iii) condition 4 that the licensee must establish and maintain adequate training, supervision and compliance procedures to ensure that the licensee and its representatives only provide factual information on the Bourse System and Metastock software and the technique of analysing historical stock market data and the application of technical analysis theory and do not provide personal advice.
 - (d) pursuant to section 912A (1) (c) of the Corporations Act 2001 failed to comply with the financial services laws;

- (e) contravened section 949A (2) of the Corporations Act 2001 in failing to provide adequate warnings in relation to SP3 as general advice to retail clients;
- (f) contravened section 912D (1) of the Corporations Act 2001 by not reporting its failure to meet its obligations under section 912A of the Corporations Act 2001;
- (g) by virtue of the contraventions and breaches noted in paragraph 1.19 (a) – (f), also contravened section 912A (1) (a) of the Corporations Act 2001 being its general obligation to do all things necessary to ensure that the financial services covered by the AFSL are provided efficiently, honestly and fairly;
- (h) by virtue of the contraventions and breaches noted in paragraph 1.19 (a) – (f), also contravened section 912A (1) (ca) of the Corporations Act 2001 being its obligation to take reasonable steps to ensure that its representatives comply with the financial services laws.

Acknowledgements Regarding System Pack 2003

1.20 CI acknowledges:

- (a) ASIC's concerns and views in paragraphs 1.14 to 1.19 above, however, CI does not admit that it has breached any law. CI has agreed to give ASIC the undertakings set out in this Enforceable Undertaking; and
- (b) that in doing any or all of the things contained in 2.1 and 2.2 below, ASIC may produce this Enforceable Undertaking as evidence.

Trade Sim

- 1.21 During its educational seminars, CI teaches the concept of "back testing". Back testing is a means by which a person can test the effectiveness of a trading system by using historical data. This can be done manually or electronically with the use of software specifically designed to back test trading systems.
- 1.22 Trade Sim is a form of electronic back testing that can be added to the Metastock software that CI are licensed to market and sell.
- 1.23 CI has marketed Trade Sim as part of their educational seminars. Trade Sim was also made available for members to purchase on one of CI's websites, namely www.daytraderHQ.com.
- 1.24 ASIC has expressed concerns to CI that marketing and selling Trade Sim constitutes conducting a securities business beyond the conditions to which CI's AFSL is subject;
- 1.25 ASIC is concerned that the marketing and selling of Trade Sim constitutes a breach of CI's obligations arising under the Corporations Act 2001 and the conditions of CI's AFSL.
- 1.26 Specifically, ASIC is concerned that by marketing and selling Trade Sim CI may have:

- (a) contravened section 912A (1) (b) of the Corporations Act 2001 which states that the holder of an AFSL must comply with the conditions of the licence, namely by breaching the conditions set out at paragraph 1.19 (c) (i) (ii) and (iii) above;
- (b) by virtue of the contravention noted in sub-paragraph (a) of paragraph 1.26, also contravened section 912A (1) (ca) being its obligation to take reasonable steps to ensure that its representatives comply with the financial services laws;
- (c) by virtue of the contravention noted in sub-paragraph (a) of paragraph 1.26, also contravened section 912A (1) (a) being its general obligation to do all things necessary to ensure that the financial services covered by the AFSL are provided efficiently, honestly and fairly.

Acknowledgements Regarding Trade Sim

1.27 CI acknowledges

- (a) ASIC's concerns and views in paragraphs 1.21 to 1.26 above, however, CI does not admit that it has breached any law. CI has agreed to give ASIC the undertakings set out in this Enforceable Undertaking; and
- (b) that in doing any or all of the things contained in paragraphs 2.1 and 2.2 below, ASIC may produce this Enforceable Undertaking as evidence.

2 ASIC'S POWERS

2.1 ASIC is required by section 915C (1) of the Corporations Act 2001 to provide CI with the opportunity of a hearing before ASIC decides what, if any, action should be taken against CI as a result of CI's conduct. If findings were made against CI at such a hearing, ASIC could take the following action:

- (a) cancel CI's AFSL pursuant to section 915A of the Corporations Act 2001;
- (b) suspend CI's AFSL pursuant to section 915A of the Corporations Act 2001;
- (c) vary CI's AFSL pursuant to section 914A of the Corporations Act 2001;
- (d) impose further conditions on CI's AFSL pursuant to section 914A of the Corporations Act 2001.

2.2 Further and/or alternatively, ASIC may commence Court proceedings in relation to the breaches of the ASIC Act, Old Corporations Act and Corporations Act 2001.

2.3 CI has offered and ASIC has agreed to accept an Enforceable Undertaking in the terms set out below as an alternative to determining whether or not ASIC should exercise the powers set out in paragraphs 2.1 and 2.2 above.

3 Undertakings

Pursuant to section 93AA of the ASIC Act, CI undertakes that:

Writing to all purchasers of SP3 and provision of refunds

- 3.1 CI will:
- (a) within 2 weeks of the date of signing this Enforceable Undertaking by ASIC, send by ordinary pre-paid post a written notice in the form of Attachment "A" to this Enforceable Undertaking,;
 - (b) upon receipt of each signed Attachment "A", immediately provide to each person who has signed and returned Attachment "A" a refund for the full purchase price paid by them for SP3.

Compliance measures

- 3.2 CI will establish and maintain compliance measures that ensure, as far as reasonably practicable, that CI complies with financial services law (as that term is defined in section 761A of the Corporations Act 2001).

Compliance officer

- 3.3 Within 1 month, of the date of signing this Enforceable Undertaking by ASIC ("**Operational Date**"), CI will retain a compliance officer who will have a designated compliance role and will be responsible for ensuring that CI complies with its obligations under the Old Corporations Act, the Corporations Act 2001, the Corporations Regulations, the ASIC Act, and the conditions of CI's AFSL or any future AFSL which may be issued to CI (or any related entity to which CI transfers, sells or disposes of its assets and business).
- 3.4 CI will ensure that the compliance officer is a person who is a member of the Australian Compliance Institute, or, with the approval of ASIC, another appropriate professional association, and:
- (a) a qualified lawyer who has been practising for at least the past 5 years; and/or
 - (b) has not less than 3 years experience in the securities industry in a supervisory or compliance role.
- 3.5 CI will inform ASIC in writing of the identity of the compliance officer referred to in paragraph 3.3, within 1 month of the Operational Date and of any subsequent appointment of a compliance officer within 2 business days of the appointment, during the period of 24 months after the Operational Date.
- 3.6 CI will ensure that the Compliance Officer reports directly to the Board of CI and has appropriate authority from CI to discharge the responsibilities and functions described in paragraph 3.3.

Compliance Program

- 3.7 CI will, within 2 months of the Operational Date, engage an external independent compliance consultant (whose appointment and terms of reference are to be approved by ASIC) ("**Independent Consultant**"). The Independent Consultant will review, assess, identify, make recommendations and report in writing to CI, the registered

company auditor appointed pursuant to condition 17 of CI's AFSL ("**Auditor**") and ASIC in relation to CI's compliance with the Old Corporations Act, the Corporations Act 2001, the Corporations Regulations, the ASIC Act and the licence conditions attached to CI's AFSL or any future AFSL which may be issued to CI (or any related entity to which CI transfers, sells or disposes of its assets and business), considering CI's internal controls, compliance systems, procedures, supervision and training of its representatives ("**Report**") as at 3 months, 6 Months, 9 Months and 12 months from the Operational Date ("**Reporting Dates**").

- 3.8 Each Report will include, but not be limited to, the identification and the making of recommendations for changes to ensure full compliance with the Old Corporations Act, the Corporations Act 2001, the Corporations Regulations, the ASIC Act, and the licence conditions attached to CI's AFSL or any future AFSL which may be issued to CI (or any related entity to which CI transfers, sells or disposes of its assets and business), in particular relating to:
- (a) the structure, status, autonomy, independence and reporting lines of the compliance function;
 - (b) the content of the educational seminars offered by CI;
 - (c) any material, whether written or electronic, provided to CI members as a part of or in connection with the educational seminars offered by CI;
 - (d) any material, whether written or electronic used by CI for the purposes of marketing point of sale or educational seminars;
 - (e) training and supervision of representatives;
 - (f) an assessment of representatives' understanding of their obligations with respect to the Old Corporations Act, the Corporations Act 2001, Corporations Regulations, the ASIC Act, and CI's AFSL;
 - (g) internal and external resolution of complaints;
 - (h) the action taken by CI to remedy any deficiencies identified in previous reports; and
 - (i) compliance with this undertaking.
- 3.9 CI will use its reasonable endeavours to enable each Report to be delivered to ASIC and The Auditor within 14 days of the relevant Reporting Dates in relation to the 6, 9 and 12 month Report. The 3 month Report will be delivered by no later than 26 January 2005 due to absence of key person during the Christmas and holiday period. In the event that CI is unable to deliver a copy of the Report to ASIC and The Auditor within 14 days of the relevant Reporting Date, CI will provide to ASIC and The Auditor a written explanation for the delay and an estimate of when the report will be provided. Such written explanation must be received from CI by ASIC and The Auditor within 16 days after the Reporting Date.
- 3.10 Within 30 days of receiving each Report, CI will provide ASIC and The Auditor with a report from the CI Board ("**Board Report**"):

- (a) detailing the steps taken or to be taken by CI to comply with any recommendations of the Independent Consultant; and
 - (b) providing a full explanation as to why any recommendation of the consultant has not been or will not be followed.
- 3.11 Within 30 days of receiving each Board Report, the Auditor will lodge with ASIC an opinion ("**Compliance Opinion**"), addressed to CI and ASIC, which:
- (a) states whether CI and the Independent Consultant have complied with the requirements of this Enforceable Undertaking;
 - (b) states whether the recommendations of the Independent Consultant have been implemented in a timely and efficient manner;
 - (c) notifies ASIC of any suspected contravention by CI of any of the provisions of the Old Corporations Act, the Corporations Act 2001, the Corporations Regulations, the ASIC Act and the licence conditions attached to CI's AFSL or any future AFSL which may be issued to CI (or any related entity to which CI transfers, sells or disposes of its assets and business).

Training of representatives

- 3.12 Within 1 month of the Operational Date, CI will create and then maintain a record of the training (relevant to the provision of financial services) that each of its representatives has undertaken, including:
- (a) training undertaken after the representative became a representative of CI; and
 - (b) any training undertaken before the representative became a representative of CI to the extent that CI is able to obtain the information by reasonable enquiry.
- 3.13 For any natural person who provides financial product advice on behalf of CI, CI will, within 5 months of the Operational Date:
- (a) identify the tasks and function that person performs on behalf of CI;
 - (b) determine the appropriate knowledge and skills required to competently perform those tasks and functions;
 - (c) implement procedures for continuing training;
 - (d) record in writing each of the steps undertaken by CI to fulfil the matters identified in sub-paragraphs 3.13(a) to 3.13(c) above.
- 3.14 CI will ensure that within 10 months of the operational date that any natural person who provides financial product advice to retail clients on behalf of CI:
- (a) has completed training courses at an appropriate level that are or have been listed on the ASIC Training Register that are relevant to those functions or tasks; or

- (b) has been individually assessed as competent by an assessor that is or has been listed on the ASIC Training Register.

Costs of Compliance

- 3.15 CI will bear the costs of complying with the obligations in this Enforceable Undertaking, including the costs of engaging the Independent Consultant and The Auditor, and completing the Reports, Board Reports and Compliance Opinion.

Consequences of non-compliance

- 3.16 CI undertakes that, in the event of non-compliance with any of the undertakings set out in paragraphs 3.1-3.15 (inclusive) above, and without derogating from any other rights and remedies available to ASIC, the Reporting Dates contained in paragraph 3.6 will be further extended such that the Independent Consultant will further Report to CI, The Auditor and ASIC as at 15 months, 17 months, 19 Months, 21 Months and 24 months from the Operational Date.

Notification to ASIC of suspected contraventions

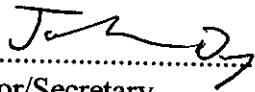
- 3.17 Without derogating from any other obligation upon CI to report to ASIC, CI will notify ASIC in writing within 3 business days of CI forming the view that either it or its representative(s) may have contravened a provision contained in the Old Corporations Act, Corporations Act 2001, Corporations Regulations, the ASIC Act and/or the conditions of CI's AFSL.

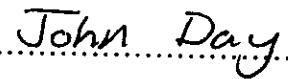
4 GENERAL ACKNOWLEDGMENTS

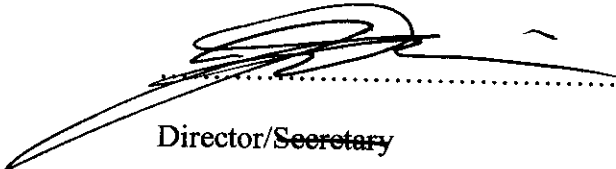
- 4.1 CI acknowledges that it has obtained legal advice in relation to the content and effect of this undertaking.
- 4.2 CI acknowledges that ASIC:
 - (a) may issue a media release on execution of this undertaking referring to its terms and the concerns of ASIC which led to its execution;
 - (b) may from time to time publicly refer to this undertaking; and
 - (c) will make this undertaking available for public inspection.
- 4.3 CI acknowledges that this undertaking in no way derogates from the rights and remedies available to ASIC. For the avoidance of doubt, in the event of CI breaching the undertaking, CI acknowledges that ASIC reserves all of its rights and remedies against CI in relation to CI's conduct whether the conduct occurred before or after the date the undertaking has operative force. In addition, CI acknowledges that 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.
- 4.4 CI acknowledges that ASIC's acceptance of an enforceable undertaking does not affect its power to investigate, conduct surveillance or pursue a criminal prosecution or its power to lay charges or seek a pecuniary penalty order.

4.5 CI acknowledges that this undertaking has no operative force until accepted by ASIC.

The Common Seal of **Capital Intelligence**)
Ltd (ACN 091 509 849) was duly affixed)
to this undertaking on 2004 in the)
presence of and the sealing is attested by:)
)
)
)
)
)


.....
Director/Secretary



.....
Print Name


.....
Director/Secretary


.....
Print Name

Accepted by the Australian Securities and Investments Commission pursuant to section 93AA of the *Australian Securities and Investments Commission Act* by its duly authorised delegate.

Dated this 11th day of October 2004


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MARK STEWARD

ATTACHMENT "A"

[TO BE TYPED ON CAPITAL INTELLIGENCE LTD LETTERHEAD]

Dear Sir/Madam,

System Pack 2003 – Your Right to a Refund of the Purchase Price

Last year, you purchased from us a product called System Pack 2003.

The Australian Securities and Investments Commission ("ASIC") has recently concluded an investigation into our conduct and determined, among other things, that we were not authorised to sell the System Pack 2003 and also made statements in relation to the System Pack 2003 which may have misled you.

As a result of ASIC's investigation, we have entered into an Enforceable Undertaking with ASIC, pursuant to which we are obliged to implement a series of internal procedures and also write to you as someone who purchased System Pack 2003 to offer a refund.

We understand that you may not have chosen to purchase the System Pack 2003, had you known that we were not licensed to sell the product or received one of the advertising flyers we circulated.

Accordingly, if you now wish to obtain a refund of the total purchase price paid by you for your copy of System Pack 2003, please sign this letter in the place indicated below and return it to us in the enclosed reply paid envelope by [date, being 4 weeks from the date of the letter being dispatched]. Upon receipt of the signed letter we will immediately provide to you, by prepaid ordinary post, a cheque for the full amount you paid for System Pack 2003.

Yours sincerely,

John Day

Director

If you wish to receive a refund of the amount paid by you for System Pack 2003, please sign below and return this letter to us by [(date) being 4 weeks from the date of the letter being dispatched].

.....