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

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

Robert John Kay  
51 Organs Road  
Bulli 2516  
New South Wales

**1. Background**

- 1.1 Elm Financial Services Pty Ltd ("**Elm Financial Services**") was incorporated in Australia on 5 June 1968. Elm Financial Services was known as Adam Securities Pty Ltd between 11 October 1983 to 14 March 2002.
- 1.2 Between 21 October 1983 and 12 July 2002, Elm Financial Services held a Securities Dealers license pursuant to the Companies Code and Corporations Law. On 12 July 2002, Elm Financial Services was granted an Australian Financial Services License numbered 221267, pursuant to the Corporations Act, 2001 ("**Corporations Act**").
- 1.3 Robert John Kay ("**Mr Kay**") was a director of Elm Nominees from about 5 July 2002, a director of Elm Management from about 31 October 2002, and a director of Fletcher Securities from about 10 February 1999.
- 1.4 Mr Kay was a member of the management committee of Elm Financial Services, Elm Nominees, Elm Management and Fletcher Securities.
- 1.5 Mr Kay was:
  - (a) An "officer" of Elm Financial services within the meaning of section 9 of the Corporations Act 2001; and
  - (b) A "providing entity" within the meaning of sections 945A and 946A of the Corporations act.

**2. ASIC Investigation**




- 2.1 On 29 May 2003, ASIC commenced an investigation pursuant to section 13 of the Australian Securities and Investments Act, 2001 of suspected contravention of the fund raising provisions of the Corporations Act, by Elm Financial Services and others, including Mr Kay. Those suspected contraventions concerned:

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- (i) The Stirling Offers made by Elm Financial Services and E Star Redfern between about June 1999 and November 2001;
- (ii) The Port Heritage Offers made by Elm Financial Services and Elm Nominees between about November 2001 and May 2002;
- (iii) The Elm Nominees offer by Elm Financial Services and Elm Nominees between about April 2003 and February 2004;
- (iv) The Elm Property Offers by Elm Financial Services, Elm Property and Fletcher Securities between about July 2002 and December 2003.
- (v) The Elm Unit Trust Offers by Elm Financial Services and Elm Nominees between about August 2002 and January 2003.

2.2 As a result of those investigations, ASIC formed the following views.

- 2.3 Between about June 1999 and November 2001 Elm Financial Services made offers (the "Stirling Offers") to members of the Australian public to acquire debentures of E Star Redfern Pty Ltd, which were accepted by a number of members of the Australian public.
- 2.4 Members of the Australian public contributed \$2.471 million to acquire the debentures. The debentures were securities within the meaning of section 761A of the Corporations Act and required disclosure pursuant to section 706 of the Act.
- 2.5 Elm Financial Services and E Star Redfern did not lodge a disclosure document with ASIC.
- 2.6 Between about November 2001 and May 2002 Elm Financial Services and Elm Nominees Pty Ltd made an offer (the "Port Heritage Offer") to members of the Australian public to acquire debentures issued by Elm Nominees. The public contributed \$1.878 million. In respect of this offer, disclosure was also required pursuant to section 706 of the Corporations Act.
- 2.7 Elm Financial Services and Elm Nominees did not lodge a disclosure document with ASIC.
- 2.8 Between about April 2003 and February 2004 Elm Financial Services and Elm Nominees made an offer to the Australian public to acquire debentures issued by Elm Nominees. The public contributed \$11.132 million. In respect of this offer, disclosure was also required pursuant to section 706 of the Corporations Act.
- 2.9 Elm Financial Services and Elm Nominees did not lodge a disclosure document with ASIC.
- 2.10 Between about July 2002 and December 2003 Elm Financial Services, Elm Property Developments Pty Ltd and Fletcher Securities Pty Ltd made an offer

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(the "Elm Property Offer") to members of the Australian public to acquire debentures issued by Elm Property. The public contributed \$5.397 million. In respect of this offer, disclosure was also required pursuant to section 706 of the Act.

- 2.11 Elm Financial Services, Elm Property Developments and Fletcher Securities did not lodge a disclosure document with ASIC.
- 2.12 Between about August 2002 and January 2003 Elm Financial Services and Elm Nominees made offers to members of the Australian public to acquire units in a unit trust known as the Elm Financial Services Unit Trust No. 1. Members of the public accepted the offer and acquired units for \$1.15 million. ASIC is of the view that the offers constituted a managed investment scheme within the meaning of section 9 of the Act and which was required to be registered pursuant to section 601 ED of the Corporations Act.
- 2.13 The Elm Unit Trust was not registered under section 601EB of the Act.
- 2.14 Between about April 2003 and September 2003 Elm Financial Services made offers (the Ann Street Offers") to members of the Australian public to pay moneys to Elm Financial Services so as to enable it to acquire Promissory Notes in Anne Street Mezzanine Pty Ltd. ASIC is of the view that the offers constituted a managed investment scheme within the meaning of section 9 of the Act and as such was required to be registered pursuant to section 601 ED of the Corporations Act.
- 2.15 The offer provided for the payment of some or all of the interest received by Elm Financial Services pursuant to the Promissory Note. Members of the Australian public contributed \$1.73 million.
- 2.16 The offer was not registered pursuant to section 601EB of the Act.

### 3. **Contraventions by Robert John Kay**

- 3.1 Mr Kay acknowledges that arising from the promotion and issue of the Elm Nominee Debenture ("**the Elm Nominee Debenture Contravention**") by Elm Financial Services and Elm Nominees, there was a contravention of section 727(1) of the Corporations Act.
- 3.2 Mr Kay acknowledges that arising out of the issue of the Elm Property Debenture ("**the Elm Property Debenture Contravention**") by Elm Financial Services and Fletcher Securities, there was a contravention of section 727(1) of the Corporations Act.
- 3.3 Mr Kay acknowledges that by the issue of units in the Elm Unit Trust ("**the Elm Unit Trust Contravention**") by Elm Financial Services and Elm Nominees, there was a contravention of section 601ED(5) of the Corporations Act.

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- 3.4 Mr Kay acknowledges that by the promotion and issue of the Anne Street Offer ("**the Anne Street Contravention**"), there was a contravention of section 601ED(5) of the Corporations Act.
- 3.5 Mr Kay acknowledges that he took no steps to prevent the **Elm Nominee Debenture Contravention, the Elm Property Debenture Contravention, the Elm Unit Trust Contravention or the Anne Street Contravention.**
- 3.6 A number of clients investing in the abovementioned securities lost funds.
- 3.7 Mr Kay acknowledges that the companies promoting the abovementioned securities had a duty under section 945A of the Corporations Act in advising clients to invest, to:
- (a) determine the relevant personal circumstances in relation to giving the advice;
  - (b) make reasonable inquiries in relation to the personal circumstances of the clients;
  - (c) have proper regard to the information from the clients in relation to their personal circumstances; and
  - (d) ensure the advice is appropriate to the client, having regard to that consideration and investigation,

and Mr Kay acknowledges that, in a number of instances, the client advisors acting on behalf of Elm Financial Services, failed to determine the relevant circumstances of their clients, failed to make reasonable inquiries of their clients, failed to have any or any proper regard to information obtained from their clients and, in all the circumstances, the recommendations or advice provided to those clients was not appropriate.

- 3.8 As a result of its investigation, ASIC has the following further concerns:
- (a) Mr Kay, in connection with recommendations to clients to roll over investments made by representatives of Elm Financial Services, took no steps to ensure that the representatives provided clients with Statements of Advice, as required by section 946A of the Corporations Act. In particular, ASIC is concerned that, as an officer of the company, Mr Kay did not prevent the contravention of section 946A(1) of the Corporations Act by Elm Financial Services and was otherwise "involved" in the contravention within the meaning of section 79 of the Corporations Act.
  - (b) Elm Financial Services and associated companies contravened section 1041E(1), 1041F(1)(a) and 1041H(1) of the Corporations Act by providing Information Memorandums containing false or misleading statements. In particular, ASIC is concerned that, Mr Kay did not prevent the contravention and was otherwise "involved" in the contravention within the meaning of section 79 of the Corporations Act.



- (c) Personal advice was provided to the retail clients of Elm Financial Services in contravention of section 945A (1) of the Corporations Act, containing statements or disseminating information that was false in a material particular or was materially misleading, in contravention of section 1041E (1) of the Corporations Act. Mr Kay failed to take reasonable steps to prevent the contravention of section 1041E (1) of the Corporations Act and was otherwise "involved" in that contravention, within the meaning of section 79 of the Act.

3.5 Mr Kay acknowledges ASIC's concerns and offers this enforceable undertaking.

**4. ASIC proceedings in the Supreme Court of New South Wales:**

4.1 ASIC is responsible for enforcement of Corporations legislation and the promotion of confident and informed participation of investors and consumers in the financial system.

4.2 On 15 October 2004 ASIC commenced proceedings in the Supreme Court of New South Wales against Mr Kay and eleven other defendants in respect of alleged contravention of the fund raising, reasonable advice and statement of advice provisions of the Corporations Act and in respect of alleged misleading and deceptive conduct in contravention of the Corporations Act; proceedings number 2313 of 2004 ("the ASIC proceedings").

4.3 ASIC and Mr Kay have agreed to settle the ASIC proceedings, so far as they affect Mr Kay. A Statement of Agreed Facts has been agreed with Mr Kay and ASIC and will be provided to the Court in support of orders, pursuant to sections 206C(1), 206D(1) and 206E(1), disqualifying Mr Kay from managing corporations for a period of five (5) years commencing on the date the Order is made by the Court.

4.4 Notwithstanding the provisions of this Enforceable Undertaking, ASIC and Mr Kay acknowledge that the Court may exercise its discretion to make declarations and orders other than those sought by the parties in the settlement of the ASIC proceedings as against Mr Kay.




4.5 Mr Kay acknowledges that he is bound by this undertaking, regardless of the outcome of the ASIC proceedings.

**5. UNDERTAKING**

5.1 Mr Kay provides the following undertaking for the purposes of section 93AA of the Australian Securities and Investments Act, 2001:

Mr Kay undertakes that he will not, for a period of five years commencing from the date this undertaking is accepted by ASIC, directly, or indirectly:

- (a) provide financial product advice within the meaning of section 766B of the Corporations Act;

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- (b) deal in a financial product within the meaning of section 766C of the Corporations Act; or
- (c) operate a registered scheme within the meaning of section 9 of the Corporations Act;

**6. Acknowledgements**

6.1 Mr Kay acknowledges that ASIC:

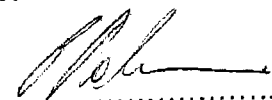
- (a) may issue a media release on execution of this undertaking referring to its terms and the concerns of ASIC that led to its execution;
- (b) may from time to time publicly refer to this undertaking; and
- (c) will make this undertaking available for public inspection.

6.2 Mr Kay 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.

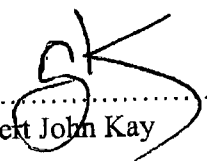
6.3 Mr Kay acknowledges that ASIC's acceptance of this undertaking does not affect ASIC's power to investigate a contravention arising from future conduct.

6.4 Mr Kay acknowledges that this undertaking has no operative force until accepted by ASIC.

Executed by ROBERT JOHN KAY  
In the presence of:

  
.....  
PETER ROBINSON  
SOLICITOR

)  
)  
)

  
.....  
Robert John Kay



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 10 day of *Oct* 2005

A handwritten signature in black ink, consisting of a large, stylized 'A' followed by a horizontal line that tapers to the right.

Allen Turton  
Deputy Executive Director, Enforcement  
Australian Securities & Investments Commission