



017029988

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:

Danielle Marie Russell (Ms Russell)

5 Parker Avenue

Sorrento WA 6020

Definitions

1. In addition to terms defined elsewhere in this undertaking, the following definitions are used:
 - a. **AFSL** means Australian Financial Services Licence;
 - b. **ASIC Act** means the *Australian Securities and Investments Commission Act 2001* (Cth);
 - c. **Business Day** means a day on which banks are open for Business in Melbourne excluding a Saturday, Sunday or public holiday in that city;
 - d. **Corporations Act** means the *Corporations Act 2001* (Cth);
 - e. **Corporations Regulations** means the Corporations Regulations 2001 (Cth);
 - f. **Infocus** means Infocus Securities Australia Pty Ltd ACN 097 797 049;
 - g. **Financial services** has the meaning given by s766A of the *Corporations Act 2001* (Cth);
 - h. **Financial product advice** has the meaning given by s766B of the *Corporations Act 2001*(Cth).

Background

2. Under s1 of the ASIC Act, ASIC is charged with a statutory responsibility to perform its functions and to exercise its powers so as to promote the confident and informed participation of investors and consumers in the financial system.
3. Pursuant to s13 of the ASIC Act, ASIC has conducted an investigation which

related to suspected contraventions of various provisions of the Corporations Act and the ASIC Act, including s945A of the Corporations Act.

Details of Conduct

4. Ms Russell was an authorised representative of Infocus between 31 July 2006 and 26 November 2008. Ms Russell operated from an Infocus branch office situated in Northbridge, Western Australia during this period.
5. The authority permitted Ms Russell to provide financial advice, deal in a financial product, and apply for, acquire or dispose of financial products on behalf of another.
6. The authority was revoked by Infocus on 26 November 2008.
7. Prior to 31 July 2006 Ms Russell operated as an authorised representative of four other AFSL holders.
8. The conduct that is the subject of this enforceable undertaking occurred during the course of Ms Russell's role in providing financial advice to clients of Infocus, namely the period 31 July 2006 to November 2008.

ASIC's concerns

9. During the period from 31 July 2006 to November 2008 Ms Russell made various recommendations to Infocus clients to acquire financial products. Pursuant to those recommendations, clients invested in the financial products recommended by Ms Russell.
10. ASIC has concerns that during the above period, Ms Russell:
 - a) Failed to make an adequate determination of and make reasonable inquiries into the relevant personal circumstances of clients to whom she made recommendations;
 - b) Failed to give proper regard to information she did obtain from clients and give proper consideration to and conduct proper investigation of the subject matter of recommendations made by her. For example:
 - (i) recommending to low income earning clients not requiring a taxation effective investment to invest in managed investment agribusiness schemes;
 - (ii) recommending to retail clients that they invest in a high proportion of 'higher risk' financial products;
 - (iii) recommending to retail clients that they acquire financial products by gearing, such as through the establishment of margin lending accounts in circumstances where no adequate cash flow analysis was carried out to assess the ability to service such loans;
 - (iv) failing to actively monitor the investment portfolios of her clients on

an ongoing basis; and

- (v) undertaking transactions within client's investment portfolios by switching holdings in shares to cash without first obtaining client authority.

Acknowledgement by Ms Russell of ASIC's concerns

11. Ms Russell acknowledges ASIC's concerns as set out in paragraph 10 above, and has offered this enforceable undertaking in terms outlined below.
12. Ms Russell acknowledges that should ASIC form the view that she has failed to comply with this enforceable undertaking, ASIC may take additional action including (without limitation) seeking court orders under s93AA of the ASIC Act requiring her to comply with the terms of this undertaking.

Undertakings

13. Under s93AA of the ASIC Act, Ms Russell has offered, and ASIC has agreed to accept as an alternative to administrative action, the undertakings as set out in paragraphs 16 to 23 and 25 to 27 inclusive.
14. Ms Russell undertakes that she will pay the costs of compliance with this enforceable undertaking.
15. Ms Russell will, within a reasonable period of time after receiving a request from ASIC, provide all documents and information requested by ASIC from time to time for the purposes of assessing Ms Russell's compliance with the terms of this enforceable undertaking.

Undertaking to complete continuing professional education

16. Ms Russell undertakes to commence continuing professional education outlined in paragraph 17 within twelve (12) months of the giving of this undertaking.
17. Ms Russell undertakes to participate in continuing professional education in the form of:
 - (a) ASIC RG 146 Competency Assessment & Gap Training program for planners and advisers conducted by Kaplan Education Pty Ltd;
 - (b) Margin lending specialist course conducted by Kaplan Education Pty Ltd; and
 - (c) 'Ethics and Conduct' course conducted by the Financial Planning Association.

(together, the Continuing Professional Education)

- (d) Ms Russell will obtain documentary evidence from the provider of the Continuing Professional Education that she has attended and successfully completed the relevant aspect of the Continuing Professional Education (**Documentary Confirmation**).
- (e) Within 14 days of successfully completing the Continuing Professional Education, Ms Russell will provide ASIC with a statutory declaration

signed by her and attaching certified copies of the Documentary Evidence and stating whether the requirements of clause 17 have been complied with.

18. Should Ms Russell fail to comply with clauses 16 and 17 within eighteen (18) months of the date of this enforceable undertaking, Ms Russell agrees to cease providing financial services of any kind whatsoever until such time as clauses 16 and 17 have been complied with.

Supervision

19. Ms Russell undertakes that in the event that Ms Russell is employed to provide financial services as at the date of this enforceable undertaking, or subsequently becomes employed to provide financial services, she will within five (5) Business days notify ASIC of:

- (a) the name and address of her employer;
- (b) position title; and
- (c) date of commencement of employment.

(Notification)

20. Ms Russell will notify ASIC in writing within three (3) Business days of any change to the details comprising the Notification.
21. Within 14 days of the date of the Notification Ms Russell will obtain the agreement of a senior financial planner employed by her AFSL holder employer (**Reviewer**), to undertake quarterly reviews of the financial services provided by her to retail clients, in accordance with clause 23 below. The agreement of the Reviewer shall be effected by signing the document marked annexure A to this enforceable undertaking and Ms Russell providing a copy of it to ASIC within three (3) Business days thereafter.
22. In the event that:
 - (a) Ms Russell is unable to obtain the agreement of a senior financial planner to be her Reviewer, or,
 - (b) the Reviewer becomes unable, for any reason, to comply with the matters specified in clauses 23 and 24,

another person must, within (5) Business Days of the event in clause 22(a) or (b) occurring, be nominated by Ms Russell to be the Reviewer subject to:

- i. Ms Russell providing ASIC with details in writing of the alternative Reviewer including their name, position and a summary of their qualifications in the financial services industry; and
- ii. ASIC providing Ms Russell of its agreement in writing to the

alternative Reviewer; and

- iii. Within (7) Business days of Ms Russell receiving ASIC's written agreement to any alternative reviewer, Ms Russell undertakes to procure the agreement of the alternative Reviewer to the terms of agreement annexed to this enforceable undertaking marked "A", and provide a signed copy of that document to ASIC .

- 23. The Reviewer shall undertake the following tasks:
 - (a) audit a sample of a minimum of five (5) clients that received financial services advice by Ms Russell during the relevant quarter;
 - (b) the review shall occur on a quarterly basis for one (1) year from the date of signing of annexure A to this enforceable undertaking by the Reviewer;
 - (c) for each client file audited the Reviewer will consider:
 - (i) whether or not the advice provided by Ms Russell was appropriate having regard to s945A of the Corporations Act; and
 - (ii) whether or not the AFSL holders' policies were complied with by Ms Russell.
 - (d) the review shall be completed within 30 days of the end of the relevant quarter.
- 24. Within five (5) Business days of completion of each quarterly audit, or any other reasonable period of time requested by the Reviewer and agreed to in writing by ASIC, the Reviewer will provide Ms Russell with a written statement (**Reviewer's Statement**) setting out the matters referred to in paragraph 23.
- 25. Ms Russell shall provide the Reviewer's Statement to ASIC within five (5) Business days of receiving it from the Reviewer.
- 26. Ms Russell will provide all reasonable assistance to the Reviewer in fulfilling the obligations set out above in clause 23 to 25.
- 27. Should any of the Reviewer's Statements identify non compliance with either or both of clause 23(c)(i) and (ii):
 - (a) Ms Russell will consider the reasons for the opinion in the Reviewer's Statement and then provide to ASIC a written plan (**Remedial Action Plan**) setting out the action she proposes to take to address the issues of non-compliance set out in the Reviewer's Statement and specifying the time in which this action will be taken. Ms Russell will provide the Remedial Action Plan to ASIC within fourteen (14) days of the date of the Reviewer's Statement.
 - (b) Ms Russell must implement the Remedial Action Plan within the time specified in the Remedial Action Plan. If ASIC requests any reasonable modifications to the Remedial Action Plan Ms Russell must implement the

Remedial Action Plan as so modified.

- (c) Where the Reviewer is of the opinion that clients did not receive appropriate advice in compliance with clause 23(c)(i) any further financial services advice provided by Ms Russell to those clients shall be further audited by the Reviewer (in addition to the audit to be conducted pursuant to clause 23(a) on a quarterly basis) until the expiration of this enforceable undertaking.

Acknowledgements-Operation of this Enforceable Undertaking

28. Ms Russell acknowledges that:

- a) This enforceable undertaking has no operative force until accepted by ASIC, and Ms Russell and ASIC acknowledge that the date of the enforceable undertaking is the date on which it is accepted by ASIC;
- b) ASIC 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;
- c) ASIC may from time to time publicly refer to this enforceable undertaking;
- d) ASIC will make this enforceable undertaking available for public inspection; and
- e) ASIC's acceptance of this undertaking does not affect ASIC's power to investigate, conduct surveillance or pursue a criminal prosecution or its power to lay charges or seek a pecuniary civil order in relation to any contravention not the subject of ASIC's concerns in this enforceable undertaking or arising from future conduct.

29. 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 or arising from future conduct.

30. Provision of notice and documents to ASIC:

- (a) The address for providing ASIC with any notice, document, including but not limited to the Reviewer statement is:

ASIC
Level 24, 120 Collins St
MELBOURNE VIC 3000
Attention: Glenn Childs

- (b) The address for providing Ms Russell with any notice or document is:

C/o Talbot & Olivier
Wesfarmers House Level 8

40 The Esplanade
Perth WA 6000
Attention: Brendon Taylor



Danielle Marie Russell

Dated: 26/10/10

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



Tim Mullaly

Delegate of Australian Securities and Investments Commission

The 1st of November 2010

Annexure A

TERMS OF AGREEMENT WITH REVIEWER

Background

1. Under the enforceable undertaking which Ms Russell made to the Australian Securities and Investments Commission (ASIC) on 2010 (**Enforceable Undertaking**), Ms Russell undertook to obtain the agreement of a person to conduct quarterly reviews of financial services advice provided by her for a period of one (1) year (**Reviewer**).

Obligations

2. The Reviewer will conduct the following tasks under the Enforceable Undertaking:
 - 2.1. review the financial services advice provided by Ms Russell on a quarterly basis for the period of one (1) year from the date of the Enforceable Undertaking;
 - 2.2. consider whether, in the Reviewer's opinion:
 - 2.2.1. the advice provided by Ms Russell is appropriate having regard to s945A of the *Corporations Act* 2001; and
 - 2.2.2. whether or not the AFSL holders' policies were complied with by Ms Russell.
 - 2.3. provide Ms Russell with a statement (**Reviewer's Statement**) setting out his/her opinion and the reasons for it, within five (5) days or any other period agreed to by ASIC after completion of the relevant audits undertaken in each quarter.
3. Ms Russell will provide all reasonable assistance to the Reviewer in fulfilling the obligations set out in clause 2 above.

Reporting

4. The Reviewer's Statement required to be written by the Reviewer will:
 - 4.1. be produced in accordance with the Enforceable Undertaking. If there is any inconsistency between these terms and the Enforceable Undertaking, the Enforceable Undertaking shall prevail;
 - 4.2. set out any limitations or qualifications to it; and
 - 4.3. list those documents or extracts of documents most relevant (in the view of the Reviewer) in producing the Reviewer's Statement.

Independence

5. The Reviewer warrants that:
 - 5.1. The Reviewer is independent of Ms Russell and will at all material times be capable of exercising objective and impartial judgment.

5.2. The Reviewer will notify Ms Russell and ASIC immediately if the Reviewer is no longer capable of exercising objective and impartial judgment in relation to his/her agreement to perform the tasks set out in clause 2. This includes, but is not limited to, circumstances where the Reviewer:

- 5.2.1. could directly or indirectly benefit from a financial interest in any company in which Ms Russell also has an interest (where "financial interest" refers to an interest in any equity or other security, debenture, loan or other debt instrument of a company);
- 5.2.2. is promoting, or may be perceived to be promoting, Ms Russell's position or opinion to the point that objectivity and/or impartiality is/are compromised;
- 5.2.3. begins to have a close relationship with Ms Russell;
- 5.2.4. may be deterred from acting objectively and/or impartially by the conduct of the AFSL holder's employees; or
- 5.2.5. becomes aware of past or current circumstances the existence of which places the Reviewer in breach of any of the warranties contained in this Agreement.

Reviewer name

Signature

Date

