

ENFORCEABLE UNDERTAKING

Australian Securities and Investments Commission Act 2001 (Cth)

Section 93AA

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

*Hugh Sutcliffe Martin
1/195 Victoria Square
Adelaide SA 5000*

1. DEFINITIONS

In addition to terms defined elsewhere in this undertaking, the following definitions are used:

ASIC Act means the *Australian Securities and Investments Commission Act 2001 (Cth)*

Corporations Act means the *Corporations Act 2001 (Cth)*

Corporations Regulations means the *Corporations Regulations 2001 (Cth)*

ASG means Australian Slab Group (ASG) Pty Ltd ACN 096 895 242

Bernardi Martin means the *firm in which Mr Martin practices*

Blue Ribbon means *Blue Ribbon Country Meats Pty Limited ACN 087 976 734*

Botanic Business means *the business operated by Botanic International, sold by contract dated 6 March 2006, assigned to Botanic Café, subsequently operated by Botanic Café and sold on 13 December 2006.*

Botanic Café means *ACN 074 778 064 Pty Ltd formerly known as Botanic Café Australia Pty Ltd ACN 074 728 064*

Botanic International means *Botanic International Pty Ltd ACN 103 159 146*

Hardcover Entertainment means *Hardcover Entertainment Pty Ltd ACN 108 754 285*

Independent Expert means *the registered liquidator engaged by Mr Martin in accordance with paragraph 3.3 of this undertaking*

IPA means the *Insolvency Practitioners Association of Australia*

Lach Transport means *Lach Transport Pty Ltd ACN 007 981 026*

Mr Martin means *Hugh Sutcliffe Martin*

Park Avenue The Hub means *Park Avenue The Hub Pty Limited ACN 104 393 302*

P&O Finance & Property means *P&O Finance & Property Facilitators Pty Limited ACN 102 575 897*

R Singleton Traders means *R Singleton Traders Pty Ltd ACN 008 072 731*

Urbane Wearhouse means *Urbane Wearhouse Pty Ltd ACN 116 315 694*

Uzumcu means *Uzumcu Enterprises Pty Ltd ACN 104 045 552*

227 Glen Osmond Road means *227 Glen Osmond Road Pty Limited ACN 104 196 536*

2. BACKGROUND

2.1 ASIC's role

2.1.1. Under section 1 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.

2.1.2. Part 9.2 of the Corporations Act charges ASIC with responsibility for registering liquidators and official liquidators and for maintaining a register of liquidators and official liquidators.

2.2 Mr Martin

2.2.1. Mr Martin was registered as a liquidator (registration number 192287) pursuant to section 1282 of the Corporations Act on 1 October 1999. Mr Martin was registered as an official liquidator (registration number 273551) pursuant to section 1283 of the Corporations Act on 14 April 2004.

2.2.2. Since 26 June 2000 Mr Martin has practiced under the registered business name, Bernardi Martin at Level 1, 195 Victoria Square, Adelaide SA 5000.

2.2.3. Mr Martin is a member of the Institute of Chartered Accountants in Australia and a member of the IPA.

2.3. ASIC's investigation / surveillance and analysis

2.3.1. As part of a targeted review of liquidators' practices ASIC undertook a practice review of Mr Martin's insolvency practice. Following from concerns identified in the review, ASIC undertook further investigation

including a complete review of the insolvency administration files of 16 administrations.

2.3.2. As a result of the investigation, ASIC formed the view that in relation to 12 external administrations Mr Martin failed to carry out or perform adequately and properly the duties of a liquidator or the duties or functions required by an Australian law to be carried out or performed by a registered liquidator.

2.4. Details of conduct

2.4.1. That Mr Martin overdrew remuneration for professional services rendered in respect of the liquidation of Lach Transport by \$29,664.98 (excluding GST) in contravention of section 449(3) of the Corporations Act without prior creditor approval, which creditor approval was obtained subsequently;

2.4.2. That Mr Martin consented to act as administrator of Botanic Café in circumstances where he had an actual conflict of interest by virtue of his role as liquidator of Botanic International including his involvement in the sale of the Botanic Business by Botanic International and its subsequent acquisition by Botanic Café;

2.4.3. That Mr Martin failed to adequately investigate the circumstances of the sale of the Botanic Business by Botanic International;

2.4.4. That Mr Martin failed to advise creditors of Botanic International of all relevant information in relation to the sale of the Botanic Business and that he did not act in the best interests of creditors by permitting the sale to proceed in those circumstances.

2.4.5. That Mr Martin failed to adequately investigate the circumstances of the acquisition, and of the sale, of the Botanic Business by Botanic Café particularly the circumstances of a purported assignment of the contract for sale of the Botanic Business by Botanic International to Botanic Café and as a consequence paid \$27,739.29 for plant and equipment to the former owner of the Botanic Business to the detriment of creditors of Botanic Café;

2.4.6. That Mr Martin consented to act as, and acted as liquidator of Urbane Warehouse whilst he was liquidator of Uzumcu and by doing so placed himself in a position of actual, apparent or implied conflict of interest;

2.4.7. That Mr Martin did not adequately investigate the affairs of P&O Finance & Property, Park Avenue The Hub, Blue Ribbon and 227 Glen Osmond Road and, in particular did not take adequate steps to obtain the companies' books and records and other information from the respective directors and did not adequately inquire into related party transactions;

2.4.8. That Mr Martin failed to adequately investigate and/or to keep sufficient records of his investigations into ASG, Hardcover Entertainment and

Uzumcu to adequately explain what investigations were undertaken and how his conclusions were reached;

2.4.9. That Mr Martin failed to adequately investigate the affairs of Uzumcu and did not adequately report to ASIC under section 533 of the Corporations Act in respect of Uzumcu;

2.4.10. That Mr Martin in his administration of ASG failed to:

2.4.10.1. undertake investigations;

2.4.10.2. take recovery actions in relation to significant assets;

2.4.10.3. prepare a supplementary 533 report; and

2.4.10.4. make distributions to creditors

in a timely manner;

2.4.11. That Mr Martin's report pursuant to section 439A of the Corporations Act in respect of Hardcover Entertainment was deficient and consequently misleading;

2.4.12. That Mr Martin used special proxies at meetings of creditors of Lach Transport and ASG to vote in favour of approving his remuneration in breach of regulation 5.6.33¹ of the Corporations Regulations;

2.4.13. That Mr Martin failed to lodge minutes of the first creditors meeting of Lach Transport with ASIC;

2.4.14. That Mr Martin signed and lodged with ASIC minutes for the first creditor's meeting of Singleton Traders that contained incorrect and misleading information.

2.5. Acknowledgement of contentions

Mr Martin accepts and acknowledges the concerns raised by ASIC on its review of his practice, recognises and regrets that his conduct has fallen below acceptable professional standards and following that review at his own initiative has:

2.5.1. refused all but eight insolvency appointments in a period of 24 months to enable him to reduce his workload by 75% to facilitate proper compliance;

2.5.2. conducted a full practice review and administration file review;

¹ Regulation 5.6.33 of the Corporations Regulations as it was at the time of the conduct in May 2005 and May 2004 respectively

2.5.3. identified poor work practices;

2.5.4. implemented new practices and systems designed to prevent re-occurrence of those problems including provision of additional staff training, holding regular staff meetings, instituting a new email based follow up procedure and adopting new documentation and conflict identification procedures.

3. UNDERTAKINGS

Under section 93AA of the ASIC Act, Mr Martin has offered, and ASIC has agreed to accept as an alternative to making an application to the Companies Auditors & Liquidators Disciplinary Board for an order pursuant to section 1292 of the Corporations Act the following undertakings:

- 3.1. Within 90 days of the date upon which this enforceable undertaking is accepted by ASIC, Mr Martin will cause the sum of \$27,739.29 to be distributed to the creditors of Botanic Café in accordance with Part 5.6, Division 6 of the Corporations Act without deduction for his costs and will confirm that he has done so by letter addressed to the Senior Manager, Deterrence Financial Services at the Adelaide office of ASIC.
- 3.2. Mr Martin must not accept any new appointments as an external administrator of a company for a period of 4 months from the date upon which this enforceable undertaking is accepted by ASIC.
- 3.3. Within 30 days of the date of this undertaking Mr Martin must engage (from a list to be supplied by ASIC) a registered liquidator who is independent of Mr Martin and Bernardi Martin to be an independent expert for the purposes of this undertaking.
- 3.4. The Independent Expert and the Independent Expert's terms of engagement must be approved by ASIC before the Independent Expert is engaged. Mr Martin must advise ASIC of the expertise and any prior association of the proposed Independent Expert with him and Bernardi Martin at the time approval is sought from ASIC. The terms of the engagement may only be varied with the agreement of ASIC.
- 3.5. All remuneration and costs associated with the Independent Expert must be born by Mr Martin.
- 3.6. The terms of the engagement must require the Independent Expert:
 - 3.6.1. within 60 days of his appointment to conduct a review of all internal

practice, procedural and compliance materials used by Mr Martin and Bernardi Martin in connection with its corporate insolvency practice and report as to the adequacy or otherwise of such materials;

3.6.2. to conduct a complete review of 10 insolvency administrations commenced or being undertaken by Mr Martin during an 18 month period following the date upon which this enforceable undertaking is accepted by ASIC, the selection of which must be approved by ASIC. This review is to cover, in respect of each appointment, the period from the date of Mr Martin's appointment or the date upon which this enforceable undertaking is accepted by ASIC, whichever is the later to the date upon which the external administration is finalised and, in the course of undertaking the review, to report on Mr Martin's compliance with his professional obligations as a registered liquidator and official liquidator including but not limited to compliance with:

3.6.2.1. the Corporations Act and Corporations Regulations;

3.6.2.2. duties and obligations imposed by common law;

3.6.2.3. the IPA's published Code of Professional Practice; and

3.6.2.4. the internal practice, procedural and compliance materials adopted by Mr Martin;

3.6.3. to provide written notification to Mr Martin and to ASIC immediately upon making a finding during a review referred to in paragraph 3.6.2 that Mr Martin did not comply with any of his professional obligations outlined in paragraph 3.6.2, setting out particulars of the non compliance.

3.6.4. to report to ASIC as follows:

3.6.4.1. in relation to the matters outlined at paragraph 3.6.1 and in relation to the matters outlined at paragraph 3.6.2 for any external administrations being undertaken by Mr Martin at the date upon which this enforceable undertaking is accepted by ASIC that are subject to review by the Independent Expert, an initial report to be provided no later than 3 months after the Independent Expert's appointment;

3.6.4.2. in respect of each new external administration undertaken by Mr Martin that is subject to review by the Independent Expert, an initial report in relation to the matters outlined at paragraph 3.6.2 to be provided as soon as practicable after the first 3 months following Mr Martin's appointment as external administrator;

- 3.6.4.3. following the initial report referred to in paragraph 3.6.4.1 above, a report to be provided at 6 monthly intervals in relation to the matters outlined at paragraph 3.6.2 in respect of each of the external administrations subject to review by the Independent Expert during the relevant 6 month period, such reports to be provided until such time as all of the external administrations being reviewed are finalised;
- 3.7. Insofar as the Independent Expert recommends any changes to the internal practice, procedural and compliance materials, Mr Martin must implement such changes within 14 days of being advised of same.
- 3.8. Insofar as ASIC and/or the Independent Expert identifies a need for Mr Martin to undertake additional training or education on compliance related matters, Mr Martin must undertake such training at the earliest practicable opportunity and in any event within 18 months from the date upon which this enforceable undertaking is accepted by ASIC.
- 3.9. In the event that the Independent Expert notifies Mr Martin and ASIC in accordance with paragraph 3.6.3 that Mr Martin has not complied with any of his professional obligations, ASIC may direct Mr Martin to request ASIC to cancel his registration as a liquidator and official liquidator under subsection 1290(1) of the Corporations Act and Mr Martin must comply with such a direction within 14 days.
- 3.10. Within 10 days of the receipt of a copy this enforceable undertaking accepted by ASIC and signed by an ASIC delegate, Mr Martin will pay the sum of \$35,000 to ASIC on account of its costs and disbursements associated with its investigation.
- 3.11. Mr Martin will pay the costs of his own compliance with this enforceable undertaking.

4. ACKNOWLEDGMENTS

4.1 Mr Martin acknowledges that ASIC:

- (a) 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;
- (b) may from time to time publicly refer to this undertaking; and
- (c) will make this undertaking available for public inspection.

4.2 Further Mr Martin acknowledges that:

- (a) 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;

(b) 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.

4.3 Mr Martin acknowledges that ASIC had reason to be concerned as to the alleged facts and has offered an enforceable undertaking in the terms of paragraphs 3.1 to 3.11 above.

4.4 Mr Martin acknowledges that this undertaking has no operative force until accepted by ASIC, and Mr Martin and ASIC acknowledge that the date of the enforceable undertaking is the date on which it is accepted by ASIC.



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Hugh Sutcliffe Martin

Dated:7/5/9.....

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



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Sean Bernard Hughes
Delegate of Australian Securities and Investments Commission

Dated:8/5/09.....