

9133

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 by:

Graham Werry
18 Marine Parade
Watsons Bay NSW 2030

DTC No.1 Pty Ltd
ACN 089 812 555
Suite 704, Level 7
74 Pitt Street
Sydney NSW 2000

Weriton Finance Pty Ltd
ACN 143 536 645
Suite 704, Level 7
74 Pitt Street
Sydney NSW 2000

A. DEFINITIONS

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

ARFT means the Australian Residential Finance Trust;

ARPT means the Australian Residential Property Trust;

ASIC means the Australian Securities and Investments Commission;

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);

DTC No.1 means DTC No.1 Pty Ltd ACN 089 812 555;

DTC No.1 att ARFT means DTC No.1 Pty Ltd as trustee for the Australian
Residential Finance Trust;

DTC No.1 att ARPT means DTC No.1 Pty Ltd as trustee for the Australian
Residential Property Trust;



Edessa Holdings means Edessa Holdings Pty Ltd ACN 003 221 716;

EMC Nominees means EMC (Nominees) Pty Ltd ACN 098 743 983;

NAB means the National Australia Bank Limited ACN 004 044 937;

Noteholders means persons and entities holding promissory notes issued by DTC No.1 Pty Ltd or Weriton Finance Pty Ltd as trustee for the Australian Residential Finance Trust;

Mr McMillan means Peter John McMillan, born on 16 April 1953;

Ross Smith Superannuation Fund is the self-managed superannuation fund whose trustees and beneficiaries are Colin Ross Smith and Heather Jean Smith.

Mr Smith is Colin Ross Smith.

Mrs Smith is Heather Jean Smith.

Scheme means the alleged scheme operated by DTC No.1 Pty Ltd and Weriton Finance Pty Ltd as trustees for the Australian Residential Finance Trust and the Australian Residential Property Trust;

Weriton Finance means Weriton Finance Pty Ltd ACN 143 536 645;

Weriton Finance atf ARFT means Weriton Finance as trustee for the Australian Residential Finance Trust;

Mr Werry means Graham Keith Werry, born on 15 February 1958.

B. BACKGROUND

1. ASIC's role

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. Details of conduct

- 2.1 Mr Werry has been a director of DTC No.1 since 7 May 2003. Through his company Edessa Holdings, Mr Werry owns 50% of shares in DTC No.1.
- 2.2 Mr McMillan was a director of DTC No.1 from 20 November 1999 to 1 October 2008 and secretary of DTC No.1 from 7 May 2003 to 1 October 2008. Mr McMillan owns 50% of shares in DTC No.1.
- 2.3 On 1 May 2003, Mr Werry and Mr McMillan established the ARPT to operate a property development business. DTC No.1 was appointed trustee of the ARPT. Mr Werry and Mr McMillan operated the business of the ARPT.



- 2.4 On 31 October 2003, Mr Werry and Mr McMillan established the ARFT and appointed DTC No.1 as the trustee of the ARFT. The ARFT raises funds from investors through the issue of promissory notes and lends those funds to the ARPT and related and unrelated companies undertaking property developments. Mr Werry has operated the ARFT since it was established in 2003. Mr McMillan operated the ARFT with Mr Werry from 2003 to 1 October 2008.
- 2.5 On 10 August 2004, a fixed and floating charge over the assets of DTC No.1 was registered in favour of EMC Nominees. EMC Nominees held the charge as security agent on behalf of Noteholders.
- 2.6 On 1 October 2008, Mr McMillan ceased to be a director of DTC No.1 and ceased to have any involvement in the operation of the ARFT and ARPT.
- 2.7 On 1 October 2008, a deed of settlement was executed in which DTC No.1 and Mr Werry released and discharged Mr McMillan from all causes of action, loans, guarantees and liabilities.
- 2.8 On 26 March 2009, DTC No.1 ceased to be trustee of the ARFT.
- 2.9 Between 31 October 2003 and 26 March 2009, DTC No.1 atf ARFT issued more than 200 promissory notes to investors with a total face value of approximately \$64 million.
- 2.10 On 27 March 2009, Weriton Finance was appointed trustee of the ARFT. Edessa Holdings is the ultimate holding company of Weriton Finance.
- 2.11 On 15 May 2009, a fixed and floating charge over the assets of Weriton Finance was registered in favour of EMC Nominees. EMC Nominees holds the charge as security agent on behalf of Noteholders.
- 2.12 On or about 1 April 2009, Weriton Finance atf ARFT issued 36 promissory notes with a total face value of approximately \$17 million. All of these promissory notes mature on 31 March 2011.

3. ASIC's concerns

- 3.1. On 16 March 2010, ASIC commenced an investigation under section 13 of the ASIC Act.
- 3.2. Having regard to the information provided to ASIC in the course of this investigation, it appears to ASIC that the Scheme is a managed investment scheme within the meaning of the Corporations Act. Further, ASIC's records indicate that:
 - (a) The Scheme is not registered as a managed investment scheme; and
 - (b) Mr Werry, DTC No.1 and Weriton Finance do not hold an Australian financial services licence.

- 3.3. On the above analysis, ASIC is concerned that Mr Werry, DTC No.1 and Weriton Finance may have:
- (a) operated an unregistered managed investment scheme that is required to be registered in contravention of subsection 601ED(5) of the Corporations Act;
 - (b) operated a financial services business without holding an Australian financial services licence in contravention of the section 911A of the Act;
 - (c) offered financial products, being interests in a managed investment scheme that was required to be registered and was not registered, in contravention of section 1020A of the Corporations Act;
 - (d) offered to issue or issued financial products to a person as a retail client without giving a Product Disclosure Statement in breach of section 1012B of the Corporations Act; and
 - (e) offered to sell or sold financial products to a person as a retail client without giving a Product Disclosure Statement in breach of section 1012C of the Corporations Act.

4. Acknowledgement of concerns

- 4.1. Mr Werry states that, given the structure of the Scheme, he had, in good faith, taken a different view to ASIC on the requirements of section 601ED of the Corporations Act.
- 4.2. While Mr Werry, DTC No.1 and Weriton Finance do not agree with ASIC's analysis, they acknowledge ASIC's concerns and have offered, and ASIC has agreed to accept, enforceable undertakings in the terms of paragraph 5 below as an alternative to commencing proceedings in relation to the contraventions alleged by ASIC in paragraph 3.3.

C. UNDERTAKINGS & ACKNOWLEDGEMENTS

5. Undertakings

Under section 93AA of the ASIC Act, Mr Werry, DTC No.1 and Weriton Finance have offered, and ASIC has agreed to accept the following undertakings:

- 5.1. Mr Werry, DTC No.1 and Weriton Finance undertake to repay the principal and interest owing under the promissory note issued by DTC No.1 atf ARFT to the Ross Smith Superannuation Fund on 1 March 2007 or otherwise reach a settlement with Mr and Mrs Smith as soon as practicable. Any repayment or settlement must include the following as a minimum:

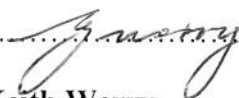
- 5.1.1. Repayment of at least \$210,000 on or before 31 March 2011.



- 5.1.2. Repayment of all other monies owing under the said promissory note on or before 30 September 2011.
- 5.2. With respect to Noteholders who were "retail clients" as defined in section 761G of the Corporations Act when they acquired the promissory notes issued on 1 April 2009, Mr Werry, DTC No.1 and Weriton Finance undertake to repay all principal and outstanding interest owing under promissory notes issued by Weriton Finance atf ARFT notes as soon as practicable, and in any event by 31 March 2011.
- 5.3. Mr Werry, DTC No.1, Weriton Finance and any other entities associated with Mr Werry, undertake not to provide financial services contrary to the requirements of the Corporations Act and acknowledge that they may only provide advice in relation to, and issue promissory notes to, new or existing Noteholders, if Mr Werry, DTC No.1, Weriton Finance or any associated entity is authorised to do so under an Australian Financial Services Licence,
- 5.4. Mr Werry, DTC No.1 and Weriton Finance undertake not to offer or issue new promissory notes to existing or new Noteholders, including as a "rollover" of an existing investment, unless the offer falls within subsections 708(1), 708(8) to 708(21) of the Corporations Act.
- 5.5. Mr Werry, DTC No.1 and Weriton Finance undertake to provide the following bank accounts as security to cover any shortfall in the payment of money due to Noteholders, including those referred to above in paragraphs 5.1 and 5.2 who are not eligible to, or choose not to, rollover their investments as contemplated above by paragraph 5.4:
- (a) NAB account (account number disclosed to ASIC) held in the name of Weriton Finance in trust for Weriton Pty Ltd and B Werry Pty Ltd (in respect of which account both Weriton Pty Ltd and B Werry Pty Ltd shall retain a subordinated beneficial interest); and
 - (b) NAB account (account number disclosed to ASIC) held in the name of Graham Keith Werry.
- 5.6 Mr Werry, DTC No.1 and Weriton Finance undertake that any correspondence that they send to existing Noteholders that refers to the terms of this enforceable undertaking will be agreed upon by ASIC before it is sent.
- 5.7 Mr Werry, DTC No.1 and Weriton Finance undertake that they will pay the costs of their compliance with this enforceable undertaking.
- 5.8 Mr Werry, DTC No.1 and Weriton Finance undertake that they will provide all documents and information reasonably requested by ASIC from time to time for the purpose of assessing their compliance with the terms of this enforceable undertaking.

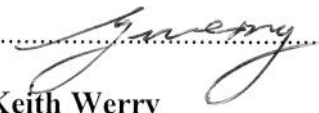
6. Acknowledgements

- 6.1. Mr Werry, DTC No.1 and Weriton Finance acknowledge that the Ross Smith Superannuation Fund is entitled to be repaid the principal and interest owing under the promissory note issued by DTC No.1 atf ARFT on 1 March 2007.
- 6.2. Mr Werry, DTC No.1 and Weriton Finance acknowledge that all other Noteholders are entitled to be repaid the principal and interest owing under their promissory notes by 31 March 2011.
- 6.3. Mr Werry, DTC No.1 and Weriton Finance 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 enforceable undertaking; and
 - (c) will make this enforceable undertaking available for public inspection.
- 6.2 Further Mr Werry, DTC No.1 and Weriton Finance acknowledge that:
- (a) ASIC's acceptance of this enforceable 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; and
 - (b) 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 or arising from future conduct.
- 6.3 ASIC acknowledges that nothing in this enforceable undertaking constitutes an admission by Mr Werry, DTC No.1 or Weriton Finance.
- 6.4 Mr Werry, DTC No.1 and Weriton Finance acknowledge that this enforceable undertaking has no operative force until accepted by ASIC.
- 6.5 Mr Werry, DTC No.1 and Weriton Finance and ASIC acknowledge that the date of the enforceable undertaking is the date on which it is accepted by ASIC.

..........
Graham Keith Werry

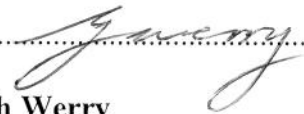
Dated:7/3/11.....

EXECUTED by **DTC NO.1 PTY LTD**)
ACN 089 812 555 was affixed in accordance
with the *Corporations Act 2001* in the)
presence of:

.......... Sole Director and Company Secretary
Graham Keith Werry

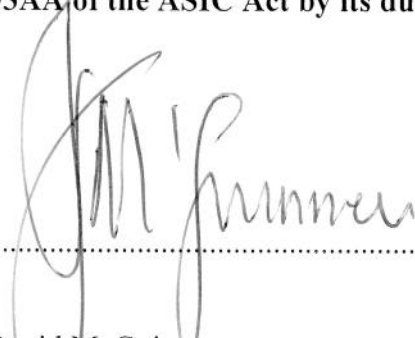
Dated:7/3/11.....

EXECUTED by **WERITON FINANCE**)
PTY LTD ACN 143 536 645 was affixed in
accordance with the *Corporations Act 2001*)
in the presence of:

.......... Sole Director and Company
Secretary
Graham Keith Werry

Dated:7/3/11.....

**Accepted by the Australian Securities and Investments Commission under section
93AA of the ASIC Act by its duly authorised delegate:**


.....
David McGuinness

Delegate of Australian Securities and Investments Commission

Dated:7/3/2011.....