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913A

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:

Kilara Financial Solutions Pty Ltd

ACN 003 636 897

146 Sanger Street

Corowa NSW 2646

(the Company)

DEFINITIONS

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

AFSL means Australian Financial Services Licence

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

Commencement Date means the date upon which this enforceable undertaking is accepted by ASIC

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

Financial services has the meaning given by s766A of the Corporations Act

Financial product advice has the meaning given by s766B of the Corporations Act

Statement of Advice has the meaning given by s761A of the Corporations Act

BACKGROUND

ASIC's role

1. 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.

The Company

2. The Company holds an AFSL (No. 244530) and in addition acted as investment manager for two managed investment schemes namely, My Income Pool (ARSN 127205476) and My Growth Pool (ASRN 12720538).
3. The AFSL, effective from 24 May 2006, authorises the Company to provide financial product advice and to deal in financial products to wholesale and retail clients.
4. During the period October 2006 to June 2008 the Company made recommendations to retail clients that they switch their superannuation holding from their current fund into an alternative fund that invested in either My Income Pool or My Growth Pool.

ASIC's investigation/ surveillance and analysis

5. Following a compliance surveillance of the Company in 2010, ASIC commenced an investigation on 29 November 2010 in relation to suspected contraventions of the Corporations Act by the Company.
6. The investigation found, in respect of 26 client files reviewed, that the Company and/or its employee representatives did not have a reasonable basis for providing advice on certain occasions and, in particular:
 - 6.1. provided advice to 11 clients recommending switching superannuation funds, in each case failing to address any of the requirements set out in s947D of the Corporations Act;

- 6.2. did not consider relevant personal circumstances of 5 clients when recommending superannuation contributions; and
 - 6.3. did not consider the risk tolerance and the goals and objectives of 5 clients; or
 - 6.4. in the alternative to paragraphs 6.2 and 6.3, did not document such consideration.
7. Further, the investigation found that the Company, in respect of the 26 client files reviewed:
- 7.1. systematically provided defective disclosure statements, namely Statements of Advice, to clients in breach of s952E(2) and s947B of the Corporations Act; and
 - 7.2. failed to provide a Statement of Advice document when advice was provided on a time critical basis in two instances.

ASIC'S CONCERNS

8. ASIC is concerned that the Company has failed to comply with its obligations under its AFSL and under the Corporations Act in respect of the matters described in paragraph 9 below.

ACKNOWLEDGEMENT OF CONCERNS

9. The Company acknowledges that, during the period October 2006 to June 2009, it failed to comply with the following obligation under its AFSL:
- 9.1. Condition 4 – requirement that the licensee establishes and maintains compliance measures that ensure, as far as is reasonably practicable, that the licensee complies with the provisions of the financial services laws.
10. The Company also acknowledges that during the period mentioned above it failed to comply with its obligations under the following sections of the Corporations Act:

- 10.1. s945A – requirement to have a reasonable basis for advice;
 - 10.2. s947D(2) – additional requirement when advice recommends replacement of one product with another;
 - 10.3. s947B(1)(h) – requirement that Statements of Advice state in dollars any remuneration or other benefits that might reasonably be expected to influence the advice; and
 - 10.4. s952C – requirement to give a disclosure document or statement.
11. The Company acknowledges ASIC's concerns as set out in paragraphs 9 and 10 above, and has offered this enforceable undertaking in terms outlined below.

INDEPENDENT EXPERT

12. Where the appointment of an independent expert is required pursuant to any paragraph of this enforceable undertaking the Company must appoint a person who is independent of the Company and its officers and has the necessary expertise, experience and operational capacity to complete the terms of engagement (**Independent Expert**).
13. All remuneration and costs associated with the engagement of the Independent Expert must be borne by the Company.
14. The Company must:
- 14.1. engage the Independent Expert to perform the tasks necessary to fulfil the obligations imposed by this enforceable undertaking;
 - 14.2. permit the Independent Expert, subject to any claim of legal professional privilege, and to the extent that is reasonable having regard to the requirements of this enforceable undertaking, to have access to its books, to interview any past or present employee and to consult with ASIC and disclose to ASIC any information obtained by the Independent Expert in the course of carrying out their assessments;

- 14.3. give the Independent Expert any information or explanation reasonably requested by the Independent Expert of any matter in any way connected with the reports required to be prepared by the Independent Expert under this enforceable undertaking (**Expert Reports**); and
 - 14.4. otherwise reasonably assist the Independent Expert in conducting the assessments and producing the Expert Reports.
15. The Company will ensure that the terms of engagement of the Independent Expert include requirements that the Expert Reports will:
 - 15.1. set out the steps that the Independent Expert has taken to fulfil their task including but not limited to:
 - (a) details of the people that have assisted the Independent Expert and in what way;
 - (b) the personnel and/or clients that have been interviewed;
 - (c) the documents that have been assessed including, where appropriate, reference to those documents or extracts of documents that the Independent Expert considers most relevant to matters raised in the Expert Reports;
 - 15.2. detail any limitations or qualifications to the Expert Reports; and
 - 15.3. otherwise comply (to the extent applicable) with the paragraphs of Practice Note CM 7 'Expert Witnesses in Proceedings in the Federal Court of Australia' issued by the Chief Justice of the Federal Court of Australia that fall under the sub-heading "The form of the expert evidence' (see Annexure A).
16. Paragraphs 14 and 15 apply to every appointment of an Independent Expert by the Company pursuant to the terms of this enforceable undertaking.
17. The Independent Expert and the Independent Expert's terms of engagement must be approved in writing by ASIC before the Independent Expert is engaged. The Company must advise ASIC of the expertise and any prior

association of the proposed Independent Expert with the Company and its related bodies corporate and officers at the time approval is sought from ASIC. ASIC must be given the draft terms of engagement at least seven working days prior to the proposed date of engagement of the Independent Expert.

18. The Company and ASIC will respectively use their best endeavours to ensure that the Independent Expert is engaged within two weeks of the Commencement Date.
19. The Company must obtain written approval from ASIC to vary the terms of engagement of the Independent Expert once those terms of engagement have been approved by ASIC in accordance with paragraph 17.

UNDERTAKINGS

Under s93AA of the ASIC Act, the Company has offered, and ASIC has agreed to accept as an alternative to pursuing administrative action, the undertakings set out in paragraphs 20 to 41 inclusive.

20. The Company undertakes that it will pay the costs of its compliance with this enforceable undertaking, including the remuneration and costs associated with the engagement of any independent expert.
21. The Company undertakes that it will not seek reimbursement of, contribution towards or otherwise directly or indirectly pass on its costs of compliance with this enforceable undertaking or any proportion of those costs to its clients.
22. The Company 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 purpose of assessing the Company's compliance with the terms of this enforceable undertaking. For the avoidance of doubt, the Company is not required to provide ASIC with documents or information that is the subject of legal professional privilege.

Compliance culture and framework

23. The Company must engage an external compliance consultant for the duration of this enforceable undertaking.
24. Within 30 days of the Commencement Date the Company must:
 - 24.1. establish a compliance framework which includes a review of its compliance program to ensure that it clearly identifies all of the Company's compliance objectives and compliance risks;
 - 24.2. in relation to each material compliance risk, conduct a review of the documented compliance activities to ensure that they adequately address the relevant compliance risk and to ensure that the compliance program clearly identifies roles and responsibilities for the key compliance activities within the compliance framework;
 - 24.3. ensure the compliance program includes a mechanism for annual review to be undertaken by its external compliance consultant to ensure that the identified compliance objectives and compliance risks remain current at all times and to ensure that the compliance activities within the compliance program adequately address the identified compliance risks;
 - 24.4. ensure that the compliance program contains adequate measures to ensure all representatives of the Company that provide financial services to one or more clients of the Company are competent to provide the financial services covered by the Company's AFSL and that they undertake adequate and appropriate training to enable them to comply with the requirements of the Company's AFSL and Chapter 7 of the Corporations Act;
 - 24.5. establish clear and measureable key performance indicators in relation to compliance obligations for representatives as relevant to their role and responsibilities and ensure that the compliance program includes a mechanism for regular monitoring and review of these indicators by the Company's external compliance consultant.

Training

25. The Company will ensure that each representative of the Company who provides financial services to one or more of the Company's clients completes the following training programs within 12 months of the Commencement Date:

25.1. ASIC RG 146 Gap Assessment Training program for planners and advisers; and

25.2. 'Ethics and Conduct' course conducted by the Financial Planning Association;

and will obtain written confirmation from each training provider that each of the representatives has attended and successfully completed the respective training program.

Assessment by Independent Expert

First Expert Report

26. Within 12 weeks of the Commencement Date, the Independent Expert must:

26.1. assess the adequacy and effectiveness of the Company's compliance program including any revisions made to it in accordance with the undertakings provided in paragraph 24;

26.2. audit a sample of a minimum of five client files in respect of clients that received financial services advice from representatives of the Company during the previous three months in relation to switching superannuation funds or, if such advice was not provided to at least five clients during the relevant period, a sample of a minimum of five client files in respect of clients that have received financial services advice, which sample shall include all of the clients who received advice in relation to switching superannuation funds during the relevant period;

26.3. for each client file audited consider:

- (a) whether or not the advice provided by the Company's representative was appropriate having regard to s945A of the Corporations Act; and
- (b) whether the documentation provided to the client, including the Statement of Advice, complies with the requirements of the Corporations Act;

26.4. identify any deficiencies arising from the assessment or audit referred to at paragraphs 26.1 and 26.2;

26.5. provide a written report to the Company and to ASIC (**First Expert Report**) that sets out:

- (a) details of its findings in respect of the matters referred to in paragraph 26.3;
- (b) details of deficiencies identified in paragraph 26.4;
- (c) recommendations on how to rectify those deficiencies; and
- (d) a reasonable time frame for rectification to be completed.

First Response

- 27. Within 14 weeks of the Commencement Date, the Company must consider the First Expert Report and provide to the Independent Expert and ASIC a plan (**First Response**) setting out the action the Company proposes to take to rectify the deficiencies identified in the First Expert Report (to the extent reasonable), specifying the reasonable time in which this action will be taken.
- 28. If ASIC or the Independent Expert requires any reasonable modifications to the First Response, ASIC or the Independent Expert must notify the Company in writing within two weeks of receipt of the First Response. The Company must make such modifications to the First Response and provide a copy of the amended First Response to both the Independent Expert and ASIC upon doing so.

29. The Company must implement the First Response within the reasonable time specified.

Second Expert Report

30. Within six months after the Commencement Date, the Independent Expert must:

30.1. assess the effectiveness of the implementation of the First Response; and

30.2. assess whether the Company's representatives including any that have been engaged since the date of the First Expert Report are appropriately trained and in particular in respect of any processes, procedures or policies that have been implemented or altered since the date of the First Expert Report;

30.3. audit a further sample of a minimum of five client files in respect of clients that received financial services advice from representatives of the Company during the previous three months in relation to switching superannuation funds or, if such advice was not provided to at least five clients during the relevant period, a sample of a minimum of five client files in respect of clients that have received financial services advice which sample shall include all of the clients who received advice in relation to switching superannuation funds in the relevant period;

30.4. for each client file audited consider:

(a) whether or not the advice provided by the Company's representative was appropriate having regard to s945A of the Corporations Act; and

(b) whether the documentation provided to the client, including the Statement of Advice, complies with the requirements of the Corporations Act;

30.5. identify any deficiencies arising from the assessments or audit referred to at paragraphs 30.1, 30.2 and 30.3;

30.6. provide a written report to the Company and to ASIC (**Second Expert Report**) that sets out:

- (a) details of its findings in respect of the matters referred to in paragraph 30.4;
- (b) details of deficiencies identified in paragraph 30.5;
- (c) recommendations on how to rectify those deficiencies; and
- (d) a reasonable time frame for rectification to be completed.

Second Response

- 31. Within seven months of the Commencement Date, the Company must consider the Second Expert Report and provide to the Independent Expert and ASIC a plan (**Second Response**) setting out the action the Company proposes to take to address each of the deficiencies raised in the Second Expert Report and (to the extent reasonable) specifying the reasonable time in which this action will be taken.
- 32. If ASIC or the Independent Expert requires any reasonable modifications to the Second Response, ASIC or the Independent expert must notify the Company in writing within 14 days of receipt of the Second Response and the Company must make such modifications to the Second Response and provide a copy of the modified Second Response to both ASIC and Independent Expert within 14 days of receipt of such notification.
- 33. The Company must implement the Second Response within the reasonable time specified.
- 34. Within 14 days of completion of the last step required in the Second Response the Company must provide ASIC with a written report detailing its implementation of the Second Response. ASIC may at its discretion consult with the Independent Expert in relation to the adequacy of the Company's implementation of the Second Response.

Third Expert Report

35. Within twelve months after the Commencement Date, the Independent Expert must:

35.1. assess the effectiveness of the implementation of the Second Response;
and

35.2. assess whether the Company's representatives including any that have been engaged since the date of the Second Expert Report are appropriately trained and in particular in respect of any processes, procedures or policies that have been implemented or altered since the date of the Second Expert Report;

35.3. audit a further sample of a minimum of ten client files in respect of clients that received financial services advice from a representative of the Company during the previous six months in relation to switching superannuation funds or, if such advice was not provided to at least ten clients during the relevant period, a sample of a minimum of ten client files in respect of clients that have received financial services advice which sample shall include all of the clients who received advice in relation to switching superannuation funds in the relevant period;

35.4. for each client file audited consider:

(a) whether or not the advice provided by the Company's representative was appropriate having regard to s945A of the Corporations Act; and

(b) whether the documentation provided to the client, including the Statement of Advice, complies with the requirements of the Corporations Act;

35.5. identify any deficiencies arising from the assessments or audit referred to at paragraphs 35.1, 35.2 and 35.3;

35.6. provide a written report to the Company and to ASIC (**Third Expert Report**) that sets out:

- (a) details of its findings in respect of the matters referred to in paragraph 35.4
- (b) details of deficiencies identified in paragraph 35.5;
- (c) recommendations on how to rectify those deficiencies; and
- (d) a reasonable time frame for rectification to be completed.

Third Response

- 36. Within 13 months of the Commencement Date, the Company must consider the Third Expert Report and provide to the Independent Expert and ASIC a plan (**Third Response**) setting out the action the Company proposes to take to address each of the deficiencies raised in the Third Expert Report and (to the extent reasonable) specifying the reasonable time in which this action will be taken.
- 37. If ASIC or the Independent Expert requires any reasonable modifications to the Third Response, ASIC or the Independent expert must notify the Company in writing within 14 days of receipt of the Third Response and the Company must make such modifications to the Third Response and provide a copy of the modified Third Response to both ASIC and Independent Expert within 14 days of receipt of such notification.
- 38. The Company must implement the Third Response within the reasonable time specified.
- 39. Within 14 days of completion of the last step required in the Third Response the Company must provide ASIC with a written report detailing its implementation of the Third Response. ASIC may at its discretion consult with the Independent Expert in relation to the adequacy of the Company's implementation of the Third Response.

Final Assessment

40. In the event ASIC consider that a further assessment should be conducted by the Independent Expert, ASIC must notify the Company and the Independent Expert within six weeks of its receipt of the Third Response.
41. In the event notice is provided by ASIC pursuant to paragraph 40, within one month of the date of that notice the Independent Expert must:
 - 41.1. assess the effectiveness of the implementation of the Third Response;
 - 41.2. assess whether the Company's representatives including any that have been engaged since the date of the Third Expert Report are appropriately trained and in particular in respect of any processes, procedures or policies that have been implemented or altered since the date of the Third Expert Report;
 - 41.3. audit a further sample of a minimum of five client files in respect of clients that received financial services advice from a representative of the Company during the previous 3 months in relation to switching superannuation funds or, if such advice was not provided to at least five clients during the relevant period, a sample of a minimum of five client files in respect of clients that have received financial services advice which sample shall include all of the clients who received advice in relation to switching superannuation funds in the relevant period;
 - 41.4. for each client file audited consider:
 - (a) whether or not the advice provided by the Company's representative was appropriate having regard to s945A of the Corporations Act; and
 - (b) whether the documentation provided to the client, including in the Statement of Advice, complies with the requirements of the Corporations Act;
 - 41.5. identify any deficiencies arising from the assessments or audit referred to at paragraphs 41.1, 41.2 and 41.3;

41.6. provide a written report to the Company and to ASIC (**Final Expert Report**) that sets out:

- (a) details of its findings in respect of the matters referred to in paragraphs 41.4 and
- (b) details of deficiencies identified in paragraph 41.5.

Provision of Documents to ASIC

42. The address for providing ASIC with any document, including but not limited to any plan or report, which this undertaking requires to be provided to ASIC is:

Senior Manager – Deterrence
Australian Securities and Investments Commission
GPO Box 9827
ADELAIDE SA 5001

Client Contact

43. Within 14 days from the Commencement Date the Company will send to each of its clients to whom My Income Pool and/or My Growth Pool superannuation products were issued, a letter in terms approved by ASIC and annexing a copy of this enforceable undertaking.
44. The letter will invite any client who believes they have been adversely impacted by advice to invest in My Income Pool and/or My Growth Pool to request the Company conduct a review of the advice to ensure compliance with the requirements of s945A and, where applicable, to ensure the information required by s947D was provided to the client at the time of the advice. Where there has been non-compliance with either s945A or the requirements of s947D, the Company will follow its internal complaints resolution procedures and in the event that the complaint is not resolved, will provide the client with information regarding the process for referring the matter to the Financial Ombudsman Service.

45. The Company undertakes to provide to ASIC at the time it provides each of the First, Second and Third Responses details of each complaint received pursuant to this process including the name and address of the client, the nature of the complaint and what, if any remedial action has been taken by the Company. Where no remedial action has been taken by the Company, the Company is to provide ASIC with the reason.

ACKNOWLEDGMENTS

46. The Company acknowledges that ASIC:
- 46.1. 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;
 - 46.2. may from time to time publicly refer to this undertaking; and
 - 46.3. will make this undertaking available for public inspection.
47. Further, the Company acknowledges that:
- 47.1. 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 the background section of this enforceable undertaking or arising from future conduct;
 - 47.2. 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.
48. The Company acknowledges that ASIC had reason to be concerned as to the alleged facts and has offered an enforceable undertaking in the terms of paragraphs 20 to 41 above.

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

**EXECUTED BY KILARA
FINANCIAL SOLUTIONS PTY
LTD** in accordance with sub-section
127(1) the *Corporations Act 2001* by:

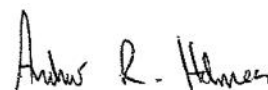
Malcolm Ian McLean

Director

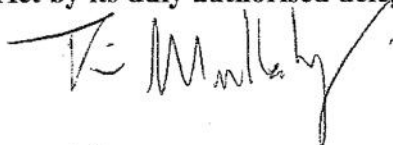


Andrew Ronald Holmes

Director



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



[name] **TIM MOWALL**

Delegate of Australian Securities and Investments Commission

[date] **22 JUNE 2011**

