

## 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:

**MACQUARIE EQUITIES LIMITED (MEL)**

**ACN 002 574 923**

### 1. DEFINITIONS

1.1. 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).

**ASIC's Concerns** means the matters set out in paragraphs 2.16 – 2.19.

**Commencement Date** means the date this undertaking is accepted by ASIC.

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

**Draft Implementation Plan** is the draft plan referred to in paragraph 3.8.

**Expert Report** means any report required to be prepared by the Independent Expert pursuant to this undertaking including the Preliminary Report, the Interim Reports and the Final Report.

**Final Report** is the report referred to in paragraph 3.17.b).

**Implementation Plan** is the plan referred to in paragraph 3.4.

**Independent Expert** means the person appointed as an independent expert pursuant to paragraph 3.19 of this undertaking.

**Interim Report** is a report referred to at paragraph 3.17.a).

**Licensee Risk Framework** means the program of work and series of systems, procedures and principles for managing compliance risks applicable to MPWA's Business and as otherwise required by s912A(1)(h) of the Corporations Act.

**MPWA's Business** means the Australian financial product advice and related dealing business of MEL that is carried on under "Macquarie Private Wealth".

**Monthly Review Meeting** is the meeting referred to in paragraph 3.16.

**Preliminary Report** is the report referred to at paragraph 3.9.c).

1.2. Except so far as the contrary intention appears in this undertaking the interpretation provisions in Part 1.2 of the Corporations Act and Part 2 Division 4 of the ASIC Act apply for

the purposes of this undertaking as if the provisions of those acts were provisions of this undertaking.

## **2. BACKGROUND**

### **ASIC's role**

- 2.1. 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.

### **Macquarie Private Wealth (Australia)**

- 2.2. MEL is the holder of Australian Financial Services Licence (No. 237504) (AFSL). MEL has held its AFSL since 1 March 2004.
- 2.3. MEL is authorised under its AFSL to operate a financial services business within the meaning of Chapter 7 of the Corporations Act to provide advice and deal in a range of financial products.
- 2.4. MEL carries on business in Australia only and under "Macquarie Private Wealth" (MPWA).
- 2.5. MEL has authorised certain persons to provide financial product advice to its clients on its behalf under its AFSL (Representatives). The Representatives are representatives of MEL within the meaning of section 910A of the Corporations Act.
- 2.6. From 2008 until March 2010, MPWA conducted client file reviews of the Representatives. Those reviews indicated compliance deficiencies involving a significant number of the Representatives, which were recurring and not reported to ASIC under section 912D of the Corporations Act, nor were they rectified in all cases.
- 2.7. In March 2010 MPWA ceased its review program in order to revise it so that it focused more on coaching and training for Representatives. The revised program was launched in March 2011.
- 2.8. In November 2011 a report providing an analysis of the results of the new review program was prepared. A significant proportion of Representatives were classified as needing improvement. Furthermore, issues were identified in regard to documentary evidence for a reasonable basis for the advice given.

### **ASIC surveillance**

- 2.9. Between December 2011 and August 2012, ASIC conducted surveillance checks of MPWA's Business and its compliance with its statutory obligations. The surveillance conducted by ASIC included reviewing various documents relating to MPWA's compliance systems, as well as compliance records dating from 2008.
- 2.10. The surveillance conducted by ASIC under section 912E of the Corporations Act identified various concerns about MPWA's compliance processes and its Licensee Risk Framework.

- 2.11. During the course of its surveillance ASIC reviewed a number of MPWA client files and identified a range of concerns.
- 2.12. ASIC's surveillance found similar issues to those identified by MEL's own reviews. In ASIC's view MPWA's systems to address compliance issues that arise in the business have been of limited effectiveness.
- 2.13. On 11 September 2012, MPWA and ASIC began a series of meetings to discuss the outcomes of the surveillance. ASIC provided a summary of its concerns to MPWA.
- 2.14. Subsequent to this meeting MPWA commenced its own review into its compliance systems and advice files in order to respond to ASIC's findings.
- 2.15. MEL has co-operated with ASIC in relation to its surveillance and has voluntarily:
  - a) changed its compliance reporting arrangements so that compliance staff no longer report to MPWA management and they now report into the group-wide compliance team; and
  - b) commenced integrating MPWA's compliance policies, procedures and systems into the group-wide compliance operations.

#### **ASIC's Concerns**

- 2.16. ASIC is concerned that MEL may have failed to satisfactorily address weaknesses in the Licensee Risk Framework. In particular, ASIC is concerned whether:
  - a) there have been effective licensee risk policies, processes, controls and systems having regard to the nature, size and complexity of its business;
  - b) there has been compliance with the obligations regarding the provision of personal advice, general advice and execution-only dealing transactions, including necessary detail in advice documents to enable retail investors to make informed decisions;
  - c) adequate consideration of personal circumstances where personal advice was provided to retail clients;
  - d) Representative conduct has been dealt with in a consistent and appropriate manner, including having robust consequences for non compliant Representatives;
  - e) recurring issues have been effectively identified and addressed over a period of time;
  - f) business information and data analysis processes and reporting capabilities have been effective in detecting advice process irregularities;
  - g) there have been adequate record keeping and related controls over retail, sophisticated and wholesale client records to enable MPWA to appropriately monitor and supervise its representatives;
  - h) appropriate resources were available to carry out effective supervisory services;
  - i) effective compliance training and education has taken place;

- j) there has been adequate licensee risk and incident identification and recording; and
  - k) there has been an appropriate assessment of breaches and whether these breaches should have been reported to ASIC.
- 2.17. ASIC is concerned that MEL management may have failed to foster and maintain a proper commitment to, and culture of, compliance within the MPWA Business.
- 2.18. As a result, ASIC considers that on occasion MEL may not have complied with certain obligations under the Corporations Act, specifically:
- a) s912A(1)(a) of the Corporations Act that requires a financial services licensee to “do all things necessary to ensure that the financial services covered by the licence are provided efficiently honestly and fairly”;
  - b) s912A(1)(ca) of the Corporations Act that requires a financial services licensee to take reasonable steps to ensure that its representatives comply with the financial services laws;
  - c) s912A(1)(d) of the Corporations Act that requires a financial services licensee – unless the licensee is a body regulated by APRA – to have available adequate resources (including financial, technological and human resources) to provide the financial services covered by the licence and to carry out supervisory arrangements;
  - d) s912A(1)(f) of the Corporations Act which requires a financial services licensee to ensure that its representatives are adequately trained;
  - e) s912A(1)(h) of the Corporations Act that requires a financial services licensee – unless the licensee is a body regulated by APRA – to have adequate risk management systems;
  - f) s912D(1) of the Corporations Act that requires a financial services licensee to notify ASIC of certain matters;
  - g) s945A of the Corporations Act that requires reasonable steps to be taken to investigate a client's financial circumstances; and/or
  - h) s947B of the Corporations Act that sets out the main requirements for Statements of Advice when provided by a financial services licensee.
- 2.19. ASIC is also concerned that MEL may not have complied with condition 4 of its AFSL requiring it “to establish and maintain compliance measures that ensure, as far as reasonably practicable, that the licensee complies with financial services laws” and may have contravened section 912A(1)(b) of the Corporations Act that requires a financial services licensee to comply with the conditions on its licence.

#### **Acknowledgement of Concerns**

- 2.20. MEL acknowledges ASIC’s Concerns and that they are reasonably held.
- 2.21. ASIC notes that the intended outcome of MEL's initiatives referred to in paragraph 2.15 is to address ASIC’s Concerns and notes MEL’s commitment to strengthen its:

- a) compliance and record keeping arrangements;
- b) arrangements for the supervision and monitoring of its Representatives; and
- c) processes for testing the effectiveness of (a) and (b).

2.22. ASIC further notes that MEL:

- a) has fully co-operated and worked constructively with ASIC in its surveillance and investigation; and
- b) has commenced the initiatives set out in paragraph 2.15 on a voluntary basis.

2.23. Nevertheless, it appears to ASIC that MPWA's voluntary initiatives should be incorporated into the work program to be set out in the Implementation Plan which has agreed time frames and independent assessment.

2.24. Subject to MEL's compliance with this undertaking and ASIC agreeing to the terms of the Implementation Plan, ASIC will not take or cause to be taken any other action against MEL in relation to the subject matter of ASIC's Concerns.

### **3. UNDERTAKINGS**

#### **Acceptance of Enforceable Undertaking**

3.1. Under s93AA of the ASIC Act MEL has offered the undertakings in paragraphs 3.2 to 3.32 and ASIC has agreed to accept those undertakings as an alternative to commencing civil proceedings or pursuing administrative action against MEL.

#### **Licensee Risk Framework Assessment**

3.2. MPWA will conduct an assessment of its Licensee Risk Framework against generally accepted standards appropriate to the nature, size and complexity of the business, with particular reference to the obligations it has as the holder of an Australian financial services licence. The current national standard is AS/NZA ISO31000:2009.

3.3. The assessment of the Licensee Risk Framework should:

- a) address ASIC's Concerns by way of specific compliance risk controls and accompanying compliance systems and procedures;
- b) analyse MPWA's Business against the generally accepted standards to determine how adequately it identifies, analyses and controls risk under its Licensee Risk Framework. This will cover defining risk criteria, consequence management, data analytics, document production processes and systems, monitoring, professional development, induction, supervision, organisational and adviser competence, remuneration, structure and accountabilities;
- c) include a review of MPWA's Business:
  - (i) legal and regulatory obligations;

- (ii) operating model;
- (iii) operating systems;
- (iv) individual operational procedures; and
- (v) external risk environment,

to the extent that each is relevant to MPWA's Business.

### **Implementation Plan**

- 3.4. MEL is to address ASIC's Concerns by developing an implementation plan for addressing any unresolved deficiencies in the Licensee Risk Framework that are identified in the assessment referred to in paragraphs 3.2 and 3.3, with appropriate project management and governance arrangements and an independent assessment as set out in paragraphs 3.9 to 3.14, to facilitate ongoing compliance with MEL's obligation to have adequate risk management systems pursuant to section 912A(1)(h) of the Corporations Act (**Implementation Plan**).
- 3.5. The revised Licensee Risk Framework as a whole must be appropriate to the nature, size and complexity of MPWA's Business and its processes.
- 3.6. The Implementation Plan is to:
  - a) provide a detailed explanation of the approach to be taken under the Implementation Plan, including methodologies and Implementation Plan governance arrangements;
  - b) clearly define the MPWA business approach to risk under its Licensee Risk Framework;
  - c) provide an overview and list of all work streams and commitments arising from this undertaking;
  - d) specify all operational stakeholders and business owners of each element of the Implementation Plan;
  - e) specify performance milestones, including agreed dates and formats of progress updates, meetings and written reports;
  - f) provide a schedule of all material risks that the assessment referred to in paragraphs 3.2 and 3.3 identifies, organised into appropriate categories and listing key existing and proposed controls against each risk;
  - g) address each of ASIC's Concerns, including an explanation of how specific work streams address any unresolved deficiencies in the Licensee Risk Framework that are identified in the assessment referred to in paragraphs 3.2 and 3.3;
  - h) address each specific risk referred to in paragraph f), including an explanation of how specific work streams address any unresolved deficiencies in the Licensee Risk Framework that are identified in the assessment referred to in paragraphs 3.2 and 3.3;

- i) provide a mechanism for MPWA, within 12 months, to identify Representatives with poor compliance, conduct a review of those Representatives' files and implement a mechanism for MPWA to rectify any concerns identified about the conduct of those advisors.

3.7. Recognising the cyclical and cumulative nature of risk and that regulatory obligations change, the Implementation Plan is intended to be a flexible working document.

3.8. The first draft of the Implementation Plan is to be prepared by MEL (**Draft Implementation Plan**) and is to be submitted to the Independent Expert and ASIC within 90 days of the Commencement Date or within such further time as is agreed with ASIC.

#### **Independent Assessment of the Draft Implementation Plan**

3.9. The Independent Expert will:

- a) measure MPWA's compliance risk assessment against the generally accepted standards;
- b) assess the Draft Implementation Plan; and
- c) in response, prepare a written report as to whether the Draft Implementation Plan addresses ASIC's Concerns in an effective and timely manner and whether any amendments to the Draft Implementation Plan are necessary or advisable (**Preliminary Report**).

3.10. A copy of the Preliminary Report is to be provided to MPWA and ASIC within 120 days of the Commencement Date or within such further time as is agreed with ASIC for the purpose of providing comments on the Preliminary Report to each other and the Independent Expert.

3.11. Within two weeks of delivery of the Preliminary Report, MPWA will make reasonable revisions to the Draft Implementation Plan and submit a copy of any revised Draft Implementation Plan to ASIC and the Independent Expert.

3.12. The Independent Expert will then provide a report to ASIC within 7 days of receipt of the revised Draft Implementation Plan with an opinion as to whether the revised Draft Implementation Plan satisfactorily addresses those comments.

3.13. Once the terms of the Draft Implementation Plan are agreed with ASIC in writing the Draft Implementation Plan will become the Implementation Plan.

3.14. The Implementation Plan may be amended to take into account changes in the Licensee Risk Framework or changes in regulation and regulatory statements, including the Future of Financial Advice reforms. Proposed changes to the Implementation Plan will first be reviewed by the Independent Expert and will not take effect until agreed with ASIC in writing. Once the terms of any amendment to the Implementation Plan are agreed with ASIC, the amendment will become part of the Implementation Plan.

#### **Implementation**

3.15. MPWA will design and implement the enhancements to the Licensee Risk Framework in accordance with the Implementation Plan.

3.16. MPWA will meet with ASIC once each month or at times otherwise agreed with ASIC (**Monthly Review Meeting**). The purpose of the Monthly Review Meeting is to provide an opportunity for regular updates and reporting by MPWA and the Independent Expert on the progress of the Implementation Plan. The pro-forma agenda and proposed attendees at the meeting are to be set out in the Implementation Plan. The agenda will include the following items:

- a) an update from MPWA and the Independent Expert on progress against the Implementation Plan;
- b) an outstanding issues list;
- c) MPWA testing (undertaken in accordance with the Implementation Plan) on the effectiveness of the measures adopted in addressing ASIC's Concerns;
- d) a written report from MPWA on client complaints it has received about MPWA's Business;
- e) a written report from MPWA on the progress of action taken under paragraph 3.28, if applicable, and any new risks identified; and
- f) any proposals for amendments to the Implementation Plan.

The Independent Expert is required to attend each Monthly Review Meeting.

#### **Independent Assessment of the Effectiveness of Implementation**

3.17. The implementation of the enhancements to the Licensee Risk Framework will be assessed by the Independent Expert who will be required to provide the following reports within the timeframes specified in the Implementation Plan.

- a) **Interim Reports.** Three Interim Reports are to be provided, being within six months, 12 months and 18 months from the Commencement Date or within such further time as agreed with ASIC. The Interim Reports will address the following:
  - (i) independent testing of the initiatives which have been implemented under the Implementation Plan;
  - (ii) confirmation that the new and improved business systems, policies, procedures and controls are an accurate reflection of the description from the Implementation Plan;
  - (iii) sample testing (as agreed with ASIC) of personal financial advice provided during each interim period as to compliance with any relevant requirements in Chapter 7 of the Corporations Act;
  - (iv) assessment of the operational effectiveness of any completed Implementation Plan initiatives, with a particular focus on key controls testing;
  - (v) comments on any matters identified that may require MEL to amend the Implementation Plan; and
  - (vi) status of all issues logged in Monthly Review Meetings and remedial action completed or outstanding on these issues.



- b) **Final Report.** The Final Report is to be provided within 24 months from the Commencement Date, or within such further time as is agreed with ASIC, and is to address the following:
- i) the completeness of MPWA's assessment of its Licensee Risk Framework including itemisation of those compliance risks the Independent Expert considers were either not identified or not sufficiently analysed;
  - ii) testing of the Licensee Risk Framework's controls including their effectiveness;
  - iii) testing the adequacy of monitoring and review procedures in place to identify and control new licensee risks;
  - iv) measurement of the adequacy of the Licensee Risk Framework to operate on an ongoing basis and to respond to changes in the business or the regulatory environment; and
  - v) an assessment of a sample of personal advice as agreed with ASIC as to compliance with Chapter 7 of the Corporations Act.

3.18. The Global Head of MPWA, or the equivalent, is to certify each Expert Report, acknowledging its receipt and stating that MPWA is satisfied that it has complied, or will comply, with any recommendation contained therein or providing reasons why a recommendation is not supported. MPWA will ensure the internal compliance risk staff that govern MPWA's Licensee Risk Framework are involved in this certification process.

#### **Independent Expert**

3.19. Within 30 days of the Commencement Date, or within such further time as is agreed with ASIC, MEL will appoint an Independent Expert, who has expertise in the area of compliance and risk management and who is independent of MPWA and its related bodies corporate and officers, to assess the implementation of enhancements to the Licensee Risk Framework, introduced in accordance with the requirements of this undertaking, and to prepare the Expert Reports and perform the tasks of the Independent Expert as set out in this undertaking.

3.20. The Independent Expert and the terms of the Independent Expert's engagement are subject to approval by ASIC. The Independent Expert is not to be engaged until such time that ASIC has agreed to and approved the Independent Expert and terms of the Individual Expert's engagement. MEL is to advise ASIC of the expertise and prior association of the proposed Independent Expert with MEL and its related bodies corporate and officers at the time approval is sought from ASIC.

3.21. The terms of engagement of the Independent Expert may only be varied with the agreement of ASIC.

3.22. All remuneration and costs associated with the Independent Expert must be borne by MEL.

3.23. MEL is to permit the Independent Expert, to the extent that is reasonable having regard to the requirements of this undertaking and subject to legal professional privilege, to have access to

its books, to interview any present employee and to consult with ASIC and disclose to ASIC any information obtained by the Independent Expert in the course of carrying out its review and permit the Independent Expert to receive any information and books that ASIC determines is appropriate to be provided to the Independent Expert.

3.24. MEL is to give the Independent Expert subject to legal professional privilege any information or explanation reasonably requested by the Independent Expert regarding any matter in any way connected with the Expert Reports.

3.25. MEL is to ensure that the terms of engagement of the Independent Expert:

- a) include a timetable for the production and delivery of the Expert Reports;
- b) include a requirement that the Expert Reports will note:
  - i) the people that have assisted the Independent Expert and the nature of the assistance provided;
  - ii) the personnel that have been interviewed; and
  - iii) the documents that have been assessed;
- c) list those documents or extracts of documents most relevant (in the view of the Independent Expert) in producing the Expert Report; and
- d) otherwise comply (to the extent applicable) with the requirements for the Form of Expert's Report set out in the guidelines for "Expert witnesses in proceedings in the Federal Court of Australia" (Practice Note CM7).

3.26. MEL is to provide reasonable access and assistance and take all reasonable steps to allow the Independent Expert to be able to fulfil the terms of its appointment subject to legal professional privilege.

#### **Other Undertakings**

3.27. MEL undertakes that it will pay the costs of its compliance with this undertaking.

3.28. MEL undertakes that if, during the course of this undertaking, it becomes aware of instances where a client may have been adversely affected due to the failings of a Representative, MEL will notify ASIC of its proposal to consider the circumstances (including where appropriate, writing to the client in terms agreed with ASIC) and if found to be adversely affected, MEL is to remediate the client where appropriate.

3.29. MEL undertakes that it will not seek reimbursement or pass on to its clients the costs incurred in carrying out this undertaking.

3.30. MEL will, within a reasonable period after receiving a request from ASIC, provide all documents and information requested by ASIC from time to time for the purpose of assessing compliance with this undertaking subject to legal professional privilege.

- 3.31. MEL undertakes that it will not seek a variation of its AFSL or its membership of an EDR scheme, unless the Independent Expert provides an assessment of the impact on this undertaking and ASIC is provided with an opportunity to comment.
- 3.32. Within 12 months of the Commencement Date, all Representatives, and all relevant MPWA managers and staff, and compliance staff will attend a compliance and regulatory obligations workshop approved by ASIC.

#### **4. ACKNOWLEDGEMENTS**

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

4.2. Further MEL acknowledges that:

- a) ASIC's acceptance of this undertaking does not affect ASIC's power to investigate, conduct surveillance or pursue 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 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;
- c) this undertaking in no way derogates from MEL obligation to report significant breaches in accordance with section 912D of the Corporations Act and its AFSL as it becomes aware of any such breach, whether or not they are identified by the Independent Expert and whether or not such breach occurred prior to the Commencement Date; and
- d) this undertaking has no operative force until accepted by ASIC and MEL and ASIC acknowledge that the date of the enforceable undertaking is the date on which it is accepted by ASIC.

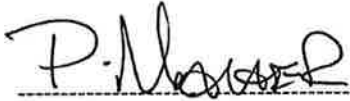
4.3. The address for providing ASIC with any document, including but not limited to any plan or report, which this undertaking requires to be provided is:

Helen Carroll  
Senior Manager, Financial Advisers  
Australian Securities and Investments Commission  
GPO Box 9827  
SYDNEY NSW 2001

4.4. Nothing contained in this undertaking constitutes an admission by MEL.

4.5. ASIC and MEL acknowledge that this undertaking ends on acceptance by ASIC of the Final Report.

Executed by  
Macquarie Equities Limited  
ACN 002 574 923  
in accordance with s127 of the  
*Corporations Act 2001(C'th)*  
on 29 January 2013

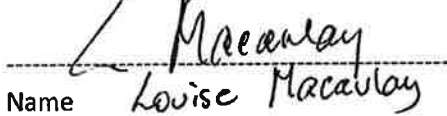


Peter Maher – Director



Dennis Leong – Secretary

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



Name Louise Macaulay

Delegate of the Australian Securities and Investments Commission

29/1/13  
Date