



913

ENFORCEABLE UNDERTAKING

Australian Securities and Investments Commission Act 2001

Section 93AA

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

SIMON DURANT

1. DEFINITIONS

- 1.1 In addition to terms defined elsewhere in this Enforceable Undertaking, the following definitions are used:

ASIC means Australian Securities and Investments Commission;

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

Cessation Period means two years from the Commencement Date;

Commencement Date means the date on which this Enforceable Undertaking is executed by ASIC;

Companies means Timesite Australia and The Unit Australia;

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

Mr Durant means Simon James Durant D.O.B 14 July 1965;

The Unit Australia means The Unit Australia Pty Ltd

Timesite Australia means Timesite Australia Pty Ltd

2. BACKGROUND

ASIC's role

- 2.1 ASIC is charged under section 1 of the ASIC Act 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.

Mr Durant

- 2.2 Mr Durant became a director of The Unit Australia on 26 February 2008 and Timesite Australia on 16 February 2009.
- 2.3 On 8 September 2009, the Supreme Court of New South Wales on application by ASIC made declarations of contraventions of directors duties under the Corporations Act against the directors of eight unrelated companies and the solicitor who advised and assisted each of those directors in relation to phoenix trading. Mr Durant was one of those directors and, on 24 September 2009 the Court disqualified Mr Durant from managing a corporation for a period of two years from 24 October 2009 (**Disqualification Period**).
- 2.4 On 20 October 2009, Mr Durant resigned as a director of the Companies.
- 2.5 On 6 January 2012, Mr Durant was reappointed as a director of the Companies.

ASIC's views

- 2.7 Around July 2011, ASIC became aware that Mr Durant may have been involved in the management of the Companies during the Disqualification Period and commenced an investigation.
- 2.8 During the investigation, ASIC obtained evidence that demonstrated that Mr Durant undertook the following conduct during the Disqualification Period:
 - (a) He acted as the sole signatory of the bank account of Timesite Australia;
 - (b) He authorised hundreds of transactions on the bank account of Timesite Australia;
 - (c) He was involved in the hiring of staff for Timesite Australia; and
 - (d) He provided instructions to an accountant in relation to the preparation of annual income tax returns for the Companies(collectively referred to as the **Conduct**).
- 2.9 ASIC's view is that as a consequence Mr Durant undertaking the Conduct in the Disqualification Period, Mr Durant may not have complied with section 206A of the *Corporations Act* which makes it an offence for a person who is disqualified from managing corporations from:
 - (a) Making, or participate in making, decisions that affect the whole, or a substantial part, of the business of a corporation; or
 - (b) Exercising the capacity to affect significantly a corporation's financial standing; or
 - (c) Communicating instructions or wishes (other than advice given by the person in the proper performance of functions attaching to the person's

professional capacity or their business relationship with the directors or the corporation) to the directors of a corporation:

- (i) Knowing that the directors are accustomed to act in accordance with the person's instructions or wishes; or
- (ii) Intending that the directors will act in accordance with those instructions or wishes.

3. ACKNOWLEDGEMENT OF ASIC'S VIEWS

3.1 Mr Durant acknowledges ASIC's views set out in clauses 2.8 and 2.9 above, and that they are reasonably held, and has offered the undertakings set out below to address ASIC's views .

4. UNDERTAKINGS

4.1 Pursuant to section 93AA of the ASIC Act, Mr Durant has offered, and ASIC has agreed to accept the following undertakings as an alternative to pursuing court action seeking declarations and injunctions.

Undertaking to cease managing corporations

4.2 Mr Durant undertakes:

- (a) To resign as a director from all corporations, of which he is presently a director within fourteen (14) days of the Commencement Date, with the exception of Never Again Pty Ltd ACN 147 055 918 which will only exist for the purpose of holding a single property asset and 55 Miller Street Pty Limited ACN 159 083 977 which acts a trustee for Mr Durant's self managed superannuation fund "The Potty Super Fund"; and
- (b) Not to take part in the management of any corporation, with the exception of Never Again Pty Ltd ACN 147 055 918 and 55 Miller Street Pty Limited ACN 159 083 977, provided the scope of the activities as described in 4.2(a) does not change

for a period of two years from the Commencement Date (**Cessation Period**).

Undertaking in relation to new directors

4.3 Mr Durant undertakes to provide to ASIC within fourteen (14) days of the Commencement Date:

- (a) The names of any directors who replace him as directors of the corporations of which he was a director (**Replacement Directors**); and
- (b) If applicable, a detailed description of his role as an employee of corporations of which he was a director, including his responsibilities and duties.

4.4 Mr Durant undertakes to provide to ASIC a statutory declaration from the Replacement Directors at twelve (12) and twenty four (24) months respectively

after the Commencement Date, which details Mr Durant's duties as an employee of those Corporations from which he resigned pursuant to clause 4.2(a) and confirms that Mr Durant has not been involved in the management of those Corporations.

- 4.5 If the Replacement Directors are themselves replaced, Mr Durant will obtain from the new directors a statutory declaration as per clause 4.3 and will obtain statutory declarations from the new directors at twelve (12) months if applicable and twenty four (24) months after the Commencement Date as per clause 4.4 .

5. CONSEQUENCE OF FAILURE TO COMPLY

- 5.1 If Mr Durant does not comply with the terms of this Enforceable Undertaking, the Cessation Period will be extended to a period of five (5) years from the Commencement Date and ASIC may consider whether further action is required as a consequence of the failure to comply.

6. REQUESTS FOR DOCUMENTS FROM ASIC

- 6.1 Mr Durant will provide any documents and information requested by ASIC from time to time for the purpose of assessing Mr Durant's compliance with the terms of this Enforceable Undertaking.

7. INSPECTIONS BY ASIC

- 7.1 ASIC may from time to time without notice conduct inspections of relevant company records or visit the premises of any relevant company to determine compliance with this Enforceable Undertaking.

8. ACKNOWLEDGEMENTS

- 8.1 Mr Durant acknowledges 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.

- 8.2 Further Mr Durant acknowledges 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.

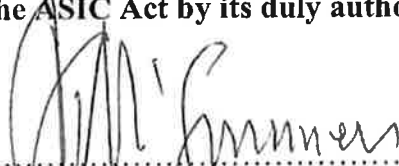
8.3 Mr Durant acknowledges that this Enforceable Undertaking has no operative force until accepted by ASIC, and Mr Durant and ASIC acknowledge that the date of the Enforceable Undertaking is the date on which it is accepted by ASIC.



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Simon Durant

Dated..... 10 Nov 2012

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



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David McGuinness

Delegate of Australian Securities and Investments Commission

Dated..... 13 December 2012