

**ENFORCEABLE UNDERTAKING***Australian Securities & Investment Commission Act 2001***Section 93AA**

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

Mr Brett Charles Fullarton
c/- KPMG
Level 8
235 St Georges Terrace
Perth WA 6000

1. BACKGROUND**ASIC's role**

- 1.1. ASIC is, pursuant to section 1 of the *Australian Securities and Investments Commission Act 2001* ("ASIC Act"), 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.
- 1.2. ASIC is also responsible for the registration of company auditors. Registered auditors must satisfy specified educational and practical experience standards, and in forming an opinion about whether financial statements audited by them comply with Australian Accounting Standards and present a true and fair view, must comply with Australian Auditing Standards and Professional Conduct Standards.
- 1.3. ASIC is empowered to bring disciplinary proceedings in the Companies Auditors and Liquidators Disciplinary Board (the "Board") against auditors who have failed to properly carry out the duties of an auditor.

Role of Mr Fullarton

- 1.4. Brett Charles Fullarton ("Mr Fullarton") is a registered company auditor (Registration No. 72623), having first obtained registration on 21 March 1994.
- 1.5. Mr Fullarton is a partner of KPMG, working out of the Perth office which is located at Level 8, 235 St Georges Terrace, Perth, Western Australia.
- 1.6. The Perth Office of KPMG provided auditing and other services to the Westpoint group for a number of financial years.
- 1.7. Mr Fullarton signed audit opinions in connection with the following entities within the Westpoint group:
 - (a) **2002 financial year**
York Street Mezzanine Pty Ltd ("York Street Mezzanine"), Bayshore Mezzanine Pty Ltd ("Bayshore Mezzanine"), Market Street Mezzanine Ltd ("Market Street Mezzanine"), Market Street Mezzanine No. 2 Pty Ltd ("Market Street Mezzanine No. 2") (formerly 297 Murray Street Pty Ltd), Scots Church Development Limited ("Scots Church"), Westpoint Management Limited ("Westpoint Management") and Westpoint Corporation Pty Ltd ("Westpoint Corporation");
 - (b) **2003 financial year**
York Street Mezzanine, Bayshore Mezzanine, Market Street Mezzanine, Market Street Mezzanine No. 2, Ann Street Mezzanine Pty Ltd ("Ann Street Mezzanine"), Bayview Heritage Mezzanine Pty Ltd ("Bayview Heritage Mezzanine"), Scots Church, Westpoint Management, Westpoint Corporation Pty Ltd and Westpoint Constructions Pty Ltd ("Westpoint Constructions");
 - (c) **2004 financial year**
Westpoint Constructions, Westpoint Management and Westpoint Corporation.

Westpoint Group

- 1.8. The Westpoint group was involved in property development and management, managed investment schemes, property syndication and joint ventures.
- 1.9. The Westpoint group raised much of the funds required for its property development from private investors, attracting individual investments of \$50,000 and over by the issue of promissory note products.
- 1.10. The Westpoint group utilised a network of financial advisors across Australia, which it used to promote its promissory note products. These financial advisers received commission for promoting and selling the promissory note products which were offered in information memoranda published for the various property development projects being undertaken by the Westpoint group.
- 1.11. The Westpoint group collapsed in 2005 and in the course of its investigations into the group, ASIC came to consider the appropriateness of Mr Fullarton having issued certain unqualified audit opinions.

Corporate Structure

- 1.12. Westpoint Corporation was a company whose activities included providing central treasury, administration and support services to the Westpoint group. Special purpose entities ("Development Entities") were created to develop and sell multi-storey residential and commercial building developments on various sites in Brisbane, Perth, Melbourne and Sydney.
- 1.13. For the purpose of raising funds, typically a separate "Mezzanine Company" was incorporated for each major development undertaken by the Westpoint group. The Mezzanine Companies were specific purpose entities, incorporated to raise finance for specific developments.

1.14. When moneys were raised by the Mezzanine Companies they were paid to Westpoint Corporation which performed a central treasury role within the Westpoint group. In the accounts of the companies within Westpoint group, funds raised were shown as having been:

- (a) on-lent to the Development Entity for the purposes of undertaking the particular development;
- (b) paid to Westpoint Constructions, which contracted with the Development Entity to perform the construction of the development project and which pre-billed the Development Entity for construction work; and
- (c) lent by Westpoint Constructions to Westpoint Corporation.

1.15. Westpoint Corporation guaranteed the repayment by the Development Entities of these loans to the Mezzanine Companies.

2. ASIC'S CONCERNS

- 2.1. ASIC, in its investigations, identified a number of concerns in respect of the audit process, and contends that Mr Fullarton acted in breach of various auditing standards in the conduct of the audits.
- 2.2. Westpoint Corporation's capacity to satisfy its obligations under its guarantee of the loans to the Development Entities, and the capacity of the Mezzanine Companies to repay money raised from investors, was substantially dependent on the success of the development projects.
- 2.3. The success of the projects depended, in turn, upon, among other things, Westpoint Corporation's capacity to fund the construction work. Westpoint Corporation's accounts recorded as significant assets, amounts owed by the Development Entities consequent upon fees (described as "management" or "procurement" fees) having been

charged to the Development Entities in anticipation of profits being earned on the conclusion of the developments.

- 2.4. In these circumstances the accuracy of the statements made in the accounts of the companies referred to in paragraph 1.7 were in many ways substantially dependent upon the accuracy of assumptions on which the accounts were based in relation to the revenue and expenses associated with the developments, and the timing of receipt of revenue from the developments. ASIC is concerned as to the adequacy of the audit procedures undertaken in connection with these matters.
- 2.5. More particularly, ASIC's concerns include the following non-exhaustive matters.
- 2.6. In connection with the audits of Westpoint Corporation for the year ended 30 June 2003 and Westpoint Corporation and its Controlled Entities for the year ended 30 June 2004 ASIC contends that Mr Fullarton failed to:
- (a) obtain sufficient appropriate audit evidence in connection with the cash flow forecast prepared by the management of Westpoint Corporation, being audit evidence on which the going concern assumption was based; and
 - (b) obtain sufficient appropriate audit evidence in connection with the carrying value and classification of receivables, being audit evidence on which the going concern assumption was based.
- 2.7. In carrying out the audits of Market Street Mezzanine for the financial year ended 30 June 2002 and Ann Street Mezzanine, Bayshore Mezzanine, Bayview Heritage Mezzanine and York Street Mezzanine for the financial year ended 30 June 2003, ASIC contends that Mr Fullarton failed to consider the importance of the effect of continued fund raising through promissory notes subsequent to balance date and up to the date of signing the audit report that were in excess of the amount specified in the relevant information memoranda.

- 2.8. In carrying out the audits of Westpoint Corporation, York Street Mezzanine, Scots Church, Bayshore Mezzanine, and Market Street Mezzanine for the financial years ended 30 June 2002 and 30 June 2003, and Westpoint Management and its Controlled Entities for the financial year ended 2004, ASIC contends that Mr Fullarton failed to:
- (a) obtain sufficient appropriate audit evidence of the actual costs to date of the development projects being undertaken by the group;
 - (b) obtain sufficient appropriate audit evidence of the estimated cost to complete, revenue and profit in connection with the projects; and
 - (c) adequately consider the appropriateness of the recognition of profit earned on each such project as at the balance date.
- 2.9. In carrying out the audits of Westpoint Corporation for the years ended 30 June 2002, 2003 and 2004, ASIC contends that Mr Fullarton failed to:
- (a) obtain sufficient appropriate audit evidence in relation to the valuation and disclosure of receivables;
 - (b) obtain sufficient appropriate audit evidence in relation to the disclosure of loans to and from related parties; and/or
 - (c) adequately consider the appropriateness of the calculation and recording of procurement and management fee revenue.
- 2.10. In carrying out the audit of Westpoint Corporation for the financial years ended 30 June 2002, 30 June 2003 and 30 June 2004, ASIC contends that Mr Fullarton failed to include in the audit report a "qualified" opinion identifying the inappropriate use of financial reporting and presentation standards applicable to non-reporting entities in relation to non-compliance with financial reporting presentation and Australian Accounting Standards.

3. ACKNOWLEDGEMENT OF CONCERNS

- 3.1. While he disagrees with ASIC's concerns, Mr Fullarton acknowledges these concerns and has offered, and ASIC has agreed to accept, the commitments in this enforceable undertaking ("undertaking") as an alternative to ASIC making an application to the Board for an order under section 1292 of the *Corporations Act 2001* ("the Act").

4. UNDERTAKINGS

Under Section 93AA of the ASIC Act, Mr Fullarton has offered, and ASIC has agreed to accept, the following undertakings:

- 4.1. Mr Fullarton undertakes that for a period of two years from the date of acceptance of this undertaking ("period of non-practice as a registered auditor"), he will not perform any duty or function which requires registration as an auditor under the Act.
- 4.2. Mr Fullarton undertakes to participate in an additional ten hours Continuing Professional Education (CPE) on audit related matters during the period of non-practice as a registered auditor in addition to the mandatory CPE requirements imposed upon him as a consequence of him being a member of the Institute of Chartered Accountants in Australia.
- 4.3. Mr Fullarton agrees that after the conclusion of the period of non-practice as a registered auditor referred to in paragraph 4.1, in respect of the next three audit engagements for which require registration as an auditor under the Act, the audit work and conclusions will be submitted for review by the KPMG Partner in Charge, Department of Professional Practice - Audit (from time to time) who is to provide to ASIC a statement whether, in that person's opinion, the three audits in question have been conducted in all material respects in accordance with established Australian Auditing Standards and in accordance with KPMG's Audit Manual effective as at the date of any audit.

- 4.4. Mr Fullarton undertakes to pay, within 14 days of the date of acceptance of this undertaking, the reasonable investigation and legal costs of ASIC's investigation of the concerns referred to in section 2 above as agreed or, in the absence of agreement, as assessed by an independent costs consultant.
- 4.5. Mr Fullarton undertakes to provide ASIC with any documents or information requested by ASIC in respect of the undertakings referred to in paragraphs 4.1 to 4.4 inclusive within 7 days of receiving the request.

5. ACKNOWLEDGMENTS

Acknowledgments by Mr Fullarton

- 5.1. Mr Fullarton 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.
- 5.2. Mr Fullarton further acknowledges that this undertaking:
- (a) in no way derogates from the rights and remedies available to ASIC or any other person or entity relating to or arising from any matter referred to in this undertaking;
 - (b) 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 or all of the matters referred to in this undertaking or any contravention arising from future conduct; and
 - (c) has no operative force until accepted by ASIC.

5.3. Any written notification to ASIC pursuant to this undertaking is to be provided to the Senior Executive Leader, Accountants and Auditors Team, ASIC.

Signed this 13th day of August 2009

by BRETT CHARLES FULLARTON



in the presence of:



witness

S. J. SWANOLE

name (print)

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address
Kell WA 6100

ACCEPTED BY THE AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION
PURSUANT TO SECTION 93AA OF THE AUSTRALIAN SECURITIES AND
INVESTMENTS COMMISSION ACT 2001 (CTH) BY ITS DULY AUTHORISED
DELEGATE:

Anthony Michael D'Aloisio

Chairman and Delegate of the Australian Securities & Investments Commission

Dated this 11th day of August 2009