



**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 Robert Charles Kelly  
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 Kelly**

- 1.4 Robert Charles Kelly ("Mr Kelly") is a registered company auditor (Registration No. 230785), having first obtained registration on 16 July 2003.
- 1.5 Mr Kelly 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 Kelly was the manager of the Westpoint group audits for the 2002 and 2003 financial years.
- 1.8 Mr Kelly signed audit opinions for the 30 June 2004 financial year in connection with the following entities within the Westpoint group: Scots Church Development Limited ("Scots Church"), 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"), Ann Street Mezzanine Pty Ltd ("Ann Street Mezzanine"), and Bayview Heritage Mezzanine Pty Ltd (Bayview Heritage Mezzanine").

### **Westpoint Group**

- 1.9 The Westpoint group was involved in property development and management, managed investment schemes, property syndication and joint ventures.
- 1.10 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.

- 1.11 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.
- 1.12 The Westpoint group collapsed in 2005 and in the course of its investigations into the Group, ASIC came to consider the appropriateness of Mr Kelly having issued certain unqualified audit opinions.

#### Corporate Structure

- 1.13 Westpoint Corporation Pty Limited ("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.
- 1.14 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.
- 1.15 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.
- 1.16 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 Kelly 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 1.8 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 carrying out the audits of Ann Street Mezzanine, Market Street Mezzanine, Market Street Mezzanine No. 2, York Street Mezzanine and Scots Church for the financial year ended 30 June 2004, ASIC contends that Mr Kelly 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 Ann Street Mezzanine, Market Street Mezzanine and York Street Mezzanine for the financial year ended 30 June 2004, ASIC contends that Mr Kelly 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 connection with the audit of Scots Church the year ended 30 June 2004, ASIC contends that Mr Kelly failed to:
- (a) obtain sufficient appropriate audit evidence of actual costs to date for the York Street Project; and
  - (b) obtain sufficient appropriate audit evidence of estimated cost to complete, revenue and profit and for the York Street Project.

### 3. ACKNOWLEDGEMENT OF CONCERNS

- 3.1 While he disagrees with ASIC's concerns, Mr Kelly 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 Kelly has offered, and ASIC has agreed to accept, the following undertakings:

- 4.1 Mr Kelly undertakes that for a period of eighteen months 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 Kelly 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 Kelly 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 which require registration 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 Kelly 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 Kelly 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 Kelly

- 5.1 Mr Kelly 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.

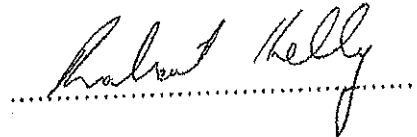
- 5.2 Mr Kelly further acknowledges that this undertaking:

- (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 matters 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

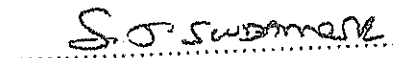
by ROBERT CHARLES KELLY



in the presence of:



witness

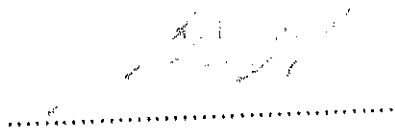


name (print)

C/- Kham  
235 St George's Terrace  
Perth WA 6000

address

ACCEPTED BY THE AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION  
PURSUANT TO SECTION S93AA 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 17th day of August 2009