

## 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:

**AIW Dealer Services Pty Ltd**

**ACN 153 322 420**

**Licence No: 414256**

**7/39 Sherwood Road, Toowong, QLD, 4066**

### INTERPRETATION

1.1 In this enforceable undertaking,

- (a) a reference to the doing of an act within a certain period or by a certain time includes a reference to a longer period or later time as agreed with ASIC;
- (b) an expression that is defined in section 761A of the Act has the same meaning as in that section;
- (c) Act means the *Corporations Act 2001*.

**Affected Client** means a Client who received SMSF Advice from an adviser of Otium during the Relevant Period which may not have complied with financial services laws.

**AIW** means AIW Dealer Services Pty Ltd ACN 153 322 420, a financial services licensee holding an Australian financial services licence (No. 414256).

**ASIC Act** means the *Australian Securities and Investments Commission Act 2001*.

**ASIC's Concerns** means the concerns set out in paragraphs 5.1 – 5.2.

**Client** means a retail client who received SMSF Advice from an Otium adviser during the Relevant Period.

**Client File** means a file of Otium that contains information relating to advice provided to a Client and includes documents such as the Financial Services Guide, Product Disclosure Statement, Statement of Advice, fact find, application forms, authority to proceed, research, client correspondence and any other supporting documentation.

**Commencement Date** means the date of acceptance by ASIC of this enforceable undertaking.

**Independent Expert** means the person, firm or company appointed for the purposes of this enforceable undertaking (and, for the avoidance of doubt, includes any replacement Independent Expert within paragraph 8.6).

**Otium** means Otium Advice Pty Ltd ACN 160 427 592.

**Relevant Period** means the period from 1 January 2015 to 23 June 2016.

**Remediation Recommendation** means a recommendation made by either AIW or the Independent Expert on how to remediate an Affected Client.

**SMSF Advice** means financial product advice recommending the establishment and / or use of a self-managed superannuation fund within the meaning of the *Superannuation Industry (Supervision) Act 1993*.

## **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.

### **Background**

- 3.1 Since 2 February 2012, AIW has held an Australian financial services licence authorising it to carry on a financial services business to provide financial product advice and to deal in financial products.
- 3.2 Otium was a corporate authorised representative of AIW between 19 November 2012 and 30 September 2016. Individual advisers of Otium were appointed as authorised representatives of AIW.
- 3.3 The conduct that is the subject of this enforceable undertaking occurred during the Relevant Period and in the course of Otium or its advisers providing financial product advice on behalf of AIW.

### **ASIC's surveillance**

- 4.1 For the purpose of ensuring compliance with the Act, ASIC reviewed 10 Client Files of Otium throughout June to October 2016. ASIC's surveillance identified a number of issues regarding Otium which were outlined to AIW in ASIC's letter dated 7 October 2016.
- 4.2 ASIC considers that, in relation to those Client Files, the advisers of Otium used a 'one size fits all' advice model, advised Clients to switch superannuation funds when it was inappropriate to do so, and failed to demonstrate the ability, professional skills and knowledge required to competently provide financial product advice.

### **ASIC's concerns**

- 5.1 ASIC is concerned that advisers connected with Otium acting in their capacity as authorised representatives of AIW may have failed to:
  - (a) act in the best interests of their Clients in relation to the provision of financial product advice (in contravention of section 961B of the Act);
  - (b) provide financial product advice that was appropriate to their Clients (in contravention of section 961G of the Act);
  - (c) give priority to their Clients' interests when providing the financial product advice (in contravention of section 961J of the Act); and
  - (d) provide adequate financial product advice when recommending replacement of one financial product with another (in contravention of section 947D of the Act).

- 5.2 ASIC is also concerned that AIW may not have complied with certain statutory obligations imposed on financial services licensees under the Act, specifically:
- (a) to do all things necessary to ensure that the financial services covered by the licence are provided efficiently, honestly and fairly (in contravention of paragraph 912A(1)(a) of the Act);
  - (b) to take reasonable steps to ensure that its representatives comply with the financial services laws (in contravention of paragraph 912A(1)(ca) of the Act);
  - (c) to have available adequate resources to provide the financial services covered by the licence and to carry out supervisory arrangements (in contravention of paragraph 912A(1)(d) of the Act);
  - (d) to ensure that its representatives are adequately trained (in contravention of paragraph 912A(1)(f) of the Act); and
  - (e) to have adequate risk management systems (in contravention of paragraph 912A(1)(h) of the Act).

## **ACKNOWLEDGEMENTS**

6.1 AIW acknowledges that:

- (a) ASIC's Concerns are reasonably held;
- (b) it must comply with all of the requirements of this enforceable undertaking in order to address ASIC's Concerns.

6.2 AIW acknowledges that ASIC:

- (a) may issue a media release on execution of this enforceable undertaking referring to its terms and of ASIC's Concerns which led to its execution;
- (b) may from time to time publicly refer to this enforceable undertaking and whether AIW has complied with it;
- (c) will make this enforceable undertaking available for public inspection; and
- (d) may from time to time publicly refer to the content of any written reports to be provided by the Independent Expert to ASIC and AIW in connection with this enforceable undertaking, and may publish a summary of the content of the reports or a statement that refers to the content of the reports.

6.3 ASIC acknowledges that it will not publicly refer to information from the Independent Expert's reports that AIW has asked ASIC not to publicly release, provided ASIC is satisfied that the information:

- (a) could reasonably be expected to unreasonably affect the business, commercial or financial affairs of AIW otherwise than in a way that arises from the execution, implementation and reporting of the outcomes of the enforceable undertaking; or
- (b) should not be disclosed because it would be against the public interest to do so; or

- (c) consists of personal information about an individual whose acts or omissions are not the subject of ASIC's Concerns in this enforceable undertaking.

6.4 AIW acknowledges that:

- (a) ASIC's acceptance of this enforceable undertaking does not affect ASIC's power to investigate or conduct surveillance (including in relation to any reports of misconduct, referrals or statutory reports involving AIW) or pursue administrative, civil or criminal proceedings in relation to any contravention not the subject of ASIC's Concerns in this enforceable undertaking or arising from future conduct;
- (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; and
- (c) this undertaking has no operative force until accepted by ASIC.

6.5 ASIC acknowledges that AIW has co-operated with ASIC.

## **UNDERTAKINGS**

### **Acceptance of enforceable undertaking**

- 7.1 Under section 93AA of the ASIC Act, AIW has offered the undertakings in this enforceable undertaking, and ASIC has agreed to accept those undertakings as an alternative to ASIC commencing civil proceedings or taking administrative action against AIW in relation to ASIC's Concerns.

### **Appointment of Independent Expert**

- 8.1 Within 20 business days of the Commencement Date, AIW undertakes to request ASIC to approve the appointment of the nominated Independent Expert and the draft terms of engagement that meet the requirements of this enforceable undertaking.
- 8.2 AIW undertakes to nominate an Independent Expert who, in AIW's opinion:
- (a) has the necessary expertise, experience and operational capacity to perform the role contemplated by this enforceable undertaking; and
  - (b) is independent of AIW, its related bodies corporate and its officers at the time of the appointment, and who will at all material times be capable of exercising objective and impartial judgement.
- 8.3 Within 10 business days of receiving approval from ASIC, AIW undertakes to appoint the Independent Expert on the approved terms of engagement.

### **Terms of engagement**

- 8.4 AIW undertakes to ensure the terms of engagement of the Independent Expert include the following:

- (a) a statement that the work of the Independent Expert is being carried out for AIW and ASIC, and acknowledging that ASIC is relying on the work of the Independent Expert;
- (b) a requirement that ASIC is to be copied into all or specified communications between AIW and the Independent Expert, if ASIC so requests;
- (c) a requirement that the Independent Expert must notify ASIC, as soon as practicable, if a conflict of interest arises during the engagement, or if the Independent Expert becomes aware of information that adversely affects its ability to exercise objective and impartial judgement; and
- (d) an acknowledgement by the Independent Expert that, in relation to the written reports to be provided to ASIC and AIW in connection with this enforceable undertaking, ASIC may from time to time publicly refer to the content of the reports, and may publish a summary of the content of the reports or a statement that refers to the content of the reports.

8.5 AIW further undertakes to:

- (a) permit the Independent Expert, to the extent that it is reasonable having regard to the requirements of this enforceable undertaking, to have access to its books and to interview current employees or representatives;
- (b) 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; and
- (c) otherwise reasonably assist the Independent Expert in carrying out the terms of its engagement and producing the reports required to be prepared by the Independent Expert under this enforceable undertaking.

Appointment of replacement Independent Expert

8.6 AIW undertakes to seek approval under paragraph 8.1 for the appointment of a new Independent Expert within 15 business days of becoming aware that the appointed Independent Expert is unable to continue its appointment.

**Policy and Procedure Review**

9.1 AIW undertakes to require the Independent Expert to complete a review (the **Policy and Procedure Review**) of the effectiveness of AIW's policies and procedures in relation to the following matters:

- (a) conflicts of interest;
- (b) auditing of client files;
- (c) process for appointing, monitoring, training and supervising authorised representatives to ensure that AIW has suitably qualified authorised representatives who understand their legal obligations when providing financial product advice to clients;

- (d) process for appointing compliance staff with the requisite skills to effectively monitor and supervise AIW's authorised representatives and AIW's business;
- (e) complaints handling and breach reporting; and
- (f) any other aspects of AIW's financial services business that the Independent Expert deems necessary to address ASIC's Concerns.

9.2 The Policy and Procedure Review is to be completed within 90 business days after the engagement of the Independent Expert.

#### Policy and Procedure Report

9.3 AIW undertakes to require the Independent Expert to prepare and give a report (the **Policy and Procedure Report**) that:

- (a) details its findings in respect of the Policy and Procedure Review;
- (b) contains recommendations as to any action that should be taken by AIW in response to any of its findings; and
- (c) states the Independent Expert's opinion on a reasonable time period for implementation of any recommended action/s.

9.4 The Policy and Procedure Report is to be given by the Independent Expert to AIW and ASIC within 30 business days after completion of the Policy and Procedure Review.

#### Policy and Procedure — Remedial Action Plan

9.5 AIW undertakes to prepare a plan (the **Policy and Procedure — Remedial Action Plan**) that:

- (a) sets out the action AIW proposes to take to implement the recommendations made in the Policy and Procedure Report; and
- (b) specifies the date by which each action will be taken.

9.6 The Policy and Procedure – Remedial Action Plan is to be given by AIW to ASIC and the Independent Expert within 30 business days after AIW has received the Policy and Procedure Report.

9.7 If ASIC or the Independent Expert notifies AIW within 10 business days after receipt of the Policy and Procedure – Remedial Action Plan that it requires specific modifications to it, AIW undertakes to make such modifications, and to give a copy of the modified Policy and Procedure — Remedial Action Plan to both ASIC and the Independent Expert within 10 business days after receipt of such notification.

9.8 AIW undertakes to implement the Policy and Procedure – Remedial Action Plan in full and within the specified time periods, and to notify ASIC in writing within 5 business days after full implementation.

#### **Review and Remediation Program**

10.1 AIW undertakes to prepare a program (the **Review and Remediation Program**) that:

- (a) is consistent with the principles set out in ASIC Regulatory Guide 256: *Client review and remediation conducted by advice licensees*; and
  - (b) sets out the methodology and processes to be used by AIW to review the SMSF Advice provided to Clients during the Relevant Period, and to remediate Affected Clients.
- 10.2 AIW undertakes to give the proposed Review and Remediation Program to the Independent Expert and ASIC within 45 business days after the engagement of the Independent Expert.
- 10.3 AIW undertakes to:
- (a) require the Independent Expert to, within 30 business days of being given the proposed program, review the effectiveness of the proposed program and provide comments to ASIC and AIW (including any modifications they recommend to be made to the proposed program); and
  - (b) make all modifications recommended by the Independent Expert (unless ASIC specifies otherwise) and any other modifications required by ASIC within 10 business days of receiving ASIC's comments relating to the modifications; and
  - (c) within 5 business days of making all modifications required under subparagraph (b), notify ASIC and the Independent Expert in writing that all modifications required to be made to the proposed program have been made.
- 10.4 AIW undertakes that the Review and Remediation Program will, as a minimum, provide for the following reviews to be conducted, and reports prepared and given, by the deadlines set out in the Review and Remediation Program:
- (a) suitably qualified AIW staff are to review the SMSF Advice provided to Clients during the Relevant Period to test compliance with:
    - (i) section 947D of the Act, which requires additional information to be included in a Statement of Advice when an advice recommends replacement of one financial product with another;
    - (ii) section 961B of the Act, which requires a provider to act in the best interests of the client in relation to the advice;
    - (iii) section 961G of the Act, which requires a provider to only provide advice if it would be reasonable to conclude that the advice is appropriate to the client; and
    - (iv) section 961J of the Act, which requires a provider to give priority to the client's interests when giving advice if there is a conflict.
  - (b) the Independent Expert is to:
    - (i) within 6 months of being notified by AIW under subparagraph 10.3(c)—complete a review of 50 Client Files (consisting of 40 randomly selected Client Files that have been reviewed by AIW under subparagraph (a) and the 10 Client Files referred to in paragraph 4.1) to test compliance with the



sections of the Act referred to in subparagraph (a) and AIW's file review methodology; and

- (ii) within 30 business days of completing the review—prepare and give to ASIC and AIW a report (the **Review and Remediation Report**) that sets out the following information in relation to the 50 Client Files:
  - (A) the name of the Client and the name of the Otium adviser who provided the advice;
  - (B) the total number of Clients to whom remediation should be made;
  - (C) details of the type of remediation that should be made to each Client including where relevant, the dollar amount of remediation payment that should be made to the Client;
  - (D) the total dollar amount of remediation payments that should be made;
  - (E) a breakdown of remediation payments that should be made per Otium adviser;
  - (F) whether the Independent Expert agreed with AIW's assessment of advice provided to the Client including the reasons for any disagreement;
  - (G) whether the Independent Expert agreed with AIW's Remediation Recommendation including the reasons for any disagreement and the Independent Expert's Remediation Recommendation; and
  - (H) whether in the opinion of the Independent Expert, AIW has complied with the Review and Remediation Program.

10.5 AIW undertakes to require the Independent Expert to:

- (a) monitor, assess and where necessary make reasonable recommendations to improve the effectiveness of the Review and Remediation Program;
- (b) monitor and assess whether Affected Clients are being remediated in accordance with the Review and Remediation Program and, where necessary, make reasonable recommendations to ensure compliance with the Review and Remediation Program; and

10.6 AIW undertakes to prepare a plan (the **Review and Remediation – Remedial Action Plan**) that:

- (a) sets out the action AIW proposes to take to implement any recommendations made by the Independent Expert;
- (b) confirms that sufficiently qualified and skilled persons are available to discharge the Review and Remediation – Remedial Action Plan; and
- (c) specifies the date by which each action will be taken.

- 10.7 The Review and Remediation – Remedial Action Plan is to be given by AIW to ASIC and the Independent Expert within 30 business days after AIW has received the Review and Remediation Report.
- 10.8 If ASIC or the Independent Expert notifies AIW within 10 business days after receipt of the Review and Remediation – Remedial Action Plan that it requires specific modifications to it, AIW undertakes to make such modifications, and to give a copy of the modified Review and Remediation – Remedial Action Plan to both ASIC and the Independent Expert within 10 business days after receipt of such notification.
- 10.9 AIW undertakes to implement the Review and Remediation – Remedial Action Plan in full and within the specified time periods, and to notify ASIC in writing within 5 business days after full implementation.
- 10.10 AIW undertakes to complete the Review and Remediation Program by 30 September 2019.

#### **Other Matters**

- 11.1 AIW undertakes to pay the costs of compliance with this enforceable undertaking, including the remuneration and costs associated with the engagement of the Independent Expert.
- 11.2 AIW undertakes to provide to ASIC all documents and information requested by ASIC from time to time for the purpose of assessing this compliance with the terms of this enforceable undertaking.
- 11.3 AIW undertakes to notify ASIC as soon as reasonably practicable, and in any event within 10 business days of becoming aware, of any failure to comply with a term of this enforceable undertaking.

#### **Notification**

- 12.1 The address for providing ASIC with any document or notification required by this enforceable undertaking is:

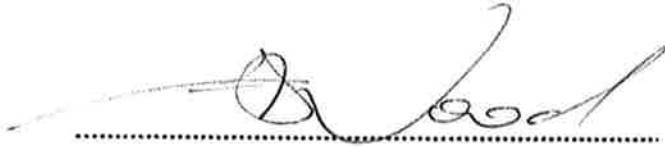
Kate Metz, Senior Manager

Financial Advisers

Level 7, 120 Collins Street, Melbourne, Victoria 3000

Email: [kate.metz@asic.gov.au](mailto:kate.metz@asic.gov.au).

**Executed by AIW Dealer Services Pty Ltd in  
accordance with section 127 of the  
*Corporations Act 2001***



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**Signature of Director**

**Name: Bradley Malcolm Wood**

**Accepted by the Australian Securities and Investments Commission under section 93AA of the  
ASIC Act by its duly authorised delegate:**



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**Louise Macaulay**

**Senior Executive Leader**

**Delegate of the Australian Securities and Investments Commission**

**14 December 2017**

