

**Enforceable Undertaking****Australian Securities & Investments Commission Act 2001****Section 93AA**


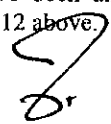
The commitments in this undertaking are offered to the Australian Securities and Investments Commission ("ASIC") by:

**Barton Capital Securities Pty Ltd**  
ACN 066 231 507  
99 William Street  
Melbourne Vic 3000

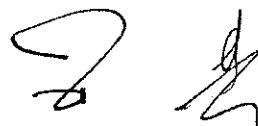
**1 Background**

- 1.1 ASIC conducted an investigation into the conduct of Barton Capital Securities Pty Limited (ACN 066 231 507) ("BCS") in relation to certain proper authorities it issued and which were in effect during the period 31 October 2000 to 2 April 2001.
- 1.2 BCS carries on a securities business under a licence issued pursuant to section 784 of the old Corporations Act ("Corporations Act"), as defined in section 1410(1) of the Corporations Act 2001.
- 1.3 eStar Online Trading Limited ("eStar") is a publicly listed company that sells and supplies to clients services that enable users to buy and sell securities on the Australian Stock Exchange using the internet (the "trading platform").
- 1.4 At all material times, BCS acted in the belief that eStar was entitled to facilitate trade in securities in reliance on BCS' dealers licence. That belief was reasonably based upon legal advice provided to eStar (the effect of which was communicated by eStar to BCS) by its solicitors.
- 1.5 On 31 October 2000, eStar entered into an agreement with Online Trading Systems Limited ("OTS") to supply the trading platform for use by OTS' client base ("OTS Agreement"). BCS was not a party to the OTS Agreement.
- 1.6 The terms of the OTS Agreement included that:
  - (a) the trading platform would be made available to OTS' client base (through OTS' front end) for the purposes of online trading;
  - (b) eStar would provide the service, including execution, clearing and settlement, based on a set price structure, by arrangement with BCS;
  - (c) provided that OTS' activities were supervised by Mr Michael Tortoni, BCS was prepared to issue proper authorities to appropriate members of OTS' staff;
  - (d) a \$1 per trade surcharge would be levied by eStar on OTS during the period that OTS utilised proper authorities issued by BCS;
  - (e) OTS indemnify BCS for all matters arising in consequence of OTS staff being granted proper authorities by BCS;

- (f) OTS undertook that Mr Tortoni would at all times personally supervise those staff to whom a proper authority had been issued by BCS; and
  - (g) BCS reserved the right to terminate proper authorities issued to OTS staff at any time without notice.
- 1.7 Mr Tortoni was, at all relevant times, a holder of a proper authority issued by BCS and was, until approximately 27 October 2000, the head of BCS' dealing desk. From 1 November 2000, Mr Tortoni was no longer engaged by BCS. However, Mr Tortoni was permitted by BCS to continue to hold a proper authority in respect of his work with OTS, subject to the terms and conditions contained in the OTS Agreement.
- 1.8 On 31 October 2000, BCS issued proper authorities to directors of OTS and certain employees of a wholly owned subsidiary of OTS, Trading Mastery Pty Ltd ("PA Holders"). There was no agreement between BCS and Trading Mastery Pty Ltd. BCS was not aware that some of the PA Holders were staff of Trading Mastery Pty Ltd and not OTS.
- 1.9 The BCS proper authorities of the PA Holders and Mr Tortoni were cancelled on 2 April 2001. The immediate cause of the cancellation of those proper authorities was the written resignation submitted that day to BCS by Mr Tortoni and the absence, in BCS' view, of any other appropriate person at OTS to supervise the PA Holders.
- 1.10 ASIC has expressed concern in relation to BCS and the PA Holders during the period 31 October 2000 to 2 April 2001 about:
- (a) a lack of supervision, training and continuing education by BCS of the PA Holders;
  - (b) a lack of knowledge on the part of BCS of the activities of the PA Holders;
  - (c) a lack of any contractual arrangements directly between BCS and the PA Holders.
- 1.11 ASIC is concerned that the OTS Agreement was an unsatisfactory arrangement to discharge BCS' obligations arising under the Corporations Act, the Corporations Regulations and / or the conditions of BCS' dealers licence.
- 1.12 Specifically, ASIC is concerned that BCS may have contravened:
- (a) regulation 7.3.02 of the Corporations Regulations and condition 3 of its dealers licence, each of which imposes obligations upon BCS in relation to its supervision, training and education of authorised representatives. Condition 3 of BCS' licence also requires BCS to maintain adequate compliance procedures;
  - (b) regulation 7.3.02D of the Corporations Regulations, which requires BCS to provide certain warnings to retail investors or prospective retail investors if general securities advice is given in a document;
  - (c) section 787 of the Corporations Act, which imposes an obligation upon BCS to notify ASIC within one day of an event constituting a contravention of a licence condition.
- 1.13 BCS acknowledges ASIC's concerns but does not believe that there have been any contraventions by it of the regulations and sections referred to in paragraph 1.12 above.



- 1.14 ASIC has also expressed concern that BCS did not notify ASIC of:
- (a) certain instances of alleged irregular trading by three advisors engaged by BCS;
  - (b) arrangements made between BCS and certain clients of one of its former advisors whereby BCS sought an undertaking from those clients that they not lodge a complaint with ASIC, ASX or any complaint resolution scheme; and
  - (c) an instance of dealing in ordinary shares in Satellite Group Limited on 28 June 2000 prior to their official quotation,
- (collectively the "additional matters").
- 1.15 BCS acknowledges ASIC's concern in relation to the additional matters, but did not consider that it was under any obligation to notify ASIC of the additional matters at the relevant times.
- 1.16 In light of the matters set out in paragraphs 1.10, 1.11, 1.12 and 1.14, ASIC has expressed concern that BCS may have failed to perform efficiently, honestly and fairly the duties of a holder of a dealers licence.
- 1.17 ASIC has also expressed concern that it may have reason to believe that BCS will not perform efficiently, honestly and fairly in the future for the reasons set out in paragraphs 1.10, 1.11, 1.12 and 1.14 above, which, in ASIC's view, may demonstrate that:
- (a) BCS has fallen short of the standard expected and required of a licensed securities dealer on several occasions during a period of approximately 18 months prior to April 2001 and in different contexts; and
  - (b) the compliance practices at BCS may not be sufficient to prevent further instances of conduct that fall below the minimum standard required of a licensed securities dealer.
- 1.18 BCS acknowledges ASIC's concerns and has determined to implement additional measures for the purpose of enhancing its ongoing compliance with the Corporations Act, the Corporations Act 2001, the Corporations Regulations and the conditions of the BCS dealers licence.
- 2 ASIC's powers**
- 2.1 ASIC is required by section 837 of the Corporations Act to provide BCS with the opportunity of a hearing before ASIC decides what, if any, action should be taken against BCS as a result of BCS' conduct. If findings were made against BCS at such a hearing, ASIC could take the following action:
- (a) revoke BCS' licence under section 826(1) of the Corporations Act;
  - (b) suspend BCS' licence under section 827(1)(c) of the Corporations Act;
  - (c) prohibit BCS, either permanently or for a specified period, from doing specified acts, being acts of a licensee under section 827(1)(d) of the Corporations Act;



- (d) impose further conditions on BCS' dealers licence under section 786(1)(b) of the Corporations Act;
- (e) vary conditions of BCS' dealers licence under section 786(7) of the Corporations Act.

- 2.2 BCS has offered and ASIC has agreed to accept an enforceable undertaking in the terms set out below as an alternative to determining whether or not ASIC should exercise the powers set out in paragraph 2.1 above.

### 3 Undertakings

Pursuant to section 93AA of the Australian Securities and Investments Commission Act 2001 ("ASIC Act"), BCS undertakes that:

#### *Compliance measures*

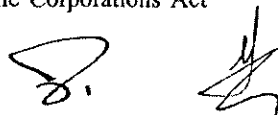
- 3.1 BCS will establish and maintain compliance measures that ensure, as far as reasonably practicable, that BCS complies with the financial services law (as that term is defined in section 761A of the Corporations Act 2001).

#### *Compliance officer*

- 3.2 With effect from 13 May 2002, BCS will retain a compliance officer who will have a designated compliance role and will be responsible for ensuring that BCS complies with its obligations under the Corporations Act, the Corporations Act 2001, the Corporations Regulations, the ASIC Act, the conditions of BCS' dealers licence, the ASX Business Rules and the ASX Listing Rules.
- 3.3 BCS will ensure that the compliance officer is a person who is a member of the Australian Compliance Professionals Association or the Securities and Derivatives Institute of Australia or, with the approval of ASIC, another appropriate professional association, and:
- (a) a qualified lawyer who has been practising for at least the past 5 years; and/or
  - (b) has not less than 3 years experience in the securities industry in a supervisory or compliance role.
- 3.4 BCS will inform ASIC in writing of the identity of the compliance officer referred to in paragraph 3.2, above, by 15 May 2002 and of any subsequent appointment of a compliance officer within 2 business days of the appointment, during the period of 24 months after the day on which this undertaking is accepted by ASIC.
- 3.5 BCS will ensure that the compliance officer reports directly to the Board of BCS and has appropriate authority from BCS to discharge the responsibilities and functions described in paragraph 3.2.

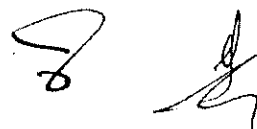
#### *Compliance Program*

- 3.6 BCS will, by 20 May 2002, engage an external independent compliance consultant (whose appointment and terms of reference are to be approved by ASIC). The consultant will review, assess, identify, make recommendations and report in writing to BCS and ASIC in relation to BCS' compliance with the Corporations Act, the Corporations Act



2001, the Corporations Regulations, the ASIC Act, the ASX Business Rules, the ASX Listing Rules and the licence conditions attached to Licence Number 83290 or any future Australian Financial Services Licence which may be issued to BCS (or any related entity to which BCS transfers, sells or disposes of its assets and business), considering BCS' internal controls, compliance systems, procedures, supervision and training of its representatives ("**report**") as at 31 July 2002, 30 November 2002, 31 March 2003, 30 September 2003 and 31 March 2004 ("**reporting dates**").

- 3.7 Each report will include, but not be limited to, the identification and the making of recommendations for changes to ensure full compliance with the Corporations Act, the Corporations Act 2001, the Corporations Regulations, the ASIC Act, the ASX Business Rules, the ASX Listing Rules and the licence conditions attached to Licence Number 83290 or any future Australian Financial Services Licence which may be issued to BCS (or any related entity to which BCS transfers, sells or disposes of its assets and business), in particular relating to:
- (a) the structure, status, autonomy, independence and reporting lines of the compliance function;
  - (b) induction and training programs for new representatives of BCS;
  - (c) training and supervision of representatives;
  - (d) an assessment of representatives' understanding of their obligations with respect to the Corporations Act, the Corporations Act 2001, Corporations Regulations, the ASIC Act, the ASX Business Rules, the ASX Listing Rules and BCS' licence conditions;
  - (e) remedial training in the event that a representative is found not to understand his or her obligations;
  - (f) unauthorised trading;
  - (g) internal and external resolution of complaints;
  - (h) the action taken by BCS to remedy any deficiencies identified in previous reports; and
  - (i) compliance with this undertaking.
- 3.8 BCS will use its reasonable endeavours to enable each report to be delivered to ASIC within 14 days of the relevant reporting date. In the event that BCS is unable to deliver a copy of the report to ASIC within 14 days of the relevant reporting date, BCS will provide to ASIC a written explanation for the delay and an estimate of when the report will be provided. Such written explanation must be received from BCS by ASIC within 16 days after the reporting date.
- 3.9 Within 30 days of receiving each report, BCS will provide ASIC with a report from the BCS Board:
- (a) detailing the steps taken or to be taken by BCS to comply with any recommendations of the consultant; and



- (b) providing a full explanation as to why any recommendation of the consultant has not been or will not be followed.

***Training of representatives***

- 3.10 Within 1 month of the signing of this undertaking, BCS will create and then maintain a record of the training (relevant to the provision of financial services) that each of its representatives has undertaken, including:
  - (a) training undertaken after the representative became a representative of BCS; and
  - (b) any training undertaken before the representative became a representative of BCS to the extent that BCS is able to obtain the information by reasonable enquiry.
- 3.11 For any natural person who provides financial product advice on behalf of BCS, BCS will, by 30 June 2002:
  - (a) identify the tasks and function that person performs on behalf of BCS;
  - (b) determine the appropriate knowledge and skills required to competently perform those tasks and functions;
  - (c) implement procedures for continuing training;
  - (d) record in writing each of the steps undertaken by BCS to fulfil the matters identified in sub-paragraphs 3.11(a) to 3.11(c) above.
- 3.12 BCS will ensure that by 30 June 2002 any natural person who provides financial product advice to retail clients on behalf of BCS:
  - (a) has completed training courses at an appropriate level that are or have been listed on the ASIC Training Register that are relevant to those functions or tasks; or
  - (b) has been individually assessed as competent by an assessor that is or has been listed on the ASIC Training Register.

***Notification to ASIC of suspected contraventions***



- 3.13 Without derogating from any other obligation upon BCS to report to ASIC, BCS will notify ASIC in writing within 3 business days of BCS forming the view that either it or its representative(s) may have contravened a provision contained in the Corporations Act, Corporations Act 2001, Corporations Regulations, the ASIC Act, the conditions of BCS' dealers licence, the ASX Business Rules or the ASX Listing Rules.

**4 Acknowledgments**

- 4.1 BCS acknowledges that it has obtained legal advice in relation to the content and effect of this undertaking.
- 4.2 BCS acknowledges that ASIC:
  - (a) may issue a media release on execution of this undertaking referring to its terms and the concerns of ASIC which led to its execution;

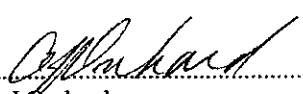
- (b) may from time to time publicly refer to this undertaking; and
  - (c) will make this undertaking available for public inspection.
- 4.3 BCS acknowledges that this undertaking in no way derogates from the rights and remedies available to ASIC, or any other person or entity arising from any conduct described in this undertaking.
- 4.4 BCS acknowledges that ASIC's acceptance of an enforceable undertaking does not affect its power to investigate, conduct surveillance or pursue a criminal prosecution or its power to lay charges or seek a pecuniary penalty order.
- 4.5 BCS acknowledges that this undertaking has no operative force until accepted by ASIC.

The Common Seal of **Barton Capital Securities Pty Ltd** (ACN 066 231 507) was  
 duly affixed to this undertaking on  
 2002 in the presence of and the sealing is  
 attested by:

 )  
 Director 6th May 2002 )  
 )  
 Director/Secretary 6th May 2002 )

Accepted by the Australian Securities and Investments Commission pursuant to section 93AA of the *Australian Securities and Investments Commission Act* by its duly authorised delegate.

Dated this 6th day of MAY 2002

  
 .....  
 A J Orchard  
 Director, Enforcement  
 South/West