



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:

Robert Lesley Hardy

By his attorney pursuant to Power of Attorney, Lynette Maree Hardy

252 Kilaben Road, Kilaben Bay NSW 2283

1 Definitions

In addition to terms defined elsewhere in this undertaking, the following definitions are used:

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

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

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

Corporations Regulations means the *Corporations Regulations 2001* (Cth);

Hardy-Curtis means ACN 122 076 377 Pty Ltd, formerly known as Hardy-Curtis Pty Ltd (ACN 122 076 377);

HBMC means ACN 108 050 308 Pty Ltd, formerly known as Hardy Bros Mining and Constructions Pty Ltd (ACN 108 050 308);

HBM & Civil Construction means Hardy Bros Mining and Civil Construction Pty Limited (ACN 608 230 397);

HBMC Services means HBMC Services Pty Ltd (ACN 608 210 948);

Mr Hardy means Robert Lesley Hardy.

2 ASIC's role

2.1 Under s 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.



3 Background

- 3.1 Mr Hardy was an officer of four corporations that have been wound up, being:
- 3.1.1 **Hardy-Curtis;**
 - 3.1.2 **HBMC;**
 - 3.1.3 **HBM & Civil Construction; and**
 - 3.1.4 **HBMC Services.**
- (together, “the Companies”)
- 3.2 HBM & Civil Construction was wound up on 11 April 2019 and HBMC Services was wound up on 17 April 2019. Mr Hardy was a director of both companies at the time that they were wound up.
- 3.3 Hardy-Curtis and HBMC were both wound up on 6 June 2016. Mr Hardy’s appointment as a director of Hardy-Curtis ceased on 22 February 2016. After his appointment ceased Mr Hardy continued to have access to and control over Hardy-Curtis’ sole transaction account while the new director, Evelyn Hardy, did not. He also retained control of the company’s books and records, continued to be responsible for the day-to-day management of the company and was consulted by Evelyn Hardy in relation to the company.
- 3.4 Mr Hardy’s appointment as a director of HBMC ceased on 20 November 2015. After his appointment ceased, Mr Hardy continued to have access to and control over HBMC’s transaction accounts. He retained control of HBMC’s books and records and he continued to be responsible for the general management and operations of the company. He acknowledged that he continued to be the director of HBMC in the Questionnaire for Directors and Officers that he provided to the liquidator.
- 3.5 Liquidators lodged reports under s 533(1) of the Corporations Act that each of Hardy-Curtis, HBMC, HBM & Civil Construction and HBMC Services may be unable to pay its unsecured creditors more than 50 cents in the dollar. ASIC received a supplementary report under s533(2) of the Corporations Act in relation to each of the Companies from the liquidators.



4 ASIC's Concerns

4.1 On 2 March 2020, ASIC issued a notice to Mr Hardy requiring him to demonstrate why he should not be disqualified from managing corporations. ASIC's notice set out ASIC's concerns identified in clause 4.2 below.

4.2 ASIC was concerned that:

4.2.1 As a director of the Companies, Mr Hardy may have failed to ensure that debts and taxes of each of the Companies were paid. The Companies were wound up with significant estimated deficiencies;

- i. Hardy-Curtis was wound up with an estimated deficiency of \$184,574.31, which included an estimated \$182,381.31 owing to the Australian Taxation Office (ATO);
- ii. HBMC was wound up with an estimated deficiency of \$10,487,643.00, which included \$482,679.43 owed to the ATO;
- iii. HBM & Civil Construction was wound up with an estimated deficiency of \$8,213,575.00; and
- iv. HBMC Services was wound up with an estimated deficiency of \$4,187,361.17, which included \$2,368,204.84 owing to the ATO, \$71,239.21 owing to the State Revenue Office of Victoria, \$171,502.72 owing to the NSW Revenue, and \$209,903.46 owing to the Attorney-General's Department under the Fair Entitlements Guarantee.

4.2.2 Mr Hardy may have failed to comply with his duties as a director by reason of:

- i. Mr Hardy's failure to lodge certain business activity statements and income tax returns in relation to Hardy-Curtis (during 2015 and 2016), HMB & Civil Construction (during 2018-9) and HBMC Services (during 2018);
- ii. In June and July 2015, Mr Hardy made and declared dividend payments from Hardy-Curtis to related entities, despite outstanding ATO liabilities and so materially prejudiced Hardy-Curtis' ability to pay its creditors. In doing so, Mr Hardy may have improperly used his position as a director to gain an advantage for himself or someone else, or cause detriment to Hardy-Curtis, may have failed to exercise his powers and discharge his duties in good faith and in the best interests of Hardy-Curtis for a proper purpose, and may have failed to exercise his powers and discharge his duties with due care and diligence;
- iii. From at least 2013, Mr Hardy may have failed to exercise his powers and discharge his duties in good faith and in the best interests of HBMC, may have failed to exercise his powers and



discharge his duties with due care and diligence and may have improperly used his position as a director to gain an advantage for an associated entity or cause detriment to HBMC, by allowing it to provide loans to an associated entity, which were not repaid;

- iv. From before 2017, Mr Hardy may have failed to act in the best interests of HBMC Services by allowing the company to provide loans to associated entities, which severely affected HBMC Services' ability to pay its creditors. In doing so, Mr Hardy may have improperly used his position as a director to gain an advantage for himself or someone else, or cause detriment to HBMC Services, and may have failed to exercise his powers and discharge his duties in good faith and in the best interests of HBMC Services for a proper purpose;
 - v. From 1 July 2017 Mr Hardy may have allowed HBMC Services to enter uncommercial arrangements with a group of associated entities, which conduct was an improper use of his position as a director of HBMC Services to gain an advantage for himself or someone else, or cause detriment to HBMC Services. As a result of these transactions, Mr Hardy may have failed to exercise his powers and discharge his duties in good faith and in the best interests of HBMC Services for a proper purpose;
 - vi. Between 30 June 2016 to 11 April 2019, Mr Hardy may have allowed HBM & Civil Construction incur debts while there were reasonable grounds for suspecting it was insolvent;
 - vii. Between 1 July 2017 and 11 April 2019, Mr Hardy may have allowed HBMC Services to incur debts while there were reasonable grounds for suspecting it was insolvent;
 - viii. Mr Hardy may have failed to exercise his powers and discharge his duties with due care and diligence by failing to ensure that HBMC Services could meet its obligations to pay its employees' superannuation and holiday pay entitlements; and
- 4.2.3 Mr Hardy may have failed to take all reasonable steps to ensure HBM & Civil Construction complied with its obligation to keep adequate books and records, explaining the company's transactions, financial position and performance and would enable true and fair financial statements to be prepared and audited.

5 The Disqualification Order

- 5.1 As a result of ASIC's concerns as set out in clause 4.2 above, a disqualification order was made by an ASIC delegate on 11 May 2020 pursuant to s 206F of the Corporations Act ("the **Disqualification Order**").
- 5.2 The Disqualification Order prohibited Mr Hardy from managing corporations for a period of four years from 13 May 2020 to 12 May 2024.
- 5.3 On 25 May 2020, Mr Hardy, by his tutor Lynette Marie Hardy, lodged an application for review of the Disqualification Order with the Administrative Appeals Tribunal ("AAT Review").

6 Acknowledgment of ASIC's views

- 6.1 Lynette Marie Hardy, as attorney for Mr Hardy, acknowledges that ASIC's concerns as set out in clause 4.2 above are reasonable, and that the Disqualification Order was made on the basis of those concerns.

7 Mr Hardy's medical condition

- 7.1 Mr Hardy, through his lawyers, has provided evidence, which ASIC accepts, that he is suffering from a degenerative condition. As a result of his condition, Mr Hardy is unable to participate in the future management of corporations.

8 Undertakings

- 8.1 In the circumstances set out above and, in particular, Mr Hardy's medical prognosis and the impact that his condition is likely to have on the proper conduct of AAT Review, under s93AA of the ASIC Act, Mr Hardy has offered, and ASIC has agreed to accept in lieu of the Disqualification Order made against Mr Hardy, the undertakings in paragraphs 8.2 to 8.5 below.
- 8.2 The undertakings will be given to ASIC by Mr Hardy through Mrs Lynette Hardy, pursuant to Power of Attorney dated 30 August 2017.
- 8.3 Upon acceptance of the undertakings by ASIC:
 - 8.3.1 Mr Hardy undertakes that from the Commencement Date he will refrain from participating in the management of any corporation.
 - 8.3.2 For the purposes of this EU, and consistent with s 206F of the Corporations Act, a person participates in the "management of a company" if:
 - (a) they make, or participate in making, decisions that affect the whole, or a substantial part, of the business of the corporation; or
 - (b) they exercise the capacity to affect significantly the corporation's financial standing; or
 - (c) they communicate 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 the 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.

8.3.3 Every twelve months from the commencement date, on 1 August, Lynette Marie Hardy will provide a statutory declaration to ASIC setting out whether Mr Hardy has or has not been involved in the management of any Australian company for a period of five years. The statutory declaration is to be sent to Senior.Manager.ALT@asic.gov.au and marked "EU Compliance CAS-58526-B4D4N2 [EU Ref Number affixed to the executed undertaking]".

8.4 Mr Hardy, by his attorney Lynette Marie Hardy, undertakes that he will pay the costs of its compliance with this enforceable undertaking.

8.5 Mr Hardy, by his attorney Lynette Marie Hardy, will provide all documents and information requested by ASIC from time to time for the purpose of assessing Mr Hardy's compliance with the terms of this enforceable undertaking.

9 Acknowledgements

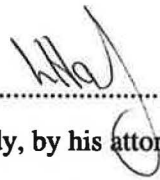
9.1 Mr Hardy, by his attorney Lynette Marie Hardy acknowledges that ASIC:

- 9.1.1 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;
- 9.1.2 may from time to time publicly refer to this undertaking;
- 9.1.3 will from time to time publicly report about compliance with this undertaking; and
- 9.1.4 will make this undertaking available for public inspection.

9.2 Further Mr Hardy, by his attorney Lynette Marie Hardy, acknowledges that:

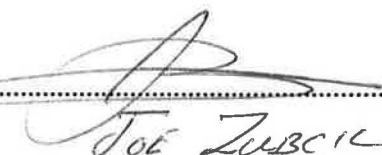
- 9.2.1 ASIC's acceptance of this undertaking does not affect ASIC's power to investigate, conduct surveillance or pursue a criminal prosecution or its power to lay charges or seek a pecuniary civil order in relation to any contravention not the subject of ASIC's concerns in this enforceable undertaking or arising from future conduct;
- 9.2.2 this undertaking in no way derogates from the rights and remedies available to any other person or entity arising from any conduct described in this undertaking or arising from future conduct.

9.3 Mr Hardy, by his attorney Lynette Marie Hardy acknowledges that this undertaking has no operative force until accepted by ASIC, and Mr Hardy, by his attorney Lynette Marie Hardy and ASIC acknowledge that the date of the enforceable undertaking is the date on which it is accepted by ASIC.


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Mr Hardy, by his attorney Lynette Marie
Hardy

Date: 13/7/21

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


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Name: Joe Zubcic

Delegate of Australian Securities and Investments Commission

Date: 24/8/21