



## 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:

*PGW Financial Services Pty Ltd*

*ACN 123 835 441*

*6A River Street*

*Marden SA 5070*

### DEFINITIONS

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

**AFS Licence** means Australian Financial Services Licence.

**Audit review** means a review undertaken in accordance with clause 24(b) below and for the avoidance of doubt means a review of both the personal advice provided by the relevant Authorised Representative together with a review of the audit conducted as part of PGW's adviser audit program.

**Authorised Representative** has the meaning given to it by section 916A of the Corporations Act and includes current Authorised Representatives, together with those who are subsequently authorised by PGW during the Review Period.

**ASIC Act** means the *Australian Securities and Investments Commission Act 2001* (Cth) and includes the regulations made under that Act.

**Business day** means a day on which banks are open for business in Brisbane, excluding a Saturday, Sunday or public holiday in that city.

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

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

**Financial Product** has the meaning given to it by section 763A of the Corporations Act.

**Financial Product Advice** has the meaning given to it by section 766B of the Corporations Act.

**Financial Services** has the meaning given to it by section 766A of the Corporations Act.

**Financial Services Law** has the meaning given to it by section 761A of the Corporations Act.

**Independent Expert** means a compliance expert appointed in accordance with the terms of clauses 15 to 22 below.

**Independent Expert Engagement Date** means the date upon which the Independent Expert enters into the agreement as prescribed by clause 19 or Clause 22 of this Enforceable Undertaking.

**Independent Expert's Statement** means the written reports provided by the Independent Expert in accordance with the terms of clause 24(a) to 24(c) below.

**Licensee Review** means a review undertaken in accordance with clause 24(a) below.

**PGW** means PGW Financial Services Pty Ltd ACN 123 835 441.

**Relevant Period** means 1 July 2012 to the date of this Enforceable Undertaking.

**Remedial Action Plan** means the written plan provided by PGW to ASIC in accordance with the terms of clause 26(a) below.

**Review Period** means from the date of this Enforceable Undertaking to 31 August 2015, or such further period as may be caused by any extension as required by clause 26(c) of this Enforceable Undertaking.

## **BACKGROUND**

### **ASIC's role**

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.

### **PGW**

2. PGW was incorporated on 8 February 2007 and was granted an AFS Licence (384713) on 9 May 2011.
3. Under its AFS Licence, PGW is authorised to operate a financial services business within the meaning of Chapter 7 of the Corporations Act, to provide Financial Product Advice and to deal in a range of Financial Products, further details of which are set out in its AFS Licence.
4. PGW has appointed 49 Authorised Representatives.

### **ASIC's surveillance**

5. On 11 April 2013, ASIC commenced a surveillance into PGW for the purpose of ensuring compliance with the Corporations Act.
6. Based on the information and documents obtained during its surveillance, ASIC has found numerous instances where Authorised Representatives of PGW may have:
  - a) failed to demonstrate a reasonable basis for the advice provided (in contravention of section 945A (as it then was) of the Corporations Act);
  - b) failed to adequately provide replacement advice to clients (in contravention of sections 945A and 947D of the Corporations Act); and
  - c) failed to provide advice documents to clients in accordance with section 946A of the Corporations Act.
7. ASIC has further found that PGW may have:
  - a) failed to maintain adequate human and technological resources to ensure appropriate supervision of its Authorised Representatives;
  - b) failed to maintain adequate records of financial services provided on its behalf. PGW's only access to client records is via its Authorised Representatives and it was reliant upon individual Authorised Representatives to advise it of any financial services provided by them during the period of ASIC's surveillance;
  - c) failed to adequately assess the competency of its Authorised Representatives prior to their appointment;
  - d) failed to ensure that its Authorised Representatives received adequate ongoing compliance training and education;
  - e) failed to ensure that breaches and potential breaches of the Corporations Act detected during compliance audits were added to PGW's breach register and analysed for systemic trends or training needs; and
  - f) failed to respond to compliance failures of its Authorised Representatives.

### **ASIC'S CONCERNS**

8. As a result of the matters referred to at clauses 6 and 7 above, ASIC is concerned that during the Relevant Period, PGW may have failed to comply with its obligations under the Corporations Act, by:

- a) failing, in accordance with section 912A(1)(a) of the Corporations Act, to do all things necessary to ensure that the Financial Services covered by its AFS Licence were provided efficiently, honestly and fairly;
- b) failing, in accordance with section 912A(1)(d) of the Corporations Act, to have available adequate resources (including financial, technological and human resources) to provide the Financial Services covered by its AFS Licence and to carry out supervisory arrangements; and
- c) failing, in accordance with section 912A(1)(f) of the Corporations Act, to ensure that its Authorised Representatives were adequately trained and competent to provide the Financial Services covered by its AFS Licence.

#### **ACKNOWLEDGMENT OF CONCERNS**

9. PGW acknowledges ASIC's concerns and believes that they are reasonably held.
10. ASIC acknowledges that PGW has fully co-operated with ASIC during the course of its enquiries.

#### **UNDERTAKINGS**

11. Under s93AA of the ASIC Act, PGW has offered, and ASIC has agreed to accept as an alternative to pursuing administrative action under the Corporations Act, the undertakings set out in clauses 12 to 29 below.

#### ***Costs***

12. PGW undertakes that it will pay the costs of its compliance with this Enforceable Undertaking, including the remuneration and costs associated with the engagement of the Independent Expert.
13. PGW undertakes that it will not seek reimbursement of, contribution towards or otherwise directly or indirectly pass on its costs of compliance with this Enforceable Undertaking, to any third party (including its clients or Authorised Representatives).

#### ***Requests for documents by ASIC***

14. PGW will provide all documents and information requested by ASIC, in writing, where the request is for the purpose of assessing PGW's compliance with the terms of this Enforceable Undertaking, within fourteen (14) Business days of the request being made.

#### ***Independent Expert***

15. Within 30 Business days of the date of this Enforceable Undertaking, PGW must obtain the agreement of an Independent Expert who has particular expertise in the area of compliance, and:
  - a) who is independent of PGW and its Authorised Representatives; and
  - b) has not previously provided compliance services to PGW,to be PGW's Independent Expert for the purposes of this Enforceable Undertaking.
16. The Independent Expert must be approved by ASIC before the Independent Expert is formally engaged by PGW.
17. At the time the approval is sought from ASIC, PGW must provide the following information to ASIC in writing:
  - a) the Independent Expert's name, position and a summary of the Independent Expert's relevant qualifications and experience; and
  - b) confirm the Independent Expert's independence with reference to clause 15 above.
18. The Independent Expert is to undertake an assessment of the Financial Services provided by PGW in accordance with clauses 23 and 24 below.
19. The agreement of the Independent Expert shall be effected by signing the document marked Annexure A to this Enforceable Undertaking and PGW providing a copy of it to ASIC within three (3) Business days thereafter.
20. The terms of engagement of the Independent Expert may only be varied with the express written agreement of ASIC.
21. Upon the engagement of the Independent Expert, PGW must provide the Independent Expert with a copy of its compliance policies and procedures.
22. In the event that:
  - a) PGW is unable to obtain the agreement of an Independent Expert; or
  - b) ASIC fails to approve the Independent Expert proposed by PGW; or
  - c) the Independent Expert becomes unable, for any reason, to comply with the matters specified in clauses 23 and 24 below;another person must, within five (5) business days of the event in clause 22 occurring, be nominated by PGW to be the Independent Expert subject to:
  - i) PGW providing ASIC with details in writing of the alternative Independent Expert as otherwise required by clause 15 above;

- ii) ASIC providing PGW with its agreement in writing to engage the alternative Independent Expert; and
- iii) within seven (7) Business days of receiving ASIC's written agreement to engage the alternative Independent Expert, PGW procuring the agreement of the alternative Independent Expert by having the alternative Independent Expert sign the agreement attached in Annexure A, and providing a signed copy of that document to ASIC within three (3) Business days of such execution.

### ***Reviews***

23. The Independent Expert will undertake a minimum of three (3) Licensee Reviews and three (3) Audit Reviews across the Review Period as follows:
- a) the first review will be completed three (3) months from the Independent Expert Engagement Date (**First Audit**).
  - b) subsequent reviews will be completed six (6) months after the First Review and by every six (6) monthly period thereafter (**Subsequent Audits**).
  - c) notwithstanding the terms of subparagraph (b) above, the final review will be completed by the expiry of the Review Period (**Final Audit**).
24. The Independent Expert shall undertake the following tasks in undertaking the reviews set out in clause 23 above:

### *Licensee Review*

- a) Comprehensively review, assess and make written recommendations on:
  - i) the adequacy of the human and technological resources of PGW in relation to its advice and audit functions;
  - ii) PGW's process for assessing the competency of potential Authorised Representatives when considering appointing them; and
  - iii) each of the specific concerns identified in ASIC's letter to PGW dated 1 April 2014, to the extent that they are not covered in clauses 24(a)(i) or 24(a)(ii) above.

### *Audit Review*

- b) Review, assess and make written recommendations on the audits conducted upon Authorised Representatives as part of PGW's compliance program, and where applicable, PGW's implementation of any recommendations made in the previous Independent Expert's Statement, during the following periods:

- i) in the First Audit, for the preceding three (3) months; and
    - ii) in the Subsequent Audits and Final Audit, for the preceding six (6) month period.
  - c) Assess and make recommendations in relation to PGW's response to the audit reports provided to it, including:
    - i) PGW's assessment and response to the issues identified in the audit reports;
    - ii) where relevant, any remediation recommended by PGW for the relevant Authorised Representative(s) who provided the advice and the relevant client(s) that received the advice; and the implementation of that remediation; and
    - iii) how effectively the issues identified during in the audit reports are incorporated into the Authorised Representatives and/or PGW's training program.
  - d) For the avoidance of doubt, if the Independent Expert disagrees with a finding within the PGW compliance audit, or finds additional issues, these should be included in the Independent Expert's Statement.
  - e) where a Remedial Action Plan is implemented in accordance with clause 26(a) of the Enforceable Undertaking, the Independent Expert is to include in their next Independent Expert's Statement, a review of the implementation and effectiveness of that Remedial Action Plan; and
  - f) within five (5) business days of completion of each review conducted in accordance with clauses 24(a) to (c), or other reasonable period of time as requested by the Independent Expert, and agreed to in writing by ASIC, the Independent Expert will provide PGW and ASIC with the Independent Expert's Statement.
- 25. PGW will provide all reasonable assistance to the Independent Expert in fulfilling the obligations set out in this Enforceable Undertaking and in Annexure A to this Enforceable Undertaking.

### ***Non Compliance***

- 26. Should the Independent Expert's Statement identify non-compliance with any part of clauses 24 above:
  - a) PGW undertakes to consider the reasons for the opinion in the Independent Expert's Statement and provide ASIC with a written plan setting out the action it proposes to take to address the issues of non-compliance set out in the Independent Expert's Statement and specifying

the time within which this action will be taken. PGW will provide the Remedial Action Plan to ASIC within fourteen (14) days of the date of the Independent Expert's Statement;

- b) PGW undertakes to implement the Remedial Action Plan within the time specified in the Remedial Action Plan. If ASIC requests any reasonable modification to the Remedial Action Plan, PGW must implement the Remedial Action Plan as so modified; and
  - c) Should the Independent Expert identify non-compliance with any part of its recommendations made in ~~the~~ the Independent Expert's Statements, ~~Error! Reference source not found.~~ in its Final Audit, the Review Period and this Enforceable Undertaking are to be extended in six (6) monthly periods until such time as non-compliance is resolved satisfactorily.
27. For the avoidance of doubt, ASIC reserves its rights to take administrative action with respect to the concerns raised in this Enforceable Undertaking should the Review Period extend beyond ~~30 August 2015.~~ *31<sup>st</sup> AUGUST 2015. LM B*
28. Should PGW fail to comply with any of the clauses in this Enforceable Undertaking, PGW acknowledges and accepts that it will be in default of this Enforceable Undertaking.
29. PGW undertakes that should it be in default of this Enforceable Undertaking, PGW undertakes that for a period of two (2) years from the date of default, it will not:
- a) do any act or engage in any conduct as an AFS Licensee;
  - b) hold itself out as a representative of an AFS Licensee;
  - c) provide a Financial Service whether on its own behalf or on behalf of another person who carries on a financial services business;
  - d) carry on a business, either directly or indirectly, in relation to Financial Products or Financial Services;
  - e) hold out that it is in any way authorised to provide particular Financial Services or that it is in any way authorised to provide Financial Services generally; or
  - f) apply to ASIC under section 913A of the Corporations Act for another AFS Licence.

#### ACKNOWLEDGMENTS

30. PGW acknowledges that ASIC:

- a) may issue a media release on execution of this Enforceable 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 Enforceable Undertaking; and
- c) will make this Enforceable Undertaking available for public inspection.

31. Further, PGW acknowledges that:

- a) ASIC's acceptance of this Enforceable 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;
- 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;
- c) PGW acknowledges that ASIC had reason to be concerned as to the alleged facts and has offered an enforceable undertaking in the terms of clauses 12 to 29 above; and
- d) PGW acknowledges that this Enforceable Undertaking has no operative force until accepted by ASIC, and PGW and ASIC acknowledge that the date of the Enforceable Undertaking is the date on which it is accepted by ASIC.

**PROVISION OF DOCUMENTS**

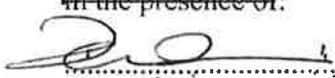
32. The address for providing ASIC with any notice, document, including but not limited to the Independent Expert's Statement is:

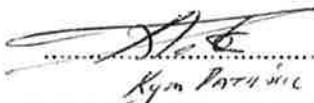
Australian Securities and Investments Commission  
Level 20, 240 Queen Street  
Brisbane QLD 4001  
Attention: Senior Manager – Financial Advisers

33. The address for providing PGW with any notice or document is:

PGW Financial Services Pty Ltd  
6A River Street  
Marden SA 5070  
Attention: Kym Peters

~~THE COMMON SEAL of PGW Financial~~ ) PGW FINANCIAL SERVICES  
~~PTY LTD ACN 123 835 441~~ was affixed in ) PTY LTD DOES NOT HAVE  
accordance with the ~~Corporations Act 2001~~ A COMMON SEAL.  
in the presence of:

  
..... SIGNED BY DIRECTORS ON BEHALF OF  
PHILIP CHISHOLM PGW FINANCIAL SERVICES PTY LTD  
Director

  
..... Director/Company Secretary  
Kym Patricia Peters

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

  
.....

Louise Macaulay

Delegate of Australian Securities and Investments Commission

..... 18/7/14 .....

Date