



**ENFORCEABLE UNDERTAKING**

***Australian Securities & Investment Commission Act 2001***

**Section 93AA**

The commitments in this undertaking are offered to the Australian Securities & Investments Commission by:

First Capital Financial Planning Pty Ltd  
ACN 003 212 717  
Level 8, Suite 802  
15 Castlereagh Street  
SYDNEY NSW 2000

**1. DEFINITIONS**

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

**ASIC** means Australian Securities and Investments Commission

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

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

**First Capital** means First Capital Financial Planning Pty Ltd

**FORB** means FC One Retirement Builder

**FSS** means the First State Super Superannuation Scheme

**Matrix** means Matrix Super Master Trust

**Navigator** means Navigator Personal Retirement Plan

**Wealthtrac** means Wealthtrac Personal Super Plan

## **2. BACKGROUND**

- 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.
- 2.2. First Capital is a company carrying on business as a financial planning service provider.
- 2.3. From 15 February 2003 to 30 November 2004, First Capital carried on business as a corporate authorised representative of Matrix Planning Solutions Limited. On 1 December 2004 First Capital obtained its own Australian Financial Services Licence number 281193.
- 2.4. First Capital's business includes providing seminars and personal financial advice to teachers employed by the New South Wales Department of Education and Training about their retirement planning, superannuation, salary packaging and personal investments.

- 2.5. A number of First Capital's clients were contributing members of FSS, which at the time was the industry superannuation fund for New South Wales Government employees.
- 2.6. The Corporations Act requires, amongst other things, that financial advisers providing personal financial advice must:
  - (a). consider the client's individual circumstances;
  - (b). have a reasonable basis for any advice they provide; and
  - (c). set out the advice, and the basis for the advice, in a written document called a "Statement of Advice".
- 2.7. Following the receipt of a complaint ASIC conducted an investigation into advice provided by First Capital. This review led to ASIC having a number of concerns including:
  - (a). that First Capital were not advising clients properly about the differences in fees and charges and the effect they could have on superannuation returns; and
  - (b). that in the seminars presented to clients, First Capital referred to the fact that the earlier State Government superannuation schemes (which were now closed) had substantial unfunded liabilities without explaining that this had no impact on the performance of FSS.
- 2.8. On 15 December 2005 ASIC commenced proceedings No. 6301 of 2005 in the Supreme Court of New South Wales (**Court Proceedings**) in relation to advice provided by First Capital to 177 clients (**Clients**) to move their superannuation investments from FSS to Wealthtrac, Matrix, Navigator or FORB (FORB is First Capital's in-house superannuation product). All of these products had substantially higher fees than FSS.

2.9. In the Court Proceedings ASIC alleged, amongst other things, that the Statements of Advice given to these clients:

- (a). were defective within the meaning of section 953A of the Corporations Act because they:
  - (i). either failed to compare at all, or made inaccurate comparisons of, the fees payable in FSS with the fees payable in the recommended superannuation product, and were therefore misleading or deceptive;
  - (ii). failed to explain the impact of different levels of fees on superannuation returns;
  - (iii). failed to explain the insurance coverage available to clients in the FSS; and
- (b). failed to disclose a reasonable basis for the recommendation to move from FSS to the other product.

2.10. ASIC sought a range of relief in the Court Proceedings including:

- (a). declarations that First Capital had breached the law and injunctions restraining them from engaging in similar conduct in the future; and
- (b). orders requiring First Capital to write a letter in a form specified by the Court to the Clients containing corrective information and advising them of their rights, including to return to FSS if they wished to do so.

2.11. First Capital has agreed to resolve the Court Proceedings and ASIC's concerns by:

- (a). consenting to declarations and injunctions being made by the Supreme Court;
- (b). consenting to an order requiring First Capital to send a letter in the form of Schedule D (**Letter**) to the orders to the Clients; and

- (c) offering the undertakings set out in this document.

ASIC has agreed to accept the undertakings as part of the overall resolution of the Court Proceedings and its concerns.

- 2.12. First Capital acknowledges that should ASIC form the view that First Capital has failed to comply with the terms of this undertaking, ASIC may take additional action including (without limitation) seeking court orders under section 93AA of the ASIC Act requiring First Capital to comply with the terms of this undertaking.

### 3. UNDERTAKINGS

Under section 93AA of the ASIC Act, First Capital has offered, and ASIC has agreed to accept in as part of a settlement of the Court Proceedings, the following undertakings.

#### *Assisting Clients to return their superannuation investment to FSS*

- 3.1. Without limiting the undertakings set out below, First Capital will use its best endeavours to assist any of the Clients who, after receiving the Letter, have any inquiries or wish to return to FSS.

#### *Requests for superannuation comparison*

- 3.2. First Capital will, if requested to do so by any of the Clients after receiving the Letter:
  - (a) advise the Client of their current superannuation account balance (**First Capital Current Balance**); and

- (b). calculate, and advise the Client, what their superannuation account balance would have been had they remained with FSS instead of moving their superannuation investments in accordance with the advice provided by First Capital (**Comparison Balance**).

*Payment to Clients who return to FSS and are worse off*

3.3. If:

- (a). any Client decides to move their superannuation investment back to FSS after receiving the Letter; and
- (b). after the Client's move back to FSS is complete, the balance of their superannuation account with FSS (**FSS Current Balance**) is less than the Comparison Balance as at that date,

then First Capital will pay into that Client's FSS account an amount sufficient to make the FSS Current Balance equal to the Comparison Balance within 21 days of the Client's superannuation account being returned to FSS.

*Appointment of an independent accounting expert*

3.4. First Capital will, within one month of the date of this undertaking, appoint an independent person (**Expert Accountant**), with:

- (a). accounting qualifications; and
- (b). at least 10 years accounting experience.

3.5. The identity of the Expert Accountant and the terms of their engagement must be approved by ASIC before they are engaged to undertake any work.

- 3.6. The Accounting Expert shall be engaged to review and comment on the accuracy and reasonableness of:
- (a). the calculation of Comparison Balances undertaken by First Capital in compliance with the undertaking at paragraph 3.2(b) above; and
  - (b). the calculation of amounts paid to Clients in compliance with the undertaking at paragraph 3.3 above.
- 3.7. The Accounting Expert will prepare a report for First Capital every three months, commencing three months after the date of this undertaking, summarising all reviews and comments they have made in accordance with their engagement.
- 3.8. First Capital will provide ASIC with a copy of any report provided to it by the Accounting Expert in accordance with paragraph 3.7 above within 7 days of receiving the report.
- 3.9. All remuneration and costs associated with the consultant shall be borne by First Capital.

***Calculation of Comparison Balance***

- 3.10. The bases on which the Comparison Balance for any Client is calculated shall include the following:
- (a). the starting point shall be the Client's superannuation account balance at FSS immediately before they withdrew from FSS;
  - (b). amounts for employer and employee contributions shall be added in the same amounts and at the same times as have been paid to the Client's superannuation account since they left FSS;

- (c). amounts equal to the fees and charges that the Client would have incurred in FSS shall be deducted as at the dates they would have been deducted;
  - (d). if the Client took out any insurance cover after leaving FSS then the following amounts shall be deducted:
    - (i). if the same or substantially the same insurance cover was available through FSS, an amount equal the premium that would have been payable for that insurance at the time that premium would have been payable; or
    - (ii). if the same or substantially the same insurance cover was not available through FSS, an amount equal to and at the same time as premiums actually paid by the Client;
  - (e). amounts shall be added equal to the returns made by the FSS investment strategy that the Client had chosen immediately before they withdrew from FSS, based on the assumptions at (a), (b), (c) and (d) above.
- 3.11. If First Capital is of the view that additional assumptions need to be made in order to calculate a Comparison Balance they will:
- (a). obtain advice from the Accounting Expert as to:
    - (i). whether the further assumption is necessary; and
    - (ii). whether the assumption is fair and reasonable;
  - (b). provide ASIC with a copy of the advice obtained from the Accounting Expert; and
  - (c). either:



- (i). if ASIC approves the advice provided by the Accounting Expert, follow the advice; or
- (ii). if ASIC does not approve the advice provided by the Accounting Expert, calculate the Comparison Balance in accordance with paragraph 3.10 above.

***Comparison Balance and Payments where Client had multiple superannuation accounts***

3.12. Where a Client:

- (a). at the time they received the Statement of Advice from First Capital, had one or more superannuation accounts in addition to their FSS superannuation account (**Additional Accounts**); and
- (b). after receiving the Statement of Advice from First Capital, transferred the balance from one or more of their Additional Accounts as well as the balance from FSS, into the superannuation product recommended by First Capital,

then the following additional assumptions will apply when the Comparison Balance is calculated:

- (i). First Capital will calculate the ratio of funds transferred from FSS into the product recommended by First Capital to the total funds (including the funds from FSS) transferred into the product recommended by First Capital (**Transfer Ratio**); and
- (ii). First Capital will calculate and advise the Client of an adjusted First Capital Current Balance by applying the Transfer Ratio to the First Capital Current Balance;

- (iii). First Capital will apply the Transfer Ratio to the amounts calculated in accordance with subparagraphs 3.10(b) and (d) before they are included in the calculation of the Comparison Balance.

***Representations as to the impact of unfunded State Government liabilities on FSS's performance***

- 3.13. First Capital undertakes not to represent to its clients or any person attending any presentation given by or on behalf of First Capital that the performance of FSS is in any way affected by the fact that earlier State Government superannuation schemes were closed to new members with unfunded liabilities.

***Reports to ASIC***

- 3.14. Every three months, commencing three months after the date of this undertaking and ending only when First Capital's obligations under this undertaking are finalised, First Capital will provide reports to ASIC containing the following information concerning the number of inquiries and requests to return to FSS made by Clients complaints since the date this undertaking was accepted by ASIC. The report must also contain information (current as at the date of the report) about the status of all such complaints including:
  - (a). the number of Clients who have requested a Comparison Balance and the status of those requests;
  - (b). the number of Clients who have requested to return to FSS and the status of those requests including:
    - (i). whether they have completed their return to FSS;
    - (ii). whether they are entitled to a payment from First Capital;
    - (iii). whether payments due from First Capital have been paid.

***Provision of Information***

3.15. First Capital undertakes to provide ASIC with any documents or information requested by ASIC in respect of its undertakings in paragraphs 3.1 to 3.15 inclusive within 7 days of receiving the request.

**4. ACKNOWLEDGMENTS**

4.1. First Capital 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.


4.2. First Capital 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 or conduct the subject of the Court proceedings.

4.3. First Capital acknowledges that 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 or all of the conduct described in this undertaking or any contravention arising from future conduct.

4.4. First Capital acknowledges that this undertaking has no operative force until accepted by ASIC, and First Capital and ASIC acknowledge that the date of the enforceable undertaking is the date on which it is accepted by ASIC.


THE COMMON SEAL of FIRST )  
CAPITAL FINANCIAL PLANNING PTY )  
LTD was affixed in accordance with the )  
*Corporations Act 2001* in the presence of:



.....  
 Director

..... Director/Company Secretary

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

 .....

~~James Turton~~ ALLEN TURTON  
Delegate of the Australian Securities & Investments Commission

Dated 11/4/2007