

913

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:

Christopher Baker

PO Box 156, Croydon NSW 2132

1. DEFINITIONS

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

AFSL means Australian Financial Services License;

ASIC means the Australian Securities and Investments Commission;

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

Authorised Representative means a person authorised in accordance with section 916A or 916B of the Act, to provide a financial service or financial services on behalf of a licensee.

Australian Financial Services License means a license under section 913B of the Act, that authorises a person who carries on a financial services business to provide financial services;

Australian Financial Services Licensee mean a person who holds an Australian Financial Services Licence

Mr Baker means Christopher Baker, date of birth 27 March 1957;

Business Day means a day on which banks are open for Business in Sydney excluding a Saturday, Sunday or public holiday in that city;

Cessation Period means the five (5) year period commencing from the Commencement Date as extended by clause 5.1;

CFPL means Commonwealth Financial Planning Limited (ACN 003 900 169);

Commencement Date means the date this undertaking is accepted by ASIC;

Compliance Officer means an employee with a minimum of (5) five years experience in relation to compliance and financial services;

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

Corporations Regulations means the Corporations Regulations 2001 (Cth);

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

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

Financial Product Advice has the meaning given by section 766B of the *Corporations Act*;

Relevant Period means 1 March 2005 to 27 February 2009;

Reporting Period means the (6) six month period commencing after the Cessation Period ends.

Statement of Advice (or SOA) has the same meaning as it has in Chapter 7 of the Corporations Act.

- 1.2 Except so far as the contrary intention appears in this undertaking the interpretation provisions in Part 1.2 of the Corporations Act and Part 2 Division 4 of the ASIC Act apply for the purposes of this undertaking as if the provisions of those acts were provisions of this undertaking.

2. 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.

Commonwealth Financial Planning Limited

- 2.2 Commonwealth Financial Planning Limited (CFPL) (formerly known as Colonial Financial Planners Limited) operates a financial services business within the meaning of Chapter 7 of the Corporations Act.

- 2.3 Since 1 October 2003, CFPL has held an Australian Financial Services Licence (No. 231139) (AFSL) which authorises CFPL to carry on a financial services business to provide advice and deal in a range of financial products.
- 2.4 CFPL has authorised certain persons to provide financial services on its behalf (Representatives). The Representatives are representatives of CFPL within the meaning of section 910A of the Corporations Act.

Mr Baker

- 2.5 Mr Baker was a representative of CFPL from 1 March 2005 to 27 February 2009.
- 2.6 Mr Baker's role with CFPL predominately involved the provision of financial advice to the client base allocated to him by CFPL.

ASIC's Investigation

- 2.8 On 5 April 2011 ASIC commenced an investigation pursuant to section 13 of the ASIC Act of suspected contraventions of sections 945A(1), 946A, 947B(2) and 947D(2) of the Corporations Act by Mr Baker in relation to the services provided by him as a representative of CFPL.
- 2.9 In the course of its investigation ASIC reviewed Mr Baker's client files and found that Mr Baker had not complied with the practices and procedures of CFPL and may have contravened the Corporations Act, in particular, as a result of its investigation, ASIC found that Mr Baker:
- (a) had not properly completed a number of CFPL's Financial Needs Analysis documents;
 - (b) failed to determine the relevant personal circumstances and failed to make reasonable inquiries in relation to the personal circumstances of clients before implementing advice;
 - (c) had a large proportion of clients that were profiled with aggressive risk profiles;
 - (d) provided property asset allocations to clients which were far above the recommended asset allocation for their risk profile;
 - (e) failed to provide a Statements of Advice to clients when he was required to do so; and
 - (f) failed to include a replacement product advice record in a Statement of Advice.

3. ASIC's VIEWS

- 3.1 As a consequence of the conduct outlined in clause 2.9 above, ASIC is concerned that Mr Baker has failed to comply with his obligations as a representative of CFPL and during the Relevant Period may have:
- (a) failed to determine the relevant personal circumstances of clients and failed to make reasonable inquiries in relation to those personal circumstances before implementing advice, in contravention of section 945A of the *Corporations Act*;
 - (b) failed to provide a Statement of Advice to clients before the implementation of advice, in contravention of section 946A of the *Corporations Act*;
 - (c) failed to provide a replacement product advice record, in contravention of section 947D of the *Corporations Act*.

4. Acknowledgement of ASIC's Views

- 4.1 Mr Baker acknowledges ASIC's views set out in clause 3.1 above, and that they are reasonably held, and has offered the undertaking set out below.

5. Undertakings

- 5.1 Under section 93AA of the ASIC Act, Mr Baker has offered, and ASIC has agreed to accept as an alternative to exercising its power under section 920A of the Corporations Act to make a banning order against Mr Baker, the following undertakings.

Undertaking to cease providing financial services

- 5.1.1 Mr Baker undertakes that during the Cessation Period, he will not provide any financial service, on his own behalf, or on behalf of any other person, or as officer of a corporation, or as an officer of an entity that is neither an individual nor a corporation, or as an authorised representative of any individual, corporation or entity, or in any other capacity.
- 5.1.2 Should Mr Baker fail to comply with clause 5.1.1, Mr Baker will be in default of this undertaking.

Undertaking to complete continuing professional education

- 5.1.3 Mr Baker undertakes to:
- (a) enrol in and complete an approved Financial Planning Compliance course listed on the ASIC training register in accordance with

ASIC Regulatory Guide 146, by 21 March 2014 ("**the Continuing Professional Education**");

- (b) obtain documentary evidence from the providers of the Continuing Professional Education that he has attended and successfully completed (or has been assessed in respect of) the Continuing Professional Education ("**Documentary Confirmation**"); and
- (c) provide ASIC with a statutory declaration within 14 days of receiving notification that he has successfully completed the Continuing Professional Education, that is signed by him and attaches certified copies of the Documentary Confirmation and stating that he has otherwise complied with the requirements of subclauses (a) and (b) above.

5.1.4 Should Mr Baker fail to comply with clause 5.1.3, Mr Baker undertakes:

- (a) to notify ASIC within 14 days that the Continuing Professional Education has not been completed; and
- (b) that the Cessation Period will be extended until such time as the Continuing Professional Education is completed.

Supervision

5.1.5 Mr Baker undertakes:

- (a) within ten (10) Business days after the Commencement Date, to notify ASIC of the terms of his employment, including:
 - i. the name and address of his employer
 - ii. position title; and
 - iii. a detailed description of his role, including his responsibilities and duties; and
- (b) if his employer is an Australian Financial Services Licensee, every twelve (12) months thereafter, up until the Cessation Period ends, Mr Baker will obtain written confirmation from a senior person within his current workplace confirming that Mr Baker has not provided a financial service within that previous twelve (12) month period.

5.1.6 In the event that:

- (a) it is found that Mr Baker has provided a financial service during the Cessation Period; or

- (b) is unable to obtain written confirmation that he has not provided a financial service during the Cessation period,

Mr Baker will be in default of this undertaking.

Reviews by Compliance Officer

- 5.1.7 Mr Baker undertakes that once the Cessation Period ends, in the event Mr Baker is employed to provide financial services, he will use his best endeavours to obtain the agreement of a compliance officer employed by his AFSL holder employer ("**Reviewer**"), to undertake one review of the financial services provided by Mr Baker to retail clients during the Reporting Period, in accordance with clause 5.1.9. The agreement of the Reviewer shall be effected by signing the document marked annexure A to this enforceable undertaking and Mr Baker providing a copy of it to ASIC within five (5) Business days thereafter.
- 5.1.8 The Reviewer shall undertake the following tasks:
- (a) audit a sample of a minimum of five (5) clients that received financial services advice by Mr Baker during the relevant half yearly period;
 - (b) conduct the review six months after the Cessation Period ends;
 - (c) for each client file audited, consider:
 - i. whether or not the advice provided by Mr Baker was appropriate having regard to section 945A of the *Corporations Act*;
 - ii. whether SOA's have been provided to clients in accordance with section 946A of the *Corporations Act*; and
 - iii. whether a replacement product advice record has been provided in SOA's in accordance with 947D of the *Corporations Act*.
 - (d) complete the review within 30 days of the end of the relevant half yearly period.
- 5.1.9 Within five (5) Business days of completion of the half yearly audit, or any other reasonable period of time requested by the Reviewer and agreed to in writing by ASIC, the Reviewer will provide Mr Baker with a written statement ("**Reviewer's Statement**") setting out the matters referred to in clauses 5.1.8, 5.1.8(a), 5.1.8(b), 5.1.8(c) and 5.1.8(d).

- 5.1.10 Mr Baker shall provide the Reviewer's Statement to ASIC within five (5) Business days of receiving it from the Reviewer.
- 5.1.11 Mr Baker will provide all reasonable assistance to the Reviewer in fulfilling the obligations set out above in clause
- 5.1.12 Should any of the Reviewer's Statements identify non compliance with clauses 5.1.8, 5.1.8(a), 5.1.8(b), 5.1.8(c) and 5.1.8(d):
- (a) Mr Baker will consider the reasons for the opinion in the Reviewer's Statement and then provide to ASIC a written plan ("**Remedial Action Plan**") setting out the action he proposes to take to address the issues of non-compliance set out in the Reviewer's Statement and specifying the time in which this action will be taken. Mr Baker will provide the Remedial Action Plan to ASIC within fourteen (14) days of the date of the Reviewer's Statement; and
 - (b) Mr Baker must implement the Remedial Action Plan within the time specified in the Remedial Action Plan. If ASIC requests any reasonable modifications to the Remedial Action Plan Mr Baker must implement the Remedial Action Plan as so modified.
- 5.1.13 Should Mr Baker fail to obtain the agreement to conduct of a Reviewer to undertake the review as contemplated by paragraphs 5.1.7 to 5.1.9 above, Mr Baker will be in default of this undertaking.

6. Consequences of Default

- 6.1 Should Mr Baker be in default of this undertaking, the Cessation Period will continue for a period of (5) five years from the Commencement Date.

7. Costs

- 7.1 Mr Baker undertakes to pay the costs of compliance with this Enforceable Undertaking.

8. Requests for Documents from ASIC

- 8.1 Mr Baker will provide all documents and information requested by ASIC from time to time for the purpose of assessing Mr Baker's compliance with the terms of this Enforceable Undertaking.

9. Acknowledgements

- 9.1 Mr Baker 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.

9.2 Further Mr Baker acknowledges that:

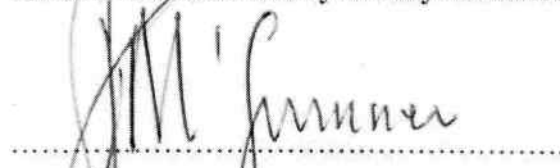
- (a) ASIC's acceptance of this undertaking does not affect ASIC's power to investigate, conduct surveillance or pursue a criminal prosecution or its power to lay charges or seek a pecuniary civil order in relation to any contravention not the subject of ASIC's concerns in this enforceable undertaking or arising from future conduct;
- (b) 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 Baker acknowledges that this undertaking has no operative force until accepted by ASIC, and Mr Baker and ASIC acknowledge that the date of the enforceable undertaking is the date on which it is accepted by ASIC.


.....
Mr Baker

Dated: 2 APRIL 2012 -

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


.....
David McGuinness

Delegate of Australian Securities and Investments Commission

Dated: 3 April 2012

Annexure A

TERMS OF AGREEMENT WITH REVIEWER

Background

1. Under the enforceable undertaking which Mr Baker made to the Australian Securities and Investments Commission (ASIC) on 2011 (**Enforceable Undertaking**), Mr Baker undertook to obtain agreement of a person to conduct a half-yearly review of financial services advice provided by him (**Reviewer**).

Obligations

2. The Reviewer will conduct the following tasks under the Enforceable Undertaking:
 - 2.1 review the financial services advice provided by Mr Baker six months after the Cessation period specified in the Enforceable Undertaking ends;
 - 2.2 consider whether, in the Reviewer's opinion:
 - 2.2.1 the advice provided by Mr Baker was appropriate having regard to section 945A of the *Corporations Act*;
 - 2.2.2 whether SOA's have been provided to clients in accordance with section 946A of the *Corporations Act*; and
 - 2.2.3 whether replacement product advice records have been provided in SOA's in accordance with 947D of the *Corporations Act*; and
 - 2.3 provide Mr Baker with a statement (**Reviewer's Statement**) setting out his/her opinion and the reasons for it, within five (5) days or any other period agreed by ASIC after the completion of the relevant audits undertaken in each half-yearly period.
3. Mr Baker will provide all reasonable assistance to the Reviewer in fulfilling the obligations set out in clause 2 above.

Reporting

4. The Reviewer's Statement required to be written by the Reviewer will:
 - 4.1 be produced in accordance with the Enforceable Undertaking. If there is any inconsistency between these terms and the Enforceable Undertaking, the Enforceable Undertaking shall prevail;
 - 4.2 set out any limitation or qualifications to it; and
 - 4.3 list those documents or extracts of document most relevant (in the view of the Reviewer) in producing the Reviewer's Statement.

Independence

5. The Reviewer warrants that:
- 5.1 The Reviewer is independent of Mr Baker and will at all material times be capable of exercising objective and impartial judgment.
 - 5.2 The Reviewer will notify Mr Baker and ASIC immediately if the Reviewer is no longer capable of exercising objective and impartial judgment in relation to his/her agreement to perform the tasks set out in clause 2. This includes, but is not limited to, circumstance where the Reviewer:
 - 5.2.1 could directly or indirectly benefit from a financial interest in any company in which Mr Baker also has an interest (where "financial interest" refers to an interest in any equity or other security, debenture, loan or other debt instrument of a company);
 - 5.2.2 is promoting, or may be perceived to be promoting, Mr Baker's position or opinion to the point that objectivity and/or impartiality is/are compromised;
 - 5.2.3 begins to have a close relationship with Mr Baker;
 - 5.2.4 may be deterred from acting objectively and/or impartially by the conduct of the AFSL holder's employees; or
 - 5.2.5 becomes aware of past or current circumstances the existence of which places the Reviewer in breach of any of the warranties contained in this Agreement.

Reviewer name

Signature

Date