



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:

*Leo Ignatius Menkens
Brisbane, Queensland*

DEFINITIONS

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

Advice means personal advice and has the meaning given to it by section 766B of the Corporations Act.

AFS Licence means Australian Financial Services Licence.

AMPFP means AMP Financial Planning Pty Limited ACN 051 208 327, AFS Licence 232706.

ASIC means the Australian Securities and Investments Commission.

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

Audit Review(s) means an assessment of Advice to test compliance with Financial Services Law as required by clauses 26 to 29 of this Enforceable Undertaking.

Authorised Representative has the meaning given to it by section 916A of the Corporations 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.

Client(s) means both retail and wholesale clients and has the meaning given to them by section 761G of the Corporations Act.

Compliance Breach(es) means a breach of a financial services law.

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 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 17 to 24.3 of this Enforceable Undertaking.

Independent Expert Engagement Date means the date upon which the Independent Expert enters into the agreement as prescribed by clause 21 of this Enforceable Undertaking.

Independent Expert's Statement means the written report(s) provided by the Independent Expert in accordance with the terms of clause 29 of this Enforceable Undertaking.

Menkens Financial Group means Menkens Financial Group Pty Ltd ACN 146 152 892.

Mr Menkens means Leo Ignatius Menkens, date of birth 19 June 1950.

Relevant Period means 16 December 2013 to 6 February 2015.

Representative has the meaning given to it by section 910A of the Corporations Act.

Review Period means 12 calendar months from the Independent Expert Engagement Date, or until such further period as may be caused by any extension as required by clause 26.4 of this Enforceable Undertaking.

SoA means Statement of Advice and has the meaning given to it by section 946A of the Corporations Act.

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.

Background

2. On 8 August 2014, AMPFP provided a report of misconduct to ASIC identifying concerns within an unnamed Authorised Representative business within its

network. Those concerns included matters such as: Advice being implemented prior to the provision of an SoA; SoAs being backdated to align with the provision of previous verbal Advice; and client fact finds and SoAs not meeting the best interest duty requirements.

3. ASIC then issued statutory notices to obtain the names of the relevant Authorised Representative business. In response, AMPFP identified Mr Menkens, Reid Matthew Menkens and Menkens Financial Group, a company of which Reid Matthew Menkens is the sole director.
4. AMPFP terminated the authorisation of Mr Menkens, Reid Matthew Menkens and Menkens Financial Group on 15 August 2014.

Mr Menkens

5. Mr Menkens was an Authorised Representative of AMPFP between 21 June 2013 and 15 August 2014.
6. Under its AFS Licence, AMPFP is authorised to operate a financial services business within the meaning of Chapter 7 of the Corporations Act, to provide Advice and to deal in a range of Financial Products. Further details are set out in AMPFP's AFS Licence.
7. Mr Menkens provides Advice services in Brisbane, Queensland, under the name Menkens Financial Group.
8. In this capacity, Mr Menkens is both:
 - 8.1 the provider of Advice to Clients with the obligations set out out Part 7.7A of the Corporations Act (including, but not limited to, the requirements set out in section 961B of the Corporations Act (**'the best interests obligation'**)); and
 - 8.2 the providing entity of documents required to be given to Clients under Part 7.7 of the Corporations Act (including, but not limited to, the requirements set out in section 946C of the Corporations Act (**'the SOA timing obligation'**)).

ASIC'S SURVEILLANCE

9. For the purpose of ensuring compliance with the Corporations Act, ASIC conducted a surveillance activity into the Advice provided by Mr Menkens as Authorised Representative of AMPFP.
10. In the course of its surveillance, ASIC reviewed 5 client files of Mr Menkens and within those files, found instances where Mr Menkens may have:

- 10.1 failed to comply with the best interests obligation;
- 10.2 failed to comply with the SOA timing obligation; and
- 10.3 failed to comply with Advice processes.

ASIC'S CONCERNS

11. Based on the documents obtained during its surveillance, ASIC found evidence of failures by Mr Menkens, in dealing with Clients, to:
 - 11.1 demonstrate that he had acted in accordance with the best interests obligation;
 - 11.2 comply with record keeping obligations relating to personal Advice; and
 - 11.3 comply with the SOA timing obligation.
12. As a result, ASIC is concerned that, during the Relevant Period, Mr Menkens may have failed to comply with his obligations under the Corporations Act.

ACKNOWLEDGMENT OF CONCERNS

13. Mr Menkens acknowledges ASIC's concerns and believes that they are reasonably held.

UNDERTAKINGS

14. Under s93AA of the ASIC Act, Mr Menkens has offered, and ASIC has agreed to accept, as an alternative to pursuing administrative action under the Corporations Act, the undertakings set out in this Enforceable Undertaking.

Costs

15. Mr Menkens undertakes that he will pay, or he will arrange for Menkens Financial Group to pay the costs of his compliance with this Enforceable Undertaking, including the remuneration and costs associated with the engagement of the Independent Expert.
16. Mr Menkens undertakes that he will not, either on behalf of himself or Menkens Financial Group, seek reimbursement of, contribution towards or otherwise directly or indirectly pass on the costs of compliance with this Enforceable Undertaking, to any third party (including his Clients).

Independent Expert

17. Within 30 Business Days of the date of this Enforceable Undertaking, or if Mr Menkens is not acting as a Representative of an AFS Licensee at the time of signing this Enforceable Undertaking, within 10 Business Days of being appointed as a Representative of an AFS Licensee, Mr Menkens must obtain the agreement of an Independent Expert who has particular expertise in the area of compliance with Financial Services Law, who:
 - 17.1 is independent of Mr Menkens and Menkens Financial Group; and
 - 17.2 has not previously provided compliance services to Mr Menkens;to act as Independent Expert for the purposes of this Enforceable Undertaking.
18. The Independent Expert must be approved by ASIC before the Independent Expert is formally engaged by Mr Menkens.
19. At the time the approval is sought from ASIC, Mr Menkens must provide the following information to ASIC in writing:
 - 19.1 the Independent Expert's name, position and a summary of the Independent Expert's relevant qualifications and experience; and
 - 19.2 confirmation as to the Independent Expert's independence of Mr Menkens and Menkens Financial Group.
20. The Independent Expert is to undertake an assessment of the Advice provided by Mr Menkens in accordance with clauses 25 to 29.3 of this Enforceable Undertaking.
21. The agreement of the Independent Expert shall be effected by executing the document marked Annexure A to this Enforceable Undertaking and Mr Menkens providing a copy of it to ASIC within three (3) Business Days of such execution.
22. The terms of engagement of the Independent Expert may only be varied with the express written agreement of ASIC.
23. Upon the engagement of the Independent Expert, Mr Menkens must ensure the Independent Expert has copies of the current compliance policies and procedures relating to Advice issued by any AFS Licensee for whom Mr Menkens acts as Authorised Representative during the Review Period.

24. In the event that:

- 24.1 Mr Menkens is unable to obtain the agreement of an Independent Expert; or
- 24.2 ASIC fails to approve the Independent Expert proposed by Mr Menkens; or
- 24.3 the Independent Expert becomes unable, for any reason, to comply with the matters specified in clauses 25 to 29.3 below;

another person must, within five (5) Business Days of the event in clause 24 occurring, be nominated by Mr Menkens to be the Independent Expert subject to:

- i) Mr Menkens providing ASIC with details in writing of the alternative Independent Expert as otherwise required by clause 19 above;
- ii) ASIC providing Mr Menkens 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, Mr Menkens should procure 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.

Pre Vetting Undertaking

25. Mr Menkens undertakes that he will, from the date of entry into this Enforceable Undertaking:

- 25.1 have the next five pieces of Advice he provides to Clients audited by the Independent Expert;
- 25.2 have the Independent Expert record, in writing, any changes that are required;
- 25.3 provide a copy of the document described in 25.2 above to the AFS Licensee under whose authorisation the Advice was provided; and
- 25.4 subject to the approval of the AFS Licensee under whose authorisation the Advice was provided, implement any changes to the Advice or the Advice documents required by the Independent Expert;
- 25.5 should the AFS Licensee under whose authorisation the Advice was provided not consent to any changes identified in 25.2 being

implemented, Mr Menkens will seek written advice as to what amendments that licensee requires and implement those amendments;

prior to providing the Advice to the Clients.

Enhanced Auditing Undertaking

26. The Independent Expert will undertake a minimum of four (4) Audit Reviews across the Review Period as follows:
 - 26.1 the first review will be completed three (3) months from the Independent Expert Engagement Date (First Audit);
 - 26.2 each Audit Review will include the assessment of four (4) individual pieces of Advice that were provided by Mr Menkens during the preceding three (3) month period;
 - 26.3 subsequent Audit Reviews will be completed three (3) months after the First Review and thereafter until the end of the Review Period (Subsequent Audits);
 - 26.4 notwithstanding the terms of subparagraph 26.3 above, the final Audit Review will be completed by the expiry of the Review Period (Final Audit), except if there is insufficient pieces of Advice to meet the required quantity for the Audit Review, in which case, the Review Period will be extended.
27. In order to conduct the First Audit, the Independent Expert will review, assess and make written recommendations (if required) in relation to the Advice provided by Mr Menkens.
28. In each subsequent Audit Review (including the Final Audit), the Independent Expert will also have regard to the recommendations made in one or more of the previous Audit Reviews and whether these issues continue to be detected within the Advice.
29. Within seven (7) Business Days after completing each Audit Review, the Independent Expert will provide the Independent Expert's Statement to ASIC, which will be made available to Mr Menkens and the AFS Licensee under whose authorisation the Advice the subject of that Audit Review was provided, which shall set out details of:

- 29.1 the review, assessment and recommendations made in relation to Mr Menkens' Advice;
- 29.2 Mr Menkens' compliance with legislative and licensee requirements relating to the Advice; and
- 29.3 in Audit Reviews subsequent to the First Audit, the instance of any issues being detected that have already been raised in previous Independent Expert Statements.

AFS licensee

30. While this Enforceable Undertaking is in force, Mr Menkens must advise any AFS licensee that authorises him to provide Advice during the Review Period of the existence of this Enforceable Undertaking.
31. Mr Menkens undertakes that should his authorisation from any AFS Licensee end prior to the cessation of the Review Period, the terms of this Enforceable Undertaking will be suspended and will recommence upon the date of his appointment to any subsequent AFS Licensee(s).

ASIC

32. Mr Menkens undertakes to provide all documents and information requested by ASIC, where the request is for the purpose of assessing Mr Menkens' compliance with the terms of this Enforceable Undertaking, within fourteen (14) business days of the request being made.

Non Compliance

33. Should the Independent Expert report:
 - 33.1 that Mr Menkens has failed to implement recommendations prescribed by the Independent Expert (and where required, agreed to by the AFS Licensee); or
 - 33.2 that repetitive Compliance Breaches have been detected in Audit Reviews;

Mr Menkens will have failed to materially comply with this Enforceable Undertaking.

34. Should ASIC believe that Mr Menkens has failed to materially comply with the Enforceable Undertaking as described in clause 33.1 it will write to Mr Menkens setting out its concerns regarding non-compliance.
35. Mr Menkens will have fourteen (14) days from the date of ASIC's letter referred to in clause 34 to provide evidence to satisfy ASIC that he has remedied such non-compliance.

36. Should Mr Menkens submit evidence under clause 35, ASIC has discretion to determine whether the evidence remedies the potential non-compliance.
37. Should Mr Menkens be unable to demonstrate his compliance pursuant to clause 35 or should the Independent Expert report that repetitive Compliance Breaches have been detected in Audit Reviews as described in clause 33.2, Mr Menkens acknowledges and accepts that he will be in default of this Enforceable Undertaking.
38. Mr Menkens undertakes that should he be in default of this Enforceable Undertaking, he will not, for a period of three (3) years from the date of default:
 - 38.1 do any act or engage in any conduct as an AFS Licensee or as a Representative of an AFS Licensee;
 - 38.2 hold himself out as an AFS Licensee or as a Representative of an AFS Licensee;
 - 38.3 provide a Financial Service whether on his own behalf or on behalf of another person who carries on a financial services business;
 - 38.4 be involved in the provision of Financial Services or Financial Products;
 - 38.5 hold out that he is in any way authorised to provide particular Financial Services or that he is in any way authorised to provide Financial Services generally; or
 - 38.6 apply to ASIC under section 913A of the Corporations Act for an AFS Licence.

ACKNOWLEDGMENTS

39. Mr Menkens acknowledges that ASIC:
 - 39.1 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;
 - 39.2 may from time to time publicly refer to this Enforceable Undertaking and compliance herewith; and
 - 39.3 will make this Enforceable Undertaking available for public inspection.
40. Further, Mr Menkens acknowledges that:

- 40.1 ASIC's acceptance of this Enforceable Undertaking does not affect ASIC's power to investigate, conduct surveillance, or pursue civil or criminal proceedings in relation to any contravention not the subject of ASIC's concerns in this Enforceable Undertaking or arising from future conduct;
- 40.2 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;
- 40.3 Mr Menkens acknowledges that ASIC had reason to be concerned as to the alleged facts and has offered undertakings in the terms of clauses 14 to 38 above; and
- 40.4 Mr Menkens acknowledges that this Enforceable Undertaking has no operative force until accepted by ASIC, and Mr Menkens and ASIC acknowledge that the date of the Enforceable Undertaking is the date on which it is accepted by ASIC.


PROVISION OF DOCUMENTS

41. 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

42. The address for providing Mr Menkens with any notice or document is:


Leo Menkens
As known to ASIC
Brisbane, Queensland



.....

Leo Menkens

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

17/9/15
.....

Date