

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:

HSBC Bank Australia Limited

ACN 006 434 162

AFSL 232595

580 George Street Sydney NSW 2000

1. DEFINITIONS

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

Acceptance Date means the date this undertaking is accepted by ASIC.

Affected Clients has the meaning given by paragraph 2.6 of this undertaking.

AFSL means Australian financial services licence as that term is defined in section 761 of the Corporations Act.

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

Assessment Plan has the meaning given by paragraph 3.9.1 of this undertaking.

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

Financial Product has the meaning given to that term by Division 3 of Part 7.1 of the Corporations Act.

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

HSBC means HSBC Bank Australia Limited ACN 006 434 162.

Independent Expert means the person, firm or company required to be appointed under paragraph 3.3.

Other Affected Clients has the meaning given by paragraph 3.9.1 of this undertaking.

Relevant Period means 1 January 2009 to 28 March 2013.

Remediate means each of the following steps:

- (i) for Affected Clients, and Other Affected Clients who received a statement of advice but no personal advice, reimbursement of any advice fees paid by the client to HSBC;
- (ii) for Affected Clients, and Other Affected Clients who received personal advice:
 - a. an offer to review the advice provided to the client, together with any additional information the client provides, where compliance with section 945A cannot be determined from the client's file; and
 - b. if the review referred to at a. above finds the advice did not comply with section 945A: an offer of compensation based on the application of the principles for compensation set out in the guidelines to paragraphs 9.2 and 9.3 of the FOS Terms of Reference other than the compensation caps set out in those guidelines, and in the document The FOS Approach to Loss Calculation in Financial Advice; and an offer to review the client's present circumstances and provide them with fee-free personal advice;
- (iii) the content and form of a template for communications with Affected Clients and Other Affected Clients about the matters set out at (i) and (ii) above is agreed to by ASIC prior to the communication occurring.

Structured Products means investments whose value is based on the movement of underlying assets such as a share index.

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.

Details of conduct

- 2.2 HSBC operates a financial services business within the meaning of Chapter 7 of the Corporations Act.
- 2.3 Since 1 December 2003, HSBC has held an AFSL (No. 232595) which authorises HSBC to provide Financial Product Advice and deal in a range of Financial Products.
- 2.4 HSBC has authorised certain persons to provide Financial Product Advice on its behalf (**Representatives**). These Representatives are representatives of HSBC within the meaning of section 910A of the Corporations Act.
- 2.5 Between July 2014 and August 2014, ASIC conducted a review of a sample of Representatives' client files containing Financial Product Advice to clients who invested in Financial Products classified by HSBC as Structured Products, during the Relevant Period. Through this review, ASIC identified a number of concerns in relation to HSBC's Financial Product Advice business, which ASIC communicated to HSBC in September 2014. These concerns included:

- 2.5.1 The adequacy of Representatives' inquiries in relation to certain clients' personal circumstances;
- 2.5.2 The provision of statements of advice (**SOAs**) to certain clients who may have received an execution-only service;
- 2.5.3 The narrow scope of advice given by Representatives and concerns as to whether advice given was appropriate for certain clients; and
- 2.5.4 The adequacy of product replacement disclosure provided by Representatives to certain clients.
- 2.6 In September 2014, following ASIC's review referred to in paragraph 2.5, HSBC commenced its own review of all client files for HSBC retail clients who invested in Structured Products during the Relevant Period, being approximately 557 client files (**HSBC Review**). The HSBC Review identified approximately 464 of these clients (**Affected Clients**) where further investigation was considered warranted.
- 2.7 On 5 June 2015, HSBC lodged a notification with ASIC under section 912D of the Corporations Act (**Breach Notification**) notifying ASIC of potential contraventions of financial services laws identified by the HSBC Review. The Breach Notification identified potential breaches of HSBC's general obligations under section 912A of the Act, section 945A (a financial services law during the Relevant Period) and section 947B.
- 2.8 The Breach Notification indicated that the HSBC Review identified instances where there may have been:
- 2.8.1 issues with the formulation and documentation of advice; and
- 2.8.2 file documentation which was consistent with a client directed transaction but where personal advice was provided by Representatives in an SOA.
- 2.9 The issues in relation to the formulation and documentation of advice included:
- 2.9.1 certain files held insufficient information to determine whether advice given was appropriate to the client;
- 2.9.2 certain files had an asset allocation to single HSBC Structured Products exceeding HSBC guidelines;
- 2.9.3 certain files had conflicting information in file notes, fact finds and SOAs which were not resolved in the files;
- 2.9.4 certain files had investment goals and objectives closely aligned with the features of the products being advised upon; and
- 2.9.5 certain files with no alternative strategies set out in SOAs.

ASIC's views concerning the conduct

- 2.10 As a result of the matters referred to in paragraphs 2.5, 2.7, 2.8 and 2.9, ASIC's view is that, during the Relevant Period, HSBC may have failed to comply with its obligations under the Corporations Act, specifically:

- 2.10.1 section 912A(1)(c) of the Corporations Act, which requires a financial services licensee to comply with the financial services laws;
 - 2.10.2 section 912A(1)(ca) of the Corporations Act, which requires a financial services licensee to take reasonable steps to ensure that its representatives comply with the financial services laws;
 - 2.10.3 section 912A(1)(f) of the Corporations Act, which requires a financial services licensee to ensure that its representatives are adequately trained, and are competent to provide financial services;
 - 2.10.4 section 912A(1)(b) of the Corporations Act, which requires a financial services licensee to comply with the conditions of the licence (see paragraph 2.11 below);
 - 2.10.5 section 945A of the Corporations Act, between January 2009 and March 2013, in relation to the requirement to have a reasonable basis for advice; and
 - 2.10.6 section 947D of the Corporations Act, in relation to replacement product disclosure.
- 2.11 ASIC is also of the view that during the Relevant Period, HSBC may not have complied with:
- 2.11.1 condition 3 of its AFSL, which requires a financial services licensee to establish and maintain compliance measures that ensure, as far as is reasonably practicable, that the licensee complies with the financial services laws; and
 - 2.11.2 condition 4 of its AFSL, which requires a financial services licensee to ensure its Representatives are adequately trained.
- 2.12 ASIC is also concerned that the compliance issues identified in paragraphs 2.5, 2.7, 2.8 and 2.9 may extend beyond advice given on Structured Products during the Relevant Period, to advice about other Financial Products given by Representatives during the Relevant Period.

Acknowledgment of ASIC's views

- 2.13 HSBC acknowledges ASIC's views, acknowledges that they are reasonably held and has offered an enforceable undertaking in the terms of paragraphs 3.1 to 3.19 below.

Acknowledgements by ASIC

- 2.14 ASIC acknowledges that after ASIC conducted the review referred to in paragraph 2.5 and communicated its views to HSBC:
- 2.14.1 HSBC commissioned an independent expert to review the adequacy of HSBC's current advice processes and risk controls framework;

- 2.14.2 HSBC developed a plan (**Compliance Enhancement Plan**) to address the independent expert's recommendations on enhancements that could be made to the advice processes and controls framework;
- 2.14.3 HSBC took steps to implement the Compliance Enhancement Plan; and
- 2.14.4 HSBC commissioned the independent expert to conduct an assessment of the implementation of the Compliance Enhancement Plan and of the sustainability of changes made to HSBC's advice processes and risk controls framework under the Compliance Enhancement Plan. The assessment found that HSBC had satisfactorily addressed the recommendations in the Compliance Enhancement Plan, and identified no material exceptions or further recommendations. HSBC has provided that assessment to ASIC.
- 2.15 ASIC acknowledges that HSBC has worked constructively with ASIC in relation to its enquiries and this enforceable undertaking.

3. UNDERTAKINGS

- 3.1 Under section 93AA of the ASIC Act, HSBC has offered, and ASIC has agreed to accept, as an alternative to pursuing administrative action against HSBC in respect of the matters referred to in paragraphs 2.10 and 2.12, the following undertakings.

Engagement of Independent Expert

- 3.2 HSBC undertakes to request ASIC to approve, within 15 business days of the Acceptance Date or within such longer period as may be agreed by ASIC and HSBC:
- 3.2.1 the appointment of an Independent Expert that meets the criteria in paragraph 3.4 below, and
- 3.2.2 draft terms of engagement for that expert that meet the requirements of this enforceable undertaking.
- 3.3 If ASIC approves the draft terms of engagement and the Independent Expert following a request by HSBC under paragraph 3.2, HSBC undertakes to appoint the approved Independent Expert on the terms approved by ASIC, within 10 business days of receiving ASIC's approval, or within such longer period as may be agreed by ASIC and HSBC.
- 3.4 HSBC undertakes to nominate, under paragraph 3.2.1 above, an independent expert who, in HSBC's opinion:
- 3.4.1 has the necessary expertise, experience and operational capacity to perform the role contemplated by this enforceable undertaking; and
- 3.4.2 is independent of HSBC, its related bodies corporate and its officers at the time of the appointment, and who will at all material times be capable of exercising objective and impartial judgement.
- 3.5 HSBC undertakes to ensure the terms of the Independent Expert's engagement provided to ASIC for approval under paragraph 3.2.2:

- 3.5.1 include a statement to the effect that the work of the Independent Expert is being carried out for HSBC and ASIC, and acknowledging that ASIC is relying on the work of the Independent Expert;
- 3.5.2 include a statement that upon request by ASIC, ASIC is to be copied into all or some communications between HSBC and the Independent Expert;
- 3.5.3 require the Independent Expert to notify ASIC where a conflict of interest arises during the engagement or when the Independent Expert becomes aware of information that adversely affects its ability to exercise objective and impartial judgement;
- 3.5.4 include an acknowledgement that in relation to the written reports to be provided to ASIC and HSBC as described in paragraph 3.5.6 to 3.5.9, ASIC may from time to time publicly refer to the content of the report, and may make a summary of the content of the reports or a statement that refers to the content of the reports public;
- 3.5.6 require the Independent Expert, within three months of its engagement (or such other date as may be agreed to by ASIC), to conduct an assessment of:
 - (i) the Assessment Plan (see paragraph 3.9.1 below) and provide a report to HSBC and ASIC setting out to whether the Assessment Plan will allow HSBC to identify all Other Affected Clients in an efficient, honest and fair manner; and
 - (ii) the HSBC Remediation Plan (see paragraph 3.9.2 below) and to provide a report to HSBC and ASIC setting out whether the HSBC Remediation Plan complies with the requirements of paragraph 3.11 of this undertaking, and includes any recommendations for amendments to the HSBC Remediation Plan required for it to comply with paragraph 3.11.
- 3.5.7 require the Independent Expert, within six months of engagement (or such other date as may be agreed to by ASIC), to provide an interim report (**Interim Report**) on the implementation of the HSBC Remediation Plan, including progress against performance milestones, results of interim testing (based on statistically valid samples) of the operating effectiveness of the work performed by HSBC, and any recommendations for actions that, in the opinion of the Independent Expert, would be necessary for HSBC to implement to rectify deficiencies in the implementation of the HSBC Remediation Plan;
- 3.5.8 require the Independent Expert to review and comment on monthly written progress reports prepared by HSBC (and provided to ASIC) on the progress of implementation of the HSBC Remediation Plan, commencing in the month after the delivery of the Interim Report, and continuing for as long as clients are being Remediated under the HSBC Remediation Plan;
- 3.5.9 require the Independent Expert, within two months of the completion of client Remediation under the HSBC Remediation Plan (or such other date as may be agreed by ASIC), to provide a final written report (**Final Report**)

to HSBC and ASIC which sets out the Independent Expert's assessment of whether the HSBC Remediation Plan has been implemented, an assessment of the effectiveness of that implementation and any recommendations for further steps to be undertaken by HSBC for the purposes of complying with the undertakings in paragraphs 3.9 and 3.10; and

3.5.10 require the Independent Expert, to test whether the recommendations identified in the Final Report (if any) have been implemented 6 months after the date of the Final Report (or such other date as may be agreed between HSBC and ASIC) and to provide a report (**Further Report**), if necessary, on the outcome of such testing to HSBC and ASIC as soon as practicable after that testing.

3.6 HSBC undertakes that it will not vary the terms of engagement of the Independent Expert without the prior written approval of ASIC.

3.7 HSBC undertakes to:

3.7.1 permit the Independent Expert, to the extent that it is reasonable having regard to the requirements of this enforceable undertaking, to have access to its books and to interview current employees;

3.7.2 give the Independent Expert any information or explanation reasonably requested by the Independent Expert of any matter in any way connected with the reports required to be prepared by the Independent Expert under this enforceable undertaking; and

3.7.3 otherwise reasonably assist the Independent Expert in carrying out the terms of its engagement and producing the reports required to be prepared by the Independent Expert under this enforceable undertaking.

For the avoidance of doubt, HSBC is not required to provide the Independent Expert with any document or information that is the subject of a claim by HSBC of legal professional privilege. If HSBC does not produce, or provide access to, a document or information reasonably requested by the Independent Expert under paragraph 3.7 on the grounds that that document or information is subject to a claim of legal professional privilege, HSBC will notify ASIC as soon as reasonably practicable and in any case no later than five business days after it has refused a request, that such a claim has been made.

3.8 HSBC undertakes to seek approval under paragraph 3.2 for the appointment of a new independent expert, within 15 business days or within such longer period as may be agreed to by ASIC of becoming aware the appointed Independent Expert is unable to continue its appointment.

HSBC Assessment Plan and HSBC Remediation Plan

3.9 HSBC undertakes, within 45 days of the appointment of the Independent Expert or within such longer period as may be agreed to by ASIC, to:

3.9.1 develop a plan (**Assessment Plan**) that sets out the steps that HSBC will take to determine whether the conduct and advice issues set out in the Breach Notification and paragraphs 2.5, 2.7, 2.8 and 2.9 extend to clients

- (Other Affected Clients)** who received advice or services in relation to Financial Products other than Structured Products during the Relevant Period, and the steps HSBC will take to identify all of those clients;
- 3.9.2 develop a plan (**HSBC Remediation Plan**), that complies with paragraph 3.11 below, to Remediate all Affected Clients and Other Affected Clients;
- 3.9.3 provide the HSBC Remediation Plan to ASIC and the Independent Expert; and
- 3.9.4 amend the HSBC Remediation Plan to include any changes recommended by the Independent Expert or requested by ASIC.
- 3.10 HSBC undertakes to implement the HSBC Remediation Plan as amended (if applicable) in the timeframes set out in the HSBC Remediation Plan.
- 3.11 HSBC undertakes to ensure the HSBC Remediation Plan:
- 3.11.1 requires HSBC to Remediate Affected Clients and Other Affected Clients, in an efficient, honest and fair manner;
- 3.11.2 sets out the methodology to be employed by HSBC to ensure all Affected Clients and Other Affected Clients are Remediated, including setting out the approach for reviewing client files and the remediation activities to be taken;
- 3.11.3 sets out the governance arrangements that will be implemented in respect of the remediation process, including operational stakeholders and business owners responsible for each element of the remediation process;
- 3.11.4 specifies performance milestones, including dates for progress updates;
- 3.11.5 sets out the process for communicating with Affected Clients and Other Affected Clients; and
- 3.11.6 provides for clients to have the right to have the outcome of HSBC's Remediation reviewed by the external dispute resolution (EDR) scheme of which HSBC is a member.
- 3.12 HSBC undertakes:
- 3.12.1 it will not object to the EDR scheme reviewing a client's Remediation under paragraph 3.11.6, and
- 3.12.2 where the EDR scheme determines that the appropriate compensation for a client is a sum in excess of that able to be awarded under the scheme's terms of reference, to resolve the dispute with the Affected Client or Other Affected Client on the basis of a settlement in the amount of that sum.

Other undertakings

- 3.13 HSBC undertakes to implement the further steps (if any) identified in the Final Report in time-frames to be agreed with ASIC.
- 3.14 HSBC undertakes that it will pay the costs of its compliance with this enforceable undertaking.

- 3.15 HSBC undertakes to within a reasonable period of receiving a request from ASIC provide all documents and information requested by ASIC from time to time for the purpose of assessing HSBC's compliance with the terms of this enforceable undertaking. For the avoidance of doubt, HSBC is not required to provide ASIC with any document or information that is the subject of a claim by HSBC of legal professional privilege.
- 3.16 HSBC undertakes that it will not seek reimbursement or pass on to clients the costs incurred in carrying out this enforceable undertaking.
- 3.17 HSBC undertakes to notify ASIC as soon as reasonably practicable and in any event within 5 business days of becoming aware of any failure by HSBC to comply with a term of this enforceable undertaking.

4. ACKNOWLEDGEMENTS

4.1 HSBC acknowledges that ASIC:

- 4.1.1 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;
- 4.1.2 may from time to time publicly refer to this enforceable undertaking;
- 4.1.3 will report publicly on whether the undertakings given by HSBC in this enforceable undertaking have been complied with; and
- 4.1.4 will make this enforceable undertaking available for public inspection.

4.2 In relation to the written reports to be provided to ASIC and HSBC under paragraphs 3.5.6 to 3.5.9, HSBC acknowledges that ASIC:

- 4.2.1 may issue a media release referring to the content of the reports;
- 4.2.2 may from time to time publicly refer to the content of the reports; and
- 4.2.3 will make available for public inspection the reports, or a summary of the content of the reports, or, a statement that refers to the content of the reports.

4.3 ASIC acknowledges that in relation to paragraph 4.2, it will delete, remove or not refer to specific information that:

- 4.3.1 consists of personal information of an identified natural person whose acts or omissions are not the subject of, or a concern mentioned in, the enforceable undertaking;
- 4.3.2 ASIC is satisfied would be unreasonable to release because the release of the information would unreasonably affect the business, commercial or financial affairs of HSBC or a third party otherwise than in a way that arises from the execution, implementation and reporting of the outcomes of the enforceable undertaking;
- 4.3.3 ASIC is satisfied should not be released because it would be against the public interest to do so; or

4.3.4 HSBC has requested that the specific information not be released and ASIC is satisfied;

- (a) the information would or could reasonably be expected to unreasonably affect the business, commercial or financial affairs of HSBC otherwise than in a way that arises from the execution, implementation and reporting of the outcomes of this enforceable undertaking; or
- (b) otherwise should not be disclosed because it would be against the public interest to do so.

4.4 HSBC further acknowledges that:

- (a) ASIC's acceptance of this enforceable undertaking does not affect ASIC's power to investigate, conduct surveillance or pursue criminal prosecution or its powers 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; and
- (c) this enforceable undertaking has no operative force until accepted by ASIC, and HSBC and ASIC acknowledge that the date of this enforceable undertaking is the date on which it is accepted by ASIC.

4.5 HSBC acknowledges that ASIC will report publicly on whether the undertakings given by HSBC in this enforceable undertaking have been complied with.

4.6 Nothing in this enforceable undertaking constitutes an admission by HSBC.

5. PROVISION OF DOCUMENTS TO ASIC

5.1 The address for providing ASIC with any document or notification which this enforceable undertaking requires to be provided to ASIC is:

Senior Manager

Financial Advisers

Australian Securities and Investments Commission

GPO Box 9827

Sydney NSW 2001

Executed by HSBC Bank Australia Limited (ACN 006 434 162)



Signature of director

Name: *GRAHAM BRABLEY*



Signature of director

Name: *TONY CLAPPS*

Accepted by the Australian Securities and Investments Commission under section 93AA of the *Australian Securities and Investments Commission Act 2001* (Cth) by its duly authorised delegate:



Name: *Louise Macaulay*

Date: *13/5/16*