



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:

Commonwealth Financial Planning Limited
 ACN 003 900 169
 AFSL 231139
 Ground Floor Tower 1, 201 Sussex Street Sydney NSW 2000

BW Financial Advice Limited
 ACN 097 084 878
 AFSL 230727
 Ground Floor Tower 1, 201 Sussex Street Sydney NSW 2000

1. DEFINITIONS

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

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

Affected Client means a person who paid fees to CFPL or BWFA pursuant to a CFPL OGS or BWFA OGS agreement, and in respect of whom CFPL or BWFA (as applicable) has not located sufficient evidence that the person was provided with one or more CFPL Annual Reviews or BWFA Annual Reviews to which he or she was entitled.

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

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

Attestation means an attestation provided by CFPL in accordance with clause 3.3 of this undertaking.

BWFA means BW Financial Advice Limited ACN 097 084 878.

BWFA Annual Review has the meaning provided at clause 2.28 of this undertaking.

BWFA OGS has the meaning provided at clause 2.26 of this undertaking.

CBA means Commonwealth Bank of Australia ACN 123 123 124.

CBA Group means the Commonwealth Bank of Australia ACN 123 123 124 and its subsidiaries including Commonwealth Financial Planning Limited ACN 003 900 169 and BW Financial Advice Limited ACN 097 084 878.

CFPL means Commonwealth Financial Planning Limited ACN 003 900 169 and for the purposes of this enforceable undertaking excludes the 'Pathways' business which is a separate business of CFPL comprising self-employed authorised representatives.

CFPL Annual Review has the meaning provided at clause 2.8 of this undertaking.

CFPL OGS has the meaning provided at clause 2.6.

Company means CFPL or BWFA (or, together, the **Companies**).

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

Financial Planner means a representative of an AFSL holder within the meaning of section 910A of the Corporations Act.

Financial Product has the meaning given to that term by Division 3 of Part 7.1 of Chapter 7 of the Corporations Act.

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

Review and Remediation Program refers to the program described in clauses 2.19 to 2.20 and 2.37 to 2.38.

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.

CFPL

Details of conduct

2.2 CFPL is a wholly owned subsidiary of CBA.

2.3 CFPL operates a financial services business within the meaning of Chapter 7 of the Corporations Act.

2.4 Since 1 October 2003, CFPL has held an AFSL (No. 231139) which authorises CFPL to provide Financial Product Advice and deal in a range of Financial Products.

2.5 Certain employees of the CBA Group provide, and have in the past provided, personal Financial Product Advice services on behalf of CFPL (**CFPL Financial Planners**).

- 2.6 Since around 2004, CFPL has agreed with various clients to provide them with a package of services known generally as "Ongoing Service" (**CFPL OGS**) in exchange for an annual fee.
- 2.7 CFPL has offered CFPL OGS to clients under various names, specifically:
- 2.7.1 from about 2004 to June 2013, the "Ongoing Service" package (now referred to as the "Legacy Ongoing Service" package); and
 - 2.7.2 since about July 2013, the "Local Ongoing Service" and "Central Ongoing Service" packages (although the Central Ongoing Service Package is no longer offered),
- (collectively, the clients are referred to as the **CFPL OGS Clients**).
- 2.8 A key component of the CFPL OGS is the provision to the CFPL OGS Client of an annual review of his or her financial plan (the **CFPL Annual Review**).
- 2.9 The CFPL Annual Reviews are to be provided by CFPL Financial Planners.
- 2.10 On 11 July 2014, CFPL informed ASIC that it had identified that some clients may not have received all of the services they were entitled to, and that CFPL was conducting further analysis.
- 2.11 On 13 August 2014, CFPL lodged a breach notification with ASIC under section 912D of the Corporations Act identifying that there were a number of clients in respect of whom evidence could not be located establishing that a CFPL Annual Review had been provided in the 2013/2014 financial year.

ASIC's investigation and analysis

- 2.12 In about July 2014, ASIC began monitoring and engaging with CFPL in relation to the identification and remediation of CFPL OGS Clients who were entitled to, but may not have received, CFPL Annual Reviews.
- 2.13 In about May 2015, ASIC commenced an investigation under section 13(1) of the ASIC Act into suspected contraventions of the Corporations Act and the ASIC Act by CFPL in relation to CFPL OGS Clients having paid for but not having received financial services during the period from 1 September 2004 to 30 June 2013.
- 2.14 ASIC's investigation and its liaison with CFPL while it undertook the Review and Remediation Program described in clauses 2.19 and 2.20 have identified that from about 2007 until at least 13 August 2014, CFPL has not located evidence that it provided the CFPL Annual Review to a significant number of its clients who had paid CFPL OGS fees and were therefore entitled to receive a CFPL Annual Review.

ASIC's Concerns

- 2.15 ASIC is concerned that during the period from 1 July 2007 to at least 13 August 2014, in the circumstances set out above, CFPL failed to comply with section 912A(1)(a) of the Corporations Act, which provides that a financial services licensee must do all things necessary to ensure that the financial services covered by the licence are provided efficiently, honestly and fairly.
- 2.16 ASIC is concerned that CFPL did not do all things necessary to ensure that the CFPL OGS package was provided efficiently, honestly and fairly for the following reasons:
- 2.16.1 CFPL either did not provide, or has not identified evidence regarding the provision of, a CFPL Annual Review to approximately 28,000 CFPL OGS Clients who were identified under the Review and Remediation Program;
- 2.16.2 CFPL did not have adequate systems and processes in place for tracking its CFPL OGS Clients and ensuring it provided the CFPL Annual Review to its CFPL OGS Clients; and
- 2.16.3 Senior management were aware from at least mid-2012 that:
- i. a relatively small number of CFPL OGS Clients were not assigned in CFPL's systems to an active adviser. These clients may not have received a CFPL Annual Review to which they were entitled for one or more periods and were remediated through the Review and Remediation Program and prior remediation activities; and
 - ii. there was a potential risk of a broader issue in relation to CFPL OGS Clients who were assigned to an active adviser not receiving a CFPL Annual Review. CFPL was not in a position to determine the extent of this issue at the time as it did not have centralised electronic systems to track the provision of ongoing services. It was not until after the 2013/2014 financial year, once CFPL had fully implemented centralised electronic systems, that CFPL was in a position to determine the extent of issues regarding the provision of service to a number of CFPL OGS Clients. CFPL notified ASIC of the issue on 11 July 2014.
- 2.17 ASIC is also concerned that during the period from at least 1 July 2007 to 13 August 2014, in the circumstances set out above, CFPL did not comply with Condition 2 of its AFSL, by which it was required to establish and maintain compliance measures that ensure, as far as is reasonably practicable, that it complies with the provisions of the financial services laws.

Acknowledgement of ASIC's concerns

- 2.18 CFPL acknowledges that the concerns expressed by ASIC at clauses 2.15 to 2.17 are reasonably held and has offered an enforceable undertaking in the terms set out in Section 3 below.

Acknowledgements by ASIC

Review and Remediation Program

- 2.19 ASIC acknowledges that CFPL has agreed with ASIC to:
- 2.19.1 complete reviews in relation to approximately 58,000 CFPL OGS Clients for the period 1 July 2007 to 30 June 2015 to determine whether those clients will be paid fee refunds and interest; and
 - 2.19.2 provide refunds and interest to CFPL OGS Clients where it has not identified sufficient evidence regarding the provision of a CFPL Annual Review.
- 2.20 As at 31 January 2018, CFPL has offered to pay approximately \$85 million in fee refunds (plus interest) to approximately 28,000 Affected Clients.

BWFA

Details of conduct

- 2.21 BWFA is a wholly owned subsidiary of CBA.
- 2.22 BWFA operated a financial services business within the meaning of Chapter 7 of the Corporations Act.
- 2.23 Since 13 October 2003, BWFA has held an AFSL (No. 230727) which authorises BWFA to provide Financial Product Advice and deal in a range of Financial Products.
- 2.24 In October 2008, CBA acquired BWFA.
- 2.25 BWFA authorised certain persons (**BWFA Financial Planners**) to provide Financial Product Advice on its behalf.
- 2.26 Since around 2003, BWFA has agreed with various clients to provide them with a package of services known generally as "Ongoing Service" (**BWFA OGS**) in exchange for an annual fee.

2.27 BWFA has provided the BWFA OGS to clients under various names, specifically:

2.27.1 from 1 November 2010 to about December 2013, the "Premium Ongoing Service" and "Classic Ongoing Service" packages; and

2.27.2 since about December 2013, the "Local Ongoing Service" and "Central Ongoing Service" packages,

(collectively, the clients are referred to as the **BWFA OGS Clients**).

2.28 A key component of the BWFA OGS from around November 2010 onwards was the provision to the BWFA OGS Client of an annual review of his or her financial plan (the **BWFA Annual Review**).

2.29 On 5 December 2014, BWFA lodged a breach notification with ASIC under section 912D of the Corporations Act identifying that there were a number of clients in respect of whom evidence could not be located establishing that a BWFA Annual Review had been provided during the 2014 financial year.

ASIC's investigation and analysis

2.30 In about December 2014, ASIC began monitoring and engaging with BWFA in relation to the identification and remediation of BWFA OGS Clients who were entitled to, but did not receive, BWFA Annual Reviews.

2.31 In about May 2015, ASIC commenced an investigation under section 13(1) of the ASIC Act into suspected contraventions of the Corporations Act and the ASIC Act by BWFA in relation to BWFA OGS Clients having paid for but not having received financial services during the period 21 September 2009 to 5 December 2014.

2.32 ASIC's investigation and its liaison with BWFA while it undertook the Review and Remediation Program described in clause 2.37 to 2.38 have identified that from 1 November 2010, when BWFA began offering the "Premium Ongoing Service" and "Classic Ongoing Service" packages, until at least 5 December 2014, BWFA has not located evidence that it provided the BWFA Annual Review to a significant number of its clients who had paid BWFA OGS fees and were therefore entitled to receive a BWFA Annual Review.

ASIC's concerns

2.33 ASIC is concerned that during the period from 1 November 2010 to at least 5 December 2014, in the circumstances set out above, BWFA failed to comply with section 912A(1)(a) of the Corporations Act, which provides that a financial services licensee must do all things necessary to ensure that the financial services covered by the licence are provided efficiently, honestly and fairly.

- 2.34 ASIC is concerned that BWFA did not do all things necessary to ensure that the BWFA OGS packages referred to in clause 2.27 above were provided efficiently, honestly and fairly for the following reasons:
- 2.34.1 BWFA either did not provide, or has not identified evidence regarding the provision of, a BWFA Annual Review to a significant number of clients who were identified under the Review and Remediation Program;
 - 2.34.2 BWFA did not have adequate systems and processes in place for tracking BWFA OGS Clients and ensuring it provided the BWFA Annual Review to those clients; and
 - 2.34.3 It was not until after issues regarding the provision of CFPL Annual Reviews to a number of CFPL OGS Clients had been identified, that BWFA undertook an analysis that identified similar issues within BWFA.
- 2.35 ASIC is also concerned that during the period from at least 1 November 2010 to 5 December 2014, in the circumstances set out above, BWFA did not comply with Condition 2 of its AFSL, by which it was required to establish and maintain compliance measures that ensure, as far as is reasonably practicable, that it complies with the provisions of the financial services laws.

Acknowledgement of ASIC's concerns

- 2.36 BWFA acknowledges that the concerns expressed by ASIC at clauses 2.33 to 2.35 are reasonably held and has offered an enforceable undertaking in the terms set out in Section 3 below.

Acknowledgements by ASIC

Review and remediation program

- 2.37 ASIC acknowledges that BWFA has agreed with ASIC to:
- 2.37.1 complete reviews in relation to approximately 4,000 BWFA OGS Clients for the period 1 November 2010 to 30 June 2015 to determine whether those clients will be paid fee refunds and interest; and
 - 2.37.2 provide refunds and interest to BWFA OGS Clients where it has not identified sufficient evidence regarding the provision of a BWFA Annual Review.
- 2.38 As at 31 January 2018, BWFA had offered to pay \$3.6 million in fee refunds (plus interest) to approximately 3,500 Affected Clients. BWFA estimates the total payment required for fee refunds and interest is around \$4.1 million.

Ceased trading

2.39 ASIC acknowledges that in October 2016, BWFA ceased trading. BWFA does not currently have any BWFA OGS Clients.

3. UNDERTAKINGS

3.1 Under section 93AA of the ASIC Act, CFPL and BWFA have offered, and ASIC has agreed to accept, as an alternative to ASIC pursuing civil or administrative action against CFPL or BWFA in respect of the matters referred to in clauses 2.15 to 2.17 and clauses 2.33 to 2.35 above, the following undertakings.

Community benefit payment

3.2 Within 60 days of the Acceptance Date (or any such date agreed to by CFPL, BWFA and ASIC), the Companies (or CBA) will make a community benefit payment of \$3 million in aggregate to one or more organisations to be nominated by ASIC following good faith consultation with CBA as to the identity of the recipients. The funds are to be used for the purpose of promoting the confident and informed participation of investors and consumers in the financial system.

Attestations

3.3 CFPL undertakes to, within 28 days of the Final Report referred to in clause 3.5.5, or within such longer period as may be agreed by ASIC and CFPL, provide ASIC with an Attestation signed by a senior executive that:

3.3.1 sets out, in summary form, the material changes to CFPL's systems, controls and processes that have been implemented by CFPL within its financial planning business in response to the issues set out at clauses 2.2 to 2.17 of this undertaking;

3.3.2 confirms that CFPL has taken reasonable steps to identify and remediate CFPL OGS Clients in respect of whom CFPL did not discharge its CFPL Annual Review contractual obligations in relation to the period 1 July 2015 to 31 January 2018; and

3.3.3 confirms that he or she has taken reasonable steps to satisfy himself or herself that, as at the date of the Attestation, CFPL's systems, processes and controls as designed and implemented are reasonably adequate to track CFPL OGS Clients and the discharge of CFPL's contractual obligations to those clients.

Independent expert

- 3.4 CFPL undertakes to appoint Ernst & Young as an independent expert on terms of engagement that meet the requirements of this enforceable undertaking.
- 3.5 CFPL undertakes to ensure the terms of the independent expert's engagement provided to ASIC:
- 3.5.1 include a statement to the effect that the work of the independent expert is being carried out for CFPL as well as for 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 CFPL 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 report to be provided to ASIC and CFPL by the independent expert as described in clause 3.5.5, ASIC may from time to time publicly refer to the content of the report, and may make a summary of the content of the report or a statement that refers to the content of the report public;
 - 3.5.5 require the independent expert to advise in a written report (**Final Report**) to be provided to ASIC and CFPL within three months of the Acceptance Date (or by such other date as may be agreed to by ASIC and CFPL) whether:
 - (i) CFPL has taken reasonable steps to identify and remediate CFPL OGS Clients in respect of whom CFPL did not discharge its CFPL Annual Review contractual obligations in relation to the period 1 July 2015 to 31 January 2018; and
 - (ii) CFPL's systems, processes and controls (in place on a date between the Acceptance Date and the date of the Final Report) as designed and implemented are reasonably adequate to track CFPL OGS Clients and the discharge of CFPL's contractual obligations to those clients.
- 3.6 CFPL undertakes to:
- 3.6.1 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;

- 3.6.2 give the independent expert any information or explanation reasonably requested by the independent expert of any matter in any way connected with the Final Report required to be prepared by the independent expert under this enforceable undertaking; and
- 3.6.3 otherwise reasonably assist the independent expert in carrying out the terms of its engagement and producing the Final Report required under this enforceable undertaking.
- 3.7 For the avoidance of doubt, CFPL is not required to provide the independent expert with any document or information that is the subject of a claim by CFPL of legal professional privilege.
- 3.8 CFPL undertakes to seek approval for the appointment of a new independent expert, within 15 business days of becoming aware that the appointed independent expert is unable to continue its appointment.

Other undertakings

- 3.9 Each Company undertakes that it will pay the costs of its compliance with this enforceable undertaking.
- 3.10 Each Company undertakes that it will not seek reimbursement or pass on to clients the costs incurred in carrying out this enforceable undertaking.
- 3.11 Each Company undertakes to provide all documents and information requested by ASIC from time to time for the purposes of assessing its compliance with the terms of the enforceable undertaking (except for material over which there is reasonably a claim by CFPL or BWFA of legal professional privilege).
- 3.12 Each Company undertakes to notify ASIC as soon as reasonably practicable and in any event within 5 business days of becoming aware of any failure by CFPL to comply with a term of this enforceable undertaking.

4. ACKNOWLEDGEMENTS

- 4.1 Each Company 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 from time to time publicly report about compliance with this enforceable undertaking;
 - 4.1.4 will make this enforceable undertaking available for public inspection;

- 4.1.5 may issue a media release referring to the content of an Attestation as described in clause 3.3 and the Final Report described in clause 3.5.5;
- 4.1.6 may from time to time publicly refer to the content of an Attestation as described in clause 3.3 and the Final Report described in clause 3.5.5; and
- 4.1.7 will make available for public inspection a summary of the content of an Attestation as described in clause 3.3 and a summary, endorsed by the independent expert (such endorsement not to be unreasonably withheld), of the content of the Final Report described in clause 3.5.5, or statements that refer to the content of an Attestation or the Final Report.
- 4.2 ASIC acknowledges that in relation to clause 4.1, it will not refer to any information that:
- 4.2.1 consists of personal information of an identified natural person whose acts or omissions are not the subject of, or a concern mentioned in, this enforceable undertaking;
- 4.2.2 ASIC is satisfied would be unreasonable to release because the release of the information would unreasonably affect the business, commercial or financial affairs of the Companies or a third party otherwise than in a way that arises from the execution, implementation and reporting of the outcomes of this enforceable undertaking;
- 4.2.3 ASIC is satisfied should not be released because it would be against the public interest to do so; or
- 4.2.4 the Companies have requested not to be released if ASIC is satisfied:
- i. it would be unreasonable to release because the release of the information would unreasonably affect the business, commercial or financial affairs of the Companies otherwise than in a way that arises from the execution, implementation and reporting of the outcomes of the enforceable undertaking; or
 - ii. it should not be released because it would be against the public interest to do so.
- 4.3 The Companies further acknowledge that:
- 4.3.1 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; and

4.3.2 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.

4.4 The Companies acknowledge that this enforceable undertaking has no operative force until accepted by ASIC, and each Company and ASIC acknowledges that the date of this enforceable undertaking is the Acceptance Date.

Executed by COMMONWEALTH FINANCIAL PLANNING LIMITED ACN 003 900 169 in accordance with section 127(1) of the Corporations Act



Signature of Director

JAMES MYERSCOUGH

Name of Director




Signature of Director/ Company Secretary

ANDREW MORGAN

Name of Director/ Company Secretary

Executed by BW FINANCIAL ADVICE LIMITED ACN 097 084 878 in accordance with section 127(1) of the Corporations Act



Signature of Director

JAMES MYERSCOUGH

Name of Director



Signature of Director/ Company Secretary

ANDREW MORGAN

Name of Director/ Company Secretary

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


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Name: TIM McWHANN

Delegate of Australian Securities and Investments Commission

Date: 9 APRIL 2018