

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 Bank of Australia (CBA)

123 123 124

Ground Floor Tower 1, Sussex 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.

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

ASIC means the Australian Securities and Investments Commission.

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

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

Corporations Regulations means the Corporations Regulations 2001 (Cth).

CBA means the Commonwealth Bank of Australia (ACN 123 123 124).

Financial Health Check means the process set out in paragraph 2.6.

Financial Product Advice has the meaning given to it under section 766B of the Corporations Act.

Independent Expert means the person, firm or company required to be appointed under paragraph 3.9.

Needs-Based Discussion means any discussion with a customer regarding their financial situation and needs which is similar in structure and content to a Financial Health Check.

Personal Advice and **General Advice** have the meanings given to them in s766B of the Corporations Act.

Relevant Period means 1 July 2013 to 8 October 2017.

Superannuation Product means a superannuation interest as defined by section 10 of the *Superannuation Industry (Supervision) Act 1993* (Cth).

2. Background

ASIC's role

- 2.1 Under s1 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 CBA holds Australian Financial Services Licence 234945 and provides financial services under that AFSL.
- 2.3 Essential Super is a superannuation product issued out of the superannuation fund known as Commonwealth Essential Super (ABN 56 601 925 435). CBA provides financial services in respect of Essential Super under its AFSL.
- 2.4 During the Relevant Period, CBA has distributed Essential Super through its branch network. Essential Super is offered to customers by branch employees who are accredited to provide General Advice to customers about Essential Super, and to commence and process applications for customers for Essential Super. In addition, until 1 January 2017 branch employees also helped customers to roll over funds from their other superannuation accounts into Essential Super.
- 2.5 During the Relevant Period, the sale of Essential Super in branch sometimes followed a branch process called a Financial Health Check.
- 2.6 A Financial Health Check involves branch staff asking questions about a customer's general banking needs, including the customer's goals and aspirations in relation to their everyday banking, credit, insurance, and

savings and investments (including superannuation), in order to assist them with their banking needs.

- 2.7 Branch staff may offer Essential Super to customers at the conclusion of a Financial Health Check by taking the following steps:
 - 2.7.1 providing a General Advice warning to the customer;
 - 2.7.2 raising Essential Super with the customer;
 - 2.7.3 if the customer is interested in discussing the product, initiate a series of screens that explain the key product features of Essential Super to the customer. The screens are viewed by customers and display an additional general advice warning. They also prompt branch staff to read the warning out verbally; and
 - 2.7.4 open an Essential Super account, if so instructed.
- 2.8 Until 1 January 2017, in some circumstances, branch staff may have discussed with the customer the benefits of consolidating multiple existing superannuation accounts and offered to assist the customer in rolling their external accounts into their Essential Super account.
- 2.9 Throughout the Relevant Period, between 38% - 49% of all Essential Super accounts have been opened immediately or shortly after a Financial Health Check.

ASIC's investigation and analysis

- 2.10 In about August 2014, ASIC commenced a surveillance of CBA and its branch sales of Essential Super.
- 2.11 On 19 November 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 CBA in relation to the Essential Super sales process over the Relevant Period.
- 2.12 ASIC's investigation concluded that, during the Relevant Period:
 - 2.12.1 by virtue of the proximity between a Financial Health Check and the contemporaneous Financial Product Advice in connection with Essential Super given by staff, there is a risk that CBA staff may in some cases have considered, or a reasonable person in the position of a customer might expect that CBA staff were considering, one or more of the customer's objectives, financial situation or needs uncovered during the Financial Health Check, and thus providing Personal Advice to customers about Essential Super; and
 - 2.12.2 if CBA branch staff members provided Personal Advice about Essential Super to customers during the Relevant Period as

contemplated above, the disclosure and consumer protection obligations that apply where Personal Advice is provided, contained in Chapter 7 parts 7 and 7.7A of the Corporations Act, will not have been met.

ASIC's concerns

- 2.13 ASIC is concerned that, in circumstances where a Financial Health Check is followed by the contemporaneous Financial Product Advice in connection with Essential Super given by staff, this may have resulted in CBA failing to comply with its obligations under the Corporations Act in relation to some sales of Essential Super during the Relevant Period. Specifically, the following breaches may have occurred in relation to some sales:
- 2.13.1 Section 912A(1)(c), which requires a financial services licensee to comply with the financial services laws;
 - 2.13.2 Section 946A, which requires an advice provider to give a client a Statement of Advice when the provider gives the client Personal Advice;
 - 2.13.3 Section 961K, by virtue of the failure by CBA branch staff to act in the best interests of customers as required by s 961B(1) of the Corporations Act in relation to Personal Advice; and
 - 2.13.4 Section 961L, which requires a financial services licensee to take reasonable steps to ensure that its representatives comply, relevantly, with section 961B, which requires a provider to act in the best interests of the client when the client is provided with Personal Advice.
- 2.14 ASIC is concerned that there is a risk that the branch sales of Essential Super by CBA branch staff in the circumstances outlined at paragraphs 2.5 to 2.8 above may not have allowed informed decision making by the retail client in that the retail client may not have appreciated that the CBA branch staff were not considering the risks specific to the retail client of



acquiring an interest in Essential Super or disposing of existing superannuation interests.

Acknowledgement of ASIC's views

- 2.15 CBA acknowledges that the concerns expressed by ASIC in relation to the alleged facts are reasonably held and has offered an enforceable undertaking in the terms of paragraphs 3.2 to 3.18 below.

3. Undertakings

- 3.1 Under s93AA of the ASIC Act, CBA has offered, and ASIC has agreed to accept as an alternative to pursuing court action in relation to the conduct outlined in 2.5 – 2.8 above pursuant to sections 912A(1)(c) and 946A of the Corporations Act, and pursuing civil penalty court action pursuant to sections 961K(2) and 961L of the Corporations Act, the undertakings in paragraphs 3.2 to 3.19 below.
- 3.2 CBA undertakes that it will not recommend Essential Super or any other Superannuation Product to any customer immediately before, during, or immediately after, or in conjunction with, or in a manner that might be perceived by a reasonable person to be in conjunction with:
- 3.2.1 a Financial Health Check conducted with that customer; or
- 3.2.2 any other Needs-Based Discussion conducted with that customer.
- 3.3 CBA undertakes to ensure that any CBA staff member or representative who is to offer Essential Super or any other Superannuation Product to a customer will not be permitted to access any information obtained from that customer during a Financial Health Check or Needs-Based Discussion before providing any Financial Product Advice to the customer in relation to the offer.
- 3.4 CBA undertakes to ensure that, where any CBA staff member or representative offers Essential Super or any other Superannuation Product to a customer and they know that the customer has previously completed a Financial Health Check or any other Needs-Based Discussion, that staff member or representative will inform the customer that they will not have regard to the information provided to CBA by the customer in any Financial Health Check or Needs-Based Discussion.
- 3.5 CBA undertakes to, upon the Acceptance Date, take immediate steps to ensure that within 14 days of the Acceptance Date CBA staff and



representatives will comply with the steps outlined in paragraphs 3.2 to 3.4 above.

- 3.6 CBA undertakes that if CBA offers Essential Super or any other Superannuation Product to a customer by telephone, that call will be recorded.
- 3.7 The undertakings in paragraphs 3.2 to 3.6 do not apply to the following offers of Essential Super as long as those offers otherwise comply with the Corporations Act:
 - 3.7.1 offers made following provision of compliant Personal Advice; and
 - 3.7.2 offers made online or through other digital means that do not involve branch or call centre staff or representatives and where the offers are not linked to a Financial Health Check or Needs-Based Discussion.

Community Benefit Payment

- 3.8 CBA undertakes that it will make, within 30 days of the Acceptance Date (or such other date as may be agreed to by ASIC and CBA), a community benefit payment in the total amount of \$1.25 million 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.

Engagement of Independent Expert

- 3.9 CBA undertakes that within three months of the Acceptance Date CBA will request ASIC to approve:
 - 3.9.1 the appointment of an Independent Expert that meets the criteria in paragraph 3.11 below, and
 - 3.9.2 draft terms of engagement for that expert that meet the requirements of this enforceable undertaking.
- 3.10 If ASIC approves the draft terms of engagement and the Independent Expert following a request by CBA under paragraph 3.9, CBA 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 CBA.

- 3.11 CBA undertakes to nominate, under paragraph 3.9 above, an Independent Expert who, in CBA's opinion:
- 3.11.1 has the necessary expertise, experience and operational capacity to perform the role contemplated by this enforceable undertaking;
and
 - 3.11.2 is independent of CBA, 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.
- 3.12 CBA undertakes to ensure the terms of the Independent Expert's engagement provided to ASIC for approval under paragraph 3.9:
- 3.12.1 include a statement to the effect that the work of the Independent Expert is being carried out for CBA and ASIC, and acknowledging that ASIC is relying on the work of the Independent Expert;
 - 3.12.2 include a statement that, upon request by ASIC, ASIC is to be copied into all or some communications between CBA and the Independent Expert;
 - 3.12.3 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 judgment;
 - 3.12.4 include an acknowledgement that, in relation to the written reports to be provided to ASIC and CBA as described in paragraphs 3.12.6 – 3.12.10, ASIC may from time to time publicly refer to the content of the reports, and may make a summary of the content of the reports or a statement that refers to the content of the reports public;
 - 3.12.5 require the Independent Expert to conduct a review of CBA's compliance with paragraphs 3.2-3.6 of this enforceable undertaking, including but not limited to an audit of sample customer transactions and/or conversations where a recommendation has been made to a customer to open an Essential Super account;
 - 3.12.6 require the Independent Expert, within 60 days of engagement (or such other date as may be agreed to by ASIC) to provide a report to CBA clearly specifying any deficiencies identified by the



Independent Expert in CBA's compliance with paragraphs 3.2 to 3.6 of this enforceable undertaking, and to make recommendations for remedying those deficiencies (**Compliance Report**);

3.12.7 require the Independent Expert to provide ASIC with a copy of the Compliance Report within 7 days of CBA receiving it from the Independent Expert;

3.12.8 require the Independent Expert to conduct a further review of CBA's compliance with paragraphs 3.2 to 3.6 of this enforceable undertaking during the period of 12 months following the completion of the Compliance Report, but not before:

- i. a period of three months has elapsed following the provision of the Compliance Report to ASIC; and
- ii. any Action Plan prepared in accordance with paragraph 3.13 below has been implemented;

and prepare a written report (**Second Compliance Report**) of the further review;

3.12.9 require the Independent Expert to clearly specify in the Second Compliance Report any deficiencies identified by the Independent Expert in CBA's compliance with paragraphs 3.2 to 3.6 of this enforceable undertaking and make recommendations for remedying those deficiencies; and

3.12.10 require the Independent Expert to provide ASIC with a copy of the Second Compliance Report of the further review within 7 days of CBA receiving it from the Independent Expert.

3.13 If the Compliance Report identifies any non-compliance with paragraphs 3.2 to 3.6 of this enforceable undertaking, CBA undertakes to:

- i. consider the recommendations made by the Independent Expert to remedy those deficiencies and then provide to ASIC a plan (**Action Plan**) setting out the action it proposes to take to



- rectify those deficiencies and specifying the time in which this action will be taken;
- ii. provide the Action Plan to ASIC within 30 days of the date that the Compliance Report is provided to ASIC;
 - iii. implement the Action Plan within the time specified in the Action Plan; and
 - iv. if ASIC requests any reasonable modifications to the Action Plan, implement the Action Plan as modified within the time specified by ASIC.
- 3.14 If the Second Compliance Report identifies any non-compliance with paragraphs 3.2 to 3.6 of this enforceable undertaking, CBA undertakes to:
- i. consider the recommendations made by the Independent Expert to remedy those deficiencies and then provide to ASIC a plan (**Second Action Plan**) setting out the actions it proposes to take to rectify those deficiencies and specifying the time in which those actions will be taken;
 - ii. provide the Second Action Plan to ASIC within 30 days of the date that the Second Compliance Report was provided to ASIC;
 - iii. implement the Second Action Plan within the time specified in the Second Action Plan; and
 - iv. if ASIC requests any reasonable modifications to the Second Action Plan, CBA must implement the Second Action Plan as modified within the time specified by ASIC.
- 3.15 CBA undertakes that it will not vary the terms of engagement of the Independent Expert without the prior written approval of ASIC.
- 3.16 CBA undertakes to:
- 3.16.1 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; and
 - 3.16.2 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.

For the avoidance of doubt, CBA is not required to provide the Independent Expert with any document or information that is the

subject of a claim by CBA of legal professional privilege. If CBA does not produce, or provide access to, a document or information reasonably requested by the Independent expert under paragraphs 3.16.1 or 3.16.2 on the grounds that that document or information is subject to a claim of legal professional privilege, CBA 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.

Other undertakings

- 3.17 CBA undertakes that it will pay the costs of its compliance with this enforceable undertaking.
- 3.18 CBA undertakes to provide all documents and information requested by ASIC from time to time for the purpose of assessing CBA's compliance with the terms of this enforceable undertaking.
- 3.19 CBA undertakes to notify ASIC as soon as reasonably practicable and in any event within five business days of becoming aware of any failure by it to comply with a term of this enforceable undertaking.

4. Acknowledgements

- 4.1 CBA 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 will from time to time publicly report about compliance with this undertaking;
 - 4.1.3 will make this undertaking available for public inspection;
 - 4.1.4 may issue a media release referring to the content of the Compliance Report and the Second Compliance Report;
 - 4.1.5 may from time to time publicly refer to the content of the Compliance Report and the Second Compliance Report; and
 - 4.1.6 will make available for public inspection a summary of the content of the Compliance Report and Second Compliance Report, or a statement that refers to the content of the Compliance Report Second Compliance Report.
- 4.2 ASIC acknowledges that it will not refer to any information from an expert report 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, the 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 CBA or a third party otherwise than in a way that arises from the execution, implementation and reporting of the outcomes of the enforceable undertaking;
- 4.2.3 ASIC is satisfied should not be released because it would be against the public interest to do so; or
- 4.2.4 CBA has asked 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 CBA 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 Further, CBA acknowledges that:
 - 4.3.1 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;
 - 4.3.2 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.
- 4.4 CBA acknowledges that this undertaking has no operative force until accepted by ASIC, and CBA and ASIC acknowledge that the date of the enforceable undertaking is the date on which it is accepted by ASIC.



Signed by Commonwealth Bank of Australia (ACN 123 123 124) this 2nd July 2018 by its duly constituted attorney Angus Sullivan, Group Executive Retail Banking Services, under Power of Attorney dated 24 June 2013 and registered in in New South Wales Book 4651 No. 555 in the presence of:

[signature of attorney]

ANGUS SULLIVAN

[name of attorney]

[Handwritten signature]

[signature of witness]

NATALIE O'BRIEN

[name of witness]

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

[INSERT Name of Delegate] TIM MULHALLY

Delegate of Australian Securities and Investments Commission

[INSERT date] 3/7/2018