

2010-2011-2012

The Parliament of the  
Commonwealth of Australia

HOUSE OF REPRESENTATIVES

*As read a third time*

**Corporations Amendment (Further  
Future of Financial Advice Measures)  
Bill 2012**

**No.     , 2012**

**A Bill for an Act to amend the law in relation to  
financial products, and for related purposes**



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1 THIS Bill originated in the House of  
2 Representatives; and, having this day passed,  
3 is now ready for presentation to the Senate  
4 for its concurrence.

5 B.C. WRIGHT  
6 *Clerk of the House of Representatives*

7 House of Representatives  
8 22 March 2012

9 **A Bill for an Act to amend the law in relation to**  
10 **financial products, and for related purposes**

11 The Parliament of Australia enacts:

12 **1 Short title**

13 This Act may be cited as the *Corporations Amendment (Further*  
14 *Future of Financial Advice Measures) Act 2012.*

15 **2 Commencement**

16 (1) Each provision of this Act specified in column 1 of the table  
17 commences, or is taken to have commenced, in accordance with  
18 column 2 of the table. Any other statement in column 2 has effect  
19 according to its terms.  
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**Commencement information**

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<b>Column 1</b>	<b>Column 2</b>	<b>Column 3</b>
<b>Provision(s)</b>	<b>Commencement</b>	<b>Date/Details</b>
1. Sections 1 to 3 and anything in this Act not elsewhere covered by this table	The day this Act receives the Royal Assent.	
2. Schedule 1	Immediately after the commencement of Schedule 1 to the <i>Corporations Amendment (Future of Financial Advice) Act 2012</i> .	1 July 2012

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1 Note: This table relates only to the provisions of this Act as originally  
2 enacted. It will not be amended to deal with any later amendments of  
3 this Act.

4 (2) Any information in column 3 of the table is not part of this Act.  
5 Information may be inserted in this column, or information in it  
6 may be edited, in any published version of this Act.

7 **3 Schedule(s)**

8 Each Act that is specified in a Schedule to this Act is amended or  
9 repealed as set out in the applicable items in the Schedule  
10 concerned, and any other item in a Schedule to this Act has effect  
11 according to its terms.  
12

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1 **Schedule 1—Amendments**  
2

3 *Corporations Act 2001*

4 **1 Section 9 (after paragraph (b) of the definition of *civil***  
5 ***penalty order*)**

6 Insert:

7 (ba) a refund order under section 1317GA;

8 **2 Section 9 (paragraph (c) of the definition of *civil penalty***  
9 ***order*)**

10 Before “1317H”, insert “961M,”.

11 **3 Paragraph 199A(2)(b)**

12 Before “1317H”, insert “961M,”.

13 **4 Subsection 199A(3) (note 1)**

14 Before “1317E”, insert “961M,”.

15 **5 Subsection 769B(7)**

16 After “Part 7.7” (wherever occurring), insert “or 7.7A”.

17 **6 Subdivision B of Division 3 of Part 7.7**

18 Repeal the Subdivision.

19 **7 Paragraph 947B(2)(f)**

20 Omit “section 945B”, substitute “section 961H”.

21 **8 Paragraph 947C(2)(g)**

22 Omit “section 945B”, substitute “section 961H”.

23 **9 Paragraph 953B(1)(c)**

24 Omit “945A, 945B,”.

25 **10 Section 960**

26 Insert:

1                    *asset-based fee* has the meaning given by section 964F.

2        **11 Section 960**

3                    Insert:

4                    *basic banking product* has the meaning given by section 961F.

5        **12 Section 960**

6                    Insert:

7                    *conflicted remuneration* has the meaning given by section 963A,  
8                    as affected by sections 963B, 963C and 963D.

9        **13 Section 960**

10                    Insert:

11                    *custodian*, in relation to a registrable superannuation entity, has the  
12                    same meaning as in the *Superannuation Industry (Supervision) Act*  
13                    *1993*.

14        **14 Section 960**

15                    Insert:

16                    *group life policy for members of a superannuation entity* has the  
17                    meaning given by subsection 963B(2).

18        **15 Section 960**

19                    Insert:

20                    *life policy for a member of a default superannuation fund* has the  
21                    meaning given by subsection 963B(3).

22        **16 Section 960**

23                    Insert:

24                    *reasonable investigation* has a meaning affected by section 961D.

25        **17 Section 960**

26                    Insert:

27                    *reasonably apparent*:

- 1 (a) in Division 2—has the meaning given by section 961C; and  
2 (b) in Subdivision B of Division 5—has the meaning given by  
3 section 964H.

4 **18 Section 960**

5 Insert:

6 *registrable superannuation entity* has the same meaning as in the  
7 *Superannuation Industry (Supervision) Act 1993*.

8 **19 Section 960**

9 Insert:

10 *responsible licensee*, in relation to a contravention of a provision  
11 of this Part, has the meaning given by section 961P.

12 **20 Section 960**

13 Insert:

14 *RSE licensee* has the same meaning as in the *Superannuation*  
15 *Industry (Supervision) Act 1993*.

16 **21 Section 960**

17 Insert:

18 *volume-based shelf-space fee* has a meaning affected by  
19 section 964A.

20 **22 At the end of Division 1 of Part 7.7A**

21 Add:

22 **960B Obligations under this Part in addition to other obligations**

23 The obligations imposed on a person under this Part are in addition  
24 to any other obligations to which the person is subject under this  
25 Act or any other law.

26 **23 After Division 1 of Part 7.7A**

27 Insert:

1 **Division 2—Best interests obligations**

2 **Subdivision A—Preliminary**

3 **961 Application of this Division**

- 4 (1) This Division applies in relation to the provision of personal advice  
5 (the *advice*) to a person (the *client*) as a retail client.
- 6 (2) The individual who is to provide the advice is referred to in this  
7 Division as the *provider*.
- 8 (3) If 2 or more individuals are to provide the advice, each of those  
9 individuals is referred to in this Division as the *provider*.
- 10 (4) An individual is a *provider* for the purposes of this Division even if  
11 the individual is a representative of a financial services licensee  
12 and is to provide the advice on behalf of that licensee.
- 13 (5) If it is not reasonably possible to identify the individual who is to,  
14 or individuals who are to, provide the advice, the person who is to  
15 provide the advice is the *provider* for the purposes of this Division.
- 16 (6) A person who offers personal advice through a computer program  
17 is taken to be the person who is to provide the advice, and is the  
18 *provider* for the purposes of this Division.

19 **961A Application to a financial services licensee acting as an**  
20 **authorised representative**

21 If a financial services licensee is acting as an authorised  
22 representative of another financial services licensee in relation to  
23 the advice, this Division applies to the first licensee in relation to  
24 the advice in that licensee's capacity as an authorised  
25 representative (rather than in the capacity of licensee).

26 **Subdivision B—Provider must act in the best interests of the**  
27 **client**

28 **961B Provider must act in the best interests of the client**

- 29 (1) The provider must act in the best interests of the client in relation  
30 to the advice.

- 1 (2) The provider satisfies the duty in subsection (1), if the provider  
2 proves that the provider has done each of the following:
- 3 (a) identified the objectives, financial situation and needs of the  
4 client that were disclosed to the provider by the client  
5 through instructions;
- 6 (b) identified:
- 7 (i) the subject matter of the advice that has been sought by  
8 the client (whether explicitly or implicitly); and
- 9 (ii) the objectives, financial situation and needs of the client  
10 that would reasonably be considered as relevant to  
11 advice sought on that subject matter (the *client's*  
12 *relevant circumstances*);
- 13 (c) where it was reasonably apparent that information relating to  
14 the client's relevant circumstances was incomplete or  
15 inaccurate, made reasonable inquiries to obtain complete and  
16 accurate information;
- 17 (d) assessed whether the provider has the expertise required to  
18 provide the client advice on the subject matter sought and, if  
19 not, declined to provide the advice;
- 20 (e) if, in considering the subject matter of the advice sought, it  
21 would be reasonable to consider recommending a financial  
22 product:
- 23 (i) conducted a reasonable investigation into the financial  
24 products that might achieve those of the objectives and  
25 meet those of the needs of the client that would  
26 reasonably be considered as relevant to advice on that  
27 subject matter; and
- 28 (ii) assessed the information gathered in the investigation;
- 29 (f) based all judgements in advising the client on the client's  
30 relevant circumstances;
- 31 (g) taken any other step that, at the time the advice is provided,  
32 would reasonably be regarded as being in the best interests of  
33 the client, given the client's relevant circumstances.

34 Note: The matters that must be proved under subsection (2) relate to the  
35 subject matter of the advice sought by the client and the circumstances  
36 of the client relevant to that subject matter (the client's relevant  
37 circumstances). That subject matter and the client's relevant  
38 circumstances may be broad or narrow, and so the subsection  
39 anticipates that a client may seek scaled advice and that the inquiries  
40 made by the provider will be tailored to the advice sought.

1                    *Basic banking products—best interests duty satisfied if certain*  
2                    *steps are taken*

3                    (3) If:

- 4                    (a) the subject matter of the advice sought by the client is solely  
5                    a basic banking product; and  
6                    (b) the provider is an agent or employee of an Australian ADI, or  
7                    otherwise acting by arrangement with an Australian ADI  
8                    under the name of the Australian ADI;

9                    the provider satisfies the duty in subsection (1) if the provider takes  
10                    the steps mentioned in paragraphs (2)(a), (b) and (c).

11                    *General insurance products—best interests duty satisfied if certain*  
12                    *steps are taken*

13                    (4) If the subject matter of the advice sought by the client is solely a  
14                    general insurance product, the provider satisfies the duty in  
15                    subsection (1) if the provider takes the steps mentioned in  
16                    paragraphs (2)(a), (b) and (c).

17                    Note:            A responsible licensee or an authorised representative may contravene  
18                    a civil penalty provision if a provider fails to comply with this section  
19                    (see sections 961K and 961Q). The provider may be subject to a  
20                    banning order (see section 920A).

21                    *Regulations*

22                    (5) The regulations may prescribe:

- 23                    (a) a step, in addition to or substitution for the steps mentioned  
24                    in subsection (2), that the provider must, in prescribed  
25                    circumstances, prove that the provider has taken, to satisfy  
26                    the duty in subsection (1); or  
27                    (b) that the provider is not required, in prescribed circumstances,  
28                    to prove that the provider has taken a step mentioned in  
29                    subsection (2), to satisfy the duty in subsection (1); or  
30                    (c) circumstances in which the duty in subsection (1) does not  
31                    apply.

32                    **961C When is something *reasonably apparent*?**

33                    Something is *reasonably apparent* if it would be apparent to a  
34                    person with a reasonable level of expertise in the subject matter of  
35                    the advice that has been sought by the client, were that person

1 exercising care and objectively assessing the information given to  
2 the provider by the client.

3 **961D What is a *reasonable investigation*?**

- 4 (1) A *reasonable investigation* into the financial products that might  
5 achieve those of the objectives and meet those of the needs of the  
6 client that would reasonably be considered relevant to advice on  
7 the subject matter sought by the client does not require an  
8 investigation into every financial product available.
- 9 (2) However, if the client requests the provider to consider a specified  
10 financial product, a reasonable investigation into the financial  
11 products that might achieve those of the objectives and meet those  
12 of the needs of the client that would reasonably be considered  
13 relevant to advice on the subject matter sought by the client  
14 includes an investigation into that financial product.

15 **961E What would reasonably be regarded as in the best interests of  
16 the client?**

17 It would reasonably be regarded as in the best interests of the client  
18 to take a step, if a person with a reasonable level of expertise in the  
19 subject matter of the advice that has been sought by the client,  
20 exercising care and objectively assessing the client's relevant  
21 circumstances, would regard it as in the best interests of the client,  
22 given the client's relevant circumstances, to take that step.

23 **961F What is a *basic banking product*?**

24 Each of the following is a *basic banking product*:

- 25 (a) a basic deposit product;  
26 (b) a facility for making non-cash payments (see section 763D)  
27 that is related to a basic deposit product;  
28 (c) an FHSA product of a kind mentioned in subparagraph (c)(i)  
29 of the meaning of *FHSA* in section 8 of the *First Home*  
30 *Saver Accounts Act 2008* (first home saver accounts);  
31 (d) a facility for providing traveller's cheques;  
32 (e) any other product prescribed by regulations for the purposes  
33 of this paragraph.



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- 1 (4) If 2 or more individuals provide the advice and one of those  
2 individuals provides a warning in accordance with this section, the  
3 other individuals are taken to have complied with this section.
- 4 (5) Nothing in this section affects the duty of the provider under  
5 section 961B to make reasonable inquiries to obtain complete and  
6 accurate information.
- 7 Note: A responsible licensee or an authorised representative may contravene  
8 a civil penalty provision if a provider fails to comply with this section  
9 (see sections 961K and 961Q). The provider may be subject to a  
10 banning order (see section 920A).

11 **Subdivision E—Provider to give priority to the client’s interests**

12 **961J Conflict between client’s interests and those of provider,**  
13 **licensee, authorised representative or associates**

- 14 (1) If the provider knows, or reasonably ought to know, that there is a  
15 conflict between the interests of the client and the interests of:  
16 (a) the provider; or  
17 (b) an associate of the provider; or  
18 (c) a financial services licensee of whom the provider is a  
19 representative; or  
20 (d) an associate of a financial services licensee of whom the  
21 provider is a representative; or  
22 (e) an authorised representative who has authorised the provider,  
23 under subsection 916B(3), to provide a specified financial  
24 service or financial services on behalf of a financial services  
25 licensee; or  
26 (f) an associate of an authorised representative who has  
27 authorised the provider, under subsection 916B(3), to provide  
28 a specified financial service or financial services on behalf of  
29 a financial services licensee;  
30 the provider must give priority to the client’s interests when giving  
31 the advice.

32 Note: A responsible licensee or an authorised representative may contravene  
33 a civil penalty provision if a provider fails to comply with this section  
34 (see sections 961K and 961Q). The provider may be subject to a  
35 banning order (see section 920A).

- 36 (2) Subsection (1) does not apply if:

- 1 (a) the subject matter of the advice sought by the client is solely  
2 a basic banking product; and  
3 (b) the provider is an agent or employee of an Australian ADI, or  
4 otherwise acting by arrangement with an Australian ADI  
5 under the name of the Australian ADI.
- 6 (3) Subsection (1) does not apply if the subject matter of the advice  
7 sought by the client is solely a general insurance product.

## 8 **Subdivision F—Responsibilities of licensees under this Division**

### 9 **961K Civil penalty provision—sections 961B, 961G, 961H and 961J**

- 10 (1) A financial services licensee contravenes this section if the licensee  
11 contravenes section 961B, 961G, 961H or 961J.

12 Note: This subsection is a civil penalty provision (see section 1317E).

- 13 (2) A financial services licensee contravenes this section if:

14 (a) a representative, other than an authorised representative, of  
15 the licensee contravenes section 961B, 961G, 961H or 961J;  
16 and

17 (b) the licensee is the, or a, responsible licensee in relation to that  
18 contravention.

19 Note: This subsection is a civil penalty provision (see section 1317E).

### 20 **961L Licensees must ensure compliance**

21 A financial services licensee must take reasonable steps to ensure  
22 that representatives of the licensee comply with sections 961B,  
23 961G, 961H and 961J.

24 Note: This section is a civil penalty provision (see section 1317E).

### 25 **961M Civil action for loss or damage**

- 26 (1) This section applies if the client suffers loss or damage because of  
27 a contravention of a provision of this Division.

28 (2) A Court may order that one or more of the following persons  
29 compensate the client for the amount of the loss or damage:

30 (a) if the person who contravenes the provision is a financial  
31 services licensee—that licensee;

- 1 (b) if the person who contravenes the provision is a  
2 representative of a financial services licensee, or 2 or more  
3 financial services licensees—the, or a, responsible licensee in  
4 relation to the contravention.
- 5 (3) The Court may make the order under this section:  
6 (a) on its own initiative, during proceedings before the Court; or  
7 (b) on the application of ASIC; or  
8 (c) on the application of the client.
- 9 (4) In determining the damage suffered by the client, the Court may  
10 include profits resulting from the contravention that are made by:  
11 (a) if the person who contravenes the provision is a financial  
12 services licensee—the licensee; or  
13 (b) if the person who contravenes the provision is a  
14 representative of a financial services licensee, or 2 or more  
15 financial services licensees:  
16 (i) the representative; and  
17 (ii) where the Court’s order under subsection (2) relates to a  
18 financial services licensee that is the, or a, responsible  
19 licensee in relation to the contravention—the licensee.
- 20 (5) An order under this section may be made whether or not the  
21 licensee against whom the order is made (or anyone else) has been  
22 convicted of an offence, or been the subject of a civil penalty order,  
23 in respect of the matter.
- 24 (6) An action to recover the amount of the loss or damage may be  
25 begun at any time within 6 years after the contravention.
- 26 (7) An order under this section may be enforced as if it were a  
27 judgement of the Court.
- 28 (8) This section does not affect any liability that a person has under  
29 any other law.

30 **961N Additional powers of Court to make orders**

- 31 (1) The Court dealing with an action under subsection 961M(2) may,  
32 in addition to awarding loss or damage under that subsection and if  
33 it thinks it necessary in order to do justice between the parties:

- 1 (a) make an order declaring void a contract entered into by the  
2 client for or relating to a financial product or a financial  
3 service; and  
4 (b) if it makes an order under paragraph (a)—make such other  
5 order or orders as it thinks are necessary or desirable because  
6 of that order.
- 7 (2) Without limiting paragraph (1)(b), an order under that paragraph  
8 may include either or both of the following:  
9 (a) an order for the return of money paid by a person;  
10 (b) an order for the payment of an amount of interest specified  
11 in, or calculated in accordance with, the order.

12 **961P *Responsible licensee***

- 13 For the purposes of this Part, the, or a, *responsible licensee*, in  
14 relation to a contravention of a provision of this Part, is:  
15 (a) if the person who contravenes the provision is a  
16 representative of only one financial services licensee—that  
17 financial services licensee; or  
18 (b) if the person who contravenes the provision is a  
19 representative of more than one financial services licensee:  
20 (i) if, under the rules in section 917C, one of those  
21 licensees is responsible for the person’s conduct—that  
22 licensee; or  
23 (ii) if, under the rules in section 917C, 2 or more of those  
24 licensees are jointly and severally responsible for the  
25 person’s conduct—each of those licensees.

26 **Subdivision G—Responsibilities of authorised representatives**  
27 **under this Division**

28 **961Q Civil penalty provision—sections 961B, 961G, 961H and 961J**

- 29 (1) An authorised representative of a financial services licensee  
30 contravenes this section if the authorised representative  
31 contravenes section 961B, 961G, 961H or 961J.  
32 Note: This subsection is a civil penalty provision (see section 1317E).  
33 (2) Subsection (1) does not apply if:

- 1 (a) the licensee had provided the authorised representative with  
2 information or instructions about the requirements to be  
3 complied with in relation to the giving of personal advice;  
4 and  
5 (b) the authorised representative's failure to comply with  
6 section 961B, 961G, 961H or 961J occurred because the  
7 representative was acting in reliance on that information or  
8 those instructions; and  
9 (c) the representative's reliance on that information or those  
10 instructions was reasonable.

11 **24 After Division 3 of Part 7.7A**

12 Insert:

13 **Division 4—Conflicted remuneration**

14 **Subdivision A—Preliminary**

15 **963 Application to a financial services licensee acting as an**  
16 **authorised representative**

17 If a financial services licensee is acting as an authorised  
18 representative of another financial services licensee in relation to  
19 financial product advice, this Division applies to the first licensee  
20 in relation to the advice in that licensee's capacity as an authorised  
21 representative (rather than in the capacity of licensee).

22 **Subdivision B—What is conflicted remuneration?**

23 **963A *Conflicted remuneration***

24 ***Conflicted remuneration*** means any benefit, whether monetary or  
25 non-monetary, given to a financial services licensee, or a  
26 representative of a financial services licensee, who provides  
27 financial product advice to persons as retail clients that, because of  
28 the nature of the benefit or the circumstances in which it is given:

- 29 (a) could reasonably be expected to influence the choice of  
30 financial product recommended by the licensee or  
31 representative to retail clients; or

- 1 (b) could reasonably be expected to influence the financial  
2 product advice given to retail clients by the licensee or  
3 representative.

4 **963B Monetary benefit given in certain circumstances not *conflicted***  
5 ***remuneration***

- 6 (1) Despite section 963A, a monetary benefit given to a financial  
7 services licensee, or a representative of a financial services  
8 licensee, who provides financial product advice to persons as retail  
9 clients is not ***conflicted remuneration*** in the circumstances set out  
10 in any of the following paragraphs:
- 11 (a) the benefit is given to the licensee or representative solely in  
12 relation to a general insurance product;
  - 13 (b) the benefit is given to the licensee or representative solely in  
14 relation to a life risk insurance product, other than:
    - 15 (i) a group life policy for members of a superannuation  
16 entity (see subsection (2)); or
    - 17 (ii) a life policy for a member of a default superannuation  
18 fund (see subsection (3));
  - 19 (c) each of the following is satisfied:
    - 20 (i) the benefit is given to the licensee or representative in  
21 relation to the issue or sale of a financial product to a  
22 person;
    - 23 (ii) financial product advice in relation to the product, or  
24 products of that class, has not been given to the person  
25 as a retail client by the licensee or representative in the  
26 12 months immediately before the benefit is given;
  - 27 (d) the benefit is given to the licensee or representative by a  
28 retail client in relation to:
    - 29 (i) the issue or sale of a financial product by the licensee or  
30 representative to the client; or
    - 31 (ii) financial product advice given by the licensee or  
32 representative to the client;
  - 33 (e) the benefit is a prescribed benefit or is given in prescribed  
34 circumstances.
- 35 (2) A life risk insurance product is a ***group life policy for members of***  
36 ***a superannuation entity*** if the product is issued to an RSE licensee  
37 of a registrable superannuation entity, or a custodian in relation to a

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1 registrable superannuation entity, for the benefit of a class of  
2 members of the entity.

3 (3) A life risk insurance product is a *life policy for a member of a*  
4 *default superannuation fund* if:

5 (a) the product is issued to an RSE licensee of a registrable  
6 superannuation entity, or a custodian in relation to a  
7 registrable superannuation entity, for the benefit of a person  
8 who is a member of the entity; and

9 (b) the person has not given written notice to an employer of the  
10 person that the fund is the person's chosen fund, but the  
11 employer of the person makes contributions to the fund for  
12 the benefit of the person.

13 Note: Superannuation guarantee surcharge may be imposed on an employer  
14 if the employer does not make contributions to a superannuation fund  
15 for the benefit of its employees. If an employee does not notify the  
16 employer of the employee's chosen fund, the employer is still able to  
17 satisfy its obligations by making contributions to certain funds (see the  
18 *Superannuation Guarantee (Administration) Act 1992*).

19 **963C Non-monetary benefit given in certain circumstances not**  
20 ***conflicted remuneration***

21 Despite section 963A, a non-monetary benefit given to a financial  
22 services licensee, or a representative of a financial services  
23 licensee, who provides financial product advice to persons as retail  
24 clients is not ***conflicted remuneration*** in the circumstances set out  
25 in any of the following paragraphs:

26 (a) the benefit is given to the licensee or representative solely in  
27 relation to a general insurance product;

28 (b) each of the following is satisfied:

29 (i) the benefit is of less than an amount prescribed;

30 (ii) identical or similar benefits are not given on a frequent  
31 or regular basis;

32 (c) the benefit satisfies each of the following:

33 (i) the benefit has a genuine education or training purpose;

34 (ii) the benefit is relevant to the provision of financial  
35 product advice to persons as retail clients;

36 (iii) the benefit complies with regulations made for the  
37 purposes of this subparagraph;

38 (d) the benefit satisfies each of the following:

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- 1 (i) the benefit is the provision of information technology  
2 software or support;
- 3 (ii) the benefit is related to the provision of financial  
4 product advice to persons as retail clients in relation to  
5 the financial products issued or sold by the benefit  
6 provider;
- 7 (iii) the benefit complies with regulations made for the  
8 purposes of this subparagraph;
- 9 (e) the benefit is given to the licensee or representative by a  
10 retail client in relation to:
- 11 (i) the issue or sale of a financial product by the licensee or  
12 representative to the client; or
- 13 (ii) financial product advice given by the licensee or  
14 representative to the client;
- 15 (f) the benefit is a prescribed benefit or is given in prescribed  
16 circumstances.

17 **963D Benefits for recommending basic banking products not**  
18 ***conflicted remuneration***

- 19 Despite section 963A, a monetary or non-monetary benefit given to  
20 a financial services licensee, or a representative of a financial  
21 services licensee, is not ***conflicted remuneration*** if:
- 22 (a) the benefit is remuneration for work carried out, or to be  
23 carried out, by the licensee or representative as an agent or an  
24 employee of an Australian ADI, or in otherwise acting by  
25 arrangement with an Australian ADI under the name of the  
26 Australian ADI; and
- 27 (b) access to the benefit, or the amount of the benefit, is solely  
28 dependent on the licensee or representative recommending a  
29 basic banking product; and
- 30 (c) the licensee or representative does not, in the course of  
31 recommending that basic banking product, give other  
32 financial product advice that does not relate to a basic  
33 banking product.

1 **Subdivision C—Ban on conflicted remuneration**

2 **963E Licensee must not accept conflicted remuneration**

3 (1) A financial services licensee must not accept conflicted  
4 remuneration.

5 Note: This subsection is a civil penalty provision (see section 1317E).

6 (2) A financial services licensee contravenes this section if:

7 (a) a representative, other than an authorised representative, of  
8 the licensee accepts conflicted remuneration; and

9 (b) the licensee is the, or a, responsible licensee in relation to the  
10 contravention.

11 Note: This subsection is a civil penalty provision (see section 1317E).

12 **963F Licensee must ensure compliance**

13 A financial services licensee must take reasonable steps to ensure  
14 that representatives of the licensee do not accept conflicted  
15 remuneration.

16 Note: This section is a civil penalty provision (see section 1317E).

17 **963G Authorised representative must not accept conflicted**  
18 **remuneration**

19 (1) An authorised representative of a financial services licensee must  
20 not accept conflicted remuneration.

21 Note: This subsection is a civil penalty provision (see section 1317E).

22 (2) Subsection (1) does not apply if:

23 (a) the licensee had provided the authorised representative with  
24 information about the nature of the benefit to be accepted by  
25 the authorised representative; and

26 (b) at the time the authorised representative accepted the benefit,  
27 the representative was not aware that the benefit was  
28 conflicted remuneration because the representative was  
29 acting in reliance on that information; and

30 (c) the representative's reliance on that information was  
31 reasonable.

1 **963H Other representatives must not accept conflicted**  
2 **remuneration**

3 A representative, other than an authorised representative, of a  
4 financial services licensee must not accept conflicted remuneration  
5 unless it is in circumstances for which an employer of the licensee  
6 or representative is liable under section 963J.

7 Note: A representative who contravenes this section may be subject to a  
8 banning order (see section 920A).

9 **963J Employer must not give employees conflicted remuneration**

10 An employer of a financial services licensee, or a representative of  
11 a financial services licensee, must not give the licensee or  
12 representative conflicted remuneration for work carried out, or to  
13 be carried out, by the licensee or representative as an employee of  
14 the employer.

15 Note: This section is a civil penalty provision (see section 1317E).

16 **963K Product issuer or seller must not give conflicted remuneration**

17 An issuer or seller of a financial product must not give a financial  
18 services licensee, or a representative of a financial services  
19 licensee, conflicted remuneration.

20 Note: This section is a civil penalty provision (see section 1317E).

21 **963L Volume-based benefits presumed to be conflicted**  
22 **remuneration**

23 It is presumed for the purposes of this Division that a benefit of  
24 one of the following kinds is conflicted remuneration, unless the  
25 contrary is proved:

26 (a) a benefit access to which, or the value of which, is wholly or  
27 partly dependent on the total value of financial products of a  
28 particular class, or particular classes:

29 (i) recommended by a financial services licensee, or a  
30 representative of a financial services licensee, to retail  
31 clients, or a class of retail clients; or

32 (ii) acquired by retail clients, or a class of retail clients, to  
33 whom a financial services licensee, or a representative

- 1 of a financial services licensee, provides financial  
 2 product advice;
- 3 (b) a benefit access to which, or the value of which, is wholly or  
 4 partly dependent on the number of financial products of a  
 5 particular class, or particular classes:
- 6 (i) recommended by a financial services licensee, or a  
 7 representative of a financial services licensee, to retail  
 8 clients, or a class of retail clients; or
- 9 (ii) acquired by retail clients, or a class of retail clients, to  
 10 whom a financial services licensee, or a representative  
 11 of a financial services licensee, provides financial  
 12 product advice.

## 13 **Division 5—Other banned remuneration**

### 14 **Subdivision A—Volume-based shelf-space fees**

#### 15 **964 Application**

- 16 (1) This Subdivision applies if:
- 17 (a) a financial services licensee or an RSE licensee (the *platform*  
 18 *operator*) is, or offers to be, the provider of a custodial  
 19 arrangement; and
- 20 (b) a monetary or non-monetary benefit is given, or to be given,  
 21 by a financial services licensee or an RSE licensee (the *funds*  
 22 *manager*) to the platform operator; and
- 23 (c) a financial product to which the custodial arrangement relates  
 24 is a financial product in which the funds manager deals (the  
 25 *funds manager's financial product*).
- 26 (2) In this Subdivision:
- 27 *custodial arrangement* has the same meaning as it has in  
 28 subsection 1012IA(1), subject to subsection (3).
- 29 *provider* has the same meaning as in subsection 1012IA(1).
- 30 (3) The definition of *custodial arrangement* in subsection 1012IA(1)  
 31 is to be read as if the reference in that definition to an instruction  
 32 included a reference to a direction to follow an investment strategy  
 33 of the kind mentioned in subsection 52(4) of the *Superannuation*  
 34 *Industry (Supervision) Act 1993* that involves the acquisition of a

1 particular financial product, or a financial product of a particular  
2 kind.

3 (4) A reference to a kind of financial product in subsection (3) has the  
4 same meaning in that subsection as it has in the definition of  
5 **custodial arrangement** in subsection 1012IA(1).

6 **964A Platform operator must not accept volume-based shelf-space**  
7 **fees**

8 (1) The platform operator must not accept the benefit if it is a  
9 volume-based shelf-space fee.

10 Note: This subsection is a civil penalty provision (see section 1317E).

11 (2) Subject to subsection (3), the benefit is presumed to be a  
12 volume-based shelf-space fee if the benefit, or the value of benefit,  
13 is wholly or partly dependent on the total number or value of the  
14 funds manager's financial products of a particular class, or  
15 particular classes, to which the custodial arrangement relates.

16 (3) If it is proved that all or part of the benefit is of a kind specified in  
17 one of the following paragraphs then, to the extent that the benefit  
18 is of that kind, it is not presumed to be a volume-based shelf space  
19 fee:

20 (a) a reasonable fee for a service provided to the funds manager  
21 by the platform operator or another person;

22 (b) a discount on an amount payable, or a rebate of an amount  
23 paid, to the funds manager by the platform operator, the  
24 value of which does not exceed an amount that may  
25 reasonably be attributed to efficiencies gained by the funds  
26 manager because of the number or value of financial products  
27 in relation to which the funds manager provides services to  
28 the platform operator, or through the platform operator to  
29 another person.

30 **Subdivision B—Asset-based fees on borrowed amounts**

31 **964B Application**

32 This Subdivision applies where a financial services licensee, or a  
33 representative of a financial services licensee, provides financial  
34 product advice (the **advice**) to a person (the **client**) as a retail client.

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1 **964C Application to a financial services licensee acting as an**  
 2 **authorised representative**

3 If a financial services licensee is acting as an authorised  
 4 representative of another financial services licensee in relation to  
 5 the advice, this Subdivision applies to the first licensee in relation  
 6 to the advice in that licensee's capacity as an authorised  
 7 representative (rather than in the capacity of licensee).

8 **964D Financial services licensees must not charge asset-based fees**  
 9 **on borrowed amounts**

- 10 (1) The financial services licensee must not charge an asset-based fee  
 11 on a borrowed amount used or to be used to acquire financial  
 12 products by or on behalf of the client.

13 Note: This subsection is a civil penalty provision (see section 1317E).

- 14 (2) A financial services licensee contravenes this section if:

- 15 (a) a representative, other than an authorised representative, of  
 16 the licensee charges an asset-based fee on a borrowed amount  
 17 used or to be used to acquire financial products by or on  
 18 behalf of the client; and  
 19 (b) the licensee is the, or a, responsible licensee in relation to the  
 20 contravention.

21 Note: This subsection is a civil penalty provision (see section 1317E).

22 *Exceptions*

- 23 (3) Subsections (1) and (2) do not apply in relation to a borrowed  
 24 amount if it is not reasonably apparent that the amount has been  
 25 borrowed.  
 26 (4) The regulations may provide that subsections (1) and (2) do not  
 27 apply in prescribed circumstances.

28 *Duty to make reasonable inquiries*

- 29 (5) Nothing in this section affects the duty of the financial services  
 30 licensee, or the representative of the financial services licensee,  
 31 under section 961B to make reasonable inquiries to obtain  
 32 complete and accurate information.

1 **964E Authorised representatives must not charge asset-based fees**  
2 **on borrowed amounts**

- 3 (1) The authorised representative of the financial services licensee  
4 must not charge an asset-based fee on a borrowed amount used or  
5 to be used to acquire financial products by or on behalf of the  
6 client.

7 Note: This subsection is a civil penalty provision (see section 1317E).

8 *Exceptions*

- 9 (2) Subsection (1) does not apply in relation to a borrowed amount if it  
10 is not reasonably apparent that the amount has been borrowed.
- 11 (3) The regulations may provide that subsection (1) does not apply in  
12 prescribed circumstances.

13 *Duty to make reasonable inquiries*

- 14 (4) Nothing in this section affects the duty of the authorised  
15 representative under section 961B to make reasonable inquiries to  
16 obtain complete and accurate information.

17 **964F What is an asset-based fee?**

18 A fee for providing financial product advice to a person as a retail  
19 client is an *asset-based fee* to the extent that it is dependent upon  
20 the amount of funds used or to be used to acquire financial  
21 products by or on behalf of the person.

22 **964G Meaning of borrowed**

- 23 (1) In this Subdivision:

24 *borrowed* means borrowed in any form, whether secured or  
25 unsecured, including through:

- 26 (a) a credit facility within the meaning of the regulations; and  
27 (b) a margin lending facility.

- 28 (2) To avoid doubt, an amount is no longer borrowed to the extent that  
29 it has been repaid.

**964H When is something *reasonably apparent*?**

Something is *reasonably apparent* if it would be apparent to a person with a reasonable level of expertise in the subject matter of the advice that has been sought by the client, were that person exercising care and objectively assessing the information given to the financial services licensee, or the representative of the financial services licensee, by the client.

**25 Paragraph 965(a)**

Omit “for the sole or dominant purpose”, substitute “for the sole purpose or for a purpose (that is not incidental)”.

**26 Section 1317DA (definition of *corporation/scheme civil penalty provision*)**

Repeal the definition, substitute:

*corporation/scheme civil penalty provision* means a provision referred to in subsection 1317E(1), other than in paragraphs 1317E(1)(jaab) to (jg).

**27 Section 1317DA (definition of *financial services civil penalty provision*)**

Repeal the definition, substitute:

*financial services civil penalty provision* means a provision referred to in any of paragraphs 1317E(1)(jaab) and (jaai) to (jg).

**28 Paragraphs 1317E(1)(j) to (jae)**

Repeal the paragraphs, substitute:

- (j) subsection 601JD(3) (duties of members);
- (ja) subsection 601UAA(2) (duties of officers of licensed trustee company);
- (jaaa) subsection 601UAB(2) (duties of employees of licensed trustee company);
- (jaab) subsection 674(2), 674(2A), 675(2) or 675(2A) (continuous disclosure);
- (jaac) subsection 798H(1) (complying with market integrity rules);
- (jaad) subsections 961K(1) and (2) (financial services licensee responsible for breach of certain best interests duties);

- 1 (jaae) section 961L (financial services licensee to ensure  
2 compliance with certain best interests duties);  
3 (jaaf) subsection 961Q(1) (authorised representative responsible for  
4 breach of certain best interests duties);  
5 (jaag) section 962P (charging ongoing fee after termination of  
6 ongoing fee arrangement);  
7 (jaah) subsection 962S(1) (fee recipient must give fee disclosure  
8 statement);  
9 (jaai) subsections 963E(1) and (2) (financial services licensee  
10 responsible for breach of ban on conflicted remuneration);  
11 (jaaj) section 963F (financial services licensee must ensure  
12 representatives do not accept conflicted remuneration);  
13 (jaak) subsection 963G(1) (authorised representative must not  
14 accept conflicted remuneration);  
15 (jaal) section 963J (employer must not pay employees conflicted  
16 remuneration);  
17 (jaam) section 963K (financial product issuer or seller must not give  
18 conflicted remuneration to financial services licensee or  
19 representative);  
20 (jaan) subsection 964A(1) (platform operator must not accept  
21 volume-based shelf-space fees);  
22 (jaao) subsections 964D(1) and (2) (financial services licensee  
23 responsible for breach of asset-based fees on borrowed  
24 amounts);  
25 (jaap) subsection 964E(1) (authorised representative must not  
26 charge asset-based fees on borrowed amounts);  
27 (jaaq) section 965 (anti-avoidance of Part 7.7A provisions);

28 **29 Paragraph 1317G(1A)(b)**

29 After “financial services civil penalty provision”, insert “not dealt with  
30 in subsections (1E) to (1G)”.

31 **30 Subsections 1317G(1E) to (1G)**

32 Repeal the subsections, substitute:

33 *Best interests obligations and remuneration*

34 (1E) A Court may order a person to pay the Commonwealth a pecuniary  
35 penalty if:

- 
- 1 (a) a declaration of contravention by the person has been made  
2 under section 1317E; and  
3 (b) the contravention is of one of the following provisions:  
4 (i) subsections 961K(1) and (2) (financial services licensee  
5 responsible for breach of certain best interests duties);  
6 (ii) section 961L (financial services licensee to ensure  
7 compliance with certain best interests duties);  
8 (iii) subsection 961Q(1) (authorised representative  
9 responsible for breach of certain best interests duties);  
10 (iv) section 962P (charging ongoing fee after termination of  
11 ongoing fee arrangement);  
12 (v) subsection 962S(1) (fee recipient must give fee  
13 disclosure statement);  
14 (vi) subsections 963E(1) and (2) (financial services licensee  
15 must not accept conflicted remuneration);  
16 (vii) section 963F (financial services licensee must ensure  
17 representatives do not accept conflicted remuneration);  
18 (viii) subsection 963G(1) (authorised representative must not  
19 accept conflicted remuneration);  
20 (ix) section 963J (employer must not pay employees  
21 conflicted remuneration);  
22 (x) section 963K (financial product issuer or seller must not  
23 give conflicted remuneration to financial services  
24 licensee or representative);  
25 (xi) subsection 964A(1) (platform operator) must not accept  
26 volume-based shelf-space fees);  
27 (xii) subsections 964D(1) and (2) (financial services licensee  
28 must not charge asset-based fees on borrowed amounts);  
29 (xiii) subsection 964E(1) (authorised representative must not  
30 charge asset-based fees on borrowed amounts);  
31 (xiv) section 965 (anti-avoidance of Part 7.7A provisions).
- 32 (1F) The maximum amount that the court may order the person to pay  
33 for contravening a provision mentioned in paragraph (1E)(b)  
34 (except a provision mentioned in subparagraph (1E)(b)(iv) or (v))  
35 is:  
36 (a) \$200,000 for an individual; or  
37 (b) \$1 million for a body corporate.

- 1 (1G) The maximum amount that the court may order the person to pay  
2 for contravening a provision mentioned in  
3 subparagraph (1E)(b)(iv) or (v) is:  
4 (a) \$50,000 for an individual; or  
5 (b) \$250,000 for a body corporate.

6 **31 After paragraph 1317P(1)(b)**

- 7 Insert:  
8 (ba) a refund order has been made against the person; or

9 **32 Subsection 1317S(1) (paragraph (a) of the definition of**  
10 ***eligible proceedings*)**

11 After “588W,”, insert “961M, 1317GA,”.

12 **33 At the end of Chapter 10**

13 Add:

14 **Part 10.18—Transitional provisions relating to the**  
15 **Corporations Amendment (Further Future**  
16 **of Financial Advice Measures) Act 2012**  
17

18 **1526 Definitions**

19 (1) In this Part:

20 ***amending Act*** means the *Corporations Amendment (Further*  
21 *Future of Financial Advice Measures) Act 2012*.

22 ***custodial arrangement*** has the same meaning as it has in  
23 subsection 1012IA(1), subject to subsection (2).

24 ***platform operator*** means the provider of a custodial arrangement,  
25 or custodial arrangements.

26 ***provider***, in relation to a custodial arrangement, has the same  
27 meaning as in subsection 1012IA(1).

28 (2) The definition of ***custodial arrangement*** in subsection 1012IA(1)  
29 is to be read as if the reference in that definition to an instruction  
30 included a reference to a direction to follow an investment strategy

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1 of the kind mentioned in subsection 52(4) of the *Superannuation*  
2 *Industry (Supervision) Act 1993* that involves the acquisition of a  
3 particular financial product, or a financial product of a particular  
4 kind.

### 5 **1527 Application of best interests obligations**

6 Division 2 of Part 7.7A, as inserted by item 23 of Schedule 1 to the  
7 amending Act, applies in relation to the provision of personal  
8 advice to a person as a retail client on or after the day on which  
9 that item commences (whether or not the advice was sought before  
10 that day).

### 11 **1528 Application of ban on conflicted remuneration**

- 12 (1) Subject to subsections (2) and (3), Division 4 of Part 7.7A, as  
13 inserted by item 24 of Schedule 1 to the amending Act, does not  
14 apply to a benefit given to a financial services licensee, or a  
15 representative of a financial services licensee, if:  
16 (a) the benefit is given under an arrangement entered into before  
17 the day on which that item commences; and  
18 (b) the benefit is not given by a platform operator.
- 19 (2) The regulations may prescribe circumstances in which that  
20 Division applies, or does not apply, to a benefit given to a financial  
21 services licensee or a representative of a financial services licensee.
- 22 (3) Despite subsection (1), that Division does not apply to a benefit  
23 given to a financial services licensee, or a representative of a  
24 financial services licensee, to the extent that the operation of that  
25 Division would result in an acquisition of property (within the  
26 meaning of paragraph 51(xxxi) of the Constitution) from a person  
27 otherwise than on just terms (within the meaning of that paragraph  
28 of the Constitution).

### 29 **1529 Application of ban on other remuneration—volume-based** 30 **shelf-space fees**

- 31 (1) Subject to subsection (2), Subdivision A of Division 5 of  
32 Part 7.7A, as inserted by item 24 of Schedule 1 to the amending  
33 Act, does not apply to a benefit given to a financial services

1 licensee, or an RSE licensee, under an arrangement entered into  
2 before the day on which that item commences.

3 (2) The regulations may prescribe circumstances in which that  
4 Subdivision applies to a benefit given to a financial services  
5 licensee, or an RSE licensee, under an arrangement entered into  
6 before the day on which that item commences.

7 **1530 Regulations do not apply where an acquisition of property**  
8 **otherwise than on just terms would result**

9 Regulations made for the purposes of subsection 1528(2) or  
10 1529(2) do not apply to the extent that the operation of the  
11 regulations would result in an acquisition of property (within the  
12 meaning of paragraph 51(xxxi) of the Constitution) from a person  
13 otherwise than on just terms (within the meaning of that  
14 paragraph).

15 **1531 Application of ban on other remuneration—asset-based fees on**  
16 **borrowed amounts**

17 (1) Subdivision B of Division 5 of Part 7.7A, as inserted by item 24 of  
18 Schedule 1 to the amending Act, applies to asset-based fees  
19 charged on or after the day on which that item commences on  
20 borrowed amounts, but only to the extent that those amounts are  
21 used or to be used to acquire financial products on or after that day.

22 (2) Despite subsection (1), that Subdivision does not apply to an  
23 asset-based fee charged on or after the day on which that item  
24 commences, to the extent that the operation of that Subdivision  
25 would result in an acquisition of property (within the meaning of  
26 paragraph 51(xxxi) of the Constitution) from a person otherwise  
27 than on just terms (within the meaning of that paragraph of the  
28 Constitution).

29 **34 Schedule 3 (table items 270A, 270B and 270C)**

30 Repeal the items.  
31

(270/11)

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