

2010-2011-2012

The Parliament of the
Commonwealth of Australia

HOUSE OF REPRESENTATIVES

As read a third time

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

No. , 2012

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

Contents

| | | |
|------------------------------|------------------------------|----------|
| 1 | Short title | 1 |
| 2 | Commencement | 1 |
| 3 | Schedule(s) | 2 |
| Schedule 1—Amendments | | 3 |
| | <i>Corporations Act 2001</i> | 3 |

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 advice, and for related purposes**

11 The Parliament of Australia enacts:

12 **1 Short title**

13 This Act may be cited as the *Corporations Amendment (Future of*
14 *Financial Advice) 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.
20

Commencement information

| Column 1 | Column 2 | Column 3 |
|---|---|---------------------|
| Provision(s) | Commencement | Date/Details |
| 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 | 1 July 2012. | 1 July 2012 |

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9 repealed as set out in the applicable items in the Schedule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

1 **Schedule 1—Amendments**
2

3 ***Corporations Act 2001***

4 **1 Section 760B (after table item 7)**

5 Insert:

- 7A 7.7A best interests obligations
charging ongoing fees to clients
ban on conflicted remuneration and other remuneration

6 **2 Paragraph 913B(1)(b)**

7 Repeal the paragraph, substitute:

- 8 (b) ASIC has no reason to believe that the applicant is likely to
9 contravene the obligations that will apply under section 912A
10 if the licence is granted; and

11 **3 Paragraph 913B(4)(a)**

12 Repeal the paragraph, substitute:

- 13 (a) any conviction of the person, within 10 years before the
14 application was made, for an offence that involves dishonesty
15 and is punishable by imprisonment for at least 3 months; and

16 **4 Paragraph 915C(1)(aa)**

17 Repeal the paragraph, substitute:

- 18 (aa) ASIC has reason to believe that the licensee is likely to
19 contravene their obligations under section 912A;

20 **5 Paragraph 920A(1)(ba)**

21 Repeal the paragraph, substitute:

- 22 (ba) ASIC has reason to believe that the person is likely to
23 contravene their obligations under section 912A; or

24 **6 After paragraph 920A(1)(c)**

25 Insert:

- 26 (d) ASIC has reason to believe that the person is not of good
27 fame or character; or

- 1 (da) ASIC has reason to believe that the person is not adequately
2 trained, or is not competent, to provide a financial service or
3 financial services; or

4 **7 Paragraph 920A(1)(f)**

5 Repeal the paragraph, substitute:

- 6 (f) ASIC has reason to believe that the person is likely to
7 contravene a financial services law; or

8 **8 At the end of subsection 920A(1)**

9 Add:

- 10 (g) the person has been involved in the contravention of a
11 financial services law by another person; or
12 (h) ASIC has reason to believe that the person is likely to
13 become involved in the contravention of a financial services
14 law by another person.

15 **9 After subsection 920A(1)**

16 Insert:

17 (1A) In considering whether, at a particular time, there is reason to
18 believe that a person is not of good fame or character, ASIC must
19 (subject to Part VIIC of the *Crimes Act 1914*) have regard to:

- 20 (a) any conviction of the person, within 10 years before that
21 time, for an offence that involves dishonesty and is
22 punishable by imprisonment for at least 3 months; and
23 (b) whether the person has held an Australian financial services
24 licence that was suspended or cancelled; and
25 (c) whether a banning order or disqualification order under
26 Division 8 has previously been made against the person; and
27 (d) any other matter ASIC considers relevant.

28 Note: Part VIIC of the *Crimes Act 1914* includes provisions that, in certain
29 circumstances, relieve persons from the requirement to disclose spent
30 convictions and require persons aware of such convictions to disregard
31 them.

32 (1B) To avoid doubt, a person contravenes a financial services law if a
33 person fails to comply with a duty imposed under that law, even if
34 the provision imposing the duty is not an offence provision or a
35 civil penalty provision.

1 **10 After Part 7.7**

2 Insert:

3 **Part 7.7A—Best interests obligations and**
4 **remuneration**

5 **Division 1—Preliminary**

6 **960 Definitions**

7 In this Part:

8 *disclosure day* has the meaning given by section 962J.

9 *fee disclosure statement* has the meaning given by subsection
10 962H(1).

11 *fee recipient* has the meaning given by section 962C.

12 *ongoing fee* has the meaning given by section 962B.

13 *ongoing fee arrangement* has the meaning given by section 962A.

14 *renewal notice* has the meaning given by subsection 962K(2).

15 *renewal notice day* has the meaning given by subsection 962L(1).

16 *renewal period* has the meaning given by subsection 962L(2).

17 *representative* of a financial services licensee has the same
18 meaning as in Part 7.6 (see section 910A).

19 **960A No contracting out**

20 A condition of a contract or other arrangement is void if it provides
21 that a party to the contract is required or bound to waive any right
22 under this Part, or waive the compliance with any requirement of
23 this Part.

1 **Division 3—Charging ongoing fees to clients**

2 **Subdivision A—Preliminary**

3 **962 Application of this Division**

- 4 (1) This Division applies in a case where:
- 5 (a) a financial services licensee, or a representative of a financial
- 6 services licensee, enters into an ongoing fee arrangement
- 7 with another person (the *client*); and
- 8 (b) the arrangement has not terminated for any reason.
- 9 (2) This Division also applies in a case where:
- 10 (a) the rights of a financial services licensee, or a representative
- 11 of a financial services licensee, under an ongoing fee
- 12 arrangement are assigned to another person; and
- 13 (b) the arrangement has not terminated for any reason.

14 **962A Ongoing fee arrangements**

15 *Ongoing fee arrangements*

- 16 (1) If:
- 17 (a) a financial services licensee gives personal advice to a person
- 18 as a retail client; and
- 19 (b) that person enters into an arrangement with the financial
- 20 services licensee, or a representative of the financial services
- 21 licensee; and
- 22 (c) under the terms of the arrangement, a fee (however described
- 23 or structured) is to be paid during a period of more than 12
- 24 months;
- 25 the arrangement is an *ongoing fee arrangement*.
- 26 (2) If:
- 27 (a) a representative of a financial services licensee gives
- 28 personal advice to a person as a retail client; and
- 29 (b) that person enters into an arrangement with the representative
- 30 or the financial services licensee; and
- 31 (c) under the terms of the arrangement, a fee (however described
- 32 or structured) is to be paid during a period of more than 12
- 33 months;

1 the arrangement is an *ongoing fee arrangement*.

2 *Paying for advice by instalments*

- 3 (3) Despite subsections (1) and (2), an arrangement is not an *ongoing*
4 *fee arrangement* if each of the following is satisfied:
- 5 (a) the total of the fees payable under the terms of the
6 arrangement is fixed at the time the arrangement is entered
7 into;
 - 8 (b) the total of the fees payable under the terms of the
9 arrangement is specified in the arrangement;
 - 10 (c) the fees payable under the terms of the arrangement are to be
11 paid by instalments over a fixed period specified in the
12 arrangement;
 - 13 (d) the fees payable under the terms of the arrangement can
14 reasonably be characterised as relating to personal advice
15 given to the person before the arrangement is entered into;
 - 16 (e) under the terms of the arrangement, there is no fee payment
17 of which, or the amount of which, is dependent on the
18 amount invested by the person, or the amount in relation to
19 which personal advice is given;
 - 20 (f) the person cannot opt out of payment of any of the fees
21 payable under the terms of the arrangement.

22 *Insurance premiums*

- 23 (4) Despite subsections (1) and (2), an arrangement is not an *ongoing*
24 *fee arrangement* if the only fee payable under the arrangement is
25 an insurance premium.

26 *Other prescribed arrangements*

- 27 (5) Despite subsections (1) and (2), an arrangement is not an *ongoing*
28 *fee arrangement* if it is an arrangement of a prescribed kind that
29 relates to a fee that is prescribed as a product fee.

30 **962B Ongoing fees**

31 A fee that is payable under an ongoing fee arrangement is referred
32 to in this Division as an *ongoing fee*.

1 **962C Fee recipients**

2 (1) Where:

3 (a) a financial services licensee enters into an ongoing fee
4 arrangement; and

5 (b) the rights of the licensee under the arrangement have not
6 been assigned to another person;

7 the licensee is the *fee recipient* in relation to the arrangement.

8 (2) Where:

9 (a) a representative of a financial services licensee enters into an
10 ongoing fee arrangement; and

11 (b) the rights of the representative under the arrangement have
12 not been assigned to another person;

13 the representative is the *fee recipient* in relation to the
14 arrangement.

15 (3) Where the rights of a financial services licensee, or a representative
16 of a financial services licensee, under an ongoing fee arrangement
17 have been assigned to another person, the person who currently
18 holds those rights is the *fee recipient* in relation to the
19 arrangement.

20 **962CA Exemption from application of opt-in requirement**

21 (1) ASIC may exempt a person, or a class of persons, from
22 section 962K (the *opt-in requirement*), if ASIC is satisfied that the
23 person is, or persons of that class are, bound by a code of conduct
24 approved by ASIC for the purposes of this section.

25 (2) A code of conduct is approved by ASIC for the purposes of this
26 section if:

27 (a) the code of conduct is approved by ASIC under
28 section 1101A; and

29 (b) ASIC is satisfied that the code of conduct obviates the need
30 for persons bound by the code to be bound by the opt-in
31 requirement; and

32 (c) ASIC is satisfied of any other matters prescribed by the
33 regulations.

34 (3) The exemption must be in writing and ASIC must publish notice of
35 it in the *Gazette*.

Subdivision B—Termination, disclosure and renewal**962D Application of this Subdivision**

- (1) This Subdivision only applies where:
- (a) the client has not been provided with personal advice as a retail client before the commencing day by:
 - (i) in a case where the client has entered into an ongoing fee arrangement with a financial services licensee—the financial services licensee or a representative of the financial services licensee; or
 - (ii) in a case where the client has entered into an ongoing fee arrangement with a representative of a financial services licensee—the representative or the financial services licensee; and
 - (b) the client enters into the ongoing fee arrangement on or after the commencing day.
- (2) In this section, the *commencing day* is the day on which this Part commences.

962E Client may terminate arrangement at any time

- (1) It is a condition of the ongoing fee arrangement that the client may terminate the arrangement at any time.
- (2) Any condition of the ongoing fee arrangement, or any other arrangement, that requires the client to pay an amount on terminating the ongoing fee arrangement is void to the extent that the amount exceeds the sum of:
- (a) any liability that the client has accrued but not satisfied under the ongoing fee arrangement before the termination; and
 - (b) the costs of the current fee recipient incurred solely and directly because of the termination.

962F Arrangement terminates if this Subdivision not complied with

- (1) It is a condition of the ongoing fee arrangement that the arrangement terminates if section 962G (the disclosure obligation) or section 962K (the renewal notice obligation) has not been complied with in relation the arrangement, whether by the current or a previous fee recipient.

1 (2) The client is not taken to have waived the client's rights under the
2 condition (subject to subsection (3)), or to have entered into a new
3 ongoing fee arrangement, if the client makes a payment of an
4 ongoing fee after a failure to comply with section 962G or
5 section 962K in relation to the ongoing fee arrangement.

6 (3) However, if the client makes a payment of an ongoing fee after a
7 failure to comply with section 962G or section 962K in relation to
8 the ongoing fee arrangement, the fee recipient is not obliged to
9 refund the payment.

10 Note: A Court may order that the fee recipient refund the amount (see
11 section 1317GA).

12 **962G Fee recipient must give fee disclosure statement**

13 (1) The current fee recipient in relation to an ongoing fee arrangement
14 must, before the end of a period of 30 days beginning on the
15 disclosure day for the arrangement, give the client a fee disclosure
16 statement in relation to the arrangement.

17 (2) The regulations may provide that subsection (1) does not apply in a
18 particular situation.

19 **962H Fee disclosure statements**

20 (1) A *fee disclosure statement*, in relation to an ongoing fee
21 arrangement, is a statement in writing that:

22 (a) includes the information required under this section; and

23 (b) relates to:

24 (i) a period of 12 months (the *previous year*) that ends on a
25 day that is no more than 30 days before that on which
26 the statement is given; and

27 (ii) any other period prescribed by the regulations.

28 (2) The following information is required for a fee disclosure
29 statement in relation to an ongoing fee arrangement, subject to
30 subsection (3):

31 (a) the amount of each ongoing fee paid under the arrangement
32 by the client in the previous year, expressed in Australian
33 dollars unless an alternative is provided in the regulations;

-
- 1 (c) information about the services that the client was entitled to
2 receive from the current and any previous fee recipient under
3 the arrangement during the previous year;
- 4 (d) information about the services that the client received from
5 the current and any previous fee recipient under the
6 arrangement during the previous year;
- 7 (f) information about any other prescribed matters, including
8 information that relates to a period that begins after the
9 previous year.
- 10 (3) The regulations may provide either or both of the following:
- 11 (a) that particular information is not required for a fee disclosure
12 statement, either in a particular situation or generally;
- 13 (b) a more detailed statement of the information that is required
14 for a fee disclosure statement, either in a particular situation
15 or generally.

16 **962J Disclosure day**

- 17 The *disclosure day* for an ongoing fee arrangement is:
- 18 (a) if no fee disclosure statement has been given to the client in
19 relation to the arrangement since the arrangement was
20 entered into—the anniversary of the day on which the
21 arrangement was entered into; and
- 22 (b) if a fee disclosure statement in relation to the arrangement
23 has been given to the client since the arrangement was
24 entered into—the anniversary of the day immediately after
25 the end of the earliest period of 12 months to which the last
26 fee disclosure statement given to the client related.

27 **962K Fee recipient must give renewal notice**

- 28 (1) The current fee recipient in relation to an ongoing fee arrangement
29 must, before the end of a period of 30 days beginning on the
30 renewal notice day for the arrangement, give the client a renewal
31 notice and a fee disclosure statement in relation to the arrangement.
- 32 (2) A *renewal notice*, in relation to an ongoing fee arrangement, is a
33 notice in writing that includes:
- 34 (a) a statement that the client may renew the arrangement by
35 giving the current fee recipient notice in writing of the
36 election; and

- 1 (b) a statement that the arrangement will terminate, and no
2 further advice will be provided or fee charged under it, if the
3 client does not elect to renew the arrangement; and
4 (c) a statement that the client will be taken to have elected not to
5 renew the arrangement if the client does not give the current
6 fee recipient notice in writing of an election to renew before
7 the end of the renewal period; and
8 (d) a statement that the renewal period is a period of 30 days
9 beginning on the day on which the renewal notice and fee
10 disclosure statement is given to the client.
- 11 (3) The regulations may provide that subsection (1) does not apply in a
12 particular situation.

13 **962L *Renewal notice day and renewal period***

- 14 (1) The *renewal notice day* for an ongoing fee arrangement means:
15 (a) if the arrangement has not previously been renewed—the
16 second anniversary of the day on which the arrangement was
17 entered into; and
18 (b) if the arrangement has previously been renewed—the second
19 anniversary of the last day on which the arrangement was
20 renewed.
- 21 (2) The *renewal period* for an ongoing fee arrangement is a period of
22 30 days beginning on the day on which the current fee recipient in
23 relation to the arrangement gives the client a renewal notice and a
24 fee disclosure statement in relation to the arrangement.

25 **962M *If client notifies fee recipient that client does not wish to***
26 ***renew***

27 If the client notifies the current fee recipient in relation to the
28 ongoing fee arrangement in writing within the renewal period for
29 the arrangement that the client does not wish to renew the
30 arrangement, the arrangement terminates on the day on which the
31 notification is given.

1 **962N If client does not notify fee recipient that client wishes to**
2 **renew**

3 If the client does not notify the current fee recipient in relation to
4 the ongoing fee arrangement in writing within the renewal period
5 for the arrangement that the client wishes to renew the
6 arrangement, the arrangement terminates at the end of a further
7 period of 30 days after the end of the renewal period for the
8 arrangement.

9 **962P Civil penalty provision—charging ongoing fees after**
10 **arrangement terminated**

11 If an ongoing fee arrangement terminates for any reason, the
12 current fee recipient in relation to the arrangement must not
13 continue to charge an ongoing fee.

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

15 **962Q Effect of termination**

16 To avoid doubt, if, under an ongoing fee arrangement, the
17 continued provision of a service to the client by the fee recipient in
18 relation to the arrangement is dependent on the continued payment
19 of an ongoing fee, on termination of the arrangement, the
20 obligation to continue to provide the service also terminates.

21 **Subdivision C—Disclosure for arrangements to which**
22 **Subdivision B does not apply**

23 **962R Application of this Subdivision**

24 This Subdivision applies to an ongoing fee arrangement to which
25 Subdivision B does not apply.

26 **962S Fee recipient must give fee disclosure statement**

- 27 (1) The current fee recipient in relation to the ongoing fee arrangement
28 must, within a period of 30 days beginning on the disclosure day
29 for the arrangement, give the client a fee disclosure statement in
30 relation to the arrangement.

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

- 1 (2) The regulations may provide that subsection (1) does not apply in a
2 particular situation.

3 **Division 6—Anti-avoidance**

4 **965 Anti-avoidance**

- 5 (1) Subject to subsection (2), a person must not, either alone or
6 together with one or more other persons, enter into, begin to carry
7 out or carry out a scheme if:
8 (a) it would be concluded that the person, or any of the persons,
9 who entered into, began to carry out or carried out the
10 scheme or any part of the scheme did so for the sole or
11 dominant purpose of avoiding the application of any
12 provision of this Part in relation to any person or persons
13 (whether or not a person or persons who entered into, began
14 to carry out or carried out the scheme or any part of the
15 scheme); and
16 (b) the scheme or the part of the scheme has achieved, or apart
17 from this section, would achieve, that purpose.

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

- 19 (2) Subsection (1) does not apply to a scheme to the extent that the
20 operation of the subsection would result in an acquisition of
21 property (within the meaning of paragraph 51(xxxi) of the
22 Constitution) from a person otherwise than on just terms (within
23 the meaning of that paragraph of the Constitution).

24 **11 Before paragraph 1317E(1)(jaa)**

25 Insert:

- 26 (jaac) section 962P (charging ongoing fee after termination of
27 ongoing fee arrangement);
28 (jaad) section 962S (fee recipient must give fee disclosure
29 statement);
30 (jaae) section 965 (anti-avoidance of Part 7.7A provisions);

31 **12 After subsection 1317G(1D)**

32 Insert:

Best interests obligations and remuneration

1
2 (1E) A Court may order a person to pay the Commonwealth a pecuniary
3 penalty if:

- 4 (a) a declaration of contravention by the person has been made
5 under section 1317E; and
6 (b) the contravention is of one of the following provisions:
7 (i) section 962P (charging ongoing fee after termination of
8 ongoing fee arrangement);
9 (ii) section 962S (fee recipient must give fee disclosure
10 statement);
11 (iii) section 965 (anti-avoidance of Part 7.7A provisions).

12 (1F) The maximum amount that the Court may order the person to pay
13 for contravening a provision mentioned in subparagraph (1E)(b)(i)
14 or (ii) is:

- 15 (a) \$50,000 for an individual; or
16 (b) \$250,000 for a body corporate.

17 (1G) The maximum amount that the Court may order the person to pay
18 for contravening a provision mentioned in
19 subparagraph (1E)(b)(iii) is:

- 20 (a) \$200,000 for an individual; or
21 (b) \$1 million for a body corporate.

22 **13 After section 1317G**

23 Insert:

24 **1317GA Refund orders—contravention of section 962P**

25 (1) A Court may order that a person (the *fee recipient*) refund a fee
26 paid to the fee recipient by another person (the *client*) if the Court
27 is satisfied that:

- 28 (a) the fee recipient knowingly or recklessly contravened
29 section 962P in charging the client the fee (charging ongoing
30 fee after termination of ongoing fee arrangement); and
31 (b) it is reasonable in all the circumstances to make the order.

32 Note: An order may be made under this subsection whether or not a
33 declaration of contravention has been made under section 1317E.

1
2
3
4
5
6
7
8
9
10
11
12
13
14

Applications for order

- (2) The Court may make the order under this section:
 - (a) on its own initiative, during proceedings before the Court; or
 - (b) on application by ASIC; or
 - (c) on the application of the client.

When order may be made

- (3) The Court must not make an order under this section in relation to fees paid more than 6 years before the proceedings for the order are commenced.

Recovery of amount as a debt

- (4) If the Court makes an order that the fee recipient refund an amount specified in the order to the client, the client may recover the amount as a debt due to the client.

(217/11)
