

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**

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 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.
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	Immediately after the commencement of Schedule 1 to the <i>Corporations Amendment (Future of Financial Advice) Act 2012</i> .	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9 repealed as set out in the applicable items in the Schedule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 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.

1 **Subdivision C—Resulting advice must be appropriate to the**
2 **client**

3 **961G Resulting advice must be appropriate to the client**

4 The provider must only provide the advice to the client if it would
5 be reasonable to conclude that the advice is appropriate to the
6 client, had the provider satisfied the duty under section 961B to act
7 in the best interests of the client.

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

12 **Subdivision D—Where resulting advice still based on**
13 **incomplete or inaccurate information**

14 **961H Resulting advice still based on incomplete or inaccurate**
15 **information**

- 16 (1) If it is reasonably apparent that information relating to the
17 objectives, financial situation and needs of the client on which the
18 advice is based is incomplete or inaccurate, the provider must, in
19 accordance with subsections (2) and (3), warn the client that:
20 (a) the advice is, or may be, based on incomplete or inaccurate
21 information relating to the client’s relevant personal
22 circumstances; and
23 (b) because of that, the client should, before acting on the advice,
24 consider the appropriateness of the advice, having regard to
25 the client’s objectives, financial situation and needs.
- 26 (2) The warning must be given to the client at the same time as the
27 advice is provided and, subject to subsection (3), by the same
28 means as the advice is provided.
- 29 (3) If a Statement of Advice is the means by which the advice is
30 provided, or is given to the client at the same time as the advice is
31 provided, the warning may be given by including it in the
32 Statement of Advice.

33 Note: The Statement of Advice must at least contain a record of the warning
34 (see paragraphs 947B(2)(f) and 947C(2)(g)).

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

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:

- 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.

Subdivision C—Ban on conflicted remuneration**963E Licensee must not accept conflicted remuneration**

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

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

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

- (a) a representative, other than an authorised representative, of the licensee accepts conflicted remuneration; and
(b) the licensee is the, or a, responsible licensee in relation to the contravention.

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

963F Licensee must ensure compliance

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

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

963G Authorised representative must not accept conflicted remuneration

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

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

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

- (a) the licensee had provided the authorised representative with information about the nature of the benefit to be accepted by the authorised representative; and
(b) at the time the authorised representative accepted the benefit, the representative was not aware that the benefit was conflicted remuneration because the representative was acting in reliance on that information; and
(c) the representative's reliance on that information was 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.

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:

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- (a) a declaration of contravention by the person has been made under section 1317E; and
- (b) the contravention is of one of the following provisions:
 - (i) subsections 961K(1) and (2) (financial services licensee responsible for breach of certain best interests duties);
 - (ii) section 961L (financial services licensee to ensure compliance with certain best interests duties);
 - (iii) subsection 961Q(1) (authorised representative responsible for breach of certain best interests duties);
 - (iv) section 962P (charging ongoing fee after termination of ongoing fee arrangement);
 - (v) subsection 962S(1) (fee recipient must give fee disclosure statement);
 - (vi) subsections 963E(1) and (2) (financial services licensee must not accept conflicted remuneration);
 - (vii) section 963F (financial services licensee must ensure representatives do not accept conflicted remuneration);
 - (viii) subsection 963G(1) (authorised representative must not accept conflicted remuneration);
 - (ix) section 963J (employer must not pay employees conflicted remuneration);
 - (x) section 963K (financial product issuer or seller must not give conflicted remuneration to financial services licensee or representative);
 - (xi) subsection 964A(1) (platform operator) must not accept volume-based shelf-space fees);
 - (xii) subsections 964D(1) and (2) (financial services licensee must not charge asset-based fees on borrowed amounts);
 - (xiii) subsection 964E(1) (authorised representative must not charge asset-based fees on borrowed amounts);
 - (xiv) section 965 (anti-avoidance of Part 7.7A provisions).

- (1F) The maximum amount that the court may order the person to pay for contravening a provision mentioned in paragraph (1E)(b) (except a provision mentioned in subparagraph (1E)(b)(iv) or (v)) is:
 - (a) \$200,000 for an individual; or
 - (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

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)
