

2010-2011

The Parliament of the
Commonwealth of Australia

HOUSE OF REPRESENTATIVES

Presented and read a first time

**Corporations Amendment (Further
Future of Financial Advice Measures)
Bill 2011**

No. , 2011

(Treasury)

**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> | | <i>3</i> |

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

3 The Parliament of Australia enacts:

4 **1 Short title**

5 This Act may be cited as the *Corporations Amendment (Further*
6 *Future of Financial Advice Measures) Act 2011*.

7 **2 Commencement**

8 (1) Each provision of this Act specified in column 1 of the table
9 commences, or is taken to have commenced, in accordance with
10 column 2 of the table. Any other statement in column 2 has effect
11 according to its terms.
12

Schedule 1—Amendments

Corporations Act 2001

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

Insert:

(ba) a refund order under section 1317GA;

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

Before “1317H”, insert “961M,”.

3 Paragraph 199A(2)(b)

Before “1317H”, insert “961M,”.

4 Subsection 199A(3) (note 1)

Before “1317E”, insert “961M,”.

5 Subsection 769B(7)

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

6 Subdivision B of Division 3 of Part 7.7

Repeal the Subdivision.

7 Paragraph 947B(2)(f)

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

8 Paragraph 947C(2)(g)

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

9 Paragraph 953B(1)(c)

Omit “945A, 945B,”.

10 Section 960

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:

Division 2—Best interests obligations

Subdivision A—Preliminary

961 Application of this Division

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

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

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

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

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

- (1) The provider must act in the best interests of the client in relation 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 would reasonably be regarded as
 32 being in the best interests of the client, given the client's
 33 relevant circumstances.

34 *Basic banking products—best interests duty satisfied if certain*
 35 *steps are taken*

- 36 (3) If:
- 37 (a) the subject matter of the advice sought by the client is solely
 38 a basic banking product; and
-

- 1 (b) the provider is an agent or employee of an Australian ADI, or
2 otherwise acting by arrangement with an Australian ADI
3 under the name of the Australian ADI;
4 the provider satisfies the duty in subsection (1) if the provider takes
5 the steps mentioned in paragraphs (2)(a), (b) and (c).

6 *General insurance products—best interests duty satisfied if certain*
7 *steps are taken*

- 8 (4) If the subject matter of the advice sought by the client is solely a
9 general insurance product, the provider satisfies the duty in
10 subsection (1) if the provider takes the steps mentioned in
11 paragraphs (2)(a), (b) and (c).

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

16 *Regulations*

- 17 (5) The regulations may prescribe:
18 (a) a step, in addition to or substitution for the steps mentioned
19 in subsection (2), that the provider must, in prescribed
20 circumstances, prove that the provider has taken, to satisfy
21 the duty in subsection (1); or
22 (b) that the provider is not required, in prescribed circumstances,
23 to prove that the provider has taken a step mentioned in
24 subsection (2), to satisfy the duty in subsection (1); or
25 (c) circumstances in which the duty in subsection (1) does not
26 apply.

27 **961C When is something *reasonably apparent*?**

28 Something is ***reasonably apparent*** if it would be apparent to a
29 person with a reasonable level of expertise in the subject matter of
30 the advice that has been sought by the client, were that person
31 exercising care and objectively assessing the information given to
32 the provider by the client.

961D What is a *reasonable investigation*?

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

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

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

961F What is a *basic banking product*?

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

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

Subdivision C—Resulting advice must be appropriate to the client

961G Resulting advice must be appropriate to the client

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

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

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

961H Resulting advice still based on incomplete or inaccurate information

- (1) If it is reasonably apparent that information relating to the objectives, financial situation and needs of the client on which the advice is based is incomplete or inaccurate, the provider must, in accordance with subsections (2) and (3), warn the client that:
 - (a) the advice is, or may be, based on incomplete or inaccurate information relating to the client's relevant personal circumstances; and
 - (b) because of that, the client should, before acting on the advice, consider the appropriateness of the advice, having regard to the client's objectives, financial situation and needs.
- (2) The warning must be given to the client at the same time as the advice is provided and, subject to subsection (3), by the same means as the advice is provided.
- (3) If a Statement of Advice is the means by which the advice is provided, or is given to the client at the same time as the advice is provided, the warning may be given by including it in the Statement of Advice.

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

(4) If 2 or more individuals provide the advice and one of those individuals provides a warning in accordance with this section, the other individuals are taken to have complied with this section.

(5) Nothing in this section affects the duty of the provider under section 961B to make reasonable inquiries to obtain complete and accurate information.

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

Subdivision E—Provider to give priority to the client's interests

961J Conflict between client's interests and those of provider, licensee, authorised representative or associates

(1) If the provider knows, or reasonably ought to know, that there is a conflict between the interests of the client and the interests of:

- (a) the provider; or
- (b) an associate of the provider; or
- (c) a financial services licensee of whom the provider is a representative; or
- (d) an associate of a financial services licensee of whom the provider is a representative; or
- (e) an authorised representative who has authorised the provider, under subsection 916B(3), to provide a specified financial service or financial services on behalf of a financial services licensee; or
- (f) an associate of an authorised representative who has authorised the provider, under subsection 916B(3), to provide a specified financial service or financial services on behalf of a financial services licensee;

the provider must give priority to the client's interests when giving the advice.

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

(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:

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

24 After Division 3 of Part 7.7A

Insert:

Division 4—Conflicted remuneration

Subdivision A—Preliminary

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

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

Subdivision B—What is conflicted remuneration?

963A *Conflicted remuneration*

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

- (a) could reasonably be expected to influence the choice of financial product recommended by the licensee or 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;
 - 26 (d) the benefit is given to the licensee or representative by a
27 retail client in relation to:
 - 28 (i) the issue or sale of a financial product by the licensee or
29 representative to the client; or
 - 30 (ii) financial product advice given by the licensee or
31 representative to the client;
 - 32 (e) the benefit is a prescribed benefit or is given in prescribed
33 circumstances.
- 34 (2) A life risk insurance product is a ***group life policy for members of***
35 ***a superannuation entity*** if the product is issued to an RSE licensee
36 of a registrable superannuation entity, or a custodian in relation to a

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

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

- (a) the product is issued to an RSE licensee of a registrable superannuation entity, or a custodian in relation to a registrable superannuation entity, for the benefit of a person who is a member of the entity; and
- (b) the person has not given written notice to an employer of the person that the fund is the person's chosen fund, but the employer of the person makes contributions to the fund for the benefit of the person.

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

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

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

- (a) the benefit is given to the licensee or representative solely in relation to a general insurance product;
- (b) each of the following is satisfied:
 - (i) the benefit is of less than an amount prescribed;
 - (ii) identical or similar benefits are not given on a frequent or regular basis;
- (c) the benefit satisfies each of the following:
 - (i) the benefit has a genuine education or training purpose;
 - (ii) the benefit is relevant to the provision of financial product advice to persons as retail clients;
 - (iii) the benefit complies with regulations made for the purposes of this subparagraph;
- (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.

963H Other representatives must not accept conflicted remuneration

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

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

963J Employer must not give employees conflicted remuneration

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

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

963K Product issuer or seller must not give conflicted remuneration

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

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

963L Volume-based benefits presumed to be conflicted remuneration

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

- (a) a benefit access to which, or the value of which, is wholly or partly dependent on the total value of financial products of a particular class, or particular classes:
 - (i) recommended by a financial services licensee, or a representative of a financial services licensee, to retail clients, or a class of retail clients; or
 - (ii) acquired by retail clients, or a class of retail clients, to whom a financial services licensee, or a representative

-
- of a financial services licensee, provides financial product advice;
- (b) a benefit access to which, or the value of which, is wholly or partly dependent on the number of financial products of a particular class, or particular classes:
- (i) recommended by a financial services licensee, or a representative of a financial services licensee, to retail clients, or a class of retail clients; or
- (ii) acquired by retail clients, or a class of retail clients, to whom a financial services licensee, or a representative of a financial services licensee, provides financial product advice.

Division 5—Other banned remuneration

Subdivision A—Volume-based shelf-space fees

964 Application

- (1) This Subdivision applies if:
- (a) a financial services licensee or an RSE licensee (the *platform operator*) is, or offers to be, the provider of a custodial arrangement; and
- (b) a monetary or non-monetary benefit is given, or to be given, by a financial services licensee or an RSE licensee (the *funds manager*) to the platform operator; and
- (c) a financial product to which the custodial arrangement relates is a financial product in which the funds manager deals (the *funds manager's financial product*).
- (2) In this Subdivision:
- custodial arrangement* has the same meaning as it has in subsection 1012IA(1), subject to subsection (3).
- provider* has the same meaning as in subsection 1012IA(1).
- (3) The definition of *custodial arrangement* in subsection 1012IA(1) is to be read as if the reference in that definition to an instruction included a reference to a direction to follow an investment strategy of the kind mentioned in subsection 52(4) of the *Superannuation 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.

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

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

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

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

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 charges an asset-based fee on a borrowed amount used or to be used to acquire financial products by or on behalf of the client; 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).

Exceptions

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

Duty to make reasonable inquiries

- (5) Nothing in this section affects the duty of the financial services licensee, or the representative of the financial services licensee, under section 961B to make reasonable inquiries to obtain 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 (jaae)

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.
-

(1G) The maximum amount that the court may order the person to pay for contravening a provision mentioned in subparagraph (1E)(b)(iv) or (v) is:

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

31 After paragraph 1317P(1)(b)

Insert:

- (ba) a refund order has been made against the person; or

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

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

33 At the end of Chapter 10

Add:

Part 10.18—Transitional provisions relating to the Corporations Amendment (Further Future of Financial Advice Measures) Act 2011

1526 Definitions

(1) In this Part:

amending Act means the *Corporations Amendment (Further Future of Financial Advice Measures) Act 2011*.

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

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

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

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

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

1527 Application of best interests obligations

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

1528 Application of ban on conflicted remuneration

(1) Subject to subsection (2), Division 4 of Part 7.7A, as inserted by item 24 of Schedule 1 to the amending Act, does not apply to a benefit given to a financial services licensee, or a representative of a financial services licensee, if:

- (a) the benefit is given under an arrangement entered into before the day on which that item commences; and
- (b) the benefit is not given by a platform operator.

(2) The regulations may prescribe circumstances in which that Division applies to a benefit given to a financial services licensee, or a representative of a financial services licensee, where:

- (a) the benefit is given under an arrangement entered into before the day on which that item commences; and
- (b) the benefit is not given by a platform operator.

(3) The regulations may prescribe other circumstances in which that Division applies, or does not apply, to a benefit given to a financial service licensee or a representative of a financial services licensee.

1529 Application of ban on other remuneration—volume-based shelf-space fees

(1) Subject to subsection (2), Subdivision A of Division 5 of Part 7.7A, as inserted by item 24 of Schedule 1 to the amending Act, does not apply to a benefit given to a financial services licensee, or an RSE licensee, under an arrangement entered into before the day on which that item commences.

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

5 **1530 Regulations do not apply where an acquisition of property**
6 **otherwise than on just terms would result**

7 Regulations made for the purposes of subsection 1528(2), 1528(3)
8 or 1529(2) do not apply to the extent that the operation of the
9 regulations would result in an acquisition of property (within the
10 meaning of paragraph 51(xxxi) of the Constitution) from a person
11 otherwise than on just terms (within the meaning of that
12 paragraph).

13 **1531 Application of ban on other remuneration—asset-based fees on**
14 **borrowed amounts**

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

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

27 **34 Schedule 3 (table items 270A, 270B and 270C)**

28 Repeal the items.