

2010-2011

The Parliament of the  
Commonwealth of Australia

HOUSE OF REPRESENTATIVES/THE SENATE

**EXPOSURE DRAFT**

If you have any comments on this exposure draft, they should be sent to:

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By Friday, 16 September 2011.

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

**No.     , 2011**

*(Treasury)*

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



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

3     The Parliament of Australia enacts:

4     **1 Short title**

5                     This Act may be cited as the *Corporations Amendment (Future of*  
6                     *Financial Advice) 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.  
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**Commencement information**

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<b>Column 1</b>	<b>Column 2</b>	<b>Column 3</b>
<b>Provision(s)</b>	<b>Commencement</b>	<b>Date/Details</b>

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1. Sections 1 to 3 and anything in this Act not elsewhere covered by this table	The day this Act receives the Royal Assent.	
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2. Schedule 1	1 July 2012.	1 July 2012
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1 Note: This table relates only to the provisions of this Act as originally  
2 enacted. It will not be amended to deal with any later amendments of  
3 this Act.

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

7 **3 Schedule(s)**

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9 repealed as set out in the applicable items in the Schedule  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

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## Schedule 1—Amendments

### *Corporations Act 2001*

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

Insert:

- 7A 7.7A best interests obligations  
charging ongoing fees to clients

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

Repeal the paragraph, substitute:

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

#### **3 Paragraph 915C(1)(aa)**

Repeal the paragraph, substitute:

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

#### **4 Paragraph 920A(1)(ba)**

Repeal the paragraph, substitute:

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

#### **5 After paragraph 920A(1)(c)**

Insert:

- (d) ASIC has reason to believe that the person is not of good fame and character; or  
(da) ASIC has reason to believe that the person is not adequately trained, or is not competent, to provide a financial service or financial services; or

#### **6 Paragraph 920A(1)(f)**

Repeal the paragraph, substitute:

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

1 **7 At the end of subsection 920A(1)**

2 Add:

- 3 (g) the person has been involved in the contravention of a  
4 financial services law by another person; or  
5 (h) ASIC has reason to believe that the person is likely to  
6 become involved in the contravention of a financial services  
7 law by another person.

8 **8 After subsection 920A(1)**

9 Insert:

10 (1A) In considering whether, at a particular time, there is reason to  
11 believe that a person is not of good fame or character, ASIC must  
12 (subject to Part VIIC of the *Crimes Act 1914*) have regard to:

- 13 (a) any conviction of the person, within 10 years before that  
14 time, for serious fraud; and  
15 (b) whether the person has held an Australian financial services  
16 licence that was suspended or cancelled; and  
17 (c) whether a banning order or disqualification order under  
18 Division 8 has previously been made against the person; and  
19 (d) any other matter ASIC considers relevant.

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

24 (1B) To avoid doubt, a person contravenes a financial services law if a  
25 person fails to comply with a duty imposed under that law, even if  
26 the provision imposing the duty is not an offence or a civil penalty  
27 provision.

28 **9 ~~Subdivision B of Division 3 of Part 7.7~~ [Section 944A](#)**

29 Repeal ~~the Subdivision~~ [section 944A](#), substitute:

30 **944A Situation in which Division applies**

31  
32  
33 (1) This Division applies in relation to the provision of  
34 personal advice (the **advice**) ~~in the following~~  
35 ~~circumstances~~ [to a person as a retail client \(the client\)](#);  
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(2) ~~(a) the advice is provided~~ For the purposes of this Division:

(a) a **providing entity** is:

- (i) ~~by a~~ the financial services licensee ~~(the providing entity)~~ who provides the advice or on whose behalf the advice is provided to the client; or
- (ii) where a person provides the advice ~~by a person (the providing entity)~~ in ~~their~~ the capacity of ~~an~~ authorised representative of a financial services licensee (the **authorising licensee**), or of 2 or more financial services licensees (the **authorising licensees**), that authorised representative; and

(b) ~~the advice is provided to a person (the client) as a retail client.~~ **provider** has the meaning given to that expression under subsections 961(2) to (6) as if a reference to “this Division” in those provisions includes this Division.

**10 Section 945A**

Repeal section 945A, substitute:

**945A Requirement to have a reasonable basis for the advice**

- (1) ~~The providing entity~~ **A provider** must only provide the advice to the client if:
  - (a) the ~~providing entity~~ **provider**:
    - (i) determines the relevant personal circumstances of the client ~~in relation to giving the advice~~; and
    - (ii) makes reasonable inquiries in relation to those personal circumstances~~;~~

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but only to the extent that it is reasonable and necessary having regard to the nature and subject matter of the advice required by the client; and

(b) having regard to information obtained from the client in relation to those personal circumstances, the-  
~~providing entity~~ provider has given such consideration to, and conducted such investigation of, the subject matter of the advice as is reasonable in all of the circumstances; and

(c) the advice is appropriate to the client, having regard to that consideration and investigation and the provider's duty under section 961C to act in the best interests of the client.

Note: ~~Failure to comply with this subsection is an offence (see subsection 1311(1)).~~ This subsection is a civil penalty provision (see section 1317E).

(2) In any proceedings against an authorised representative of a financial services licensee for ~~an offence~~ a contravention based on subsection (1), it is a defence if:

(a) the authorising 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 representative's failure to comply with subsection (1) 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.

Nothing in this subsection (2) shall be taken to limit the liability of the authorising licensee under this Chapter.

~~Note:—A defendant bears an evidential burden in relation to the matters in subsection (2). See subsection 13.3(3) of the Criminal Code.~~

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(3) A financial services licensee must take reasonable steps to ensure that ~~an authorised~~ representatives of the licensee ~~complies~~ comply with subsection (1).

Note: ~~Failure to comply with this subsection is an offence (see subsection 1311(1))~~ This subsection is a civil penalty provision (See section 1317E).

**11 Section 945B**

Repeal the section 945B, substitute:

**945B Obligation to warn client if advice based on incomplete or inaccurate information**

- (1) If:
- (a) the advice is based on information relating to the client’s relevant personal circumstances that is incomplete or inaccurate; and
  - (b) the ~~providing entity~~ provider knows that the information is incomplete or inaccurate, or is reckless as to whether it is incomplete or inaccurate;
- the ~~providing entity~~ provider must, in accordance with subsections (2) and (3), warn the client that:
- (c) the advice is, or may be, based on incomplete or inaccurate information relating to the client’s relevant personal circumstances; and
  - (d) because of that, the client should, before acting on the advice, consider the appropriateness of the advice, having regard to the client’s relevant personal circumstances.

Note: ~~Failure to comply with this subsection is an offence (see subsection 1311(1))~~ This subsection is a civil penalty provision (See section 1317E).

(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 the Statement of Advice (see Subdivision C) 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).

~~10 Paragraph 947B(2)(f)~~

~~Omit “section 945B”, substitute “section 961J”.~~

~~11 Paragraph 947C(2)(g)~~

~~Omit “section 945B”, substitute “section 961J”.~~

~~12 Paragraph 953B(1)(c)~~

~~Omit “945A, 945B,”.~~

~~13~~ **12 After Part 7.7**

Insert:

**Part 7.7A—Best interests obligations and fees**

**Division 1—Preliminary**

**960 Definitions**

In this Part:

*basic banking product* has the meaning given by section 961~~FE~~.

*disclosure day* has the meaning given by section 962F.

*fee disclosure statement* has the meaning given by subsection 962E(1).

*ongoing fee* has the meaning given by subsection 962A(2).

*ongoing fee arrangement* has the meaning given by subsection 962A(1).

- 1 ~~*reasonable investigation* has the meaning given by section 961E,~~  
2 ~~as affected by subsection 961G(3).~~
- 3 ~~*reasonably apparent* has the meaning given by section 961D.~~
- 4 *renewal notice* has the meaning given by subsection 962G(2).
- 5 *renewal notice day* has the meaning given by subsection 962H(1).
- 6 *renewal period* has the meaning given by subsection 962H(2).
- 7 *representative* of a financial services licensee has the same  
8 meaning as in Part 7.6 (see section 910A).
- 9 *responsible licensee*, in relation to a contravention of a provision  
10 of Division 2, has the meaning given by section 961RL.

11 **960A No contracting out**

12 A condition of a contract or other arrangement is void if it provides  
13 that a party to the contract is required or bound to waive any right  
14 under this Part, or waive the compliance with any requirement of  
15 this Part.

16 **Division 2—Best interests obligations**

17 **Subdivision A—Preliminary**

18 **961 Application of this Division**

- 19 (1) This Division applies in relation to the provision of personal advice  
20 (the *advice*) to a person (the *client*) as a retail client.
- 21 (2) The individual who provides the advice is referred to in this  
22 Division as the *provider*.
- 23 (3) If 2 or more individuals provide the advice, each of those  
24 individuals is referred to in this Division as the *provider*.
- 25 (4) An individual is a *provider* for the purposes of this Division even if  
26 the individual is a representative of a financial services licensee  
27 and provides the advice on behalf of that licensee.

- 1 (5) If it is not reasonably possible to identify the individual, or  
2 individuals, who provide the advice, the person who provides the  
3 advice is the *provider* for the purposes of this Division.
- 4 (6) A person who offers personal advice through a computer program  
5 is taken to have provided the advice, and is the *provider* for the  
6 purposes of this Division.

7 **961A Application to a financial services licensee acting as an**  
8 **authorised representative**

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

14 **961B Obligations under this Division in addition to other obligations**

15 The obligations imposed on the provider under this Division are in  
16 addition to any other obligations to which the provider is subject  
17 under any other law.

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

20 **961C Provider must act in the best interests of the client**

- 21
- 22 (1) The provider must act in the best interests of the client when  
23 giving the advice.
- 24
- 25 (2) ~~The steps that the provider must take in acting in the best~~  
26 ~~interests of the client include, but are not limited to~~For the  
27 purposes of this section, the provider acts in the best interests of  
28 the client if all the following conditions are satisfied:
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- 30 (a) the provider has identified:
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- 32 (i) the nature and scope of the advice required by  
33 the client; and  
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(ii) the relevant personal circumstances of the client in accordance with section 945A;

(b) the provider has the requisite knowledge, skills and experience to provide the advice;

(c) the provider has acted honestly and for the benefit of the client when giving advice;

(d) if there is a conflict between the client’s interest and the provider’s interest or that of any other person, the provider has:

(i) disclosed that conflict (including the nature and extent of the conflict) in writing to the client; and

(ii) given priority to the client’s interest when giving advice; and

~~(e)~~ any other requirements prescribed by regulations made for the purposes of this section have been complied with.

(3) The regulations may:

(a) set out additional requirements that must be satisfied in order for a provider to be taken to be acting in the best interests of a client in relation to the provision of advice; or

(b) clarify the requirements under this section.

Regulations made for the purposes of this subsection have effect despite anything else in this section.

~~(a) identifying the objectives, financial situation and needs of the client that are disclosed to the provider by the client through instructions; and~~

~~(b) identifying the subject matter of the advice that has been requested by the client; and~~

- 
- 1 ~~(c) where it is reasonably apparent that information~~  
2 ~~relating to the objectives, financial situation and needs of the~~  
3 ~~client that is given by the client in instructions is:~~
- 4 ~~(i) incomplete for the purposes of providing the~~  
5 ~~advice on the subject matter requested; or~~
- 6 ~~(ii) inaccurate;~~  
7 ~~make reasonable inquiries to obtain complete and~~  
8 ~~accurate information; and~~
- 9 ~~(d) where it is reasonably apparent that the client's~~  
10 ~~objectives could be better achieved, or the client's needs~~  
11 ~~better met, if the client obtained advice on another subject~~  
12 ~~matter, either in addition to or in substitution for the advice~~  
13 ~~requested, advising the client in writing of that fact; and~~
- 14 ~~(e) assessing whether the provider has the expertise~~  
15 ~~required to give the client advice on the subject matter~~  
16 ~~requested and, if not, declining to give advice; and~~
- 17 ~~(f) assessing whether the client's objectives could be~~  
18 ~~achieved, and needs met, through means other than the~~  
19 ~~acquisition of financial products; and~~
- 20 ~~(g) either:~~
- 21 ~~(i) conducting a reasonable investigation into the~~  
22 ~~financial products that might achieve the objectives and~~  
23 ~~meet the needs of the client of which the provider is~~  
24 ~~aware and assessing the information gathered in the~~  
25 ~~investigation; or~~
- 26 ~~(ii) if another individual has made such an~~  
27 ~~investigation and the provider has access to the results~~  
28 ~~of the investigation—assessing the information gathered~~  
29 ~~in the investigation; and~~
- 30 ~~(h) if the provider proposes to advise the client to acquire a~~  
31 ~~financial product in substitution for or in addition to another~~  
32 ~~financial product:~~
- 33 ~~(i) assessing the disadvantages (including risk and~~  
34 ~~increased complexity) in acquiring the product; and~~
- 35 ~~(ii) weighing them against the advantages of not~~  
36 ~~acquiring the product; and~~
- 37 ~~(iii) advising the client to acquire the product only~~  
38 ~~if, having weighed those disadvantages against the~~  
39 ~~advantages, it is reasonable to conclude that the client's~~
-



objectives could be better achieved, and the client's needs better met, if the client acquired the product; and

~~(i) basing all judgements in advising the client on the objectives, financial situation and needs of the client.~~

(3) If:

~~(a) the subject matter of the advice requested by the client is solely a basic banking product; and~~

~~(b) the provider is an agent or employee of an Australian ADI;~~

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

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 961MH and 961SM). The provider may be subject to a banning order (see section 920A).

#### **961D—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 requested by the client, were that person exercising care and objectively assessing the information given to the provider by the client.~~

#### **961E—What is a *reasonable investigation*?**

~~(1) A *reasonable investigation* into the financial products that might achieve the objectives and meet the needs of 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, or financial products of a specified class, a *reasonable investigation* into the financial products that might achieve the objectives and meet the needs of the client includes an investigation into that financial product, or financial products of that class.~~

#### **961FE—What is a *basic banking product*?**

Each of the following is *basic banking product*:

(a) a basic deposit product;

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

9 **961G Approved product lists**

10 *Approved product list maintained by licensee*

- 11 ~~(1) This section applies where:~~
- 12 ~~(a) the provider is a financial services licensee or a~~
  - 13 ~~representative of a financial services licensee; and~~
  - 14 ~~(b) the licensee maintains a list of financial products that it~~
  - 15 ~~recommends, or authorises its representatives to recommend;~~
  - 16 ~~and~~
  - 17 ~~(c) it is reasonably apparent that there is no product on that list~~
  - 18 ~~that would achieve the objectives and meet the needs of the~~
  - 19 ~~client.~~

20 *Approved product list maintained by authorised representative*

- 21 ~~(2) This section also applies where:~~
- 22 ~~(a) the provider is an authorised representative of a financial~~
  - 23 ~~services licensee, or an employee of an authorised~~
  - 24 ~~representative of a financial services licensee; and~~
  - 25 ~~(b) the authorised representative maintains a list of financial~~
  - 26 ~~products that it recommends, or authorises its employees to~~
  - 27 ~~recommend; and~~
  - 28 ~~(c) it is reasonably apparent that there is no product on that list~~
  - 29 ~~that would achieve the objectives and meet the needs of the~~
  - 30 ~~client.~~

31 *Reasonable investigation*

- 32 ~~(3) The requirement that the provider conduct a *reasonable*~~
- 33 ~~*investigation* into the financial products that might achieve the~~

~~objectives and meet the needs of the client does not require the provider to investigate products that are not on the list.~~

~~*No recommendation to be made from list*~~

~~(4) However, to satisfy the duty under section 961C to act in the best interests of the client the provider:~~

~~(a) must advise the client in writing that the provider cannot recommend a product from the list that might achieve the objectives and meet the needs of the client; and~~

~~(b) must not advise the client to acquire a product that is on the list.~~

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

**961HF Resulting advice must be appropriate to the client**

- (1) 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 961C 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 961MH and 961SM). The provider may be subject to a banning order (see section 920A).

(2) For the purposes of subsection (1), factors that affect any conclusion as to whether the advice is appropriate to the client include but are not limited to consideration of:

(a) whether the client’s objectives could be better achieved, or the client’s needs better met, if the advice given considered any other subject matter, either in addition to or in substitution for the advice requested;

(b) whether the client’s objectives could be achieved, and needs met, through means other than the acquisition of financial products;

(c) whether a reasonable investigation into the financial products that might achieve the objectives and meet the

needs of the client had been undertaken by the provider or, if undertaken by any other person, properly assessed by the provider.

**961G What is a reasonable investigation?**

(1) For the purposes of this Subdivision, a reasonable investigation into the financial products that might achieve the objectives and meet the needs of the client does not require an investigation into every financial product that is available.

(2) However, if the client requests the provider to consider a specified financial product, or financial products of a specified class, a reasonable investigation into the financial products that might achieve the objectives and meet the needs of the client includes an investigation into that financial product, or financial products of that class.

**961H Approved product lists**

*Approved product list maintained by licensee*

~~(1) — This section applies where:~~

~~(a) — the provider is a financial services licensee or a representative of a financial services licensee; and~~

~~(b) — the licensee maintains a list of financial products that it recommends, or authorises its representatives to recommend;~~

~~(c) — the licensee does not consider or recommend and does not authorise its representatives to consider or recommend any financial products that are not on that list; and~~

~~(cd) — it is reasonably apparent that there is no product on that list that would achieve the objectives and meet the needs of the client.~~

Approved product list maintained by authorised representative

~~(2) — This section also applies where:~~

~~(a) — the provider is an authorised representative of a financial services licensee, or an employee of an authorised representative of a financial services licensee; and~~

~~(b) — the authorised representative maintains a list of financial products that it recommends, or authorises its employees to recommend; and~~

~~(c) — the authorised representative does not consider or recommend or is not authorised by the financial services licensee to consider or recommend any financial products that are not on that list; and~~

~~(cd) — it is reasonably apparent that there is no product on that list that would achieve the objectives and meet the needs of the client.~~

Reasonable investigation

~~(3) — For the purposes of paragraph 961F(2)(c):~~

~~(a) — a reasonable investigation into the financial products that might achieve the objectives and meet the needs of the client does not require the provider to investigate products that are not on the list; and~~

~~(b) — if there are no products on the list that achieve the objectives and meet the needs of the client or the client's objectives can be achieved, and needs met, through means other than the acquisition of financial products, the provider must not advise the client to acquire a product that is on the list.~~

~~(4) — For the purposes of this section, 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 requested by the client, were that person exercising care~~

~~and objectively assessing the information given to the provider by the client.~~

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

~~**961J—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 961C to make reasonable inquiries to obtain complete and accurate information (see paragraph 961C(2)(e)).~~

~~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 961M and 961S). The provider may be subject to a banning order (see section 920A).~~

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

2 **~~961K—Conflict between client’s interests and those of provider~~**

3 ~~————— If there is a conflict between the interests of the client and the~~  
4 ~~provider’s interests, the provider must give priority to the client’s~~  
5 ~~interests when giving the advice.~~

6 ~~Note: ——— A responsible licensee or an authorised representative may contravene~~  
7 ~~a civil penalty provision if a provider fails to comply with this section~~  
8 ~~(see sections 961M and 961S). The provider may be subject to a~~  
9 ~~banning order (see section 920A).~~

10 **~~961L—Conflict between client’s interests and those of licensee or~~**  
11 **~~authorised representative~~**

12 ~~————— If the provider knows, or reasonably ought to know, that there is a~~  
13 ~~conflict between the interests of the client and the interests of:~~

14 ~~————— (a) a financial services licensee of whom the provider is a~~  
15 ~~representative; or~~

16 ~~————— (b) an authorised representative of whom the provider is an~~  
17 ~~employee;~~

18 ~~the provider must give priority to the client’s interests when giving~~  
19 ~~the advice.~~

20 ~~Note: ——— A responsible licensee or an authorised representative may contravene~~  
21 ~~a civil penalty provision if a provider fails to comply with this section~~  
22 ~~(see sections 961M and 961S). The provider may be subject to a~~  
23 ~~banning order (see section 920A).~~

24 **Subdivision F—Responsibilities of licensee and authorised**  
25 **representative under this Division**

26 **961MH Civil penalty provision—sections 961C and, 961FH, 961J,**  
27 **~~961K and 961L~~**

28 (1) A financial services licensee contravenes this section if the licensee  
29 contravenes section 961C; or 961FH, 961J, ~~961K or 961L~~.

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

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

32 (a) a representative, other than an authorised representative, of  
33 the licensee contravenes section 961C; or 961FH, 961J, ~~961K~~  
34 ~~or 961L~~; and

(b) the licensee is the, ~~or a,~~ responsible licensee in relation to that contravention (see section 961RL).

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

#### 961NI Licensees must ensure compliance

A financial services licensee must take reasonable steps to ensure that representatives of the licensee (including its authorised representatives) comply with sections 961C and, 961FH, ~~961J, 961K and 961L~~.

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

#### 961PJ Civil action for loss or damage

(1) If the client suffers loss or damage because of a contravention of a provision of this Division, the client may recover the amount of the loss or damage by action against one or more of the following persons, whether or not that person (or anyone else) has been convicted of an offence in respect of the matter:

- (a) if the person who contravenes the provision is a financial services licensee—that licensee;
- (b) if the person who contravenes the provision is a representative of a financial services licensee, or 2 or more financial services licensees—the, or a, responsible licensee in relation to the contravention (see section 961RL).

(2) An action under subsection (1) may be begun at any time within 6 years after the day on which the cause of action arose.

(3) This section does not affect any liability that a person has under any other law.

#### 961QK Additional powers of court to make orders

(1) The court dealing with an action under subsection 961PJ(1) may, in addition to awarding loss or damage under that subsection and if it thinks it necessary in order to do justice between the parties:

- (a) make an order declaring void a contract entered into by the client for or relating to a financial product or a financial service; and



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

9 **961RL** *Responsible licensee*

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

23 **Subdivision G—Responsibilities of authorised representatives**

24 **961SM** *Civil penalty provision—sections 961C, 961FH, 961J, 961K*  
25 *and 961L*

- 26
- 27 (1) An authorised representative of a financial services licensee  
28 contravenes this section if the authorised representative  
29 contravenes section 961C; ~~or 961FH, 961J, 961K or 961L.~~

30

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

- 32
- 33 (2) Subsection (1) does not apply if:
- 34 (a) the licensee had provided the authorised representative  
35 with information or instructions about the requirements

- 1 to be complied with in relation to the giving of personal  
2 advice; and  
3  
4 (b) the authorised representative's failure to comply with  
5 section 961C, ~~or 961F, 961J, 961K or 961L~~ occurred  
6 because the representative was acting in reliance on that  
7 information or those instructions; and  
8  
9 (c) the representative's reliance on that information or those  
10 instructions was reasonable.

11 Nothing in this subsection (2) shall be taken to limit the liability  
12 of the licensee under this Chapter.  
13  
14

### 15 **Division 3—Charging ongoing fees to clients**

#### 16 **962 Application of this Division**

- 17 (1) This Division applies in a case where:  
18 (a) a financial services licensee, or an authorised representative  
19 of a financial services licensee, enters into an ongoing fee  
20 arrangement with ~~another person~~ a retail client ~~(the client)~~;  
21 and  
22 (b) the arrangement has not been terminated for any reason.
- 23 (2) This Division also applies in a case where:  
24 (a) the rights of a person to receive an ongoing fee under the  
25 terms of an financial services licensee, or an authorised  
26 representative, under an ongoing fee arrangement are  
27 assigned to another person; and  
28 (b) the arrangement has not been terminated for any reason.
- 29 (3) However, this Division (other than section 962D) only applies  
30 ~~where:~~ to an ongoing fee arrangement that commences on or after  
31 the commencing day.
- 32 ~~(a) the client has not been provided with financial product advice as a~~  
33 ~~retail client by the financial services licensee or the authorised~~  
34 ~~representative before the commencing day; and~~
-

1 ~~(b) the client enters into the ongoing fee arrangement on or after the~~  
2 ~~commencing day.~~

3 (4) In this section, the *commencing day* is the day on which this Part  
4 commences.

5 **962A Ongoing fee arrangement, ongoing fee and fee recipient**

6 (1) An *ongoing fee arrangement* is an arrangement under which: a  
7 retail client (the *client*) acquires or obtains a financial service  
8 (the *initial service*) on terms that require the client to pay an  
9 ongoing fee.

10 ~~(a) a person to whom a financial services licensee, or a~~  
11 ~~representative of a financial services licensee, provides~~  
12 ~~financial product advice as a retail client, agrees to pay a~~  
13 ~~fee (however described or structured); and~~

14 ~~(b) the fee cannot reasonably be characterised as relating to~~  
15 ~~advice that, at the time the arrangement is entered into,~~  
16 ~~has already been given.~~

17 (2) ~~The fee is referred to in this Division as a~~ An ongoing fee is a  
18 fee payable by the client:

19 (a) on a regular basis (each occasion for payment being a  
20 payment interval);

21 (b) ostensibly for the provision of financial advice to the  
22 client after the initial service (the *subsequent service*);

23 (c) to any one of:

24 (i) the provider of the initial service; or

25 (ii) the provider of the subsequent service; or

26 (iii) any other person through whom the provider of  
27 the subsequent service receives that fee or any  
28 part of that fee; and

29 (d) where the client's liability to pay the fee:  
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(i) applies automatically at each payment interval and does not depend on any further agreement or consent by the client on each occasion of a subsequent service; and

(ii) arises whether or not the subsequent service is in fact provided to the client.

(3) ~~The person to whom the client is liable to pay the ongoing fee under the ongoing fee arrangement is referred to i~~ In this Division ~~as~~ the *fee recipient* is:

(a) the person with whom the client has agreed that the client will pay the ongoing fee whether or not that person is the ultimate recipient of the ongoing fee; or

(b) where the client's liability to pay the ongoing fee arises under the terms of a trust, the trustee for that trust.

**962B Client may terminate arrangement at any time**

(1) It is a condition of the ongoing fee arrangement that the client may terminate the arrangement at any time.

(2) Any condition of the ongoing fee arrangement, or any other arrangement, that requires the client to pay an amount on terminating the ongoing fee arrangement is void to the extent that the amount exceeds the sum of:

(a) any liability that the client has accrued but not satisfied under the ongoing fee arrangement before the termination; and

(b) the costs of the fee recipient incurred solely and directly because of the termination.

(3) Where the ongoing fee arrangement arises under the terms of a trust, despite anything to the contrary in those terms, the client shall be entitled to terminate the ongoing fee arrangement.

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1     **962C Client not liable to pay fee if this Division not complied with**

- 2             (1) It is a condition of the ongoing fee arrangement that the client is  
3                     not liable to pay the ongoing fee if section 962D (the disclosure  
4                     obligation) or section 962G ( the renewal notice obligation) has not  
5                     been complied with in relation the ongoing fee arrangement,  
6                     whether by the current or a previous fee recipient.
- 7             (2) The client is not taken to have waived the client’s rights under this  
8                     section, or entered into a new ongoing fee arrangement, if the  
9                     client makes a payment of an ongoing fee after a failure to comply  
10                    with section 962D or section 962G in relation to the ongoing fee  
11                    arrangement.
- 12            (3) Any ongoing fee that the client has paid to a fee recipient after  
13                    there has been a failure to comply with section 962D or  
14                    section 962G (whether by that or another fee recipient) must be  
15                    refunded by that fee recipient to the client if the client requests the  
16                    fee recipient to do so.

17     **962D Fee recipient must give fee disclosure statement**

- 18             (1) The current fee recipient must, at least 30 days before the  
19                     disclosure day, give the client a fee disclosure statement.
- 20             (2) The regulations may provide that subsection (1) does not apply in a  
21                     particular situation.

22     **962E Fee disclosure statements**

- 23             (1) A *fee disclosure statement* is a statement in writing that includes  
24                     the information required under this section.
- 25             (2) The following information is required for a fee disclosure  
26                     statement, subject to subsection (3):
- 27                     (a) the amount of the fee paid by the client in the 12 months  
28                         immediately preceding the disclosure day, expressed in  
29                         Australian dollars unless an alternative is provided in the  
30                         regulations;
- 31                     (b) the amount of the fee that the current fee recipient anticipates  
32                         that the client will pay in the 12 months beginning on the  
33                         disclosure day, expressed in Australian dollars unless an  
34                         alternative is provided in the regulations;

- 1 (c) details of the services that the client was entitled to receive  
2 from the current and any previous fee recipient under the  
3 arrangements during the 12 months immediately preceding  
4 the disclosure day;
- 5 (d) details of the services that the client received from the current  
6 and any previous fee recipient during the 12 months  
7 immediately preceding the disclosure day;
- 8 (e) details of the services that the client is entitled to receive  
9 from the current fee recipient under the arrangement during  
10 the 12 months beginning on the disclosure day;
- 11 (f) details of the services that the current fee recipient anticipates  
12 that the client will receive from that fee recipient during the  
13 12 months beginning on the disclosure day.
- 14 (3) The regulations may provide either or both of the following:
- 15 (a) that particular information is not required for a fee disclosure  
16 statement, either in a particular situation or generally;
- 17 (b) a more detailed statement of the information that is required  
18 for a fee disclosure statement, either in a particular situation  
19 or generally.

20 **962F Disclosure day**

- 21 The *disclosure day* is:
- 22 (a) if no fee disclosure statement has been given to the client in  
23 relation to the ongoing fee arrangement since the  
24 arrangement was entered into—the anniversary of the day on  
25 which the arrangement was entered into; and
- 26 (b) if a fee disclosure statement in relation to the ongoing fee  
27 arrangement has been given to the client since the  
28 arrangement was entered into—the anniversary of the day on  
29 which a disclosure statement in relation to the arrangement  
30 was last given to the client.

31 **962G Fee recipient must give renewal notice**

- 32 (1) The current fee recipient must, at least 30 days before the renewal  
33 notice day for an ongoing fee arrangement, send the client a  
34 renewal notice and a fee disclosure statement in relation to the  
35 arrangement.
- 36 (2) A *renewal notice* is a notice in writing that includes:
-

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

16 **962H *Renewal notice day and renewal period***

- 17 (1) The ***renewal notice day*** for an ongoing fee arrangement means:  
18 (a) if the arrangement has not previously been renewed—the  
19 second anniversary of the day on which the arrangement was  
20 entered into; and  
21 (b) if the arrangement has previously been renewed, the second  
22 anniversary of the last day on which the arrangement was  
23 renewed.  
24 (2) The ***renewal period*** for an ongoing fee arrangement is a period of  
25 30 days beginning on the day on which the current fee recipient  
26 gives the client a renewal notice and a fee disclosure statement.

27 **962J *If client notifies fee recipient that client does not wish to renew***

28 If the client notifies the current fee recipient in writing within the  
29 renewal period for the ongoing fee arrangement that the client does  
30 not wish to renew the arrangement, the arrangement terminates at  
31 the end of a further period of 30 days after the end of the renewal  
32 period.

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

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

8 **962L Civil penalty provision—charging ongoing fees after**  
9 **termination under section 962J or 962K**

10 If an ongoing fee arrangement terminates under section 962J or  
11 962K, the current fee recipient must not continue to charge the  
12 ongoing fee.

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

14 **962M Effect of termination**

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

20 **14 Before paragraph 1317E(jaa)**

21 Insert:

- 22 | (jaac) section 961~~MI~~ (financial services licensee responsible for  
23 | breach of certain best interests duties);
- 24 | (jaad) section 961~~NJ~~ (financial services licensee to ensure  
25 | compliance with certain best interests duties);
- 26 | (jaae) section 961~~SN~~ (authorised representative responsible for  
27 | breach of certain best interests duties);
- 28 | (jaaf) section 962L (charging ongoing fee after termination of  
29 | ongoing fee arrangement);

30 **15 After subsection 1317G(1D)**

31 Insert:

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*Best interests obligations*

- (1E) A Court may order a person to pay the Commonwealth a pecuniary penalty if:
- (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) section 961MI (financial services licensee responsible for breach of certain best interests duties);
    - (ii) section 961NJ (financial services licensee to ensure compliance with certain best interests duties);
    - (iii) section 961SN (authorised representative responsible for breach of certain best interests duties);
    - (iv) section 962L (charging ongoing fee after termination of ongoing fee arrangement).
- (1F) The maximum amount that the court may order the person to pay for contravening a provision mentioned in subparagraph (1E)(b)(i), (ii) or (iii) is:
- (a) \$200,000 for an individual; or
  - (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) is:
- (a) \$50,000 for an individual; or
  - (b) \$250,000 for a body corporate.

**16 Table items 270A, 270B and 270C of Schedule 3**

Repeal the items.

**17 At the end of Chapter 10**

Add:

1 **Part 10.18—Transitional provisions relating to the**  
2 **Corporations Amendment (Future of**  
3 **Financial Advice) Act 2011**  
4

5 **1526 Definitions**

6 In this Part:

7 *amending Act* means the *Corporations Amendment (Future of*  
8 *Financial Advice) Act 2011*.

9 *commencing day* means the day on which Schedule 1 to the  
10 amending Act commences.

11 **1527 Application of best interests obligations**

12 Division 2 of Part 7.7A, as inserted by item 13 of Schedule 1 to the  
13 amending Act, applies in relation to the provision of personal  
14 advice to a person as a retail client on or after the commencing day  
15 (whether or not the request for advice was made before the  
16 commencing day).

17