

1 **Division 2—Best interests obligations**

2 **Subdivision A—Preliminary**

3 **961 Application of this Division**

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

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

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

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

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

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

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

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

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

3 (3) If:

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

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

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

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

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

21 *Regulations*

22 (5) The regulations may prescribe:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

16 (a) the provider; or

17 (b) an associate of the provider; or

18 (c) a financial services licensee of whom the provider is a
 19 representative; or

20 (d) an associate of a financial services licensee of whom the
 21 provider is a representative; or

22 (e) an authorised representative who has authorised the provider,
 23 under subsection 916B(3), to provide a specified financial
 24 service or financial services on behalf of a financial services
 25 licensee; or

26 (f) an associate of an authorised representative who has
 27 authorised the provider, under subsection 916B(3), to provide
 28 a specified financial service or financial services on behalf of
 29 a financial services licensee;

30 the provider must give priority to the client’s interests when giving
 31 the advice.

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

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

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

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

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

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

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

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

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

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

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

20 **961L Licensees must ensure compliance**

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

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

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

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

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

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

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

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

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

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

12 **961P *Responsible licensee***

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

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

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

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

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

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

12 Insert:

13 **Division 4—Conflicted remuneration**

14 **Subdivision A—Preliminary**

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

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

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

23 **963A *Conflicted remuneration***

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

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