



# **Corporations Amendment (Future of Financial Advice) Act 2012**

**No. 67, 2012**

**An Act to amend the law in relation to financial advice, and for related purposes**

Note: An electronic version of this Act is available in ComLaw (<http://www.comlaw.gov.au/>)



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## Contents

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





# Corporations Amendment (Future of Financial Advice) Act 2012

No. 67, 2012

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## An Act to amend the law in relation to financial advice, and for related purposes

[Assented to 27 June 2012]

The Parliament of Australia enacts:

### 1 Short title

This Act may be cited as the *Corporations Amendment (Future of Financial Advice) Act 2012*.

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## 2 Commencement

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

Commencement information		
Column 1	Column 2	Column 3
Provision(s)	Commencement	Date/Details
1. Sections 1 to 3 and anything in this Act not elsewhere covered by this table	The day this Act receives the Royal Assent.	27 June 2012
2. Schedule 1	1 July 2012.	1 July 2012

Note: This table relates only to the provisions of this Act as originally enacted. It will not be amended to deal with any later amendments of this Act.

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

## 3 Schedule(s)

Each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.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<br>charging ongoing fees to clients<br>ban on conflicted remuneration and other remuneration |
|----|------|---|

#### **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 913B(4)(a)**

Repeal the paragraph, substitute:

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

#### **4 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;

#### **5 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

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

Insert:

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

## **7 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

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

Add:

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

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

Insert:

- (1A) In considering whether, at a particular time, there is reason to believe that a person is not of good fame or character, ASIC must (subject to Part VIIC of the *Crimes Act 1914*) have regard to:
  - (a) any conviction of the person, within 10 years before that time, for an offence that involves dishonesty and is punishable by imprisonment for at least 3 months; and
  - (b) whether the person has held an Australian financial services licence that was suspended or cancelled; and
  - (c) whether a banning order or disqualification order under Division 8 has previously been made against the person; and
  - (d) any other matter ASIC considers relevant.

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

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



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**10 After Part 7.7**

Insert:

**Part 7.7A—Best interests obligations and remuneration****Division 1—Preliminary****960 Definitions**

In this Part:

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

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

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

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

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

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

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

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

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

**960A No contracting out**

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

## Division 3—Charging ongoing fees to clients

### Subdivision A—Preliminary

#### 962 Application of this Division

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

#### 962A Ongoing fee arrangements

##### *Ongoing fee arrangements*

- (1) If:
  - (a) a financial services licensee gives personal advice to a person as a retail client; and
  - (b) that person enters into an arrangement with the financial services licensee, or a representative of the financial services licensee; and
  - (c) under the terms of the arrangement, a fee (however described or structured) is to be paid during a period of more than 12 months;the arrangement is an *ongoing fee arrangement*.
- (2) If:
  - (a) a representative of a financial services licensee gives personal advice to a person as a retail client; and
  - (b) that person enters into an arrangement with the representative or the financial services licensee; and
  - (c) under the terms of the arrangement, a fee (however described or structured) is to be paid during a period of more than 12 months;

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the arrangement is an ***ongoing fee arrangement***.

*Paying for advice by instalments*

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

*Insurance premiums*

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

*Other prescribed arrangements*

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

## **962B Ongoing fees**

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

### 962C Fee recipients

- (1) Where:
  - (a) a financial services licensee enters into an ongoing fee arrangement; and
  - (b) the rights of the licensee under the arrangement have not been assigned to another person;the licensee is the *fee recipient* in relation to the arrangement.
- (2) Where:
  - (a) a representative of a financial services licensee enters into an ongoing fee arrangement; and
  - (b) the rights of the representative under the arrangement have not been assigned to another person;the representative is the *fee recipient* in relation to the arrangement.
- (3) Where the rights of a financial services licensee, or a representative of a financial services licensee, under an ongoing fee arrangement have been assigned to another person, the person who currently holds those rights is the *fee recipient* in relation to the arrangement.

### 962CA Exemption from application of opt-in requirement

- (1) ASIC may exempt a person, or a class of persons, from section 962K (the *opt-in requirement*), if ASIC is satisfied that the person is, or persons of that class are, bound by a code of conduct approved by ASIC for the purposes of this section.
- (2) A code of conduct is approved by ASIC for the purposes of this section if:
  - (a) the code of conduct is approved by ASIC under section 1101A; and
  - (b) ASIC is satisfied that the code of conduct obviates the need for persons bound by the code to be bound by the opt-in requirement; and
  - (c) ASIC is satisfied of any other matters prescribed by the regulations.
- (3) The exemption must be in writing and ASIC must publish notice of it in the *Gazette*.

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

- (1) This Subdivision only applies where:
- (a) the client has not been provided with personal advice as a retail client before the application day by:
    - (i) in a case where the client has entered into an ongoing fee arrangement with a financial services licensee—the financial services licensee or a person acting as a representative of the financial services licensee; or
    - (ii) in a case where the client has entered into an ongoing fee arrangement with a person acting as a representative of a financial services licensee—the representative or the financial services licensee; and
  - (b) the client enters into the ongoing fee arrangement on or after the application day.

- (2) In this section:

***application day*** means:

- (a) where:
  - (i) the client enters into the ongoing fee arrangement with a financial services licensee, or a person acting as a representative of a financial services licensee; and
  - (ii) the financial services licensee has lodged notice with ASIC in accordance with subsection 967(1) that the obligations and prohibitions under this Part are to apply to the licensee and persons acting as representatives of the licensee, on and from a day specified in the notice; the day specified in the notice; or
- (b) in any other case—1 July 2013.

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

- (1) It is a condition of the ongoing fee arrangement that the client may terminate the arrangement at any time.
- (2) Any condition of the ongoing fee arrangement, or any other arrangement, that requires the client to pay an amount on

terminating the ongoing fee arrangement is void to the extent that the amount exceeds the sum of:

- (a) any liability that the client has accrued but not satisfied under the ongoing fee arrangement before the termination; and
- (b) the costs of the current fee recipient incurred solely and directly because of the termination.

**962F Arrangement terminates if this Subdivision not complied with**

- (1) It is a condition of the ongoing fee arrangement that the arrangement terminates if section 962G (the disclosure obligation) or section 962K (the renewal notice obligation) has not been complied with in relation the arrangement, whether by the current or a previous fee recipient.
- (2) The client is not taken to have waived the client's rights under the condition (subject to subsection (3)), or to have entered into a new ongoing fee arrangement, if the client makes a payment of an ongoing fee after a failure to comply with section 962G or section 962K in relation to the ongoing fee arrangement.
- (3) However, if the client makes a payment of an ongoing fee after a failure to comply with section 962G or section 962K in relation to the ongoing fee arrangement, the fee recipient is not obliged to refund the payment.

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

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

- (1) The current fee recipient in relation to an ongoing fee arrangement must, before the end of a period of 30 days beginning on the disclosure day for the arrangement, give the client a fee disclosure statement in relation to the arrangement.
- (2) The regulations may provide that subsection (1) does not apply in a particular situation.

**962H Fee disclosure statements**

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

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- (a) includes the information required under this section; and
  - (b) relates to:
    - (i) a period of 12 months (the *previous year*) that ends on a day that is no more than 30 days before that on which the statement is given; and
    - (ii) any other period prescribed by the regulations.
  - (2) The following information is required for a fee disclosure statement in relation to an ongoing fee arrangement, subject to subsection (3):
    - (a) the amount of each ongoing fee paid under the arrangement by the client in the previous year, expressed in Australian dollars unless an alternative is provided in the regulations;
    - (c) information about the services that the client was entitled to receive from the current and any previous fee recipient under the arrangement during the previous year;
    - (d) information about the services that the client received from the current and any previous fee recipient under the arrangement during the previous year;
    - (f) information about any other prescribed matters, including information that relates to a period that begins after the previous year.
  - (3) The regulations may provide either or both of the following:
    - (a) that particular information is not required for a fee disclosure statement, either in a particular situation or generally;
    - (b) a more detailed statement of the information that is required for a fee disclosure statement, either in a particular situation or generally.

### **962J** *Disclosure day*

The *disclosure day* for an ongoing fee arrangement is:

- (a) if no fee disclosure statement has been given to the client in relation to the arrangement since the arrangement was entered into—the anniversary of the day on which the arrangement was entered into; and
- (b) if a fee disclosure statement in relation to the arrangement has been given to the client since the arrangement was entered into—the anniversary of the day immediately after

the end of the earliest period of 12 months to which the last fee disclosure statement given to the client related.

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

- (1) The current fee recipient in relation to an ongoing fee arrangement must, before the end of a period of 30 days beginning on the renewal notice day for the arrangement, give the client a renewal notice and a fee disclosure statement in relation to the arrangement.
- (2) A **renewal notice**, in relation to an ongoing fee arrangement, is a notice in writing that includes:
  - (a) a statement that the client may renew the arrangement by giving the current fee recipient notice in writing of the election; and
  - (b) a statement that the arrangement will terminate, and no further advice will be provided or fee charged under it, if the client does not elect to renew the arrangement; and
  - (c) a statement that the client will be taken to have elected not to renew the arrangement if the client does not give the current fee recipient notice in writing of an election to renew before the end of the renewal period; and
  - (d) a statement that the renewal period is a period of 30 days beginning on the day on which the renewal notice and fee disclosure statement is given to the client.
- (3) The regulations may provide that subsection (1) does not apply in a particular situation.

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

- (1) The **renewal notice day** for an ongoing fee arrangement means:
  - (a) if the arrangement has not previously been renewed—the second anniversary of the day on which the arrangement was entered into; and
  - (b) if the arrangement has previously been renewed—the second anniversary of the last day on which the arrangement was renewed.
- (2) The **renewal period** for an ongoing fee arrangement is a period of 30 days beginning on the day on which the current fee recipient in



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relation to the arrangement gives the client a renewal notice and a fee disclosure statement in relation to the arrangement.

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

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

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

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

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

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

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

**962Q Effect of termination**

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

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

**962R Application of this Subdivision**

- (1) This Subdivision applies, on and from the application day, to an ongoing fee arrangement to which Subdivision B does not apply.
- (2) In this section:

*application day* means:

(a) where:

- (i) the client has entered into the ongoing fee arrangement with a financial services licensee, or a person acting as a representative of a financial services licensee; and
  - (ii) that licensee or representative is the fee recipient in relation to the arrangement on 1 July 2012; and
  - (iii) the financial services licensee has lodged notice with ASIC in accordance with subsection 967(1) that the obligations and prohibitions under this Part are to apply to the licensee and persons acting as representatives of the licensee, on and from a day specified in the notice;
- the day specified in the notice; or

(b) where:

- (i) the client has entered into the ongoing fee arrangement with a financial services licensee, or a person acting as a representative of a financial services licensee; and
  - (ii) because the rights of the licensee or representative under the arrangement have been assigned, another person is the fee recipient in relation to the arrangement on 1 July 2012; and
  - (iii) a notice has been lodged with ASIC in accordance with subsection 967(1) or (3) that the obligations and prohibitions under this Part are to apply to the other person, on and from a day specified in the notice;
- the day specified in the notice; or

(c) in any other case—1 July 2013.

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

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

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

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

**Division 6—Anti-avoidance****965 Anti-avoidance**

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

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

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

**Division 7—Transition****966 Transition period**

In this Division:

*transition period* means the period beginning on 1 July 2012 and ending on 30 June 2013.

**967 Best interests obligations and remuneration provisions to apply during transition period**

- (1) A financial services licensee may, during the transition period, lodge notice in the prescribed form with ASIC that the obligations and prohibitions imposed under this Part are to apply to the licensee, and any person acting as a representative of the licensee, on and from a day that:
    - (a) falls on or after the day on which the notice is lodged with ASIC; and
    - (b) is specified in the notice.
  - (2) If a notice is lodged with ASIC in accordance with subsection (1), ASIC must, on its website:
    - (a) publish the name of the financial services licensee who lodged the notice; and
    - (b) include a statement that the obligations and prohibitions imposed under this Part are to apply to the licensee, and any person acting as a representative of the licensee; and
    - (c) state the day on and from which those obligations and prohibitions are to apply.
  - (3) A person:
    - (a) who would be subject to an obligation or prohibition under this Part, if it applied; and
    - (b) who would not be subject to the obligation or prohibition as a financial services licensee, or a person acting as a representative of a financial services licensee;may, during the transition period, lodge notice in the prescribed form with ASIC that the obligations and prohibitions imposed under this Part are to apply to the person on and from a day that:
    - (c) falls on or after the day on which the notice is lodged with ASIC; and
    - (d) is specified in the notice.
  - (4) If a notice is lodged with ASIC in accordance with subsection (3), ASIC must, on its website:
    - (a) publish the name of the person who lodged the notice; and
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- (b) include a statement that the obligations and prohibitions imposed under this Part are to apply to the person; and
  - (c) state the day on and from which those obligations and prohibitions are to apply.

### **968 Notice to clients in transition period**

- (1) A financial services licensee who lodges a notice with ASIC in accordance with subsection 967(1) must ensure that any person in relation to whom the licensee, or a person acting as a representative of the licensee, has an obligation or is subject to a prohibition under this Part during the transition period (the *client*) is given a notice that complies with this section.
- (2) The notice:
  - (a) must be in writing; and
  - (b) must be given to the client on or before the notice day for the client; and
  - (c) must state that the obligations and prohibitions imposed under this Part begin to apply to the licensee, and any person acting as a representative of the licensee, on a day specified in the notice given to the client.
- (3) The day specified in the notice given to the client must be the same as the day specified in the notice lodged with ASIC in accordance with subsection 967(1).
- (4) The *notice day* for a person to whom the licensee, or a person acting as a representative of the licensee, is obliged to give a fee disclosure statement during the transition period is:
  - (a) unless paragraph (b) applies—the disclosure day for the arrangement in relation to which the fee disclosure statement is to be given that falls within the transition period; and
  - (b) if a fee disclosure statement is given before the end of a period of 30 days beginning on that disclosure day—the day on which it is given.

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

Insert:

- (jaac) section 962P (charging ongoing fee after termination of ongoing fee arrangement);

(jaad) section 962S (fee recipient must give fee disclosure statement);

(jaae) section 965 (anti-avoidance of Part 7.7A provisions);

## 12 After subsection 1317G(1D)

Insert:

### *Best interests obligations and remuneration*

(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 962P (charging ongoing fee after termination of ongoing fee arrangement);
  - (ii) section 962S (fee recipient must give fee disclosure statement);
  - (iii) section 965 (anti-avoidance of Part 7.7A provisions).

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

- (a) \$50,000 for an individual; or
- (b) \$250,000 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)(iii) is:

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

## 13 After section 1317G

Insert:

### 1317GA Refund orders—contravention of section 962P

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

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

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

*Applications for order*

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

*When order may be made*

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

*Recovery of amount as a debt*

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

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[Minister's second reading speech made in—  
House of Representatives on 13 October 2011  
Senate on 10 May 2012]

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(217/11)