



IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

No A25 of 2014

ON APPEAL FROM THE FULL COURT OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN: RONALD SELIG AND JANNA SELIG
Appellants

10 AND: WEALTHSURE PTY LTD (ABN 3097405108)
And DAVID BERTRAM
First and Second Respondents

AND: RICHARD WILLIAM SPENCER, SILVANA PEROVICH, and
PETER MAURICE TOWNLEY
Third, Fourth and Fifth Respondents

AND: MARK RICHARD NORTON
Sixth Respondent

20 AND: NEOVEST LIMITED (IN LIQUIDATION) ACN 104 915 906
Seventh Respondent

AND: NORTON CAPITAL PTY LTD (DEREGISTERED) ACN 086 207
169
Eighth Respondent

AND: DANIEL GEOFFREY LILLEY
Ninth Respondent

30 AND: DAMIEN BERNARD GREER, ROBERT NOEL GALLAGHER,
STEVEN JAMES DICKENS, and MICHAEL JOSEPH CROUCH
Tenth, Eleventh, Twelfth and Thirteenth Respondents

APPELLANTS' SUBMISSIONS
REVISED

Part I: Certification

1. These submissions are in a form suitable for publication on the Internet.

Filed on behalf of the Appellants
By John Radbone
Solicitor
91 Halifax Street
ADELAIDE SA 5000
7491.selighsubmissions.150102.doc

Telephone : (08) 8223 1388
Fax: (08) 8232 1849
jradbone@radbonelaw.com

Part II: Issue

2. Whether a claim for damages for misleading financial advice given by an Australian financial services licence holder¹ pursuant to any or all of sections 769C, 945A, 945B and 1041E of the Corporations Act is apportionable under sections 1041H -1041S of the Corporations Act.

Part III: Section 78B of the Judiciary Act 1903

3. Consideration has been given to the question of whether notice pursuant to section 78B of the Judiciary Act 1903 (Commonwealth) should be given with the conclusion that this is not necessary.

10 Part IV: Citations

4. The appeal is from a first instance decision of the Federal Court of Australia reported at [2013] FCA 348. That decision was appealed to the Full Court of the Federal Court of Australia, reported at [2014] FCAFC 64.

Part V: Facts

5. The First and Second Respondents ('the Advisor Respondents') were the Appellants' financial advisors. The Respondent Wealthsure is and was at all material times the holder of an Australian Financial Services Licence 238030. The Respondent Bertram was at all material times an authorised representative of Wealthsure.
- 20 6. In 2004 the Advisor Respondents introduced the Appellants to a financial product 'Neovest'. The Advisor Respondents recommended Neovest to the Appellants as a suitable investment because it was a capital guaranteed product [J 393]² which would enable them to have a secure source of dividend income.
7. It was contemplated by the Advisor Respondents (and incorporated in the written statements of advice under the Act) that the Appellants would use the Neovest income to negatively gear investment in real estate [J 403].

¹ Corporations Act 2001 sections 910A and 911A

² References to the findings of the trial judge [J]

8. The Advisor Respondents provided the Appellants with a disclosure document which was defective in circumstances in which a disclosure document or statement was required to be given to the client [J 908]. The trial judge relied upon section 953B to find that in doing so the Advisor Respondents breached sections 945A and 945B. Such finding was not the subject of challenge on appeal.
9. Neovest was insolvent at least by March 2005 [J 752]. It made only one interest payment to the Appellants. The Appellants lost their investment and suffered consequential losses in respect of a property portfolio purchased on the strength
10 of the Neovest investment.
10. The Advisor Respondents accepted that they must bear some responsibility for the financial advice but argued that the loss was apportionable and that, inter alia, the promoters of Neovest should bear responsibility for the majority of the claim.
11. The trial judge held that the liability of financial advisers pursuant to inter alia s.953B³ was not apportionable. He assessed the Appellant's damages in the sum of \$1,760,512 plus costs.
12. The Court of Appeal held by a majority of two to one that the liability was apportionable with the Advisor Respondents being responsible for 60% only.
20 There was a consequential reduction in the total amount of damages which were assessed on appeal at the slightly lower sum of \$1,716,680. The Appellants do not appeal against this minor reduction in the amount of the pre-apportionment damage assessment.
13. The Advisor Respondents were insured by QBE. However, the limit of the policy (including legal costs) was \$3 million. By the time the trial concluded approximately \$1.3 million had been expended in legal costs by the Advisor Respondents. The balance was less than the amount required to satisfy the principal judgment.
14. The respondent Bertram was insolvent and was made bankrupt shortly after the
30 commencement of the appeal to the Full Federal Court (for unrelated debts). The respondent Wealthsure was under insured and not able to pay the first judgment.

³ Non-compliance with obligations relating to disclosure documents.

15. QBE conducted the litigation under the policy and, from the instigation of the Federal Court appeal at the latest, had a direct interest in the outcome of the appeal.

Part VI: Argument

16. The Corporations Act provides, upon its natural reading, that loss consequent upon misleading advice from a licensed financial services provider is to be recovered without apportionment.

17. The financial services provider is the gatekeeper for retail investors who "...require greater protection as they may find it more difficult to, and face greater costs in, gathering the information required to make an informed decision".⁴

18. The matter is now the subject of inconsistent decisions by differently constituted appellate courts: *Wealthsure Pty Ltd v Selig* [2014] FCAFC 64 and *ABN AMRO Bank NV v Bathurst Regional Council* [2014] FCAFC 65.

19. The statute is also the subject of conflicting decisions at first instance, including *Woods v De Gabriele* [2007] VSC 177; *Bathurst Regional Council v Local Government Financial Services Pty Ltd (No 5)* [2012] FCA 1200; *Rod Investments (Vic) Pty Ltd v Abeyratne (No 2)* (2009) VSC 278 and *McGraw-Hill Financial Inc v City of Swan* [2014] FCA 665.

20. The statute is considered as a whole and in context: *Commissioner of Taxation v Consolidated Media Holdings* [2012] HCA 55; (2012) 293 ALR 257 at [39]; *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355 at 384, [78].

21. It is submitted that the interpretation of a single section, or a few sections, viz., here, ss.1041I, 1041L, 1041N, must commence first with a consideration of the statute as a whole: *Engineer's Case* (1920) 28 CLR 129 at 161-2, per Higgins J. The 'statute' in this instance is the Financial Services Reform Act 2001 (FSRA) which became Chapter 7 of the Corporations Act.

22. The FSRA was the legislative response to the Financial System Inquiry (FSI). The FSI was established by the Federal Government in 1996 to investigate and

⁴ *Corporate Law Economic Reform Program Proposal for Reform: paper number 6* (Clerp 6) at page 27. See also pages 3, 4 10, 21, 89, 90, 95, 96, 99 and 100 as to the importance of the role of financial intermediary and the obligations as to licence.

recommend ways to improve Australia's financial system and regulation. In conjunction with the FSI, the government established the Corporate Law Economic Reform Program (CLERP) to review business regulation. *CLERP Paper No 6* dealt specifically with the financial system. Changes proposed by *CLERP Paper No 6* were incorporated into the FSRA.

23. In this case it is appropriate then to focus on Chapter 7. The Appellants say that the majority in the Full Federal Court were lead to error by not considering the 'statute as a whole', in that sense, but rather by a consideration of a few sections: Mansfield J at [7] – [16], Besanko J from [73] where His Honour asserts that the
10 'starting point ... of an analysis of the provisions is s.1041N'.
24. Chapter 7 deals discretely with "Financial Services and Markets". The Chapter is divided into twelve (12) Parts. Part 7.1 commences with S.760A which describes the object of the Chapter. The construction of sections within the Chapter will occur against the object of the Chapter. Part 7.1 also defines 'financial product' in Div 3 and 'financial service' in Div 4. Parts 7.5, 7.6, 7.7, 7.9 and 7.10 come under direct consideration.
25. Part 7.5 addresses compensation regimes for financial markets. The aim of the compensation provisions is to provide investors in appropriate circumstances with protection from certain losses.⁵ Division 3 focuses on retail investors. Compensation arrangements must be 'adequate'.⁶ However, the losses to be
20 covered are losses due to the defalcation or fraudulent misuse of funds.
26. Part 7.6 addresses licensing of providers of financial services. Following parts establish consistent conduct and disclosure standards applying to all licencees.
27. Part 7.7 addresses "Financial services disclosure". Relevantly, the Part addresses the provision of a Financial Services Guide and a Statement of Advice. A Financial Services Guide (FSG) is a document that contains basic information that any retail client is entitled to receive before obtaining any financial advice or service.⁷ A Statement of Advice (SoA) is required wherever personal advice is given to retail clients, either as the means by which the service
30 is provided or as a record of the advice. Inter alia the SoA must contain the

⁵ Explanatory Memorandum to FRSA, para 10.12.

⁶ Subdiv D of Div 3.

⁷ S.942B(2)

advice and the basis on which it was given.⁸ Division 3 addresses requirements for the provision of advice to a retail client. Ss. 945A and 945B appear in Division 3, as does s.946A, and the obligation to give a Statement of Advice. S.949A addresses an obligation to warn a client that advice does not take account of 'inter alia' the client's financial situation or needs. S.951A precludes contracting out. Division 7 (s.952A et seq) addresses enforcement. S.953B provides a civil action for loss or damage if a person contravenes inter alia ss. 945A, 945B.

28. Part 7.9 addresses "Financial product disclosure" and other provisions relating to issue, sale and purchase of financial products. This Part addresses the requirements of a Product Disclosure Statement and the obligations of the issuer of the relevant product,⁹ including as to advertising (Division 4). S.1020D precludes contracting out. As with Part 7.7, Division 7 of Part 7.9 addresses enforcement. S.1022B provides for civil action for loss or damage.

29. Part 7.10 addresses "Market misconduct and other prohibited conduct relation to financial products and financial services." S.1041E addresses false or misleading statements appertaining to "financial products" and s.1041H "misleading or deceptive conduct". The heading to s.1041H is of significance: 'Misleading or deceptive conduct (civil liability only)'. S.1041H(3) excludes conduct relating to a Statement of Advice (s.953A) or a Product Disclosure Statement (s.1022A) from conduct addressed by Part 7.10. Further, unlike the enforcement provisions in Parts 7.7 and 7.9, the provisions in Part 7.10 (i.e. Division 2A) provide for proportionate liability for misleading and deceptive conduct *under that Part*.¹⁰

30. The Full Federal Court in *ABN AMRO NV v Bathurst Regional Council* [2014] FCAFC 65 saw a difference between sections relating to conduct which was misleading or deceptive but neither a criminal offence nor a civil penalty provision and sections relating to conduct which was criminal or which incurred a civil penalty.

31. The Full Court in *ABN AMRO* reasoned relevantly that in context the statute might be expected to exclude some conduct from the proportionate liability

⁸ Regs 7.7.11 and 7.7.12.

⁹ In the case at bar, Neovest.

¹⁰ Note s.1041L(4) – apportionable claims are limited to claims under s.1041I which are limited to claims "caused by conduct...done in contravention of s.1041H".

scheme because (at 1565) conduct done in contravention of any of sections 1041E, 1041F and 1041G constitutes an offence. As the Full Court said this alone would provide sufficient reason to understand why section 1041L is confined to conduct done in contravention of 1041H.

32. The finding that the Advisor Respondents had engaged in conduct in contravention of section 1041E with respect to its retail clients was not disturbed by the Full Court. Nor was the finding that the Advisor Respondents had engaged in conduct in contravention of section 945A and 945B (appertaining to non-compliance with obligations relating to disclosure documents (s.953A)). Failure to comply with these sections is also an offence: s1311(1). Refer however to Note 1 to s1041H(1) which states: 'Failure to comply with this sub-section is not an offence'.
33. The Davis report of 1994 is quoted as to the cost of insurance to the "deep pocket defendant." ¹¹ Apportionment between tortfeasors is favoured over full compensation to an injured plaintiff. However, the report also considers the possibility of "full compensation for consumer claims"¹² if Parliament considers that important. The Corporations Act ultimately provides specific exceptions where, for example the conduct of the tortfeasor amounts to either an offence or a breach of a civil penalty provision¹³. On the Appellants' argument it is also otherwise where the Act deems particular conduct to stand in a class of its own, viz the conduct of financial services advisors to give proper advice re financial products to their customers.
34. The Full Court in *ABN AMRO* also (at 1590) identified that only claims made under 1041I in respect of conduct in contravention of 1041H may be the subject of contributory negligence provisions under 1041I(1B) of the Act. It was inappropriate therefore to reduce the Appellants' damages by reference to concepts of contributory responsibility. It was inappropriate to employ section 1041N(3) to circumvent the express and deliberate language of section 1041I(1B). The Appellants repeat that this section 1041I(1B) provides for

¹¹ Page 3

¹² Page 40

¹³ See also exceptions found in section 87CC of the Competition and Consumer Act (fraud) and also sections 236 and 237 of the Australian Consumer Law. The Civil Liability Act 2003 (Qld) considered both at first instance and on appeal excludes apportionment in respect of claims for personal injury or by a consumer (which the plaintiffs were found to be).

contribution only in respect of conduct contrary to section 1041H. Quite apart from the reasoning of the Full Court in *ABN AMRO* the Appellants point to claims such as that pursuant to s.953B (obligations re disclosure documents) and assert that the Corporations Act excludes such claims from the proportionate liability sections.

35. The Appellants say that Parliament could not have made itself clearer (*expressio unius est exclusio alterius* – here, the express reference to apportionability in respect to a Part 7.10 claim, and the exclusion of it in Parts 7.7 and 7.9, whilst conduct under Part 7.10, excludes apportionability in respect of claims pursuant to Parts 7.7 and 7.9). Thus, whilst the claims addressed in Part 7.10 are apportionable, those deriving from the provision of a “disclosure document or statement” are not.
36. It is submitted that once a cause of action is established which is non-apportionable the claim is not apportionable even though the facts might give rise to a separate claim that is an apportionable claim.
37. The regime is therefore as follows:
- 37.1. Whether or not a claim is apportionable is determined by section 1041L.
- 37.2. Under section 1041L only a claim under 1041I for economic loss or damage to property caused by conduct done in contravention of 1041H is apportionable.
- 37.3. Section 1041I(1B) provides for reduction for contributory conduct by the applicant in respect of claims under 1041H. There is no such provision in respect of claims for contravention of 1041E, 1041F or 1041G.
- 37.4. Section 1041H(3) expressly excises claims under section 670A, 728, 953A (appertaining to a disclosure document) and 1022A from section 1041H by providing that conduct in contravention of these sections does not contravene section 1041H(1).
- 37.5. Section 1041L(1) provides that “This division applies to a claim (an apportionable claim) if the claim is...caused by conduct that was done in contravention of section 1041H.”
- 37.6. Section 1041N(2) notes that proceedings may involve both an apportionable claim and a claim that is not an apportionable claim.

38. The learned trial judge and also White J on appeal (at 329) held that the reference in section 1041L(2) to *“the same loss or damage”* is a reference to the damage caused by a concurrent wrong-doer, and not the damages which the Court may ultimately award. This is the approach which is consistent with the analysis of Chapter 7 as a whole and which places the liability with the ‘gatekeeper’, the entity from whom the potential investor seeks the specialist advice.
39. It is also submitted that it is the result indicated by an application of s 15AA of the Acts Interpretation Act 1901 (Cth.) as *“best (achieving) the purpose or object of the Act”*. That object, as indicated by s 760A, with its reference to *“professionalism by those who provide financial services”* is to leave no scope for the unsophisticated investor to be misled.
40. It is submitted that this approach is indicated by the Second Reading Speech of the then Minister for Financial Services and Regulation, Mr. Hockey, on 5 April 2001 on the Financial Services Reform Bill 2001 (Parliamentary Debates, 26,521).
41. The Second Reading Speech does not address proportionate liability but rather emphasizes that the Bill is ‘consumer focused’ (26521), is based on a ‘licensing regime’ (26521), designed to ‘protect...consumers’ (26522) through licensees being ‘responsible for the conduct of their representatives’ (26523) and through ‘disclosure obligations’ relating to ‘products’ (26523), breach of which obligations leading to ‘civil penalties and criminal penalties’ (26524).
42. Section 1041H(3)(iii)¹⁴ was amended in 2012. There were further express exclusions from Section 1041H(1). The exclusions related to specified conduct involving failure to disclose or give notice.
43. On the Appellants’ case these amendments are consistent with the conclusion that section 1041H(3) is a natural place to specify conduct which is to be excluded from the apportionment regime.

¹⁴ The Superannuation Legislation Amendments (Further MySuper and Transparency Measures) Act 2012 number 171 of 2012 schedule 3 amends the Corporations Act by excluding breaches of section 1021NA, 1021NB and 1021NC from the operation of section 1041H (1).

44. More generally, and by parity of reasoning, the Corporations Act contains strict liability provisions. Sections 670A, 670B, 728 and 729 of the Corporations Act provide for liability even if the tortfeasor "*did not commit*" or was "*not involved in the contravention*". Section 1041H(3) expressly excludes Sections 670A, 670B, 728 and 729 from section 1041H(1). This is consistent.

Part VII: Legislation - Legislative Provisions are Attached to Applicants' Submissions

- 10 45. Corporations Act sections 769C, 945A, 945B and 1041E 1041H-1041S (see attachment).
46. Those provisions are still in force, in that form, at the date of making the submissions save that section 1041H(3)(a) has been amended by the addition of sub placitum (iii).
47. The amending provision provides that sections 1021NA, 1021NB and 1021NC (which relate to obligations to disclose or give notice and which incorporate the obligations under sections 1017BC, 1017BD and 1017BE) are excluded as contraventions of subsection (1).

Part VIII: Orders sought

- 20 48. The Appellants seek orders that:
- 48.1. the appeal be allowed;
 - 48.2. judgment be entered in favour of the Appellants against the respondents in the amount of \$1,716,680;
 - 48.3. the Appellants be awarded interest on the amount of the judgment from 18 April 2013;
 - 48.4. the Respondents pay the Appellants' costs of the trial in the Federal Court on the basis of an indemnity, the appeal to the Full Court, the application for special leave to the High Court and of the appeal to the High Court;
 - 48.5. an order for non-party costs be made against QBE in respect of the
- 30 appeal to the Full Court, the application for special leave to the High Court and of the appeal to the High Court.

Part IX: Time estimate

49. The Appellants would seek 2 hours for the presentation of oral argument.

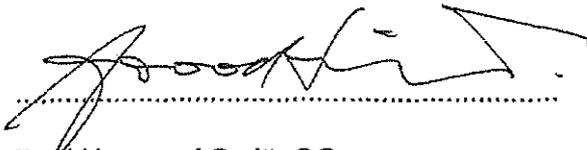
Dated: 19 December 2014

Paul Heywood
Smith

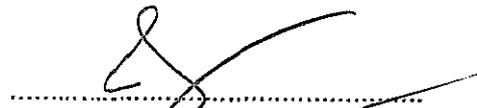
Phone (08) 8228 0001
Fax (08) 82280022
Email:
pheywoodsmith@anthonymasonchambers.com.au

David Riggall

Phone (08) 8228 0006
Fax (08) 82280022
E-mail:
driggall@anthonymasonchambers.com.au



Paul Heywood Smith QC
Counsel for the Appellants



John Radbone
Radbone & Associates,
Telephone: (08) 82231388
Facsimile (08) 8232 1849
91 Halifax Street,
Adelaide, South Australia 5000.

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ATTACHMENT TO APPELLANTS' SUBMISSIONS

LEGISLATIVE PROVISIONS

Filed on behalf of the Appellants

By John Radbone

Solicitor

91 Halifax Street

ADELAIDE SA 5000

7491.selighcsubmissionsannexure.150102.doc

Telephone : (08) 8223 1388

Fax: (08) 8232 1849

jradsone@radbonelaw.com

Section 769C

- (10) In this section:
- (a) a reference to a proceeding *under* this Chapter includes a reference to:
 - (i) a prosecution for an offence based on a provision of this Chapter; and
 - (ii) a proceeding under a provision of Part 9.4B that relates to a provision of this Chapter; and
 - (iii) any other proceeding under any other provision of Chapter 9 that relates to a provision of this Chapter; and
 - (b) a reference to *conduct* is a reference to an act, an omission to perform an act, or a state of affairs; and
 - (c) a reference to the *state of mind* of a person includes a reference to the knowledge, intention, opinion, belief or purpose of the person and the person's reasons for the person's intention, opinion, belief or purpose.

Note: For the meaning of *offence based on* a provision, see the definition in section 9.

769C Representations about future matters taken to be misleading if made without reasonable grounds

- (1) For the purposes of this Chapter, or of a proceeding under this Chapter, if:
- (a) a person makes a representation with respect to any future matter (including the doing of, or refusing to do, any act); and
 - (b) the person does not have reasonable grounds for making the representation;
- the representation is taken to be misleading.
- (2) Subsection (1) does not limit the circumstances in which a representation may be misleading.
- (3) In this section:
- proceeding under this Chapter* has the same meaning as it has in section 769B.

Division 3—Additional requirements for personal advice provided to a retail client

Subdivision A—When this Division applies

944A Situation in which Division applies

This Division applies in relation to the provision of personal advice (the *advice*) in the following circumstances:

- (a) the advice is provided:
 - (i) by a financial services licensee (the *providing entity*); or
 - (ii) by a person (the *providing entity*) in their capacity as authorised representative of a financial services licensee (the *authorising licensee*), or of 2 or more financial services licensees (the *authorising licensees*); and
- (b) the advice is provided to a person (the *client*) as a retail client.

Subdivision B—Requirements relating to basis of advice

945A Requirement to have a reasonable basis for the advice

- (1) The providing entity must only provide the advice to the client if:
 - (a) the providing entity:
 - (i) determines the relevant personal circumstances in relation to giving the advice; and
 - (ii) makes reasonable inquiries in relation to those personal circumstances; and
 - (b) having regard to information obtained from the client in relation to those personal circumstances, the providing entity 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.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Section 945B

- (2) In any proceedings against an authorised representative of a financial services licensee for an offence based on subsection (1), it is a defence if:
- (a) the licensee had provided the authorised representative with information or instructions about the requirements to be complied with in relation to the giving of personal advice; and
 - (b) the 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.

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

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

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

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 knows that the information is incomplete or inaccurate, or is reckless as to whether it is incomplete or inaccurate;
- the providing entity 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.

Section 946A

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (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).

Subdivision C—Requirement for a Statement of Advice to be given

946A Obligation to give client a Statement of Advice

- (1) The providing entity must give the client a Statement of Advice in accordance with this Subdivision and Subdivision D.
- (2) The Statement of Advice may be:
 - (a) the means by which the advice is provided; or
 - (b) a separate record of the advice.
- (3) This section has effect subject to section 946B.

946B Situations in which a Statement of Advice is not required

Further market-related advice

- (1) The providing entity does not have to give the client a Statement of Advice for particular advice (the *further market-related advice*) if:
 - (a) the providing entity is a participant in a licensed market, or is an authorised representative of a participant in a licensed market; and
 - (b) the providing entity has previously given the client a Statement of Advice that set out the client's relevant personal circumstances in relation to the advice (the *previous advice*) set out in that Statement; and

Section 1041E

- (a) the transaction, or thing done, constitutes or would constitute a contravention of section 1041A, 1041B, 1041C, 1041E or 1041F; and
- (b) the person, or an associate of the person:
 - (i) has entered into such a transaction or done such an act or thing; or
 - (ii) has received, or may receive, directly or indirectly, a consideration or benefit for circulating or disseminating, or authorising the circulation or dissemination of, the statement or information.

Note 1: Failure to comply with this section is an offence (see subsection 1311(1)). For defences to a prosecution based on this section, see Division 4.

Note 2: This section is also a civil penalty provision (see section 1317E). For relief from liability to a civil penalty relating to this section, see Division 4 and section 1317S.

1041E False or misleading statements

- (1) A person must not (whether in this jurisdiction or elsewhere) make a statement, or disseminate information, if:
 - (a) the statement or information is false in a material particular or is materially misleading; and
 - (b) the statement or information is likely:
 - (i) to induce persons in this jurisdiction to apply for financial products; or
 - (ii) to induce persons in this jurisdiction to dispose of or acquire financial products; or
 - (iii) to have the effect of increasing, reducing, maintaining or stabilising the price for trading in financial products on a financial market operated in this jurisdiction; and
 - (c) when the person makes the statement, or disseminates the information:
 - (i) the person does not care whether the statement or information is true or false; or
 - (ii) the person knows, or ought reasonably to have known, that the statement or information is false in a material particular or is materially misleading.

Section 1041F

Note 1: Failure to comply with this subsection is an offence (see subsection 1311(1)). For defences to a prosecution based on this subsection, see Division 4.

Note 2: Failure to comply with this subsection may also lead to civil liability under section 1041I. For relief from liability under that section, see Division 4.

- (2) For the purposes of the application of the *Criminal Code* in relation to an offence based on subsection (1), paragraph (1)(a) is a physical element, the fault element for which is as specified in paragraph (1)(c).
- (3) For the purposes of an offence based on subsection (1), strict liability applies to subparagraphs (1)(b)(i), (ii) and (iii).

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

1041F Inducing persons to deal

- (1) A person must not, in this jurisdiction, induce another person to deal in financial products:
- (a) by making or publishing a statement, promise or forecast if the person knows, or is reckless as to whether, the statement is misleading, false or deceptive; or
 - (b) by a dishonest concealment of material facts; or
 - (c) by recording or storing information that the person knows to be false or misleading in a material particular or materially misleading if:
 - (i) the information is recorded or stored in, or by means of, a mechanical, electronic or other device; and
 - (ii) when the information was so recorded or stored, the person had reasonable grounds for expecting that it would be available to the other person, or a class of persons that includes the other person.

Note 1: Failure to comply with this subsection is an offence (see subsection 1311(1)). For defences to a prosecution based on this subsection, see Division 4.

Note 2: Failure to comply with this subsection may also lead to civil liability under section 1041I. For relief from liability under that section, see Division 4.

- (2) In this section:
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1041H Misleading or deceptive conduct (civil liability only)

- (1) A person must not, in this jurisdiction, engage in conduct, in relation to a financial product or a financial service, that is misleading or deceptive or is likely to mislead or deceive.

Note 1: Failure to comply with this subsection is not an offence.

Note 2: Failure to comply with this subsection may lead to civil liability under section 1041I. For limits on, and relief from, liability under that section, see Division 4.

- (2) The reference in subsection (1) to engaging in conduct in relation to a financial product includes (but is not limited to) any of the following:

- (a) dealing in a financial product;
- (b) without limiting paragraph (a):
 - (i) issuing a financial product;
 - (ii) publishing a notice in relation to a financial product;
 - (iii) making, or making an evaluation of, an offer under a takeover bid or a recommendation relating to such an offer;
 - (iv) applying to become a standard employer-sponsor (within the meaning of the *Superannuation Industry (Supervision) Act 1993*) of a superannuation entity (within the meaning of that Act);
 - (v) permitting a person to become a standard employer-sponsor (within the meaning of the *Superannuation Industry (Supervision) Act 1993*) of a superannuation entity (within the meaning of that Act);
 - (vi) a trustee of a superannuation entity (within the meaning of the *Superannuation Industry (Supervision) Act 1993*) dealing with a beneficiary of that entity as such a beneficiary;
 - (vii) a trustee of a superannuation entity (within the meaning of the *Superannuation Industry (Supervision) Act 1993*) dealing with an employer-sponsor (within the meaning of that Act), or an associate (within the meaning of that Act) of an employer-sponsor, of that entity as such an employer-sponsor or associate;

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- (viii) applying, on behalf of an employee (within the meaning of the *Retirement Savings Accounts Act 1997*), for the employee to become the holder of an RSA product;
- (ix) an RSA provider (within the meaning of the *Retirement Savings Accounts Act 1997*) dealing with an employer (within the meaning of that Act), or an associate (within the meaning of that Act) of an employer, who makes an application, on behalf of an employee (within the meaning of that Act) of the employer, for the employee to become the holder of an RSA product, as such an employer;
- (x) carrying on negotiations, or making arrangements, or doing any other act, preparatory to, or in any way related to, an activity covered by any of subparagraphs (i) to (ix).

(3) Conduct:

- (a) that contravenes:
 - (i) section 670A (misleading or deceptive takeover document); or
 - (ii) section 728 (misleading or deceptive fundraising document); or
- (b) in relation to a disclosure document or statement within the meaning of section 953A; or
- (c) in relation to a disclosure document or statement within the meaning of section 1022A;

does not contravene subsection (1). For this purpose, conduct contravenes the provision even if the conduct does not constitute an offence, or does not lead to any liability, because of the availability of a defence.

1041I Civil action for loss or damage for contravention of sections 1041E to 1041H

- (1) A person who suffers loss or damage by conduct of another person that was engaged in in contravention of section 1041E, 1041F, 1041G or 1041H may recover the amount of the loss or damage by action against that other person or against any person involved in the contravention, whether or not that other person or any person

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involved in the contravention has been convicted of an offence in respect of the contravention.

(1A) Subsection (1) has effect subject to section 1044B.

Note: Section 1044B may limit the amount that the person may recover for a contravention of section 1041H (Misleading or deceptive conduct) from the other person or from another person involved in the contravention.

(1B) Despite subsection (1), if:

(a) a person (the *claimant*) makes a claim under subsection (1) in relation to:

- (i) economic loss; or
- (ii) damage to property;

caused by conduct of another person (the *defendant*) that was done in contravention of section 1041H; and

(b) the claimant suffered the loss or damage:

- (i) as a result partly of the claimant's failure to take reasonable care; and
- (ii) as a result partly of the conduct referred to in paragraph (a); and

(c) the defendant:

- (i) did not intend to cause the loss or damage; and
- (ii) did not fraudulently cause the loss or damage;

the damages that the claimant may recover in relation to the loss or damage are to be reduced to the extent to which the court thinks just and equitable having regard to the claimant's share in the responsibility for the loss or damage.

Note: Division 2A also applies proportionate liability to a claim for damages under this section for a contravention of section 1041H.

(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.

(4) Section 1317S (which provides for relief from liability) applies in relation to liability under subsection (1) as if:

(a) the sections referred to in subsection (1) were civil penalty provisions; and

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(b) proceedings under subsection (1) were eligible proceedings.

Note: Relief from liability under this section may also be available
(depending on the circumstances) under Division 4.

1041J Sections of this Division have effect independently of each other

Subject to any express provision to the contrary, the various sections in this Division have effect independently of each other, and nothing in any of the sections limits the scope or application of any of the other sections.

1041K Division applies to certain conduct to the exclusion of State Fair Trading Acts provisions

- (1) This section applies to conduct:
- (a) that contravenes:
 - (i) section 670A (misleading or deceptive takeover document); or
 - (ii) section 728 (misleading or deceptive fundraising document); or
 - (b) that relates to a disclosure document or statement within the meaning of section 953A; or
 - (c) that relates to a disclosure document or statement within the meaning of section 1022A.

For this purpose, conduct contravenes the provision even if the conduct does not constitute an offence, or does not lead to any liability, because of the availability of a defence.

- (2) This Division operates in relation to conduct to which this section applies to the exclusion of the provisions of the State Fair Trading Act of any State or Territory.

Section 1041L

Division 2A—Proportionate liability for misleading and deceptive conduct

1041L Application of Division

- (1) This Division applies to a claim (an *apportionable claim*) if the claim is a claim for damages made under section 1041I for:
 - (a) economic loss; or
 - (b) damage to property;caused by conduct that was done in a contravention of section 1041H.
- (2) For the purposes of this Division, there is a single apportionable claim in proceedings in respect of the same loss or damage even if the claim for the loss or damage is based on more than one cause of action (whether or not of the same or a different kind).
- (3) In this Division, a *concurrent wrongdoer*, in relation to a claim, is a person who is one of 2 or more persons whose acts or omissions (or act or omission) caused, independently of each other or jointly, the damage or loss that is the subject of the claim.
- (4) For the purposes of this Division, apportionable claims are limited to those claims specified in subsection (1).
- (5) For the purposes of this Division, it does not matter that a concurrent wrongdoer is insolvent, is being wound up or has ceased to exist or died.

1041M Certain concurrent wrongdoers not to have benefit of apportionment

- (1) Nothing in this Division operates to exclude the liability of a concurrent wrongdoer (an *excluded concurrent wrongdoer*) in proceedings involving an apportionable claim if:
 - (a) the concurrent wrongdoer intended to cause the economic loss or damage to property that is the subject of the claim; or
 - (b) the concurrent wrongdoer fraudulently caused the economic loss or damage to property that is the subject of the claim.

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- (2) The liability of an excluded concurrent wrongdoer is to be determined in accordance with the legal rules (if any) that (apart from this Division) are relevant.
- (3) The liability of any other concurrent wrongdoer who is not an excluded concurrent wrongdoer is to be determined in accordance with the provisions of this Division.

1041N Proportionate liability for apportionable claims

- (1) In any proceedings involving an apportionable claim:
 - (a) the liability of a defendant who is a concurrent wrongdoer in relation to that claim is limited to an amount reflecting that proportion of the damage or loss claimed that the court considers just having regard to the extent of the defendant's responsibility for the damage or loss; and
 - (b) the court may give judgment against the defendant for not more than that amount.
- (2) If the proceedings involve both an apportionable claim and a claim that is not an apportionable claim:
 - (a) liability for the apportionable claim is to be determined in accordance with the provisions of this Division; and
 - (b) liability for the other claim is to be determined in accordance with the legal rules, if any, that (apart from this Division) are relevant.
- (3) In apportioning responsibility between defendants in the proceedings:
 - (a) the court is to exclude that proportion of the damage or loss in relation to which the plaintiff is contributorily negligent under any relevant law; and
 - (b) the court may have regard to the comparative responsibility of any concurrent wrongdoer who is not a party to the proceedings.
- (4) This section applies in proceedings involving an apportionable claim whether or not all concurrent wrongdoers are parties to the proceedings.

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- (5) A reference in this Division to a defendant in proceedings includes any person joined as a defendant or other party in the proceedings (except as a plaintiff) whether joined under this Division, under rules of court or otherwise.

1041O Defendant to notify plaintiff of concurrent wrongdoer of whom defendant aware

- (1) If:
- (a) a defendant in proceedings involving an apportionable claim has reasonable grounds to believe that a particular person (the *other person*) may be a concurrent wrongdoer in relation to the claim; and
 - (b) the defendant fails to give the plaintiff, as soon as practicable, written notice of the information that the defendant has about:
 - (i) the identity of the other person; and
 - (ii) the circumstances that may make the other person a concurrent wrongdoer in relation to the claim; and
 - (c) the plaintiff unnecessarily incurs costs in the proceedings because the plaintiff was not aware that the other person may be a concurrent wrongdoer in relation to the claim;
- the court hearing the proceedings may order that the defendant pay all or any of those costs of the plaintiff.
- (2) The court may order that the costs to be paid by the defendant be assessed on an indemnity basis or otherwise.

1041P Contribution not recoverable from defendant

A defendant against whom judgment is given under this Division as a concurrent wrongdoer in relation to an apportionable claim:

- (a) cannot be required to contribute to any damages or contribution recovered from another concurrent wrongdoer in respect of the apportionable claim (whether or not the damages or contribution are recovered in the same proceedings in which judgment is given against the defendant); and
- (b) cannot be required to indemnify any such wrongdoer.

1041Q Subsequent actions

- (1) In relation to an apportionable claim, nothing in this Division or any other law prevents a plaintiff who has previously recovered judgment against a concurrent wrongdoer for an apportionable part of any damage or loss from bringing another action against any other concurrent wrongdoer for that damage or loss.
- (2) However, in any proceedings in respect of any such action, the plaintiff cannot recover an amount of damages that, having regard to any damages previously recovered by the plaintiff in respect of the damage or loss, would result in the plaintiff receiving compensation for damage or loss that is greater than the damage or loss actually sustained by the plaintiff.

1041R Joining non-party concurrent wrongdoer in the action

- (1) The court may give leave for any one or more persons to be joined as defendants in proceedings involving an apportionable claim.
- (2) The court is not to give leave for the joinder of any person who was a party to any previously concluded proceedings in respect of the apportionable claim.

1041S Application of Division

Nothing in this Division:

- (a) prevents a person being held vicariously liable for a proportion of an apportionable claim for which another person is liable; or
- (b) prevents a partner from being held severally liable with another partner for that proportion of an apportionable claim for which the other partner is liable; or
- (c) affects the operation of any other Act to the extent that it imposes several liability on any person in respect of what would otherwise be an apportionable claim.