

## Conflicted remuneration

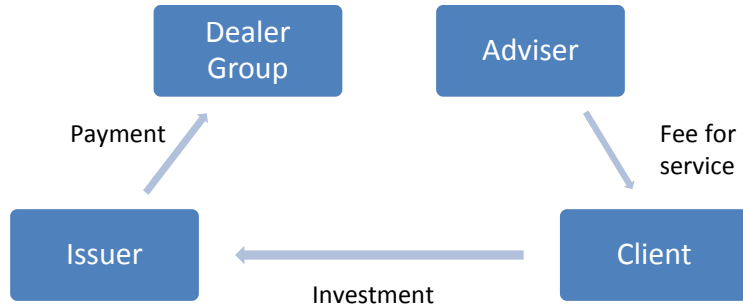
‘..any benefit, whether monetary or non-monetary, given to a financial services licensee, or a representative of a financial services licensee, who provides financial product advice to persons as retail clients that, because of the nature of the benefit or the circumstances in which it is given:

- (a) could reasonably be expected to influence the choice of financial product recommended by the licensee or representative to retail clients *in personal advice*; or
- (b) could reasonably be expected to influence the ~~financial product advice~~ *personal advice* given to retail clients by the licensee or representative.’

(Section 963A as proposed to be amended)

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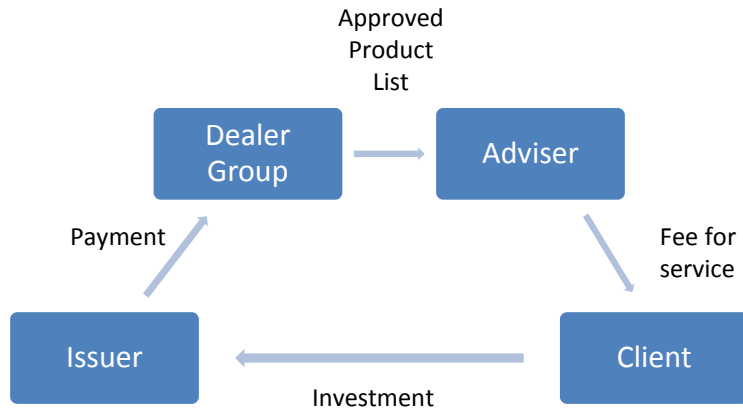
**Benefits not passed on to adviser**



- ASIC Regulatory Guide 246.123
- Payment not likely to influence advice
- Not a 'no action' position; the way the law works!

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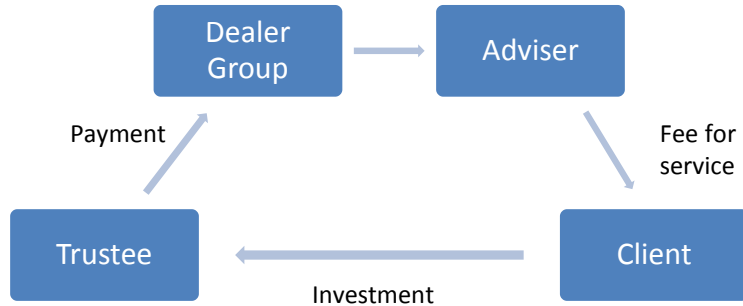
### Product added to APL



- Benefit not passed on to adviser but APL narrows products available
- Has benefit 'influenced' advice?
- Would the product be on the APL but for the benefit?

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### Services/'relationship' fees



- Trustee pays for general or intra-fund advice
- Adviser also receives exempt payment from client
- Payment from trustee still needs to be considered

## Grandfathering

- Prohibition 'does not apply to a benefit given to a financial services licensee, or an RSE licensee, *under an arrangement entered into* before the application day' (sections 1528, 1529).
- Arrangement 'generally means a contract, agreement, understanding, scheme or other arrangement as existing from time to time, whether it is:
  - (a) formal or informal, or partly formal and partly informal;
  - (b) written or oral, or partly written and partly oral; and
  - (c) enforceable, or intended to be enforceable, by legal proceedings (or not), and based on legal or equitable rights (or not): s761A.' (ASIC Regulatory Guide 246.191).

## Grandfathering

- Established principles of law apply to determine whether there is an 'arrangement'
- Need to establish an enforceable right to the benefit
- (Relatively straightforward) example: representation to pay commission in PDS
- (Less straightforward) example: course of conduct

## Grandfathering

- Variation of terms of grandfathered arrangements: again, established principles apply
- Change of party to arrangement contemplated by legislation, so assignment/novation available
- What about where issue of new interest (ie, SFT)?
- Will the situation be different after 1 July 2014?

## Anti-avoidance

‘...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 purpose or for a purpose (that is not incidental) 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.’



## Anti-avoidance

- Explanatory Memorandum provides no guidance
- Does tax law provide any useful guidance?
- ASIC accepts restructure 'in ordinary course of business'
- (Straightforward) example: restructuring to avoid the operation of Part 7.7A entirely
- (Less straightforward) example: restructuring to fall within exemption or grandfathering