The Following Paper is a description of many of the principles governing financial advice in Australia. It is written by Wesley McMaster and is updated from time to time.

Relevant Standards for Financial Advice

(1) Financial advice is designed to advise a person on the efficient use of their financial resources to achieve their objectives.

(2) It is useful to refer to accepted standards that apply in giving financial advice. To do this we need to first understand the process that a reasonably competent Financial Adviser will follow in giving financial advice.

(3) Australian Financial Services Licensees design their training and compliance programs to reflect the rules governing financial advice that are found in the *Corporations Act 2001* (Cth). Financial Advisers are trained to understand the legislation that applies to financial advice and to have regard to that legislation in their professional practice.

1. The advice of a reasonably competent Financial Adviser

(4) In my experience, a reasonably competent Financial Adviser would undertake the following process in formulating and delivering personal financial advice to retail clients.

(a) A reasonably competent Financial Adviser would first undertake a discovery process with the client so that the adviser understands the client's position. The purpose of this is to ensure that any advice is appropriate to the client's personal circumstances, investment objectives and tolerance to risk (appropriate advice). Where advice applies to financial products, this principle of appropriate advice is mandated by s961B of the *Corporations Act 2001* (Cth).[1]

(b) The discovery process will include the following information:

(1) Personal position (family, career and other matters);

(2) Assets and liabilities;

[1] *Corporations Act 2001* (Cth) as at 19 July 2013.

(3) Income and expenses (this will include the income and expenses of a spouse, if relevant);

(4) Ownership of assets (if a trust is involved then the Financial Adviser needs to know who are the beneficiaries and their relevant individual taxation positions);

(5) Insurance policies;

(6) Identification and agreement on objectives (objectives must be measurable otherwise the Financial Adviser cannot measure the progress towards achieving them);[2]

(7) Tolerance to risk.

This information will form the basis for formulating a financial strategy for a client. A financial strategy is the sum of the actions designed to achieve the financial objectives of the client.

(c) Common experience suggests that most people use their financial resources inefficiently. Consequently, a reasonably competent Financial Adviser will design a financial strategy to do two things. The first is to re-position the client so that they use their financial resources efficiently. The second is to advise on immediate and future strategies designed to achieve the client's objectives. The financial strategy will be documented in a Statement of Advice (**SOA**).

(d) The SOA documents the advice given and the reason for that advice. The advice has two components. The key element of the advice is the financial strategy, and this typically includes an investment strategy and may also include a risk management (insurance) strategy. The investment strategy is generally expressed as an asset allocation model. The second element of advice is in the selection of financial products to implement the strategy, for example choosing individual investments to populate the asset allocation model or insurance policies to implement the risk management strategy. The SOA will also contain a written disclosure of the interest of the Financial Adviser in giving the advice as well as documenting the research undertaken on any product recommended.

(e) Once a financial strategy has been determined, it is prudent to review it regularly and measure the progress towards achieving the objectives. Accordingly, a key aspect of an ongoing relationship between a client and a Financial Adviser is

[2] See 6 for a detailed view on objectives.

usually that the Financial Adviser accepts responsibility to conduct such reviews. These reviews typically occur annually. Investment portfolios are generally reviewed and rebalanced more frequently. The annual review will also include a discussion with the client about the amount of risk in the portfolio and whether this should be adjusted.

2. The regulation of financial advice

(5) As described above, when giving financial advice, a reasonably competent Financial Adviser adopts a two step process. The first step is to design the financial strategy. The second step is to select financial products to implement that strategy.

(6) Financial Advisers are trained to exercise a reasonable degree of care in providing financial advice and have regard to the principles of professional responsibility that apply to both steps of the process.

(7) The provisions of the *Corporations Act 2001* (Cth) apply to the second step, being the selection of products to implement the financial strategy.[3]

(8) In my experience the following rules governing financial advice are generally understood and applied to professional practice by reasonably competent Financial Advisers.

(9) In addition to the requirements of the *Corporations Act 2001* (Cth), ASIC issued Regulatory Guides (**RG**) to clarify its interpretation of the *Corporations Act 2001* (Cth) and the standards ASIC expects Australian Financial Services Licensees and their Representatives to follow in giving financial advice.

(10) From approximately 1997 these RGs were called Policy Statements (**PS**). Before 1997, the then Australian Securities Commission issued Policy Notes (**PN**). In my opinion, the transitions did not involve any changes to the relevant standards other than the addition of the Best Interest Duty in July 2013.

(11) The ASIC policies and interpretative guidelines set out in these Regulatory Guides are not a comprehensive statement of the legislation and therefore must be read together

[3] The *Corporations Act 2001* (Cth) commenced on 15 July 2001. Prior to this date, the *Corporations Act 1989* (Cth) applied.

with the Act. They should be used only as guidance on key aspects of the relevant legal obligations.

(12) ASIC Regulatory Guides form the basis of ASIC audits of Financial Advisers and ASIC measures the performance of Financial Advisers by these rules.[4] The rules therefore are considered as minimum standards of behaviour for Financial Advisers and are "best practice" guidelines. The principal RG that advisers refer to is RG175 that was first issued on 5 July 2007[5] and superseded PS175B. RG175 covers conduct and disclosure of financial product providers. However, there are many other RGs that are also consulted, for example, RG181 covers management of conflicts of interest.

(13) The Financial Planning Association of Australia Ltd also issued a set of practice standards and rules that were professional standards for Financial Advisers. The FPA called their rules, the "Rules of Professional Conduct" and they reflect the standards outlined in the ASIC Regulatory Guides.[6] Australian Financial Services Licensees also use these rules in their training and in their Manuals of Procedures for their Representatives.

(14) Based on my experience as a Financial Adviser, an academic (training Financial Advisers) and as a consultant in the industry and former Chairman of the FPA, it is commonly accepted that the standards expressed in these Regulatory Guides reflect the industry standard with respect to giving financial advice as a representative of an Australian Financial Services Licensee.

(15) An examination of the relevant parts of the Corporations Law and *Corporations Act 2001* (Cth) as well as the policy guides issued by the (then) Australian Securities Commission (ASC, now ASIC), starting with SPN 23 issued on 13 July 1992 and SPN 41 issued on 27 November 1993, reveals that the general principles of:

(a) disclosure of interests;

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[4] In the Policy Notes, Policy Statements and Regulatory Guides issued by the ASIC (formerly the ASC) they describe how they expect Financial Advisers to satisfy their obligations under the relevant Acts that apply to financial advice. I refer to these descriptions as “rules”. For example, RG175.173 (Nov. 2017) identifies some “rules” that certain information is to be included in a SOA.

[5] There have been a number of updated versions since.

[6] I have a copy of the FPA Code of Professional Practice which was first published in November 2009. It includes the FPA Code of Ethics, the FPA Practice Standards and the Rules of Professional Conduct. It was reprinted in September 2010. The FPA Code of Professional Practice was last amended in July 2013. A copy of the Code of Practice dated 17 November 2009 and July 2013 are at Annexure 2.

(b) ascertaining that a recommendation is appropriate to the investment objectives, financial situation and particular needs of the client as known to the Financial Adviser;

(c) basing the recommendation on such consideration and investigation, reasonable in all the circumstances, in relation to the financial products which are to be recommended; and

(d) accounting for the client's tolerance to risk

have not changed since the commencement of the *Corporations Act 1989* (Cth). Consequently, when I quote recent publications to explain these principles, they were just as relevant in 1989 as they are today.

(16) The Best Interest Duty was added to the *Corporations Act 2001* (Cth) in July 2013 and was subsequently included in Regulatory Guides. It has always been generally understood within the financial advice community that a Financial Adviser had always had a duty to act in the best interests of clients (Fiduciary Duty).

(17) I summarise key elements of these rules below.

3. The additional standards that apply to a Licensee

(18) A Licensee has obligations in addition to the obligations of a Financial Adviser. A Licensee is responsible for meeting the conditions of its licence. This will include financial conditions. However, the most important issue is that the Licensee is responsible for almost all advice given by its representatives. This causes competent Licensees to develop strict compliance processes within their businesses and processes for supervising their representatives.[7]

(19) Licensees have obligations to supervise and train their representatives. These obligations are included in the AFSL issued by ASIC.

4. Standards for the supervision of financial advice

(20) Different holders of an AFSL will have different methods of supervising their representatives depending on their size, use of technology and business model. My

[7] S917B of the *Corporations Act 2001* (Cth) .

views on supervision that I outline below are not an exhaustive or complete list of supervisory methodology.

(21) One level of supervision of advice is to mandate that all representatives use approved templates for Statements of Advice, Records of Advice (**ROA**) or Limited Statements of Advice (**LSOA**). In my experience, a reasonably competent Licensee will prepare templates covering the various generic strategies that are likely to be included in a SOA. The benefit of having all representatives use these templates is that advice within the area covered by the template will be consistent and the wording and data will be compliant with the rules of the Licensee.

(22) Another level of supervision that is common for Licensees is to mandate that all advice must comply with the internally published policies of the Licensee. In my experience a reasonably competent Licensee will publish a policy statement on each generic financial planning strategy (such as negative gearing or switching products). The purpose of the policy statements is to establish the rules which apply to the Licensee's representatives when giving advice on the subject matter. By mandating that all advice must comply with these policy statements, the Licensee is seeking to ensure that advice is reasonable and appropriate to the client and that advice on a subject matter is not given if the client does not satisfy the conditions described within the particular policy statement.

(23) Where a Licensee operates from a single site, in my experience, it is common to have advice reviewed by a peer before it is delivered to a client. Single site Licensees are often small businesses and may not have a full-time compliance officer.

(24) Most Licensees which operate from multiple sites have larger businesses and more resources than Licensees operating from a single site. In my experience, these businesses will generally have a full-time compliance officer or team. The degree of supervision of advice will depend on the size of the business. With medium sized businesses it may not be commercially possible to examine all written advice. However, with large businesses (with more resources) there is a greater capacity to examine a larger sample of advice. In my experience, the following processes are common.

(a) A new representative will generally have to submit all written advice for review until the Licensee is satisfied with the representative's competency and adherence to the rules of the Licensee.

(b) All representatives will submit a quality control checklist to the Licensee to indicate that advice has been prepared. The advice may or may not be examined by the Licensee subject to the checklist and the assessed competency of the Authorised Representative (**AR**).

(c) The Licensee will have an audit program to systematically review a sample of written advice given by ARs. If a web-based Customer Relationship Management system is used (such as Xplan), then advice can be examined centrally without leaving head office. If this is not the case, then advice can only be examined by a visit to the remote office or by requesting that it is sent to head office. An examination of advice includes an examination of file notes and other documentation associated with the advice.

(d) Compliance staff may also examine revenue statements to look for unusual transactions and this will cause the examination of the advice associated with those transactions.

(e) Compliance staff may also conduct an audit program relating to specific issues such as super switching.

(f) Surveillance by compliance staff should recognise where personal advice has been given and can match that with the adviser to see whether the adviser was authorised to give personal advice.

(25) A reasonably competent Licensee will conduct an annual audit of each site where ARs operate. The purpose of these visits is to inspect signage; office standards; organisational capacity to provide the required level of service; and client files.

5. Approved Product Lists

(26) Australian Financial Services Licensees are responsible for the advice that is given by their representatives and they have a consequent obligation to supervise that advice. One of the tools of supervision that they employ is the Approved Product List (**APL**).

(27) It is normal practice for a reasonably competent Licensee to restrict their ARs so that they can only advise clients on the investments that are included on the Licensee's APL.

(28) In my experience, a reasonably competent Licensee will undertake the process described at 9.2 or a process similar, in examining whether a financial product should be placed on the APL.

(29) By going through this process, a reasonably competent Licensee will filter investments with a view to excluding those that carry unacceptable risk or those that are unlikely to meet the return or other criteria that the Licensee considers acceptable. By default, this process identifies acceptable (to the Licensee) investments that the Licensee may include on their APL.

(30) Reasonably competent Licensees will also review the investments on the APL so that if there is a material change, they may remove the investment from the APL and advise their ARs as to what action should be taken with clients as a result of the removal. If an investment that was included on an APL, issues a new offer document or any information that is a material change, then a reasonably competent Licensee would, as a matter of routine, review that investment to determine whether it should remain on the APL.

(31) This process provides the following benefits to the Licensee.

(a) The Licensee can be confident that the investments included on the APL meet the firm's criteria.
(b) The Licensee has reduced advice liability through a thorough research process and the restriction of ARs to only advising on the investments on the APL.
(c) The Licensee controls distribution of client financial resources through control of the products that will or will not be included on the APL.
(d) The Licensee limits their ongoing research requirement by restricting the APL to a certain number of products and therefore avoiding the need to research the universe of products.

(32) Where an AR wants to give advice on a product that is not on the APL of the Licensee, the rules of a typical Licensee are such that the AR must request permission. A reasonably competent Licensee then assumes responsibility for reviewing available information about the product and forming a judgement as to whether to allow the AR to give such advice or not.

6. Objectives

(33) The function of advice is to achieve an outcome (objective). Advice cannot be constructed to achieve an outcome if that outcome is not known.

(34) In my opinion a Financial Adviser cannot give appropriate financial advice without understanding what the client wants to achieve. In formulating financial advice, a Financial Adviser will design the strategy to achieve the client's objective. Consequently, understanding the objective is critical to the advice.

(35) If the Financial Adviser is not aware of the objective, then there is no parameter within which the advice should be given. Additionally, there would be no basis for the advice.

(36) The risk to the client if the Financial Adviser is not aware of the objective or the objective is not clearly defined is that the advice may not be appropriate to the client. For example, a Financial Adviser may advise negative gearing when that risk is not necessary in order to achieve the objective. I have seen an example where a Financial Adviser advised a client to borrow money to invest and markets collapsed causing the client to lose money because they could no longer afford the debt. An examination of the position of the client before this advice revealed that they had sufficient resources to achieve their financial objective without borrowing money. The higher risk of using debt was not necessary. This is an example of inappropriate advice. Another example of inappropriate advice is where a Financial Adviser gave advice to transfer personal risk to an insurance company and this became an objective, although the basis for the amount of risk was not clearly defined. The Financial Adviser recommended insurance policies with high sums insured (providing high commissions) and the client did not have the financial capacity to sustain the high premiums. This created financial difficulty and stress for the client causing them to cancel one policy and reduce the sums insured on 2 others.

(37) With respect to financial product advice, the s961B obligation to have a reasonable basis for advice includes identifying:

> *"the objectives, financial situation and needs of the client that would reasonably be considered as relevant to advice sought on that subject matter (the client's relevant circumstances);"*[8]

[8] S961B of the *Corporations Act 2001*(Cth) .

(38) Although the *Corporations Act 2001* (Cth) applies to financial product advice, in my experience, it is generally accepted in the financial advice community that the same standards apply to all financial advice.

(39) Financial objectives should be quantified so that they can be measured. Measurement should include a timeframe and a quantum.[9] If an objective cannot be measured then, during the period of progress towards the objective, a Financial Adviser cannot determine whether the client is likely to achieve the objective or whether remedial action needs to be taken. Further, by quantifying an objective, a Financial Adviser can determine what financial resources and how much risk (and therefore what asset allocation) needs to be applied to achieve the objective. Where an objective is to transfer personal risks to an insurance company (such as debt and the risk of sickness or accident), the Financial Adviser can also determine what financial resources and how much risk needs to be applied to the strategy to achieve the objective.

(40) In my experience it is common for clients to be initially unable to quantify their objectives. In my opinion, the role of a Financial Adviser is to explore with the client what they really want to achieve and then to help them translate that into a quantum and timeframe.

(41) There are times when a client is not able to quantify their objectives. Where this is so, a Financial Adviser will generally recommend a benchmark so that the performance of an investment portfolio or strategy can be measured and determined to be efficient[10] or require remedial adjustment. For example, a benchmark for an investment portfolio could be to achieve growth of 3% pa above inflation in any 3 year period. For a share market portfolio, it could be to achieve growth of 3% pa above the S&P/ASX 300 Index. Some clients don't think about personal risk and a common objective overlooked by clients is the need to protect their financial position by transferring personal risk to an insurance company. For example, using an appropriate income protection insurance policy to protect their income if they are unable to work through sickness or accident.

(42) At times a client will have objectives that cannot be achieved given their financial resources and timeframe. In such cases, it is the role of a Financial Adviser to advise

[9] Refer to paragraphs 261-273 of the following Judgement. *Australian Securities and Investments Commission v Cassimatis (No 8)* [2016] FCA 1023.

[10] By "efficient", I mean that because risk and return are related, a high risk investment should achieve a high return and a low risk investment should achieve a low return. A high risk investment that achieved a low return is inefficient.

the client that they should either adjust their financial resources; the amount of risk that they take; the time period; or their objective. Adjusting the amount of risk they take will introduce a volatility experience that may not correlate with their risk profile or, in the case of an insurance policy, the client might have to accept a lower sum insured because it is all they can afford.

7. Risk Profile

(43) After identifying a client's objectives, a reasonably competent Financial Adviser will then determine the client's tolerance to investment risk. This is called the client's risk profile.

(44) There is a significant difference in the type of investments that a reasonably competent Financial Adviser would recommend to clients with different risk profiles. The risk profile will determine the asset allocation that is appropriate to a client because the asset allocation defines the risk and return character of an investment portfolio. Consequently, the identification of a client's risk profile is critical in determining the advice that is appropriate to that client.

(45) Section 961B of the *Corporations Act 2001* (Cth) requires a Financial Adviser to have a reasonable basis for the advice taking into account the client's relevant personal circumstances.

(46) In considering a client's personal circumstances ASIC has specifically established the need for a Financial Adviser to account for a client's tolerance to investment risk in RG175.309 (Nov 2017) which provides:

"Where advice relates to financial product(s) with an investment component, we consider that—depending on the subject matter of advice sought by the client—the client's relevant circumstances may include the client's:

(d) tolerance for the risk of capital loss, especially where this is a significant possibility if the advice is followed;

(e) tolerance for the risk that the advice (if followed) will not produce the expected benefits. For example, in the context of retirement advice, this may include considering longevity risk, market risk and inflation risk;"

(47) Tolerance to the risk of capital loss or the failure of the expected benefits is generally determined through the process known as risk profiling.

(48) The risk profile can be determined in a number of ways each involving a subjective process. In my experience there are three broad methods used in the financial advice industry.

(a) Some Financial Advisers use a sophisticated psychometric testing process.

(b) The most common method is to ask the client a simple set of questions where the answers are weighted and equated with an asset allocation aligned with a risk profile.

(c) Another method is where a Financial Adviser will explain how investment markets behave and explain the role of risk. With this background, the adviser will explain the risk and return characteristics of the different investment options (aligned with risk profiles) and probable outcomes that the client can choose and then discuss with the client which investment option they think will best suit their tolerance to risk.

(49) The success of this process relies on two factors. One is the ability to sufficiently educate the client so that the client can make an informed judgment about his or her risk preference. The other is to avoid adviser bias in influencing the client to select a position that may not be suitable.[11]

(50) Generally, investors are identified as having one of the following standard risk profiles.

The standard risk profiles are:

(a) *Conservative* – Low risk, bias towards secure income producing investments.
(b) *Moderate* – bias towards income producing but with more growth investments than conservative.
(c) *Balanced* – Balance between income producing and growth investments.
(d) *Growth* (also referred to as Moderately Aggressive) – Bias towards growth with a small component of income producing investments.
(e) *High Growth* (also referred to as Aggressive) – High risk, all growth and some speculative investments.

(51) There is a difference in the type of investments that a Financial Adviser would recommend to an investor in each of these categories. Consequently, the identification

[11] Refer to paragraphs 293-300 of the following Judgement. Australian Securities and Investments Commission v Cassimatis (No 8) [2016] FCA 1023

of an investor's risk profile is critical in determining the advice that is appropriate to that person.

(52) To give some context to these descriptors, typical ratios of growth assets/defensive assets[12] in investment portfolios that are applied to clients with these risk profiles are;

- Conservative 20/80
- Moderate 40/60
- Balanced 60/40
- Growth 80/20
- High Growth 100/0

This observation is based on my experience in advising clients, managing financial planning businesses and examining many financial planning businesses since 1982.

(53) Growth assets (shares and property) generally provide high capital growth and low income. Defensive assets (fixed interest and cash) generally provide high income and low (if any) capital growth. Volatility and risk is generally higher in growth assets and lower in defensive assets.

(54) It is important to understand that although a client who wants 100% of their investments in growth assets will be determined to be a High Growth investor, this does not mean that all such clients will find high risk and speculative investments acceptable. Some clients want to invest conservatively in growth assets and such clients will typically hold property and "blue chip" shares.

(55) In their published "Policy Position on Risk Tolerance"[13], the FPA outline the following relevant principles.

Paragraph 5 (b)

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[12] This is a succinct way of describing the broad asset allocation and therefore the risk and return characteristics of an investment portfolio. Generally, shares and property are included in the growth component and fixed interest and cash are included in the defensive component.

[13] Dated October 2003

(ii) "Financial Advisers are in the best position to explain and educate clients on the investment risks associated with the recommendations being made and the relationship of these investment risks to the client's risk tolerance assessment.

(iii) FPA emphasises that this educative relationship between the Financial Adviser and the client is acknowledged at Common Law [14]."

Paragraph 5 (c)

(iii) "Financial Advisers would be expected to be able to advise clients about the range of outcomes they could reasonably expect to experience and to advise and discuss with clients, in terms they can easily understand, the financial implications of returns being at the bottom end of the possible range. For example, this may mean that retirement would need to be postponed for an extra year or lifestyle may need to be reduced in later years if they adopt the proposed strategy instead of opting for a risk free return such as an assumed cash return. It is also appropriate to consider the outcomes if normal market returns are experienced and even upside opportunity to allow clients to form a view about whether they value the potential benefits enough to justify the risk."

8. Relationship between objectives and risk profile

(56) A client's objectives and risk profile cannot be viewed in isolation. They are interdependent.

(57) The risk profile determines the asset allocation and therefore the risk and return character of an appropriate investment portfolio.

(58) A reasonably competent Financial Adviser will apply the available financial resources to the asset allocation determined by the risk profile. This will allow a projection of the value of the investment portfolio over time to see whether the objectives are likely to be satisfied.

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[14] *Paige v FPI Limited & Anor* [2001] NSWSC 627: Adviser found liable as a result of, inter alia, failing to advise the client that there were risks to his capital in the recommended investments. McClellan J noting at 198 that "a reasonable investigation would have ensured at the least that the clients were explained the elements of and practical application of their risk profile to the investments which he was recommending."

(59) If the objectives are not likely to be satisfied, then the client will need to take one or more of the following steps:

(a) either apply more financial resources,
(b) increase their timeframe;
(c) reduce their objectives; or
(d) take higher risk.

(60) Regardless of a client's objectives and risk profile, a Financial Adviser has a primary obligation to give advice that will not place a client in a position where the risk of their strategy could significantly affect their financial capacity to maintain their present financial position (based on the reasonable judgement of the Financial Adviser). For example:

> In my opinion a retired couple who owned their home, had no debt and had a small amount invested would not be suited to the risk of negative gearing. The reason for this view is that if their geared investments declined in value, they would generally not have the cash reserves nor surplus income to replace those investments or meet any margin calls. Additionally, they generally would not have the surplus income to pay the net investment costs (after allowing for investment income). In my opinion a negative gearing strategy for people in this position has the risk that it could significantly affect their financial capacity to maintain their present (before gearing) financial position. In my opinion a reasonably competent Financial Adviser would not advise clients in this position to take high risk or to leverage risk by negative gearing.

(61) Where a client insists on a strategy or particular objective that in the reasonable judgement of a Financial Adviser would place them in a position where the risk could significantly affect their financial position in a negative way, then the adviser has an obligation to explain those risks and possible outcomes and, in some cases may refuse to give advice based upon that strategy. [15]

[15] Refer to paragraph 333 of the following Judgement. Australian Securities and Investments Commission v Cassimatis (No 8) [2016] FCA 1023.

9. Research

9.1 General obligation

(62) Although the *Corporations Act 2001* (Cth) applies to financial product advice, it is generally accepted in the financial advice community that the same standards apply to all financial advice.

(63) A primary obligation in s961B is the requirement that the Financial Adviser give such consideration to, and conduct such investigation of, the subject matter of a recommendation as is reasonable in all the circumstances. In my experience, reasonably competent Financial Advisers can either carry out research and analyse investments themselves or will use research and analysis generated from external sources. The extent of the research and analysis that it is reasonable to expect the Financial Adviser to do depends on the nature of the product or strategy that forms the basis of the particular recommendation and the needs of the client being advised.

(64) In S961B ASIC specifically identifies the obligation of a Financial Adviser as the providing entity[16] to conduct research on the subject matter of their advice.

(65) In my opinion, to provide advice appropriate to a particular client a Financial Adviser should, as a minimum requirement, consider economic and accounting information relating to markets and industries and securities respectively. This information, when analysed, forms the basis for judging future income and growth expectations and risk factors associated with recommended investments, individually and collectively, in an investment portfolio. The Financial Adviser is required to take those analyses into account when selecting from competing products and formulating suitable investment strategies.

(66) A Financial Adviser should at any time be able to provide sufficient written information about the investments recommended so that the basis on which those investments were considered appropriate for the particular client can be understood.[17] It is expected that this information would usually be provided to the client before the client takes up the recommendation. It should also be easily accessible in the Financial Adviser's files relating to the client.

[16] RG175.30 (Nov. 2017)
[17] RG 175.181 (Nov. 2017)

(67) These written reports should address both risk factors and return expectations. Some of the matters that should be disclosed include:

(a) risks associated with the issuer. These include the qualities and experience of the issuer, associated companies, management company and trustee, as appropriate;

(b) risks associated with the product, such as the quality of underlying assets and risk-return characteristics of the product;

(c) market and economic risks, such as economic cycles, volatility and other capital market factors; and

(d) capital and income prospects. [18]

9.2 The research obligation of a Licensee

(68) Licensees are responsible for the advice that is given by their ARs and they have a consequent obligation to supervise that advice. One of the tools of supervision that they employ is the Approved Product List (APL).

(69) It is normal practice for a Licensee to restrict their ARs so that they can only advise clients on the investments that are included on their APL.

(70) In my experience, a Licensee will undertake the following process or a process similar, in examining whether a financial product should be placed on the Approved Product List.

(a) Due diligence on the manager of the financial product;

(b) Analysis of the PDS, prospectus, company or investment offer;

(c) Analysis of the assets, liabilities and investment methodology;

(d) Analysis of risks associated with the investment;

(e) Analysis of past performance (measurement of risk and return) versus objectives and relevant indices;

(f) Analysis of fees;

(g) Analysis of the effect of tax on net return;

(h) Analysis of capital market factors; and

(i) Analysis of research on the product published by a research house.

[18] PS122.109

(71) Some of the above analyses may be provided by a research house. It is common practice for many licensees to accept the recommendations and research of a research house on the basis that the research house has undertaken the above process. Effectively such Licensees have outsourced research.

9.3 The research obligation of a Financial Adviser

(72) In my opinion, the extent of research of a reasonably competent Financial Adviser in relation to a financial product that the adviser is considering for recommendation to a client, will be to critically examine the prospectus, PDS or offer and read the research provided by the Licensee that relates to that product. It is reasonable for the Financial Adviser to rely on the integrity of the due diligence undertaken by the Licensee and on the research findings provided by the Licensee. It is not common for Financial Advisers to undertake research additional to the research of the Licensee.

(73) In my opinion, a Financial Adviser should be able to generally rely on the research, analysis and information provided by the Licensee. It is, in my opinion, unreasonable to expect Financial Advisers to duplicate the work of the Licensee. However, a reasonably competent Financial Adviser should review all information to examine it for reasonableness. By this I mean that such an adviser will understand the information provided to them and will form an opinion about the investment based on that information and will seek further information if the adviser judges that it is needed.

(74) A Financial Adviser should be kept up to date on approved products through research updates issued by the Licensee, professional development training and through the process of reviewing clients' investment portfolios at least annually. In this process, a reasonably competent Financial Adviser will review financial products that have been recommended to the client.

9.4 The research obligation with direct equities

(75) The role of a reasonably competent Financial Adviser in giving investment advice is to:

(a) determine an appropriate asset allocation (this defines the risk and return character of the portfolio); and
(b) select appropriate investments within each asset class.

(76) Some Financial Advisers (such as stockbrokers) are expert in company analysis and will select particular companies to be included in their client portfolios on the basis that they predict that those companies will out-perform others in terms of their risk and return qualities. Other Financial Advisers who are not expert in company analysis will select professionally managed funds to populate the asset classes for their clients.

(77) In my opinion the research required of a Financial Adviser who selects companies is greater than the research required of a Financial Adviser who uses professionally managed funds. The latter adviser has the benefit of a Product Disclosure Statement that generally describes the methodology of the fund manager in choosing companies and ensuring that the mixture of companies is appropriately correlated commensurate with the objectives of the fund. Further, the fund manager will undertake expert analysis to assist them to make daily decisions on what companies to sell or buy. A Financial Adviser who selects companies must undertake the same detailed research and analysis as is undertaken by professional fund managers.

(78) To select particular companies and direct investments for a client, a reasonably competent Financial Adviser would have regard to analysts' reports on each of the investments and analysts' reports on the relevant status of each market and factors likely to affect it. It is usual to consider more than one analyst report because different analysts may express different views on such matters.

10. Risk and return

10.1 Explaining the Concept of Risk

(79) In order to identify the risk in a financial product I need to explain the general concept of risk, as this informs and explains my opinions that follow.

(80) A fundamental principle of investment is that risk and return are related. All investments carry risk and the expected return of an investment reflects the amount of risk in that investment.

(81) Risk in investments is generally considered in a spectrum ranging from low risk investments to high risk investments. For example:

(a) an investment in government bonds is regarded as a risk free investment (on the basis that the government will not default);

(b) an investor expects to receive a lower return for cash and fixed interest investments (lower risk); and

(c) an investor expects to receive a higher return with equity investments (higher risk). Investors in shares are taking more risk and expect to be rewarded with a higher return as compensation for higher risk. This higher return over the risk free return is called the risk premium***.***

(82) An efficient investment portfolio is one that ensures that the investor is rewarded for the risk that they take. Taking low risk increases the probability of achieving the investor's objectives because there is a lower variability of returns and a low credit risk. Taking high risk when choosing investments increases the risk that the investor's objectives might not be achieved because there is a high variability in returns and if high risk investments are used there is a higher credit risk. Credit risk is explained below.

(83) There are many elements of risk but the two elements that are critical for Financial Advisers to consider with regard to investments are credit risk and volatility.

(a) **Credit risk** is the risk that capital and/or income due will not be recovered. Another way of putting this is that credit risk is the risk of loss of capital and/or income.

(b) **Volatility** is a measure of the variation in the value of an investment over time. It is generally measured by using the concept of standard deviation. Standard deviation is a measure of the dispersion of a set of data from its mean. It is a statistical measurement that sheds light on historical volatility. For example, a volatile stock will have a high standard deviation while the standard deviation of a stable blue chip stock will be lower. A large dispersion tells us how much the return on the investment is deviating from expected mean or average returns.

Assuming that an investment is capable of producing negative returns, then it is generally the case that volatility increases the risk of capital loss. Given the above, standard deviation is commonly used as a proxy for risk in finance. In this case, risk is defined as uncertainty about future investment returns. Volatility is a measurement of that risk.

10.2 Explaining Risk in an Investment Portfolio

(84) The risk of an investment portfolio as measured by standard deviation is determined by the asset allocation. This assumes that the investments used to populate the asset allocation will efficiently capture the return of each asset class.

(85) Asset allocation models are designed to incorporate a particular amount of risk in order to achieve an expected return commensurate with that risk.

(86) The critical decision after asset allocation is the choice of investments within each asset class and how these choices are made.

(87) If investments are chosen that capture the return of their asset class, then the return of the portfolio will be commensurate with the risk. Also, the risk of the portfolio will be the same as the designed risk of the asset allocation model. Such a portfolio is described as efficient because the return reflects the risk. By contrast an inefficient portfolio will have unrewarded risk.

(88) High risk investments are designed to produce high returns. By this I mean returns that exceed the return of their asset class. By populating an asset allocation model with high risk investments, the investment portfolio will become higher risk than the risk designed in the asset allocation model.

(89) Some advisers argue that a portfolio may include some high risk investments and some low risk investments and that this will result in a moderate risk portfolio. In terms of risk measured by standard deviation, they may be correct. However, by introducing high risk investments, they also introduce a higher probability of credit risk and this will generally be inappropriate for a conservative, moderate or balanced risk portfolio.

(90) The limitation of the argument that a portfolio may include some high risk investments and some low risk investments and that this will result in an appropriate moderate risk portfolio ignores the distinction between risk as measured by volatility and credit risk. Investors in conservative, moderate or balanced risk portfolios choose to avoid credit risk therefore a high credit risk investment is not appropriate for them. As noted above in this report, credit risk is the risk of loss of capital. If that risk comes to fruition the capital subject to that risk is lost to the investor forever. Credit risk is not mitigated through the measurement of volatility in an investment portfolio.

(91) In my opinion investments that are selected to populate the asset classes in an investment portfolio should have a risk character that is suitable for the designed risk of the asset allocation model of the investment portfolio.

10.3 Explaining a high risk investment

(92) When I talk about a high risk investment, I am generally referring to the following:

(a) an investment that has high credit risk; and/or

(b) a volatile investment, being an investment that has a higher variability in returns than the median variability for its asset class; and/or

(c) an investment that may use high risk strategies to deliver returns, such as the use of leverage.

(93) Financial Advisers deal with research on investment returns and measurement of risk in various markets on a day to day basis. A reasonably competent Financial Adviser would be familiar with the relationship between risk and return as well as the expected returns on different classes of investment. A reasonably competent Financial Adviser would seek to question and understand the source of investment return and the source of risk in an investment.

11. Borrowing to invest

(94) The practice of borrowing to invest (gearing) increases risk as well as potential reward. For example, if an investor invests $100,000 of their own cash and borrows $100,000 from the bank to make a $200,000 investment, then here is an illustration of their experience if the investment rises and if the investment falls.

The effect of borrowing to invest				
	$	**$**	**$**	**$**
Cash invested	100,000	100,000	100,000	100,000
Borrowings @ 7%pa	0	100,000	0	100,000
Amount of investment	100,000	200,000	100,000	200,000
Investment increases by 15% in a year	15,000	30,000		
Investment decreases by 15% in a year			-15,000	-30,000
Investment sold at end of year	115,000	230,000	85,000	170,000
Less loan repayment (with interest)	0	-107,000	0	-107,000
Gross return	15,000	23,000	-15,000	-37,000
% return	15.0	23.0	-15.0	-37.0
Loan to valuation ratio (%)		50.0		50.0

The effect of taking a margin loan on investments that are funded by borrowings		
	$	**$**
Cash invested	0	0
Borrowings @ 7%pa	200,000	200,000
Margin loan @ 8% pa	150,000	150,000
Total amount of investment	350,000	350,000
Investment increases by 15% in a year	52,500	
Investment decreases by 15% in a year		-52,500
Investment sold at end of year	402,500	297,500
Less loan repayment (with interest)	-376,000	-376,000
Gross return	26,500	-78,500
Loan to valuation ratio (%)	100.0	100.0

(95) This illustration ignores investment and borrowing costs. Clearly in the event of markets falling, there is greater risk if geared. This risk is substantially increased if borrowed funds are used to purchase the assets on which a margin loan is based. Because of this, a reasonably competent Financial Adviser will generally recommend gearing with conservative investments that are less likely to fall in value and will only recommend gearing to clients who are prepared to assume more risk in connection with their investments.

(96) Because borrowing to invest leverages (increases) risk, in my opinion, a reasonably competent Financial Adviser would have undertaken the following process in considering this strategy.

(a) Consider whether the client's risk profile is suitable to the higher risk strategy of negative gearing (borrowing to invest). If the strategy was not suitable, because, for example, the client was a Conservative or even a Balanced investor then the advice would generally not be given. In my opinion a reasonably competent Financial Adviser would generally only advise an investor with a Growth or High Growth risk profile to borrow to invest. The reason for this is that investors with these risk profiles invest principally for capital growth and they are tolerant to higher risk. (It is generally inefficient to borrow to invest in fixed interest securities because the cost of borrowing almost always exceeds the return (unless they are high risk securities). Consequently it is not efficient to borrow to invest in (for example) a 60/40 investment portfolio because 40% is in fixed interest but it is efficient to borrow to invest in a portfolio of growth assets.)

(b) Conduct an analysis of the client's cash flow to determine their capacity to fund the costs associated with the borrowings and any margin calls to the extent not covered by income from the investments.[19]

(c) Prepare a sensitivity analysis to determine how the client could be affected if the investments performed badly as well as how they could be affected if the investments performed well.[20]

(97) As a general principle, where a client borrows to invest, a reasonably competent Financial Adviser will place all of their investments that are funded by debt in growth assets (shares/property). The reason for this is that the success of borrowing to invest is generally dependent on asset growth and the margin between the interest cost of borrowing and the investment return of debt investments (bonds) is either too narrow or negative to make borrowing against bonds an attractive strategy.

(98) The success of a borrowing to invest strategy relies on the asset growth and income return of investments exceeding the costs of borrowing and any other costs related to the investments.

(99) If the income return is insufficient to meet those costs and the asset growth either has not occurred or is insufficient or has not been realised, the client must have another source of funds available they are to meet these costs as they become payable.

(100) The strategy of borrowing to invest and managing expenses can work provided the assumptions are reasonable and the client has the capacity to fund the strategy through periods when markets fall or when unforeseen events occur. In my opinion, any advice to borrow to invest should only be given after conducting a sensitivity analysis to look at how the strategy and the client is affected when markets fall or when assumptions are not met.[21]

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[19] Refer to paragraphs 286-290 of the following Judgement. Australian Securities and Investments Commission v Cassimatis (No 8) [2016] FCA 1023.

[20] RG175.104 (d) and (e) and refer to paragraphs 274-284 of the following Judgement. Australian Securities and Investments Commission v Cassimatis (No 8) [2016] FCA 1023.

[21] RG175.309 (d) and (e) (Nov 2017)

12. Acting in the client's best interest

(101) Although the *Corporations Act 2001* (Cth) applies to financial product advice, it is generally accepted in the financial advice community that the same standards apply to all financial advice.

(102) Section 961B of the *Corporations Act* 2001 (Cth)[22] requires a Financial Adviser to act in the best interest of the client. The relevant part of that section is reproduced below.

> *(1) "The provider must act in the best interests of the client in relation to the advice.*
>
> *(2) The provider satisfies the duty in subsection (1), if the provider proves that the provider has done each of the following:*
>
> *(a) identified the objectives, financial situation and needs of the client that were disclosed to the provider by the client through instructions;*
>
> *(b) identified:*
>
> *(i) the subject matter of the advice that has been sought by the client (whether explicitly or implicitly); and*
>
> *(ii) the objectives, financial situation and needs of the client that would reasonably be considered as relevant to advice sought on that subject matter (the* ***client's relevant circumstances****);*
>
> *(c) where it was reasonably apparent that information relating to the client's relevant circumstances was incomplete or inaccurate, made reasonable inquiries to obtain complete and accurate information;*
>
> *(d) assessed whether the provider has the expertise required to provide the client advice on the subject matter sought and, if not, declined to provide the advice;*
>
> *(e) if, in considering the subject matter of the advice sought, it would be reasonable to consider recommending a financial product:*
>
> *(i) conducted a reasonable investigation into the financial products that might achieve those of the objectives and meet those of the needs of the client that would reasonably be considered as relevant to advice on that subject matter; and*
>
> *(ii) assessed the information gathered in the investigation;*
>
> *(f) based all judgements in advising the client on the client's relevant circumstances;*
>
> *(g) taken any other step that, at the time the advice is provided, would reasonably be regarded as being in the best interests of the client, given the client's relevant circumstances.*
>
> *Note: The matters that must be proved under subsection (2) relate to the subject matter of the advice sought by the client and the circumstances of the client relevant to that subject matter (the client's relevant circumstances). That subject matter and the client's relevant circumstances may be broad or narrow, and so the subsection anticipates that a client may seek scaled advice and that the inquiries made by the provider will be tailored to the advice sought."*

[22] As at 6 August 2014.

(103) In summary, the best interest duty and related obligations in Div 2 of Pt 7.7A (of the *Corporations Act 2001* (Cth)) require advice providers, when providing personal advice to retail clients, to:[23]

(a) act in the best interests of their clients (see RG 175.221–RG 175.246);

(b) provide appropriate advice (see RG 175.340–RG 175.358);

(c) warn the client if advice is based on incomplete or inaccurate information (see RG 175.359–362); and

(d) prioritise the client's interests (see RG 175.363-RG175.386).

(104) While s961B is limited by its terms to retail clients, in my opinion the obligation to act in the best interest of clients and have a reasonable basis for advice was applied from the commencement of the *Corporations Act 1989* (Cth) and I consider that a Financial Adviser providing advice and recommendations to any client would need to have a reasonable basis for the advice and recommendations, taking account of the client's circumstances, objectives and tolerance to risk. The reason that I hold this view is because:

(a) In my experience, it is logical to understand the personal circumstances of a client to ensure that the advice is appropriate to their circumstances. The function of advice is to achieve an outcome. It is not logical to give financial advice if you do not understand the client's intended outcome (objective). It is essential that financial advice suits an investor's tolerance to investment risk. Additionally, an adviser must understand the subject matter of the advice.

(b) These principles are universal and apply when formulating advice for any client, including both retail and wholesale clients. In my opinion they are also the principles embodied in establishing a reasonable basis for advice pursuant to the former s945A of the *Corporations Act 2001* (Cth) and s851 of the *Corporations Act 1989* (Cth).

13. Standard of advice

(105) PS122, that was issued on 3 March 1997,[24] provides:

"*As a matter of best practice, a securities adviser giving a personal securities recommendation to a client should explain to that client why the recommendation is considered appropriate to the investment objectives, financial situation and particular needs of the client. The ASC considers it important that the adviser tells their client*

[23] References are to RG175 issued in October 2013.
[24] PS122.100.

about any significant risks associated with the investment and any investment strategies recommended to the client."[25]

(106) Although PS122.100 is expressed to be "best practice" and has since been superseded, in my experience, the training that Licensees give their representatives and the relevant professional standards[26] proceed on the basis that this principle is a matter of normal practice to be followed by a reasonably competent Financial Adviser.

(107) I note that predecessors to PS122, being SPN23 issued on 13 July 1992 and SPN41 issued on 27 November 1993, demonstrate that these standards were also in place at those earlier times.

[25] PS122.100. This PS was eventually superseded by PS175 and this was superseded by RG175.
[26] I refer to the professional standards of the FPA as well as the standards in PSs and RGs.