

**FSRA – Operating Safely under Financial
Services Reform Act**

Operating safely under the Financial Services Reform Act

The Financial Services Reform Act 2001 (FSRA) amended the Corporations Act 2001 by introducing, with effect from 11 March 2002, a new regulatory regime for the provision of financial services. The amendments provided a two year transitional period ending 10 March 2004, for those required to comply with the new requirements of the Act.

Effectively, what this means for practitioners carrying on a financial services business after 10 March 2004, is that they must either hold an Australian Financial Services Licence (AFSL), be an authorised representative of a licence holder, or have other arrangements in place, to do so.

An AFSL is obtained from the Australian Securities and Investment Commission (ASIC) and is effectively "tailor made" for each applicant, limiting transactions that can be undertaken by the licensee **only** to those which are authorised by that particular licence.

Practitioners who do not provide any financial services, or provide financial services that are exempt or as an authorised representative of a licence holder, are not required to hold an AFSL.

STOP PRESS – Relief for accountants advising on the establishment of SMSFs

In a press release of 9 February 2004, a copy of which is on page 129, the Federal Treasurer, The Hon Peter Costello, announced a new regulation will be introduced with effect before 11 March 2004, to provide relief for authorised accountants advising their clients on the decision to establish an SMSF.

On 23 December 2003, a joint media release issued by Michael Carmody, Commissioner of the ATO, and Jeffrey Lucy of the ASIC stated that both the ATO and the ASIC:

"...are working together to consider what, if any, additional guidance might be issued to help financial advisers and tax agents comply with their obligations under the law.

"We are considering whether any further guidance is needed to help industry understand the range of services they are authorised to provide and the standards of conduct they are expected to meet under the tax law and the Corporations Act," Mr Carmody said.

Mr Carmody said there may be some circumstances where financial advisers providing tax advice may need to be registered as tax agents under the tax law. Alternatively, they may be able to seek confirmation of tax consequences from a registered tax agent.

"While ASIC has been active in issuing a number of publications about its compliance expectations for financial advisers under the Corporations Act, we have agreed to work with the ATO to determine whether industry can be assisted by the issue of further guidance about the compliance requirements for the provision of tax advice..." Mr Lucy said."

STOP PRESS – ASIC warning

In a media release of 20 January 2004, ASIC warned "it is an offence to carry on a financial services business without a licence, punishable by a fine of \$22,000 or imprisonment for two years, or both. The conduct of an unlicensed financial services business may also expose offenders to other court actions....After 10 March 2004, ASIC will conduct surveillances targeting businesses that are illegally operating without a licence or otherwise not complying with financial services laws."

Under S.766A (references in this topic of the notes are to the Corporations Act and Regulations, unless otherwise stated), a person is considered to provide a **financial service** if they:

- Provide financial product advice (refer below);
- Deal in financial products (refer below);
- Make a market for financial products (ie, where a person, other than the issuer, regularly states prices at which they propose to buy or sell financial products – refer S.766D);
- Operate a registered scheme;
- Provide a custodial or depository service of financial products (refer S.766E); or
- Engage in conduct of a kind prescribed in the Corporations Regulations 2001.

Practitioners are most likely to provide advice on, or be dealing in, financial products. However, before a financial services business can be conducted, a financial product is required.

A **financial product** is defined, generally, in S.763A as a facility through which a person may:

- Make financial investments (eg, in shares or managed investment schemes etc, but not investments in real estate which is specifically excluded – refer S.763B);
- Manage financial risks (eg, by taking out insurance, entering currency swaps etc); or
- Make non-cash payments (eg, a cheque facility, credit card, direct debit facility etc).

The meaning is very broad and would apply to much of the work undertaken by practitioners, unless specifically exempt under the Act and the accompanying regulations.

Providing financial product advice

A practitioner “providing financial product advice” must be licensed (or be an authorised representative of a licence holder) to do so, unless an exemption applies.

Section 766B(1) of the Act defines **financial product advice** as the giving of a recommendation or a statement of opinion that is intended (or could reasonably be regarded as being intended) to influence any decision a person makes in relation to a particular financial product (or class of financial products). Merely providing factual information is, generally, not the provision of financial product advice unless a recommendation or opinion is also involved.

Dealing in a financial product

Practitioners “dealing in a financial product” must also be licensed (or be an authorised representative of a licence holder), unless an exemption applies.

Dealing in a financial product means to apply for, acquire, issue, vary or dispose of a financial product, and includes the underwriting of securities or managed investments – refer S.766C. “Dealing” also includes “arranging” another person to engage in any of these activities.

EXAMPLE – Providing financial product advice

Steve has obtained a product ruling for a planned documentary on crocodiles, which allows investors to claim a substantial tax deduction for their investment. Steve shows the product ruling and prospectus to his accountant, Bob, who recommends it to a number of his clients. Several clients decide to invest in the project and ask Bob to complete all the necessary forms ready for their signature. For his troubles, Steve pays Bob a small commission.

Bob’s recommendation to his clients to invest in the film project is likely to constitute the provision of financial product advice. Further, arranging for his clients to invest in the project is likely to constitute dealing in a financial product. Therefore, Bob must hold an AFSL (or be an authorised representative of a licence holder).

Exemptions for practitioners

Taxation advice

Advice given by “registered tax agents” (also called “practitioners” in this section of the notes) in the ordinary course of their agent related activities, and which is reasonably regarded as a necessary part of those activities, is not considered to be financial product advice – refer S.766B(5)(c).

However, the extent of the exemption is unclear – just what are the necessary activities of a tax agent? Do they only relate to the preparation of tax returns?

Part VIIA of the ITAA 1936 requires a registered tax agent be a fit and proper person in order to “prepare income tax returns and transact business on behalf of taxpayers in income tax matters”. This indicates registered tax agents are expected to do more than merely prepare income tax returns, and thus, the exemption applies to tax advice given outside the preparation of a tax return.

The mere giving of tax advice, even in relation to a financial product, should not constitute the provision of financial product advice.

EXAMPLE – Providing tax advice on financial products

Jason, a financial planner, has prepared an investment strategy for Michael and his wife at their request. Michael is, however, unclear about the tax effect of the investments, and has asked Sam, his tax agent, for an explanation.

If Sam merely advises on the tax implications of investing in the various financial products recommended by Jason, this will not constitute financial product advice. However, Sam must not comment on whether or not Michael should proceed with any of the investments.

Regulation 7.1.29

Section 766A(2)(b) states that the regulations may set out circumstances in which a person is taken not to provide a financial service - the most important for practitioners being Reg 7.1.29 which has been reproduced at page 126.

This regulation exempts practitioners from the requirement to hold an AFSL in order to provide the general accounting and tax advice they have traditionally given their clients (eg, recommending a client establish a shelf company to purchase a new business).

Specifically, exempt financial services are listed in sub-regulations 7.1.29(3), (4) and (5).

To be an **exempt financial service** under Reg 7.1.29, the financial service must be:

- Provided in the course of conducting an “exempt service”;
- Reasonably necessary to conduct the “exempt service”; and
- Provided as an integral part of the “exempt service”.

These requirements ensure practitioners cannot avoid the licensing requirements by simply providing a financial service that is only an incidental, but not integral, part of an exempt service.

EXAMPLE – Providing an exempt financial service under Reg 7.1.29

Tamara, a sole practitioner who does not hold an AFSL, recommended that Jack, a client of several years, establish a private company to carry on the family water bottling business, and that, for asset protection purposes, his wife Jill be the sole shareholder of the company.

Continued next page

If it were not for the exemption in Reg 7.1.29(3)(c), Tamara would be required to hold a licence as her recommendation is about investing in a financial product (ie, the shelf company shares).

However, given the recommendation is made in the course of providing business structuring advice and is both reasonably necessary and integral to the advice given, Tamara does not require a licence, although she should include a written disclaimer in the tax advice provided (refer below for a discussion about disclaimers).

Under sub-regulation 7.1.29(1), a financial service provided in the course of conducting an activity, such as the provision of tax advice, will be exempt if it is **reasonably necessary** to, and an **integral** (ie, not merely incidental) part of, undertaking that activity. A financial service that does not satisfy both these requirements can only be provided by a licensed practitioner, unless another exemption applies.

Further examples of exempt (and non-exempt) activities and services are provided in the checklist on page 118.

Disclaimers – Tax advice

Under Regulation 7.1.29(4), unlicensed practitioners providing tax advice in relation to financial products which may also constitute financial product advice are exempt from the licensing requirements if they do not receive a benefit (other than a fee for the service) as a result of the client acquiring a financial product mentioned in the advice, and provide a written statement (disclaimer) to the client, a sample of which follows. The disclaimer should be included with the tax advice provided to the client.

PRECEDENT CLAUSE FOR WRITTEN TAX ADVICE

It is possible that the above taxation advice may also constitute “financial product advice” within the meaning of that term in the Corporations Act 2001. I/We am/are therefore required to advise that I/we am/are not licensed to provide financial product advice and tax is only one of the matters that must be considered when making a decision on a financial product. You should consider taking advice from the holder of an Australian Financial Services Licence before making a decision on a financial product.

The fact that I/we am/are required under the Corporations Act 2001 to provide this warning does not in any way affect my/our ability to provide taxation advice and, in particular, the specific tax advice in this letter.

Practitioners who are uncertain as to whether the tax advice they have given also constitutes financial product advice, should include the disclaimer as a precautionary measure.

A disclaimer does not determine whether a communication is financial product advice or not. A practitioner cannot get around the rules by merely including a written disclaimer in their advice. The purpose of this exemption is to allow practitioners to continue to provide tax advice, which may also constitute financial product advice, without a licence.

EXAMPLE – Providing tax advice that is also financial product advice

In May, Andre seeks advice from his accountant, Steffi, about how he may legitimately reduce his tax bill. Steffi mentions a number of ideas such as prepaying expenses etc. One of the ideas she mentions which Andre likes, is for Andre to make an age based contribution to his superannuation fund.

Continued next page

Whilst Steffi is giving tax advice to Andre, a recommendation to make a contribution to his superannuation fund also constitutes the provision of financial product advice. In these circumstances, Steffi would need to provide Andre with the written statement outlined above.

Superannuation

A superannuation interest is specifically defined as a financial product under S.764A(1)(g). Therefore, a financial service in relation to superannuation interests ordinarily requires licensing.

However, sub-regulation 7.1.29(5) allows practitioners to provide advice to a trustee, a director of a trustee, an employer sponsor or a controller of a fund's management in relation to:

- Operating a superannuation fund;
- Establishing a superannuation fund (only after the client has decided to establish a fund) – (* see note);
- The structure of a superannuation fund (eg, the addition of new trustees and/or members);
- The valuation of the superannuation fund;
- Compliance with the Superannuation Industry (Supervision) Act 1993 (SIS Act), SIS Regulations or the Superannuation Guarantee (Administration) Act 1992 (SGAA); and
- Whether there has been a breach of the SISA, SIS Regulations or the SGAA;

but **excludes** recommendations regarding:

- Changes to the investment strategy of, or the level of contributions to, a fund;
- Specific financial products the fund should acquire or dispose of;
- Making additional and voluntary contributions to a fund; and
- Whether or not a superannuation fund should be established (*see note);

unless the advice is given for the sole purpose of, and only to the extent reasonably necessary for, complying with the SIS Act, SIS Regulations or the SGAA.

** Note, as announced in the Federal Treasurer's press release of 9 February 2004, a new regulation will be introduced to provide relief for accountants who provide advice on the establishment of an SMSF.*

The amendment is consistent with a recommendation made by the Parliamentary Joint Committee on Corporations and Financial Services which considered this matter.

Disclaimers – Superannuation advice

Practitioners who provide their clients with superannuation related advice that may also constitute financial product advice, should also issue a written statement (disclaimer) in accordance with sub-regulation 7.1.29(5). The following provides an example of a precedent clause for superannuation related advice:

PRECEDENT CLAUSE FOR SUPERANNUATION RELATED ADVICE

It is possible that the above information may also constitute “financial product advice” within the meaning of that term in the Corporations Act 2001 (the Act).

I/We am/are therefore required to advise that I/we am/are not licensed under the Act to provide financial product advice. You should consider taking advice from the holder of an Australian Financial Services Licence before making a decision on a financial product.

If required, I/we can refer you to someone who is licensed to advise you in this/these matter(s).

Under sub-regulation 7.1.29(4), the provision of tax advice in relation to a superannuation fund will be exempt if it is a reasonably necessary, integral part of the service provided and:

- A benefit such as a commission is not received as a consequence of the client acquiring a financial product mentioned in the tax advice; and
- A disclaimer is provided where the advice is financial product advice, as discussed at “Exemptions for practitioners – Taxation advice”.

The checklist below also lists under the heading “Superannuation”, advice that may or may not be provided in relation to superannuation. For example, unlicensed practitioners may:

- Discuss the tax implications of receiving an annuity versus a pension, but cannot recommend that a client commence an allocated pension instead of a complying pension;
- Undertake the necessary paperwork to set up an SMSF once a client has made the decision to do so and instructed the practitioner accordingly, but cannot recommend the client establish an SMSF – **note, the Federal Treasurer issued a press release on 9 February 2004 which announced an exemption in respect of this matter,**
- Discuss generally, the need for a fund to have an investment strategy, but cannot recommend specific investments.

Unlicensed practitioners – Checklist of advice they CAN (✓) and CAN’T (✗) give clients

Advice/Activity	CAN (✓) CAN’T (✗)	Reference *
<i>* SR=Sub-regulation; R=Regulation; S=Section</i>		
1. TAXATION		
Tax advice provided in the ordinary course, and as a necessary part, of activities as a registered tax agent	✓	S.766B(5)(c)
The structuring of remuneration packages of client employees	✓	R 7.1.32
Advising on the tax implications of investing in a financial product (note: a disclaimer may be required)	✓	SR 7.1.29(4)
2. BUSINESS PLANNING, STRUCTURING, OPERATING & RISK MANAGEMENT		
Advising on different business structures & recommending a specific one – eg, a company	✓	SR 7.1.29(3)(c)
Advising on the establishment of the structure (eg, ownership of company shares & in what proportion)	✓	SR 7.1.29(3)(c)

Tax Hot Spots 2004

Advice/Activity	CAN (✓) CAN'T (✗)	Reference *
Advise on the use of a shelf company or trust	✓	SR 7.1.29(3)(d)
Attending to the paperwork to establish an entity, or to effect share/unit transfers, etc, but only on instruction from the client	✓	SR 7.1.29(3)(g)
Advise an entity carrying on a business (or a related entity) about the administration, due diligence or valuation of the business structure (eg, issuing additional shares or units)	✓	SR 7.1.29(3)(c)
Advice on a business structure provided to an entity that is not the one actually carrying on the business (or a related entity)	✗	SR 7.1.29(3)(c)
Advising on the acquisition of an entity carrying on a business	✓	SR 7.1.29(3)(c)
Advice regarding the disposal of an entity carrying on a business (eg, sell the business v sell the entity)	✓	SR 7.1.29(3)(c)
Advice on bringing family members in, or retiring them from, the family business where the transfer of shares/units in the family company/unit trust is involved	✓	SR 7.1.29(3)(c)
Advising on the preparation or audit of financial or audit reports	✓	SR 7.1.29(3)(a)
Advising on business risks and recommending insurance types to mitigate that risk (eg, PI insurance)	✓	SR 7.1.29(3)(b)
Advice in relation to medical indemnity insurance	✓	SR 7.6.01(1)(t)
Recommending a client obtain (or not obtain) insurance from a particular insurer or take out a particular policy over another	✗	S.764A(1)(d),(e) & (f)
Advice provided in the course of representing a client in relation to the handling or settlement of the client's insurance claims	✓	R 7.1.33
Advising on the business operations, including cash flow management, ratio analysis, Key Performance Indicators, etc	✓	SR 7.1.29(3)(c)
Recommending a specific method of financing acquisitions of business assets (eg, hire purchase, lease, etc)	✓	R 7.1.06 & S.765A(1)(h)
Recommending the purchase or sale of business assets that are financial products	✗	SR 7.1.29(3)(c)
3. ALLOCATION OF INVESTMENT FUNDS		
Advising on a financial plan prepared by a financial planner	✗	S.763B
Advising on the broad allocation of client funds across general types of investments (eg, shares, deposits, bonds, etc)	✓	R 7.1.33A
Providing advice on specific investments (eg, BHP shares) or specific classes of investments (eg, mining shares)	✗	S.764A
Recommending the purchase of real property	✓	S.763B
Advise on transfers of financial products between related companies	✓	SR 7.1.29(3)(e)
Advise on entering a dividend reinvestment plan, taking up bonus shares, investing in a new company float or a specific hedging contract, etc, or advise on not doing any of these	✗	S.764A
Advise on using financial products (eg, shares) as security to purchase non-financial product assets (eg, real property etc)	✓	SR 7.1.29(3)(h)

Tax Hot Spots 2004

Advice/Activity	CAN (✓) CAN'T (✗)	Reference *
4. OTHER CLIENT SERVICES		
Referring clients to a specific AFSL holder (of whom the referrer is not a representative) where a disclaimer and disclosure of any commissions receivable is provided	✓	SR 7.6.01(1)(e)
Provision of credit card & other non-cash payment facilities	✓	S 765A(1)(h)
Acting as a receiver, receiver & manager, liquidator, official receiver/trustee/administrator under the Bankruptcy Act 1966, administrator or personal representative of a deceased person	✓	S.911A(2)(f)
Enforcement of a client's rights under a credit facility whilst acting under a power of attorney given by the client (eg, a mortgagee exercising a power of sale under a mortgage)	✓	R 7.1.34
5. SUPERANNUATION – refer note		
Advise on the establishment of a superannuation fund (eg, on the fund's obligations under the SIS Act)	✓	SR 7.1.29(5)
Provide tax advice and information about different superannuation structures (eg, SMSFs, retail funds, etc)	✓	SR 7.1.29(4),(5) & S.766B (5)(c)
Recommend the suitability of a specific superannuation structure, or a specific fund in preference to another (except where merely providing factual information) – refer note	✗	SR 7.1.29(5)(c)
A recommendation to establish (or not establish) a fund, or about the type of investments a fund should make – refer note	✗	SR 7.1.29(5)(c)
Advise on how to establish a superannuation fund after the trustee has made the decision to establish one	✓	SR 7.1.29(3)(f) & (5)
Advise on adding a trustee or member to a fund	✓	SR 7.1.29(5)
Recommend whether or not a fund member should join another sub-plan of the same fund	✗	SR 7.1.29(5)(c)
Valuation of the assets of a superannuation fund	✓	SR 7.1.29(3),(5)
Advise the employer on their superannuation guarantee obligations	✓	SR 7.1.29(5)
Advise on additional and voluntary contributions to an SMSF (except where merely providing factual information)	✗	SR 7.1.29(5)(c)
Advise an investment strategy is needed to satisfy the SIS Act & Regulations, & whether the requirements have been met	✓	SR 7.1.29(5)
Prepare or review a superannuation investment strategy	✗	SR 7.1.29(5)(c)
Advise a trustee to buy/sell specific assets, a person to buy/sell a superannuation product, modify their investment strategy or contributions, but ONLY where the advice is given solely, and only to the extent reasonably necessary, to comply with the SIS Act & Regs (eg, to remedy an in-house rule breach)	✓	SR 7.1.29(3)(f) & (5)(c)
Recommend assets for a fund to (or not to) acquire or sell	✗	SR 7.1.29(5)(c)
Recommend the transfer of benefits between investments	✗	SR 7.1.29(5)(c)
Audit a superannuation fund	✓	SR 7.1.29(5)

Advice/Activity	CAN (✓) CAN'T (✗)	Reference *
Recommend an existing SMSF acquire business real property	✓	S.763B
Recommend an SMSF be established to acquire real property – <i>refer note</i>	✗	SR 7.1.29(5)(c)
Advise on the tax implications of a family law dispute	✓	SR 7.1.29(5)
Value assets & advise which to transfer in a family law dispute	✗	SR 7.1.29(5)(c)
Prepare paperwork for ETPs, pensions, share transfers, etc	✓	SR 7.1.29(5)
Recommend a change from growth phase to the pension phase	✗	SR 7.1.29(5)(c)
Recommend an insurance policy for an SMSF	✗	SR 7.1.29(5)(c)
Tax advice in relation to a particular type of insurance policy	✓	SR 7.1.29(3)(b)
Tax advice regarding allocated pensions, lump sum payouts, etc, including attending to the paperwork at the client's request	✓	SR 7.1.29(4),(5) S.766(B)(5)(c)
Recommend one option (eg, allocated pension) over another	✗	SR 7.1.29(5)(c)

Note, the Federal Treasurer issued a press release on 9 February 2004 announcing a new regulation will be introduced allowing recognised accountants to provide advice on the establishment of an SMSF.

What are you allowed to say when referring clients to a financial planner?

Practitioners are not required to hold an AFSL when merely informing a client that an AFSL holder can provide the particular financial service they require, and then providing the contact details of an AFSL holder – refer Reg 7.6.01(1)(e).

However, practitioners must not be a representative of the licensee and are required to disclose any benefits (eg, commission) receivable for the referral.

This disclosure is required to be provided in the same form as the referral – eg, if a verbal referral is provided, disclosure of any benefits receivable should also be verbal.

Whilst the process of referring clients can be done relatively quickly and inexpensively, it is prudent to keep written documentation of the referral (eg, by letter) to ensure all parties have a clear understanding of the client's needs and objectives in order to ensure their concerns are addressed. Practitioners may even attend any meetings between the client and the licensee – although they must be careful not to provide, or comment on, any financial product advice other than merely providing tax advice.

When making a referral, practitioners must be careful to ensure they are merely providing the client with information about what services a particular licensee can provide them with, and not an endorsement or otherwise, of the licensee's services.

EXAMPLE – Referring a client to a financial planner

Sonia owns and operates a successful chain of fashion stores and has been making maximum age based superannuation contributions for herself, to her SMSF. However, she is unhappy with the low level of returns on some of the retail industry shares held by the fund.

Continued next page

Sonia is considering selling the retail shares and investing the proceeds into BHP shares. She has approached her accountant, Bill, to discuss the matter. Bill is not licensed to provide financial product advice.

What Bill CAN'T say:

“Unfortunately Sonia, the law has changed in relation to financial services and to answer your question regarding whether or not your SMSF should invest in BHP shares, is to provide you with financial product advice – and I am not licensed to do so. You need to speak to someone that holds an AFSL. You should speak to Terry Jones – he’s the best when it comes to investment related matters – and he’s licensed too! His phone number is ...”

Bob is specifically commenting on Terry’s abilities, when he should be simply providing Sonia with Terry’s details.

What Bill CAN say:

“Unfortunately Sonia, the law has changed in relation to financial services and to answer your question regarding whether or not your SMSF should invest in BHP shares is to provide you with financial product advice – and I am not licensed to do so. You need to speak to someone that holds an AFSL. You should speak to Terry Jones who is licensed to advise on investment related matters! His phone number is ...I am required to tell you that I will receive a 1% commission from Terry for the referral. If you do decide to sell the retail shares to invest in BHP shares, I can attend to the paperwork and advise on the tax implications.”

Bob’s referral is in accordance with Reg 7.1.06(1)(e).

Practical tips when advising clients

Except when providing services that are exempt or as an authorised representative of a licensee, it is an offence under the Act for practitioners (and their staff) to provide financial services without an AFSL – refer S.911C.

Accordingly, practitioners should consider implementing procedures to ensure all staff dealing with clients are aware of, and understand, the boundaries with respect to what can and cannot be discussed with clients. The following are examples of some of the ways this may be achieved.

1. **Document all discussions** with clients in a letter;

PRECEDENT LETTER – DOCUMENTATION OF VERBAL ADVICE

Dear *[insert client name or salutation]*

Re Taxation and Business Advice

I/We refer to our meeting on *[insert date]* held at *[insert place, eg, our office]* during which we discussed your taxation and business affairs. I/We am/are writing to you so that you have a record of the matters we discussed and the advice I/we provided.

I/We confirm that we discussed:

[List in summary form, the matters discussed, eg, the structuring of your business, methods of reducing your personal tax, etc]

Continued next page

I/We also confirm that, in general terms, I/we provided the following recommendations and advice:

[List in summary form, the recommendations and advice provided]

I/We also confirm that in relation to item *[insert number]* I/we advised that it may also constitute financial product advice under the Corporations Act 2001. As a result, I/we was/were required to advise that I/we am/are not licensed to provide financial product advice and tax is only one of the matters to be considered when making a decision on a financial product, and that you should consider taking advice from the holder of an Australian Financial Services Licence before making a decision on a financial product.

If you do not believe the above accurately reflects our discussion, please contact me/us otherwise, I/we will assume you agree with the above.

I/We note that you are currently considering the matters we discussed and will contact me/us if you have any queries or require any further advice.

Yours faithfully

[insert name, signature, title of practitioner]

2. **Use fact/information sheets** – Develop fact sheets on topical issues (eg, Tax Planning Tips, SMSFs, Establishing an Investment Portfolio, etc) which may be handed to clients in a meeting, or attached to a letter of tax advice, etc.

The format of the fact sheet may simply be a Question and Answer approach to questions frequently asked by clients, or a more descriptive style which outlines information, perhaps some options, and the advantages and disadvantages of each option.

It is essential that the information provided in the fact sheet cannot reasonably be regarded as making or implying, a recommendation in relation to a financial product;

3. **Use disclaimers** – These are required under Regs 7.1.29(4) and (5) where the advice given by the practitioner can also constitute financial product advice. Disclaimers may be included in letters of advice provided to clients. Refer to the sample disclaimers at pages 116 and 118;
4. **Refer clients to AFSL holders** – The mere referral of a client to a licensed third party does not constitute the provision of financial product advice if provided in accordance with Reg 7.6.01(e). Referrals may be inserted into the standard fact sheets to ensure they are documented;

EXAMPLE – Advising a client

Mary is a registered tax agent and the proprietor of Tax Made Easy, which provides advice in relation to taxation, business and retirement planning matters. The firm is not licensed, preferring to outsource all superannuation and investment related client work.

Jim MacDonald has been breeding alpacas for the last 3 years. Jim expects current year profits from the business to be substantially higher than previous years and has approached Mary to discuss some options for reducing his potential tax bill. Jim is an STS taxpayer.

Mary suggested Jim prepay next year's rent and bring forward all purchases of feed. She also discussed the 2004 financial year limits for maximum age based contributions. When Jim expressed his interest in pursuing superannuation, Mary handed him a fact sheet, *Superannuation Made Easy*, outlining the advantages and disadvantages of superannuation, the different types of funds (eg, SMSFs, industry funds, etc) and the taxation implications.

Continued next page

Mary advised she could refer Jim to a licensed superannuation specialist, and that she may receive a referral fee for doing so. This information was also stated in the fact sheet as a standard paragraph.

As the fact sheet provided by Mary merely outlines superannuation related information and the referral meets the requirements of Reg 7.6.01(e), she is not providing financial product advice.

Furthermore, Mary has had the fact sheet reviewed by a third party to ensure that, for example, the information it contains is not presented in such a way as to suggest there is only one real option or that one option is preferable to another. The fact sheet also contains a disclaimer that is in accordance with the requirements of Reg 7.1.29(4).

Note, if the relief announced in the Federal Treasurer's press release of 9 February 2004 for accountant's advising on the establishment of an SMSF also extends to advice on making contributions, Mary may not need to refer Jim elsewhere for this advice.

A restricted licence – What is it and how to get one?

In general, the concessional tax treatment of superannuation products has seen their popularity rise, with practitioners traditionally recommending clients incorporate an SMSF into their business structure as part of their retirement planning strategy. To date, they have been able to do this without the need for a licence.

As a consequence of amendments to the Corporations Act which define superannuation as a financial product, practitioners must either hold an AFSL, be an authorised representative of a licence holder or have other arrangements in place by 11 March 2004 in order to continue providing their clients with this type of advice.

Because licences are tailor made, practitioners can apply for an AFSL authorising them to provide superannuation related services only, ie, a **restricted licence**. This option may suit practitioners already providing their clients with superannuation related advice, who wish to continue doing so after 10 March 2004.

A restricted licence reduces the risk of unlicensed practitioners losing clients as a consequence of being unable to provide them with a full advisory service, to firms that are licensed to advise in all matters including superannuation.

There may also be cost savings in applying for a restricted licence, compared with applying for a licence to provide several types of financial services. Furthermore, the status quo is retained for existing clients who have always received advice in all areas from the one practice, and can continue to do so.

Applying for an AFSL is an involved process. Applicants must satisfy ASIC (eg, with supporting documentation) that they have, or will have, procedures in place to satisfy their obligations relating to:

- The provision of the financial services;
- The experience, knowledge and skills requirements of staff;
- The training (refer ASIC Policy Statement 146 (PS 146) for minimum requirements) of staff;
- A compliance and risk management system which satisfies Australian Standards;
- A system for dispute resolutions (refer PS 165);
- The adequacy of financial (refer PS 166), technological and human resources;

ASIC maintains a Training Register of approved courses that satisfy the requirements of PS 146. Apart from the requirement to have a general understanding of superannuation products and their markets, PS 146 does not detail the knowledge and skill requirements for providers of superannuation advice.

In terms of financial resources, applicants are generally required, amongst other things, to have positive net assets, sufficient cash reserves to cover three months expenses (including contingencies) and pay a security bond of \$20,000.

The ASIC website (www.asic.gov.au) contains all necessary information about obtaining an AFSL, including an AFS Licensing Kit.

TAX TIP – Applying for an AFSL

A practitioner wishing to obtain an AFSL should identify each type of financial service and financial product that forms part of their financial services business, and which services require authorisation.

These services will be listed on the licence as the only services which can be provided. Therefore, it's important a practitioner understands the business and chooses carefully, those services for which a licence is required.

Other options

For some practitioners, the costs (both in time and money) to obtain a licence, even a restricted licence, which covers all the types of financial services they provide, and in maintaining systems and training staff makes this an unattractive option – particularly if financial services are not a major source of revenue for the practice.

They may choose, instead, to become an **authorised representative** of a person licensed to provide the specific services their clients require (eg, superannuation). Authorised representatives are not required to hold an AFSL as they operate in accordance with the conditions of the licensee's authority – refer S.911A(2). However, they must still satisfy certain requirements such as PS 146.

A major downside for the representative, however, is that their activities are likely to be closely monitored and controlled by the licensee. This is because the licensee is responsible for the actions of their representatives and for training and maintaining their competency levels.

ASIC maintains an "AFS Authorised Representatives Register" which lists all persons or companies authorised to act as a representative of an AFSL holder. The register can be found on the ASIC website at www.asic.gov.au.

Alternatively, practitioners may prefer to **refer clients** to a third party that is licensed to provide financial product advice in relation to superannuation funds. Mere referrals are exempt from the licensing requirements provided the practitioner is not a representative of the third party and any benefits receivable from the referral are disclosed.

However, whilst this is a relatively inexpensive option, a major concern with outsourcing work is ensuring that the quality of service provided to the client is not compromised.

Outsourcing also requires a change in business practices. Clients who previously received superannuation advice from a particular firm, may not be comfortable having to go elsewhere for this advice alone. Furthermore, there is also a risk of losing clients to other firms who can offer a "one stop shop" of services in-house.

Alternatively, practitioners may **employ a financial planner** to keep the work in-house. Such a person would provide financial services either under their own AFSL, or as an authorised representative of another licensee. In the latter case, the licensee is responsible for monitoring and supervising the financial planner.

However, finding the right person for the practice can take time and money, and what then if the person leaves the firm? Can they be easily replaced? Is there a risk of the person taking some clients with them?

The decision of which way to go is not an easy one!

Corporations Regulations 2001

REG 7.1.29 Circumstances in which a person is taken not to provide a financial service

- (1) For paragraph 766A(2)(b) of the Act, a person who provides an eligible service is taken not to provide a financial service if:
 - (a) the person provides the eligible service in the course of conducting an exempt service; and
 - (b) it is reasonably necessary to provide the eligible service in order to conduct the exempt service; and
 - (c) the eligible service is provided as an integral part of the exempt service.
- (2) For this regulation, a person provides an *eligible service* if the person engages in conduct mentioned in paragraphs 766A(1)(a) to (f) of the Act.
- (3) For this regulation, a person who does any of the following provides an *exempt service*:
 - (a) provides advice in relation to the preparation or auditing of financial reports or audit reports;
 - (b) provides advice on the risk associated with carrying on a business and identifies generic financial products or generic classes of financial product that will mitigate that risk, other than advice for inclusion in an exempt document or statement;
 - (c) provides advice on the acquisition or disposal, administration, due diligence, establishment, structuring or valuation of an incorporated or unincorporated entity, if the advice:
 - (i) is given to a person who is, or is likely to become, an interested party in the entity; and
 - (ii) to the extent that it is financial product advice — is confined to advice on a decision about:
 - (A) securities of a body corporate, or related body corporate, that carries on or may carry on the business of the entity; or
 - (B) interests in a trust (other than a superannuation fund or a managed investment scheme that is registered or required to be registered), the trustee of which carries on or may carry on the business of the entity in the capacity of trustee; and
 - (iii) does not relate to other financial products that the body corporate or the trustee of the trust may acquire or dispose of; and
 - (iv) is not advice for inclusion in an exempt document or statement;
 - (d) provides advice on financial products that are:
 - (i) securities in a company (other than securities that are to be offered under a disclosure document under Chapter 6D of the Act); or
 - (ii) interests in a trust (other than a superannuation fund or a managed investment scheme that is registered or required to be registered);if the company or trust is not carrying on a business and has not, at any time, carried on a business;
 - (e) provides advice in relation to the transfer of financial products between related bodies corporate;

- (f) arranges for another person to engage in conduct referred to in subsection 766C(1) in relation to interests in a self managed superannuation fund in the circumstances in paragraphs (5)(b) and (c);
 - (g) arranges for another person to engage in conduct referred to in subsection 766C(1), by preparing a document of registration or transfer in order to complete administrative tasks on instructions from the person;
 - (h) provides advice about the provision of financial products as security, other than where the security is provided for the acquisition of other financial products.
- (4) For this regulation, a person also provides an *exempt service* if:
- (a) the person provides advice to another person on taxation issues including advice in relation to the taxation implications of financial products; and
 - (b) the person will not receive a benefit (other than from the person advised or an associate of the person advised) as a result of the person advised acquiring a financial product mentioned in the advice, or a financial product that falls within a class of financial products mentioned in the advice; and
 - (c) either:
 - (i) the advice does not constitute financial product advice to a retail client; or
 - (ii) the advice constitutes financial product advice to a retail client and it includes, or is accompanied by, a written statement that:
 - (A) the person providing the advice is not licensed to provide financial product advice under the Act; and
 - (B) taxation is only one of the matters that must be considered when making a decision on a financial product; and
 - (C) the client should consider taking advice from the holder of an Australian Financial Services Licence before making a decision on a financial product.
- (5) For this regulation, a person also provides an *exempt service* if:
- (a) the person provides advice in relation to the establishment, operation, structuring or valuation of a superannuation fund, other than advice for inclusion in an exempt document or statement; and
 - (b) the person advised is, or is likely to become:
 - (i) a trustee; or
 - (ii) a director of a trustee; or
 - (iii) an employer sponsor; or
 - (iv) a person who controls the management;of the superannuation fund; and
 - (c) except for advice that is given for the sole purpose, and only to the extent reasonably necessary for the purpose, of ensuring compliance by the person advised with the SIS Act (other than paragraph 52(2)(f)), the SIS Regulations (other than regulation 4.09) or the *Superannuation Guarantee (Administration) Act 1992* — the advice:
 - (i) does not relate to the acquisition or disposal by the superannuation fund of specific financial products or classes of financial products; and
 - (ii) does not include a recommendation that a person acquire or dispose of a superannuation product; and

- (iii) does not include a recommendation in relation to a person's existing holding in a superannuation product to modify an investment strategy or a contribution level; and
- (d) if the advice constitutes financial product advice provided to a retail client — the advice includes, or is accompanied by, a written statement that:
 - (i) the person providing the advice is not licensed to provide financial product advice under the Act; and
 - (ii) the client should consider taking advice from the holder of an Australian Financial Services Licence before making a decision on a financial product.
- (6) In this regulation:

employer sponsor has the meaning given by subsection 16(1) of the SIS Act.

exempt document or statement has the meaning given by subsection 766B(9) of the Act.

generic means without reference to a particular brand or product issuer.

interested party means:

- (a) an associate within the meaning of Division 2 of Part 1.2 of the Act; or
- (b) a manager; or
- (c) an officer; or
- (d) a trustee or director of a trustee.

self managed superannuation fund has the meaning given by section 17A of the SIS Act.



NO.008

FINANCIAL SERVICES REFORM ACT 2001 – RELIEF FOR ADVICE PROVIDED BY ACCOUNTANTS IN RELATION TO SELF MANAGED SUPERANNUATION

A new regulation is to be made to provide relief from the Financial Services Reform Act 2001 (FSRA) for accountants who provide advice to their clients on the decision to acquire or dispose of an interest in a self managed superannuation fund (SMSF).

The Government accepts that such advice should not require licensing under the FSRA regime. The new regulation will be consistent with a recommendation made by the Parliamentary Joint Committee on Corporations and Financial Services which considered this matter.

The regulation would be limited to 'recognised accountants' that hold appropriate qualifications to provide the advice (the relevant professional membership qualifications are attached). A recognised accountant would be exempted from the previous restriction in Corporations Regulation 7.1.29 that they not make 'a recommendation that a person acquire or dispose of a superannuation product' in relation to a SMSF. The exemption will not cover the provision of advice about the particular investments that a SMSF may hold and such advice will remain subject to FSRA licensing.

The new regulation is intended to promote certainty for accountants. It acknowledges the important role that accountants currently play in providing a range of professional advice and expertise to their business and other clients.

It ensures that advice on the establishment of a SMSF, which often forms a part of overall business arrangements, is treated comparably with other FSRA exempt advice provided to a client, such as on business structuring and taxation. The exemption for advice on the establishment of a SMSF is in keeping with the policy of exempting such advice from the FSRA.

I wish to thank Australian Democrats Senator Andrew Murray for his contribution to the development of this regulation and the implementation of the Government's financial services reform agenda.

The regulation will have effect from the end of February 2004, before the conclusion of the FSRA transitional period on 11 March 2004.

CANBERRA
9 February 2004

Contact: David Alexander
02 6277 7340

ATTACHMENT

Recognised Accountant

A 'recognised accountant' for the purposes of the regulation will be:

Tax Hot Spots 2004

- members of CPA Australia who are entitled to use the post-nominals “CPA” or “FCPA”, and are subject to and comply with CPA Australia's continuing professional education requirements;
- members of The Institute of Chartered Accountants in Australia (ICAA) who are entitled to use the post-nominals “CA”, “ACA” or “FCA”, and are subject to and comply with ICAA's continuing professional education requirements;
- members of the National Institute of Accountants (NIA) who are entitled to use the post nominals “PNA”, “FPNA”, “MNIA” or “FNIA”, and are subject to and comply with the NIA's continuing professional education requirements.

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