

# FSR: Accounting Industry Guide

A joint publication by:  
CPA Australia (CPAA)  
The Institute of Chartered Accountants in Australia (ICAA)  
The National Institute of Accountants (NIA)

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## PLEASE NOTE

The information contained in this guide is not legal advice and is provided for guidance only. Any particular fact stated should be tested against the actual regulations, and professional legal advice obtained if necessary. It is prepared based on the *Corporations Act 2001* and Corporations Regulations as at February 2005.

# Foreword

**The Hon Chris Pearce, Parliamentary Secretary to the Treasurer:**

**On behalf of the Australian Government, I commend the major professional accounting organisations for their initiative in producing this guide. The guide reflects the philosophy of the Financial Services Regime, namely of a legislative framework supported by guidance from both industry bodies and the regulator, the Australian Securities and Investments Commission.**

**I also thank the accounting profession for its continuing support for the objectives of the Financial Services Regime, which will modernise and facilitate the development of a competitive financial services industry while delivering protection for consumers.**

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# 1 Purpose of the Guide

This guide has been prepared by the accounting profession (the Professional Bodies) as represented by CPA Australia, The Institute of Chartered Accountants in Australia (ICAA) and the National Institute of Accountants (NIA) following significant member input and ongoing consultations. Particular thanks to Mr Peter Davis, practitioner, for his support and input.

This guide is intended to provide a clear indication of when licensing\* is required for members and when accounting services are not considered to be financial services and thus not covered by the *Corporations Act 2001* (as amended by the *Financial Services Reform Act 2001*) (the Act).

This guide provides practical examples of when typical professional advice provided by accountants is or is not required to be performed by a financial services licence holder. In summary, the Professional Bodies are of the opinion that most of our members who are not in the financial planning industry do not advise or deal in financial products, and therefore are not captured by the licensing provisions of the FSR regime. However, those members who provide financial product advice (e.g. invest in X unit trust) will be required to comply with the FSR licensing requirements.

**\*Please note that, throughout this guide, reference to licensing means an Australian Financial Services Licence issued by the Australian Securities and Investments Commission (ASIC), or becoming an Authorised Representative or Representative of a Licence Holder.**

## 1.1 Update to guide

This Guide was first issued in September 2003. It has now been updated for FSR Regulation 7.1.29A and new information published by ASIC and the ATO. Additional Q&As have also been added in response to frequent member queries.

For those of you familiar with the first guide, below is a list of the sections and Q&As where **significant** changes have been made or new questions added:

<b>Section:</b>	1.3
	3.3.6
	3.5
<b>Q&amp;As:</b>	6.4.9
	6.6.5 – 6.6.6
	6.7.2
	6.7.18 - 6.7.25
	6.8.9
	6.10 (Case study)

## 1.2 Key reference material

It is important to remember that this is a guide for accountants and only provides guidance on a very narrow part of FSR, being the licensing provisions. For more detailed information, you should refer to the source materials.

***Corporations Act 2001 as amended by the Financial Services Reform Act 2001 (the Act)***

This is the key legislation. The Act replaced parts 7 and 8 of the *Corporations Act* and in addition made a number of consequential amendments to the other parts of the *Corporations Act*. The key parts for our members are Parts 7.1, 7.6, 7.7 and 7.8 as they relate to licensing.

### **Corporations Regulations**

The Regulations are one of the most important parts of the regime for members. Regulations are legally enforceable, but do not undergo the same process to be implemented by governments. Key regulations to review include regulations 7.1.29, 7.1.29A, 7.1.33A and 7.6.01.

### **Explanatory Memoranda/Statements**

Explanatory Memoranda/Statements have been issued to provide additional guidance to the Act and the Regulations. Explanatory Memoranda/Statements provide an insight into the intention behind a particular section of the Act or regulation and how it is intended to operate. Despite the significance of these documents in understanding the regime, it is important to note that Explanatory Memoranda/Statements are issued by the Government and are not legally enforceable. They are the Government's interpretation of the regime and how it should operate in practice.

### **ASIC Policy Statements**

ASIC has issued a range of policy statements and guides to assist in understanding how it is going to regulate FSR. It should be noted that ASIC's Policy Statements are also not legally enforceable. They are simply ASIC's interpretation of the legislation and a guide to how it intends to regulate. ASIC also have a number of Frequently Asked Questions (FAQ) and other FSRA related material, and where appropriate, this guide has taken into account ASIC pronouncements.

### 1.3 Outstanding issue Superannuation Fund Structure Advice

The accounting bodies believe that providing advice on superannuation structures should not be regulated under the Act. We've said this to government and in the media, while working towards creating a workable regime.

It has been a difficult process but we have made some gains. The draft (pre FSR) legislation would have required most accountants to be licensed. Now accountants can provide most traditional accounting activities that they have always provided to their clients.

A Parliamentary Committee inquiry into regulation 7.1.29 under the Corporations Regulations 2001 has recently endorsed our position in their 2 June 2004 report. Highlights from the Joint Committee on Corporations and Financial Services Committee's findings include:

- The Committee considers that the application of the FSR licensing regime to accountants who do not provide investment advice on specific, branded financial products and merely engage in traditional accounting activities is unnecessary.
- The Committee believes that regulation 7.1.29 should be amended, at the very least, to provide accountants with a licensing exemption for recommendations made about superannuation fund structures to their clients.
- Licensees who do not have professional accounting qualifications and tax agent status may not give the quality of advice that would be expected on superannuation fund matters.

In February 2004, the Treasurer, Peter Costello, announced the amendment to regulation 7.1.29, that is regulation 7.1.29A which allows Recognised Accountants to give advice to clients on whether they should acquire or dispose of an interest in a self managed superannuation fund (SMSF).

Whilst we continue to advocate that regulation 7.1.29A should be clarified so that Recognised Accountants are able to give superannuation structure advice, we are mindful of the fact that the government is not bound to accept the recommendations of a Parliamentary Committee.

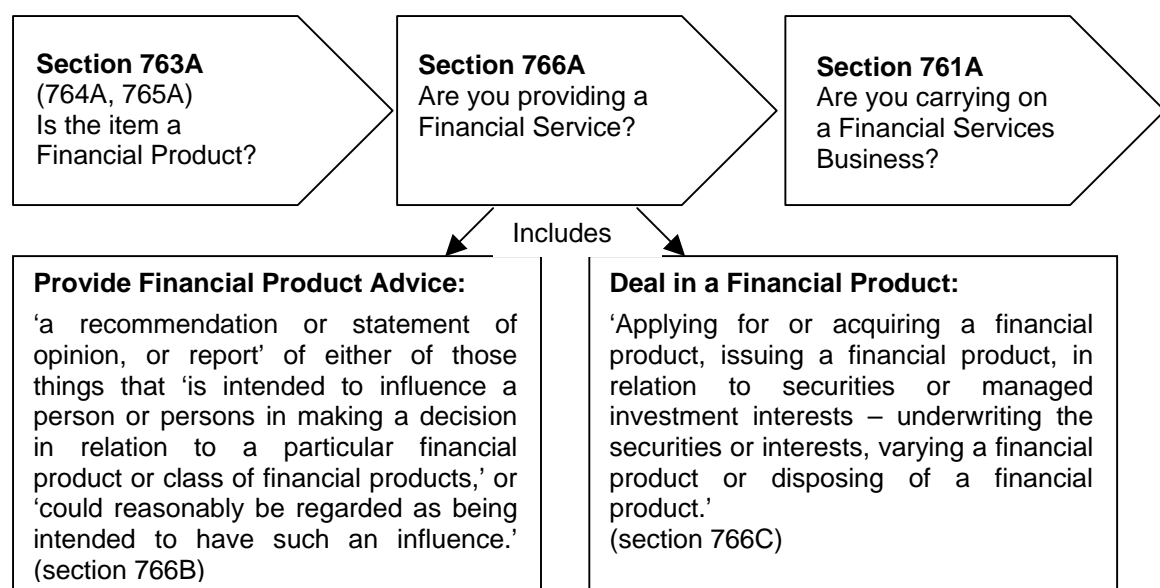
At this time the FSR: Accounting Industry Guide reflects the requirements of regulations 7.1.29 and 7.1.29A which allows recognised accountants to give advice on the acquisition or disposal of an SMSF, but for other superannuation fund structures, only factual advice can be given.

## 2 When is a Licence Required?

The Act sets out those situations when an Australian Financial Services Licence (AFSL) is required. Members should understand the following important sections of the Act in order to make a decision about whether their circumstances require them to be licensed.

If all of the above sections apply, **section 911A** of the *Corporations Act* requires a person to hold an AFSL. That is:

- the item is a Financial Product;
- you are providing a Financial Service in relation to that product (e.g. providing advice or dealing in the Financial Product); and
- you are carrying on a Financial Services Business.



### 2.1 Becoming licensed

Members who want to provide financial product advice to their clients will need to become an authorised representative of a licence holder or obtain a licence in their own right. For information about how to become licensed, including training courses available, please contact your professional body or visit their website as listed below.

CPA Australia: [www.cpaaustralia.com.au/links/finplan](http://www.cpaaustralia.com.au/links/finplan)

ICAA: [www.icaa.org.au/finplanchapter](http://www.icaa.org.au/finplanchapter)

NIA: [www.nia.com.au](http://www.nia.com.au)

## 2.2 Items that are NOT financial products

The first test in assessing if an AFSL is required is whether or not the item involved is a financial product. Section 765A provides a list of specific things that are not financial products.

Two of the most relevant things that are not financial products are direct property and credit facilities.

### 2.2.1 Direct Property

Accountants are called upon to give advice in relation to the purchase and sale of property and other forms of real estate. Such advice might relate to investment, taxation or business advice.

However, direct real estate is not considered a financial product under section 763A of the Act, so any advice given in relation to direct real estate (e.g. You should buy 1 ABC Street) will not be financial product advice. One of the key considerations for this is that it is a physical asset, not a facility. Other physical assets such as wine, art and stamp collections are also excluded.

For further guidance on this issue, refer to the Q&As in Section 6.5 of this guide.

### 2.2.2 Credit Facilities

Under section 765A(1)(h) of the Act, a credit facility (that satisfies the definition of a 'credit facility' provided in regulation 7.1.06) is also not considered to be a financial product. In many instances a credit facility is combined with an investment, such as is the case with margin lending. In this instance, only the credit facility within this product is not considered a financial product. Also, there are exemptions to the 'credit facility' definition.

Examples of facilities that may not be caught by the definition of 'credit facility' provided in regulation 7.1.06 and hence which could still be a 'financial product' are:

- the debt securities of many securitisation vehicles; and
- any debt securities issued by a bank.

For further guidance on this issue, refer to the Q&As in Section 6.2 of this guide.

These exemptions are current at the time of printing. However, accountants should note the regulation of advice provided in both these areas is currently under review. A Parliamentary Committee is looking into the regulation of property advice and the Office of Fair Trading is reviewing the regulation of finance broking advice.

For further information on these issues, visit your professional body's web site.

## 3 When is a Licence not Required?

An Australian Financial Services Licence (AFSL) is not required when a financial service is not provided, such as when factual information is being provided to a client. In addition, the Act and Regulations sets out activities that are deemed not to be 'financial product advice' or a 'financial service'. There are four key exemptions provided to accountants. These are:

- |                                      |   |
|--------------------------------------|---|
| 1. Taxation advice                   | section 766B(5)(c) & regulation 7.1.29(4) |
| 2. Traditional accounting activities | regulation 7.1.29 & 7.1.29A               |
| 3. Broad asset allocation advice     | regulation 7.1.33A                        |
| 4. Referrals                         | regulation 7.6.01(1)(e)                   |

### 3.1 Factual information

ASIC has provided information clarifying when an AFSL is required. [LIC 60] Licensing: The scope of the licensing regime: Financial product advice and dealing (issued 28/11/2001, updated 11/2002, paragraph 1.2.4-1.2.5) states that if a communication does not involve a recommendation or a statement of opinion, or a report of either of these things, it is not financial product advice. Accordingly, communications that consist only of factual information will generally not involve the expression of opinion or recommendation and will not, therefore, constitute financial product advice.

In some circumstances, a communication that consists only of factual information may amount to financial product advice, for instance where the information is presented in a manner that may reasonably be regarded as suggesting or implying a recommendation to buy, sell or hold a particular financial product or class of financial products. If the accountant is remunerated for making the communication an intention to influence may be more readily inferred.

It is recommended that accountants relying on this exclusion from the requirement to hold an ASFL should accompany the information with a disclaimer. For more information on disclaimers, including some samples, refer to Section 5.

For examples of factual information refer to [www.asic.gov.au](http://www.asic.gov.au), in particular the FIDO consumer area.

### 3.2 Taxation services

The giving of tax advice is regulated under section 251L of the *Income Tax Assessment Act 1936* (ITAA) and sets out, amongst other things, who can charge for providing taxation advice on behalf of a taxpayer. Under this section, only registered tax agents and exempted persons (such as a legal practitioner) can provide advice about a tax law for a fee on behalf of taxpayers.

Certain advice given by tax agents and lawyers has been specifically exempted from being financial product advice under the FSR regime. In relation to tax agents, section 766B(5)(c) of the Act states that the following is not financial product advice:

'advice given by a tax agent registered under Part VIIA of the *Income Tax Assessment Act 1936* that is given in the ordinary course of activities as such an agent and that is reasonably regarded as a necessary part of those activities'.

Regulation 7.1.29(4) provides an additional exemption for when tax advice is being provided in relation to financial products. While this exemption applies to any person, this does not provide an exemption from a requirement to comply with any relevant tax legislation that may apply, such as section 251L of the ITAA.

Regulation 7.1.29(4) states that when giving advice about the taxation implications of financial products covered by the Act, this is permissible so long as the advisor does not receive a benefit (other than the fee charged for such advice) as a result of the client then investing in a financial product (and depending on the type of advice given, provided certain disclosures are made – see below).

### **Disclaimers – Taxation advice**

It is important to note that if taxation advice constitutes financial product advice, under regulation 7.1.29(4), the person providing the advice must also advise the client that they are not licensed under the Act to provide financial product advice, that taxation is only one consideration when deciding on a financial product and the client should consider seeking advice from an Australian financial services licensee before making a decision on a financial product.

For more information on disclaimers, including some samples, refer to Section 5.

## **3.3 Traditional accounting services – Regulations 7.1.29 and 7.1.29A**

The original regulation 7.1.29, issued in November 2001, applied only to ‘Recognised Accountants’, being members of CPA Australia, ICAA and the NIA. Changes made to the regulation (released May 2003) have removed the application of the term ‘Recognised Accountant’ for the main regulation and it now applies to any person that might potentially be caught unintentionally by the Act. However, the exemptions provided in Regulation 7.1.29A, relating to SMSFs, does only apply to ‘Recognised Accountants’.

Regulations 7.1.29 and 7.1.29A provide exemptions to the licensing requirements for certain activities which will be considered further below under the following broad headings:

- Business planning;
- Compliance advice;
- Financing the acquisition of assets;
- Insurance;
- Share valuations and due diligence; and
- Superannuation.

Subsection (1) of regulation 7.1.29 states:

- 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.

This subsection is a threshold test. This means that the activities that are listed in subregulations (3) to (5) can only be provided by accountants (and other advisors) as long as in doing so any financial product advice is given in the ordinary course of those activities and is reasonably necessary to and an integral part of that activity.

Regulation 7.1.29A is a recent amendment to the regulations, which has effect from 11 February 2004. The regulation exempts a ‘Recognised Accountant’ from the licensing requirements where advice on whether to acquire or dispose of an interest in a self managed superannuation fund (SMSF) is provided to a client.

In interpreting regulations 7.1.29 and 7.1.29A the regulations’ list of activities needs to be considered in the overall context of the FSR regime. The Government, Parliament and Treasury have consistently advised that the regulations can only be a mechanism that provides a fairly wide-ranging exemption under the law and cannot specifically cover every

practical instance raised. Common sense is therefore required, particularly in determining whether a specific financial product recommendation is made.

The key issues covered by regulations 7.1.29 and 7.1.29A are detailed below.

In applying the regulations to each of the activities referred to below, the threshold test referred to above needs to be met. For example, advice that is given as part of business planning activities must be given in the ordinary course of those activities and reasonably necessary to and an integral part of the business planning activities.

### **3.3.1 Business Planning**

Business planning includes those activities when the client of an accountant seeks advice in relation to the establishment, running and sale of a business. Such business planning advice is a normal part of the activities of an accountant and other advisors.

Accountants are able to advise on the most appropriate structure for setting up a business, e.g. as a sole trader, partnership, trust or company. Accountants are also able to assist their client in setting up those structures. They are then able to assist with the ongoing administration of these types of businesses.

However, if the business-planning activities include financial product advice, it must be confined to advice on a decision about:

- securities of a body corporate, or related body corporate, that carries on or may carry on the business of the entity; or
- 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.

Accountants are not, however, permitted to advise their client (whether they are an individual, body corporate or trustee) about any financial products or investments that a client may hold within that business.

For further information on business planning, refer to Section 6.1.

### **3.3.2 Compliance Advice**

The Explanatory Statement to regulation 7.1.29 clarifies that the provision of compliance advice (e.g. compliance under any other acts) will not require a person to be licensed under FSR, except for:

- (a) advice about a body corporate or trust (other than a super fund or managed investment scheme that is required to be registered) where the advice relates to financial products that the body corporate or trustee of the trust may acquire or dispose of; or
- (b) advice in relation to a super fund that relates to compliance with section 52(2)(f) of the SIS Act and regulation 4.09 of the SIS Regulations.

For example, compliance advice given under the *Corporations Act* (e.g. audit requirements under Chapter 2M), *Family Law Act*, in particular for superannuation, the *Superannuation Industry (Supervision) (SIS) Act* and Regulations and the *Superannuation Guarantee Act*, will not be a licensable activity – e.g. these are your obligations under the ABC Act/this is the requirement you must meet under the XYZ Act.

### **3.3.3 Financing the Acquisition of Assets**

A necessary part of an accountant's duty when advising a client in relation to running their business will involve the accountant advising on the most effective means to acquire business assets.

Section 765A of the Act specifically declares that certain credit facilities are not financial products for the purposes of the Act and regulation 7.1.06 defines 'credit facility' broadly but does not cover all credit facilities. Regulation 7.1.29 provides further clarification that providing advice about using existing financial products as security for purchasing assets (other than financial products) is also not considered to be the provision of financial product advice.

### **3.3.4 Insurance**

Accountants are not insurance brokers and should not be advising their clients in relation to specific insurance products. Such advice is financial product advice and can only be provided by a properly licensed or authorised professional. However, accountants also have a professional and legal duty to provide their client with all necessary information on managing business risks. This will inevitably lead to the accountant informing the client of the need for various forms of insurance, such as Director's and Officer's insurance.

Regulation 7.1.29(3)(b) allows accountants to provide advice to their client about the risks associated with carrying on a business, what insurance is required to mitigate those risks and why, and provide them with information about what to look for in getting appropriate insurance coverage. What the accountant cannot do (unless they are otherwise authorised) is recommend specific insurance products e.g. a recommendation that their client insure with XYZ Insurance Company.

### **3.3.5 Share Valuations and Due Diligence**

Accountants are regularly called upon by their clients to provide due diligence reports and to undertake share valuations in respect of an entity as part of their professional services to their clients. Where such activities are part of the range of services the accountant provides to their clients and does not involve advising the client as to their investment portfolio, such activities can be provided by accountants without the need for an AFSL provided the advice is given to a person who is, or is likely to become, an interested party in the entity and, to the extent that the advice is financial product advice, it is confined to advice on a decision about:

- securities of a body corporate, or a related body corporate that carries on or may carry on the business of the entity; or
- 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.

### **3.3.6 Superannuation**

Regulation 7.1.29 allows an accountant to provide the following advice without the need to be licensed, provided no recommendations are made and any advice given does not relate to the acquisition or disposal by the superannuation fund of specific financial products or classes of financial product. In all cases the client must be or is likely to become a trustee, a director of a trustee, an employer sponsor or a person who controls the management of the superannuation fund:

- advice on the taxation implications for superannuation contributions (subject to complying with the conditions referred to in regulation 7.1.29(4) ;
- compliance advice in respect of SMSFs and other super funds (subject to complying with the conditions referred to in the 'Compliance Advice' section on this page);
- provide employers with advice on SG obligations (subject to complying with the conditions referred to in the 'Compliance Advice' section on this page);
- provide audit work and advise the client in respect of legislative breaches and their resolution (subject to complying with the conditions referred to in the 'Compliance Advice' section on this page);
- generally discuss investment issues including broad asset allocation about certain assets without providing specific asset allocation advice by recommending particular financial products or classes of financial products;
- set up an SMSF on the instructions of a client (however, an accountant cannot recommend an SMSF over another superannuation structure or recommend that the client switch from another superannuation structure to an SMSF);
- assist in the roll-over of assets into an SMSF structure on the instructions of a client;
- advise on deficiencies and otherwise of a trust deed;
- discuss characteristics of superannuation structures and broadly discuss the type of person these structures would suit (for example SMSFs offer a high degree of control over investments but because of the various costs associated with their

set up and ongoing operation are generally an expensive option unless a person has significant assets to invest e.g. in excess of \$200,000). (See information relating to Regulation 7.1.29A below);

- Advising an employer or employee client what choice of funds is and how it can be implemented

In some cases, the above information may only amount to the provision of factual information. For more information on this, refer to Section 3.1 However, where the advice (except for taxation advice referred to above) given in any of the above circumstances is financial product advice provided to a retail client, the advice must be accompanied by a written statement that you are not licensed to provide financial product advice under the Corporations Act and that the client should consider taking advice from the holder of an AFSL before making a decision on a financial product. For more information on disclaimers, refer to Section 5.

As for taxation advice referred to in the dot points above, regulation 7.1.29(4) also allows an accountant to provide recommendations on which superannuation products or superannuation structures might be most appropriate for a client's taxation situation. Note that where the advice given would otherwise be financial product advice it must be accompanied by a written statement that:

- (i) the person providing the advice is not licensed to provide financial product advice under the *Corporations Act 2001*;
- (ii) the client should consider taking advice from the holder of an AFSL before making a decision on a financial product; and
- (iii) taxation is only one of the matters that must be considered when making a decision on a financial product.

There are restrictions on a person who is not a lawyer engaging in legal work for reward. Generally, a person is engaged in legal work:

- by doing something that is usually done by a lawyer and by doing it in a way as to imply that the person is a lawyer;
- by doing something that is prohibited to be done by someone unless done by a duly qualified lawyer; or
- by doing something that is required to be done only by those who have the necessary training and experience in law (such as giving legal advice).

Having regard to the above, in setting up an SMSF, it is important to note that accountants should not be setting up an SMSF from scratch as this would constitute legal advice. Accountants can supply a trust deed prepared by lawyers to the clients and arrange to set up the SMSF, but they should not be drafting the documents themselves.

### **Regulation 7.1.29A**

Regulation 7.1.29A now permits a Recognised Accountant, defined below, to provide a recommendation to a client on whether the client should acquire or dispose of an interest in an SMSF without the requirement to be licensed. The client must be or is likely to become a trustee, a director of a trustee, an employer sponsor or a person who controls the management of the SMSF. The amendment however does not extend to being able to advise the client on specific investments that should be acquired or disposed of. The amendment does not permit the provision of financial product advice on any other superannuation structures. This issue is still the subject of discussion with government.

'Recognised Accountant means:

- (a) a member of CPA Australia who:
  - is entitled to use the letters "CPA" or "FCPA"; and
  - is subject to, and complies with, CPA Australia's continuing professional education requirements; or

- (b) a member of the Institute of Chartered Accountants in Australia (ICAA) who:
  - is entitled to use the letters “ACA”, “CA” or “FCA”; and
  - is subject to, and complies with, ICAA’s continuing professional education requirements; or
- (c) a member of the National Institute of Accountants (NIA) who:
  - is entitled to use the letters “FNIA”, “FPNA”, “MNIA” or “PNA”; and
  - is subject to, and complies with, the NIA’s continuing professional education

### 3.4 Broad asset allocation advice

Regulation 7.1.33A is a general exemption from the licensing requirements for what is commonly known as broad asset allocation advice, by stating that such advice ‘is taken not to provide a financial service’. The regulation provides relief where the advice relates to the allocation of funds that are available for investment between one or more of the following:

- Shares
- Debentures
- Debentures, stocks or bonds issued, or proposed to be issued by a government
- Deposit products
- Managed investment products
- Investment life insurance products
- Superannuation products

However, care needs to be taken that no recommendation or statement of opinion is made that relates to specific financial products or classes of financial products (e.g. a specific class of equities – such as mining shares).

### 3.5 Referrals

Regulation 7.6.01(1)(e) makes it clear that when an accountant (or another person), who is not licensed to provide financial services, merely refers a client (e.g. informs the client of the financial services the licensee can provide and how the client can contact them) to a licensed third party or authorised representative of a licensee, they will be covered by an exemption and so do not need to be covered by a licence in respect of their referral activities. However, the regulation also requires that the accountant must disclose any benefit (such as a commission) they or their associates receive for making the referral in the same form as the referral.

While regulation 7.6.01(1)(e) does not require a written disclosure if the referral was provided in another format (e.g. over the phone), written disclosure is a requirement of your professional association through their Code of Professional Conduct.

Section 766B(1) of the Act provides that a recommendation or a statement of opinion is financial product advice if it is intended to or is reasonably expected to influence a decision in relation to a particular financial product.

A referral may be deemed to be an endorsement of financial product advice or services or deemed to be the provision of advice in itself where the person to whom the client is referred only advises on one type of insurance or the products of one company.

It is important to be aware of the distinction between “referring” and “arranging”. Generally, “arranging” refers to negotiating or bringing into effect a dealing in a financial product. Significant involvement in the events leading up to the dealing often indicates that the person is “arranging”. Other indicators are where the person receives a benefit depending on the client’s decision or where the dealing would not have taken place had it not been for the person’s involvement.

Accountants need to take care to avoid “arranging” a dealing such as the buying or selling of the financial product, as by “arranging”, the accountant is providing financial product advice and therefore, must be a licensed financial advisor. For example, if an accountant discusses investment possibilities with the client, such as a particular mix of managed funds, if the accountant then contacts a financial advisor and arranges for the advisor to acquire those funds for a client, this IS “arranging”. If the accountant received a fee, that also is indicative of “arranging”.

Accountants also need to look closely at any referral arrangements that they have in place with third parties. Arrangements which are integral to an accountant’s business run the risk of going beyond a mere referral and in fact involve providing financial services advice, therefore must be a licensed financier advisor. Accountants need to take care to review all referral arrangements, whether they are formal or informal.

## 4 Industry Body Codes

While this guide focuses on the activities that can be undertaken without a licence under FSR, all members of CPA Australia and the ICAA are bound by a joint Code of Professional Conduct. All members of the NIA are bound by Pronouncement 1 of the Code of Ethics. The requirements stipulated in these codes (the Codes) must be complied with in addition to those set out under FSR. An activity may be permitted under FSR but may not be permitted, or additional conditions may be required, by the Codes. For example, regulation 7.6.01(1)(e) of FSR allows verbal disclosures of referral fees and commissions, whereas the Codes require all referral fees to be provided to the client in writing.

The Codes recognise that the objectives of the accountancy profession are to work to the highest standards of professionalism, to attain the highest levels of performance and, generally, to meet the public interest requirement.

The Codes are designed to provide members with authoritative guidance on minimum acceptable standards of professional conduct. The Codes focus on essential matters of principle and are not to be taken as a definitive statement on all matters.

Members should be guided not merely by the terms but also by the spirit of the Codes. The fact that particular conduct does not receive a mention does not prevent it from being unacceptable or discreditable conduct, thus making the member liable to disciplinary action.

In addition to the requirements of FSR, all members should be familiar with the fundamental principles of the Codes, being:

- The Public Interest
- Integrity
- Objectivity
- Independence
- Confidentiality
- Technical and Professional Standards
- Competence and Due Care
- Ethical Behavior

Furthermore, both CPA Australia and ICAA have jointly developed a set of professional standards for members engaged in the provision of Financial Advisory Services. APS12 - Statement of Financial Advisory Services, outlines industry best practice which enhances the requirements of existing legislative provisions. It clearly outlines what is expected of members of CPA Australia and the ICAA in the provision of professional and ethical financial advice and adopts a strong stance on key issues such as professional independence, conflict of interest, soft dollar remuneration and professionalism.

## 5 Disclaimers

Whilst the use of a disclaimer is not a defence against breaching the licensing provisions, it is a useful reminder that financial product recommendations do require a Financial Services Licence, and will help avoid misleading or confusing consumers about the purpose of the communication. When using a disclaimer the accountant must make it clear that they are not licensed pursuant to FSR to provide financial product advice and that if the client seeks such advice they must be referred to a licensed third party.

ASIC encourages the use of disclaimers to help avoid misleading clients. Their Licensing Guide (LIC 60, 1.2.10 ) states:

‘If your communications include information about financial products, but do not constitute financial product advice, you should consider giving consumers a disclaimer to the effect that you are not providing financial product advice, and that consumers should consider obtaining independent advice before making any financial decisions. This will help avoid misleading or confusing consumers about the purpose of the communication.

Note: A disclaimer will not, of itself, determine whether a communication constitutes financial product advice.’

There are numerous instances where disclaimers will be needed by accountants in the legislation. Below are some sample disclaimers you may be able to use in written correspondence with your clients.

### 5.1 Sample disclaimer – Factual information

The following information is provided as an information service only and, therefore, does not constitute financial product advice and should not be relied upon as financial product advice. None of the information provided takes into account your personal objectives, financial situation or needs. You must determine whether the information is appropriate in terms of your particular circumstances. For financial product advice that takes account of your particular objectives, financial situation or needs, you should consider seeking independent financial advice from an Australian Financial Services Licensee before making a financial decision.

OR

The information I have provided you is purely factual in nature and does not take account of your personal objectives, situation or needs. The information is objectively ascertainable and, therefore, does not constitute financial product advice. If you require personal advice you should consult a properly licensed or authorised financial advisor.

### 5.2 Sample disclaimer – Tax advice (regulation 7.1.29(4))

The advice provided is not ‘financial product advice’ as defined by the *Corporations Act* (as amended by the *Financial Services Reform Act 2001*). I ..... am not licensed to provide financial product advice and taxation is only one of the matters that you need to consider when making a decision on a financial product. You should consider seeking advice from an Australian Financial Services Licensee before making any decisions in relation to a financial product.

### 5.3 Sample disclaimer – Referrals (regulation 7.6.01(1)(e))

I..... have not provided you (the client) with any financial advice or financial product advice. I have informed you of the contact details of an Australian Financial Services Licensee or their representative who is able to provide you with financial advice or financial product advice that is relevant to your particular objectives, situation and needs.

I am not a representative of, nor a related body corporate of, the Australian Financial Services Licensee to whom I have referred you. However, I am obliged to disclose any benefits I obtained or am likely to obtain in respect of this referral.

Accordingly, I disclose the following benefit (if any) that was/is likely to be received by me.

**Note 1:** The disclosure of benefits must be provided in the same form as the referral information. This means that where you verbally refer a client, you will need to verbally disclose the benefits you will or may receive and, in accordance the Codes, provide the client with the above written statement.

**Note 2:** Although you are not required by law to give a written statement of referral details, as a CPA, ICAA and NIA member, the Codes by which you are bound require that such a statement is made in writing.

#### 5.4 Sample disclaimer – Superannuation (regulations 7.1.29(5) & 7.1.29A)

The advice contained in this communication contains factual information and/or recommendations with regard to maintaining fund compliance. It is in this context that we have also commented on [describe the superannuation investment]. I..... am not licensed to provide financial product advice under the *Corporations Act 2001*. You should consider obtaining advice from an Australian Financial Services Licensee before you make a decision on a financial product, including (include details on financial products or class of financial products discussed).. I can provide you with a referral to ..... (include contact details) who is licensed to provide such advice.

**NOTE 1: A disclaimer is not required by an accountant if the accountant is only providing factual information and/or recommendations with regard to maintaining fund compliance.**

**NOTE 2: Refer to Section 3.5 for information on the issues to consider when referring a client to a licensee or representative of a licensee.**

## 6 Q&As and Case Studies

Below are a series of questions and answers, together with a case study covering some of the key aspects of the FSR regime for accountants. These questions and case studies are to assist accountants in how the legislation can be interpreted.

<b>NB:</b>	<b>Reg</b>	<b>= regulation</b>
	<b>S.</b>	<b>= section</b>
	<b>the Act</b>	<b>= <i>Financial Services Reform Act</i></b>
	<b>EM</b>	<b>= Explanatory Statement and/or Explanatory Memorandums</b>
	<b>licensed</b>	<b>= A holder of an Australian Financial Services Licence or a representative or an authorised representative of a licence holder</b>

Only short answers are provided to the questions below. For additional information concerning each answer, reference should be made to the corresponding heading referred to earlier in this guide. For example, for an explanation of questions in 6.1 you should refer to 'Business planning' in paragraph 3.3.1 above.

**Individual circumstances should be tested against the actual regulation and professional legal advice obtained if necessary.**

### 6.1 Business planning

**Q6.1.1: Can an accountant recommend to a client that they establish their business as either a company, trust, partnership or sole trader, or combination of these?**

A: YES. Such recommendations do not require an accountant to be licensed. Regulation 7.1.29(3)(c) permits '...advice on the acquisition or disposal... establishment, structuring...of an incorporated or unincorporated entity'. Accountants can analyse the needs of the client (provided the client is, or is likely to become, an interested party in the entity), identify the pros and cons of different arrangements and advise which solution best fits the needs of that client. This includes recommendations as to the most appropriate entity structure (provided any financial product advice given is confined to advice on a decision about securities of a body corporate, or related body corporate that carries on or may carry on the business of the entity; or 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), the work required to set up such a business structure and to help administer and operate the business structure. Regulation 7.1.29(3)(d) covers the recommendation of so-called 'shelf' entities that have never carried on a business.

**Q6.1.2: After advising the client which structures are appropriate, can an accountant then take such actions as are necessary to set up the structure, including the use of a 'shelf' company?**

A: YES, but only where instructed by the client to do so. Regulation 7.1.29(3)(g) allows accountants to arrange for the issue or purchase by a client of a financial product, by 'preparing a document of registration or transfer in order to complete administrative tasks on instructions from the person'.

**Q6.1.3: Can an accountant organise for the purchase/transfer of shares in a business on behalf of the client?**

A: YES, but only where instructed by the client to do so. Regulation 7.1.29(3)(g) allows accountants to arrange for the purchase of a financial product by 'preparing document of registration or transfer in order to complete administrative tasks on instructions from the person'.

BUT

Any advice given prior to the transfer taking place must be given in accordance with Reg 7.1.29(3)(c). The EM to Reg 7.1.29(3)(c) refers to the fact that advice must 'not apply to any financial products that the company acquires or disposes of, such as investments that the company holds'. Therefore, this exemption does not apply to the purchase or transfer of shares in any investments that the company may hold.

**Q6.1.4: Can an accountant set up a bank account for a client in order for them to run the business?**

A: POSSIBLY. Regulation 7.1.29(3)(g) will allow an accountant to arrange for the purchase of a financial product by 'preparing a document of registration or transfer in order to complete administrative tasks on instructions from the person'.

BUT

This Reg clearly indicates that a document of registration or transfer can only be prepared if instructed by the client, not based on a recommendation given by the accountant. While Reg 7.1.29(3)(c) permits '...advice on the acquisition or disposal...establishment, structuring...of an incorporated or unincorporated entity' and this could include general advice on the types of accounts that might be appropriate for the business (e.g. a cheque account or other payment mechanisms), no specific bank products could be recommended. The EM to Reg 7.1.29(3)(c) refers to the fact that advice must 'not apply to any financial products that the company acquires or disposes of, such as investments that the company holds'.

**Q6.1.5: Can an accountant provide analysis on the merits of having different classes of shares in the body corporate that will be carrying on the proposed business?**

A: YES. Such recommendations do not require an accountant to be licensed. Regulation 7.1.29(3)(c) permits '...advice on the acquisition or disposal... establishment, structuring...of an incorporated or unincorporated entity' provided the advice is confined to advice about the securities in a body corporate that carries on or may carry on the business of the entity. The EM indicates that accountants can provide these services as they are concerned with the 'administration and operation' of the business.

**Q6.1.6: Can an accountant provide advice, or comment on the assets and investments owned by a business ?**

A: NO. The EM to Reg 7.1.29(3)(c) states that 'the advice must only be in relation to the actual entity or related entities such as subsidiaries. It will not apply to any financial products that the company acquires or disposes of, such as investments that the company holds'. Therefore, advice must not be given in relation to the purchase or transfer of shares in any investments that the company may hold or to the purchase of shares in another entity, unless it is to a related entity (see Reg 7.1.29(3)(e)).

**Q6.1.7: Can an accountant monitor their client's business performance, recommending improved systems and cash flow management?**

A: YES. Such recommendations do not require an accountant to be licensed. Regulation 7.1.29(3)(c) permits '...advice on the acquisition or disposal... establishment, structuring...of an incorporated or unincorporated entity'. The EM indicates that accountants can provide these services as they are concerned with the 'administration and operation' of the business.

**Q6.1.8: Can an accountant, at the request of their client, maintain the Company Share Registry?**

A: YES. Regulation 7.1.29(3)(g) allows accountants to arrange for the purchase, transfer or disposal of a financial product by 'preparing a document of registration or transfer in order to complete administrative tasks on instructions from the person'.

**Q6.1.9: Can an accountant conduct ratio analysis and provide recommendations on the appropriate mix of current/non-current assets?**

A: YES. Such recommendations do not require an accountant to be licensed. Regulation 7.1.29(3)(c) permits '...advice on the acquisition or disposal... establishment, structuring...of an incorporated or unincorporated entity'. The EM indicates that accountants can provide these services as they are concerned with the 'administration and operation' of the business.

BUT

As stated in the EM, the analysis and recommendation 'must only be in relation to the actual entity or related entities such as subsidiaries. It will not apply to any financial products that the company acquires or disposes of, such as investments that the company holds' and, therefore, you can not advise which bank or banking product is the most suitable.

However, note that Reg 7.1.33A provides that a person is taken not to have provided a financial service if the service consists only of a recommendation or statement of opinion about the allocation of the person's funds among one or more of the assets specified at 3.4 (Broad asset allocation advice).

**Q6.1.10: Can an accountant bring to the client's attention various options for holding cash reserves (e.g. interest-bearing vs non interest-bearing accounts)?**

A: YES. But only where the information is purely factual in nature e.g. it is not financial product advice, the accountant is not required to be licensed. The Act only regulates the provision of financial product advice, not when the communication relates to the provision of factual information (refer to SECTION 3.1 for further information).

BUT

If an accountant provides more than factual information e.g. a statement of opinion or recommendation that could reasonably be regarded as intending to influence (even if this was not the intention of the accountant) the client to make a decision about a financial product, a licence would be required to provide such advice. For example, if the accountant were to draw comparisons between the products which either expressly or impliedly recommended one product over another.

**Q6.1.11: Can an accountant retain custody of certain business documents, such as Share Certificates and accounting and tax records?**

A: YES. The mere holding of business documents is not the provision of a financial service and, as such, the accountant need not be licensed for this activity.

**Q6.1.12: Can an accountant, in compliance with a court order, arrange for the transfer of assets, including financial products, in the following circumstances:**

- **between spouses, defactos and other parties subject to a Family Court settlement?**
- **between litigants in a commercial dispute?**

A: YES. But only where instructed by the client to do so. Such activities do not require an accountant to be licensed. Regulation 7.1.29(3)(g) allows accountants to arrange for the purchase, transfer or disposal of a financial product by 'preparing a document of registration or transfer in order to complete administrative tasks on instructions from the person'.

**Q6.1.13: Can an accountant, acting as an executor to an estate, provide advice that certain financial products be disposed of in order to maximise CGT gains/losses?**

A: YES. Such activities do not require a licence. When an accountant is acting as an executor they are acting in a personal capacity rather than on behalf of a client. S.911A(2)(f)(viii) states that a person is exempt from the requirements to hold a licence if they are acting 'as a personal representative of a deceased person....'.

## 6.2 Debt management

**Q6.2.1: Can an accountant advise their client about their options in relation to debt/equity capital structure?**

A: YES. Advice relating to debt, at least where it is accessed via a 'credit facility' (as defined in Reg 7.1.06), does not involve a financial product and therefore would not be covered by FSR. When the advice relates to securities in a body corporate or a related body corporate that carries on or may carry on the business of the entity, Reg 7.1.29(3)(c) will also be applicable. It permits accountants to give limited advice on 'the acquisition, disposal, administration...structuring' of an entity. Regulation 7.1.29(3)(h) may also be applicable to this situation, which allows accountants to discuss using a business's assets as security for raising additional funds. 'For example, this could involve advice to a company that it should raise money by securing a floating charge over assets in the company, which could include shares held by the company.' (EM)

**Q6.2.2: Can an accountant provide analysis of different loan packages from a range of lenders?**

A: YES. As long as the loan package meets the definition of 'credit facility' in Reg 7.1.06. Under S.765A(1)(h) of the Act, a credit facility is not considered to be a financial product.

BUT

When a financing package has both a credit and an investing component, licensing would be required for any advice given in respect of the investment component.

**Q6.2.3: Can an accountant provide analysis of different borrowing facilities (e.g. lease vs mortgage vs unsecured finance)?**

A: YES. As long as the loan package meets the definition of 'credit facility' in Reg 7.1.06. Under S.765A(1)(h) of the Act, a credit facility is not considered to be a financial product.

**Q6.2.4: Can an accountant provide analysis on specific interest rate caps and collars?**

A: NO. This will be financial product advice as interest rate caps and collars are a form of derivative and, therefore, meet the definition of a financial product under the Act.

### 6.3 Financing the acquisition of assets

**Q6.3.1: Can an accountant advise clients on the most effective ways to acquire business assets such as equipment, cars, office furniture (e.g. gearing, leasing, hire purchase, loan facilities)?**

A: YES. Provided the facility is a 'credit facility' as defined in Reg 7.1.06, an accountant does not need to be licensed in this situation as credit facilities are not financial products in accordance with Reg 7.1.06 and S.765A (1)(h) and business assets are also not included as financial products (S.765A).

**Q6.3.2: Can an accountant advise clients in relation to margin lending facilities?**

A: YES. An accountant can advise a client about the loan component of a margin lending facility as this is typically a 'credit facility' and as such not a financial product under S.765A.

BUT

A licence would be required to provide financial product advice about the securities that might be purchased with the borrowed funds.

### 6.4 Insurance

**Q6.4.1: Can an accountant advise a business client generally on risk management and possible strategies for managing the risks identified?**

A: YES. Regulation 7.1.29(3)(b) permits accountants to provide general '...advice on the risk associated with carrying on a business...' and to identify generic financial products or generic classes of financial products that will mitigate that risk. Furthermore, the Act allows the giving of factual information.

Generic is defined in the regulations as meaning "without reference to a particular brand or product issuer."

**Q6.4.2: Can an accountant advise a business client on the particular types of insurances that need to be considered?**

A: YES. Regulation 7.1.29(3)(b) permits accountants to identify 'generic financial products or generic classes of financial products that will mitigate risk'. This allows an accountant to recommend types of insurance that might be appropriate (e.g. Public Liability Insurance).

BUT

Specific product recommendations are not able to provided without a licence.

**Q6.4.3: Can an accountant advise a business client about the different reinsurance products by which client insurers can mitigate their own risks?**

A: YES. Reinsurance is specifically excluded from the definition of financial product (S.765A(1)(g)) and, therefore, a licence is not required to provide this type of advice.

**Q6.4.4: Can an accountant refer a business client to one or more insurance agents/brokers?**

A: YES. 'Mere referrals' do not require a licence (Reg 7.6.01(1)(e)) as long as all the conditions of the 'mere referral' exemption are met, including benefit disclosure (e.g. any commission or other payment received as a result of referral). For further information on referrals, refer to Section 3.5.

**Q6.4.5: Can an accountant advise a business client of the best product available for a specific type of insurance?**

A: NO. Specific product recommendations meet the definition of financial product advice and therefore you would need to be licensed to provide this type of advice.

**Q6.4.6: Can an accountant advise a business client pre- and post-loss to assist the client with insurance claims management?**

A: YES. But only in relation to pre-loss or in relation to post-loss, and so long as the information given is purely factual information. Regulation 7.1.29(3)(b) permits accountants to provide general '...advice on the risks associated with carrying on a business...' and to identify generic financial products or generic classes of financial products that will mitigate those risks. Furthermore, the Act does not cover the giving of factual information.

**Q6.4.7: Can an accountant advise the client of the insurance risks associated with changing superannuation fund?**

A: YES. FSR only regulates the provision of financial product advice, not the provision of purely factual information (refer to Section 3.1 for further information).

BUT

If an accountant provides more than factual information, that is, information that could reasonably be regarded as intending to influence (even if this was not the intention of the accountant) a person in making a decision about a financial product, a licence would be required to provide such information.

**Example**

Where a client intends to change superannuation fund as a result of a change of employment they may not be aware that the insurance in one fund may cease and cover with the new fund may not commence until contributions commence. The delay in contributions from the employer can leave the individual without life insurance cover.

In this situation this information can be provided to the client, but it would also be advisable to refer the client to someone who is licensed to provide the client with advice about the insurance within their superannuation fund or any other superannuation fund. For further information on referrals, please see section 3.5.

**Q6.4.8: Can an accountant advise a personal client of their insurance needs, such as income protection insurance?**

A: NO. Accountants are not insurance brokers and should not be advising their clients in relation to specific insurance products. Such advice is financial product advice and must be provided by someone who is licensed. Regulation 7.1.29(3)(b) does provide an exemption when an accountant provides advice to businesses on the types of insurance needed to address business risks. This exemption does not extend to advising individuals on the insurance that might suit their circumstances.

**Q6.4.9 Can an accountant advise of the opportunity to consider audit insurance to a client to cover the costs of the accountant's assistance in the event of an ATO audit of the client?**

A: YES. Regulation 7.1.29(3)(b) permits accountants to identify 'generic financial products or generic classes of financial products that will mitigate risk'. This allows an accountant to recommend types of insurance that might be appropriate (e.g. Audit Insurance).

BUT

Specific product recommendations are not able to be provided without a licence. Firms that either provide or arrange for the issue of specific insurance products for their clients must be licensed as such activity falls within the licensing requirements of the Act.

## 6.5 Property and real estate

**Q6.5.1: Can an accountant recommend a direct investment in real property?**

A: YES. Under S.763A and B, any direct real property, and other physical things purchased for investment purposes such as art, wine and gold bullion does not meet the definition of a financial product and is specifically excluded from the Act. Note 2 to S.763A states that 'while the property or bullion may generate a return for the person, it is not a return generated by the use of the purchase money by another person'.

BUT

An accountant must be mindful of other rules and legislation dealing with real estate, together with the requirements in the Codes relating to possessing appropriate skills and knowledge to provide such advice. Refer to Section 4 for more information on the Codes.

**Q6.5.2: Can an accountant advise on a property syndicate for a client?**

A: NO. An accountant would need to be licensed to provide advice on a property syndicate or trust. Only direct real property is excluded from FSR.

**Q6.5.3: Can an accountant assist in the establishment of a syndicated structure for investment in real property?**

A: YES. But only on instructions from the client. Regulation 7.1.29(3)(c) allows for accountants to establish a syndicate structure as a company or trust (other than a super fund or a trust that is required to register as a managed investment scheme) as long as the advice does not relate to other financial products the company or trust may acquire or dispose of.

**Q6.5.4: Can an accountant provide advice about the taxation implications of investing in real property?**

A: YES. Real property is not a financial product under FSR (see Q6.5.1 above) and the Act also does not cover tax advice (see S.766B(5)(c) and Reg 7.1.29(4) – see Section 3.2).

**Q6.5.5: Can an accountant advise a client on whether to purchase retail or commercial real property?**

A: YES. Both these investments are a form of real property, which is not a financial product under FSR.

BUT

An accountant must be mindful of other rules and legislation dealing with real property, together with the requirements in the Codes relating to possessing appropriate skills and knowledge to provide such advice. (Refer to Section 4 for more information on the Codes.)

## 6.6 Share valuations and due diligence

**Q6.6.1: Can an accountant provide share valuations of shares in a family business?**

A: YES. Such recommendations do not require an accountant to be licensed. Provided the advice is given to a person who is an interested party in the family business and the advice is confined to advice on a decision about shares in the family business and does not, for instance, relate to other financial products that the business may acquire or dispose of. Reg 7.1.29(3)(c) permits ‘...advice on the...valuation ...of an incorporated or unincorporated entity’. The EM indicates that accountants can provide these services as they are concerned with the ‘administration and operation’ of the business.

**Q6.6.2: Can an accountant provide a number of different valuations on, for example, the following bases: going concern, fire sale for equipment and stock?**

A: YES. Such recommendations do not require an accountant to be licensed. As detailed in Q6.6.1, Reg 7.1.29(3)(c) permits ‘...advice on the...valuation...of an incorporated or unincorporated entity’. Nothing in the Reg, or the EM dictates how the valuation should be determined. It is, therefore, assumed an accountant is able to undertake a number of different valuations, depending on the needs of the client.

**Q6.6.3: Can an accountant provide a comparison valuation based on publicly available information, between two listed companies that the client is considering adding to an investment portfolio?**

A: NO. This is not covered by Reg 7.1.29 as it is financial product advice, for which a licence is required.

**Q6.6.4: Can an accountant sign an Investigating Accountant’s Report as a Registered Company Auditor for a merger and acquisition or stock market float?**

A: YES. Reg 7.1.29(3)(a) allows for ‘the preparation or auditing of financial reports or audit reports’ and Reg 7.1.29 3(c) allows for ‘conducting a due diligence on a business’ which in combination is what an Investigating Accountant’s Report is required for to satisfy the requirements of the *Corporations Act*. The EM makes it clear that advice about a company’s financial statements such as Investigating Accountant’s Reports [can be] included in an exempt document (such as a PDS) without losing the benefit of the exemption.

**Q6.6.5: Can an accountant following a client’s request, provide projected financial statements for them (whether for internal budgeting or other purposes). ?**

A: YES. Regulation 7.1.29(3)(a) permits ‘the preparation or auditing of financial reports or audit reports’. The EM indicates that accountants can provide these services as they are concerned with the ‘administration and operation’ of the business. Therefore, an accountant can provide projected financial statements without being licensed, if the accounts are being prepared for internal purposes.

BUT

Where the financial statements are prepared for the purposes of a merger, acquisition or a stock market float, licensing will be required. In such an instances a suitable disclaimer should be attached to any such advice making it clear that a recommendation on a financial product is not being made and it is up to the client to make an appropriate decision taking into account any financial product advice that the client may obtain from a licensed financial adviser.

**Q6.6.6: Can an accountant upon the request of the client provide advice on the financial characteristics of two alternative businesses that the client is intending to purchase?**

A: YES. Provided the advice is purely factual information that the accountant is qualified to provide and is in the nature of due diligence (i.e. debt/equity, projected cash flow assumption and analysis, tax issues) then such advice does not require licensing as it is not providing a recommendation to buy or not buy one or other of the businesses. In such instances a suitable disclaimer should be attached to any such advice making it clear that a recommendation on a financial product is not being made and it is up to the client to make an appropriate decision taking into account any financial product advice that the client may obtain from a licensed financial adviser.

BUT

Regulation 7.1.29(3)(c) which allows due diligence advice to be given, may not be used as a pretext for providing a financial product recommendation which is a decision for the client taking into account and any financial product advice that the client may obtain from a licensed financial adviser.

## 6.7 Superannuation

NOTE: Refer to Sections 1.3 and 3.3.6 for comment on the Joint Committee on Corporations and Financial Services Recommendation that Reg 7.1.29 should be amended to allow for a recommendation to be made on superannuation fund structures without the need for an FSR Licence. The Q&As below have not factored in the Parliamentary Committee’s recommendations because at the time of printing, these recommendations had not been adopted by the Government.

**Q6.7.1: Can an accountant inform a client about the characteristics of different superannuation choices (e.g. a SMSF vs a retail fund)?**

A: YES. An accountant can provide information about the differences between superannuation choices. Regulation 7.1.29(5)(a) allows the accountant to advise on establishing, structuring and operating a superannuation fund within the meaning of the SIS Act. The accountant can inform the client about the differences in the control of investments, in-house asset investment opportunities and other structural differences between superannuation choices.

This enables accountants to assist clients in identifying the types of superannuation available, how they can be accessed and the advantages and disadvantages of each type without making a particular recommendation.

BUT

The accountant cannot, without being licensed, provide advice about the performance of different types of superannuation choices or different superannuation funds or recommend one structure over another.

**Q6.7.2: Can a Recognised Accountant recommend to a client that they should establish an SMSF over other superannuation structures?**

A: YES. A Recognised Accountant pursuant to Reg 7.1.29A is permitted to advise a client on the suitability of acquiring or disposing of an interest in an SMFS but only in the course of providing advice in relation to the establishment or structuring of an SMSF. Also, the client must be or is likely to become a trustee, director of a trustee, employer sponsor or a person who controls the management of the SMSF. The Recognised Accountant can only refer to factual information about other superannuation structures. Accountants who are not Recognised Accountants cannot advise a client to establish an SMSF pursuant to Reg 7.1.29A.

HOWEVER

The Recognised Accountant should be careful to not make the recommendation if they reasonably expect that the client will take the recommendation to establish an SMSF as a recommendation to withdraw a superannuation investment in another superannuation arrangement. ASIC provides further guidance on this issue (QFS 123), stating that advice about existing superannuation monies should only occur where the client has already decided to move assets from their current superannuation arrangement.

**Q6.7.3: Can an accountant assist in the setting up of an SMSF?**

A: YES. An accountant can provide these services as this would be considered to be 'arranging for another person to engage in conduct referred to in subsection 766C(1) in relation to interests in a self managed superannuation fund' provided that the client is, or is likely to become a trustee, a director of a trustee, an employer sponsor or a person who controls management and provided no recommendation is made to the client in respect of establishing the SMSF according to Reg 7.1.29(3)(f).

**Q6.7.4: Can an accountant assist a client to roll-over assets into an SMSF (realisation and acquisition of assets)?**

A: YES. An accountant can provide these services as this would be considered to be 'arranging for another person to engage in conduct referred to in subsection 766C(1) in relation to interests in a self managed superannuation fund', provided

that the client is, or is likely to become trustee, a director of a trustee, an employer sponsor or a person who controls management and provided no recommendation is made to the client in respect of transferring the assets according to Reg 7.1.29(3)(f).

**Q6.7.5: Can an accountant advise a client about which assets can be contributed to a superannuation fund and used to establish an SMSF?**

A: YES. But only if given for the sole purpose, and only to the extent reasonably necessary for the purpose of ensuring compliance with the SIS Act (other than S.52(2)(f)) and the SIS Regulations (other than Reg 4.09). This is because this would be considered to be 'establishment, structuring and operation of a superannuation fund within the meaning of the SIS Act' under Reg 7.1.29 (5)(a). This information is also factual information about superannuation structures.

Subject to meeting the purpose test described above, clients can be advised about the need to have an investment strategy, the restrictions on investments by the SIS Act and the benefits of diversification. In addition the client can be advised which investments of those held by the client can be contributed as in-specie contributions in compliance with S.66 of the SIS Act. The client can also be told about the in-house assets limitations.

BUT

Specific financial product recommendations cannot be provided without being licensed.

**Q6.7.6: Can an accountant advise a client as to which assets in an SMSF to liquidate/transfer in relation to a divorce settlement?**

A: POSSIBLY. Examples of circumstances where an exemption will be available are as follows:

(a) S.766B (5)(c), which provides an exemption for tax agents when they provide advice in the ordinary course of their activities may also be applicable to this situation. (Refer to Q6.8.2 for further guidance relating to the provision of taxation advice.)

(b) The client can be advised on the assets that can be split and the tax consequences of roll-over or liquidation of assets in order to give effect to a split to the extent that the information reflects the taxation and compliance aspects of the decision. The accountant can assist the client to give effect to the split at the client's request and completing the paperwork. The recipient can be advised on rollover relief and tax advice related to receiving a benefit.

(c) The accountant is advising on the acquisition, disposal etc. of real property, which is not considered a financial product under the Act (Refer to Q.6.5.1 for further information.)

BUT

The accountant cannot make a recommendation as to the fund to accept the payment or how this should be invested. The accountant cannot make a recommendation as to which assets to split or a recommendation as to the designation of split assets.

**Q6.7.7: Can an accountant value the assets within a superannuation fund?**

A: YES. Such recommendations do not require an accountant to be licensed. Regulation 7.1.29(5)(a) permits '...advice on the...valuation....of a superannuation fund' provided the advice is given to person who is a trustee, director of a trustee,

an employer sponsor or a person who controls management and provided that advice is not given in contravention of 7.1.29(5)(c).

This exemption recognises that trustees of reporting entities have an obligation to comply with AAS25 and value assets at net market value. This function is often outsourced to the accountant particularly in relation to related trusts and other entities that are not listed at market value.

**Q6.7.8: Can an accountant advise on the investment requirements/restrictions of the SIS Act (e.g. limitations on in-house assets)?**

A: YES. An accountant can provide these services as this would be considered to be 'establishment, structuring and operation of a superannuation fund within the meaning of the SIS Act' under Reg 7.1.29(5)(a) provided the advice is given to a person who is a trustee, director of a trustee, an employer sponsor or a person who controls management and provided that advice is not given in contravention of 7.1.29(5)(c). The accountant can discuss broad asset allocation issues and investment limitations imposed by the SIS Act. The accountant can also document the client's investment strategy based on the client's advice or the client's current investment holdings.

BUT

The client would be responsible for establishing, revising and adjusting the strategy accordingly. An accountant cannot prepare an investment strategy, detailed asset allocation recommendations or review an investment strategy unless they are licensed. Discussions must be limited to compliance or tax requirements.

**Q6.7.9: Can an accountant advise a client to dispose of a particular asset based on the requirements of the SIS Act (e.g. limitations on in-house assets)?**

A: YES. An accountant can provide these services if they are given for the sole purpose, and only to the extent necessary, of ensuring compliance with the SIS Act under Reg 7.1.29(5)(c). Where the advice is financial product advice, the accountant must provide a written statement in accordance with Reg 7.1.29(5)(d). An example would be where, during the preparation of accounts, the accountant becomes aware that the trustee has acquired an in-house asset. The accountant can advise the client of the breach and the method of resolution e.g. sale of the asset or increase other assets through contribution.

**Q6.7.10: Can an accountant recommend using ABC Master Trust?**

A: NO. IDPSs (e.g. Wraps) and Superannuation and Investment Master Trusts, nominee and custody services and IDPS - like services are considered financial products under FSR. Therefore, an accountant cannot advise or recommend that their client use a particular fund or superannuation product unless they are licensed.

**Q6.7.11: Can an accountant arrange off market transfers to ensure the assets are held in the appropriate entity as required by the regulators (ATO/APRA)?**

A: YES. An accountant can provide these services as this would be considered to be 'arranging for another person to engage in conduct referred to in subsection 766C(1) in relation to interests in a self managed superannuation fund' provided the service is provided to a person who is a trustee, director of a trustee, an employee, an employer sponsor or a person who controls management and provided the service that advice is not given in contravention of R.7.1.29(5)(c) according to R.7.1.29(3)(f).

The regulators expect that assets are held in the name of the fund. This means that assets contributed as in-specie contributions need to have an ownership change.

**Q6.7.12: Can an accountant provide factual information detailing the taxation of lump sum benefits and allocated pensions and, without recommending which to use, seek instructions from the client as to which they desire?**

A: YES. This activity does not require a licence as Reg 7.1.29(5)(a) allows for the operation of a Superannuation Fund and S.766B(5)(c) may apply where advice is given by a registered tax agent in the ordinary course of activities as such an agent typically undertakes and that is reasonably regarded as a necessary part of those activities. Regulation 7.1.29(4) may apply where advice relates only to taxation issues, the accountant does not receive a benefit (other than from the client) and an appropriate written statement is given where the advice is financial product advice (see Section 5).

BUT

The accountant cannot recommend that a person take an allocated pension or other income stream over a lump sum without being licensed.

**Q6.7.13: Can an accountant provide advice on an SMSF in relation to restructuring the composition of member accounts on retirement?**

A: YES. This activity does not require a licence for accountants as Reg 7.1.29(5)(a) allows for advice on the operation and structuring of a Superannuation Fund, provided the person advised is a trustee, a director of the trustee, or a person who controls management, and the advice is not excluded by Reg 7.1.29(5)(c) and (where the advice is financial product advice) an appropriate written statement is given in accordance with 7.1.29(5)(d) (see section 5).

Section 766B(5)(c) may apply where advice is given by a registered tax agent in the ordinary course of activities as an agent, and that is reasonably regarded as a necessary part of those activities. This would include an analysis of the tax implications of segregated or unsegregated assets and an explanation of the tax and actuarial requirements associated with a pension. However, the accountant cannot provide advice in relation to the specific investments in the fund.

**Q6.7.14: Does a superannuation trustee have to be licensed by ASIC?**

A: Section 911A(2)(j) expressly removes the requirement for trustees of Self-Managed Superannuation Funds to be licensed for services provided in their capacity as trustee of the SMSF. Regulation 7.6.01(1)(a)-(d) goes further, expressly removing the requirement for non-public offer fund and certain PST trustees to be licensed in respect of their dealing activities undertaken in their capacity as trustee. Such trustees will still need to be authorised to provide financial product advice. For public offer funds it is less clear. We recommend that you seek your own legal advice as to whether licensing is required in this situation.

**Q6.7.15: Can an accountant advise an employer on Superannuation Guarantee obligations?**

A: YES. An accountant is able to give advice on how to comply with Superannuation Guarantee legislation as this type of advice is exempted by Reg 7.1.29(5)(c). The accountant can advise an employer of the minimum contribution level, the employers reporting obligations and interpretative decisions on the definition of 'employees'.

BUT

An accountant cannot recommend which superannuation fund an employer should use for their employees.

**Q6.7.16: Can an accountant recommend that a member increase their contributions to cover the SG minimum?**

A: NO. An accountant can certainly provide a client with factual information such as the age-based limits when giving tax advice and explain the different tax treatment between income taken as cash and income contributed to superannuation. An accountant may also refer to guidance provided by ASFA and other professional associations highlighting the benefits of increased contributions on retirement lifestyles.

BUT

An accountant cannot recommend that a client increase their superannuation contributions.

**Q6.7.17: Can an accountant provide information to their client on the ability of a fund to accept a roll-over?**

A: YES. This is factual information based on the terms of the funds trust deed.

BUT

An accountant cannot advise a client that they should rollover into a particular fund.

**Q6.7.18 Can an accountant recommend to a client that they should establish an SMSF because it will provide better long-term returns to other superannuation structures?**

A: NO. Comparing an SMSF, including the performance of an SMSF to other superannuation structures is providing advice that is not covered by reg 7.1.29A and is providing more than factual information. This would be financial product advice and requires a license.

**Q6.7.19 Can an accountant recommend the type of investments the fund should acquire as part of the advice to set up an SMSF?**

A: NO. An accountant is NOT permitted to advise the client of any financial products that the fund should acquire or to advise on what financial products the fund should dispose of as this advice falls within the licensing requirements.

**Q6.7.20: Can an accountant explain to a client how 'choice' in superannuation works and what the implications are for the client?**

A: YES. This is factual information where the accountant explains to the client what 'choice' in superannuation means and how the legislation works. For a client who is an employer, the accountant can also explain what the employer's obligations are.

BUT

An accountant cannot advise a client that they should change to another fund as this is financial product advice. Even if a client is setting up an SMSF, the accountant cannot recommend that the funds be transferred from their existing superannuation fund. They are however, permitted to transfer funds to an SMSF, provided it is at the client's request (refer to Q.6.7.4).

**Q6.7.21: Can an accountant assist a client in administration of implementing 'choice' for their business?**

A: YES. An accountant can provide these services as this would be considered to be meeting your obligations under the Superannuation Guarantee Act. The sorts of activities an accountant could assist a client with include:

- Preparing the standard choice form
- Ensuring that the default fund fulfils the requirements to be an eligible choice fund
- Providing employees with the standard choice form as per the required timeline
- Determining whether the employer is exempt from offering the employee a choice of fund
- Keeping records of employees choices

BUT

You cannot recommend a default fund unless it is factual information ie contained in the award covering the class of employees.

**Q6.7.22: Can an accountant explain how portability works under the 'choice' regime?**

A: YES. An accountant can provide information about portability and whether an existing superannuation account is eligible to be transferred at the end of the six month period.

BUT

An accountant cannot make a recommendation that the member transfer their benefits.

**Q6.7.23: Can an accountant explain the lost monies provisions and provide information on where to find lost monies?**

A: YES. This is factual information and therefore can be provided by an accountant.

BUT

If a client finds money under the lost monies provisions the accountant cannot make a recommendation about how the client should invest those funds.

**Q6.7.24: Can an accountant provide transition services which generally include: review of existing funds operations; identification of potential providers; review and assessment of tender documents; recommendation of product to accept transfer; audit of transfer?**

A: YES. The majority of the components of the transition service are exempt from licensing under Reg 7.1.29(5)(a), including reviewing a funds operations, identifying potential providers and reviewing tender documents.

BUT

The recommendation of a product to accept the transfer is a product recommendation and is financial advice not subject to an exemption under 7.1.29.

**Q6.7.25: Can an accountant advise a client to have a binding death benefit nomination?**

A: NO. You can provide factual advice setting out the advantages and disadvantages of binding death benefit nominations. You can also advise a client that a nomination they have made is invalid or has expired. You can explain the tax consequences of paying a benefit to a nominee or proposed nominee. However, you cannot recommend that your client have a binding nomination, nor can you advise your client whom the nomination should be made in favour of without being licensed.

**Q6.7.26: Can an accountant set up a business that specifically promotes SMSFs to the public without being licensed?**

A: NO. A license would be required given that you are promoting SMSFs as a product and you are therefore giving financial product advice, particularly where this is independent of any advisory work on the client's other affairs. For example, you may well be providing advice to a person off the street that an SMSF is right for them. This is inappropriate without gathering further information and providing detailed financial advice.

## 6.8 Taxation services

**Q6.8.1: Can an accountant provide tax planning advice for a fee, including CGT advice on asset switching?**

A: YES. Only registered tax agents and lawyers are legally able to charge a fee for the provision of taxation advice when they are standing in the place of the taxpayer in their representation to the Commissioner. FSR specifies that activities performed by registered tax agents in the ordinary course of their activities as a tax agent, and that is reasonably regarded as a necessary part of these activities, are exempt under S.766B(5)(c). Therefore, provided the accountant is a registered tax agent, or employee of a tax agent, they can continue to provide tax planning advice for a fee, including advice on the capital gains tax implications of switching assets on behalf of a taxpayer.

BUT

Tax advice may not be used as a pretext for providing financial product advice. The advice must relate to the taxation consequences of financial products but should not be used to recommend particular financial products. Regulation 7.1.29(4) deals with this issue. One of the requirements under Reg 7.1.29(4) is that a written disclaimer must be provided if tax advice is financial product advice, that is, it is given in relation to a financial product, such as shares. (Refer to Section 5 for further information on disclaimers.)

**Q6.8.2: Can an accountant, who is a registered tax agent, provide taxation advice for a fee in relation to different products that a client is considering?**

A: YES. Where the advice is given in the ordinary course of their activities as a registered tax agent and that is reasonably regarded as a necessary part of those activities then they can rely on S.766(B)(5)(c). To the extent that exemption is not available then rely on Reg 7.1.29(4). Where a client is seeking advice on the taxation implications of different financial products they are considering purchasing, the accountant may give tax advice about the different products.

However, under Reg 7.1.29(4) there are a number of restrictions on this type of advice, such as the accountant can not receive a benefit from a third party, other than their fee, from the advice and must give written statements in line with 7.1.29(4)(c)(ii). The advice must relate to the taxation consequences and related issues but should not be used to recommend particular financial products. (Refer to Section 5 for further information on disclaimers.)

**Q6.8.3: Can an accountant, who is not a tax agent, provide taxation advice in relation to different products a client is considering if they do not charge a discrete fee ?**

A: POSSIBLY. Regulation 7.1.29(4) permits anyone to 'provide advice to another person on taxation issues including advice in relation to the taxation implications of financial products' provided a number of conditions are met. Conditions include that the accountant cannot receive a benefit, other than their fee, from the advice and a written statement must be provided in line with 7.1.29(4)(c)(ii).

BUT

Only registered tax agents and lawyers are legally able to charge a fee for the provision of taxation advice where they are effectively standing in the shoes of the taxpayer in their representation to the Commissioner. Provided the conditions in Reg 7.1.29(4) are met, an accountant would be able to provide taxation advice in relation to different financial products a client is considering.

**Q6.8.4: Can an accountant provide advice to a client who is a Government-funded employee on the tax implications of rolling over an ETP (e.g. the post-1983 untaxed component and the impact of undeducted contributions made prior to roll-over on components)?**

A: YES. Only registered tax agents and lawyers are legally able to charge a fee for the provision of taxation advice where they stand in the shoes of the taxpayer in their dealings with the Commissioner. FSR specifies that activities performed by registered tax agents in the ordinary course of their activities, as a tax agent and that is reasonably regarded as a necessary part of these activities, are exempt under S.766B(5)(c). Therefore, provided the accountant is a registered tax agent, or employee of a tax agent, they can continue tax planning advice for a fee, including advise on the capital gains tax implications of switching assets.

BUT

Tax advice may not be used as a pretext for providing financial product advice. The advice must relate to the taxation consequences of financial products but should not be used to recommend particular financial products. Regulation 7.1.29(4) deals with this issue. One of the requirements under Reg 7.1.29(4) is that a written disclaimer must be provided if tax advice is financial product advice, that is, it is given in relation to a financial product, such as shares. (Refer to section 5 for further information on disclaimers.)

**Q6.8.5: Under Reg 7.1.29(4)(b) it says the person will not receive a benefit (other than from the person advised...), what does this mean in practical terms?**

A: What this means is that an accountant can provide taxation advice in relation to financial products but only where they receive a benefit from the client or a client's associate (such as a fee for service). Where the accountant would receive a benefit from a third party as a result of giving the advice, such as a commission, spotter's fee or similar benefit, following a client acquiring a financial product as result of the advice, they are not covered by the Reg.

**Q6.8.6: Where an accountant, who is a registered tax agent, and a licence holder share a practice as partners, can the accountant provide tax advice in relation to a range of financial products recommended to the client by the licence holder?**

A: YES. An accountant, who is a registered tax agent, can continue to provide taxation advice for a fee as detailed in Q6.8.1.

If the accountant then refers the client onto another member of the practice for financial product advice, they must disclose any additional fees or commissions he may receive as a result of the referral. This would include any share in the business's overall profits as a result of financial product recommendations. (Refer to section 3.5 for further information regarding referrals.)

**Q6.8.7: Does the exemption for tax agents under S.766B(5)(c) cover corporate tax agents?**

A: The tax agents exemption in S.766B(5)(c) extends not just to individual tax agents but also the other nominees of the tax agents. That section states '[t]he following advice is not financial product advice:...advice given by a tax agent registered under Part VIIA of the *Income Tax Assessment Act 1936*'. Division 3 of Part VIIA of the ITAA sets out the requirements for a tax agent to be registered. This allows for the registration of corporate tax agents and extends the notion of a tax agent to those nominees of the company.

Therefore, while not every member of the company would be covered, those who are nominees of the company would be covered for the tax advice they provide.

**Q6.8.8 Where an accountant and a licence holder share a practice as partners, can the accountant pass on information and advice from the licence holder?**

A: POSSIBLY. An accountant can pass on information from a licence holder without the need to be licensed, provided they do not endorse the material and it is very clear that the accountant is not the one responsible for the information or advice. ASIC provides further guidance on this issue. It states that a person does not provide financial product advice if 'the person's conduct consists only of passing on publishing, distributing or otherwise disseminating a document that contains financial product advice' (LIC 60 1.4.2).

**Q6.8.9 Can an accountant advise a client to acquire a Farm Management Deposit account (FMD) with an Australian bank which allow primary producers to shift before-tax income from profitable years to less profitable years?**

A Yes. FMDs are only available to primary producers. The decision to use an FMD is primarily motivated by tax considerations and would form part of the activities performed by registered tax agents in the ordinary course of their activities, as a tax agent and that is reasonably regarded as a necessary part of these activities, are exempt under s.766B(5)(c). For accountants who are not tax agents, Reg 7.1.29(4) exempts tax advice including advice in relation to the tax implications of a financial product.

BUT

Tax advice may not be used as a pretext for providing financial product advice. The advice must relate to the taxation consequences of financial products but should not be used to recommend particular financial products. Regulation 7.1.29(4) deals with this issue. One of the requirements under Reg 7.1.29(4) is that a written disclaimer must be provided if tax advice is financial product advice, that is, it is given in relation to a financial product, such as FMDs. (Refer to Section 5 for further information on disclaimers.)

## 6.9 Miscellaneous issues

**Q6.9.1: Can an accountant get their clients to sign an indemnity form stating they are aware that the advice is being provided without being licensed?**

A: NO. You are not able to override the licensing requirements under FSR. If you wish to provide clients with financial product advice, you can only do so if you are properly authorised to do this. You are recommended to contact your professional body and to visit the ASIC website for details on how to become licensed or an authorised representative of a licence holder. The use of disclaimers, waivers or other notices will be ineffective. You will face severe penalties if you provide financial product advice without the proper authority.

**Q6.9.2: Can an accountant provide recommendations about specific equities due to bonus issues, restructuring or new floats?**

A: NO. An accountant cannot make recommendations about specific equities. S.766B(5)(c) and Reg 7.1.29 (4) only allow the accountant to advise on the tax consequences of this issue (provided certain conditions are met – see Section 3.2). Recommendations or advice about specific equities requires a licence.

**Q6.9.3: Can an accountant provide comments or give an opinion on product recommendations given in a financial plan that a client has brought to them for review?**

A: NO. By commenting on product recommendations, the accountant is effectively providing financial product advice themselves. An accountant is able to comment on the taxation implications of making the investments. (Refer to Q6.8.2 in the tax section for more guidance on what advice can be provided.)

HOWEVER

Accountants have ethical duties to their clients. If an accountant believes that a proposed product recommendation may not be in the best interest of their client, due to the fact that the accountant knows the client well and the proposed product recommendations do not appear to be appropriate for that client, the accountant should:

(a) inform the client that they are not a licensed financial product advisor, but that given their knowledge of the client's affairs, they have some concerns about the suitability of this product recommendation without identifying the specific concerns; and

(b) inform the client that they should consider seeking a second opinion from an independent licensed financial advisor.

If the accountant believes that a product recommendation may breach the law, they should consider informing ASIC.

**Q6.9.4: Can an accountant give general asset allocation advice?**

A: FSR licensing is not required when general asset allocation advice is given. This is when a recommendation or statement of opinion is provided to a person about the allocation of the person's funds that are available for investment between one or more of certain types of investment. These include shares, deposit products, managed investments and superannuation. However, you will need to be licensed to provide any more specific advice than this. Under FSR, advice includes not only advice about particular products (e.g. ABC Imputation Fund, XYZ Ltd Shares), but also about classes of products (e.g. banking shares, mining shares).

**Q6.9.5: Does it matter whether the benefit received from a licensee is merely a spotter's fee (e.g. a one-off payment) or a commission calculated by the amount of business referred? Is it critical whether the benefit received for the referral is received whether the product is purchased or not?**

A: Regulation 7.6.01(1)(e) exempts a referee who makes 'mere referrals' from requiring a licence as long as all benefits (regardless of whether they are a spotter's fee or commission-based and regardless of whether the benefit is received contingent on the client purchasing a financial product or not) that may be receivable are clearly disclosed to the client being referred in the some form as the referral.

**Q6.9.6: Can an accountant provide insolvency services without an FSR Licence?**

A: YES. Section 911A(2)(f) exempts any person who performs functions or activities of an official receiver, receiver, receiver and manager, liquidator, administrator, trustee administering a compromise or arrangement, personal representative of a deceased person and administrator of a bankrupt estate.

**Q6.9.7: Can an accountant who is employed by an organisation provide financial service activities (e.g. an analysis of different investments) to his employer where instructed by his employer as part of his employment?**

A: YES. As an employee, you would not meet the business test of 'conducting a financial services business' and therefore would not need to be licensed to undertake investment activities on behalf of your employer.

**Q6.9.8: Where can an accountant go to get more information about FSR and how it may impact them?**

A: You should contact your professional association. Information is available on their respective websites [www.cpaaustralia.com.au/links/fsra](http://www.cpaaustralia.com.au/links/fsra), [www.icaa.org.au](http://www.icaa.org.au), [www.nia.org.au](http://www.nia.org.au); and articles in their journals and other publications. The ASIC website ([www.asic.gov.au](http://www.asic.gov.au)) also has information about FSR, how to get a licence, licence requirements, as well as important Policy Statements, Guides and FAQs.

## 6.10 Case study

This case study demonstrates how a number of the regulations relating to accountants can be applied in practice. In particular, this case study indicates the type of advice that can be provided in relation to an SMSF.

NOTE: Refer to Sections 1.3 and 3.3.6 for comment on the Joint Committee on Corporations and Financial Services Recommendations that Reg 7.1.29 should be amended to allow for a recommendation to be made on superannuation fund structures without the need for an AFSL. The case study has not factored in the Parliamentary Committee's Recommendation.

Rob is setting up a new business – Rob's Adventure Holidays – and has come to see his accountant about his superannuation needs. He has a wife and two sons (29 and 26). One son works for Rob's Adventure Holidays and the other has his own building business.

Rob and his wife currently have the following investments:

Investment Property	250,000
Shares	20,000
Managed Funds (mostly fixed interest)	200,000
Cash/Term Deposits	20,000
Bonds/Treasury Notes	10,000
Retail Superannuation Fund – RB	100,000
Total	600,000

**The following scenario illustrates services that can be given without a licence under FSRA. In each instance you should note specific requirements of the applicable regulation, which has been referenced throughout the case study.**

**NOTE: The following information is factual. This scenario assumes that there is no express or implied endorsement of a particular option over any other and that no remuneration is payable to the accountant in respect of any of the options by a third party.**

**Rob:** Thanks for making the time to see me. I know we've talked about the structures I should put in place for the business, but now I'd like to discuss how to manage my superannuation.

**Accountant:** Well, Rob, there are a number of ways you can structure your superannuation. You can invest directly into retail superannuation funds. These products are open to the public so anyone can contribute regardless of where you are employed. They are managed professionally and their fees tend to range from xx% - xx%. A lot of these funds also have entry, exit and switching fees. They normally provide wide investment choices.

Another option would be to invest in an industry fund. These funds are generally cheaper than the retail alternative but often don't have the same flexibility and additional options as retail funds, such as insurance.. They tend to be geared towards a particular industry, such as the retail or building industry. In some cases, you can only join if your employer is a sponsor of the fund, but this is slowly changing as some are now open to the public. These funds are also managed professionally.

You may also like to consider setting up your own Self-Managed Superannuation Fund. These funds allow you to take a more active role in your investments. For someone with their own business, these funds also offer business real property exemptions.

From a cost benefit point of view, these funds tend to be a more expensive option, unless you have a significant amount of assets to invest (e.g. greater than \$200,000). (Reg 7.1.29(5))

REASON: This is factual advice and therefore exempt. However, if an accountant says more than what is factual, it is no longer exempt.

**Rob:** So which type of superannuation fund do you think would work best for me?

**Accountant:** On the basis of your circumstances, needs and goals I can recommend that you acquire a Self-Managed Superannuation Fund. I am unable, however, to compare an SMSF with other superannuation structures, which are considered to be financial products. I am only permitted to provide you with factual information about these other superannuation structures.

Anyone who provides financial product advice, such as investment recommendations, has to be licensed. I currently do not hold a licence. The Government is very tough on this, given the amount of poor advice that people have received in the past. By licensing this area, the Government is also able to ensure extra consumer protection is available in case someone gives you bad advice.

You should consider taking advice from the holder of a licence before making a decision about your superannuation if you do not want to establish your own Self-Managed Superannuation Fund. As I said, I am not licensed to provide you with financial product advice but I can refer you to Mary Jones, who is licensed to provide you with that advice. Would you like her details? (Regs 7.6.01(1)(e), 7.1.29A)

REASON: Reg 7.1.29A limits structure advice at the moment to SMSF advice. Other structure advice must be by a licensed financial advisor.

**Rob:** Yes, please.

**Accountant:** I should let you know that I get a \$100 spotter's fee for referring you to Mary. Her details are XXXX. (Reg 7.6.01(1)(e))

**Rob:** So if I want to set up my own fund, will you be able to help me?

**Accountant:** Yes, I can recommend that you acquire an SMSF and I can actually prepare all the paperwork for you to establish an SMSF, once you've decided that's the type of super fund you want to go with. (Reg 7.1.29(3)(f), 7.1.29A)

**Rob:** Great. Now I've already got a range of investments. I've got some retail funds, some direct equity and some superannuation. You mentioned that one of the benefits of a Self-Managed Superannuation Fund is consolidating all my investments in superannuation. Can I put all these investments into my superannuation fund?

**Accountant:** It's certainly possible to do that, but remember with superannuation, you won't be able to access your funds until retirement. There are also tax consequences of contributing non-cash assets to superannuation. For example, when transferring shares and managed funds, you will incur capital gains/losses in your personal income tax return. (Reg 7.1.33A)

I can structure a package to transfer some of these assets without incurring a personal tax liability. However, taxation is only one of the matters that must be considered when making decisions about financial products. You should consider taking advice from the holder of a licence like Mary Jones before making a final decision. (Reg 7.1.29(4))

- Rob:** I know all that. But I've listened to all the information you've given me and I've decided that I want to proceed and set up my own fund. Can you arrange all that for me, including that information about transferring assets without incurring a tax liability?
- Accountant:** Yes, I can arrange all that for you. (Reg 7.1.29(3)(f))
- Rob:** So what do you think of my investment allocation? Should I change that allocation while I'm moving them across?
- Accountant:** Well, you do seem to be quite weighted towards fixed interest and perhaps a little underweight in equities – given your willingness to take risks and retirement savings goals. (Reg 7.1.33A)
- Rob:** OK, I guess I should expand my equity holding. So what shares are good at the moment?
- Sorry, Rob, but as I mentioned earlier, investment advice is heavily regulated in Australia. I don't hold an Australian Financial Services Licence and can't give you any specific product recommendations. That's something you might like to discuss with Mary Jones or another licensed financial advisor. (Reg 7.6.01(i)(e))
- Rob:** I'm a bit confused. If I want to set up my own super fund, should I be talking to you or Mary Jones?
- Accountant:** I can advise you to set up an SMSF and once you've made the decision as to which way you'd like to go, I am certainly able to set up and administer your super fund on an ongoing basis. The only part you'll need to seek Mary's advice on is the investments you make in the fund. (Reg 7.1.29(3)(f))

# 7 Appendices

## 7.1 Appendix 1 – FSR regime references

### When is a licence required?

#### 911A Need for an Australian Financial Services Licence

- (1) Subject to this section, a person who carries on a financial services business in this jurisdiction must hold an Australian financial services licence covering the provision of the financial services.
- (2) However, a person is exempt from the requirement to hold an Australian Financial Services Licence for a financial service they provide in any of the following circumstances:
  - (a) the person provides the service as representative of a second person who carries on a financial services business and who:
    - (i) holds an Australian Financial Services Licence that covers the provision of the service;

#### 761A Definitions

**financial services business** means a business of providing financial services.

#### 766A when does a person provide a financial service?

- (1) For the purposes of this Chapter, subject to paragraph (2)(b), a person provides a financial service if they:
  - (a) provide financial product advice (see section 766B);

#### 766B Meaning of financial product advice

- (1) For the purposes of this Chapter, financial product advice means a recommendation or a statement of opinion, or a report of either of those things, that:
  - (a) is intended to influence a person or persons in making a decision in relation to a particular financial product or class of financial products, or an interest in a particular financial product or class of financial products; or
  - (b) could reasonably be regarded as being intended to have such an influence.However, the provision or giving of an exempt document or statement is not to be taken to be a provision of financial product advice.

### When is a licence not required?

**Section 766B(5)** The following advice is not financial product advice:

- (a) advice given by a lawyer in his or her professional capacity, about matters of law, legal interpretation or the application of the law to any facts;
- (b) except as may be prescribed by the regulations — any other advice given by a lawyer in the ordinary course of activities as a lawyer that is reasonably regarded as a necessary part of those activities;
- (c) except as may be prescribed by the regulations — advice given by a tax agent registered under Part VIIA of the *Income Tax Assessment Act 1936*, that is given in the ordinary course of activities as such an agent and that is reasonably regarded as a necessary part of those activities.

## **Section 766E: Meaning of provide a custodial or depository service**

- (1) For the purposes of this Chapter, a person (the provider) provides a custodial or depository service to another person (the client) if, under an arrangement between the provider and the client, or between the provider and another person with whom the client has an arrangement (whether or not there are also other parties to any such arrangement), a financial product, or a beneficial interest in a financial product, is held by the provider in trust for, or on behalf of, the client or another person nominated by the client.
- (2) The following provisions apply in relation to a custodial or depository service:
  - (a) subject to paragraph (b), for the purposes of this Chapter, the time at which a custodial or depository service is provided is the time when the financial product or beneficial interest concerned is first held by the provider as mentioned in subsection (1);
  - (b) for the purposes of Part 7.6, and of any other provisions of this Act prescribed by regulations made for the purposes of this paragraph, the continued holding of the financial product or beneficial interest concerned by the provider as mentioned in subsection (1) also constitutes the provision of a custodial or depository service.

Note: Because of paragraph (a) (subject to regulations made for the purposes of paragraph (b)), the requirements of Part 7.7 relating to financial services disclosure need only be complied with before the product or interest is first held by the provider. However, because of paragraph (b), the provider will be subject to the licensing and related requirements of Part 7.6 for so long as they continue to hold the product or interest.

- (3) However, the following conduct does not constitute providing a custodial or depository service:
  - (a) the operation of a clearing and settlement facility;
  - (b) the operation of a registered scheme, or the holding of the assets of a registered scheme;
  - (c) the operation of a regulated superannuation fund, an approved deposit fund or a pooled superannuation trust (within the meaning of the *Superannuation Industry (Supervision) Act 1993*) by the trustee of that fund or trust;
  - (ca) the operation of a statutory fund by a life company (within the meaning of the *Life Insurance Act 1995*);
  - (d) the provision of services to a related body corporate;
  - (e) any other conduct of a kind prescribed by regulations made for the purposes of this paragraph.

## **Financial Services Reform Regulations**

### **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 that another person might be subject to 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 associates;
  - (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 acquiring or an associate of the person advised) as 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 *Corporations Act 2001*; 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 *Corporations Act 2001*; and
    - ii. the client should consider taking advice from the holder of an Australian Financial Service 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 particular brand or product issuer.

**interested party** means:

- (a) an associate within the meaning of Division 2 or 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.

### **Regulation 7.1.29A Self-managed superannuation funds**

- (1) Subparagraph 7.1.29(5)(c)(ii) does not apply to a recommendation by a recognised accountant in relation to a self-managed superannuation fund.
- (2) In this regulation:  
*recognised accountant* means:
  - (a) a member of CPA Australia who:
    - (i) is entitled to use the letters 'CPA' or 'FCPA'; and
    - (ii) is subject to, and complies with, CPA Australia's continuing professional education requirements; or
  - (b) a member of the Institute of Chartered Accountants in Australia (ICAA) who:
    - (i) is entitled to use the letters 'ACA', 'CA' or 'FCA'; and
    - (ii) is subject to, and complies with, ICAA's continuing professional education requirements; or
  - (c) a member of the National Institute of Accountants (NIA) who:
    - (i) is entitled to use the letters 'FNIA', 'FPNA', 'MNIA' or 'PNA'; and
    - (ii) is subject to, and complies with, the NIA's continuing professional education requirements.

### **Regulation 7.1.33A Allocation of funds available for investment**

For paragraph 766A(2)(b) of the Act, a circumstance in which a person is taken not to provide a financial service within the meaning of paragraph 766A(1)(a) of the Act, is the provision of a service that consists only of a recommendation or statement of opinion provided to a person about the allocation of the person's funds that are available for investment among 1 or more of the following:

- (a) shares
- (b) debentures
- (c) debentures, stocks or bonds issued, or proposed to be issued, by a government
- (d) deposit products
- (e) managed investment products
- (f) investment life insurance products
- (g) superannuation products
- (h) other types of asset.

*Note: This regulation does not apply to a recommendation or statement of opinion that relates to specific financial products or classes of financial products.*

### **Regulation 7.6.01(1)(e) Referrals**

For paragraph 911A(2)(k) of the Act, the provision of the following services is covered by an exemption from the requirement to hold an Australian Financial Services Licence a financial service provided by a person (person 1) in the following circumstances:

- (i) the service consists only of:
  - (A) informing a person (person 2) that a financial services licensee, or a representative of the financial services licensee, is able to provide a particular financial service, or a class of financial services.
  - (B) giving person 2 information about how person 2 may contact the financial services licensee or representative.
- (ii) person 1 is not a representative of the financial service licensee, or of a related body corporate of the financial services licensee;
- (iii) person 1 discloses to person 2, when the service is provided:

- (A) any benefits (including commission) that person 1, or an associate of person 1, may receive in respect of the service.
- (B) any benefits (including commission) that person 1, or an associate of person 1, may receive that are attributable to the service.
- (iv) the disclosure mentioned in subparagraph (iii) is provided in the same form as the information mentioned in subparagraph (i).

## Explanatory statements

### **Activities that are taken not to be a financial service – Substituted regulation 7.1.29**

Section 766A of the Act describes when a person provides a financial service. Paragraph 766A(2)(b) provides that the regulations may set out the circumstances in which persons are taken to provide, or taken not to provide, a financial service.

The regulation is intended to clarify that when a person performs an activity (or an exempt service) listed in subregulations 7.1.29(3), (4) and (5), a person will not be providing a financial service (or eligible service), provided that person also meets the requirements of subregulation 7.1.29(1).

#### **Purposive approach in the regulation**

The activities listed in subregulations 7.1.29(3), (4) and (5) are considered to be activities that should not be regulated as a financial service under the Act and therefore not subject to the relevant licensing, disclosure and conduct obligations of the FSR regime. This approach is consistent with the functional regulatory basis that underpins the Act, which focuses on the nature of the activities performed.

The regulation is not intended to be an exhaustive list of every task that a person can perform without licensing. Therefore, certain activities are described in broad terms using words such as 'administration', 'establishment' and 'structuring'. It is intended that reasonable tasks would be covered by this exemption from FSR licensing. For example providing advice on compliance with legislation is part of 'administration' tasks.

#### **Exclusion from exemption where material is for inclusion in an exempt document**

The exemptions in 7.1.29(2)(b), (2)(c) and (5) are intended to exempt from licensing requirements where the advice is provided to those actually operating a business or superannuation fund. For consumer protection purposes, it is not intended that advice provided under an exemption from licensing will be republished in an exempt document to a wider audience. An example is if a person provides a valuation of a company to its directors and that valuation is reproduced in a prospectus.

That said, this restriction does not apply to advice about a company's financial statements or taxation that is included in an exempt document (such as Investigating Accountant's Reports).

#### **Specific Provisions**

##### 7.1.29(1)

While this regulation does allow a financial service to be provided, the intention is that this financial service must be an integral and not merely incidental part of the specified activity to take advantage of this licensing exemption. For example, if relying on the tax advice limb, any financial service must be part of providing that taxation advice. Financial advice that is merely incidental to that tax advice would not fall within this exemption.

##### 7.1.29(2)

An 'eligible service' has the same definition as a financial service under subsection 766A(1) of the Act.

##### 7.1.29(3)(a)

This activity concerns activities such as the preparation of financial reports and the conducting of audit functions as required by law.

#### 7.1.29(3)(b)

The exemption in paragraph (3)(b) clarifies that a person may advise on the risk that a business faces and identify a financial product that could mitigate that risk. Therefore, a person could recommend that a particular business requires certain types of insurance in their circumstances, such as contents insurance and public liability insurance.

However, that person would not receive the benefit of the exemption if they recommended products of, for example, ABC Ltd Insurance to meet those requirements. This information cannot be included in an exempt document for wider consumption.

#### 7.1.29 (3)(c)

This activity concerns advice to an incorporated entity or unincorporated entity on administrative and operational issues. The most common use of this provision is likely to be a person advising the management of a company.

The advice must only be in relation to the actual entity carrying on the business or related entities such as subsidiaries. It will not apply to any financial products that the company acquires or disposes of, such as investments that the company holds. This exemption cannot be relied upon if the information is included in an exempt document.

#### 7.1.29(3)(d)

Paragraph (3)(d) concerns advice to be provided in relation to a shelf company or shelf trust that has never carried on a business.

#### 7.1.29(3)(e)

In this activity, advice on transferring financial products among related bodies corporate could be provided without licensing. This is because there is largely limited or no change in beneficial ownership of the financial products involved, such as insurance.

#### 7.1.29(3)(f)

This activity applies to arranging activities to assist trustees in operating a self managed superannuation fund (SMSF).

This allows a person to undertake tasks such as rolling over funds into a SMSF, such as where the decision to roll over the funds has already been made. However, this arranging exemption will only apply to a SMSF given the need to assist member-trustees operate their own funds. Arranging can only be provided to persons mentioned in paragraph (5)(b) and must not be inconsistent with the limitation in paragraph (5)(c).

#### 7.1.29(3)(g)

This provision concerns the preparation of documents to complete administrative tasks such as share transfers, transferring superannuation funds and establishing structures without licensing. This exemption can only be used provided the administrative tasks are due to a direct instruction from the client. This activity will usually involve completing relevant documentation for signature of the client.

The provision of 'arranging' activities needs to be distinguished from the 'financial product advice' that recommends the registration or transfer of a financial product. That advice must fall within an exemption (either under this regulation or elsewhere under the Act) or require licensing. Once the client makes a decision, then the provisions of this exemption may be used to bring effect to the client's instructions.

#### 7.1.29(3)(h)

Paragraph (3)(h) clarifies that providers of advice on financial products that are used as security upon purchasing assets other than financial products do not require licensing. For example this could involve advice to a company that it should raise money by securing a floating charge over assets in the company, which could include shares held by the company.

The exemption cannot be used as a means to provide unlicensed advice when the security is used to purchase other financial products, such as margin loans.

#### 7.1.29(4)

This activity provides an exemption from FSR licensing when providing taxation advice.

It does not, however, provide an exemption from a requirement to comply with relevant tax legislation that may apply. For example section 251L of the *Income Tax Assessment Act 1936* makes it an offence for anyone other than a registered tax agent or an exempted person (such as a legal practitioner) to stand in the shoes of the taxpayer in their representation to the Commissioner and give advice about a tax law for a fee.

A person that receives a benefit from the client or its associate (such as a fee for taxation advice) will be able to use this provision. However, this exemption cannot be used as a means to market or sell financial products without a licence on the basis that a person is promoting taxation advantages and providing taxation advice. Therefore, a person cannot use this exemption if they receive a benefit from a third party, such as a commission, following a client acquiring a financial product as a result of the advice.

Taxation advice should not be the only consideration in making an investment decision. Therefore, if taxation advice includes financial product advice provided to a retail client, a written statement disclosure must be provided to the client.

#### 7.1.29(5)

This subregulation provides that unlicensed advice may be provided to the management or controllers of a superannuation fund in relation to running a superannuation fund. This would include advising a trustee on administration and operational issues. Therefore, a person can advise a superannuation trustee on operational issues such as:

- how to establish a fund after the trustee has made that decision;
- the addition of new trustees and members; and
- providing a valuation of the superannuation fund.

A person is able to advise on compliance with legal requirements. This would include advice on what are the legal requirements and whether there has been a breach of these requirements. In limited circumstances, a person may also give advice that would normally contravene paragraph (5)(c) if the advice were for the sole purpose and only to the extent reasonably necessary to ensure compliance with specified legislation. This legislation is the *Superannuation Industry (Supervision) Act 1993* (SIS Act), SIS Regulations and the *Superannuation Guarantee (Administration) Act 1992*. Note that while a person can advise on the need for an investment strategy that meets certain requirements under section 52(2)(f) of the SIS Act and regulation 4.09 of the SIS Regulations, no advice can be given that contravenes the requirements of paragraph (5)(c).

Advice that may breach paragraph (5)(c) cannot go beyond what is required by the specified legislation. For example, recommending a trustee purchase a financial product to comply with the need to act in the best interests of the beneficiaries under section 52(2)(c) of the SIS Act would not satisfy the requirement that is 'for the sole purpose and only to the extent reasonably necessary'.

Only advice relating to certain legislation may breach paragraph (5)(c). This is due to certain provisions of the specified legislation virtually requiring advice being provided on how to remedy breaches of the legislation. This would include advice on:

- the sale of financial products to correct a breach under section 129 of SIS;
- meeting in-house asset rules; and
- modifying the contribution level due to changes in the superannuation guarantee level.

It is not envisaged that a normal retail client holding employer-sponsored superannuation would require advice on issues such as establishment and structuring.

Superannuation is a financial product under section 764A(1)(g) of the Act and a financial service in relation to superannuation ordinarily requires licensing. Financial product advice (or a recommendation) that influences a client's investment or retirement planning decisions will have a significant impact upon that person's economic future. An example is a recommendation on which superannuation structure, vehicle or fund type the person advised should enter.

In that light, advice a consumer receives in these circumstances should be subject to consumer protection offered by the FSR Act. Therefore, financial product advice on investment decisions cannot be given without licensing in circumstances such as:

- a person becoming a member of a superannuation fund other than a self-managed superannuation fund;
- an existing member of the superannuation fund joining another sub plan in that same fund;
- a superannuation product changing from the growth phase to the pension phase;
- transferring benefits between investment options;
- making additional and voluntary contributions to a superannuation fund; and
- deciding what financial products should be held by a superannuation fund.

Under the FSR, recommending a person establish an SMSF structure is a superannuation investment decision as it is equivalent to recommending a person becomes a member of a SMSF. However, the recommending a person acquire or dispose of an interest in a self-managed Superannuation fund is permitted for recognised accountants. Further, when a person accepts a recommendation to establish an SMSF, that client will probably not consider seeking further advice from a licensed person on what other investment alternatives may be suitable in their circumstances. Caution must be exercised to ensure that investment advice is not provided and that the client is directed to a licensee if they require investment advice.

If unlicensed advice is provided under this provision, which includes financial product advice to retail clients, the person advised must also receive additional written disclosure. This exemption cannot be relied upon if the information is included in an exempt document.

## **Accountants and self-managed superannuation funds - new regulation 7.1.29A**

Paragraph 7.1.29(5)(c)(ii) of the Principal Regulations indicates that a person provides an exempt service if advice is given in relation to a superannuation product and that advice does not include a recommendation to acquire or dispose of that product.

The purpose of the amendment is to provide an exemption from the FSRA for recognised accountants making a recommendation that a person acquire or dispose of a self-managed superannuation product.

The amendment only applies in relation to self-managed superannuation as opposed to other superannuation products. Self-managed superannuation funds are often used as a tool to implement FSRA-exempted advice given by accountants, such as business structuring advice and taxation advice. The exemption for self-managed superannuation would therefore be in keeping with the policy of exempting such advice from the FSRA. Further, the exemption would be limited to the following members of professional bodies, which are subject to continuing educational and ethical requirements:

- \* 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; and
- \* 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.