



# FINANCIAL ADVICE AND REGULATIONS

**GUIDANCE FOR THE ACCOUNTING PROFESSION**

**DEVELOPED EXCLUSIVELY FOR THE MEMBERS IN PUBLIC PRACTICE  
OF CPA AUSTRALIA AND CHARTERED ACCOUNTANTS AUSTRALIA AND NEW ZEALAND**

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<b>DATE</b>	1 September 2017
<b>VERSION</b>	2.2
<b>DESCRIPTION</b>	Financial advice and Regulations: Guidance for the accounting profession

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# INTRODUCTION

The purpose of this guide is to provide members of CPA Australia and Chartered Accountants Australia and New Zealand with guidance on what services you can and cannot provide if you do not hold or operate under an Australian Financial Services (AFS) licence (that is, you are unlicensed), and to provide some guidance on operating under a limited AFS Licence (limited licence).

The guide provides information on when a licence is required, when a licence is not required, professional and ethical standards, sample disclaimers and other reference sources.

If you hold a limited licence, you should also refer to our member guide *Limited Australian Financial Services licence: Your obligations*.

# KEY SERVICES PROVIDED BY PROFESSIONAL ACCOUNTANTS

Three of the most critical areas for professional accountants covered by the *Corporations Act 2001* (the Act) and the *Corporations Regulations 2001* (the Regulations) relate to business, superannuation and taxation advice.

## BUSINESS ADVICE

*Reference – Regulation 7.1.29(3)(c)*

Exemptions are provided, subject to certain restrictions, for advice relating to setting up, administering and selling a business, including advice on how to manage business risks.

## TAXATION ADVICE

*References – s766B(5), Regulation 7.1.29(4)*

You can continue to provide tax advice to your clients, including the tax implications of certain investments, again subject to certain restrictions. In meeting the requirements under the Act, you should be mindful that general anti-avoidance provisions under the *Income Tax Assessment Act 1936* prevent taxpayers from entering into arrangements with the dominant purpose of obtaining a tax benefit.

Regulation 7.1.29(4) provides that you may provide tax advice on financial products, such as an interest in a self-managed superannuation fund (SMSF) and underlying investments held by the SMSF, as long as you do not receive a benefit (other than from your client or their associate) as a result of your client acquiring a financial product (or a financial product that falls within the class of products) mentioned in the advice and the advice relates to a financial product(s) that are not covered by any licence/authorisation you are operating under; and an appropriate written disclaimer is provided.

## SUPERANNUATION

*References – Regulations 7.1.29(3)(f) and 7.1.29(5).*

Factual information can be provided on the different superannuation options available for clients (e.g. SMSF -v- industry -v- retail) without a limited licence or a full AFS Licence.

Up until 30 June 2016 when Regulation 7.1.29A was repealed, you were able to recommend the establishment or winding up of an SMSF, provided no specific product recommendations were provided aside from the SMSF.

Now, if you wish to recommend the establishment or winding up of a SMSF, you need to obtain or operate under a limited licence or a full AFS Licence.



We strongly recommend that you familiarise yourself with the contents of this guide to ensure you make an informed decision about the advice and services you provide to your clients if you are not licensed.

# YOUR OPTIONS

If you wish to provide financial product advice or other financial services, it is crucial that you are aware of ALL your options.

There are four options you can consider.

## 1. REFER

- Refer all SMSF, other superannuation and financial planning related queries to an appropriately licensed financial adviser.
- You must disclose to the client any benefits you may receive from the referral.
- A referral agreement has been included as part of this guide.

## 2. BECOME AN AUTHORISED REPRESENTATIVE OF ANOTHER ENTITY'S LICENCE

- Enables you to provide financial product advice, while the licensee is responsible for ensuring compliance with the licence obligations.
- **Considerations when selecting an Australian Financial Services (AFS) licensee** has been prepared to help you select the type of licensee that is appropriate for your practice.

### 3. OBTAIN YOUR OWN AFS LICENCE OR LIMITED AFS LICENCE

- Applying for a limited licence enables you to provide a range of SMSF advice and 'class of product' advice and while you are responsible for ensuring compliance with the licence obligations, you also maintain your professional independence.
- The potential licensing authorisations available to limited licensees are set out in the reference material at the end of this guide (see Regulation 7.8.12A(4) and Regulation 7.8.14B(3))
- Note that there are some exemptions discussed in this guide which are available to unlicensed accountants but are not available to limited licensees. Specifically, a limited licensee will not be able to rely on Regulation 7.1.29(4) to the extent it covers taxation advice about products covered by authorisations held under a limited licence. Limited licensees also cannot rely on the exemption in 7.1.29(5) to provide advice related to superannuation compliance. Limited licensees may instead be able to rely on their licensing authorisations to provide advice that could otherwise have been covered by these exemptions.
- It is important that limited licensees are familiar with their individual licensing authorisations, and understand when these authorisations are being relied upon to give advice. When giving financial product advice covered by their licence, limited licensees will need to comply with each of the obligations that apply to the advice process, particularly when giving personal advice.
- Applying for a full AFS Licence can enable you to provide financial product advice, including specific financial product and class of product recommendations and dealing services, in a broad range of areas

Note: if you do not have relevant qualifications and experience to provide licensed financial product advice and dealing services you will need at least one appropriately qualified and experienced responsible manager to obtain the licence.

### 4. RECRUIT / JOINT VENTURE

- The joint venture option allows you to provide a complete financial planning solution to clients without personally providing financial product advice i.e. because the advice will be provided by the entity which holds the AFS Licence e.g. a financial planning practice.
- Key to making the recruitment option successful will be committing to integrating a separately licensed adviser within the practice and investing in resources to make it happen.

# 1. PURPOSE OF THE GUIDE

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 Act. This guide provides a Q&A format of practical examples.



\*Throughout this guide, reference to licensing means holding an Australian Financial Services licence issued by ASIC, a limited licence or being an authorised representative or representative of a licence holder.

## KEY REFERENCE MATERIAL

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

### The Act

The *Corporations Act 2001* is the primary legislation. The key parts for members are Parts 7.1, 7.6, 7.7, 7.7A and 7.8 as they relate to licensing.

### Corporations Regulations

The Regulations are one of the most important parts of the regime. 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, 7.1.33A, 7.6.01, 7.6.01BA, 7.6.04, 7.8.12A, 7.8.13A, 7.8.14(b), 7.8.14A, Schedule 2 and Schedule 3 of the Corporations Amendment Regulations 2013 (No.3).

## Explanatory Memoranda/Statements

Explanatory Memoranda (EM)/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 their significance, it is important to note that Explanatory Memoranda/Statements are issued by the Government and are not legally enforceable. However, they can assist with interpretation of the Act and the Regulations.

## ASIC Regulatory Guides

ASIC has issued a range of regulatory statements to assist in understanding how it is going to regulate licensing. ASIC's Regulatory Guides are not legally enforceable. Rather they are simply ASIC's interpretation of the legislation and a guide to how it intends to regulate. ASIC also has a number of Frequently Asked Questions (FAQ) and other related material, and where appropriate, this guide has taken into account ASIC pronouncements.

## 2. WHEN IS A LICENCE REQUIRED?

The Act sets out those situations when licensing 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 following sections apply, section 911A of the Corporations Act requires a person to hold AFS Licence:

- 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.



On 1 July 2016, the accountants' exemption previously set out in Regulation 7.1.29A was repealed. Accountants are now required to hold an AFS licence (or operate under another entity's AFS Licence) if they provide establishment or wind-up advice, deal or arrange to deal in an interest in a SMSF or if they financial provide advice or dealing services in relation to certain financial products.



For more information on your options please refer to the [CPA Australia website](#).

## 2.1 ITEMS THAT ARE NOT FINANCIAL PRODUCTS

The first test in assessing if an AFS Licence 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.

### 2.1.1 Direct property

Accountants are called upon to provide 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.

Direct real estate is not a financial product under s.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. This is because it is a physical asset held by the investor as owner, not a facility through which another person generates a return for an investor. Other physical assets such as wine, art and stamp collections are also excluded.

However, in ASIC Report 337: *SMSFs: Improving the quality of advice given to investors*, ASIC states:

*173 A person provides a financial service (i.e. financial product advice) if they recommend that an existing or proposed trustee/member of an SMSF purchase real property through their SMSF. This is because the vehicle through which the underlying investment is made is an SMSF and an interest in an SMSF is a financial product. It does not matter for licensing purposes that the underlying investment (real property in this case) is not a financial product. A person who carries on a business of providing financial services in Australia is generally required to hold an AFS licence. For the avoidance of doubt, we note that this does not mean that a real estate agent will ordinarily require an AFS licence. A real estate agent who does not specifically market to SMSFs, or carry on a business of recommending that SMSFs be used to purchase real property, is not required to obtain an AFS licence.*

Given ASIC's view, an accountant cannot recommend a person purchase a property through a SMSF unless they are appropriately licensed.

For further guidance refer to the Q&As in section 6.5 *Property and Real Estate* of this guide.

### 2.1.2 Credit facilities

Under s.765A(1)(h) of the Act, a credit facility (that satisfies the definition of a 'credit facility' provided in Regulation 7.1.06) is not considered to be a financial product.

This exemption means that products such as traditional home loans are not considered to be financial products and therefore do not require an AFS Licence.

However, some 'facilities' are still considered to be financial products, even though they have credit-like characteristics.

Examples of facilities that are not covered by the 'credit facility' exemption are:

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

Note: a margin lending facility (e.g. a lending facility that allows for the purchase of shares, using shares as collateral) is a financial product.

For further guidance on this issue, refer to the Q&As in section 6.2 *Debt Management of this guide*.

You will need an Australian credit licence (ACL) if you provide credit services to clients. For example, if you provide credit assistance by suggesting that they apply for or remain in a particular credit contract or lease, or apply to increase their credit limit under a particular contract, this is a regulated activity. Similarly, if you help them make an application for a credit contract, or increase their credit limit, or otherwise act as an intermediary between the client and the credit provider or lessor, you may need an ACL.

See ASIC's Regulatory Guide 203 *Do I need a credit licence?* for further guidance.



For more information on the regulation of consumer credit refer to the [CPA Australia website](#).

## 3. WHEN IS A LICENCE NOT REQUIRED?

A full AFS Licence or a limited licence 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 set out activities that are deemed not to be 'financial product advice' or a 'financial service'.

There are four key exemptions provided to accountants:

<b>1. Taxation advice</b>	s.766B(5)(c) & Regulation 7.1.29(4)
<b>2. Traditional accounting activities</b>	Regulation 7.1.29
<b>3. Broad asset allocation advice</b>	Regulation 7.1.33A
<b>4. Referrals</b>	Regulation 7.6.01(1)(e)

ASIC has released the information sheet INFO 216: *AFS licensing requirements for accountants who provide SMSF service*, which clarifies how the AFS licensing requirements apply to SMSF services provided by accountants and the various SMSF services accountants can provide.



For further guidance refer to **ASIC INFO 216: AFS licensing requirements for accountants who provide SMSF service.**

### 3.1 FACTUAL INFORMATION

ASIC has provided information clarifying when a licence is required. Regulatory Guide 36 *Licensing: Financial product advice and dealing* states that communications that consist only of factual information (i.e. objectively ascertainable information whose truth or accuracy cannot be reasonably questioned) will generally not involve the expression of opinion or recommendation and will not, therefore, constitute financial product advice (RG 36.23).

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, it will be financial product advice. 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 a licence should accompany the information with a disclaimer.

For more information and sample disclaimers refer to section 5.



For further guidance on factual information refer to **ASIC Regulatory Guide 36 Licensing: Financial product advice and dealing**

### 3.2 TAXATION SERVICES

The Tax Agent Services Act 2009 (TASA) provides for the registration and regulation of tax agents, BAS agents and tax (financial) advisers. Only registered tax agents, BAS agents, tax (financial) advisers and exempted persons (such as legal practitioners) can provide tax agent services – which includes tax advice for a fee, or to engage in other conduct connected with providing such services.

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

*except as may be prescribed by the regulations - advice given by a registered tax agent or BAS agent (within the meaning of the Tax Agent Services Act 2009) 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.*

The definition of tax agent services in s.90.5 of *Tax Agent Services Act 2009* is quite broad as it is any service relating to ascertaining or advising about liabilities, obligations or entitlements of entities under a taxation law where it is reasonable to expect the entity will rely on the service to satisfy liabilities or obligations, or to claim entitlements under a taxation law, which is defined in s.995.1 of the *Income Tax Assessment Act 1997*.

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.

Regulation 7.1.29(4), as modified by the legislative instrument *ASIC Corporations (Recognised Accountants: Exempt Services) Instrument 2016/1151*, states that when giving advice about the taxation implications of financial products covered by the Act, this is permissible where the person providing the advice is not licensed, or where the advice is provided by a licensed or authorised person, it is in relation to a product not covered by the person's authorisation, so long as the person 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 advise the client in writing that:

- they are not licensed or authorised under the Act (as applicable) to provide financial product advice in relation to the product; and
- taxation is only one of the matters that must be considered when making a decision on a financial product; and
- the client should consider taking advice from an Australian Financial Services licensee with the appropriate authorisation before making a decision on a financial product.

For more information and sample disclaimers refer to section 5.

### 3.3 TRADITIONAL ACCOUNTING ACTIVITIES – REGULATION 7.1.29

The original Regulation 7.1.29, issued in November 2001, applied only to 'Recognised Accountants', being members of CPA Australia, ICAA and the IPA. Changes made to the regulation in 2003 removed the application of the term 'Recognised Accountant' for the main regulation and it applied to any person that might potentially be caught unintentionally by the Act.

Regulation 7.1.29 provides 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
- Tax issues; and
- Superannuation.

Subregulation (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 subregulation 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 advisers) 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.

In interpreting regulation 7.1.29 the regulation's list of activities needs to be considered in the overall context of the licensing 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 regulation 7.1.29 as well as the new regulations introduced on 1 July 2013, 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 advisers.

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.

Also, that advice must be given to a person who is or is likely to become an officer (including a director), manager, associate or trustee of the business (an interested party').

However, accountants are not 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 superannuation 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 superannuation fund that relates to compliance with s.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.

As such, under Regulation 7.1.29(5), no licence is required for advice given:

- a. in relation to the establishment, operation, structuring or valuation of a superannuation fund, other than advice for inclusion in an exempt document or statement (such as a statement of advice (SoA)); and

<sup>1</sup> Note: s.52(2)(f) of the SIS Act was replaced by s.52(6) effective 1 July 2013.

- b. to a trustee of a superannuation fund (or a director of a trustee, an employer sponsor or a person who controls its management); and
- c. where the advice is provided for the sole purpose, and only to the extent reasonably necessary for, ensuring compliance with the provisions of the superannuation legislation set out above.

As advice given under Regulation 7.1.29(5) must be for the sole purpose and only to the extent reasonably necessary to ensure compliance with the specified legislation, it will only be in limited circumstances that this exemption will cover recommendations that:

- the superannuation fund acquire or dispose of specific financial products or classes of financial products;
- a person acquire or dispose of a superannuation product; or
- a person change their investment strategy or contribution level.

Further, if the accountant is covered by a licence, including a limited licence, they cannot rely on the exemption provided by Regulation 7.1.29(5) as they cannot provide the prescribed statement (per section 5 of this guide) that they are not licensed to provide financial product advice.

Also, an unlicensed accountant cannot provide advice about the investment strategy itself – even if it is for the sole purpose and only to the extent reasonably necessary to ensure compliance with the specified legislation.

Further information is set out in the reference materials at the end of this guide (see page 62).

### 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 cannot advise 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 generic risk management advice that is not restricted to merely business clients. This allows other clients, such as private individuals, to receive basic risk management advice, including taking out insurance. The relief is restricted to the presence of a risk that a person may face and does not allow the recommendation or advice about specific financial products, or those provided by a particular issuer.

From 1 July 2013 an accountant can obtain a limited licence if the accountant wishes to:

- advise a client in relation to the particular types of life risk insurance they should hold (e.g. life insurance)
- advise a client on how much insurance they should hold; or
- advise a client of the insurance risks associated with changing superannuation funds (without advising on the specific insurance products contained within a superannuation fund).

Only holders of a full AFS Licence (with the appropriate authorisations) will be able to:

- provide advice in relation to individual insurance products; and
- provide assistance with completing application forms for insurance policies.

### 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.

Such activities can be provided by accountants without the need for an AFS Licence 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.

These activities must not involve advising the client about their investment portfolio (or any investments or potential investments of the entity).

### 3.3.6 Superannuation

Regulation 7.1.29 allows accountants to provide limited advice without the need to be licensed.

However, unlicensed accountants cannot provide advice about the acquisition or disposal by the superannuation fund of specific financial products or classes of financial product, or a person's existing holding in a superannuation product to modify an investment strategy or a contribution level. Also, in all cases, the client must be, or must be likely to become, a trustee, a director of a trustee, an employer sponsor or a person who controls the management of the superannuation fund.

The following advice can be provided:

- Provide factual information about the taxation implications for superannuation contributions (subject to complying with the conditions referred to in Regulation 7.1.29(4), refer section 3.2).
- Compliance advice in respect of SMSFs and other superannuation funds (subject to complying with the conditions referred to in section 3.3.2).
- Provide employers with advice on SG obligations (subject to complying with the conditions referred to in section 3.3.2).

- Provide audit work and advise the client in respect of legislative breaches and their resolution (subject to complying with the conditions referred to in section 3.3.2).
- 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 (see section 3.4).
- Advise on the compliance status of a fund's trust deed with the requirements of the superannuation legislation. As a trust deed is a legal document, advice from a lawyer should be obtained in relation to drafting a trust deed and identifying any deficiencies.
- Advise an employer or employee client what choice of funds is and how it can be implemented (without recommending any fund).

In some cases, the above information may only amount to the provision of factual information (refer section 3.1). Where the advice provided in any of the above circumstances is financial product advice and is provided to a retail client, the advice must be accompanied by a written statement stating that:

- you are not licensed to provide financial product advice under the Act; and
- the client should consider taking advice from the holder of a licence before making a decision on a financial product.

For more information on disclaimers refer to section 5.



ASIC INFO 216 states that if you are covered by an AFS licence, including a limited AFS licence, you cannot rely on the exemption provided by Regulation 7.1.29(5) as you cannot provide the statement that you are not licensed to provide financial product advice.

An unlicensed accountant can set up a SMSF on the instructions of a client (including where the client provides those instructions based on a recommendation from a licensed financial adviser). However, an accountant cannot recommend a SMSF over another superannuation structure or recommend that the client switch from another superannuation structure to a SMSF unless they are appropriately licensed.

Importantly, accountants should not be setting up a 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 on the instructions of the client, but they should not be drafting the documents themselves, unless also legally qualified.

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
- prohibited to be done by someone unless done by a duly qualified lawyer; or
- required to be done only by those who have the necessary training and experience in law (such as providing legal advice).

While accountants cannot recommend establishment or winding up of a SMSF without being appropriately licensed, they can still arrange for the increase or decrease of an interest in a financial product (such as a SMSF) by preparing a document of registration or transfer in order to complete administrative tasks on instructions from the person.



ASIC is increasingly focusing on SMSF advice and services. It is highly likely ASIC will review and question practices that frequently establish SMSFs as an 'execution only' service.

As a matter of best practice, we recommend that where a member who is unlicensed is requested by a client to set up a SMSF, that is provide an execution only service, the member refers the client to external resources first in order to assist the client validate their decision.

Importantly, members should appropriately document the scope of the services being provided to ensure the client understands the services being provided. We recommend members outline the scope of the arrangement as part of an engagement letter signed by both parties.

Appropriate resources would include:

- **ATO** published resources including *Thinking about self-managed super*; and
- **Self-managed superannuation fund trustee education program**;
- ASIC Information Sheet 205: *Advice on Self-Managed Superannuation Funds: Disclosure of Risks*; and
- ASIC Information Sheet 206: *Advice on Self-Managed Superannuation Funds: Disclosure of Costs*.

### 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; and
- superannuation products.

This means no licence is required to provide a recommendation or statement of opinion to a client on the allocation of funds within their SMSF across the broad asset classes above.

However, recommendations on broad asset allocation are a separate activity to providing class of product advice (such as a recommendation that a client invest in international or mining shares), and class of product advice requires licensing.

Care also needs to be taken that no recommendation or statement of opinion is made that relates to specific financial products (e.g. shares in XYZ company).



For further guidance refer to **ASIC INFO 216: AFS licensing requirements for accountants who provide SMSF service**.

### 3.5 REFERRALS

Regulation 7.6.01(1)(e) provides an exemption that applies where a person merely refers a client to an AFS licensee or their representative (i.e. informs the client of the financial services the licensee or their representative can provide and how the client can contact them), to a licensed third party or authorised representative of a licensee. In all circumstances 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.

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). In each case the disclosure must be made via the same means as the referral. However, the receipt of referral fees or commissions create self-interest threats that must also be evaluated in accordance with the requirements of APES 230 *Financial Planning Services* and APES 110 *Code of Ethics for Professional Accountants* (the Code).

Section 766B(1) of the Act provides that financial product advice is a recommendation or a statement of opinion that is intended to influence a person to make a decision in relation to a particular financial product or class of products, or could reasonably be regarded as being intended to have such an influence. Care must be taken as a referral may be deemed to be an endorsement of financial product advice or services or deemed to be the provision of advice itself where the person to whom the client is referred only advises on the products of one company.

#### 3.5.1 Arranging and dealing

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 this would constitute providing financial product advice and requires the individual to be appropriately licensed.

#### EXAMPLE

An accountant discusses possible investment options with a client, such as a particular mix of managed funds, and then contacts a financial adviser and arranges for the financial adviser to acquire those funds for the client. This would be considered 'arranging' and the accountant would be in breach of the Act if they are not appropriately licensed. If the accountant also received a fee, this is also indicative of 'arranging'.



For further guidance refer to  
**ASIC INFO 216: AFS licensing  
requirements for accountants  
who provide SMSF service.**

### 3.5.2 Referrals and third party arrangements

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 and require a high level of cooperation between the accountant and a product issuer run the risk of going beyond a mere referral and in fact involve providing financial services advice and, therefore, the accountant must be a licensed financial adviser. Accountants need to take care to review all referral arrangements, whether they are formal or informal.



For further guidance and examples refer to Section D of ASIC's RG 36: *Licensing: Financial Product Advice and Dealing*.

### 3.5.3 Referrals to consumer credit providers

There are specific rules for referring consumer credit related matters. Where the information given to the consumer constitutes a mere referral to a credit licensee or representative, the adviser may be able to rely on an exemption if they also disclose any benefits, such as commissions, they or their associate may receive for giving the referral.



For further guidance refer to paragraph RG 203.116 of ASIC's **RG 203: Do I need a credit licence?** and Regulations 25(2), 25(2A) and 25(5) of the *National Consumer Credit Protection Regulations 2010*.

## 4. CODE OF ETHICS FOR PROFESSIONAL ACCOUNTANTS

While this guide focuses on the activities that can be undertaken without being licensed, all members of CPA Australia must observe and comply with APES 110 *Code of Ethics for Professional Accountants* (the Code).

The requirements stipulated in the Code must be complied with in addition to those set out under the current licensing regime. An activity may be permitted under the licensing regime but may not be permitted, or additional conditions may be required, by the Code. For example, Regulation 7.6.01(1)(e) allows verbal disclosures of referral fees and commissions, whereas the Code requires all referral fees to be disclosed to the client in writing.

The Code recognises 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 Code is designed to provide members with authoritative guidance on minimum acceptable standards of professional conduct.

Members should be guided not merely by the words but also by the spirit of the Code. 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 the legislation, all members must be familiar with the fundamental principles of the Code, being:

- Integrity
- Objectivity

- Professional Competence and Due Care
- Confidentiality; and
- Professional Behaviour

The Code is based on a conceptual framework that requires active consideration of issues based on the fundamental principles. The framework can be applied to differing circumstances and relies on professional judgement.

The conceptual framework requires Members to use their professional judgement in order to:

- identify any threats to compliance with the fundamental principles;
- evaluate the significance of the identified threats; and
- apply safeguards to eliminate threats or reduce them to an acceptable level.

Furthermore, members of CPA Australia are required to abide by all **applicable standards issued** by the APESB.

The *Professional Standards of Financial Advisers Act 2017* commenced on 15 March 2017, with effect from 1 January 2019. The Financial Adviser Standards and Ethics Authority Limited is responsible for governing the conduct of professionals in the financial advice sector, by setting mandatory educational and training requirements, developing and setting an industry exam, and creating a new Code of Ethics. The Code of Ethics will commence on 1 January 2020, with all advisers being required to adhere to the Code from that day forward.

## 5. DISCLAIMERS

Whilst the use of a disclaimer is not a defence against breaching the licensing provisions, it is a useful reminder that many financial product recommendations do require you to be licensed, and will help avoid misleading or confusing consumers about the purpose of the communication. Some exemptions to licensing requirements also require the use of a specific disclaimer under certain circumstances.

When using a disclaimer the unlicensed accountant must make it clear that they are not licensed pursuant to the Act to provide financial product advice and that if the client seeks such advice they must be referred to a licensed third party. Accountants who hold limited licenses will also be required to use certain disclaimers.

ASIC encourages the use of disclaimers to help avoid misleading clients, and in Regulatory Guide 36 *Licensing: Financial product advice and dealing states*:

*RG 36.31 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.*

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

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, 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, and you will need to make your own decision about how to proceed. Alternatively, for financial product advice that takes account of your particular objectives, financial situation or needs, you should consider seeking 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 an appropriately licensed or authorised financial adviser.

### 5.2 Disclaimer – tax advice (Regulation 7.1.29(4))

I ..... am not licensed to provide financial product advice under the *Corporations Act 2001* **or if applicable** I am not authorised under the *Corporations Act 2001* to provide financial product advice in relation to this product.

Taxation is only one of the matters that must be considered when making a decision on a financial product. You should consider taking advice from an Australian Financial Services licensee with the appropriate authorisation before making a decision on a financial product.

### 5.3 Sample disclaimer – referrals (Regulation 7.6.01(1)(e))

I..... have not provided you (the client) with any 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 product advice and dealing services.

I am not a representative of the Australian Financial Services licensee, nor a related body corporate, to whom I have referred you. However, I am obliged to disclose any benefits that I, or my associates, may obtain in respect of, or which are attributable to, this referral.

Accordingly, please note that the following benefit (if any) that I/my associates have received/may receive.

*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 with the Code, 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 Australia member, the Codes by which you are bound require that such a statement is made in writing.*

### 5.4 Sample disclaimer – superannuation compliance

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 appropriately licensed or authorised financial adviser 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 with regard to maintaining fund compliance.*

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

## 6. Q&AS

The following series of questions and answers has been developed to provide professional accountants with guidance on what advice and services can and cannot be provided if they are not licensed to provide financial product advice.

The following terms and abbreviations have been used in this section:

ABBREVIATION	TERM
s	section
the Act	<i>Corporations Act 2001 (Cth)</i>
EM	Explanatory Statement / Explanatory Memorandum
licensed	Holder of a full AFS Licence / limited licence; or representative / authorised representative of a licence holder
ACL	Australian Credit Licence (or being licensed as a credit representative of an ACL)

For additional background information to the following Q & As, please refer to the respective section of the guide. For example, for an explanation of questions in section 6.1 refer to 3.3.1 Business Planning.

**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?**

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?**

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?**

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 a document of registration or transfer in order to complete administrative tasks on instructions from the person'.

**HOWEVER**

Any advice given prior to the transfer taking place must be limited to that given in accordance with Regulation 7.1.29(3)(c). The Explanatory Statement to Regulation 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?**

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

**HOWEVER**

This regulation 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 Regulation 7.1.29(3)(c) permits '... advice on the acquisition or disposal... establishment, structuring...of an incorporated or unincorporated entity', no specific bank products (or class of bank products) can be recommended.

The Explanatory Statement to Regulation 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?**

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 on the assets and investments owned by a business?**

NO. The EM to Regulation 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 interests in any investments that the company may hold or to the purchase of shares in another entity, unless it is to an associate, which includes the company’s officers, a related body corporate, or the officers of a related body corporate (refer Regulation 7.1.29(3)(e)).

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

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?**

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?**

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.

**HOWEVER**

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’.

However, note that Regulation 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 in section 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)?**

YES. But only where the information is purely factual in nature, i.e. if 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 the provision of factual information (refer section 3.1).

**HOWEVER**

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, this would not be purely factual information.

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

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?

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?**

YES. Such activities do not require a licence.

Section 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....'. If the accountant is acting as a personal representative of the deceased (for example, acting as an executor), then a licence is not required.

**HOWEVER**

The accountant should investigate the professional indemnity insurance implications of acting as a personal representative – it may be that these activities are not covered.

**Q6.1.14 Can an accountant provide advice on family succession planning and farms?**

IT DEPENDS. There are a potentially broad range of issues that a client may request advice on in relation to the broad topics of family succession planning and farms.

For example, any advice on the distribution or transfer of real property, including tax advice, would not be financial product advice and would not require a licence.

Where a client requests recommendations as to whether they should transfer to a family member their shares in a company that operates the farming business, accountants could rely on the exemption in Regulation 7.1.29(3)(e), which covers advice in relation to the transfer of financial products between associates.

Recommendations that help the client make a decision about FMDs will be financial product advice. However, given that FMDs are a tax-driven product, such advice may be covered by the exemption under Regulation 7.1.29(4), which permits advice on the taxation implications of financial products (see section 3.2 of this guide).

Advice from a lawyer should be obtained in relation to requests for assistance with trusts, wills, agreements or other legal documents.

## 6.2 DEBT MANAGEMENT

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

YES. Advice relating to debt, at least where it is accessed via a 'credit facility' (as defined in Regulation 7.1.06), does not involve a financial product and therefore would not be covered by the Corporations Act 2001.

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, Regulation 7.1.29(3)(c) will also be applicable. It permits accountants to provide 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' assets as security for raising additional funds. The EM states:

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.

If the accountant provides credit assistance, they may require an ACL (refer section 2.1.2).

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

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

#### HOWEVER

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 or margin lending component.

An ACL may also be required (refer section 2.1.2).

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

YES. As long as the loan package meets the definition of 'credit facility' in Regulation 7.1.06. Under s.765A(1)(h) of the Act, a credit facility is not considered to be a financial product, unless it is (or includes) a margin lending facility.

An ACL may be required (refer section 2.1.2).

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

NO. Such analysis 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)?**

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

If the accountant provides credit assistance or acts as an intermediary, it may require an ACL (refer section 2.1.2).

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

NO. An accountant cannot advise a client about a margin lending facility as this is a financial product.

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

### **Q6.3.3 Can an accountant provide an analysis of different home loan packages from a range of lenders?**

NO. Where the accountant suggests that the client apply for a particular loan, this activity may require an ACL (refer section 2.1.2).

## 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?**

YES. Regulation 7.1.29(3)(b) permits accountants to provide advice on a risk that another person might be subject to and to identify generic financial products or generic classes of financial products that will mitigate that risk. Furthermore, the Act does not regulate 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?**

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).

#### **HOWEVER**

Specific insurance product recommendations (or recommendations about particular brands or product issuers) are not able to be provided without a full AFS 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?**

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?**

YES. 'Mere referrals' do not require a licence (Regulation 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 on the best product available for a specific type of insurance?**

NO. Specific product recommendations meet the definition of financial product advice and therefore you would need a full AFS Licence 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?**

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 advice on the risks that a business might be subject to, and to identify generic financial products or generic classes of financial products that will mitigate those risks. Furthermore, the Act does not regulate the giving of factual information.

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

YES. The licensing regime only regulates the provision of financial product advice, not the provision of purely factual information (refer section 3.1).

**HOWEVER**

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 their 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?**

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, income protection).

**HOWEVER**

Specific product recommendations are not able to be provided without being appropriately licensed.

**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?**

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). Importantly, accountants cannot recommend that their clients take out the cover. They can only inform clients of its availability.

**HOWEVER**

Specific product recommendations are not able to be provided without being appropriately licensed.

Note: Accountants can make clients aware of insurance contracts which provide cover for fees incurred by the client as a result of accounting services in relation to an audit or investigation by the ATO.

**Q6.4.10 Can an accountant advise a client on the amount of life risk insurance they should hold?**

NO. Advice on the amount of insurance that a client should hold goes beyond the exemption in Regulation 7.1.29(3)(b).

**HOWEVER**

The accountant can provide such advice if they obtain a limited licence with the appropriate insurance authorisation, or a full AFS Licence.

**Q6.4.11 Can the accountant advise the client about the death and disability options in their existing superannuation product?**

YES. The licensing regime only regulates the provision of financial product advice, not the provision of purely factual information (refer section 3.1).

**HOWEVER**

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 (including acquiring a financial product or further interests in a financial product, continuing to hold a financial product, or either disposing of it or reducing the client's interests in the financial product), a licence would be required to provide such information.

**Q6.4.12 Can the accountant advise the client that they might want to get further advice from an expert about their life risk insurance product to ensure it is right for them?**

YES. No licence is required.

The accountant is simply advising the client to review the appropriateness of a product for the client's specific situation – but the accountant cannot provide any financial product advice (including by suggesting that the client may need to change their product or level of cover).

If an accountant believes that a product may not necessarily fulfil the needs of the client, the accountant should:

- a. inform the client that they are not a licensed financial adviser, but that given their knowledge of the client's affairs, they would encourage the client to ensure the suitability of the product without identifying any specific concerns; and
- b. inform the client that they may wish to consider seeking the opinion of a licensed financial adviser.

**Q6.4.13 Can an accountant advise a client on the general insurance requirements of their SMSF with regard to the SMSF's assets?**

TO A LIMITED EXTENT. Regulation 7.1.29(3) (b) permits accountants to provide advice on a risk that another person might be subject to, and 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, income protection or home and contents insurance).

**HOWEVER**

Under 7.1.29(3)(b), an unlicensed accountant cannot provide a recommendation on the amount of insurance that is required, only the types of insurance.

A limited licensee authorised to provide 'class of financial product advice' in relation to insurance would be permitted to advise on quantum (e.g. a recommendation that the client should acquire \$1,000,000 of life insurance). This is different to giving specific product recommendations, or recommendations about particular insurance providers or brands, which cannot be given under a limited licence.

## 6.5 PROPERTY AND REAL ESTATE

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

YES. Under sections 763A and B, any direct real property, and other physical things purchased for investment purposes such as art, wine and gold bullion do not meet the definition of a financial product and are specifically excluded from the Act.

Note 2 to s.763B 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'.

**HOWEVER**

An accountant must be mindful of other rules and legislation dealing with real estate, together with the requirements of APES 110 which state the accountant must possess the appropriate skills and knowledge to provide such advice (refer section 4).

Further, ASIC has stated in Report 337 SMSFs: *Improving the quality of advice given to investors* that:

*A person provides a financial service (i.e. financial product advice) if they recommend that an existing or proposed trustee/member of an SMSF purchase real property through their SMSF. This is because the vehicle through which the underlying investment is made is an SMSF and an interest in an SMSF is a financial product.*

Given ASIC's view, an accountant cannot recommend a person purchase a property through an SMSF unless they are appropriately licensed (refer section 2.1.1).

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

NO. An accountant would need to be licensed to provide advice on most types of property syndicate.

Only direct real property advice is excluded from the licensing regime (unless you recommend that the client purchase a property through an SMSF).

Some property syndicates are excluded from being a financial product, so accountants can advise on those particular syndicates without needing a licence. You should speak to a specialist lawyer about these types of syndicates.

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

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 superannuation 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?**

YES. Real property is not a financial product (refer Q6.5.1) and the Act also does not cover tax advice (see s.766B(5)(c), Regulation 7.1.29(4) and section 3.2).

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

YES. Both these investments are a form of real property, which is not a financial product under the Act.

**HOWEVER**

An accountant must be mindful of other rules and legislation dealing with real property (refer section 2.1.1 and Q6.5.1). The obligations of APES 110 are also relevant.

**6.6 SHARE VALUATIONS AND DUE DILIGENCE****Q6.6.1 Can an accountant provide valuations of shares in a family business?**

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.

Regulation 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?**

YES. Such recommendations do not require an accountant to be licensed.

As detailed in Q6.6.1, Regulation 7.1.29(3)(c) permits ‘...advice on the...valuation...of an incorporated or unincorporated entity’. Nothing in the regulation, 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?**

NO. This is not covered by Regulation 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?**

SOMETIMES. When an accountant signs an Investigating Accountant’s Report (IAR), they are typically expressing an opinion about a company’s financial position – even if the opinion is that, in its view, the financial records are accurate. Regulation 7.1.29(3)(c) allows for providing advice on the acquisition or disposal, administration, due diligence, establishment, structuring or valuation of an incorporated or unincorporated entity.

**HOWEVER**

That advice can only be given where it:

1. is given to a person who is or is likely to become an officer (including a director), manager, associate or trustee of the business (an interested party’); and
2. 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; and
3. does not relate to financial products or investments that a client may hold within that business; and
4. is not advice for inclusion in an exempt document or statement (such as a PDS).

Accordingly, it is common that an IAR contained in a PDS or prospectus is only prepared by a business that is appropriately licensed (and if the document is given to retail clients, an FSG should be included). If the IAR is for the purposes of a merger or acquisition and the readers of the IAR are managers or directors who are (or likely to be) selling or buying the relevant company, and the advice otherwise meets the four requirements of the regulation as numbered above, then licensing will not be required.

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

YES. Regulation 7.1.29(3)(a) permits 'the preparation or auditing of financial reports or audit reports'. Also, providing projected financial statements, by itself, is unlikely to be financial product advice.

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.

**HOWEVER**

Where the financial statements are prepared for the purposes of a merger, acquisition or a stock market float, and are connected to the valuation of a financial product such as shares, licensing may be required (refer Q6.6.7).

**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?**

YES. Provided the advice is of a type 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 exempt under regulation 7.1.29(3)(c) (provided that each of the conditions of the exemption are met, as discussed in section 3.3.1 and in the reference materials at the end of this guide).

Alternatively, an accountant can provide purely factual information, and this will not be financial product advice. In such instances a suitable disclaimer should be attached, 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.

**Q6.6.7 Can an accountant provide a valuation of a business for sale without an AFS Licence?**

YES. Regulation 7.1.29(3)(c) provides an exemption for a valuation of an entity, whether incorporated or unincorporated, where that valuation is given to a person who is, or is likely to become, an interested party in the entity.

The advice must be limited to advice on a decision about the securities of the company or related company that carries on the business of the entity (or the interests in a trust where the trustee carries on the business of the entity in the capacity of trustee) and cannot relate to any other financial products that the entity may acquire or dispose of.

The valuation also cannot be included in an exempt document or statement, such as a Product Disclosure Statement or Financial Services Guide.

**HOWEVER**

There may be professional indemnity insurance implications. Some insurers do not cover this type of work, so the accountant must ensure that their insurance is adequate before providing business valuation services.

## 6.7 SUPERANNUATION

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

YES. An accountant can provide factual information about the differences between superannuation choices.

Regulation 7.1.29(5)(a) allows the unlicensed 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.

**HOWEVER**

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.

Further, if the accountant holds or operates under a full AFS Licence or limited licence, they cannot rely on the exemption provided by Regulation 7.1.29(5) as they cannot provide the statement that they are not licensed to provide financial product advice. To the extent that a licensee is authorised to provide financial product advice about interests in a SMSF or other superannuation product (as relevant), they could rely on that authorisation to provide this advice under their licence.

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

NO. An accountant cannot recommend the establishment or winding up of a SMSF unless appropriately licensed.

**Q6.7.3: Can an accountant set up a SMSF on instruction from a client or from a client who has received advice from a licensed financial adviser (ie execution only)?**

YES. Technically this does not require a licence as accountants are allowed to arrange for the increase or decrease of an interest in a financial product (such as a SMSF) by preparing a document of registration or transfer in order to complete administrative tasks on instructions from the person.

**HOWEVER**

ASIC is increasingly focusing on SMSF advice and services. It is highly likely that ASIC will review and question practices that frequently establish SMSFs as an 'execution only' service.

As a matter of best practice, where an accountant who is unlicensed is requested by a client to set up a SMSF as an execution only service, the member refers the client to external resources first in order to assist the client validate their decision.

Importantly, accountants should appropriately document the scope of the services being provided to ensure the client understands the services being provided.

As best practice, accountants should have clients sign off on the services provided, e.g. Letter of Engagement

Appropriate resources would include:

- **ATO** published resources including *Thinking about self-managed super*;
- **Self-managed superannuation fund trustee education program**;
- ASIC Information Sheet 205: *Advice on Self-Managed Superannuation Funds: Disclosure of Risks*; and
- ASIC Information Sheet 206: *Advice on Self-Managed Superannuation Funds: Disclosure of Costs*.

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

YES. Accountants are allowed to arrange for the application, variation 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 without being licensed.

Further, these services 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 of the superannuation fund and provided no recommendation is made to the client in respect of transferring the assets according to Regulation 7.1.29(3)(f).

**HOWEVER**

ASIC is increasingly focusing on SMSF advice and services. It is highly likely that ASIC will review and question practices that frequently establish SMSFs as an 'execution only' or provide 'execution only' SMSF services.

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

YES. Provided it is only 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 Regulation 4.09 which governs investment strategy requirements).

This is because this would be considered to be establishment, structuring and operation of a superannuation fund under Regulation 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 section 66 of the SIS Act.

The client can also be told about the in-house assets limitations.

**HOWEVER**

Specific financial product recommendations cannot be provided without being licensed.

Further, if the accountant holds or operates under a full AFS Licence or limited licence, they cannot rely on the exemption provided by Regulation 7.1.29(5) as they cannot provide the statement that they are not licensed to provide financial product advice. To the extent that a licensee is authorised to provide financial product advice about interests in a SMSF, they could rely on that authorisation to provide this advice under their licence.

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

NO. 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.

**HOWEVER**

- a. An accountant can identify 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.
- b. The accountant is advising on the acquisition, disposal etc. of real property, which is not considered a financial product under the Act (refer Q.6.5.1 and section 2.2.1.)

Further, if the accountant holds or operates under a full AFS Licence or limited licence, they cannot rely on the exemption provided by Regulation 7.1.29(5) as they cannot provide the statement that they are not licensed to provide financial product advice. To the extent that a licensee is authorised to provide financial product advice about interests in a SMSF, they could rely on that authorisation to provide this advice under their licence.

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

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 a person who is, or is likely to become, a trustee, a director of a trustee, an employer sponsor or a person who controls management of the superannuation fund and provided that advice is not given in contravention of Regulation 7.1.29(5)(c).

This exemption recognises that trustees of reporting entities have an obligation to comply with AASB1056 in identifying the fair value of assets. This function is often outsourced to the accountant.

#### **HOWEVER**

If the accountant holds or operates under a full AFS Licence or limited licence, they cannot rely on the exemption provided by Regulation 7.1.29(5) as they cannot provide the statement that they are not licensed to provide financial product advice. To the extent that a licensee is authorised to provide financial product advice about interests in a SMSF, they could rely on that authorisation to provide this advice under their licence.

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

YES. An unlicensed accountant can provide these services as this would be considered to be 'establishment, operation and structuring of a superannuation fund under Regulation 7.1.29(5)(a) provided the advice is given to a person who is, or is likely to become, a trustee, a director of a trustee,

an employer sponsor or a person who controls management of the superannuation fund and provided that advice is not given in contravention of Regulation 7.1.29(5)(c). This information is also factual information about the investment restrictions of the SIS Act.

The accountant can discuss broad asset allocation issues (refer section 3.4 of this guide) 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.

#### **HOWEVER**

The client would be responsible for establishing, revising and adjusting the strategy accordingly.

An accountant cannot prepare detailed asset allocation recommendations or review an investment strategy unless they are licensed. Discussions must be limited to compliance or tax requirements.

Further, if the accountant holds or operates under a full AFS Licence or limited licence, they cannot rely on the exemption provided by Regulation 7.1.29(5) as they cannot provide the statement that they are not licensed to provide financial product advice. To the extent that a licensee is authorised to provide financial product advice about interests in a SMSF, they could rely on that authorisation to provide this advice under their licence. However, a licensee may choose instead to provide factual information on these matters.

**Q6.7.9 Can an accountant provide a pro forma generic investment strategy for a client with appropriate disclaimers?**

YES. An accountant can provide a generic investment strategy provided it falls within the broad asset allocation exemption in Regulation 7.1.33A (refer section 3.4).

**HOWEVER**

The accountant must make it clear that the strategy is a generic template only, and it is up to the trustee to ensure it meets the relevant requirements. Also, the accountant should make it clear that provision of the template is not the endorsement of a particular investment strategy.

**Q6.7.10 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)?**

YES. Technically, this does not require a licence.

An unlicensed 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 Regulation 7.1.29(5)(c).

Where the advice is financial product advice, the accountant must provide a written statement in accordance with Regulation 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

**HOWEVER**

Other than the specific type of recommendation discussed here, an accountant should be careful that they are not providing class of product advice or any other financial product advice unless they are appropriately licensed.

Further, if the accountant holds or operates under a full AFS Licence or limited licence, they cannot rely on the exemption provided by Regulation 7.1.29(5) as they cannot provide the statement that they are not licensed to provide financial product advice. To the extent that a licensee is authorised to provide financial product advice about interests in a SMSF, they could rely on that authorisation to provide this advice under their licence.

**Q6.7.11 Can an accountant recommend using ABC Master Trust?**

NO. IDPSs (e.g. Wraps) and Superannuation and Investment Master Trusts, nominee and custody services and IDPS-like services are considered financial products.

Therefore, an accountant cannot advise or recommend that their client use a particular fund or superannuation product unless they are licensed. However, an accountant can refer the client to the provider of these products under the 'mere referral' exemption that applies under regulation 7.6.01(1)(e), as outlined in section 3.5 of this guide and in the reference materials.

**Q6.7.12 Can an accountant arrange off market transfers to ensure the assets are held in the appropriate entity as required by the regulators (ATO/APRA)?**

NO. An unlicensed accountant, or an accountant with a limited licence, would not be able to do this. However, no licence is required to act as an intermediary in arranging for an appropriately licenced person to carry out these services.

**Q6.7.13 Can an accountant provide factual information detailing the taxation of lump sum benefits and account based pensions and, without recommending which to use, seek instructions from the client as to which they desire?**

YES. This activity does not require a licence as factual information is not financial product advice.

Regulation 7.1.29(4) may apply where any financial product advice given relates to the taxation implications of the financial products, the accountant does not receive a benefit (other than from the client), the advice relates to a financial product or products that are not covered by any licence/authorisation the accountant is operating under and an appropriate written statement is given where the advice is financial product advice (refer section 5).

**HOWEVER**

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

**Q6.7.14 Can an accountant recommend a Transition to Retirement (TTR) strategy within a SMSF or with any superannuation product?**

YES. An accountant can provide information about a member's eligibility to move into pension phase, including information about tax implications, and the operation of the superannuation fund, as allowed by Regulations 7.1.29(4) and 7.1.29(5).

**HOWEVER**

The accountant cannot recommend one superannuation product over another, or recommend the acquisition, variation or disposal of an interest in a superannuation product that goes beyond taxation and operational aspects of the superannuation product.

An accountant who holds or operates under a full AFS Licence or limited license will not be able to rely on Regulation 7.1.29(4) to provide this advice in relation to a product that is covered by their licence.

Further, if the accountant holds or operates under a full AFS Licence or limited licence, they cannot rely on the exemption provided by Regulation 7.1.29(5) as they cannot provide the statement that they are not licensed to provide financial product advice.

To the extent that a licensee is authorised to provide financial product advice about interests in a SMSF or other superannuation product (as relevant), they could rely on that authorisation to provide this advice under their licence.

**Q6.7.15 Where a licensed financial adviser recommends a client commence a pension from a SMSF, can an accountant administratively set it up?**

YES, but only on instruction from the client (refer section 6.7.4).

Such activities do not require an accountant to be licenced, as Regulation 7.1.29(3)(g) allows accountants to apply for, vary or dispose of an interest in a financial product by 'preparing a document of registration or transfer in order to complete administrative tasks on instructions from the person.'

**Q6.7.16 Can an accountant administratively set up a pension from a SMSF on request from a client? (Preparing all documentation that evidences the pension including correspondence from trustees, minutes etc.)**

YES, but only on instruction from the client (refer section 6.7.4).

Such activities do not require an accountant to be licenced, as Regulation 7.1.29(3)(g) allows accountants to apply for, vary or dispose of an interest in a financial product by 'preparing a document of registration or transfer in order to complete administrative tasks on instructions from the person.'

**Q6.7.17 Can an accountant provide advice on a SMSF in relation to restructuring the composition of member accounts on retirement?**

YES, but only in limited circumstances.

It is possible for an unlicensed accountant to provide some advice on this topic under Regulation 7.1.29(5).

Under Regulation 7.1.29(5) a person is able to advise on the operation and structuring of a superannuation fund, and on compliance with the superannuation legislation (other than advice on investment strategies). The client must be, or must be likely to become, a trustee, a director of a trustee, or a person who controls management of the superannuation fund.

However, note that Regulation. 7.1.29(5)(c) only allows advice on the following topics if that advice is being given for the **sole purpose of, and to the extent necessary for**, ensuring compliance with the legislation:

- advice on the acquisition or disposal by the superannuation fund of specific financial products or classes of financial products;
- a recommendation that a person acquire or dispose of a superannuation product; or
- a recommendation in relation to a person's existing holding in a superannuation product to modify an investment strategy or a contribution level.

Under Reg. 7.1.04E, moving superannuation from the growth phase to the pension phase will involve the issue of a new financial product. In practice, there may be very few situations where advice on this topic (or one of the other topics listed at the bullet points above), and successfully meeting the 'sole purpose' and 'extent necessary' tests, would be given specifically in connection with restructuring the composition of member accounts on retirement.

Where the advice is financial product advice, an appropriate written statement must be provided in accordance with Regulation 7.1.29(5)(d) (refer section 5).

An unlicensed accountant could also rely on the exemption in Regulation 7.1.29(4) to provide advice on the taxation implications of strategies that the client seeks advice on, in relation to their SMSF. The accountant would need to meet each of the requirements of Regulation 7.1.29(4), as set out in section 3.2 of this guide.

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 unless appropriately licenced.

Further, if the accountant holds or operates under a full AFS Licence or limited licence, they cannot rely on the exemption provided by Regulation 7.1.29(5) as they cannot provide the statement that they are not licensed to provide financial product advice. To the extent that a licensee is authorised to provide financial product advice about interests in an SMSF, they could rely that authorisation to provide this advice under their licence.

The holder of a full AFS Licence or a limited licence similarly would not be able to rely on Regulation 7.1.29(4) if they are authorised to provide financial product advice about SMSFs. However, they may rely on their licence to provide this advice if they are so authorised.

For further guidance on Regulation 7.1.29 please refer to section 7 of the Guide and ASIC's Information Sheet 216: *AFS licensing requirements for accountants who provide SMSF services*.

#### **Q6.7.18 Does a superannuation trustee have to be licensed by ASIC?**

NO. 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 trustees of certain pooled superannuation trusts 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.

#### **HOWEVER**

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.

**Q6.7.19 Can an accountant advise an employer on Superannuation Guarantee obligations?**

YES. This type of advice is exempted by Regulation 7.1.29(5)(c).

The accountant can advise an employer of the minimum contribution level, the employer's reporting obligations and interpretive decisions on the definition of 'employees'.

**HOWEVER**

An accountant cannot recommend which superannuation fund an employer should use for their employees, as this would constitute specific financial product advice.

**Q6.7.20 Can an accountant recommend that a member increase their contributions to over the Superannuation guarantee (SG) minimum?**

NO. An accountant cannot recommend that a client increase their superannuation contributions unless they are appropriately licensed.

**HOWEVER**

An accountant can provide the client with factual information such as the relevant contribution caps or (when giving tax advice) explain the different tax treatment between income taken as cash and income contributed to superannuation. In providing any tax advice, the accountant should give the appropriate disclaimer required under Regulation 7.1.29(4)(c) (refer to 3.2).

**Q6.7.21 Can an accountant provide information to their client on the ability of a fund to accept a roll-over?**

YES. This is factual information based on the terms of the fund's trust deed.

**HOWEVER**

An accountant cannot advise a client that they should rollover into a particular fund unless are appropriately licensed.

**Q6.7.22 Can an accountant assist a client with the rollover of a member's balance from one fund to a SMSF?**

YES, but only on instruction from the client. (Refer section 6.7.4).

Such activities do not require an accountant to be licenced, as Regulation 7.1.29(3) (g) allows accountants to arrange for the acquisition, variation 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.'

**Q6.7.23 Can an accountant recommend to a client that they should establish a SMSF because it will provide better long-term returns compared to other superannuation structures?**

NO. Recommending a SMSF, including the favourable comparison of the performance of a SMSF, to other superannuation structures goes beyond providing factual information and is considered financial product advice that requires the provider to be appropriately licensed.

**Q6.7.24 Can an accountant recommend the type of investments the fund should acquire as part of the advice to set up a SMSF?**

NO. An accountant cannot advise the client which financial products the fund should acquire or advise on which financial products the fund should dispose of unless they are appropriately licensed. (Refer section 3.4).

**Q6.7.25 Can an accountant explain to a client how 'choice' in superannuation works and what the implications are for the client?**

YES. This is factual information.

The accountant can explain 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.

**HOWEVER**

Unless appropriately licensed, 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 a SMSF, the accountant cannot recommend that the funds be rolled over from their existing superannuation fund. However, an accountant can rollover the funds to the SMSF provided this it is at the client's request. (Refer Q6.7.4 and Q.6.7.5).

**Q6.7.26 Can an accountant assist a client in the administration of implementing 'choice' for their business?**

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

- preparing the standard choice form
- ensuring 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; and
- keeping records of employees choices.

**HOWEVER**

An accountant cannot recommend a default fund unless it is factual information, i.e. contained in the award covering the class of employees.

**Q6.7.27 Can an accountant explain how portability works under the 'choice' regime?**

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.

**HOWEVER**

An accountant cannot make a recommendation that the member transfer their benefits unless they are appropriately licensed.

**Q6.7.28 Can an accountant explain the lost monies provisions and provide information on where to find lost monies?**

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

**HOWEVER**

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

**Q6.7.29 Can an accountant advise a client to have a binding death benefit nomination?**

NO. An accountant can provide factual information setting out the advantages and disadvantages of binding death benefit nominations. They can also advise a client that a nomination they have made is invalid or has expired and explain the tax consequences of paying a benefit to a nominee or proposed nominee.

**HOWEVER**

Unless the accountant is appropriately licensed they cannot recommend that their client have a binding nomination, nor can they advise the client whom the nomination should be made in favour of.

**Q6.7.30 Can an accountant operate a business that specifically promotes SMSFs to the public without being licensed?**

NO. A licence is required as SMSFs are a financial product.

**Q6.7.31 Can an accountant recommend that a client borrows funds to invest through their (already established) SMSF?**

POSSIBLY. The accountant does not require a licence if the borrowing arrangement is a limited recourse borrowing arrangement secured over property, and no recommendation is made about the property itself (refer section 2.2.1). Also an accountant can provide factual information on the implications of such an arrangement.

**HOWEVER**

If the accountant recommends that clients borrow to invest in a specific class of product (e.g. mining or bank shares) the accountant will need to be appropriately licensed.

If the accountant recommends that clients borrow to invest in a broad asset class (e.g. securities), the accountant may not need a licence (refer section 3.4).

However, if the borrowing arrangements are a margin loan, the accountant would require appropriate authorisation under a full AFS Licence. If the recommendation is related to a specific credit product, the accountant may require an ACL.

**Q6.7.32 Can an unlicensed accountant provide a client calculations on the minimum or maximum pension amounts for a superannuation fund?**

YES. Provided the accountant is only providing factual information and is not providing a recommendation as to the pension amount that the client should take.

**Q6.7.33 Can an accountant discuss the benefits of a corporate trustee versus individual trustee for a SMSF?**

YES. Discussing the benefits of an individual trustee versus a corporate trustee does not involve making a recommendation that the client make a decision in relation to a financial product (such as a SMSF).

**HOWEVER**

Accountants need to be licensed to recommend that the client establish a SMSF.

**Q6.7.34 Can an approved SMSF auditor recommend a SMSF trustee wind-up their SMSF to rectify serious SIS contraventions?**

NO. An accountant can rely on the exemption in Regulation 7.1.29(5) to give a recommendation that a client dispose of a superannuation product, but only to the extent that the advice is given for the sole purpose, and as reasonably necessary, for ensuring compliance with the superannuation legislation (see 3.3.2 of this guide).

As such, to give this recommendation, an accountant would need to have formed the view that it was reasonably necessary for the client to wind-up their SMSF to achieve compliance with the legislation (i.e. such compliance could not reasonably be achieved through other means). The explanatory statement highlights that a recommendation to dispose of a superannuation product will only be reasonably necessary in limited circumstances, where the breaches 'virtually require' advice of this type.

**Q6.7.35 Can an accountant provide advice to assist clients comply with the Government's July 2017 superannuation changes?**

YES. An unlicensed accountant can provide clients with this advice under Regulation 7.1.29(5) for the sole purpose of, and to the extent reasonably necessary for, ensuring compliance with the SIS Act (as set out in section 3.2.2 of this guide). An example would be where an accountant becomes aware that a client needs to take action to avoid an excess balance transfer. The accountant will need to include the required disclaimer in their advice.

If the accountant holds or operates under a full AFS Licence or limited licence, they cannot rely on the exemption provided by Regulation 7.1.29(5) as they cannot provide the statement that they are not licensed to provide financial product advice. To the extent that a licensee is authorised to provide financial product advice about interests in an SMSF, they could rely that authorisation to provide this advice under their licence

If the recommendations are being given in relation to a superannuation account other than an SMSF, limited licensees may not be able to provide the advice and should carefully check whether the specific advice (e.g. advice on contributions) falls within the scope of their authorisations.

An unlicensed accountant would also be able to rely on Regulation 7.1.29(4) to provide advice on the tax implications of these issues in relation to the client's superannuation. In doing so, the accountant would need to provide the appropriate disclaimer as set out in section 5 of this guide. Note that a licensee would only be able to rely on this regulation to the extent that advice about the product is not covered by their particular licence authorisations.

**Q6.7.36 Can an accountant administratively commute a pension from a SMSF on request from a client as a result of the 1 July 2017 superannuation changes?**

YES. An unlicensed accountant can rely on Regulation 7.1.29(3)(g) to complete this task, which would amount to 'preparing a document of registration or transfer in order to complete administrative tasks on instructions'.

A licensee authorised to arrange to deal in SMSF interests would also be able to do this (or if not so authorised, could still rely on Regulation 7.1.29(3)(g)).

**Q6.7.37 Can an accountant provide advice on adding new members to a fund (for example to remain a resident SMSF)?**

YES. An unlicensed accountant can provide advice on adding new members to an existing fund under Regulation 7.1.29(5), as this would be advice on administration and operational issues (refer to 3.3.2 of this guide).

If the accountant holds or operates under a full AFS Licence or limited licence, they cannot rely on the exemption provided by Regulation 7.1.29(5) as they cannot provide the statement that they are not licensed to provide financial product advice. To the extent that a licensee is authorised to provide financial product advice about interests in a SMSF, they could rely on that authorisation to provide this advice under their licence

Another option (for which no licence is required) would be to provide a client with factual information about how to add new members to a fund, and the consequences of doing so.

**Q6.7.38 Can an accountant assist a client with estate planning requirements for pre and post retirees?**

TO SOME EXTENT.

An accountant can provide factual information about the consequences of various strategies that clients may consider as part of their pre or post retirement estate planning. For example, an accountant can explain the factual difference between a reversionary pension and a non-reversionary pension. Similarly, an accountant may provide clients with factual information about the consequences of not making a binding death nomination. However, the information provided should be purely factual, and should not be presented in a way that impliedly recommends one decision over another.

An unlicensed accountant can also provide advice about the taxation implications of decisions such as contribution levels, the splitting of superannuation balances, or implementing a re-contribution strategy. The advice must relate to the taxation consequences and should not be used to recommend particular financial products. Regulation 7.1.29(4) specifically requires a written disclaimer be provided if the tax advice is financial product advice, i.e. it is given in relation to a financial product (refer section 5).

A limited licensee would most likely not be able to rely on Regulation 7.1.29(4) to make these types of recommendations in relation to SMSF interests, as it is very common that a limited licensee's authorisations would cover SMSFs.

Advice from a lawyer should be obtained in relation to requests for assistance with trusts, wills, agreements or other legal documents.

## 6.8 TAXATION SERVICES

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

YES. Provided the accountant is a registered tax agent (or employee of a tax agent).

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.

The law 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.

#### HOWEVER

The advice must relate to the taxation consequences of financial products and should not be used to recommend particular financial products. Regulation 7.1.29(4) specifically requires a written disclaimer be provided if the tax advice is financial product advice, i.e. it is given in relation to a financial product (refer section 5).

### 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?

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 the accountant can rely on s.766B(5)(c).

An unlicensed accountant can rely on Regulation 7.1.29(4). For example, where a client is seeking advice on the taxation implications of different financial products they are considering purchasing, the accountant may provide advice about the tax implications of different products.

#### HOWEVER

Regulation 7.1.29(4) places a number of restrictions on this type of advice:

- the advice relates to a financial product or products that are not covered by any AFS licence or authorisation the accountant is operating under;
- the accountant cannot receive a benefit from a third party, other than their fee from the advice; and
- the accountant must provide a written statement in line with Regulation 7.1.29(4)(c) (ii) (refer section 5).

The advice must relate to the taxation consequences (and related issues) but should not be used to recommend particular financial product.

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

YES. 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, the advice relates to a financial product or products that are not covered by any AFS licence or authorisation the accountant is operating under and a written statement must be provided in line with Regulation 7.1.29(4)(c)(ii) as amended by ASIC Legislative Instrument 2016/1151.

**HOWEVER**

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 Regulation 7.1.29(4) are met, and no fee is charged for the advice, an accountant would be able to provide taxation advice in relation to different financial products a client is considering.

**Q6.8.4 Regulation 7.1.29(4)(b) states the person will not receive a benefit (other than from the person advised), what does this mean in practical terms?**

An accountant can provide taxation advice in relation to financial products where they receive a benefit only from the client or a client's associate (such as a fee for service).

If, as a result of the advice, the accountant will receive a benefit (e.g. a commission, spotter's fee or a similar benefit) from a third party if the client acquires the financial product (or a financial product within the same class of financial products mentioned in the advice), the accountant will not be covered by the regulation.

**Q6.8.5 Where a licence holder and an accountant, who is a registered tax agent, 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?**

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 on to another member of the practice for financial product advice, they must disclose any additional fees or commissions they may receive as a result of the referral. This will include any share in the business' overall profits as a result of financial product recommendations (refer section 3.5).

**Q6.8.6 Does the exemption for tax agents under s.766B(5)(c) cover corporate tax agents?**

YES. The tax agents exemption under 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 registered tax agent or BAS agent (within the meaning of the *Tax Agent Services Act 2009*), 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.

The Tax Agent Services Act 2009 allows for the registration of individuals, partnerships and companies. This allows for the registration of corporate tax agents and extends the notion of a tax agent to those nominees of the company.

**Q6.8.7 Where an accountant and a licence holder share a practice as partners, can the accountant pass on information and advice from the licence holder?**

POSSIBLY. An accountant can pass on information or a document containing financial product advice from a licence holder without the need to be licensed, provided they do not endorse or control the material and it is very clear that the accountant is not the one responsible for the information or advice. This exemption is set out in Regulation 7.1.31.

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' (RG 36.34(f)).

**Q6.8.8 Can an accountant advise a client to acquire a Farm Management Deposit account (FMD) with an Australian bank which allows primary producers to shift before-tax income from profitable years to less profitable years?**

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).

Regulation 7.1.29(4) exempts tax advice including advice in relation to the tax implications of a financial product.

**HOWEVER**

Regulation 7.1.29(4) places a number of restrictions on this type of advice:

- the advice relates to a financial product or products that are not covered by any AFS licence or authorisation the accountant is operating under;
- the accountant cannot receive a benefit from a third party, other than their fee from the advice; and
- the accountant must provide a written statement in line with Regulation 7.1.29(4)(c) (ii) if the advice is given in relation to a financial product, such as FMDs (refer section 5).

The advice must relate to the taxation consequences (and related issues) but should not be used as an artificial means to recommend a particular financial product.

**Q6.8.9 Can an accountant recommend that a client buys an investment property for negative gearing purposes?**

YES. Direct investment in property is not a licensed activity (refer section 2.1.1).

**HOWEVER**

It is ASIC's view, that unless appropriately licensed an accountant cannot recommend a person purchase a property through a SMSF.

An accountant who recommends that a client apply for a particular credit contract, or who assists them to apply for credit, may require an ACL.

**Q6.8.10 Can an accountant provide tax advice on the dividends related to the continued holding of certain securities?**

YES. No licence is required.

Regulation 7.1.29(4) exempts tax advice including advice in relation to the tax implications of a financial product provided specific conditions are met. As discussed at 6.8.8, certain conditions must be met in order to rely on this exemption.

**Q6.8.11 Can an accountant provide tax advice on super contributions and also suggest that the client takes out an amount of money from one bank account and deposit the funds in a specific superannuation account?**

NO. Suggesting that the client take money out of one known account and deposit it into another known account is financial product advice and would require the accountant to be appropriately licensed.

**HOWEVER**

The accountant can provide the tax component of the advice (refer Q6.8.2 and Q6.8.3).

The accountant can recommend that available funds can be invested in deposit products, but cannot recommend a specific product or class of product (e.g. term deposits) (refer section 3.4).

**6.9 BROAD ASSET ALLOCATION ADVICE****Q6.9.1 Can an accountant provide general asset allocation advice?**

YES. The asset allocation exemption allows you to provide a recommendation or statement of opinion 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 (refer section 3.4).

**HOWEVER**

You will need to be licensed to provide more specific advice. Under the Act, financial product 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).

**Q6.9.2 Can an unlicensed accountant provide advice on the split of an investment portfolio held by a SMSF?**

YES. This advice can be provided under Regulation 7.1.33A as long as the advice is restricted to broad asset allocation and does not recommend specific financial products or classes of financial products (refer section 3.4 and 6.9.1 above).

**HOWEVER**

The accountant may not be able to prepare the investment strategy for the SMSF (refer Q6.7.9 and Q6.7.10).

## 6.10 SECURITIES

### **Q6.10.1 Can an accountant recommend a client hold direct shares through their SMSF?**

YES. This is permitted under broad asset allocation exemption (refer section 3.4).

### **Q6.10.2 Can an accountant recommend the type of shares (e.g. bank or mining) a client should invest in?**

NO. Such advice would go beyond the exemption in Regulation 7.1.33A and would require the accountant to be appropriately licenced.

### **Q6.10.3 Can an accountant provide recommendations about specific equities due to bonus issues, restructuring or new floats?**

NO. An accountant cannot make recommendations about specific equities unless they are appropriately licensed.

Section 766B(5)(c) and Regulation 7.1.29(4) only permit an accountant to advise on the tax consequences of this issue (provided certain conditions are met (refer section 3.2)).

## 6.11 BASIC DEPOSIT PRODUCTS

### **Q6.11.1 Can an accountant recommend that a client invest a lump sum in a term deposit?**

NO. A term deposit is a type of deposit product, and therefore goes beyond the broad asset allocation exemption in Regulation 7.1.33A.

The accountant can only advise the client to invest a lump sum in a deposit product. This advice can be provided under the broad asset allocation exemption as long as the advice does not involve the recommendation of a specific financial product or class of financial product (refer section 3.4).

Also, an accountant cannot recommend that a client invests a lump sum into a term deposit, or into a deposit product with Bank A or Bank B. This advice would require the accountant to be appropriately licensed.

## 6.12 SIMPLE MANAGED INVESTMENT SCHEMES (MIS)

### **Q6.12.1 Can an accountant recommend that a client invest a lump sum in a simple MIS (eg. a cash management trust) for a period of six months?**

NO.

An accountant cannot recommend that a client invests a lump sum into a simple MIS, for example with Product A or B, or a class of simple MIS, for example, an ASX200 simple MIS. This advice would require the accountant to be appropriately licensed.

## 6.13 MISCELLANEOUS ISSUES

### Q6.13.1: Can an accountant get their clients to sign an indemnity form stating they are aware that the advice is being provided without being licensed?

NO. An accountant cannot contract out of the licensing requirements under the Act.

The use of disclaimers, waivers or other notices will be ineffective in changing the nature of any advice provided. Accountants who provide unlicensed financial product advice will face severe penalties.

### Q6.13.2 Can an unlicensed accountant provide comments or give an opinion on product recommendations given in a financial plan that a client has brought to them for review?

NO. By commenting on product recommendations, the accountant is effectively providing financial product advice themselves. An accountant can comment on the taxation implications of making the investments (refer section 3.2, Q6.8.1 and Q6.8.2) or alternatively, provide other factual information.

#### HOWEVER

If an accountant believes that a recommendation in relation to a financial product, as set out in the advice, may not necessarily fulfil the needs of the client, the accountant should:

- a. inform the client that they are not a licensed financial adviser, but that given their knowledge of the client's affairs, they would encourage the client to ensure the suitability of the product without identifying any specific concerns; and
- b. inform the client that they may wish to consider seeking a second opinion from an appropriately licensed financial adviser.

### Q6.13.3 Can an accountant, who holds a limited licence, provide comments or give an opinion on the product recommendations given in a financial plan their client has bought to them for review?

YES. The accountant can provide comments and give an opinion on the financial plan under their limited licence.

This constitutes giving financial product advice, so the accountant must ensure that all of their compliance obligations relating to the advice process (including disclosure documents such as a SoA or FSG) are met.

#### HOWEVER

The accountant must ensure that they confine their comments to the financial advice they are authorised to provide under their limited licence.

They cannot provide specific product advice (such as giving an opinion on a specific share investment) and they cannot provide advice on classes of products which are not covered by their limited licence (such as derivatives).

If an accountant believes that a product may not necessarily fulfil the needs of the client, the accountant should:

- c. inform the client that they are not a licensed financial adviser, but that given their knowledge of the client's affairs, they would encourage the client to ensure the suitability of the product without identifying any specific concerns; and
- d. inform the client that they may wish to consider seeking a second opinion from an appropriately licensed financial adviser.

**Q6.13.4: Where an accountant refers a client to a licensed financial adviser, does it matter whether the benefit received from the licensee is merely a spotter's fee (i.e. a one-off payment) or a commission calculated by the amount of business referred? Is it critical that the benefit received for the referral is received whether the product is purchased or not?**

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 same form as the referral.

**HOWEVER**

Members of CPA Australia must abide by the obligations of APES 110, which requires a member in public practice who is undertaking an engagement in Australia and receives a referral fee or commission to inform the client in writing of:

- the existence of such arrangement;
- the identity of the other party or parties; and
- the method of calculation of the referral fee, commission or other benefit accruing directly or indirectly to the Member.

**Q6.13.5 Can an unlicensed accountant provide insolvency services?**

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.

Those who provide 'business turnaround' or restructuring services, which (broadly) are business management advice or services designed to return a company to solvency, would also likely be able to do so under the exemption at Regulation 7.1.29(3)(c). That exemption relevantly extends to advice on the administration or structuring of an entity (provided the advice meets each of the criteria set out at section 3.3.1 and in the reference materials at the end of this guide).

**Q6.13.6 Can an accountant provide financial services to his employer where instructed as part of his employment (for example, where asked to provide an analysis of different financial products such as business insurance or deposit products)?**

YES. As an employee providing financial services (such as advice or dealing services) to their employer, the accountant is unlikely to meet the business test of 'conducting a financial services business'.

Therefore, the accountant would not need to be licensed to undertake investment activities for their employer's benefit.

**HOWEVER**

The accountant can only provide these services to their employer. They cannot provide the same services to an unrelated party unless they are appropriately licensed. The accountant's employer similarly should not provide the financial services to a third party without an appropriate licence.

**Q6.13.7 Can an accountant recommend an investment in bitcoin?**

YES. At present, bitcoin is not regulated as a financial product, and as such any recommendation to invest in bitcoin directly will not be financial product advice.

**HOWEVER**

An accountant may wish to consider the potential risks associated with making this type of recommendation, given that bitcoin and other emerging digital or cryptocurrencies are highly volatile and often not well understood. Separately to their regulatory obligations, accountants will have various general law obligations, including a duty of care to their clients.

Further, an accountant should be careful not to recommend that a client withdraw funds from a bank account to invest in bitcoin, as this would be financial product advice.

Accountants cannot recommend that a client invest in a fund which invests in bitcoin, because that fund is likely to be a financial product.

**Q6.13.8 Can an accountant provide advice on Centrelink entitlements?**

YES. A recommendation that a client apply for (or make other decisions in relation to) a Centrelink benefit is not financial product advice. This will be the case to the extent that the receipt of a Centrelink benefit involves the client receiving a regular pension or allowance from Centrelink, or receiving favourable tax treatment.

Factual information about the types of benefits payable by Centrelink, and their eligibility criteria, will also not be financial product advice.

However, an accountant should not make recommendations as to which bank account/s a client should use to receive any such entitlements.

### **Q6.13.9 Can an accountant provide advice on aged care?**

IT DEPENDS. Clients may seek an accountant's advice on a range of issues related to the broad category of aged care.

The usual process (as set out under section 2 of this guide) will apply in determining what advice relates to a financial product, and therefore whether it can be provided by an accountant who is unlicensed or who holds only a limited licence.

For example, a client may ask for advice on whether they should sell their family home. As this involves a decision in relation to real property only, it would not be financial product advice.

However, if a client is seeking recommendations on which of their investments to sell in order to fund their accommodation or care needs, or advice on which specific financial products may provide a stable income, this would amount to financial product advice for which a full AFS Licence may be required (depending on the type of investments involved).

An unlicensed accountant could rely on Regulation 7.1.29(4) in order to provide advice on the taxation implications of financial products (which, using the example above, could include an investment portfolio that the client may wish to dispose of). A licensee would also be able to rely on this exemption to the extent the particular products are not covered by their license authorisations (as set out in 3.2 of this guide).

Unlicensed and licensed accountants can each provide factual information on matters such as accommodation options and their tax implications.

Older clients may be experiencing vulnerability. As such, in providing advice on aged care, it may be necessary to have regard to the client's circumstances beyond the discrete issue they have requested advice on. For example, the client may have asked for your advice on whether they should remain in their own home, construct a granny flat, or enter an aged care facility. The client may not benefit from a recommendation that they remain in their own home if their health means they may need a carer (and will need to pay for this service). These types of recommendations would not, of themselves, require licensing.

Accountants should also exercise caution in making any recommendations on reverse mortgages, and may require an ACL to do so.

## 7. REFERENCES

The provisions in this section refer to the Corporations Act 2001 unless otherwise stated.

### 7.1 WHEN IS A LICENCE REQUIRED?

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

5. 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.
6. 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?

7. 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);
  - b. deal in a financial product (see section 766C);
  - c. ...
  - d. ...
  - e. provide a custodial or depository service (see section 766E);

#### 766B Meaning of financial product advice

8. 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 does not constitute the provision of financial product advice.

## 7.2 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 registered tax agent or BAS agent (*within the meaning of the Tax Agent Services Act 2009*) 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.
- b. that is provided in circumstances where the entity can reasonably be expected to rely on the service for either or both of the following purposes:
    - i. to satisfy liabilities or obligations that arise, or could arise, under a taxation law;
    - ii. to claim entitlements that arise, or could arise, under a taxation law.
  2. A service specified in the regulations for the purposes of this subsection is not a **tax agent service**.

**Section 90.5** of *Tax Agent Services Act 2009* provides that:

1. A **tax agent service** is any service:
  - a. that relates to:
    - i. ascertaining liabilities, obligations or entitlements of an entity that arise, or could arise, under a **\*taxation law**; or
    - ii. advising an entity about liabilities, obligations or entitlements of the entity or another entity that arise, or could arise, under a taxation law; or
    - iii. representing an entity in their dealings with the Commissioner; and

**Section 995.1** of the *Income Tax Assessment Act 1997* provides that:

**"taxation law"** means:

- a. an Act of which the Commissioner has the general administration (including a part of an Act to the extent to which the Commissioner has the general administration of the Act); or
- b. legislative instruments made under such an Act (including such a part of an Act); or
- c. the *Tax Agent Services Act 2009* or regulations made under that Act

**Section 766C:** Meaning of dealing

1. For the purposes of this Chapter, the following conduct (whether engaged in as principal or agent) constitutes dealing in a financial product:
  - d. applying for or acquiring a financial product;
  - e. issuing a financial product;
  - f. in relation to securities or managed investment interests – underwriting the securities or interests;
  - g. varying a financial product;

- h. disposing of a financial product.
- 2. Arranging for a person to engage in conduct referred to in subsection (1) is also dealing in a financial product, unless the conduct concerned amounts to providing financial product advice.

**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.3.3.

- 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 trustees 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.

## 7.3 REGULATIONS

### 7.1.29 Circumstances in which a person is taken not to provide a financial service<sup>3</sup>

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 a 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;

<sup>3</sup> Note: These Regulations have been amended by Legislative Instruments 2016/1151 and 2017/464, as discussed in section 3 of this guide.

- 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.
- 3A. For this regulation, a person also provides an exempt service if the person:
    - a. is registered as an auditor under Part 9.2 of the Act; and
    - b. performs any of the functions of a cover pool monitor mentioned in subsection 30(4) of the Banking Act 1959.
  - 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. person will not receive a benefit (other than from the person advised or an associate of the person advised) as a result of the person advised acquiring a financial product mentioned in the advice, or a financial product that falls within a class of financial products mentioned in the advice; and
    - c. either:
      - i. the advice does not constitute financial product advice to a retail client; or
      - ii. the advice constitutes financial product advice to a retail client and it includes, or is accompanied by, a written statement that:
        - a. the person providing the advice is not licensed to provide financial product advice under the Act; and

- b. taxation is only one of the matters that must be considered when making a decision on a financial product; and
  - c. client should consider taking advice from the holder of an Australian Financial Services Licence before making a decision on a financial product.
- 5. For this regulation, a person also provides an exempt service if:
  - a. the person provides advice in relation to the establishment, operation, structuring or valuation of a superannuation fund, other than advice for inclusion in an exempt document or statement; and
  - b. the person advised is, or is likely to become:
    - i. a trustee; or
    - ii. a director of a trustee; or
    - iii. an employer sponsor; or
    - iv. a person who controls the management; of the superannuation fund; and
  - c. except for advice that is given for the sole purpose, and only to the extent reasonably necessary for the purpose, of ensuring compliance by the person advised with the SIS Act (other than paragraph 52(2)(f)), the SIS Regulations other than regulation 4.09) or the Superannuation Guarantee (Administration) Act 1992—the advice:
    - i. does not relate to the acquisition or disposal by the superannuation fund of specific financial products or classes of financial products; and
    - ii. does not include a recommendation that a person acquire or dispose of a superannuation product; and
    - iii. does not include a recommendation in relation to a person's existing holding in a superannuation product to modify an investment strategy or a contribution level; and
  - d. if the advice constitutes financial product advice provided to a retail client—the advice includes, or is accompanied by, a written statement that:
    - i. the person providing the advice is not licensed to provide financial product advice under the Act; and
    - ii. the client should consider taking advice from the holder of an Australian Financial Services Licence before making a decision on a financial product.
- 6. In this regulation:
  - employer sponsor** has the meaning given by subsection 16(1) of the SIS Act.
  - exempt document or statement** has the meaning given by subsection 766B(9) of the Act.
  - generic** means without reference to a particular brand or product issuer.

**interested party** means:

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

**Self-managed superannuation fund** has the meaning given by section 17A of the SIS Act.

**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**

1. 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:
  - e. 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; and
      - 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; and
      - 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);
- ea. 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; and
    - b. giving person 2 information about how person 2 may contact the financial services licensee or representative;
  - ii. person 1 is a representative of the financial service licensee, or of a related body corporate of the financial services licensee;

**Regulations 7.8.12A and 7.8.14B (modifications to the Act for limited licensees)**

“... .

**class of product advice** means financial product advice about a class of products but does not include a recommendation about a specific product in the class.

Example: A financial services licensee may give a recommendation about term deposit products but must not make a specific recommendation that a person deposit their money into a term deposit product offered by a particular bank or building society.

**limited financial service** means the following financial services:

- a. financial product advice on self-managed superannuation funds;
- b. financial product advice on superannuation products in relation to a person's existing holding in a superannuation product but only to the extent required for:
  - i. making a recommendation that the person establish a self-managed superannuation fund; or
  - ii. providing advice to the person on contributions or pensions under a superannuation product;
- c. class of product advice on the following:
  - i. superannuation products;
  - ii. securities;
  - iii. simple managed investment schemes;
  - iv. general insurance products;
  - v. life risk insurance products;
  - vi. basic deposit products;
- d. arrange to deal in an interest in a self-managed superannuation fund.

Note 1: See section 761A for the meaning of basic deposit product, financial product advice, general insurance product, life risk insurance product, self-managed superannuation fund and superannuation product.

Note 2: Financial product advice on self-managed superannuation funds includes advice about acquiring or disposing of an interest in a self-managed superannuation fund.

**limited licensee** means a financial services licensee that:

- a. does not deal with money to which Division 2 of Part 7.8 of the Act applies; and
- b. is only licensed to provide one or more limited financial services.

**simple managed investment scheme** has the same meaning as in the regulations.”

## 7.4 EXPLANATORY STATEMENTS

### Circumstances in which a person is taken not to provide 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 *Corporations Act 2001*. 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 AFS 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.

Note: The regulation allows generic risk management advice to be provided to business clients or natural persons. The relief is restricted to the presence of a risk that a person may face and does not allow the recommendation of specific advice about financial products, for example, those provided by a particular issuer, or the level of insurance required.

### 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 an SMSF, such as where the decision to roll over the funds has already been made. However, this arranging exemption will only apply to an 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 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 give advice about a tax law for a fee.

*Note:* Subdivision 50-5 of the *Tax Agent Services Act 2009* prohibits anyone other than a registered tax agent (or in some instances a legal practitioner) from charging or receiving a fee or other reward for providing a tax agent service). Tax agent services include ascertaining or advising about liabilities, obligations or entitlements that arise or could arise under a taxation law where the entity could reasonably be expected to rely on the service to satisfy liabilities or obligations, or claim entitlements, that arise or could arise under a taxation law (subdivision 90-5). Representatives of an AFSL can also provide "tax (financial) advice services" for a fee, as set out in the *Tax Agents Services Act 2009*.

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 of 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 *Corporations Act 2001*. 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.

This provision will not provide an exemption for advice recommending an SMSF structure in isolation or as a preferred structure to other alternative investment vehicles.

Under the *Corporations Act 2001*, recommending a person establish an SMSF structure is a superannuation investment decision as it is equivalent to recommending a person becomes a member of an SMSF. 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.

## 7.5 OTHER KEY CONCEPTS

<b>Annual compliance certificate</b>	<p>An annual certificate that will be required to be provided to ASIC by limited licensees who do not hold client monies under the licence, to show that they meet their financial and compliance obligations.</p> <p>Limited licensees that handle client funds will need to instead meet an annual audit requirement.</p>
<b>Authorised representative</b>	<p>A person, company or partnership that is authorised in writing under the <i>Corporations Act 2001</i> to provide a financial service on behalf of the licensee.</p> <p>ASIC must be notified of the appointment of an authorised representative. Employees of a licensee are generally not authorised representatives (however, see the explanation of 'Representative' below).</p>
<b>Class of product advice</b>	<p>Financial product advice about a class of products that does not include a recommendation about a specific product in the class.</p> <p>The classes are:</p> <ul style="list-style-type: none"> <li>• superannuation</li> <li>• securities</li> <li>• simple managed investment schemes</li> <li>• general insurance</li> <li>• life risk insurance</li> <li>• basic deposit products</li> </ul>
<b>External Dispute Resolution (EDR) scheme</b>	<p>An independent dispute resolution service that assists retail clients if they have a complaint or dispute with a licensee.</p> <p>Licensees that provide financial services to retail clients must be a member of an ASIC approved EDR scheme.</p>
<b>Financial Services Advice and Regulations: Guidance for the accounting profession</b>	<p>A guide that sets out key areas of what services accountants can provide without a licence, and to a limited extent, what limited licensees can and cannot do under their limited licence.</p>
<b>Financial product advice</b>	<p>A recommendation or statement of opinion that is intended (or could reasonably be regarded as being intended) to influence a person (or persons) to make a decision about a financial product or class of products. It can be verbal or in writing.</p> <p><b>Personal advice</b> – financial product advice where you have considered one or more of a person's objectives, financial situation and needs (or a reasonable person might expect you to have considered one or more of those matters).</p> <p><b>General advice</b> – financial product advice that does not consider one or more of a person's objectives, financial situation and needs.</p>

<b>Financial Services Guide (FSG)</b>	<p>A disclosure document that describes the financial services that you can provide, as well as other information including costs and complaints handling.</p> <p>It must normally be provided as soon as practicable after it becomes apparent that a financial service will be, or is likely to be, provided to the client, and must in any event be given to the client before the financial service is provided.</p>
<b>Limited licensee</b>	<p>The entity, or person, that holds a limited licence.</p>
<b>Product Disclosure Statement (PDS)</b>	<p>A disclosure document that sets out the key features, benefits, risks, and terms and conditions that apply to a particular financial product.</p> <p>A PDS is prepared by the product issuer and should usually be provided at the time, or before financial services advice is provided to a retail client.</p>
<b>Regulatory Guides (RGs)</b>	<p>Guides issued by ASIC that explain how ASIC interprets and administers the financial services laws and other relevant laws.</p> <p>They can be found on the ASIC website.</p>
<b>Representatives</b>	<p>Includes:</p> <ul style="list-style-type: none"> <li>• authorised representatives;</li> <li>• employees or directors of the licensee;</li> <li>• employees or directors of a related body corporate of the licensee; or</li> <li>• any other person acting on behalf of the licensee.</li> </ul> <p>Representatives include all staff of the licensee, including support staff and other staff who do not provide financial services.</p>
<b>Retail client</b>	<p>A client that is not a wholesale client. Retail clients must be provided with FSG, SoA, PDS and warnings depending on the circumstances.</p>
<b>Responsible manager</b>	<p>A nominated individual within a licensee that ASIC looks at to ensure that the licensee is "competent" to provide financial services.</p>
<b>Statement of Advice (SoA)</b>	<p>A disclosure document that sets out to the retail client information including the following:</p> <ul style="list-style-type: none"> <li>• tailored financial product advice being provided;</li> <li>• information about the basis on which the advice is given; and</li> <li>• information about remuneration.</li> </ul>

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**Wholesale client**

A person or entity that can meet certain legislative requirements. The definitions are quite complex, but include matters such as the client's level of assets or income. Some important additional considerations are as follows:

- for superannuation products (including SMSFs) the client must generally (except for some large superannuation funds) always be treated as a retail client, regardless of their eligibility to be a wholesale client;
- for most personal, motor vehicle and domestic types of general insurance products, clients who are individuals and small business clients must always be treated as retail clients regardless of their eligibility to be a wholesale client; or
- if a body corporate is a wholesale client, then any related body corporate is also a wholesale client.

A person will be a retail client unless they qualify as a wholesale client. If you wish to treat a client as a wholesale client (this means you do not have to meet obligations that would apply when dealing with a retail client, such as providing a PDS or SoA) it is recommended that you obtain further advice on this issue as it can be highly complex as there is often no 'clear' answer.

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## 7.6 SAMPLE REFERRAL AGREEMENT

**This Agreement** is dated on the date set out in Item 1 of the Schedule and made

**Between**

**The party named in Item 2 of the Schedule** (“the Referrer”)

**and**

**The party named in Item 3 of the Schedule** (“the Financial Services Provider”)

### Recitals

- a. The Referrer is a full member of either CPA Australia or Chartered Accountants Australia and New Zealand (a “Recognised Accountant”).
- b. The Financial Services Provider is the holder of an Australian Financial Services Licence or is the authorised representative of the holder of an Australian Financial Services Licence. The Financial Services Provider’s authority to provide financial services (“Authorisation”) is set out in the copy Australian Financial Services Licence, certificate or similar document annexed as “A”.
- c. The Referrer may refer clients of the Referrer to the Financial Services Provider on the terms and conditions of this Agreement.

## Terms of this Agreement

### 1. Interpretation

In this Agreement, unless the context otherwise requires, a reference to a word which is defined in the *Corporations Act 2001* shall have the same meaning as in the *Corporations Act 2001*.

### 2. Referral of Referrer’s clients

2.1 The Referrer may refer clients of the Referrer to the Financial Services Provider on the terms of this Agreement and such other terms prescribed by the Referrer from time to time.

2.2 The Financial Services Provider shall only provide services to the Referrer’s clients in accordance with the Authorisation and as reasonably directed by the Referrer from time to time.

### 3. Consideration

The Financial Services Provider shall in respect of all of the Referrer’s clients directly or indirectly referred by the Referrer to the Financial Services Provider pay to the Referrer fees and commissions in the amounts and the manner set out in Item 4 of the Schedule.

### 4. Financial Services Provider to comply with Financial Services Law and professional codes

Despite anything else contained in this Agreement, the Financial Services Provider and the Referrer must at all times comply with the Financial Services Law, the Authorisation, any direction of the Referrer, any applicable professional codes or guides, including APES 110 and the law generally.

## 5. Financial Services Provider's warranties

The Financial Services Provider warrants to the Referrer that:

- a. the Financial Services Provider is authorised to provide financial services in accordance with the Authorisation;
- b. the Financial Services Provider will notify the Referrer immediately upon the Authorisation changing in any way, including but not limited to a suspension or revocation of or amendment to the Authorisation;
- c. all information provided by the Financial Services Provider to the Referrer is true and correct and not misleading or deceptive in any particular and there has been no material omission in the information provided;
- d. the Financial Services Provider has never been suspended or banned from holding an Australian Financial Services Licence, being authorised as a Representative or holding any similar licence or authority under the Corporations Act or any similar law;
- e. the Financial Services Provider has never been guilty of fraud;
- f. the Financial Services Provider has never been guilty of an indictable offence;
- g. the Financial Services Provider has never been declared bankrupt, entered into a formal scheme of arrangement with creditors under bankruptcy law, been declared insolvent or been declared an externally administered body corporate;
- h. the Financial Services Provider has the power and capacity to enter into this Agreement and to perform fully its obligations under this Agreement; and
- i. the Financial Services Provider will use the utmost skill and care in providing financial services to the Referrer's clients as contemplated in this Agreement.

## 6. Disclaimer

The Referrer shall provide a disclaimer to any clients referred to the Financial Services Provider in the form annexed as "B".

## 7. Consent and acknowledgement of client

The Financial Services Provider shall obtain the consent and acknowledgment of any client of the Referrer directly or indirectly referred to the Financial Services Provider in the form annexed as "C" and provide a copy of such consent to the Referrer immediately upon receipt.

## 8. Indemnity

The Financial Services Provider shall indemnify and keep indemnified the Referrer and all of its employees and agents against any claim, cost, expense, charge, loss or damage (including, without limitation consequential loss or damage) suffered or incurred by the Referrer or any of its employees or agents as a result of the provision of financial services by the Financial Services Provider or any of its employees or agents or the non-performance or breach of this Agreement by the Financial Services Provider or any of its employees or agents except to the extent that such claim, cost, expense, loss or damage is caused by the negligence, wrongful act or omission of the Referrer or its employee or agent.

## 9. Termination

9.1 This Agreement may be terminated by the Referrer immediately upon the provision of written notice to the Financial Services Provider.

9.2 The obligations of the Financial Services Provider and provisions of this Agreement which are capable of being performed or taking effect after the termination of this Agreement shall remain in full force and effect and be binding on the Financial Services Provider notwithstanding termination.

9.3 Termination of this Agreement shall not affect, limit, reduce or bring to an end any liability of the Financial Services Provider to pay any amount that is or becomes due and payable to the Referrer prior or subsequent to termination and, without limiting the generality of the foregoing, the Financial Services Provider shall continue to be liable to pay the commissions as provided by clause 3.

## 10. Restraint

10.1 The Referrer's clients remain clients of the Referrer.

10.2 In consideration of the referral of the Referrer's clients to the Financial Services Provider pursuant to this Agreement and other valuable consideration and to reasonably protect the goodwill of the Referrer's business, the Financial Services Provider undertakes to the Referrer that the Financial Services Provider will not, without the prior written consent of the Referrer, during the term of this Agreement and for the restricted period after the termination of this Agreement directly or indirectly:

- a. approach, induce or attempt to induce any director, manager, employee or agent of the Referrer or any associated company to terminate his or her employment or agency with his or her employer; or

- b. approach, induce, solicit the custom of, or deal in trade with any person or entity who is or has been a client of the Referrer and with whom the Financial Services Provider has had contact of any business-related type.

10.3 For the purpose of this clause the "restricted period" means:

- a. one month;
- b. three months;
- c. six months; and
- d. twelve months.

10.4 In the event any provision of this clause is void, unenforceable or illegal it shall be read down so as to be valid and enforceable or, if it cannot be so read down, the provisions (or, where possible, the off ending words) shall be severed from this clause without affecting the validity or enforceability of the remaining provisions (or parts of those provisions) of this clause which shall continue to have full force and effect.

## 11. Confidentiality

11.1 Subject to clause 11.2, the Financial Services Provider shall not, without the prior written consent of the Referrer, disclose to any person or use itself any confidential or client information of the Referrer.

11.2 The Financial Services Provider may disclose the confidential or client information of the Referrer to an employee, contractor or adviser of the Financial Services Provider only if:

- a. it is for the purposes of complying with this Agreement or the law;
- b. such person has a need to know; and

- c. the Financial Services Provider takes all necessary steps to ensure that the person receiving the information is bound by the same obligations of confidentiality in relation to the information as contained in this Agreement.

## 12. Privacy

12.1 each of the parties warrants to the other that in relation to any personal information (as defined in the *Privacy Act 1988*) that either of them collects, holds, discloses or uses in connection with this Agreement or otherwise that:

- a. the individual to whom the information relates has been notified of any matters of which they are required to be informed before or at the time of the collection of the personal information;
- b. that the disclosure and use of the information is authorised by or under the *Privacy Act 1988*; and
- c. each of the parties has a clearly expressed and up-to-date privacy policy about its management of personal information.

12.2 In relation to any personal information collected in connection with this Agreement, neither party may collect, hold, use or disclose the information except in accordance with the *Privacy Act 1988* and any associated regulations and registered codes.

## 13. Dispute Resolution

13.1 If either party wishes to resolve a dispute in relation to this Agreement or any matter connected with this Agreement, it must use the mediation procedure in clause 13.2 and 13.3 before taking any action in a court of law.

13.2 The party who wishes to resolve the dispute must give notice to the other party and to the President of the professional organisation of which the Referrer is a member (CPA Australia or Chartered Accountants Australia).

The notice of dispute must:

- a. state that a dispute has arisen;
- b. specify the matter in dispute; and
- c. request that a mediator be appointed by the President to mediate between the parties for resolution of the dispute.

13.3 The parties must use all reasonable endeavours to ensure that the mediation carried out under clause 13.2 takes place as soon as practicable and, in any event, within 30 days of the mediator receiving instructions to act in the matter.

13.4 The parties must bear the costs of the mediation equally and provide all assistance reasonably requested by the mediator.

## 14. GST

14.1 In this clause:

- a. "GST" means GST within the meaning of the GST Act;
- b. "GST Act" means A New Tax System (Goods and Services Tax) Act 1999 as amended;
- c. "Supply" has the meaning given to it by the GST Act; and
- d. "Taxable supply" has the meaning given to it by the GST Act.

14.2 The Financial Services Provider and the Referrer agree that consideration payable by the Financial Services Provider for any Supply made by the Referrer to the Financial Services Provider under this Agreement is expressed as a GST exclusive amount.

14.3 If any Supply made by the Referrer to the Financial Services Provider under this agreement is a Taxable Supply, the Financial Services Provider must, in addition, pay to the Referrer the GST payable in respect of that Taxable Supply.

## 15. General

15.1 This Agreement constitutes the entire agreement between the parties with respect to its subject matter.

15.2 This Agreement shall not be varied except by a document in writing signed by the parties.

15.3 A party shall not assign or otherwise deal with any of its rights or obligations under this Agreement without the prior written consent of the other party.

15.4 This Agreement shall be governed by the laws of the state or territory listed in Item 5 of the Schedule and the parties agree to submit to the courts of that jurisdiction.

### Executed as an agreement

[If the Referrer is a company]

**EXECUTED** by the **REFERRER** in accordance with the *Corporations Act 2001* by being signed by the following officer(s):

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Director

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Director/Company Secretary

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OR Sole Director and Sole Company Secretary

OR [If the Referrer is an individual]  
**EXECUTED** by the **REFERRER** in  
the presence of:

---

Individual

---

Witness

---

Print name of Witness

---

Print address of Witness

[If the Financial Services Provider is a  
company]

**EXECUTED** by **THE FINANCIAL SERVICES  
PROVIDER** in accordance with the  
*Corporations Act 2001* by being signed by the  
following officer(s):

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Director

---

Director/Company Secretary

---

OR Sole Director and Sole Company  
Secretary

OR [If the Financial Services Provider is an individual]

**EXECUTED** by the **FINANCIAL SERVICES PROVIDER** in the presence of:

---

Individual

---

Witness

---

Print name of Witness

---

Print address of Witness

## SCHEDULE

<b>Item 1:</b>	Date of Agreement:	#
<b>Item 2:</b>	Details of Referrer:	
	• Name:	• #
	• [ACN]	• #
	• Address	• #
<b>Item 3:</b>	Details of Financial Services Provider:	
	• Name:	• #
	• [ACN]	• #
	• Address	• #
<b>Item 4:</b>	Consideration Product: #	Commission/fee: #
	Timing of payment: [The commissions and fees payable by the Financial Services Provider to the Referrer must be paid within 7 days of receipt by the Financial Services Provider.]	
<b>Item 5:</b>	Governing law: #	

## ANNEXURE "A"

AUSTRALIAN FINANCIAL SERVICES LICENCE/AUTHORITY

## ANNEXURE "B"

DISCLAIMER

## ANNEXURE "C"

CONSENT AND ACKNOWLEDGEMENT