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JOINT COMMITTEE ON CORPORATIONS AND FINANCIAL SERVICES

Reference: Corporations Amendment Regulations 2003-04 (Batches 6, 7 and 8)

WEDNESDAY, 24 MARCH 2004

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JOINT COMMITTEE ON CORPORATIONS AND FINANCIAL SERVICES

Wednesday, 24 March 2004

Members: Senator Chapman *(Chair)*, Senator Wong *(Deputy Chair)*, Senators Brandis, Conroy, Murray and Mr Byrne, Mr Ciobo, Mr Griffin, Mr Hunt and Mr McArthur

Senators and members in attendance: Senators Brandis, Chapman, Conroy, Murray and Wong and Mr Ciobo

Terms of reference for the inquiry:

To inquire into and report on:

Corporations Amendment Regulations 2003-04 (Batches 6,7 and 8)

WITNESSES

Committee met at 4.12 p.m.

FARRELL, Ms Kathleen, Member of the Executive, Business Law Section, Law Council of Australia

GREENTREE-WHITE, Mr James Russell, Lawyer, Legal and Policy, Law Council of Australia

SIMMONS, Ms Lisa, Representative, Law Council of Australia

CHAIRMAN—Today the committee is conducting a public hearing regarding its inquiry into the Corporations Amendment Regulations 2003-04 batch 6 and draft regulations, Corporations Amendment Regulations 2003-04, batch 7, sections 7.1.29A, 7.1.35A and 7.1.40H and relevant related matters. The committee expresses its gratitude to contributors to this inquiry, including those who will be appearing as witnesses before us today. To date the committee has received 24 submissions, 12 of which specifically address these particular sections of the regulations.

Before we commence taking evidence, may I reinforce for the record that all witnesses appearing before the committee today are protected by parliamentary privilege with respect to the evidence given. Parliamentary privilege refers to the special rights and immunities attached to the parliament or its members and others necessary for the discharge of parliamentary functions without obstruction or fear of prosecution. Any act by any person which operates to the detriment or disadvantage of a witness on account of evidence given by him or her before the parliament or any of its committees is treated as a breach of privilege. I also indicate that, unless the committee should decide otherwise, this is a public hearing. As such, all members of the public are welcome to attend. This is the committee's only public hearing for this inquiry.

I welcome representatives of the Law Council of Australia to the hearing. As I said, this is a public hearing, so the committee prefers that all evidence be given in public. However, if at any stage of your evidence or responses to questions you wish to respond in private, you may request that of the committee and we would consider such a request to move into camera. We have before us your written submission, which we have numbered 9. Are there any alterations or additions you would like to make to the submission at this stage?

Ms Farrell—No, there are not.

CHAIRMAN—I invite you to make an opening statement, at the conclusion of which I am sure we will have some questions.

Ms Farrell—We think the opening statement here needs to be fairly brief. Our submission covers the main points. Lawyers obtained an exemption from the definition of financial product advice in section 766B(5) at the time the Financial Services Reform Act was being introduced. On further review of the act and over time, we have considered that for greater caution it needs to be made clearer that in the provision of ordinary legal services we do not inadvertently fall into the definition of arranging or dealing, which is a separate area from the provision of financial product advice under the act, although the same action can often give rise to concerns under each provision.

In fairness, we think that the exemption from the definition of financial product advice for lawyers was, in essence, good enough for ordinary legal practice. That is why we asked for that at the time that the act was being introduced. However, we have had some concern about the breadth of drafting in conjunction with a number of insurers who are now introducing exceptions to insurance policies, particularly in the context of first-tier insurance—that is the compulsory level of insurance that applies certainly in Victoria and New South Wales—where there is an exclusion for either any activity that requires a licence or any activity for which you have a licence under the financial services legislation.

That meant that we could no longer be robust in our interpretation of what we think was the parliamentary intent when the section 766B(5) exemption was given to lawyers. Our concern is not only for individual lawyers in practice discovering five years after the event that, while they thought they were covered by their insurance policy for some act that they did in the ordinary course of their legal practice and for which prior to 11 March they had insurance, they are not covered. Our concern also extends to the reasonable expectations of their clients that, in the event of error by lawyers in the ordinary practice, they would have access to an insurance policy of relevant levels of coverage.

The primary regulations we are dealing with here are clarificatory of the position that parliament I think intended to put us in when the Financial Services Reform Act came into place. One of the regulations deals with an exemption from dealing which permits investment in cash management trusts. It is very common for lawyers, say, pending the settlement of a matter to be asked to invest moneys either in a trust account for which there is an exemption under the regulations or in controlled moneys. Frankly, clients cannot tell the difference between a cash management account and a trust account and they would often prefer you to put the money into a cash management account. That one we have asked for for the convenience of our clients rather than as an absolutely necessary part of our practice. Our practice could continue easily without that exemption. I think clients would not understand why we were not able to operate in that very normal fashion.

So that is the basis for the two regulations that cover lawyers that are to be considered in this batch. Importantly, in our submission, we draw to your attention the very extensive system of court and other supervision that applies to lawyers that we think either matches or exceeds the coverage that would be given to lawyers were we subject to the Financial Services Reform Act. These regulations are required both for the purpose of clarification and, I think, in the public interest of ensuring that there is not duplication.

CHAIRMAN—Thank you, Ms Farrell. In your submission, you say that one of the reasons you give for endorsing the regulations is that they support the general intent of the FSR legislation, which is to regulate only those activities which truly constitute the provision of financial services and not activities which are peripheral to that industry. Given that ‘peripheral’ does not have a precise meaning, do the types of exemptions being provided to lawyers and accountants make monitoring and scrutiny by ASIC more difficult, do you think, or not? If so, why?

Ms Farrell—Of whom? Monitoring and scrutiny of whom?

CHAIRMAN—Of accountants and lawyers in relation to these issues.

Ms Farrell—It means that ASIC really has no role there and they should not because somebody is already watching what lawyers do in that context. The provisions that deal with discipline and oversight of lawyers, the audit that occurs with lawyers' accounts and the requirement of continuous legal education that applies in many of the jurisdictions, means that for ASIC to have that level of supervision would simply duplicate somebody else's already active supervision in that area. To the extent to which ASIC might have had supervision under financial services legislation, we consider that to be inappropriate and inconsistent with legal professional privilege.

CHAIRMAN—So you are confident these other bodies are actually capable of monitoring whether, in your case, lawyers are straying into areas that comes under FSR?

Ms Farrell—It will be—

CHAIRMAN—And ASIC does not need to even take account of that?

Ms Farrell—ASIC will have the same function in relation to lawyers as they do in relation to the whole of the community as to whether or not they are conducting an activity that requires a licence. At that level, lawyers are therefore subject to the same level of supervision as everybody else in the community at the point before they have one. But the law societies, law institutes and bar councils around the country will be active in the supervision of the heart of the practice of lawyers, which we think is peripheral to financial services. So at that level supervision is, we think, more than adequate.

Senator WONG—It is a different sort of supervision.

Ms Farrell—It is a different sort of supervision, but then our practice is different from the people who are active in the core of financial services industry.

Senator WONG—Obviously, but I presume the Law Council's position is that, if a lawyer were providing financial product advice over and above what might ordinarily be given in the course of legal dealings, it would not resile from the possibility they may need to be licensed and they may be subject to the regime?

Ms Farrell—That is right. We have taken steps since these regulations have been put in place—so since we have known where the defined territory is—to provide information to the profession as a whole that tries to assist them in the demarcation of what is ordinary legal services and what goes beyond.

CHAIRMAN—The Financial Planning Association has put the view that accountants who are given relief from licensing requirements should still be required to belong to an independent regulated complaint handling mechanism similar to the Financial Industry Complaints Scheme rather than complaints being handled by their own professional body. I guess the same argument could be made in relation to lawyers. In a case where a dispute might arise in the area of providing advice by lawyers who are exempt from these regulations, what external independent complaints handling arrangements are in place for lawyers? I am sorry, we have to go to a division.

Proceedings suspended from 4.24 p.m. to 4.29 p.m.

ACTING CHAIR (Senator Wong)—Senator Chapman will be back. I want to raise a couple of matters. I understand from your submission that you say 5(b) of 766B does not deal with your concerns. Why is that?

Ms Farrell—It is clear that, if a lawyer is giving advice about a share sale agreement, for instance, that might be financial product advice. It is absolutely normal legal service to provide. But when someone comes to you to deal with a share sale agreement, say, to buy the local milk bar, they do not just expect you to provide advice; they actually expect you also to do the drafting and to sit by their side in the negotiations with the vendor of those shares. The concern we had was that, in the actual drafting of the share sale agreement and the lack of clarity about the extent to which you could assist in negotiations without falling over the edge into arranging, given how broad that language is and the intent that it might have, what is an absolutely normal legal service may well fall foul of the very wide language that applies in relation to arranging and dealing. We did not think that that was the intent.

ACTING CHAIR—Is it very often that lawyers would be in the position of giving advice regarding an investment decision as opposed to advice about effecting an investment decision? Do you understand the distinction I am drawing?

Ms Farrell—Not clearly.

ACTING CHAIR—It is not an area of practice that I engaged in, so I do not have much knowledge personally of this area, but it would seem to me generally that a legal practitioner might be approached to assist with effecting a particular transaction. It would be rare, I would have thought, for the legal adviser to be asked for investment advice. Can you see the distinction?

Ms Farrell—It is in fact quite rare for lawyers to be asked for investment advice. That is why we say that we are on the periphery of financial services.

ACTING CHAIR—Most often, that advice would have been obtained elsewhere and then you are brought into it for the purpose of effecting the transaction, whatever that may be.

Ms Farrell—And in that context we will tell people what particular provisions of agreements might mean. We might look at loan agreements, for instance, and indicate that loans are terminable when the shares are sold or, indeed, cannot be terminated for another three years after a controlling share parcel has passed. That certainly has implications for a decision about whether or not someone should buy or sell the securities. But it is in fact core legal advice about the interpretation of an agreement and the application of laws to agreements that either exist or which may be entered into.

ACTING CHAIR—In answer to Senator Chapman, you made the point that basically other bodies are watching lawyers, so ASIC does not need to. I think that is a reasonable summary of your evidence.

Ms Farrell—Yes.

ACTING CHAIR—Why do you say that those consumer protection measures are sufficient? Can I just explain what I would like you to touch upon or focus on. This is a consumer protection regime that we are looking at. The provisions which govern the conduct of lawyers—professional rules, whatever particular act applies in the state et cetera— are focused on conduct as a legal practitioner and the provision of advice in that context. It might be argued that, if you were negligent or if you gave poor investment advice, that did not necessarily constitute poor legal advice for the purposes of any breach of your professional conduct rules or the like.

Ms Farrell—I think there are probably two prongs to this answer. Some of the people who are with me may care to jump in. The first is that the coverage for complaints handling at all levels in all of the states and territories does vary. But, broadly speaking, it is available to all consumers and it is in relation to all conduct of the lawyer acting as a lawyer. Ultimately, it not only is overviewed by the professional bodies themselves through, say, the Law Society of New South Wales but is subject to the supervision of the court in relation to not only literal compliance with the law but also the provision of ethical standards. So from that context I think that the coverage is as stringent as would be applied by ASIC to a financial services licensee.

You have raised the question of impinging slightly on financial services advice. To the extent to which that is part of an ordinary legal service and that the lawyer provides that advice inadequately, then there would be access to that lawyer's insurance policy. That is what financial services legislation attempts to do in things like capital adequacy in relation to financial services licensees. So I think there is at that level an equivalent coverage. Either a lawyer or somebody who is a financial services licensee can get their advice wrong. That is life. That applies to any area of opinion. But the primary thrust of what lawyers do is not to give financial planning advice or financial services advice; it is to give legal advice. So, to the extent to which there is a financial services element of that, it is again peripheral to the main core of advice that is being given. But I think there is adequate consumer protection through compulsory insurance and through the complaints mechanisms that exist that are equivalence in coverage.

ACTING CHAIR—What I am asking is whether you can envisage a situation where the existing consumer protection regime which applies to lawyers in whatever jurisdiction might not offer relief to someone who is given poor financial advice by a lawyer.

Ms Farrell—I think the regimes are equivalent in that area.

Ms Simmons—Is the question where a lawyer has exceeded what they might be permitted to do within the scope of the exemption? Are you talking about a lawyer who is providing advice that is not in the ordinary course of the activities of a lawyer?

ACTING CHAIR—Let us deal with that first. That is a good point.

Ms Simmons—If a lawyer would have gone outside the scope of the exemption and ought to have gone and got a licence and acted illegally, then chances are they would not have the benefit of the coverage of their professional indemnity policy, because the professional indemnity policies now are carving out financial services. But then the person who received that advice would be in the same position as if they had received advice from any non-licensed person. Of course, the regime does have some discussion in it about what happens if a person is dealing with an unlicensed person.

Ms Farrell—I thought your question was in fact if you are within the regime of ordinary legal services.

ACTING CHAIR—I was going to come to that next. If you are within the regime of the exemption—

Ms Simmons—Then, to the extent that it would otherwise have fallen within the definition of financial service, they ought to have the benefit of the lawyer's professional indemnity policy. The way the exemptions have been crafted, they actually take that particular activity out of the scope of the definition of financial service. Therefore, the policies ought to be available in that particular circumstance.

Ms Farrell—I think the bottom line is there is an equivalence of consumer protection.

ACTING CHAIR—I will go back to what Ms Simmons said. There is an assumption that the breadth of the policies will be contiguous with the exemptions.

Ms Simmons—That seems to be our experience. We have seen a couple of instances of policies being drafted up. The carve-outs have differed. Some have said they carve out the provision of financial services generally. That is with or without a licence. Some have carve-outs that say that you do not have coverage if you are providing a financial service without a licence. In other words, the suggestion is that you would actually be covered under that policy if you were providing a financial service but had gone to the trouble of getting yourself licensed. I guess the position has not been particularly clear across the various policies. We have had some concern in doing the preparatory work for the submissions that in fact a lawyer, but for the exemptions, might have got themselves into a position where they were providing something for which they thought they were covered but that technically fell outside. As Kathleen said, five years later, they go back to revisit their policy and there is an argument on as to whether what they said or did was in fact a financial service and therefore fell outside the policy because the policy carved out all financial services.

ACTING CHAIR—Which then has a flow-on consumer protection issue, does it not?

Ms Simmons—Exactly.

Ms Farrell—The original draft of this regulation was an exemption from the requirement to be licensed. The language has changed to deal with, in essence, carving out this area of activity from being a financial service. People who are not really accustomed to the intricacies of the 500-odd pages of legislation would inadvertently fall outside the terms of an insurance policy.

Senator MURRAY—I just have an observation. It is about the reference that lawyers sometimes get it wrong and then admit it under privilege.

Ms Farrell—The only time we do admit something like that!

Senator MURRAY—I have no quarrel with the position put by the Law Council.

ACTING CHAIR—Thank you very much.

Ms Farrell—Thank you.

[4.42 p.m.]

BISHELL, Mr Peter Thomas, Authorised Representative, AMP

REGAN, Mr Anthony George, Managing Director, Hillross Financial Services Ltd

ACTING CHAIR—Welcome. The committee prefers all evidence to be given in public, but should you at any stage wish to give any part of your evidence in private you may ask to do so and the committee will consider your request. The committee has before it a written submission from AMP, which we have numbered submission 22. Are there any alterations or additions you would like to make to the submission at this stage?

Mr Regan—No.

ACTING CHAIR—I now invite you to make a brief opening statement and then we will proceed to questions.

Mr Regan—Thank you for allowing me to speak to our submission today. By way of explanation, Hillross, which I represent, is a wholly owned subsidiary of AMP. It may interest you to know that the gentleman accompanying me today, Mr Peter Bishell, is one of our financial planners and authorised representatives based here in Canberra. Peter is a little unique in that he specialises in self-managed superannuation funds. It is almost the entire basis of his practice. He is also a certified practicing accountant, so he is well across the issues that straddle this legislation.

I will start by saying that overall we support the Financial Services Reform Act because it places a single licensing regime for financial sales advice and dealing in place. It covers obviously financial products and it creates a consistent form of disclosure. In effect, we support if anything the strengthening of FSR. It has put in place a competitively neutral regulatory system which benefits participants in the industry by providing uniform regulation and removing unnecessary distinctions between products. Additionally, it gives consumers a more consistent framework of consumer protection in which to make their financial decisions. FSR facilitates innovation and promotes business while at the same time ensuring an adequate level of consumer protection and market integrity. The philosophy behind the act is to ensure that market participants act with integrity and that consumers are protected. This is due to the complexity of financial products, the adverse consequences of breaching financial promises and the need for a low-cost means to resolve disputes.

The principles of FSR are competitive neutrality, cost effectiveness, transparency, flexibility and accountability. As you are aware, the act requires people who provide financial services to be holders of an Australian financial services licence or representatives of a licensee, depending on whether they are acting as a principal or representative. Under the act, the person provides financial services if they carry out certain activities in relation to financial products. Financial product advice means a recommendation or statement of opinion or report of either of those things that is intended to influence the person or persons in making a decision or could be

reasonably regarded as being intended to have such influence in relation to either a product or a class of products or an interest in a financial product.

We are concerned that the accounting bodies continue to seek exclusion from the FSR consumer protection regime, citing various grounds as to why they should not have to be licensed in the same way as financial planners in relation to advising clients. Moreover, accountants consider that they should be able to make comparisons between different superannuation funds and make recommendations to their clients about which one is best, all without an Australian financial services licence.

While understanding that the accountants have gained an exemption in relation to the acquisition or investment of a self-managed fund, I understand that accountants want a further exemption to make recommendations on all superannuation fund structures rather than just self-managed superannuation funds. Let me say that I appreciate that accountants have a limited advice role to play in superannuation. However, I see this role is to advise clients in relation to their taxation arrangements of superannuation in general or the taxation arrangements or the superannuation arrangements that the client currently has in place. An example is how to minimise taxation within a client's current self-managed super fund or advise the client on the tax effectiveness of making certain types of contributions to their existing superannuation fund.

The role of the accountant is not to give advice to their client on whether or not a certain type of superannuation fund is better. I think it is important to make the distinction here between structures and products. Self-managed superannuation funds are almost unique in the industry in respect of the fact that there is a very clear demarcation between the structure and the product. In most other cases, there is an intertwined association between the structure and the product. It is very difficult to then disseminate a piece of advice which does not embrace both the structure and the product as part of the advice.

Financial advice about superannuation takes into account a number of factors. One of the more important factors is matching of a client's risk profile with the potential investments and their possible returns. Accountants are unlikely to advise on the risks or returns that an investment may have or match these with client needs. Accountants are also unlikely to think about the risk insurance needs of the client whereas a financial planner does.

We are strongly of the view that further carve-outs under the regime would be damaging to the integrity of the consumer protection regime as a whole, particularly where such carve-outs relate to the provision of retail consumer advice in the core area of superannuation, which is obviously the dominant area of advice that most Australians need.

Licensing is the first line of protection for consumers and should be required for all parties providing financial advice or recommendations of any kind to retail consumers, including small business proprietors. We have some other concerns in relation to the independence of advice. The accounting bodies are arguing that a consumer is better protected by receiving independent advice on superannuation fund structures from a recognised but unlicensed accountant than from a licensed financial planner. We strongly dispute this view. Our financial planners and dealer groups are either the holders of an AFSL licence or the authorised representatives of those bodies are subject to strict FSR consumer protection provisions under the Corporations Act. Importantly, we have a duty of care to our clients to not only recommend financial products that

will meet their needs, objectives and financial situation; otherwise, the recommendation cannot be made. All benefits that planners receive that could be considered to influence their advice or the services that they provide are fully disclosed to the client under the current regime. Accordingly, the accounting bodies' argument should not form a basis to exempt accountants from the FSR licensing regime in respect to superannuation products.

There are also questions about professional education and ethical requirements. The accounting bodies are arguing in their submission that consumer protection is enhanced in their case by strict professional education and the ethical requirements that they currently hold. AMP notes, however, that in respect to financial planners we are also meeting minimum education standards. We undergo structured, continuous professional development specifically to these products. We are covered by professional indemnity insurance, are subject to quality assurance audits, are subject to investigation and disciplinary procedures and are subject to high standards of ethical and professional behaviour. The accounting bodies are arguing the above measures as a point of differentiation between themselves and licensed financial planners. We respectfully disagree.

I would also like to highlight the risk to consumers. Superannuation advice influences a person's investment and retirement decisions and will significantly impact that person's economic future. Given this, care should be taken in providing exemptions from the consumer protection provisions of the FSR regime in the area of superannuation. In our view, the recently announced amendment for the purpose of providing an exemption from FSR for recognised accountants making a recommendation that a person acquire or dispose of a self-managed superannuation fund product represents real risks to retail consumers, especially in light of the fact that the SMS sector is by far the fastest-growing area of superannuation savings. It attracts many small business owners who, notwithstanding their entrepreneurial and financial skills, are quite often vulnerable when it comes to the complexities of the superannuation environment. While AMP recognises that self-managed funds are a tool to implement FSRA exempted advice given by accountants, such as business structuring advice and taxation advice, any further exemption for accountants would not, in our view, be keeping with the policy objective of regulating the provision of retail product advice under FSRA. Our submission is as tendered. We would be more than happy to take some questions from you.

ACTING CHAIR—Thank you, Mr Regan. In the submission there was a reference to the exemption sought by the legal profession. You do not have any particular views on that, do you?

Mr Regan—Nothing further to add.

Senator MURRAY—My long experience with accountants and lawyers is that they are reluctant to give you investment advice because it damages the essential relationship which attaches to, if you like, the object of advice. With respect to the specific issue of accountant advice, they will be approached with a circumstance where a small business owner, for instance, will say, 'Should I put my money into a self-managed superannuation fund or should I invest it in a retail fund or some other investment vehicle?' Essentially, the decision as to where it goes is a graded decision which affects risk, return, security and all those sorts of things. You are right in judging there to be a flavour in there of assessment as to the virtues of the product. But the real life experience is that all they would do is tease out their client's needs and try to fit those needs to what they know of the market. Having said, 'We don't think you should put it into a super

fund; you need to go and look at the range of other funds,' off they will toddle to see a financial planner or somebody from a major company, somebody with expertise. Don't you think the fears concerning the carve-out, as it is described, for accountants and lawyers is overblown in view of the way the market actually operates and in view of the way that advice actually operates?

Mr Regan—I can speak from personal and professional experience. Perhaps I will give you the former first. I acquired a self-managed superannuation fund in 1997. It is looked after by my chartered accountant. In the course of the discussions that he has with me, he does address or has previously addressed the issues of asset allocation through the course of those discussions to the extent where, for example, he introduced me to a retail stockbroker because he felt that I should have a greater component of equities. He took account of my age, my level of investment and a range of other factors and suggested that he had a person that was a very good broker at Merrill Lynch—I think that is where the chap was working at the time—and suggested I go and see him. I think that is a pretty clear real life example where—it is very hard—once you get into the area where you start taking people down the road of the structure, you very quickly get into discussions about asset allocation, which I think is the core issue.

Senator MURRAY—Let us dissect what you have just said. I presume he is your appointed auditor for the fund.

Mr Regan—Yes.

Senator MURRAY—By law, he must advise you that you must lodge a strategic plan and, by law, that strategic plan has to be balanced. For instance, you could not put 100 per cent of your assets into—

Mr Regan—I might just clarify that. Do you mean the investment strategy?

Senator MURRAY—Yes.

Mr Regan—Yes, I am with you there.

Senator MURRAY—If you said, 'Here's my plan. It consists of 100 per cent of the funds in the super fund going into high-risk speculative ventures in Patagonia,' or somewhere, he would be obliged to tell you that you must have a balanced portfolio approach. That is the advice I get from my chartered accountant with respect to my self-managed fund, which I manage, not him, I might say. He has said to me, 'If you need investment advice, I can put you on to a financial planner,' which is similar to what your chap has done. I have declined it because I do my own. To me, in my experience, there is a sufficient set of checks and balances. I do not quarrel that there are grey areas within our discussion. The quarrel I have is that the principal earnings of an accountant with respect to this particular instance are derived from pointing you in the direction, taking a commission from that direction—for instance, from the broker—or having a particular motive in generating income. There are accountants who are like that, but the law says they must be licensed.

Mr Regan—Who did your investment strategy?

Senator MURRAY—I did.

Mr Regan—So, during that process of evolving that investment strategy, did you do any form of risk profiling?

Senator MURRAY—Yes.

Mr Regan—You did that yourself?

Senator MURRAY—Yes.

Mr Regan—But you did not have a legal obligation to do it?

Senator MURRAY—Oh, I have—

Mr Regan—You had an obligation to yourself?

Senator MURRAY—No. I have a legal obligation.

Mr Regan—To have an investment strategy, yes.

Senator MURRAY—That is right.

Mr Regan—That is right.

Senator MURRAY—The investment strategy requires you to preserve the assets of a super fund in a manner which guarantees that they are likely to be preserved and protected. So you may not borrow against your fund. You have got to have a mixed portfolio because the Taxation Office has the ability to look over the shoulder to ensure that you can satisfy them that you are conducting your affairs properly. The point I make is simply this: the individual experience may vary but the law is quite clear as to what the accountant's obligations are as an auditor or somebody setting it up. But, where an accountant wishes to put in investment or financial advice, they must be licensed. The carve-out does not say they must not be licensed. The carve-out simply says that, if you are advising somebody as to structure, you do not have to be licensed. What I am trying to test is not the grey areas, because we both understand they exist, but whether your concerns—and I put that in my earlier question—are overblown. Is how it will operate actually of as much concern as you might be indicating? That is what I am testing.

Mr Regan—I think my erstwhile colleague would like to speak.

Mr Bishell—If I can address that issue, I think you would be absolutely right if the legislation stood as it was originally drafted. But the amendments that are being asked for take it a step further than that. In order to answer the proposed questions in the couple of examples in the paper put forward by the accountant, there would be assumed knowledge of an accountant on broad structures of superannuation funds such as industry funds—any of those public offer type superannuation vehicles. As we pointed out in the submission, the minute you start to talk about those structures, you are no longer talking about something that is just a structure. It is way beyond a structure. It is a product. No industry fund is just set up as a structure. It has within it all sorts of terms and conditions of membership, and that would mean that I, if with my

authorised representative licence hat gave advice on it, would have to comply with FSR in giving that advice, because that is a product.

Senator MURRAY—Let us test that. Let us assume this accountant says, 'I don't think you should go into your own fund. I think you should go into a publicly available fund.' Surely the accountant then tells that person to go off and examine those. The danger, surely, or what you fear, I suspect, from a straight business competitive basis, is when the accountant does not know enough about all those funds and says, 'I don't know enough about that. I think you're safer in the super fund.' I will be frank with you. I read your submission as driven by self-interest and the desire to protect your competitive place in the market, which I think is perfectly legitimate. I do not regard it as being based on some principle which is pure. What we are arguing about here in essence is whether every accountant should be excluded from this area of discussion unless they are licensed—in other words, they be prohibited from giving any advice on structure of any kind unless they are licensed. I think that is what lies behind your position.

Mr Bishell—Can I answer that by saying that I am a practitioner and I have given up my time to be here because I have a belief that this is a bad amendment to the legislation. I have no self-interest in this. I wear both hats. Here is the problem. If I am an authorised representative and an accountant—and there are something like 25 per cent, I think, of CPA members, and they are the ones I know, who fit into both categories—and a client comes in and sits across the table from me and asks the sorts of questions we have been talking about and I give some advice and, as our legal colleagues pointed out, five years down the track, the client says, 'Oh, I'm not really happy with the outcomes from that advice; I'd like to go and see that guy and take him to the cleaners,' we have opened up an opportunity for my PI cover on the accounting side to say, 'Sorry, you should have done that under FSR,' and the PI cover on the FSR side says, 'No. He had an exemption under the accountant's exemption, so neither of us are going to cover it.' It is unclear where the lines are drawn unless you are going to be absolutely clear about what we are talking about here. The minute I open my mouth as an authorised representative of a dealer group and talk about a class of product—I am sure an industry fund or anything would meet the definition of a class of product—I am covered by FSR.

So what hat am I wearing? As a practitioner, I have a real dilemma with this. I think that to carve out on the basis of person creates as many problems as the carving out on the basis of product. As a person, I am now acting in more than one capacity in front of my clients. That leads to ambiguity.

Senator MURRAY—That often happens. People often have more than one role. I do not accept that as a proposition.

Mr Regan—Is it not better to have it codified more clearly, though?

Senator MURRAY—And that is a legitimate argument. I accept you have an argument. I am just trying to test whether it will express itself with the degree of concern you imply. Frankly, there is no way we can know until it is in place and operating. We understand that.

Mr Regan—But there are checks and balances built into our licensing regime which give levels of consumer protection which are not going to be apparent if the advice is given as incidental or by the carve-out with an accountant. To pick up on the point Peter was making

before, if he gives advice as an authorised representative of a licensee, he has an obligation to know his product. He cannot make any reference to any of those other products or classes of products unless they sit on the approved list with thorough research supporting them from the licensee. Consumers do not have that protection if the accountant provides a similar level of recommendation.

Senator MURRAY—Is that true? The accountants are governed by professional standards and a set of enforceable obligations in terms of their professional conduct. The law is quite specific as to what they cannot do in terms of investment advice. There is a grey area as to what they can do, which is really what we are discussing.

Mr Regan—My point is that they will not have the same level of accreditation in relation to the products and the structures of products that would be the alternative comparison that they are making to the self-managed superannuation fund.

Senator MURRAY—But can't they argue the same as financial planners? Numerous financial planners do not have the same professional qualifications and experience of accountants, for instance?

Mr Regan—Yes, but we are not giving accounting advice.

Senator MURRAY—Sometimes those abilities very much apply in the financial field.

Mr Regan—I am sorry, but I do not quite understand.

CHAIRMAN—I have seen a lot of advertisements for seminars run by financial planners on self-managed super funds that purport to be providing tax advice, which is near the area of professional expertise of accountants.

Mr Regan—I do not believe you would find too many licensees sanctioning any form of tax advice unless the people were appropriately accredited. They could fall into the category that Peter does. Just for your benefit, Senator Chapman, Peter is a CPA as well as a financial planner. He is a representative of Hillross. You might find someone like Peter being able to offer such a service, but that is only if he is accredited as a tax practitioner.

Senator MURRAY—I do not have any more questions.

CHAIRMAN—There being no further questions, thank you very much, Mr Bishell and Mr Regan, for appearing before the committee. I apologise for my absence. I was actually in the chamber tabling the previous set of regulations.

[5.07 p.m.]

HENDRIE, Mr John James, Certified Financial Planner, Chair of Melbourne Chapter, Financial Planning Association

HRISTODOULIDIS, Mr Con, National Manager, Public Policy and Government Relations, Financial Planning Association

THOMPSON, Mr Phillip Clayton, ACT Chapter Chair, Financial Planning Association

CHAIRMAN—Welcome. The committee prefers that all evidence be given in public. However, if at any stage of your evidence you wish to respond in private, you may request that of the committee and the committee will consider such a request to move in camera. We have before us your written submission, which we have numbered 16A. Are there any alterations or additions you wish to make to the written submission?

Mr Hristodoulidis—Not at this stage.

CHAIRMAN—If not, I invite you to make you an opening statement, at the conclusion of which I am sure we will move to questions.

Mr Hristodoulidis—I will make a quick opening statement. John will also make a quick statement. We are happy to take some questions. As you are aware, the Financial Planning Association is the peak professional organisation for the financial planning industry in Australia. We have approximately 14,500 members organised through a network of 33 chapters across Australia and a state office located in each capital city. The FPA represents qualified financial planners who manage the financial affairs of over five million Australians with a collective investment value of more than $560 billion. We welcome the opportunity to make the submission and appear at today's hearings into the regulations before us.

We would like to make these following comments. The FSRA cornerstone is that all market participants providing financial advice, including superannuation advice, be licensed and regulated by ASIC to protect consumers from unlicensed advice. The FSRA licensing regime relates, among our things, to self-managed superannuation funds. It was intended that the act treat self-managed super funds the same as any other super product and structure—that is, you need a licence to recommend them. Mr Ross Cameron, Parliamentary Secretary to the Treasurer, confirmed this when he said in November 2003 in the *Independent Financial Adviser*:

> Accountants should be able to act on instructions to create SMSF structures and they should be able to advise on the tax consequences of an SMSF, but it still remains that the act treats an SMSF the same as any other product and structure in that it requires a licence to recommend them.

However, the professional accounting bodies argued that accountants provide broad superannuation related advice in the course of general advice to clients and should not have to be licensed for such incidental advice.

As a result of the accountants' lobbying, the government developed a new regulation, 7.1.29A, providing partial FSR licensing relief for advice provided by accountants to clients concerning the acquisition and/or disposal of a self-managed super fund. Encouraged by this, the accountants have continued to press for full carve-out so that they can, without a licence, continue to provide advice not only about how to acquire and dispose of a self-managed super fund but also about the comparison and recommendations about various superannuation structures. The FPA believes that this position waters down the licence requirements meant to protect consumers and compromises the intended universality of the FSR licensing requirement and regulatory neutrality for industry participants. Whilst we support exempting certain activities such as administration, establishing and structuring and compliance advice for self-managed super funds, our position is that the advice of accountants given relief should be limited to the structure and establishment or disposing of self-managed funds as the current regulation stands.

The current regulation should only apply to those relationships already entered into by accountants and not where there is not an established relationship. Otherwise, it could facilitate a tax avoidance product marketed by promoters without consideration of investor circumstance. The regulation should be broadened to include a disclaimer by accountants providing self-managed super funds related advice under the regulation about the exemption that recognised accountants are operating under.

Accountants giving advice under such exemption should still be required to meet a suitability test for the advice and have appropriate evidence—for example, a short form or statement of advice—to support it. The FPA has argued that exempting accountants from the licensing requirements will mean that consumers have limited redress for bad advice provided by accountants in relation to superannuation. Further, consumers will not have access to cost-effective external dispute resolution schemes like the Financial Industry Complaints Scheme, FICS. The accountants argue that they are better educated professionals who were providing self-managed super fund advice before the FSRA regime. They have professional indemnity insurance to protect clients who can prove they were given bad advice.

The FPA contends that it was intended that the new regulatory regime apply to the whole sector. It is undesirable to have different regulatory regimes with accountants who give incidental super advice regulated in effect through insurance companies and professional associations and disciplinary bodies.

To protect consumers, accountants given licensing relief should still be required to belong to an independent regulated complaint-handling mechanism such as FICS. Self-managed super fund advice requires specialist knowledge to provide the advice. The suitable educational qualifications under the regs should encompass this; otherwise, the exemption should apply uniformly across all advisers with a specialist knowledge regardless of the professional body of membership.

Mr Hendrie—I run a business under two headings—accounting and financial planning—and they are actually run in separate structures. We look after about 80 self-managed superannuation funds, hundreds of small businesses and thousands of individual taxpayer clients. I think that there is a role for both accountants and financial planners within the self-managed super fund environment. I think that there are some activities which are clearly the realm of accountants only. I think there are some activities which are clearly the realm of financial planners or

licensed accountants. I think there is a fair degree of grey area in between. I think it is that grey area that presents the real difficulty. I see the real difficulty being when my client, whom I have known for however many years it might be, comes to me as an unlicensed accountant and says, 'What do you think about this?' Personally, I can turn him away, but whether the hundreds and thousands of accountants around Australia can turn that person away is another issue. I think it is a really difficult issue unless the situation is very clear-cut and put into as black as white terms as we possibly can get them.

I will give you an example which happened within the last two weeks. It has nothing to do with self-managed super. It is from one of those other clients that does not have a self-managed superannuation fund who bought in what appeared to be a prospectus, left it with one of my accountants and said, 'What do you think of this?' They are trained to say, 'Can't do it. I'll give it to John to have a look at.' He gave it to me to have a look at. It was not a prospectus. It was an inviting glossy investment in the thoroughbred industry. As it turned out, when I read the booklet, it was to buy a computerised tipping system. But people will ask you those sorts of questions. They will come in with the superannuation brochure that has been given to them by someone else. They will come in with their industry fund information and say, 'Here it is. What do you think about it?' Looking at industry funds and the submission that was put in by the accounting bodies, I would have to say that industry funds are financial products. I think the examples that they are giving there clearly fall within the realms of where people should be licensed.

CHAIRMAN—Thank you, Mr Hendrie. Do you have anything to add, Mr Thompson?

Mr Thompson—I would like to make one comment. One of the reasons that has been brought up for accountants being granted a further exemption has been the cost and time that go into getting an FSR licence. That does raise an issue in that, if it is too costly and too much time is required to get an FSR licence, it might be an argument to say that maybe as a business they should then only be focusing on one particular area rather than trying to focus on doing the structure and advice area. As a practitioner, I have many working relationships with accountants where the accountant focuses on the structure relationship and then refers them across to the financial planner for investment advice within the structure. I think there can be good working relationships there. I do not think that the cost of getting the FSR licence should be a good reason for having the carve-out.

CHAIRMAN—Thanks, Mr Thompson. Mr Hristodoulidis, you have said in your remarks that the regulation that has been promulgated was a consequence of the accounting profession lobbying the government. Would you acknowledge that in fact this committee held a hearing on this very issue last year and quite specifically recommended that accountants be able to advise on the structure of superannuation?

Mr Hristodoulidis—I would also make the point that the quote I read from Parliamentary Secretary Ross Cameron was after the findings of that parliamentary inquiry.

CHAIRMAN—Sorry?

Mr Hristodoulidis—The quote I read out from Mr Ross Cameron, the Parliamentary Secretary to the Treasurer, was after the date of the release of that inquiry report.

CHAIRMAN—Mr Thompson, you just said that accountants have raised the issue of the cost and time involved in acquiring a licence and, therefore, that the two roles should be split and that they should limit their activity to structures. As I understand it, that is exactly what the accountants are seeking. They are not seeking an exemption to be able to advise on superannuation products; they are seeking to be able to advise on superannuation structures.

Mr Thompson—I think maybe I am mixing two issues there. I certainly support the idea that accountants can provide advice on the structure of a self-managed super fund. There are good reasons for doing that—estate planning reasons or business real property. They are great reasons, but as soon as we start looking at crossing into the underlying investments I think we have to be very careful about the protection we are giving consumers and making sure it is a level playing field for all the professionals providing advice in that area. My point there was that if the reason was the cost and time of getting a licence for getting the extra carve-out to provide that investment advice then it allows us to look at whether the business is well structured to provide the quality advice in the right areas.

CHAIRMAN—I do not think anyone disputes that. We will hear from the accountants later. I do not think they are disputing that. Certainly the committee is not disputing that. If you look at our previous report, our recommendation was to limit the carve-out for accountants to the capacity to advise on structure. We quite strongly made the point that if they are going to advise on products then they should be licensed under the FSR regime.

Mr Hristodoulidis—I suppose our concern arises when we read the accountants' submission and the examples they put forward. We are quite clear in our minds that that is financial product advice. I do not think anybody would dispute that outside the accounting bodies.

CHAIRMAN—So are you saying that the previous recommendation of this committee was—

Mr Hristodoulidis—No. The examples raised in the more recent accounting bodies' submission, which I think for this current inquiry was on the batches 6, 7 and 8 regulations. They had a couple of examples raised in that. If you read those examples, I do not think anybody outside the accounting bodies would dispute that is financial product advice and needs to be licensed under FSR. When we read those examples, that puts a bit of fear into us from the consumer's perspective because, if that is exempted from the FSRA, what kind of protection is in place for consumers if they get bad advice in that area?

CHAIRMAN—Would you concede that it is difficult or, in a sense, unworkable for accountants to be able to advise on the structure of a self-managed fund without being able to advise on the alternatives? In fact, limiting the capacity to advise on self-managed funds only might in fact result in clients getting bad advice if they cannot compare a self-managed fund with an industry fund or with a managed fund or a small APRA fund—in other words, giving clients advice on the pluses and minuses of each of those and then advising on which structure is best for them. The regulation as it is currently drafted might lead accountants simply to advise people to go into a self-managed fund when it might not be the appropriate fund for them.

Mr Hristodoulidis—The fear, if you read the example put forward by the accounting bodies on the industry funds, in that example is that the accountants have not taken into consideration the underlying investment within that industry fund. Therefore, the advice to sustain that

industry fund is not based on the client's financial needs and objectives or circumstances but based purely on the structure. Therefore, that client is not going to get the full benefit of the complete advice process.

That is why we are saying, when you read those examples, it is quite scary to think that clients could be receiving that type of advice outside of the FSR regime and not getting complete advice. So I suppose the question would be back to the accounting bodies: how could they give advice on an industry fund without taking into consideration the client's financial circumstances, needs and objectives?

CHAIRMAN—They know their advice, that an industry fund is best. I do not think in this context you would expect them to be able to advise on a particular industry fund without being FSR licensed because that is getting into the—

Mr Hristodoulidis—But, even if it is just general about industry funds, you still need to understand the client's financial circumstances to actually be able to say, 'This is what the structure is like. These are your financial circumstances. I think you should stay or move.' You cannot take those two things apart.

CHAIRMAN—As a client's accountant, I am sure they would understand their financial circumstances. That is the whole raison d'etre.

Mr Hristodoulidis—As the previous people who gave evidence said, it is very unlikely that they will undertake a risk profile on their client. That could have a bearing on whether they stay in an industry fund or go into a self-managed super fund.

Mr Hendrie—There are various types of clients that accountants have. If you are sitting across the desk from a business that you deal with on a fairly regular basis, you probably do know their financial circumstances quite well and would be in an ideal position to say, 'I think a self-managed superannuation fund could be a good idea for you.' On the other hand, if you are sitting across the road from Joe Average whose tax return you do once a year and may have done for two or three years running, you will not know what his financial affairs are because you see him once a year, you see a group certificate and you fill out a form. So you are not in a position to advise him, I do not think, without considerable further inquiry as to how to meet his needs and objectives.

CHAIRMAN—But why would you be advising that person on a super fund in any case if all you are doing is their tax return?

Mr Hendrie—Not when you are doing their tax return but when they come.

CHAIRMAN—But what if that is the only role you are fulfilling for that particular client rather than being their business adviser, as most accountants are, with small businesses.

Mr Hendrie—People have over a period of time built a relationship with their accountant because they see them as their financial adviser. When a financial issue arises, they turn to someone they know. If they know a financial planner, they might go to a financial planner for some superannuation advice. If they do not know a financial planner, who are the people they

know—someone at the bank? They are not going to go there. The accountant is the next port of call. That accountant may or may not be licensed, may or may not have any training or experience in the sorts of issues that they are going to have to deal with. Joe Average has to deal with them on quite a regular basis. The employer decides that they are going to change their superannuation fund. There are a whole lot of issues involved with that. Suddenly they have got 17 options where they used to have five options. What is he going to do? He is going to go and ask for advice. Who is he going to see? Is he going to see the bloke that the employer has pulled in to set up the new fund for him? Maybe. You might just as readily say, 'Look, Dean, my son, has been doing my tax for the last three years. I've got a bit of a rapport with him. I'll go and ask him what to do about this superannuation issue that faces me.' That is going to go a long way beyond structure. If that accountant says, 'I can't advise you on this,' that is fine, but that then starts to deteriorate the relationship between the accountant and the client because you are telling him he cannot do something that the client expects to be done. So it becomes a difficult decision for an accountant to make to say, 'Hey, you've made an appointment to come in and see me. You're in front of me here and now and all I can tell you is I can't advise you on it.'

CHAIRMAN—That is what the situation is going to be now, isn't it?

Mr Hendrie—That is what the situation is going to be, yes. I guess the point that concerns me is that if there is grey in there then it is really difficult for the accountant in that situation. I am making it very clear to the accountants who work for me that they cannot answer that question. If the client is sitting in their office, they can pick them up and bring them across to the other side of the floor and someone will be able to talk to them about it. But not everybody is going to have that sort of luxury.

Mr CIOBO—I want to go back a couple of steps. Am I right in paraphrasing that it is your assertion that structural advice cannot be provided by an accountant without reference to the performance of a fund? Is that what you were implying before?

Mr Hristodoulidis—With something like the industry fund or a retail fund or a corporate fund, there are a lot of things involved. There are the investment strategies, which are important. They may also offer insurance. If an accountant is looking at just the structure of the industry fund and the benefits and disadvantages of being in an industry fund as opposed to some other type of superannuation fund, they miss out on that intricate detail. The recommendation the accountant made there would look at the industry fund and compare it to a self-managed super fund in terms of the structures. It would be then, 'We think in your circumstance the industry fund is the structure you should stay with,' or, 'The industry fund is the one you should leave.' But that might not be the right decision when you start delving into the financial circumstances in terms of insurance, the risk profile of the client and the type of investment strategy that that particular fund may have. So there are all those things which are inextricably linked to the advice you give about a particular industry fund or retail fund or corporate fund which, from the self-managed super fund perspective, is a little easier to do in terms of the structure. You can actually say, 'The structure of a self-managed super fund is of benefit to you because of business planning or tax purposes.' You cannot actually do that with those other type of super products.

Mr CIOBO—So you are saying that advice that excludes those aspects would be deficient advice?

Mr Hristodoulidis—Inefficient, yes, or possibly deficient.

Mr CIOBO—I would like to explore an issue Senator Murray mentioned to me before he had to go. I said I would pursue it on his behalf. It is the issue of a disclaimer. Do you think it would be advantageous if accountants were required to provide a disclaimer with respect to the kind of advice that we are talking about? Would that help clarify in a customer or a consumer's mind which person wears which hat and for which purpose?

Mr Hristodoulidis—I think it is important. I think it is important to confront the client in terms of the advice they are about to get that they are protected by a particular legal regime and a number of infrastructures that are in place if something goes wrong with the advice as opposed to no protection in terms of external dispute schemes and those types of aspects of protection.

Mr CIOBO—So would you be more comfortable in that situation then, if that was the case?

Mr Hristodoulidis—I think, in terms of our submission, the disclaimer plus the requirement to be part of an independent dispute resolution scheme plus the requirement to provide some sort of short form statement of advice—all those areas we raise in our submission—are important aspects, if we go forward with a broader carve-out, that need to be picked up.

Mr CIOBO—Can I ask one final general question. Is the concern you have more that consumers do not differentiate between the structural advice and investment advice or that accountants do not discern the difference between the two? That might be an overly simplistic way of putting it.

Mr Hendrie—I think there is an element of truth in both those statements. I come from the outer suburbs of Melbourne. I deal with factory workers and reasonably well paid executives—the whole spectrum. Some of those people would understand the difference between structure and product and some people would not have a clue. You could explain it to them until the cows come home and they still would not have a clue. I guess there is some danger of the same sort of thing with accountants, but more I think it is an accountant being able to draw the line at a point and saying, 'I can't go any further than this.' If a client comes in and they are aware enough to identify the difference between structure and product, and you can talk to them about structure, I could guarantee you, I reckon, that in 95 per cent of cases it is going to lead to product. Whether that product is an industry fund, a RAP account, master trust and burrowing in deeper, particularly in a corporate super fund, whether anybody could realistically draw the line halfway through a consultation and say, 'I can't go any further with you here,' is I think the real problem.

Mr Thompson—Can I just add to that. It is a great point. The concern is that the door has been opened a bit and we need to have a line as far as where the advice can stop. I do not think we are doing the consumer any favours and we are not protecting the consumer by allowing an accountant to provide advice to the extent of saying, 'Join this industry fund,' because that has then opened up a whole new set of questions and concerns once you get into that fund. So at some point you need to have the line. I think we need to stop it sooner rather than later.

Mr Hendrie—I want to go back to a question that Senator Chapman asked earlier. I think it was what sort of advice and who was going to ask the question. We have had question after question addressed to my accountants in the last couple of weeks in relation to the buyback of

Commonwealth shares and the buyback of AMP income securities. The client starts with the question, 'What are the tax implications of this?' and they lead on to, 'Should I do it?' That is really where they are heading with their question. That is the decision that they are looking to come to. They ask the tax question. They are talking to their financial adviser. They logically go on into those other areas. Again, my people will get on the phone and say to me, 'Hey, this person needs some answers to a Commonwealth Bank question here or an AMP question here'. But, if I am a one-man show in the suburbs, I do not have anywhere else to go.

CHAIRMAN—Isn't that essentially a tax question, looking at that buyback issue? If they were genuinely considering selling their shares, they would be selling them irrespective of whether there was a buyback or they were on the market. So, when it comes to a buyback issue, isn't the principal issue the tax effect of that? Most buybacks are framed with special tax advantages.

Mr Hendrie—That is certainly the case, but I am not sure that the people who are Commonwealth Bank shareholders and AMP income security holders, because they happened to have GIO shares once in the past, realise the specifics of the tax issues when they ring up. They know that there is an issue. They want to know what the tax implications are going to be. But they have not necessarily thought about selling these things until the Commonwealth Bank says to them, 'Do you want us to buy them back?' or AMP says, 'Do you want us to buy them back?' Nobody thought about buying shares in Telstra until Telstra sent out the prospectuses. I will not say nobody, but a lot of people would not have thought about it. A lot of people would not have thought about buying National Bank income securities until the National Bank sent out an offer that made it look like they were offering term deposits. That is what people interpreted them as. They rang up to ask, 'Do you think it is a good idea?' That has nothing to do with self-managed super as opposed to retail super. It is a question of what the client perceives. But it is in the same realm as retail super and the sorts of questions that they are likely to ask the one person they might know who understands finance.

CHAIRMAN—There being no further questions, thank you for your appearance before the committee.

[5.36 p.m.]

WOLTHUIZEN, Ms Catherine Nicole, Senior Policy Officer, Financial Services, Australian Consumers Association

CHAIRMAN—Welcome. The committee prefers that all evidence be given in public, but if at any stage you wish to give part of your evidence or responses to questions in private you may request that of the committee and we will consider such a request to move in camera. I invite to you make a brief opening statement, at the conclusion of which we will have questions.

Ms Wolthuizen—Thank you. First of all, I would like to apologise to the committee for not having provided a written submission. I will take this opportunity to make a brief statement. I would like to start by saying that, in previous deliberations relating to accountants and FSRA, ACA has been sympathetic to some of the functions and roles that accountants can play in the provision of advice to consumers, which we believe often does appropriately fall outside the FSRA. However, in this case we are concerned on two particular fronts. The first is that we are concerned that this exemption undermines the consistent application of FSRA in contravention of the original intention of a universal regime across like financial services and products and that, particularly, that has the capacity to undermine legitimate consumer expectations of equivalent protection when seeking advice and when dealing in regulated financial services and products. The second is that we have specific concerns at what we see is an existing risk of inappropriate advice related to SMSFs arising out of the financial planning quality of advice survey conducted by ACA and ASIC, the results of which were released last year. I will go into a little detail about that later.

Just listening to some of the other witnesses this afternoon, the accountants' submission detailing the transfer of funds from an industry fund to an SMSF quite neatly encapsulates our concerns about the degree to which this exemption undermines the regulatory neutrality previously in place across how SMSF advice would be dealt with under FSRA. In our view, this would be exactly the sort of situation we would want to see captured by FSRA. A consumer seeking advice in relation to a regulated product—in this case, the industry fund—and dealing with that product should have equivalent regulation as if they went and dealt with a financial planner in making decisions about that industry fund and whether or not a self-managed super fund would be more appropriate.

We would be particularly concerned that they have access to the consumer protection mechanisms of FSRA—disclosure, the requirement that the advice be appropriate to their needs and all the other risk profiling and consumer needs analysis—and that recourse to appropriate complaints resolution mechanisms be available. When we look at that sort of situation, the way ACA views that kind of discussion between a consumer and accountant or a consumer and a financial planner would be that there is an implicit assumption at the start of that conversation that the industry fund is inappropriate for the consumer's needs. We find it difficult to separate that kind of discussion from any implicit assumption that a needs analysis has taken place. I suppose it would be analogous to a consumer visiting a financial planner and discussing a switch from an industry fund to a managed fund. FSRA quite explicitly envisages that that situation is regulated. We do not see a real fundamental difference between that sort of situation where

someone is seeking advice and the situation where they would be transferring funds out of an industry fund into a self-managed super fund. In our view, the circumstances cited in favour of this exemption do not fall outside the scope of FSRA. In our view, they clearly involve dealing with a regulated product. We would expect and hope that consumers receive equivalent protection in those circumstances.

Following on from that, we believe also that regulatory consistency is especially important to enhance consumer protection. We recognise there will be instances where consumers seek basic tax advice from an accountant which does not involve the conduct regulated by FSRA. However, decisions relating to appropriate superannuation arrangements made upon consultation with an accountant will be understood by consumers and should be understood by consumers, in our view, to be subject to the same regulatory requirements as those undertaken upon the advice provided by a licensee or a licensed financial planner. Harking back to the original objectives of FSRA, they are to promote that consistency to ensure that consumers have equivalent expectations when dealing with financial services and financial service providers.

Further to that, the question of inappropriate advice I think is of particular relevance to this issue. We are especially concerned about the potential for distortions and inappropriate incentives to emerge in the provision of advice relating to self-managed super funds. We perceive it as quite a realistic likelihood that many consumers, dissatisfied with the performance and cost of their superannuation fund, will contemplate a self-managed super fund as an alternative. We know consumers already are expressing interest and enthusiasm in those products. It is entirely reasonable that they would therefore seek advice and information on whether those sorts of arrangements would be appropriate to their needs. It is the case that you can barely open a financial magazine or newspaper supplement these days without finding an article advocating self-managed super funds, reflecting that growing consumer interest in these sorts of arrangements. However, these are arrangements that are not appropriate to everyone and do need to be undertaken with an analysis of whether they are appropriate to the particular consumer's circumstances.

When we actually surveyed the quality of financial advice with ASIC, one of the particular areas of concern for our judges cited in the report of that survey related to the recommendations of self-managed super funds. It was found by the judges and reported in the ASIC report that self-managed super funds were sometimes proposed with little justification in terms of the client's specific circumstances. One plan recommended an SMSF despite listing one of the client's goals as simple administrative arrangements. Some judges suspected that SMSFs had been recommended so the adviser would get ongoing payment for administration work. I just state that 'adviser' in that case is a generic term.

Once again, I had hoped to bring the specific cases before the committee. I will undertake to do that as a supplementary submission to the committee's deliberations. I also make the point that FSRA is designed to counter some of those problems—counter the potential for the provision of inappropriate advice—yet if we carve out accountants who are equally, I suppose, at risk of giving inappropriate advice to consumers we are carving out consumer protection under FSRA. They are the two main concerns we would like to express. I am happy to take any questions from the committee.

CHAIRMAN—Thank you. Did the survey to which you refer not relate to the financial planning industry?

Ms Wolthuizen—Accountants were part of that survey as well. Accountants and stockbrokers were also within it.

CHAIRMAN—All accountants?

Ms Wolthuizen—It is a sample. The survey was designed as a sample of financial planning advice, but recognising that financial planning advice is provided across a range of sectors and accountants were selected in proportion to the degree to which they make up the overall profile of the financial planning sector.

CHAIRMAN—But in relation to financial planning advice rather than general business or taxation advice?

Ms Wolthuizen—That is correct. Consumers were told to go and ask for a comprehensive financial plan. In some cases, though—and this was, I suppose, a kind of cursory look at some of the results in preparation to come before you today—consumers actually went and said, 'Can you tell me about a self-managed super fund?' It was actually in those cases that the judges did note that there were inappropriate recommendations made and that there was not necessarily the consideration of the broad range of financial arrangements which might have been appropriate. It was simply, 'Why don't you take your money out of this and put it into a self-managed super fund.'

CHAIRMAN—Would it be fair to describe your position, in a sense, as an absolutist position in that you do not believe that accountants should be able to advise on any form of superannuation structure without being licensed under FSRA?

Ms Wolthuizen—No, not at all. ACA certainly recognises that this is an issue that does fall, if you like, at the margins of the reach of FSRA. There are going to be circumstances where accountants are providing tax or structural advice in relation to superannuation which does not involve a decision. It is particularly the decision to transfer money, as in this industry fund case that has been provided to the committee, out of a regulated product that involves that implicit assumption that the original product or arrangement was not suitable or appropriate to that person's needs. But if the exemption is provided then that decision will not be underpinned by an analysis of what is appropriate in the same way it would if the consumer went to a licensed financial service provider.

CHAIRMAN—Would you concede that the regulation as promulgated by the government, when compared with the recommendation made by this committee, might increase the likelihood that accountants advise people to move from other types of funds into self-managed funds whereas the recommendation of this committee, in proposing they can advise across the board on structures—not content but on structures—would be less likely to encourage them to advise someone to move out of an industry fund if they were already in an industry fund?

Ms Wolthuizen—The way this area is developing, the growing demand for advice relating to self-managed super funds, I think itself creates the risk of there being inappropriate advice not sufficiently surrounded by the consumer protections provided under FSRA.

Mr CIOBO—Do you have a position on whether or not it is possible that structural advice can be given without delving into product advice?

Ms Wolthuizen—I think the situations we would have a concern about are fairly easy to discern. There will be situations where an accountant can give advice on superannuation structures that do not involve a decision being made about whether an industry fund is an appropriate investment vehicle or whether some other regulated product is an appropriate investment vehicle. I think that is the particular concern where you are actually dealing with regulated products because you have made an implicit assumption and moved on from that to a decision that an SMSF is more appropriate.

Mr CIOBO—So in that instance you are comfortable with the exclusion from licensing?

Ms Wolthuizen—The exclusion from licensing for general—

Mr CIOBO—Correct. Are you comfortable with the structural advice exclusion?

Ms Wolthuizen—As long as it does not involve consumers being advised to transfer funds into –

Mr CIOBO—But how do you regulate that, though?

Ms Wolthuizen—The question there is if you cannot appropriately carve it out you require it to be licensed. It is extremely difficult to draw a line, noting of course that in other areas the grey or the line has been drawn in relation to unregulated matters.

Mr CIOBO—I guess that was the thrust of my first question.

Ms Wolthuizen—Could you repeat the question.

Mr CIOBO—It was about whether or not it is easy to identify the distinction between them.

Ms Wolthuizen—I suspect it will be easier in hindsight to identify where the line has been crossed. For that reason we do have a concern that there has been a carve-out. A consumer going to see an accountant will have an expectation, we hope, that there will be protections available for them if they are making decisions which we believe should be regulated. The concern is that, if they stray into this area under the exemption, they will find themselves bereft of that kind of protection, particularly the access to complaints mechanism, should something go wrong.

Mr CIOBO—From a policy maker point of view, are consumers better off being burdened with the additional costs of compliance to ensure safety or are we better off allowing for perhaps a closer analysis and the ethics that apply to accountants to determine what is appropriate and what is inappropriate advice for them to determine whether or not they should have the exemption apply? That is the trade-off, isn't it?

Ms Wolthuizen—I think that issue was settled when FSRA was first devised—the idea that you have that kind of overarching.

Mr CIOBO—But just with respect to the issue we are discussing here today, though, of course.

Ms Wolthuizen—It is ACA's hope that all financial services, be they planners or accountants, operate ethically and have appropriate training and education to provide a high quality of advice. Unfortunately, that does not happen in all cases. FSRA has been devised to place additional compliance requirements on financial services providers to justify the advice that they present to consumers and demonstrate that recommendations are appropriate. There are compliance costs that have come with that for other sectors. If accountants are going to engage in giving advice in what we consider to be regulated areas, they subject themselves to those costs.

Mr CIOBO—You do not really know how often that is going to be the case, though, is my point. It could be very few instances. It could only apply to those accountants that do not abide by what would be ethical limitations in terms of their kind of advice. So the thrust of my question is this: in those few instances, would you rather the compliance cost be borne by consumers to ensure safeguards are in place or would you leave it to the accounting bodies and the professionals themselves to make that decision?

Ms Wolthuizen—It is a decision of accountants to give advice on these products and bear those compliance costs. In terms of leaving it up to the accountancy bodies or the professional bodies to enforce ethical standards, we certainly urge them to do that, but I do not think it is an equivalent protection to subjecting them to FSRA.

CHAIRMAN—There being no further questions, thank you very much, Ms Wolthuizen.

[5.52 p.m.]

DIRKIS, Mr Michael James, Tax Director, Taxation Institute of Australia

CHAIRMAN—Welcome. The committee prefers all evidence to be given in public, but if at any stage of your evidence you wish to give it in private or respond to any questions in private you may request that of the committee and we would consider such a request to move in camera. We do not have a written submission from you.

Mr Dirkis—No.

CHAIRMAN—I invite you to make an opening statement, at the conclusion of which we will move to questions.

Mr Dirkis—First, I would like to thank the committee for being given the opportunity to appear. Our focus is probably more structural around regulation 7.1.29A. That is principally where we will be focused. I suppose our initial concerns—and they are concerns that seem to have arisen through the whole process of FSRA—are a lack of appreciation, not necessarily by this committee but certainly by the Markets Division of Treasury, that there is this major crossover between what constitutes legal advice at any point of time, including what constitutes tax advice and what constitutes financial advice. At the edges it gets a bit messy. In devising FSRA, the interrelationship between existing regulatory regimes to some limited extent appears to have been ignored. When you came forward with the recommendation of the committee, one would have thought this regulation would have been subject to at least some consultation before being presented. Unfortunately, that did not occur. As a result, there are a couple of minor issues that we believe need some sort of exploration.

The first is that the regulation is very blunt in the sense that it is a very narrow exemption. It is essentially just to allow recognised accountants to advise on the disposal and acquisition of superannuation products. The issue around 'recognised accountant' is that the regulation only recognises the three existing bodies and does not give the capacity for either ASIC or a regulator at a later date to prescribe other bodies that meet similar sorts of standards. One would have thought that would be appropriate. As other representatives bodies emerge that have certain criteria and competencies in place, they should also be able to benefit from the regulation.

The other is more that in formulating the class of persons there is a category that still cannot give this advice, and that is the registered tax agent, who may for various reasons be no longer a member of these bodies. To highlight the dichotomy, I will give you an example. You can be an expat member of a recognised accounting body. As an expat member, you would probably try to retain your practising certificate because it is too hard to get if you come back. You probably would come back to Australia and do the CPD that was required. But, in those circumstances, you will be permitted under these regulations to give financial advice to this limited extent, whereas if you are a registered tax agent regulated under rules that have been in place for some years and have been possibly giving advice for 20 years you are not. It just highlights the difficulties that this committee and certainly the regulators are faced with in that crossover. I suppose really the only thing we are asking is that the more substantial issue is just to ensure that

the regulation has some additional powers to allow later registrants if they meet the criteria. It is a very simple request.

CHAIRMAN—Where do you see the current regulation fitting in terms of the evidence we have heard earlier in the evening and the original recommendation of this committee?

Mr Dirkis—The original recommendation was limited to structuring. This is obviously a little bit further than that. We as an organisation have some concerns about the competencies that exist currently because of this interface between what constitutes what. In order to give financial advice, you have to be licensed and you have to meet certain competencies. Some of those competencies are things like having legal skills to give proper legal advice and tax advice. With the greatest respect to people that are giving financial planning, in order to give legal advice, you need legal training. A six-month module on the law does not necessarily give you the basis to fully understand the legal implications of a particular structure. So the issue comes whether they are giving legal advice or merely giving representations from a prospectus that somebody else has prepared. Similarly, when it comes to tax advice, tax is something that is acquired through, first, some degree of university training and, hopefully, a professional year as an accountant and then on-the-job training and ongoing CPD requirements to ensure that you can give that advice. Again, doing a six-month module is not going to give you that level of knowledge sufficiently to advise someone competently.

CHAIRMAN—Would you be comfortable with extending the regulations to what was originally recommended by the committee?

Mr Dirkis—We certainly would be comfortable with that extension. As I said, the other issue—so that we all do not come back here again—is to have some sort of power to allow other bodies that display similar competencies to join subsequently.

CHAIRMAN—With regard to the regulation as it has been promulgated, the National Tax Accountants Association and the Association of Taxation and Management Accountants have requested that their members be included in the definition of 'recognised accountant'. What is your attitude to that request?

Mr Dirkis—Provided they meet those criteria and they have the regulated standards. My understanding is the ATMA is working towards that situation. Once it meets those standards, then I do not think there is an issue. The only question that was asked was about a group that has become disenfranchised through this process, which is the registered tax agent that does not belong, but in one sense you can sometimes understand that. Until we see standards for the tax profession develop as a process, that is probably understandable at this stage.

CHAIRMAN—What is your response to the view of the Financial Planning Association that if accountants are given relief from the licensing requirements they should be required to belong to an independent regulated complaint-handling mechanism, such as the Financial Industry Complaints Scheme, rather than simply their professional bodies handling complaints?

Mr Dirkis—Currently, the professional bodies, certainly from an outsider, seem to handle the complaint mechanisms. People are regularly removed from practice. One would assume that those processes would be continuing. We have not been presented with any evidence which

would suggest that those processes do not work and that people continue to remain members of these associations having breached ethical standards or created criminality. There have been high-profile people in recent times who have been removed from some of those associations on conviction for other offences.

CHAIRMAN—There being no further questions, thank you very much for your appearance before the committee.

[6.01 p.m.]

ABBOTT, Mr Grantley Giles, Chief Executive Officer, The Strategist Group Pty Ltd

CHAIRMAN—Welcome. The committee prefers that all evidence be given in public, but if at any stage of your evidence or response to questions you wish to respond in private you may request of that of the committee and we would consider such a request to move in camera. We have before us your written submission, which we have numbered 23. Are there any alterations or additions you want to make to the written submission?

Mr Abbott—No, not at all.

CHAIRMAN—I invite you to make an opening statement, at the conclusion of which we will have questions.

Mr Abbott—I do not want to spend too much of the committee's time dragging over elements of the submission. I think it is a very invidious position you are looking at. It seems that, whichever way you go, someone is going to particularly lose out. If we look at self-managed super funds, they have had unprecedented growth in the last eight or nine years. They are now commanding around about $125 billion in superannuation assets. If you look at the latest Treasury estimates, that works out to around $2.5 billion of tax concessions each year afforded to self-managed superannuation funds. From that perspective, there are about 500,000 people in those self-managed superannuation funds. Most of them are generally high net worth people. I will probably refer back to them. A lot of them are fairly sophisticated. Some of them are not necessarily sophisticated. For the most part, the growth has been driven by the accountants. I would certainly put the fact that I do not think that accountants necessarily should need to be licensed in providing self-managed superannuation fund advice. I think to do so would create an expense. I hark back to the committee's original report that the licensing is an expensive process. They do already have professional indemnity cover. I think there are some fairly important issues there.

However, I think there are some important issues if we go back to FSRA. I know the accountants have taken the spirit and intent of the FSRA. Three issues that need to be taken into account are competent standards, product disclosure statements and compensation. From our perspective, going back to what you were talking about before, Senator Chapman, the way the regulations are drafted at the moment in fact forces accountants to recommend self-managed super funds without a balanced view. I think it is extremely dangerous.

Currently, there are about 130,000 self-managed super funds with less than $200,000 sitting in them. If you look at that, it is generally recommended that if you have less than $200,000 it is not an economic position; it is not a beneficial statement. What we will end up is a lot more of these funds, which effectively would be established with fairly small and minimum balances. I think you need to have the accountants, who are trusted advisers, need to have a balanced view. How you fit that into the spirit and progress of FSRA is important.

In terms of self-managed super funds, and superannuation for that matter—I think I would be welcome to extend it to superannuation products per se—quite extensive competency standards have been laid down by the Australian National Training Authority. I think it may be a recommendation, or certainly one way around it, that provided accountants need to meet those standards for providing advice on superannuation or self-managed super funds. The accounting bodies—the Financial Planning Association and the Taxation Institute as well as the Taxation Office—have spent nine months or the last nine months building those competency standards for anyone who provides advice on self-managed super funds. My feeling is that, if at least someone—it does not matter what side of the fence they come from, be it a member of the Taxation Institute, the ATMA or a financial planner; it does not make any difference—meets those competency standards, I think consumers can probably be safeguarded, which is really the big issue around that.

In relation to product disclosure statements, you did go down the track of talking about industry based funds and so on and so forth. If they have the competency to recommend those, then I believe they should. This is provided again they have given a product disclosure statement. The FSRA is about the individual making an informed choice. Let them make the informed choice. Generally, you find accountants will not push things. They will essentially allow the client to make a decision. Provided the client is provided with all the information, I think that is appropriate.

The final point I would probably talk about is compensation. Currently, if something goes wrong with an accountant, the only way to address the matter is to actually take an action in the Supreme Court and sue the accountant for negligence to recover any compensation. That is an extremely expensive process and will set you back at least $15,000 to $30,000. I know that the accounting bodies have disciplinary committees. My feeling is that it would probably work if we could see the accounting bodies—because they are working in unison in this—set up a compensation or claims tribunal for people who feel they have been wronged in terms of the provision of superannuation advice or, alternatively, self-managed super fund advice. That way, you get the strength of FSRA without the necessary need for licensing.

In the submission, I have actually redrafted 7.1.29A which encompasses those three aspects. I feel that it probably would suit most of the bodies provided that it gives those safeguards. It certainly goes back to what Catherine from ACA was talking about.

CHAIRMAN—Thanks, Mr Abbott. Are the competency standards to which you refer in effect FSR competency standards?

Mr Abbott—No. If you look at it, the National Finance Industry Training Authority Board set down standards for an industry. In fact, they have actually set down quite a raft of standards for the accounting industry. They are about accounting, such as what a junior accountant does. The self-managed superannuation funds standards were set down by industry—and, as I said, all of industry, quite irrespective of FSRA. The point is that I suppose in the modern world we live in we expect certain standards.

It is certainly worth while getting Dean Sanders from the NFITAB to give evidence or a submission. It is quite an extensive process working out the day in the life of a self-managed super fund adviser. That includes an accountant who is providing self-managed super fund

process. What is the process they go through? With those particular standards—and they are minimum competency standards—my feeling is that, if they were used as a base, at least consumers can say, 'This person has met those standards.' I could well imagine that the institute and CPAs would end up with a group that would have separate specialisations, that they have met these competency standards with self-managed super funds.

CHAIRMAN—Does this mean in effect now we have two sets of standards? We have these national training standards that you refer to, which relate to self-managed superannuation funds, but we also have the FSR standards promulgated to ASIC's policy statements, which also relate in part to them.

Mr Abbott—They actually relate to superannuation. The standards you are talking to for self-managed super fund advice sit well and truly outside ASIC. So it has nothing to do with ASIC. ASIC have endorsed it. If a licensee or a dealer group, such as a financial planner or the gentleman before, provide self-managed super fund advice, there is a particular policy statement by ASIC saying that, if there is a national industry standard, the licensee is required to utilise that standard for competency and training. It certainly does not sit on the ASIC register. Again, a lot of work has been spent—thousands of hours—to develop this broad brush, pretty comprehensive set of standards applying to anyone providing advice, including accountants, tax agents and anyone along those lines.

CHAIRMAN—Is this standard limited to the structure of superannuation funds?

Mr Abbott—Structuring only.

CHAIRMAN—So it does not relate to investment?

Mr Abbott—No. I am neither an accountant nor a lawyer but I am a specialist self-managed super fund adviser. From my perspective—and it is the same with the accountants—you are looking at the structural side of things. If you step over the line, I quite agree you should meet the relevant ASIC standards.

CHAIRMAN—I want to clarify that. This training standard you are talking to is about structure only?

Mr Abbott—Correct. I have before me the set of laws relating to superannuation. They are quite extensive. There are 3,200 pages of them. Those standards go to the structuring aspect of those particular laws. So it has nothing to do with investment. One of the aspects there is that it allows the accountant to check the investment strategy put down by a financial planner in terms of a self-managed super fund to see that it actually meets the sole purpose test. I think the Taxation Office is looking at this, but effectively there is a large carrot inside a self-managed super fund. We all should stick to that. Accountants have been driving it hard. But, with $2.5 billion in tax concessions, it is important that accountants are provided with that ability to provide structural advice.

Another way I would go is that my inclination of what you were talking about before, Senator Chapman, is that I think it has to be extended to superannuation products. However, I would say that we do not get hung up on structure. If we use the concept of 'structural', a unit trust for a

managed fund is a structure. So there is no difference between me investing in an industry based fund and a managed fund. If we go back and say, 'If you meet these relevant competency standards,' you should be given the right to advise in this area. In fact, I would not be surprised if the institute and the CPAs are not adopting those mandatory standards for their members anyway.

CHAIRMAN—That is what I was going to ask. To what extent is this NFITAB training requirement currently incorporated in the professional development processes?

Mr Abbott—It is not at the moment. At this stage it has been finalised. It has gone out to all the relevant state vocational education training advisory bodies and will be coming out in June as a final endorsed standard. I think it is important. I am not sure, but if the institute and the CPAs adopt that and say, 'Look, only members have met that standard,' I think everyone has won. You can say that financial planners have to meet the standard, these guys have to meet the standard—everyone has to do that. It makes your role a lot easier because you can bring the tax agents in. But the issue about that is that there has to be some sort of credos to actually get them to do that. If you make the regulation and then they do not put the standard in, it actually weakens the whole process. Instead of talking about accountants versus financial planners versus tax agents and all that, it is more about, 'Well, let's have a look at the context of the FSRA. If it's about competency standards, consumer relief and protection, take it from there.' Licensing is then a secondary issue if you then draft the appropriate regulation to meet those criteria.

CHAIRMAN—So you are saying it is the competency, not the licensing?

Mr Abbott—If someone knows that and they are competent—the licensing is not the issue. Is the person in front of you competent to achieve their particular goals? If there is an industry standard there, that is the test of whether someone meets an industry standard. I am presuming there, for example, for professional indemnity insurance, that if they do not meet an industry standard they are not going to get coverage anyway. It is pretty obvious. You can tell whether you are negligent or not by testing against that industry standard. These industry standards are 50 pages long. They are extremely extensive.

CHAIRMAN—One of the issues that was raised by the accountants in our hearings on 7.1.29 and arguments against the requirement to be licensed was the time and the cost involved in obtaining the level of training that ASIC might regard as necessary. It is the cost of that and then the cost of getting the licence. What time and cost would be involved in meeting the competency training standard?

Mr Abbott—For example, the Securities Institute of Australia has a current course that goes for four days. It is designed to meet the NFITAB standards. The Strategist Group whom I belong to has a 10-day course, but it is set at an extremely higher level from that. In addition, I would have thought that the Institute of Chartered Accountants and the CPAs could develop their own program whereby accountants who have worked and had experience in the area could submit current work being performed and then that work can be assessed against the relevant competency standards. There may be very little work required simply from someone signing off the audit file. It is called recognised prior learning in terms of training. If someone has had 25 years experience and they have had a good breadth of the law, they already do statements of advice for most of their clients, and if they have evidence to show that, my feeling is they do not

necessarily need to do training. Again, I would hark back that you have a chat with NFITAB and Dean Sanders there, who drove the whole process for that period of time. Again, ASIC was involved and the ATO, I think, in that competency. Certainly the tax office would probably be quite happy about it as well.

CHAIRMAN—You mentioned a high percentage of self-managed funds having a lower level of assets than is regarded as being viable for the operation of the fund. To what extent is that due to the fact that a lot of funds have only been set up in recent years and they are making annual contributions but they have not yet got to that level but will within a few years?

Mr Abbott—I quite agree. I think it is a misnomer. That is a throwaway comment, with all due respect. It depends on a person's position. For example, inside my fund, I have got $200,000. Ostensibly, it looks as though I fit into that context. I have developed my fund mainly for future retirement planning but also for my life insurance or estate planning. In the event that I die, my children get a very tax effective income stream to be looked after. That is the purpose of it. If there is a fund that is set up for, say, someone who is 65 who has $200,000, although there are quite a number set up at this present time in order to access the age pension to get the assets test exemption inside self-managed super funds, which will presumably drop out shortly anyway, it may not be the requisite thing.

I am not saying accountants push these, because quite often clients go and read something and say, 'I don't want to have anything to do with a fund manager because they are expensive, they rip me off,' and so on and so forth, 'so I want to go and do it myself.' Probably the worst case is a lot of people are truly doing it themselves and the accountant is simply having to pick up the pieces 18 months after something has happened. Then quite draconian penalties may apply to the clients. It is a tough area to be in. Going back to what you were saying, I think that, if you just keep the regulation as it is, it is extremely unclear in its effect. More importantly, I think it is just going to drive accountants to setting up self-managed super funds without a proper consideration of all the superannuation needs. That is my personal perspective.

CHAIRMAN—Another issue that has been raised with me in relation to self-managed funds is that accountants will set the structure up, because it is tax effective and the other advantages, and the cash goes in but then there are no investments made. Under FSRA, accountants cannot advise on investments, so the cash just sits there and is not actually being put into appreciating assets.

Mr Abbott—I think, if you look at the statistics, you will find that is not the case. The statistics looked at by the tax office and APRA effectively show there is only about a 20 per cent cash component.

CHAIRMAN—Can you excuse us for this division?

Mr Abbott—Sure.

Proceedings suspended from 6.17 p.m. to 6.26 p.m.

CHAIRMAN—I think Senator Wong has some questions.

Senator WONG—Mr Abbott, I have just read part of your submission. I want to be clear about what you are actually proposing. You are saying that you would accept the carve-out or the carve-out would be reasonable provided that first PDS be provided in relation to the financial product being sought.

Mr Abbott—I think the key issue is what benefits and entitlements the particular client would be getting. More important, I think the key issue is what are their responsibilities and downsides if they make a mistake. I think that would help the accountant in making sure they are going to keep themselves compliant and, more importantly, the potential costs and fees. They are the sort of issues that would form part of the PDS.

Senator WONG—What do you think might be the response from the accountants about the compliance with that requirement?

Mr Abbott—As the FSRA is drafted at the moment, trustees of self-managed super funds are required to provide a PDS anyway. Generally—and there has been a lot of research based on this through the tax office and the ASX—mum and dad trustees rely on their accountants to provide them with compliance advice from that perspective. There is also a danger anyway with the way the FSRA works where if the accountant recommends to a trustee of a self-managed superannuation fund to establish one and then the trustee themselves do not issue a PDS themselves—it is ridiculous but that is the way it works—effectively under the criminal code the accountant will be liable for the same penalty. It is effectively embodied in there as well.

Senator WONG—So what you are proposing in terms of that additional requirement is a PDS being provided to the client in relation to the SMSF. You do not consider that to be too onerous on the accountant?

Mr Abbott—No, not at all. I think it is essential in the fact. I am sure accountants who are coming up probably well and truly would see that as best practice anyway.

Senator WONG—They would see it as best practice, you say?

Mr Abbott—Yes.

Senator WONG—I want to move to the issue of competencies. I think you said about four days was one of the courses provided by one trainee.

Mr Abbott—The Securities Institute of Australia. There are a number coming around. Once the final standards are endorsed, my assumption—I cannot speak for the Institute of Chartered Accountants and the CPAs—is that they would also have similar courses to meet those specific standards.

Senator WONG—In your view, do you think one would need, as an accountant, to have attained those competencies in order to properly advise in relation to SMSFs?

Mr Abbott—That is what the accounting bodies said. They had a hand in drafting those standards. They are the ones who actually spent a lot of time developing those standards. I am presuming—

Senator WONG—That they got it right.

Mr Abbott—It is not only them. ASPA also had a big hand in it, as did the tax institute and the Australian Taxation Office. The process of it is that it is an industry standard that everyone has to sign off on before it gets promulgated. It was not something that just happened overnight. A lot of work went into looking at how a person conducts their self-managed super fund structural advice business and has taken it from there. Again, as I said before, I presume that the associations would effectively endorse them anyway.

Senator WONG—Are you aware that there is a proposition for a greater carve-out? You may well have covered this. I am sorry if I was not here for that evidence. What is your view about that? What further change to the proposed regulation would you envisage being required in that event?

Mr Abbott—In the submission I made, I made a redraft of 7.1.29A to cover some of the things I saw. When I started making the submission, I started putting in superannuation product. My feeling is that, as it stands at the moment, I think it is heavily biased towards self-managed super funds. Personally, I do not mind that, but I do not think it allows the accountant to give a balanced view in that regard. If the accountant has met the relevant NFITAB standards for providing advice on self-managed super funds, those standards are well and truly so much higher than the public offer—to provide advice on superannuation—because they are structurally based. My feeling is that with those standards, if they stand, the accountant should also be able to advise on the general superannuation product—does that make sense?—because it is of a lot lesser standard.

Senator WONG—Provided they have the competency standards that you referred to?

Mr Abbott—Correct.

CHAIRMAN—When you are talking about product, are you still talking about structure or the investment?

Mr Abbott—No. I am talking about structure.

CHAIRMAN—So whether it is a self-managed fund or an APRA fund or whatever?

Mr Abbott—Correct. You will find that with most industry based funds, most commercial funds, when you go in, there are a range of investment choices. The accountant should be there explaining. They should not be explaining what the investment choices are. They do not do that in the self-managed super fund. They should be saying, 'An industry based fund does this. It's cheap. It does this, it does that', and so on and so forth, 'and structurally this is what it does.' You can say it because you can say, 'Look, with an industry based fund, under that structure you have one pension option, which is an allocated pension and maybe this growth pension; but, under a self-managed super fund, you could run a lifetime complying pension. You can run a fixed term pension.' You have a lot more choices. Then the client is aware of both. The problem with it is that if you do not do that, you are not giving balanced advice. Does that make sense?

I would also argue the reverse is the case. I think there is a danger under the current FSRA. The Financial Planning Association was saying that, if a financial planner sits down and just talks about industry based funds without talking about self-managed super funds, there is a lack of balance in that sort of argument too.

Senator MURRAY—It is a very similar problem.

Mr Abbott—It is. The client is not getting the full amount of information for them to make an informed choice, which is especially what we are seeking to do here, which is consumer protection. I think that is where it comes down to. As I said, the standards will get you a long way because they are extremely high. Out of all of the financial services industry, they are set at a high standard. It would be very unlikely, for those practitioners operating in this area, that the ACA would ever be able to do a study on what people are doing wrong. You feel proud that people are not going to be dodgy with them.

Senator WONG—The proposed changes to the regulation that you would suggest, which relate to the competency standards, are equally applicable to the possibility of a greater carve-out?

Mr Abbott—Correct. I would change the word to 'superannuation product'.

Senator WONG—And what about the provision of the PDS?

Mr Abbott—At the moment, the trustee is required to do the PDS. The determinant of what costs are going to be involved is the accountant. The accountant is not required to do the PDS if they are not licensed. My feeling is that if you put the product disclosure or state these are the costs involved and so on and so forth, it will get you back to having a balanced view.

Senator WONG—That is in relation to—

Mr Abbott—A self-managed super fund or a superannuation product.

Senator WONG—So if there were a carve-out in relation to other structures of superannuation, you would also suggest that the requirement to provide PDS be retained?

Mr Abbott—Yes. I am thinking about the flipside if you are trying to get that broader carve-out going.

Senator WONG—Well, no, I am not. I am aware of the politics of this.

Mr Abbott—I am trying to stay neutral. I am looking at the protection to the consumer. If you do end up with it, you will end up with a situation where FSRA applies in a situation externally. From my perspective, if you have a broader range of the superannuation product, you need to have a PDS and likewise a self-managed super fund, so you can compare apples with apples.

Senator WONG—I have one last question. What would the accountants' view be, do you think, about how onerous the requirement to provide a PDS would be if a broader carve-out were granted there?

Mr Abbott—If there is a broader carve-out, I would not have thought it is going to be that onerous for them. I am just talking about self-managed super funds at the moment.

Senator WONG—The PDS for an industry fund will already have been prepared, will it not?

Mr Abbott—But if you carve it out from the accountants, there is no requirement for the accountant to give a PDS.

Senator WONG—That is what I am saying.

Mr Abbott—My feeling is about why you need to have the PDS in there. If you did a broader carve-out, by putting it in as I have put it in the 7.1.29A, it forces the accountant and anyone else who comes into that carve-out to give a PDS around the particular other funds they are talking about and recommending.

Senator WONG—If you go to an accountant under your scenario, would he or she, if they were recommending, say, an industry fund, not utilise whatever PDS the industry fund has produced?

Mr Abbott—Yes, they would. That is what I am saying.

Senator WONG—So it is not particularly onerous. You are saying there should be a legal obligation on them, if they want the benefit of the carve-out, to say, 'Here is the PDS'?

Mr Abbott—Correct, yes. The person who is required—

Senator WONG—That is what I was checking.

Mr Abbott—The person required to draft the PDS—

Senator WONG—Is the trustee?

Mr Abbott—is the trustee. If you are talking about a self-managed super fund, this is where it gets ridiculous.

Senator WONG—Fine. I understand. Thank you.

Mr Abbott—And the accountant, if they want to get the carve-out, I think they should. It gives a broad perspective.

CHAIRMAN—The amendment as you have redrafted it does not have that broader carve-out, does it?

Mr Abbott—No.

CHAIRMAN—But you are comfortable with a broader carve-out?

Mr Abbott—Yes. Just change the words 'self-managed super fund' to 'superannuation product'.

CHAIRMAN—Structure?

Mr Abbott—No, superannuation product.

Senator WONG—Let us not get into a legal argument about how to draft a regulation. I think we understand where you are coming from, Mr Abbott. You are saying the same additional protections that you are trying to get at in this regulation would work equally well for a broader carve-out?

Mr Abbott—Correct.

Senator WONG—Thank you.

Mr Abbott—Because it does exactly the same thing. It could be extended to the taxation bodies as well. I would also put in the legal fraternity as well in the same way that lawyers do not necessarily have skills in self-managed super funds, but, if they meet those competency requirements, they have a level playing field. If the industry has set down a standard and the standard does not work, what do you do? You complain, and then you raise the standard.

Senator WONG—Thanks, Mr Abbott.

Senator MURRAY—The accounting bodies have detailed the following consumers' protection measures, which I assume they mean apply to all accountants. They are minimum education standards of at least 2½ years full-time study in accounting and in most instances a three-year degree in accounting plus additional professional postgraduate accounting standards. Next is a minimum of 40 hours structured continuous professional development each year. Third is the requirement to hold indemnity insurance cover of at least $250,000. Fourth is the requirement to be subject to quality assurance audits. There is then the accounting bodies' investigation and discipline procedures and members being subject to high standards of ethical and professional behaviour as set in the code of conduct and related professional pronouncements of the accounting bodies. What interests me in that list relative to your competency recommendation is the minimum of 40 hours of structured continuous professional development each year and the requirement to be subjected to quality assurance audits. It seems to me your recommendation could fit within those quite well.

Mr Abbott—Definitely. Let us say we come up with a standard where the Institute of Chartered Accountants or the CPAs come in and say, 'Look, if you practice in self-managed super funds, you are required to do, of those 40, 15 hours of study specific to the provision of self-managed super fund advice that meets within those competency standards'. I think are you sitting down and fitting within there. Does that make sense?

Senator MURRAY—That would specifically apply to those who were not licensed under the FSRA?

Mr Abbott—Correct.

Senator MURRAY—Those who are licensed would not have to do that?

Mr Abbott—I would have thought that for the accountant to say that they have met specialist self-managed super fund competency standards would be a bonus for them because there are standards laid out. As you said, they say, 'For part of these 40 hours, I am dedicating my specific time to providing advice in this area.' It means that, when the client goes along, the institute or the accounting associations have that stamp on it saying, 'Look, these guys are self-managed super fund specialists', and we know they meet a certain minimum competency standard.

Senator MURRAY—Given your expertise, let us assume the accounting professions have developed these competency programs and have them properly accredited, and an accountant goes through it. The next step is to audit them. That is the requirement to be subject to quality assurance audits. How would that work? Who does it? How do they do it?

Mr Abbott—I am not sure. That would probably be something that would be directed towards each association.

Senator MURRAY—How would you see it being done?

Mr Abbott—What I would see—and I think the issue you raise is really important—is that I do not think you need an external body. If you go back, the associations need to have quality assurance themselves. Over a period of time, the people are subject to peer review in terms of their work papers. The thing is that, if you have a competency standard, it is very easy to do peer review. I could take someone's statement of advice. It would only take me five minutes to see whether it matches up against a competency standard.

Senator MURRAY—Tell me how practically that would work in your mind. Somewhere in country New South Wales there are a couple of small accounting firms. It might be a small country town with maybe 5,000 or 10,000 people. There might be a couple of accounting firms. They have gone through the competency standard. What physically happens to do a quality assurance? Do they have to travel somewhere, or does somebody come to see them?

Mr Abbott—Generally, the biggest quality assurance program ever is run by the tax office. The tax office audits these funds. When they audit the funds, with all due respect to the Institute of Chartered Accountants, the quality assurance comes from the tax office.

Senator MURRAY—But that only happens occasionally.

Mr Abbott—The commissioner has come out and said that he is going to audit every fund within the next five years.

Senator MURRAY—All quarter of a million of them?

Mr Abbott—Yes, all quarter of a million. In fact, in the last budget you guys allocated an extra $30 million of resources to them. Their audit teams have grown from something like 30 to 110. So they are the ultimate quality assurance, I can tell you, from our perspective.

Senator MURRAY—But they do not do it formally; they just do a tax audit.

Mr Abbott—I am having a bit of jest there. I think that you can use the same methodology the tax office does, which is that in relation to this client a whole checklist of material needs to be sent to the tax office. I presume the accounting bodies would do the same thing. So they do not have to leave. If someone is in Kalgoorlie, they do not need to leave their office. They simply get the file tidy—in fact, it would be good—send it to Sydney or Perth or wherever they are going to do it. Someone can then go through from a quality assurance perspective and see how it assesses against the competency standards. That is like a pre-audit before the tax office. It also helps the body. They know the people have met those standards. If the tax office comes calling, they should be quite happy that those people have met the competency standards and they have a squeaky keen reputation.

Senator MURRAY—How many hours of effort does the person who is being audited have to put in to meet a good quality assurance?

Mr Abbott—If you are going to do a good quality assurance, an average number of funds for accountants is about 40, although about 9,000 have five or six funds. If their audit files and work papers are relatively up to date, I would say it is not going to be a huge amount. It would only be in the instance where someone is falling behind or their business systems and processes are not meeting the requisite standards that they would need to do a lot of work to get them up to speed. But in that instance they would fail the competency standards anyway. Do you understand what I mean? If someone has met the competency standard, which talks about the documentation you need, it should not be that difficult a process to send a file off and get it checked against what is required.

Senator MURRAY—You know what will happen. If we said, 'This is a bright shiny idea. Let's recommend competency standards', the accountants will all come out and say, 'Hey, this is going to cost us 10 hours a year at $100 an hour. That is $1,000.'

Mr Abbott—I can see the committee is between a rock and a hard place. You are never going to win, with all due respect. The thing about it is by taking the competency level, all the accounting associations, the tax office and everyone has signed off that these are our minimum competency standards for anyone providing advice. So I do not think you need to say this is absolutely necessary. All I think you have to do is provide the standards or meet the relevant standards that the accounting bodies have signed off and are endorsed by the Australian National Training Authority.

Senator MURRAY—And it is within a structure that they themselves have already set up?

Mr Abbott—Correct. It is within the structure.

Senator MURRAY—That is the attraction of it for me. That is all I have, Mr Chairman.

Mr Abbott—I think that way you will meet consumer protection. With all due respect, it may weed out some of the lesser lights in the accounting profession. But the competency standards will do that anyway.

CHAIRMAN—There being no further questions, thank you very much, Mr Abbott. You can see from the extensive questions we have had that you have been very helpful for our deliberations.

[6.47 p.m.]

ARNHEIM, Mr Richard Throsby, Certified Financial Planner, Godfrey Pembroke Ltd, Investment and Financial Services Association

DRUMMER, Mr Christopher John, Manager, Government Relations and Policy, MLC Ltd, Investment and Financial Services Association

CHAIRMAN—Welcome. The committee prefers that all evidence be given in public. However, if at any stage you wish to give part of your evidence or responses to questions in private, you may request that of the committee and we will consider such a request to move in camera. We have before us IFSA's written submission, which we have numbered 10B. Are there any alterations or additions you wish to make to the written submission?

Mr Drummer—No, there are not.

CHAIRMAN—I invite to you make an opening statement, at the conclusion of which we will move to questions.

Mr Drummer—Thank you. IFSA thanks you for the opportunity to appear before the committee. I will give a brief statement, as you offered. My colleague Rick Arnheim, who is also a CPA and a member of the Institute of Chartered Accountants and a CFP, will give a brief outline of his experiences on both sides of the two different types of professions.

IFSA represents the retail and wholesale funds management and life insurance industry and has over 100 members who are responsible for investing approximately $655 billion on behalf of over nine million Australians. Under the Financial Services Reform regime, consumers enjoy the benefits of a range of important consumer protection initiatives, including a rigorous new licensing regime. The basic tenets of the FSRA include conduct and disclosure requirements, a single licensing regime and minimum levels of training for those giving financial product advice, as outlined in PS146. IFSA is opposed to the granting of broad exclusions from the fundamental aspects of the FSRA consumer protection regime, especially where such exclusions relate to the provision of advice and superannuation.

IFSA is of the view that all market participants who provide financial product advice, including forms of superannuation, must be licensed under the FSRA. Accountants wishing to give such advice must be licensed under the FSRA. Many accountants have chosen to do so already. An example of this is Rick Arnheim. I understand previous evidence was given that approximately 25 per cent of financial planners have accounting qualifications. We wish to work with accountants in that endeavour, sharing our respective but separate areas of competence for the benefit of the consumer. We are strongly of the view that any further carve-outs from the FSRA licensing requirements would be damaging to the integrity of the consumer protection regime as a whole, particularly where such carve-outs relate to the provision of retail consumer advice in the area of superannuation.

Licensing is the first line of protection for consumers and should be required for all parties providing advice or recommendations of any kind to retail consumers, including small business proprietors. While there have been amendments to regulation 7.1.29 and specifically 7.1.29A dealing with the extent to which recognised accountants can give advice and deal in self-managed super funds, there continues, we understand, to be lobbying to extend the lobbying exemption further to all superannuation products. To extend the licensing exemption further, however, goes beyond the terms and spirit of what was intended to provide a uniform level of licensing and therefore consumer confidence in the financial services regime.

Such extension, we believe, is untenable for the following reasons. The first is regulatory fairness. The regulatory and compliance obligations borne by part of the community giving advice and not by others creates an unlevel playing field. Four of IFSA's largest members have together spent $100 million complying with the FSRA and to ensure ongoing monitoring, supervision, training and other obligations are met. Exempting one group creates inequity and competitive disadvantage against those who have to comply. The requirements of the FSRA and regulatory policy relating to financial adequacy, uniform level of minimum competence, consumer access to a free external dispute resolution service and all other Australian financial service licence conditions must be met by all those who give financial product advice.

The second reason for our arguments is based on consumer protection needs. The Corporations Act at chapter 7 contains numerous provisions aimed at providing a uniform level of consumer protection by financial service providers. This is federal legislation, not self-regulatory provisions. By exempting one sector of the industry, the very principles of law are potentially being eroded. It is considered this will produce a very poor outcome for consumers. Section 912A of the Corporations Act requires amongst other things that those who provide financial services under an Australian financial service licence must, firstly, ensure all representatives are trained in the provision of financial services and are competent to provide those services. This is described in ASIC's policy statement 146, which follows the competencies set down by the Australian National Training Authority, or ANTA, as minimum levels required in each specified field of financial product advice, which includes both the core knowledge in the financial sector and specialist knowledge areas, including superannuation and self-managed super funds. These competencies can and do differ from those in other financial services professions, such as accounting.

Secondly, it is a requirement to comply with the financial services laws. Thirdly, it is a requirement to have adequate resources, including financial, technological, human resources and to supervise the activities of representatives—representatives, not just authorised representatives. Appropriate financial services resources are detailed in PS166, for instance, requiring three months reserves of normal rolling expenses.

Fourthly, it is a requirement of the dispute system resolution, which includes an internal dispute resolution mechanism, and membership of an ASIC external dispute resolution mechanism, such as FICS. Further, section 912B requires that the licensee has adequate compensation arrangements in relation to financial services provided to retail clients. Until Treasury finalises its position on compensation, the old provisions apply, such as the requirement to maintain a security deposit and/or professional indemnity insurance to a prescribed limit.

Section 912D provides an obligation to notify ASIC of certain matters, such as breaches of licence conditions. Section 912E requires a licensee to assist ASIC in any surveillance checks. Additionally, authorised representatives must be recorded on ASIC's public web site for access by consumers. Any further extension to the exemption from licensing will deny retail consumers access to the protection afforded by the above provisions of the Corporations Act. This is clearly not in the consumer's interest or that of the government. An exemption for all superannuation will allow recognised accountants to advise on the acquisition and disposal of such vehicles, including, say, rollovers, and cover the investment implications of such products without the consumer and regulatory provisions or the core or specialist skills and knowledge. I would like to talk further in a few minutes on the issue of structures that we have been talking about.

CHAIRMAN—Mr Drummer, the purpose of the opening statement is to be relatively brief, just to introduce your submission. It is starting to get a bit long. You say you want to talk about something else in a few minutes. I ask you to make it reasonably compact.

Mr Drummer—In that regard, I might hand over to Rick Arnheim. I would like to come back to a couple of issues, such as structures.

Mr Arnheim—I will attempt to be brief. My background is in chartered accounting. I started life with Peat Marwick Mitchell and then KPMG in their audit and tax divisions. In 1980, I joined a small aggressive tax planning firm and established my own accounting firm in 1985. I founded that firm on the basis that I could assist my clients achieve financial independence. My view was that accounting practices generally were not doing it. They were very, very focused on getting tax outcomes for their clients. They were not focused on the big picture of assisting them to achieve financial independence.

My experience has been that the historical and tax focused nature of accounting does not provide the necessary discipline to achieve long-term financial wellbeing for clients. In contrast, the financial planning industry is focused on the future achievement of long-term goals. I think the two disciplines are quite separate.

From 1985 until 2000, I conducted both an accounting taxation firm and a financial planning firm to achieve those wealth objectives. The accounting firm was sold in the year 2000 and enabled me to focus exclusively on assisting clients in their financial planning matters. The accounting firms that I work with were very focused on achieving these favourable tax outcomes without cognisance of the wider ramifications of capturing those savings for investment and long-term wealth creation on a personal level. The training I undertook under the auspices of the accounting bodies was appropriate to advise on the selection of legal structure. It gave me the tools to make a decision on whether we use company structures or unit trusts or self-managed superannuation funds or superannuation in general. However, the application of risk management and investment principles for the individual are entirely a separate and specialised field.

This debate goes, I believe—I do not mean to be dramatic—to the heart of the national savings and the heart of future national savings and the ability of future retirees to maintain a reasonable standard of living in retirement. We have legislation to promote this objective. All players must operate within the legislation to achieve this essential goal. I believe only authorised persons—FSRA qualified—should be able to perform financial product advice.

CHAIRMAN—Thank you. Mr Drummer, you wanted to add some final points?

Mr Drummer—Yes. The issue tonight seems to have turned largely on the issues of structures as opposed to the underlying investments. I am just wondering if I could turn back, without having received full legal advice on this, to really where we are coming from with regard to a couple of sections in the Corporations Act.

If we come back down to the definition of financial product advice under section 766B(1), it means a recommendation or statement of opinion or a report of either of those things that is intended to influence a person in making a decision in relation to a particular financial product or class of financial product or an interest in a particular financial product or class of financial product or could reasonably be regarded to have such an influence. Some of the discussion tonight where accountants might have slightly erred to that extent where it could be intimated they are reasonably giving such advice would be in breach of the Financial Services Reform Act, or chapter 7 of the Financial Services Reform Act under 766B(1) as defined.

The other issue, getting back to specify this issue of structures, is the definition of financial services product. I do not wish to bore senators, but 763A(1) says a financial services product is a facility through which or through the acquisition of which a person does one or more of the following: (a) makes a financial investment, or, (b), manages financial risk, for example, insurance. I think the current carve-out that has been provided under regulation 7.1.29A is purely with regard to that definition of financial services product, which is a facility through which the person does one of the following. A self-managed super fund is merely a facility. That is why we have no problems with the current regulation, 7.1.29A. Accountants will be able to advise on that facility but not on the underlying financial services products and investments.

It may be a matter of semantics—I think Senator Penny Wong may have raised this issue of who will do the drafting. I think the fundamental problem we might have here is if the senators appear to be heading to a direction of saying, 'Well, if you can provide advice on structures, then you're okay but not underlying investments', the trouble you have is under these two definitions. Basically, you will be okay with regard to self-managed funds and possibly with regard to industry funds, but with regard to retail funds and corporate funds, they are clearly caught because they are clearly financial services products under 763A(1), where you make a financial investment. You cannot separate the investment from what you call structure. The term 'structure' does, to the best of my knowledge, not appear to be in the legislation. The closest thing appears to be a facility through which you might operate.

The trouble the senators may have is with regard to this structure idea. As soon as an accountant gives advice with respect to a self-managed super fund, if there is an investment component or a financial services product or with regard to, say, a retail fund and says, 'I recommend you basically should dispose of your AMP retail super policy or acquire a self-managed super fund', that is clearly a financial services product. It is a product as defined and issued by a product issuer. You have to be licensed for it. Financial accountants will not be able to say, 'I recommend that you get rid of or dispose of this AMP or MLC superannuation policy or corporate superannuation policy.' You cannot compare them without giving financial product advice, which is then caught by the legislation.

CHAIRMAN—Thank you. If rather than being able to give advice on superannuation structures we talked about being able to give advice on superannuation facility, that would meet the requirements of the legislation?

Mr Drummer—I am not someone who can draft this. However—

CHAIRMAN—I think we have to leave it up to the drafter. We need to express the intent of what our recommendation is. We will leave that to the drafters.

Mr Drummer—The sections there are 766B(1) and 763A(1), where you do have financial services products defined. The difficulty you have will be separating somehow what is this financial services product from the underlying investment. In one case with self-managed super funds, you can because in the definition it is a facility. But in all other products you will be caught because the investment is inherently part of the financial services product.

CHAIRMAN—But isn't a small APRA fund a facility?

Mr Drummer—A small APRA fund—

CHAIRMAN—Is an industry fund a facility?

Mr Drummer—As I said, probably the two I thought of could be an industry fund and a self-managed super fund, without any investments at the time you speak of them, could be okay. But the retail funds and the corporate funds or perhaps an industry fund which is an existing fund which has existing investments I believe would be caught. It already has the inherent investment inside it.

Senator MURRAY—I want to explore your views on a proposition I put earlier. I must stress that I am one of those who believe the carve-out for accountants is valid. I think the law clearly indicates that if you are going to provide investment advice you must be licensed. But the structure or the facility falls within the traditional responsibilities and expertise. The problem is the grey area. In deciding what facility you would recommend your client accept, you would need to know something about rates of return, risk profile, suitability for the client profile et cetera. You are starting to get into an evaluative area. Frankly, that does not concern me because my experience of the profession is I think they make the right judgment at which stage they tell you to go to a financial planners. You heard a witness say that in his experience they do not. I want to test with you whether we should be overconcerned as to what I might describe as a grey area. Those who against the carve-out emphasise it, and perhaps exaggerate it. Those who are for it sort of minimise it. What is your attitude?

Mr Drummer—I am interpreting that as two potential carve-outs. There is the current 7.1.29A, which we are happy with. Potentially, it is a small carve-out with regard to the facilities through which you operate, which is specifically with regard to self-managed super funds. If you are referring to the wider carve-out, I suppose we are not quite sure exactly what that looks like and feels like. But if it is a superannuation facility, I do not believe there is a grey area here.

I think one of your previous witnesses—Grant Abbott—made an excellent point. He said it is very hard to purely just give advice with respect to a structure. A self-managed super fund has

some inherent qualities, such as having lifetime fixed term pensions, growth pension facilities et cetera that some of the other vehicles might not have. If you have to give advice to compare those vehicles, you have to know the underlying tax structures and how they work. Further, to talk to the client, you have to know your client well. You would have to know that they might have an existing superannuation fund but that they might be uninsurable at the moment. They may have five times salary as insurance in their current super fund, but you as a financial planner generally know the client's health history, their economic history as well as—and this is an interesting thing—their aspirations: where they want to go in life.

Without commenting on accountants, it might be just the factual information before them rather than what I call the information about their health and their aspirations of where they want to go in life. So you need to understand that. It is all pursuant to the FSRA, which is an obligation to know your client very well, including where they are going in life. Until you know all those circumstances—for instance, whether they are uninsurable now—and you get them out of one of these superannuation products and put them in another, you may be doing them a disservice because you know about their health as a financial planner but you might not know that as an accountant. You also would not know their aspirations. You perhaps would not know the position of their RBLs or their interest in lifetime fixed growth pensions and their other circumstances, such as their estate planning needs—where they want to leave their assets ultimately. Do they have binding nominations within their current self-managed super fund or do they not? All those things which might have been put in place by a financial planner, who has met the requirements of the FSRA in policy statement 146, could be set asunder by someone who focused purely on a structure without giving all that other information behind the scenes and without fully knowing the client.

Senator MURRAY—I have judged some of the opposition to this to be driven by commercial self-interest. I have no quarrel with that; people are entitled to be commercially self-interested. Recognising that neither witnesses nor senators nor the government can ever know how this thing will operate until it operates—because you cannot know everything—is there any problem with us proceeding on the basis that we have so far, with the way the act and the regulations are structured, and after a certain number of years reviewing the system, which I am sure it will be, establish whether the carve-out, if you like, the ability of accountants to operate in the way that is forecast, is working effectively or whether consumers are disadvantaged by it because competencies are inadequate and so on, and then strengthening the system later on. My feeling is what we have adopted is the precautionary principle. We cannot see it is self-evident that you need to lay on a lot of cost to people already doing a job about facilities in the way you have described them so we will leave them alone for the while. But we recognise there are those who have a counter view. How do you react to that sort of approach?

Mr Drummer—I think you made a point about self-interested groups. I suppose at first we have an interest in seven years of work that has gone into the Financial Services Reform Act, with a lot of pain and suffering and a lot of industry consultation over the seven years to come up with a structure which is basically to protect consumers. The first point, quite simply, is to give a carve-out to any particular group that will not have to comply with the licensing obligations and all other safety obligations that are described—we would be extremely disappointed with that, as I am sure others would be as well.

Senator MURRAY—But the regulations do not do that. They just say you attend to structure or facility.

Mr Drummer—The current regulation 7.1.29A we have no problems with at all. Sorry, but I interpreted your question to mean if it went further with regard to all superannuation. We have no problem with 7.1.29A.

CHAIRMAN—As it is currently drafted, don't we have a horse designed by cabinet—that is, we have a camel? How can someone advise on whether a self-managed fund is the most appropriate structure for someone unless they can also compare and contrast the other alternatives?

Mr Arnheim—Precisely. Unless you have a grip and understand the underlying products, you cannot make a decision on which is the most appropriate facility to use. Let me give you an example. If you have $50,000 or $100,000 and you decide on acquiring a self-managed super fund, you are straightaway into $1,500 to $2,000 a year in costs. That includes audit, tax preparation and statutory fees. You then have to make your investment decisions. They are also going to cost. So there are two sides of the equation. In that situation you might use a retail product. It will give you a far better cost outcome, a far better investment income and a far better wealth accumulation over your life.

So I would strongly argue that while we are saying that, yes, we accept the structuring issue, the facility, as an acceptable position, in fact it is not that clear. You have to have a knowledge of the products. To know what you will do with the money once you have it in your SMSF or, alternatively, retail products, master funds, whatever it might be, you need that knowledge to make the recommendation.

CHAIRMAN—So you do need a bit broader carve-out?

Mr Arnheim—Absolutely not.

CHAIRMAN—And it is limited to structure, not investment?

Mr Arnheim—Yes. A more defined definition of facility. It is quite dangerous. We heard tonight from Grant Abbott of 130,000 funds under $200,000. My break-even point when I am advising clients is closer to $250,000 to $300,000 for an SMSF. It depends what you are going to use it for—a complying pension, flexibility, estate planning. There is a lot more knowledge and depth that have to go into. Some of it is product knowledge, which is specifically FSRA.

Mr Drummer—I do not know if this should be an 'us and them' type of argument. We want to work with our good friends, the accountants.

Senator BRANDIS—I always get suspicious when people describe others as their good friends.

Senator MURRAY—We use the words 'with respect'.

Mr Drummer—There are differences and different competencies. Maybe we could comment a bit about the competencies you have as an accountant and the competencies you have as a financial planner. Someone else gave evidence—I can only rely on that—that something like 25 per cent of financial planners are also accountants. We believe that the three professions must work together. Financial planners can talk to a client, know their client well, know about all their needs and circumstances, perhaps talk about one of the particular products or facilities, be it a self-managed super fund or whatever the client must want. The accountant could refer it to the financial planner and say, 'This could be a client. I would recommend a self-managed super fund. Could you look at their circumstances.' The two would work together. The client would then get the self-managed super fund. The financial planner would then give the investment advice. The solicitor might set up some estate planning needs—the will and testamentary trust and anything else that is required—and the three professionals work together. In that way, the honesty of the FSRA is preserved and the professionalism of the accountants and the financial planners and the solicitors are all involved.

Senator WONG—I am really not clear, given your answer to Senator Chapman. I thought I understood what your position was. What is IFSA's position in relation to a carve-out that extends beyond the current wording of 7.1.29A to enable accountants to provide advice regarding various superannuation structures—I think that is the term Senator Chapman—

CHAIRMAN—Or facilities, as Mr Drummer said.

Senator WONG—Or facilities—that is, self-managed funds, industry fund, retail fund et cetera without the need to be licensed.

Mr Drummer—IFSA would oppose it on the basis that under current definitions you cannot separate the investment component from the structure, from this facility, for instance, in retail funds. Secondly, as my colleague Rick Arnheim might have said, you really need to understand all the structures and all the underlying complications of complying pensions.

Senator WONG—So essentially what you are saying, Mr Drummer, in what you said before, is that you cannot see how one can separate advice and assessment on the financial product—that is, the retail fund with its various investment choices and products it offers, and industry fund and self-managed fund et cetera. That advice is inherently also, you say, advice for the acquiring and assessment of the financial product.

Mr Drummer—I will clarify that. What you are saying, then, potentially is the acquisition and disposal and comparison of those structures or facilities. Would that mean that, if this carve-out were extended, an accountant could say, 'We think you should get rid of it'?

Senator WONG—You had better ask them what the carve-out should be.

Mr Drummer—You should say acquisition but not disposal when you are comparing. Will this allow an accountant to say, 'I notice you have four other superannuation policies, facilities and structures. I think a new self-managed super fund is the way to go and you should get rid of all of those other ones?' I am just talking about structure. I am not going to get involved in anything else.

CHAIRMAN—That is what they can do under this regulation. But they cannot advise them to stay in the industry fund.

Mr Drummer—With respect—if I can use that term—they cannot advise to dispose of, say, a retail super fund. With regard to 7.1.29A at the moment, all an accountant can do on our legal advice is advise with regard to the acquisition or disposal of a self-managed super fund. They cannot comment on, say, a retail fund or anything else. They cannot advise to dispose of, say, a retail fund that the client has.

Senator WONG—What they are seeking is an exemption that would enable them to do that?

Mr Drummer—Yes. Once you get into that, we would have serious concerns because you are then saying, 'You have four other investments. I am not licensed to give advice on that. I don't know you as a client. I am not aware of your health situation. I don't know anything about you potentially, but I think you should have a self-managed super fund and you should really get rid of all these other investments.'

Senator BRANDIS—So your point, Mr Drummer, is that advice like that cannot really be given in isolation from broader circumstances. If the accountants apprise themselves of those broader circumstances, there is no warrant for them being exempted at all?

Mr Drummer—That is right. The protection provisions of FSRA should prevail. When that line is crossed and they are giving financial product advice, they are comparing products and financial services products. They are looking at the client's financial needs—

Senator BRANDIS—I suppose it follows from what you say that in giving advice on that kind of broader spectrum they are really not acting in their capacity as accountants. They are acting as financial advisers. So there is no reason why they should not be treated as such?

Mr Drummer—Absolutely. We totally agree with you on that. I return to what education is required with regard to this. I know there has been a lot of talk about how onerous this would be. It is all laid down in policy statement 146. You need the core competencies and generic and specific competencies. FPA and other RTOs provide that training. It is up to the licensee under section 912A to determine what is necessary for the person. Accountants could do a course to understand those generic competencies and specialist competencies. They would have to do a superannuation course, an insurance course, something on estate planning and a generic course about the understanding of financial planning. They would then be in a position to give that advice.

CHAIRMAN—What is your view on Mr Abbott's proposal that, as long as they meet the competencies, they should not have to become FSR licensed?

Mr Drummer—Our view is this—

Senator MURRAY—With respect to structures.

CHAIRMAN—Structures only, not investments or facilities—whatever term you want to use.

Senator WONG—They do not accept that you can make a distinction.

CHAIRMAN—I know they do not.

Mr Drummer—Thank you. First of all, we do not accept the distinction.

CHAIRMAN—I do not agree.

Mr Drummer—Secondly, I am not totally familiar with Mr Abbott's course. If that course in fact covers PS146 requirements, your general competencies and special competencies, thanks very much. That is a 146 compliant course. Financial planners then would be satisfying the obligations of 146. That then is half the obligation. The other half and the other consumer protection provision, though, is the licensing requirements and the need to have all the compensation arrangements and the PI and the other things. Further, I could also say it is my understanding—perhaps Mr Abbott and others can confirm it—I believe under the regime you might be proposing, because an accountant would not be licensed, there would be no obligation to hand out an FSG or an SOA. We would have grave concerns about that.

CHAIRMAN—Isn't it illogical or almost untenable for a client to front up to their accountant and say, 'Look, I think I should do something about superannuation. Should I go into a self-managed fund? What should I do?' And the accountant looks at the situation and says, 'Well, you're not really going to have enough money to reach the viable level for a self-managed fund.' The client says, 'Well, what should I do?' The accountant says, 'I can't give you any more advice. You've got to go and talk to someone else.' That is just crazy.

Mr Arnheim—The commercial reality is that most accountants would then have someone they would be happy to introduce them to to seek that advice.

CHAIRMAN—But that is doubling up. I do not want to have to do that, quite frankly. I am quite happy to go and talk to my accountant.

Mr Drummer—But when it comes to advice on estate planning and whether you have a will and a testamentary trust with children under 18, where there could be some facilities there of use to them, would you turn to your accountant for that advice as well?

CHAIRMAN—No. I would probably go to a lawyer about that.

Mr Drummer—The profession which is equal to the accounting profession and legal profession is the financial planning profession. It has that segment and gives the advice on financial services.

Senator BRANDIS—Perhaps you will agree with this, Mr Drummer. I see great difficulties in an environment in which you have three professions which, from different perspectives, are offering somewhat similar services and species of advice having different compliance requirements in terms of the provision of advice in a defined area—in this case, the area of which we speak.

Mr Drummer—The basic tenet, I understand, of the FSRA and why a single licensing regime was introduced is that we did have a fragmented regime. We did have stockbrokers, general insurance brokers and life insurance brokers. We had life insurance agents. We had the Insurance (Agents and Brokers) Act, the Life Insurance Act and the corporations provisions. The basic philosophy of FSRA is to say, 'Let's bring all these together. Anybody who gives financial planning advice and financial product advice will be licensed under one regime and will have the compensation provisions, will have the safety net with regard to everything.' If we start saying, 'You have life insurance agents, stockbrokers and a few others but we will put on the side accountants, lawyers and perhaps some other profession'—engineers or someone might come forward—we have basically then dismantled the FSRA and the safety net across the groups. You have specific definitions.

Senator MURRAY—Stay with this analogy: lawyers, accountants and financial service advisers. Accountants and financial service advisers cannot give legal advice. Lawyers and financial advisers cannot give taxation advice. Lawyers and accountants cannot give financial services advice. It seems very easy to me. But lawyers can advise the structure which best suits a tax scheme. That is perfectly proper. Accountants can give advice which best suits the structure in which investment should sit. That is perfectly reasonable to me. Financial advisers would surely be able to suggest to their people the sort of legal and accounting structures to which people should look and take advice on relative to their investments. If you want to go to a financial planner and say, 'I want to buy a property', he will say, 'Well, you should talk to your lawyer or your accountant as to whether you put that into a family trust or a corporation or you keep it in your partnership' or whatever. You do not see that much difficulty with it. What I am concerned with here is where you have natural competencies supported by professional training and qualification that we do not allow this new system to fit into that as easily as it might. My point really is to come back to the point I made to you earlier. Isn't it better to lay this scheme down and let it operate with some flexibility and some grey areas unless we can assess in some years time how it physically operates?

Mr Drummer—I will take your last point first. When you say 'let the scheme operate', are you saying just maintain 7.1.29A and look at that for a number of years before you go further, or are you saying give the broader carve-out and look at that for a number of years?

Senator MURRAY—It seems to me that we have to deal with market reality. Market reality is that when somebody goes to an accountant and says to them, 'I have got a heap of money and I want to know what structure or facility I should put it into', the accountant cannot say—it is impossible—'You can put it into a self-managed superannuation fund but I cannot tell you about anything else.' It is just not going to happen like that. The reality is that accountants are going to end up saying, 'You can put it into a self-managed superannuation fund, a retail fund or a master fund' or whatever. That is what they are going to do. I know they are going to do it because that is life.

What we have to be sure of is that they know what they cannot do, which I think the act is very clear on. With respect to what I have described as the grey area, we buttress that with sufficient professional training to ensure that at least they cover the basics of risk profile and so on without getting into returns and the particular benefits of a particular product. That is really where Mr Abbott was going, as I understand it. He was saying that he recognises the market reality is going to be there. Therefore, you need to buttress it with a little more assurance from

the consumer perspective. Your view, if I understand you correctly, is this will open up a great chasm in the intent of the act.

Mr Drummer—I will ask once again: is it just with regard to the acquisition or also the disposal of these other superannuation vehicles or structures? If what you are saying is widen it such that an accountant can sit down with a client and say, 'Just look at a recommended self-managed super fund. You could have a retail fund and an industry fund but I recommend a self-managed super fund', that is one scenario. But if the accountant can go the next step and say, 'I understand you already have a retail fund or some other fund and I think you should dispose of that and set up a self-managed super fund, that is a much bigger step.'

Senator BRANDIS—But the distinction is a bit artificial, isn't it, as Senator Murray rightly says, in a face-to-face real world environment interviewing a client. At the end of the day, clients only want one thing: they want to be advised and given the best advice. If the client asks the next question, just in the nature of things, the professional adviser is going to want to provide the best answer that he can provide. It seems to me, Mr Drummer, that, if you are talking about like categories of advice, it is logical that that be covered by an identical regime irrespective of the hat or professional designation of the person providing that advice.

Mr Drummer—It may be that you are looking at the academic qualifications of the accountants. We have a regime that has been set up with regard to—

Senator BRANDIS—I think I am agreeing with you. The point seems really simple to me, but perhaps I am missing something.

Mr Drummer—If I take your interpretation, you are saying that accountants give professional advice not dissimilar to financial planning advice and therefore they should be allowed to effectively because they are not too dissimilar?

Senator BRANDIS—No. I am saying that, if they give the same financial advice that financial planners give, they should be subject to the same regime.

Mr Drummer—Yes. I absolutely agree.

CHAIRMAN—I do not think any of us disagree with that.

Senator WONG—Yes, you do.

CHAIRMAN—It is not financial planning advice. It is structural advice.

Senator BRANDIS—The question is: do they get an exemption or don't they?

CHAIRMAN—There being no further questions, thank you, Mr Drummer and Mr Arnheim, for your appearance before the committee.

[7.29 p.m.]

AGLAND, Mr Reece Graeme, Technical Counsel, National Institute of Accountants

CRACK, Ms Catharine Mary, Policy Adviser, Financial Planning, CPA Australia

DAVIS, Mr Peter, Public Practitioner, Peter Davis Taxation and Accounting Services

ORCHARD, Mrs Susan Janet, Superannuation Technical Adviser, Institute of Chartered Accountants in Australia

REILLY, Mr Keith, Technical Standards Adviser, Institute of Chartered Accountants in Australia

CHAIRMAN—Welcome. The committee prefers that all evidence be given in public. However, if at any stage of your evidence or responses to questions you wish to respond in private, you may request that of the committee and the committee would consider such a request to move in camera. We have before us your joint written submissions, which we have numbered 15A and 5. Are there any alterations or additions you wish to make to the written submissions?

Mr Reilly—No.

CHAIRMAN—I ask you to make your opening statement or statements and we will proceed to questions. I ask you to keep them as succinct as possible without detracting from the points you want to make.

Mr Reilly—Thank you very much. Again, thank you for the opportunity of meeting with the committee on regulation 7.1.29A. The accounting bodies continue to appreciate the support of the committee in our respective endeavours to ensure that there is clarity in the application of the FSR licensing regime. Our view accords with the committee's last report back in June 2003 in that we are trying to ensure that any specific financial product investment type advice where the consumer can make or lose money should quite clearly be subject to the FSR licensing regime.

On the other hand, we also want to make sure that advice given by professionals such as accountants and lawyers that is not specific financial product investment advice is not inadvertently caught up in the regime. Our submission on 26 February argued that we supported the intent behind regulation 7.1.29A as we believe that structural advice or a facility—I am picking up that word now—certainly should be exempted from the regime in a like manner to other exempted advice, such as business structuring and taxation advice. I might also say that the committee is well aware of the quite detailed industry guide we have issued on that topic.

We have also raised in our submission a concern that the regulation may need further clarification to ensure that it can operate in a practical and workable manner. We go back to the committee's 26 June 2003 report, which recommended that superannuation recommendations by accountants be exempted where they refer to superannuation fund structures. We would support the committee's support for a further amendment to 7.1.29A that makes it clear that structure

advice should be exempted rather than just limiting the advice to a particular superannuation fund structure, which is a self-managed fund.

Very quickly, the other issue I would just like to leave with the committee which has been picked up by a number of other submissions is that we do support some mechanism to allow other organisations, particularly two overseas bodies, being the English Institute of Chartered Accountants and the New Zealand Institute of Chartered Accountants, to be able to use the recognised accountant provision. If those particular bodies meet those requirements, and we believe they do, that should be fine. I would like to hand over to Susan Orchard, who is a specialist superannuation adviser, who will just go through very quickly a couple of the detailed points on superannuation fund structures, which may help the committee in working its way through the difference between structures and specific product advice.

Mrs Orchard—The key thing in relation to self-managed funds is that we seem to have people concerned that there is going to be this open slather approach with lots of recommendations for self-managed funds. I would like to refer you to the fact that we do 275,000 self-managed funds in an environment where up until March this year there has been an opportunity to recommend these funds. So it has not been an open slather type approach in the past. That is compared to 1.25 million small businesses or 24 million superannuation accounts.

While this advice has not been given consistently by everybody in the past in a sensible manner, it has generally been given in a sensible manner. We have not seen this massive outflow of money from other sectors into the self-managed fund sector. The reason for the growth in the self-managed fund sector is the maturing of the market and the fact that self-managed funds have become the topic of discussion in popular press. So a lot more people are aware of them. A lot more people, particularly in the professions, such as doctors, lawyers and others, are becoming more aware of them and are looking at them as an alternative to current offers.

In relation to the relief that the regulation 7.1.29A offers, it still leaves us with the issue that, once you have set somebody up a self-managed fund, there is an implied advice that they are going to transfer moneys from other structures into it. That causes some grey areas for us. There is also the fact that a self-managed fund is not right for everybody. In a general sense, you want to be able to recommend to somebody to consider staying where they are. I think we have to also remember that 7.1.29, when you are giving superannuation advice, does require you to also disclaim that, saying, 'This isn't financial advice and you should seek further advice.' So what you are doing there is saying to somebody, 'That may be not appropriate for you. However, if you're not sure, go and talk to somebody else who is able to give you that advice.' So it is not coming as a standalone item. From a practitioner point of view, that is what I would like to raise.

Senator BRANDIS—Can I just jump in and raise something immediately from what you just recently said. To me, that seems to be very artificial. You have a client sitting across the desk from you. What they want is information about their affairs and the structures that suit them best. Depending upon who the client is, they may or may not be capable of appreciating distinctions and boundaries of professional competencies. Don't you truly think that very frequently the professional discourse is bound to trespass over that border? A lot of clients are dumb. They might not even appreciate that distinction.

Mrs Orchard—I guess as professional bodies we are educating our members as to where the boundaries are.

Senator BRANDIS—Quite. My very point is to ask you to consider it from the client's point of view, not from the professional point of view.

Mrs Orchard—From the client's point of view, I guess that is one of our issues. If clients come in and say to you, 'I've been given the offer of joining this fund or this fund. What should I do?', they are expecting us to tell them factually about what that fund can offer and what that fund can offer but cannot make a conclusion. So I can give you factual advice that might clearly point in one direction or another but I cannot give you a conclusion. That is where the clients expect—

Senator BRANDIS—Sorry to interrupt, but the moment you say to a client, 'I can give you factual advice but I can't go beyond that to a conclusion', a lot of clients are going to think, 'What's the difference between telling us the facts and telling us a conclusion.'

Mrs Orchard—I am telling you the way the law works. The law works such that if I am given the option of a retail fund, a corporate fund or a government fund, I can say to you that, in the parliamentary pensions scheme, for example, there is an 11 per cent contribution that goes in from your employer, that it is a defined benefit pension at the end and is generally quite generous in the scheme of things as compared to an industry fund, where your employer would generally make a nine per cent contribution. That is fact; that is on the record. It is the features of the fund. What I then cannot say is, 'Therefore it might be best for you to stay where you are in the parliamentary scheme.' But I could if I were licensed.

Senator WONG—It is not that you cannot say it; it is that your profession says—and I appreciate your position—'We don't want to have to be licensed.' Therefore, I say to you that you are choosing not to be in the business of giving that advice.

Mrs Orchard—That is right. If I choose to give that advice, I have to undertake significant cost to my practice. In the example of my practice, I am a sole practitioner. There is me and one other person in my office. I am looking in the order of $45,000 per annum.

Senator WONG—I understand that. Are you not here asking us for an exemption.

Mrs Orchard—No. What we are saying is—

Senator WONG—Sorry to interrupt you. Can I just clarify: the evidence you just gave seems to go, frankly, to a different issue. As I understand it, you are here asking us to (a) support the current recommendation and (b) to expand it further, but you are not asking for a wholesale exemption from the requirement to be licensed in order to give the opinion advice that you just described.

Mrs Orchard—That is right.

Senator WONG—So we do not really need to have a further discussion about how much it is going to cost you. You are not asking to be able to give that advice.

Mrs Orchard—We are not asking for an exemption from that. We are saying that in a practical sense the comparison is sometimes given between a self-managed fund or an industry fund. 'I am currently here but I want to be here. Can I do that?' The answer is, 'Yes, of course you can. But is it appropriate?' In those circumstances, just at that very high level, to be able to say, 'You may need to consider staying where you are'. Bear in mind it does come with the disclaimer that it is not financial advice.

Senator WONG—You could just say you should see a financial planner.

Mrs Orchard—I could.

CHAIRMAN—What is your response to the points that were made by some of the witnesses earlier, that with the non-self-managed type superannuation funds, you cannot really separate the structure from the product?

Mrs Orchard—I guess we are talking in a general sense. When I am talking about the structure, I am talking about an industry fund or a government fund. As government employees, there is a government fund available. As an award employee, your award may stipulate one or two award funds. We are talking about sitting at that industry fund level and saying, 'You're in an industry which requires payment to a fund that is specified in an award or multiple funds that are specified in an award. You need to go and consider those industry funds.' We then refer them to the advice. One of the issues that I do have as an adviser is who I refer people to in order to get them to tell them about the industry fund. I do not have that information.

CHAIRMAN—About the product side of it?

Mrs Orchard—Yes.

Ms Crack—From an industry fund perspective.

Mrs Orchard—From an industry fund perspective, not a corporate fund perspective.

Senator WONG—They have authorised representatives on all the industry funds and officers in all of the states and financial planners as well, who are paid for by that other body whose name escapes me right now.

Mrs Orchard—The thing is that a lot of this information is not known by the general public.

Senator WONG—It is on the web sites. I can tell you about these—

CHAIRMAN—Is this the one that Gary Weaver makes his fortune out of?

Mrs Orchard—I knew about that, but I knew about it because I work all my time in superannuation.

Senator WONG—Which does not operate on commissions.

Mrs Orchard—It is not something which lots of people who were expecting to make these referrals know about. It does not address the corporate fund issue. It does not address—

Senator WONG—Yes, I agree corporates is a different issue. I have to say that I disagree with your evidence about industry funds. I have had to refer people on many occasions. That information is readily available by web site or telephone. I have had to refer people to representatives from any of the industry funds to give them advice regarding what products they offer and the investment choices they offer. I think we were going through the opening statements and we stopped with Ms Orchard.

Mr Davis—I thank the committee for allowing me to appear here today. I would like to submit a couple of things. I would like to ask the committee's indulgence on a couple of things. First of all, since we last met in June, I would like to explain to the committee that I am now a financial planner. I am somewhere near $10,000 poorer. I have a diploma of financial planning and I am a certified financial adviser. I have done it for particular reasons, as I stated, in my last evidence in June, to give my clients advice. But it does not solve many, many problems. There are many problems with the legislation.

Other people cannot give advice, apart from self-managed funds, including FSR licence holders. They are not able to provide independent structural advice. The committee needs to really come to grips with the fact that whoever is a licence holder or their authorised representative has what is called a recommended product list. The principal licence holder, be it you, Senator Wong, or any one of the committee as an example, and if you licence us here, you dictate to us what products we can talk about. In the case of your example, Senator Wong, about an industry fund, if we cannot talk about it to our clients as a straight recognised accountant because we can only talk about SMSFs, we have to refer them to a financial planner. The average financial planner is not endorsed to talk about an industry type superannuation fund or small APRA fund. They are only endorsed and authorised to talk about a very, very select range. So the consumer is losing out. This whole exercise was to protect the consumer. The consumer is not being protected. They cannot get unbiased general advice to help them.

I will make a couple of other points. There is an awful lot of misinformation and false comments being made by many, many vested interests in the marketplace and in the press. The press are just pushing whatever barrel they can to make a dramatic exercise out of this. From my own personal position as a practitioner and as an individual, I appreciate that the committee is very, very busy, but I would love to see the committee draw all the interested people together, put us in a big room like here, get out a cricket bat and hit every one of us over the head. It is not happening. You really have to understand. I am talking from being out at the coalface. You guys hit the nutshell a little while ago when you asked the previous people why can't this group of people—Senator Murray has left—do this? It is all quite simple for you guys. It is not happening in the marketplace. The legislation is not like that. There are major problems there. There is no independent advice. We have already talked about the cost of training.

The last point that I submit to you is that there are names that have been whited out of a document here. The email name is a colleague of my mine who has consented to his name being up there. Otherwise, his name would have been whited out as well. I submit to you a real financial services guide, which is after page 3, which is produced by a financial planner and a licensed adviser. I draw your attention to the commissions and the structure on there. But that is

not the point. The real point that everybody needs to get involved with is reflected in the adviser profiles. The gentlemen's names are there. It looks like five columns of nothing, but it has people's names with representatives' numbers on the real version. They are all giving tax planning advice. On the next page they talk about schedules of fees and charging fees for giving tax advice. On the next page there is an asterisk next to estate planning and taxation. It says, 'We don't give any tax planning advice. We recommend someone else.' The point is that they are giving tax planning advice in contravention of section 251L of the income tax act. It is horses for one and chariots for another. This is not the way we should be going.

Senator WONG—I hope you did not take what I said before as being somehow an endorsement of the financial planning industry. We have had our issues with them as well. You do not want to tell me who it is.

Mr Davis—I do not have permission to release the people's names. I know who it is. I have the original copy.

Senator WONG—Do they market themselves or hold themselves out to be financial planners?

Mr Davis—They do.

Senator WONG—Are they members of the FPA?

Mr Davis—I would say presumably, yes.

Senator WONG—So you did not have the opportunity to raise this with the FPA representatives before they left? They are not here any more.

Mr Davis—No, I did not, unfortunately. I would like to ask the committee's indulgence—Senator Chapman requested our predecessors to be brief—to make a couple of very, very brief comments about some of the earlier comments. I am talking from a practitioner's point of view. I am only talking about what is happening in the marketplace. If the committee would allow me, I would like to make a couple of general comments.

CHAIRMAN—It probably would be helpful to get some responses to what has been said earlier in terms of our deliberations, as long as they are succinct.

Senator WONG—Keep it brief because the poor old Treasury representatives have been waiting a very long time and they are right at the end.

Mr Davis—I got up at 3 o'clock to come here today so I have had a long day. I had to drive down. I want to make some general comments. Our learned colleagues from the AMP said that they do not provide tax advice and they are not tax agents and everything else. I can clearly give you documentary evidence that the financial planning industry are providing tax advice and they are doing things.

Senator WONG—Mr Davis, I absolutely agree with you, but it would be helpful for us if you could focus your response to comments which relate to the regulations we are considering.

Mr Davis—The other comments are just about what other people have said. I think you have been provided with some evidence tonight which is a little distorted. If you want to leave it at that, I am quite happy to leave it at that.

CHAIRMAN—I would like you to develop what you were going to say.

Senator WONG—Go ahead. Where do you think it is distorted?

Mr Davis—I am just talking about the financial planning and the cost of time to get a licence. We are not recommending investments. We are never asked to recommend investments. The accounting profession and I, in evidence we have given before, are never asked to recommend investments. We have never even said we want to recommend investments. In fact, again, speaking for myself as a practitioner, I go out of my way to tell my clients that I cannot recommend investments. In fact, I will have a proper authority soon, which makes me a little different; I probably can recommend investments. But, in principle, we are not even highlighting the fact that we should recommend investments and we have never done that. I think the committee accepts that.

One of my colleagues from the FPA talked about the CBA buyback. That is great. We cannot talk about it because it is an investment product under the terms of FSR. We have to send the client to talk to a financial planner. In reality, and the FPA agree, it is tax driven. They are not tax agents and they send them back to us. We cannot talk about it because it is product. It is a catch-22 and the consumer is not winning.

The ACA mentioned the quality of advice and their survey problems. They said accountants were surveyed. I dispute that. It was a financial planning survey as far as I know.

Mrs Orchard—There were accountants who were financial planners.

Mr Davis—But they were accountants who were financial planners.

Mrs Orchard—They were not straight accountants.

Mr Davis—Not straight accountants. Many of my colleagues who work in the straight tax profession and compliance have never been approached. I do not know anybody. I support the comments by Michael Dirkis from the tax institute. My learned colleague—that is a good phrase, isn't it, Senator? —Mr Abbott talks about competencies. These are not law at the moment. He talks about more training. I made the sacrifice after we met in June. My clients are going to pay for that in their fees next year. I have to recover the money somewhere or somehow. I have done it to provide an ongoing service to my clients. IFSA—we are talking about the big funds and everything else—cannot talk about industry funds and self-managed super funds. It is coming back to the same dictatorial attitude of the big manufacturers, the big life companies, the super and insurance and the banks. If it is not on their product list, the consumer loses out. I have finished.

Senator WONG—On the issue you just raised, as I understood it, you were taking issue with Mr Abbott's suggestion in relation to the carve-out, making reference to certain competency

standards regarding superannuation structures. Do I understand from what you are saying, Mr Davis, that you would oppose that?

Mr Davis—No, I do not oppose it. I am just saying that someone needs to look at the overall cost structure. Everyone is coming out and saying that you have to do this, have you to do that, you have to do something else.

Senator WONG—As I understood it, Mr Davis, these are competencies that your profession has signed off on. Is that not correct?

Mrs Orchard—The NFITAB has been preparing some competencies that look at what you need to know in order to give self-managed fund advice going down into the investment level, what you need to know if you are going to be a tax agent in this area, what you need to know if you are going to be an auditor in the area and what you need to know if you are going to be a legal adviser in the area. They are looking at across the board standards about giving advice to self-managed funds. You will not necessarily have to comply with all of those, depending on the involvement you have with the funds.

Senator WONG—That is what I understood. There are different levels of competencies required. Presumably there is a competency level relating to advice as between different types of superannuation structure.

Mrs Orchard—Yes.

Senator WONG—There is?

Mrs Orchard—Yes.

Senator WONG—I have a principal problem with the distinction between structure and product, but let us put that to one side. I think there is some merit in Senator Chapman's point in saying that, if are you going to give advice about one structure, the position the cabinet has come to does not seem to be logically consistent. If we were minded to look at Mr Abbott's suggestion, is that something you would have difficulty with?

Mrs Orchard—It is not. I guess with many of the competencies as they are set down, many CAs and CPAs are qualified in 96. Certainly much of the information was already covered as a part of that, as a part of doing my degree, and as a part of qualifying with my PY. Much of the information I would see as being a top-up component.

Senator WONG—Does the ITAB recognise that? Is that an RPL or something?

Mrs Orchard—You can have a prior learning type approach. Much of the information that I would be required to top up is available in the public arena because it is information about industry funds and industry fund structures. It is the sort of information that is publicly available on the ASIC web site and is available to our clients.

Ms Crack—Certainly from the CPAs' perspective we want our members to meet more than just the minimum standard. That is in fact the way we are approaching our education already.

The competency standards are fantastic. Yes, there has been some input into it, but we would want our members to meet a higher standard than that. That is great as a benchmark, but we really want them to distinguish themselves.

Senator WONG—Given that, would your organisation take the view that having that as a minimum standard, as part of the carve-out, would not be unreasonable?

Ms Crack—I do not think we would have any problem with that.

Mr Reilly—Susan Orchard also works on a part-time basis for the Institute of Chartered Accountants.

Senator WONG—Yes. I am aware of that.

Mr Reilly—She was our representative at one stage.

Senator WONG—We spoke last time.

Mr Agland—From the NIA's perspective, we do not have a problem with the competency model. We support it. I guess the issue I would have is whether putting that competency in the legislation is where it should be. We as professional bodies are the ones that are going to be assessing those competency standards. It is probably something for us to require—

Senator WONG—That is a self-regulation arrangement, Mr Agland.

Mr Agland—Yes, it is.

Ms Crack—There was a roundtable that discussed these competencies. ASIC expressed that it was never their intention to have these competencies enshrined in PS146 unless and until the industry demonstrated that it was unable to meet these competencies as a minimum standard. So I would be concerned, as Mr Agland is, at having this in legislation necessarily.

Senator WONG—But this is in the context of your profession seeking a far greater exemption from consumer protection legislation. I would have thought this is a pretty minimum requirement that the parliament might have set down.

Ms Crack—Oh, absolutely. I have no argument that it is a minimum requirement. As I said, we would seek to go beyond that minimum requirement in making sure all our members were far more qualified than what the minimum requirement identified there should be.

Mr Reilly—I am a little loath to enter into the argument as to just how great an exemption and how great a departure it is from the FSR regime. In our submission we made it quite clear, and we agreed with the committee's report last June, that we do not see this as destroying the intent of the regime at all. We have been very careful in producing our industry guide, which came out after the original regulation 7.1.29 came out, to ensure that we made the clear distinction between invest financial products—investment products, as I call them—and what we could call structured type advice, which is advice that is not advice that a consumer is going to make or

lose money on. That has really been the point of our argument the whole way through. I know we have seen it from different perspectives.

Senator WONG—Let us not go there, Mr Reilly. If I come to you and you recommend either a certain retail product or a self-managed fund or an industry fund, they are intrinsically bound up with the sorts of products that they encompass.

Mr Reilly—We could debate that for some time so I will try not to. Again, what we are looking at is the structure itself. We are divorcing ourselves from the performance of the fund. What we continue to say to our members is that, where you are giving an opinion on the future performance of an investment, that clearly is licensing. If, on the other hand, all you are doing is going through and explaining the tax advantages, the fact that there are different contributions and different levels of fees, we do not see that as requiring licensing because that is not commenting on the performance of the fund. The performance of the fund will be in the investments that the fund purchases.

Again, there was some comment about independent disputes resolution schemes. We think they are terribly important for consumers. We would see complaints against accountants being in terms of the level of fees they might charge or whether or not they have explained it. But where a consumer has lost money—they probably will not see you if they have made money—it will be the group that has recommended the specific investment products that go in there. It is quite appropriate to do that.

Senator WONG—We have had the two accountancy associations—the National Tax and Accountants Association and the Association of Taxation and Management Accountants—request that their members be included in the definition of recognised accountant. Do you have any views on that?

CHAIRMAN—You referred to the overseas bodies but I do not think you commented on this groups.

Mr Reilly—I think our policy would be exactly the same. We would support any organisation that meets the requirements that are currently set for the three accounting bodies represented here today to also be covered under the recognised accountant category. We have supported particularly the Institute of Chartered Accountants in England and Wales and the Institute of Chartered Accountants in New Zealand because we have gone through and recognised their membership in terms of certain things that they are able to do out here in Australia. Those particular groups were also recognised in terms of licensing for auditing for registered company auditors. Provided those other organisations met the appropriate qualifications, experience and ethical standards, we would be happy for someone like ASIC to assess that.

CHAIRMAN—Do you know whether or not they do?

Mr Reilly—I would have to leave it up to them to make that comment. I could not comment on that.

Senator MURRAY—I want to ask you about the disclaimer or statement idea. Instinctively, I am attracted to it but I suspect it might not be complied with on a regular and frequent basis

because you literally have millions of contract hours with tens and tens of thousands of accountants. I want to ask you the question from a different direction. It seems to me that accountants advertise their professional wares. They put their qualifications and expertise on their windows or on their letterheads: that they are a member of the CPA and the associations they belong to. Perhaps the reverse requirement would be for them to put what they do not have. You do not need to say you are not a lawyer because self-evidently you are not. But I would assume that somebody who has been licensed under the FSRA will make that claim: 'licensed under the FSRA'. It is a selling point. Instead of a disclaimer or statement, perhaps we should simply require accountants to have in their professional advertisements or literature—they can have something framed on their wall or have something on their desk—'I am not licensed by the FSRA to give investment advice.' Then they do not have to remember to tell everybody who comes into their room, give disclaimers, read statements or anything else. It is there for all to see.

Mrs Orchard—I have addressed it in my practice by putting the disclaimer in my audit engagement letters that I audit self-managed trusts.

Senator MURRAY—It is hard for me to hear you.

Mrs Orchard—I audit self-managed funds. My audit engagement letters, which go to my clients each year and which set out the fees, costs and the scope of my audit, have a paragraph that says that the management letter provided at the end is not financial advice and may need to be supported with a financial adviser. When I write a management letter, it also has a similar disclaimer in it. That is in my correspondence, which documents the work I have done for the client.

Senator MURRAY—I would expect that to happen. It happens already in my own experience.

Mrs Orchard—That is a requirement of the act.

Senator MURRAY—If I can continue. It happens already with my own experience with accountants. But I am concerned about the client who walks into the accountant on a regular basis and says, 'Listen, I've just realised an asset. I want to invest this money. What should I do?' There is no piece of paper there; it is a personal relationship and engagement. I cannot foresee in every circumstance every accountant covering their base. If we put into the law a requirement for a disclaimer or a statement of such kind, how do you regulate it and how do you make sure that everyone is doing it? I am simply asking whether in addition to those practices, which I accord and agree with, Mr Reilly, do you think it would be impractical, over the top or anything else for the committee to say, 'Look, if you're not licensed, you have to say so. There has to be something hanging on your wall, on your desk or on your paperwork which says you are not licensed under the FSRA.'

Mr Reilly—I have sympathy with what you are trying to achieve. What the three bodies are saying to our members is that we have ethical rule number one, which says 'Don't go around doing work that you are not competent to do.' So for a number of our members who specialise purely in auditing, I could probably see a long list of activities that a typical accountant might do which they certainly would not do. I think that disclaimers do work. I agree with Ms Orchard

that there are certain areas the FSR requirements and the regulation 7.1.29 require you to give: tax advice, superannuation at the moment the way the regulation is drafted pre 7.1.29A and referrals. I think that our members are using those disclaimers.

When we do look at complaints that are made against our members, invariably it is because there has been a lack of communication between the member and the client. We are recommending that disclaimers be used, particularly with the financial services regime, the so-called grey area that we have discussed this afternoon. We make it quite clear in our industry guide. We say that the use of a disclaimer is not a defence to breaching the licensing provisions, so you cannot say, 'I'm not allowed to give you this advice. Here's the disclaimer saying it ... but'. We are saying you cannot do that. We are saying it is a useful reminder that financial product recommendations do require a financial services licence and will help avoid misleading or confusing consumers about the purpose of the communication. It is just a question of practicality, I guess. From a sole practitioner's point of view, who is providing advice and services in a lot of different areas, you would have a short list of things that that practitioner is not able to do. On the other hand, for someone who is from, say, a big four accounting firm—I go back to the CLERP 9 audit issues—you would probably have a long list of things that that particular accountant does not do but that the firm would do overall. I would like to see the experience of the disclaimers. I also support your view that there should be some sort of sunset review of regulation 7.1.29 and some of the other exemptions that ASIC has in fact granted to date.

Ms Crack—If we left disclaimers as they are in a written sense to a client, to monitor that we could use quality assurance or quality assessment, identifying those who have implemented that and stuck to the requirements versus those that have not and then take appropriate disciplinary action against members that have deviated from that requirement.

Mr Agland—At a recent FSRA seminar we did, quite a few of our members said that they want to cover their arse. They get the client to sign something to say that this is the advice they gave. They keep a copy for the client and they keep a copy for themselves. If something happens down the track and the client gets in trouble, they cannot come back and say, 'You told me this.' They have something written there. It is something that accountants are starting to recognise. Two accountants spoke to us at this seminar. They said that their clients are quite happy for them to say that. A lot of people have just said, 'The accountant is just going to give all the advice because it will piss off the client if they can't'—wrong word to use—'It will annoy the client that they can't give that kind of advice.' These people said to us, 'Well, no. Their clients are happy for them to know the limits of their accountant's advice and what they cannot give and to understand that superannuation investment advice is a specialist area, that it is not the kind of advice they would normally expect their accountant to give.' Therefore, they are happy for that client to then be recommended to someone.

Senator MURRAY—So the summary of that remark is that market pressure—namely, in the form of being potentially exposed to a liability suit because the law now says what you cannot do—will oblige accountants to cover their backs, to use a less colloquial phrase. I have a question for you, Mr Reilly. With professional indemnity insurance, is it likely to be the case that insurers will put as a term within their insurance policies that accountants should provide disclaimers and so on with respect to the FSRA, for instance? By saying that, they clearly will be telling the accountants a breach of that will leave them without cover.

Mr Reilly—I am not sure I have seen any recent policies that have stated you must use disclaimers. The policies clearly say that if you giving financial services advice and you are not licensed then you do not have any PI cover. So they are quite clear. The cost of PI cover goes up significantly if you actually tick the box to say that you are giving financial services advice, which is required to be licensed under the FSR regime. Again, in the audit area, we have a mandatory rule that you must set out the letter of engagement, the terms of engagement you go through. From a practical perspective, even where a client comes in and it is, 'Oh, and by the way something else is said,' I would argue that it is quite dangerous to not actually document that and actually make a file note to that effect and send it back to the client. I would have to refer back to my colleagues in practice. They may have some interesting comments on it.

Senator MURRAY—I do not want to extend this too much because we have Treasury. I am sure they need a sugar injection or some food to restore their levels of energy. What you have done is given me great comfort. Market pressures or financial pressures of those kinds do much more to enforce a law than legions of inspectors.

Mr Davis—I want to reply to a question. I have just sent my proposal for the renewal of my PI after it increasing a reasonable amount. There was no question about having to provide disclaimers. There is a question about whether I am giving financial services advice. I agree with Mr Reilly that it would push the premium up significantly. But there is no question dictating that as a requirement of renewal of my professional indemnity insurance.

Mr Reilly—If I can just continue: in terms of regulation 7.1.29A and any amendment to that, we would be more than happy to have a requirement that there be a disclaimer to that effect when the accountant is making a superannuation fund structure recommendation—a disclaimer making it quite clear that the accountant is not licensed and the accountant is not commenting on the future performance of the actual investments within that fund. I do not see a problem there. We would be happy to work with our colleagues in Treasury and the committee on that.

Senator MURRAY—That is all I have.

CHAIRMAN—There being no further questions, I thank each of you for your contribution to our hearing this evening.

[8.13 p.m.]

McGRATH, Ms Angela, Analyst, Investor Protection Unit, Corporations and Financial Services Division, Department of the Treasury

ROSSER, Mr Michael John, Manager, Investor Protection Unit, Corporations and Financial Services Division, Department of the Treasury

CHAIRMAN—Welcome. The committee prefers that all evidence be given in public, but if at any stage of your evidence you wish to respond in private you may request that of the committee and the committee would consider such a request. I invite you to make an opening statement, at the conclusion of which we will move to questions.

Mr Rosser—I would like to make a few opening comments, if I might. The regulation in question recognises the important role that accountants play in the community. In deciding the form of the FSRA, an important objective was to ensure that it did not impose unintended obligations in relation to activities that were not envisaged to be FSRA regulated. Consistent with that objective, corporations regulation 7.1.29, with which the committee is well familiar, lists a series of activities that are not financial services under the FSR.

The new regulation 7.1.29A is based on the view that certain advice provided by recognised accountants should not require licensing under the FSRA regime. The regulation is intended to avoid unnecessarily interfering with the ordinary activities of accountants. The new regulation recognises that advice on self-managed superannuation funds often forms part of an overall business strategy which would include other FSRA exempt advice such as on business structuring and taxation matters. In this regard, in the event that the client decides to establish a self-managed superannuation fund, they will be a trustee of that fund and, hence, will be in full control of their investment. Furthermore, once the decision is made by the person to use a self-managed superannuation fund, an accountant's role in physically establishing the fund and the administration and operational functions of running that superannuation fund do not require licensing under the FSR act.

In recognition of the importance of the adviser having suitable competence to provide such advice to clients, the regulation is limited to recognised accountants that hold appropriate qualifications to provide the advice. This limitation recognises that such accountants are subject to ongoing educational, ethical and other standards. Finally, I will just mention that the government is certainly open to extending the range of groups that are recognised subject to them meeting similar standards.

CHAIRMAN—Thank you, Mr Rosser.

Mr Rosser—I am happy to answer questions.

CHAIRMAN—Even though it was designed by a committee, we started off a very sleek horse in the form of the recommendation that came out of this committee and cabinet has turned into a bit of a camel by going part way down the track but leaving it in a fairly illogical situation

where you can advise about one structure but you cannot advise about the alternatives. I just do not see logically how you can do that.

Mr Rosser—I think that proposition depends on acceptance of the notion that the structures are common or similar and that in fact self-managed superannuation and other superannuation entities and, indeed, any other investment opportunity—for example, a managed fund—is simply a structure rather than a product. One issue is where, if you like, the differentiating point is and the regulation takes the view that the differentiating point is appropriately at the self-managed superannuation level.

CHAIRMAN—Even if you say that in the others there are elements of product there as well as structure, I still do not see how you can advise on one without providing a comparison with the others. It seems to me this regulation is actually encouraging accountants to put people into self-managed funds when that might not be the appropriate structure for them because they do not have enough money to make it worth while and they would be better off saying, 'Look, no, you go into a small APRA fund or you go into an industry fund or you go into a retail fund.' It is in the client's interests for the accountant to tell them to do that.

Mr Rosser—First of all, I am hesitant to provide legal advice on the direct implications of the regulation. As to the question of providing advice by a recognised accountant in relation to alternative opportunities, the regulation does contemplate that an adviser, an accountant, might provide advice as comparing a self-managed superannuation fund with, for example, another superannuation product. So it does not merely limit the opportunity to providing advice only on the self-managed superannuation fund. But it does not permit the advice to extend to the virtues or otherwise of alternative superannuation products. So that is an important distinction to make. It allows that, if you like, comparison but it only allows the advice to be in relation to the self-managed superannuation fund.

CHAIRMAN—So it is only the self-managed fund they can say, 'This is the one you should go into'?

Ms McGrath—Yes. Provided they are making a recommendation about the self-managed super fund to acquire or dispose, they can refer to other superannuation products, for example, and say that this is a better option than, say, a retail fund.

CHAIRMAN—But if they say you should not go into a self-managed fund—

Ms McGrath—It does not count.

CHAIRMAN—they cannot, say, go into a small APRA fund?

Ms McGrath—No.

Mr Rosser—It is probably worth while for the committee to consider that superannuation is not the only opportunity in terms of long-term investments. It is one way of making a long-term investment, but it is certainly not the only one. The question of alternative structures includes a consideration of whether superannuation as an investment formulation, if you like, is an appropriate vehicle. There is a significant disadvantage in superannuation and that is that the

benefits are preserved. So that is an important consideration. What I am saying, if you will pardon me, is that in a sense there is a question of whether or not a person should make an investment of a variety of sorts. A self-managed superannuation fund, if you like, is a subset of a subset of the total group of opportunities.

Senator WONG—Doesn't that evidence just demonstrate the difficulty in drawing a distinction between structure and product?

Mr Rosser—I think the distinction is most clearly made in relation to self-managed superannuation, where in a sense it is an empty vessel. It is a way of structuring a set of investments which will occur in the future. An industry superannuation fund, for example, is not an empty vessel. It is a specific form of investment which has been predetermined. The investments underlying that fund are in place and will not be in control of the investor because they will not be a trustee of that fund. In a sense, it is difficult to say that investing in an industry fund is merely investing in a structure. In fact, it is investing in the particular structure that that industry fund has in place.

Senator WONG—Which may have certain implications for that client?

Mr Rosser—Correct.

Senator MURRAY—If I may progress that a little, I think in today's evidence we brought that out without realising it. I like your empty vessel analogy. What happens is subsequent to the establishment of the super fund the money goes in. You then have to provide your registered auditor with a statement of strategy.

Mr Rosser—The regulation would permit the accountant to advise on, if you like, the establishment, including the amount to be established and the assets to be established.

Senator MURRAY—Let me explore what I am saying to you. Your registered auditor has to verify that you have a strategic plan. That indicates in fact that it is not preset, which is your point, that the setting of the investments comes subsequent to the decision to create the fund. In contrast, an established retail fund, master fund, industry fund—whatever kind of fund—is preset, the investment strategy is already there and the product design is already there, the spread of investments, and the risk is established. I thank you for that distinction. It is useful.

CHAIRMAN—Regulation 7.1.29 also allows the accountant to advise on the disposal of the fund, which is after the fact when it does have investments.

Senator MURRAY—Yes, but that is in totality. It is not in respect to each of the individual investments within it. It is the disposal of the structure, not of the components. That is correct, isn't it?

Mr Rosser—Correct. The notion would be, for example, a rollover situation where the person might be approaching retirement age and deciding to change the nature of their long-term investment, if you like, from one form to another. That would be the disposal of an acquisition of potentially another form. I will make a further comment. In relation to the question of the structure—the comment I made in my opening remarks about the ongoing role of the accountant

in relation to, for example, the auditing and compliance with the superannuation industry supervision legislation, taxation legislation and so on—if the client expects and receives that service from the accountant, similarly they are receiving that as the trustee of the fund. They are in full control. They have decided that that is the person from whom they wish to receive the advice. In relation to an industry fund, the investor, if you like, is passive in the sense that they are simply an investor and they are not in any control of the operation of the fund or of the auditing and so on. So in a sense the services of an accountant to them are irrelevant to that ongoing investment.

CHAIRMAN—They are in control of a small APRA fund, though, aren't they?

Mr Rosser—A small APRA fund is a fund where another party is a trustee.

CHAIRMAN—But you could have an investor director or a member director of a small APRA fund.

Mr Rosser—The distinguishing feature is that the other party is the trustee. Therefore, the investor, if you like, is not the trustee. Therefore, they are not in full control of the investment.

Senator WONG—So why do you say that the current other does not present a problem in terms of the overall FSR regime, the objective of consumer protection?

Mr Rosser—The new regulation?

Senator WONG—Yes.

Mr Rosser—One way of looking at it is that there is no perfect result and that this is a particular result which takes into account all of the various considerations that were put to the government in consultations.

Senator WONG—What do you say about the accountant's problem, which Senator Chapman has discussed, that if they are going to be giving advice regarding self-managed funds why ought not they be able to point the client to other forms of superannuation investment or the means of investing in superannuation?

Mr Rosser—Going back to the basic premise of the FSR is to apply a comparable regulatory apparatus and liabilities to people providing financial advice, in this situation it was thought appropriate to have a departure from that, given all of the circumstances.

Senator WONG—What is your response to any suggestion to expand the carve-out?

Mr Rosser—I think I suggested in my remarks earlier that, in a sense, the differentiating point between the advice—

CHAIRMAN—It is an empty vessel versus a full vessel.

Mr Rosser—The ongoing role as to various features, the other ancillary services that the accountant might provide in relation to the fund, they are all in present in relation to self-

managed superannuation, but they are not present, if at all, and certainly to a greater or lesser extent, in relation to other forms of superannuation. As I mentioned before, they would not be present in other forms of longer term investment.

CHAIRMAN—If the accountant were able to say, 'Your investment isn't going to be large enough to make it worth your while to have a self-managed fund, you should look at these other alternatives,' acknowledging your point that these other alternatives are not empty vessels, couldn't the accountant say, 'To work out which of these you should go into, you need to talk to a financial planner in terms of their investment strategy and their product content and so on, but we think one of these is better for you than a self-managed fund; go and talk to a financial planner about the detailed investments'?

Mr Rosser—In a sense, the scope of the exemption would be that the accountant would have to say to the client that that was the extent of the advice they could provide them and that they would need to go to an FSR regulated person to receive advice in relation to the other alternatives. In a sense, the accountant is deciding whether a self-managed superannuation structure is suitable for a particular person. For example, if the person had very limited assets, and given the costs of running a self-managed fund, it might be seen as just being prohibitively expensive. It might be as simple as that.

CHAIRMAN—That is the point I am making. Why shouldn't we extend it so that the accountant can say, 'Here are these other alternatives but, as to which of those alternatives will be best for you, you need to look at the individual investments; that needs to be done with a financial planner'?

Mr Rosser—Going back to the basic premise of FSR, it is to apply a comparable regulatory regime to people providing financial advice. To sort of carve-out an area and say that, because one piece is not subject to the regulatory regime, other somewhat similar things should also not be subject, then one could keep extending the range of the carve-outs. At the end of the day, there might not be much left.

CHAIRMAN—You could, but is the problem with the one size fits all proposition? One size does not fit all in reality. I think this is what Senator Murray is talking about—the commercial reality. To the extent that you can possibly get one size to fit all, let us do it, but recognise that in practical terms one size does not fit all and you do need to have that.

Mr Rosser—The regulation attempts to address the commercial realities in the sense that the most common or expected service provided by an accountant in relation to superannuation would likely to be self-managed superannuation. It would not be routine that a client would expect their accountant to advise them on whether or not they should invest in an industry superannuation fund or share transaction or opening a bank account or any number of other things which are regulated under FSR. So it is a question of proximity, in short.

Senator WONG—I think your point is a good one. We have been operating, to some extent, under the assumption that the decision to go into a self-managed fund is equivalent to a decision to go into a range of superannuation structures; but, as you point out, that is in itself a financial decision—to choose superannuation as the vehicle for your investment as opposed to some other mechanism.

Mr Rosser—Yes.

Senator WONG—And that is what granting a greater exemption would open up?

Mr Rosser—Certainly if superannuation as a product class were not covered by FSR, which is the practical effect of what Senator Chapman is raising.

Senator WONG—In respect of accountants?

Mr Rosser—In respect of recognised accountants—then there would be a question of whether that was the proper result. Recognised accountants, as I mentioned, traditionally provide advice on self-managed superannuation.

Senator MURRAY—Two scenarios enter my mind from what you are saying. The first is a criteria determination. You, Mr Rosser, come to me as an accountant and you ask me to put you into or to consider a self-managed super fund. I would reject you because I do not think you have the personal background to manage it yourself and I do not think you have enough assets and so on. So I then advise you that, no, you are not suited for investment there. This first scenario automatically then means that if you have that money you have to go to some other form of investment, and the accountant then sends them off to the financial planner. The second one is where the grey area exists for me: a person might qualify for a super fund but should still be advised to look at the alternatives because weighing them up should be their decision. I think the first one is quite neatly catered for by the regulation. It is the second one which I think we have probably been driving at. In practical terms, how do you see that circumstance arising?

Mr Rosser—First of all, assuming the person comes to the accountant with superannuation on their mind, if you like, as the thing after which they are seeking advice and not other long-term savings possibilities—I think that is a presumption—and the self-managed superannuation structure is not appropriate for that person, as I mentioned, the recognised accountant would be capable of explaining the basis of that recommendation, including the reasons why a self-managed fund would not be suitable or, alternatively, why an alternative arrangement might be preferable. The question then becomes: if the accountant were able to provide advice on that, it is very close to an accountant being able to provide advice on superannuation in any circumstances.

Senator MURRAY—Which would require them to be licensed. That is the area where we are identifying concern. It is not the rejection of somebody who is not suited for that. I do not have any problems with an accountant doing that. It is where they are suited for both a self-managed fund and any other form of fund. That is the comparability discussion that Senator Chapman was having. If I understand your answer correctly there, you are saying that if you are going to make a comparable recommendation as accountant yourself you need to be licensed. If you are going to answer that you are suitable to run a super fund but you should assess with a financial planner whether an alternative would suit you, then you would regard that as responding to both the regulation and the act. Is that a correct summary?

Mr Rosser—Yes, I think so. A difficulty arises for the accountant because the next question the client would ask would be, 'Well, which particular superannuation fund should I become a

member of?' It is not a particularly helpful piece of advice to say, 'I think you should join a class of fund,' if you like.

Senator MURRAY—Which means they have to go to a financial planner?

Mr Rosser—The client would say, 'Well, you're suggesting that I should go to an industry superannuation fund, for example, because it offers group insurance. That is a particularly attractive feature because of the nature of your business.' That is an example. Then the question is which particular one. That becomes very difficult because clearly that is the sort of advice which was intended to be covered by FSR.

Senator MURRAY—So your evidence is that the process just weeds itself out automatically because the accountant reaches a stage where they will realise they are going to stray into investment advice. We have had evidence earlier they are exposed to liability and they will send you off to the financial planner.

Mr Rosser—Similarly, if they formed the view that an alternative form of investment was the best approach for that person, for example, because of the stage in their life and the preservation rules, the accountant might form the view that superannuation in its entirety was an inappropriate investment for that person. Similarly, they would then have to say to the client, 'Unfortunately, I cannot provide you advice on the other alternatives which you might wish to consider which don't have preservation rules,' for example

CHAIRMAN—They could advise on a family trust?

Mr Rosser—They can and do. The existing regulation 7.1.29 permits that. One of the considerations there is that the family trust will have trustees, that client will be a trustee and they will be in full control of that investment. Similarly, with the establishment of a family company, they will be directors of that company and in full control as a director. In a sense, a financial product is about a third party providing a service over which the investor has no immediate control or involvement. That is not the case in relation to self-managed superannuation.

CHAIRMAN—But the trust could have a corporate trustee; it does not have to be the trustee themselves.

Mr Rosser—But that is the point. If they are not the trustee, then they are not in full control of the investment. For example, if the establishment of a family trust were involved and they were a trustee of that trust, they would obviously have an ongoing role in the operation of that trust. If they, instead, make an investment in another type of superannuation, then they will not have that ongoing role.

CHAIRMAN—What I am saying is they do not have to be the trustee of the family trust. They can have a corporate trustee so they are not in control.

Mr Rosser—That is correct.

CHAIRMAN—But they cannot advise them to do that.

Mr Rosser—But the intention of regulation 7.1.29 was to identify products or structures or things which were not intended to be FSR regulated. So, in a sense, that thing was not intended to be regulated under FSR.

Senator WONG—The family trust?

Mr Rosser—Regulation 7.1.29A is quite different from that. It is intended to identify things that are intended to be regulated under FSR and circumstances where advice on those things could be provided without a requirement to be licensed. So 7.1.29 was really trying to identify the things that, if you like, were inappropriately caught whereas the recent regulation was to identify something which was caught and for a variety of reasons was better for it not to be subject to the licensing obligation.

CHAIRMAN—You have already commented on adding those groups to the recognised accountants, haven't you?

Mr Rosser—Yes. We currently have a number of organisations which have approached us seeking similar treatment, which we are considering at present.

Senator WONG—But, in principle, if there are analogous requirements on them in terms of professional standards, insurance, disciplinary procedures et cetera, you would have no objection?

Mr Rosser—Quite correct.

CHAIRMAN—There being no further questions, Mr Rosser and Ms McGrath, thanks very much for your appearance before the committee.

Committee adjourned at 8.39 p.m.