Parliamentary Joint Committee
on Corporations and Financial Services

Inquiry into Regulation 7.1.29 in Corporations Amendment Regulations 2003 (No. 3), Statutory Rules 2003 No. 85

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ACRONYMS AND ABBREVIATIONS

ASIC	Australian Securities and Investments Commission
FSR Act	*Financial Services Reform Act 2001*
FSR licence	Australian Financial Services Licence
FSR licensee	Australian Financial Services Licensee
FPA	Financial Planning Association of Australia Limited
ICAA	The Institute of Chartered Accountants in Australia
ITAA	*Income Tax Assessment Act 1936*
Law Council	Law Council of Australia
Licence	Australian Financial Services Licence
Licensee	Australian Financial Services Licensee
NTAA	National Tax & Accountants' Association
NIA	National Institute of Accountants
PS 146	ASIC Policy Statement 146: *Licensing: Training of financial product advisers*
RIS	Regulation impact statement
SMSF	Self-managed superannuation fund
TAI	Taxpayers Australia Inc
TIA	Taxation Institute of Australia

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CHAPTER 1

REGULATION 7.1.29 OF CORPORATIONS AMENDMENT REGULATIONS 2003 (NO. 3)

1.1 On 14 May 2003, the Parliamentary Joint Committee on Corporations and Financial Services resolved to inquire into and report on the following regulations by 24 June 2003:

- Corporations Amendment Regulations 2003 (No. 1), Statutory Rules 2003, No. 31 effective from 11 March 2003; and
- regulation 7.1.29 of Corporations Amendment Regulations 2003 (No. 3), Statutory Rules 2003 No. 85.

1.2 The above regulations were made under section 1364 of the *Corporations Act 2001*.

1.3 The Committee advertised the inquiry on its web site and, on 21 May 2003, in the *Australian*. Invitations to participate in the inquiry were also sent to several financial sector industry associations and individual stakeholders.

1.4 The Committee received 11 submissions which are listed in Appendix 1 of this report. Copies are published on the Committee's web site at http://www.aph.gov.au/senate/committee/corporations_ctte/inquire.htm.

1.5 The Committee held a public hearing on 16 June 2003. The transcript of the hearing is available at the web site address above. Details of witnesses who appeared at the hearing are in Appendix 2.

1.6 The Committee's report on Corporations Amendment Regulations 2003 (No. 1) was tabled on 24 June 2003. However, the Committee decided to defer the reporting date for regulation 7.1.29 to 26 June 2003 because of the breadth of issues raised about this regulation. Submissions and the Hansard transcript were tabled with the first report.

1.7 In the next chapter, the Committee examines the history and content of regulation 7.1.29. In chapter 3 the Committee reviews the evidence and makes its recommendations.

1.8 The Committee thanks those who made submissions to this inquiry or appeared as witnesses at the hearing.

CHAPTER 2

REVIEW OF REGULATION 7.1.29

History

2.1 Regulation 7.1.29 was one of many regulations made to support the reforms introduced into the *Corporations Act 2001* (the Act) by the *Financial Services Reform Act 2001* (the FSR Act) from 11 March 2002.[1]

2.2 The original regulation was intended to provide a licensing exemption for certain activities carried out by 'recognised accountants' in the course their work. Without such an exemption, accountants would have to be licensed to engage in these activities as they constituted the provision of a 'financial service' under the Act.[2]

2.3 During the Committee's inquiry last year into the regulations and ASIC policy statements made under the FSR Act, regulation 7.1.29 attracted extensive criticism from the accounting profession.[3]

2.4 The main objections were that:

- the regulation defied interpretation; and
- the intended licensing exemption was too narrowly framed.

2.5 In relation to the second point, accountants argued that the exemption should cover 'traditional accounting activities'. This, they said, was consistent with the findings of the Financial System Inquiry's Final Report and similar to the 'incidental advice exemption' that had worked well under the previous regime.

2.6 They argued that an exemption falling short of the 'incidental advice exemption' would merely increase costs and do little for consumer protection. They were concerned that small accounting practices which they said looked after the

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1 Regulation 7.1.29 was contained in Corporations Amendment Regulations 2001 (No. 4), Statutory Rules 2001 No. 319. References to 'qualified accountant' were replaced by 'recognised accountant' in Corporations Amendment Regulations 2002 (No. 3), Statutory Rules 2002 No. 41 to provide ASIC with the flexibility to make determinations regarding a person's status as a 'recognised accountant' for the purposes of the regulation.

2 See subsection 766A(1) which sets out when a person provides a financial service. Section 911A says that a person who carries on a financial services business must hold an Australian financial services licence. See also section 911D. These provisions were introduced into the Act by the FSR Act.

3 *Report on the regulations and ASIC policy statements made under the Financial Services Reform Act 2001*, tabled on 23 October 2002. See Chapter 5, pp. 29-37.

majority of self-managed superannuation funds (SMSFs) would no longer be able to deliver cost-effective services or any services at all to these funds.

2.7 Although paragraph 766B(5)(c) of the Act provides a licensing exemption in certain instances to tax agents registered under the *Income Tax Assessment Act 1936* (ITAA), accountants said this was not wide enough to cover the type of taxation advice they commonly gave to clients. They said the regulation should incorporate an exemption for this type of advice as well.

2.8 The Committee's conclusions were that the regulation was unworkable. It also thought that the intended licensing exemption was too narrow and recommended that:

- The Act or regulation 7.1.29 should be amended to provide a licensing exemption for accountants similar in terms to that provided to lawyers in paragraphs 766B(5)(a) and (b) of the Act. This was a fairly broad exemption more akin to the 'incidental advice exemption' previously in place.
- The exemption should not apply where payment for the activity was in the form of commission or a similar benefit made by a third party not connected with the client.[4]

2.9 The Report by the Labor Members urged the Government to re-draft the regulation as soon as possible to ensure certainty about what activities would be regulated. The Labor Members thought the licensing exemption should not apply where advice given by accountants was financial product advice.[5]

Overview of the provisions

2.10 Regulation 7.1.29 has been made under paragraph 766A(2)(b) of the Act which provides that the regulations may set out the circumstances in which persons are taken to provide, or are taken not to provide, a financial service.

2.11 The regulation sets out 'the circumstances in which a person is taken not to provide a financial service and therefore does not need to be licensed' when performing those services.[6] The Explanatory Statement summarises these circumstances as relating to:

- administrative tasks such as the registration of companies;
- advice on shelf companies and trusts;
- audit advice;
- business advice;

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4 *Report on the regulations and ASIC policy statements made under the Financial Services Reform Act 2001*, tabled on 23 October 2002. See Chapter 5, p. 36.

5 *Report on the regulations and ASIC policy statements made under the Financial Services Reform Act 2001*, tabled on 23 October 2002, p. 82.

6 Explanatory Statement, Corporations Amendment Regulations 2003 (No. 3), p. 1.

- risk management advice;
- superannuation advice; and
- taxation advice.[7]

2.12 Unlike its predecessor, which applied to a 'recognised accountant', the current regulation refers to 'a person who provides an eligible service' and is therefore capable of applying to persons other than accountants.

The provisions in detail

2.13 Under subregulation 7.1.29(1), a person who provides an 'eligible service', which is one and the same as a 'financial service', is taken not to provide a financial service if the following three criteria are satisfied:[8]

- the eligible service is provided in the course of conducting an 'exempt service'; and
- it is reasonably necessary to provide the eligible service to conduct the 'exempt service'; and
- the eligible service is provided as an integral part of the 'exempt service'.

2.14 Subregulations 7.1.29(3), (4) and (5) specify the activities that constitute an 'exempt service'. According to the Explanatory Statement, these activities are those to which the exemption applies.

2.15 The 'exempt services' listed in subregulation 7.1.29(3) include:

- Advising on auditing activities.[9]
- Advising on risk assessment for a business.[10]
- Advising on the acquisition or disposal, administration, due diligence, establishment, structuring or valuation of an incorporated or unincorporated entity provided it is given to an interested party (or a person who is likely to become an interested party) and is confined to a decision about:
  - the securities of an entity that carries on or may carry on the business of the entity; and
  - the interests in a trust that carries on or may carry on the business of the trust,

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7 Explanatory Statement, Corporations Amendment Regulations 2003 (No. 3), p. 1.

8 Subregulation 7.1.29(2) defines 'eligible service' as conduct mentioned in paragraphs 766A(1)(a) to (f) of the Act.

9 Paragraph 7.1.29(3)(a).

10 Paragraph 7.1.29(3)(b).

but the advice cannot be about other financial products that the entity or trust may acquire or dispose of and it cannot be advice included in an exempt document or statement.[11]

- Advising on securities in a company if the company is not carrying on a business and has not carried on a business (except where such securities are or will be the subject of the fundraising provisions of Chapter 6D of the Act)—in other words, advice on a shelf company.[12]
- Advising on interests in a trust if the trust is not carrying on a business and has not carried on a business (and excluding a superannuation fund or managed investment scheme that is registered or required to be registered)—in other words, advice on a shelf trust.[13]
- Advising in relation to the transfer of financial products between related bodies corporate.[14]
- Arranging for a person to deal in relation to interests in a self-managed superannuation fund in the circumstances specified in paragraphs (5)(b) and (c) of regulation 7.1.29.[15]
- Arranging for a person to deal in a financial product by preparing transfer or registration documents on instruction from that person.[16]
- Advising on the provision of financial products as security except when the security is used to acquire other financial products.[17]

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11 Paragraph 7.1.29(3)(c). The Explanatory Statement for this provision says: 'This activity concerns advice to an incorporated entity or unincorporated entity on administrative and operational issues. The most common use of this provision is likely to be a person advising the management of a company. The advice must only be in relation to the actual entity carrying on the business or related entities such as subsidiaries'.

12 Paragraph 7.1.29(3)(d)(i)

13 Paragraph 7.1.29(3)(d)(ii).

14 Paragraph 7.1.29(3)(e). The Explanatory Statement for this provision says that licensing is not needed here 'because there is largely limited or no change in beneficial ownership of the financial products involved, such as insurance'.

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

16 Paragraph 7.1.29(3)(g). The Explanatory Statement says for this provision that: 'The provision of 'arranging' activities needs to be distinguished from the 'financial product advice' that recommends the registration or transfer of a financial product. That advice must fall within an exemption (either under this regulation or elsewhere under the Act) or require licensing'.

17 Paragraph 7.1.29(3)(h).

2.16 Under subregulation 7.1.29(4), a person provides an exempt service if the person advises on taxation issues involving financial products and:

- the adviser will not receive a benefit (for example, commission) other than from the client as a result of the client's acquisition of a financial product recommended by the adviser and either—
  - the advice is not a recommendation or opinion about a financial product[18] given to a retail client; or
  - if the advice is such a recommendation or opinion given to a retail client, the retail client must be advised in writing that the adviser is not licensed to provide such advice, that taxation is only one matter relevant to a decision on a financial product and the client should consider obtaining advice from an Australian financial services licensee.

2.17 The Explanatory Statement says in relation to subregulation 7.1.29(4) that:

> This activity provides an exemption from FSR licensing when providing taxation advice…
>
> …this exemption cannot be used…to market or sell financial products without a licence on the basis that a person is promoting taxation advantages and providing taxation advice. Therefore, a person cannot use this exemption if they receive a benefit from a third party, such as a commission, following a client acquiring a financial product as the result of the advice.
>
> Taxation advice should not be the only consideration in making an investment decision. Therefore, if taxation advice includes financial product advice provided to a retail client, a written disclosure statement must be provided.[19]

2.18 Subregulation 7.1.29(5) provides that an exempt service is advice given regarding the establishment, operation, structuring or valuation of a superannuation fund in the following circumstances:

- advice included in an exempt document or statement is not exempted; and
- the person advised is or is likely to hold an office in or control the management of the fund; and

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18 The term used in the legislation is 'financial product advice' which is defined in subsection 766B as being a recommendation or a statement of opinion that is intended to influence or could reasonably regarded as intended to influence a person in making a decision about a financial product.

19 Explanatory Statement, Corporations Amendment Regulations 2003 (No. 3), p. 4.

- except for advice given for the sole purpose and to the extent reasonably necessary to ensure the advised's compliance with superannuation legislation (but not concerning the fund's investment strategy),[20] the advice[21]—
  - must not concern the acquisition or disposal of specific financial products by the fund;
  - must not include a recommendation that a person acquire or dispose of a superannuation product;
  - must not include a recommendation about a person's investment strategy in a fund or level of contributions; and
- if the advice is financial product advice given to a retail client, the client must be advised in writing that the adviser is not licensed to provide the advice and the client should consider taking advice from an Australian financial services licensee.

2.19 To summarise, the exemption in subregulation 7.1.29(5) applies to advice given to actual or proposed office bearers or managers of a superannuation fund or proposed fund. This advice can be about the structure a new fund should take or what is required to ensure compliance with relevant legislation, for example. The advice cannot consist of recommendations about the suitability of a superannuation fund as an investment (or preferred investment) vehicle or what investment strategy the fund should adopt. The exemption clearly does not apply to any advice given to a retail client about joining a superannuation fund or about the client's existing membership in a fund.

2.20 The Explanatory Statement for subregulation 7.1.29(5) says the following are circumstances in which consumers cannot be advised on investment decisions unless the adviser is licensed:

- a person becoming a member of a fund;
- an existing member of a fund joining another subplan of that fund;
- a superannuation product changing from the growth to the pension phase;
- transferring benefits between investment options;
- making additional and voluntary contributions to a superannuation fund; and
- deciding what financial products should be held by a superannuation fund.[22]

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20 This is the *Superannuation Industry (Supervision) Act 1993* (except for paragraph 52(2)(f)), the Superannuation Industry (Supervision) Regulations 1994 (except for regulation 4.09) or the *Superannuation Guarantee (Administration) Act 1992*.

21 These exceptions relate to the trustee's covenants to formulate and give effect to a fund's investment strategy taking into account specified circumstances.

22 Explanatory Statement, Corporations Amendment Regulations 2003 (No. 3), p. 5.

CHAPTER 3

REVIEW OF THE EVIDENCE AND THE COMMITTEE'S CONCLUSIONS

Introduction

3.1 Evidence to the Committee concerned the effect of the regulation on accountants and lawyers. While there was support for the reforms introduced by the FSR Act, evidence from accountants, lawyers and their respective professional associations was unanimous that the licensing exemptions in regulation 7.1.29 had been too narrowly framed.[1]

3.2 Not all evidence was critical of regulation 7.1.29. The Financial Planning Association of Australia Limited (FPA) strongly supported the regulation and said it would provide for 'greater consumer protection' and remove uncertainties 'which may be exploited by unauthorised individuals'. The FPA expressed specific support for the limitations applying to the licensing exemptions for taxation advice and advice on self-managed superannuation funds (SMSFs).[2]

3.3 The Committee will now review several points raised by witnesses about terms used and drafting anomalies in regulation 7.1.29. It will then consider accountants' concerns before turning to issues raised by lawyers.

Drafting issues

3.4 Some submissions proposed specific drafting amendments either to give the regulation some efficacy or to correct possible inadvertent omissions.

3.5 The Law Council of Australia thought paragraph 7.1.29(3)(c) relating to the advice exemption for acquisitions or disposals of entities should be amended to:

- accommodate advice on part disposals or acquisitions; and
- ensure consistency in the terminology used in the regulation.

3.6 The National Tax & Accountants' Association (NTAA) proposed that the exemption in paragraph 7.1.29(3)(e) should accommodate transfers to other related bodies which were not bodies corporate, such as family trusts.[3]

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1 See *submissions* 1, 2, 3, 5, 6, 7, 9 and 11.

2 *Submission* 10.

3 *Submission* 3.

3.7 The Committee has identified what could be an anomaly in subregulation 7.1.29(4) which seems to exempt advice on taxation issues but only in cases where the client buys a financial product.

3.8 It also appears that the regulation has been drafted with the result that the licensing exemption applicable to 'eligible services' may not apply to 'exempt services'.

3.9 The Committee makes further comment about the drafting of regulation 7.1.29 in its recommendations on page 28.

Regulation 7.1.29 and its implications for accountants

3.10 Accountants' main concern was that the licensing exemption in the regulation did not allow them to make recommendations to clients about the suitability of one superannuation fund structure over another. Therefore, a client seeking this information would have to go to a suitably licensed person to find it.

3.11 One witness looked at the 'flip side' of the regulation's limitation on superannuation advice, namely, that it also precluded accountants from advising clients *not* to proceed with certain superannuation arrangements.

3.12 In this regard, it is clear that regulation 7.1.29 does not prevent an accountant from setting up a superannuation fund on instructions from a client. However, this appears to presume that a client giving these instructions is acting in his or her best interests. Ms Susan Orchard, accountant, who appeared for The Institute of Chartered Accountants in Australia (ICAA), commented in this regard that:

> …if somebody comes in and asks me to set up a self-managed fund, under this regime as it stands, I actually have to go ahead and set up that fund for them. I cannot talk to them and counsel them perhaps if it is an inappropriate thing for them to do based on the fact that they have a very small balance or that their record keeping and tax keeping has not been good in the past. So on the flip side that is also considered to be intending to influence under this regime.
>
> …If you come in and say to me, 'I want a self-managed fund,'…It may not be the wisest thing to do…I am intending to influence if I try and counsel you against that fund.[4]

3.13 As far as some witnesses were concerned, recommendations about superannuation structures and, indeed, other business structures, was first and foremost 'tax advice'—not 'financial product advice'—and so should not come within

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4 *Committee Hansard*, 16 June 2003, p. CFS 11. With the situation outlined by Ms Orchard, the Committee wonders whether an accountant who decides in the client's best interests to refer that client to a licensee for advice on the merits of setting up such a fund (and presumably having to explain to the client why the referral was thought necessary), might be regarded as exceeding the scope of the exemption.

the FSR licensing regime. This point was made most strongly in the context of advice regarding SMSFs.

3.14 Mr Peter McDonald, Taxpayers Australia Inc (TAI), said that with superannuation products, 'taxation advice is inextricably linked to financial advice' and a person advising in this area had to understand the tax implications. He did not think that a person licensed under the FSR regime would necessarily have the requisite training to appreciate these tax implications.[5]

3.15 He was concerned that the regulation had not achieved certainty about the licensing exemption but had merely blurred the line between taxation advice and the types of advice caught by the FSR regime. He noted that registered tax agents under the *Income Tax Assessment Act 1936* (ITAA) were entitled to give taxation advice under the pre-FSR regime. It was his view that regulation 7.1.29 would only create adverse outcomes if it sought to characterise tax advice dispensed by registered agents under the ITAA as 'financial planning advice' and thus within the realms of FSR regulation.[6]

3.16 In addition to these concerns, accountants thought the superannuation advice limitation was arbitrarily drawn and did not appreciate the breadth of accountants' knowledge and expertise. They also considered that this limitation would lead to the following undesirable outcomes:

- If unlicensed accountants were forced to refer their clients to licensees for recommendations about superannuation fund structures—
  - their clients would merely incur higher costs for no benefit; and
  - advice would become fragmented and suffer in quality.
- If accountants wished to continue giving superannuation advice that went beyond the scope of the licensing exemption in regulation 7.1.29—
  - the upfront and ongoing high costs of licensing rendered it a commercially unviable option for many practitioners;
  - the alternative to licensing—obtaining status as an authorised representative—would force accountants to become product sellers to pay their way and thus severely compromise the independence, impartiality and thus quality of their advice to clients; and
  - an accountant offering a quality service to clients as an authorised representative could lose his or her status as an authorised representative for reasons only that the accountant had not met the licensee's sales targets.

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5 *Committee Hansard*, 16 June 2003, p. CFS 29.

6 *Committee Hansard*, 16 June 2003, p. CFS 26.

3.17 The Committee will look at the claims made by accountants within the following framework:

a) why accountants say there should be a licensing carve-out for them;

b) why accountants say the superannuation advice exemption is inappropriate and will not work; and

c) how limitations on accountants' licensing carve-out will affect consumers, specifically with regard to the impact on the quality and cost of advice provided by accountants.

Why accountants say there should be a licensing carve-out

3.18 The Committee was interested to know why accountants thought they should be able to make superannuation recommendations without meeting FSR licensing requirements.

3.19 Accountants responded that their qualifications and the requirements of their professional associations equipped them to offer high-quality advice on financial and business matters.

3.20 The ICAA and CPA Australia said the vast majority of chartered accountants had to complete postgraduate qualifications as part of their membership of professional associations. These qualifications, they said, included training in the broad classifications of superannuation fund structures to equip accountants to advise in this area.[7]

3.21 The ICAA, CPA Australia, TIA and the National Institute of Accountants (NTAA) had also commented in their joint written submission that one of the justifications for the earlier licensing carve-out made for accountants was 'the Accounting Bodies' mandatory Codes of Professional Conduct and Ethics, as well as mandatory Independent Quality Reviews for those accountants providing services to the public'.[8]

3.22 Ms Kath Bowler, CPA Australia, suggested that, in contrast to the training received by accountants, her experience when completing the diploma in financial planning was that it 'covered what you should invest in…all the different types of superannuation products, but…not whether a self-managed fund, an industry fund or a retail fund is most appropriate.'[9]

3.23 Mr McDonald said that advisers on SMSFs had to be 'totally qualified' to operate in the SMSF area. This entailed having a good understanding of the tax issues

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7 *Committee Hansard*, 16 June 2003, pp. CFS 15-16.

8 *Submission* 5, p. 2.

9 *Committee Hansard*, 16 June 2003, p. CFS 16.

involved. According to Mr McDonald, financial planners holding a financial services licence would not be suitably qualified to advise on these structures whereas tax agents and accountants were. Tax agents, he said, had to satisfy the requirements of section 251L of the ITAA which meant that 'you must be fully qualified and, even better…you must have relevant experience to actually practise in that area'. He indicated that a tax agent's licence could only be withdrawn by the Tax Agents Board for reasons related to their professional conduct. He contrasted this with authorised representatives who could have their status cancelled for not meeting sales targets and suggested that this militated against their independence and impartiality.[10]

Why the superannuation advice exemption is inappropriate

3.24 As indicated in the overview of regulation 7.1.29, subregulation (5) places limitations on the licensing exemption available in relation to advice provided about superannuation fund structures. It is clear that while the exemption applies to advice on 'administration and operational issues' and 'compliance with legal requirements',[11] the exemption does not include recommendations that a person join a fund or change the person's contributions or investment strategy.

3.25 Accountants did not object to the licensing requirement for advice given about the investment strategy of a fund or investment in specific, branded financial products. However, they were highly critical that licensing would be necessary if they wished to make recommendations to clients regarding the relative merits of different superannuation fund structures.

3.26 Ms Bowler queried why recommendations on superannuation structures should be treated differently from advice on other structures given that you were 'not telling [clients] where to invest their money'.[12]

3.27 Mr Peter Davis, practitioner with his own business, thought the limitation did not factor in accountants' knowledge and experience or the extra costs that clients would incur if referred to a licensee for certain recommendations. He said that:

> As an accountant of many years experience, I do not understand why I cannot use that knowledge and experience of both superannuation and my client's affairs to make a professional determination about the appropriate superannuation structure for them.
>
> …The advice that we continually provide to our clients in small business, taxation legislation, and other matters puts accountants ideally in the right position to be of assistance to them. [13]

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10 *Committee Hansard*, 16 June 2003, pp. CFS 23-4.

11 Explanatory Statement, Corporations Amendment Regulations 2003 (No. 3), p. 4.

12 *Committee Hansard*, 16 June 2003, p. CFS 9.

13 *Submission* 6, p. 2.

3.28 Ms Orchard said that the exemption sought by accountants to allow them to advise clients on the relative merits of different superannuation fund structures was of a more 'generic' character in that it would not involve recommendations that a client purchase a particular branded financial product. She said in this regard that:

> The issue comes down to self-managed funds, small APRA funds, retail funds, industry funds, corporate funds and government funds. People in the marketplace have access to each of those types of funds. They may already be in one of those funds. We are looking to be able to say, 'This structure might suit this business operation' or 'This structure might suit you, based on what we know about you, your record keeping and other types of history; the types of funds that you have invested in superannuation or are likely to invest in superannuation.'
>
> …we want to be able to be that generic and say, 'Yes, you could have a self-managed fund, but as a worker in that industry your employer is going to have to pay to that fund; to have two funds is going to incur costs, there are going to be some implications of that.'[14]

3.29 With regard to SMSFs in particular, Mr McDonald said the regulation would result in a 'blurring' of advice on self-managed funds because 'the tax and financial areas in the small managed superannuation fund…[were] dovetailed'. He added that, 'You cannot have financial advice without having taxation advice, and that is what we see as the crux of the problem'.[15]

3.30 Mr McDonald said that the exemption as framed in the regulation would result in the situation where SMSF trustees:

> …will need to have both their financial planner and their tax agent sitting opposite them so they can bounce all the ideas off them, because you have in effect a situation where the financial planner cannot give taxation advice and the tax agent cannot give financial advice. You actually need both of them there to make sure you end up getting the right advice in terms of the product on an ongoing basis.[16]

3.31 Many SMSFs were vehicles used by small businesses to manage their 'entire business operations together with their potential retirement strategies', Mr McDonald said, and because of this feature, 'most of the decisions that [SMSFs] make are very much tax driven'. He argued that the legislation failed to recognise this and blurred the distinction between 'what is tax advice and what is financial advice'.[17]

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14 *Committee Hansard*, 16 June 2003, p. CFS 7.

15 *Committee Hansard*, 16 June 2003, p. CFS 24.

16 *Committee Hansard*, 16 June 2003, pp. CFS 24-5.

17 *Committee Hansard*, 16 June 2003, p. CFS 26.

Effect on consumers—the cost and quality of advice

3.32 Accountants argued that the limitations in the regulation's licensing exemptions would result in:

- higher costs for consumers; and
- a poorer quality of advice to consumers.

These alleged outcomes often went hand in hand and are therefore considered in this light.

Referrals, costs and fragmentation of advice

3.33 The higher costs which accountants said would ultimately be borne by consumers could arise in a number of different ways. They could arise from referrals, for example, which accountants argued would not only increase costs but impair the quality of advice given to the consumer.

3.34 The NTAA said in this regard that:

> Often it is prudent, as part of general structuring advice, to suggest that the client establish a self-managed superannuation fund to hold the business premises. Accountants will no longer be able to provide such sound and practical advice unless regulation 7.1.29 is amended.
>
> …
>
> It is no answer to this criticism to state that the accountant should simply refer the client to a licensed financial planner for advice as to whether a self-managed superannuation fund should be included in the overall business structure. In most cases the licensed financial planner would seek advice from the accountant about the proposed structure and the client's affairs which would merely cause undue additional cost to the client for no added benefit.[18]

3.35 According to Ms Bowler, if accountants were not licensed:

> …advice will be fragmented because [consumers] are getting structural advice for two-thirds of their affairs from the accountant and then for this little bit of superannuation they will be going externally and there is a high chance that the advice will cause inconsistencies.[19]

3.36 Mr Keith Reilly, ICAA, continued in a similar vein and commented that:

> …[with] the superannuation fund structure, you can provide factual advice on the differences between different types of funds. You can actually prepare a spreadsheet where you list the differences but you cannot then say,

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18 *Submission* 3, p. 1.

19 *Committee Hansard*, 16 June 2003, p. CFS 21.

> 'Based on the results of my analysis and my discussion with you as the client, this fund would appear to suit you better than the others.' What you have to say to the client is, 'I cannot tell you that. You might be able to work it out in terms of how many ticks or crosses are there, but you, the client, have to make that recommendation or go to someone who is licensed who is a financial planner supplier, product flogger—call it whatever you want—to actually give that sort of advice'—which they would not give. What they will give is advice on what investments to put in there. That is really the issue.[20]

3.37 Mr Davis suggested that 'costs for consumers are going to escalate quite astronomically' either because of licensing costs or the duplication of work involved in a referral because the financial service is not exempted from the licensing requirements.[21] He said that:

> If I choose to go and get a licence, I have to pay that money [the estimated licensing cost]. If I have to pay that money, I have to recover that cost somewhere in running my business…So my overhead costs go up and all my clients pay, or I choose not to recommend superannuation funds for my clients and I send them down to a financial adviser. As the financial adviser…does not understand about [my clients'] taxation affairs…you have a to-ing and fro-ing thing which still means that the consumer is paying additional costs in his fees anyway.[22]

3.38 Mr George Lawrence, practitioner with his own business, considered it undesirable that he should have to refer his clients to a person having no familiarity with his clients' circumstances for advice that he was best equipped to give. On this point, he said:

> My main concern about [not being able to make recommendations to clients] would be that if my client has to go to a complete stranger—one who does not know the client—and the client does not know the financial person, as compared with somebody like me who has had something like 30 years of practice and has spent a lot of time with clients, there would be inappropriate advice given at an extra cost…[23]

High costs of licensing and flow-throughs to consumers

3.39 Accountants raised concerns that many smaller accounting practices wanting to give advice on those superannuation matters which regulation 7.1.29 had not exempted would be prevented from doing so by the high costs entailed in obtaining an FSR licence. Where accountants did become licensees, it was argued that clients would end up paying more but for no discernible benefit.

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20 *Committee Hansard,* 16 June 2003, p. CFS 10.

21 *Committee Hansard*, 16 June 2003, p. CFS 5.

22 *Committee Hansard*, 16 June 2003, p. CFS 9.

23 *Committee Hansard*, 16 June 2003, p. CFS 6.

3.40 The Committee sought evidence to substantiate accountants' claims about the high costs of licensing. Ms Bowler said that CPA Australia had considered becoming a licensee to provide its members with the means of becoming authorised representatives. She said CPA Australia had estimated licensing costs ranging from $25,000 per representative per year to give full financial product advice to $10,000 to $12,000 per representative per year to give more restricted general advice. This factored in PI insurance, ongoing training requirements, auditing requirements, compliance procedures and software costs.[24]

3.41 According to Ms Bowler, accountants would not become authorised representatives if they had to pay $10,000 to $12,000 per year to do so. She indicated she had come to this view after receiving feedback from 3000 accountants.[25]

3.42 When questioned about the Department of the Treasury's response to these costs, Mr Reilly said, 'We have argued a cost factor. Treasury has not, from memory, come back to us and said those costs are too high or too low'.[26]

Authorised representative status, accountants' independence and effect on quality of advice

3.43 Under the FSR Act, accountants who could not afford the cost of licensing but still wanted to be able to deliver the full range of 'trading accounting' services, could become authorised representatives of licensees. However, accountants said this was not a viable option for those accountants who wanted to retain their independence and avoid becoming product marketers.

3.44 Mr Davis, for example, queried how it would add to consumer protection if accountants, as authorised representatives, were required by their sponsoring licensees to meet financial products sales targets so as to retain their licences.[27]

3.45 Mr Lawrence was doubtful that licensing would 'guarantee good advice'. He commented that in his 30 years of practice as an accountant, he had never seen one financial planning recommendation that a person set up a self-managed fund. He attributed this to the interest of financial planners in commissions which resulted in a predominance of recommendations that clients invest in managed funds.[28]

3.46 Ms Orchard's evidence suggested that, even if practitioners were prepared to meet sales targets to ensure their future as authorised representatives, this was not an option for every practitioner. In this regard, she referred to the situation with small

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24 Ms Bowler and Mr Reilly, *Committee Hansard*, 16 June 2003, pp. CFS 19-20.

25 *Committee Hansard*, 16 June 2003, p. CFS 21. Refer also to Ms Bowler's testimony at the Committee's inquiry into the regulations and ASIC policy statements made under the FSR Act, *Committee Hansard*, 11 July 2002, pp. 175-9.

26 *Committee Hansard*, 16 June 2003, p. CFS 21.

27 *Committee Hansard*, 16 June 2003, p. CFS 5.

28 *Committee Hansard*, 16 June 2003, pp. CFS 21-2.

practitioners having different specialties who often shared a common client base. She said that while some offered financial advice, others provided auditing services.

3.47 She suggested that her specialisation as an independent auditor did not lend itself to product marketing. If she were to become an authorised representative for a licensee, she said there was no guarantee that her future in this capacity would be assured. She explained why this would be so:

> …I am the independent auditor—and clients often seek their financial advice from other sources…yes, I may be able to get a licence in the first year but will I be able to retain that authorised representation in the years ahead? The dealer group undertakes significant costs in having to ensure that I am trained, that I have appropriate insurance, and all the other add-ons that go with licensing, and they need to get some recoup for that. They do not get any of my practice, so after 12 months I get checked out and I am back in the same situation.[29]

3.48 Mr McDonald shared these concerns and said a problem for authorised representatives was that their status could be 'withdrawn at the stroke of a pen'. He referred to the executive director of his organisation as having had her authorised representative status withdrawn twice 'because she was not pushing product'. He saw this as being inconsistent with the independence and impartiality in advice 'that we see as being so dear'.[30]

3.49 During its inquiry last year into the regulations and ASIC policy statements made under the FSR Act, the Committee heard similar evidence about product pushing and the threat posed by FSR licensing requirements to accountants' independence.[31] The Committee was concerned that these claims were still being made and sought the Department of the Treasury's views in this regard.[32]

3.50 The Treasury responded that:

> There are licensees who charge on a fee-for-service basis. There is nothing to prevent a person becoming an authorised representative of a licensee and remitting to the licensee appropriate remittances to cover the costs of their supervision and competency requirements as set out in the legislation. There is nothing in the legislation that requires an authorised representative to sell financial products. In fact, the legislation is directed towards provision of advice.[33]

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29 *Committee Hansard*, 16 June 2003, p. CFS 19.

30 *Committee Hansard*, 16 June 2003, p. CFS 24.

31 See the Committee's *Report on the Regulations and ASIC Policy Statements made under the Financial Services Reform Act 2001*, tabled on 23 October 2002, pp. 34-5.

32 *Committee Hansard*, 16 June 2003, pp. CFS 46-7.

33 *Committee Hansard*, 16 June 2003, p. CFS 47.

3.51 When asked to comment specifically on accountants' allegations that the actual, practical effect—as opposed to the theoretical alternatives envisaged by the legislation—meant that authorised representative status entailed product pushing, the Department repeated that 'there is nothing in the legislation that results in that industry structure'. Mr Rosser further commented that:

> The testimony you have heard is that a person would be required to sell financial products. My evidence would be that I do not believe that that would be the case.[34]

3.52 In response to this comment, Ms Bowler sought to place accountants' concerns about product pushing on a firmer footing and said that:

> [CPA Australia] have the offer from COUNT, the largest dealer group for accountants, that they are willing to testify that they will not give proper authorities if somebody is not giving product advice because it is not worth their while to do that. We are certainly not aware of any dealers who offer [a proper authority without requiring the holder to give product advice] because we get asked for it from our members all the time.[35]

3.53 Moreover, in answer to those who proposed that it was open to an accountant to obtain a licence if becoming an authorised representative posed concerns about independence, Ms Bowler said that licensing would not be an option for accountants after 10 March 2004 because would-be licensees, among other things, needed experience as authorised representatives to qualify.[36]

The Committee's views

3.54 The Committee considers that the application of the FSR licensing regime to accountants who do not provide investment advice on specific, branded financial products and merely engage in 'traditional accounting activities' is unnecessary. In this regard, the Committee endorses the following views expressed by Ms Orchard that:

> To make [licensing] a requirement of the ordinary commerce of being an accountant adds an additional layer of cost of regulation to what is a function largely driven by compliance and largely driven by the tax act and all the legislative requirements. That is an unfair burden to place, predominantly, on small businesses.[37]

3.55 The Committee believes that regulation 7.1.29 should be amended—at the very least—to provide accountants with a licensing exemption for recommendations

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34 *Committee Hansard*, 16 June 2003, p. CFS 47.

35 *Committee Hansard*, 16 June 2003, p. CFS 51.

36 *Committee Hansard*, 16 June 2003, p. CFS 51.

37 *Committee Hansard*, 16 June 2003, p. CFS 52.

made about superannuation fund structures to their clients. In coming to this position, the Committee has taken into account that:

- accountants' professional qualifications and post-graduate and ongoing training, quality control and ethical requirements of their professional associations provide sufficient oversight to meet an acceptable level of consumer protection;
- no evidence was produced to indicate that a person licensed to give financial product advice (both general and personal) and who is not already a professional accountant and registered tax agent, will have the requisite taxation knowledge or knowledge of superannuation *structures* to ensure consumers receive appropriate advice. Evidence from Ms Bowler and Ms Orchard, both of whom said they had completed a diploma of financial planning, suggests that licensees who do not have professional accounting qualifications and tax agent status may not give the quality of advice that would be expected on superannuation fund matters; and
- no evidence has been produced to date by interested stakeholders, ASIC or the Department of the Treasury to demonstrate that the gains to consumers if accountants are licensed will outweigh the costs of licensing.

3.56 The Committee believes that accountants have produced compelling evidence to establish that:

- the costs of licensing for many accountants will substantially increase their overheads and increase the costs to consumers;
- becoming an authorised representative of a licensee is more likely than not to place demands on accountants to push products and thus compromise their independence; and
- accountants who become authorised representatives could have their representative status cancelled for reasons entirely unconnected with the quality of the services they offer. There is no reason why they should be exposed to the potentially serious commercial ramifications that might ensue from cancellation of their representative status in such circumstances.

3.57 The Committee heard no evidence from the Department of the Treasury to indicate that the Treasury had given any real consideration to the issues raised by accountants. Given that accountants would have been liaising with the Treasury for some time about the scope of the licensing carve-out, the Committee considers this is unacceptable.[38] The Treasury's evidence on independence issues was not convincing and was clearly outweighed by evidence provided by the TAI and CPA Australia, among others.

38 The Committee notes in this regard that the original regulation was first gazetted on 15 October 2001.

3.58 On the issue of licensing costs, the Treasury said that 'at various times we have heard a wide variety of costs. It is very difficult to make a judgment about them because they are wide and varied and they seem to move over time'. However, the Treasury indicated that it had not undertaken an assessment of licensing costs itself but had prepared a regulation impact statement (RIS) when developing the FSR legislation.[39] The Committee notes that the RIS predicted:

- a reduction in compliance costs 'particularly for entities that offer several different financial services and would have required multiple licensing under existing regulation';
- there would be 'some costs associated with the move to the new licensing regime' but these were 'difficult to quantify';
- the increased competition facilitated by the FSR regime would benefit consumers 'through lower costs and a greater range of products and services'; and
- 'there will also be reduced risk of confusion due to participants holding several different licences to act in different capacities'.[40]

3.59 Looking at these predictions, the costs savings enjoyed by multiple licensees will not apply to accountants. The indication that 'some costs' would be incurred under the new regime but that these were 'difficult to quantify' does not clarify the situation for accountants. The Committee notes that the RIS seems to give considerable weight to comments made by the Investment & Financial Services Association Ltd (IFSA) that FSR legislation would have a 'positive impact on the costs associated with the licensing and distribution of financial services'.[41] Nonetheless, the Committee considers the evidence given by accountants' professional associations and practising accountants gives a more useful indication of how much licensing will cost them.

3.60 The Committee believes that the licensing cost predictions in the RIS for the FSR Bill are vague and inadequate. The RIS does not disclose any reliable evidence to support the Treasury's conclusions about licensing costs. These appear to be little more than educated guesses.

3.61 The Committee considers that the Treasury was obliged to ensure it was in a position to assess the accuracy of licensing estimates put before it by accountants given the potentially serious implications involved. This clearly was not done although accountants' licensing costs and associated issues have been in contention for a considerable time.

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39 Mr Mike Rosser, *Committee Hansard*, 16 June 2003, p. CFS 45.

40 Financial Services Reform Bill 2001, Explanatory Memorandum, Parliament of the Commonwealth of Australia, House of Representatives, p. 12.

41 Financial Services Reform Bill 2001, Explanatory Memorandum, Parliament of the Commonwealth of Australia, House of Representatives, p. 12.

3.62 At the hearing, the Treasury took on notice the Committee's more specific questions about licensing costs and provided additional information in a letter to the Committee on 19 June 2003. A copy of the Treasury's letter to the Committee is in Appendix 3.

3.63 In this letter, the Treasury says that costs 'will vary widely and depend in part on the scale, nature and type of the particular financial services business'. As far as initial upfront licensing costs are concerned, the Treasury advises that ASIC provides 'guidance to applicants to enable parties to apply for a licence without the need for external assistance'. For smaller businesses that opt to use the services of licensing advisers to review their systems and help with documentation, the Treasury says the fee commonly charged is around $3,500. However, application costs are merely one component of upfront licensing costs.

3.64 With regard to PI insurance costs, the Treasury suggests that:

> The need to ensure adequate compensation arrangements under the FSR should be seen in light of the fact that many applicants already hold professional indemnity insurance cover. This is especially the case for professionals such as accountants.[42]

3.65 The Committee accepts the Treasury's point that accountants would hold PI insurance cover. However, the Treasury appears not to have investigated whether licensing per se could have an appreciable impact on PI insurance premiums, bearing in mind the additional risk exposure that is likely to be involved. The Committee is consequently reluctant to accept the Treasury's implication that PI insurance costs will stay much the same. On this point, the Committee notes Ms Bowler's evidence that 'PI insurance is a big [component]' of overall licensing costs.[43] The Committee also notes the comments of Mr Lawrence that 'the insurance would be at least $8,000'.[44]

3.66 Accountants referred to training costs as another licensing expense. The Treasury comments that accountants already have to meet ongoing training expenses as part of their membership of professional associations. It also indicates that ASIC recognises many courses run by these associations in PS 146, its policy statement on training requirements.[45]

3.67 During the Committee's inquiry last year into the regulations and ASIC policy statements made under the FSR Act,[46] accountants claimed that ASIC had failed to give proper recognition to accountants' professional qualifications and training in PS 146. As training was only touched on during the current inquiry, the Committee is

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42 Letter from the Department of the Treasury to the Committee, 19 June 2003, p. 2.

43 *Committee Hansard*, 16 June 2003, p. CFS 19.

44 *Committee Hansard*, 16 June 2003, p. CFS 21.

45 Policy Statement 146: *Licensing: Training of financial product advisers.*

46 See the Committee's *Report on the regulations and ASIC policy statements made under the Financial Services Reform Act 2001*, tabled on 23 October 2002, pp. 35-6.

not in a position to come to a definite conclusion on this issue. However, it notes the Treasury's somewhat equivocal comment that:

> …the FSR training requirements might be expected to sit alongside rather than replace existing requirements and in many cases not result in a need for additional training. Evidence was provided to the Committee by at least some accounting representatives that they had sufficient training to advise to some extent on financial products'.[47]

3.68 The Treasury advises in its letter that it did not consider auditing and 'systems and procedures' would entail any or much greater costs for accountants. The Committee finds this difficult to accept given that licensing will subject accountants to a comprehensive conduct and disclosure regime which arguably will call for new monitoring and compliance systems. According to Ms Bowler and Mr Reilly, the auditing and compliance costs will involve significant additional expenditure especially for larger dealer groups because new systems will be needed.[48]

3.69 The Committee is not satisfied that the cost information provided by the Treasury sufficiently addresses the Committee's request for an 'indication of what it might cost an accountant to become licensed' and 'what [the Treasury says are] varying cost estimates associated with becoming licensed, whether as an authorised representative or otherwise'.[49] With the exception of the estimated fees charged by advisers for assistance with licence applications, no figures were given to indicate what upfront and ongoing licensing costs, for example, a sole practitioner, smaller business (say up to five practitioners) and larger business might incur.

3.70 The Committee therefore questions whether the Treasury has sufficient information to support its conviction that the licensing of accountants and the costs entailed can be justified in terms of the benefits that will ensue to consumers who ultimately will have to pay for these costs.

3.71 The Committee notes that amended regulation 7.1.29 was intended to bring certainty to the market and was therefore disturbed to hear from several witnesses that the regulation merely created confusion about which types of advice would fall within the FSR regime and which would not or should not. In this regard, the Committee refers to Mr McDonald's remarks that:

> …there needs to be clarity in this whole process. I am not convinced by anything I have heard sitting here tonight that there is in fact clarity; quite the opposite, in fact—it is very fuzzy and confused. Until such time as the delineation between what we see as tax advice, legal advice and financial planning advice is corrected, I think this is going to be a very muddy area. With the whole intention of FSR being to protect the consumer, it seems to me that the consumer is the one in the firing line in this process, and they

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47 Letter from the Department of the Treasury to the Committee, 19 June 2003, p. 2.

48 *Committee* Hansard, 16 June 2003, p. CFS 20.

49 *Committee Hansard*, 16 June 2003, p. CFS 46.

> are the ones that are going to wear incredibly increased costs as a result of the process that is currently in place.[50]

3.72 In the context of accountants' claims that much of their advice on superannuation fund structures could be characterised as 'tax advice', the Committee notes the FPA's views that:

> …the 'incidental advice provisions'…have been used to systematically circumvent the FSRA licensing provisions…[And] many unlicensed individuals and firms have sought to provide advice on investment-related products such as 'managed funds' under the guise of 'tax advice'.[51]

3.73 To the Committee's mind, this is mere assertion as no evidence was produced to support it. On the other hand, the Committee notes the evidence from accountants, particularly with regard to SMSFs, indicating that taxation advice can be inextricable from (or possibly one and the same as) 'financial product advice' given in relation to superannuation fund structures.

3.74 As in the Committee's earlier inquiry where licensing of accountants was discussed, the Committee defers to the views expressed by the Wallis Inquiry that:

> Financial advice is often provided by professional advisers such as lawyers and accountants. This advice is typically provided in the context of broader advisory services offered to clients extending beyond the finance sector, often where an adviser has a wide appreciation of the business and financial circumstances of a client. In such cases, the best course is to rely upon the professional standing, ethics and self-regulatory arrangements applying to those professions.
>
> However, a clear distinction needs to be drawn if an adviser acts on an unrebated commission or similar remuneration with a client and places such advisory activities on a footing similar to that of other financial advisers. In such cases, financial market licensing should be required.[52]

Conclusion

3.75 Given all of the above considerations and consistent with the recommendations of the Wallis Inquiry, the Committee believes that accountants should not have to be licensed under the FSR regime for advising their clients about generic financial products in the course of, and as a necessary part of their business and for which no payments are received by the accountant from a third party unconnected to the client.

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50 *Committee Hansard*, 16 June 2003, p. CFS 52.

51 *Submission* 10.

52 *Financial System Inquiry Final Report*, March 1997, pp. 275-6.

3.76 The Committee notes that accountants are anxious to have their concerns about regulation 7.1.29 settled as soon as possible. The Committee notes further that accountants are prepared to accept some of the regulation's shortcomings provided they can continue to give their clients personal and general financial product advice on superannuation fund structures and provided the confusion concerning taxation, financial product and legal advice is resolved. The Committee understands that accountants would not favour the disallowance of the current regulation or part of it because this would mean a return to the original version which was manifestly inadequate.

Recommendation 1

The Committee recommends that, as a short-term measure until proper consideration is given to a more comprehensive licensing carve-out for accountants, regulation 7.1.29 should be amended as soon as possible to:

- **exempt superannuation recommendations made by accountants from FSR licensing requirements; and**
- **distinguish between taxation, financial product and legal advice so that FSR licensing is not required except for advice that can be characterised as predominantly financial product advice.**

Recommendation 2

The Committee recommends that, for the longer term, the Government should give proper consideration to a broader licensing carve-out in respect of the following activities engaged in by accountants in the course of, but incidentally to, their day-to-day businesses:

- **dealing in financial products; and**
- **financial product advice that does not amount to 'product pushing' of specific, branded financial products.**

Recommendation 3

The Committee recommends that the Department of the Treasury should investigate the drafting issues raised in the submissions, particularly by the National Tax & Accountants' Association, the Law Council of Australia and Mr Keith Harvey, to determine whether they require further action.

Regulation 7.1.29 and its implications for lawyers

3.77 The Committee received two submissions, one from Mr Keith Harvey, legal practitioner, and the other from the Law Council, commenting on the application of regulation 7.1.29 to professional activities carried out by lawyers.[53] The Law Council

53 *Submissions* 9 and 11.

referred in its submission to the licensing exemptions currently provided under the Act[54] in respect of financial product advice given by lawyers, and commented that:

> By including these exemptions…Parliament has recognised the need to balance the costs of requiring lawyers to hold [licenses] against the benefits to be gained from their doing so. These exemptions are sensible and necessary given the wide definition of 'financial product advice'…It is sensible that lawyers not be subject to additional licensing requirements given the professional standing, ethic and self-regulatory arrangements applying to lawyers.[55]

3.78 The Committee received these submissions relatively late in the course of this inquiry and so was not able to conduct as thorough a review of the points raised as it would have liked.

3.79 Nevertheless, the Committee has identified the following issues as being of concern to lawyers and will deal with each in turn:

- the failure of regulation 7.1.29 to exempt the provision of custodial and depository services in certain instances from the FSR licensing regime;
- the need for certain 'dealing' activities to be exempted; and
- the provisos in subregulation 7.1.29(1).

Custodial and depository services

3.80 While welcoming the additional licensing exemptions provided by regulation 7.1.29, the Law Council considered that certain 'dealing' activities and custodial or depository services provided by lawyers should also be exempted from licensing requirements. According to the Law Council, these omitted activities were provided by lawyers 'in the ordinary course of activities of a lawyer', were 'reasonably regarded as a necessary part of those activities' and should not 'on a public policy basis' be regulated under the Act.[56]

3.81 At the hearing, Ms Lisa Simmons for the Law Council, said lawyers' principal concern was to ensure that where lawyers were required to hold and deal with trust money and controlled money, they would not have to be licensed. Ms Simmons said this was an activity that would most likely fall within the definition of providing a custodial and depository service and so require a licence. However, she indicated that draft regulations released in March 2003 for comment would resolve difficulties with this aspect of lawyers' concerns once the regulations were made.[57]

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54 Paragraphs 766B(5)(a) and (b).

55 *Submission* 11, p. 4.

56 *Submission* 11, p. 5.

57 *Committee Hansard*, 16 June 2003, p. CFS 33.

3.82 Mr Keith Harvey, Lawyer, agreed with the Law Council and proposed that regulation 7.1.29 include a licensing exemption for the provision of custodial and depository services where:

- an accountant or lawyer holds documents such as share certificates, bank bills or life policies in safe custody for a client; and
- a trustee of any trust holds any kind of financial product on trust for beneficiaries.[58]

Activities associated with 'dealing'

3.83 The Law Council proposed amendments to the licensing regime so that the following 'dealing' activities would not fall within licensing requirements:

- dealing undertaken by a lawyer when acting as a client's attorney;
- arranging sales of securities in certain instances;
- dealing undertaken by a lawyer when acting as the executor or trustee of a deceased's estate;
- arranging cover notes of insurance in conveyancing transactions.[59]

Provisos in the regulation

3.84 Subregulation 7.1.29(1) only provides an exemption for eligible services where they are provided in the course of conducting an exempt service and:

- it is reasonably necessary to provide the eligible service to conduct the exempt service; and
- the eligible service is provided as an integral part of the exempt service.

3.85 The Law Council argued that the provisos of 'reasonably necessary' and 'integral part' be made alternatives and questioned the rationale of requiring satisfaction of both criteria before the licensing exemption should apply. In this regard, it thought the legislation should adopt a similar approach to that in the United Kingdom which allowed a licensing exemption for regulated activities if they could 'reasonably be regarded as a necessary part of other services provided in the course' of a profession or business. The UK exemption did not have the additional test that the activities be an 'integral part' of the services provided.[60]

3.86 To demonstrate the difficulties this would create, the Law Council cited the example of a lawyer acting for a client in the acquisition of a company. It said that the advice on due diligence, the terms of the contract of acquisition, the regulatory approvals and related tax issues would fall within the 'financial product advice'

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58 *Submission* 9, p. 3.

59 *Committee Hansard*, 16 June 2003. These are all referred to on p. CFS 33.

60 *Submission* 11, p. 7.

exemption under the Act and under regulation 7.1.29(3)(c). The Law Council questioned whether the following activities undertaken by lawyers would meet the conditions to qualify as an 'eligible service':

- execution of the acquisition contract as attorney for a client; and
- receipt, holding and temporarily investing the consideration for the acquisition paid to the lawyer by the client.

In this regard, the Law Council asked:

> Will these ancillary services, which are activities undertaken within the ordinary course of activities of a lawyer, be taken to be reasonably necessary and an integral part of the provision of advice on the acquisition? The first test, that the service be 'reasonably necessary', is likely to be satisfied. The second test, that the service be 'an integral part of' may not be satisfied in respect of each of the additional activities listed above.[61]

3.87 At the hearing, Ms Simmons elaborated on this point and stated that:

> I think the 'an integral part of' test is actually quite a hard one to satisfy. The way the regulation in 7.1.29(3)(c) is framed, it refers to the fact that it is advice being provided. So for anything that you do that is not advice, you would query how that could be an integral part of the advice that is being provided. For instance, if you are executing the contract or you are providing some other sort of service, it is very difficult to see how that could be an integral part of the advice.[62]

3.88 Slightly at odds with the Law Council, the NTAA thought the term, 'reasonably necessary', in subregulation 7.1.29(1) could present problems. It argued that the term could be so narrowly interpreted as to 'defeat the whole purpose' of the regulation. It recommended the substitution of 'appropriate' so the provision would read:

> …it is appropriate to provide the eligible service in order to conduct the exempt service.

The Committee's views

3.89 The Committee notes that the definition of custodial and depository services in section 766E of the Act casts a very wide net. It consequently believes that a case has been made out for the exemption of these services when provided by lawyers and accountants in certain instances. The Committee agrees with the first limb of the specific proposals made by Mr Harvey but believes the second limb may be framed too widely.

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61 *Submission* 11, pp. 6-7.

62 *Committee Hansard*, 16 June 2003, p. CFS 37.

Recommendation 4

The Committee recommends that the *Corporations Act 2001* should be amended or regulations drafted to provide an exemption from the licensing requirements for the provision of custodial or depository services by an accountant or lawyer where, in the ordinary course of the conduct of their business, they are required to hold documents in safe custody for their clients.

3.90 As far as the other issues raised by the Law Council, Mr Harvey and the NTAA are concerned, the Committee urges the Government to give these due consideration so that appropriate licensing exemptions can be finalised as soon as possible before the end of the transition period on 11 March 2004.

CHAPTER 4

THE CORPORATIONS AMENDMENT REGULATIONS 2003 (NO. 3), STATUTORY RULES 2003 NO. 85

4.1 Although submissions to the inquiry focused on regulation 7.1,29, the Committee sought explanations of the purpose of a number of regulations in Statutory Rules 2003 No. 85 beyond that provided in the Explanatory Statement. In particular the Committee sought clarification on:

- regulation 7.1.33D concerning investment linked insurance products;
- regulation 7.6.01(1)(la) concerning non-cash payment facilities; and
- regulation 12.7.06 concerning the Friendly Societies Code.

Regulation 7.1.33D

4.2 A person who carries on a financial services business must hold an Australian Financial Services Licence covering the provision of the financial services under subsection 911A(1) of the *Corporations Act* (the Act). The term 'financial services business' is defined as 'a business of providing financial services'.[1] The term, 'financial service', is in turn defined in section 766A of the Act.

4.3 Section 766A(2)(b) permits regulations to set out the circumstances in which persons are taken to provide, or are taken not to provide, a financial service. Corporations Regulations 7.1.30—7.1.33B in Division 3 of Part 7.1 of the Corporations Regulations specify a number of activities which are taken not to amount to providing a financial service within the meaning of paragraph 766A(1)(a) of the Act. Under regulation 7.1.33A, the provision of a recommendation or statement of opinion about the allocation of funds among certain general asset types is taken not to amount to providing a financial service within the meaning of paragraph 766A(1)(a).

4.4 The Corporations Regulations include new regulation 7.1.33D in Division 3 of Part 7.1 of the Corporations Regulations. Regulation 7.1.33D provides that a person is not taken to provide a financial service if he/she makes a market for a financial product and is the issuer of the product and the product is an investment-linked life insurance policy under an investment-linked contract (within the meaning of the *Life Insurance Act 1995*).

4.5 The Explanatory Statement provided the following explanation:

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1 Section 761A.

> Unit-linked life insurance products share a number of common features with superannuation products and managed investment schemes, which are listed under an exemption from the definition of 'making a market' in subsection 766D(2) of the Act. The regulation will ensure that simply calculating unit prices in relation to their redemption value will not of itself constitute making a market. This will result in a comparable treatment with the exemption currently available to superannuation products and managed investment schemes.

4.6 Mr Mike Rosser, Department of the Treasury, further explained:

> The rationale for this regulation is that the way the legislation is framed, the operation of the 'making a market' provisions which require licensing can inadvertently capture certain types of investment products that are provided where, each period, the offerer of the product has to provide a price at which it can be redeemed. That could constitute making a market, but the purpose of the regulation is to recognise that what it is doing is actually providing a service to the person to tell them what the value of that would be at a particular point in time. It is not about making generally available the willingness to form part of a making a market transaction. It is not a general offer to the public; it is actually in respect of a specific client.[2]

Regulation 7.6.01(1)(la)

4.7 Regulation 7.6.01(1) lists services that are exempt from the requirement to hold an Australian financial services licence. Regulation 7.6.01(1)(la) includes in the list of exempt services in regulation 7.6.01(1) a financial service provided by one person to another if the financial service is provided in the ordinary course of the person's business, the first person holds a licence authorising the provision of financial services other than the financial service provided in the ordinary course of the person's business or does not hold a licence and the financial service consists of advising in relation to a non-cash payments facility or arranging to deal in a non-cash payments facility to pay for a financial product or service.

The Explanatory Statement provided the following explanation:

> Regulation 7.6.01(1)(la) extends the relief from licensing provided by 7.6.01(1) to financial service providers. That is, relief from licensing is provided for financial service providers who, as part of their business, advise their customers or clients on the options available for making payments for goods or services supplied, or make arrangements to put a payment facility in place.

4.8 Mr Rosser further explained:

> It is a refinement of the provision that deals with the definition of what a non-cash payment is, to the extent of defining what types of products are subject to FSR licensing obligations. The definition that is in the legislation

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2 *Committee Hansard*, 16 June 2003, p. CFS 39.

> at the moment talks about a transaction where there is one party involved in the transaction, which gives rise to a difficulty when that party is in effect a joint party—that is, it is an account or facility that is held in the name of more than one person—as it means that, if it were held in the name of more than one person, it would be subject to an exemption. So the refinement is to say that one party can include a jointly held product.[3]

Regulation 12.7.06

4.9 Regulation 12.7.06 provides for certain provisions of the Friendly Societies code to cease to apply to FSR licensees. The Explanatory Statement provided the following explanation:

> This regulation is intended to ensure that a Friendly Society transitioning into the FSR Act's disclosure regime does not have to comply with multiple disclosure requirements. Schedule 4 of the Act concerns the Transfer of Financial Institutions and Friendly Societies. If a body to which this schedule applies transitions to the FSR's disclosure regime, the application of paragraph 36 of Schedule 4 of the Act would mean that two separate disclosure regimes might apply to such products. Therefore, the Schedule 4 disclosure provisions will apply the sooner of 11 March 2004 or opting in to the Part 7.9 disclosure regime.

4.10 Mr Yik, the Treasury, further explained:

> That was a transitional amendment as part of coming into the FSR regime. The old schedule 4 applied to friendly societies. There was no method to disapply that provision, so that basically came into the new FSR regime. They had the old regime applying to them as well. All this regulation says is that you have only one regime applying to you—you do not need more than one: it is either FSR or the old schedule 4.[4]

Conclusion

4.11 The Committee notes the information provided by the Department of the Treasury on the above regulations. There is nothing in the evidence to suggest that the regulations should be amended.

Senator Grant Chapman
Chairman

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3 *Committee Hansard*, 16 June 2003, p. CFS 40.

4 *Committee Hansard*, 16 June 2003, p. CFS 40.

REPORT BY THE LABOR MEMBERS

Introduction

The Labor members of the Committee support the objectives of the *FSR Act* and are keen to ensure that the Government monitors the implementation of the Act and the related regulations.

Accordingly, the Labor members recommend a review of the FSR regime post-implementation in 2004.

Previously, the Committee has examined the position of accountants under the FSR Act. The Labor members reiterate their view that accountants who provide financial product advice should not be exempt from the operation of the *FSR Act*.

Subject to the recommendations below, the Labor members support the re-draft of regulation 7.1.29 to carve-out those activities which are not considered to be financial services.

During the hearing a number of arguments have been advanced to support a further exemption from the *FSR Act* for accountants in recommending a superannuation structure to their clients, on the basis that such advice is not investment advice.

In our view, this argument has not been sufficiently made out and is discussed in detail below.

Investment advice

The key issue that the Committee considered was whether accountants should be exempted from FSR for recommending to their clients a type of superannuation fund structure.[1]

Under regulation 7.1.29, whilst accountants will be able to provide factual information to their clients on the types of fund structure available, they will not be to make a recommendation as to the type of structure a client should adopt. Such advice constitutes "financial product advice" and as such would require the accountant to hold an AFSL.

Advice from Phillips Fox lawyers (tendered by the ICAA during the hearing) confirms that advice to a client recommending a type of super fund structure would fall within the existing definition of "financial product advice". The Phillips Fox advice states that:

> *"An accountant who advises a client about which superannuation structure or combination of structures is most suitable for that client*

[1] The type of fund structures which a client may choose from include: retail funds, industry funds, corporate funds, small APRA funds, public sector funds and self-managed superannuation funds (SMSF's).

> *is making a recommendation or statement of opinion that is intended (or could reasonably be regarded as being intended) to influence the client in making a decision in relation to a particular class of financial products or an interest in a particular class of financial products, so that activity falls within the definition of a financial service and will require a licence unless there is a relevant exemption."*

The accountants were of the view that such advice should be exempted from the FSR regime on the basis that no investment decision is made by the consumer in choosing a superannuation structure.

Mr Reilly from the ICAA said that:

> *"We would argue that the consumer is not making an investment decision because there are not investment products in there. There are no trails in setting up a superannuation fund structure whatsoever. Where the trails come through is when a licensed financial adviser is required to actually put investment products in that superannuation fund."*[2]

Others argued that setting up a self-managed super fund was simply setting up an empty vehicle.

Mr Lawrence said that:

> *"We are talking about the establishment of a fund. The establishment of a fund is the mere signing of a bunch of documents….Establishing a super fund is simply signing a document under the Superannuation Industry (Supervision) Act which says that this fund is set up by them power for the benefit of the members for their retirement; end of story. It is a piece of paper which is then signed by the trustee, signed by the members stamped in some states, and not in others and that is it."*

The Labor members are of a different view.

In our view, choosing to set up a self-managed super fund is a choice which entails an investment decision. Once the decision is made to set up a self-managed super fund – generally, the decision to direct funds into that fund is made.

The explanatory statement explains this as follows:[3]

> *"Under the FSR, recommending a person establish a SMSF structure is a superannuation investment decision as it is equivalent to recommending a person becomes a member of a SMSF. Further, when a person accepts a recommendation to establish a SMSF, that client will probably not consider seeking further advice*

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2 Committee Hansard, 16 June 2003, p. 14.

3 Explanatory Statement, *Corporations Amendment Regulations 2003 (No. 3) Statutory Rule No. 85*, p. 5.

> *from a licensed person on what other investment alternatives may be suitable in their circumstances. "*

The Labor members believe that recommending one superannuation structure over another constitutes an investment decision.

It is not an ordinary investment decision; it is one that has the potential to impact on the consumers' retirement and their future economic well being.

Accordingly, consumers are entitled to the protection afforded by the *FSR Act* in relation to such a decision.

In light of these issues and the overriding objective of the legislation to protect the interests of consumers, the Labor members do not support the Committee's recommendations.

The Committee's recommendation that the regulation should be amended to exempt accountants from the FSRA for recommendations in relation to superannuation fund structures is not supported, nor are the recommendations for broader carve-outs for accountants.[4]

Qualifications

In seeking an exemption for advice on superannuation fund structures, the accountants also argued that they are the best-qualified practitioners to deliver advice on choice of superannuation structure and that they provide independent advice.

Qualifications

Mr Reilly from the ICAA said that:

> *"..it is the accountant who is best placed to provide that impartial, independent advice."*

Mrs Orchard made the point that distinguishing between the broad classes of superannuation is *"part of our postgraduate training"*.

Ms Bowler made the point that she had done the diploma in financial planning and that:

> *"…..we did not cover the structural issues for superannuation. It covered what you should invest in, it covered all the different types of superannuation products, but it did not cover whether a self-managed super fund, an industry fund or a retial fund is most appropriate. I do not think it was considered part of financial product advice."*[5]

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4 In paragraphs 3.55 and 3.76 of the Report

5 Committee Hansard, 16 June 2003, p. 16

The Labor members are of the view that these comments highlight the need to increase the minimum training required of people who provide financial product advice to retail clients.

Accordingly, the Labor members recommend that the basic training requirements for financial product advisers include training in relation to the different superannuation structures.

Suite of products

The hearing also raised the issue of independence and the limited suite of products generally recommended by financial planners.

Mr Lawrence and Ms Bowler referred to the ACA/Choice Shadow Shopping survey of the financial planning industry.

Ms Bowler said she sat on the panel for the *Choice* survey and it was found that *"the only people who recommended self-managed super funds were authorised representatives with an accounting background."*

Mr Lawrence said that:[6]

> *"In the 30-odd years that I have been practice, I have not seen one financial planning recommendation which recommends the setting up of a self-managed super fund and which recommends anything other than managed funds. It is an absolute fact of lite that the financial planning industry works on commissions; they do not work on fees for service and therefore they do not recommend self-managed superannuation funds."*

The menu of options which financial planners provide to their clients is an issue which goes to the heart of the FSRA regime.

The fact that few financial planners are offering limited low cost products to clients is an issue which must be addressed particularly in light of the Government's Choice legislation.

The Labor members are of the view that the Government should require financial planners (and other AFSL holders as required) to offer their clients a menu of superannuation options – which include low cost products.

Lawyers

The Labor members note the concerns raised by the Law Council in relation to custodial and depository services and note that draft regulations have been issued by the Government in relation to this issue.

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6 Committee Hansard, 16 June 2003, p. 20

The Labor members reiterate their view that the Government must maintain a vigilant oversight of the type of services lawyers are offering and where appropriate make regulations. This is particularly important in light of the growing trend for lawyers to consider commission arrangements with suppliers of services to clients.

Miscellaneous

The Labor members note that the exemptions in the original regulation were restricted to "recognised accountants" whereas the exemptions in the new regulation apply to "a person".

Recognised accountants are members of accounting professional bodies who are subject to Codes of Professional Conduct and Ethics as well as mandatory Independent Quality Reviews for accountants providing services to the public.

The Labor members recommend that a review of the FSR regime post-implementation in 2004 should be conducted and that such a review should consider whether further consumer protection measures should be implemented in light of the expanded exemption provided in the revised regulation.

Also, we note the concern that ASIC has not given proper recognition to accountants' professional qualifications and training in PS 146 and recommend that this issue is considered as part of the post-implementation review in 2004.

Senator Penny Wong
Labor Senator for South Australia

Mr Alan Griffin MP
Australian Labor Party

Senator Stephen Conroy
Labor Senator for Victoria

Mr Anthony Byrne MP
Australian Labor Party

APPENDIX 1

SUBMISSIONS RECEIVED AND ADDITIONAL INFORMATION

Submissions

1. Hall Jackson Pty Ltd
2. Mr George Lawrence
3. National Tax & Accountants' Association
4. Credit Union Services Corporation (Australia) Limited
5. The Institute of Chartered Accountants in Australia; CPA Australia; National Institute of Accountants, and Taxation Institute of Australia
6. Peter Davis Taxation & Accounting Services
7. Taxpayers Australia Inc
8. Australian Bankers' Association
9. Mr Keith Harvey
10. Financial Planning Association of Australia Limited
11. The Law Council of Australia

Additional Information

Additional information accepted as public evidence:

Correspondence dated 16 June 2003 from Phillips Fox Lawyers to The Institute of Chartered Accountants of Australia – Accountants, AFS Licensing provisions and superannuation advice.

APPENDIX 2

PUBLIC HEARING AND WITNESSES

Monday, 16 June 2003, Canberra

National Institute of Accountants
Agland, Mr Reece, Technical Counsel

CPA Australia
Bowler, Ms Kathryn Laurayne, Director, SMEs

Peter Davis Taxation and Accounting Services
Davis, Mr Peter, Principal

Law Council of Australia
Greentree-White, Mr James, Lawyer, Legal and Policy
Simmons, Ms Lisa, Representative

Lawrence, Mr George (Private capacity)

Taxpayers Australia Inc.
McDonald, Mr Peter James, National Director
Mooney, Ms Caroline Faye, Financial Services Adviser

The Institute of Chartered Accountants in Australia
Orchard, Mrs Susan Janet, Superannuation Technical Consultant
Reilly, Mr Keith, Technical Adviser

Taxation Institute of Australia
Payne-Mulcahy, Mr Michael, Tax Counsel

Department of the Treasury
Rosser, Mr Michael John, Manager, Investor Protection Unit, Corporations and Financial Services Division
Yik, Mr Andrew Yu Chin, Analyst

APPENDIX 3

ADDITIONAL INFORMATION PROVIDED BY THE DEPARTMENT OF THE TREASURY

Telephone: (02) 6263 3962
Facsimile: (02) 6263 3030

THE TREASURY

Corporations and Financial Services Division
The Treasury
Langton Crescent
PARKES ACT 2600

19 June, 2003

Dr Kathleen Dermody
Committee Secretary
Parliamentary Joint Committee on Corporations and Financial Services
Parliament House
CANBERRA ACT 2600

Dear Dr Dermody

COST OF OBTAINING AN AUSTRALIAN FINANCIAL SERVICES LICENCE AND REGULATIONS 7.7.02 AND 10.2.38

I am writing in response to a question asked by the Parliamentary Joint Committee on Corporations and Financial Services (the Committee) in its public hearing on Monday 16 June 2003. I understand the Committee is interested in the costs associated with obtaining and maintaining an Australian Financial Services Licence (AFSL), especially for accountants. Also, enclosed is some additional information on two regulations raised at the Committee's hearing on 16 June 2003.

A. COST OF FSR LICENSING

Cost of applying for an AFSL

In evidence taken on the evening of the 16th of June, mention was made of a sum of $20,000 for the cost associated with obtaining an AFSL.

It is difficult to provide an average single dollar amount for the costs incurred for individual applicants applying for an AFSL, and I note that the Australian Securities and Investments Commission (ASIC) does not obtain this data from applicants. As you would appreciate, the cost of obtaining an AFSL will vary widely and depend in part on the scale, nature and type of the particular financial services business. As the number of persons that apply for an AFSL increase, new applicants can (and are) leveraging off the experiences of others and consequently, the time involved and cost of applying for a licence is understood to be falling.

I also note that ASIC has designed its licensing systems and provides guidance to applicants to enable parties to apply for a licence without the need for external assistance. However, given the requirements of licensing, many applicants will engage advisers to assist them. For smaller businesses, we understand from industry participants that such advisers commonly charge in the vicinity of $3,500 for services such as:

- a review of systems;
- assistance in completing the application; and
- assembling the required documentation.

For a larger business often much of the work will be done in-house, and would among other things involve, full due diligence and legal advice on complex issues with industry consultations having previously cited figures of around $60,000.

Ongoing costs

I note that licensing costs were also discussed in terms of ongoing requirements. The main determinants of the costs are highlighted below:

1. Insurance

- Complying with the FSR regime may result in Professional Indemnity insurance costs to meet the FSR's compensation requirements as set out in section 912B of the *Corporations Act*.

- The need to ensure adequate compensation arrangements under the FSR should be seen in light of the fact that many applicants already hold professional indemnity insurance cover. This is especially the case for professionals such as accountants.

- It should be noted that Corporations Regulation 10.2.44 relieves licensees of the obligation to provide compensation arrangements for retail clients until the end of the FSR transition period, that is 11 March 2004.

2. FSR Training

- Many professionals already need to meet ongoing competency or professional development requirements, for example, the continuing professional development required by particular accounting bodies. As noted in Attachment A, many courses run by the accounting bodies are recognised by ASIC as part of the training requirements it sets for FSR licensing under ASIC Policy Statement 146.

- Therefore, the FSR training requirements might be expected to sit alongside rather than replace existing requirements and in many cases not result in a need for additional training. Evidence was provided to the Committee by at least some accounting representatives that they had sufficient training to advise to some extent on financial products.

3. Audit provisions

- Many professionals already have pre-existing financial and tax reporting and audit obligations to meet their current professional requirements. In many instances, there will need to be no substantial change to accommodate the FSR's requirements.

4. Systems and procedures

- Similarly, new systems may be required in some cases in others. However, many pre-FSR business systems will be capable of being adapted to meet the requirements under FSR.

B. ADDITIONAL INFORMATION ON SUBREGULATIONS 7.7.02 AND 10.2.38

Subregulations 7.7.02(4) and (5)

This regulation provides an exemption from the requirement to provide a Financial Services Guide (FSG) in limited circumstances. The regulation is based on an existing exemption from providing a

FSG in relation to material that would constitute general advice when this is provided in a 'public forum' (such as a billboard or newspaper).

There are analogous circumstances where comparable information is available or provided to people but where this does not occur in what has been defined in the legislation as a 'public forum'. Examples include a brochure in a bank or advertising sent to a person by mail. It would not be practical to require a full FSG to be provided where information is provided in such situations. Provision of a FSG in such situations was not contemplated when the FSR was being developed and (on a technical reading of the Act) a requirement to do so is an unintended consequence.

There are several conditions that limit the use of this exemption, such as the advice:

- must only be general advice (ie it cannot be advice that considers a person's personal objectives and financial situation);
- must be provided by a person linked to the product, such as a product issuer;
- cannot be provided during a meeting or telephone call; and
- must be accompanied by certain information required in an FSG namely, the provider's name and contact details, information about remuneration or benefits and information about associations and relationships.

If a person ultimately chooses to approach the provider directly about a product advertised in this way, then the obligations to provide disclosure documents, such as a FSG and a Product Disclosure Statement would be triggered.

Subregulation 10.2.38(2)

Amendments to this subregulation were made to allow a broader range of persons to take advantage of the streamlined licensing provisions available through the Act. These persons will be eligible to make a streamlined licence application in respect of all activities lawfully carried on pre-FSR, which will require an AFSL after the FSR commencement.

The essential difference between a streamlined licence application and a 'full' licence application is that ASIC does not need to be satisfied that streamlined licence applicants are of good fame and character, or that they will comply with their obligations under section 912A (which includes matters such as providing financial services efficiently, honestly and fairly, and complying with the financial services laws, as defined in section 761A). Rather the applicant provides a written attestation to this effect.

Following licensing, although applicants for a streamlined licence do not have to demonstrate the above-mentioned matters to ASIC's satisfaction as part of the licensing process, they of course have to meet these requirements on an ongoing basis. Further, their licence can be revoked if they fail to meet the relevant obligations in section 912A.

The basis on which streamlined licensing was made available was that certain categories of people (generally those who were previously licensed or registered by ASIC or APRA pre-FSR) would have already demonstrated their good fame and character, and their ability to comply with licensing obligations, as part of that pre-FSR regulation.

However, the streamlined licence application provisions in the Act presently only allowed streamlining where all of the pre-FSR activities were licensed by ASIC (or were subject to

registration under legislation administered by ASIC). Thus, even if only small proportions of pre-FSR activities were not subject to ASIC licensing, a person could not make a streamlined licence application. The practical effect of this was that the streamlined licensing procedure was open to only a very small number of applicants.

The regulations widen the scope of the streamlined licensing provisions to include persons who carried on some activities pre-FSR that were subject to ASIC regulation, even though all of their activities may not have been. It also allows persons regulated by APRA prior to FSR to make a streamlined licence application.

In relation to insurance brokers, their activities are subject to regulation through the *Insurance (Agents and Brokers) Act* (IABA) which provides the statutory basis for consumer protection regulation of insurance companies, agents and brokers. IABA is administered by ASIC.

The general basis for the amendment to the streamlining provisions is that the parties involved are already regulated by ASIC or APRA and in many cases both. Therefore, even though some aspects of a streamlined licensee's pre-FSR activities may not have been regulated by ASIC, the licensee would have been regulated to the extent required by the relevant pre-FSR regime.

It should be noted that the streamlining provisions only apply to activities that were *lawfully* carried on pre-FSR, and only relate to a particular entity or person regulated under existing law. Therefore, if an activity should have been licensed or regulated under a pre-FSR regime and was not, the streamlining provisions do not apply. Similarly, if one company in a corporate group held an ASIC or APRA licence pre-FSR, this does not enable other companies in the group to streamline.

I trust this information will be of assistance to you.

Yours sincerely

Michael Rosser
Manager, Investor Protection Unit
Corporations and Financial Services Division

ATTACHMENT A

SOME COURSES PROVIDED BY ACCOUNTING BODIES RECOGNISED AS PART OF FSR TRAINING

(Source: ASIC Training Register)

Training provider	**Course or assessment name**	**Specialist knowledge component**	**How the course meets ASIC's minimum requirements set out in Appendices A & B of PS 146**
CPA Australia	Discovering the options of Securities and Futures Markets	Securities and Futures Markets	Meets requirements for specialist knowledge component
CPA Australia	Managed Investments	Managed Investments	Meets requirements for specialist knowledge component
CPA Australia	Intensive Course in Financial Planning	Financial Planning; Managed Investments; Superannuation	Meets requirements for generic and specialist knowledge components
CPA Australia	Personal Financial Planning and Superannuation (CPA110): CPA Program	Financial Planning; Superannuation	Meets requirements for generic and specialist knowledge components
CPA Australia	Insurance and Risk Management in Financial Planning	Core and General Life Insurance; Insurance Broking	Meets requirements for generic and specialist knowledge component.
Institute of Chartered Accountants in Australia	ICAA Financial Planning Authorised Representative Course (formerly Property Authority Course) **PLUS** Advanced Financial Planning Course	Financial Planning; Managed Investments; Superannuation	Meets requirements for generic and specialist knowledge components
Institute of Chartered Accountants in Australia	Financial Planning Authorised Representative Course (formerly Proper Authority Course)	Financial Planning; Managed Investments; Superannuation	Meets requirements for generic and specialist knowledge components