

CHAPTER 5

Accountants

Licensing and related matters

Introduction

5.1 The Committee received several submissions and heard evidence from professional accounting bodies and a taxation and accounting practice which indicated widespread confusion and dissatisfaction across the industry about the licensing exemptions.

5.2 Although some relief is provided to registered tax agents by paragraph 766B(5)(c) of the FSR Act, this was regarded by some witnesses as not going far enough.

5.3 The most significant dissatisfaction was with regulation 7.1.29 which was described as confusing, unworkable and in urgent need of clarification. The regulation may have been intended to provide a licensing carve-out for the activities specified in subregulation (1). However, this is not clear.

5.4 A number of submitters maintained that accountants needed to know whether or not their activities would fall within an exemption but regulation 7.1.29 did not provide the guidance needed. They were concerned about what they contended were high licensing costs and the ramifications for accountants who sought authorised representative status. In addition, ASIC's Policy Statement 146: *Licensing: Training of financial product advisers* (PS 146) attracted some criticism on the grounds that its training requirements for accountants were inappropriate and costly.

5.5 These issues are discussed in this Chapter.

Exemption from licensing

5.6 Submissions from the Institute of Chartered Accountants of New Zealand (ICANZ), Peter Davis Taxation & Accounting Services (Peter Davis Accounting), The Institute of Chartered Accountants in Australia (ICAA) and CPA Australia (CPAA)(joint submission), the National Institute of Accountants (NIA), the Taxation Institute of Australia (TIA) and the National Tax & Accountants' Association (NTAA) all argued for a licensing exemption for what were generally termed as 'traditional accounting activities'.¹

1 See submissions 3, 11, 12, 16, 27 and 34 respectively.

5.7 Although most of the debate focussed on the industry's dissatisfaction with regulation 7.1.29 (which will be discussed later in this chapter), it was implicit in their evidence that a licensing exemption was unanimously supported.

5.8 In particular, there was agreement that licensing of accountants would be appropriate where they provided financial product advice as a core part of their activities or where commission or other remuneration from a third party was paid in relation to the advice. However, where traditional accounting activities were concerned, the general consensus was that there should be an exemption.

5.9 The ICAA and CPAA argued that a licensing exemption for traditional accounting activities was consistent with the Financial System Inquiry's (Wallis Inquiry's) Final Report that found:

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 basis which substantially alters the character of the relationship 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.²

5.10 The NIA commented that the 'Incidental Advice Exemption' in the previous legislation had worked well because it recognised the wide array of advice incidental to general advice that accountants dispensed to their clients.³

5.11 It appeared from the submissions and evidence that the relief afforded to registered tax agents by the legislation had a limited application in practice for those accountants who also held a tax agent's licence. According to the NIA, most work performed by accountants was outside the tax agents' exemption and was more in the nature of 'independent business advice'.⁴ There was also the difficulty in determining where the line would be drawn between the exempted tax agent's activities and other work engaged in by accountants.

5.12 The NIA argued that, if accountants were required to obtain licences for their traditional accounting activities, the costs associated with licensing would threaten the delivery of services by smaller suburban accounting practices which currently provided a cost-effective, 'one-stop shop' to consumers. In this regard, the TIA and

2 *Financial System Inquiry Final Report*, March 1997, pp. 275–76.

3 Submission 16, p. 2.

4 Submission 16, p. 5.

Peter Davis Accounting adverted to the potentially serious ramifications for self-managed superannuation funds, the majority of which were managed and administered by smaller suburban practices.

5.13 The argument was also advanced that additional regulation, other than imposing quite substantial licensing and compliance costs on the profession, would not result in increased consumer protection or any other benefits.

5.14 At the hearing on 11 July 2002, Mr Reece Agland, General Counsel, NIA, listed various consumer safeguards already in place such as requirements that accountants are insured, belong to professional bodies, satisfy continuing professional educational requirements, observe codes of conduct and practice quality assurance.⁵

5.15 While a licensing exemption for accountants was the overriding concern in submissions and evidence given, the main focus of debate was on how the exemption could be achieved. In this regard, the efficacy of regulation 7.1.29 was seriously questioned.

The exemption in regulation 7.1.29

Analysis of the regulation

5.16 The contentious features of regulation 7.1.29 are in subregulations (1) and (2).

5.17 Subregulation 7.1.29(1) lists ‘circumstances’ in which recognised accountants will be taken not to be providing a financial service within the meaning of paragraph 766(1)(a) of the FSR Act. The circumstances are as follows:

- advising in relation to the preparation or auditing of financial statements;
- advising or acting in the capacity of a controller, administrator, receiver, manager, liquidator or trustee in bankruptcy in relation to the administration (including the disposal) of an entity or estate;
- advising on the financing of the acquisition of assets that are not financial products (for example, advising on the advantages and disadvantages of financing alternatives such as leasing and hire purchase);
- advising on the processes for the establishment, structuring and operation of a superannuation fund within the meaning of the *Superannuation Industry (Supervision) Act 1993* (SIS Act);
- advising on debt management, including factoring, defeasance and the sale of debts;
- advising on taxation issues, including in relation to the taxation implications of financial products;

5 *Committee Hansard*, 11 July 2002, p. 167.

- advising on the management of risk associated with conducting a business, including risk management through the use of financial products (for example, hedging);
- advising on business planning, including advice in relation to the establishment, structuring and administration of a business;
- conducting a due diligence on a business; and
- valuing the assets of, or shares in, a business, or part of that business.

5.18 However, in subregulation 7.1.29(2) there is a proviso. If the activities in subregulation (1) involve the accountant in making a recommendation, providing a statement of opinion or giving a report of either of those things that is intended to (or could reasonably be regarded as being intended to) influence a person in making a decision in relation to a particular financial product or a class of financial products, the exemption no longer holds.

5.19 In other words, if the accountant gives what amounts to ‘financial product advice’ in the course of carrying out any of the activities in subregulation (1), there is no exemption.

The objections to regulation 7.1.29

5.20 A number of witnesses called for the regulation to be amended urgently to give the accounting industry some certainty about where it stood in relation to the new licensing regime. Criticisms were made that the regulation defied interpretation and did not work. It did not work, according to evidence given, because an accountant providing the services in subregulation (1) would, as a matter of course, make recommendations and give opinions about financial products. Mr Gavan Ord, Technical Policy Manager, NIA, summarised the problem thus:

It is nigh on impossible [for accountants] to provide the sort of advice set out in subregulation (1) without having an influence on a client making a decision in relation to a particular product or class of products. Even where the adviser has not recommended or even suggested to invest in a particular product, their advice will influence the client in making a decision.⁶

5.21 In a similar vein, the ICAA and CPAA stated that:

The main problem with the existing regulation is that the exclusion of financial product advice from the exemption renders the regulation itself virtually meaningless. Since ‘financial product advice’ is so broadly defined, accountants will *in the ordinary course of their duties as accountants* be providing it even though to regulate such activities does not seem consistent with the intention of the legislation.⁷

6 *Committee Hansard*, 11 July 2002, p. 162.

7 Submission 12, p. 4.

5.22 Mr Gil Levy, Senior Vice-President and Treasurer of the TIA, argued that many of the everyday activities of accountants would not qualify for the licensing exemption in regulation 7.1.29 because they necessarily involved the accountant's assessment of and recommendations on various alternatives open to clients. He stated that it seemed anomalous that, without a licence, an accountant experienced in giving advice on a range of business matters would have to refer a client to a financial planner for a recommendation or opinion.⁸

5.23 On the subject of how the carve-out could be achieved, the ICAA and CPAA provided a suggested re-draft in their submission. This retained the activities listed in subregulation (1) but re-fashioned the proviso in subregulation (2). The effect of the re-draft was that the exemption would only apply to the listed activities if they were provided in the ordinary course of the accountant's activities and could reasonably be regarded as a necessary part of those activities. The exemption did not apply where the provision of financial product advice was a significant part of an accountant's usual activities or otherwise where remuneration including commission or other benefits were paid to the accountant by third parties.⁹

5.24 The NIA expressed support at the hearing for the nature and extent of the carve-out proposed by the ICAA and CPAA.¹⁰ The TIA agreed that amendment was necessary and suggested that some of the anomalies with the regulation might be overcome by allowing accountants to provide a recommendation or opinion on business structure.¹¹

5.25 At the hearing on 7 August 2002, officers from the Department of the Treasury advised:

...we are in active discussions with the accounting professional bodies in relation to the regulation that was drafted in consultation with those bodies. We are in discussions with them about something that might be more workable in terms of defining the activities of an accountant which might not be totally included in the regulation.¹²

5.26 When questioned about the Department's progress in drafting an amended regulation, the Department responded that:

At the moment the ball is largely in the accounting bodies' court. We are basically waiting for guidance from them about the sorts of specification and description of the types of activities they feel should be excluded.¹³

8 *Committee Hansard*, 11 July 2002, pp. 169–70.

9 Submission 12, pp. 7–8.

10 *Committee Hansard*, 11 July 2002, p. 162.

11 *Committee Hansard*, 11 July 2002, pp. 172–73.

12 *Committee Hansard*, 7 August 2002, p. 261.

13 *Committee Hansard*, 7 August 2002, pp. 260–61.

5.27 Concerns were raised in the submissions and at the hearings about what was perceived as a lack of guidance from ASIC on how it would enforce regulation 7.1.29.

5.28 In this regard, officers from ASIC said that, given the industry's ongoing negotiations with the Department of the Treasury, ASIC considered the matter to be one of law reform and consequently did not intend to issue further guidance on the regulation.¹⁴

Licensing costs and accountants' independence

5.29 At the hearings, concerns were also raised about the independence of accountants who sought to become authorised representatives of licensees. In this regard, Mr Ord for the NIA said that:

Many accountants, many of our members, express to us—contrary to what people say—that they do not want to become financial planners; they do not want to become authorised representatives. Why? Because they are then stuck with selling certain products and they believe that it is impairing their independence to give advice. As was said by the Financial Planners Association, if you become an agent of a licence holder, you have to meet certain criteria. You have to sell a certain number of products each year to maintain your agent status.¹⁵

5.30 This view was supported by confidential evidence received from an accountant and tax agent. More particularly, the claim was made that licensees were requiring their authorised representatives to meet marketing targets as a condition of keeping their authorised representative status.¹⁶

5.31 Ms Kathy Bowler, Manager, Financial Planning, CPAA, suggested that there was a relationship between the cost of licensing and the independence of authorised representatives. She said that:

The fact is that no-one...will give our members a licence, because they are not selling product and making money for [the licensees]. Most licence holders run at a loss; they are a loss leader and make their money through the product.¹⁷

5.32 At the hearings, concerns were expressed about the cost of licensing and the ramifications for accountants' professional independence. The question was raised whether authorised representative status really offered accountants a viable alternative to licensing.

14 *Committee Hansard*, 7 August 2002, p. 274.

15 *Committee Hansard*, 11 July 2002, p. 167.

16 Confidential submission 40.

17 *Committee Hansard*, 11 July 2002, p. 167.

5.33 Ms Bowler commented that CPAA had been looking at the possibility of becoming a licensee to provide an avenue for its members to become authorised representatives. Ms Bowler said the proposal was only intended to cover those members who wanted to practice as financial planners but who were not prepared to earn remuneration from the promotion or endorsement of specific financial products. She claimed that these members were having problems in finding licensees to take them on as authorised representatives.¹⁸

5.34 Ms Bowler said her estimates of licensing costs where no product advice was given, worked out to somewhere in the realms of between \$12,000 to \$15,000 per annum per adviser on a cost recovery basis. She estimated that for authorised representatives making recommendations about specific products, the costs would work out to about twice that much. These factored in the costs of training, compliance, software and research.

5.35 When asked by the Committee whether she agreed with the statement by Ms Vamos in her letter to the NIA dated 5 July 2002¹⁹ that licensing costs for most accountants would be minimal, Ms Bowler replied that:

‘Minimal’ certainly does not describe the cost we have come up with.²⁰

5.36 The Committee was keen to gauge an industry cost from these figures and, using a notional figure of 150,000 accountants who had to be licensed, estimated the cost would be between \$1.8 billion (assuming a restricted licence cost of \$12,000 per adviser) and \$3.6 billion (assuming \$24,000 per adviser on an unrestricted basis).²¹

Training requirements

5.37 Some submitters were critical about ASIC’s training requirements in PS 146 as they apply to accountants providing financial product advice. (PS 146 was discussed more fully in a previous chapter of this report.)

5.38 The NIA argued that the training was inappropriate for accountants and failed to give due recognition to the professional qualifications and continuing training obligations of accountants.²²

5.39 Mr Peter Davis, an accountant and tax agent appearing in a private capacity at the hearing, said he had not been able to determine which of his activities would fall within the licensing exemption and which would not. He was concerned that although he held professional tertiary qualifications, was a registered tax agent, and complied with his continuing professional education obligations, PS 146 appeared to require

18 *Committee Hansard*, 11 July 2002, pp. 175–76.

19 See Appendix 3.

20 *Committee Hansard*, 11 July 2002, pp. 175–79.

21 *Committee Hansard*, 11 July 2002, pp. 175–77.

22 Submission 16, p. 12.

him to undertake a financial planning course to qualify for a licence. He said he had been quoted between \$5,000 and \$7,000 for such a course. He indicated, however, that he was not sure how his qualifications or experience would be treated under PS 146 on an individual assessment basis.²³

5.40 ASIC was not questioned specifically about the impact of PS 146 on accountants seeking a financial services licence. However, the Committee does appreciate that PS 146 allows applicants to undergo individual assessments as an alternative to formal training if they have had 5 years' relevant experience over the immediate past 8 years.²⁴ ASIC has referred to this option at the Committee's hearings.

The Committee's views

5.41 The Committee accepts the evidence from the accounting industry that regulation 7.1.29, as presently drafted, is causing widespread uncertainty and confusion among accountants. It also accepts that increased regulation of accountants will add to costs which will be passed on to consumers with little, if any, added consumer protection. Of considerable concern to the Committee, is the threat posed by these additional costs to small accounting practices and the delivery of cost-effective services to the self-managed superannuation fund industry.

5.42 The Committee considers that these outcomes are inconsistent with an objective of the FSR Act to facilitate efficiency, flexibility and innovation in the provision of financial products and services.

5.43 The Committee further considers that licensing requirements for accountants should be clarified urgently. In this regard, the Committee makes the following recommendation:

Recommendation

The Committee recommends that the Government amend the Corporations Act or regulation 7.1.29 to provide a licensing exemption for accountants in similar terms to the exemption provided to lawyers in paragraphs 766B(5)(a) and (b) of the Act. The exemption should also make it clear that it will not apply where the exempted activity attracts payment of commission or other benefit from a third party not connected with the client.

5.44 The Committee notes that this recommendation is consistent with the recommendation of the Wallis Inquiry to the effect that accountants should not have to be licensed if they provide investment advice only incidentally to their other business

23 *Committee Hansard*, 11 July 2002, pp. 198–207.

24 Paragraph PS 146.42.

and rebate any commissions to clients.²⁵ It is also consistent with the Committee's recommendation in its report on the Financial Services Reform Bill 2001.

5.45 In relation to the training requirements prescribed in PS 146 for accountants wishing to engage in financial planning as opposed to traditional accounting activities,²⁶ the Committee is satisfied that ASIC has made provision for recognition of an applicant's existing qualifications and experience through its individual assessment option. However, the Committee does not favour the application of the 5 years in 8 threshold for individual assessment for accountants seeking a licence to provide traditional accounting services. Should the Government provide a licensing exemption for these services according to the Committee's recommendations, the suitability or otherwise of the PS 146 training requirements will not be a live issue.

5.46 The continuing problems arising to date from the Government's preferred approach, which has remained at odds with this Committee's previous recommendations, raises the question of what is informing the Government's policy on this matter, which in the Committee's view has consistently been flawed.

5.47 While not directly within this inquiry's terms of reference, the Committee notes the evidence given by some submitters about threats to the independence of accountants seeking authorised representative status. The Committee considers it would be premature to draw any definite conclusions at this early stage. However, it is disturbed by suggestions that accountants without the resources to obtain a financial services licence might find themselves under pressure to market financial products should they seek authorised representative status.

5.48 This outcome is inconsistent with the objectives of the FSR Act to promote flexibility in the industry. In the circumstances, the Committee draws ASIC's attention to these claims and encourages it to monitor developments closely. The Committee would be prepared to consider any additional information about this issue as industry adjusts to the new regime.

25 *Financial System Inquiry Final Report*, March 1997, pp. 275–76.

26 'Traditional accounting activities' are those which the Committee recommends should be exempted from the FSR Act licensing requirements.

