Parliamentary Joint Committee on Corporations and Financial Services

Corporations Amendment Regulations 7.1.29A, 7.1.35A and 7.1.40(h)

June 2004

ISBN 0 642 71382 0

Printed by the Senate Printing Unit, Parliament House, Canberra.

MEMBERS OF THE COMMITTEE

Senator Grant Chapman, **Chairman**

Senator Penny Wong, **Deputy Chair**

Senator George Brandis

Senator Stephen Conroy

Senator Andrew Murray

Mr Anthony Byrne MP

Mr Steven Ciobo MP

Mr Alan Griffin MP

Mr Gregory Hunt MP

Mr Stewart McArthur MP

SECRETARIAT

Mr Paul Lucerne, Principal Research Officer

Dr Kathleen Dermody, Secretary
Ms Angela Lancsar, Executive Assistant

Suite SG.64
Parliament House
Canberra ACT 2600

T: 61 2 6277 3583
F: 61 2 6277 5719
E: corporations.joint@aph.gov.au
W: www.aph.gov.au/senate/committee/corporations_ctte

DUTIES OF THE COMMITTEE

Section 243 of the *Australian Securities and Investments Commission Act 2001* sets out the duties of the Committee as follows:

The Parliamentary Committee's duties are:

(a) to inquire into, and report to both Houses on:

(i) activities of ASIC or the Panel, or matters connected with such activities, to which, in the Parliamentary Committee's opinion, the Parliament's attention should be directed; or

(ii) the operation of the corporations legislation (other than the excluded provisions), or of any other law of the Commonwealth, of a State or Territory or of a foreign country that appears to the Parliamentary Committee to affect significantly the operation of the corporations legislation (other than the excluded provisions); and

(b) to examine each annual report that is prepared by a body established by this Act and of which a copy has been laid before a House, and to report to both Houses on matters that appear in, or arise out of, that annual report and to which, in the Parliamentary Committee's opinion, the Parliament's attention should be directed; and

(c) to inquire into any question in connection with its duties that is referred to it by a House, and to report to that House on that question.

TERMS OF REFERENCE

On 5 February 2004, the Parliamentary Joint Committee on Corporations and Financial Services resolved to inquiry into and report by 11 March 2004 on the following package of regulations:

- the Corporations Amendment Regulations 2003 (Batch 6);
- Draft Regulations—Corporations Amendment Regulations 2003/04 (Batch 7); and
- Draft Regulations—Corporations Amendment Regulations 2004 (Batch 8).

TABLE OF CONTENTS

Members of the Committee iii
Duties of the Committee v
Terms of Reference vii

CHAPTER 1

INTRODUCTION

Background 1
Establishment of the inquiry 1
Conduct of the inquiry 2
Submissions 2
Hearing and evidence 2
Structure of the report 2
Acknowledgement 3

CHAPTER 2

FINANCIAL SERVICES REFORM

History 5
Draft Financial Services Reform Bill 2000 6
Financial Services Reform Bill 2001 6
The Financial Services Reform Act 7
Regulation 7.1.29 8

CHAPTER 3

REVIEW OF REGULATION 7.1.29A

Overview of new regulation 7.1.29A 13
The provisions in detail 13
Evidence 15
Support for regulation 7.1.29A 15
Further exemptions 16
Arguments against any further exemption 18
Structural advice or investment advice 19
Committee view 22
Complaints or dispute resolution mechanism 23
Committee view 24
Disclaimer 25
Committee view 26

Competency to advise on superannuation 26
Committee view 28
Definition of 'recognised accountant' 29
Issue 29
Committee view 30

CHAPTER 4

REVIEW OF REGULATIONS 7.1.35A and 7.1.40(h)

History 31
Evidence 34
Committee view 37

REPORT BY THE LABOR MEMBERS 39

APPENDIX 1

SUBMISSIONS AND TABLED DOCUMENTS 47

APPENDIX 2

PUBLIC HEARING AND WITNESSES 49

CHAPTER 1

INTRODUCTION

Background

1.1 The *Financial Services Reform Act 2001 (*FSRA) was the culmination of a comprehensive reform project that was looking at the regulatory requirements applying to the financial services industry. It amended the *Corporations Act 2001* and is contained in Chapter 7 of that Act.

1.2 The significant reforms introduced by the FSRA into the Corporations Act were designed to facilitate a more efficient and flexible regime for financial markets and products through an integrated regulatory framework for financial products.[1] The FSRA provided basic principles for uniform regulation across the financial services sector. The Act commenced on 11 March 2002 but provided a two-year transition period to allow time for existing industry participants to move to the new regime.

1.3 The Corporations Act provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be specified in regulations. Many regulations have been made since the commencement of the FSRA to give effect to the practical application of the legislation. The corporations amendments regulations under consideration by this Committee are the latest batches of regulations to be made and are intended 'to support the reforms to the regulation of the financial services industry which were implemented in the FSRA and associated legislation'.[2]

1.4 The Parliamentary Joint Committee on Corporations and Financial Services has taken an active interest in the development and implementation of regulations which now form an important and solid body of Financial Services Reform legislation. The making of regulations, however, is an on-going process. The Government released its most recent set of regulations in December, January and February as Batches 6, 7 and 8.

Establishment of the inquiry

1.5 In keeping with its involvement in the development of the FSRA regime, the Committee, on 5 February 2004, resolved to inquire into and report by 11 March 2004 on the following new package of regulations:

---

1 See for example Revised Explanatory Memorandum, Financial Services Reform Bill 2001, p.23.

2 Explanatory Statement, Statutory Rules 2003 No…, issued by the Parliamentary Secretary to the Treasurer, Corporations Act 2001, Corporations Amendment Regulations 2-3 (No. …), p.1.

- the Corporations Amendment Regulations 2003 (Batch 6);
- Draft Regulations—Corporations Amendment Regulations 2003/04 (Batch 7); and
- Draft Regulations—Corporations Amendment Regulations 2004 (Batch 8).

1.6 On 11 March, the Committee agreed to extend the reporting date to on or before 25 March 2004. It decided further to present two separate reports, the first one dealing with the three batches of regulations and a second one that would focus on regulations 7.1.29A, 7.1.35A and 7.1.40(h). These regulations are concerned with excluding a limited range of activities conducted by lawyers and recognised accountants from the licensing requirements under the FSRA. The Committee set 1 April 2004 as the reporting date for the second report and on 31 March decided to extend the reporting period. The Committee tabled its first report on 24 March 2004.

Conduct of the inquiry

1.7 The Committee advertised the inquiry on its web site and in the *Australian* on 11 February 2004 calling for written submissions. It also wrote to over 40 associations, organisations and individuals interested in the FSR program drawing attention to the inquiry and inviting submissions.

Submissions

1.8 The Committee received 24 submissions of which 12 addressed the subject of exemptions. All submissions are listed in Appendix 1 of this report. Copies are published on the Committee's website at http://www.aph.gov.au/senate/committee/corporations_ctte/inquire.htm.

Hearing and evidence

1.9 The Committee held a public hearing in Parliament House, Canberra, on 24 March 2004. It took evidence from those representing consumer interests, lawyers, accountants, the superannuation, and investment industries and from officers of the Department of the Treasury. Those who attended the inquiry are listed in Appendix 2. The transcript of the hearing is available on the website address above.

Structure of the report

1.10 As noted earlier, the Committee decided to present a separate report on regulations 7.1.35A and 7.1.40(h) from Batch 6 together with regulation 7.1.29A contained in Batch 7.

1.11 The report is divided into two parts:

1.12 *Part 1* considers regulation 7.1.29A in Batch 7 as made on 19 February 2004 which provides relief for recognised accountants from FSR licensing in certain circumstances. When Batch 7 was released on 24 December 2003 as draft regulations

for consultation, it did not contain this regulation. The regulations made on 19 February 2004 included new regulation 7.1.29A. They were gazetted on 26 February and tabled in the Senate on 1 March 2004.[3] In light of this recent amendment, the Committee decided to conduct a hearing and report separately on this particular regulation; and

1.13 *Part 2* examines regulations 7.1.35A and 7.1.40(h) from batch 6 which cover conduct that does not constitute dealing in a financial product—lawyers acting on instruction.

Acknowledgement

1.14 The Committee is grateful to, and wishes to thank, all those who assisted in its inquiry.

3 Corporations Amendment Regulations 2004 (No. 2), Statutory Rules 2004 No. 25, Senate *Journal*, 1 March 2004, p. 3032.

CHAPTER 2

FINANCIAL SERVICES REFORM

History

2.1 The financial sector is undergoing rapid change and development resulting concerns about whether existing regulation is meeting the challenge. The Financial Systems Inquiry (FSI) was established in 1996 to analyse the forces driving change in the financial system, and to recommend ways to improve current regulatory arrangements.[1]

2.2 The FSI report also considered the philosophy behind financial regulation that was later to underpin the FSRA. It concluded that:

> …specialised regulation was required to ensure that market participants acted with integrity and that consumers were protected. This was so due to the complexity of financial products, the adverse consequences of breaching financial promises and the need for low-cost means to resolve disputes. The principles of regulation which guided the inquiry were competitive neutrality, cost effectiveness, transparency, flexibility and accountability.[2]

2.3 The FSI recommended that a single licensing regime be introduced for all advisers providing investment advice and dealing in financial products.[3] Licensing was seen as a means to develop a framework of regulation to provide protection for consumers receiving advice. Advisors could not provide advice on financial services and products unless they met the licensing requirements of competency, integrity and accountability.

2.4 The problem arises however, in the definition of financial products and subsequently, the definition of financial advice. This problem has dogged much of the debate relating to the exemptions from the requirement to be licensed. It has been the subject of numerous inquiries and is now being examined by this Committee. Specifically, the fundamental question hinges on clarifying and reconciling what is deemed to be financial service advice with the activities that lawyers and accountants carry out in the normal course of their daily business. For example, whether the provision of general business advice, which includes incidental and general structural advice relating to superannuation, qualifies as financial advice? Similarly, at what point does structural advice cross the line and become specific advice relating to a financial product? At what point does the benefit of licensing cease to justify the cost in time and money to the consumers?

---

1 *Regulation Impact Statement*, Financial Services Reform Bill 2001, p. 3.

2 *Regulation Impact Statement*, Financial Services Reform Bill 2001, p. 3.

3 *Regulation Impact Statement*, Financial Services Reform Bill 2001, p. 5.

Draft Financial Services Reform Bill 2000

2.5 The history of the regulations under consideration granting exemptions dates back to debates on the provisions of the Draft Financial Services Reform Bill in 2000. At this time, the accounting bodies submitted that the present exemption for incidental financial advice was 'uncertain and confusing'.[4] They were concerned that there was a real risk that the Corporations Law was being breached, with a consequent result that professional indemnity insurance was 'invalid'.[5] The lawyers also suggested that the definition in the draft Bill of financial product advice was 'wide and could cover a number of unintended situations'. The Committee sympathised with the views of the lawyers and accountants and stated its belief that the draft Bill should not affect anyone whose involvement in financial services is 'incidental to their main activity' and recommended that the legislation should apply in the clearest fashion.[6]

Financial Services Reform Bill 2001

2.6 A year later during its examination of the Financial Services Reform Bill 2001, the Committee once again examined issues relating to the licensing regime and professional bodies and found them wanting. It concluded that:

> …there are fundamental problems with provisions in the Bill relating both to declared professional bodies and to incidental advice.[7]

2.7 Labor members of the Committee were also unhappy with this aspect of the Bill. They considered whether the exemption for incidental advice should be restored but the definition of 'incidental advice' clarified. They also posed an alternative where the definition of 'financial product advice' or other definitions in the Bill could be amended to clarify what activities undertaken by lawyers and accountants were not intended to be captured by this Bill.[8]

2.8 During debate on the Bill in August 2001, section 766B was amended. In summing up the provisions governing the activities of accountants and the requirement to be licensed, the Hon Mr Joe Hockey, Minister for Financial Services and Regulation said:

---

4 Parliamentary Joint Committee on Corporations and Financial Services, *Report on the Draft Financial Services Reform Bill,* August 2000, p. 24.

5 Parliamentary Joint Committee on Corporations and Financial Services, *Report on the Draft Financial Services Reform Bill,* August 2000, p. 24.

6 Parliamentary Joint Committee on Corporations and Financial Services, *Report on the Draft Financial Services Reform Bill,* August 2000, p. 23.

7 Parliamentary Joint Committee on Corporations and Financial Services, *Report on the Financial Services Reform Bill 2001,* August 2001, p. 93.

8 Parliamentary Joint Committee on Corporations and Financial Services, *Report on the Financial Services Reform Bill 2001,* August 2001, p. 113.

> Many activities of an accountant will not fall within the definitions of the bill. If an accountant is doing no more than the activities described in the bill, they will not be required to come within the FSR regime. As a result of its careful consideration of submissions made on behalf of the accounting profession, the government has clarified that activities conducted by accountants as tax agents are excluded from the bill.[9]

The Committee examines this matter and related provisions of the Act in the following section.

The Financial Services Reform Act

2.9 Division 4 of the Corporations Act specifies the circumstances under which a person provides a financial service. A person who carries on a financial services business must hold an Australian financial services licence covering the provision of the financial services.[10] A person may be an authorised representative of a person who carries on a financial services business.

2.10 Under section 776A a person provides a financial service if they, among other things, provide financial product advice. Financial product advice is defined as a recommendation or a statement of opinion, or a report of either of those things; that:

(a) is intended to influence a person or persons in making a decision in relation to a particular financial product or class of financial products, or an interest in a particular financial product or class of financial products; or

(b) could reasonably be regarded as being intended to have such an influence.

Under sub section 776B(5) the following advice is specified as not financial product advice:

(a) advice given by a lawyer in his or her professional capacity, about matters of law, legal interpretation or the application of the law to any facts;

(b) except as may be prescribed by the regulations—any other advice given by a lawyer in the ordinary course of activities as a lawyer, that is reasonably regarded as a necessary part of those activities.

The Committee is also examining two regulations—7.1.35A and 7.1.40(h)—made under this provisions governing lawyers.

Sub section 776B(5) also has similar provisions for accountants. It reads:

> The following advice is not financial product advice:

---

9 House *Hansard*, 28 August 2001, p. 30393.

10 Section 911A—need for an Australian financial services licence.

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

The Committee is examining regulation 7.1.29A promulgated under this provision.

Regulation 7.1.29

2.11 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.[11]

2.12 The original regulation was intended to provide a licensing exemption for certain activities carried out by 'recognised accountants' in the course of 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. [12]

2.13 During the Committee's inquiry in 2002 into the regulations and ASIC policy statements made under the FSR Act, regulation 7.1.29 attracted extensive criticism from the accounting profession.[13]

2.14 The main objections were that:

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

2.15 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.

2.16 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

---

11 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.

12 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.

13 *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.

2.17 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.

2.18 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.[14]

2.19 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.[15]

2.20 New regulation 7.1.29 came under further scrutiny from the Committee in 2003 shortly after it was made and gazetted. After considering the evidence before it and consistent with the recommendations of the Wallis Inquiry, the Committee found 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.[16]

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

---

14 *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.

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

16 Parliamentary Joint Committee on Corporations and Financial Services, *Inquiry in Regulation 7.1.29 in Corporations Amendment Regulations 2003 (No. 3), Statutory Rules 2003 No. 85,* June 2003, p. 24.

- 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.

2.22 In considering the long term, the Committee recommended that the Government give proper consideration to a broader licensing carve out in respect of the following activities engaged in by accountants in the course of, but incidental 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.

2.23 Labor Members were not convinced by the argument that accountants should be exempted for the FSR for recommending to their clients a type of superannuation fund structure. In essence, they were of the view that:

> …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.

2.24 They believed that recommending one superannuation structure over another constitutes an investment decision. In their report, Labor Members explained further:

> 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.[17]

2.25 On 11 February 2004, the Government announced its intention to make a regulation that would take account of the Committee's findings. At this time, the Treasurer stated that new regulation 7.1.29A would be consistent with the Committee's recommendations. He added:

---

17 See the Labor Members' Report, pp. 37–7 and paragraphs 3.55 and 3.76 of the report.

> The new regulation is intended to promote certainty for accountants. It acknowledges the important role that accountants currently play in providing a range of professional advice and expertise to their business and other clients.
>
> It ensures that advice on the establishment of a SMSF, which often forms a part of overall business arrangements, is treated comparably with other FSRA-exempt advice provided to a client, such as on business structuring and taxation. The exemption for advice on the establishment of a SMSF is in keeping with a policy of exempting such advice from the FSRA. [18]

2.26 New regulation 7.1.29A, however, did not meet the expectations of the accounting bodies, which did not see it as consistent with this Committee's recommendation.

2.27 The Committee in the following chapter examines the recently promulgated regulation 7.1.29A, which is designed 'to provide an exemption from the FSRA for recognised accountants making a recommendation that a person acquire or dispose of a self-managed superannuation product.'[19]

---

18 Press Release, Treasurer, No. 008, 11 February 2004.

19 *Explanatory Statement*, Corporations Amendment Regulations 2004 (No. 2) 2004 No. 25.

CHAPTER 3

REVIEW OF REGULATION 7.1.29A

Overview of new regulation 7.1.29A

3.1 New regulation 7.1.29A further extends the exemptions provided for under 7.1.29 to include general structural advice on Self-Managed Superannuation Funds when that advice is provided by 'recognised accountants'. It defines 'recognised accountant' to include certain members of specified professional accounting bodies.

3.2 The Explanatory Statement makes clear that the amendment applies only in relation to self-managed superannuation as opposed to other superannuation products and notes the reason for exempting advice of this nature:

> Self-managed superannuation funds are often used as a tool to implement FSRA-exempted advice given by accountants, such as business structuring advice and taxation advice. The exemption for self-managed superannuation would therefore be in keeping with the policy of exempting such advice from the FSRA.[1]

3.3 It explains that the exemption is limited to certain professional bodies 'which are subject to continuing education and ethical requirements'.

The provisions in detail

3.4 Regulation 7.1.29 of the Principal Regulations specifies the circumstances in which a person is taken not to provide a financial service.

3.5 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:

- 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'.

Subregulations 7.1.29(3), (4) and (5) specify the activities that constitute an 'exempt service'. Relevant to this inquiry is subregulation 7.1.29(5) which provides that an

---

1 Explanatory Statement, Statutory Rules 2003 No…, Issued by the Parliamentary Secretary to the Treasurer, *Corporations Act 2001*, *Corporations Amendment Regulations 2004 (No.…),* p. 3.

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

3.6 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.

3.7 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.

3.8 The purpose of regulation 7.1.29A is to provide an exemption from the FSRA for 'recognised accountants' making a recommendation that a person acquire or dispose of a self-managed superannuation product.

Recognised accountants are defined as:

- members of CPA Australia who are entitled to use the post-nominals 'CPA' or 'FCPA', and are subject to and comply with CPA Australia's continuing professional education requirements;

- members of the Institute of Chartered Accountants in Australia (ICAA) who are entitled to use the post-nominals 'Corporations Act', 'ACA' or 'FCA', and are subject to and comply with ICAA's continuing professional education requirements; and

- members of the National Institute of Accountants (NIA) who are entitled to use the post-nominals 'PNA', 'FPNA', 'MNIA' or 'FNIA', and are subject to and comply with the NIA's continuing professional education requirements.

Evidence

3.9 During the inquiry, the debate concentrated on two aspects of regulation 7.1.29A. The first one focused on whether exempting general structural advice on superannuation would significantly weaken the consumer protection regime. Opinions were divided on this matter with some arguing:

- against any exemptions being provided;

- in support of the amendment (some with qualifications); and

- for an extension of the exemption to include general structural advice on all superannuation, not just Self-Managed Superannuation Funds.

3.10 The second aspect of the debate concerned the definition of 'recognised accountant' with some suggesting that other domestic and foreign accounting organisations and other professional non-accounting bodies such as tax institutes should be included in the definition.

Support for regulation 7.1.29A

3.11 There were a number of submissions and witnesses that supported the proposed exemption level prescribed in 7.1.29A that would allow 'recognised accountants' to provide general structural advice on SMSFs only.

3.12 Mr Anthony Regan, AMP, stated that AMP recognised that self-managed funds are a tool to implement FSRA exempted advice given by accountants, such as business structuring advice and taxation advice.[2] Mr Christopher Drummer, IFSA, stated simply that IFSA's members have no problems with regulation 7.1.29A as it now stands.[3] Similarly, the FPA also supported exempting certain activities such as administration, establishing and structuring and compliance advice for self-managed superannuation funds from the licensing requirements. It stressed that relief should be limited to the structure and establishment or disposing of self-managed funds as stipulated in the current regulation.[4] Mr Phillip Thompson, FPA, told the Committee:

> I certainly support the idea that accountants can provide advice on the structure of a self-managed super fund. There are good reasons for doing that—estate planning reasons or business real property.[5]

Further exemptions

3.13 There were a significant number of witnesses, however, who supported broadening the exemption contained in Regulation 7.1.29A to include structural advice on all superannuation, not just SMSFs. These included representatives from CPA Australia (CPA), Institute of Chartered Accountants in Australia (ICAA), National Institute of Accountants (NIA) and Peter Davis Taxation and Accounting Service, Taxpayers Australia and The Strategist Group (TSG).

3.14 The accounting bodies wanted to make clear that structural advice on superannuation funds should be exempted rather than simply limited to advice to a particular superannuation fund structure, which is a self-managed fund.[6] They 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.

3.15 The accounting bodies submitted that the regulation needs clarification to make clear that an exemption should be made for a recommendation on a Superannuation Fund Structure rather than just Self-Managed Superannuation Funds (SMSF). They explained that under regulation 7.1.29A their members would face the difficulty in being able to recommend that a client have a SMSF but where that is not appropriate, 'they will not be able to give general advice about an appropriate alternative.'[7] They provided the following real-life example of a situation faced daily

---

2 *Committee Hansard*, p. 10.

3 *Committee Hansard*, p. 50.

4 Con Hristodoulidis, *Committee Hansard*, p. 16.

5 *Committee Hansard*, p. 18.

6 Peter Reilly, *Committee Hansard*, p. 57

7 *Submission* 15, p. [2].

by their members which, to their mind, illustrated the practical difficulties with the regulation as it is currently written:

> A client asks a recognised accountant whether it makes sense to switch their current Industry Fund to say an SMSF on the basis that some friends have said their SMSFs are working well. The recognised accountant needs to be in a position to compare the different types of Superannuation Fund Structures and make a recommendation based on the client's own particular circumstances. It might be that the client does not have a sufficient capital base to have their own SMSF (the Association of Superannuation Funds of Australia (ASFA) and indeed ASIC refer to the need for at least $150,000 due to the on-going costs of having an SMSF), or the client does not want to be involved in personal monitoring but wishes some flexibility in investment choice (e.g. some business assets) in which case a Small APRA Fund would be more suitable, or perhaps stay with an Industry Fund on the basis that the client is employed in an industry where that particular arrangement is specified in an Award and the client will incur significant costs in having two superannuation funds.[8]

3.16 In summary, they argued that enabling a recognised accountant 'to provide a recommendation on the appropriate Superannuation Fund Structure is important and should not be just limited to the advantages and disadvantages of an SMSF'.

3.17 Mr Peter Davis, a Registered Tax Agent, reinforced this view. He maintained that it was 'completely irrational and unreasonable to expect a recognised accountant to be unable to advise their Client should they not wish a Self Managed Superannuation Fund, that the Recognised Accountant should be able to recommend another type of Superannuation Structure for their Client'. He argued that 'It may be that an Industry Fund, Managed Fund or Small APRA Fund may be more suitable for the Client and this fact should be able to be conveyed to the Client and explained'.[9] He also drew attention to the added costs:

> I note that the costs associated with the Client obtaining some types of advice associated with this ACT (FSRA) will increase substantially due to the Client now possibly having to consult with two professional people, namely a recognised accountant and a financial planner, the holder of an AFSL or a proper authority from same, just to get…[10]

3.18 Mr Grant Abbott, the Strategist Group, also regarded regulation 7.1.29A as flawed because of its incompleteness. He maintained that the way the regulation is drafted 'forces accountants to recommend self-managed super funds without a balanced view'. In his opinion, the regulation was 'extremely dangerous.'[11] He explained:

---

8 *Submission* 15.

9 *Submission* 5, p. [2].

10 *Submission* 5, p. [2].

11 *Committee Hansard*, p. 31.

> The accountant should be there explaining. They should not be explaining what the investment choices are. They do not do that in the self-managed super fund. They should be saying, 'An industry based fund does this. It's cheap. It does this, it does that', and so on and so forth, 'and structurally this is what it does.' You can say it because you can say, 'Look, with an industry based fund, under that structure you have one pension option, which is an allocated pension and maybe this growth pension; but, under a self-managed super fund, you could run a lifetime complying pension. You can run a fixed term pension.' You have a lot more choices. Then the client is aware of both. The problem with it is that if you do not do that, you are not giving balanced advice.[12]

3.19 According to Mr Abbott, the client, under the current regulation, 'is not getting the full amount of information for them to make an informed choice, which is essentially what we are seeking to do here, which is consumer protection.'[13]

Arguments against any further exemption

3.20 Of the witnesses who tended to support the current regulation 7.1.29A, a number objected to any further exemptions. In opposing any extension to the exemption, they expressed concern that further relief would :

- damage the integrity of the consumer protection regime as a whole, 'particularly where such carve-outs relate to the provision of retail consumer advice in the area of superannuation';[14]
- undermine the consistent application of the FSRA and contradict the policy objective and original intent of a universal regime across similar financial services and products;[15]
- deny consumers protection provided under the FSRA when seeking advice and when dealing in regulated financial services and products especially access to a complaints handling or dispute resolution mechanism;[16] and
- increase the risk of inappropriate advice related the SMSFs.[17]

---

12 *Committee Hansard*, p. 37.

13 *Committee Hansard*, p. 38.

14 See Christopher Drummer, IFSA, *Committee Hansard*, p. 44.

15 See Anthony Regan, Hillross Financial Services Ltd, *Committee Hansard*, p. 10; Con Hristodoulidis, FPA, *Committee Hansard*, p. 15 and Catherine Wolthuizen, ACA, *Committee Hansard*, p. 23.

16 Catherine Wolthuizen, ACA, *Committee Hansard*, p. 23.

17 Catherine Wolthuizen, ACA, *Committee Hansard*, p. 23.

3.21 The following section looks at the overall objections to further exemptions to the FSRA licensing requirement for accountants before turning to the central question of whether advice on superannuation structures should be licensed.

3.22 The Investment & Financial Services Association Ltd (IFSA) argued in their submission that further exemptions would damage the 'integrity of the consumer protection regime' and present 'real risks to retail consumers.' It argued further that, 'licensing provides the first line of protection for consumers and should be required for all parties providing advice or recommendations of any kind to retail consumers'.[18] Ms Wolthuizen also stated that:

> …this exemption undermines the consistent application of FSRA in contravention of the original intention of a universal regime across like financial services and products.[19]

3.23 In its evidence, the Financial Planning Association (FPA) accepted that there were some grounds for exempting accountants from the licensing regime as currently prescribed by section 7.1.29A but was cautious about any extensions. Mr Thompson explained:

> I certainly support the idea that accountants can provide advice on the structure of a self-managed super fund. There are good reasons for doing that, such as estate planning reasons or business through property. They are great reasons. But as soon as we start looking at crossing into the underlying investments, I think we have to be very careful about the protection we are giving consumers.[20]

Structural advice or investment advice

3.24 In its testimony to the Committee, IFSA highlighted the difficulty that accountants would face in providing advice at a general structural level only. According to IFSA, when providing any advice, the client's expectation will pressure accountants into advising in more detail and thus, overstepping the line into specific advice for which they are not qualified.

3.25 Indeed, Mr Drummer noted that the main concern turned largely on the issues of structures of superannuation funds as opposed to the underlying investments. In his view, the core problem was separating a financial services product from the underlying investment.[21] He believed that under current definitions the investment component cannot be isolated from the structure. This means that the retail funds and

---

18 *Submission 10B* Page [1].

19 *Committee Hansard,* p. 23.

20 *Committee Hansard*, p. 18.

21 *Committee Hansard*, p. 48.

the corporate funds, or perhaps an industry fund which is in an existing fund that has existing investments, would be caught in the licensing regime.[22] He stated:

> As soon as an accountant gives advice with respect to a self-managed super fund, if there is an investment component or a financial services product or with regard to, say, a retail fund and says, 'I recommend you basically should dispose of your AMP retail super policy or acquire a self-managed super fund', that is clearly a financial services product. It is a product as defined and issued by a product issuer. You have to be licensed for it. Financial accountants will not be able to say, 'I recommend that you get rid of or dispose of this AMP or MLC superannuation policy or corporate superannuation policy.' You cannot compare them without giving financial product advice, which is then caught by the legislation.[23]

3.26 Mr Peter Bishell from AMP considered that it is impossible to provide structural advice on industry funds:

> …the minute you start to talk about those structures, you are no longer talking about something that is just a structure. It is way beyond a structure. It is a product. No industry fund is just set up as a structure. It has within it all sorts of terms and conditions of membership, and that would mean that I, if with my authorised representative licence hat gave advice on it, would have to comply with FSR in giving that advice, because that is a product.[24]

3.27 He added that it is uncertain 'where the lines are drawn unless you are going to be absolutely clear about what we are talking about here…I am sure an industry fund or anything would meet the definition of a class of product'.[25]

3.28 The FPA also underlined the difficulty in placing the range of financial services in black and white terms. It also used the example of industry funds as products that should be regulated. Mr John Hendie, FPA, told the Committee:

> Looking at industry funds and the submission that was put in by the accounting bodies, I would have to say that industry funds are financial products. I think the examples that they are giving there clearly fall within the realms of where people should be licensed.[26]

3.29 Mr Con Hristodoulidis underscored FPA's concern regarding the increased exemptions sought by accountants and again referred to the example provided by the accountants (see paragraph 3.15):

> I suppose our concern arises when we read the accountants' submission and the examples they put forward. We are quite clear in our minds that that is

---

22 *Committee Hansard*, pp. 48, 51.

23 *Committee Hansard*, p. 47

24 *Committee Hansard*, pp. 12-13.

25 *Committee Hansard*, p. 13.

26 *Committee Hansard*, p. 17.

> financial product advice. I do not think anybody would dispute that outside the accounting bodies.[27]

3.30 Mr Anthony Regan echoed these sentiments. He stated:

> I think it is important to make the distinction here between structures and products. Self-managed superannuation funds are almost unique in the industry in respect of the fact that there is a very clear demarcation between the structure and the product. In most other cases, there is an intertwined association between the structure and the product. It is very difficult to then disseminate a piece of advice which does not embrace both the structure and the product as part of the advice.[28]

3.31 The ACA shared this view about the difficulties in differentiating between activities that should or should not be regulated under the FSRA, particularly where such activities are nearing the margin of the reach of the Act. Ms Catherine Wolthuizen explained:

> There are going to be circumstances where accountants are providing tax or structural advice in relation to superannuation which does not involve a decision. It is particularly the decision to transfer money, as in this industry fund case that has been provided to the committee, out of a regulated product that involves that implicit assumption that the original product or arrangement was not suitable or appropriate to that person's needs. But if the exemption is provided then that decision will not be underpinned by an analysis of what is appropriate in the same way it would if the consumer went to a licensed financial service provider.[29]

In her view, it is extremely difficult to draw a line.

3.32 Mr Mike Rosser, Treasury, took up this point and stated that the regulation takes the stand that 'the differentiating point is appropriately at the self-managed superannuation level'.[30] He explained further that the regulation does 'not permit the advice to extend to the virtues or otherwise of alternative superannuation products…it allows that…comparison but it only allows the advice to be in relation to the self-managed superannuation fund.'[31] He noted that:

> I think the distinction is most clearly made in relation to self-managed superannuation, where in a sense it is an empty vessel. It is a way of structuring a set of investments which will occur in the future. An industry superannuation fund, for example, is not an empty vessel. It is a specific form of investment which has been predetermined. The investments underlying that fund are in place and will not be in control of the investor

---

27 *Committee Hansard*, p. 18.

28 *Committee Hansard*, p. 9.

29 *Committee Hansard*, p. 25.

30 *Committee Hansard*, p. 70.

31 *Committee Hansard*, p. 70.

> because they will not be a trustee of that fund. In a sense, it is difficult to say that investing in an industry fund is merely investing in a structure. In fact, it is investing in the particular structure that that industry fund has in place.[32]

3.33 Mr Keith Reilly, CPA, also made a distinction between what activities should and should not be regulated under the FSR. He, however, placed the dividing line along a different boundary effectively staking out a broader area of activity carried on by accountants that should be exempt under 7.1.29A. His intention was to make a clear distinction between investment financial products and structural type advice that in his words 'is not advice that a consumer is going to make or lose money on'.[33] He told the Committee that:

> …what we are looking at is the structure itself. We are divorcing ourselves from the performance of the fund. What we continue to say to our members is that, where you are giving an opinion on the future performance of an investment, that clearly is licensing. If, on the other hand, all you are doing is going through and explaining the tax advantages, the fact that there are different contributions and different levels of fees, we do not see that as requiring licensing because that is not commenting on the performance of the fund. The performance of the fund will be in the investments that the fund purchases.[34]

3.34 The accounting bodies wanted to make sure that advice given by professionals such as accountants and lawyers that is not specific financial product investment advice is not inadvertently caught up in the licensing regime.[35] They were firmly of the view that structural advice 'certainly should be exempted from the regime in a like manner to other exempted advice, such as business structuring and taxation advice'.[36] Mrs Susan Orchard made the point that as professional bodies 'we are educating our members as to where the boundaries are'.[37]

Committee view

3.35 The Committee accepts the argument that being able to provide general structural advice on SMSFs but not other superannuation structures creates situations where consumers will go back and forth from accountants to licensees to accountants for various 'pieces of the puzzle'. It does not see this as efficient in cost and time while providing little or no increased assurance to consumers.

---

32 *Committee Hansard*, p. 71.

33 *Committee Hansard*, pp. 64–5.

34 *Committee Hansard*, p. 65.

35 *Committee Hansard*, p. 56.

36 *Committee Hansard*, pp. 56.

37 *Committee Hansard*, p. 58.

3.36 The Committee appreciates that the nub of this problem is in isolating advice on superannuation structures from the underlying investment of a fund. It believes that this distinction can and should be made. Further, it believes that regulation 7.1.29A as it now stands prevents an accountant from providing balanced advice and is persuaded that structural advice on superannuation funds, not just SMSF, should be exempted from the licensing requirements.

3.37 In essence, the Committee believes that the exemption should be strictly limited to advice on the actual structure of superannuation funds. It must not touch on past or future investment performances of funds, or on specific superannuation funds or products nor about a person's investment strategy in a fund. When providing information, the accountant can only speak in generic terms about the various superannuation structures or the form that funds take—SMSF, industry funds, retail and corporate funds—and definitely not about specific funds.

3.38 By making this clear distinction, accountants and the consumer should have a sound understanding of where the line is drawn on the eligibility of accountants to provide advice on superannuation.

Recommendation 1

The Committee recommends that subregulation 7.1.29A(1) be amended to read: 'Subparagraph 7.1.29(5)(c)(ii) does not apply to a recommendation by a recognised accountant in relation to a superannuation fund structure.'

Complaints or dispute resolution mechanism

3.39 Another area of concern touched on consumer protection particularly access to a complaints handing or dispute resolution mechanism. The FPA submitted that 'to ensure that appropriate consumer protection be retained across the board, accountants who are given relief from licensing requirements should still be required to belong to an independent, regulated complaint handling mechanism such as the Financial Industry Complaints Scheme.[38] The FPA maintain that the accounting bodies fail to acknowledge that the FSR requires an external dispute resolution and that there is 'no such independent arbitration requirement imposed by the accounting bodies on their members'.[39]

3.40 Along similar lines, Mr Abbott argued that the current professional 'disciplinary' committees of the various accounting bodies should have an additional complaints and compensation scheme similar to that of the Finance and Investment Complaints Scheme (FICS). In his opinion, the current disciplinary processes do not have a compensation aspect and as such, do not provide the assurance of FICS.[40]

---

38 *Submission* 16A, p. 2.

39 *Submission* 16A, p. 2.

40 *Committee Hansard,* p. 32.

3.41 The accounting bodies countered by arguing that their disciplinary processes are a recognised standard including the capacity to de-register a member. They outlined in their submission the following consumer protection measures:

- minimum education standards of at least two and a half years full-time study in accounting; in most instances a three-year degree in accounting plus additional professional post-graduate accounting standards;
- minimum of 40 hours of structured continuous professional development each year;
- the requirement to hold indemnity insurance cover of at least $250,000;
- the requirement to be subject to quality assurance audits;
- the Accounting Bodies investigation and disciplinary procedures (which can include removing members from the membership); and
- members being subject to high standards of ethical and professional behaviour as set in the Code of Conduct and related professional pronouncements of the Accounting Bodies.

3.42 In referring directly to a dispute resolution mechanism, Mr Reilly added that:

> We would see complaints against accountants being in terms of the level of fees they might charge or whether or not they have explained it. But where a consumer has lost money—they probably will not see you if they have made money—it will be the group that has recommended the specific investment products that go in there. It is quite appropriate to do that.[41]

Committee view

3.43 The Committee notes that the intent of the FSR licensing regime is to provide adequate protection to consumers by ensuring that they receive appropriate, balanced and independent advice. The licensing regime goes some way to providing that protection by requiring that licensees:

- display competence and skill;
- ensure they have an effective understanding of the client and their financial situation and aspirations;
- provide advice in the best interest of the client;
- have internal quality assurance processes; and

41 *Committee Hansard*, p. 65.

- have dispute resolution and compensation processes both internally and externally.

3.44 The Committee agrees that a dispute resolution and compensation scheme is an essential element to consumer protection when providing advice in regards to superannuation. While recognising that accounting bodies have disciplinary committees, there does not seem to be a specific compensation mechanism or dispute resolution vehicle which an external client can access. Although the Committee understands that because accountants who are not licensed will not be giving investment or product advice, it nonetheless can see the advantages in consumers having recourse to an independent complaints handling mechanism for services obtained from an accountant.

3.45 The Committee suggests that the accounting bodies consider requiring their members who are giving advice on superannuation structures to ensure that their clients have access to a scheme such as the FICS.

Recommendation 2

The Committee recommends that the accounting bodies consider making it a requirement for their members who provide advice on superannuation structures to ensure that their clients have access to a dispute resolution scheme such as the Finance and Investment Complaints Scheme.

Disclaimer

3.46 The FPA suggested that accountants who provide advice on SMSFs under the proposed regulation should be required to provide a disclaimer or statement about the exemption and the limitations to providing financial product advice under FSRA.[42]

3.47 Mr Reilly told the Committee that the accounting bodies would:

> …be more than happy to have a requirement that there be a disclaimer to that effect when the accountant is making a superannuation fund structure recommendation—a disclaimer making it quite clear that the accountant is not licensed and the accountant is not commenting on the future performance of the actual investments within that fund. I do not see a problem there. We would be happy to work with our colleagues in Treasury and the committee on that.[43]

Committee view

3.48 On the use of disclaimers, the Committee notes that if an accountant is not licensed under the FSR, he/she should not be giving financial product advice. It accepts, however, that a client may well ask for advice from an accountant that may

---

42 *Submission* 16A, p. 2.

43 *Committee Hansard*, p. 68.

be advice that comes under the licensing regime. In such cases the Committee believes that the accountant is under an obligation to inform the client that he or she is not authorised to provide such advice and the client should seek the advice from a person licensed to give such advice.

3.49 The Committee urges the accounting bodies and Treasury to consult on this matter with a view to identifying the circumstances where an accountant is to issue a disclaimer and determine the form of words that the statement should take.

Recommendation 3

The Committee recommends that Treasury and the accounting bodies discuss the use of disclaimers with a view to identifying the circumstances where an accountant is to issue a disclaimer and to determine the form of words that the disclaimer should take.

Competency to advise on superannuation

3.50 In previous inquiries, the discussion often laboured over comparisons about who is better qualified to give certain advice. In regard to superannuation, the debate has matured considerably and now sensibly focuses on the qualifications of the person giving advice on superannuation regardless of whether the person is a financial services adviser or an accountant. Mr Abbott, Chief Executive Officer of The Strategist Group (TSG), regarded competency as a key consumer protection. He maintained:

> if at least someone—it does not matter what side of the fence they come from, be it a member of the Taxation Institute, the ATMA or a financial planner; it does not make any difference—meets those competency standards, I think consumers can probably be safeguarded, which is really the big issue around that.[44]

3.51 Although not strictly within the terms of reference for this inquiry, the Committee now looks at the question of competency and whether specific consideration should be given to imposing competency standards on people providing advice on superannuation.

3.52 A number of witnesses recognised the growing importance of superannuation to all Australians. Mr Abbott, provided the following statistics on SMSF:

> If we look at self-managed super funds, they have had unprecedented growth in the last eight or nine years. They are now commanding around about $125 billion in superannuation assets. If you look at the latest Treasury estimates, that works out to around $2.5 billion of tax concessions each year afforded to self-managed superannuation funds. From that perspective, there are about 500,000 people in those self-managed superannuation funds. Most of them are generally high net worth

44 *Committee Hansard*, p. 32.

> people…A lot of them are fairly sophisticated. Some of them are not necessarily sophisticated.[45]

3.53 The Investment and Financial Services Association Ltd (IFSA) and AMP argued that the SMSF is the fastest growing sector of superannuation and it attracts many people who are 'quite vulnerable when it comes to the complexities of the superannuation environment.'[46]

3.54 Ms Catherine Wolthuizen from the Australian Consumers' Association (ACA) argued that a major intent of the Financial Services Reform Act and subsequent licensing of financial advisers was to ensure a high level of competency in advisers. She referred to the recent survey conducted by the ACA into the quality of financial product advice where the result was 'frighteningly poor' which in her view highlighted the need for licensing.[47] She particularly noted the results relating to SMSFs where the judges found that such funds were 'sometimes proposed with little justification in terms of the client's specific circumstances'.[48]

3.55 To the same effect, the FPA acknowledged that providing advice on SMSFs requires specialist knowledge. It submitted:

> This has been recognised by the National Finance Industry Training Advisory Body which recently developed prerequisite competency units in relation to Self Managed Superannuation. The Accounting Bodies were part of the development and fully support the NFITAB SMSF competencies. Hence, we believe that 'suitable' educational qualifications for providing SMSFs advice under the proposed Regulation should encompass the specialist knowledge/educator required to provide advice on SMSF.[49]

3.56 The Association of Taxation and Management Accountants also referred to a 'minimum level of compliance training that any accountant should undertake in order to show they have the adequate knowledge to provide advice in superannuation to their clients'.[50]

3.57 Mr Abbott argued that it is necessary for accountants (and financial planners) to be able to discuss all options so as to give 'balanced advice'. He spoke of the failure of Treasury to focus on the 'real' issue when it came to providing any advice in relation to Superannuation, that is, not professional membership, but competency'.

---

45 *Committee Hansard*, p. 31.

46 *Submission 10B,* p.[1]

47 Online report – Financial Planners put to the test February 2003.

48 *Committee Hansard*, p. 24.

49 *Submission* 16A, p. 2.

50 *Submission* 21A, p. 2.

3.58 According to Mr Abbott, he was aware that members of other professional bodies who have expertise in superannuation would not be recognised to provide general structural advice. To his mind, this appears to discriminate between professional bodies when the issue is personal competence.

3.59 He also referred to the National Finance Industry Advisory Body (NFITAB) SMSF competencies. He described the training package as having been developed to define minimum competencies for a range of services relating to superannuation advice. These competencies were organised in conjunction with the accounting bodies (amongst others). In his view, there should be no difficulty incorporating these competencies into the training and required knowledge before a member of any of the professions is considered to have met internal competency standards of their association.

3.60 He specifically recommended that the exemption proposed by the accountancy bodies only be given in cases where:

> The member meets the competency standards for providing advice in self managed superannuation funds in the National Financial Services Training Package published by the Australian National Training Authority.[51]

3.61 The accounting bodies accepted that these minimum standards could be incorporated in their own, noting however that they are minimum standards, not the higher standards which the accounting bodies would like their members to achieve.[52]

Committee view

3.62 The Committee appreciates the arguments presented by the accountancy bodies that their members do have many of the requisite competencies and skills to provide advice in relation to superannuation products at a structural level. When considered in the context of their professional restraints to only provide advice in areas of competence, the Committee understands that no greater competence risk can be assigned to recognised accountants providing advice on SMSFs than would be so in the case of licensed financial planners.

3.63 Even so, the Committee is not persuaded that all members of accounting bodies, despite their designation as a FCA or CPA, etc., are competent to provide advice even at a general structural level on superannuation funds. Professional codes of ethics in the organisations require members to consider whether they have the competency before providing advice on a specific topic. However, the accounting bodies have not specified superannuation competency standards and their members are left with minimal direction.

---

51 *Committee Hansard,* p 31-32

52 *Committee Hansard,* 24 March 2004, pp. 63-64.

3.64 The Committee recognises the growing importance of superannuation advice to all Australians. It is concerned that the quality of such advice should be high and those providing the advice fully competent to explain the complexities of superannuation. It endorses the work being done by the NFITAB and recommends that the Government consider requiring people, whether licensed financial advisers or accountants, to have obtained these minimum competencies before being eligible to provide advice on superannuation.

Recommendation 4

The Committee recommends that the Government consider requiring people, whether licensed financial advisers or accountants, to acquire minimum competencies in relation to Self Managed Superannuation as set down by the National Finance Industry Training Advisory Body before being eligible to provide advice on superannuation.

Definition of 'recognised accountant'

Issue

3.65 The definition of recognised accountant also received a significant number of comments in submissions. The two main concerns related to the recognition of:

- other Australian professional bodies; and
- overseas accounting organisations.

3.66 Several professional accounting bodies expressed concern that they had not been included in the list of recognised accountants. These organisations, the Australian Management and Taxation Accountants (AMTA) and the National Tax & Accountants Association (NTAA) had apparently not been included in consultations with Treasury and as such, despite their recognition by the Australian Tax Office and APRA, were not included in the definition of recognised accountants (see paragraph 3.8).

ATMA states in their submission that:

> ATMA is one of the 5 Recognised Professional Associations for the purposes of Section 251L of the Income Tax Act. Also ATMA members and Fellows are named in the SIS Act as able to audit self managed superannuation funds.[53]

It also argued that it is only reasonable for ATMA members to be able to compete fairly with other professional accounting bodies.[54]

---

53 *Submission 21*, p. [2].

54 *Submission 21*, p. [2].

3.67 Similarly, NTAA argues that fellows of NTAA should be recognised accountants as they must:

> Hold appropriate qualifications and comply with strict continuing professional education requirements similar to those of the accounting bodies currently named in Regulation 7.1.29A.
>
> Further, the NTAA has a code of conduct which it actively enforces and any fellow members found to be in breach of that code of conduct are subject to disciplinary and misconduct provisions as set out in the NTAA's constitution.[55]

3.68 Two overseas associations—the Institutes of Chartered Accountants in New Zealand and England—sought to be included in the listing of 'recognised accountants'.[56] The Australian accounting bodies supported their request.[57]

3.69 Mr Rosser from Treasury indicated that several groups had already approached Treasury to be included in the list of recognised accountants. He also agreed that if these organisations met the same standards as the current group of recognised accountants, there would be no objection to recognising them as well.[58]

Committee view

3.70 The Committee notes that Treasury has been approached by a number of accounting organisations seeking to be included in the definition of recognised accountants.

Recommendation 5

The Committee recommends that Treasury consult with the various professional bodies that made submissions to the inquiry seeking to be included in the definition of 'recognised accountants' to determine whether it is appropriate that they be included.

---

55 *Submission 19,* p. [1].

56 *Submissions 13 & 18.*

57 *Submission 13,* p. [3].

58 *Committee Hansard*, p. 76.

CHAPTER 4

REVIEW OF REGULATIONS 7.1.35A and 7.1.40(h)

History

4.1 The regulations in Batch 6 were gazetted on 23 December 2003. Regulations 7.1.35A, conduct that does not constitute dealing in a financial product—lawyers acting on instructions, and 7.1.40(h), conduct that does not constitute the provision of a custodial or depository service, were contained in this Batch and are the subject of this report.

4.2 Legal services were not specifically identified during the Financial Service Inquiry as services which should be included in the licensing regime as implemented in the Financial Services Reform Act 2001 (the FSRA).

4.3 Even so, some of the services provided by lawyers in day-to-day legal advice to clients involve transactions which would be normally treated by the FSRA as a provision of a financial product, or, the 'dealing' in or 'arranging' of a financial product. Without an exemption then, lawyers would be caught in the licensing regime of the FSRA when seeing to a client's affairs as instructed by the client.

4.4 In 2000, the Law Institute of Victoria suggested that:

> …the definition in the draft Bill of financial product advice is wide and could cover a number of unintended situations. For instance, it could include a lawyer who advises on the scope of cover of a general insurance policy; or who advises a client not to purchase a business by way of shares, because the lawyer has discovered contingent liabilities in relation to them; or who advises about legal aspects of superannuation or other investment products being considered by the client. In these cases, a general insurance policy, shares and superannuation are all financial products.[1]

The Committee accepted that the provision of the FSR Bill needed to be clarified.

4.5 The matter also came before the Committee in 2001. Again, it agreed that concerns remained in this area and concluded:

> That a solicitor engaged to advise on all aspects of the matter in a professional capacity, cannot limit the advice provided to matters of a legal nature, and indeed may be liable for failing to give incidental financial

---

1 Parliamentary Joint Committee on Corporations and Financial Services, *Report on the Draft Financial Services Reform Bill,* August 2000, p. 23.

> advice. The Committee notes that it is therefore part of a solicitor's duty to provide financial advice in certain circumstances.[2]

4.6 Section 766B(5) was included in the Corporations Act to provide relief from the licensing regime when a lawyer provides legal advice or services which would normally be considered a necessary part of a lawyer's activities.

4.7 Section 766B(5)(b) provides that exceptions may be made under regulations so that certain activities are not defined as 'financial product advice' and so excluded from the licensing. This facility was allowed so that where certain activities are not easily defined as being 'legal advice', the particular transaction can be prescribed so (or prescribed as being exempt).

4.8 Although lawyers obtained an exemption from the definition of financial product advice in s. 766B(5) with the introduction of the FSRA, they have continued to monitor the operation and application of this provision and its associated regulations. On closer examination, it become clear that certain activities by lawyers in the course of their day-to-day business may be deemed to be either the 'arranging'[3] or 'dealing' in financial products. It was not anticipated that the 'provision of a custodial service'[4] would also be considered a financial product. Ms Kathleen Farrell told the Committee:

> On further review of the act and over time, we have considered that for greater caution it needs to be made clearer that in the provision of ordinary legal services we do not inadvertently fall into the definition of arranging or dealing, which is a separate area from the provision of financial product advice under the act, although the same action can often give rise to concerns under each provision.[5]

4.9 It was not certain how these activities would be understood—whether they would be exempted by virtue of 766B or whether they would be caught up in the licensing regime. Amendments to regulations 7.1.35A and 7.1.40(h) have been developed to provide a greater degree of certainty.

4.10 Regulation 7.1.35A reads as follows:

> For subsection 766C (7) of the Act, a financial service provided by a lawyer is taken not to be dealing in a financial product if:
>
> (a) the financial service consists of:

---

2 Parliamentary Joint Committee on Corporations and Financial Services, *Report on the Financial Services Reform Bill,* August 2001, p. 93.

3 Sub-section 766C(2).

4 Section 766E.

5 *Committee Hansard*, p. 1.

(i) arranging for a person to engage in conduct referred to in subsection 766C (1) of the Act; or

(ii) dealing as an agent or otherwise on behalf of a client, an associate of a client or a relative of a client; and

(b) the lawyer is acting:

(i) on the instructions of the client, an associate of the client or a relative of the client; and

(ii) in his or her professional capacity; and

(iii) in the ordinary course of his or her activities as a lawyer; and

(c) the financial service can reasonably be regarded as a necessary part of those activities; and

(d) the lawyer has not received, and will not receive, a benefit in connection with those activities other than:

(i) the payment of professional charges in relation to those activities; and

(ii) reimbursement for expenses incurred or payment on account of expenses to be incurred on behalf of the client, an associate of the client or a relative of the client;

from the client or from another person on behalf of the client.

4.11 Regulation 7.1.40(h) reads as follows:

For paragraph 766E (3) (e) of the Act, conduct that is mentioned in subsection 766E (1) of the Act does not constitute providing a custodial or depository service if:

(a) the financial product held by the provider is a basic deposit product (within the definition in section 761A of the Act) or is an account mentioned in subsection 981B (1) of the Act; or

(b) the client is an associate of the provider (within the meaning of Division 2 of Part 1.2 of the Act); or

(c) the provider and its associates have no more than 20 clients in aggregate for all custodial or depository services that they provide; or

(d) the financial product is held as part of the arrangements for securing obligations under:

(i) a credit facility; or

(ii) a debenture that is held as trustee under a trust deed:

(A) entered into under section 283AA of the Act or former section 260FA of the Corporations Law of a State or Territory; or

(B) mentioned in former section 1052 of the Corporations Law of a State or Territory; or

(e) the provider is a participant in a licensed market and the financial product held is a derivative acquired on the licensed market by the provider on behalf of a client; or

(f) the provider is a participant in a licensed clearing and settlement facility and the financial product held is a derivative registered on the licensed clearing and settlement facility by the provider on behalf of the client; or

(g) the financial product is held under an order of the Court.

(h) the service is provided by a lawyer in the following circumstances:

(i) the financial service consists of acquiring, holding or disposing of a cash management trust interest, being an interest to which a law of a State or Territory relating to the audit of trust or controlled monies applies;

(ii) the lawyer is acting:

(A) on instructions from the client, an associate of the client or a relative of the client; and

(B) in his or her professional capacity; and

(C) in the ordinary course of his or her activities as a lawyer;

(iii) the financial service can reasonably be regarded as a necessary part of those activities;

(iv) the lawyer has not received, and will not receive, a benefit in connection with the activities other than:

(A) the payment of professional charges related to those activities; and

(B) reimbursement for expenses incurred or payment on account of expenses to be incurred on behalf of the client, an associate of the client or a relative of the client;

from the client or from another person on behalf of the client.

Evidence

4.12 Of the 24 submissions received in relation to Corporations Amendments Regulations (Batches 6, 7 & 8), only the Law Council of Australia directly addressed the exemptions relating to lawyers.

4.13 The Law Council of Australia supported the new regulations. It believes that they clarify the position that Parliament intended when introducing the FSRA.[6] Ms Kathleen Farrell explained:

> These regulations are required both for the purpose of clarification and, I think, in the public interest of ensuring that there is not duplication.[7]

---

6 *Committee Hansard*, p. 2.

4.14 The Law Council supported the changes arguing that the regulations:

- support the general intent of the FSR legislation, which is to regulate only those activities which truly constitute the provision of financial services, and not activities which are peripheral to that industry; and
- provide certainty in relation to insurance arrangements.[8]

4.15 It also advised that there is already extensive regulation of lawyers and that any requirement to obtain FSR licensing would simply duplicate the consumer protection already in place.

4.16 The Law Council listed activities which, without section 7.1.35A and 7.1.40(h), could possibly be interpreted as requiring a license under FSR:

> (1) investing client money on trust in cash management funds, as directed by the client;
>
> (2) preparing and participating in negotiation of agreements for sale or purchase of shares in a target company;
>
> (3) preparing a bidder's or target statement and preparing buy-back documents;
>
> (4) preparing and participating in the negotiation of mortgages of financial products where the security is being provided for the acquisition of other financial products;
>
> (5) taking out insurance cover notes on behalf of the client following a transaction, for instance, the completion of a real property purchase.[9]

4.17 Further, the Law Council listed a range of adverse effects in the absence of exemptions granted in regulations 7.1.35A and 7.1.40(h):

> If it is the case that the activities identified above…amount to the provision of a financial service and the lawyer is taken to be carrying on a financial services business, then:
>
> - the lawyer faces a further layer of regulation under the Corporations Act in addition to the extensive regulatory structure which governs lawyers by State and Territory legislation—the Law Council cannot see that there is public benefit in this double regulation;

---

7 *Committee Hansard*, p. 2.

8 *Submission 9,* p. 1.

9 S*ubmission 9,* p.4.

- it potentially jeopardises legal professional privilege, because many of these activities cannot be separated from giving legal advice (for example, drafting/negotiation of a sale of shares agreement);

- there will be a significant increase in the cost of legal services to clients without correlating additional benefits;

- ASIC's resources would be stretched to cover the licensing of Australian lawyers and FSR licensing of lawyers would divert finite resources from the primary activity of regulating core players in the financial services industry who are not otherwise regulated; and

- there would be uncertainty as to the extent of the cover under professional indemnity insurance for activities for which cover is readily available in the pre-FSR regime. Because of the uncertainty about what constitutes 'arranging' or 'dealing', a lawyer may take a view that he or she is covered but only many years later, when the provisions fall for consideration by a court, may all concerned discover that insurance cover has been excluded for what is seen as an ordinary legal service.[10]

4.18 In evidence to the Committee at the public hearing on 24 March 2004, representatives from the Law Council reiterated these arguments. Ms Farrell underlined the reason for the exemptions:

> In fairness, we think that the exemption from the definition of financial product advice for lawyers was, in essence, good enough for ordinary legal practice. That is why we asked for that at the time that the act was being introduced. However, we have had some concern about the breadth of drafting in conjunction with a number of insurers who are now introducing exceptions to insurance policies, particularly in the context of first-tier insurance—that is the compulsory level of insurance that applies certainly in Victoria and New South Wales—where there is an exclusion for either any activity that requires a licence or any activity for which you have a licence under the financial services legislation.
>
> The primary regulations we are dealing with here are clarification of the position that parliament I think intended to put us in when the Financial Services Reform Act came into place.[11]

4.19 Ms Farrell also provided a number of examples of where a lawyer may be engaged in activities which could be defined as 'arranging' or 'dealing' in a financial product but which, in her view, was not the intention of the Act:

> It is clear that, if a lawyer is giving advice about a share sale agreement, for instance, that might be financial product advice. It is absolutely normal legal

---

10 *Submission 9,* p. 6.

11 *Committee Hansard,* p. 2.

> service to provide. But when someone comes to you to deal with a share sale agreement, say, to buy the local milk bar, they do not just expect you to provide advice; they actually expect you also to do the drafting and to sit by their side in the negotiations with the vendor of those shares. The concern we had was that, in the actual drafting of the share sale agreement and the lack of clarity about the extent to which you could assist in negotiations without falling over the edge into arranging, given how broad that language is and the intent that it might have, what is an absolutely normal legal service may well fall foul of the very wide language that applies in relation to arranging and dealing. We did not think that that was the intent.
>
> …
>
> We might look at loan agreements, for instance, and indicate that loans are terminable when the shares are sold or, indeed, cannot be terminated for another three years after a controlling share parcel has passed. That certainly has implications for a decision about whether or not someone should buy or sell the securities.[12]

4.20 She concluded:

> But it is in fact core legal advice about the interpretation of an agreement and the application of laws to agreements that either exist or which may be entered into.[13]

4.21 In regard to consumer protection such as complaints or dispute resolutions, Ms Farrell noted :

> …the coverage for complaints handling at all levels in all of the states and territories does vary. But, broadly speaking, it is available to all consumers and it is in relation to all conduct of the lawyer acting as a lawyer. Ultimately…[it] is subject to the supervision of the court in relation to not only literal compliance with the law but also the provision of ethical standards. So from that context I think that the coverage is as stringent as would be applied by ASIC to a financial services licensee.[14]

Committee view

4.22 The Committee:

- accepts that there are normal day-to-day activities, which occur in the course of providing legal advice, that may be construed as 'financial products';

---

12 *Committee Hansard*, p. 4.

13 *Committee Hansard,* p. 4.

14 *Committee Hansard,* p. 5.

- agrees that the activities shown to be affected by this are not activities that should, in the case of lawyers, be caught up in the FSR licensing regime;
- recognises that there may be some negative consequences if these activities are not clearly exempted;
- agrees that existing mechanisms for consumer protections are adequate; and
- notes that there was no opposition to the regulations.

Overall, after examining regulations 7.1.35A and 7.1.40(h), the Committee considers them appropriate.

SENATOR GRANT CHAPMAN
CHAIRMAN

REPORT BY THE LABOR MEMBERS

REGULATION 7.1.29A

Introduction

The Labor members of the Committee reiterate their support for the objectives of the *FSR Act* and their recommendation that the Government monitors the implementation of the Act and the related regulations.

The Labor members also reiterate their recommendation for a review of the FSR regime post-implementation.

History

On a number of previous occasions, the Committee has examined the position of accountants under the FSR Act.

During this hearing and previous hearings, arguments have been advanced to support a further exemption from the *FSR Act* for accountants in recommending superannuation fund structures to their clients.

As noted in previous reports, the Labor members have supported a re-draft of regulation 7.1.29 to carve-out certain activities. However, the Labor members reiterate their view that accountants who provide financial product advice should not be exempt from the operation of the *FSR Act*.

The key issue considered during this hearing was whether accountants should be provided with an exemption for the acquisition or disposal of an interest in a self-managed super fund (SMSF).

The new regulation is inspired by a previous Committee report on this issue which recommended that accountants should be exempt from the FSR regime for advice relating to the choice of a superannuation structure.

This recommendation was not supported by the Labor members.

The new regulation 7.1.29A is limited to advice relating to self-managed super funds (SMSF).

The Treasurer has justified the exemption on the basis that the establishment of a SMSF is treated comparably with other advice which is exempt from the FSR regime such as business structuring and taxation.[1]

Issues

A number of groups have concerns with the exemption in relation 7.1.29A.

---

[1] Press Release, Treasurer, No. 8, 11 February 2004.

Concerns about the exemption include:

- whether the exemption undermines the consistent application of the FSR Act in contravention of the original intention - which was to provide universal regulation of like financial products and services (in other words, regulatory neutrality is eroded);
- whether the exemption exposes consumers to risks especially in light of the growth of the SMSF industry; and
- the training of 'recognised accountants' in relation to the provision of advice on SMSFs.

In contrast, the accounting bodies have sought to expand the exemption to include all super fund structures.

Regulatory Neutrality

The impact that the new regulation will have on undermining the existing FSR framework is a significant concern to many witnesses.

The importance of regulatory neutrality was a key concern for IFSA who advised the Committee that:[2]

> *"We are strongly of the view that any further carve-outs from the FSR licensing requirements would be damaging to the integrity of the consumer protection regime…"*

The Australian Consumers Association (ACA) advised the Committee that:

> *"A consumer seeking advice in relation to a regulated product…and dealing with that product should have equivalent regulation as if they went and dealt with a financial planner in making decisions about that industry fund and whether or not a self-managed super fund would be appropriate."*

AMP expressed their concerns as follows:[3]

> *AMP is strongly of the view that further carve-outs from the FSR licensing requirements would be damaging to the integrity of the consumer protection regime as a whole, particularly where such cave-outs relate to the provision of retail consumer advice in the area of superannuation and pensions…….It would create an un-level playing field in the provision of financial advice across the various professional bodies."*

---

2 Letter from IFSA, dated 23 March 2004.

3 Submission from AMP Financial Services, dated 19 March 2004.

Growth of SMSF Industry

There has been major growth in the SMSF industry.

The Strategists Group referred to the following statistics from APRA:

- In 1995 there were just 100,447 funds and these funds had around $20.2 billion in assets. This amounted to around 8.7% of total fund assets.
- By September 2003, there were more than 275,000 funds and these funds had around $117.9 billion in assets. This amounts to around 21.5% of all super assets. [4]

The growth in the use of SMSF's may increase in light of this regulation.

Mr Abbott from the Strategist Group advised the Committee that:

> *"….the way the regulations are drafted at the moment in fact forces accountants to recommend self-managed super funds without a balanced view. I think it is extremely dangerous."*[5]

In practice, this regulation will mean that an accountant (who does not hold an AFSL) can provide factual advice surrounding each super fund structure[6] but can only make a recommendation to acquire or dispose of an interest in a self-managed super fund.

The logical conclusion which has been drawn by witnesses like the Strategist Group is that accountants (who do not have an AFSL) now have an incentive to advise clients to establish SMSFs.

This may in fact encourage the growth in SMSFs.

Given the growth in the industry and the potential for this regulation to facilitate that growth, the quality of advice being provided in relation to SMSFs is an issue.

IFSA says that the exemption:[7]

> *"…..presents real risks to retail consumers, especially in light of the fact that the SMSF sector is by far the fastest growing area of superannuation savings – it attracts many small business owners who, notwithstanding their entrepreneurial and financial skills, are often quite vulnerable when it comes to the complexities of the superannuation environment."*

---

4 Submission from The Strategists Group, dated 19 March 2004.

5 Committee Hansard, p. 31.

6 See comments from the ICAA relating to this issue, Committee Hansard, p. 58-59.

7 Letter from Mr Richard Gilbert to the Parliamentary Joint Committee, dated 23 March 2004.

The Australian Consumers Association noted that the survey conducted by the ACA with ASIC in relation to quality of advice highlighted some serious concerns about the advice provided in relation to SMSFs.

The ACA advised the Committee that:[8]

> *"…SMSFs were sometimes proposed with little justification in terms of the client's precise circumstances. One plan recommended an SMSF despite listing one of the client's goals as simple administrative arrangements."*

Another issue is the fees being generated by SMSFs.

The ACA advised the Committee that their quality of advice survey found that:[9]

> *"Some judges suspected that SMSFs had been recommended so the adviser would get ongoing payment for administrative work."*

Concerns about fees were also expressed by the Strategists Group who advised the Committee that the annual fees associated with SMSFs "makes for solid recurring revenue" to the accountant.[10]

Level of advice

Treasury have advised that a decision was made to differentiate the treatment of SMSF's from other types of super fund structure.[11]

In Treasury's view, accountants traditionally provide advice on establishing SMSFs and the new regulation takes into account that commercial reality.

Mr Rosser, from Treasury, advised the Committee that:[12]

> *"The new regulation recognises that advice on SMSF often forms part of an overall business strategy which would include other FSRA exempt advice such as on business structuring and taxation matters."*

Mr Rosser also advised the Committee that Treasury took the view that an SMSF was an "empty vessel".

The Labor members take the view that 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.

---

8 Committee Hansard, p. 24.

9 Committee Hansard, p. 24

10 Submission from The Strategists Group, dated 19 March 2004.

11 Committee Hansard, p. 70

12 Committee Hansard, p. 69

The original explanatory statement explains this as follows:[13]

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

The Labor members believe that the decision to acquire or dispose of an interest in a SMSF constitutes an investment decision.

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

Another issue which was raised during the hearing was the type of advice that an accountant would be able to provide in relation to other super fund structures (that is, structures aside from SMSFs).

Mr Rosser from Treasury said that whilst an accountant would be able to make a comparison between different super fund structures they would not be able to provide advice on the other super fund structures.

In his view:

> *"It allows that, if you like, comparison but it only allows the advice to be in relation to the SMSF."*

This discussion highlights the difficulty of distinguishing between super fund structures and super fund products.

Extension of Exemption

The accounting bodies argued that the exemption should be extended beyond SMSF's to other types of superannuation fund structure.

The accounting bodies were of the view that the exemption in regulation 7.1.29A should be extended to advice on superannuation fund structures, although advice on specific financial products or classes of products should remain subject to licensing.[14]

Treasury views SMSF's as different to other types of super fund structure, so on that basis they did not support an expansion of the exemption to other types of super fund structure (as proposed by the accounting bodies).

---

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

14 Submission from the Accounting Bodies, dated 26 February 2004.

Mr Rosser made the point that a consideration of different superannuation structures also involves a decision as to the type of investment that the consumer wants to make.

He said:[15]

> *"…superannuation is not the only opportunity in terms of long-term investments. It is only way of making a long-term investment, but it is certainly not the only one. The question of alternative structures includes a consideration of whether superannuation as an investment formulation, if you like, is an appropriate vehicle."*

The decision as to the type of super structure to be used or whether investing in super is even the appropriate choice of investment for a particular consumer, is an investment decision and therefore should be covered by the FSR regime.

Treasury were also concerned that expanding the exemption would mean that *"at the end of the day, there might not be much left"* in the FSR regime.[16]

In light of these issues and the overriding objective of the legislation to protect the interests of consumers, the Labor members do **not** support Recommendation 1 of the Committee to expand the exemption.

Competency Levels

In seeking the broader exemption for advice on superannuation fund structures, the accountants also argued that they are the best-qualified practitioners to deliver advice.

The accounting bodies argued that consumers are better protected when receiving advice from 'recognised accountants' on the basis that such bodies impose upon their members "strict professional, education and ethical requirements".[17]

The Labor members recognise that such bodies do offer certain consumer protection measures. However, some witnesses raised concerns about the competency of 'recognised accountant's in relation to SMSFs.

The submission from the Strategist Group said that the accounting bodies do not mandate specific competency standards for their members in relation to providing advice on SMSF or conducting an audit of a SMSF.[18]

Their submission says that although licensees under the FSR Act are required to meet minimum competency standards developed by the National Finance Industry Training Body (NFITAB) in relation to the provision of SMSF advice, accounts do not have to meet these standards if they are not licensed.

---

15 Committee Hansard, p. 71

16 Committee Hansard, p. 73

17 Submission from the Accounting Bodies, dated 26 February 2004.

18 Submission from the Strategist Group, dated 19 March 2004.

The Labor members are of the view that these comments highlight the need to require certain minimum competencies for people who provide advice on SMSF's to retail clients.

Post Implementation Review

The Labor members recommend that the competency of the 'recognised accountants' in relation to SMSF's is considered as part of the post-implementation review of the FSR regime.

Another issue which needs to be addressed as part of this review is the erosion of regulatory neutrality.

The Labor member's are concerned that by allowing accountants (who do not hold an AFSL) to provide advice in relation to SMSF's a two tier regulatory environment will be created.

The first tier will consist of those advisers (including some accountants) who hold an AFSL and who are subject to the FSR regime with all the attendant consumer protections.

The second tier will consist of advisers who do not hold an AFSL but are able to provide advice on self-managed super funds. The clients of these advisers do not obtain the benefit any of the protections of the FSR regime. Those benefits include external dispute resolution systems, compensation arrangements and training.

This two tier system has been created by carving out various interest groups from the FSR regime. Decisions have been made to exempt mortgage brokers (who provide or advise on offset accounts), and now accountants who advise on SMSFs from the FSR regime.

The Labor members believe that these carve-outs are undermining the consistency of regulation in relation to the financial services industry.

Conclusion

The Labor members take the view that the decision to acquire or dispose of an interest in a SMSF constitutes an investment decision. Accordingly, consumers are entitled to the protections afforded by the FSR Act in relation to such a decision.

The Labor members are also concerned that exemptions like regulation 7.1.29A are eroding the principle of regulatory neutrality upon which the FSR regime was based.

Accordingly, the Labor members do not support the approach taken by the regulation nor the Committee's recommendation to extend the exemption to other super fund structures.

SENATOR PENNY WONG
DEPUTY CHAIR

MR ANTHONY BYRNE MP

SENATOR STEPHEN CONROY

MR ALAN GRIFFIN MP

APPENDIX 1

SUBMISSIONS AND TABLED DOCUMENTS[1]

Number	From
8	20/20 Funds DIRECTINVEST
7	American Home Assurance Company
22	AMP Life Limited
11	Association of Financial Advisers
17	Association of Superannuation Funds of Australia Limited
21	Association of Taxation and Management Accountants
21A	Association of Taxation and Management Accountants
6	Australian Association of Permanent Building Societies
6A	Australian Association of Permanent Building Societies
14	Australian Bankers' Association
14A	Australian Bankers' Association
12	Australian Consumers' Association
2	Credit Union Services Corporation (Australia) Ltd
2A	Credit Union Services Corporation (Australia) Ltd
16	Financial Planning Association
16A	Financial Planning Association
15	Institute of Chartered Accountants in Australia; CPA Australia; and the National Institute of Accountants
18	Institute of Chartered Accountants in England & Wales
13	Institute of Chartered Accountants of New Zealand
3	Insurance Council of Australia Ltd

1 Tabled on 24 March 2004 with the Committee's report on Corporations Amendment Regulations 2003 (Batch 6); Corporations Amendment Regulations 2003 (Batch 7); and Draft Regulations-Corporations Amendment Regulations 2004 (Batch 8).

10	Investment and Financial Services Association Ltd
10A	Investment and Financial Services Association Ltd
10B	Investment and Financial Services Association Ltd
9	Law Council of Australia Word format
19	National Tax & Accountants' Association
5	Peter Davis Taxation & Accounting Services
1	Rainmaker Information Pty Ltd
20	Ramsay, Professor Ian
4	Securities and Derivatives Industry Association
24	Taxpayers Australian Inc.
23	The Strategist Group Pty Ltd

TABLED DOCUMENTS

Received	Document
03/03/04	*ASIC Fee Template*, February 2004 - A report by IFSA (IFSA Standard No. 12.00
03/03/04	*Ongoing Fee Measure (OGFM),* February 2004 – A report by IFSA (IFSA Standard No. 4.00)
03/03/04	*Summary of Research Findings*, 3 March 2004 – A report by Chant West Financial Services.
03/03/04	*Single Fee Measure, A presentation paper by Colonial First State*

APPENDIX 2

PUBLIC HEARING AND WITNESSES

WEDNESDAY, 24 MARCH 2004 - CANBERRA

THE STRATEGIST GROUP PTY LTD
ABBOTT, Mr Grantley Giles, Chief Executive Officer

NATIONAL INSTITUTE OF ACCOUNTANTS
AGLAND, Mr Reece Graeme, Technical Counsel

INVESTMENT AND FINANCIAL SERVICES AUSTRALIA
ARNHEIM, Mr Richard Throsby, Financial Planner
DRUMMER, Mr Christopher John, Major, Government Relations and Policy

AMP
BISHELL, Mr Peter Thomas, Authorised Representative

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

PETER DAVIS TAXATION AND ACCOUNTING SERVICES
DAVIS, Mr Peter, Public Practitioner

TAXATION INSTITUTE OF AUSTRALIA
DIRKIS, Mr Michael James, Tax Director

LAW COUNCIL OF AUSTRALIA
FARRELL, Ms Kathleen, Member of the Executive, Business Law Section
GREENTREE-WHITE, Mr James Russell, Lawyer, Legal and Policy
SIMMONS, Ms Lisa, Representative

FINANCIAL PLANNING ASSOCIATION
HENDRIE, Mr John James, Certified Financial Planner, Chair of Melbourne Chapter
HRISTODOULIDIS, Mr Con, National Manager, Public Policy and Government Relations
THOMPSON, Mr Phillip Clayton, ACT Chapter Chair

DEPARTMENT OF THE TREASURY
McGRATH, Ms Angela, Analyst, Investor Protection Unit, Corporations and Financial Services Division
ROSSER, Mr Michael John, Manager, Investor Protection Unit, Corporations and Financial Services Division

INSTITUTE OF CHARTERED ACCOUNTANTS IN AUSTRALIA
ORCHARD, Mrs Susan Janet, Superannuation Technical Adviser
REILLY, Mr Keith, Technical Standards Adviser

HILLROSS FINANCIAL SERVICES LTD
REGAN, Mr Anthony George, Managing Director

AUSTRALIAN CONSUMERS ASSOCIATION
WOLTHUIZEN, Ms Catherine Nicole, Senior Policy Officer, Financial Services