



23 May 2024

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Dear Ben,

SMSF ASSOCIATION SUBMISSION – LICENSING AND REGULATIONS FOR AGED CARE ADVICE PROVIDERS

The SMSF Association welcomes the opportunity to provide this submission in response to Aged Care Steps discussion paper *Licensing and Regulations for Aged Care Advice*. We acknowledge that aged care funding models, systems and terminology are confusing and complex, making it difficult for families to understand and engage with. This highlights the need for suitably qualified professionals to assist families with the advice, support, and information they need in making decisions for their loved ones that takes into account their specific needs and circumstances.

We understand the concerns that have been raised surrounding the unethical behaviour of some unlicensed providers that have transitioned to aged care following reforms to the financial advice sector or those who have vested or conflicted financial interests. As well as the cases of elder abuse observed. We support measures that ensure appropriate consumer protections and improve the regulation of the sector. This however must be carefully balanced along side regulatory burden and the impact that will have for consumers and professional advisers.

Accessible and Affordable Advice

The aged care system would benefit from a simplification of the funding model. Its complexities are a significant barrier for many families and increase financial risk and risk of elder abuse. Professional advice has an important role to play. Not only for the information, guidance, or financial advice, but also the human aspect of personal advice.

The type of advice required will be quite varied, depending on the specific circumstances applicable to the client. For those whose main asset is the family home, direct property is not classed as a financial product. This presents a significant challenge. Concerns regarding the behaviour of some real estate agents have been held over many years. Particularly where the advice and services encroach upon, or indeed cross over into the arena of personal financial advice.

Any changes being considered to address concerns in this sector must also consider the current structure of the financial advice framework and how that impacts financial advisers, licensed and unlicensed accountants. Changes to the regulatory framework may have unintended consequences



and add to the regulatory burden for existing professionals. The outflow of which are increased costs and reduced accessibility to professional advice.

Aged Care as a Financial Product

Firstly, we do have concerns on the negative impacts and constraints that would arise if aged care advice was to be classed as financial product advice. The financial advice sector is already under considerable strain and will be for some time. This is a consequence of the financial advice sector education reforms and the increasing complexity and costs to business arising from the many layers of regulatory burden.

There has been a significant contraction in the number of licensed financial advisers, meaning that the capacity of the financial advice sector is significantly constrained. Many firms have consolidated their client lists seeing many previously advised clients now unable to access financial advice. This is a growing problem area for SMSF trustees who have lost access to financial advice or now seek to engaged with a financial advisor.

The current compliance frameworks make the cost of providing advice unwieldy and expensive. This also adds to the time to provide advice. For many families, aged care decisions need to be made quickly due to sudden changes in circumstances. The challenges in finding suitable accommodation would be further exacerbated if access to advice were to further delay this process.

An assessment would also need to be made as to whether ASIC are equipped to take on the role of regulator in this area.

Role of Accountants

Accountants in public practice provide a range of accounting and tax agent services. Many of which are not well understood outside the accounting profession.

Accountants are frequently called up to complete Centrelink certificates and provide information pertaining to income, assets as well as information on structures the client has interest in such as family trusts, private companies and superannuation balances and pension data. They may also be called upon to assist clients needing support in completing applications for various benefits. As such there are many accountants who are well equipped to provide certain Centrelink and aged pension and related advice and information services.

These services are often provided to clients for no fee. This is an essential service and support to the many clients who do not have access to a financial adviser.

ASIC statistics show that many accountants are not authorised representatives under an AFSL. Of those that are licensed under an AFSL, some may hold a limited advice authorisation, and others will be fully authorised to provide comprehensive financial advice. AFSLs offering limited advice authorisations may themselves hold a limited AFSL, or a comprehensive AFSL, limiting the authorisation given to the authorised representative.



Exemptions to the provision of personal financial advice

Under the current law, unlicensed accountants can legally provide class of product advice. The *Corporations Act*¹ section 766A(2)(2) provides for the Regulations to set out the circumstances in which a person are taken not to provide a financial service.

Exclusions contained in the regulations enable the provision of class of product advice. That advice must consist only of a recommendation or statement of opinion about the allocation of a client's funds that are available for investment across a range of asset classes.² These include shares, debentures, stocks or bonds, deposit products, managed investments, and others.³ Importantly, that advice cannot extend to a specific financial product. Advice pertaining to an identified client risk, which identifies generic financial products, or generic classes of financial product, that will mitigate that risk, may also be provided.⁴

Advice provided on taxation issues, including advice in relation to the tax implications of financial products where no benefit will be received as a result of the acquisition of the financial product or class of financial products, will not be an exempt service. Importantly the advice must be accompanied by a written statement noting the party providing the advice are not licensed to give financial product advice, that taxation is only one of the matters to be considered and must include a recommendation to seek advice from a licensed financial adviser.⁵

These and other exemptions available in the Regulations operate imperfectly and already present a number of challenges for unlicensed accountants who seek to provide advice and services to their clients. We have been advocating for changes to these provisions to provide greater certainty and clarity for accountants providing tax agent services, and those seeking to assist and advise their SMSF clients. While the current provisions have their challenges, we would not support amendments that would remove or restrict these exemptions as they apply to professional accountants and registered tax agents.

Accountants are required to comply with a professional code of ethics *APES 110 Code of Ethics for Professional Accountants*.⁶ This code substantially pre-dates the financial advisers code of ethics. It was first introduced in 2006 and has been regularly revised and updated throughout its operative life.

APES 110 is accompanied by a number of professional standards and guidance notes published by the Board on a range of important practice areas including, terms of engagement, quality management for firms, risk management for firms, taxation services, and financial planning services. These are all mandatory for accounting professionals who are members of CPA Australia, CA ANZ or IPA.

¹ *Corporations Act 2001* (Cth).

² *Corporations Regulations 2001* (Cth), r 7.1.33A.

³ *Corporations Regulations 2001* (Cth), r 7.1.33A (a) – (h).

⁴ *Corporations Regulations 2001* (Cth), r 7.1.29 (3)(b).

⁵ *Corporations Regulations 2001* (Cth), r 7.1.29 (4).

⁶ Accounting Professional & Ethical Standards Board (APES).

APES 110 requires accountants to exercise their professional judgement⁷ which draws on their training, professional knowledge, skill, and experience in the context of the relevant facts and circumstances, nature and scope of the particular engagement or activity.⁸

The application of professional judgement requires consideration be given to factors such as:

- The accountant's expertise and experience are sufficient to reach a conclusion.
- The need to consult with others with relevant expertise or experience.
- Whether the accountant's own preconception or bias might be affecting the exercise of professional judgement.⁹

A reasonable and informed third-party test must also be applied. This involves consideration on whether the same conclusions would likely be reached by another party. They must weigh all the relevant facts and circumstances that they know, or could reasonably be expected to know, at the time, and possess the relevant knowledge and experience to understand and evaluate the appropriateness of the conclusions in an impartial manner.¹⁰

Prior to accepting any engagement, accountants are required to assess whether they and the engagement team hold the relevant knowledge, experience, or expertise.¹¹ If they do not, they should consider the use of experts, or decline the engagement. Firms are required to have established policies and procedures to ensure compliance with the code,¹² and robust processes for the acceptance and allocation of engagements within the firm.¹³

There will be accountants in practice who will refer on to another professional, who is suitably qualified and experienced to provide the advice and services to the client. Others will hold the requisite knowledge and expertise to advise clients in relation to aged care and related matters. Some will be licensed, and others will operate under the class of product advice framework. If at any point the advice exceeds their capability or scope of advice that can be given, they have a duty and an obligation to refer the client to a suitably qualified professional.

Proposed Solution

We are concerned that adding a further licensing regime for aged care advice services would add unwanted red tape and complexity to the detriment of consumers. Advice must be accessible and affordable but also provided by suitably qualified professionals.

We would support a legislative framework that utilises the existing professional and ethical frameworks that apply to financial advisers and accountants. A suitably qualified licensed financial adviser or an accountant who are a member of a prescribed professional association with codes of conduct and disciplinary processes would be appropriate. Both professions have established codes of ethics, continuing professional development obligations, a duty to hold the requisite knowledge

⁷ APES 110 [120.5.A4].

⁸ APES 110, 41.

⁹ APES 110 [120.5.A5].

¹⁰ APES 110 [120.5.A6].

¹¹ APES 110 [320.3.A4].

¹² APES 320 [4.37].

¹³ APES 320 [4.38].



and expertise to provide advice, and a requirement to hold appropriate professional indemnity insurance.

We would support the introduction of a CPD and training requirement for those who advise in this area. This also provides an opportunity to engage with practitioners across both professions on best practice aged care advice, technical knowledge as well as professional, ethical, and legal limitations that apply.

A limited license model could be considered for those who do not meet the definition of a suitably qualified financial adviser or professional accountant. This may be a solution to address unlicensed practitioners operating in the market. As a specific form of limited license, the existing code of ethics applicable to financial advisors could be extended to this cohort. It would also provide an opportunity to prescribe CPD obligations for this cohort and ensure that individuals are held to account in the event inappropriate advice is provided to consumers or to address unethical behaviour.

If you have any questions about our submission, please do not hesitate to contact us, and we thank you again for the opportunity to provide this submission.

Yours sincerely,

Tracey Scotchbrook
Head of Policy and Advocacy

ABOUT THE SMSF ASSOCIATION

The SMSF Association is the peak body representing the self-managed superannuation fund (SMSF) sector which is comprised of over 1.1 million SMSF members and a diverse range of financial professionals. The SMSF Association continues to build integrity through professional and education standards for practitioners who service the SMSF sector. The SMSF Association consists of professional members, principally accountants, auditors, lawyers, financial advisers, tax professionals and actuaries. Additionally, the SMSF Association represents SMSF trustee members and provides them with access to independent education materials to assist them in the running of their SMSF.