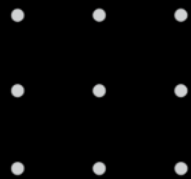


# Deep Dive: What Accountants, Planners and SAPEPAA Advisers Can Advise on



# Let's test your knowledge – right or wrong?



1. A client asks their accountant to set up a SMSF. The accountant tells the client they cannot advise on SMSFs?

2. An accountant advises a client to set up a Leading Member discretionary trust to protect family wealth for bloodline. Can an accountant set up a discretionary trust?

3. The sole director of a company established by an accounting firm goes into liquidation on the death of the director because there is no replacement director. The Executor takes action against the accountant for recovery of losses?

4. A tax agent advises a client on using a contributions suspense account to maximise 2022 deductions and not breach the concessional contributions cap. His friend tells him that is illegal.

5. An accountant creates an enduring power of attorney based on a data capture from the client which enables the Attorney to become the Trustee of a SMSF. His planner colleague said he needs to be licensed.

6. A lawyer makes a BDBN for a client that directs death benefits to the estate without elaborating on the risk of a family provisions claims. The Executor sues the lawyer for losses.



**We are SAPEPAA**

**Succession, Asset Protection & Estate Planning Advisers Association**

**Leave a Legacy**

# ***SINCLAIR v FC of T, Administrative Appeals Tribunal of Australia, 16 November 2010***

**SA Forgie (Deputy President)**

“92. On the basis of the evidence, and particularly that of his solicitors, I find that Mr Sinclair did not approach them for formal legal advice regarding the taxation consequences of the contractual arrangements he had made with Towerlake. He did approach Mr Jasper who worked with him and the solicitors on the arrangements. Mr Jasper said that the three of them, Mr Sinclair, the solicitor and he himself, worked on the matter. I accept his evidence that they all felt that an amount paid as pre-paid interest in respect of an activity that produced income would be deductible. As I have found, though, the solicitors did not put that in writing and do not admit to giving specific legal advice about the particular arrangement entered by Mr Sinclair. Mr Jasper is a Fellow of the Tax Institute of Australia but he could not give legal advice regarding the taxation implications of the arrangements.”

# Let's look at taxation - Tax Agents Services Act 2009

## 90-5 Meaning of *tax agent service*

- (1) A *tax agent service* is any service:
  - (a) that relates to:
    - (i) ascertaining liabilities, obligations or entitlements of an entity that arise, or could arise, under a \*taxation law; or
    - (ii) advising an entity about liabilities, obligations or entitlements of the entity or another entity that arise, or could arise, under a taxation law; or
    - (iii) representing an entity in their dealings with the Commissioner; and
  - (b) that is provided in circumstances where the entity can reasonably be expected to rely on the service for either or both of the following purposes:
    - (i) to satisfy liabilities or obligations that arise, or could arise, under a taxation law;
    - (ii) to claim entitlements that arise, or could arise, under a taxation law.
- (2) A service specified in the regulations for the purposes of this subsection is not a *tax agent service*.



# ***Importantly for Tax Agents***

## **Tax Agents Services Act 2009 – Explanatory Memorandum**

Where an agent, after consulting the relevant authorities and sources, is still uncertain of how to apply a taxation law, the agent may choose to seek assistance from another party, such as another agent, a legally qualified professional, a recognised professional association or recognised BAS agent association, a legal professional association, or the ATO

# Accountants and Super

“The introduction of the Financial Services Reform Act in 2001 heralded a new era of financial advice reforms that, whether by design or otherwise, included a member’s superannuation interest as a “financial product”. For large superannuation funds that makes sense as a member is turning over their hard earned SGC to a completely independent and faceless super trustee (and behind the scenes fund manager) to look after their life savings.

But what were they thinking with SMSFs? Did they try a one size fits all approach so that a SMSF member was also caught, although by law they are required to sign off on all investments of the fund. I don’t know but it never really made sense to me. Luckily there was an exemption for accountants to establish and wind up SMSFs but that “across the board” exemption was replaced with much fanfare by the limited license for accountants.

BUT – did you know there still is a whole raft of exemptions for accountants and tax agents in terms of SMSF advice. *Unfortunately, these exemptions are not available for limited license accountants nor AFSL licensees.*”

# Keys to SMSF Advice for Accountants and Tax Agents

- Know what is a SMSF financial product
- Know the law
- Know ASICs guidelines – **they are the Regulator!!!!**
- Know how LightYear Docs has been tailored to meet the ASIC guidelines
- What to do if you are limited license?
- Where to from here



# Know the Corporations Act 2001

Section 764A of the CA includes specific investments or products as “financial products” for the purposes of CA.

From a SMSF perspective, Section 764A(1)(g) provides that a superannuation interest within the meaning of the Superannuation Industry Supervision Act 1993 is a financial product.

Turning to Section 10(1) of the SIS Act, the definition of a superannuation interest means a beneficial interest in a regulated superannuation fund. As such, any interest in a SMSF is deemed to be a financial product for the purposes of CA.

This includes: contributions - lump sums - pensions - rollovers - (BDBN?)

# The Tax Agents and Lawyers Exemption – s 766B of the CA 2001

- (5) The following advice is 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;
  - (c) except as may be prescribed by the regulations—advice given by a registered tax agent or BAS agent (within the meaning of the *Tax Agent Services Act 2009*), 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.

# ASIC Guidance Note INFO 216

- **Licensed Accountants** – Cannot take advantage of the Licensing Exemptions
- **Accountants** – Investment strategies are okay as they are not advice to consumers. Setting up SMSF – only if client asks and then must provide an exemption letter
- **Tax Agents** – Exempt for any advice is in the “ordinary course of tax agent’s business” and the same as a lawyers – review of the ASIC guides
- **SMSF Advisers and Administrators** – Caught under the current regime and need to limit SMSF advice touchpoints

# ASIC ON SMSF ESTABLISHMENTS FOR ACCOUNTANTS

“You may provide advice on establishing, operating, structuring or valuing an SMSF without an AFS licence: regulation 7.1.29(5) ..... Where you are relying on this exemption, if your client is a ‘retail’ client (as opposed to a ‘wholesale’ client – see section 761G and related regulations for the definition of this term), under regulation 7.1.29(5)(d) you must provide a written statement to your client that:

1. you are not licensed to provide financial product advice under the Corporations Act
2. they should consider taking advice from an AFS licensee before making a decision about a product.

The advice you give about establishing, operating, structuring or valuing an SMSF must not amount to an explicit or implied recommendation to establish an SMSF, or to acquire or dispose of an interest in an SMSF (or another superannuation product).

However, we recognise that advice given to a person about the establishment of an SMSF may also carry an implicit recommendation that the person acquire an interest in the SMSF. Therefore, you are more likely to be able to rely on the exemption when your client has already made a decision to establish the SMSF before seeking your assistance to take the next steps. For example, you may recommend the best structure for an SMSF to suit your client’s situation, after they have made the decision to establish an SMSF.”

# ASIC ON CONTRIBUTIONS FOR TAX AGENTS

“Under the exemption, a registered tax agent may provide advice on any tax implications of contributions into an SMSF (or other superannuation fund), such as a client’s eligibility to make concessional and non-concessional contributions and the tax treatment of those contributions. For instance, a tax agent can use a client’s total superannuation balance to advise the client on their eligibility for:

1. the unused concessional contributions cap carry-forward
2. the non-concessional contributions cap and the two-year or three- year bring-forward period.

However, they cannot recommend that a client make a particular level of contributions (although they can advise on the maximum level of contributions a client can make). This is because the decision to make a particular level of contributions involves considerations other than tax.

As another example, a tax agent can advise a client that they will be eligible for a tax offset if they make a spousal contribution. The tax agent cannot recommend the amount of the spousal contribution. However, they may provide factual information about the spousal contribution eligibility criteria that is relevant to calculating the amount of the tax offset. This may include, but is not limited to, the spouse’s income and the amount of the non-concessional contribution to superannuation.”

# 3. What is giving legal advice?

**Re Matthews (1938) 79 P 2d 535, (at 108):**

"... the court held that work of the mere clerical kind, such as filling out of skeletal blanks or drawing instruments of generally recognised and stereotype forms effectuating the conveyance or encumbrance of property, such as a simple deed or mortgage not involving the determination of the legal effect of special facts and conditions, should be generally regarded as the legitimate right of any layman because it involves nothing more or less than the clerical operations of the now almost obsolete scrivener. (The scrivener was eliminated in England by the 1804 Act.) The court went on to say that where an instrument is to be shaped from a mass of facts and conditions, the legal effect of which must be carefully determined by a mind trained in the existing law in order to ensure a specific result and to guard against others, more than the knowledge of the layman is required and a charge for such services brings it definitely within the term 'practice of the law'."



# 3. What is not giving legal advice?

**LEGAL PRACTICE BOARD -v- COMPUTER ACCOUNTING AND TAX PTY LTD [2007] WASC  
184**

In relation to the application of the material part of Legal Practitioners Act, s 77(1), I note the following from Legal Practice Board v Said [2002] WASC 35, at [15] and [17]:

"It has been generally accepted in this State that in the particular context of s 77(1) the notion of drawing or preparing a document involves 'the use of the intellect to compose the document, the use of the brain to select the correct words, to put them in the correct sequence so that the document expresses the intention of the parties'; see *Green v Hoyle* [1976] 1 WLR 575 at 581, per Widgery LCJ and [*Palm Management (supra)*] per Brinsden J at 109-110. It is on this basis that in this State the mere routine filling up of a document which is in the form of a precedent has been generally regarded as merely a 'clerical' or 'ministerial' function, and that more than this is required to constitute the 'drawing' or 'preparing' of a document for the purposes of s 77(1).

# Trust Deeds – automated v word document

**Legal Practice Board v Computer Accounting and Tax Pty Ltd [2007] WASC 184.**

**Justice Simmonds**

“It seems to me that on the evidence before me I should find beyond a reasonable doubt that the provision of the trust deed involved the respondent "directly or indirectly" performing, carrying out or engaging in any work in connection with the practice of law. While true it is that the trust deed was shown on the website for the respondent as a "Product", it was, like the trust deeds in *Marbellup* (supra), a "complicated document". It was a document that the respondent required a few days to complete in accordance with the instructions of Mr Kingsbury. There is no evidence before me that the respondent had explained it was simply performing a clerical function of completion of a commercially available document.”

# If you need legal help

- The provision of SMSF advice is our specialty – for something more detailed or complex come to Abbott & Mourly Lawyers
- Abbott & Mourly can provide sign off on any LightYear documents with a legal letter of advice if you are concerned
- Download the Abbott & Mourly app and send your query or document in or you can do inside the document



 This app is available for all of your devices

Installed



Advisors

*Australia's Leading Legal SMSF Advisory.*

Access the Abbott & Mourly team around the clock via chat.

*High-Net-Worth Individuals and Family Offices.*

AM  
Abbott & Mourly  
Good Morning, Mark

Grant Abbott  
Advisor

Of course, I'll schedule app now. How afternoon at 4

That's a partner's meeting.

Ok sounds great, can you please also upload your documents to our secure storage within the chat. Chat with you this afternoon.

Instantly c  
with your l