

IFPA RESPONSE TO ALRC

Executive Summary

The Institute of Financial Professionals Australia (IFPA) is an association that represents several elements of what the general public commonly regard as being professionals in the financial services industry in Australia. Those elements are taxation professionals, superannuation advisers and financial advisers.

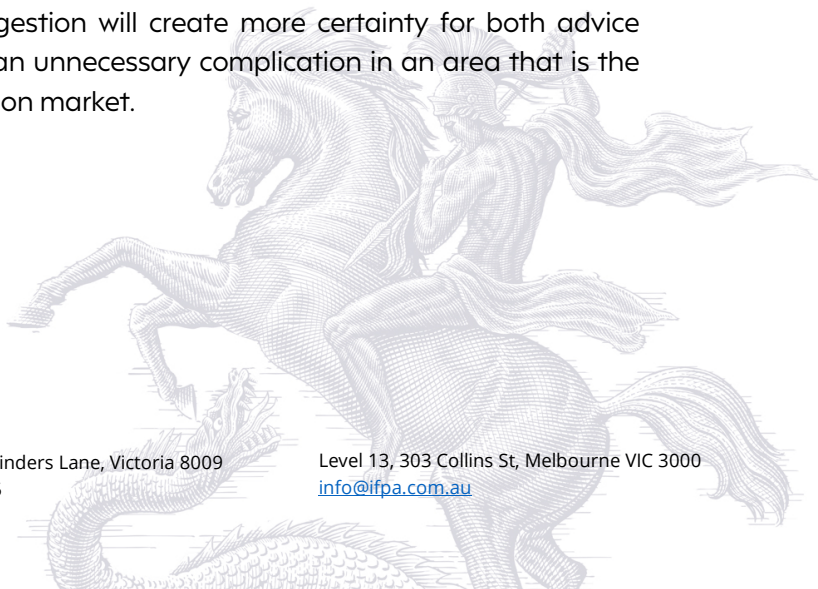
Currently, the provision of financial product advice is defined as when advice regarding a financial product is personal to the client's situation. This includes the provision of advice on superannuation including Self Managed Superannuation Funds ("SMSF").

With taxation being such a specialised area for application to an SMSF, a taxation professional has a significant role to play in the advice provided to the members (who are also trustees) of the fund. Unfortunately, advice on tax structuring that is in the best interests of the client can often be intertwined with what is considered personal advice, thus requiring the advice to be given by someone who is authorised under an Australian financial services (AFS) licence.

This is an area that IFPA believes can be addressed by proposal B4 of the Australian Law Reform Commission (ALRC) report, Financial Services Legislation: Interim Report B (Report 139, 2022) (the Report), – that a class of exempt persons be created under Chapter 7 of the Corporations Act 2001 (Cth). We believe that a solution that best serves clients and advice professionals (both financial and taxation advisers) alike would be:

- "Self-Managed Superannuation" be noted as a separate financial product to that of "Superannuation".
- Specialist SMSF professionals be an exempt class of persons, able to give advice specifically to the financial product designated as "Self-Managed Superannuation".
- Require a person wishing to be in that exempt class of persons to meet certain attributes to give comfort to both industry and consumers alike that advice being provided is on a competent and qualified basis.

We believe that the application of our suggestion will create more certainty for both advice providers and consumers alike and remove an unnecessary complication in an area that is the fastest growing segment of the superannuation market.



Position of the Institute of Financial Professionals Australia

One element of the Report that we would like to address, as it would help eliminate a paradox in terms of the provision of financial advice and currently provides a level of frustration to our overall membership, is the provision of advice on SMSFs.

The 'Paradox'

Every superannuation fund regulated under the Superannuation Industry (Supervision) Act 1993 ("SIS Act") is required to operate on the basis of their meeting what is known as the "Sole Purpose Test". This test requires a fund to be operated to meet the core purpose of providing retirement benefits to members, either upon their retirement, attaining a certain age or in the event of their death paying benefits to dependants (or their legal personal representative).

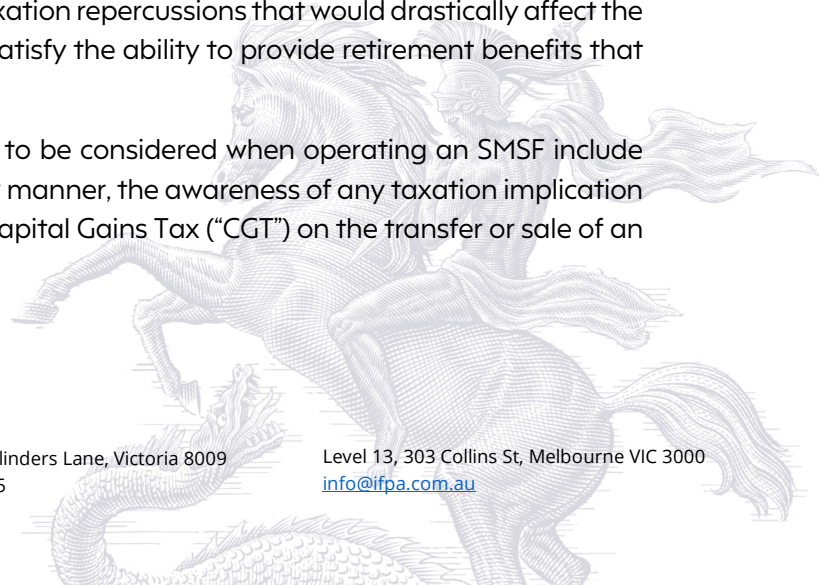
In general practice, ensuring these core benefits are met requires an understanding of the client's circumstances such as their current position and goals and objectives for their retirement, as well as the level of investment risk to be undertaken. That these aspects are particular to a person's situation, making a recommendation based on such is regarded as personal advice about a financial product (a superannuation fund), and therefore must be provided under the authorisation of an AFS licence.

The paradox here is that a member's benefit in a public offer superannuation fund exists simply to hold that member's balance of assets within their member account, whereas an SMSF offers a higher degree of complexity. This requires a higher level of knowledge when advising on the structure of the fund, an area that a taxation professional holds particular expertise in.

Further aspects of SMSF advice require specialist taxation advice. While member accounts are kept within the fund, assets backing the member accounts are not necessarily segregated according to which member account they support. Also, the use of an SMSF to enact a succession plan by which assets may be passed from one member to another is a complex area that has serious taxation implications if not handled correctly.

Taxation penalties can be severe if the fund is not administered correctly when the member makes use of concessions given by legislation; examples such as not correctly structuring the use of the business real property exemption, the incorrect application of collectibles purchased within the fund and any improper manner by which an investment property may be purchased and operated by the fund, can have significant taxation repercussions that would drastically affect the means by which an SMSF would be able to satisfy the ability to provide retirement benefits that would adequately meet a member's needs.

Further important taxation issues that need to be considered when operating an SMSF include the need to lodge taxation returns in a timely manner, the awareness of any taxation implication on the transfer of assets and the impact of Capital Gains Tax ("CGT") on the transfer or sale of an asset that may create a CGT event.



With taxation being such a specialised area for application to an SMSF, a taxation professional has a significant role to play in the advice provided to the members (who are also trustees or directors) of the fund. Unfortunately, advice on tax structuring that is in the best interests of the client can often be intertwined with what is considered personal advice, thus requiring the advice to be given by someone who is authorised under an AFS licence.

With this paradox in play, we believe it can have the following effects detrimental to the trustees of the SMSF:

- While a financial adviser might be expert on investment strategy and placement, they may not have sufficient technical expertise to cover the complex taxation issues.
- Focus only on taxation by a taxation professional and not the “sole purpose” of the fund (i.e., whether the final retirement benefit is likely to meet the needs of the client at that time).
- If the trustees are required to use two separate professionals for each element of retirement funding (investment) and taxation issues, the expense to the fund is increased significantly.

“Financial” or “Taxation” advice?

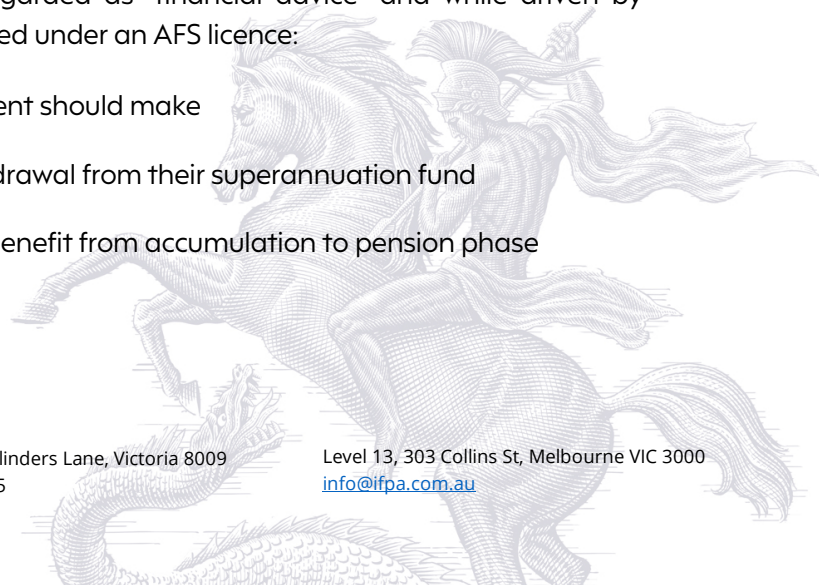
A further point of confusion that is created by the application of the Corporations Act 2001 (Cth) (“Corps Act”) is the difference between what is regarded as “financial” advice and “taxation” advice.

As we have noted above, the provision of financial advice is when advice is personal to the client’s situation. Hence, it is allowable for a taxation professional to advise a client on:

- The allowable contribution limits before excess contributions tax applies
- The effect of tax on a current superannuation balance
- The difference in tax treatment between assets in accumulation and pension phase
- The tax liabilities of any withdrawal to be made from a superannuation fund

However, the following points would be regarded as “financial advice” and while driven by taxation must be provided a person authorised under an AFS licence:

- The amount of contribution that a client should make
- Whether a client should make a withdrawal from their superannuation fund
- Whether a client should switch their benefit from accumulation to pension phase



We believe it is appropriate to say that when a client discusses their taxation situation with their taxation adviser, they expect that person to be able to answer questions such as those that the law regards as being financial advice. To be required to refer a client to another advice professional for such items only causes confusion and additional cost for the client and adviser alike, thus contributing to the unaffordability of financial advice we see currently.

What is the solution?

We believe that this paradox is created by the provisions of the Corps Act, that being the way that “financial product advice” is defined (section 766B of the Corps Act and ASIC’s Regulatory Guides 36 and 244), as well as the requirements for a person to be licensed or authorised under an AFS licence to provide personal financial advice. This is what the Corps Act refers to as a “relevant provider”.

According to section 921B of the Corps Act, a relevant provider must meet the following criteria:

1. That their degree or higher qualification must be approved by the Minister
2. That they have passed an exam administered by ASIC in accordance with principles approved by the Minister; and
3. Have undertaken one year’s work and training that meets standards set by the Minister.

As an association we understand the need for the criteria set out for those whose main role is providing financial product advice. The purpose of this submission is not to question what is there.

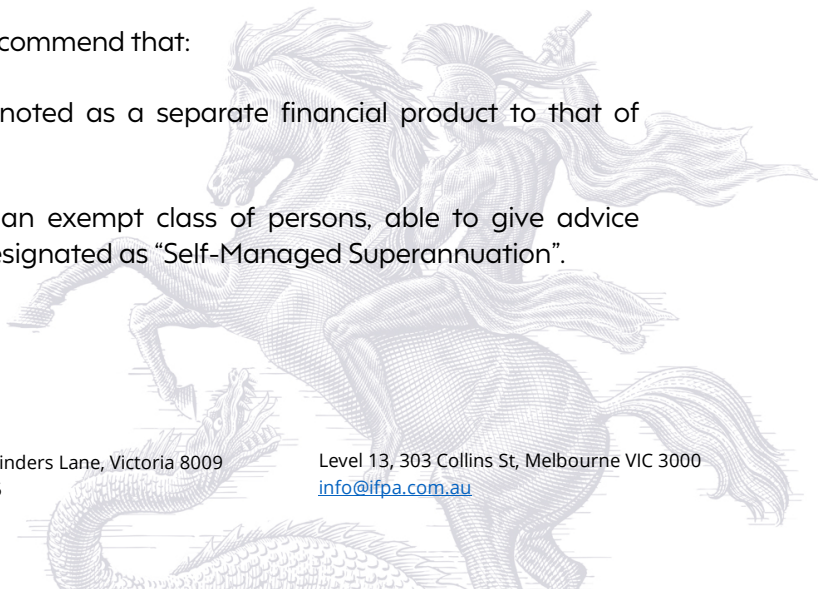
We do however question the need for those who demonstrate expertise in an aligned area having to meet these criteria, just to be able to provide advice aligned to their area of specialisation when that advice only marginally meets the definition of “financial advice”.

On this basis we support the proposal B2 (“The Proposed Legislative Model”) in the Report that:

- “Chapter 7 of the Corporations Act 2001 (Cth) should be amended to include a power to:*
- a. exclude classes of products and services or exempt classes of persons from provisions of Chapter 7 of the Act; and*
 - b. set out detail that adjusts the scope of any provisions in Chapter 7 of the Act”*

Specifically, alongside your proposal B2 we recommend that:

- “Self-Managed Superannuation” be noted as a separate financial product to that of “Superannuation”; and
- A “Specialist SMSF Professional” be an exempt class of persons, able to give advice specifically to the financial product designated as “Self-Managed Superannuation”.



In making this recommendation we believe that to be able to utilise such an exemption, a tax professional needs to have certain qualifications. Such a requirement is in line with the requirement that a financial adviser must attain certain attributes to be able to operate as a tax (financial) adviser.

While many tax professionals have advocated for the return of the “Accountants’ Exemption” since its loss on 1 July 2016, we do not believe that allowing any exemption should be as simple a process as how that exemption was put into place (i.e., with association membership being the sole exemption criterion). Having certain requirements in order for the adviser to be able to avail themselves of the exemption will provide a signal to the industry that giving advice on SMSFs is a specialised field; it will also provide the general public with comfort that the adviser is qualified to provide competent advice in this area.

To be granted the ability to provide advice on this exempt class of product, the “class of person” would have the following attributes:

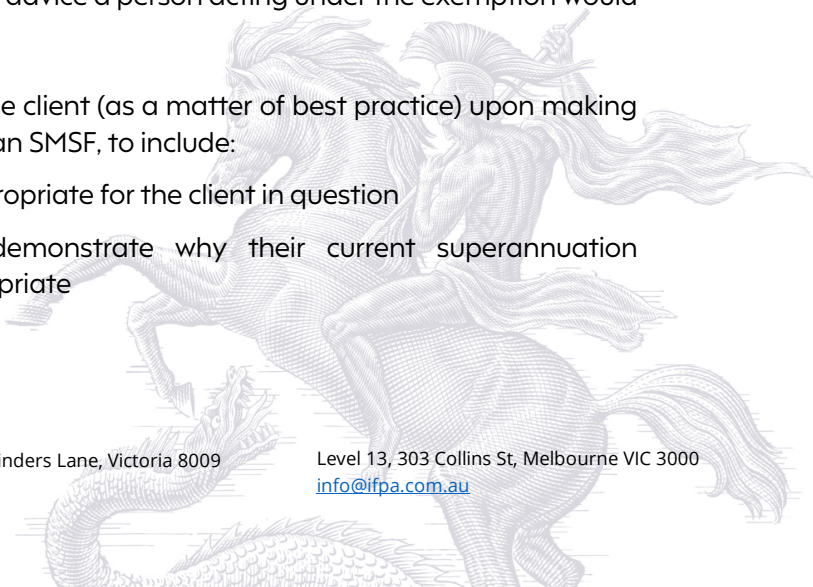
- Minimum 3 years as a registered tax agent with the Tax Practitioners Board
- Be degree qualified or higher in a relevant field of study
- Have completed a short course of study specialising in SMSF
- Membership of a recognised professional association

Where a person meets these requirements, to operate under the exemption they would then register with ASIC so their ability to do so can be available to the general public.

We note that in the terms of section 921B of the Corps Act, the degree qualification or above must have been approved by the Minister. We do not believe such approval is required, alleviating the regulatory burden and not unfairly excluding a qualified professional from being able to provide advice in this area, or having to spend considerable time and money to achieve a qualification they already possess through an institution that has not taken the time or trouble to be registered.

We also believe that in terms of providing this advice a person acting under the exemption would meet the following business guidelines:

- A “Record of Advice” to be given to the client (as a matter of best practice) upon making any recommendations for the use of an SMSF, to include:
 - The reason why an SMSF is appropriate for the client in question
 - A cost/benefit analysis to demonstrate why their current superannuation arrangements are not as appropriate



- A list of the benefits forfeited by moving from their current superannuation arrangements (including the loss of any personal insurances held by the current fund)

Conclusion

We believe that the application of our suggestion will create more certainty for both advice providers and consumers alike and remove an unnecessary complication in an area that is the fastest growing segment of the superannuation market.

Please feel free to contact the association should you wish any clarification on our submission.

