



# Pre-payment of Super Contributions

The law, the application, the documentation and the client comms

2 June 2021

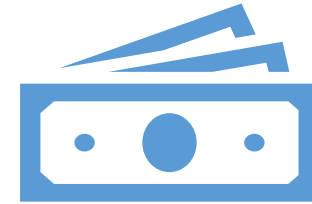
# We want tax deductions at year end clients say



Each year before 30 June clients turn towards a range of tax-deductible strategies and solutions. After all who wants to pay a lot of tax?



From instant asset write off, to tax advantaged investments, super and pre-payments – accountants have their own tools to make a difference in their client's tax position.



*So, what about a pre-payment of deductible super? Let's look at how that works?*

# Client Case Study

- John Smith is a lawyer who has had a very good year despite Covid. He works for salary wages at a mid-tier law firm and earns \$125,000 and expects a \$30,000 bonus
- He is a member of the Smith Family SMSF and his employer has made \$10,000 in super contributions to the Fund so far this year
- He is currently revaluating and refinancing his property, which he expects to be valued at \$1.5M with a \$450,000 mortgage and credit line of \$500,000 available in early July
- How can super and prepaying super help this year



# What are the action steps?

1. Send all your clients the pre-payment of super email
2. Determine the amount that should be contributed to super for best tax effectiveness
3. If you are an accountant – fit in with the exemption for tax agents in ASIC Guidance note Info 216
4. Check the deed or upgrade it
5. Build the documents on the LightYear Docs platform
6. Render the invoice
7. Monitor next year's super contributions

# The Law – check your deed

## LightYear Docs SMSF Deed and Leading Member SMSF Deed

### Rule 5.3 Suspense Accounts

The Trustee may accept an Asset, monies, payments, in-kind benefit, distribution or such other amount as described in Rule 4.1 and at their discretion (unless otherwise required under the Superannuation Laws) may hold these amounts in a suspense account before being credited to an account or Member Superannuation Interest. There is no limit, unless the Superannuation Laws otherwise provide, as to the time any specific amount is held in the Suspense Account. Any Suspense Account, and the Trustee may create as many as they choose, may have its own Investment Strategy if the Trustee so chooses.



Make sure that you make it to Deed Awareness Week so you don't miss a beat on SMSF, Unit Trust, Testamentary Trust and Discretionary Trust deeds -



# What does the ATO say?

SMSFRB 2018/1

## SMSF Regulator's Bulletin

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The use of reserves by self-managed superannuation funds

### Can I use a reserve to hold unallocated contributions?

44. We understand the suspense accounts used to hold contributions pending their allocation under Division 7.2 of the SISR to an accumulation interest of a member are commonly referred to as 'reserves'. Consistent with APRA's views in SPG 222, we do not consider that these accounts are reserves for the purposes of the SISA and SISR.

45. However, we consider that the meaning of 'reserve' is broader for the purposes of regulation 291-25.01 of the ITAR 1997 and for that purpose, would include an amount held in this type of suspense account. The inclusion of these contributions in either concessional contributions or as non-concessional contributions is not dependent on the amount being allocated from a 'reserve'. These contributions are included in concessional contributions through subregulation 291-25.01(2) of the ITAR 1997 or non-concessional contributions through subregulation 292-90.01(2) of the ITAR 1997 (see Taxation Determination TD 2013/22 *Income tax: 'concessional contributions' - allocation of a superannuation contribution with effect from a day in the financial year after the financial year in which the contribution was made*).

46. SMSF trustees are able to accept contributions to these accounts pending allocation to the relevant member in accordance with Division 7.2 of the SISR.

# What does Division 7.2 of SISR say?

## **7.08 Contributions to be allocated to members**

- (2) For subsection 31(1) of the Act, the trustee must allocate the contribution to a member of the fund:
  - (a) not later than 28 days after the end of the month; or
  - (b) if it is not reasonably practicable to allocate the contribution to the member of the fund not later than 28 days after the end of the month—within such longer period as is reasonable in the circumstances.

# And the 1997 ITAA on deductions

## 290-60 Employer contributions deductible

- (1) You can deduct a contribution you make to a \*superannuation fund, or an \*RSA, for the purpose of providing \*superannuation benefits for another person who is your employee when the contribution is made (regardless whether the benefits are payable to a \*SIS dependant of the employee if the employee dies before or after becoming entitled to receive the benefits).

Note: Other provisions of this Act and the *Income Tax Assessment Act 1936* may reduce, increase or deny the deduction in certain circumstances. For example, see sections 85-25 and 86-75 of this Act.

- (2) However, the conditions in sections 290-70, 290-75 and 290-80 must also be satisfied for you to deduct the contribution.
- (3) You can deduct the contribution only for the income year in which you made the contribution.

## 290-150 Personal contributions deductible

- (1) You can deduct a contribution you make to a \*superannuation fund, or an \*RSA, for the purpose of providing \*superannuation benefits for yourself (regardless whether the benefits are payable to your \*SIS dependants if you die before or after becoming entitled to receive the benefits).

Note: Other provisions of this Act and the *Income Tax Assessment Act 1936* may reduce, increase or deny the deduction in certain circumstances. For example, see section 26-55 of this Act.

- (2) However, the conditions in sections 290-155, 290-165, 290-167, 290-168 and 290-170 must also be satisfied for you to deduct the contribution.



# Pre-payment of Super Contributions with twists

1. Can be both personal and also employer but need to do separate documentation for each
2. For employer contributions can be for a number of members
3. Both concessional and also non-concessional
4. If a Family Trust look for everyone to be employed and salary sacrificed – parents and children
5. Investigate what the tax position would be if John went up to and additional \$50,000 in concessional contributions suspense from his own personal account
6. Note: He would have to use an “on demand” promissory note until his finance came through



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## AFS licensing requirements for accountants who provide SMSF services

This information sheet (INFO 216) is for accountants who provide services relating to self-managed superannuation funds (SMSFs). These services are referred to as 'SMSF services' in this information sheet. It covers:

- how the Australian financial services (AFS) licensing regime applies to SMSF services provided by accountants, and how the law applying to accountants has changed from 1 July 2016
- the various SMSF services accountants might provide, and whether a licensing exemption applies to them or whether accountants must be covered by an AFS licence for that service.

### How the AFS licensing regime applies to SMSF services provided by accountants

The *Corporations Act 2001* (Corporations Act) regulates people who provide financial services – that is, certain types of services or activities that relate to a 'financial product'.

Financial products include an interest in an SMSF and many of the investments that are typically held by an SMSF, such as securities and interests in managed investment schemes. Other common types of financial products are:

- debentures
- general and life insurance
- superannuation products.

While real property is not itself a financial product, an interest in an SMSF is a financial product. Providing a recommendation or a statement of opinion on using an SMSF as a vehicle to invest in real property is financial product advice, and requires an AFS licence with an appropriate authorisation.

The financial services typically provided by an accountant might include:

- **providing financial product advice** – providing a recommendation or statement of opinion, or a report of either of those things, with the intention of influencing a person's decision on a financial product (or that could reasonably be regarded as being intended to have such an influence)
- **dealing in a financial product** – including applying for, acquiring, varying or disposing of a financial product on behalf of a client, or arranging for someone else to do any of these things.

For more information on financial products and services, see Regulatory Guide 175 Licensing: *Financial product advisers—Conduct and disclosure* ([RG 175](#)) and Regulatory Guide 36 Licensing: *Financial product advice and dealing* ([RG 36](#)).

A person providing financial product advice must also comply with provisions under the Corporations Act that ban conflicted remuneration: see Regulatory Guide 246 *Conflicted and other banned remuneration* ([RG 246](#)) for more details.

Other regulatory guides that are relevant to the provision of financial product advice are Regulatory Guide 244 *Giving information, general advice and scaled advice* ([RG 244](#)) and Regulatory Guide 245 *Fee disclosure statements* ([RG 245](#)).

Generally, a person who provides financial services must be covered by an AFS licence, either by:

- holding an AFS licence, or
- becoming the representative of an AFS licensee and providing financial services on behalf of the AFS licensee.

However, there are a number of exemptions from the requirement to be covered by an AFS licence, including for accountants providing services relating to SMSFs. These exemptions apply to a variety of different activities, and are outlined in Table 1: [SMSF services and the AFS licensing regime](#).

One former exemption, which allowed recognised accountants (i.e. certain accountants who are members of CPA Australia, Chartered Accountants Australia and New Zealand, or the Institute of Public Accountants) to give financial product advice about acquiring or disposing of an interest in an SMSF, was repealed on 1 July 2016. This exemption was in regulation 7.1.29A of the Corporations Regulations 2001 (Corporations Regulations). The repeal of regulation 7.1.29A reflects the Australian Government's policy decision that financial product advice about acquiring or disposing of an interest in an SMSF should be within the scope of the AFS licensing regime, regardless of who provides that advice.

This means from 1 July 2016 all accountants must be covered by an AFS licence to give advice about acquiring or disposing of an interest in an SMSF to their clients.

### Limited AFS licence regime

To facilitate moving into the AFS licensing regime, accountants can apply for an AFS licence to provide a limited range of financial services relevant to SMSFs. We refer to this form of licence as a 'limited' AFS licence: see regulations 7.8.12A and 7.8.14B.

A limited AFS licence only authorises the licensee to provide a limited range of financial services relevant to SMSFs – for example, advice about SMSFs, advice about a client's existing superannuation holdings (in certain circumstances) and 'class of product advice' – depending on the authorisations that are selected in the application and granted by ASIC.

'Class of product advice' means financial product advice about a class of products that does not include a recommendation about a specific product. For example, an accountant covered by a limited AFS licence could provide class of product advice about mining shares or shares in the ASX 100, as long as that advice did not include a recommendation about a particular mining share or a particular share in the ASX 100.

A limited AFS licensee can be authorised to provide 'class of product advice' about the following financial products:

- superannuation
- securities
- simple managed investment schemes
- general insurance products
- life risk insurance products
- bank deposit products.

We have provided more details on applying for a limited AFS licence and class of product advice on our [Limited financial services](#) webpage.

Accountants who wish to provide broader financial services than those authorised under a limited AFS licence will need to be covered by a full AFS licence with the relevant authorisations.

### Discussions about borrowing through an SMSF

An SMSF is permitted to borrow money in limited circumstances and subject to certain rules – for example, having limited recourse borrowing arrangements: see sections 67 and 67A of the *Superannuation Industry (Supervision) Act 1993* (SIS Act).

A limited recourse borrowing arrangement may be a margin lending facility (and therefore a financial product) if the credit is provided to an individual and is used to acquire a financial product: see section 761EA. If you are recommending that a client establish a margin lending facility within an SMSF, you will need to be covered by a full AFS licence with an appropriate authorisation.

If you are discussing options for borrowing for investment in residential property through an SMSF with your clients, you might need to be covered by an Australian credit licence. For example, if you suggest an individual SMSF trustee apply for a particular loan from a particular credit provider to invest in residential property, or assist them to do so, you will need to hold a credit licence (or be a representative of a credit licensee). Alternatively, you may refer clients to a credit licensee.

See Regulatory Guide 203 *Do I need a credit licence?* ([RG 203](#)) for more details on when a credit licence is required, including when your discussions with clients might amount to 'suggesting' they take out a loan.

## Exemptions for certain SMSF services

While the licensing exemption in regulation 7.1.29A for recognised accountants who gave financial product advice about acquiring or disposing of an interest in an SMSF has been repealed, a range of other exemptions still continue after 1 July 2016. Under these exemptions, you can provide some types of financial services without being covered by an AFS licence: see Table 1: [SMSF services and the AFS licensing regime](#) for a summary of these exemptions. It is important to understand which types of conduct fall within an exemption and which require a licence.

SMSF services provided by accountants usually fall into one of three categories:

- **'traditional' accountant services** – for example, preparation and lodgement of tax returns, which are not regulated as financial services
- **financial product advice relating to SMSFs** – this is a financial service that requires the provider to be covered by an AFS licence
- **exempt SMSF financial services** – an AFS licence is not required to provide these services, as they are either not a financial service or they are covered by a licensing exemption. However, in some cases, you might still be required to meet other requirements, such as providing your clients with warnings (see Table 1: [SMSF services and the AFS licensing regime](#) for an overview).

Generally, the exemptions will apply if the financial service happens to be an integral part of or incidental to another type of service typically provided by an accountant – that is, you would reasonably need to provide the exempt SMSF financial service in order to carry out your normal accounting practice.

The exemptions operate concurrently, so you may rely on different exemptions for different aspects of your practice: see Table 1: [SMSF services and the AFS licensing regime](#) for an overview.

However, it is important to be aware of the limits of any exemption you rely on. Even if you rely on an exemption to provide one type of SMSF service, if you also provide financial product advice recommending an SMSF or particular investments through the SMSF at the same time, this advice will trigger the requirement to be covered by an AFS licence. Operating under an exemption does not remove the requirement to be covered by a licence for other types of financial service.

## Exemptions that apply for SMSF services

Recommending that a person acquires or disposes of an interest in an SMSF is financial product advice and requires you to be covered by an AFS licence. It is also financial product advice if you recommend that a person should not dispose of an interest in an SMSF, or that they should remain in their non-SMSF superannuation fund and should not acquire an interest in an SMSF, because this is financial product advice about a person's existing interest in their superannuation fund.

However, there are other types of advice and services you may provide without an AFS licence. Table 1 provides an overview of the other types of SMSF services you may provide, and whether a licensing exemption applies.

**Table 1: SMSF services and the AFS licensing regime**

Type of SMSF service	What you may do without being covered by an AFS licence	Relevant legislation

Type of SMSF service	What you may do without being covered by an AFS licence	Relevant legislation
Establishing, operating, structuring or valuing an SMSF, including advice and assistance on administrative and operational issues, and the process of winding up or exiting an SMSF	<p>You <b>may</b> provide advice on establishing, operating, structuring or valuing an SMSF, as long as you give your client the appropriate warnings. This includes:</p> <ul style="list-style-type: none"> <li>• advice provided for the sole purpose of, and only to the extent reasonably necessary for, ensuring compliance with the superannuation legislation</li> <li>• advice on the process of winding up or exiting an SMSF.</li> </ul> <p>You <b>may not</b> recommend that your client acquires or disposes of an interest in an SMSF.</p> <p>For further information, see <a href="#">Establishing, operating, structuring or valuing an SMSF</a>.</p>	Regulation 7.1.29(5)
Asset allocation and investment strategy	<p>You <b>may</b> provide a recommendation or statement of opinion on how your client should distribute their available funds among different categories of investments.</p> <p>You <b>may not</b> advise your client to make particular investments through the SMSF.</p> <p>For further information, see <a href="#">Asset allocation and investment strategy</a>.</p>	Regulation 7.1.33A
Tax advice on SMSFs and other financial products	<p>You <b>may</b> provide tax advice on financial products, such as an interest in an SMSF and underlying investments held by the SMSF, as long as you do not receive a benefit as a result of your client acquiring a financial product (or a financial product that falls within the class of products) mentioned in the advice and you give your client the appropriate warnings.</p> <p>For further information, see <a href="#">Tax advice on SMSFs and other financial products</a>.</p>	Regulation 7.1.29(4)
Tax agent and BAS services	<p>If you are a registered tax agent or BAS agent, you <b>may</b> provide advice that is given in the ordinary course of the activities of such an agent and that is reasonably regarded as a necessary part of those activities.</p>	Section 766B(5)(c)
Referring clients to an AFS licensee or representative	<p>You <b>may</b> refer clients on to an AFS licensee or representative for financial product advice, as long as you make the appropriate disclosures.</p> <p>For further information, see <a href="#">Referring clients to an AFS licensee or representative</a>.</p>	Regulations 7.6.01(1)(e)–(ea)



## Establishing, operating, structuring or valuing an SMSF

You may provide advice on establishing, operating, structuring or valuing an SMSF without an AFS licence: regulation 7.1.29(5). This means that without being covered by a licence, you can:

- provide advice on:
  - the practical steps that need to be taken to establish or wind up an SMSF
  - how to add new trustees and members to an existing SMSF
  - the different ways an SMSF could be structured
  - how to process transfers or rollovers of funds
- assist clients to complete paperwork (e.g. to acquire securities through the SMSF, as long as you do not influence the decision to acquire those securities)
- help clients to add new members and trustees to a fund or to exit a fund
- arrange to wind up an SMSF on a client's behalf.

You may also provide other relevant factual information that your client should know about establishing an SMSF (e.g. that they must have the financial accounts and statements for the SMSF audited each year by an approved SMSF auditor).

You can only rely on this exemption if the advice is provided to a trustee, a director of a trustee, an employer sponsor or a person who controls the management of the SMSF. The advice must be given to the person in their capacity as a person who controls the assets owned by the trustee of the SMSF, and not in their capacity as a beneficiary (member) of the SMSF.

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:

- you are not licensed to provide financial product advice under the Corporations Act
- 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.

### Advice for ensuring compliance with the superannuation legislation

You may also provide advice that is for the sole purpose of, and only to the extent reasonably necessary for, ensuring compliance with superannuation legislation – that is, the SIS Act, the *Superannuation Guarantee (Administration) Act* 1992 and the Superannuation Industry (Supervision) Regulations 1994 (SIS Regulations): regulation 7.1.29(5)(c). This might include matters such as:

- modifying contribution levels due to changes in the superannuation guarantee levy
- complying with rules on investment restrictions.

Advice provided for the sole purpose of ensuring compliance with the superannuation legislation may stray into areas that would not normally be covered by the exemptions applying to SMSF services – such as advice about acquiring or disposing of an interest in an SMSF, the investment strategy of the fund, and financial products acquired through the fund. For example, you may provide advice on how to comply with the requirement for an SMSF trustee to act in the best interests of beneficiaries (section 52(2)(c) of the SIS Act) – but if you then go on to recommend the purchase of a particular asset through the SMSF because this would generate a good investment return for beneficiaries, this would not

satisfy the requirement that the advice be for the sole purpose of, and only to the extent reasonably necessary to, ensure compliance with the legislation.

If you provide advice about compliance with section 52(2)(f) of the SIS Act (which places a duty on trustees to act fairly in dealing with beneficiaries within a class) or advice about compliance with regulation 4.09 of the SIS Regulations (which imposes certain standards for trustees in formulating an investment strategy for SMSFs), you must ensure that the advice:

- is not about the acquisition or disposal by a superannuation fund, including an SMSF, of specific financial products or classes of financial product
- does not include a recommendation that a person acquire or dispose of a superannuation product
- does not include a recommendation about a person's existing holding in a superannuation product, for the purpose of modifying an investment strategy or a contribution level.

If your client is a retail client, under regulation 7.1.29(5)(d) you must also provide a written statement warning them that:

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

## Asset allocation and investment strategy

Without an AFS licence, you may not advise your client about their retirement investment strategy, including whether your client should increase or decrease their contributions into their SMSF, what their overall investment strategy should be for their SMSF (e.g. what the target investment return should be and how to achieve this), or what contributions they should make to their SMSF relative to any other superannuation fund of which they are a member.

However, you may provide a recommendation or statement of opinion to your clients on broad asset allocation within their SMSF (regulation 7.1.33A) – that is, what proportion of funds should be allocated across one or more of the following categories:

- shares
- debentures
- debentures, stocks or bonds issued, or proposed to be issued, by a government
- deposit products
- managed investment products
- investment life insurance products
- superannuation products
- other types of assets.

Providing a recommendation or statement of opinion to clients on asset allocation within their SMSF is different from providing class of product advice, which requires a licence: see our [Limited financial services](#) webpage. The exemption for providing a recommendation or statement of opinion on asset allocation does not apply to making a recommendation on or giving a statement of opinion about specific financial products or classes of financial product: see regulation 7.1.33A.

This means that you may provide a recommendation or statement of opinion on asset allocation among the broad categories listed above, but not among classes of financial product or specific products within those categories. For example, you may recommend that your client hold a certain proportion of their SMSF funds in one of the eligible product types (e.g. shares), but to make any of the recommendations set out in Table 2 you will need the appropriate licence.

**Table 2: Licences required for specific types of recommendation**

Recommendation that your client hold	Type of licence(s) required
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Recommendation that your client hold	Type of licence(s) required
A specific product (e.g. shares issued by a particular biomedical company)	AFS licence
A particular class of shares (e.g. shares issued by companies in the biomedical sector, generally)	AFS licence or limited AFS licence
A certain proportion of international shares	AFS licence or limited AFS licence
Shares that may have franked dividends	AFS licence or limited AFS licence

## Tax advice on SMSFs and other financial products

Providing tax advice is a core part of an accountant's practice. However, in the course of providing tax advice relating to SMSFs, you might also provide financial product advice. For example, when you advise on the taxation implications of acquiring, holding or disposing of an interest in an SMSF, or a financial product held through the SMSF (e.g. shares), this could be financial product advice because it might influence a decision about that financial product.

Under regulation 7.1.29(4), you may provide advice on the taxation implications of financial products without being covered by an AFS licence. This exemption allows you to provide financial product advice on your client's interest in an SMSF or a financial product they hold through their SMSF, as long as this advice is merely incidental to the tax advice you are providing and not a separate recommendation on the merits of the financial product itself.

However, you can only rely on this exemption if:

- you do not receive a benefit as a result of your client acquiring a financial product mentioned in your advice (other than the remuneration you receive directly from the client or someone associated with the client, such as another SMSF member)
- your client is a retail client and you also provide a statement warning them that:
  - you are not licensed to provide financial product advice under the Corporations Act
  - taxation is only one of the matters that must be considered when making a decision on a financial product
  - they should consider taking advice from an AFS licensee before making a decision on a financial product.

All AFS licensees and their representatives who provide tax advice in the context of financial advice (tax (financial) advisers) for a fee or other reward must be registered with the Tax Practitioners Board (TPB). See the [TPB website](#) for further information about tax (financial) advisers and the requirement to be registered.

## Tax agent and BAS services

If you are registered with the TPB as a tax agent or BAS agent, you do not need a licence or to be a representative of a licensee to provide advice that is given in the ordinary course of your activities as a tax or BAS agent and which is reasonably regarded as a necessary part of those activities: see section 766B(5)(c) of the Corporations Act.

To understand what services are within the ordinary course of the activities of a tax agent or BAS agent, see the information on [tax agent services](#) and [BAS services](#) on the TPB website, including the examples provided. For the purposes of relying on this exemption, a tax agent service or BAS service will generally:

- involve advising on liabilities, obligations or entitlements a client may have under a taxation law (for a tax agent service) or BAS provision (for a BAS service)

- be provided in circumstances where it is reasonable to expect that the client will rely on that advice to satisfy liabilities or obligations or to claim entitlements under a taxation law (for a tax agent service) or BAS provision (for a BAS service).

The advice that you give in your capacity as a tax agent or BAS agent will be considered a necessary part of your activities as a tax agent or BAS agent if you cannot provide a competent tax agent or BAS service without giving such advice. For example, a tax agent may provide advice on the tax implications of acquiring a financial product (such as an SMSF) but cannot advise on whether to actually acquire the financial product because advice on whether to actually acquire the financial product is not necessary to provide a competent tax agent service.

If you are a registered tax agent, the exemption in section 766B(5)(c) will cover most of the same types of advice as the exemption in regulation 7.1.29(4) of the Corporations Regulations. However, the definition of 'taxation law' which applies to section 766B(5)(c) is slightly narrower than the tax laws that you can advise on under regulation 7.1.29(4). For example, advice about foreign tax laws and state and territory tax laws such as stamp duty, payroll tax and land tax is not covered under section 766B(5)(c).

The scenarios below are examples of how this exemption may apply in practice.

### **Contributions into an SMSF**

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:

- the unused concessional contributions cap carry-forward
- 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.

### **Accumulation versus pension phase**

A registered tax agent may also advise a client on the tax implications of moving their superannuation benefits from accumulation to pension phase but may not make a recommendation to a client about when to do so. For instance, a tax agent may advise the client of the tax implications of retiring at different ages (such as a client being able to withdraw superannuation benefits tax-free after a certain age) but should make it clear to the client that tax is not the only consideration involved in making retirement decisions.

### **Transfer of assets**

A registered tax agent may advise a client on the need to meet the requirements of a tax law (such as the transfer balance cap) and of the tax consequences of a particular transfer of assets. However, they cannot advise the client

about whether or not to transfer the assets or what assets to actually transfer. This is because tax outcomes are only one factor to consider when making such decisions.

## Referring clients to an AFS licensee or representative

At various points across the range of SMSF services you provide, clients might seek advice from you that is financial product advice and does not fall within any of the exemptions described in this information sheet – for example, whether they should establish an SMSF, whether they should transfer their balance from another fund, or what investments they should make through the SMSF.

While you may not provide such advice without being covered by an AFS licence, you may refer your client on to an AFS licensee or representative. Merely making a referral to an AFS licensee or representative will often not constitute financial product advice. It will only constitute financial product advice if you phrase your referral in a way which explicitly or implicitly contains a recommendation or statement of opinion about a financial product or class of financial product.

When making a referral, you may ensure the referral does not constitute financial product advice by choosing to rely on the exemption in regulations 7.6.01(1)(e)–(ea). If you choose to rely on this exemption, the referral must consist only of:

- letting your client know that the AFS licensee or representative can provide the type of financial service or services the client requires
- giving the client contact details for the AFS licensee or representative.

In addition, in order to rely on the exemption, you must disclose any benefits or commissions that you or your associates might receive as a result of the referral or any subsequent services provided to the client, unless the AFS licensee or representative to whom you refer your client is related to you (e.g. it is a related company or you are its representative).

Sometimes the client may also want you to facilitate the financial service by engaging with the AFS licensee or representative to whom you refer them. This is permitted provided you do not give any explicit or implicit financial product advice when doing so. For example, you must not endorse or make any recommendations regarding the financial product advice provided by the AFS licensee or representative.

## How the exemptions will apply if you are covered by an AFS licence

### Establishing, operating, structuring or valuing an SMSF

If you are covered by an AFS licence, including a limited AFS licence, you cannot rely on the exemption for the provision of advice on the establishment, operation, structure or valuation of a superannuation fund (regulation 7.1.29(5)) to a retail client. This is because an AFS licensee, or its representatives, cannot comply with the requirement in regulation 7.1.29(5)(d)(i) to provide a written statement that the person providing the advice is not licensed to provide financial product advice under the Corporations Act.

Therefore, any financial product advice that you provide to a trustee of a superannuation fund about the establishment, operation, structure or valuation of the fund is not an exempt service and will generally be covered by your licence. This includes advice given for the sole purpose of complying with superannuation legislation.

### Asset allocation

If you are covered by an AFS licence, including a limited AFS licence, with an authorisation to provide financial product advice, you can rely on the asset allocation exemption in regulation 7.1.33A. This is because the provision of relevant asset allocation advice is not the provision of a financial service for which a licence is required.

### Tax advice on SMSFs and other financial products

If you are covered by an AFS licence, including a limited AFS licence, you can rely on the exemption in regulation 7.1.29(4) to provide tax advice on financial products that are not covered by an authorisation in your licence. [ASIC Corporations \(Recognised Accountants: Exempt Services\) Instrument 2016/1151](#) (as amended by [ASIC Corporations](#)

(Amendment Instrument 2017/464) modifies regulation 7.1.29(4)(c)(ii) as it applies to AFS licensees and their authorised representatives, so that you do not have to provide a written statement that you are not licensed to provide financial advice under the Corporations Act. Instead, you must provide your client with a written statement that:

- you do not have the authorisation to provide this advice as an AFS licensee (whether full or limited) or as the authorised representative of an AFS licensee
- taxation is only one of the matters that must be considered when making a decision on a financial product
- they should consider taking advice from an AFS licensee with the appropriate authorisation before making a decision on the financial product.

If you hold an AFS licence, including a limited AFS licence, the exemption to provide tax advice on financial products does not extend to advice that is covered by your licence. A representative of an AFS licensee similarly will not be able to rely on this exemption if they are providing the advice on behalf of the licensee. However, you can rely on this exemption to give tax advice on financial products that are not covered by your licence.

### Tax agent and BAS services

If you are covered by an AFS licence and are also a registered tax agent or BAS agent, you can rely on section 766B(5) (c) of the Corporations Act to give advice that is within the ordinary course of your activities as a tax agent or BAS agent and which is reasonably regarded as a necessary part of those activities.

### Referring clients to an AFS licensee or representative

AFS licensees, including limited AFS licensees and their representatives, may refer a client to another AFS licensee or to an authorised representative for advice that they themselves are not authorised to provide.

## Where can I get more information?

- For more information on your obligations, see the following regulatory guides and information sheets:
  - RG 36 *Licensing: Financial product advice and dealing*
  - RG 104 *Licensing: Meeting the general obligations*
  - RG 105 *Licensing: Organisational competence*
  - RG 175 *Licensing: Financial product advisers—Conduct and disclosure*
  - RG 203 *Do I need a credit licence?*
  - RG 244 *Giving information, general advice and scaled advice*
  - RG 245 *Fee disclosure statements*
  - RG 246 *Conflicted and other banned remuneration*
  - INFO 205 *Advice on self-managed superannuation funds: Disclosure of risks*
  - INFO 206 *Advice on self-managed superannuation funds: Disclosure of costs.*
- For more details on applying for a limited AFS licence, see our Limited financial services webpage.
- Contact ASIC at [www.asic.gov.au/question](http://www.asic.gov.au/question).
- Contact your professional or industry association (e.g. the SMSF Association, CPA Australia, Chartered Accountants Australia and New Zealand, or Institute of Public Accountants).
- Go to our AFS licensees webpage.

## Important notice

Please note that this information sheet is a summary giving you basic information about a particular topic. It does not cover the whole of the relevant law regarding that topic, and it is not a substitute for professional advice.

You should also note that because this information sheet avoids legal language wherever possible, it might include some generalisations about the application of the law. Some provisions of the law referred to have exceptions or important qualifications. In most cases, your particular circumstances must be taken into account when determining how the law applies to you.

This is **Information Sheet 216 (INFO 216)**, updated on 26 April 2018. Information sheets provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

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