

## **SAFE, AND SOUND**

# **A guide for unlicensed accountants who want to keep servicing their SMSF clients without breaking the law**

### **Guide 1: What an unlicensed accountant can do for their SMSF client and when to refer to an adviser or a digital advice platform**

**The repeal of the accountants exemption doesn't put an end to accountants' ability to provide a high-value service to their SMSF clients.**

**Armed with an understanding of the rules and some carefully chosen referral partners including innovative SMSF advice technology, accountants can continue to service SMSF clients in this 577,000-strong market - without additional cost and without jeopardising the client relationship.**

**It's worth reading this brief guide so you can make informed decisions about the future of your SMSF practice.**

# Guide 1 of a complementary set of 2

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## 1. Introduction

In this first guide for unlicensed accountants committed to the SMSF sector, we assume the accountant in question is a:

- “recognised accountant” (a full member of CPA Australia, Chartered Accountants ANZ or the Institute of Public Accountants), and a
- registered tax practitioner,

but is not:

- a full or limited Australian Financial Services (AFS) licensee, nor an Authorised Representative (AR) of a full AFS licensee.

Although we use the term “unlicensed accountant” for such people, please note that the word “unlicensed” pertains only to the AFS licensing regime, and not to any of the numerous licenses, qualifications, memberships etc relevant to the accounting profession in Australia.

Unlicensed accountants may provide some financial services in relation to SMSFs without needing to hold an AFS license. They can also refer clients to licensed advisers, including digital advisers, when financial product advice is required.

In this first guide, we cover the types of advice an unlicensed accountant can still provide to SMSF clients after 1 July 2016, mainly through use of a range of other exemptions, such as the ability to provide tax advice.

We also discuss the limit to these exemptions; the point at which accountants should refer advice-seeking SMSF clients to an AFS holder.

Our second guide canvasses the various referral options, including the innovative online advice service developed by new special-purpose SMSF digital advisers.

Quick to recognise the “pain points” for accountants and their SMSF clients, these non-traditional advisers offer a new way of managing this regulatory change with the least possible disruption.

If you have any questions about this guide or A.S.A.P., please contact us - 03 6240 1575 or [info@asap-advice.com.au](mailto:info@asap-advice.com.au)

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Dear Jim

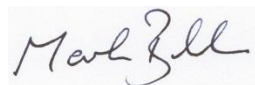
I confirm that, as requested by A.S.A.P., we have reviewed A.S.A.P.'s two referral guides for unlicensed accountants version 1.0, dated February 2017.

In the course of our review we considered the contents of the guides against the obligations that would arise for A.S.A.P. and an accountant without an Australian financial services licence authorisation (who is a registered tax practitioner) using A.S.A.P. in the manner set out in Guide 2. In particular, we have considered:

- the repeal of what was known as “the accountants exemption” relating to advice to establish a self managed superannuation fund; and
- the scope of the AFS licensing regime in relation to financial product advice and dealing as it relates to:
  - opinions and recommendations relating to legal compliance;
  - referrals;
  - superannuation rollovers; and
  - implementation by accountants of financial product advice a client has received from A.S.A.P.

Notwithstanding this, any unlicensed accountant working with the referral guides should not rely on the fact that we have reviewed the guides and should obtain their own, independent legal advice.

Yours sincerely



Mark Bland  
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## 2. What support can I keep giving SMSF clients if I don't have an AFS license?

### What support can I keep giving SMSF clients if I don't have an AFS license?

An SMSF is legally classified as a “financial product”, with much of the advice previously provided under the repealed accountants exemption now requiring an AFS license (AFSL).

However, there still exist several exemptions<sup>1</sup> from licensing that accountants can rely on, as discussed below.

Although limited, they help unlicensed accountants explain to their client their main SMSF transaction options and how they work from a tax and compliance point of view.

This information helps the client to then direct what scope of “financial product” advice they require and, for confident SMSF clients, can dramatically reduce the cost of obtaining the required advice.

#### Exemption 1: Factual information

Unlicensed accountants can communicate factual information to clients. Factual information is information that is objectively ascertainable. Ideally this should be followed up with references to external resources which the client can read. An example of a ‘factual only’ conversation about a transition-to-retirement strategy can be read in ASIC’s Regulatory Guide 244 (page 97). More generally, see ASIC’s Regulatory Guide 36, paragraph 23.

#### Exemption 2: Taxation advice

Unlicensed accountants can continue to provide taxation-only advice such as explaining how relevant taxes will work under different scenarios. This includes explaining the tax implications of certain financial products.

Merely setting out options and discussing the tax benefits of each option will not necessarily involve a recommendation or opinion. An unlicensed accountant can answer the client’s direct questions about how the tax works for different decisions, but must take care not to endorse any decision the client makes, nor suggest specific scenarios. You should be careful to ensure that a person could not reasonably regard you to be giving an opinion or recommendation with the intention to influence them in a financial product related decision.

The law requires that a specific disclaimer must be issued to the effect that the advice takes into account taxation consequences only and not the totality of financial implications for the client, and therefore does not constitute financial product advice for which an AFSL is required. See Corporations Act regulation 7.1.29(4) for more information. The accountant must not receive a benefit such as a fee or commission (other than from the client) as a result of the client acquiring a financial product mentioned in the tax advice.

Example: an SMSF trustee asks her unlicensed accountant whether it’s wise to directly own shares in her SMSF. The accountant can discuss the tax rules and present the

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<sup>1</sup> Note that legally, exemptions are things that are caught by a provision of law and then carved out from the application of that law. Factual information is not strictly an ‘exemption’ in this sense but we have described as an exemption in the interests of simplicity.

outcomes they produce for real-world or hypothetical examples, but should caveat that this advice doesn't take into consideration any other financial implications, and must issue a disclaimer to this effect. If the trustee then asks for advice on how best to fund the purchase by liquidating managed funds held in her SMSF, the accountant can only provide advice on the taxation consequences of certain scenarios. Again, a disclaimer must be issued.

See Corporations Act s766B(5) and regulations 7.1.29, for more information.

### **Exemption 3: Compliance advice**

Unlicensed accountants can explain the superannuation rules, and advise on strategies to comply with those rules, providing they don't go beyond superannuation law consequences only. Accountants can alert their client to potential legislative breaches and their resolution. However in doing so they cannot give advice about which financial products the client may acquire, hold or dispose of.

See Corporations Act regulations 7.1.29 for more information.

### **Exemption 4: Superannuation advice:**

Because SMSFs are highly regulated tax-efficient structures, the superannuation exemption will often overlap to an extent with the tax advice and compliance exemptions discussed above.

For example, the tax implications of super contributions could lawfully be provided by an unlicensed accountant under both exemptions.

Unlicensed accountants can discuss the factual characteristics of different asset classes (e.g. volatility of shares v cash).

Unlicensed accounts can also advise on the allocation of funds available for investment into one or more of certain specific asset classes.<sup>2</sup>

However, the exemption stops short of permitted unlicensed accountants to advise on optimal investment strategies, nor are they permitted to advise on the acquisition or disposal of a pension within an SMSF as a pension account is a financial interest.

See Corporations Act regulations 7.1.29(3)(f), 7.1.29(5) and 7.1.33A for more information.

### **Exemption 5: Insurance advice:**

Unlicensed accountants can continue to give high level advice around identifying and managing risks, including identifying the need for generic 'forms of insurance'. But they cannot recommend insurance amounts or particular products.

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<sup>2</sup> Giving advice about a client's allocation of funds across the following specific asset class categories is an exempt service: shares, debentures, government securities, deposit products, managed investment products, investment life insurance products and superannuation products. No recommendation or statement of opinion can be made about specific financial products or other classes of financial products (e.g. 'mining shares' or 'international shares')

Nor can they provide assistance with completing application forms for insurance policies.

They also cannot apply for or cancel insurance on the client's behalf. For more information, see Corporations Act regulation 7.1.29(3).

### **Nudge, nudge, wink, wink...what about "execution only"?**

There has been media speculation that some accountants are exploiting the "execution-only" framework to push untested boundaries.

That is, implying that some accountants are providing their clients with verbal, informal advice but asking the client to sign hefty disclaimers stating they independently decided to execute the relevant transaction / strategy without seeking third-party financial advice, and only asked for an execution only service from their accountant.

Given the strong likelihood that clients would disavow disclaimers if anything goes wrong or if the regulator ever comes knocking, **we recommend that unlicensed accountants only enter into execution-only arrangements, if they're accompanied by a Statement of Advice from a licensee.**

Just endorsing a transaction, or telling a client 'here is what I would do' may amount to financial produce advice.

ASIC are clearly alert to the possible adoption of execution-only 'work-around' and other "avoidance" strategies, and has warned that it will prosecute those in breach of licensing laws.

**If the client pushes for a recommendation; "What would you do? What do others do? Is XYZ the right decision?" it's a clear signal that they need to consult a licensed accountant/adviser.**

You are unlikely to be able to answer these questions without issuing a compliant, written Statement of Advice/Record of Advice.

While giving factual information, accountants shouldn't present the information in a manner that may be regarded as being intended to influence the client's decision about a financial product or class of financial product.

Hence it would be safest to present the consequences of more than one relevant course of action, and/or to present more than one example, because discussion of only one scenario may be perceived as implied endorsement of that scenario. When doing so it would be preferable to focus on 'maximum', 'minimum', or 'cashflow neutral' scenarios.

Digital and technical innovation means that it's simply not worth the risk of breaking the law. The emergence of inexpensive, specialist licensed advisers has changed the cost:benefit equation for confident SMSF trustees and their unlicensed accountants.

### **But wait, there's more....**

Certain "execution-only" transactions can also be caught under the complex "anti-arranging" regulations. The concept of "arranging" refers to negotiating or bringing into effect a "dealing" in a financial product, the definition of which includes an SMSF.

If a unlicensed person's involvement in a transaction is of sufficient importance that without them it would not have taken place (such as if the client communicates with that person as a key contact to acquire an investment or negotiate terms), it's likely that they will be found to have "arranged" the transaction and if unlicensed will be in breach.

For more information see regulation 7.1.29, ASIC RG36, regulation 7.1.29(3), 7.1.29(5) and section 766C(1) of the Corporations Act.

### 3. Key SMSF transactions: what unlicensed accountants can and can't do

Transaction/admin	CAN	refs	CAN'T
Superannuation generally	<p>Factual info on the different options available (e.g. SMSF v industry v retail).</p> <p>Can:</p> <ul style="list-style-type: none"> <li>- explain the tax implications of contributions</li> <li>- provide compliance advice on super &amp; SMSFs</li> <li>- explain SG obligations to employers</li> <li>- provide broad asset allocation advice</li> </ul> <p>Can set up SMSF using a trust deed prepared by a lawyer on the instruction from a client (cannot give advice during this process).</p>	<p>Reg 7.1.29(3)(f)</p> <p>7.1.29(4)</p> <p>7.1.29(5)</p>	<p>Recommend the establishment or wind up of an SMSF.</p> <p>Recommend particular financial products or classes of financial products.</p> <p>Present factual information in a manner that may reasonably be regarded as intending to influence the client's decision about a financial product. Or receive a commission or benefit if a transaction proceeds.</p>
Establish SMSF	<p>Give facts. Explain rules.</p> <p>Explain the investment requirements/restrictions of SIS Act (e.g. in-house assets).</p> <p>Explain the implications of using a corporate or individual trustee.</p>	<p>RG 36.23</p> <p>Reg 7.1.29</p>	<p>Recommend or endorse an SMSF.</p> <p>Recommend or endorse a rollover.</p> <p>Make a representation or statement of opinion which is intended to influence or endorse the client's decision.</p>
Rollover super to SMSF	<p>Give facts. Explain rules &amp; characteristics.</p>	<p>Reg 7.1.29(5)(a)</p> <p>Reg 7.1.29(3)(g)</p>	<p>Recommend or endorse a rollover.</p> <p>Advise on performance or recommend one structure over another.</p>
Insurance lost by changing fund	<p>Warn the client that insurance will be lost on exiting the fund (provided that only factual information is given).</p>	<p>RG 36.23</p>	<p>Make a representation or statements of opinion which is intended to influence the client's decision.</p> <p>Apply for or cancel insurance on behalf of the client.</p>
Concessional and non-concessional contributions	<p>Provide factual information such as relevant contribution caps.</p> <p>Explain the different tax treatment of salary vs super contributions (when giving tax advice).</p>	<p>Reg 7.1.29(5)(a)</p>	<p>Recommend that the client make or cease superannuation contributions or change their contribution levels.</p>



	Explain superannuation preservation rules.		
Commence TTR pension/ account based pension	Provide information about eligibility to move into pension phase, advise on tax implications and provide factual information on the operation of a super/pension fund.	Regs 7.1.29(4) and (5)	Recommend a particular superannuation product, or recommend the acquisition, variation or disposal of an interest in super that goes beyond tax and operational aspects of the product.
Make a lump sum withdrawal	Accountant can provide factual info detailing the tax of lump sums and pensions, without recommending one but seek instructions from client about which one they desire.	Reg 7.1.29(5)(a) Reg 7.1.29(4)	Recommend a client take a pension or other income stream over a lump sum (or vice versa)
Investment strategy (asset mix)	Give broad asset allocation advice <sup>3</sup> without recommending particular financial products or classes of financial products.	Reg 7.1.29(3)(g) Reg 7.1.33A	Make a recommendations or statement of opinion that relates to specific financial product or class of financial products (e.g. Healthscope Limited or health care shares).
Investment selection (new securities & sales of)	Explain the requirements/ restrictions of the SIS Act, and broad asset allocation issues. Provide tax planning advice for a fee including CGT advice on switching.	Reg 7.1.29(5) & (4) s.766B(5)(c)	Advise on securities or other financial product or play a key role in arranging for the client to deal in financial products.  Note: Avoid receiving benefits other than the fee for service.
Referrals to an adviser	Provide details of a licensed adviser where the client can obtain advice. Assist the client in setting the scope of advice Pass on advice from a license holder, providing they do not endorse the material and it is clear the accountant is not responsible for the advice.	RG 36.34(f) Reg 7.6.01 Reg 7.1.31	Assisting the client in setting the scope of advice in a fashion that could reasonably be regarded as intending to influence the client in making a decision in relation to a financial product or class of financial products.

<sup>3</sup> Giving advice about a client's allocation of funds across the following **specific** asset class categories is an exempt service: shares, debentures, government securities, deposit products, managed investment products, investment life insurance products and superannuation products. No recommendation or statement of opinion can be made about specific financial products or other classes of financial products (e.g. 'mining shares')

**Notes about the rules that apply to various general areas of an accountant's work:**

Factual information	Communicate only factual information that is objectively ascertainable and cannot be questioned	ASIC RG36.23	Present factual information in a manner that may reasonably be regarded as intending to influence the client's decision about a financial product or class of financial product. Or receive a commission or benefit.
Taxation advice	Can provide tax advice to clients, including the tax implications of certain financial products (disclaimer is required if tax advice also constitutes financial product advice).	Corps Act s766B(5) Reg 7.1.29(4)	Must not receive a commission or benefit for any taxation advice which also constitutes financial product advice.
Broad asset allocation advice	Strangely, anyone can give advice about a client's allocation of funds between the following <b>specific</b> asset class categories: shares, debentures, government securities, deposit products, managed investment products, investment life insurance products and superannuation products.	SS251L of ITAA 36 Reg 7.1.33A	No recommendation or statement of opinion can be made about specific financial products or other classes of financial products (e.g. 'mining shares')
Arranging (negotiating or bringing into effect a dealing in a financial product)	Pass on money or forms (unless you are also being paid an additional amount if the client acquires a the product – receipt of benefits suggests a more active involvement in the transaction).	RG 203.116	Arrange to 'deal' – I.e. you arrange for a person to acquire, or an issuer to issue or dispose of a financial product (other than a SMSF) in a manner where your involvement is of sufficient importance that without you the transaction would not have taken place. For example, the client communicates with you as a key person to acquire an investment or you negotiate product terms for the client. Another example would be responding to queries from a client's existing fund about a rollover to a SMSF on the client's behalf (other than providing merely factual information). See FAQ 9 in Guide 2.
<b>Traditional accounting activities:</b>	<i>further 'certain activities' are exempt from licensing. See next 4 rows:</i>	R7.1.29	
Compliance advice	Compliance advice e.g. about corps act, family law act, SIS Act, SG (that is not legal advice)		Advice about financial products the client may acquire or dispose of.
Financing the acquisition of assets	Advice to a business about how to acquire business assets	s765A, Reg 7.1.06, 7.1.29	

Insurance	Advice on managing risks, including need for generic 'forms of insurance'.	Reg 7.1.29(3)(b)	Advise on specific insurance products, or amounts of cover. Advice on the insurance risks of changing super fund.
Business advice	Most activities relating to setting up, administering and selling a business, including advice on how to manage business risks	Reg 7.1.29(3)(c)	If the business planning includes financial product advice, it must be confined to advice on: securities of the business itself or a trust that carries on the business given to a person who is likely to become an interested party in the business and does not relate to other financial products.

## 4. Apart from providing information and exempt advice, what else can I do for clients if I don't have an AFSL?:

### Referral to licensee

Unlicensed accountants can refer their clients to a licensed adviser/planner. They can also assist in helping the client to decide the scope of that advice and can provide a service of passing on advice from an AFS license holder, as long as it does not control the content of the documented advice or endorse the advice.

Refer to our Guide 2 for more information.

### Execution after receipt of advice

Once the client has received a SoA from the planner (e.g. from A.S.A.P.), the accountant can to some degree assist the client to implement that advice under instruction from the client to the extent that implementation involves the establishment of an SMSF and the issuing of different types of interests in an SMSF (accumulation or pension.) For example:

- establish an SMSF and help the client create different types of interests in an SMSF (accumulation or pension);
- completing forms on the instruction of the client for a rollover from their existing fund; and
- supply a trust deed prepared by lawyers

Refer to our Guide 2 for more information.

### Compliance advice

Unlicensed accountants can advise their client on compliance aspects of the establishment, operation, structuring or valuation of a superannuation fund as long as it does not go so far as to recommend the acquiring or disposing of specific financial products or classes of financial products, rollovers or modification of an investment strategy (unless it is general asset allocation advice as discussed above). For example, an accountant can discuss the alternatives of a corporate or individual trustee of a SMSF.

### Issuance of disclaimers

ASIC encourages the use of disclaimers to help avoid misleading clients, and some of the above regulations require a specific written statement to be provided to the client.

The accounting bodies set out sample disclaimers for in their joint guide '[Financial Advice and Regulations – Guidance for the accounting profession](#)'. See Appendix 2 of this Guide for another example.

We hope this Guide helps to explain what unlicensed accountants can and can't say to SMSF clients without breaking the law.

You should also ensure you are familiar with the support materials provided by the accounting professional bodies. For anyone wanting to undergo professional training in this area. A.S.A.P. has agreed a special rate of \$299 for the online training module provided by specialists 'Licencing for Accountants' ([www.l4a.com.au](http://www.l4a.com.au)) called "The Licensing Line". You can access this CPD accredited module (~ 1.5 hours) once signed up as an A.S.A.P. user although keep an eye out for similar training from your accounting body.

## Appendix 1: Example client conversation

This example conversation applies for accountants who are registered tax practitioners but do not have an AFSL<sup>4</sup>.

.... During the client-accountant meeting / phone call ....

Client: What can I do to use my SMSF to improve my tax position this year?

Accountant: Well, since 1 July 2016, the rules have been tightened around what I, as your accountant, can recommend you do, as we don't hold a financial advice licence. I can still give you:

- Tax advice;
- Superannuation compliance advice; and
- Factual information about your options

but this is limited to helping you understand your options and how they work, rather than recommending specific transactions that are in your best interests.

The way this works in practice is I can set out your main options, and discuss the objective benefits and disadvantages of each option including how the tax works.

As an example, we can talk through how things would work if you contributed the maximum / minimum to super or drew the maximum or minimum pension income. I can also explain how the superannuation legislation applies such as preservation rules, and I can outline the facts about commonly used strategies such as transition-to-retirement pensions<sup>5</sup>.

For me to go further than tax and compliance advice would require me to obtain a financial services licence, as well as carry out a formal advice process to document my recommendations and provide an audit trail to explain them. Obviously this would cost clients a lot more so instead, for our confident clients, we now refer you to a digital advice service called A.S.A.P. for financial product advice on key SMSF product transactions.

If the information I provide you, along with your own research, is enough for you to propose what transactions you wish to proceed with, then A.S.A.P. has a simple process to provide licensed advice on whether your transaction choices are appropriate given your objectives – looking at it from a financial planning point of view.

Does that sound ok?

Client: Do I have to take advice from ASAP or can I proceed without it?

Accountant: We recommend you take advice as tax is only one matter to take into account when making decisions about a financial product. A.S.A.P.'s process supplements the service I provide as it takes into account your personal situation, goals and objectives and validates that the transactions are appropriate for you - which cannot be done without a license.

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<sup>4</sup> ASIC [Info Note 216](#) states that accountants who do have an AFS license are not eligible to give tax and compliance advice as an exempt service under regulation 7.1.29.

<sup>5</sup> Refer to ASIC Regulatory Guide 244, Example 9 for a sample conversation that stays within the definition of 'Factual Information'.

Because the rules have tightened in this area, our firm has introduced an internal policy where we can only assist clients to implement a transaction if there is a Statement of Advice on file. The risk is too high if you were to make decisions based on our tax advice alone. From \$250+GST the Statement of Advice protects you and us and the cost is inexpensive compared to being referred to a traditional planner.

Because A.S.A.P. are a digital service, it's quick and painless to get the advice piece covered. We can log in online now and start the process...

## Appendix 2: Example disclaimers

**Note: ideally these example disclaimers would be provided in relation to each client assignment.**

Please note that whilst I can provide you with factual information, tax advice and compliance advice, being exempt services under the Corporations Act Regulations, I am not licensed to provide you with financial product advice. You should therefore consider obtaining independent advice that considers your personal situation and objectives before making financial decisions. In particular:

### **Factual information**

I am able to provide you with factual information as information only which, as such, does not constitute advice and should not be relied upon as financial product advice. This information is purely factual and doesn't take into account your personal objectives, situation or needs. You should rely on external sources to validate this information and must determine whether the information is appropriate for your particular circumstances before making a decision. For financial product advice that takes account of your objectives, financial situation or needs, you should seek financial advice from an Australian Financial Services license holder before making a decision.

### **Tax Advice (written disclaimer as per reg 7.1.29(4))**

The tax advice I provide you with is an exempt service under the Corporations Act. I am not licensed to provide you with financial product advice and tax is only one of the matters that must be considered when making a decision on a financial product so you should consider taking advice from the holder of an Australian Financial Services Licensee before making a decision on a financial product.

### **Superannuation compliance**

As well as providing factual information, explaining superannuation rules and the tax treatment of your options, I am able to make recommendations about maintaining fund compliance. I am, however, not able to provide recommendations about your decisions to start, cancel or change specific financial products.

### **Referrals**

I will not provide you with financial product advice that requires a license however I can provide you with details of an Australian Financial Services License holder who is able to provide you with financial product advice and other services that may be appropriate to your needs. I am not a representative of any AFSL holder I refer you to. Should I receive any benefits in respect of a referral then I will disclose this to you.