

## 5. Financial Services Regime rules

When setting up a super plan for clients, advisers must be aware of the Financial Services Regime (FSR) rules that apply and the restrictions on providing certain advice without an Australian Financial Services Licence (AFSL). The following is a basic guide to what advisers can and cannot do.

Note that this is a general guide only and advisers should seek guidance from their professional bodies. Some of the items below rely on specific exemptions in the *Corporations Regulations 2001* (Cth) that require the adviser to provide certain written disclaimers to their client and provided the adviser does not receive a benefit from anyone other than their client (e.g., commission) as a result of their client acquiring a financial product: refer to Reg 7.1.29(4) and (5) and 7.1.29A (Accountants FSR Exemption) for more detail.

### PROPOSED CHANGE

The Cooper Review has recommended that the accountants FSR Exemption referred to above be removed and that every adviser who provides advice in relation to the establishment of an SMSF obtain an AFSL. A number of professional accounting bodies (but not the NTAA) have supported this recommendation.

Description	What practitioners <u>can</u> do	What practitioners <u>cannot</u> do
<b>1. Establishment of an SMSF</b>		
Recommend a client establish an SMSF	✓ If a 'recognised accountant'	
Recommend that an SMSF be set up in preference to alternative investments		x
Recommend that a person become a member of an SMSF		x
Organise the paperwork required for the establishment or variation of an SMSF	✓	
Recommend joining an SMSF if the recommendation is an integral part of advice about the establishment, operation, structuring or valuation of the fund	✓ If a 'recognised accountant'	
Provide information on features of different products (e.g., the difference between an SMSF and a general public offer fund)	✓	
Obtain a Product Disclosure Statement ('PDS')	✓	

## Setting Up a Tax Effective Super Plan

Description	What practitioners <u>can</u> do	What practitioners <u>cannot</u> do
<b>2. Administration of the fund</b>		
Arrange the paperwork in relation to operational-administrative matters (e.g., roll-overs and share transfers)	✓	
Recommend that the SMSF open a cash management account		x
Provide advice where a kickback, commission or a soft reward is received		x
Audit an SMSF and provide advice relating to the audit	✓	
<b>3. Contributions to superannuation</b>		
Advice on making contributions to a superannuation fund		x
Advice on the tax issues of making contributions and the tax treatment of superannuation benefits	✓	
<b>4. Investment Advice</b>		
Provide investment advice for an SMSF		x
Recommend the transfer of benefits between investment options		x
Provide advice on acquiring a commercial property or real estate	✓	
Advise a client on the tax and commercial implications of transferring business real property to their SMSF	✓	
Advise a client to transfer business real property to their SMSF for investment reasons		x <i>(affects the design of the investment strategy)</i>
Advise on the tax implications of an SMSF purchasing or disposing of property and shares	✓	
Provide advice to ensure an SMSF meets the sole purpose test and compliance requirements (e.g., can provide advice on meeting the in-house asset rules)	✓	

## Setting Up a Tax Effective Super Plan

Description	What practitioners <u>can</u> do	What practitioners <u>cannot</u> do
Provide advice relating to the tax implications of Financial Products ('FPs')	✓	
Advise that an investment strategy is required for an SMSF (but not prepare the strategy)	✓	
Recommend investment in particular assets or investment strategies of SMSFs		x
Recommend or influence the purchase of a FP that an SMSF should hold to fulfill an investment strategy		x
Advise on and then prepare the investment strategy for an SMSF		x
Advise on various business structures (e.g., company and trusts) and attend to administrative tasks to set up a structure	✓	
Advise on business risks and identify generic FPs to mitigate these	✓	
Recommend disposing of an interest within an SMSF (but <b>cannot</b> recommend they switch into another type of superannuation fund)	✓ If a 'recognised accountant'	
Recommend disposing of an interest in a non-SMSF		x
<b>5. Pension Advice</b>		
Recommend that a member commences a pension (i.e., moving from growth phase to pension phase)		x
Advise on the tax issues of commencing a pension	✓	
Advise a client whether to take a lump sum or an income stream from a super fund		x
Attend to the taxation and paperwork requirements of a lump sum or pension	✓	
<b>6. Insurance Advice</b>		
Advise on the tax implications of a particular type of insurance policy	✓	
Provide advice on the tax treatment of different types of insurance, the premium and	✓	

## Setting Up a Tax Effective Super Plan

Description	What practitioners <u>can</u> do	What practitioners <u>cannot</u> do
proceeds – however, <b>cannot</b> recommend a specific product		
Recommend a specific insurance policy for an SMSF		x
<b>7. Miscellaneous</b>		
Value the assets of an SMSF following a family law dispute	✓	
Recommend clauses be inserted into an SMSF trust deed	✓	
<b>8. SMSF Borrowing Arrangements</b>		
Recommend that an SMSF enter into an SMSF borrowing arrangement		x Note 1. Broadly from 29 September 2010 it is proposed that SMSF Borrowing arrangements will be deemed to constitute a financial product under the Corporations Act 2010. Further, a person will be required to have an AFSL which covers derivatives to advise on these arrangements.
Prepare a tax opinion on an SMSF Borrowing arrangement	✓	
Arrange for SMSF borrowing documents to be prepared based on client instructions	✓ Note 2. Practitioners should be aware of what constitutes legal work	

Note also that from 1 March 2010 only persons registered pursuant to the Tax Agent Services Act 2009 (TASA) may render tax services for a fee. However, financial planners have been exempted from the provisions of TASA for a period of 12 months (i.e., to 1 March 2011), at which time they would become:

- subject to the TASA laws, or
- subject to more comprehensive supervision under the AFSL regime (presumably to include oversight of tax related activities undertaken by financial planners).