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What limits SMSF advisers should be aware of when providing advice

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Overview

This articles examine what advice SMSF advisers can and cannot provide without 'stepping over the line' especially in providing taxation, financial product or legal advice which they may not be permitted to provide.

For example, an adviser providing legal advice or services (eg, preparing an SMSF deed update, binding death benefit nomination ('BDBN') or deed of change of trustee) exposes themselves and their firm to significant risk and legal claims especially if their professional indemnity insurance does not cover such activity. Moreover, an adviser providing financial product or tax advice can similarly be subject to significant liability and penalties.

This article also provides some guidance on practical solutions to minimise risk and adopt best practice.

Can an adviser provide advice on SISA and superannuation law matters?

It may appear surprising to many SMSF advisers that unless they are a qualified and registered lawyer that they are generally prohibited on advising on superannuation law matters that impacts a person's rights and obligations (as this constitutes a legal service) unless they are a registered lawyer who is authorised to provide legal advice for a fee.

Thus, are there any relevant carve outs or exceptions under the law for advisers to provide *Superannuation Industry (Supervision) Act 1993* (Cth) ('SISA') advice?

Possible carve out for advisers providing advice on Commonwealth taxation law

There may be a potential argument for advisers providing advice on Commonwealth 'taxation law' (as defined below) who are a registered tax practitioner with the Tax Practitioners Board ('TPB') who may be able to rely on the 'carve out' under the *Tax Agents Services Act 2009* (Cth) ('TASA'). This Commonwealth Act gives 'registered tax agents' a right to provide 'tax agent services' (as defined in s 90-5 of TASA) as any service:

(a) that relates to:

*(i) ascertaining liabilities, obligations or entitlements of an entity that arise, or could arise, under a *taxation law; or*

(ii) advising an entity about liabilities, obligations or entitlements of the entity or another entity that arise, or could arise, under a taxation law; or

(iii) representing an entity in their dealings with the Commissioner …; and

(b) that is provided in circumstances where the entity can reasonably be expected to rely on the service for either or both of the following purposes:

(i) to satisfy liabilities or obligations that arise, or could arise, under a taxation law;

(ii) to claim entitlements that arise, or could arise, under a taxation law.

The term "taxation law", in s 995-1 of the *Income Tax Assessment Act 1997* (Cth) ('ITAA 1997') to mean:

(a) an Act of which the Commissioner has the general administration (including a part of an Act to the extent to which the Commissioner has the general administration of the Act); or

(b) legislative instruments made under such an Act (including such a part of an Act); or

(c) the *Tax Agent Services Act 2009* or regulations made under that Act.

Note therefore that an adviser who is registered with the TPB under TASA may provide advice on Commonwealth taxation law. This carve out does not however cover state taxes such as stamp duty, payroll tax, land tax and the wide array of other state taxes. Thus an adviser providing advice on stamp duty, payroll tax or land tax for a fee without being a registered lawyer would be at risk of being convicted under the LP Act and subjected to a penalty of $41,305 or imprisonment for 2 years, or both.

Furthermore, in any negligence action or similar claim against an adviser providing legal services where any loss or damage was suffered, that adviser is likely be tested against the standard of a reasonably competent legal practitioner providing a similar service. Moreover, and to add '*salt to these wounds*', such an unqualified adviser is likely to have disqualified themselves under their professional indemnity insurance cover and will be responsible for any loss or damage was suffered. It is important to note here that an action in negligence can also be made direct to an adviser even if they are employed on behalf of a company with insufficient assets. Thus, advisers need to mindful of their personal exposure as some of their employers may be happy to put their adviser-employee 'necks on the line'.

Possible carve out for tax agents providing advice on SISA matters

Thus, it is clear that a tax agent's service such providing advice on Commonwealth taxation law can be provided by a tax agent registered with the TPB (without needing to be a lawyer). This opens up the question of how broad a range of services does 'taxation law' cover? In particular, this definition (refer to the definition above) includes:

… a part of an Act to the extent to which the Commissioner has the general administration of the Act …

Fortunately, the ATO as the compliance regulator for SMSFs administers certain parts of the SISA. Thus, it is arguable that an adviser may be able to provide certain advice in their role as a registered tax agent in relation to SISA matters.

In particular, the ATO has specific regulatory supervisory powers under SISA that relate to SMSFs. In particular, SISA confers powers on the relevant 'regulator' in respect of relevant parts or sections of the legislation. Section 6 of the SISA sets out the SISA powers for the various regulators. The 'regulator' for non-SMSFs is APRA and the Australian Investment and Securities Commission ('ASIC'). Specific powers are also conferred on APRA and ASIC under s 6 of the SISA.

The Commissioner of Taxation's powers and functions are specified at s 6(1)(e), (ea), (f), (fa) and (g), and (2AA) to (2AC) of the SISA. Of those provisions, s 6(1)(e) is the most relevant:

the Commissioner of Taxation has the general administration of the following [SISA] provisions to the extent that they relate to SMSFs:

(ia) Division 2 of Part 3B;

(i) Parts 4, 5, 7 (other than s 68A) and 8;

(ii) Part 12 other than section 105;

(iii) Parts 13 and 14;

(iv) Part 15;

(v) Division 2 of Part 16 and s 128P;

(vi) Part 17 other than s 140;

(vii) Parts 21 and 24

(viii) Divisions 2, 3 and 4 of Part 25A.

The above means that advisers who are providing advice on taxation law as a registered tax agent need to be careful to check that they are only advising in respect of SISA provisions in relation to which the ATO has relevant power. If a tax agent is advising on parts of the SISA that fall outside the specific SISA powers referred to above that fall within the ATO's powers, eg, advice in relation to a large APRA superannuation fund, then they will likely be providing legal advice that will expose them to the usual risks outlined in this article if they are not a qualified lawyer.

For example, a registered tax agent may, under the above analysis, provide advice to an SMSF trustee on what acquisitions of assets are permitted under s 66 of the SISA (which falls under Part 7 of SISA) because if this provision is contravened, the SMSF may be rendered non-complying and subject to a hefty tax liability and related penalties. You will note in this example that I have linked the (SISA) advice provided with a tax outcome to minimise the risk of it constituting legal advice.

To explain myself further on this point, let's say that the adviser merely stated to the SMSF trustee that it could not acquire a residential property from a member because the maximum penalty under s 66 of SISA is one year's jail. This advice, not be linked to a tax outcome, could constitute legal advice which must be provided by a lawyer.

However, in the prior s 66 example, linking the s 66 advice to a tax outcome (ie, a non-complying fund is taxed at 45%, etc) provides the tax agent an argument that the adviser was not providing legal advice but was advising on 'taxation law' which includes parts of SISA that the ATO has power of administration over.

Naturally, a written disclaimer should also be provided by such an adviser to the client along the following lines:

The adviser is not qualified nor registered as a lawyer and if you require legal advice you should consult a lawyer. Please let me know if you require a referral to a lawyer.

Where in doubt, this disclaimer is worthwhile adding to any written or verbal communication (with a follow up email confirming same) where there is any advice provided which may be in the nature of legal advice even if the advice covered is within the specific parts of the SISA which the ATO administers.

Further, if you are not a lawyer, you should at least recommend that each client have any legal document impacting their legal rights and obligations reviewed by a lawyer.

Australian Financial Services licence ('AFSL') regime

Accountants and other SMSF advisers who are not covered by an AFSL are not permitted to provide financial product ('FP') advice or related financial services under the *Corporations Act 2001* (Cth).

While some commentators argue that the preparation of an investment strategy is not an FP requiring a licensed adviser, an adviser who is not covered by a licence would be placing themselves at substantial legal risk of contravening the *Corporations Act 2001* (Cth) and potential exposure to damages and other claims by simply providing an investment strategy, especially if this proved unsatisfactory.

For example, a non-licensed adviser supplying an investment strategy covering investments that lost substantial value may be at risk in relation to an SMSF trustee that suffers any loss and damages from the fund's poor investment performance. While the adviser may argue that the investment strategy template was merely provided to satisfy the *Superannuation Industry (Supervision) Act 1993* (Cth) and *Superannuation Industry (Supervision) Regulations 1994* (Cth) criteria and was not intended to be relied upon as a '*real*' investment strategy, that adviser will be tested to the level of care and skill that a reasonably competent licensed professional providing investment strategies would prepare (especially after appropriate fact finding and disclosures of the service offering, etc).

A licensed (AFSL) adviser should typically run through the following steps in relation to preparing an investment strategy for a client:

- agree their relevant terms of engagement and scope and provide their Financial Services Guide;
- undertake an extensive fact finding exercise;
- undertake risk profiling of the client based on their goals and level of risks, etc;
- provide a statement of advice;
- provide an investment strategy based on the above; and
- ensure each step above is appropriately documented/recorded.

A non-licensed adviser who merely provides an investment strategy template without going through the above process, in addition to contravening the *Corporations Act 2001* (Cth) and not being covered by their professional indemnity insurance, would be measured to the standard of a reasonably competent professional adviser with an appropriate licence under the *Corporations Act 2001* (Cth).

Also, the recent SMSF auditor negligence case, namely *Ryan Wealth Holdings Pty Ltd v Baumgartner* [2018] NSWSC 1502 highlights how advisers can readily be liable for any shortcomings in an SMSF's investment strategy.

Broadly, in this case, the SMSF auditor had an '*indirect*' responsibility for checking the SMSF investment strategy for SISA/SISR and financial statement purposes, and the auditor was held primarily liable for the investment losses suffered.

Similarly, as noted in the above example, a non-licensed adviser simply providing an investment strategy template where the SMSF trustee suffers a material loss could potentially be liable for any consequential loss or damages suffered. Moreover, as lawyers often point out, there is always the risk of a vexatious litigant!

Moreover, assume that the template investment strategy also covered the requirement regarding the consideration of insurance in reg 4.09(2)(e) and that the non-licensed adviser wanted the client to also be covered from a SISA/SISR viewpoint. Thus, the template investment strategy may include wording such as:

the trustees have considered insurance cover on each member and have resolved not to implement any cover.

Now assume that one of the members, who happens to be the main 'breadwinner' of the family, dies without any insurance. The non-licensed adviser could be liable for substantial damages on the basis that such an investment strategy was a recommendation not to implement insurance when that recommendation has subsequently proved to be inappropriate due to the death of the SMSF member.

This is where the investment strategy involves FP advice under the *Corporations Act 2001* (Cth). Such an adviser may be potentially liable in, among other things, negligence to the SMSF member or anyone else who may suffer due to no or inappropriate insurance in place.

An adviser must generally be licensed to provide a recommendation in relation to insurance. A non-licensed adviser can provide limited factual advice on the general types of insurance available to manage risk without making any recommendation, where a recommendation can include seeking to influence a decision in relation to a financial product.

Thus, SMSF advisers need to understand their limits and contravening the *Corporations Act 2001* (Cth) can result in significant liability and penalties.

Prohibition regarding 'engaging in legal practice'

Each jurisdiction in Australia prohibits non-lawyers engaging in legal practice or marketing services as being legal services when provided by an unqualified practitioner.

In Victoria, for example, the *Legal Profession Uniform Law Application Act 2014* (Vic) ('the 'LP Act') provides that (sch 1 s 10(1)):

An entity must not engage in legal practice in this jurisdiction, unless it is a qualified entity.

Penalty: 250 penalty units or imprisonment for 2 years, or both.

The penalty of 250 penalty units based on the 1 July 2019 penalty unit in Victoria of $165.22 per unit equates to a fine of $41,305. This can be imposed in addition to a two year prison sentence. Despite the various law institutes and societies around Australia not being active at policing who provides legal services, these penalties are not something to readily ignore.

Further it is worthwhile noting that an 'entity' is defined to include an individual, an incorporated body and a partnership. Accordingly, if you are, for example, an adviser, this prohibition applies regardless of how your business is structured.

This then raises the question of what it means to 'engage in legal practice'. Section 6(1) of schedule 1 to the LP Act provides that 'engage in legal practice' includes practise law or provide legal services.

There is some difference from jurisdiction to jurisdiction in Australia on what constitutes engage in legal practice and there is no 'clear line' of demarcation where 'practising law' begins and ends, and where the 'provision of legal services' begins and ends. However, where an adviser is preparing a document that affects a person's legal rights or obligations, they are likely to be providing legal services.

Moreover, where a person provides advice in a context that the receiver of that information has reason to consider it is backed with relevant expertise and qualifications, then that is another factor in determining whether legal services were provided if the document or service was one that would normally be provided by a lawyer.

As you would appreciate, it is a simple fact that each profession has its limits. Indeed, the various codes of professional and ethical behaviour of numerous professional accounting and financial planning bodies preclude their members, for good reason, from providing legal services. Obviously, no professional body would want its members contravening the law and exposing its members to significant risk.

One further major risk that many advisers may not realise is that their professional indemnity cover is likely to exclude claims where the adviser or any of their staff contravene the law or act outside the bounds of their 'licence' (assuming they have Australian Financial Services Licence or restrictions under their licensing arrangements with their relevant AFSL holder).

For example, an SMSF adviser providing legal advice or services, eg, preparing an SMSF deed update, BDBN, reversionary pension nomination or deed of change of trustee exposes themselves and their firm to significant risk and legal claims especially if their professional indemnity insurance does not cover such activity.

I know that many SMSF advisers would not like to hear this truthful account of the law especially as many document suppliers misrepresent the fact that their documents are signed-off or in some other manner approved by a lawyer. However, each of these typical documents, eg, an SMSF deed update, BDBN, reversionary pension nomination or deed of change of trustee if prepared by a non-qualified lawyer involves the provision of legal services with the consequent liability and penalties that are outlined above. Sure you can disclaim that you are not providing legal services but ultimately the adviser will be accountable if any legal challenge arises. Such disputes are increasing surfacing especially in relation to death benefit disputes.

Summary of who can provide what advice

The following if a brief and broad summary of who can advise on what:

Type of advice	**Who can provide**
Legal advice	A lawyer who has a current practising certificate in accordance with the relevant State or Territory legal profession legislation ('Registered Lawyer')
Taxation advice –– Commonwealth	A registered tax agent with the TPB under the TASA ('Tax Agent') Registered Lawyer
Taxation advice –– State or Territory	Registered Lawyer
SISA advice	Tax Agent – provided the advice falls within the specified limits of s 6 of SISA Registered Lawyer
Other superannuation law advice	Registered Lawyer
Financial product advice	An adviser with an appropriate class of authority under an AFSL in accordance with the *Corporations Act 2001* (Cth)

As noted above, each profession has its limits and SMSF advisers need to be aware of what they can and cannot do and when they may be assuming too much risk. They should then 'team up' with a suitable range of other providers who are suitably qualified and competent to provide the services in a professional manner that is in each client's

best interests.

Conclusion

Advisers need to be well aware of what they can and cannot advise on. Every adviser should aim to deliver the best quality advice and documents available. The best way to do so is to be aligned with a quality and appropriately qualified adviser network. If you are not wanting to achieve best practice, then make sure you are informed of the risks as what may appear less costly and more profitable now may readily change when the first legal dispute or claim arises.

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