



ASIC

Australian Securities & Investments Commission

CONSULTATION PAPER 24

Licensing: Principals and representatives

June 2001

Your comments

You are invited to comment on the proposals and issues for consideration in this paper. All submissions will be treated as public documents unless you specifically request that we treat the whole or part of your submission as confidential.

Comments are due by Thursday 5 July 2001 and should be sent to:

**Roxanna Irvin
FSR Project Office
Regulatory Policy Branch
Australian Securities & Investments Commission
GPO Box 4866
Sydney NSW 1042
email: FSRProjectOffice@asic.gov.au**

You can also contact the ASIC Infoline on 1300 300 630 for information and assistance.

What this policy proposal is about

1 This policy proposal paper builds on the guidance provided in our policy proposal papers:

- (a) *Licensing: The scope of the licensing regime: Financial product advice and dealing* (Advice and Dealing PPP) (April 2001); and
- (b) *Licensing: Organisational capacities* (Organisational Capacities PPP) (April 2001).

This policy proposal paper should be read in conjunction with those papers. This paper will help you determine whether you need to be licensed as a principal or to hold an authorisation as a representative given by a licensed principal.

2 The proposals in this paper are based on the *Financial Services Reform Bill 2001* (the Bill) introduced into Parliament on 5 April 2001. These proposals will be reviewed, and further guidance may be issued, to take into account:

- (a) changes to the Bill in its passage to legislation;
- (b) regulations made under the Bill; and
- (c) the transitional provisions.

3 The policy proposals cover:

- (a) What is the meaning of “principal” and “representative”? (**Section A**)
- (b) What obligations apply to principals and representatives? (**Section B**)
- (c) What will be the status of our existing policy publications on the issues in this paper? (**Section C**)

4 The Schedule sets out some further examples showing how the licensing regime applies in relation to para-planners, superannuation trustees and superannuation fund administrators.

Important note: The proposals in this paper do not constitute legal advice. You will need to seek your own legal advice to find out whether you need a licence. The policy and examples in this paper are at a preliminary stage only. There may be changes as a result of the comments we receive. You should treat this paper as an indication of how we are thinking at this stage.

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Policy proposals

We have three sets of policy proposals. For each of these proposed policies we have listed various aspects of those proposals that we are considering and have raised issues which we would like you to comment on. When necessary we have also included some explanations of our proposals.

Note: In this paper, we have included the explanations in the “Policy proposal” section. There is no separate “Explanation” section for each proposal.

The Schedule sets out examples, in addition to those in the Schedule to the Advice and Dealing PPP, showing how the licensing regime applies to various activities.

Special note: We want to provide you with guidance about our plans for policy and processes as soon as we can to help you plan effectively. While we have done our best to cover the main issues, you will need to make your own preparation plans. It is possible we have missed some issues or have not taken into account the way the new legislation will affect specific industry situations. *We are keen to hear from you on our general approach, and what might be missing from it, as well as your answers to specific questions.*

A What is the meaning of “principal” and “representative”?

Policy proposal	Your feedback
<p>A1 In this policy proposal paper, the term “principal” refers to a person who carries on a business of providing financial services, other than as a representative of a principal. The expression “representative” is used in this policy proposal paper to refer to a person who acts on behalf of a principal.</p> <p>A2 A person provides financial services if they:</p> <ul style="list-style-type: none">(a) provide financial product advice;(b) deal in a financial product;(c) make a market for a financial product;(d) operate a registered scheme;(e) provide a custodial or depository service; or(f) engage in conduct of a kind prescribed in regulations: see 766A. <p>Note: You can get guidance on the meaning of “provide financial product advice”, “deal” and the “business” test in the Advice and Dealing PPP.</p>	
<p>A3 The broad criteria set out in Interim Policy Statement 161 <i>Registered insurance brokers and their representatives</i> [PS 161] may help you in considering whether you are acting as a principal or a representative. We consider that these criteria are relevant to all kinds of financial service providers.</p> <p>In summary, you may be acting as a principal and not as a representative if:</p> <ul style="list-style-type: none">(a) your conduct is not monitored and supervised by someone else;	<p>A3Q1 Are there any other factors that are indicators of whether a person is acting as a principal or as a representative? If so, what are they and why?</p> <p>A3Q2 Are any of these factors more important than others in determining whether a person is acting as a principal or as a</p>

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- (b) you give consumers the impression that you are acting as a principal;
- (c) your conduct is not covered by anyone else's compensation arrangements (eg professional indemnity insurance);
- (d) client assets are held in an account in your name;
- (e) clients are directed to pay any fees owing in relation to the provision of financial services into an account in your name;
- (f) you receive commissions directly from product issuers; or
- (g) you have ownership of client information.

A person does not cease to be a representative merely by handling money as a conduit. A person acts as a conduit where that person performs purely administrative or mechanical functions on behalf of the principal in relation to the money, eg accepting and banking cheques drawn in favour of the principal; or accepting insurance premiums from clients and depositing them immediately in the insurance broker's trust account.

- A4** The criteria set out in policy proposal paragraph A3 are indicators only. They are not determinative of whether you are acting as a principal or representative.
- A5** A person (A) may produce and distribute his, her or its own business documentation (such as letterhead, business cards and promotional material) without necessarily being treated by us as a principal. However, the business documentation must comply with the broad principles underlying Part III of Policy Statement 117 *Investment advisory services: acting as a representative* [PS 117] and

Your feedback

representative? If so, what are these factors and why?

- A3Q3** What practical problems (if any) do these criteria cause for persons who consider themselves to be authorised representatives? What guidance could ASIC give to overcome these problems, and why is it needed?

- A5Q1** Should business documentation of an authorised representative comply with any other broad principles? If so, what are they and why should they apply?

Policy proposal

[PS 161], which are generally as follows:

- (a) the documentation must make it clear that A is acting as a representative of a licensee and not as a principal; and
- (b) the principal for whom A acts must be clearly disclosed; and
- (c) the documentation must not be confusing or misleading to consumers.

A6 The mere fact that a person (A) pays (which may include by means of a commission) a second person (B) to provide a financial service to another person (or persons), does not necessarily mean that B is a representative of A. For example, if a trustee of a superannuation fund pays (which may include by means of a commission) a licensee to provide financial product advice to members and prospective members of the fund (at a seminar or individually), this does not, of itself, mean that the licensee is a representative of the trustee.

On the contrary, the licensee will normally be acting as principal if the licensee is not acting under the supervision of the trustee and if persons attending the seminar or receiving individual advice are clearly informed that the licensee assumes responsibility for the advice. Similar principles apply where an employer pays for a licensee to provide financial product advice to its employees. In these circumstances, and without additional facts, the trustee and licensee are not required to be licensed.

Note: In both of the examples in policy proposal paragraph A6, the second person (B) will be required, among other things, to disclose the relevant remuneration details: see 941C(5), 942B, 942C, 947B and 947C.

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A6Q1 Do you disagree with this interpretation of the licensing provisions? If so, why and how should our interpretation be amended?

B What obligations apply to principals and representatives?

Policy proposal	Your feedback
<p>B1 We have already briefly discussed this subject in Sections B and D of the Advice and Dealing PPP. This section provides more detailed explanation.</p> <p>Principals</p> <p>B2 If you are a principal (as defined in policy proposal paragraph A1), and you satisfy the jurisdictional nexus test in 911D, you must hold an Australian financial services licence (a licence) unless one or more of the exemptions in 911A(2)(b)–(l) applies.</p> <p>Notes:</p> <p>The jurisdictional nexus test is generally satisfied if your conduct is intended to induce people in this jurisdiction to use the financial services that you provide or if your conduct is likely to have that effect: 911D.</p> <p>Some of the exemptions in 911A(2)(b)–(l) are referred to in the Advice and Dealing PPP (policy proposal paragraphs B13 to B18 and D10 to D14).</p> <p>B3 If you are required to hold a licence, you must comply with the licensee obligations set out in 912A and with any other requirements which apply in relation to the provision of financial services. The duties of a licensee include (but are not limited to) the following:</p> <ul style="list-style-type: none"> (a) it must ensure that the financial services are provided competently and honestly; (b) it must take reasonable steps to ensure that its representatives comply with the law; (c) it must maintain its competence to 	<p>B2Q1 Is any guidance needed on the jurisdictional nexus test for licensees? If so, what guidance should be provided and why?</p>

Policy proposal	Your feedback
<p>provide the financial services;</p> <p>(d) it must adequately train its representatives and ensure that they are competent;</p> <p>(e) it must have adequate risk management systems (unless it is a regulated by APRA).</p> <p>Notes:</p> <p>For more detailed discussion about compliance with the licensee obligations, see our policy proposal papers <i>Licensing: Organisational capacities</i> (April 2001), <i>Licensing: External and internal dispute resolution procedures</i> (June 2001), and our planned policy proposal paper on <i>Licensing: Financial requirements</i> (June 2001). Policy proposal paragraphs B7 to B8 of the Organisational Capacities PPP explain that each of the licensee duties overlap and collectively form an integrated whole.</p> <p>In policy proposal paragraph D1 of the Organisational Capacities PPP, we point out that we expect a licensee will have documented procedures in place to monitor, supervise and train its representatives (including its authorised representatives). These procedures should allow a licensee to:</p> <ul style="list-style-type: none"> (a) ensure all its representatives are appropriately authorised (as applicable); (b) determine whether its representatives are complying with all the obligations applying to licensees under the Law; (c) implement appropriate responses to compliance failures (or breaches); and (d) ensure that its representatives are (and remain at all times) appropriately trained to provide the financial services which they have authority to provide. <p>B4 We consider that if a licensed principal outsources the monitoring and supervision arrangements of its authorised representatives (including to any of its own</p>	

Policy proposal	Your feedback
<p>corporate authorised representatives), it must ensure that these arrangements are adequate and that its licensee obligations are satisfied.</p> <h2>Representatives</h2> <p>B5 Representatives must comply with:</p> <ul style="list-style-type: none"> (a) 911A, that deals with when a person who carries on a financial services business needs to be licensed (see policy proposal paragraph B5); and (b) 911B, that deals with when a person may provide financial services on behalf of a person who carries on a financial services business (see policy proposal paragraph B7). <p>B6 If you are a representative, you will comply with 911A if:</p> <ul style="list-style-type: none"> (a) you do not carry on a business of providing financial services in this jurisdiction; or (b) one or more of the exemptions in 911A(2) applies. <p>911A(2)(a) exempts a representative from 911A(1) if it provides the financial service <i>as representative of a principal</i>, provided that the principal is either licensed or exempt from the requirement to be licensed.</p> <p style="padding-left: 40px;">Note: To determine whether financial services are provided as principal or representative, see policy proposal paragraphs A3 to A6 of this paper.</p> <p>B7 If you are a representative, you must also ensure that one or more of the paragraphs of 911B(1) apply if you provide financial services in this jurisdiction.</p> <p>The overall effect of 911B(1) is that a person who provides financial services to a third party on behalf of a principal must generally be authorised by the principal (911B(1)(b)),</p>	<p>B6Q1 Is any further guidance needed (in addition to policy proposal paragraphs A3 to A6) in relation to the exemption for a representative from the need to be licensed in 911A(2)(a)? If so, what guidance should ASIC provide?</p> <p>B7Q1 Do we need to provide more guidance on the application of 911A and 911B when a person provides financial services directly to another person (rather than on behalf of a principal)?</p>

Policy proposal	Your feedback
<p>and the principal must hold a licence. A person does not need to hold an authorisation if:</p> <ul style="list-style-type: none"> (a) they are an employee or director of the licensed principal (or a related body corporate of the principal) and can satisfy 911B(1)(a); (b) they are an employee of an authorised representative of the licensed principal, but only if the financial service it is providing is a basic deposit product (or a facility for making non-cash payments) which complies with 911B(1)(c); (c) they are a licensee providing the financial service under its own licence: see 911B(1)(d), 916D and 916E; or (d) the services they provide would not require a licence if they were instead provided by the principal: see 911B(1)(e). <p>Note: Under 910A, an employee or a director of a licensee (or a related body corporate of the licensee) and an employee of an authorised representative of a licensee are representatives of the licensee.</p> <p>Mere referrals</p> <p>B8 A specific issue arises as to when a person referring consumers to a licensee will be providing a financial service and will, therefore, need to hold a licence or an authorisation.</p> <p>Note: Under the new regime, a person who does not provide a financial service does not need to hold a licence or authorisation (although they may be a “representative” as defined in 910A). Under s94 of the old law, however, a person who does <i>any act</i> in connection with a securities or investment advice business generally requires a proper authority.</p> <p>B9 We have already provided some guidance on mere referrals (see policy proposal</p>	<p>If so, what and why?</p>

Policy proposal	Your feedback
<p>mere referrals (see policy proposal paragraphs A14 to A15 and D5 of the Advice and Dealing PPP). Policy proposal paragraphs B10 to B13 provide further guidance on mere referrals.</p> <p>Financial product advice</p> <p>B10 The mere act of referring a consumer to a licensee will generally not constitute the provision of financial product advice by the referring party. However, such a referral <i>may</i> involve the provision of financial product advice (including the notion of implied financial product advice) if the referral is made to a licensee who deals in or advises on a narrow range of financial products <i>and</i> if the referring party receives a benefit dependent on the consumer’s decision. This benefit will often be (but need not be) described as a commission.</p> <p style="padding-left: 40px;">Note: For the removal of doubt, the word “commissions” on the fourth line of the example following policy proposal paragraph A14 of the Advice and Dealing PPP should read “benefits”.</p> <p>B11 The meaning of the expression “narrow range of financial products” will depend on the circumstances and, in particular, on the objectives, financial situation and needs of the consumer, in so far as they are known to the referring party. If the referring party is aware that the consumer is interested in buying, say, motor vehicle insurance, then a referral to a licensee who deals in or advises on only a few motor vehicle insurance products from the one product issuer <i>may</i> constitute financial product advice (even if the licensee deals in or advises on many other types of financial product). We consider this kind of referral may be advice only if the referring party receives a benefit dependent on the consumer’s decision.</p>	<p>B10Q1 Do you agree with these proposals? If not, what guidance should ASIC provide and why?</p> <p>B10Q2 Do these proposals cause practical difficulties for any particular business activities? If so, what are these difficulties and how could they be overcome?</p> <p>B10Q3 Do you think that, in the circumstances of policy proposal paragraph B10, advice is definitely being provided? If not, why not?</p> <p>B11Q1 Do you disagree with our interpretation of “financial product advice” in the context of referrals to a licensee who deals or advises in a narrow range of products? If so, why and what is your preferred interpretation in these circumstances?</p>

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Notes:

We do not consider that a referring party who receives benefits dependent on consumers' decisions to buy, sell or hold financial products would be likely to fall within the exemption for the actions of a clerk or cashier: see 766A(3). The payment of such a benefit is a strong indicator that the actions of the referring party involve the exercise of judgement, and are therefore not purely administrative or mechanical.

We also note that the clerks and cashiers exemption in 766A(3) is provided to avoid doubt only, and is not intended to significantly affect the range of activities that would otherwise be regulated by the licensing regime.

Dealing

B12 The mere act of referring a consumer to a licensee will not constitute “arranging” (which is a form of dealing) if the referring party does *not* participate in any way in negotiations about the contractual terms and conditions attaching to the financial product or the consideration to be paid for the transaction *and* if the referral is made as an incidental part of another business (ie the referring party must not offer or provide a discrete referral service without a licence or an authorisation).

B13 One of the conditions we will continue to impose on the grant of a licence is that fees and commissions payable to referring parties must be disclosed by the licensee to its clients: see Policy Statement 120 *Investment Advisory Services: mere referrals and other excluded activities* at [PS 120.30].

Business introductory services

B14 Business introductory services provide information about prospective business partners (ie persons seeking capital for

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B12Q1 Does it matter whether or not the referring party is operating a discrete referral service, in deciding if the referring party is “arranging”? If not, why not?

B13Q1 Are there any practical problems that arise from compliance with the proposed continued application of this licence condition? If so, what are they and how could they be overcome?

B14Q1 Is any further guidance needed relating to business introduction services? If

Policy proposal	Your feedback
<p>expanding businesses and prospective investors in such businesses). These services are generally provided through special purpose publications.</p> <p>B15 An operator of a business introductory service will not need a licence or an authorisation if the operator is not providing a financial service. It is necessary to consider whether the operator is providing financial product advice and whether the operator is dealing.</p> <p>Financial product advice</p> <p>B16 Applying the policy principles set out in Section A of the Advice and Dealing PPP, we consider that an operator will generally not be providing financial product advice if:</p> <ul style="list-style-type: none"> (a) the operator does not provide any express or implied advice about the merits of investing in any business; and (b) the operator does not receive any benefit that is dependent on any investors' decision. <p>Note: Policy proposal paragraph B16 is a continuation of the policy described in Policy Statement 120 <i>Investment advisory services: mere referrals and other excluded activities</i> at [PS 120.28]–[PS 120.29].</p>	<p>so, what guidance should be provided and why?</p>
<p>Dealing</p> <p>B17 Under the Bill, it will also be necessary for operators of business introductory services to consider whether they are “arranging” within the meaning of 766C and, therefore, dealing. We have provided guidance on “arranging” in Section D of the Advice and Dealing PPP.</p> <p>An operator will not be “arranging” if it does not participate in any way in negotiations between the prospective business partners about the contractual terms and conditions attaching to the financial product or the</p>	<p>B17Q1 Does this proposal cause practical problems for operators of business introduction services? If so, what are these problems and how can they be overcome?</p>

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consideration to be paid for the transaction and if the operator provides the business introduction service as an incidental part of another business.

Agents of registered scheme operators

B18 766A(4) says that a person is not regarded as operating a registered scheme merely because they act as an agent or employee of another person who does. This means that if an agent of the operator of a registered scheme merely acts in connection with the operation of the scheme, and does not provide a financial service of a type referred to in 766A(1)(a), (b), (c), (e) or (f), they will not have to hold an authorisation.

Note: The responsible entity remains responsible for the acts of agents employed in the circumstances described in policy proposal paragraph B18: see 601FB(3).

What obligations apply to representatives?

B19 The primary obligation to ensure that financial services are provided lawfully rests with the licensee. However, some legal obligations are imposed directly on representatives. For example, authorised representatives must comply with various obligations in Part 7.7 and all representatives must ensure that they do not engage in misleading or deceptive conduct: see 1041H.

Issuing authorisations

B20 Authorisations to representatives must generally be issued by the licensee. However, 916B allows a limited exception to this rule. It permits an authorised representative who is a body corporate to issue authorisations to natural persons who

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then become an authorised representative *of the licensee*, and are subject to the licensee's monitoring and supervision arrangements. The licensee's obligations for a natural person authorised in this way are identical to its obligations for representatives it directly authorises. Regardless of the way in which authorisations are issued, the licensee remains responsible and liable for the provision of financial services under its licence. Licensees should take great care in their appointment of all representatives.

Note: We plan to issue process documents in the coming months which will provide administrative guidance about giving authorisations.

Your feedback

C What will be the status of our existing policy publications on the issues in this paper?

Policy proposal	Your feedback
<p>C1 We consider that the final policy statements addressing the issues in this policy proposal paper (and the Advice and Dealing PPP) will replace the following policy statements:</p> <ul style="list-style-type: none"> (a) Policy Statement 116 <i>Investment advisory services: licensing and “independent” advisory services</i> [PS 116]; (b) Policy Statement 117 <i>Investment advisory services: acting as a representative</i> [PS 117]; (c) Policy Statement 118 <i>Investment advisory services: media, computer software and Internet advice</i> [PS 118]; (d) Policy Statement 120 <i>Investment advisory services: mere referrals and other excluded activities</i> [PS 120]; (e) Policy Statement 123 <i>Investment advisory services: superannuation advice</i> [PS 123]; and (f) Policy Statement 161 <i>Registered insurance brokers and their representatives</i> [PS 161]. <p>Note: See our FSRB Policy Proposal Paper No 8 <i>Licensing: Discretionary powers</i> (June 2001) for more details on the extent to which our existing policy and guidance publications will apply after commencement of the Bill.</p>	<p>C1Q1 Are there any issues covered in [PS 116], [PS 117], [PS 118], [PS 120], [PS 123] and [PS 161] that are not adequately addressed in this policy proposal paper or in the Advice and Dealing PPP? If so, what are these issues and what guidance should ASIC provide?</p>
<p>C2 As a general rule, and depending on the final form of the legislation (and regulations), we expect that these policy statements will</p>	<p>C2Q1 Is further guidance needed about the application of [PS 116], [PS 117],</p>

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continue to operate during the transitional period for existing market participants (as applicable), but only until a licence is obtained under the new regime.

Note: See Examples 2 and 3 of the Schedule to this policy proposal paper where the application of Policy Statement 123 *Investment advisory services: superannuation advice* [PS 123] during the transitional period is explained further.

Your feedback

[PS 118], [PS 120], [PS 123] and [PS 161] during the transitional period? If so, what guidance is needed and why?

Schedule – Further examples

The examples in this Schedule illustrate how the licensing regime (as interpreted in the proposals in this paper and the Advice and Dealing PPP) applies to activities typically undertaken by:

- 1 Para-planners
- 2 Superannuation trustees
- 3 Superannuation fund administrators

Important note: Do *not* rely on the examples below to help you work out whether you are providing a financial service or need an Australian financial services licence or authorisation. Each case will depend on its own specific circumstances and context. You should obtain your own legal advice on whether your activities come under the licensing provisions and, if so, how your activities will be regulated. The policy and examples in this paper are at a preliminary stage only. The examples and the suggested conclusions may change as a result of the comments we receive. You should treat them only as an indication of how we are thinking at this stage.

Questions

SQ1 Are there any other important activities on which guidance is needed? If so, what are those activities and why is guidance needed? (We will *not* be attempting to provide comprehensive guidance on the full range of activities.)

SQ2 Would further detail make the examples in this Schedule more helpful? If so, what additional level of detail should be provided?

SQ3 Do you disagree with any of the conclusions reached about the application of the Law in any of the examples in this Schedule? If so, please explain why.

Example 1: Para-planners

Consider the following example:

AR is the authorised representative of a licensee (**L**).

AR uses a para-planner (**PP**) to assist in providing financial product advice to retail clients. **AR** pays **PP** (which may include by means of commission) for its services.

PP is not employed or authorised by **L** and does not satisfy the training requirements referred to in our FSRB Policy Proposal Paper No 3 *Licensing: Adapting IPS 146 to the Financial Services Reform regime* (April 2001).

PP engages in the following activities:

- (a) collects information directly from retail clients (whether or not with **AR**) about their objectives, financial situation and needs;
- (b) prepares draft statements of advice (in purported accordance with 947C) which identify the authorised representative as the providing entity (**PP** is not referred to in the statement of advice);
- (c) prepares the personal advice in the draft statements of advice in purported compliance with the requirements to have a reasonable basis for the advice (see 945A);
- (d) assists **AR** in explaining these statements of advice in discussion with the retail clients.

Question: How would the licensing provisions apply to **L**, **AR** and **PP**?

L must have compliance measures in place that are designed to ensure that **AR** plays a material role in the provision of financial product advice to retail clients. These measures must satisfy the requirements set out in Sections C and D of our FSRB Policy Proposal Paper No 2 *Licensing: Organisational capacities* (April 2001).

If **L** does not have appropriate compliance measures in place, it will breach several duties, including the duty to ensure that financial services are provided competently and honestly, the duty to take reasonable steps to ensure that its representatives are complying with the law and the duty to maintain the competence to provide the financial services. It would be inconsistent with these duties for a licensee to allow financial product advice to be provided under its licence without the material involvement of persons who are authorised and competent to provide that advice.

The requirement for **AR** to play a material role does not mean that **AR** must personally perform all the functions associated with the provision of the advice. Rather, **AR** must:

- (a) review the draft statements of advice prepared by **PP** with a view to assessing whether all legal obligations have been satisfied (including the “reasonable basis” for advice obligation in 945A and the disclosure requirements for statements of advice in 947C); and
- (b) take any necessary action to ensure that the final statements of advice comply with legal obligations (this may include, for example, obtaining further information from clients or altering the recommendation); and
- (c) manage and lead any oral explanation of the financial product advice to retail clients.

As a general rule, where there is disproportionately high number of unauthorised para-planners being used by a licensee’s authorised representatives (compared to the number of the licensee’s authorised representatives), we believe that there is an increased risk that the licensee will not be satisfying its obligations.

It is important to note that **L** remains ultimately responsible for the financial product advice provided by **AR** (and **L** will be liable to consumers if the advice is defective) regardless of the extent to which **AR** uses para-planners to assist in the preparation of that advice. Accordingly, **L** must have compliance measures in place for ensuring that the advice provided by **AR** complies with the law. This includes (but is not limited to) ensuring that **AR** plays a material role in the provision of the advice.

In this example, **AR** may also be breaching the law if it does not play a material role in the provision of the financial product advice. The reference to **AR** in the written statement of advice, without any acknowledgement of the role of **PP**, may be misleading or deceptive: see policy proposal paragraph B19. Further, **AR** will, of course, contravene the law if the statement of advice does not satisfy the “reasonable basis” requirement in 945A.

There is also a risk that **PP** may be breaching the law if **AR** does not play a material role in the provision of the financial product advice. This is because it may be held that **PP** is a person who “provides” the financial product advice (within the meaning of 766A(1)(a)) in this circumstance: see policy proposal paragraph B1 of our Advice and Dealing PPP where we state that the persons who “provide” financial product advice are the author of that advice, the person for whom the author acts and any person who endorses the advice.

Example 2: Superannuation trustees

Consider the following example

T is the trustee of a superannuation fund.

T engages in the following activities:

- (a) prepares disclosure documents required by Part 7.9 as the issuer of the disclosure documents. These documents contain some general advice;
- (b) issues and redeems interests in the fund;
- (c) varies interests in the fund at the request of members (eg a change in a portfolio choice of a member's interest in the fund);
- (d) invests the trust fund in various assets, including financial products.
- (e) **T**'s inquiry officer gives factual information to members and prospective members of the fund;
- (f) pays for a licensee (**L**) to present seminars to members and prospective members. These seminars involve giving financial product advice.

T does not engage in any other activity that could arguably constitute the provision of a financial service.

Question: How would the licensing provisions apply to **T**?

To answer this question, each of the activities needs to be considered: see Table 1 on the next page

Table 1: Superannuation trustees

Activity	Answers
<p><i>“(a) prepares disclosure documents required by Part 7.9 as the issuer of the disclosure documents. These documents contain some general advice. Employees of T distribute them”</i></p>	<p>Activity (a) may involve the provision of financial product advice by T (whether or not the documents were drafted by someone else on behalf of T).</p> <p>This will depend on whether the disclosure documents are “exempt documents”. The precise meaning of “exempt document” will be determined by the regulations. It is expected that product disclosure statements under Part 7.9 will be exempt documents, meaning that the provision of a complete product disclosure statement will not constitute the provision of financial product advice.</p> <p>If necessary, we will provide further guidance on this matter once the final form of the legislation (and regulations) is known: see also policy proposal paragraphs A17 to A18 of the Advice and Dealing PPP.</p>
<p><i>“(b) issues and redeems interests in the fund”</i></p>	<p>Activity (b) involves dealing.</p> <p>T will need to obtain a licence if the business test in 761C is satisfied, unless one of the exemptions in 911A(2) applies. We consider that the effect of the exemption in 911A(2)(b) is that T will not need a licence in relation to an issue or redemption of interests where:</p> <ul style="list-style-type: none"> (a) a second person who holds a licence (or an authorised representative of such a person) “arranges”, whether the licensee is acting on behalf of T or the consumer; and (b) that arranging leads to the issue or redemption of the interests; and (c) the issue or redemption of interests accords with the instructions given to the licensee by the consumer. <p>We consider that this exemption applies whether or not the licensee provides financial product advice to the consumer (any such advice must be provided by the licensee under its own licence, and <i>not</i> as agent for the trustee if the trustee is unlicensed).</p>
<p><i>“(c) varies interests in the fund at the request of members”</i></p>	<p>Activity (c) involves dealing. However, T does not need a licence for this activity: see 911A(2)(c). T will also not need to be licensed if it relies on the exemption under 911A(2)(b) as discussed in our answer to activity (b) above.</p>

Activity	Answers
<p><i>“(d) invests the trust fund in various assets, including financial products”</i></p>	<p>Activity (d) may involve dealing.</p> <p>Under the current law, there are exemptions for superannuation trustees (and their agents) in relation to trustees’ investment activities: see reg 7.3.13 of the Corporations Regulations. Exemptions designed to achieve a similar effect may be provided by the regulations under the Bill. If necessary, we will give further guidance on this matter once the final form of the legislation (and regulations) is known.</p>
<p><i>“(e) T’s inquiry officer gives factual information to members and prospective members of the fund”</i></p>	<p>Activity (e) does not involve the provision of a financial service: see policy proposal paragraphs A5 to A6 of the Advice and Dealing PPP.</p> <p>This means that the trustee will not need to hold a licence (and the inquiry officer will not need to comply with 911B) in relation to these activities.</p> <p>However, in this situation we would expect the trustee to have an adequate system in place to ensure that the only information given to members and prospective members by the inquiry officer was purely factual information, and not financial product advice. For example, it would be important to ensure that any statements made about the potential benefits for members of consolidating superannuation benefits into one fund or making additional voluntary contributions constituted purely factual information, and did not involve any express or implied financial product advice.</p>
<p><i>“(f) pays for a licensee (L) to present seminars to members and prospective members. These seminars involve giving financial product advice”</i></p>	<p>Activity (f) clearly involves the provision of financial product advice by L.</p> <p>Provided that:</p> <ul style="list-style-type: none"> (a) L is not acting on behalf of T in relation to the giving of that advice; and (b) T does not endorse the advice, <p>then T will not need a licence: see policy proposal paragraph B1 of the Advice and Dealing PPP.</p> <p>As noted in policy proposal paragraph A6 of this paper, the mere fact that T pays L to give the seminar does not mean that L is acting on behalf of T.</p>

Conclusion

It seems unlikely that **T** will need a licence if:

- (a) 911A(2)(b) is satisfied in relation to any issue or redemption of interests in the fund;
- (b) 911A(2)(b) or 911A(2)(c) is satisfied in relation to any variation of interests in the fund at the request of members;
- (c) its inquiry officer does not provide any financial product advice; and
- (d) it does not endorse the advice provided by **L** at the seminars.

However, this tentative conclusion will need to be re-assessed once the final form of the legislation (and regulations) is known.

Note: There is a further issue of whether the act of amending the trust deed may involve dealing and is not exempt under 911A(2)(c). If necessary, we will provide further guidance on this matter once the final form of the legislation and regulations is known.

Variation on Example 2

Consider a variation to the facts of Example 2

The inquiry officer sometimes provides financial product advice in response to queries received from members and prospective members, for example, advice about portfolio choices available within the fund (as opposed to merely factual information about the existence and nature of the portfolio choices).

In this case, the inquiry officer will be providing financial product advice. The main options available to ensure compliance with the law are as follows:

- (a) the trustee obtains a licence (the inquiry officer will need to hold an authorisation unless they are an employee of the trustee or one of its related bodies corporate); or
- (b) the inquiry officer gives the advice as a representative of another person who holds a licence. Normally the inquiry officer would need to hold an authorisation from that licensee (unless the licensee was a related body corporate of **T**). In this situation, the inquiry officer is giving the advice as a representative of the third party licensee, not on behalf of the trustee. This distinction must be made clear in any business documentation: see policy proposal paragraph A5 of this paper.

Important note concerning the transitional period: Depending on the final form of the legislation and regulations, we want to ensure that existing trustees (and their employees and agents) can claim the benefit of any current exemption *during the transitional period*. This will enable existing trustees of superannuation funds to continue to provide financial services which they can currently lawfully provide (eg investing the assets of the fund and issuing interests in the fund), without the requirement to hold a licence or authorisation, during the transitional period: see Policy Statement 123 *Investment advisory services: superannuation advice* [PS 123].

Example 3: Superannuation fund administrators

Consider the following example

A is a body corporate administrator of a superannuation fund.

A engages in the following activities:

- (a) “arranges”, which leads to the issue, redemption and variation of interests in the fund (A is arranging on behalf of T);
- (b) gives broad asset allocation advice to T;
- (c) completes and processes application forms on behalf of T (ie application forms for the issue of financial products to T) and instructs stockbrokers or fund managers to buy and sell investments on behalf of T.

A performs other functions that clearly do not involve the provision of a financial service (eg it provides, orally or in writing, purely factual information to members of the fund, such as account balances).

A does not engage in any other activity that could arguably constitute the provision of a financial service.

Question: How do the licensing provisions apply to A?

To answer this question, each of the activities needs to be considered: see Table 2 on the next page.

Table 2: Superannuation fund administrators

Activity	Answers
<p><i>(a) “A ‘arranges’, which leads to the issue, redemption and variation of interests in the fund (A is arranging on behalf of T)”</i></p>	<p>Activity (a) involves the provision of a dealing service by A.</p> <p>A will generally need either a licence or an authorisation to provide this service, due to the operation of 911A and 911B.</p> <p>Note: Unless A holds a licence or authorisation, T will not be exempt from the obligation to hold a licence in relation to any issue or redemption of interests: see Example 2, activity (b).</p>
<p><i>“(b) gives broad asset allocation advice to T”</i></p>	<p>Activity (b) does not involve the provision of financial product advice, provided the advice falls within the broad asset allocation guidance set out in policy proposal paragraph A11 of the Advice and Dealing PPP.</p>
<p><i>“(c) completes and processes application forms on behalf of T (ie application forms for the issue of financial products to T) and instructs stockbrokers or fund managers to buy and sell investments on behalf of T”</i></p>	<p>Activity (c) involves the provision of a dealing service by A, for which A will generally need either a licence or authorisation. (These activities are not purely administrative or mechanical functions, and therefore would not fall within the clerks and cashiers exemption; cf the situation where a person merely assists a consumer complete an application form and posts it).</p>

Conclusion

It seems likely that **A** is providing a dealing service but is not providing any financial product advice. If so, **A** will need to hold a licence or authorisation permitting this dealing activity, but will not need to comply with obligations relating to the provision of financial product advice. However, this tentative conclusion needs to be re-assessed once the final form of the legislation (and regulations) is known.

Variation on Example 3

Consider a variation to the facts of Example 3

A gives either or both:

- (a) advice to **T** about specific financial products and classes of financial products, including pooled superannuation trusts;
- (b) financial product advice to members and prospective members of the fund concerning the interests in the fund (including the distribution of newsletters that contain general advice).

In this case, **A** will be giving financial product advice. The advice given by **A** to **T** concerning pooled superannuation trusts is provided to **T** as a retail client: 761G(6). To determine whether advice given to **T** about financial products (other than superannuation or general insurance) is provided to **T** as a retail client, it is necessary to consider 761G(7). The advice given by **A** to members and prospective members is provided to those persons as retail clients.

Important note concerning the transitional period: Depending on the final form of the legislation and regulations, we want to ensure that existing superannuation fund administrators (and their agents) can claim the benefit of any current exemption *during the transitional period*. This will enable existing administrators to continue to provide financial services which they can currently lawfully provide (eg investing the assets of the fund on behalf of the trustee), without the requirement to hold a licence or authorisation, during the transitional period: see Policy Statement 123, *Investment advisory services: superannuation advice* [PS 123].

Regulatory and financial impact

We have considered the likely regulatory and financial impact of the policy proposals in this paper. Based on the information that we currently have, we believe that our proposals strike an appropriate balance between facilitating financial services activity and protecting investors. To ensure that we have achieved an appropriate balance, we are also developing a Regulatory and Financial Impact Statement (RIS).

The RIS will address the following seven key elements:

1 Issue/problem

This will discuss the nature and magnitude of the problem.

2 Objective(s)/analysis of the problem

The objective(s), or the outcome sought in relation to the identified issue/problem, will be addressed.

3 Options/solutions

We will identify all the alternative options that could achieve the objective(s) stated above for dealing with the issue being considered (eg no specific action; ASIC policy proposal; media release; information statement; self regulation/quasi regulation; codes of conduct; and co-regulation, compliance and enforcement strategies).

4 Impact analysis (costs and benefits) of each option

Impact analysis will include:

- (a) analyzing the benefits and costs of the options, including any restriction on competition for different persons affected;
- (b) identifying persons or bodies affected by the problem and those that will be affected by the solutions or options identified (ie applicant/proponent of issue; other interested parties, consumers, business and government);
- (c) considering how each of the proposed options will affect existing law, regulations or policies;
- (d) identifying and categorizing the expected effects of the proposed options as likely benefits or costs for each of the

relevant persons/bodies;

We will try to quantify these effects where possible (for example, will there be any restriction on competition as a result of the proposed regulation?)

Costs to business affected by a regulatory initiative might include: administrative costs; complying with new regulatory standards; licence fees; delays etc.

Costs to consumers affected could also include higher prices for goods and services; reduced utility of goods and services; delays and more difficult or expensive options for seeking redress.

- (e) identifying the benefits of the options (even where they are not quantifiable); and
- (f) identifying the data sources used and assumptions made in these assessments.

5 Consultation

Detailed consultation will take place as part of the policy process.

6 Conclusions and recommended option

The preferred option(s) will be given, together with the reasons why.

7 Implementation and review

We will discuss how the proposed option will be administered, implemented, or enforced (eg instrument of relief; policy statement; practice note; no action letter).

For us to fully assess the financial and regulatory impact of our proposals, we invite you to:

- (a) consider possible options that would achieve our objectives;
- (b) comment on the impact that these policy proposals might have;
- (c) consider the costs and benefits of these proposals.

Where possible, we are seeking both quantitative and qualitative data.

Any comments that we receive will be taken into account when preparing our final RIS.

Development of policy proposal

We have developed this policy proposal paper by considering:

- (a) the intention of the Bill as indicated in the Explanatory Memorandum to the Bill and the Second Reading Speech in the House of Representatives on the introduction of the Bill into Federal Parliament;
- (b) the Report on the Bill by the Parliamentary Joint Committee on Corporations and Securities issued in August 2000;
- (c) the Government's response to the Report, issued on 29 March 2001;
- (d) relevant comparisons with current legislative requirements for the regulation of financial services activity under the law;
- (e) a review of existing ASIC policies and practices relevant to the regulation of financial services activity under the law; and
- (f) a review of public submissions on the Exposure Draft Bill issued by the Government in February 2000.

Key terms

In this policy proposal:

“ASIC” means the Australian Securities and Investments Commission;

“authorised representative” of a financial services licensee means a person authorised by the licensee, in accordance with 916A or 916B to provide a financial service services on behalf of the licensee;

Note: This is a definition contained in 761A

“Bill” means the *Financial Services Reform Bill 2001*;

“dealing”, subject to the exemptions in 766C, means the following conduct:

- (a) applying for or acquiring a financial product;
- (b) issuing a financial product;
- (c) in relation to securities or managed investment interests – underwriting the securities or interests;
- (d) varying a financial product;
- (e) disposing of a financial product;

Further, arranging for a person to engage in conduct referred to in sub-paragraphs (a)–(e) is also dealing in a financial product, unless the actions concerned amount to providing financial product advice;

Note: This is a definition contained in 766C

“financial product” means a facility through which, or through the acquisition of which, a person does one or more of the following:

- (a) makes a financial investment (see 763B);
- (b) manages financial risk (see 763C);
- (c) makes non-cash payments (see 763D);

Note: This is a definition contained in 763A

“financial product advice” means a recommendation, a statement of opinion, or a report of any of those things, that:

- (a) is intended to influence a person or persons in making a decision in relation to a particular financial product or class of financial products, or an interest in a particular financial product or class of financial products; or
- (b) could reasonably be regarded as being intended to have

such an influence;

but does not include anything in an exempt document;

Note: This is a definition contained in 766B

“Financial Services Guide” (FSG) means a document that must be given to a retail client before the provision of a financial service in accordance with Part 7.7;

“financial services licensee” means a person who holds an Australian Financial Services Licence;

Note: This is a definition is contained in 761A

“general advice” means financial product advice that is not personal advice;

Note: This is a definition contained in 766B

“Law” means the Corporations Law (including as intended to be replaced by the *Corporations Bill 2001*);

“licensee” means a person who holds an Australian financial services licence;

Note: This is a definition contained in 761A

“licensee obligations” means the obligations imposed on a licensee under the Law, and includes those set out in 912A;

“managed investment provisions” means Chapter 5C of the Law;

“old Law” is the Law before amendment by the Bill;

“personal advice” has the meaning set out in 766B(3) of the Bill;

“product disclosure statement” means a document that that must be given to a retail client in relation to the offer or issue of a financial product in accordance with Part 7.9;

“representative” of a financial services licensee means:

- (a) an authorised representative of the licensee;
- (b) an employee or director of the licensee;
- (c) an employee or director of a related body corporate of the licensee; or
- (d) any other person acting on behalf of the licensee;

Note: This is a definition contained in 910A

“retail client” has the meaning set out in 761G;

“Statement of Advice” (SOA) means a document that that must be given to a retail client in relation to the provision of personal advice in accordance with Part 7.7;

“[PS 136]” (for example) means an ASIC policy statement (in this example numbered 136);

“982A” (for example) means a clause of the Bill;

“s782” (for example) means a section of the Law.

What will happen next?

Stage 1

6 June 2001 ASIC policy proposal paper released

Stage 2

June 2001 Consultation period on the contents of this policy proposal paper

5 July 2001 Comments due on the policy proposal

13 July to September 2001 Drafting of policy statement

Stage 3

Late September 2001 Policy statement released

Your comments

You are invited to comment on the proposals and issues for consideration in this paper. All submissions will be treated as public documents unless you specifically request that we treat the whole or part of your submission as confidential.

Comments are due by Thursday 5 July 2001 and should be sent to:

Roxanna Irvin
FSR Project Office
Regulatory Policy Branch
Australian Securities & Investments Commission
GPO Box 4866
Sydney NSW 1042
email: FSRProjectOffice@asic.gov.au

You can also contact the ASIC Infoline on 1300 300 630 for information and assistance.

Related papers

This policy proposal paper is one of a set of four proposal papers issued together in June 2001 on the implementation of the *Financial Services Reform Bill 2001*. As outlined in our paper *Building the FSRB Administrative Framework* (April 2001), we issued an earlier set of policy proposal papers in April 2001. We intend to issue further policy proposal papers in the coming months all related to the implementation of the Bill.

The policy proposal papers issued together in June are:

- *Licensing: Principals and representatives*
FSRB Policy Proposal Paper No 6
- *Licensing: External and internal dispute resolution procedures*
FSRB Policy Proposal Paper No 7
- *Licensing: Discretionary powers*
FSRB Policy Proposal Paper No 8
- *Approval of codes*
FSRB Policy Proposal Paper No 9

The earlier policy proposal papers issued together in April are:

- *Building the FSRB Administrative Framework – Policy to implement the Financial Services Reform Bill 2001*
- *Licensing: The scope of the licensing regime: Financial product advice and dealing*
FSRB Policy Proposal Paper No 1
- *Licensing: Organisational capacities*
FSRB Policy Proposal Paper No 2
- *Licensing: Adapting IPS 146 to the Financial Services Reform regime*
FSRB Policy Proposal Paper No 3
- *Disclosure: Product Disclosure Statements (and other disclosure obligations)*
FSRB Policy Proposal Paper No 4
- *Disclosure: Discretionary powers and transition*
FSRB Policy Proposal Paper No 5

- *Licensing Process Guideline: How do you get an Australian Financial Services Licence?*

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