



SEPTEMBER 2015

Welcome to the September 2015 Update

This month we have an interesting article regarding the life of a personal guarantee, an article about gold, and one about the requirement for accountants to hold a financial services license. The latter is a rather long article but gives a good insight into the situation that accountants will face in 2016. Worth reading!

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What happens to a personal guarantee if you die?

Brian Herd

A personal guarantee is a promise to pay someone a debt that is owed by somebody else.

Usually a personal guarantee is only called upon if the person who owes the money doesn't pay it when they have to.

Parents & Grandparents Forever

It is remarkable how many parents give personal guarantees for their children's or even their grandchildren's debts. Many of us seem to believe that we never stop being a parent or a grandparent.

Personal guarantees, however, can be a serious and risky commitment, especially in our later lives. The worst case we have seen was a personal guarantee given to a financier by a 76-year-old father for his 47-year-old son's \$820,000 debt associated with a hydroponic herb farm that went bad.

Upcoming Events

Perth Information Meeting

Garry Davis - Director Specialist Share Education
Wembley Downs Tennis Club, Cnr Morden & Ednah Streets, Wembley Downs WA
6th October 2015 7.30pm

Melbourne Information Meeting

David Bassanese and Michael Kemp
Telstra Conference Centre, Room 1, Level 1, 242 Exhibition St, Melbourne VIC
6th October 2015 7.00pm

Blackburn Discussion Group

7th October 2015 7.15pm

Brisbane Information Meeting

Paul Burbidge: Managing a portfolio
Perpetual Private Wealth, Level 15, Central Plaza 1, 345 Queen Street, Brisbane QLD
7th October 2015 1.30am

Canberra Discussion Group

12th October 2015 7.30pm

Adelaide Information Meeting

David Bassanese - Chief Economist
BetaShares
The German Club - Senatoren Room, 223 Flinders Street, Adelaide SA
13th October 2015 7.00pm

What happens to a personal guarantee if you die? (Cont'd)

Of course, if you have multiple children and provide financial benefit to some and not others while you are alive, the tension that creates in your family is obvious.

A tricky, sticky issue

Quite apart from the prudence of giving a guarantee, however, there is another tricky issue that can arise – namely, what happens to the personal guarantee you gave when you were alive, when you die?

The effect of death

A personal guarantee will usually last as long as the associated debt is outstanding. If you die while the personal guarantee is still alive, what does that mean for your estate?

In a nutshell, usually – and subject to the terms of the document – the guarantee does not die with your death. Instead, your estate continues to be liable under your personal guarantee. Can you imagine the consequences of that!

Here are just a few:

- Your estate cannot be finalised until the personal guarantee ends, i.e. when the related debt is paid.
- If the debtor defaults in paying the debt, your estate will be called upon under the guarantee to meet the debt.
- If the guarantee was given for the benefit of one of your children, the other children who are beneficiaries of your estate will not be pleased, to say the least, particularly if the guarantee is called upon and, as a consequence, they lose some or all of their entitlements.

What to do?

Here are some options.

- As always, one of your options is to do nothing and leave the guarantee in place and hope like hell that it won't come home to haunt you and your beneficiaries.
- See your lawyer about the effect of your death on the terms of your particular personal guarantee and how you might adjust your will to take into account the possibility of the guarantee falling on your estate's shoulders.
- Explore the possibility of getting personal guarantee insurance to protect you or your estate if the guarantee is called upon.

- See if you can get out of the guarantee – usually extremely difficult unless some other form of security is offered to replace it.

In the end – and it is easy advice to give – the best solution is not to give personal guarantees. Problem is, even when our instinct says don't do it, it is often hard to say no to our children, particularly when saying yes may mean our children can put bread on the table of our grandchildren.

If you do want to do it, at least get some good advice beforehand to assess what you can do to reduce the potential impact on you and your estate. Otherwise, you won't be leaving generous benefits to your children but, rather, some loathsome burdens.

Brian Herd is a Partner, Elder Law Services, CRH Law
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AIA Annual General Meeting
The Chatswood Club
11 Help Street Chatswood NSW
Wednesday 14th October at 8.30pm

The Death of Gold.....Or Not!

Jordan Eliseo

Gold prices fell to their lowest level in years in early July 2015. A negative reaction to China's upgraded national gold reserve announcements added to already weak sentiment, and saw the price of the yellow metal fall below USD \$1100z.

The latest bout of weakness compounds a difficult period for the precious metal, which hit a cyclical top back in 2011, when gold was trading closer to USD \$1900oz.

Since then, a bull market in listed equities, a USD rally, declining inflation and a huge sell off in commodities like oil and iron ore have all helped push gold prices considerably lower.

Expectations of an imminent Fed rate hike are also contributing to the negative sentiment, somewhat surprising as three of the fastest periods of gold price

appreciation (191-74, 1976-80 and 2001-07) occurred when the Fed was hiking rates aggressively.

But with no catalysts on the immediate horizon, bullish gold forecasts are almost impossible to come across, whilst a swathe of analysts have hit the headlines recently, with predictions of a further collapse in prices.

In the past few weeks we've seen gold described as 'pet rock' by the Wall Street Journal, whilst other headlines from Bloomberg, Marketwatch and the like have stated;

- Investors see no reason to buy Gold
- Why gold is falling and won't get up again
- Gold may have 'much more downside'
- Gold's slump is here to stay

So bad is sentiment today that one particularly bold journalist was even willing to claim that the sell off in metal prices this past month represented "the Death of Gold".

Is Gold Dead?

So is this pessimism towards the precious metal market warranted, or should prudent investors instead be looking at the recent sell off in the bullion market as an opportunity?

We think the latter, and for a number of reasons.

Firstly, the last 4 years have seen a huge divestment from gold ETFs, and a quite remarkable change in net positioning in the gold futures market.

Looking at ETFs first, and we note that since 2012, there have been close to 1,000 tonnes sold out of these vehicles, with total remaining holdings back to a level last seen prior to the onset of the GFC.

In the futures market, hedge funds are actually net short gold today, something we haven't seen in over a decade, as the following chart highlights.

Gold Net-Position

Hedge funds are net-short for the first time since data begins in 2006.



Source: CFTC

Bloomberg

As you can see, back in 2011, hedge funds were net long approximately 250,000 futures contracts, with a record

number willing to bet on higher prices. Today, AFTER the price has dropped 40% in USD terms, none of them are long, and most want to bet on falling prices.

As such, it's obvious that nearly everyone that wanted to sell gold has already sold, with the turmoil in the sector also hitting gold stocks, where record volumes were traded in mid July when the market crashed over 10% in a day.

That's capitulation selling, and it's a bullish sign.

Another supportive element will be role of central bank gold purchases, which turned net positive in the aftermath of the GFC. It's quite instructive that the world's most powerful financial institutions see it as prudent to build their gold reserves, and they are likely to be buyers for many years to come.



On that note, we think the market miscalculated with their negative reaction to the latest Chinese gold announcement, for a number of reasons. Firstly, it is worth mentioning that China does not just hold physical gold through the People's Bank of China (PBOC). They can also hold gold through the State Administration of Foreign Exchange (SAFE), and the China Investment Corporation (CIC).

One of the major functions of SAFE is to manage gold reserves, whilst the CIC is a Chinese sovereign wealth fund, with several hundred billion dollars invested in it, nearly a quarter of which is in long-term investments, which include commodities specifically.

It is also worth noting that the China Gold Association is on record as saying China should look to build a total gold reserve of over 8,000 tonnes.

Bottom line: China, and other emerging market central banks will be buyers of physical gold for a long time.

A final catalyst for gold will be eventual portfolio reallocations by Western investors. Across the entire developed world, equity markets are at or close to all time highs, as are fixed income markets, as is property. This is despite low growth, an unresolved global debt burden, weak earnings and a lack of business capital investment.

As such, it will be incredibly difficult for investors to repeat the returns of the past six years between now and 2020, and with real cash rates negative, it's only natural that more investors will turn to gold.

This is something we're seeing at ABC Bullion already, with sales to SMSF Trustees quadrupling since the start of the year, predominantly in response to interest rate cuts by the RBA.

“When all the experts and forecasts agree—something else is going to happen” – Bob Farrell

The final reason to be optimistic about the future of gold prices is the overwhelming pessimism toward the market that we are seeing from the majority of gold market commentators, analysts and fund managers.



Buying assets when they're unloved, and when no one wants to buy them is a much better strategy than buying assets when everyone loves them.

Indeed seeing a headline like the “The Death of Gold” can't help remind us of arguably the most famous Business Week headline of all time, which hit the press back in August of 1979.

Titled “THE DEATH OF EQUITIES”, it is the most frequently cited example of why investors should do the exact opposite of what the headlines in the financial media imply they should do, for the simple reason that this headline almost marked to the day the beginning of one of the greatest stock bull markets of all time.

Back then, everyone wanted to buy gold, and no one wanted to buy stocks, even though that's exactly what they should have been doing. Today, some 35 years later, the situation is completely reversed, with optimism towards financial markets at all time highs, whilst gold is universally loathed as an investment choice.

In all likelihood, the headlines will be as wrong today as they were back in August of 1979, whilst those who have recently dumped gold may well have caused the capitulation event that typically marks the bottom of any bear market.

Prudent investors should treat this period as a buying opportunity, with gold set to reclaim its all time highs between now and the end of the decade.

Jordan Eliseo is Chief Economist at ABC Bullion

Accountants planning to have or not to have an Australian Financial Services Licence after mid 2016

By Daniel Butler (dbutler@dbalawyers.com.au)

I have recently presented many seminars around Australia on whether an accountant requires an Australian Financial Services Licence ('Licence') after 30 June 2016. The interest and feedback gathered from this round of seminars has been very insightful.

While the actual number of limited Licences that have been issued to date by ASIC is still relatively low compared to what was expected, there are many advisers I came across during my travels that are some way through the process of either applying for a Licence or seeking to become an authorised representative of an existing Licence holder.

I have also been advising a number of accounting firms on the strategy which may best work with their firm and their main options. Indeed, quite a number of our accounting firm clients intend to continue to operate without a Licence providing the services they have for many years.

The following is a brief overview of some of the main issues and decisions for accountants to consider. All references below are to the *Corporations Act 2001* (Cth) ('CA') and the *Corporations Regulations 2001* (Cth) ('Regs') unless stated otherwise.

Recognised accountant's exemption

Broadly, the current recognised accountant's exemption authorises a recognised accountant to provide advice in

relation to the acquisition and disposal of an interest in an SMSF without the need to hold a Licence (reg 7.1.29A of the Regs which ceases on 30 June 2016). A recognised accountant is a member of The Chartered Accountants Australia and New Zealand (formerly known as The Institute of Chartered Accountants in Australia), Certified Practising Accountants and Institute of Public Accountants.

Thus, accountants will not be able to rely on an exemption from advising in relation to the acquisition and disposal of an interest in an SMSF or superannuation from mid-2016 unless they have a Licence.

When is a Licence required?

This raises the question of when does an accountant require a Licence? We therefore briefly analyse the legislative basis below of when a Licence is required.

A person who carries on a financial services business must hold a Licence covering the provision of the financial services (s 911A(1)).

A person, provides a financial service under s 766A(1) if they:

- (a) provide financial product ('FP') advice (s 766B); or
- (b) deal in a FP (s 766C).

A FP, under s 763A(1), is broadly a facility through which a person does one or more of the following:

- (a) makes a financial investment (s 763B);
- (b) manages financial risk (s 763C).

FP advice, under s 766B(1), means a recommendation or a statement of opinion that:

- (a) is intended to influence a person in making a decision in relation to a particular FP or class of FPs; or
- (b) could reasonably be regarded as intended to have such an influence.

As you can see from the above, the provision of FP advice or dealing in a FP invokes the requirement to be Licensed. Dealing in an FP includes acquiring, disposing or varying a FP. It is quite easy for an accountant to be involved with the dealing of a FP, eg, where they assist with the rolling-over of superannuation balances from a public offer superannuation fund to an SMSF.

Also, many accountants now use documentation supply services when setting up say a new SMSF that also sets up a bank or cash deposit account. These accountants could be 'dealing' in a FP and would be contravening the CA unless the accountant is Licensed or makes appropriate adjustments to their business operations and provides the appropriate disclosures and disclaimers.

What can an accountant without a Licence do after 30 June 2016?

From mid-2016 accountants without a Licence will need to ensure that they comply with the CA or risk being

subject to a range of penalties and legal ramifications. The main exemptions accountants can rely on include:

Factual advice.

Taxation advice.

Traditional accounting services, eg, preparing financial statements, auditing or valuing a business.

Broad asset allocation advice.

Advice which does not involve a financial service (often referred to as 'execution only services').

Many accountants without a Licence are comfortable moving forward and sticking to the above exemptions. We now analyse each of the above in more detail.

Factual advice

An accountant can provide objective and factual information that is not intended to influence a person's decision on a FP without needing to hold a Licence as such advice is not FP advice. ASIC regulatory guides 36 and 244 provide details on what factual advice and FP advice is.

An accountant can, for example, advise a client that reg 4.09 of the *Superannuation Industry (Supervision) Regulations 1994* (Cth) ('SISR') requires an SMSF to have an investment strategy. The accountant would need to be careful however on what further advice is provided in regards to finalising such a strategy.

An accountant that provides a template investment strategy to a client which, for example, states that insurance has been considered but is not needed may be at risk. Let's assume, for instance, that the accountant established an SMSF for a mum and dad client and this mum and dad couple rolled their super out of a large industry superannuation fund that provided insurance on death and disablement. Now assume the dad passes away. The wife may allege that the accountant provided FP advice in recommending they establish an SMSF, that they then roll-over their super moneys to the SMSF, that they dispose of their insurance cover in the industry fund and that the mum and dad both accepted the accountant's recommendation not to effect any insurance in the SMSF. Thus, the mum is now suing the accountant for damages reflecting the loss of insurance cover, costs and interest.

Thus, accountants need to carefully assess these types of risks as not having a Licence will expose them and their professional indemnity insurance.

Taxation advice

Advice given by a registered tax agent (within the meaning of the *Tax Agent Services Act 2009* (Cth) 'TASA') that is given in the ordinary course of activities as such an agent and that is reasonably regarded as a necessary

part of those activities is also excluded under s 766B(5)(c) and reg 7.1.29(4).

Many accountants are surprised to learn that TASA only provides authority for a registered tax agent to provide advice on Commonwealth tax law but not State or Territory laws such as stamp duty, land tax and payroll tax. Such advice therefore falls under legal advice which should be provided by a lawyer in the jurisdiction.

Accountants need to be careful how they phrase their advice especially if it is in writing. An accountant who does not have a Licence can, for instance, discuss what a member's concessional contribution cap for FY2016 is and that a member may be entitled to a tax deduction for super if they satisfy the appropriate tests in the *Income Tax Assessment Act 1997* (Cth) ('ITAA 1997'). However, they should not simply recommend a member to contribute \$30,000 to superannuation as that is likely to be construed as FP advice. Further, the accountant providing such tax advice should issue a disclaimer that he or she does not offer FP advice nor do they have a Licence.

This may result in some practical difficulties as many recognised accountants who do not wish to obtain a Licence may not realise that they are providing FP advice when they are advising their clients on their superannuation strategies. This is one risk area for accountants who may inadvertently provide FP advice without realising it. Care in providing verbal and written advice will minimise this risk.

Note that financial planners can now provide certain tax advice under TASA and have their own status as 'registered tax (financial) advisers'. The Tax Practitioners Board recently confirmed that for the financial year that ended on 30 June 2015, 16,329 registrations of 'registered tax (financial) advisers' were recorded. However, as noted below many accounting firms are registered under TASA as tax agents and their 'associated' FP entity may therefore not become registered as a 'registered tax (financial) adviser'.

Traditional accounting services

Accountants can continue to provide a range of traditional accounting services that are best suited to be handled by an accountant under Reg 7.1.29. These services include advice in respect of:

- business planning, eg, establishment, running or sale of a business including the best structure and set up such structure;
- compliance, eg, compliance with the CA and Regs, eg, a company must lodge an annual statement;
- financing the acquisition of assets;

- insurance, eg, general risk management advice on insurance;
- share valuations and due diligence;
- tax issues; and
- superannuation (subject to the recognised accountant's exemption in Reg 7.1.29A which is to be phased out for SMSFs in mid-2016).

While this appears to cover a broad range of services that accountants can provide, any FP advice in relation to these services has to be reasonably necessary to the FP advice to be exempt from providing FP advice under Reg 7.1.29(1). By way of example, the setting up of a \$2.00 company for the mum and the dad who are to become the directors and shareholders of that company is FP advice and potentially dealing in a FP, but would be exempt where this FP advice relates to an eligible accounting service, such as advising the mum and the dad on business structures.

Broad asset allocation advice

A recommendation provided to a person about the allocation of the person's funds that are available for investment among one or more of the following:

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

is deemed not to be financial service under Reg 7.1.33A. This advice might, for instance, cover an accountant saying to a client that in general it is better for someone to have a diversified portfolio of investments via one or more of cash, shares, managed fund investments and property. However, an accountant would not be authorised under this Reg to say that no more than 50% of your money should be invested in a particular asset class.

Advice which does not involve a financial service

An accountant that is told what to do and simply facilitates a client's instructions via an execution only service of say setting up an SMSF is generally not providing a financial service. This is because the accountant may be able to provide a service that results in no influence or recommendation provided in accordance with s 766B. However, it may appear that an accountant is dealing in a FP where they, for instance, assist with the roll-over of superannuation moneys from a public offer superannuation fund to an SMSF.

Naturally, such an accountant should also not receive any commissions or fees from the supply of FPs. A disclaimer setting out that the accountant has no Licence and does not provide FP advice should be issued.

Example — execution only services:

Jack is an accountant with no Licence who does not provide FP advice. A client comes to Jack and says he knows what he wants and instructs Jack to:

- set up an SMSF;
- assist to roll-over assets into the SMSF;
- provide factual information about different super choices;
- value SMSF assets;
- advise on the SISA investment rules;
- provide a pro-forma generic investment strategy; and
- advise on a pension (transition to retirement income stream) strategy and prepare the documents.

The [‘Financial Advice and Regulations for the accounting profession’](#) (‘Accountants Guide’) published by CAANZ and CPA recommend that:

where a member who is unlicensed is requested by a client to set up a SMSF, that is provide an execution only service, the member refers the client external resources first in order to assist the client to validate their decisions.

Such ‘external resources’ might include:

[ATO website](#)

[CPA website](#)

The adviser will still be legally at risk by undertaking some of the above matters if the client was to allege that they were provided FP advice and sue for damages, eg, the investments substantially decreased in value or as explained above, the client’s spouse was no longer covered by insurance in the SMSF and died or was rendered disabled. Even if such an accountant issued appropriate disclaimers, a vexatious litigant may sue and the accountant would need solid evidence by way of file records and correspondence that clearly evidenced what the accountant’s role was and scope of engagement.

The old saying ‘*if you want an adviser’s real opinion, don’t ask for it in writing*’ may result in a client seizing on and selectively hearing the adviser state ‘yes, this can be done’, without picking up on the subsequent qualifications and disclaimers. It is imperative that accountants have sound records and file notes of conversations and write to clients confirming that the conversation was based on one of the exempt services that they are authorised to provide and did not

constitute FP advice with an appropriate disclaimer unless they have a Licence.

The main options for accountants:

Do nothing

This is not a good option even if an accountant does not obtain a Licence. From June 2016, accountants need to ensure that their services will not give rise to any undue risk. This may result in curtailing execution only services to what is clearly not ‘dealing’ in a FP. A complete review of documentation and communications to clients should also be undertaken to ensure that no FP advice or financial services are provided as the firm does not have a Licence.

An accountant who does not obtain a Licence may wish to refer clients to an appropriate Licence holder and in doing so, should issue a written statement that sets out that they do not have a Licence and the appropriate disclaimers and confirm whether they obtain any commissions or fees from that referral in accordance with Reg 7.6.01(1)(e).



Obtain a Licence

An accountant has a range of options to consider in obtaining a Licence. The main options include: Obtain a Licence - this may place considerable responsibility and extra administration on a firm to maintain the relevant documentation and processes to provide advice in compliance with all applicable law and regulations.

Become an authorised representative (‘AR’) of a Licence Holder - there are many on offer and if you do choose to become an AR there are many factors in addition to cost that should be considered to ensure the Licence holder is suitable. The due diligence period associated with determining which Licence holder or dealer group is suitable can take considerable time.

In obtaining a Licence or becoming an AR, a key factor to consider is that the Licence may be limited in its authorisation, eg, superannuation/SMSF or could include other authorisations, eg, insurance, managed investment products, etc.

Many accountants who start on the journey like to consider the extra functionality they may need to provide a more rounded service. Extra authorisations could be added over time if say an accountant commences with a limited Licence and then seeks to extend their service offering.

Consider business structure

Accountants should give careful consideration to establishing a separate legal entity such as a separate company or other appropriate structure for their Licence and FP activities. This may allow the opportunity to 'rebrand' and communicate with clients about the separate and additional services that will be on offer.

Having a separate legal entity is also the best way to manage risk. This should assist in ensuring that the traditional accounting services are offered by one entity and the financial services by another entity with different letterheads, etc.

I know of numerous examples where the professional indemnity insurers have denied liability on the basis that it was not clear on which '*side of the fence*' the advice was provided.

Example — who provided the advice?

In many cases, the accountant servicing the client is providing traditional accounting services, tax advice and FP advice. Typically, the accounting practice (as distinct from the related but separate FP entity) provides the traditional accounting services and tax advice including the preparation and lodgement of tax returns. Indeed, the accounting firm is usually registered with the Tax Practitioners Board under TASA. However, the FP advice should have been provided under the separate FP entity. Consider the situation where the accountant is providing traditional accounting services and FP advice in the same meeting, whether it is likely that the respective records of each of the accounting and FP entities reflects the discrete advice given by the accountant on behalf of

each entity. Further, if tax advice is provided, was it provided under the accounting entity which is the registered tax agent or was it provided under the FP entity of the accountant on behalf of the FP entity and was that FP entity that have a 'registered tax (financial) adviser'?

As you will no doubt understand from the above example, a vexatious litigant client could make allegations that the FP advice provided by the accounting firm was not Licensed or vice versa. It would then be up to the respective separate entities to defend themselves against such allegations, hopefully with sound records.

RG146 Training on SMSFs

DBA Network has recently prepared an online SMSF Core Course that provides an in-depth learning experience that can be undertaken at your own pace. The online version covers 10 key units of SMSF core knowledge, providing intensive materials and video training on each topic. Each unit can be undertaken individually, or can be undertaken as part of the full SMSF Core Course. This course constitutes a significant portion of the RG146 training towards a limited Licence to provide SMSF/Superannuation advice, the balance of which can be undertaken through Integrity Education which is an independent registered training organisation. For more information or to register, [click here](#).

Conclusions

There are a number of key strategic decisions to make when obtaining a Licence or deciding not to have one. DBA Lawyers is well placed to provide legal advice and assistance as needed.

Daniel Butler, DBA LAWYERS

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