



Guidelines for IPA member referrals of clients for financial services

1. These Guidelines

These Guidelines were prepared by Maddocks lawyers for IPA members. The legal information provided in and accompanying these Guidelines is general only, and is provided by Maddocks and not the IPA. The IPA cannot and does not provide legal advice. Any IPA member who requires further advice about these Guidelines should speak with their lawyer or Maddocks about the advice they require. IPA members should also obtain and read ASIC Regulatory Guide 36 Licensing: Financial product advice and dealing June 2016.

2. Background

The act of referring a client to a financial adviser for the provision of a financial service, including providing financial advice is, in itself, providing a financial service.

Unless an exemption or exception applies, a person (Referrer) who refers another person (Referred Person) to a financial adviser for advice must hold a financial services licence. From 1 July 2016, the exemption previously available for accountants under Regulation 7.1.29A of the Corporations Regulations 2001, no longer applies.

A key exception is if the referral is a 'mere referral' that consists only of giving the Referred Person information about the services that a financial adviser can provide and how to contact the financial planner. However, a mere referral also has restrictions, including in relation to the disclosure of benefits the Referrer or the Referrer's associate receives in connection with making the referral.

There are also other compliance issues that a Referrer must consider in making the Referral.

The Guidelines set out below are to assist an IPA member with compliance in making a referral.

3. The Guidelines

- 3.1** Only refer a client to a financial planner who is an AFS Licence holder or an AFS Licence authorised representative.

Verify the AFS Licence of any financial advisor to whom you may refer a client before the first referral to that financial advisor and then routinely to ensure their AFS Licence has not been suspended or terminated

- 3.2** Only refer a client to a financial adviser for financial advice within the scope of the adviser's authorisation.

Check the scope of the financial planner's AFS Licence, understand the advice your client requires and only make the referral if they match.

- 3.3** Only refer the client to the financial adviser by giving the client information about the services the financial planner can provide and how to contact the financial planner.

Use the Referral Form to make the referral.

- 3.4** Do not make the referral by directly contacting the financial planner. Avoid representations regarding the quality of the services the financial planner can provide.

Use the Referral Form to make the referral.

- 3.5** Do not pass on any of the financial planner's marketing collateral. Disclose benefits at the same time as making the referral.

Use the Referral Form to make the referral.

- 3.6** Obtain the client's consent to provide the financial planner with information.

The retained copy of the Referral Form includes a consent to the disclosure of information. Ensure you retain this and do not pass on any information about the client unless the client has signed the consent.

- 3.7** If the client does not consent to the disclosure of information, do not provide the financial planner with information.

- 3.8** Keep records of referrals.

Keep the retained copy of the Referral Form. You can scan it and retain an electronic copy only, so long as you can store it where it is easily retrievable.

4. Corporations Act

4.1 *Why is the Corporations Act relevant?*

Chapter 7 of the Corporations Act regulates financial services and markets.

A person who provides a financial service, including providing financial product advice, must either hold an AFS Licence which authorised them to do so or must be an authorised representative of someone who holds an AFS Licence and the financial service must be within the scope of the authorisation.

A person provides a financial service if they provide financial product advice, deals in a financial product, makes a market for a financial product, operates a registered scheme, provides a custodial or depository service or engages in conduct that is prescribed by regulations to be a financial service. A person who endorses financial product advice, or causes or authorises the provision of financial product advice is also deemed to be providing financial product advice.

A financial product is a facility through which or through the acquisition of which a person makes a financial investment (for example, buying shares), manages a financial risk (for example, purchasing insurance), or makes a non-cash payment (for example, using a PayPal account).

4.2 *Financial product advice*

A person provides financial product advice when they make a recommendation or a statement of opinion, or a report of either of those things that is intended to influence a person or persons in making a decision in relation to a particular financial product, or a class of financial products, or an interest in a particular financial product or class of financial products.

4.3 Compliance requirement

Unless an exemption applies, a person who provides financial product advice must hold an AFS Licence.

4.4 Exemptions

There are 2 possible exemptions that can apply to an IPA member referring a client to a financial advisor. However, the IPA member must meet the specific requirements of the relevant exemption for it to apply.

The exemptions are as follows:

Mere referral:

A person who refers a second person to an AFS Licence holder for the provision of financial services is not required to hold an AFS Licence if:

- a) the referral consists only of:
 - i. informing the client that the financial advisor, who must be an AFS Licence holder or an authorised representative of an AFS Licence holder, is able to provide a particular financial service; and
 - ii. giving the client information about how to contact the financial advisor; and
- b) at the time the information is given to the client, the IPA member discloses to the client, in the same form as the information that is given to the client any benefits (including commission) that the IPA member or an associate of the IPA member may receive in respect of, or that are attributable to, the financial service to be provided.

Authorised representative:

A person who refers a second person to an AFS Licence holder for the provision of financial services is not required to hold an AFS Licence if:

- c) the referral consists only of:
 - i. informing the client that the financial advisor, who must be an AFS Licence holder or an authorised representative of an AFS Licence holder, is able to provide a particular financial service; and
 - ii. giving the client information about how to contact the financial advisor; and
- d) the referrer is, at the time of the referral, a representative of the AFS Licence holder or a related body corporate of the AFS Licence holder.

5. Privacy

5.1 Why is privacy relevant?

All accountants hold personal information in respect of their clients. An accountant may also hold personal information about his or her client that constitutes sensitive information for the purposes of the Privacy Act.

The Privacy Act contains a number of obligations on entities that collect, hold and use personal information. Set out in Schedule 1 to the Privacy Act are 13 principles that apply to the collection, holding, use and disclosure of personal information called the Australian Privacy Principles (APPs). Section 15 of the Privacy Act provides that an entity must not do an act, or engage in a practice, that breaches an APP.

5.2 What is personal information?

Personal information is information or an opinion about an identified individual, or an individual who is reasonably identifiable:

- a) whether the information or opinion is true or not; and
- b) whether the information or opinion is recorded in material form or not.

5.3 Restriction on disclosure

APP 6 restricts an entity that holds personal information about an individual from using the personal information or disclosing that personal information to another person unless:

- the individual has consented to the use or disclosure; or
- the individual would reasonably expect the personal information to be used or disclosed in that way.

If an accountant refers a client to a financial advisor and the referral consists merely of:

- informing the client that the financial advisor, who must be an AFS Licence holder or an authorised representative of an AFS Licence holder, is able to provide a particular financial service; and
- giving the client information about how to contact the financial advisor

6. Australian Consumer Law

6.1 *Why is the Australian Consumer Law relevant?*

The Australian Consumer Law contains, in addition to provisions regulating consumer transactions, provisions that apply to aspects of interactions that are between businesses (i.e. the Australian Consumer Law is not limited to consumer transactions) and so are not consumer transactions. Accordingly, some parts of the Australian Consumer Law will apply to interactions between an accountant and his or her client, whether or not the client is an individual, corporation, trust or partnership.

6.2 *How can the Australian Consumer Law apply to referrals?*

Section 18 of the Australian Consumer Law provides that:

A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

Advising a client that a financial planner:

- can provide a particular financial service that the financial planner is not authorised to provide; or
- is particularly skilled or knowledgeable in respect of a particular subject matter without having a reason to believe the financial planner has that skill or knowledge, could mislead or deceive the client. If the client ultimately suffered a loss, or did not gain an expected benefit, but could not seek recourse against the financial planner, the client could seek recourse against the accountant for misleading or deceiving the client.

The Australian Consumer Law contains other provisions relating to misleading or deceptive statements in relation to services.

Accordingly, it is important that any referral by an accountant of a client to a financial planner:

- does not include any particular representation about services that the financial planner can provide unless the accountant is certain that the financial planner can provide those services; and
- does not include a representation about the skill or knowledge of the financial planner.

7. Definitions

Unless the context requires otherwise, in these Guideline:

AFS Licence means an Australian Financial Services Licence issued by the Australian Securities and Investments Commission under Chapter 7 of the Corporations Act.

APP means an Australian Privacy Principle set out in Schedule 1 of the Privacy Act.

Australian Consumer Law means the Australian Consumer Law as set out in Schedule 2 of the Competition and Consumer Act 2010 (Cth).

Corporations Act means the Corporations Act 2001 (Cth).

Privacy Act means the Privacy Act 1988 (Cth).

Referral Form means the current IPA Financial Advice Referral Form.

⁴In *Bathurst Regional Council v Local Government Financial Services Pty Ltd (No 5)* [2012] FCA 1200, the Federal Court found, among other things, that ABN Amro and Local Government Financial Services Pty Ltd had each engaged in misleading and deceptive conduct in publishing materially false information as to the meaning and reliability of Standard & Poors' rating of complex financial instruments sold to local governments.

⁵See ss 29, 34, 151 and 156 of the Australian Consumer Law.