One of the main objectives is to ensure consumers can easily compare functionally similar products and make informed decisions about the acquisition of those products. Chapter 7 of the Corporations Act creates:

- a consistent product disclosure regime for all retail financial products (§8-220) and streamlines existing disclosure requirements (§8-290)
- a concept “financial services”, which includes dealing, advising, making a market, providing a custodial or depository service and operating a registered scheme (§8-230)
- a single uniform licensing regime that applies to all participants in the financial services industry (§8-250).

The licensing provisions replaced a number of regulatory requirements including:

- those previously found in Ch 7 and 8 of the Corporations Act
- all of the Insurance (Agents and Brokers) Act 1984
- Life Code of Practice
- parts of the SISA.

**Note**

The concept of a financial product and the provision of financial services are the fundamental principles to the operation of the Corporations Act.

**§8-220 What is a financial product?**

**Note**

The definition of a financial product is central to an understanding of what financial services are (§8-230). When an adviser provides financial services in relation to financial products, Ch 7 of the Corporations Act applies.

A financial product is a “facility” through which a person does any of the following:

- makes a financial investment — an investor gives money to another person and that other person uses it to generate a financial return or other benefit for the investor
- manages a financial risk — avoids or limits the financial consequences of particular circumstances happening, or
- makes a non-cash payment or payment by cheque, electronic payment system, travellers cheques or credit or debit card.
The range of financial products covered by Ch 7 of the Corporations Act is wide, including:
- superannuation
- banking
- general and life insurance
- managed funds
- securities
- derivatives
- smart cards
- non-cash payment facilities.

**Margin lending**

From 1 January 2010, margin lending became a financial product under the Corporations Act.

**What are the new requirements for margin lending?**

Issuers and advisers of margin lending facilities must comply with new licensing, conduct and disclosure requirements.

The Financial Modernisation Act, among other things, makes margin lending facilities a financial product and requires that issuers and advisers of margin lending facilities hold an AFS licence authorising them to provide these facilities.

The same licensing, conduct and disclosure requirements that currently apply to financial services will apply to providers and financial advisers in relation to margin lending facilities. Margin lending facilities will be regulated in the same way as other financial products, such as managed investments and shares.

The legislation also imposes new responsible lending requirements on issuers of margin lending facilities and clarifies responsibility for providing notification of margin calls.

**Timeline for licensing of margin lending facilities**

<table>
<thead>
<tr>
<th>By 30 June 2010</th>
<th>Issuers and advisers of margin lending facilities must have applied for an AFS licence, or a variation to an existing AFS licence.</th>
</tr>
</thead>
<tbody>
<tr>
<td>After 30 June 2010</td>
<td>If issuers and advisers have not already lodged an application with ASIC for an AFS licence or a variation to an existing AFS licence, they must not issue or advise on margin lending facilities until they have been granted an AFS licence, or a variation to an existing AFS licence.</td>
</tr>
<tr>
<td>From 1 January 2011</td>
<td>Issuers and advisers will be subject to new conduct and disclosure requirements.</td>
</tr>
</tbody>
</table>
New requirements for margin lending

Lenders will be required to:

- hold an AFSL
- have external dispute resolution arrangements
- disclose fees and commissions before lending
- follow responsible lending obligations which includes assessing a person's "true" loan-to-value ratio.

Lenders will also be required to assess a person's "true" loan-to-value ratio, meaning that they will no longer assume that the money put forward as collateral for margin loan is not itself debt; for example, where people have been advised to take equity out of their family home and use this debt to leverage into buying shares through a margin loan.

The lender is responsible for notifying the client in the event of a margin call. However, the adviser can make this notification where the lender has made an arrangement with the advisor and the client has agreed to this.

This is an area that ASIC is closely examining when issuing licences that include margin lending or in varying licences to include margin lending to ensure appropriate contractual arrangements, as well as robust processes are in place.

Instalment warrants

Generally, superannuation funds are not permitted to borrow funds except in limited circumstances. Limited recourse borrowing arrangements, such as instalment warrants, are one of the exceptions permitted under the SIS Act, under subsection 67(4A). See s 15-360.

The government has introduced proposed regulations that would make these limited recourse borrowing arrangements financial products under the Corporations Act 2001 when entered into by regulated superannuation funds.

The Draft Regulations provide that:

- these limited recourse borrowing arrangements are financial products under the Corporations Act when acquired by superannuation funds
- these limited recourse borrowing arrangements are not a credit facility under the Corporations Act when acquired by superannuation funds, and
- an authorisation to advise and deal in derivatives is held under an Australian Financial Services Licence.

The Regulations are proposed to commence on 29 September 2010.
Implications for AFS licensees and advisers

The proposed Regulations would deem that an AFSL covering derivatives also applies to these limited recourse borrowing arrangements. Existing AFSL holders and their advisers with product and dealing authorisations covering derivatives will not need to re-apply for a separate AFSL to issue or provide advice about instalment warrants.

However those AFSL holders without an authorisation to advise and deal in derivatives will need to amend their licence.

What is not a financial product?

It is also important to understand what is not considered to be a financial product. There is a comprehensive list in the Corporations Act s 765A which includes:

- excluded or unregistered managed investment schemes, ie schemes where there are less than 20 investors and which are not promoted by a person who is in the business of promoting managed investment schemes
- health insurance
- insurance provided by the Commonwealth, states or territories including where they are joint insurers
- credit facilities
- reinsurance
- a facility for the transmission and reconciliation of non-cash payments
- a financial market, a clearing and settlement facility and a payment system operated as part of a clearing and settlement facility, and
- a foreign currency exchange contract that is settled immediately.

8-230 When is a financial service provided?

It is important to understand when an adviser is providing a financial service. An adviser is providing a financial service when:

1. providing financial product advice
2. dealing in a financial product
3. making a market for a financial product
4. operating a registered scheme, or
5. providing a custodial or depository service.

Each of these activities is discussed below.

1 (1) What is financial product advice?

An adviser will be providing financial product advice when a:

- recommendation
- statement of opinion, or
- report of a recommendation or statement of opinion,
COMPLIANCE

is provided with the intention to influence a person in making a decision in relation to a particular financial product or a group of financial products, or in the circumstances where some might reasonably expect the adviser had that intention.

**General v personal advice**

Advisers must understand when they are actually giving financial product advice and whether that advice is general or personal. This will determine the types of disclosure that must be given (§8-250) and the level of training that advisers are required to undertake (§8-260).

The following table highlights the difference between the two types of advice.

<table>
<thead>
<tr>
<th>Personal advice</th>
<th>General advice</th>
</tr>
</thead>
<tbody>
<tr>
<td>The adviser has considered one or more of the objectives, financial situation and needs of the person</td>
<td>The adviser did not consider any of the objectives, financial situation or needs of the person</td>
</tr>
<tr>
<td>A reasonable person might have expected the adviser to have considered any of those matters</td>
<td>A reasonable person did not expect the adviser to have considered any of those matters</td>
</tr>
<tr>
<td>All other financial product advice other than that covered under personal advice</td>
<td>All other financial product advice other than that covered under personal advice</td>
</tr>
</tbody>
</table>

**Warning about general advice**

Where general advice is given to a retail client, the providing entity (through the adviser) must warn the client that:

- the advice has been prepared without taking into account the client’s objectives, financial situation or needs
- the client should therefore consider the appropriateness of the advice in light of their own objectives, financial situation or needs before acting, and
- the Product Disclosure Statement (PDS) should be considered before making a decision.

Where general advice is given, such as at a seminar, clients must be warned that the advice does not take the client’s circumstances into account. The warning must be given at the same time as the advice and must be communicated by the same means.

In November 2005, ASIC announced relief for providers of general product advice which allows providers to give a shorter, simpler general advice warning when they provide oral general advice.

§8-230
The following warnings would all be sufficient under the class order [CO 05/1195]:

- "This advice is general, it may not be right for you"
- "This advice is not tailored, so you can’t assume it will be suitable for you"
- "This advice may not be suitable for you because it is general advice"
- "You will need to decide whether this advice meets your need because I haven’t".

Under the class order, the general advice warning needs to be given once in any telephone conversation or face-to-face meeting where general advice is provided to a retail client.

The class order was gazetted on 6 December 2005.

ASIC in RG175.43 has also indicated:

"Providers of general advice do not have to use the words in the class order but may develop their own words to convey this simpler warning. We consider it good practice for providing entities to consider the needs of their audience when deciding what words to use."

RG 175 and personal advice

RG 175.29 identifies factors which point to or indicate whether personal advice is being provided. It is worth familiarising yourself with these factors, which include whether:

- the adviser offered to provide personal advice (eg in the Financial Services Guide (FSG) or any other material that was given to the client before the advice was provided)
- the adviser had an existing relationship with the client where personal advice had previously been provided regularly
- the client requested personal advice
- the adviser requested information about the client’s personal circumstances
- the advice was directed towards a specific client
- the advice contained a general advice warning
- the advice appeared to be tailored to the client’s personal circumstances and whether it makes reference to those circumstances, and
- the adviser received or already possessed information about the client’s relevant personal circumstances.
Remember that this is an objective test, for example, the question is whether a reasonable person might expect the adviser to have considered the information in providing the advice.

Therefore, as a matter of best practice, if it is reasonable for the client's objectives, financial situation or needs to be considered, then on an objective basis, it is personal advice, regardless of whether the adviser believed that it was just general advice.

Remember also that the adviser need not consider all the client's relevant circumstances (eg the client's objectives, financial situation or needs) for the advice to be personal. If at least one of these is considered, then it is personal advice and the obligations and standards in relation to providing personal advice have to be met. It cannot be identified as general advice.

ASIC in RG 175.35 states that advice may be personal advice even when:
- it is not given face-to-face
- there is no direct contact with the client
- it only relates to one product
- it is given in a seminar
- the client is a body corporate, or
- the adviser did not (subjectively) intend to provide personal advice.

The FPA provide examples of how to make recommendations to advisers' clients. The Statement of Advice Guide example recommends that if an adviser is giving general advice to a retail client, the client should be given the following warning. This should be done at the same time as when the advice is given, and in the same way. If an adviser uses the SoA to give personal advice to their client, they may include the warning in the SoA.

This advice has been prepared without taking account of your objectives, financial situation or needs. You must therefore assess whether it is appropriate, in the light of your own individual objectives, financial situation or needs, to act upon this advice. If this advice contains information about a particular financial product, you should ensure you obtain a Product Disclosure Statement in respect of that product prior to making any decision to acquire that product.

It may be necessary to carefully tailor the warning, having regard to the completeness of the information which the adviser has on the product and whether or not a PDS or some alternative form of disclosure document is available.

Merely calling advice "general advice" does not make it general advice. An adviser may cross over into providing personal advice even though the adviser may believe that he or she is providing general advice or in fact is not providing any advice at all (eg in a preliminary discussion).
Exemptions

There are some exemptions from providing financial product advice, which means the Corporations Act does not apply, including situations where:

- an adviser is providing advice that does not relate to a financial product
- a registered tax agent provides advice in the ordinary course of business
- a lawyer provides advice about the matters of law, legal interpretation or the application of the law
- an accountant advises in relation to the preparation or auditing of financial statements (§8-250)
- information or estimate of the cost of a financial product is provided where that cost or estimate is based on the suggested value of an item
- a clerk or cashier performs administrative and support functions to an adviser, which does not involve judgment about a financial product, or
- the media publishes general financial product advice.

Further exemptions can be found in the Corporations Regulations 2001, reg 7.1.29 to 7.1.33F.

(2) Dealing in a financial product

Advisers are dealing in a financial product when they are:

- applying for or acquiring a financial product
- issuing or dealing with a financial product
- underwriting securities or managed investment interests
- varying a financial product
- disposing of a financial product, or
- arranging for a person to engage in any of these conducts.

(3) Making a market for a financial product

An adviser is providing a financial service when they make a market for a financial product. This refers to:

- regularly stating a price at which an adviser proposes to acquire or dispose of financial products on their behalf
- when others have a reasonable expectation that they can regularly affect transactions at the stated prices, or
- actions that do not comprise the operation of a financial market.

Tip

This financial service relates mainly to markets in securities and derivatives.

§8-230
(4) Operating a registered scheme

Operating a managed investment scheme that is registered under the Corporations Act represents a financial service. This refers to:

- giving advice in relation to interests in the scheme
- deals in interests in the scheme, and
- making a market for interests in the scheme.

(5) Providing a custodial or depository service

An adviser will generally provide a custodial or depository service to a client if there is an arrangement with the client (or someone else with whom the client has an arrangement) to hold a financial product or a beneficial interest in a financial product on behalf of the client.

\[\textbf{Checklist}\]

Once it has been determined that a financial service has been provided, an adviser needs to establish:

- whether the service is provided to a retail or wholesale client (§8-240)
- whether a licence or some other authorisation is required (§8-250), and
- what disclosure obligations must be met (§8-290).

§8-240 Retail or wholesale client?

Advisers are faced with significantly more detailed disclosure and conduct requirements when providing financial services to retail clients than to wholesale clients. This is due to the assumption that wholesale clients have a greater understanding and ability to rely upon their own resources compared to retail clients.

Review of retail/wholesale client distinction

The appropriateness of the current criterion under which a client is classified as retail or wholesale will be examined, under the FoFA reforms. The original test was designed to approximate a sophisticated investor, and this distinction has not been reviewed since its introduction in 2001.

The review will also include consideration of the current thresholds for determining wholesale or retail status.

§8-240