
COUNTDOWN TO FINANCIAL SERVICES REFORM

Q. We are a principal planning business that is part of a medium sized Australia wide Licensee group that is scheduled for transition on 1 January 2004. We are looking to review our business structure in the post FSR environment and are keen to understand the FSR impact on who owns the client?

This ancient question has been given fresh life. However, even with the FSR induced changes the old answers still apply, but there is a modern FSR twist.

The real question is not: who owns the clients but who enjoys control of the income that is generated and therefore can claim an interest in the relationship? It is now also common to ask: who controls the relationship with referrers?

Control is worked out through understanding the proper form of legal relationship between those who would claim the rights of the client. As a principal Authorised Representative we see the control issues reflected in your relationship with your Licensee, with your contracted and employee financial planners (that are authorised representatives of your Licensee) as well as your admin and support staff, and also certain of the key staff of your Licensee.

So the first question is: Which of these relationships is the one that is most important in terms of controlling (or influencing) the income flows? Put another way, where is the greatest fear of challenge of who owns the client? The next question is: What is the basis of the legal relationship and what does it say about control of the income flows? Once again, put another way; is the primary relationship one of employment or independent contractor? And is it in writing or not?

Now we get to the FSR point. If there is no written agreement, no matter what the form of the relationship may be, the *on behalf of* nature of the FSR relationship will mean that the Licensee owns the client. That is, the Licensee controls the income flows. And the Privacy Act principles will reinforce this.

Where there is no written agreement, the nature of the relationship, that is employee or independent contractor, will determine if the Licensee can exert rights against a former employee or contractor, or as in *Halliday's* case, the Licensee can even claim a loss of profits for up to 12 months for clients that have been taken.

The issue of control becomes very problematical for a principal Authorised Representative who has employed planners where the authorisation comes directly from the Licensee. FSR says that the Licensee has a direct relationship with clients but the employed planner of the principal Authorised Representative has their major commercial relationship with the Licensee! Just where the principal planner fits in is a matter of some challenge, a potential challenge to their business.

Where there is a written contract, the principles briefly mentioned above are not to be ignored, they may still have application. They are simply modified by the written terms of the agreement. Naturally, if the written agreement attempts to deal with the subject, particular attention must be put to the terms of that agreement.

Many of these agreements are being rewritten as a consequence of FSR. Certainly, there are aspects of current agreements that cannot survive an FSR transition.

Look to the words of the contract, what does it say about the right to direct future income flows arising from client investments? A right to direct future income flows is not enough, especially from a taxation perspective. In fact, without the benefit of being able to link the income flows with a business of financial planning, any payment (perhaps because of a BOLR or sale of the planning business) for the re-direction of an income flow is likely to be argued by the Taxation Office as fully income taxable, no capital gains tax concessions will apply. This can be corrected where the relationship with the client can be clearly stated as being part of the business, where the person who re-directs the income can lawfully claim to 'own the client' and has sold 'the rights to them'.

So let's return to the question: in the post FSR environment who owns the client?

FSR makes clear that a Licensee must have a direct relationship with the client. Because your planner business *acts on behalf of* the Licensee business, the Licensee has the direct relationship. Your relationship is therefore dependent on what your contract says, if you have a contract. If it is silent, or does not exist, the Licensee owns the client. In the absence of any specific rules the weight of FSR opinion is clearly in favour of the Licensee. Don't bemoan this since the weight of FSR opinion is that the liability burden also falls heavily on the Licensee.

If your agreement is of the old pre-FSR and it attempts to oust the Licensee, it has the potential to fail because it is contrary to law. However, if properly structured, the agreement can evidence a shared or mutual, but separate relationship with clients. Such an agreement will survive FSR.

But do not stop at the Licensee/planner relationship, as a principal Authorised Representative we assume that you are also interested in protecting your business, even if your Licensee may not because it has a come-and-go relationship with planners. So now the question is re-directed at your relationship with your staff and your contractors. Simply put, you need to ask all the same questions only now you do not have the benefit of the FSR presumption that you own the client, only your Licensee has this. Mind you, the nature of your Licensee's authorisation of your planners may allow you to benefit from its presumptive ownership of the client.

Surviving FSR is not what is important, it is surviving the Licensee/planner relationship and the rules that operate that is the key to who owns the client.

Who owns the client? The most important recommendation we can make is: work it out for yourself!

Don't try to work out what you might have, rather, with all of your relationships, sit down and clearly work out what it is that you want. Then clearly set this out in writing and ensure that everybody agrees - but make sure that it is FSR 2004 compliant.