

AGENDA PAPER

Item Number: 2
Date of Meeting: 27 August 2013
Subject: Proposed Revised APES 215 *Forensic Accounting Services*

Action Required **For Discussion** **For Information Only**

Purpose

To update the Board on the progress with the APES 215 project and to obtain the Board's direction on the key issues and the way forward.

Background

The Accounting Professional and Ethical Standards Board (APESB) issued the Standard APES 215 *Forensic Accounting Services* in December 2008 with an effective date of 1 July 2009. APES 215 replaced APS 11 *Statement of Forensic Accounting Standards* and GN 2 *Forensic Accounting*. The Annual Review of APES 215 performed in 2010 identified a number of minor editorial matters that need to be incorporated in the next revision of APES 215.

At the November 2010 Board Meeting, the Board directed Technical Staff to commence a project to develop two new appendices for inclusion in APES 215. The first appendix will contain a decision tree for Members to determine whether they are providing a Forensic Accounting Service, and then if this is the case, assist in determining the type of Forensic Accounting Service. The second appendix will provide a number of scenarios and demonstrate the application of APES 215 to determine, based on the facts and circumstances presented, whether the Member is providing an Expert Witness Service, Consulting Expert Service, Lay Witness or Investigation Service.

At the February 2012 Board Meeting, the Board discussed the proposed revisions to APES 215 and instructed the taskforce to make further amendments including the development of a guidance paragraph on working papers and development of a Lay Witness example.

The exposure draft for the revised APES 215 ED 02-12 was issued for public comment in June 2012. APESB received 9 submissions from the Institute of Chartered Accountants Australia, CPA Australia, Ernst & Young, Australia New Zealand Policing Advisory Agency, Deloitte, McGrathNicol, Victoria Police, Gregory O'Neil (CPA) and ASIC (confidential).

25 February 2013 APESB Board Meeting

At the 25th February meeting, the Board noted the project update and respondents' comments to ED 02/12 APES 215 *Forensic Accounting Services*. The Board considered respondents' comments on the Exposure Draft and discussed the most significant matter raised by a key stakeholder, the role of a Non-Expert as opposed to an Expert Witness in Court proceedings. The Board acknowledged that it is up to the Courts to determine whether or not a witness is an Expert depending on the work performed, the subject matter and the witness' qualifications in the area.

The Board instructed Technical Staff to wait for the key stakeholder's response, following their deliberation with internal legal counsel to obtain a legal interpretation of the key stakeholder's role in Court proceedings. Subject to the finalisation of the key stakeholder's response, the Board directed Technical Staff to amend APES 215 as necessary and table the proposed revised Standard at a future Board meeting.

Consideration of Issues

Key Issues raised at the Taskforce meeting on 24 July 2013

The Taskforce met on 24th July 2013 and discussed outstanding matters from respondents to ED 02/12 APES 215. The following are the key issues from the meeting:

- A flow diagram is to be drafted containing a list of relevant quotes and terms derived from Australian court cases to enhance Appendix 1;
- Further guidance is to be drafted on the term "Other Evidence";
- Appendix 2 to be amended to suggest potential outcomes if expert evidence is ruled inadmissible by the Court;
- Further examples to be drafted in Appendix 3 on Lay Witness, and Expert Witness – distinction between opinion and non-opinion evidence; and
- Additional guidance is to be added to section 5.6 regarding limitations to expertise when being considered an Expert Witness.

The taskforce also discussed the possibility of a Forensic Accounting Service being considered as an Assurance Engagement. A taskforce member suggested that it is common for a Forensic Engagement to be considered as Assurance Engagement for the purposes of completing the practical experience requirements of a professional body. The taskforce agreed that this matter needs to be clarified. The APESB Technical Director will clarify this matter with the AUASB and thereafter communicate with the senior audit staff of the professional accounting bodies.

Key issues raised by a stakeholder in a government agency regarding Legal Advice they received on Expert Witness Services

Based upon the legal advice received, a key stakeholder does not believe that their forensic accountants provide expert evidence in Court proceedings. This is due to two points presented by the key stakeholder: that there is an issue about the independence of the FAS (Forensic Accounting Services) officers, since they are employed at a government agency that is a party to the proceedings; and that expert witnesses are only called as experts in order to provide opinion evidence. The specific conclusion from the legal advice that supports the key stakeholder's views is as follows:

*“...there are two legal considerations which generally mean that the kind of evidence given by FAS officers [Forensic Accounting Service] and other [government staff] accountants is **not evidence of the kind for which expert witnesses are called.**” [emphasis added]*

Based upon this conclusion, the key stakeholder is of the view that the definition of Expert Witness in APES 215 includes services that would not be regarded by the courts as expert witness work. In particular, the non-opinion work in “collating, summarising, analysing or otherwise assisting the Court to understand large or complex amounts of information or specialised terminology” would not generally be expert witness work.

The key stakeholder recommends that the Standard should clearly state that a Member could meet the APES 215 definition of “Expert Witness” per the Standard but not be regarded by the Court as being an Expert Witness. As a result of this assessment, the key stakeholder’s accountants are not providing a statement that their work has been performed in accordance with the Standard, which would constitute a compliance breach with paragraph 5.6(o) of the current Standard.

Technical Staff response to the key stakeholder’s views in light of the Legal Advice

The specific description of non-opinion work in “collating, summarising, analysing...” used by the key stakeholder in their letter has been removed from the current definition of Expert Witness and also has not been carried over into the new defined term Other Evidence. Technical Staff are of the view that regardless of how the Court views the evidence presented by the accountant, if the type of service requires the specialised training, study and expertise of a professional accountant to perform the service, then a Member must comply with the requirements of APES 215 where they are providing a Forensic Accounting Service. It may be appropriate to add guidance as suggested by the key stakeholder that it is the mandate of the Court to determine whether a Member is an Expert Witness.

Taskforce response to the key stakeholder’s views

Taskforce members have responded to the key stakeholder’s legal opinion and covering letter (refer Appendix). The following summarises the key points from the taskforce members’ comments received:

- There is no link between the potential lack of independence of the FAS officers and the Court’s assessment of whether they will be treated as expert witnesses, therefore it is inappropriate for a Member to present themselves as a “non-expert witness” when an eventual decision of the Court may invalidate this assertion and regard the Member as an Expert Witness;
- The case of *ASIC vs. Rich* clearly shows that the judge in this case ruled the work of the forensic accountant as expert work but not opinion evidence, therefore there is legal precedent of an Expert Witness being able to present to the Court evidence that is other than opinion evidence; and
- There are practical methods for dealing with potential independence threats which include establishing policies for the use of external forensic accountants when an Expert Witness Service is likely to be required and also how to deal with a matter that originates as another Forensic Accounting Service but then becomes an Expert Witness Service.

Staff Recommendation

The Board note the Key Issues and discussion documented above and provide direction on the way forward in respect of this project.

Material Presented

- Proposed Revised APES 215 *Forensic Accounting Services* (marked up);

APPENDIX: Taskforce member comments

Authors: Channa Wijesinghe
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Date: 20 August 2013

APPENDIX: Taskforce member comments

Email to APES 215 Taskforce 3 August 2013

Dear APES 215 Taskforce colleagues

I have had a read of the [key stakeholder] documents and provide you with the following comments.

Firstly [the key stakeholder] has specifically stated and agreed to adopt best practice and that they will comply with 5.6 a) to n). The only sticking point that effectively everything else relates to is that they don't want to put in a line in their reports that addresses 5.6 (o) being "a statement that the Expert Witness Service was conducted in accordance with this standard."

I think that we all agree with the fact that the courts may make a decision to not recognise any evidence provided by a Forensic Accountant as expert evidence, despite their report/statement/evidence meeting the requirements of APES 215 section 5. That is the court's decision and theirs alone to make. The example that [the key stakeholder] includes regarding the definition of "Expert Witness" and non-opinion work in paragraph 4 is clearly at odds with the Taskforces view. I think if we could provide them with some real life case examples of this scenario it may assist in helping them to understand it better.

Generally [the key stakeholder's] concerns are similar to those that a number of lawyers/staff had raised here at [government agency] when members in business were brought into the new standard.

The approach/policy taken here is that our lawyers/staff always initially engage our internal Forensic Accountants as Consulting Experts or as an Investigation Service. When it is likely that a civil matter is to run to trial and Forensic Accounting evidence is required the policy here is to engage an external Forensic Accountant i.e. PPB, Deloitte etc. to provide the Expert Witness Service. If the matter is a criminal matter as soon as the internal Forensic Accountant is aware that the intention is to call them to give evidence in the matter a decision is made whether that will be the internal Forensic Accountant or whether an outside external Forensic Accountant is engaged to provide that Expert Witness Service. If the business makes the decision then to go internal then the original Consulting Expert Service or Investigation Service becomes an Expert Witness Service from that time.

I think that our approach could work with [the key stakeholder], however the difference I think with [the key stakeholder], based on my understanding, would be that their internal Forensic Accountants are engaged up front with the knowledge that they will be providing evidence in court. It is probably also likely that this occurs fairly regularly in their space so to outsource that work would become a significant cost to them which may be a factor in their current thinking.

Email to APES 215 Taskforce 17 August 2013

Channa

Sorry for the delay in responding to this. The [key stakeholder] internal advice states that:

“...APES 215 appears to involve treating some people as expert witnesses in circumstances where they would not be so treated in judicial proceedings.” (Page 3)

The support for this assertion is said to consist of two elements:

- “witnesses are called as experts to give opinion evidence”
- “there is an issue about the independence of FAS officers”

Independence

I will deal with the second point first. The [key stakeholder] advice acknowledges (and cites cases, including the case I have previously sent you) that expert evidence “is not inadmissible simply because the expert is in some way aligned to the party calling the expert.” It is correct to say, as the [key stakeholder] advice does, that

However there is simply no logical link between the potential lack of independence of the FAS officers and the contention that such a lack of independence will cause those FAS officers (or anyone else) not to be treated as experts for the purposes of giving evidence. This limb of the [key stakeholder] legal advice simply doesn’t make logical sense

Opinion evidence = expert evidence

The first head of the argument is somewhat confusing. He starts with a general (but unsupported) assertion that “witnesses are called as experts to give opinion evidence”. This – with the inclusion of the word “only” in front of “called as experts - is effectively his conclusion, but he doesn’t support it. It is correct to say that experts are required (generally) for opinion evidence to be admissible, but this begs the question of whether experts are only called to give opinion evidence... he then sets out the argument that supports the position in the ED of APES 215 that this is not the case and then appears to draw the exact opposite conclusion from it!

He makes reference to the discussion in respect of *ASIC v Rich* where the judge identifies that “*the work of a forensic accountant is to be treated as admissible in the same fashion as scientific facts.....the expert’s work is mathematical and analytical rather than based on scientific observation, but in both cases there is a factual conclusion, admissible as evidence of fact, derived from the application of specialised knowledge.*” (**emphasis added**) This clearly shows that the judge thought the work of the forensic accountant was expert work but not opinion evidence. The [key stakeholder] advice therefore specifically identifies where a judge is supporting the approach in the ED for APES 215. He then comments that “evidence generally given by FAS officers (and other [key stakeholder] accountants) is akin to this kind of evidence. It may be admitted into evidence on the basis of the normal principles but are not opinion evidence.” I don’t disagree with this comment, but the implication is (when taken in the context of the opening assertion) that because it is not opinion evidence it can’t be expert evidence. However the is exactly the opposite of what the judge says.

Therefore the [key stakeholder] advice identifies the situation – and even quotes the relevant case law – where expert evidence is NOT opinion evidence, but doesn’t actually then recognise this situation, but rather simply says that there are situations where what the FAS officers do is not opinion evidence – implicitly assuming that expert evidence is only opinion evidence. However, I note that other than the general (not specifically supported) statement

that the ED draws the definition of expert witness wider than the courts would do, there is no specific conclusion in this “advice” that says the ED is wrong.

Overall I think that this advice doesn't add anything to the discussion and doesn't actually properly address the issue of whether or not there are situations where expert evidence is adduced which is not opinion evidence. What I find particularly frustrating is that [key stakeholder] were - on at least two occasions – offered the opportunity to discuss this issue with their legal officers, but they have declined to do so and have lost the opportunity to properly understand our perspective and possibly learning something in the process. I am more than happy to discuss this with the relevant people in [key stakeholder].