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Basis for Conclusions: APES 215 Forensic Accounting Services (Formerly APS 11 & GN 2)

Prepared by the Technical Staff of the Accounting Professional & Ethical Standards Board

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This basis for conclusions has been prepared by technical staff of Accounting Professional & Ethical Standards Board Limited (“APESB”). This document has been reviewed and approved by the Board of Directors of APESB and is provided for the benefit of stakeholders to gain an understanding of the background to the development of APES 215.

The basis for conclusions **does not** form part of APES 215 *Forensic Accounting Services* and is not a substitute for reading the standard.

Background

APESB has issued the Standard APES 215 *Forensic Accounting Services* setting out mandatory requirements and guidance for members who perform forensic accounting services.

APES 215 includes mandatory requirements and guidance for forensic accounting services with respect to:

- Independence requirements;
- Professional competence of members;
- Confidentiality requirements;
- Professional engagement matters;
- Expert witness services;
- False or misleading information and changes in opinion;
- Quality control; and
- Professional fees.

This Standard will be operative for forensic accounting engagements or assignments commencing on or after 1 July 2009.

APESB issued an Exposure Draft (ED) 04/08 of the proposed standard in June 2008 with a comment deadline of 29 August 2008. APESB received submissions from the professional accounting bodies, major accounting firms, several Australian police forces and individual members. In response to the comments received, APESB made a number of changes to APES 215. The following summarises the significant issues raised by respondents and how APESB addressed them.

Scope and application¹

In certain circumstances a member may be providing a professional service (e.g. an Assurance Service) which subsequently leads to a forensic accounting service. Paragraph 1.5 was added to specify that in these instances APES 215 must be applied from the point the professional service becomes a forensic accounting service.

Paragraphs 7.2 and 8.2 of the ED stated that where a member is providing a consulting expert service or investigation service which subsequently leads to an expert witness service, then the member must comply with the expert witness obligations specified in section 5 of APES 215. The obligations previously stated in paragraphs 7.2 and 8.2 of the ED have now been relocated to paragraph 1.6 of the standard.

Respondents queried whether APES 215 was intended to apply to formal insolvency appointments. APES 215 will not apply to these appointments as the standard is based on the existence of client relationships for members in public practice and it is generally accepted that a client relationship does not exist for formal insolvency appointments. APESB is in the final stages of developing an exposure draft which will apply to formal insolvency appointments (i.e. proposed APES 330 *Insolvency Services*) and in time will replace the existing APS 7 *Statement of Insolvency Standards*. However, insolvency practitioners not undertaking formal insolvency appointments will be subject to this standard when they undertake forensic accounting services.

Definitions

The ED proposed definitions for the terms “assumed fact”, “fact” and “opinion.” In response to some of the submissions received, these definitions were deleted and assumed fact was replaced with assumption. APESB determined that these terms should have their ordinary meaning (the Appendix to the standard provides guidance to members on the use of these terms in practice).

Also in response to concerns raised, the following definitions were modified:

- “consulting expert service” now includes reference to a member of a professional tribunal;
- “expert witness” has been expanded with reference to the fact that members may express opinions to the court based on the member’s specialised training, study or experience on matters such as whether technical or professional standards have been breached, the amount of damages, the amount of an account for profits, or the amount of a claim under an insurance policy; and
- “report” now means a written report, affidavit or written statement that is for the purpose of communicating expert evidence or lay evidence in court.

¹ Paragraph numbering reflects the numbering in APES 215 and may not reflect ED 04/08.

Respondents to the ED noted that the terms “consulting expert service”, “expert witness service” and “investigation service” were defined with reference to a service by a member in public practice and thus would unintentionally capture legal practitioners in a multi-disciplinary practice. In order to remove the unintended application to legal services, the services that are subject to APES 215 are now defined with reference to a “professional service” (i.e. accounting related services) as distinct from a “service”.

Respondents also noted that the consulting expert definition may capture tax services provided in the context of general objections and appeals to tax authorities. Members are reminded of the application of APES 220 *Taxation Services* to all tax-related services carried out by a member for a client or employer. Accordingly, any additional obligation imposed on the member by this standard would only be in the context of services provided in connection with forensic accounting-related disputes.

Members in business who are involved in law enforcement activities, such as investigating proceeds of crime, will be covered by APES 215 when they provide expert witness services in connection with proceedings.

Generally, audit, review or agreed-upon procedures engagements, in the ordinary course of events, would not be engagements within the scope of APES 215. However, where it is clear to the member that the audit, review or agreed-upon procedures engagement is "in connection with allegations of, or concerns regarding conduct that may be illegal, unethical or otherwise improper" then the work will fall within the scope of this standard.

As noted above the definition of a report was amended due to concerns raised by respondents that the definition of a report in the ED was wide and may be interpreted to include internal reports that do not end up in court. The revised definition in the standard makes it clear that it only covers reports used in court in connection with expert evidence or lay evidence and thus would not apply to internal reports that are not used in court.

Proceedings

The term “proceedings” was defined in the ED as “actual or potential proceedings before the court”. Concern was raised by respondents about the use and application of the word “potential” in this definition.

To address these concerns, the definition was amended to clarify that the term “proceedings” means:

- a matter before a court;
- a matter which the member has a reasonable expectation will be brought before a court; or
- a matter in which the member is undertaking professional services to help an assessment as to whether the matter should be brought before a court.

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The revised definition removes the reference to “potential proceedings” and clarifies that an engagement or assignment involving only a remote possibility of proceedings is not caught by the application of the standard.

The second limb of the definition requires a member to have a reasonable expectation of a matter being brought before a court based on their knowledge at the time the assignment or engagement commences.

The third limb of the definition is designed to cover situations where the potential for a matter to proceed to court is not known, but the engagement or assignment is undertaken to help an assessment of whether the matter should be taken before a court.

Fundamental responsibilities of members

Some respondents to the ED noted that independence before a court is of paramount importance and that the obligation for disclosure of such a matter should be mandatory. This has resulted in the inclusion of a mandatory requirement in paragraph 3.10 for the member, acting as an expert witness, to disclose matters in the expert’s report that will assist the court to assess the member’s independence.

Respondents raised concerns regarding the need for a member in business to undertake only assignments for which the member has, or can obtain, sufficient training or expertise. A new paragraph 3.14 was inserted based on the requirements contained in Section 330 of APES 110 *Code of Ethics of Professional Accountants*.

Paragraph 3.18 of the ED was removed in response to concerns raised by a respondent about potential conflicts with whistleblowing legislation. It should be noted that the general requirements of section 140 of the Code, as cross referenced in paragraph 3.17, would not prevent a member from reporting in accordance with whistleblowing legislation. This is consistent with paragraph 1.8 of APES 215 which states that the standard is not intended to detract from any responsibilities which may be imposed by law or regulation.

Expert witness services

A number of respondents expressed concerns that some of the requirements in the expert witness services section of the ED may inhibit a member in business who is employed by a government agency undertaking its statutory function of regulation, investigation or law enforcement. To address this concern paragraph 5.3 was added to provide specific relief to a member who is employed by a government agency and where that agency has a statutory function of regulation, investigation or law enforcement.

The report of an expert witness

A significant amount of comment was received on paragraph 5.5 of the ED – now paragraph 5.6 of APES 215. In general, a number of refinements were made to improve the clarity of the requirements which were largely based on the requirements contained in Guidance Note GN 2 *Forensic Accounting* and the expert witness codes in various jurisdictions in Australia. To address a number of concerns relating to the use of specific definitions, the ordinary meaning of the terms “fact”, “assumption” and “opinion” were adopted in place of the defined terms proposed in the ED. Additionally the reporting requirements were amended for the member to disclose “significant assumptions” rather than “any assumptions” as noted in the ED.

The drafting of sub-paragraph (i) was simplified to improve its clarity and application. Additionally a new requirement has been added in subparagraph (o) to include a statement that an expert witness service was conducted in accordance with APES 215.

Professional fees

Consistent with the requirements applicable to members in public practice, a new paragraph 8.3 was inserted in APES 215 to clarify that a member in business must not enter into a contingent remuneration arrangement or receive contingent remuneration for an expert witness service.

Lay witness services, consulting expert services and investigation services

As defined in APES 215, forensic accounting services consist of expert witness services, lay witness services, consulting expert services and investigation services. For completeness, the ED therefore included separate paragraphs (paragraphs 6.1, 7.1 and 8.1) on the responsibilities of members when conducting the different types of forensic accounting services. These paragraphs have now been removed from APES 215 in response to respondent comments that these sections did not contain any substantive requirements in addition to the fundamental responsibilities identified in section 3 of APES 215 or existing legal requirements. With the relocation of paragraphs 7.2 and 8.2 of the ED into paragraph 1.6 (as discussed above), sections 6 to 8 of the ED were no longer required and were deleted.