

Agenda Item 8(a) ASIC Recommendations to Change APES 215

RECOMMENDATIONS:

1. Expand the definition of 'lay witness service' to align with the findings of *Idyllic Solutions Pty Lts & Ords—ASIC v Hobbs* [2012]
 - a. Court held that categorising transactions based on information extracted direct from source documents amounted to a lay summary
 - b. Court also held that calculating total sums of selected individual transactions that had been grouped amounted to a lay summary
2. Remove the example in red provided in the definition of 'Other Evidence' to also align with the findings of *Idyllic Solutions Pty Lts & Ords—ASIC v Hobbs* [2012].
 - a. In this case, the court specifically held that if the summary table is prepared by extracting figures direct from underlying documents and then these amounts are simply added together, this will be the summary table that would be admissible as a s50 summary
 - b. It was also found that a comprehensive summary of particular facts (such as, for example, a listing of all payment transactions to or by a particular entity or on a particular date or in relation to a particular investment) would be a summary falling within s 50. It was also held as a matter of principle, where the documents contain more than arithmetic calculation of the total of listed entries drawn from the underlying documents, then they would go beyond what is admissible under s 50 as a summary (and be a submission)
 - c. The definition of 'observed facts' within APES215 further supports the need to change the definition of 'Other Evidence' as it specifically states that observed facts are **lay observations**

Proposed changes to APES215 for recommendations 1 and 2 (additions highlighted in yellow):

Lay Witness Services means a **Professional Activity** provided in the context of **Proceedings** to provide evidence other than expert evidence, whether orally or in the form of a **Report** or both. This service involves the Member giving evidence on matters within the Member's professional knowledge that are directly observed or perceived by the Member. **For example, if the Member is reviewing and summarising financial transactions into selected categories based on the information directly observed by them from the underlying documents. Another example might be where a Member provides a summary of the sales, by month, by product, by geography, based on the information contained within a series of invoices and a general ledger (moved from 'other evidence'.) The extraction and summary of this information is facilitated by the Member directly observing information from the underlying documents.**

3. Change the definition of "observed facts"
 - a. The definition reads as a contradiction, "lay" and "expert"

Proposed changes to APES215:

Observed facts: these are lay observations by the ~~expert~~ Member.

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Inclusion of a new example: the grouping of transactions from a particular entity based on information directly observed from the underlying source documents.

4. Amend the decision tree to include the distinction between direct observations and inferences when deciding if it amounts to lay witness evidence versus expert witness evidence

Proposed changes to APES215

Under 'Is the service to provide evidence?' have a new level under 'yes' → 'is an inference drawn?' if no, lead to 'lay witness service'.

5. Revision of example 6 to be 'Lay Witness Service'
 - a. In this example, the nature of the assignment is to 'summarise' complex transactions based on accounting journals (including ledger entries). There is no requirement to comment on the accuracy of the accounting journals and the role only requires a summary
 - b. As this assignment will only require the Member to observe the information contained directly from the source documents, and use information directly extracted from the source documents to present a visual representation/summary—it will amount to lay evidence as found in *Idyllic Solutions Pty Lts & Ords—ASIC v Hobbs* [2012]
 - c. This case also addresses the complexity issue of a summary assignment. The case found that provided the summary tables prepared are done so by extracting contents from two or more underlying documents, then the fact that as a practical matter they were derived by a process of extraction (by computer or manual re-sorting) from a larger and more comprehensive summary of the underlying documents does not preclude them from being a summary for the purposes of s 50. "Summary" in s 50 is a reference to the nature of the document, not to the process by which it was prepared
6. Expansion to example 7 to distinguish expert more clearly from lay witness services
 - a. The current example does not clearly provide details to explain the nature of the underlying source documents provided to the Member to complete their analysis
 - b. A fundamental source document in tracing the flow of funds that is critical in distinguishing lay witness from expert witness evidence is the provision of bank vouchers/trace reports obtained direct from the relevant financial institution to verify the remitter/recipient of funds
 - c. A flow of funds activity that is solely based on extracting information (such as date, amount, and recipient/remitter) from underlying source documents (such as bank statements and bank vouchers/trace reports) will be lay witness evidence. That is, the flow of funds from A to B is directly supported by the underlying source documents
 - d. If, however, a flow of funds activity is based on extracting information from limited underlying source documents (for example, relying on the bank description contained within a bank statement) this will require the drawing of an inference/assuming a fact which will amount to expert witness evidence
 - e. A clear example of this is 'intra-account' flow of funds between two bank accounts:

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- i. Scenario 1: The Member reviews the bank statements for Account 1 and Account 2 and identifies several debits from Account 1 in which the date and amount matches specific credits into Account 2. Each of these matches contain a similar reference in the bank description. The Member draws an inference that due to the reoccurring characteristics of the matching transactions; that is, matching date, amount, and bank description, these are intra-account transfers between the two bank accounts. This will be 'expert witness statement'.
 - ii. Scenario 2: The Member reviews the bank statements for Account 1 and Account 2 and identifies several debits from Account 1 in which the date and amount matches specific credits into Account 2. Each of these matches are confirmed to be an intra-account transfer by a supporting bank voucher/trace report. The bank voucher/trace report contains information that shows the funds moved from Account 1 to Account 2. The Member summarises the source documents to show the intra-account transfers between the two bank accounts. This will be 'lay witness statement'.
7. **Quality Control** currently 7.2 is not in bold. It is recommended the standard for Members in Business who undertake a Forensic Accounting Service should be mandatory in the standard (as it is for Members in Public Practice). The risks and responsibilities are significantly higher in the business arena, especially when dealing with criminal matters in the regulatory industry, such as the work undertaken by ASIC (whether in-house or referred to an external consultant).