

AGENDA PAPER

Item Number: 4
Date of Meeting: 16 November 2020
Subject: Update on review of APES 230 *Financial Planning Services*

Action required **For discussion** **For noting** **For information**

Purpose

To:

- provide an update to the Board on the APES 230 project, consultation process and the August 2020 Taskforce meeting;
- obtain the Board's view and direction on the scope of APES 230; and
- obtain the Board's approval for the proposed way forward for the APES 230 project.

Background

APESB issued APES 230 *Financial Planning Services* (APES 230) in April 2013, with an effective date of 1 July 2014 (with sections relating to remuneration effective on 1 July 2015).

Since APES 230 was issued, there have been significant changes in the political, legislative, and regulatory environment for financial planning services. A summary of actions taken by APESB to consider these changes were provided at the June 2020 Board meeting in Technical Staff's [update on the consultation regarding APES 230](#). Since the June 2020 Board meeting, APESB has:

- convened the fourth APES 230 Taskforce meeting on 18 August 2020 (refer 1.2 below); and
- provided a third submission to Financial Adviser Standards and Ethics Authority (FASEA) on the Draft FASEA Guide on 2 November 2020 (refer 5 below).

Matters for Consideration

1. Scope of APES 230

1.1 APES 230 Consultation Paper

Stakeholders raised concerns about the scope including (refer specific comments Items 3, 9-15):

- Association of Financial Advisers Ltd (AFA) believes APES 230 captures wholesale clients, which is appropriate and broader than the FASEA Code. AFA also has no objection to APES 230 applying to mortgage broking services and that it should apply to strategic and real estate advice;
- Including real estate and non-product advice could create issues with SMSF investment strategies (Bongiorno Wealth Management Financial Planning (BWM));
- Chartered Accountants Australia and New Zealand (CA ANZ) notes that it is "*currently working on a project with other member organisations to reform the extensive regulatory environment in which all members who practice in financial advice operate*" and that real estate advice and non-product advice related strategies should not be added to APES 230 now;
- CPA Australia (CPAA) believes it needs to be made explicitly clear which services are covered and those not captured by the standard and that there are inconsistencies between the standard and legislative requirements. There are challenges with adopting and implementing APES 230 due to a lack of clarity with scope and definitions and inconsistencies between the standard and law. The scope and definitions in APES 230 need to be re-assessed and reviewed, and the broad scope of the standard makes it difficult to "*create explicit requirements that apply consistently across the range of services envisaged*" (also refer General Comment Item 20 in Agenda Paper 4(c));
- Most of the Institute of Public Accountants' (IPA) members consulted with were against expanding the scope, and one member commented that "*APES Board, therefore, should not be able to expand the definition of financial planning to include merely all (wealth) advice at its absolute discretion*" beyond Corporations Act requirements which disadvantages members compared to non-member financial planners;
- Pitcher Partners believes the definition of financial planning services is limited to 'personal financial affairs,' which is not properly defined and proposed an alternative definition; and
- Robert Brown and Suzanne Haddan recommend clarifying the definition to ensure that real estate advice is captured by the standard, which was the standard's original intention and propose an alternative definition.

Detailed analysis of stakeholders' comments on the scope of APES 230 are included in the Draft APES 230 CP 01/19 General & Specific Comments Tables (Agenda Items 4(c) and 4(d)).

1.2 APES 230 Taskforce Meeting

The fourth APES 230 Taskforce meeting was convened on 18 August 2020 (draft minutes attached at Agenda Item 4(e)).

The Taskforce considered the Draft Flowchart – APES 230 Scope (Agenda Item 4(a)), and there were divergent views about the flowchart and APES 230's definition of Financial Planning Advice.

Some Taskforce members believe the flowchart accurately depicts the intended scope of APES 230 to capture all financial planning advice in respect of *personal financial affairs* irrespective of whether it falls under an AFSL/ACL and that part (d) of the definition of Financial Planning Advice may cause confusion and should be reconsidered and redrafted to not link back to parts (a) to (c) of the definition.

Other Taskforce members believe the scope was not intended to go beyond financial planning and consumer credit advice regarding personal affairs covered by an AFSL/ACL, that the APES 230 should be anchored in legislation and expand beyond this causes confusion.

The Taskforce discussed recommendations to purchase property in a SMSF and noted that ASIC now deems this as financial product advice (refer 1.3). The Taskforce also discussed whether APES 230's title contributes to the confusion as financial planning advice is associated with an AFSL; however, it was noted that there was considerable debate about the name of the standard in 2012 and 2013.

1.3 Technical Staff Analysis

Financial Planning Advice is defined in APES 230 to include "*personal financial affairs specifically related to wealth management, retirement planning, estate planning, risk management and related services.*" It captures financial planning services to all clients and does not distinguish between retail and wholesale clients¹ and does not cover corporate finance or corporate financial advisory services.²

The definition was written to capture all financial advice related to a client's personal affairs, including real estate advice and non-product advice related to strategies, and does not limit it to financial advice captured under an AFSL or ACL.³ It does not aim to narrowly focus on services defined in legislation.

Part (d) of the definition of Financial Planning Advice in APES 230 includes "*other advice such as taxation, real estate and non-product related advice on financial strategies or structures provided as part of the advice under (a) – (c).*"

For example, part (d) captures advice provided to a small business owner regarding holding business real property in a SMSF. However, this would now be captured by parts (a) and (b) of the definition of Financial Planning Advice (relating to an AFSL). [ASIC's Information Sheet 216](#) (issued December 2016) states that while real property is not a financial product, an interest in a SMSF is. Hence, a recommendation to hold business real property in a SMSF is financial product advice requiring an AFSL.

Technical Staff are of the view part (d) of the definition of Financial Planning Advice would capture other examples where the accountant does not hold an AFSL or ACL, such as:

- Recommending a client to finance a residential property to negatively gear as part of a personal wealth management strategy. An ACL would not be required as long as the accountant does not suggest a particular lender, specific product or a lender with limited products.⁴ An AFSL would not be necessary unless the advice was to purchase the property through a SMSF.⁵
- Advice on the taxation implications of purchasing specific direct shares and managed funds based on research and analysis of the products and the client's personal circumstances. An AFSL would not be required unless the accountant received a

¹ [Basis for Conclusions 2013](#) Page 4.

² [Basis for Conclusions 2013](#) Page 3.

³ APESB [Consultation Paper: Review of APES 230 Financial Planning Services](#).

⁴ CPAA [Activities that can be provided without holding a credit licence](#).

⁵ CPAA [Financial Advice and Regulations Guidance for the Accounting Profession page 11](#).

benefit (other than the fee for the service) related to the product or failed to make disclosures required where tax advice is provided without an AFSL.⁶

- Providing advice to a client to sell their property. Recently ASIC took no action against a financial adviser it had banned, who continued to advise a client to sell their property. This was partly due to property not being a 'financial product' and therefore not a breach of the ban.⁷

However, it is evident from the submissions received by APESB on the APES 230 Consultation Paper and from the views expressed by some Taskforce members that the intent and scope of APES 230 requires further clarification.

A professional standard for a specialised area (e.g., Valuation, Forensic or Insolvency) is developed based on the likely scope of services a member in public practice may provide and not from the perspective of legislation.

The original development of the Financial Planning Advice definition in APES 230 in 2012/13 was informed by the American Institute of CPAs (AICPA) *Statement on Standards on Personal Financial Planning Services*.

AICPA's current [Statement on Standards on Personal Financial Planning Services](#) incorporate the following definition and explanation:

Personal financial planning services. The process of identifying personal financial goals and resources, designing financial strategies, and making personalized recommendations that, when implemented, assist the client in achieving these goals. (Ref: par. 3)

par 3

PFP is the process of identifying personal financial goals and resources, designing financial strategies, and making personalized recommendations (Ref: par. 12) (whether written or oral) that, when implemented, assist the client in achieving these goals.

This process may include implementation of recommendations or monitoring or updating the engagement. PFP services encompass one or more of the following activities:

- a. Cash flow planning*
- b. Risk management and insurance planning*
- c. Retirement planning*
- d. Investment planning*
- e. Estate, gift, and wealth transfer planning*
- f. Elder planning*
- g. Charitable planning*
- h. Education planning*
- i. Tax planning*

Technical Staff believes that the scope of APES 230 should capture personal financial planning advice irrespective of whether it is linked to an AFSL or ACL and seek the Board's views concerning this matter.

⁶ CPAA [Financial Advice and Regulations Guidance for the Accounting Profession page 14.](#)

⁷ [https://www.abc.net.au/news/2020-08-26/couple-loses-almost-\\$1m-superannuation-through-financial-adviser/12594060](https://www.abc.net.au/news/2020-08-26/couple-loses-almost-$1m-superannuation-through-financial-adviser/12594060)

2. APES 230 Consultation Paper – Best interests of the client and Fees/Remuneration

Stakeholders' comments concerning the best interests of the client and fees/remuneration and Technical Staff's initial analysis are included in Agenda Items 4(c) and 4(d).

Technical Staff aimed to convene the fifth Taskforce meeting in late October/early November 2020 to focus on the best interests of the client and fees/remuneration. However, due to clashes with Taskforce members' availability, a suitable time could not be achieved. As such, Technical Staff propose to convene the sixth Taskforce meeting in November/December 2020.

Stakeholders had mixed views in relation to the best interests of the client and whether the safe harbour provisions have been effective. Agenda Item 4(b) summarises the submissions and the best interest requirements under APES 230, the Corporations Act 2001 (Corporations Act), the FASEA Code, mortgage broking, and tax practitioners.

Technical Staff's preliminary view is that the definition of best interests of the client in APES 230 should be maintained in line with the Corporations Act, with qualifying guidance that if the service is subject to, and complies with, the best interest requirements under the FASEA Code, it would comply. Technical Staff believe this approach:

- avoids duplication between APES 230 and Corporations Act requirements;
- avoids further duplication by deeming FASEA Code as APES 230 compliance;
- establishes a higher level of best interests' duty for mortgage broking;
- means other 'financial planning advice' captured by APES 230 (wholesale clients not captured by the FASEA Code, taxation, real estate and non-product related advice on financial strategies or structures) remain subject to the same requirements; and
- will remain fit for purpose subsequent to the Government and ASIC's review in 2022 of whether or not safe harbour provisions should be retained.

Remuneration methodology remains the most contentious issue, with all stakeholders expressing strong views. Agenda Item 4(b) provides a summary of submissions and a table of arguments presented for and against remuneration structures used in financial planning services.

3. APES 230 Consultation Paper – Remaining Major Themes

Technical Staff propose to analyse the remainder of the feedback received on the APES 230 Consultation Paper during December 2020/January 2021 and convene the sixth Taskforce meeting in the first quarter of 2021 to focus on broader regulatory reform and avoiding duplication.

4. Government's Implementation of the Financial Services Royal Commission Recommendations

Technical Staff's [update on the consultation regarding APES 230](#) for the June 2020 board meeting included a status update on the Financial Services Royal Commission Recommendations' implementation. No further developments are noted since the Government [announcement on 8 May 2020](#) of a six-month delay to implementation due to the coronavirus's impacts. The current status of legislation and regulation can be found [here](#).

5. FASEA Update

The FASEA Code commenced on 1 January 2020, and there is still no oversight body. [ASIC's approach to advice licensee obligations](#) sets out reasonable steps that ASIC expects to comply with the FASEA Code.

FASEA issued a [Draft FASEA Financial Planners & Advisers Code of Ethics 2019 Guide \(October 2020\)](#) on 5 October 2020 for consultation until 2 November 2020. APESB provided a submission to FASEA on 2 November 2020 (Agenda Item 4(f)), supporting the guide and suggesting improvements for FASEA's consideration.

Way Forward

Technical Staff propose the following actions in respect of the APES 230 project:

- convene the fifth Taskforce meeting in November/December 2020 focusing on best interests of the client and fees/remuneration from the APES 230 Consultation Paper;
- analyse the remainder of the feedback received on the APES 230 Consultation Paper during December 2020/January 2021;
- convene the sixth Taskforce meeting(s) in the first quarter of 2021 focusing on broader regulatory reform and avoiding duplication from the APES 230 Consultation Paper; and
- present the feedback from the fifth and sixth Taskforce meetings at the March 2021 Board meeting.

Recommendations

That the Board:

- note the update on the APES 230 project, consultation process and the August 2020 Taskforce meeting;
- provide the Board's view and direction on the scope of APES 230; and
- approve the proposed way forward to progress the APES 230 project, including the proposed scope of APES 230.

Materials Presented

Agenda Item 4(a) – Draft Flowchart – APES 230 Scope

Agenda Item 4(b) – APES 230 CP 01 19 Best Interests and Fees

Agenda Item 4(c) – Draft APES 230 CP 01 19 General Comments Table

Agenda Item 4(d) – Draft APES 230 CP 01 19 General Comments Table

Agenda Item 4(e) – APES 230 Taskforce meeting 18 August 2020 – Draft Minutes

Agenda Item 4(f) – APESB submission on Draft FASEA Guide

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