

AGENDA PAPER

Item Number: 3
Date of Meeting: 31 May 2023
Subject: Proposed revised APES 215 *Forensic Accounting Services*

Action required For discussion For noting For information

Purpose

To:

- provide the Board with details of submissions received on Exposure Draft ED 07/22 Proposed Standard: APES 215 *Forensic Accounting Services* (ED 07/22); and
- seek the Board's approval, subject to the Board's review comments and editorials, to issue a revised APES 215 *Forensic Accounting Services* (APES 215) and related Basis for Conclusions.

Background

Technical Staff provided a brief history of the development of APES 215 and a project proposal to update the standard at the June 2021 Board meeting, which the Board approved ([Agenda Item 7](#)). The project proposal stemmed from a request from representatives of the Australian Securities and Investments Commission (ASIC) to amend specific examples in APES 215 relating to evidence presented to the court under section 50 of the *Evidence Act 1995* (Evidence Act)¹. ASIC representatives contend that evidence presented under section 50 of the Evidence Act is not expert evidence but lay observations as bank officers present underlying banking documents to the court and ASIC Forensic Accounting Services officers highlight and summarise key information directly from those source documents.

Technical Staff provided project updates at the following Board meetings:

- September 2021 on an APES 215 working party meeting on 23 July 2021 and a meeting with ASIC representatives on 20 August 2021 ([Agenda Item 8](#));
- June 2022 on an additional submission from ASIC representatives, an APES 215 working party meeting on 20 May 2022 and Technical Staff's initial responses to ASIC's recommendations ([Agenda Item 8](#));

¹ Section 50 of the Evidence Act enables evidence to be presented of the contents of 2 or more documents as a summary if the court is satisfied it would not be possible to conveniently examine otherwise due to the volume or complexity of the documents.

- September 2022 on an APES 215 Taskforce meeting on 15 August 2022 and a preliminary draft Exposure Draft for APES 215 ([Agenda Item 16](#)). A verbal update was also provided by Technical Staff at the Board meeting on a meeting held with ASIC representatives on 20 September 2022; and
- December 2022 on the Second APES 215 Taskforce meeting on 2 November 2022 and a proposed Exposure Draft for APES 215 ([Agenda Item 4](#)).

The Board approved [ED 07/22](#), which was issued on 12 December 2022 and was open for comment until 20 February 2023.

Matters for Consideration

1. Submissions Received

APESB received five submissions on ED 07/22 from Chartered Accountants Australian and New Zealand, CPA Australia and the Institute of Public Accountants, Deloitte Touche Tohmatsu and EY, who generally supported the proposed amendments. Respondents' comments are tabulated in General and Specific Comment Tables at Agenda Items 3(a) and 3(b).

Key issues raised and Technical Staff responses are summarised below.

a) Proposed paragraph 1.8

A respondent believes proposed paragraph 1.8 in ED 07/22 created confusion about the distinction between an Expert Witness Service and a Forensic Accounting Service that is not an Expert Witness Service and the application of Section 5 of APES 215, and recommended amendments to paragraph 1.4 in APES 215 (SC9).

Technical Staff agree with these comments and recommend amending paragraph 1.4, with additional suggested changes to the respondent's wording, and deleting proposed paragraph 1.8 of APES 215, which becomes obsolete if the proposed amendments to paragraph 1.4 are adopted.

b) Additional Definitions including for 'expert evidence' and 'evidence'

Two respondents believe APES 215 should define 'expert evidence' (SC10 and SC11) and 'evidence' and clarify the distinction between 'lay evidence' (referred to as Lay Evidence by the respondent) and 'Other Evidence' and the meaning of 'Consulting Expert Service' and its alignment with Appendix 2 (SC11).

Defining 'expert evidence' was considered during the initial development of APES 215. However, given the existing definitions and how the standard was drafted, it was deemed unnecessary. Further, defining 'evidence' would be complicated as it is based on court rules and legal precedents, which vary by jurisdiction. As such, Technical Staff do not recommend including definitions of 'expert evidence' or 'evidence' in APES 215.

Other Evidence does not provide an opinion but requires the use of specialised knowledge derived from training, study or experience. In contrast, lay evidence provided in a Lay Witness Service does not require such specialised knowledge but relates to the Member's role/Professional Activity. Hence, there is a clear distinction between Lay Witness Service and Other Evidence and Technical Staff do not recommend amending these definitions.

A Consulting Expert Service is a Professional Activity provided in the context of Proceedings, other than an Expert Witness Service, a Lay Witness Service or an Investigation Service. This definition is consistent with the decision tree in Appendix 2, which demonstrates that if the Forensic Accounting Service is not to provide evidence or concerning an investigation, it is a Consulting Expert Service. Accordingly, Technical Staff do not recommend changing the definition of Consulting Expert Service.

c) *Interaction between APES 215 and APES 110*

Two respondents believe there may be unintended consequences resulting from the interaction between APES 215 and APES 110 *Code of Ethics for Professional Accountants (including Independence Standards)* (APES 110), particularly paragraph R607.9 of APES 110, which prohibits a firm/individual from acting as an expert witness for a public interest entity (PIE) audit client (SC12, SC15 and SC16).

One of these respondents believes the definitions and Example 9 in Appendix 3 of APES 215 could be interpreted to result in a prohibited service under paragraph R607.9 of APES 110, where a Member is asked to appear as a witness of fact to describe services provided and judgements made (SC12).

The new Non-Assurance Services (NAS) provisions in APES 110 were issued in December 2022 and become effective on 1 July 2023 in Australia (globally, they became effective from 15 December 2022). These NAS provisions include paragraph R607.9, which should be read in conjunction with paragraphs 607.7 A1-A3 on Litigation Support Services. Paragraph 607.7 A2 of APES 110 provides an exception to paragraph R607.9 by stating that no threats to independence are created when an individual acts as a witness of fact and provides an opinion in response to a question when giving factual evidence.

Technical Staff believe a Forensic Accounting Service that becomes an Expert Witness Service for the purposes of APES 215 (as per Example 9 in Appendix 3), does not impact paragraphs 607.7 A2 and R607.9 of APES 110, because the two standards should be considered separately. APES 215 assists Members determine the type of Forensic Accounting Service and APES 110 determines the impact of other services on auditor independence.

These respondents also raised concerns that proposed paragraph 3.14 might prohibit a permissible service to a PIE audit client where a Report mentions specialised knowledge and/or training, study or experience (SC15 and SC16). For example, where a firm/individual provides an allowable valuation service to a PIE audit client and is subsequently asked to provide details of their qualifications or experience to support a legal proceeding without performing any additional work (SC16).

If a Member's valuation report is subsequently tendered in a Proceeding and the Member's statement accompanying the valuation report (i.e., Member's Report) details qualifications/experience then paragraph 3.14 would apply meaning its an Expert Witness Service for the purposes of APES 215.

Where the valuation report is tendered merely to establish the valuation report was prepared, it would likely be a witness of fact (Lay Witness Service and not prohibited by R607.9). Whereas if the valuation is being considered in the Proceeding, it would likely be opinion evidence (Expert Witness Service and prohibited by R607.9).

Additionally, the new NAS provisions in APES 110 prohibit an auditor from providing services to a PIE audit client if it might create a self-review threat, including paragraph R603.5 which would prohibit most valuation services.

d) Other concerns about the proposed paragraph 3.14

Three respondents provided additional comments on the proposed paragraph 3.14:

- The paragraph should reflect that not all reports prepared by a forensic accountant would result in an Expert Witness Service (refer SC13). The paragraph refers to a 'Member's Report', and Report is defined as having the purpose of communicating expert evidence or lay evidence in Court. APESB pronouncements include defined terms in title case, blue and with pop-up definitions to make it clear they are defined. Technical Staff believe using Report demonstrates there is no expectation the paragraph applies to all reports prepared by a forensic accountant, just those to communicate evidence in Court.
- The paragraph should make it clear it is a report provided by a Member (SC14). Technical Staff believe the wording 'Member's Report' makes it clear it is a Report provided by a Member.
- The wording "*Member's specialised knowledge and/or the Member's training, study or experience*" in the paragraph will deem more Forensic Accounting Services as Expert Witness Services than intended (SC15).

This paragraph aims to prevent situations where a Member includes lists of qualifications, training or experience in a Report to potentially hold themselves out as an expert, but otherwise not treat the service as an Expert Witness Service or applying Section 5 of the standard. While slightly different terminology is adopted in this paragraph than the definition of Expert Witness and paragraph 79 of the Evidence Act, using 'or' is required to address situations where a Member may not specifically refer to specialised knowledge but instead to training, study or experience.

Technical Staff do not recommend any changes to proposed paragraph 3.14 of APES 215.

e) Paragraph 7.1 and guidance on assurance engagements

A respondent recommended that APES 215 include guidance or examples of when a Forensic Accounting Service may be considered an assurance engagement or related service in respect of paragraph 7.1 (SC17).

Whether a Forensic Accounting Service is an assurance Engagement requires the Member to apply professional judgement based on the circumstances of the Engagement and the *Framework for Assurance Engagements* issued by the AUASB (paragraph 3.7 of APES 215). As such, Technical Staff do not recommend including further guidance or examples in APES 215.

f) Appendix 1

A respondent suggested that 'specialised knowledge derived from training, study, or experience' be used instead of 'expertise' in Appendix 1 of APES 215 (SC18). Technical Staff note that while the terms are synonymous, Appendix 1 was based on the *ASIC v Rich* [2005] NSWSC 149 and accordingly, believe the wording should not be changed.

g) *Appendix 3*

A respondent believes the use of 'in accounting' in Appendix 3 after 'specialised knowledge derived from training, study or experience', which is not used in the requirements and application material in APES 215, may create confusion (SC21).

APES 215 includes 'Accounting' in its title, applies to Members of the three accounting bodies, and when the general term 'accounting' is used in APESB pronouncements, it refers to the broadest sense of the word. Further, every Forensic Accounting Service involves Professional Activities which require accountancy or related skills. Accordingly, Technical Staff do not recommend any changes to APES 215.

2. APES 215, AI and Digital Technologies

Two respondents responded to the Requests for Specific Comments in ED 07/22 relating to artificial intelligence (AI) and digital technologies (SC1-SC5).

One respondent suggested APESB consider whether; APES 215 should require accountants to declare if advice or evidence has been prepared or informed by AI; engagement letters should include the use of AI; AI will breach privacy and intellectual property laws, and clients will seek assurance from accountants on the client's use of AI (SC2). This respondent also suggested including in APES 215 explanatory material on the application of the communication requirements in subparagraphs 5.6(c)-(n) and disclosure requirement in paragraph 7.3 and further examples in Appendices 1 and 3 on technology (SC5 and section 3 below).

The other respondent suggested APES 215 should refer to the International Ethics Standards Board for Accountant's (IESBA) Technology-related revisions to the *International Code of Ethics for Professional Accountants (including International Independence Standards)* (IESBA Technology standard) once the provisions become operable in APES 110 (SC4).

Technical Staff agree with this suggestion but believe it can be achieved in this revision of APES 215. The final [IESBA Technology standard](#) was issued on 11 April 2023 and becomes effective globally from 15 December 2024. These revisions will be issued as an Exposure Draft by APESB and subject to APESB's due process, with the final standard likely to be effective from 1 January 2025 in Australia.

Paragraphs 3.12, 3.18, 3.1 and 4.2 of extant APES 215 already refer to, and will automatically accommodate, substantive changes to Subsections 113 *Professional Competence and Due Care* and 114 *Confidentiality* and Sections 120 *The Conceptual Framework* and 320 *Professional Appointments* in the IESBA's Technology standard.

To ensure APES 215 accommodates other substantive changes in the IESBA's Technology standard, Technical Staff recommend adding "Section 300 *Applying the Conceptual Framework – Members in Public Practice*" to paragraph 4.2 and a proposed new paragraph 4.3 of APES 215 to require a Member in Business undertaking a Forensic Accounting Service to comply with Sections 200 *Applying the Conceptual Framework – Members in Business* and 220 *Preparation and Presentation of Information* of APES 110.

To ensure Section 4 of APES 215 accommodates Members in Business, Technical Staff recommend adding "and other" to the Section heading.

3. APES 215 Third Taskforce Meeting

A Third APES 215 Taskforce meeting was convened on 12 April 2023 to discuss submissions on ED 07/22. The Taskforce supported the Technical Staff's analysis of comments received and proposed amendments but recommended maintaining proposed paragraph 3.14 as per ED 07/22 and other editorial amendments.

The Taskforce discussed responses to the Requests for Specific Comments on technology. Technical Staff presented an option to develop a new Appendix 4 with examples of AI and digital technologies used in Forensic Accounting Services and the application of APES 215 (including paragraphs 5.6 and 7.3 to address SC5) as an alternative to incorporating examples in Appendices 1 and 3 which might confuse the primary purposes of these Appendices.

The Taskforce noted that forensic accountants have used a variety of digital technologies for a long period and, in doing so, must comply with the fundamental principle of professional competence and due care in APES 110. Further, the Taskforce believe no amendments to APES 215 are required as subparagraphs 5.6(m) and (n) sufficiently cover technology as they respectively require communication in the Report of an Expert Witness of:

- the reasoning by which the Member formed the opinions or arrived at the Other Evidence, including an explanation of any method employed and the reasons why that method was chosen; and
- a list of all documents and sources of information relied upon.

The Taskforce supported the Basis for Conclusions accompanying APES 215, including commentary on AI and digital technologies. Draft minutes from the Third APES 215 Taskforce meeting are at Agenda Item 3(c).

Proposed Revised APES 215 and Basis for Conclusions

The proposed revised APES 215 with marked-up changes from ED 07/22 reflecting the above recommendations is at Agenda Item 3(d) and a clean version at Agenda Item 3(e). The proposed effective date is 1 October 2023, with early adoption permitted.

Technical Staff seek the Board's approval to issue the proposed revised APES 215 and related Basis for Conclusions set out at Agenda Item 3(f).

Small and Medium Practices (SMPs)

Technical Staff believe the amendments in the proposed revised APES 215 more directly relate to law enforcement/regulatory bodies and would have minimal impact on SMPs.

Recommendations

The Board:

- note the submissions received on ED 07/22; and
- approve, subject to the Board's review comments and editorials, the issue of a revised APES 215 and the related Basis for Conclusions.

Materials presented

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| Agenda Item 3(a) | General Comments Table ED 07/22 |
| Agenda Item 3(b) | Specific Comments Table ED 07/22 |
| Agenda Item 3(c) | Draft Minutes of Third APES 215 Taskforce Meeting |
| Agenda Item 3(d) | Proposed Revised APES 215 (marked-up) |
| Agenda Item 3(e) | Proposed Revised APES 215 (clean) |
| Agenda Item 3(f) | Draft Basis for Conclusions APES 215 |

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