



Consultation Paper: Review of APES 230 *Financial Planning Services*

Prepared and issued by **Accounting Professional & Ethical Standards Board Limited**

Commenting on this Consultation Paper

Comments on this Consultation Paper are requested by **1 March 2020**.

Comments should be addressed to:

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A copy of all submissions will be placed on public record on the APESB website:
www.apesb.org.au.

Obtaining a copy of this Consultation Paper

This Consultation Paper is available on the APESB website: www.apesb.org.au.

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Reasons for issuing Consultation Paper 01/19

Accounting Professional & Ethical Standards Board Limited (APESB) is performing a review of APES 230 *Financial Planning Services* (APES 230), to ensure that it remains appropriate in the midst of the significant developments, including legislative and regulatory changes, that have occurred and are ongoing in the financial services industry.

APESB issues this Consultation Paper to inform its review of APES 230 and to obtain the views of stakeholders in respect of key issues impacting on APES 230 and its application.

Request for comments

Comments are invited on this Consultation Paper 01/19: Review of APES 230 *Financial Planning Services* by **1 March 2020**.

APESB would prefer that respondents express a clear opinion on the specific questions raised and that opinions are supplemented by detailed comments, whether supportive or critical, on any matter. APESB regards both critical and supportive comments as essential to a balanced view in respect of the review of APES 230.

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Review of APES 230 *Financial Planning Services*

Background & History

The predecessor to APES 230 *Financial Planning Services* (APES 230), APS 12 *Statement of Financial Advisory Service Standards* (APS 12) was issued in October 2005 by The Institute of Chartered Accountants in Australia (now Chartered Accountants Australia and New Zealand) and the Australian Society of Certified Practising Accountants (now CPA Australia).

The purpose of APS 12 was to “set a standard of professional best practice for members in the provision of quality and ethical financial advice to clients”.¹ APS 12 included guidance material that members should adopt a fee for service framework as it was more consistent with professional independence² and where a member received commissions or other incentives the member was subject to disclosure requirements.³

The development of extant APES 230 included extensive stakeholder engagement and consultation during two separate Exposure Drafts in June 2010 and July 2012 respectively. During this period, the Board’s strong preference was for Members⁴ to be remunerated on a fee for service basis to minimise remuneration driven conflicts of interest.

The Board was of the view that third party payments (such as commissions) create a self-interest threat⁵ and fees based on funds under management result in an actual or perceived conflict.⁶ The inclusion of safeguards, including informed consent resulted in the inclusion of these alternative remuneration methods as it was considered to reduce the threats to an acceptable level.⁷

APES 230 was subsequently issued in April 2013 with an effective date of 1 July 2014, except for provisions relating to professional fees and third party payments, which became effective a year later on 1 July 2015.

Scope of APES 230

APES 230 specifies the professional and ethical obligations of Members who provide financial planning services. It covers financial planning advice in respect of clients’ personal financial affairs relating to wealth management, retirement planning, estate planning, risk management and related advice. This definition then stated that it includes advice provided under an Australian Financial Services Licence (AFSL) or Australian Credit Licence (ACL). The use of “includes” in a definition is generally read in a manner that there are other activities that are not specifically mentioned in addition to the most common activities as long as you meet the general proposition.

¹ Paragraph 2.2 of APS 12.

² Paragraph 17.2 of APS 12.

³ Clauses 20 & 21 of APS 12

⁴ Members means members of Chartered Accountants Australia and New Zealand, CPA Australia and the Institute of Public Accountants.

⁵ Basis for Conclusions: APES 230 Financial Planning Services (Formerly APS 12), page 8.

⁶ Basis for Conclusions: APES 230 Financial Planning Services (Formerly APS 12), pages 7 & 8.

⁷ Basis for Conclusions: APES 230 Financial Planning Services (Formerly APS 12), pages 6 & 7.

The definition was written in a manner that it captures all financial planning advice⁸, including real estate advice and non-product advice related strategies and **not** limiting it to financial advice captured under an AFSL or ACL as long as the financial advice related to a client's personal financial affairs relating to wealth management, retirement planning, estate planning, risk management and related advice.

The standard outlines Members' professional obligations when setting the terms of financial planning services and establishing the basis for preparing and reporting of financial planning advice. The standard also includes requirements in respect of professional independence, client information, client monies and other property, professional fees, third party payments, soft dollar benefits, documentation and quality control.

The scope of APES 230 is broader than the *Future of Financial Advice* (FOFA) legislation (2012) relevant to financial planning advice as it applies to activities such as mortgage broking and extends to wholesale clients.

APESB's Review of APES 230

Since APES 230 was issued in 2013, there have been significant developments in the financial services industry in Australia, primarily related to enhancing consumer outcomes.

APESB undertook a consultation on the post-implementation review of APES 230 in 2017 (CP 01/17) and received 27 submissions, which had diverging views about whether APES 230 should transition to a fee for service approach. The Board determined to undertake further stakeholder engagement in relation to APES 230.

Concurrently with the stakeholder engagement, there have been significant industry developments and reforms, including the *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Financial Services Royal Commission) and the establishment of the Financial Adviser Standards and Ethics Authority (FASEA) and its *Financial Planners and Advisers Code of Ethics* (FASEA Code), which becomes effective 1 January 2020.

APESB also commenced a project to restructure all of its pronouncements to align with the restructured APES 110 *Code of Ethics for Professional Accountants (including Independence Standards)* (restructured Code), which becomes effective 1 January 2020. An Exposure Draft for APES 230 (ED 04/19) was issued in October 2019, incorporating changes primarily to align to the restructured Code. APESB received two submissions on ED 04/19 and a revised APES 230 is expected to be released subsequent to APESB's November 2019 Board meeting.

Financial Services Royal Commission and the Government's Response

The Financial Services Royal Commission commenced in December 2017 and the final report was issued in February 2019, which included 76 recommendations on how to improve the financial services industry. The report highlighted significant concerns in relation to fees for financial planning services inappropriately taken and advocates for the removal of conflicted remuneration (such as commissions).

⁸ Basis for Conclusions: APES 230 Financial Planning Services (Formerly APS 12), page 3.

The Government released a [Financial Services Royal Commission Implementation Roadmap](#) (the Roadmap) in August 2019 setting out how and when they intend to implement all of the recommendations from the Financial Services Royal Commission, including:

Royal Commission Recommendation	Government's Implementation Plan
Mortgage brokers to act in the best interests of clients and restrictions on commissions (recommendations 1.2 and 1.3)	Exposure Draft issued on 26 August 2019 for consultation
Annual renewal of fee arrangements (recommendation 2.1)	Consult and introduce legislation by 30 June 2020
Disclosure of lack of independence (recommendation 2.2)	Consult and introduce legislation by 30 June 2020
Banning conflicted grandfathered commissions (recommendation 2.4)	Legislation passed on 14 October 2019 to ban these commissions from 1 January 2021
Reviews of Life risk insurance commissions (recommendation 2.5) and General insurance and consumer credit insurance commissions (recommendation 2.6) and effectiveness of measures implemented by the Government, regulators and financial services entities and whether the safe harbour provisions to the best interests of clients should be repealed (recommendation 2.3)	Reviews to be undertaken in 2021 and 2022 respectively as to whether remaining exemptions from conflicted remuneration should be banned
Prohibition on 'hawking' superannuation products (recommendation 3.4) and insurance products (recommendation 4.1)	Consult and introduce legislation by 30 June 2020
Exceptions and qualifications to generally applicable norms of conduct should be eliminated (recommendation 7.3)	Longer term goal to simplify the law

FASEA & Other Legislative Changes

FASEA was established under the *Corporations Amendment (Professional Standards of Financial Advisers) Act 2017*⁹, and the FASEA Code was issued in February 2019 as a legislative instrument, which becomes effective from 1 January 2020 and consists of 5 values and 12 standards. FASEA also released [FG002 Financial Planners and Advisers Code of Ethics 2019 Guidance](#) in October 2019.

APES 230 and the FASEA Code require financial planners to act in the best interests of the client.¹⁰ However, APES 230 defines this in accordance with the *Corporations Act 2001*¹¹, whereas the FASEA Code does not define 'best interests'. The Explanatory Statement to the FASEA Code implies the requirement under the FASEA Code is broader than the *Corporations Act 2001* obligations.¹² The *Corporations Act 2001* does include a 'catch-all' provision requiring the provider to take any other steps in the best interests of the client in their circumstances¹³, however, the Financial Services Royal Commission recommended that 'safe harbour' provisions be reviewed in 2022 and potentially repealed.¹⁴

⁹ Section 921X of the *Corporations Act 2001*.

¹⁰ Paragraph 3.6 of APES 230 and Standard 2 of the FASEA Code.

¹¹ Division 2 of Part 7.7A of the *Corporations Act 2001* and including section 961B.

¹² FASEA *Financial Planners and Advisers Code of Ethics 2019 Explanatory Statement* paragraph 34.

¹³ Section 961B(g) of the *Corporations Act* "taken any other step that, at the time the advice is provided, would reasonably be regarded as being in the best interests of the client, given the client's relevant circumstances".

¹⁴ Financial Services Royal Commission recommendation 2.3.

The FASEA Code requires informed consent for all forms of remuneration, whereas APES 230 does not require informed consent for fee for service.¹⁵ The FASEA Code requires free, prior and informed consent before acting for a client, whereas APES 230 requires a written agreement.¹⁶

APES 230 impacts upon a broader population of clients than the FASEA Code as it covers all clients (not just retail clients) and includes services provided under an ACL.

Caps on upfront commissions and further prohibitions in respect of conflicted remuneration for life insurance were introduced under the *Corporations Amendment (Life Insurance Remuneration Arrangements) Act 2017*, which became effective from 1 January 2018.

Fee for Service

Although extant APES 230 allows asset based fees and third party payments (subject to laws and regulations and obtaining informed consent), there has been a strong preference since 2005 (APS 12 and APES 230) for remuneration on a fee for service basis. Further, Members must not allow a conflict of interest to compromise professional or business judgement¹⁷ and advising a client to buy a product where the Member receives a commission might create a conflict of interest.¹⁸

There is now also a broader shift towards fee for service in respect of financial services from both a legislative and regulatory perspective and from within the industry itself.

Legislation was passed in October 2019 banning grandfathered conflicted commissions from 1 January 2021. Further, implementation of the recommendations from the Financial Services Royal Commission may result in the abolition of other forms of conflicted remuneration in due course. The FASEA Code allows benefits permitted by the *Corporations Act 2001*¹⁹ and relevant providers “*must not advise, refer or act in any other manner where you have a conflict of interest or duty*”.²⁰

There has also been a broader focus within the industry on fee for service arrangements as a way of enhancing the independence and quality of financial planning advice and new organisations operating only on that basis, for example:

- ADF Financial Services Consumer Centre where defence personnel receives financial advice on a fee for service basis.
- Profession of Independent Financial Advisers (PIFA) (previously the Independent Financial Advisers Association of Australia) whose membership only consist of advisers who operate on a fee for service basis.

¹⁵ Standard 7 of the FASEA Code and paragraphs 8.2 and 9.2 of APES 230.

¹⁶ Standard 4 of the FASEA Code and paragraph 5.2 of APES 230.

¹⁷ Paragraph R310.4 of the restructured Code.

¹⁸ Paragraph 310.4 A1 of the restructured Code.

¹⁹ Standard 7 of the FASEA Code.

²⁰ Standard 3 of the FASEA Code.

Consultation Paper Questions

APESB is seeking comments from stakeholders to assist in the review of APES 230 relating to changes in the financial planning services' legal and regulatory environment. In order to help guide, but not limit, stakeholder comments APESB has developed the following questions for stakeholders' input (practical examples would also be helpful):

1. In view of substantial changes in the financial services industry since APES 230 became effective in July 2014:
 - a) Do you consider that APES 230 remains fit for purpose?
 - b) What amendments or enhancements, if any, should be made to APES 230?
 - c) Are there any tools or templates that could be included in APES 230 to assist with complying with the standard?
2. Do you believe that the definition of Financial Planning Advice in APES 230 captures all the relevant advice, products and services, including advice not provided under an AFSL or ACL such as real estate advice and non-product advice related strategies? If not, please provide an explanation and any recommendations or amendments to this definition to capture relevant Financial Planning Advice provided to a Client?
3. APES 230 requires Members to act in the "*Best Interests of the Client*" (as per the *Corporations Act 2001*):
 - a) Have there been any implementation issues in respect of this requirement?
 - b) Do you consider the 'safe harbour' provisions in the *Corporations Act 2001* ensure clients' best interests are met?
4. APES 230 currently allows remuneration as fee for service, asset based fees and third party payments (subject to laws and regulations). If APES 230 is limited to only allow fee for service:
 - a) What are the challenges, if any, that Members consider would result from implementing these changes?
 - b) Are there any transitional arrangements required?
5. APES 230 requires Members to obtain their clients' "*Informed Consent*" in respect of asset-based fees and third party payments, but not for fee for service. If Informed Consent is required for fee for service arrangements in APES 230:
 - a) Are there any the new systems, processes and/or policies that Members would need to implement?
 - b) What are the challenges, if any, that Members consider would result from implementing these changes?
 - c) Would the inclusion of a template in APES 230 be useful for Members, which includes matters to be disclosed to clients to obtain Informed Consent for remuneration?

6. The Financial Services Royal Commission recommended that 'hawking' (unsolicited offer or sale) of superannuation and insurance products should be banned (recommendations 3.4 and 4.1):
 - a) Does the requirement that Members' marketing or promotional activities must not bring the profession into disrepute²¹ adequately prevent unsolicited offers or sales in practice?
 - b) If not, are there other mechanisms that could be put in place to prevent the unsolicited offer or sale of financial products?
7. If APES 230 extended the concept of Informed Consent to the Terms of Engagement and the provision of the Financial Planning Advice, what are the challenges, if any, that Members consider would result from implementing these changes?
8. APES 230 currently allows soft dollar (non-monetary) benefits up to a cap of \$300, which is consistent with *Corporations Act 2001* requirements. Should this cap remain?
9. Do you consider that there are sufficient protections in APES 230, in relation to debt and gearing around asset-based fees (for wholesale clients)?
10. Are there any further reforms, issues or ideas that you believe the APESB should consider in APES 230 in order to protect consumers who receive financial advice from a Member?

²¹ Paragraph 3.18 of APES 230 and Section 115 of the restructured Code.