Six Month Review of APES 230 *Financial Planning Services*

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1. APES 230 Six month review

1.1 Background

Accounting Professional and Ethical Standards Board (APESB) issued APES 230 *Financial Planning Services* (APES 230) in April 2013. APES 230 is effective from 1 July 2014 with transitional provisions in respect of sections 8 and 9 dealing with remuneration which are effective from 1 July 2015. APES 230 will replace APS 12 *Statement of Financial Advisory Service Standards* which was issued jointly by the Institute of Chartered Accountants Australia (ICAA) and CPA Australia.

1.2 Reason for this report

In accordance with APESB's constitution, a six-month review of APES 230 should be performed subsequent to an issue of a pronouncement to identify and resolve any issues reported by stakeholders. This report presents a review of the issues reported to APESB or identified by an internal technical review and the proposed recommendations to address these issues.

1.3 Introductory and general comments

Stakeholders' General comments

Since the release of APES 230 CPA Australia and the Institute of Chartered Accountants Australia have received feedback from members, financial services licensees and financial institutions. The majority of inquiries have focused on seeking clarity in relation to how and when the standard will apply. A table has been included on the following pages that summarises the key feedback received and some initial comments from CPA Australia and the Institute.

We acknowledge that some of these issues have been raised and recorded in the Issues Register (February 2014). In the interests of facilitating discussions, we have included further details where appropriate. The intention was for these issues to be further explored with the APESB Technical Staff prior to the April APESB meeting. However, to date only brief discussions have been held, which did not clarify all inquiries received.

For information, engaged stakeholders have indicated that without additional clarity on some of these issues, they are unable to appropriately consider how they may implement new systems to comply with the requirements APES 230.

As an example, Count Financial Limited (a subsidiary of CBA) has publicly stated that they will provide support for their representatives to meet the requirements of APES 230. However, during extensive discussions with CPA Australia and the Institute, Count has stated that they are unable to commence assessing what system changes will be needed without a number of requirements being clarified. Depending on these outcomes, they have indicated the system changes required could be extensive, with significant time and capital investment implications.

In addition to these issues, the Government introduced into Parliament on 19 March 2014 draft legislation to significantly amend the current Future of Financial Advice (*FoFA*) reforms. We believe the Board should consider the impact and significance of this critical development, noting that the Government intends to implement the obligations of the Bill

through new regulations until the Bill is enacted. Importantly, the Bill is still being debated and has been referred to the Senate Finance and Public Administration Legislation Committee for inquiry and report by 16 June 2014. This is causing further uncertainty.

The current FoFA reforms were going to be instrumental in the successful implementation of APES 230, as it would have acted as the catalyst for crucial system changes for licensees necessary to implement key obligations of APES 230.

Since the Government announced these proposed amendments, many large licensees have publicly stated they have ceased making any changes to their current systems in anticipation that FoFA will be amended.

Consistent with the broader industry, the majority of members providing Financial Planning Services operate under another entity's licence which will in turn significantly challenge their ability to comply with APES 230.

CPA Australia and the Institute believe that given legislative uncertainty around amendments to key areas of FoFA reforms, in conjunction with the existing clarification issues, the Board should give consideration to extending the current transition provisions from 1 July 2015 to until at least 1 July 2016.

Technical Staff Response

FoFA Regime

Stakeholders have commented that potential changes to the regulation and legislation governing the *FoFA* regime may occur in the near future. Accordingly, they have requested the Board to consider an extension to the current transition provisions in respect of remuneration from 1 July 2015 to 1 July 2016.

Based on the implementation timelines for the legislation and regulations in respect of the *Future of Financial Advice* (*FoFA*) from the Treasury website, it should be noted that *FoFA* legislation commenced on **1 July 2012** with mandatory application on **1 July 2013**.

ASIC has also issued regulatory guides (RG), for example RG 98 *Licensing; Administrative action against financial services providers*, RG 175 *Licensing: Financial product advisers-Conduct and disclosure*, RG 244 *Giving information, general advice and scaled advice*, RG 246 *Conflicted remuneration*, RG 183 *Approval of financial services sector codes of conduct* and RG 245 *Fee disclosure statements* to inform stakeholders of their expectations on the implementation of the *FoFA* regime.

During the development phase of APES 230, the Board contemplated having a start date of 1 July 2013 to align with the *FoFA* reforms and to delay the remuneration provisions until 1 July 2014. However, based on the representations made at the time by the Professional Bodies, the Board determined to delay the APES 230 implementation dates to the current dates in the standard.

Whilst we acknowledge that there are various parties lobbying the Government to repeal components of the *FoFA* legislation and regulation, the existing law has been in place for nearly two years (i.e. since 1 July 2012) with application guidance from the regulator. We also understand that the regulator has indicated that before 1 July 2014 they are in a facilitative mode. We note that based on the latest announcements, the government has

frozen plans to immediately implement changes to the *FoFA* regime and halted steps to introduce any changes via regulations. It should also be noted that the focus of some of the Government's proposed changes are in the areas of general advice rather than personal advice. In regards to personal advice key areas impacted are the best interest duty and the requirement to opt-in every two years.

As it currently stands, *FoFA* legislation is the law of the land and has had legal mandatory application since 1 July 2013. If a party has determined not to comply with the *FoFA* regime due to potential changes that may or may not occur in the future then they do so at their own risk. If a consumer has not received appropriate financial advice post 1 July 2013 in accordance with the *FoFA* regime then the consumer will be within his or her rights to take legal action. In these circumstances a financial adviser who has not complied with the *FoFA* regime will be in very weak position legally if their primary argument is that they did not comply with the existing law as there was an expectation that the Government will change the law in the future.

Furthermore, given the significant debate from those for and against the Government's amendments, it is not clear what the Government's final position will be. This has now become a mainstream issue where a significant number of stakeholders (i.e. retirement groups and senior Australians) are actively involved in the debate and the management of the wealth of all Australians is at risk. The issue remains whether the proposed amendments are in the best interests of the individual investor or in the interests of the financial institution/financial adviser.

The Code and APES 230

As explained at the February 2014 meeting with stakeholders, APES 230 is based on the fundamental ethical principles of APES 110 *Code of Ethics for Professional Accountants* (the Code) and the Code is the foundation of all professional standards including the core principles in APES 230. APESB's Code is based on the international Code issued by the International Ethics Standards Board for Accountants (IESBA).

For professional accountants in Australia the Code requires Members to comply with the fundamental ethical principles of integrity, objectivity, professional competence and due care, confidentiality, and professional behaviour. Furthermore, the Code mandates Members to take reasonable steps to identify circumstances that could pose a threat to compliance with these principles. When actual or potential threats arise, a Member must apply appropriate safeguards to eliminate or reduce, to an Acceptable Level, any threats to the fundamental ethical principles.

Hence, any potential changes to the regulations and legislation governing the *FoFA* regime has a relatively lesser impact on APES 230 compared to any changes made to the IESBA Code. Furthermore, if the legislative change is creating a lower standard than an existing professional standard then its impact is negligible than if the legislative change was creating a higher standard.

A self-interest threat to the fundamental ethical principles of integrity, objectivity and professional competence and due care arises from conflicted remuneration such as Commissions and percentage based asset fees which are linked to FUM and other incentive based remuneration. These types of remunerations operate in a manner that influences a Member's behaviour, which is in conflict with the Client's best interests. Where a Member is not operating on a Fee for Service basis and receives asset based

fees or Commissions, Paragraphs 8 *Professional fees* and 9 *Third Party Payments* mandate certain safeguards that Members should comply with in order to address those threats.

The obligations of a profession

The obligation to serve the public interest is what distinguishes professionals from other occupations. Because of this self-imposed obligation, professions (such as the medical, legal and accountancy professions) are accorded a high occupational status in society. Invariably the professional standards adopted by the accounting profession are in addition to or higher than legal obligations. The voluntary adoption of professional standards (i.e. self-regulation or co-regulation) plays a key role in the accounting profession maintaining its professional status compared to industry lobby groups.

As such, the annual fee disclosure statement requirement for Clients will act in the public interest by providing transparency and information about the cost of financial advice. In addition, Clients will be in a position where they will be well informed to make decisions with regards to the clarity and transparency of services provided by Members of the accounting profession. We note that CPA Australia and ICAA have supported opt-in and fee disclosure statements in its submission to the Treasury in respect of the Corporations Amendment (Streamlining of Future Financial Advice) Bill 2014. CPA Australia's media release on 18 March 2014 favourably argues that the existing *FoFA* measures need to be retained in the best interests of consumers and urges the Government to reconsider their determination to erode these important reforms.

APESB's annual review process

APESB has a process in place, in accordance with its constitution, to review its professional pronouncements on an annual basis which takes into account changes in the external environment such as international developments and changes in legislation. APESB has a history of amending standards to take these developments into account.

However, it should be noted that historically whenever these matters have occurred they have been enhancements or instances of another body or authority setting higher standards than existing professional standards and APESB has taken appropriate action in a timely manner to amend its pronouncements.

Hence the Board has concluded that the current transitional provisions in APES 230 are appropriate.

2. Review of Specific Issues

2.1 Referral of Clients to financial service providers

Issue

Stakeholders have queried whether the obligations of Paragraph 8 *Professional Fees* and Paragraph 9 *Third Party Payments* apply to a Member who refers a Client to a financial service provider. Consequently, APES 230 apply only to Members who provide Financial Planning Services and does not apply to Members who provide non-Financial Planning Services.

CPA Australia/ICAA preliminary comments

A Member who refers a Client to a financial adviser/credit representative is not providing a 'Financial Planning Service'. Therefore, the Member can receive a Commission or referral fee provided they comply with the requirements of APES 110 and abide by the legal obligations of referring a Client under the *Corporations Act 2001* and the *National Consumer Credit Protection Act 2009*.

Specifically, the Member must comply with considerations, obligations and requirements of paragraphs AUST 240.5 – 240.8 in APES 110 if they receive a referral fee or Commission.

Impacted Stakeholders

Members in Public Practice, dealer groups and Professional Bodies

Recommendation

As noted in the APESB Issues Register (Feb. 2014), Technical Staff concur with the comments made by the stakeholders. It is the Members who provide Financial Planning Services who must comply with the requirements of APES 230 in accordance to paragraph 1.3. However, all Members must note that referral fees and commissions are also captured by paragraphs 240.5 – 240.8 of APES 110 which include AUST 240.7.1.

Paragraph AUST 240.7.1 of APES 110 states as follows:

AUST 240.7.1 A Member in Public Practice who is undertaking an engagement in Australia and receives a referral fee or commission shall inform the client in writing of:

- *the existence of such arrangement;*
- *the identity of the other party or parties; and*
- *the method of calculation of the referral fee, commission or other benefit accruing directly or indirectly to the Member.*

2.2 Grandfathering provisions

Issue

Stakeholders have queried whether there are grandfathering provisions for Members who currently charge a Client on an ongoing asset based fee.

Paragraph 9.4 of APES 230 addresses the receipt of trail Commissions for previously provided insurance and risk advice. However, it does not state if the receipt of investment Commissions (permitted under *FoFA* reforms) will continue to be provided in accordance with the requirements of this paragraph.

Paragraph 9.4 further states that trail Commissions for insurance and risk advice can continue to be received provided the contracts were entered into prior to 1 July 2014. However, based on the transition provisions in paragraph 12, the requirements of paragraph 9 is only effective from 1 July 2015.

Additionally, paragraph 9.2 (b) (ii) requires financial advisors to research alternative insurance products for a Client and to provide 3 quotes to the Client. However, in practical terms, the research is not usually provided and disclosed to the Client.

CPA Australia/ICAA preliminary comments

Members who charge their Clients on an ongoing asset based fee are bound by the obligations of paragraph 8.2 and are required to meet the requirements of 8.2(b) if they wish to continue charging their Clients in this manner.

A Member can continue to receive trail Commissions from investment advice in alignment with the application of *FoFA*, which commenced prior to paragraph 9.4. (Note: Paragraph 9.4 does not refer to investment products).

Investment Commissions were not included in these provisions because it was considered that the legal obligations of *FoFA* would apply. However, its omission has created uncertainty. Therefore, CPA Australia/ICAA seek clarification on how paragraph 9.4 may be applied to existing arrangements whereby a Commission in respect to an investment product is received.

Moreover, CPA Australia/ICAA noted a discrepancy between the applicable start date for the provisions in paragraph 9.4 and the transition requirements in paragraph 12. Accordingly, CPA Australia/ICAA requested clarification that the date stated in paragraph 9.4 should be 1 July 2015.

In relation to paragraph 9.2 b(ii), where the Member demonstrates that they comply with the conflicts priority rule i.e. must not act to further their interests or those of their related parties over the Client's interest when giving advice to the Client, then they satisfy this obligations. In addition, Members have to disclose to the Client of other products considered.

Impacted Stakeholders

Members in Public Practice, dealer groups and Professional Bodies

Technical Staff Response

Commencement date of APES 230

As explained at the February 2014 meeting with stakeholders, in respect of Members in Public Practice, the whole suite of APESB standards operate from the commencement date of the engagement and the subsequent delivery of the applicable services. Based on the transitional provision in paragraph 12, the requirements of paragraphs 8 and 9 in respect to professional fees and Third Party Payments are only effective from 1 July 2015.

Accordingly, Members should implement APES 230 in a two phased process (unless it is voluntarily early adopted) in the following manner:

(i) Where a Member provides a Financial Planning Service in respect of an engagement commencing on or after 1 July 2014, Members need to comply with the requirements of APES 230 excluding the remuneration requirements;

(ii) Where a Member provides a Financial Planning Service in respect of an engagement commencing on or after 1 July 2015, Members need to comply with the requirements of APES 230 including the remuneration requirements;

However, where there is a recurring engagement (refer to guidance in APES 305 *Terms of Engagement*), then whenever there is a change of circumstances of the engagement such as legislative changes or changes to professional standards, a new engagement effectively commences. The exclusion of an engagement prior to the application of a commencement date in the standard is not unique to APES 230 and has occurred in respect of all APESB standards and Technical Staff has explained this matter to stakeholders.

The intention of the APES 230 start date of 1 July 2014 was in effect to have a soft start (similar to the Government which commenced *FoFA* 1 July 2012 and had mandatory application from 1 July 2013 as well as ASIC which is in the facilitative phase until 1 July 2014). Accordingly, most of the provisions that already existed in APS 12 or the existing professional standards such as APES 110, APES 305 and APES 320 has a start date of 1 July 2014 and the provisions that deal with remuneration have a start date of 1 July 2015. Furthermore (as noted previously), these dates were delayed by the Board from the initially considered dates of 1 July 2013 and 1 July 2014.

Thus, if there is an engagement that occurs between 1 July 2014 and 30 June 2015 and there are no further services provided post 1 July 2015, the income from these insurance and credit contracts will be grandfathered. However, Members will need to comply with the other provisions of APES 230 which are applicable from 1 July 2014.

Commissions on Investment products

Engagements prior to 1 July 2015 where no further services are provided, which may result in the receipt of investment commissions, are outside the scope of the standard. Refer to APES 230 Application Timeline for remuneration requirements (refer Appendix 1).

For example, if the Commissions on an investment product relates to an historical engagement and the Member in Public Practice provides no further services in the post 1 July 2015 period, any receipt of income during the post 1 July 2015 period relating to the historical service is not within the scope of APES 230.

In respect of Commissions on investment products, it should be noted that the Financial Planning Association (FPA) prohibited its members from receiving Investment Commissions in 2009 and the Government's *FoFA* regime imposes a similar ban from 1 July 2012. Thus, compared to insurance and credit products which continued to have Commissions, the expectation was that in the post 1 July 2012 period there would be very minimal investment products with Commissions.

Asset based fees

As noted in the APESB Issues Register (Feb. 2014), Technical Staff concur with stakeholders' views that Members in Public Practice who charge Clients on an ongoing asset based fee are required to comply with APES 230 from 1 July 2015, regardless of the engagement's historical commencement date, due to the circumstances noted above.

Quotes for Third Party Payments

In relation to paragraph 9.2 (b) (ii) the three quotes is a key safeguard to eliminate threats and conflicts of interest and need to be applied to reduce threats to the fundamental principles of the Code. By providing the quotes to the Client, it provides transparency to the process and is in the consumer's interest. If Members are already performing this step internally then disclosing it to the Client should not be an issue.

2.3 Provision of 'accounting insurance' that is not within the scope of a Financial Planning Service

Issue

Stakeholders raised a case whereby a Member provides their Clients with 'accounting insurance' through AIB. The Member has a firm policy taken out to cover a Client should the ATO audit them. In the event, the Client takes up the policy (available to them in addition to the Firm), the Firm receives a Commission.

CPA Australia/ICAA preliminary comments

It is not the intention of APES 230 to apply in these circumstances, as they do not represent Financial Planning Services, and as such the provisions of APES 230 would not apply.

Impacted Stakeholders

Members in Public Practice, Firms and Professional Bodies

Recommendation

As noted in the APESB Issues Register (Feb. 2014), Technical Staff concur with the comments made by the stakeholders. Additionally it should be noted that as per issue 2.1, paragraphs 240.5 – 240.8 of APES 110 will also apply in these circumstances.

2.4 Scope of APES 230 over Other Services

Issue

Stakeholders raised queries as to whether APES 230 captures stockbroking services and whether it applies to general insurance advice and services.

CPA Australia/ICAA preliminary comments

Stockbroking is an execution only service and therefore it would not be captured by the provisions of APES 230. Stockbrokers may recommend a Client to purchase a specific stock, in which case they usually charge a flat dollar per trade or % per trade fee, based solely on the size of the investment. CPA Australia/ICAA was of the view that clarification should be provided on its interaction with the provisions of paragraph 8. It is not a fee for service as defined by APES 230, however if paragraph 8.2 (b) applies, the Member will not be able to comply with all necessary obligations as it is a stand-alone advice.

General insurance is concerned with the protection of personal assets, not wealth creation or retirement planning advice. As such it is not the intention of APES 230 to capture this type of advice or service.

Impacted Stakeholders

Members in Public Practice, Firms and Professional Bodies

Recommendation

The key issue for consideration is whether the provision of stock broking services and general insurance advice meets the definition of a *Financial Planning Service*.

Each professional service needs to be determined on a case by case basis taking into consideration the definition of *Financial Planning Advice* which captures advice in respect of a Client's personal financial affairs specifically related to wealth management, retirement planning, estate planning, risk management and related advice. This includes:

a) advice on financial products such as shares, managed funds, superannuation, master funds, wrap accounts, margin lending facilities and life insurance carried out pursuant to an Australian Financial Services Licence;
b) advice and dealings in financial products as defined in section 766C of the Corporations Act 2001;
c) advice and services related to the procurement of loans and other borrowing arrangements, including credit activities provided pursuant to an Australian Credit License; and

d) 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).

Technical Staff concur with the views of the stakeholders that general insurance advice is unlikely to come within the scope of APES 230. Technical Staff also agree with the stakeholders view that where the stock broking service is merely an execution process without the provision of any related *Financial Planning Advice* (as defined in APES 230), then it does not fall under APES 230. On the other hand, if the stockbroking service is provided in relation to *Financial Planning Advice* then those services will be captured by APES 230. However, it should be noted that as per issues 2.1 and 2.3 that APES 110 will apply in these circumstances if the Member receives a referral fee or Commission.

2.5 New engagements and professional fees

Issue

Respondents sought clarification on the definition of a new engagement as to whether it is dependent on new advice being provided or new advice relating to payments being received. For example, a Client has existing insurance in place and their circumstances have changed requiring an increase in their level of cover vs. a new Client requesting insurance cover.

Stakeholders raised queries whether a new engagement occurs when a statement of advice is provided and what if the Client declines to accept any further engagement.

CPA Australia/ICAA preliminary comments

For clarification and to ensure consistency with the understood terms in the industry, paragraphs 8 and 9 apply to new Clients engaged from 1 July 2015. For existing Clients i.e. engaged pre 1 July 2015, the obligations of paragraphs 8 and 9 is applicable where a new statement of advice or record is provided to the Client.

Commissions received in regards to credit or insurance contracts entered into before 1 July 2015 are grandfathered.

Impacted Stakeholders

Members in Public Practice, dealer groups and Professional Bodies

Technical Staff Response

Paragraphs 8 and 9 apply to all Clients from 1 July 2015 whether there are new Clients or whether new/recurring services are provided to existing Clients. The provisions of APES 230 apply to all existing Clients, when a Financial Planning Service is provided in the post 1 July 2014 period (subject to the transitional provisions) regardless of whether a new statement of advice or record of advice is issued to the Client.

The start date of 1 July 2014 was intended to provide a soft start (similar to the Government's approach in implementing *FoFA* on 1 July 2012 and enforcing mandatory

compliance on 1 July 2013 as well as ASIC which is in the facilitative phase until 1 July 2014).

For example, Commissions received in relation to credit or insurance contracts entered into prior to 1 July 2015 and where no further Financial Planning Services are provided in the post 1 July 2015 can be grandfathered. The grandfathering provisions are not applicable if the Client refreshes the engagement and the Member in Public Practice provides Financial Planning Advice in the post 1 July 2015 period.

Refer to APES 230 Application Timeline for remuneration requirements (Appendix 1).

The combined effect of Paragraph 5.1 of APES 230 and paragraph 3.1 of APES 305 *Terms of Engagement* is that a Member in Public Practice must document and communicate to the Client the terms of the Engagement to provide the Financial Planning Service.

Consequently, paragraph 5.2 of APES 305 further states that when determining the need to reissue or amend an Engagement document for a recurring Engagement, a Member in Public Practice should consider the following factors:

(a) any indication that the Client misunderstands the objective and scope of the Engagement;
(b) any significant changes in the Engagement;
(c) any significant changes in the professional services to be provided or the Terms of Engagement;
(d) a recent change of Client management or ownership;
(e) a significant change in the nature or size of the Client's business;
(f) any significant changes to Professional Standards or applicable accounting or auditing and assurance standards; and
(g) any changes to legal or regulatory requirements.

Furthermore, paragraph 8.4 of APES 230 has a mandatory requirement that if a Member in Public Practice proposes to make a material change to the basis upon which the Member charges professional fees, the Member must notify the Client and obtain the Client's written consent to the amended terms in accordance with APES 305.

2.6 Best interests

Issue

Members in Public Practice who provide credit advice are regulated under the *National Consumer Credit Act* and not the *Corporations Act*. APES 230 requires Members to act in the best interests of their Client, which is defined in the standard as Division 2 of Part 7.7A of the Corporations Act.

While Members in Public Practice providing credit advice can comply with the general obligation to act in their Client's best interest, they cannot comply with the remaining obligations defined in the Division 2. However, ASIC has stated in RG 175.239 that satisfying the safe harbor of Section 961B in Division 2 is not the only way to demonstrate an individual is acting in their Client's best interest.

CPA Australia/ICAA preliminary comments

There needs to be a practical and flexible approach for Members providing credit advice to ensure they can comply with the general principle of acting in the Client's best interest, rather than complying specifically with all provisions of Division 2 of Part 7.7A of the Corporations Act 2001, which they would not be required to do if they were not imposed by APES 230.

CPA Australia and ICAA propose to issue further guidance stating that Members providing credit advice captured by APES 230 will comply with the obligations to act in their Client's best interests when they comply with the responsible lending provisions of the National Consumer Credit Protection Act.

Impacted Stakeholders

Members in Public Practice, dealer groups and Professional Bodies

Technical Staff Response

The application of the Best Interests duty is a specific additional safeguard incorporated by the APESB against threats created to the fundamental ethical principles of the Code due to the receipt of Commissions. A Financial Planner will generally provide holistic advice in relation to investment and credit products. Thus the Board determined at the time to apply the Best Interest duty to all Financial Planning Advice as an additional safeguard against the threats created by Commissions.

Best Interests of the Client means the obligations as defined in Division 2 of Part 7.7A of the *Corporations Act 2001*. Provisions of Corporations Act Section 961B on *Provider must act in the best interests of the client* depends on the circumstances and states the following:

(1) The provider must act in the best interests of the client in relation to the advice.

(2) The provider satisfies the duty in subsection (1), if the provider proves that the provider has done each of the following:

(a) identified the objectives, financial situation and needs of the client that were disclosed to the provider by the client through instructions;

(b) identified:
(i) the subject matter of the advice that has been sought by the client (whether explicitly or implicitly); and
(ii) the objectives, financial situation and needs of the client that would reasonably be considered as relevant to advice sought on that subject matter (the client's relevant circumstances);

(c) where it was reasonably apparent that information relating to the client's relevant circumstances was incomplete or inaccurate, made reasonable inquiries to obtain complete and accurate information;

(d) assessed whether the provider has the expertise required to provide the client advice on the subject matter sought and, if not, declined to provide the advice;

(e) if, in considering the subject matter of the advice sought, it would be reasonable to consider recommending a financial product:
(i) conducted a reasonable investigation into the financial products that might achieve those of the objectives and meet those of the needs of the client that would reasonably be considered as relevant to advice on that subject matter; and
(ii) assessed the information gathered in the investigation;

(f) based all judgements in advising the client on the client's relevant circumstances;

(g) 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.

Whereas, the provisions of the *National Consumer Credit Protection Act* only stipulates the general responsible lending conduct and obligations of credit assistance providers before providing credit assistance.

In accordance with APES 230, Members in Public Practice must *act in the Best Interests of the Client* by applying the safeguard of the Best Interest duty and can comply with this obligation by replacing the terminology of 'financial product' used in the Provisions of Corporations Act Section 961B with 'investment in properties and credit products' (e.g. direct properties and loans).

Key stakeholders have requested that the Board consider developing a principles based definition of Best Interest Duty which is not linked to the *Corporations Act 2001*. The Board has indicated that the Board will consider this issue and requested that the key stakeholders submit a proposal for the Board's consideration.

2.7 Transition and Regulatory Framework

Issue

On 19 March, the Government introduced into Parliament draft legislation to significantly amend the current Future of Financial Advice (*FoFA*) reforms.

The key amendments include:

- the abolition of 'opt-in';
- fee disclosure statements (FDS) will only need to be provided to Clients post 1 July 2013;
- the loosening of the ban on conflicted remuneration; and
- amendments to the best interest duty.

Opt-in, fee disclosure statement requirements and the ban on conflicted remuneration was going to be instrumental in the successful implementation of APES 230. These reforms would have been the catalyst for crucial system changes for licensees necessary to implement the key obligations of APES 230 under paragraph 8 and 9. However, many licensees have publicly stated that they have ceased making any changes to their current systems in order to implement these obligations in anticipation of the *FoFA* amendments.

Consistent with the broader industry, the majority of Members providing Financial Planning Services operate under another entity's license. As they rely on the systems of their licensee when providing advice, this will significantly challenge their ability to comply with APES 230 by the end of the current transition period.

CPA Australia/ICAA preliminary comments

CPA Australia and the Institute believe that given legislative uncertainty around amendments to key areas of *FoFA* reforms, in conjunction with the existing clarification issued, the Board should give consideration to extending the current transition provisions from 1 July 2015 to until at least 1 July 2016.

Impacted Stakeholders

Members in Public Practice, dealer groups and Professional Bodies

Recommendation

Although it is understood that the Government is consulting with a view to amending the *FoFA* reforms, as it stands *FoFA* came into full effect on 1 July 2013 and is currently enforceable. Notwithstanding that the Australian Securities and Investments Commission (ASIC) provided guidance and education in respect to *FoFA* reforms with the issuance of Regulatory Guide (RG) 245 *Fee disclosure statements* and RG 246 *Conflicted remuneration* in March 2013 and RG 175 *Licensing*: *Financial product advisers-Conduct and disclosure* in October 2013.

Secondly, the legislation implementing the majority of the reforms, including the prospective ban on conflicted remuneration structures, advisor charging regimes and the statutory Best Interests duty commenced from **1 July 2012**. The Government released the reforms in two tranches to ensure a practical transition period. Tranche 1 of the reforms which covers best interest duty, opt-in and increased ASIC powers was released on 29 August 2011. Consequently, tranche 2 was released which deals with conflicted remuneration and asset based fees on geared investments. Hence, APES 230 which will be effective from 1 July 2014, is only effective one year after the mandatory application of *FoFA* on 1 July 2013 and thereafter another year is provided in respect of the remuneration requirements. Thus APES 230 will only be fully operational in July 2015 which is two years after *FoFA* has mandatory application.

As a result, despite the present lobbying efforts to unwind the *FoFA* laws, ASIC has flagged the possibility that it might start taking enforcement action against banks and financial planners who breach advice rules that are subject to the *FoFA* regime. ASIC has warned that it would review its current policy of not taking enforcement for financial advisers flouting the *FoFA* regime. ASIC has stated that they are still within their facilitative period and are looking to assist firms in getting their compliance regimes in place.

Moreover, lawyers have also warned and advised that firms and banks that breach the law will face civil action from aggrieved Clients.

In addition, excluding the remuneration matters that the Government is considering, the majority of the other requirements addressed in APES 230 are merely an enhancement of the existing provisions in APS 12 *Statement of Financial Advisory Service Standards*, APES 110 *Code of Ethics of Professional Accountants*, APES 320 *Quality Control for Firms* and APES 305 *Terms of Engagement*.

Furthermore, there are firms/practices which currently operate under the stricter Fee for Service remuneration method of APES 230 and thus, some of the systems and procedures are already in existence. With appropriate implementation support from the Professional Bodies and dealer groups Members should be able to transition to a APES 230 compliant environment.

Finally, the remuneration requirements of APES 230 i.e. paragraphs 8 and 9 in respect of professional fees and Third Party Payments are only effective from 1 July 2015. Thus, there is more than one year remaining for the development of appropriate documentation to transition Members to a APES 230 compliant environment.

Hence the Board has concluded that the current transitional provisions in APES 230 are appropriate. Refer to APES 230 Application Timeline for remuneration requirements (Appendix 1).

2.8 Defined terms

Issue

The technical review identified that the definitions section of APES 230 needs to be revised.

Definition to be revised

> ***Member in Public Practice*** means a Member, irrespective of functional classification (e.g. audit, tax or consulting) in a Firm that provides professional services. This term is also used to refer to a Firm of Members in Public Practice and means a practice entity and a participant in that practice entity as defined by the applicable Professional Body.

Impacted Stakeholders

Members, Firms and Professional Bodies.

Recommendation

The defined term in APES 230 should be revised in a manner consistent with the Code and other APESB standards. It is recommended that this change be processed at the next revision of APES 230.

APES 230 Application Timeline for remuneration requirements

APES 230	**30/6/2014**	**30/6/2015**	
Section 8 – Professional Fees Where a Member in Public Practice charges a professional fee solely determined or based on a percentage of the value of the Client's assets or funds under management (FUM), paragraph 8 is applicable for:	**Pre 1 July 2014**	**1 July 2014 – 30 June 2015**	**Post 30 June 2015**
• Existing and new Clients (i.e. engagements entered into pre 1 July 2015)	n/a	No, unless voluntary early adoption	Paragraph 8 implemented with application of safeguards in paragraph 8.2 (b) i.e. • Obtaining, prior to the commencement of the Financial Planning Service, written Informed Consent from the Client to charge and collect the professional fee on a percentage basis; • Disclosing on an annual basis to the Client the amount collected for Financial Planning Service and providing an explanation for any significant variation from previously advised fees; and • Obtaining thereafter on at least a biennial basis written consent from the Client to continue to charge and collect the professional fee on a percentage basis.
• Existing and new Clients (i.e. all engagements entered into and performed post 30 June 2015)	n/a	n/a	

APES 230	**30/6/2014**	**30/6/2015**	
Section 9 – Third Party Payments Where a Member in Public Practice receives Third Party Payments for a Financial Planning Advice, paragraph 9 is applicable for:	**Pre 1 July 2014**	**1 July 2014 – 30 June 2015**	**Post 30 June 2015**
• Existing Clients (i.e. contracts entered into pre 1 July 2014) + no new additional services provided post 30 June 2014	Grandfathered	Grandfathered	Grandfathered
• Existing and new Clients (i.e. contracts entered into between 1 July 2014 – 30 June 2015) + no new additional services provided post 30 June 2015	Grandfathered	Grandfathered	Grandfathered
• Existing and new Clients (i.e. contracts entered into pre 1 July 2015) + new or varied services provided post 30 June 2015	Grandfathered	Grandfathered	Members shall comply with the remuneration requirements. Paragraph 9 implemented with application of safeguards in paragraph 9.2 (b) i.e. • Obtaining, prior to the commencement of the Financial Planning Service, written Informed Consent from the Client for the receipt of Third Party Payments; • disclosing to the Client three comparative quotes where available, in respect of Financial Planning Advice on new contracts for life insurance and other risk products and the procurement of new loans; • disclosing on an annual basis to the Client the amount or estimated amount of Third Party Payments to be received for the Financial Planning Service; • disclosing on an annual basis to the Client the amount or estimated amount of Third Party Payments received for the Financial Planning Service; and • where applicable, disclosing to the Client the impact of any proposed changes to existing life insurance and other risk contracts and loans including the impact on Third Party Payments received or receivable by the Member as a result of recommending changes to these contracts and loans.
• New Clients (i.e. contracts entered into post 30 June 2015)	n/a	n/a	