

EXPOSURE DRAFT

ED XX/08
(May 2008)



**Proposed Standard: APES 210 Forensic Accounting Services
(Formerly APS 11 and GN2)**

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

Commenting on this Exposure Draft

Comments on this Exposure Draft should be forwarded so as to arrive by **15 August 2008**.

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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 Exposure Draft

This Exposure Draft is available on the APESB website: www.apesb.org.au. Alternatively, any individual or organisation may obtain one printed copy of this exposure draft without charge until 15 August 2008 by contacting:

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Reasons for issuing Exposure Draft XX/08

Accounting Professional & Ethical Standards Board Limited (APESB) proposes to issue the Standard APES 210: *Forensic Accounting Services* setting out mandatory requirements and guidance for Members who provide Forensic Accounting Services. APES 210 will replace APS 11 *Statement of Forensic Accounting Standards* and GN2 *Forensic Accounting* issued in December 2002.

Key requirements and guidance in ED XX/08

The proposed APES 210 includes mandatory requirements and guidance in respect of:

- Fundamental responsibilities of Members;
- Professional competence of Members providing Forensic Accounting Services;
- Confidentiality requirements;
- Professional Engagement matters;
- Expert Witness Services, Lay Witness Services, Consulting Expert Services and Investigation Services;
- Quality control requirements; and
- Professional fees.

The fundamental difference between the proposed APES 210 and APS 11/GN2 is that whilst the predecessor standards only applied to Members in Public Practice, APES 210 will also apply to Members in Business who provide Forensic Accounting Services to their Employers.

Proposed operative date

It is intended that this Standard will be operative from 01 July 2009.

Request for comments

Comments are invited on this Exposure Draft of APES 210: *Forensic Accounting Services* by **15 August 2008**. APESB would prefer that respondents express a clear overall opinion on whether the proposed Standard, as a whole, is supported and that this opinion be supplemented by detailed comments, whether supportive or critical, on any matter. APESB regards both critical and supportive comments as essential to a balanced view of the proposed Standard.



APES 210
Forensic Accounting Services
(Issued XXXX 2008)

CONTENTS

	Paragraphs
Scope and application	1
Definitions	2
Fundamental responsibilities of Members	3
- Public interest	
- Professional Independence	
- Professional competence and due care	
- Procedural fairness and compliance with laws	
- Confidentiality	
Professional Engagement matters	4
Expert Witness Services	5
Lay Witness Services	6
False and misleading information and changes in opinion	7
Quality Control	8
Professional fees	9

Appendix A: Description of Forensic Accounting Services

Appendix B: Opinions, Facts, and Assumed Facts

1. Scope and application

- 1.1 Accounting Professional & Ethical Standards Board Limited (APESB) issues professional standard APES 210 *Forensic Accounting Services (the Standard)*, which is effective from 01 July 2009. Early adoption of this Standard is permitted.
- 1.2 APES 210 sets the standards for Members in the provision of quality and ethical Forensic Accounting Services. The mandatory requirements of this Standard are in **bold** type, preceded or followed by discussion or explanations in grey type. APES 210 should be read in conjunction with other professional duties of Members, and any legal obligations that may apply.
- 1.3 **Members in Australia shall follow the mandatory requirements of APES 210 when they provide Forensic Accounting Services.**
- 1.4 **Members practising outside of Australia shall follow the provisions of APES 210 to the extent to which they are not prevented from so doing by specific requirements of local laws and/or regulations.**
- 1.5 **Members shall be familiar with relevant professional standards and guidance notes when providing Professional Services. All Members shall comply with the fundamental principles outlined in the Code.**
- 1.6 The Standard is not intended to detract from any responsibilities which may be imposed by law or regulation.
- 1.7 All references to professional standards, guidance notes and legislation are references to those provisions as amended from time to time.
- 1.8 In applying the requirements outlined in APES 210, Members should be guided not merely by the words but also by the spirit of the Standard and the Code.

2. Definitions

For the purpose of this Standard:

Assignment means an instruction, whether written or otherwise, by an Employer to a Member in Business relating to the provision of services by a Member in Business. However, consultations with the Employer prior to such instruction are not part of an Assignment.

Assumed Fact means some thing or some event which is taken for granted to be a fact without having been proved to be a fact.

Client means an individual, firm, entity or organisation to whom or to which a Forensic Accounting Service is provided by a Member in Public Practice in respect of Engagements of either a recurring or demand nature.

Code means APES 110 *Code of Ethics for Professional Accountants*.

Contingent Fee means a fee calculated on a predetermined basis relating to the outcome or result of a transaction or the result of the work performed. A fee that is established by a court or other public authority is not a contingent fee.

Consulting Expert means a Member who has been engaged or assigned to provide a Consulting Expert Service.

Consulting Expert Service means a service provided in the context of Proceedings, other than an Expert Witness Service, a Lay Witness Service or an Investigation Service.

Court means any body described as such and all other tribunals exercising judicial or quasi-judicial functions and includes professional disciplinary tribunals, industrial and administrative, statutory or parliamentary investigation and inquiries, royal commissions, arbitrations and mediations.

Employer within the context of this Standard means an entity or person that employs, engages or contracts a Member in Business.

Engagement means an agreement, whether written or otherwise, between a Member in Public Practice and a Client relating to the provision of services by a Member in Public Practice. However, consultations with a prospective Client prior to such agreement are not part of an Engagement.

Engagement Document means the document (i.e. letter, agreement or any other appropriate means) in which the terms of Engagement are specified in a written form.

Expert Witness means a Member who has been engaged or assigned to provide an Expert Witness Service.

Expert Witness Service means a service provided in the context of Proceedings to provide expert evidence, whether orally or in the form of a written Report or both.

Fact means some thing that existed or exists or some event that has happened or is happening.

Firm means

- (a) A sole practitioner, partnership, corporation or other entity of professional accountants;
- (b) An entity that controls such parties;
- (c) An entity controlled by such parties; or
- (d) An Auditor-General's office or department.

Forensic Accounting Services consist of Expert Witness Services, Lay Witness Services, Consulting Expert Services and Investigation Services.

Independence means

- (a) Independence of mind - the state of mind that permits the provision of an opinion without being affected by influences that compromise professional judgment, allowing an individual to act with integrity, and exercise objectivity and professional scepticism; and
- (b) Independence in appearance - the avoidance of facts and circumstances that are so significant a reasonable and informed third party, having knowledge of all relevant information, including any safeguards applied, would reasonably conclude a Firm's, or a member's, integrity, objectivity or professional scepticism had been compromised.

Investigation Service means a service to perform, advise on, or assist with an investigation for a Client or Employer, whether or not in the context of Proceedings, in connection with allegations of, or concerns regarding conduct that may be illegal, unethical or otherwise improper.

Lay Witness means a Member who has been engaged or assigned to provide a Lay Witness Service.

Lay Witness Service means a service provided in the context of Proceedings to provide evidence other than expert evidence, whether orally or in the form of a written Report or both.

Member means a member of a professional body that has adopted this Standard as applicable to their membership, as defined by that professional body.

Member in Business means a Member employed or engaged in an executive or non-executive capacity in such areas as commerce, industry, service, the public sector, education, the not for profit sector, regulatory bodies or professional bodies, or a Member contracted by such entities.

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

Opinion means an inference drawn from Facts or Assumed Facts.

Proceedings mean actual or potential proceedings before a Court.

Professional Standards mean all Standards issued by Accounting Professional & Ethical Standards Board Limited and all professional and ethical requirements of the applicable professional body.

Professional Services means services requiring accountancy or related skills performed by a professional accountant including accounting, auditing, taxation, management consulting and financial management services.

Report means a written report, affidavit or statement.

Terms of Engagement means the terms and conditions that are agreed between the Client and the Member in Public Practice for the Engagement.

3. Fundamental responsibilities of Members

3.1 A Member providing a Forensic Accounting Service shall comply with Section 100 Introduction and Fundamental Principles of the Code and relevant law.

Public interest

3.2 In accordance with Section 100.1 of the Code, a Member shall observe and comply with the Member's public interest obligations when the Member provides a Forensic Accounting Service.

Professional Independence

3.3 When engaged to perform a Forensic Accounting Service a Member shall be and be seen to be free of any interest which may be regarded as being incompatible with the fundamental principles of integrity and objectivity in Section 100 of the Code.

3.4 When engaged to perform a Forensic Accounting Service which requires Independence or purports to be independent, a Member in Public Practice shall comply with Section 220 Conflicts of Interest and Section 280 Objectivity – All Services and Independence in the Code.

3.5 If a Member in Public Practice is asked to provide a Forensic Accounting Service to a Client where:

(a) the Member or the Member's Firm is providing an Expert Witness Service to the Client; or

(b) the Member or the Member's Firm is providing an Expert Witness Service to a different Client which is related in some way to the proposed Forensic Accounting Service;

then the Member shall consider whether it is likely that the proposed Forensic Accounting Service would impair, or would be perceived by a reasonable person to impair, the Member's or the Member's Firm's ability to provide the Expert Witness Service with objectivity.

3.6 An Expert Witness has an obligation to act with integrity and objectivity. However, there is no requirement that an Expert Witness be independent. For example, there is no legal prohibition on a Member in Public Practice acting as an Expert Witness for an existing Client for whom the Member provides Professional Services. However, the Court will take into account the actual and apparent degree of Independence of the Expert Witness when deciding what weight to give to the expert's evidence. Therefore, it is important for the Member to disclose any matters that would assist the Court to assess the degree of Member's Independence.

Professional Competence and due care

3.7 A Member providing a Forensic Accounting Service shall maintain professional competence and take due care in the performance of the Member's work in accordance with Section 130 *Professional Competence and Due Care* of the Code.

3.8 Forensic Accounting Services generally require a Member to have specialised training, study or experience. Before accepting an Engagement or Assignment to provide a Forensic Accounting Service a Member should exercise professional judgement to determine if the Member is competent to provide the requested Forensic Accounting Service having regard to the Member's training, study and experience.

3.9 Where a Forensic Accounting Service requires the consideration of matters that are outside a Member's professional expertise, the Member shall seek expert assistance or advice from a suitably qualified third party on those matters outside of the Member's professional expertise or decline the Forensic Accounting Service. The Member shall disclose in any reports the extent of the reliance upon the advice of such a third party.

3.10 If an Expert Witness or a Lay Witness expresses an opinion that is based on the work of another expert, then the Expert Witness or Lay Witness shall treat the work of that other expert as an Assumed Fact.

Procedural fairness and compliance with laws

3.11 Where a Member performs a Forensic Accounting Service that involves acting as an investigator or as a decision-maker (as might be the case for certain Investigation or Consulting Expert Services, such as acting as an arbitrator, mediator or referee), the Member may be required to observe some or all of the rules of procedural fairness (which collectively are referred to as "natural justice"). If a Member is not certain of the Member's legal obligations then the Member should consider taking legal advice.

- 3.12 When gathering evidence a Member should be aware of the laws and regulations that govern, and in some instances prohibit, activities such as filming and recording individuals without their permission. These laws and regulations may differ between jurisdictions.
- 3.13 A Member should consider whether the Member requires a licence in certain jurisdictions over and above the Member's accounting qualification, particularly for an Investigation Service.

Confidentiality

- 3.14 In accordance with Section 140 *Confidentiality* of the Code, a Member who acquires confidential information in the course of professional work for a Client or Employer shall not use that information for any purpose other than the proper performance of professional work for that Client or Employer.
- 3.15 Unless the Member has a legal obligation of disclosure, a Member shall not convey any information relating to a Client's or Employer's affairs to a third party without the Client's or Employer's permission.
- 3.16 A Member should be aware that information obtained for one purpose (for instance a criminal investigation) may not be freely used for another purpose (for instance related civil litigation).

4. Professional Engagement matters

- 4.1 A Member in Public Practice shall document and communicate the Terms of Engagement in accordance with APES 305 *Terms of Engagement*.
- 4.2 A Member in Public Practice who is approached by a potential Client to undertake a Forensic Accounting Service shall comply with Section 210 *Professional Appointment* of the Code.

5. Expert Witness Services

- 5.1 If a Member in Public Practice is asked to provide an Expert Witness Service to a Client where:
- (a) the Member or the Member's Firm has provided or is providing another Forensic Accounting Service to the Client: or
 - (b) the Member or the Member's Firm has provided or is providing another Forensic Accounting Service to a different Client which is related to the proposed Expert Witness Service;
- then the Member shall consider whether it is likely that the Forensic Accounting Service has impaired, or would be perceived by a reasonable person to have impaired, the Member's ability to provide the Expert Witness Service with objectivity.
- 5.2 If a Member in Business is asked to provide an Expert Witness Service to the Member's Employer, where the Member or another employee of the Member's Employer has provided, or is providing, another Forensic Accounting Service to the Employer which is related to the proposed Expert Witness Service, or the Member's Employer has an interest in the outcome of the Proceedings (whether as a party or otherwise), then the Member shall consider whether it is likely that the Forensic Accounting Service has impaired, or would be perceived by a reasonable person to have impaired, the Member's ability to provide the Expert Witness Service with objectivity.

- 5.3 If a Member is asked to provide an Expert Witness Service but the Member believes that the Member's objectivity would be impaired or that a reasonable person would perceive that the Member's objectivity would be impaired (whether for reasons referred to in paragraphs 3.5, 5.1, or 5.2 above, or otherwise), then the Member shall decline the Engagement or Assignment.
- 5.4 A Member who is acting as an Expert Witness shall comply with the following duties:
- (a) a paramount duty to the Court which overrides any duty to the Client or Employer;
 - (b) a duty to assist the Court on matters relevant to the Member's area of expertise in an objective and unbiased manner;
 - (c) a duty not to be an advocate for a party;
 - (d) a duty to comply with evidentiary and procedural requirements relating to Expert Witnesses; and
 - (e) a duty to make it clear to the Court when a particular question or issue falls outside of the Member's expertise.

The Report of an Expert Witness

- 5.5 Any Report of a Member providing an Expert Witness Service shall, subject to any legal requirements, clearly communicate:
- (a) the instructions received, whether oral or written;
 - (b) any limitations on the scope of work performed;
 - (c) details of the Member's training, study and experience that are relevant to the matters on which the Member has expressed opinions;
 - (d) the relationships, if any, the Member or the Member's Firm has to any of the parties to the Proceedings (including any of the matters referred to in paragraphs 3.5 5.1, or 5.2) that may create a threat or a perceived threat to the Member's obligation to comply with the fundamental principles of the Code (or the Member's paramount duty to the Court) and any appropriate safeguards implemented;
 - (e) the extent, if any, of reliance by the Member on the work of others;
 - (f) the Opinions formed by the Member;
 - (g) whether an Opinion is provisional rather than concluded, and the reasons why a concluded Opinion has not been formed;
 - (h) the Facts upon which the opinions are based;
 - (i) any Assumed Facts upon which the Opinions are based and the following matters:
 - i) for each Assumed Fact, whether the Member was instructed to assume the Fact or whether the Member chose to assume the Fact;
 - ii) if the Member was instructed to assume a Fact and if it is within the expertise of the Member to express an Opinion on the fact assumed, then whether the Member is aware of any reason why it would be unreasonable to assume the Fact;

- iii) **if the Member chose to assume a Fact and if it is within the expertise of the Member to express an opinion on the Fact assumed, then the reason why the Member assumed the fact rather than expressed an Opinion on it, and whether the Member is aware of any reason why it would be unreasonable to assume the Fact; and**
- iv) **If it is not within the expertise of the Member to express an Opinion on the Fact assumed then the Member shall state that the Member does not express any Opinion on the Fact assumed.**
- (j) **the reasoning by which the Member formed the Opinions, including an explanation of any method employed and the reasons why that method was chosen;**
- (k) **a list of all documents and sources of information relied upon in the preparation of the Report; and**
- (l) **any restrictions on the use of the Report.**

5.6 In providing an Expert Witness Service, a Member should consider whether APES 225 *Valuation Services* is also applicable. APES 225 requires, amongst other things, that a Member make certain disclosures in a Report.

5.7 Members are referred to Appendix B of this Standard for guidance on Opinions, Facts and Assumed Facts. If a Member is not certain of whether a matter is a Fact, an Assumed Fact or an Opinion the Member should consider consulting the legal representative of the Member's Client or Employer.

6. Lay Witness Services

6.1 **In providing a Lay Witness Service a Member shall comply with the Member's paramount duty to the Court which overrides any duty to the Client or Employer.**

7. False or misleading information and changes in opinion

7.1 **A Member shall not knowingly or recklessly make a statement or cause another to make a statement in or in connection with a Forensic Accounting Service that, by its content or by an omission, is false or misleading.**

7.2 **If a Member has been engaged or assigned to provide an Expert Witness Service or a Lay Witness Service and the Member becomes aware that an Opinion expressed by the Member in a Report or in oral evidence is based on false or misleading information or omits material information and that basis or omission has not been disclosed in a Report or in oral testimony, then the Member shall immediately inform the legal representative of the Client or Employer of the basis or omission. The Member shall also consider whether it is necessary to issue a supplementary report.**

7.3 **If a Member makes a statement under oath or affirmation which is known by the Member to be false or misleading then the Member may be liable to criminal charges in addition to any disciplinary proceedings by the Member's professional body.**

8. Quality Control

- 8.1 A Member in Public Practice shall comply with the requirements of the APES 320 *Quality Control for Firms*. In accordance with paragraph 7 of APES 320 *Quality Control for Firms*, a Member in Public Practice shall establish a system of quality control that include policies and procedures that address each of the following elements:**
- (a) Leadership responsibilities for quality within the Firm;**
 - (b) Ethical requirements;**
 - (c) Acceptance and continuance of Client relationships and specific Engagements;**
 - (d) Human resource;**
 - (e) Engagement performance; and**
 - (f) Monitoring.**
- 8.2 A Member in Business who undertakes a Forensic Accounting Service should establish a system of quality control that include appropriate policies and procedures taking in to consideration the elements noted in paragraph 8.1 of this Standard.
- 8.3 A Member shall prepare working papers in accordance with this Standard that appropriately document the work performed, including aspects of the Forensic Accounting Service that have been provided in accordance with this Standard, and the basis on which, and the method by which, any calculations, determinations or estimates used in the provision of the Forensic Accounting Service have been made.**
- 8.4 A Member should be aware that working papers generated as part of undertaking a Forensic Accounting Service may be required to be furnished to other parties or the Court as evidence. Where appropriate, a Member should maintain the chain of custody, including origin, possession and disposition of documents and other material, particularly originals, relevant to the Engagement or Assignment.

9. Professional fees

- 9.1 A Member in Public Practice providing a Forensic Accounting Service shall be remunerated for such service by way of professional fees computed in accordance with Section 240 Fees and other Types of Remuneration of the Code.**
- 9.2 A Member in Public Practice shall not enter into a Contingent Fee arrangement or receive a Contingent Fee for:**
- (a) an Expert Witness Service; or**
 - (b) for a Forensic Accounting Service, other than an Expert Witness Service, that requires Independence or purports to be independent.**

Conformity with International Pronouncements

The International Ethics Standard Board for Accountants (IESBA) has not issued a pronouncement equivalent to APES 210.

Appendix A

Description of Forensic Accounting Services

The Standard applies to Members in Public Practice who are engaged by a Client to provide a Forensic Accounting Service and to Members in Business who are assigned by their Employer to provide a Forensic Accounting Service.

Forensic Accounting Services include Expert Witness Services, Lay Witness Services, Consulting Expert Services and Investigation Services. Services that are Forensic Accounting Services are also described as forensic services, litigation support services, litigation consulting services, litigation services, expert witness services, dispute analysis services, insurance claims consulting services, fraud services, and computer forensic services.

Expert Witness Services

An Expert Witness Service is a service provided in the context of Proceedings to provide expert evidence. Subject to certain exceptions, evidence of the Opinion of a witness about a relevant fact is inadmissible to prove that Fact. An exception is that evidence of the Opinion of a witness is admissible where the Opinion is wholly or substantially based on the witness's specialised knowledge acquired through training, study or experience. Such evidence is called expert evidence.

Surveys of the judiciary have reported that some members of the judiciary perceive some expert witnesses (from various professions) as having failed to discharge their duties to the Court because they have been biased or acted as advocates for the party retaining them.

In providing an Expert Witness Service the Member has a paramount duty to the Court which overrides any duty to the Client or Employer.

An Expert Witness Service usually involves expressing opinions based on specialised study, training and experience on questions arising in Proceedings concerning liability or damages or an account of profits. It may also involve assessing a claim under an insurance policy in the context of Proceedings.

Examples of an Expert Witness Service are giving expert evidence on:

- (a) expressing an Opinion on whether an auditor conducted the audit in compliance with Auditing Standards;
- (b) expressing an Opinion on the quantum of damages suffered by a plaintiff as a result of an alleged breach of contract by the defendant;
- (c) expressing an Opinion on the quantum of the profits earned by the defendant as a result of the alleged infringement of the intellectual property rights of the plaintiff; or
- (d) assessing a claim under an insurance policy.

Lay Witness Services

A Lay Witness Service is a service provided in the context of Proceedings to provide evidence other than expert evidence.

In providing a Lay Witness Service the Member's has a paramount duty is to the Court which overrides any duty to the Client or Employer.

A Lay Witness Service involves giving evidence on matters directly observed or perceived by the Member.

Examples of a Lay Witness Service are giving evidence on work done in:

- (a) taking a forensic image of the hard drive of a computer; or
- (b) collating financial records.

Consulting Expert Services

A Consulting Expert Service is a service provided in the context of Proceedings, other than an Expert Witness Service, a Lay Witness Service or an Investigation Service.

In providing a Consulting Expert Service the Member's duty is to the Client or Employer.

Examples of a Consulting Expert Service are;

- (a) acting as an arbitrator, mediator or referee; or
- (b) providing advice to the legal representatives of the Client or Employer on matters relating to the evidence of an expert witness such as the strengths and weaknesses of the expert's reasoning and opinions.

Investigation Services

An Investigation Service is a service to perform, advise on, or assist with an investigation for a Client or Employer, whether or not in the context of Proceedings, in connection with allegations of, or concerns regarding conduct that may be illegal, unethical or otherwise improper.

In providing an Investigation Service the Member's duty is to the Client or Employer. In some cases the provision of an Investigation Service by a Member may lead to the Member providing an Expert Witness Service or a Lay Witness Service (and in both cases the Member has a paramount duty to Court which overrides any duty to the Client or Employer). For example, a Member may be engaged or assigned to investigate a fraud within a Client's business and subsequently may be engaged or assigned to give evidence as an Expert Witness or a Lay Witness based on the findings of that investigation. In other cases, the provision of an Investigation Service will not lead to the Member providing an Expert Witness Service or a Lay Witness Service.

Examples of an Investigation Service are:

- (a) investigating an allegation of fraud;
- (b) investigating an allegation of financial mis-reporting;
- (c) investigating possible insolvent trading;
- (d) investigating possible breaches of anti-money laundering legislation;
- (e) determining the benefits from the proceeds of a crime; or
- (f) investigating allegations of inappropriate or unethical behaviour by an employee.

Appendix B

Opinions, Facts and Assumed Facts

An Opinion is an inference drawn from Facts or Assumed Facts. An opinion may be provisional or concluded. A provisional opinion is one that is not concluded because it is subject to some qualification. For example, an opinion may be provisional because all of the information required to form a concluded opinion is not available.

A Fact is some thing that existed or exists or some event that has happened or is happening.

An Assumed Fact is some thing or some event which is taken for granted to be a fact without having been proved to be a fact. An Assumed Fact (i.e. an assumption) may be unreasonable if it is inconsistent with other Facts or Assumed Facts or if it does not accord with the Member's knowledge and experience.

It can sometimes be difficult to determine whether a matter is a Fact, an Assumed Fact or an Opinion. In part this arises because the character of the matter (i.e. whether it is a Fact, an Assumed Fact or an Opinion) may be confused with other ways of describing it (e.g. as an input to a calculation, a variable in an equation, an estimate, or an approximation).

Also, sometimes whether a matter is a Fact or Opinion will depend on the degree of expert judgement involved. In the New South Wales Supreme Court case, ASIC v Rich [2005] NSWSC 149, Austin J explained the concept of a "scientific" fact and expressed the view that some of the work done by a forensic accountant would be admissible in the same fashion as "scientific" facts:

"269 ... In the course of his or her investigations for the preparation of a report, the expert may make a lay observation which is then recorded in the report, or may observe and record something by bringing to bear his or her expertise. Observations of the latter kind have been described as "scientific facts"...

270 Consider, for example, the evidence of a valuer recording his or her observation of the presentation of the property being valued, the locality in which it is situated and the attributes of possibly comparable properties; or the evidence of a doctor recording his or her observation of a patient during a clinical examination. Sometimes such evidence does not in any way depend upon the expert's specialised knowledge, and is admissible simply as evidence of a directly observed fact. At other times, the witness's expertise is relevant to the making of the observation, but still, the evidence is admissible as evidence of an observed fact. As the learned editors of in Phipson on Evidence (15th ed, 2003 by MN Howard and others) say (at p 922-3, para 37-10):

"Expert witnesses have the advantage of a particular skill or training. This not only enables them to form opinions and to draw inferences from observed facts, but also to identify facts which may be obscure or invisible to a lay witness. ... A microbiologist who looks through a microscope and identifies a microbe is perceiving a fact no less than the bank-clerk who sees an armed robbery committed. The only difference is that the former can use a particular instrument and can ascribe objective significance to the data he perceives. The question of subjective assessment and interpretation which is the essence of opinion evidence hardly enters into the matter at all." ...

272 It seems to me that some of the work of a forensic accountant is to be treated as admissible in the same fashion as scientific facts. Suppose the report of a forensic accountant contains a complex financial calculation. The result of the calculation is not an opinion because, if the calculation is done correctly and the financial records from which it has been derived are proven, it is true as an analytic mathematical proposition without reliance on any inferences or questions of judgment. The expert's work is mathematical and analytical rather than based on scientific observation, but in both cases there is a factual conclusion, admissible as evidence of fact, derived from the application of specialised knowledge."

A "scientific" fact arises where the Expert Witness has applied specialised knowledge but has not applied any significant degree of expert judgement. However, if the Expert Witness also applies

a significant degree of expert judgement such that the Expert Witness draws an inference then the result will be an Opinion.

The following are some examples of how the work done by a Member may be characterised:

- (a) The Member has been asked to calculate the cost of goods sold expense for a period based on balances for opening stock, purchases and closing stock that have already been agreed by the parties. In calculating the expense the Member applies specialised knowledge using a well-accepted method which is not controversial (i.e. that cost of goods sold expense is equal to opening stock plus purchases less closing stock). However, the calculation does not require the Member to apply any significant degree of expert judgement. In this case the figure calculated by the Member is a Fact rather than an Opinion (i.e. because it is in the nature of a scientific fact). On the other hand, if the Member were instructed to assume a figure for the cost of goods sold expense then that would be an Assumed Fact.
- (b) The Member has been asked to quantify the lost profits that would have been earned by a business but for a breach of duty. Among other things, this may require the Member to choose a figure for the sales revenue that the business would have earned but for the breach of duty. The question of what would have happened to sales revenue but for the breach requires the Member to consider a situation that is hypothetical rather than real and which, therefore, cannot be a question of Fact. If in assessing the figure for sales revenue the Member applies specialised knowledge and a significant degree of expert judgement then the Member will be expressing an Opinion. On the other hand, if the Member were instructed to assume a figure for the sales revenue then that would be an Assumed Fact.
- (c) The Member uses the Capitalised Asset Pricing Model to determine a discount rate for the valuation of a business using the discounted cash flow method. The Member must choose a figure for the beta, which is an input to the Capitalised Asset Pricing Model. In the normal course, the Member will choose a beta after having gathered relevant information and having performed relevant analyses. In assessing the figure for beta the Member will apply specialised knowledge and a significant degree of expert judgement. Therefore, the Member will be expressing an Opinion. On the other hand, if the Member were instructed to assume a figure for the beta then that would be an Assumed Fact.

If the opinion of an Expert Witness depends on certain Facts or Assumed Facts then those Facts or Assumed Facts must be proved or admitted into evidence before the Court will give weight to the Opinion.

In the New South Wales Court of Appeal case, *Makita (Australia) Pty Ltd v Sprowles* [2001] NSWCA 305, Heydon JA summarised, amongst other things, his view of the matters the law requires to be communicated by an Expert Witness:

“85 In short, if evidence tendered as expert opinion evidence is to be admissible, it must be agreed or demonstrated that there is a field of “specialised knowledge”; there must be an identified aspect of that field in which the witness demonstrates that by reason of specified training, study or experience, the witness has become an expert; the opinion proffered must be “wholly or substantially based on the witness’s expert knowledge”; so far as the opinion is based on facts “observed” by the expert, they must be identified and admissibly proved by the expert, and so far as the opinion is based on “assumed” or “accepted” facts, they must be identified and proved in some other way; it must be established that the facts on which the opinion is based form a proper foundation for it; and the opinion of an expert requires demonstration or examination of the scientific or other intellectual basis of the conclusions reached: that is, the expert’s evidence must explain how the field of “specialised knowledge” in which the witness is expert by reason of “training, study or experience”, and on which the opinion is “wholly or substantially based”, applies to the facts assumed or observed so as to produce the opinion propounded. If all these matters are not made explicit, it is not possible to be sure whether the opinion is

based wholly or substantially on the expert's specialised knowledge. If the court cannot be sure of that, the evidence is strictly speaking not admissible, and, so far as it is admissible, of diminished weight. And an attempt to make the basis of the opinion explicit may reveal that it is not based on specialised expert knowledge, but, to use Gleeson CJ's characterisation of the evidence in *HG v R* (1999) 197 CLR 414, on "a combination of speculation, inference, personal and second-hand views as to the credibility of the complainant, and a process of reasoning which went well beyond the field of expertise" (at [41])."