

AGENDA PAPER

Item Number: 7
Date of Meeting: 10 March 2022
Subject: Project Update on APES 230 *Financial Planning Services*

Action required For discussion For noting For information

Purpose

To update the Board on the APES 230 *Financial Planning Services* (APES 230) project.

Background

APES 230 was issued in April 2013, with an effective date of 1 July 2014 (with sections relating to remuneration effective on 1 July 2015). APES 230 was revised in December 2019 (effective 1 July 2020) to align with the restructured Code, change from a biennial to annual written consent to continue charging fees on a percentage basis and remove transitional provisions.

Since APES 230 was first issued, there have been ongoing legislative and regulatory changes in the financial planning industry. A summary of all the actions taken by APESB to consider these changes and an update on the *Consultation Paper: Review of APES 230 Financial Planning Services* were presented at the June 2020 Board meeting ([Agenda Item 9](#)).

A further update was provided at the November 2020 Board meeting ([Agenda Item 4](#)). The Board discussed the purpose of APES 230 in setting the professional and ethical standards for accountants, existing regulations and guidance and the six ethical principles outlined in the final Financial Services Royal Commission (FSRC) report.

The status of APES 230 was considered at the March 2021 Board meeting ([Agenda Item 8](#)), including CPA Australia's request in December 2020 for APESB to suspend APES 230. The Board discussed APES 230's relevance and consumer interest focus and agreed it should continue as an issued standard. The Board reiterated their hope that each Professional Body will support APES 230 given its public interest perspective and supported Technical Staff to continue monitoring the legislative and regulatory environment.

A further update was provided at the September 2021 Board meeting ([Agenda Item 6](#)), including the Technical Staff's assessment of retail versus wholesale clients and the Australian Law Reform Commission (ALRC) review of the financial services legislation.

Matters for Consideration

1. Legislative and Regulatory Update

Changes to legislation and regulations in the financial planning industry have continued since September 2021. As a result, the eventual impact on APES 230 will not be able to be determined, evaluated and managed until the regulatory process has concluded. Agenda Item 7(b) summarises other financial planning legislative developments and industry updates.

FASEA Update

FASEA consulted on options for Standard 3 of the FASEA Code of Ethics in November 2021 to ensure it is understood and workable:

- Option 1 Incorporate FASEA's intent into the Standard - *You must only advise, refer or act where you do not have a conflict of interest or duty, being that which could reasonably be expected to induce you to act other than in the client's best interest.*
- Option 2 Wording aligned with Commissioner Hayne's findings - *You must not receive any benefit (whether monetary or non-monetary), nor enter into any relationship, that could reasonably be expected to influence the advice you give or the service you provide to your client.*
- Option 3 Retain existing wording - *You must not advise, refer or act in any other manner where you have a conflict of interest or duty.*

FASEA received 40 submissions with industry and professional associations favouring Option 1 and consumers and consumer representative organisations favouring Option 3. However, due to FASEA's imminent windup, it deferred any decision to the Minister/Treasury.

However, FASEA noted that consumer and industry views should be given equal weight and supported the Financial Services Royal Commission's (FSRC) view that '*conflicts of interest and duty should be eliminated rather than managed*'.

FASEA ceased operations on 31 December 2021. ASIC's Financial Services Credit Panel (FSCP) has become the single disciplinary body for financial advisers¹ in line with recommendation 2.10 of the FSRC and FASEA's standards, including the FASEA Code, which have been transferred to the Treasury. Treasury has set up a new [Financial Adviser Standards](#) page.

Government's Quality of Advice Review

On 16 December 2021, Treasury released its Quality of Advice Review – [Draft Terms of Reference](#) consistent with recommendations 2.3, 2.5 and 2.6 of the FSRC, which include:

- opportunities to streamline and simplify regulations, where principle-based regulation could replace rules and whether regulations have created unintended consequences;
- review the legislative framework, including:
 - key concepts 'financial product advice', 'general advice' and 'personal advice';
 - safe harbour provisions in the best interests duty;
 - recent reforms for annual renewal of fee arrangements and life insurance remuneration reforms; and
 - remaining exemptions to conflicted remuneration;
- structural changes and professionalisation of the sector, development of technological solutions and opportunities to reduce compliance costs; and

¹ [Financial Sector Reform \(Hayne Royal Commission Response-Better Advice\) Act 2021](#).

- regarding the Australian Law Reform Commission's (ALRC) findings (refer below).

The Draft Terms of Reference were open for public comment until 4 February 2022. It is anticipated that an independent reviewer will undertake the Quality of Advice Review, invite public submissions, and report to the Government by 16 December 2022.

2. Australian Law Reform Commission – Financial Services law simplification

The ALRC is undertaking an inquiry to simplify Australian financial services law in response to the FSRC focussing on making the legislation more adaptive, efficient and navigable within existing policy settings.² The [Terms of Reference](#) cover three broad matters summarised as:

- A. definitions used in corporations and financial services legislation;
- B. the coherence of regulatory design and hierarchy of laws; and
- C. restructuring Chapter 7 of the *Corporations Act 2001* and *Corporations Regulations 2001* to be clearer, coherent and effective.

The ALRC's first interim report, [Financial Services Legislation: Interim Report A \(ALRC Report 137\)](#) covering A above, was issued on 30 November 2021, highlights six key problems:

- incomplete understanding of legislative complexity;
- complex use of definitions;
- difficulties navigating definitions;
- overly prescriptive legislation;
- obscured policy goals and norms of conduct; and
- difficulties administering complex legislation.

ALRC Interim Report A notes that there are over 43,000 pages in the Corporations Act, Corporations Regulations, legislative instruments, regulatory guides, ASIC instruments and reports and that '*financial services legislation requires urgent and significant reform*'.

The report makes 13 recommendations on technical simplifications that are not contentious and no feedback was sought. The report also includes 24 questions or proposals with policy implications where feedback was sought.

Proposals A3 to A6 relate to amending corporations and financial services Commonwealth Acts to have uniform definitions of 'financial product' and 'financial service'. Proposals A13 to A15 include potential reforms including to:

- remove the intermediary concept of 'financial product advice' and substitute with 'general advice and personal advice' or 'general advice or personal advice' as appropriate;
- decoupling 'personal advice' and 'financial service' and amending existing references to 'financial service' to 'financial service and personal advice' or 'financial service or personal advice' as appropriate;
- Replacing the reference to 'financial product advice' in the definition of 'financial service' with 'general advice'; and
- Renaming 'general advice' to correspond more intuitively with its substance and to create clearer regulatory boundaries from 'personal advice'.

² [Review of the Legislative Framework for Corporations and Financial Services Regulation | ALRC.](#)

The ALRC Interim Report A includes proposals relating to the definitions of retail clients (where particular protections are available) and wholesale clients (less protective regime) and whether the definition of a retail client should be amended to:

- achieve greater consistency with policy;
- simplify its application to general insurance products, superannuation products, retirement savings accounts and traditional trustee company services; or
- otherwise, achieve greater clarity and coherence.

The definition of a retail client has various exclusions which are subject to the ongoing debate and should be simplified in legislation. For example, there are now estimated to be about 3.25 million consumers or 1.09 million households that meet the legal definition of sophisticated or wholesale investor (i.e., \$2.5m in assets and annual income over \$250,000 in the previous two years). This is up from 104,000 households in 2002 when the rule first came in.³

The ALRC Interim Report A includes questions and proposals relating to conduct obligations, including the 'best interests duty' (A18 to A24) broadly relating to:

- including an object clause of fundamental norms that underlie existing conduct;
- making it clear that the 'efficiently, honestly and fairly' standard for AFSLs are standalone obligations, to replace efficiently with professionally and include examples of unfair conduct; and
- Repealing prescriptive obligations already captured elsewhere.

The ALRC sought feedback as to whether the 'safe harbour' provisions in the 'best interests duty' (section 961B of the *Corporations Act 2001*) should be amended to focus on indicative behaviours of compliance to emphasise the primacy of best interest and discourage a 'tick a box' approach to compliance. This is consistent with recommendation 2.3 of the FSRC and to review measures to improve the quality of advice.

APESB made a submission on questions and proposals for the ALRC Interim Report A that are relevant to APES 230 and APESB's mandate (Agenda Item 7(a)). Further ALRC interim reports are due 30 September 2022 (B) and 25 August 2023 (C), with the final report due 30 November 2023.

3. Impact on small and medium practices (SMPs)

At this stage, there are no changes proposed to APES 230 and, therefore, no impact on SMPs. However, Technical Staff note that the COVID-19 pandemic and the significant level of current and ongoing regulatory change and uncertainty in the financial planning industry will be having a marked impact on SMPs. Therefore, Technical Staff will continue to monitor these changes and consider their impact in any future deliberations related to APES 230.

Way Forward

Technical Staff propose to continue monitoring the legislative and regulatory environment in the financial planning industry flowing from the implementation of the FSRC's recommendations, the transition of FASEA's roles and requirements to ASIC and Treasury and the ALRC's findings and to provide further updates to the Board at future Board meetings.

³ [More than 3 million Aussies are now 'sophisticated investors' \(afr.com\)](https://www.afr.com/news/politics-government/finance/more-than-3-million-australians-are-now-sophisticated-investors-20220824)

Recommendations

That the Board note the update on the APES 230 project.

Materials Presented

Agenda Item 7(a) APESB's Submission to ALRC on Interim Report A
Agenda Item 7(b) Summary of other financial planning legislative and industry updates

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