

## AGENDA PAPER

**Item Number:** 8  
**Date of Meeting:** 3 June 2022  
**Subject:** Project update on APES 215 *Forensic Accounting Services*

---

Action required     For discussion     For noting     For information

---

### Purpose

To provide the Board with a project update on APES 215 *Forensic Accounting Services* (APES 215).

### Background

At the June 2021 Board meeting, Technical Staff provided a brief history of the development of [APES 215](#) (last revised in July 2019) and a [project proposal](#) to update the standard, which was approved by the Board.

The proposal stemmed from a request from ASIC to amend specific examples in APES 215 to incorporate scenarios where evidence is adduced to the court under section 50 of the *Evidence Act 1995* (Evidence Act) (Proof of voluminous or complex documents) and to address other aspects of the Standard that may require further consideration.

An update on APES 215 was provided to the Board in September 2021 ([Agenda Item 8](#)) on:

- An APES 215 working party meeting on 23 July 2021; and
- A meeting on 20 August 2021 between APES 215 working party members, John Wallace, ASIC Senior Executive Leader of Specialist Services, Kathleen Clough, ASIC Senior Manager of Forensic Accounting Services (FAS) and Vicky Argitis, Head of the Criminal Division of ASIC's Chief Legal Office

ASIC undertook to provide Technical Staff with additional examples derived from Examples 6 and 7 in APES 215 Appendix 3 to delineate the specific types of services FAS officers provide when adducing evidence under section 50 of the Evidence Act. ASIC provided additional information and recommendations on APES 215 on 28 January 2022 (Agenda Item 8(a)).

## **Matters for Consideration**

### ASIC's Further Submission

#### *Section 50 of the Evidence Act*

ASIC contends evidence adduced to the court under section 50 of the Evidence Act is not expert evidence but lay observations. ASIC note that bank officers produce the underlying documents to the court, including bank statements, bank vouchers and trace reports, and the FAS officers highlight and summarise key information directly from those source documents. ASIC refers to the findings in *Idyllic Solutions Pty Ltd & Ors – Australian Securities and Investments Commission v Hobbs [2012] NSWSC 568* (ASIC v Hobbs).

Section 50 of the Evidence Act enables evidence to be adduced of the contents of 2 or more documents as a summary if the court is satisfied it would not be possible to conveniently examine otherwise due to the volume or complexity of the documents. The opinion rule does not apply to evidence adduced under section 50 and is separate from the exception to providing opinion evidence based on specialised knowledge under section 79 of the Evidence Act.

#### *ASIC v Hobbs*

ASIC v Hobbs considered the admissibility of evidence summarising voluminous or complex underlying documents under section 50 of the Evidence Act. There were three bases of objection to the summaries adduced by ASIC and the liquidator, being:

1. that the summaries include arithmetical additions;
2. whether the schedules encompass an exercise of judgment or discretion and therefore statements of opinions or conclusions drawn; and
3. whether it was an impermissible attempt to adduce expert evidence other than in accordance with the rules of admission for such evidence.

ASIC v Hobb's findings on admissibility under section 50 of the Evidence Act, in short, were:

- 1 a document prepared through a process involving judgement or application of a calculation:
  - is a summary if the document prepared included the simple application of arithmetical formula (for example, summing up the total of columns);
  - is not a summary if it involves the exercise of judgement or opinion.
- 2 a document summarising other summaries is a summary; and
- 3 a conclusion based on underlying documents is not a summary.

#### *Application of APES 215*

Fundamental to applying APES 215 is determining what type of Forensic Accounting Service is provided, particularly whether it is an Expert Witness Service, which requires the Member to exercise professional judgement based on the facts and circumstances (APES 215 Appendix 2). Whether it is subsequently deemed admissible is a matter for the Court and such a decision does not change the nature of the Forensic Accounting Service.

Under APES 215, a Member may provide an Expert Witness Service, which is a Professional Activity in the context of Proceedings to give expert evidence, including expressing an opinion (an inference drawn from facts), or Other Evidence, based on the Member's specialised

knowledge derived from training, study or experience. Other Evidence does not provide an opinion but requires the application of the Member's specialised knowledge. Whether the Court subsequently deems opinion or Other Evidence as expert evidence is an after the fact matter, and the Member must comply with APES 215 in anticipation it will be treated as such.

Another important distinction relevant to ASIC's concerns is between 'observed facts' and 'scientific facts', both of which are based on the Member's observations (APES 215 Appendix 1). Observed facts are lay observations based on perceptions from one of the five senses and do not rely on expertise. On the other hand, scientific facts are true by virtue of the proper application of an accepted scientific method that is analytical or mathematical and based on expertise but not involving any significant degree of expert judgement or amount to an opinion.

Agenda Item 8(b) includes extracts from *ASIC v Hobbs*, *ASIC v Rich* [2005] NSWSC 149 (*ASIC v Rich*) on scientific facts and *Castel Electronics Pty Ltd v Toshiba Singapore Pte Ltd* [2011] FCAFC 55 relating to accountants providing expert summaries of financial evidence.

### APES 215 Working Party

Technical Staff met with an APES 215 working party, Brian Morris (APESB Board member) and Owain Stone and Brendan Halligan (APES 215 Taskforce members), on 20 May 2022 to discuss ASIC's recommendations summarised below.

### ASIC's Recommendations

The following summarises ASIC's recommendations (Agenda Item 8(a) includes the recommendations in full) and Technical Staff's initial responses:

1. **Recommendation** – Expand the definition of Lay Witness Service to align to the findings in *ASIC v Hobbs* by including commentary about directly observing and summarising financial transactions from underlying documents, and the example from the definition of Other Evidence on providing a summary of sales.

Technical Staff believe that summarising financial transactions from underlying documents such as a series of invoices and a general ledger might require the Member to apply specialised knowledge derived from training, study or experience. This might depend on the facts and circumstances and the exercise of professional judgement.

Specialised knowledge might assist the Member to "*identify facts which may be obscure or invisible to a lay witness*" (*ASIC v Rich* para 270). The example from the definition of Other Evidence emphasises this "*whilst it may be a matter of fact as to what sales were made, the extraction and summary of this information is facilitated by the Member's specialised knowledge.*"

In contrast, *ASIC v Hobbs* (para 101) states, "*I accept that the extraction of all entries of payments described in a particular way in the underlying documents (and the addition of those amounts) would not involve any particular expertise*".

On balance, Technical Staff disagree with ASIC's proposed amendments to the definition of Lay Witness Service.

However, the working party discussed a potential conflict between “*within the Member’s professional knowledge*” in the definition of Lay Witness Service and “*specialised knowledge derived from the Member’s training, study or experience*” in the definition of Expert Witness. A Lay Witness Service occurs during the Professional Activity but does not depend on expertise. A potential amendment could be:

**Lay Witness Service** means a *Professional Activity* provided in the context of *Proceedings* to provide evidence other than expert evidence, whether orally or in the form of a *Report* or both. This service involves the *Member* giving evidence on matters ~~within the Member’s professional knowledge~~ that are directly observed or perceived by the *Member* that does not require the Member to bring to bear the Member’s specialised knowledge derived from training, study or experience.

2. **Recommendation** – Remove the example of providing a summary of sales from the definition of Other Evidence (add this to Lay Witness Services) to align with ASIC v Hobbs, which held that a summary table prepared by extracting figures from underlying documents and the figures are added together is admissible as a summary under section 50 of the Evidence Act.

As noted above, Technical Staff believe this example in the definition of Other Evidence would likely result in the Member using specialised knowledge derived from training, study or experience. Without such knowledge, it may be difficult to extract relevant information and understand and ascertain the pertinent information to summarise from the underlying documents.

A potential option discussed with the working party to avoid any doubt is to amend the example in the definition of Other Evidence by replacing ‘summary’ with ‘an analysis’ to distinguish this example from a possible assignment under section 50 of the Evidence Act, which expressly refers to ‘summary’.

3. **Recommendation** – Change the definition of ‘observed facts’ to remove ‘expert’ before Member.

‘Observed facts’ is not defined in APES 215 but is referred to in Appendix 1 “*Observed facts and scientific facts are both based on observations by the expert witness*” and that “*Observed facts are lay observations because they are based on perceptions by the expert witness using one or more of the five senses, but are not based on the application of the expert witness’s expertise*”.

Appendix 1 was developed to guide expert witnesses on how to deal with facts, assumptions and opinions. However, ‘by the expert witness’ could potentially be removed to avoid any confusion. Other potential amendments to Appendix 1 to delineate observed and scientific facts discussed with the working party were:

- Change the Appendix’s title to “Expert Evidence – Facts, assumptions and opinions” to clarify its focus;
- Amend the second sentence – “*They differ in that observed facts are lay observations that could be made by any witness, but scientific facts are ~~expert~~ observations made by an expert applying the expert’s specialised knowledge derived from training, study or experience.*”
- Amend the example – “*An example might be a complex financial calculation by a Member that is based on the application of specialised knowledge, but that*

does not amount to an opinion *about either the matters that are the subject of the calculation or conclusions that might follow from the calculation that has been undertaken.*"

4. **Recommendation** – Amend the decision tree in APES 215 Appendix 2 to note the distinction between direct observations and inferences by including a level under 'Is the service to provide evidence?' and if 'yes' whether an inference is drawn and if no leading to 'Lay Witness Service'.

The important distinction between an Expert Witness Service or a Lay Witness Service is not whether an inference is made, it is whether the service is based on specialised knowledge derived from training, study or experience.

Technical Staff disagree with ASIC's recommendation as it does not contemplate expert evidence not involving an opinion (an inference drawn from facts), i.e., Other Evidence. This would include, for example, scientific facts where an expert "*may observe and record something by bringing to bear his or her expertise*" (ASIC v Rich para 269). Direct observations can result in Other Evidence, scientific facts or lay observations.

The working party discussed potential amendments to Appendix 2 to highlight the application of APES 215 as per the following mark-up:

- "It is the intention to give expert evidence that is relevant and in turn creates the obligation for a Member to comply with the requirements of this Standard including Section 5"; and
- add "If the service to be provided is a Forensic Accounting Service but not an Expert Witness Service, the Member is required to comply with the requirements of the Standard other than Section 5".

5. **Recommendation** – Revise Example 6 in Appendix 3 of APES 215 to be a 'Lay Witness Service' as this relates to summarising complex transactions based on related accounting journals and ledger entries, and the role does not require commentary on the accuracy of the journals. ASIC believes the assignment only requires the Member to observe information in the source documents and summarise it, and 'summary' under section 50 of the Evidence Act refers to the nature of the document, not how it was prepared.

Technical Staff believe that summarising complex transactions based on related accounting journals and ledger entries would require the Member to apply specialised knowledge derived from training, study or experience and would constitute Other Evidence. Whilst '*complexity of the documents*' is used in Section 50 of the Evidence Act, the use of complex in Example 6 in Appendix 3 infers the application of expertise.

Like the microbiologist (described in para 270 ASIC v Rich), the Member "*can use a particular instrument*" by accessing the accounting system for journals and ledger entries "*and can ascribe objective significance to the data he perceives*". Further, the specialised knowledge would enable the Member to locate and extract relevant reports and information and ascertain through reasoning what information is pertinent to summarise, meaning it "*is evidence of the expert's own work and observation, and it is relevant in a "secondary sense", because it forms part of the expert's reasoning process*" (para 271 ASIC v Rich).

Technical Staff recommend maintaining Example 6 as an example of Expert Witness. However, some potentially minor changes could be made to avoid any doubt similar to those for Other Evidence, being replacing 'summary' with 'an analysis' or 'document' throughout the example to distinguish it from a section 50 of the Evidence Act summary. Example 10 of Appendix 3 also uses 'summary' and may require changes.

6. **Recommendation** – Expand Example 7 in Appendix 3 of APES 215 to distinguish this more clearly from Lay Witness Service by separating it into two separate scenarios on summarising the flow of funds for Proceedings:

- a. Scenario 1 – the Member reviews two bank accounts and draws an inference due to the matching characteristics of transactions that these are intra-bank transfers, which would be an Expert Witness Service.

Technical Staff believe that if the Member draws an inference, this would be the expression of an opinion (an inference drawn from facts) and would constitute an Expert Witness Service but not necessarily Other Evidence.

- b. Scenario 2 – additionally, the Member supports each matching transaction with bank voucher/trace reports and summarises the source documents, which would be a Lay Witness Service.

Whilst this assignment would result in the Member summarising information from the source documents, Technical Staff believe it might require the Member to apply specialised knowledge derived from training, study or experience and constitute Other Evidence under APES 215.

The working party discussed an alternative option to amend Example 7 to cover adducing evidence of the contents of bank documents used to prepare the chart or summary, pursuant to section 50 of the Evidence Act as a Lay Witness. This would demonstrate that the Member does not use specialised knowledge derived from the Member's training, study or experience in the selection or interpretation of documents and the Member proffers no opinions in or upon the chart or summary.

This scenario could be contrasted within the same example where the selection or presentation of the chart or summary requires the Member to exercise their accounting skills, notwithstanding the intention to adduce the evidence under section 50 of the Evidence Act, making them an Expert Witness as it involved specialised knowledge. This could include that if the court receives submissions or evidence of the Member's training, study and experience in accounting, the Member should treat this as Expert Witness even if adducing under section 50 of the Evidence Act.

7. **Recommendation** – Make paragraph 7.2 of APES 215 a requirement paragraph mandating Members in Business to utilise a system of quality control due to the risks and responsibilities being higher in the business arena, especially with criminal matters.

Technical Staff disagree with this recommendation. Paragraph 7.1 of APES 215 requires Members in Public Practice to comply with APES 320 *Quality Control for Firms* (recently reissued as *Quality Management for Firms that provide Non-Assurance Services*). However, APES 320 does not apply to Members in Business. Paragraph 7.2 of APES 215 recommends Members in Business to utilise a system of quality control, including appropriate policies and procedures on elements from APES 320.

## APES 215 and AI and Digital Technology and Quality Management Conforming Amendments

APESB's Technology project will, in part, determine the impact of artificial intelligence and digital technologies on APES 215 (Agenda Item 7). At the March 2022 Board meeting, the Board approved a [project proposal](#) to revise APESB's pronouncements, including APES 215, relating to the reissued APES 320 *Quality Management for Firms that provide Non-Assurance Services* and AUASB Quality Management Standards. Technical Staff propose to include consideration of AI and Digital Technology and Quality Management Conforming Amendments as part of the project to update APES 215.

### APES 215 Task Force

Technical Staff propose to convene a full APES 215 Taskforce meeting in June/July 2022 to consider ASIC's concerns and potential ways to address these as identified above. The Taskforce could also consider Quality Management Conforming Amendments to APES 215. Technical Staff also intend to develop a survey relating to the use of AI and Digital Technology in forensic accounting and to seek Taskforce members' feedback.

### **Way Forward**

Technical Staff propose to:

- convene an APES 215 Taskforce meeting in June/July 2022 to consider the further information and recommendations from ASIC, Quality Management Conforming Amendments to APES 215 and to seek feedback on a Technology survey;
- respond to ASIC's request and meet with them to discuss after the Taskforce meeting;
- consider and draft relevant amendments to APES 215 and prepare an APES 215 Exposure Draft to be considered at a future Board meeting.

### **Recommendations**

The Board note Technical Staff's project update on APES 215.

### **Materials presented**

Agenda Item 8(a)      Recommendations from ASIC on APES 215

Agenda Item 8(b)      Extracts from Relevant Case Law

**Author**                      Jon Reid

**Date**                              24 May 2022