

Preliminary Comparison of APES 230 and the Code to the FASEA Code of Ethics

The following analysis provides a preliminary comparison of APES 230 *Financial Planning Services* (APES 230) and APES 110 *Code of Ethics for Professional Accountants (including Independence Standards)* (the Code) to the Financial Adviser Standards and Ethics Authority Ltd (FASEA) *Code of Ethics* (FASEA Code).

Background

APESB issued APES 230 *Financial Planning Services* (APES 230) in April 2013 (with an effective date of 1 July 2014), which sets out professional and ethical obligations in relation to financial planning services. The scope of APES 230 is broader than the Future of Financial Advice (FOFA) legislation (2012) relevant to financial planning advice as it applies to activities such as mortgage broking and extends to wholesale clients not subject to FOFA.

The Royal Commission into misconduct in the banking, superannuation and financial services industry in Australia (Banking Royal Commission) commenced in December 2017 to inquire into whether conduct by financial services entities falls below community standards and expectations and whether the conduct amounts to misconduct. It considered the root cause of any misconduct, the adequacy of relevant laws, policies, and self-regulation. The Banking Royal Commission's final report was released in February 2019 with 76 recommendations.

FASEA was established under the *Corporations Amendment (Professional Standards of Financial Advisers) Act 2017*¹ "to set the education, training and ethical standards of licensed financial advisers in Australia"². All relevant providers³ (financial planners and advisors) are required to comply with the FASEA Code⁴.

The FASEA Code was issued on 8th February 2019, however, the accompanying Explanatory Statement clarifies the effective date of the FASEA Code is from 1 January 2020⁵. The FASEA Code is a legislative instrument which consists of 5 values and 12 standards.

APES 230 and the Code include obligations for financial planners and advisors who are also Members of the professional bodies. The FASEA Code covers providers that service retail clients, whereas APES 230 and the Code are not limited to retail clients. As such, APES 230 impacts upon financial planning advice provided to a broader population of consumers than the FASEA Code.

FASEA Code Standards Compared to APES 230 & the Code

The following analysis compares 5 of the FASEA Code Standards to APES 230 and the Code, where there are potential differences. It is important to emphasise that it is unclear at this stage how FASEA will implement the FASEA Code in practice.

¹ Section 921X of the *Corporations Act 2001* (Corporations Act).

² <https://www.fasea.gov.au/>.

³ Section 910A of the Corporations Act.

⁴ Section 921E of the Corporations Act made by authority under section 921U(2)(b) of the Corporations Act.

⁵ Financial Planners and Advisers Code of Ethics 2019 Explanatory Statement, paragraph 2.

(a) FASEA Code – Standard 2

Standard 2 of the FASEA Code requires that relevant providers “*must act with integrity and in the best interests of each of your clients*”.

A Member providing a financial planning service is required to comply with the fundamental principle of integrity in the Code⁶. The Member must also act in the best interests of the client under APES 230, mirroring *Corporations Act 2001* (Corporations Act) obligations.⁷ Extant APES 230 extended the best interests duty beyond FOFA requirements to all clients and financial planning services, including services provided under the *National Consumer Credit Protection Act 2009* and other legislation or regulations such as Private Health Insurance.

The FASEA Code does not define ‘best interests’, however, the Explanatory Statement to the FASEA Code notes that “*even if you follow the steps set out in section 961B of the Act, you may still not have complied with the duty under the Code [the FASEA Code] to act in the client’s best interests*”, suggesting the FASEA Code extends beyond the Corporations Act obligations. However, the Corporations Act includes a ‘catch all’ provision requiring the provider to take any other steps in the best interests of the client in their circumstances.⁸ The Explanatory Statement to the FASEA Code includes additional elements of best interests, however, Technical Staff are of the preliminary view that these aspects are likely to be adequately covered by APES 230 and the Code as follows:

- Confidentiality (paragraphs 3.11 and 3.12 of APES 230 and subsection 114 *Confidentiality* of the Code);
- Treat all clients in a respectful and professional way (subsection 115 *Professional Behaviour* of the Code); and
- Treat all clients fairly, as between themselves (subsections 111 *Integrity*, 112 *Objectivity* and 113 *Professional Competence and Due Care* of the Code).

The ‘best interests’ obligation was included in the Corporations Act as part of the FOFA Reforms to manage conflicts of interest and the Banking Royal Commission notes that the step approach in the legislation may not cover the broader ‘best interests’ obligation in practice.⁹ However, the Banking Royal Commission also states though that it is not “*necessary or appropriate to remove the safe harbour provision at this stage*”¹⁰ and recommends that Australian Securities and Investments Commission (ASIC) undertakes a review in 2022 of the effectiveness of these measures.¹¹

(b) FASEA Code – Standards 3 & 7

Standard 3 of the FASEA Code requires that relevant providers “*must not advise, refer or act in any other manner where you have a conflict of interest or duty*”, which read strictly would prohibit conflicted remuneration. However, Standard 7 of the FASEA Code confirms benefits can be obtained where expressly permitted by the Corporations Act (which

⁶ APES 230, Paragraph 3.3.

⁷ Section 961B, 961C, 961D, 961E and 961F of the Corporations Act.

⁸ Section 961B(g) of the Corporations Act “*taken any other step that, at the time the advice is provided, would reasonably be regarded as being in the best interests of the client, given the client’s relevant circumstances*”.

⁹ Final Report on the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, Chapter 3, page 177.

¹⁰ Final Report on the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, Chapter 3, page 177.

¹¹ Final Report on the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, Chapter 3, Recommendation 2.3.

currently includes grandfathered conflicted commissions and other exemptions). Standard 7 of the FASEA Code also requires that clients give “*free, prior and informed consent to all benefits*”, including fees for services and variable components of remuneration (such as commissions or bonuses).

The Banking Royal Commission highlighted significant concerns in relation to fees for financial planning services inappropriately taken¹² and there is evidence of a lack of transparency in fees charged in superannuation funds.¹³ Legislation was introduced to parliament on 1 August 2019 to abolish grandfathered conflicted remuneration from 1 January 2021, as recommended by the Banking Royal Commission.¹⁴ The Banking Royal Commission also recommended that ASIC review the appropriateness of other exemptions to conflicted remuneration in 2022, including for life and general insurance.¹⁵

When extant APES 230 was issued, the Board’s strong preference was for Members to be remunerated on a fee for service basis to minimise the remuneration driven conflicts of interest. The Board was of the view that third party payments (such as commissions) create a self-interest threat¹⁶ and fees based on funds under management result in an actual or perceived conflict.¹⁷ Accordingly, the incorporation of safeguards including informed consent resulted in the inclusion of alternative remuneration methods as it reduced the threats to an acceptable level in the extant APES 230.¹⁸

There is also a requirement under Standard 7 of the FASEA Code to “*satisfy yourself that any fees and charges that the client must pay to you or your principal, and any benefits that you or your principal receive, in connection with acting for the client are fair and reasonable and represent value for money for the client*”. Members are required to comply with the fundamental principle of integrity under the Code and the obligation to obtain informed consent would likely address these (however, informed consent is limited to non-fee for service remuneration in APES 230).

(c) FASEA Code – Standard 4

Under FASEA Code Standard 4 relevant providers “*may act for a client only with the client’s free, prior and informed consent. If required in the case of an existing client, the consent should be obtained as soon as practicable after this Code commences*”. The FASEA Code requires free, prior and informed consent before acting for a client, whereas APES 230 requires a written agreement. Informed consent is not defined in the FASEA Code, however, the Explanatory Statement provides that:

“Informed” consent requires that the client understands and agrees to the arrangements. You will need to be satisfied of this, and have reasonable grounds to be satisfied”.

¹² Final Report on the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, Chapter 3, page 137.

¹³ Superannuation: Assessing Efficiency and Competitiveness, Productivity Commission Inquiry Report 91, 21 December 2018, page 16.

¹⁴ Final Report on the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, Chapter 3, Recommendation 2.4.

¹⁵ Final Report on the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, Chapter 3, Recommendations 2.5 and 2.6.

¹⁶ Basis for Conclusions: APES 230 Financial Planning Services (Formerly APS 12), page 8.

¹⁷ Basis for Conclusions: APES 230 Financial Planning Services (Formerly APS 12), pages 6 & 7.

¹⁸ Basis for Conclusions: APES 230 Financial Planning Services (Formerly APS 12), pages 6 & 7.

(d) FASEA Code – Standard 5

FASEA Code Standard 5 states “*All advice and financial product recommendations that you give to a client must be in the best interests of the client and appropriate to the client’s individual circumstances. You must be satisfied that the client understands your advice, and the benefits, costs and risks of the financial products that you recommend, and you must have reasonable grounds to be satisfied*”.

APES 230 includes information to be included in a written form for the client in respect of financial planning advice¹⁹, as well as comply with the following obligations when providing a financial planning service (amongst other things):

- act in the best interests of the client;²⁰
- identify the objectives, financial situation and needs of the client;²¹ and
- obtain sufficient appropriate evidence and an understanding of the Client’s objectives, financial situation and needs, and other relevant circumstances.²²

The issue that may require further clarification is in respect of the client’s understanding of the financial advice they receive.

¹⁹ APES 230 paragraph 6.8.

²⁰ APES 230 paragraph 3.6.

²¹ Section 961B of the Corporations Act.

²² APES 230 paragraph 6.3.