The Institute of Public Accountants

Submission to APESB: APES 230 Post-implementation Review

IPA INSTITUTE OF PUBLIC ACCOUNTANTS

Partnership beyond numbers

June 2017

30 June 2017

The Chairman
Accounting Professional & Ethical Standards Board Limited
Level 11, 99 William St
Melbourne VIC 3000

By email: sub@apesb.org.au

Dear Ms Roxon

Post-implementation review of APES 230 *Financial Planning Services*

The IPA welcomes the opportunity to comment on the post-implementation review of APES 230 *Financial Planning Services*, and on the broader financial services landscape affecting Members and the accounting profession.

Since the IPA did not adopt APES 230 we are unable to comment directly on its implementation; however, we are guided by the experience of our Members who are involved in financial services and by legislative and market developments in making our comments. As you are aware, the IPA issued Pronouncement 11 in place of APES 230 and we also make our comments based on our Members experience in implementing Pronouncement 11, which is in many respects similar to APES 230.

We would like to stress that the IPA remains committed to upholding the professional and ethical standards of our Members, including in the provision of financial planning services. Further, the IPA is committed to working with the APESB to resolve any outstanding matters with respect to APES 230 which would enable our Members to operate both professionally and commercially in the financial services market.

We refer to the Consultation Paper and to our comments in the attached Appendix.

If you wish to discuss our submission further or if you have any queries, then please don't hesitate to contact either Andrew Conway (andrew.conway@publicaccountants.org.au or mob. 0409 940 567) or Vicki Stylianou (vicki.stylianou@publicaccountants.org.au or mob. 0419 942 733).

Yours sincerely

Andrew Conway FIPA FFA
Chief Executive Officer
Institute of Public Accountants

APPENDIX

Question 1: Systems, processes and policies

Since APES 230 became effective in July 2014:

a) What provisions of APES 230 were easy to implement?
b) What systems, processes and policies have Members amended or developed to meet the requirements of the Standard?

Response:

Whether or not and to what extent Members have had to make changes to their systems, processes and policies has been different for every Member; and has depended on a multitude of factors. Some practices have been involved in financial services for a length of time and have not had to make major changes. Other practices have never offered financial advice and have had to implement totally new systems, processes and policies; which in turn have depended on the size of the practice, the type of clients and advice being offered, the external support systems in place (for example, outsourcing some of the preparation, research or para-planning services).

One of the main impacts has been compliance with the requirements in the *Corporations Act 2001* (Corporations Act) and *Corporations Regulations 2001* (Corporations Regulations) relating to documenting every aspect of providing financial advice. Having to provide clients with a Financial Services Guide (FSG), Statement of Advice (SOA), Record of Advice, Fee Disclosure Statement, and so on, has proved difficult for many Members. In particular, the preparation of a SOA, has been problematic, not just in terms of having suitable templates and knowing when to use them, but also in terms of developing the most appropriate advice. This has resulted in some Members either opting to become authorized representatives or opting out of financial services altogether, including providing advice on the establishment of SMSFs. For those Members who had less than about five SMSF clients it proved commercially unviable to continue to provide these services. The main alternative option was to continue to provide, or to increase SMSF related services, around tax, administration, compliance and audit work, rather than financial advice. The financial advice piece is then either outsourced or the non-financial advice work is referred by financial advisers/planners.

Obviously, for Members who have become authorized representatives, one of the main advantages is that the licensee generally provides them with systems, processes and policies and support on implementing these.

The largest volume of enquiries by far from Members has been around what they can and cannot say to clients since the end of the FoFA transition period on 30 June 2016. This is still an issue for many Members who are trying to 'do the right thing' and are very conscious of where they need to draw the line on what advice can be provided. When ASIC finally released Information Sheet 216 *AFS Licensing requirements for accountants who provide SMSF services* in December 2016 (amended in May 2017) we received more queries from Members about how to interpret Information Sheet 216, and we have provided further guidance to Members on this matter.

Question 2: Best Interests Duty

APES 230 requires Members to act in their clients' best interests and apply this requirement to all Financial Planning Advice. Have Members experienced any issues (positive and/or negative) implementing this requirement?

Response:
Both APES 230 and Pronouncement 11 apply the definition of 'best interests duty' contained in the Corporations Act.

We are not aware of any Members who have experienced a problem applying the best interests duty. Even though the safe harbour provisions add a level of complexity, our Members appear to have understood this requirement. The ASIC guidance in RG 175 Licensing: Financial product advisers – Conduct and disclosure, issued in March 2017 (116 pages) has been very useful. It deals with the interaction between the best interests duty (s961B(1)) and the safe harbour provisions (s961B(2)), among numerous other matters.

ASIC's flexible interpretive approach has been helpful for Members in that an advice provider can satisfy the safe harbour provisions by different means and that satisfying all the elements in the Corporations Act s961B(2) is only one way to achieve this. Flexibility is also built in by being able to 'scale up' or 'scale down' what is required to satisfy the best interests duty, depending on a number of factors set out in RG 175.391-RG 175.395.

Question 3: Terms of Engagement

For holders of an Australian Financial Services Licence (AFSL):

a) How do AFSL holders apply the APES 230 requirements in respect of terms of engagement?
b) What challenges, if any, have AFSL holders encountered in respect of the application of APES 230 requirements relating to terms of engagement?

Response:
Both APES 230 and Pronouncement 11 apply APES 305 *Terms of Engagement.*

We are not aware of any Members who have experienced any difficulty in applying APES 305. The IPA has provided templates for engagement letters for Members who are in a referral arrangement, including guidance and checklists. Members who are authorized representatives have relied on their licensee to ensure that the licensee's requirements are met in terms of client engagement. We are aware that Members who have their own AFSL use a standard form FSG, which more than adequately meets the requirements of APES 305.

Some of the differences are that under the Corporations Act and Corporations Regulations, all engagements must be in writing, whereas under APES 305 engagements may be 'written or otherwise'; and paragraph 3.5 of APES 305 allows engagements to be by way of 'a standard form handout, brochure, leaflet'. Engagement documents for financial advice are effectively the FSG amended for each particular client engagement. In our experience, these are at least as comprehensive, if not more so, than most engagement letters which our Members use for non-

financial advice services. The general contents of an engagement document under paragraph 4 of APES 305 are also included in a FSG and related documents.

Question 4: Informed Consent

APES 230 requires Members in public practice to obtain their clients' Informed Consent in respect of asset-based fees and third party payments.

a) If Members are using these remuneration methods, what are the new systems, processes and policies that Members have implemented in their practice relating to obtaining clients' Informed Consent?
b) What have been the positive benefits/outcomes of implementing APES 230 in your practice?
c) What are the challenges, if any, that Members have encountered in the application of these requirements?

Response:

Pronouncement 11 does not contain the requirement to obtain Informed Consent with respect to asset-based fees and third party payments. The IPA holds the view that Informed Consent, as defined by APES 230, is already incorporated into the financial planning process, including the explanation around fees, which all financial advisers are required to follow. Financial advice, if given according to the law, cannot be implemented without the client having a full understanding of all aspects of the advice being given, the rationale for the advice, the alternatives and options, and a full understanding of the basis on which they are being charged, the benefits (if any) to the adviser, potential conflicts, the amount of fees, the impact on the advice being given and so on. All of these matters are required to be clearly stated in the FSG, SOA and related documents.

For this reason, we do not see what value is added by paragraph 8.2 of APES 230. An annual Fee Disclosure Statement and a biennial opt-in from the client to being charged the fee (and to the actual provision of advice giving rise to an 'ongoing fee'), are requirements under the Corporations Act Div 3 of Part 7.7A, which states that where a fee is to be paid for more than 12 months (an 'ongoing fee arrangement') there is a need to give enhanced disclosure of fees and services. This means providing an annual Fee Disclosure Statement containing certain information about fees charged and services provided. In addition, clients who entered into ongoing fee arrangements after 1 July 2013 must be provided with a renewal notice every two years and then 'opt in'. This is essentially the same as the provisions contained in APES 230.

We assume that sub-paragraph b) refers to the benefits and outcomes of obtaining Informed Consent rather than being an open question about the positive benefits and outcomes of implementing APES 230.

Question 5. Remuneration models

The APES 230 remuneration provisions allow fee-for-service basis, asset based fees and third party payments.

a) Have these provisions worked well for Members? What remuneration options are used more often by Members and why?
b) If APES 230 was transitioned to limit remuneration to fee-for-service basis, would this work? Would such a change create any challenges?

c) What transition requirements would be needed?

Response:

The major difference between APES 230 and Pronouncement 11 relates to remuneration models/options. We acknowledge that APES 230 in its latest iteration is more flexible and allows for fees to be charged solely on the basis of a percentage of the value of the client's assets or funds under management on the basis that they must obtain written Informed Consent, provide what is essentially a Fee Disclosure Statement and obtain a biennial written consent from the client. ASIC RG 245 Fee disclosure statements covers these requirements.

On the other hand, the IPA has chosen to be non-prescriptive and to allow Members to choose the most suitable and appropriate model for each particular circumstance. In doing so, they must obviously comply with the Corporations Act*,* Corporations Regulations and be guided by ASIC's interpretation to ensure that the most appropriate model is chosen for each client. In taking this approach we also rely on the additional safeguards to which our Members are subjected, including compliance with APES 110 *Code of Ethics*, ongoing and mandatory CPD, quality assurance requirements and disciplinary processes in the event of any breach.

With respect to conflicted remuneration and managing conflicts of interest, the Corporations Act Division 4 of Part 7.7A contains a ban on benefits which are 'conflicted remuneration' (s963A), including product commissions and volume-based benefits, being given or accepted by financial services licensees or their representatives where financial product advice is provided to retail clients. The benefits banned are ones which reasonably could be expected to influence the choice of products recommended or the advice given to retail clients. Some benefits are excluded from the ban. There is also a presumption that volume-based benefits are conflicted remuneration (s963L). Viewed collectively we believe that these provisions have struck a reasonable balance between consumer protection and allowing flexibility for advisers in providing and charging for advice.

Other banned remuneration, includes, inter alia, the charging by a financial services licensee or its authorised representative who provides financial product advice to a retail client of an asset-based fee on a borrowed amount used to acquire financial products by, or on behalf of the client. In other words, the legislation covers the most likely scenarios where conflicted remuneration may arise and has banned it.

In addition, in March 2013 ASIC released RG 246 Conflicted remuneration (70 pages). ASIC sets out in RG 246.51 (and following) what they will consider when deciding whether a benefit is conflicted remuneration. They will look at substance over form and consider the overall circumstances in which the benefit is given or accepted. This includes business structure, type of financial product advice they provide and types of products to which the advice relates. The Corporations Act sets an objective standard of reasonableness for determining whether a benefit could be expected to influence the advice given. It depends on the nature of the benefit or circumstances in which it is given or accepted (RG 246.67).

We also refer to RG 244 Giving information, general advice and scaled advice, issued in December 2012 (139 pages); RG 181 Licensing: Managing conflicts of interest, issued in August 2004 (25 pages); RG 166 Licensing: Financial requirements, issued in July 2015 (129 pages); RG 104 Licensing: Meeting the general obligations, issued in July 2015 (34 pages); and numerous other RGs which are relevant to providing financial advice.

We submit that the above legislation and the plethora of ASIC guidance is reasonably sufficient and comprehensive to ensure that the system can adequately support a variety of remuneration models and that restricting accountants to one model is unwarranted.

We believe it is irrelevant which remuneration options are used most by Members, as asked by the Consultation Paper. The main point is that Members should be able to choose the most appropriate option to suit their client's needs and which are in the client's best interests. Given that the policy objective of FoFA was to provide competent and affordable financial advice to consumers, then we fail to see how limiting Members on remuneration options can be beneficial for Members or for their clients. It is critical that clients be informed of and understand all relevant aspects of the advice being offered, including the basis for fees.

If the APESB is minded to further limit remuneration models to fee-for-service, which appears to be pre-empted, then the IPA would be likely to oppose this. If Members wish to offer their services on a fee-for-service only basis, as some already do, then this should be a decision solely for the Member and their firm. If the legislation required a fee-for-service only model then all financial advisers would be on the same level playing field and our Members would not be at a commercial disadvantage. However, until this happens then we see no compelling reason to change the options available to accountants.

Different fee models are developed and evolve over time, which means APES 230 would have to be amended to stay relevant. Definitions would have to be developed which can be adequately understood and consistently applied. For instance, we refer to RG 255 Providing digital financial product advice to retail clients, released in August 2016. Prescribing the most appropriate remuneration model/options for digital and robo-advice may not be a simple exercise given the endless possibilities which are emerging with fintech and regtech.

We have sought input from IPA Members who have their own AFSL and their views are noted below:

- How you are remunerated does not determine whether you are "professional".
- Clients do not like paying fees.
- For accountants their fee is either a fee-for-service or a retainer paid on a regular basis.
- For financial planners, this can be a combination of fee-for-service or asset based fees.
- In funds management, assets are managed and clients are charged an asset fee. This is not considered 'unprofessional' and has been and still is an accepted international practise.
- There has been much commentary about the under-insurance that will emerge as the life insurance reforms push advisers and accountants to charge a fee to ensure clients are properly insured. Clients are not used to paying fees for insurance.
- Many clients are happy to pay their insurance premiums via their superannuation funds as they don't feel the pain of payment. Some clients think, incorrectly, that the superannuation fund is making the payment. Full disclosure needs to be made to the client.
- Fees are a matter of disclosure. If disclosed in full, and accepted by the client once their understanding has been gained, then this should be considered as honest disclosure.
- On the matter of 'conflicted remuneration', in practical terms if the client's best interest is served and there is full disclosure there will be no conflict.
- The amount of over-regulation in relation to remuneration hampers small business and advisers.
- Small accounting firms and advisers generally are 'cottage industries.' As small businesses it is easier to charge asset based fees rather than send out invoices for the 'fee-for-service.'

For superannuation clients, they are sent a statement twice a year, as per regulations, detailing amongst other things, all the fees and charges. For investment clients, they are, again as per regulation, sent four statements at the end of each quarter detailing all fees and charges, plus an end of year financial statement. Over and above all of this an adviser must send a Fee Disclosure Statement for fees charged to each client.

Question 6: Legislative developments and other issues

Given the recent legislative developments that impact on the financial services industry, what other issues do Members believe APESB should consider in its post-implementation review of APES 230?

Response:

As acknowledged by APESB in the Consultation Paper, the world of financial services has changed in the last four years since APES 230 was issued, with significant legislative and market developments. The IPA would go further to say that these developments have been not only significant but 'game-changing'. Firstly, there is the establishment of the Financial Adviser Standards and Ethics Authority (FASEA) which will have responsibility for governing the conduct of financial advisers, ensuring their professionalism by setting mandatory educational and training requirements, developing and setting an industry exam and creating a Code of Ethics. Secondly, there is the role and impact of technology which continues to disrupt every aspect of practice and of life in general.

We note the latest amendments to the financial services legislation will commence on 1 January 2019, with the Code of Ethics commencing on 1 January 2020. There is the possibility that the new FASEA Code of Ethics may duplicate or conflict with APES 230, creating more confusion for Members. There is also the possibility that the professionalization of the financial advice 'industry' and the increasing regulatory burden which comes with it, will force more accountants to either become fully fledged financial advisers or to leave the space altogether. The IPA has always advised Members that it is not viable to 'dabble' in financial services due to the compliance burden. This means making a business decision which requires a high level of commitment if Members are to successfully operate in financial services.

In terms of the environmental scan, we note the increasing predictions that the dealer groups, especially the larger ones, will seek greater commitment from 'entry level' authorized representatives, with many accountants being at that level, to become authorized to give advice about financial products. We do not normally quote from media articles, however, the article below reflects the comments and actual experiences of some IPA Members and other industry stakeholders with whom the IPA engages. Consequently, some Members are in the process of moving to different licensees and we have been asked to assist in some cases. The implications for APES 230 are that it must remain flexible to accommodate this movement and the changing nature of practices.

https://www.smsfadviser.com/news/15621-big-dealer-groups-tipped-to-exit-limited-licensing?utm_source=SMSFAdviser&utm_campaign=28_06_17&utm_medium=email&utm_content=1

The IPA has made a huge effort over the last 6-7 years to encourage members to diversify into growing areas of demand and away from increasingly commoditized compliance work. Financial services has been identified as a major growth area (CoreData, IbisWorld, IFAC, CommBank, and BStar). However, Members need to be supported in their move into financial services. The IPA is seeking to do this through the provision of technology based solutions and by partnering with

well-established and reputable AFSL holders.

We refer to the IPA's presentation to the APES Board in November 2016, where we outlined the IPA's financial services model as a practical and risk-averse approach to ensuring that our Members have attractive licensing and referral options. The latter acknowledges that not all accountants want to give financial advice themselves but still wish to offer financial services through referral arrangements.

In reviewing any piece of regulation, the broader picture should be considered. Accountants are increasingly subjected to more regulation and more change, rather than less. Accountants are facing the establishment of FASEA and the latest tranche of reforms, the introduction of NOCLAR and strengthened anti-money laundering provisions, to name a few. They must also keep abreast of the constant changes to taxation, superannuation, corporations, competition legislation and so on.

Question 7: Further reforms, issues or ideas to protect consumers of financial advice

Are there any further reforms, issues or ideas that Members believe the APESB should consider in order to protect consumers who receive financial advice?

Response:

One of the main protections for consumers is to improve their own financial literacy. There are countless programs being offered, however, in many cases consumers need to be encouraged to take these up. Accountants, professional associations, regulators and standard setters have a role to play in this process.

In the era of robo-advice, artificial intelligence, machine learning and other technological advances, consumers are becoming savvier and more demanding. Accountants as financial advisers must be able to respond accordingly. In this regard, the professional associations have a role to play in ensuring that Members are adequately trained, educated, informed and resourced on an ongoing basis. In addition, the role of professional and ethical standards is becoming increasingly important to ensure that the trust factor between consumers and accountants is enhanced and not diminished.

Comparison of APES 230 and Pronouncement 11

	APES 230	PRONOUNCEMENT 11
Paragraphs in APES 230:		
Para 1. Scope and application		Same
Para 2. Definitions:		
Best Interests of the Client	Defined with reference to Corps Act	Not defined
Commissions		Not defined
Fee for Service		Not defined
Financial Planning Advice		Called financial advice – reasonably similar definition
Firm		Same except APES 230 has added Auditor-General's Office or Dept
Informed Consent		Not defined
Professional Independence		Not defined
Soft Dollar Benefits		Not defined
Third Party Payments		Not defined
Other definitions:	Numerous other definitions which are not included in Pron 11 but which are not key	Pron 11 does not repeat terms such as FSG, which are defined in APES 230 with reference to Corps Act
Para 3. Fundamental responsibilities of Members:		Same
Public Interest		Not defined
Integrity, objectivity, conflicts of interest, professional competence and due care, confidentiality, professional appointments, marketing		Same
Para 4. Professional Independence		Essentially the same; adds PI insurance and updating engagement doc; FSG is adequate
Para 5. Terms of the Financial Planning Service	Refers to APES 305 Terms of Engagement; adds Informed Consent	Also refers to APES 305; adds termination and complaints clauses
Para 6. Basis of preparing and reporting Financial Planning Advice		Same; adds steps to be taken to act in client's best interests
Para 7. Client's information, monies and other property		Same
Para 8. Professional Fees	Preference for fee-for-service; but allows fees based on percentage of value of assets or FUM but must have Informed Consent of client	No prescription of fee/remuneration model; Members apply Corps Act/Regs and ASIC guidance including RG 246.24

Para 9. Third Party Payments		Not defined
Para 10. Soft Dollar Benefits		Not defined
Para 11. Documentation and quality control		Same
Para 12. Transitional provisions	NA	NA
Conformity with International Pronouncements	NA	NA