

**WORKING DRAFT**  
**Constituents' Submissions – Specific Comments Table 3**  
**Exposure Draft 02/10: APES 230 Financial Advisory Services**

**Note: Specific comments relating to APES 230 Financial Advisory Services are addressed in a separate table. This table excludes minor editorial changes.**

Item No.	Paragraph No. in Exposure Draft	Respondent	Respondents' Comments
1		ORT	<b>Confidential submission</b>
2		MS	Clarity is required in regards to which members APES 230 will apply to. For instance, it should be made clear that the standard will not apply to financial advisers who run their financial planning business separately from their accounting business. The APESB should not have jurisdiction to determine the standards that apply to businesses run by members that are not accounting businesses.
3		AFAC	<p><b>2.4. Principles based vs. regulatory based arguments</b></p> <p>There is significant research and expert commentary available on the relative merits of principles based regulation vs. rule based regulation. Burgemeestre, Hulstijn and Tan provide a very interesting overview of the respective approaches in their research paper1 “Rule-based vs. Principles-based Regulatory Compliance” and open their paper as follows:</p> <p><i>“In the domains of accounting [2,20,9] and law [10,15,16,8,14] there is a long standing debate about the relative merits of rule-based versus principle-based regulatory systems.”</i></p> <p>In the 2008 Business Law Journal2, Cristice Ford explains the significance and wisdom of “principles-based” securities regulation. It canvasses the shift in the UK Financial Services Authority (FSA) to a more comprehensive principles-based regime since 2003 and contrasts its approach with rules-based approach embodied by the Sarbanes-Oxley Act in the United States. The paper references a McKinsey &amp; Co. report commissioned by the New York City Mayor, Michael Bloomberg, which blamed American over-regulation for the City’s continuing financial sector woes. It further states that <i>“the London Stock Exchange has argued that its superior principles-based approach – not lax standards and not simple distaste for Sarbanes-Oxley Act requirements in the United States – was the reason behind the historic shift.”</i></p> <p>The paper goes on to canvas the emergence of principles-based securities regulation in Canada, starting in British Columbia.</p> <p>As stated by John Tiner, CEO, FSA3 “Principles-based regulation is essentially about outcomes or ends, while rules-based regulation is about means.” Principles-based regulation allows firms to decide how best to achieve required outcomes and, as such, it allows a much greater alignment of regulation with good business practice.</p> <p>As for legislation and regulation, there are two key philosophical approaches to standards setting – principles-based vs. rules-based. Principles-based standards are based primarily on reinforcing norms for professional behaviour; rules-based approach are based on means and detailed rules. Arguably, one approach is more focussed on “substance”, the other on “form”.</p>

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			<p>Principles-based standards are arguably more comprehensive and all-embracing than rules-based standards because they focus on (professional) behaviour, rather than trying to cover all conceivable details and eventualities through prescription-based standards. The latter is not realistically possible.</p> <p>What is the more effective approach for standards setting for the accounting profession? We would submit that this is principles-based. For example, this is the approach in APS 12 (especially the principles of “integrity” and “objectivity”) and APES 320 (quality assurance).</p> <p>APES 230 has elements of principles-based standards. For example in Section 3 – Fundamental Responsibilities of Members - which are positive, but the effectiveness of APES 230 is then negated by straying inappropriately into prescription - for example in Section 7 (The basis of preparing and reporting Financial Advice) and the interaction of the definition of Fee for Service (in the Definitions section) with Section 9.</p> <p>We submit that APES 230 should be substantially re-drafted to be a principles-based standard. We believe a principles-based approach will be more effective in assisting APES 230 achieve its intended objectives.</p> <p><b>3. DETAILED COMMENTS</b></p> <p><b>3.8. Application of standard</b></p> <p>We recommend that there be clarity in regards to which members APES 230 will apply. For instance, we believe it should be made clear that the standard will not apply to financial advisers who run their financial planning business separately from their accounting business. The APESB should not have jurisdiction to determine the standards that apply to businesses run by members that are not accounting businesses.</p> <p>It should also be noted that Financial Advisory Services tends to be offered by accountants to their clients through a number of structures. The most common appear to be the following:-</p> <ol style="list-style-type: none"> <li>1. An independent Financial Services company is incorporated with the accountant/practice and a financial adviser as directors/shareholders. The financial planner or the company is an authorised representative of a licensee and receives payment from the fund manager/s and a fee/dividend or profit is then passed on to the accountant/practice.</li> <li>2. The accounting practice incorporates an independent Financial Services Company. The company holds a corporate authorisation from a licensee and the independent company provides Financial Advisory Services to clients of the accounting practice. Remuneration is received by the corporate authorised independent company and the income arising there from is distributed in an agreed manner.</li> <li>3. The accountant is an authorised representative of a licensee and provides the Financial Advisory Services personally. The accountant receives payment directly from the licensee.</li> <li>4. The accountant holds a Financial Services Licence and provides the Financial Advisory Services. The Fund Manager pays commission directly to the accountant.</li> </ol> <p>In (1) and (2) above it may be the case that remuneration received by the accountant/practice would not be in breach of the draft proposition. Example 3. could offend in this regard. Example 4. would offend against the draft principle.</p> <p>The inequitable impact on small versus larger accounting firms also needs to be addressed.</p>

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			<p>We believe it is not the intent of the APESB to remove client choice of payment method nor impose upon product providers unnecessary burden when engaging with accountant financial advisers with regards to both new and existing clients.</p> <p><b>An example is an accountant operating in a business of financial advisers, who is now under different obligations than their colleagues. An unintended consequence may be structural engineering of advice practices to avoid these requirements.</b></p>
4	1.4	MSC	<b>Confidential submission</b>
5		SHRB	<p><b><u>Objection 2</u></b></p> <p><b>The accounting profession should do nothing at this time. Our standards should simply reflect relevant legislation as it develops (no more and no less).</b></p> <p>Adoption of this so-called “alignment with the emerging regulatory framework” position will lead to three unfortunate consequences:</p> <p><b>First</b>, our profession will be seen to have given up on self-regulation in the financial planning space, and even to have signaled our accession to the removal of our professional bodies from the self-regulatory role in general. Given that the articulation and self-regulation of professional and ethical standards should be central to the operation of any profession (and has been so in the case of the accounting bodies since their inception), our failure to adopt APES230 would signal a substantial change of direction and would be a most undesirable precedent.</p> <p><b>Secondly</b>, our profession will be seen to have accepted (even endorsed) that, instead of self-regulation, our members should be subjected to prescriptive, complex and costly compliance-based legislation which will be the inevitable result of the government’s “Future of Financial Advice” paper (FoFA). This legislation is proposed to commence on 1<sup>st</sup> July 2012. APES230 will be a “light hand of self-regulation” compared to what our members will be facing with FoFA and its inevitable refinements and “toughening” as the years pass; and</p> <p><b>Thirdly</b>, (whether or not it is so) our profession will be seen to have surrendered on the enforcement of our most fundamental ethical standards under pressure from the wider financial services industry, some of which views APES230 as an attack on product distribution networks and on the currently conflicted commercial alignments of our members with “dealer groups” and financial institutions.</p> <p><b>This “emerging regulatory alignment” position may be superficially attractive to those uninitiated in the ways of the financial planning industry who are looking for a political compromise to a potentially difficult controversy; however, the supporters of this position well know that FoFA (“the emerging regulatory framework”) does not comprehensively cover the key conflicts of interest and professional obligations addressed in APES230 (including percentage-based asset fees).</b></p> <p><b>They know that if they can convince our profession to accept their “delay and alignment” position, APES230 will have been defeated. There would be no point in having APES230 if all it did were to adopt the “lowest common denominator” position of FoFA. The opponents of APES230 know that. Indeed, it is the point of their opposition.</b></p> <p>They have calculated that if they can effectively defeat APES230 by convincing our profession that there should be an alignment of any proposed standard with the “emerging regulatory framework” (and then negotiate to water down the flawed and politically compromised</p>

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			<p>principles in FoFA even more), that will be a highly favourable commercial outcome for them; but it will be a very damaging outcome for the professional reputation, independence and self-regulatory foundations of our profession.</p> <p><b><u>Objection 3</u></b></p> <p><b>The proposed standard is acceptable “in principle”, but it should not be mandatory and should be offered as “guidance only”.</b></p> <p>Adoption of this proposition would follow the precedent of APS12, the unknown and substantially ignored “guidance only” predecessor of APES230. The critics of APES230 know that if the proposed standard is only offered as “guidance” to members, it too will be ignored, and effectively defeated.</p> <p>This decision would make our profession look weak, lacking independence, and unwilling to assert and stand behind its most fundamental professional and ethical principles in the face of pressure from powerful commercial interests.</p> <p>Much of the financial planning industry is regularly criticised for being long on rhetoric; but short on principles. Contrast this with APES230 in which our profession’s adherence to timeless professional and ethical principles has been approvingly commented upon in the media, government, academia and even in the financial services industry in general. At least, it is said, the accounting profession stands for something.</p> <p>For example, in a recent Briefing Paper (October 2010), the Industry Super Network noted:</p> <p><b><i>“The approach taken (to remuneration) by the Financial Planning Association, the Financial Services Council (formerly IFSA) and the Association of Financial Advisers contrasts quite dramatically with the Exposure Draft Standard (APES230) released by the Accounting Professional and Ethical Standards Board, which would apply to all accountants providing financial advice. The Exposure Draft standard would require accountants to adhere strictly to a fiduciary obligation when providing any financial advisory services to clients, including a mandatory requirement to only charge a true flat fee for service.</i></b></p> <p><b><i>Asset-based fees would be prohibited under this standard, along with other conflicted remuneration types including commissions, volume-based payments and soft dollar benefits.....the Exposure Draft Standard certainly reflects the more evolved state of the accounting profession and the rigour and independence of their standards setting process”.</i></b></p> <p>The ultimate value of our professional designations lies in the unambiguous trust of our clients. This is derived from our articulation and enforcement of fundamental professional and ethical principles. <b>This is the unique feature of a true profession over other occupational groups.</b></p> <p>Should we fail to mandate APES230, we’ll be no longer respected as a true profession whose central role is to articulate and enforce professional and ethical standards in the public interest. We will soon be perceived to have become a lobby group which is prepared to be flexible about adherence to its standards because of its imperative to represent the commercial interests of its members.</p> <p>Should we fail to mandate APES230, its opponents will approve publicly of that decision. They may even praise the decision as enlightened and realistic; but privately they will conclude that our profession can be counted on to compromise its principles when enough commercial</p>

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			<p>pressure is brought to bear. Supporters of APES230 will be disappointed for the same reason. Either way, we will not be respected by either side of the debate and we will return to our previous position of irrelevance in financial planning (which is where many in the industry would prefer us to be).</p> <p>In addition, our reputation in disciplines much wider than financial planning will be questioned. It would be reasonable for the media, government, regulators, and our members to ask what's next. That is, what's the next area in which our profession is going to compromise its principles under pressure and choose to apply our ethical standards as 'optional extras'? Will it be in auditing, will it be in tax, will it be in liquidations? We will have created a very large precedent.</p> <p>We cannot seriously and credibly suggest that financial planning should have a <b>special exemption</b> from our most fundamental professional and ethical standards. Otherwise, we will be placed in a position where we have two tiers of ethics (conflicted and non-conflicted) which members may choose at their commercial discretion.</p> <p>Finally, the implications of this decision are much wider than Australia. Many people in our profession around the world (for example, in the UK) are waiting to see whether we have the courage of our convictions to mandate APES230. If adopted in Australia, the principles in APES230 are likely to be considered for adoption in our profession elsewhere.</p> <p>However, failure to mandate APES230 will inevitably lead to the standard's irrelevance (like its predecessor APS12) and the continuation of the conflicted system whereby product distribution networks control much of the financial planning industry throughout the world. That outcome would be a major lost opportunity for the Australian accounting profession to lead much needed and overdue reform in the public interest.</p> <p>In summary, failure to mandate APES230 will effectively make the accounting professional bodies irrelevant in the financial planning industry.</p>
6		ISN	<p><b>Breadth of Standard</b></p> <p>The Standard proposes a broad scope of application that goes beyond the reforms proposed in the FoFA package, including application to general advice services (not just personal financial product advice) and all product types including risk products.</p> <p>Obviously the focus of the legal regulatory framework revolves around the regulation of financial product advice, which is consistent with the approach of other OECD jurisdictions. The FoFA reforms propose an approach which will further increase the legal minimum obligations for providers of personal financial product advice.</p> <p>However, in order to create minimum standards appropriate for a profession, the draft standard appropriately proposes a broader application, including setting higher professional standards for advice on all product types as well as on general financial advisory services. The breadth of approach proposed in this Standard is commendable and reflects the more evolved nature of the accounting profession when compared with the financial planning industry and the independence of the APESB.</p>
7		PB	<p><b>Comments on proposed standard</b></p>

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			<p>Notwithstanding our comments above, we also make the following observations in respect of the current exposure draft:</p> <ul style="list-style-type: none"> <li>• The scope of the proposed standard needs to be refined because the inclusion of non-licensed strategic and structural advice has the potential to make the scope of the standard so broad that it will affect the way in which traditional public accounting services are provided.</li> <li>• The standard should be applicable to Members in public practice only, as employee members are not typically involved in the strategic and operational decision making of the business and therefore they are not in a position to influence the necessary changes to remuneration structures.</li> </ul> <p><b>Summary</b></p> <p><b>Other Comments</b></p> <p>While the Joint Accounting Bodies do not support issuing the standard at this time, we have reviewed the ED and make the following comments for consideration when that document is redrafted.</p> <ul style="list-style-type: none"> <li>• The scope of the proposed standard should be refined because including non-licensed strategic and structural advice has the potential to make the scope of the standard so broad that it will affect the way in which traditional public accounting services are provided. The scope's current definition may well also impact on the services provided by members and firms at a wholesale and corporate level.</li> </ul> <p><i>[Technical Staff Note - The following dot point is repeated in Specific Comments – Table 4]</i></p> <ul style="list-style-type: none"> <li>• The scale of legacy products in the market combined with their complexities require appropriate provisions be included in APES 230, including a suitable definition, which should be based on the Government's description and be as follows: <ul style="list-style-type: none"> <li><b>Legacy Product</b> means a financial product that is closed to new Clients but remains in force due to existing client participation in the product.</li> </ul> </li> <li>• The standard be amended to be part of the APES 300 series that is applicable only to Members in public practice as employee members are not typically involved in the strategic and operational decision making of the business and therefore they are not in a position to influence the necessary changes to remuneration structures.</li> </ul>

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			<p><b>Detailed Analysis</b></p> <p><b>Scope of the proposed standard</b></p> <p>The inclusion of strategic and structural advice that does not require a licence in the definition of <b>Financial Advice</b> has the potential to capture all advice provided by Members in public practice.</p> <p>For example, Members in public practice regularly give advice on business matters including tax advice (as registered tax agents), appropriate business structures e.g. establishing, running, winding up companies, trusts, partnerships, buying and selling businesses, legal advice and underwriting share floats.</p> <p>In addition, feedback from a wide range of members in practice and business indicates that there is a clarity issue in terms of the application of the proposed standard. An unintended consequence of this lack of clarity is its application to wholesale and corporate services and advice provided by members and their firms.</p> <p><b>Recommendation:</b></p> <ul style="list-style-type: none"> <li>• <b>The scope of the proposed standard should be refined as including non-licensed strategic and structural advice has the potential to make the scope of the standard so broad that it will affect the way in which traditional public accounting services are provided.</b></li> </ul> <p><b>Application of the proposed standard</b></p> <p>The Joint Accounting Bodies are concerned at the inclusion of Members in business in the scope and application of proposed standard APES 230. Employee Members are not typically involved in the strategic and operational decision making of the business and therefore they are not in a position to influence the necessary changes to remuneration structures. These are the responsibility of senior management and the owners of the business. The inclusion of such Members in the final standard has the potential to force these Members to choose between their employment and maintaining their membership with their Professional Association.</p> <p>Further, the Joint Accounting Bodies have no means to monitor or take practical action in relation to entities that are not Members. It would be a breach of the principles of natural justice to take professional action against a Member in relation to an issue they have no control over. Implementing a compulsory standard for Members that cannot be adequately monitored or enforced puts at risk both the credibility and effectiveness of the proposed standard.</p>

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			<p>Therefore to ensure the integrity of APES 230, the standard should be amended to be applicable to Members in public practice.</p> <p>Further analysis is required to address the application of the proposed standard to the variety of entities and structures that members operate and the application to non-members within these entities. While the intent and principles are supported, there needs to be a detailed analysis of the practical application and monitoring of these different structures For example clear guidance must be issued to advise Members who will be required to adhere to the standard once issued where the Member does not provide Financial Advice but they do have an equity interest in a practice. This issue here is to identify at what stage would the proposed standard apply based on the equity holding of the entity.</p> <p><b>Recommendation:</b></p> <ul style="list-style-type: none"> <li>• <b>The standard be amended to be part of the APES 300 series that is applicable only to Members in public practice as employee members are not typically involved in the strategic and operational decision making of the business and therefore they are not in a position to influence the necessary changes to remuneration structures.</b></li> <li>• <b>Further analysis as to the application of the proposed standard to clarify its practical application to the various entity structures under which members operate.</b></li> </ul> <p><b>Legacy Products</b></p> <p>It is common in the managed investment industry for products to be closed to new investors due to changes in commercial practices. Legislative, regulatory and tax developments also result in financial products becoming outdated. These products are then known as 'legacy products'.</p> <p>The Financial Services Council (FSC) has estimated that the total amount of funds under management in legacy products may amount to \$221 billion or approximately 25% of all funds under management.</p> <p>The Government is working to establish a product rationalisation framework. This is because Clients invested in legacy products cannot simply be moved into a new product due to the structural, legal and institutional environment in which these products exist, coupled with the need to balance the interests and rights of the beneficiaries. For instance, in the case of life insurance each policy constitutes a separate contract between the consumer and the product provider.</p>

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			<p>Given the scale of these products and the complexities involved, appropriate recognition and provisions should be included in the final APES 230 standard.</p> <p>The Joint Accounting Bodies recommends that a legacy product should be defined in the standard and provisions inserted to ensure a Member will not unintentionally breach the new standard where their Client is invested in a legacy product that pays a commission. The onus will be on the Member to demonstrate that where they are receiving a commission from a Legacy Product, that they have recorded both the details of the Client and the product in a separate register. This register must then be made available for review upon request of the Members' respective Joint Accounting Body.</p> <p><b>Recommendations:</b></p> <p><i>[Technical Staff note - this recommendation is repeated in Specific Comments – Table 4]</i></p> <ul style="list-style-type: none"> <li>• <b>The scale of legacy products in the market combined with their complexities require appropriate provisions be included in APES 230, including a suitable definition, which should be based on the Government's description and be as follows:</b></li> </ul> <p style="padding-left: 40px;"><b>Legacy Product means a financial product that is closed to new Clients but remains in force due to existing client participation in the product.</b></p> <p><b>Consistency in APESB issued guidance</b></p> <p>The Joint Accounting Bodies are concerned that the principles and guidance being proposed in the APES 230 ED may not be consistent with other guidance that has been issued by the APESB.</p> <p>The APESB has proposed the banning of commissions in the APES 230 ED on the basis that they cause a conflict of interest. We note that the APES 110 Code of Ethics for Professional Accountants ED has been amended to remove the specific reference allowing a Member who is a financial adviser from receiving a commission. We raise the issue that other Members in Public Practice who do not provide <b>Financial Advice</b> and therefore will not be subject to the proposed requirements of APES 230 will still be allowed to receive a commission from the sale of goods or services to Clients.</p> <p>The proposed blanket ban of commissions in APES 230 would infer the APESB believe Members who are Financial Advisers are unable to use their own professional judgment to ensure their objectivity and professional competence and due care is not compromised.</p> <p>The Joint Accounting Bodies suggest that this apparent inconsistency be addressed to ensure that all guidance issued by the APESB is fair and equitable for all Members.</p>

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			<p><b>Recommendation:</b></p> <ul style="list-style-type: none"> <li>All guidance issued by the APESB for Members in Public Practice should be consistent across all APESB provisions and equitable between all Member groups, as currently there appears to be inconsistencies between the APES 110 Exposure Draft and the APES 230 Exposure Draft in respect of commissions.</li> </ul>

**Staff Instructions**

- Comments of a “general” nature should be dealt with first, followed by paragraph specific comments.
- Respondents’ comments must be copied verbatim into this table.
- Comments should be dealt with in paragraph order, not respondent order.
- Use acronyms only for respondents. Update the attached table with details of additional respondents.

**RESPONDENTS**

1	CFP	Crossing Financial Partners
2	DMJ	Daniel Mendoza-Jones
3	DFG	Davidson Financial Group
4	LBA	Lockhart Business Advisors
5	FFA	Fitzpatrick's Financial Advisers
6	ORT	Ortmanns Pty Ltd
7	CRA	Cooper Reeves Accountants
8	SG	Surbal Group
9	SD	Shane Dumbrell
10	RMFA	Roberts & Morrow Financial Services P/L
11	FFP	Forsythes Financial Planning Pty Ltd

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12	FAA	Forum Accounting & Advisory
13	FMFS	FM Financial Solutions
14	RIA- MR	Roskow Independent Advisory - MR
15	RIA - NS	Roskow Independent Advisory - NS
16	BIA	Brocktons Independent Advisory
17	IFAAA	IFAAA
18	NEX	Nexia Court Financial Solutions Pty Ltd
19	CONFP	Continuum Financial Planners
20	HPW	Hewison Private Wealth
21	DMR	DMR Corporate Pty Ltd
22	AP	Advantage Partners
23	PMHFP	Port Macquarie Hastings Financial Planning Pty Ltd
24	CFS	Colonial First State
25	MFS	Managed. Financial Strategy
26	JR	Johnston Rorke
27	MS	Moore Stephens
28	KEN	Kennas
29	QPPC	Qld Public Practice Committee
30	GGBW	GGBW Wealthcare
31	RT	Roland Tan
32	SCT	Strategic Consulting & Training Pty Ltd
33	PPA	Pitcher Partners Advisory Pty Ltd
34	CFPL	Curran Financial Pty Ltd
35	MHGL	McPhail HLG Financial Planning
36	FERB	Ferguson Betts
37	WB	William Buck
38	DFP	Direction Financial Planning
39	PU	Peter Uhlmann
40	BAG	Bosco Accounting Company Aust Ltd
41	GB	Greg Blaskett
42	PWC	PwC Australia
43	LFM	Landmark Financial Management Pty Ltd
44	KHFG	KH Financial Group

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45	FPA	Financial Planning Association of Australia Limited
46	DELOITTE	Deloitte Touche Tohmatsu
47	BG	Bongiorno Group
48	WHK	WHK Group Limited
49	KCA	Kothes Chartered Accountants
50	AMP	AMP Financial Services
51	AFAC	Accountant Financial Adviser Coalition
52	SPAA	SMSF Professionals' Association of Australia
53	Count	Count Financial Limited
54	MSC	Confidential Submission
55	CNIC	Cutcher & Neale Investment Services
56	FTS	Financial & Technical Solution Limited
57	GT	Grant Thornton Australia Limited
58	SHRB	Suzanne Hadden & Robert M. C. Brown
59	NCA	Noble Chartered Accountants
60	ISN	Industry Super Network
61	PB	The Joint Accounting Bodies
62	APPC	Australia Public Policy Committee
63	KPMG	KPMG
64	EY	Ernst & Young
65	FSC	Confidential Submission
66	ASIC	Confidential Submission