

25 February 2022

Financial Services Legislation
Australian Law Reform Council
PO Box 12953
George Street Post Shop
BRISBANE QLD 4003
Via Email: info@alrc.gov.au

Dear Sir/Madam,

FINANCIAL SERVICES LEGISLATION: INTERIM REPORT A (ALRC REPORT 137)

Accounting Professional & Ethical Standards Board Limited (APESB) welcomes the opportunity to make a submission on the Australian Law Reform Council's (ALRC) *Financial Services Legislation: Interim Report A* (ALRC Interim Report A and Summary).

APESB is an independent entity with a primary purpose to develop, issue, and maintain high-quality professional and ethical pronouncements for the Australian accounting profession in the public interest. APESB's pronouncements apply to the members of the three major Australian professional accounting bodies; Chartered Accountants Australia and New Zealand (CA ANZ), CPA Australia and the Institute of Public Accountants (IPA).

The existence of professional and ethical standards to govern the conduct of accountants is a critical aspect of the accounting profession. We believe that a strong framework of professional and ethical standards assists accountants in addressing ethical issues when they arise and when adhered to, establishes robust professional conduct and contributes to the stakeholders' confidence in the work performed by accountants.

In Australia, APESB issues APES 110 *Code of Ethics for Professional Accountants (including Independence Standards)* (APES 110) and a range of professional and ethical standards that address non-assurance services for the accounting profession, including [APES 230 Financial Planning Services](#) (APES 230). APES 230 was originally issued in April 2013 and sets the standards for members of the three professional bodies in the provision of quality and ethical financial planning services.

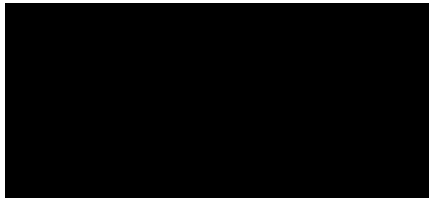
APESB commends the ALRC's inquiry into whether the *Corporations Act 2001* (Corporations Act) and *Corporations Regulations 2001* (Corporations Regulations) could be simplified and rationalised as set out in the Terms of Reference dated 11 September 2020.

APESB is generally supportive of the findings and recommendations in the ALRC Interim Report A, including addressing unnecessary complexity and ensuring the law is fit for purpose.

Appendix A provides APESB'S feedback on specific questions and proposals in the ALRC Interim Report A that are relevant to, and in accordance with, APESB's mandate.

We trust you find these comments useful in your deliberations. If you wish to discuss further or should you require any additional information, please contact APESB's Chief Executive Officer, Channa Wijesinghe, at [REDACTED]

Yours sincerely



Nancy Milne OAM
Chairman

Appendix A – APESB’s Specific Comments

Question A1 – *What additional data should the Australian Law Reform Commission generate, obtain, and analyse to understand:*

- a. *legislative complexity and potential legislative simplification;*
- b. *the regulation of corporations and financial services in Australia; and*
- c. *the structure and operation of financial markets and services in Australia?*

[APES 230 Financial Planning Services](#) (APES 230) falls under the category ‘Non-Statutory Professional Standards’ in *Figure B: Financial services regulatory ecosystem map* on page 7 of the ALRC Interim Report A Summary. APES 230 sets out accountants’ professional and ethical obligations in respect of:

- fundamental responsibilities when performing a ‘financial planning service’;
- compliance with professional independence requirements;
- terms of engagement;
- basis of reporting of ‘financial planning advice’;
- remuneration (including fees for service, asset-based fees and third-party payments); and
- documentation and quality control.

‘Financial planning service’ is defined in APES 230 as a service where the professional accountant provides ‘financial planning advice’ to a client. ‘Financial planning advice’ is defined to be advice in respect of a client’s personal financial affairs specifically related to wealth management, retirement planning, estate planning, risk management and related advice, including:

- (a) advice on financial products such as shares, managed funds, superannuation, master funds, wrap accounts, margin lending facilities and life insurance carried out pursuant to an Australian Financial Services License (AFSL);
- (b) advice and dealing in financial products as defined in section 766C of the Corporations Act;
- (c) advice and services related to the procurement of loans and other borrowing arrangements, including credit activities provided pursuant to an Australian Credit License (ACL); and
- (d) other advice such as taxation, real estate and non-product related advice on financial strategies or structures provided as part of the advice under (a) – (c).

APES 230 was first issued in 2013 and, in certain respects, led the way and created a pathway for discussion on key issues relevant to the financial services industry, such as remuneration methods. The Board’s preference for remuneration is fee for service as it eliminates threats created by other remuneration methods. However, based on concerns raised by respondents and stakeholders in 2012/2013, the Board permitted alternative methods (asset-based fees and third-party payments) with additional safeguards, namely ‘informed consent’ and disclosures designed to make the client aware of the quantum of fees, to reduce threats to the fundamental principles in APES 110 to an acceptable level.¹

¹ [Basis for Conclusions - APES 230 \(apesb.org.au\)](#)

The Professional Standards Councils of Australia reviews the accounting professional bodies' (CA ANZ, CPA Australia and the IPA) processes to monitor compliance with APESB standards by their members, as part of the approval of the Professional Standards Schemes.

Question A2 – Would application of the following definitional principles reduce complexity in corporations and financial services legislation?

When to define (Chapter 4):

- a. In determining whether and how to define words or phrases, the overarching consideration should be whether the definition would enhance readability and facilitate comprehension of the legislation.*
- b. To the extent practicable, words and phrases with an ordinary meaning should not be defined.*
- c. Words and phrases should be defined if the definition significantly reduces the need to repeat text.*
- d. Definitions should be used primarily to specify the meaning of words or phrases, and should not be used to impose obligations, tailor the application of particular provisions, or for other substantive purposes.*

Consistency of definitions (Chapter 5):

- a. Each word and phrase should be used with the same meaning throughout an Act, and throughout all delegated legislation made under that Act.*
- b. Relational definitions should be used sparingly.*
- c. To the extent practicable, key defined terms should have a consistent meaning across all Commonwealth corporations and financial services legislation.*

Design of definitions (Chapter 6):

- a. Interconnected definitions should be used sparingly.*
- b. Defined terms should correspond intuitively with the substance of the definition.*
- c. It should be clear whether a word or phrase is defined, and where the definition can be found.*

APESB generally supports the principles set out above in relation to when to define and the consistency and design of definitions. We agree that applying these principles would reduce complexity in corporations and financial services legislation. In particular, APESB agrees that:

- definitions should enhance readability, facilitate comprehension and be used where they significantly reduce the need to repeat text;
- words and phrases should have the same meaning throughout an Act, delegated legislation and across Commonwealth corporations and financial services legislation; and
- it should be clear that a word or phrase is defined.

APESB has 21 current pronouncements consisting of APES 110, APES 230, 13 other standards and 6 guidance notes. APESB's [Due process and working procedures for the development and review of APESB pronouncements](#) (APESB's due process document) includes APESB's drafting approach and details the consistency of elements across APESB pronouncements. APESB's pronouncements all have a 'Definitions' section (or 'Glossary' in APES 110) upfront directly after the 'Scope and Application' Section.

Section 5.4(d) of APESB's due process document notes '*definitions contained in the APESB pronouncements are to be applied in the interpretation of APESB pronouncements and are consistent across all pronouncements issued by APESB*'.

APESB believes that including the definitions up front enhances the readability and interpretability of our pronouncements. APESB pronouncements include defined terms in title case and blue font throughout to ensure that these terms stand out from the remainder of the text and highlight that the meaning of these terms forms part of the interpretation of the relevant sentence/paragraph. Further, APESB pronouncements have interactive PDF features, including pop-up definitions, so defined terms are readily accessible throughout to enhance interpretation.

Proposal A3 – Each Commonwealth Act relevant to the regulation of corporations and financial services should be amended to enact a uniform definition of each of the terms 'financial product' and 'financial service'.

APESB is supportive of having uniformity of definitions for 'financial product' and 'financial service' across Commonwealth Acts. We are of the view that this will reduce complexity for the financial services industry and assist the interpretability of the relevant corporations and financial services legislation.

APESB also believes that such uniformity will assist in applying and interpreting APES 230, which is linked to the Corporations Act and the *National Consumer Credit Protection Act 2009* (National Credit Act). For example, 'financial planning advice' in APES 230 (refer to Question 1A above) includes:

- advice on 'financial products' pursuant to an AFSL and the definition of AFSL includes a licence to provide 'financial services' under Chapter 7 of the Corporations Act;
- advice and dealings in 'financial products' as defined in section 766C of the Corporations Act; and
- advice and services provided pursuant to an ACL and the definition of ACL means a licence that authorises the licensee to engage in credit activities as defined in the National Credit Act.

Proposal A13 – The Corporations Act 2001 (Cth) should be amended to:

- a. *remove the definition of 'financial product advice' in s 766B;*
- b. *substitute the current use of that term with the phrase 'general advice and personal advice' or 'general advice or personal advice' as applicable; and*
- c. *incorporate relevant elements of the current definition of 'financial product advice' into the definitions of 'general advice' and 'personal advice'.*

APESB supports Proposal A13 as we agree that removing the definition of 'financial product advice' (which always constitutes either general advice or personal advice) in section 766B will simplify the Corporations Act as it is an unnecessary intermediary concept.

Proposal A14 – Section 766A(1) of the Corporations Act 2001 (Cth) should be amended by removing from the definition of ‘financial service’ the term ‘financial product advice’ and substituting ‘general advice’.

APESB supports Proposal A14, which results in ‘decoupling personal advice from the definition of financial service’ and maintaining ‘general advice’ as a financial service.² APESB is of the view that this will enhance and clarify the regulatory distinction between general advice and personal advice, the latter which is subject to more extensive requirements.

Proposal A15 – Section 766B of the Corporations Act 2001 (Cth) should be amended to replace the term ‘general advice’ with a term that corresponds intuitively with the substance of the definition.

APESB supports Proposal A15 to rename ‘general advice’ to be more intuitive to its substance and enhance its distinction from ‘personal advice’. We note that the replacement term is a matter that the Quality of Advice Review may consider³ And that ASIC’s research indicating that relabelling ‘general advice’ may not have a measurable effect on consumers’ perceptions of the nature of the ‘advice’.⁴

APESB notes that the scope of APES 230 covers all the work undertaken by a professional accountant that meets the definition of ‘financial planning services’ (see Question A1 above), which captures all the different activities performed in a financial planning practice. APESB believes that it is not appropriate to issue a professional standard that only captures some services performed in a financial planning practice and not others.⁵

Proposal A16 – Should the definition of ‘retail client’ in s 761G of the Corporations Act 2001 (Cth) be amended:

- a. *to remove:*
 - i. *subsections (5), (6), and (6A), being provisions in relation to general insurance products, superannuation products, RSA products, and traditional trustee company services; and*
 - ii. *the product value exception in sub-s (7)(a) and the asset and income exceptions in sub-s (7)(c); or*
- b. *in some other manner*

When APES 230 was issued in 2013, APESB determined to define ‘client’ in a manner to capture all clients and not to make the distinction between retail and wholesale clients as there should not be two different standards of professional service provided.⁶ The Board believes that the same level of service should be provided across the spectrum of clients.

As such, whether the client is retail or wholesale under the AFSL licensing regime is irrelevant to the application of APES 230 to ‘financial planning services’ provided by professional accountants. Further, APESB notes that any changes to the definition of ‘retail client’ in section 761G of the Corporations Act will not affect the application of APES 230.

² Paragraph 11.57 of [ALRC-FSL-Interim-Report-A.pdf](#).

³ Paragraph 11.61 of [ALRC-FSL-Interim-Report-A.pdf](#).

⁴ Paragraph 11.71 of [ALRC-FSL-Interim-Report-A.pdf](#).

⁵ Page 3 of [Basis for Conclusions - APES 230 \(apesb.org.au\)](#).

⁶ Page 4 of [Basis for Conclusions - APES 230 \(apesb.org.au\)](#).

However, APESB supports amending the definition of 'retail client' in section 761G of the Corporations Act to remove complexity, to make it contemporary, and meet the underlying policy intent. The definition of a retail client has various exclusions, which are the subject of ongoing debate and we believe this should be reflected in simpler, more understandable legislation.

APESB supports Proposal A16a.i. to remove subsections 761G(5), (6) and (6A) of the Corporations Act to simplify the application of the definition of 'retail client'. APESB also supports Proposal A16a.ii. to remove the product value exception in subsection 761G(7)(a) and the asset and income exceptions to 'retail client' in subsection 761G(7)(c).

APESB agrees that if individuals have the means to acquire a product of a certain value or have assets and income above set limits does not necessarily mean they have the requisite knowledge to make an informed decision.⁷ Further, APESB notes there are now estimated to be about 3.25 million consumers or 1.09 million households meeting the definition of wholesale investor (\$2.5m in assets and annual income over \$250,000 in the previous two years) up from 104,000 households in 2002 when the rule commenced.⁸ This 1000% increase appears to reflect this exception has become arbitrary, outdated and inconsistent with underlying policies.

Proposal A21 – Section 912A(1)(a) of the Corporations Act 2001 (Cth) should be amended by:

- a. *separating the words 'efficiently', 'honestly', and 'fairly' into individual paragraphs;*
- b. *replacing the word 'efficiently' with 'professionally'; and*
- c. *inserting a note containing examples of conduct that would fail to satisfy the 'fairly' standard.*

APESB is generally supportive of Proposal A21. We agree that 'professionally' should replace 'efficiently' in section 912A(1)(a) of the Corporations Act. This is consistent with the courts' interpretation of 'efficiently' to mean adequate performance, capable and competent⁹ and the term's current use is obscure.¹⁰

APESB believes this will also improve consistency between APES 230 and the Corporations Act. APES 230 sets out accountants' obligations when providing 'financial planning advice' including the following professional obligations:

- Professional competence and due care in accordance with [Subsection 113 Professional Competence and Due Care](#) of APES 110 and paragraphs 3.7 to 3.10 of APES 230;
- Confidentiality in accordance with [Subsection 114 Confidentiality](#) of APES 110 and paragraphs 3.11 to 3.16 of APES 230;
- Professional appointments in accordance with [Section 320 Professional Appointments](#) of APES 110 and paragraph 3.17 of APES 230;
- Marketing in compliance with [Subsection 115 Professional Behaviour](#) of APES 110 and paragraph 3.18 of APES 230; and
- Professional Independence and Section 4 of APES 230.

⁷ Paragraph 12.51 of [ALRC-FSL-Interim-Report-A.pdf](#).

⁸ [More than 3 million Aussies are now 'sophisticated investors' \(afr.com\)](#)

⁹ Paragraph 13.68 of [ALRC-FSL-Interim-Report-A.pdf](#).

¹⁰ Paragraph 13.68 of [ALRC-FSL-Interim-Report-A.pdf](#).

Question A24 – *Would the Corporations Act 2001 (Cth) be simplified by:*

- a. *amending s 961B(2) to re-cast paragraphs (a)–(f) as indicative behaviours of compliance, to which a court must have regard when determining whether the primary obligation in sub-s (1) has been satisfied; and*
- b. *repealing ss 961C and 961D*

APESB is of the view that the Corporations Act would be simplified by amending section 961B and recasting (a)–(f) as indicative behaviours of compliance, to which a court must have regard. We also agree that the ALRC's analysis will inform the Quality of Advice Review¹¹ and support the Royal Commission's findings into Misconduct in the Banking, Superannuation and Financial Services Industry (Financial Services Royal Commission).

Recommendation 2.3 *Review of measures to improve the quality of advice* of the Financial Services Royal Commission included that the 'safe harbour' provision in section 961B(2) of the Corporations Act should be reviewed, and unless there is clear justification for retaining it, it should be repealed. This stemmed from concerns that the 'safe harbour' allows advisers "to adopt a 'tick a box' approach to compliance" which may undermine the broader obligation to act in the best interests.¹²

APES 230's initial exposure draft issued in 2010 referred to fiduciary responsibilities to be complied with when providing financial planning services/advice. However, due to respondents' concerns that this could cause confusion with the 'best interests of the client' requirements in *Future of Financial Advice* reforms (FoFA), the Board determined to refocus and align the standard with FoFA.

APES 230 requires professional accountants providing a 'financial planning service' to act in the 'best interests of the client' being the obligations as defined in Division 2 of Part 7.7A of the Corporations Act. This applies to all 'financial planning advice' (per the definition in Question 1A, including in relation to credit and services provided to retail or wholesale clients).

APESB notes the introduction of a 'best interests' obligation in the National Credit Act, including in relation to mortgage brokers, which became effective from 1 January 2021. This obligation is more principles-based, compared to the Corporations Act requirements, being that the "licensee must act in the best interests of the consumer in relation to the credit assistance".¹³ However, for the purposes of APES 230, professional accountants that provide mortgage broker services must comply with the obligations as defined in Division 2 of Part 7.7A of the Corporations Act.

¹¹ Paragraph 13.140 of [ALRC-FSL-Interim-Report-A.pdf](#).

¹² Pages 177-178 of [Final Report - Volume 1 \(royalcommission.gov.au\)](#).

¹³ Section 158LA of the *National Consumer Credit Protection Act 2009*.