

A new standard for Forensics

APES 215 Forensic Accounting Services

Introduction

Lawyers and barristers working with forensic accountants, and in particular where the accountant is acting as an Expert Witness¹, should be aware that there is a new standard for forensic accountants for ensuring quality and ethics in their work. APES 215 Forensic Accounting Services (“the Standard”) aims to adopt a mandatory high water mark and has drawn on the requirements of court guidelines and rules of various Australian jurisdictions. The Standard may operate as a useful template for other professions acting as expert witnesses and for forensic accountants overseas. The Standard has been effective since 1 July 2009 and will be shortly subject to a six-month review. The Standard mandates that the report of an Expert Witness must contain a statement that it was prepared in accordance with the Standard.

“APES 215 sets the standards for Members in the provision of quality and ethical Forensic Accounting Services.” APES 215 paragraph 1.2

“The Standard is not intended to detract from any responsibilities which may be imposed by law or regulation.” APES 215 paragraph 1.8

The new standard

The Australian Professional and Ethical Standards Board (“the APESB”) issued APES 215 in December 2008 to replace the existing professional standard APS 11 Statement of Forensic Accounting Standards and guidance note GN2 Forensic Accounting.

The Standard was effective for new engagements commencing on or after 1 July 2009 and earlier adoption was permitted. APES 215 will be subject to a six-month review by the APESB following its implementation. Persons and entities should contact the APESB to have their concerns or issues registered prior to the completion of the review in early February 2010.

For more information about this article, please contact:



Owain Stone
Partner, Melbourne
Tel: +61 3 8623 3410
ostone@kordamentha.com



Fiona Oliver-Taylor
Director, Melbourne
Tel: +61 3 8623 3411
foliver-taylor@kordamentha.com

The Standard includes mandatory requirements and guidance for Forensic Accounting Services² with respect to public interest, professional independence, professional competence and due care, confidentiality, professional engagement matters, expert witness services, false or misleading information and changes in opinion, quality control and professional fees.

“In applying the requirements outlined in APES 215, Members should be guided not merely by the words but also by the spirit of the Standard...” APES 215 paragraph 1.10

Scope and application

APES 215 must be followed by all Members³ when they provide Forensic Accounting Services.

The key difference from the previous standard is that APES 215 extends to cover Members in Business (Members working in commerce, industry, government or professional bodies) as well as Members in Public Practice (Members in firms that provide Professional Services⁴). This recognises the increased role that Members in Business play in Forensic Accounting Services, for example, Members in Business who investigate illegal or improper conduct in organisations. Therefore, forensic accountants working for law enforcement and regulatory agencies are now covered by APES 215.

Forensic Accounting Services are defined to mean Expert Witness Services⁵, Lay Witness Services⁶, Consulting Expert Services⁷ and Investigation Services⁸. These services are described in the context of Proceedings which is defined by the Standard as:

- a matter before a Court⁹;
- a matter which the Member has a reasonable expectation will be brought before a Court; or
- a matter in which the Member is undertaking Professional Services to help an assessment as to whether the matter should be brought before a Court.

Consulting Expert Services includes acting as an arbitrator, mediator, member of a professional tribunal, expert in determination, referee or in a similar role. These roles were not included in the previous professional standard APS 11 and guidance note GN2.

Where a Member acts as an investigator, arbitrator, mediator or referee, “the Member may be required to observe some or all of the rules of procedural fairness (which collectively are referred to as ‘natural justice’).” APES 215 paragraph 3.16

Expert Witness Services

APES 215 highlights that Expert Witness Services have a special role and, in acting as an Expert Witness, Members’ duties are:

- to the Court which overrides any duty to the Client¹⁰ or Employer¹¹;
- to assist the Court on matters relevant to the Member’s area of expertise in an objective and unbiased manner;
- not to be an advocate for a party; and
- to make it clear to the Court when a particular question or issue falls outside the Member’s expertise.

The above duties to the Court reflect the guidelines for Expert Witnesses contained in Practice Note CM7 – Expert Witnesses in Proceedings in the Federal Court of Australia (the “Federal Court Guidelines”) and guidelines and rules of other jurisdictions in Australia.

“A Member who is acting as an Expert Witness should comply with evidentiary and procedural requirements relating to Expert Witnesses.” APES 215 paragraph 5.5

Professional Independence of an Expert Witness

As a consequence of their special duties, APES 215 imposes stricter professional independence responsibilities for Expert Witnesses, as follows:

- A Member must decline proposed Expert Witness Services if the objectives are inconsistent with the objectives of other Professional Services being provided or previously provided by the Member or Member’s Firm (and vice versa).
- A Member who is providing an Expert Witness Service must disclose matters in the Member’s Report that will assist the Court to assess the degree of the Member’s independence.

“There is no requirement, at law, that an Expert Witness be free of any relationship with parties to Proceedings. For example, there is no legal prohibition on a Member in Public Practice acting as an Expert Witness for a Client for whom the Member provides other Professional Services.” APES 215 paragraph 3.9

Report of an Expert Witness

The information an Expert Witness needs to include in a Report has been elevated to a mandatory requirement in APES 215 and reflects guidelines and rules for expert witnesses in various jurisdictions in Australia. These include that, amongst other things, an

Expert Witness must state in any Report:

- The significant facts and significant assumptions on which the Expert’s opinion(s) are based. For each significant assumption, the Expert should identify whether it was an instruction or whether it was made by the Member and why.
- If the Expert’s opinion may be misleading, because a significant assumption is likely to mislead, then the Member must disclose this in the Report with an explanation why the assumption is likely to mislead.
- The reasoning by which the Expert formed the opinion(s), including an explanation of any method employed and the reasons why that method was chosen.

The terms fact, assumption and opinion are not defined by the Standard and therefore have their ordinary meaning. However, Appendix 1 to APES 215 analyses some examples of relevant situations to assist Members determine whether a matter is a fact, an assumption or an opinion. In addition, if a Member is not certain whether a matter is a significant assumption or an opinion, the Member should consult the legal representative of the Member’s Client or Employer.

A Member must also include in any Report a statement that the Expert Witness Service was conducted in accordance with the Standard.

False or misleading information and changes in opinion

APES 215 states that if a Member subsequently becomes aware that an opinion expressed in an Expert Witness Report or in oral evidence was based on information that was false, misleading or contained material omissions, the Member shall promptly inform, as appropriate, the legal representative of the Client, the Employer or the Court and consider whether it is necessary to issue a supplementary report.

Quality Control

APES 215 requires that a Member performing a Forensic Accounting Service shall prepare working papers that appropriately document the work performed, including the basis on which, and the method by which, any calculations, determinations or estimates used in the provision of the Forensic Accounting Service have been made.

“A Member should be aware that working papers... may be required to be furnished to other parties or the Court as evidence. Where appropriate, a Member should maintain the chain of custody, including origin, possession and disposition of documents and other material, particularly originals...” APES 215 paragraph 7.4

Professional Fees

APES 215 prohibits Members entering into a Contingent Fee¹² arrangements or receiving a Contingent Fee for an Expert Witness Service or any Forensic Accounting Service that requires independence or where the Member purports to be independent.

Other Professional Standards

Expert Witnesses operate in a wide range of professions including, but not limited to, accounting and business, engineering and science, medical and surgical, property and real estate, construction and architecture, chemical and environmental, and information technology. The accounting profession is not alone in adopting a professional standard pertaining to acting as an expert witness. For example, the Australian Medical Association (“AMA”) has two Position Statements on acting as an expert medical witness¹³ and Engineers Australia has a Code of Ethics which provides guidance on acting as an expert witness¹⁴. The adoption of professional standards or guidance by the accounting profession and other professions may, or should, prompt other professions to follow suit. Whilst some professions may not have their

own standard, they may be members of Professions Australia¹⁵, a national organisation of professional associations, which has a policy called ‘Role and Duties of an Expert Witness in Litigation’¹⁶. In addition, the adoption of APES 215 in Australia may operate as a useful template for forensic accountants overseas. For example, the Institute of Certified Public Accountants of Singapore, the New Zealand Institute of Chartered Accountants and the Institute of Chartered Accountants in England and Wales do not to have specific equivalent standards.

Conclusion

Whilst there have some significant changes from the previous standard APS 11 and guidance note GN2, on one level APES 215 does nothing more than adopt a high water mark of mandatory requirements for forensic accountants, and in particular those acting as Expert Witnesses, as detailed in the Federal Court Guidelines and elsewhere. It was however important in codifying the requirements for the forensic accounting profession. It may be that overseas forensic accountants and other professions may, or should, follow suit.

Footnotes

1. Defined in APES 215 paragraph 2 as follows: “Expert Witness means a Member who has been engaged or assigned to provide an Expert Witness Service. As an Expert Witness, the Member may express opinions to the Court based on the Member’s specialised training, study or experience on matters such as whether technical or professional standards have been breached, the amount of damages, the amount of an account of profits, or the amount of a claim under an insurance policy.”
2. Defined in APES 215 paragraph 2 as follows: “Forensic Accounting Services means Expert Witness Services, Lay Witness Services, Consulting Expert Services and Investigation Services.” These terms are further defined in the Standard (refer to footnotes 5 to 8 below).
3. Defined in APES 215 paragraph 2 as follows: “Member means a member of a professional body that has adopted this Standard as applicable to their membership, as defined by that professional body.” Professional bodies that have adopted the Standard include the Institute of Chartered Accountants in Australia (“ICAA”), CPA Australia and National Institute of Accountants (“NIA”).
4. Defined in APES 215 paragraph 2 as follows: “Professional Services means services requiring accountancy or related skills performed by a Member including accounting, auditing, taxation, management consulting and financial management services.”
5. Defined in APES 215 paragraph 2 as follows: “Expert Witness Service means a Professional Service provided in the context of Proceedings to give expert evidence in a Report or, in certain circumstances, orally.”
6. Defined in APES 215 paragraph 2 as follows: “Lay Witness Service means a Professional Service 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.”
7. Defined in APES 215 paragraph 2 as follows: “Consulting Expert Service means a Professional Service provided in the context of Proceedings, other than an Expert Witness Service, a Lay Witness Service or an Investigation Service. It includes acting as an adviser, an arbitrator, mediator, member of a professional tribunal, expert in an expert determination, referee or in a similar role.”
8. Defined in APES 215 paragraph 2 as follows: “Investigation Service means a Professional Service to perform, advise on, or assist with an investigation, whether or not in the context of Proceedings, in connection with allegations of, or concerns regarding conduct that may be illegal, unethical or otherwise improper.”
9. Defined in APES 215 paragraph 2 as follows: “Court means any body described as such and all other tribunals exercising judicial or quasi-judicial functions and includes professional disciplinary tribunals, industrial and administrative, statutory or parliamentary investigation and inquiries, royal commissions, arbitrations and mediations.”
10. Defined in APES 215 paragraph 2 as follows: “Client means an individual, firm, entity or organisation to whom Professional Services are provided by a Member in Public Practice in respect of Engagements of either a recurring or demand nature.”
11. Defined in APES 215 paragraph 2 as follows: “Employer means an entity or person that employs, engages or contracts a Member in Business.”
12. APES 215 paragraph 2: “Contingent Fee means a fee calculated on a predetermined basis relating to the outcome or result of a transaction or the result of the work performed. A fee that is established by a Court or other public authority is not a contingent fee.”
13. AMA, Guidelines for Doctors Acting as Expert Medical Witnesses, [online]. Available from, <http://www.ama.com.au/node/468>, [cited 10 November 2009]; AMA, Expert Medical Witnesses, [online]. Available from, <http://www.ama.com.au/node/466>, [cited 10 November 2009].
14. Engineers Australia, 2000 Code of Ethics, [online]. Available from, http://www.engineersaustralia.org.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=F0647595-C7FE-7720-EA17-70AC27062E0B&siteName=ieaust, [cited 10 November 2009].
15. The member associations comprising Professions Australia are the Australian Dental Association, CPA Australia, Pharmaceutical Society of Australia, Australian Institute of Quantity Surveyors, Australasian Institute of Mining and Metallurgy, Audiological Society of Australia, Australian Veterinary Association, Australian Computer Society, Australian Marketing Institute, Institute of Actuaries of Australia, Institute of Chartered Accountants in Australia, National Institute of Accountants, Institute of Management Consultants, Australian Institute of Radiography, Records Management Association of Australasia, Australian Sonographers Association, The Pharmacy Guild of Australia, The Dietitians Association of Australia, The System Administrators Guild of Australia, The Institution of Surveyors NSW Inc, Victorian Institute of Teaching, Australian Dental Council, Australian Nursing and Midwifery Council.
16. Professions Australia, Role and Duties of an Expert Witness in Litigation, [online]. Available from, <http://www.professions.com.au/RDEWL.html>, [cited 10 November 2009].

Whatever the factual, accounting, financial or e-discovery issues that arise, KordaMentha Forensics' expertise and experience can bring clear thinking, objectivity and effective communication of ideas to help find the facts, understand the relevant issues and clarify the financial and other impacts in a cost-effective way.

For more information about our forensic services, please contact:

Melbourne

Owain Stone

Tel: +61 3 8623 3410
ostone@kordamentha.com

Perth

Brian McMaster

Tel: +61 8 9220 9309
bmcmaster@kordamentha.com

Adelaide

Rosemary Papps

Tel: +61 8 8212 2215
rpapps@kordamentha.com

New Zealand

Grant Graham

Tel: +64 9 307 7865
ggraham@kordamentha.com

Sydney

Richard Bennison

Tel: +61 2 8257 3040
rbennison@kordamentha.com

Singapore

Abigail Cheadle

Tel: +65 6593 9363
acheadle@kordamentha.com

Brisbane

Ginette Muller

Tel: +61 7 3225 4903
gmuller@kordamentha.com

www.kordamentha.com

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