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Basis for Conclusions: Amendments to the Non-Assurance Services provisions in APES 110 Code of Ethics for Professional Accountants (including Independence Standards)

Prepared by the Technical Staff of the Accounting Professional & Ethical Standards Board

BASIS FOR CONCLUSIONS:

Amendments to the Non-Assurance Services provisions in APES 110 Code of Ethics for Professional Accountants (including Independence Standards)

This basis for conclusions has been prepared by Technical Staff of Accounting Professional & Ethical Standards Board Limited ("APESB"). It has been reviewed and approved by the Board of Directors of APESB and is provided for the benefit of stakeholders to gain an understanding of the background to the revision of the Non-Assurance Services provisions in APES 110 *Code of Ethics for Professional Accountants (including Independence Standards)* (the Code).

The basis for conclusions **does not** form part of APES 110 and is not a substitute for reading the Code.

Background

The International Ethics Standards Board for Accountants (IESBA) issues the *International Code of Ethics for Professional Accountants (including International Independence Standards)* (the International Code), upon which APESB bases its Code.

The revisions to the existing Non-Assurance Services (NAS) provisions in the Code have been driven from the following sources:

- (a) IESBA's revisions to the NAS provisions in the International Code; and
- (b) amendments to address requests from Australian regulators to strengthen provisions relating to tax services provided to audit clients.

In July 2022, APESB issued [Exposure Draft 04/22 Proposed Amendments to the Non-Assurance Services provisions of APES 110 Code of Ethics for Professional Accountants \(including Independence Standards\)](#) (ED 04/22). ED 04/22 included two options with Australian specific provisions to address Australian regulatory concerns relating to tax services.

APESB received 10 submissions in response to ED 04/22 from a broad range of respondents, including large accounting firms, professional organisations and regulators. The submissions generally supported the NAS proposals in the exposure draft, but the stakeholder responses to the proposed revisions relating to tax services were mixed.

The details of significant changes made, the key issues raised by respondents and stakeholders during the revision of the NAS provisions of the Code and how APESB addressed them are set out below.

(a) IESBA's revisions to the NAS provisions of the International Code

The IESBA commenced a project to revise the NAS provisions in its Code in September 2018. The objective of the project was to strengthen the International

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Independence Standards to address public interest concerns about the perceived lack of independence when firms provide NAS to audit clients.

The final pronouncement, *Revisions to the Non-Assurance Services Provisions of the Code*, was released by the IESBA in April 2021 and is effective for engagement periods beginning on or after 15 December 2022, with early adoption permitted. The significant changes to the extant Code included:

- A new general prohibition on the provision of a NAS to an audit client that is a public interest entity (PIE) if the provision of that service might create a self-review threat to the firm's independence (paragraph R600.16).
- New provisions to assist firms and network firms in identifying and evaluating self-review threats that might be created by the provision of a NAS to an audit client (paragraphs 600.13 A1 to R600.14).
- New guidance indicating that the provision of advice and recommendations might create a self-review threat and which also explains the circumstances in which a firm or a network firm may provide advice and recommendations to an audit client (paragraphs 600.11 A1 and R600.17 to 600.17 A1).
- New provisions to strengthen and improve the quality of firm communication with those charged with governance about NAS-related matters, especially in the case of audit clients that are PIEs and entities within that PIE's corporate structure (paragraphs 600.20 A1 to R600.24).
- Enhanced guidance to explain that the concept of materiality is not relevant in evaluating whether a self-review threat might be created by the provision of a NAS to an audit client that is a PIE.
- Strengthened provisions to assist firms in addressing threats to independence created by the provision of NAS to audit clients that are not PIEs, including new application material in relation to situations where a safeguard is not available (paragraphs 600.18 A1 to 600.18 A4).
- New provisions and structural refinements to promote the consistent application of the NAS provisions. For example:
 - The revised NAS provisions identify certain situations where a self-review threat to independence is not created (paragraphs R601.7, 604.12 A2 and 604.17 A3).
 - The provisions that prohibit firms and network firms from assuming a management responsibility are given more prominence by being repositioned to Section 400.
 - The provisions related to acting as a witness are revised and include application material to explain the circumstances in which the advocacy threat created by acting as an expert witness will be at an acceptable level (paragraphs 607.7 A1 to R607.9).

In conjunction with the release of the IESBA's amending standard on the NAS provisions, the IESBA released a [Basis for Conclusions](#).

APESB adopted the changes to the International Code into APES 110 with no substantive changes made as a result of the exposure draft due process except for provisions relating to tax services discussed below.

(b) amendments to address requests from Australian regulators to strengthen provisions relating to tax services provided to audit clients

The Australian Taxation Office (ATO) presented at a private session of the November 2021 Board meeting, highlighting observations and concerns relating to firms providing tax advisory services to large audit clients. In addition, the ATO made a confidential written submission in February 2022 to the APESB in respect of observations and concerns about the new tax provisions in Subsection 604 of the International Code.

APESB received a [public submission](#) from the Australian Securities and Investments Commission (ASIC) in May 2022, recommending that APESB amend the Code to prohibit auditors from providing tax advisory and tax planning services to PIE audit clients or:

- prohibit an auditor of a PIE audit client from acting as an advocate on a taxation issue with the ATO or in a tribunal or court; and
- replace the criterion for an auditor to provide advice from their view of having “*a basis in law that is likely to prevail*” with “*a basis in law that is almost certain to prevail*”.

APESB noted the concerns expressed by the regulators. However, on balance APESB determined that the regulators provided insufficient evidence to support an outright prohibition on providing tax advisory and tax planning services to PIE audit clients. Accordingly, APESB resolved to consider adopting one of two options to strengthen the tax provisions in ED 04/22 and sought stakeholders’ views on the most appropriate option for Australia.

APESB decided not to include the advocacy threat prohibition in proposed paragraph R604.24 of the International Code based on the view that either of the options set out in ED 04/22 would reduce the risk of advocacy threats occurring as the permitted tax advisory and tax planning services would involve lower variability in professional judgement.

Option 1 – amend the threshold to ‘almost certain’

Option 1 included proposed Australian specific paragraphs AUST R604.4, AUST 604.4 A1 and AUST 604.12 A2 with a threshold “*basis in tax law that is almost certain to prevail*” in place of “*basis in tax law that the firm is confident is likely to prevail*” in paragraphs R604.4, 604.4 A1 and 604.12 A2 in the International Code.

Most respondents opposed Option 1, believing the Code should not deviate from the International Code without sufficient evidence. This option also diverges from New Zealand’s approach (refer to Option 2 below). Some respondents believed ‘*almost certain to prevail*’ is equivalent to a prohibition or a probability as high as 99%.

APESB noted that ‘almost certain’ is a high threshold but is not absolute and the IESBA intended “*firm is confident is likely to prevail*” to be a high threshold. However, APESB agreed with the majority view and determined not to adopt Option 1.

Option 2 – add guidance on the meaning of ‘likely to prevail’

Option 2 maintained paragraphs AUST R604.4 (except for the removal of tax avoidance – refer to pages 6-7), 604.4 A1 and 604.12 A2 as per the International Code and included Australian specific guidance paragraphs AUST 604.4 A1.1 and AUST 604.12 A2.1 to clarify and establish the "*firm is confident is likely to prevail*" as a high threshold. The AUST paragraphs note that to reach this threshold, firms need a high level of confidence, which is gained if there is a high probability if viewed objectively by applying the reasonable and informed third party test.

Option 2 is consistent with the New Zealand Auditing and Assurance Standards Board’s (NZAuASB) approach in relation to paragraph 604.12 A2 of the NZAuASB Code issued in June 2022.

Most respondents provided varying degrees of support for Option 2 due to its consistency with the IESBA’s intent and the NZAuASB approach promoting Trans-Tasman harmonisation. However, some respondents believed further guidance was required on the threshold "*firm is confident is likely to prevail*" and the application of the reasonable and informed third party test. One respondent did not support paragraphs AUST 604.4 A1.1 and AUST 604.12 A2.1, believing that the use of ‘will prevail’ could be interpreted as equivalent to the ‘almost certain’ threshold.

The IESBA considered the merits of using ‘more likely than not’ and ‘likely to prevail’ in Subsection 604 of the International Code and noted that the Public Interest Oversight Board (PIOB) "*had expressed the view that the term “more likely than not” is perceived as being too low a threshold*".¹ Accordingly, the IESBA decided to retain ‘likely to prevail’ to preserve extant language that is understood and translatable and added ‘is confident’ to clarify IESBA’s expectations that the threshold is appropriately robust.² IESBA’s intention is for a high threshold and that the firm should have a high level of confidence and a robust rationale.³

APESB determined to include paragraphs AUST 604.4 A1.1 and AUST 604.12 A2.1 in the Code. APESB is of the view that these paragraphs provide useful guidance on the meaning of "*the firm is confident is likely to prevail*" consistent with the IESBA’s intention and includes that the assessment is from the objective perspective of a reasonable and informed third party. APESB notes that the reasonable and informed third party test is used throughout the Code, is set out in paragraph 120.5 A6, defined in the Glossary and is fundamental to applying the conceptual framework.

APESB agreed with a respondent's concerns that ‘will prevail’ could be misinterpreted as a higher threshold than was intended and amended paragraphs AUST 604.4 A1.1 and AUST 604.12 A2.1 of the Code to include ‘will be likely to prevail’.

¹ Paragraphs 111-112 of IESBA’s [Basis for Conclusions](#).

² Paragraphs 111-112 of IESBA’s [Basis for Conclusions](#).

³ Question 16 of IESBA’s [Staff Questions & Answers to the Revised NAS Provisions of the Code](#).

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Documentation requirements

ED 04/22 included proposed Australian specific paragraphs AUST R604.4.1 and AUST R604.12.1 requiring documentation of how a firm has assessed it satisfies the conditions discussed in Options 1 or 2. Paragraph AUST R604.12.1 is consistent with the NZAuASB's approach.

Most respondents supported or did not foresee any practical challenges in implementing the documentation requirements. However, one respondent referred to potential challenges documenting the application of the reasonable and informed third party test (refer to comments above). Another did not support the requirements believing that determining the likelihood of a view prevailing will require legal advice, which cannot be disclosed, will be costly and time consuming and requiring firms to have processes in place may be more appropriate.

APESB determined to include the documentation requirements in the Code as it is in the public interest and will provide evidence to support the firm's decision that they meet the required criteria/conditions in paragraphs AUST R604.4 and 604.12 A2 of the Code.

Extant paragraph R400.60 of the Code requires firms to document compliance with Part 4A of the Code. Paragraphs AUST R604.4.1 and AUST R604.12.1 build on this and are specific to the factors considered and conclusions reached that the tax services meet the relevant criteria/conditions. Paragraph 600.27.A1 provides guidance on the types of documentation firms might prepare. APESB is of the view that the documentation requirements are unlikely to impact legal advice and do not require disclosure of the legal advice itself.

APESB also believes that the new documentation requirements in the Code are consistent with the [Australian Tax Advisory Firm Governance Best practice principles](#). The principles were published in August 2022 and are a voluntary framework developed by the Big 4 accounting firms, which includes principle 2.6 on documenting the advice provided to the client "*including (as materially relevant) facts, assumptions, reasoning or analysis undertaken to reach the conclusion*".

Concerns about the use of 'tax avoidance' in the Australian Code

APESB was concerned that using 'tax avoidance' in paragraph R604.4 was problematic from an Australian perspective. The ATO refers to tax minimisation schemes that are outside the spirit of the law as tax avoidance schemes or arrangements involving deliberate exploitation of the tax system.⁴ Whereas, in other jurisdictions, such as the United States, 'tax avoidance' is legal and used in Public Company Accounting Oversight Board Rule 3522 (which paragraph R604.4 of the International Code was based).

⁴ [Tax planning | Australian Taxation Office \(ato.gov.au\)](#)

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Most respondents believed the Code should maintain ‘tax avoidance’ in paragraph R604.4 to remain consistent with the International Code. However, other respondents believed ‘tax avoidance’ is inappropriate, with one suggesting replacing it with ‘tax minimisation’ and another providing the following options:

- remove “*unless the firm is confident that the proposed tax treatment has a basis in applicable tax law or regulation that is likely to prevail*” to prohibit advising on a tax treatment where the significant purpose is tax avoidance. APESB believe this is unnecessary in the Code because promoting tax avoidance schemes is already prohibited in Australia.
- remove “*and a significant purpose of the tax treatment or transaction is tax avoidance*” so firms are prohibited from being involved in tax treatments or transactions unless the firm is confident it is likely to prevail.
- replace ‘tax avoidance’ with ‘tax minimisation’. APESB believes using ‘tax minimisation’ may cause interpretation issues as to when it is, or is not, within the intent of the law.

APESB determined to delete “*and a significant purpose of the tax treatment or transaction is tax avoidance*” from paragraph R604.4 and accordingly changed it to AUST R604.4. APESB is of the view that this approach is preferable to providing additional guidance (as suggested by the IESBA⁵) to explain that ‘tax avoidance’ has a different meaning in the Australian context.

Effective date

The amendments to the NAS revisions in the Code are effective for periods beginning on or after 1 July 2023 and early adoption is permitted. A respondent noted that the equivalent revisions to the International Code are effective for periods beginning on or after 15 December 2022. APESB had proposed in ED 04/22 to implement the later effective date to provide firms, especially small to medium practices, adequate time to implement changes but also allows international firms to adopt early to conform with network requirements.

⁵ Paragraph 116 of IESBA’s [Basis for Conclusions](#).