

## AGENDA PAPER

**Item Number:** 12

**Date of Meeting:** 3 June 2022

**Subject:** Proposed revisions to the Non-Assurance Services provisions of APES 110

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Action required     For discussion     For noting     For information

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### Purpose

To:

- provide an update to the Board on Technical Staff's work in relation to the Non-Assurance Services (NAS) provisions in APES 110 *Code of Ethics for Professional Accountants (including Independence Standards)* (APES 110); and
- obtain the Board's approval, subject to the Board's feedback and review comments, to issue an Exposure Draft on *Proposed Revisions to the Non-Assurance Services provisions of APES 110*.

### Background

On 28 April 2021, the International Ethics Standards Board for Accountants (the IESBA) issued a final pronouncement: [Revisions to the Non-Assurance Services Provisions of the Code](#) (the IESBA NAS Revisions) with changes to the *International Code of Ethics for Professional Accountants (including International Independence Standards)* (the IESBA Code) effective from 15 December 2022.

The Board considered a preliminary draft exposure draft to amend APES 110 to incorporate the IESBA NAS Revisions at the March 2021 meeting ([Agenda Item 10](#)). The Board requested Technical Staff to undertake stakeholder engagement to understand the concerns and implications of the proposals, including consideration of the Parliamentary Joint Committee on Corporations and Financial Services Inquiry into the Regulation of Auditing in Australia (PJC Inquiry) recommendations.

At the June 2021 Board Meeting, Mr Robert Buchanan, the New Zealand Auditing and Assurance Standards Board (NZAuASB) Chair, and Ms Misha Pieters, the XRB Interim Director for Auditing and Assurance Standards, provided an update on NZ's project on NAS. NZAuASB proposed adopting the IESBA NAS revisions but strengthening it by prohibiting tax advisory and tax planning services and including additional guidance about independence and what is considered audit-related services.

The Board also considered at the June 2021 meeting an Exposure Draft on proposed revisions to APES 110's NAS provisions to incorporate the IESBA NAS revisions and other amendments to address PJC Inquiry recommendations and matters raised by Australian regulators ([Agenda Item 10](#)). Key proposals included prohibiting tax advisory and tax planning services if it creates an advocacy threat and changing references from 'likely to prevail' to 'highly likely to prevail'. The [Board requested](#) Technical Staff to undertake further consideration of the proposed NAS provisions.

Technical Staff provided an update at the September 2021 Board meeting ([Agenda Item 10](#)), including a high-level benchmarking analysis of NAS provisions in New Zealand, the UK and the USA and a proposed stakeholder survey on auditor independence and NAS provided to Public Interest Entities (PIEs). The Board supported Technical Staff conducting a survey and presenting the results at a future Board meeting.

Technical Staff provided a further update at the March 2022 Board meeting ([Agenda Item 9](#)) on the results of the survey on auditor independence and NAS, engagement with the Australian Taxation Office (ATO) and Australian Securities and Investments Commission (ASIC), NAS developments in New Zealand and Technical Staff's collaboration with the NZAuASB Technical Staff.

## **Matters for Consideration**

APESB Technical Staff have continued to gather information and evidence concerning NAS, and the focus areas since the March 2022 Board meeting are outlined below.

### **1. ASIC Submission**

APESB received a submission from ASIC on 22 May 2022 in respect of taxation advisory and planning services provided by auditors of Public Interest Entities (PIEs) ([Agenda Item 12 \(a\)](#)). ASIC recommends that the Board amend APES 110 to prohibit auditors from providing tax advisory and tax planning services to PIE audit clients. If the Board determines not to prohibit such services, ASIC recommends that the Board amend APES 110 to:

- 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".

ASIC believes their recommendations will help ensure the confidence in the independence and objectivity of the auditor and will outweigh the cost for PIEs and auditors resulting from the loss of any synergistic cost benefits from providing both tax advisory and audit services and the process of PIEs changing their tax advisors or auditors.

### **2. ATO's Position**

The Australian Taxation Office (ATO) presented at the private session of the November 2021 Board meeting, highlighting their observations and concerns relating to firms providing tax advisory services to large audit clients. In addition, the ATO made a confidential written submission to the APESB articulating the ATO's observations and concerns concerning the new tax provisions in Subsection 604 of the IESBA Code ([Agenda Item 12\(b\)](#)).

### 3. New Zealand update and collaboration with NZAuASB Technical Staff

APESB Technical Staff have continued to collaborate with NZAuASB Technical Staff in relation to adopting the revised NAS provisions in our respective jurisdictions, particularly relating to the tax provisions in Subsection 604.

APESB and NZAuASB Technical Staff met with IESBA Technical Staff in March 2022 to better understand IESBA's intent on the operation of Subsection 604 of the IESBA Code and, in particular, paragraph 604.12 A2. As a result, IESBA Technical Staff confirmed that tax advisory and tax planning services were intentionally 'carved out' of creating a self-review threat in circumstances where limited judgement is involved in services that are:

- supported by tax authority or precedent;
- based on established practice (commonly used and not challenged by a tax authority) or
- have a basis in tax law that the firm is confident is likely to prevail.

IESBA Technical Staff also confirmed that where the "*firm is confident is likely to prevail*" would represent a high level of confidence that the advice will not be disputed by the tax authority.

The NZAuASB [ED 2021/4 Proposed Amendments to Professional and Ethical Standard 1: Non-Assurance Services](#) included the IESBA NAS provisions but also proposed to prohibit tax planning and tax advisory services to PIE audit clients. Submissions received on ED 2021/4 highlighted strongly opposing views and were discussed at the December 2021 NZAuASB meeting. The NZ Auditor-General wanted the standards to go further and the Financial Markets Authority New Zealand supported the proposals. However, CA ANZ and most firms opposed prohibiting tax advisory and tax planning services.

NZAuASB considered these issues and options in April 2022, attended by Channa Wijesinghe, APESB CEO and Jon Reid, APESB Senior Technical Manager, as observers. The NZAuASB determined not to prohibit tax advisory and tax planning services and approved the [proposal](#) of the Chair of the NZAuASB and Director of Assurance Standards. The proposal included two additional NZ paragraphs to clarify the high threshold intended in the "firm is confident is likely to prevail" and make the test objective and the other paragraph to require documentation of how the firm satisfies paragraph 604.12 A2, as follows:

#### *NZ 604.12 A3*

*The firm will need a high level of confidence, that the tax advisory or tax planning services have a basis in New Zealand tax law that is likely to prevail. The firm will gain that confidence if there is a high probability if viewed objectively that the tax advisory or tax planning services will be likely to prevail.*

#### *NZ R604.12 xx*

*The firm shall document the factors considered and conclusions reached in determining that the tax advisory or tax planning service is supported by a tax authority or other precedent; is based on established practice or why the firm is confident that providing the tax advisory and tax planning services described in paragraph 604.12 A2 has a basis in tax law that is likely to prevail.*

At the April 2022 meeting of the New Zealand External Reporting Board (XRB), the XRB ratified the NZAuASB's decision regarding tax advisory and tax planning services.

The NZAuASB's next Board meeting is on 1 June 2022, which will finalise the position on the above approach, and there may be changes to the wording of the NZ provisions. Technical Staff will provide a verbal update at the June 2022 Board meeting.

#### **4. Subsection 604 Tax Advisory and Tax Planning Services - Options Available**

The IESBA NAS Revisions include various prohibitions on providing NAS to PIE audit clients where it 'might create' a self-review threat. For example, paragraph R604.15 of the IESBA NAS Revisions prohibits tax advisory and tax planning services to a PIE audit client if such services might create a self-review threat. However, as noted above, IESBA intentionally 'carved out' certain tax advisory and tax planning services from this prohibition via paragraph 604.12 A2 of the IESBA Code which states:

*604.12 A2 Providing tax advisory and tax planning services will not create a self-review threat if such services:*

*(a) Are supported by a tax authority or other precedent;*

*(b) Are based on an established practice (being a practice that has been commonly used and has not been challenged by the relevant tax authority); or*

*(c) Have a basis in tax law that the firm is confident is likely to prevail.*

Technical Staff are of the view that if paragraph 604.12 A2 was not included in the IESBA NAS Revisions, potentially all tax advisory and planning services would be prohibited from being provided to PIE audit clients by paragraph R604.15, as generally, tax-related matters ultimately impact the financial statements and therefore, might create a self-review threat.

As such, paragraph 604.12 A2 was included in the IESBA NAS Revisions to permit these services (arguably with lower risk) and effectively creates an exemption to the general rule.

Technical Staff agree the self-review threat might be manageable or at an acceptable level if there is a precedent or it is established practice (subparagraphs 604.12(a) and (b)). However, it might be challenging to have the same fact pattern as a precedent or established practice, and this may involve judgement as to whether it matches or is close enough.

The IESBA considered respondents' views on the use of 'likely to prevail' versus 'more likely than not' and concluded on the former, which they believe preserves extant language that is well understood and the inclusion of 'is confident' clarifies IESBA's expectations. The Basis for Conclusions also notes that firms may choose to document the factors considered in determining the firm's confidence it is likely to prevail ([Basis for Conclusions paras 109-113](#)).

The September/October 2020 IESBA meeting [minutes](#) also address 'likely to prevail' and IESBA threshold expectations and that "*IESBA members generally agreed that the audit firm should have a high level of confidence but had varied views about how best to describe that desired threshold*".

However, Technical Staff remain concerned that the threshold of 'likely to prevail' in subparagraph 604.12 A2(c) could be interpreted as being 50.1% and is a subjective assessment by the firm, that the 'firm is confident'. The position taken by NZAuASB concurs with this view.

ASIC have indicated that if the Board determines not to prohibit tax advisory and tax planning services to PIE audit clients, that the Board should increase the test to "a basis in law that is almost certain to prevail".

Technical Staff are also concerned that there is a risk that paragraph 604.12 A2 might create a lower threshold for tax advisory and tax planning services than in extant APES 110. The conditions in subparagraphs 604.12 A2(a) to (c) above have been relocated from factors that are relevant in evaluating the level of self-review or advocacy threats in extant APES 110 (paragraph 604.7 A3).

Therefore, under the IESBA NAS Revisions, if the firm/partner subjectively assesses that tax advisory and tax planning services has a basis in tax law that they are 'confident is likely to prevail', it is 'carved out' of the self-review threat, and no safeguards are required.

In contrast, under extant APES 110, the firm/partner would at least have to evaluate the threats and likely implement a safeguard.

Technical Staff's analysis and comparison of tax advisory and tax planning services under the IESBA NAS Revisions and extant APES 110 are attached at Agenda Item 12(c).

Technical Staff have identified three options to address tax advisory and tax planning services for the Board's consideration.

#### **4.1 Option 1 – Prohibit Tax Advisory and Tax Planning Services to PIEs**

Option 1 would amend the NAS revisions to the IESBA Code to prohibit firms from providing tax advisory and tax planning services to PIE audit clients. This is consistent with ASIC's preferred approach for such services and would address the ATO's concerns. However, the regulators have not provided sufficient evidence to support taking this approach.

As noted above, NZAuASB originally proposed a similar approach in ED 2021/4 but received strongly opposing views from respondents resulting in the NZAuASB taking a different approach. If Australia adopted Option 1, it would result in Trans-Tasman differences. Further, this option is contrary to the intention of the IESBA NAS Revisions to enable limited services involving minimal judgement, and it may not be in the public interest to disallow firms to provide such straightforward services to audit clients.

On balance, Technical Staff do not recommend that Option 1 is adopted by the Board.

#### **4.2 Option 2 – Amend the Threshold to 'Almost Certain' and Require Documentation**

If the Board determines not to prohibit tax planning and tax advisory services to PIE audit clients, then Option 2 would require an amendment to paragraph 604.12 A2 of the IESBA NAS Revisions consistent with ASIC's second preference. The amended paragraph would be as per the following mark-up:

*AUST 604.12 A2 Providing tax advisory and tax planning services will not create a self-review threat if such services:*

*(a) Are supported by a tax authority or other precedent;*

*(b) Are based on an established practice (being a practice that has been commonly used and has not been challenged by the relevant tax authority); or*

*(c) Have a basis in tax law that ~~the firm is~~ almost certain ~~confident is~~ likely to prevail.*

Option 2 addresses the concern that 'likely to prevail' could be interpreted by some as a low bar, and by not including 'the firm is confident', it removes the subjective assessment by the firm as to whether it will prevail. Although this approach deviates from the IESBA's wording for this paragraph, it is consistent with the IESBA's intention that this is a high threshold, and the firm should have a high level of confidence.

Option 2 deviates from the approach taken by NZAuASB but would likely result in substantively the same effect and a harmonised (although not identical) Trans-Tasman approach.

If Option 2 is adopted, Technical Staff also recommend that an AUST paragraph is added requiring documentation of how the firm has assessed that it has satisfied paragraph 604.12 A2, similar to NZAuASB's approach.

Paragraph 600.27 A1 of the NAS revisions to the IESBA Code provides guidance to firms on what documentation might include of the firm's conclusions regarding compliance with Section 600 in accordance with paragraphs R400.60 and 400.60 A1 (General Documentation of Independence for Audit and Review Engagements). However, it is noted that paragraphs R400.60 and 400.60 A1 of the Code focus on threats and safeguards, whereas paragraph 604.12 A2 deems no self-review threat exists if one or more of the conditions is met.

As such, a specific requirement for documentation of how the firm has assessed that it has satisfied paragraph 604.12 A2 would be advantageous. Technical Staff believe that requiring this documentation is in the public interest and will increase the veracity of the firm's decision that they meet the 'carve out' from the self-review threat for tax advisory and tax planning services. The proposed wording for this AUST paragraph is:

**AUST R604.12.1 The Firm shall document the factors considered and conclusions reached in determining that the tax advisory and tax planning service satisfies one or more of the conditions described in paragraph 604.12 A2.**

#### **4.3 Option 3 – Add Guidance on the Meaning of 'Likely to Prevail' and Require Documentation**

Option 3 would be similar to NZAuASB's approach by maintaining paragraph 604.12 A2 as per the IESBA NAS Revisions and including an AUST guidance paragraph to clarify and establish the high threshold of "firm is confident is likely to prevail". The proposed wording for this AUST paragraph is:

*AUST 604.12 A2.1 The Firm will need a high level of confidence that the tax advisory and tax planning services have a basis in tax law that is likely to prevail to satisfy subparagraph 604.12 A2(c). The firm will gain that confidence if there is a high probability, if viewed objectively by applying the reasonable and informed third party test, that the tax advisory and tax planning services will prevail.*

Option 3 is consistent with the IESBA's intent that the "firm is confident is likely to prevail" is a high threshold and the firm would need a high level of confidence. This approach would also result in a consistent Trans-Tasman approach with NZAuASB.

If Option 3 is adopted, Technical Staff also recommend that the same AUST requirement paragraph R604.12.1 is included as set out in 4.2 above for documentation of how paragraph 604.12 A2 has been satisfied.

Although not identical to ASIC's recommendation, Technical Staff are of the view that Option 3 with the additional AUST documentation requirement paragraph might address ASIC and ATO's concerns to some extent.

On balance, Technical Staff recommend that the Board adopt Option 2 for the public consultation process.

## **5. ASIC Recommendation on Advocacy Threats**

ASIC has also recommended that if the Board determines not to prohibit tax advisory and tax planning services being provided to PIE audit clients, then the Board should 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.

Paragraph R604.26 of the IESBA NAS Revisions prohibits firms providing tax services that involve assisting in the resolution of tax disputes for PIE audit clients if it involves acting as an advocate for the client before a tribunal or court. However, this provision does not prohibit an auditor of a PIE audit client from acting as an advocate on a taxation issue with the ATO.

Paragraph R604.24 of the IESBA NAS Revisions prohibit assistance in the resolution of tax disputes to PIE audit clients if that assistance might create a self-review threat. Paragraph 604.24 A1 provides an example of an action that might be a safeguard to address an advocacy threat from such services. Accordingly, to adopt ASIC's recommendation, the following amendments to the IESBA NAS Revisions would be required:

### *Audit Clients that are Public Interest Entities*

R604.24 A firm or a network firm shall not provide assistance in the resolution of tax disputes to an audit client that is a public interest entity if the provision of that assistance might create a self-review or advocacy threat. (Ref: Para. R600.14 and R600.16).

## Advocacy Threats

~~604.24 A1 — An example of an action that might be a safeguard to address an advocacy threat for an audit client that is a public interest entity is using professionals who are not audit team members to perform the service.~~

If this approach is adopted, Technical Staff recommend including a Request for Specific Comment in the Exposure Draft to obtain stakeholders' views on this point and whether additional guidance is required regarding what constitutes the advocacy threat in proposed paragraph R604.24.

However, Technical Staff are of the view that if either Option 2 in 4.2 above, or to a lesser extent Option 3 in 4.3 above, is adopted by the Board, the risk of advocacy threats might be diminished as the permitted tax advisory and tax planning service would involve lower variability in professional judgement.

## 6. Prohibition on Certain Tax Services in R604.4

A separate prohibition for all audit clients in paragraph R604.4 of the IESBA NAS Revisions prevents firms from providing tax services or recommending transactions related to marketing, planning, or opining in favour of tax treatment initially recommended (directly or indirectly) by the firm where a significant purpose is tax avoidance unless the firm is confident the treatment has a basis in applicable tax law or regulation that is likely to prevail.

Paragraph R604.4 and guidance paragraph 604.4 A1 that follows, use similar wording to paragraph 604.12 A2. Technical Staff believe amendments to these paragraphs will be required depending on which option the Board adopts in respect of paragraph 604.12 A2:

- Option 1 – if the Board determines to prohibit tax advisory and tax planning services, whether paragraphs R604.4 and 604.4 A 1 should be deleted;
- Option 2 – if the board determines to adopt "*have a basis in tax law that is almost certain to prevail*" in paragraph 604.12 A2, then consequential amendments to paragraphs R604.4 and 604.4 A 1 together with a documentation requirement paragraph should be considered; or
- Option 3 – if the Board determines to add guidance on the meaning of the "*the firm is confident is likely to prevail*" in paragraph 604.12 A2 and a documentation requirement paragraph, the following approaches could be considered:
  - adding similar AUST paragraphs after paragraphs R604.4 and 604.4 A 1; or
  - including cross-references between paragraphs R604.4 and 604.4 A 1 and 604.12 A2 and proposed R604.12.1.

Technical Staff also note that the use of 'tax avoidance' might be problematic from an Australian perspective, where such terminology is synonymous with breaching the law. APESB's [submission](#) on the IESBA NAS Proposals noted this concern and referred to alternative language used in APES 220 *Taxation Services* of 'tax minimisation'.



Technical Staff recommend including a Request for Specific Comment in the NAS Exposure Draft seeking stakeholders' views on the use of 'tax avoidance' and potential alternative language to use for the Australian context.

## **7. PJC Inquiry into the Regulation of Auditing in Australia**

The PJC Inquiry's final report was issued in November 2020. Recommendations relevant to NAS provisions were discussed at the March and June 2021 Board meetings. PJC recommendation three addresses developing a list of prohibited services for auditors in Australia. Technical Staff have continued to liaise with the FRC Working Group as ultimately the FRC and ASIC have ultimately been tasked with overseeing the recommendation on prohibited services. The Federal Government is yet to respond to the PJC Inquiry's final report recommendations. However, as the Federal Government moves out of caretaker status, this is likely to occur in the near future.

## **8. Proposed Exposure Draft**

A clean version of the proposed Exposure Draft *Proposed Revisions to the Non-Assurance Services provisions of APES 110 Code of Ethics for Professional Accountants (including Independence Standards)* is attached at Agenda Item 12(d), which only incorporates the IESBA NAS Revisions issued in April 2021.

A marked-up version of the Exposure Draft was presented to the Board in March 2021 ([Agenda Item 10\(e\)](#)), so a marked-up version is not provided again. Technical Staff note there were some minor editorial changes between March 2021 and the final standard IESBA NAS Revisions issued in April 2021, which have been incorporated into Agenda Item 12(d).

Technical Staff propose that the standard's effective date be delayed by six months to 1 July 2023, with early adoption permitted, which will allow international firms to adopt the standard earlier if required. Technical Staff also recommend an exposure period of 90 days to enable stakeholders sufficient time to consider the proposals and develop submissions.

## **9. Impact on Small to Medium Practices (SMPs)**

Overall, the IESBA NAS Revisions will impact the SMPs who may be providing NAS to Audit Clients. We note that the IFAC SMP Committee made a Submission to IESBA during the global consultation process. However, the most substantive changes relate to PIE audit clients, who are more likely to be clients of larger firms.

### **Recommendations**

The Board:

- note the update on the progress of APESB's NAS project;
- adopt Option 2 to address regulatory concerns with respect to the external auditor providing tax planning and advisory services to PIE audit clients as it provides greater clarity on what is a permissible tax advisory or tax planning service;

- adopt consequential amendments to paragraph 604.4 and include a request for specific comments on the use of terminology (i.e., tax avoidance);
- approve, subject to the Board's review comments and editorials, the issue of the Exposure Draft *Proposed Revisions to the Non-Assurance Services provisions of APES 110 Code of Ethics for Professional Accountants (including Independence Standards)*.

### **Materials presented**

Agenda Item 12(a)	ASIC Submission on APES 110 Taxation Advice
Agenda Item 12(b)	ATO Submission on Tax Provisions – Confidential
Agenda Item 12(c)	Tax Advisory and Tax Planning Services Analysis New to Extant
Agenda Item 12(d)	Exposure Draft Proposed revisions to the NAS provisions of APES 110 (Clean)

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