

AGENDA PAPER

Item Number: 5

Date of Meeting: 7 December 2022

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

Action required For discussion For noting For information

Purpose

To:

- provide the Board with Technical Staff's assessment of submissions received on ED 04/22 *Proposed Amendments to the Non-Assurance Services provisions of APES 110 Code of Ethics for Professional Accountants (including Independence Standards)*; and
- obtain the Board's approval, subject to the Board's review comments and editorials, to issue an amending standard *Amendments to the Non-Assurance Services provisions of APES 110 Code of Ethics for Professional Accountants (including Independence Standards)*.

Background

The International Ethics Standards Board for Accountants (the IESBA) issued [Revisions to the Non-Assurance Services Provisions of the Code](#) (IESBA NAS Revisions) in April 2021 with changes to the *International Code of Ethics for Professional Accountants (including International Independence Standards)* (the IESBA Code) effective 15 December 2022.

The Board considered a preliminary draft Exposure Draft (ED) incorporating the IESBA NAS Revisions into APES 110 at the March 2021 meeting ([Agenda Item 10](#)). The Board requested Technical Staff to undertake stakeholder engagement on concerns and implications of NAS proposals and 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 then New Zealand Auditing and Assurance Standards Board (NZAuASB) Chair, and Ms Misha Pieters, XRB Director Auditing & Assurance, provided an update on NZ's NAS project, including proposed adoption of the IESBA NAS Revisions but with a prohibition on tax advisory and tax planning services.
- The Board considered an ED incorporating the IESBA NAS Revisions into APES 110 and other amendments addressing PJC Inquiry recommendations and matters raised by Australian regulators, including prohibiting tax advisory and tax planning services that

create an advocacy threat and changing references from 'likely to prevail' to 'highly likely to prevail' ([Agenda Item 10](#)). 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 on high-level benchmarking analysis of NAS provisions in New Zealand, UK and USA and a proposed stakeholder survey on auditor independence and NAS provided to Public Interest Entities (PIEs) ([Agenda Item 10](#)).

Technical Staff provided an update at the March 2022 Board meeting on the results of the auditor independence survey, engagement with the Australian Taxation Office (ATO) and Australian Securities and Investments Commission (ASIC) and NZ NAS developments ([Agenda Item 9](#)).

At the June 2022 Board meeting the Board received updates from Mr Robert Buchanan, NZAuASB Chair, on NZ's position on tax services, Mr Doug Niven, ASIC Chief Accountant, on the options in ASIC's public submission and Technical Staff on a proposed ED for APES 110 incorporating the IESBA NAS Revisions and options for tax services ([Agenda Item 12](#)):

- Option 1 – prohibit tax advisory and tax planning services to PIEs;
- Option 2 – amend the threshold to 'almost certain' and require documentation; and
- Option 3 – add guidance on the meaning of 'likely to prevail' and require documentation.

The Board determined to seek stakeholder views on Options 2 and 3 and agreed to issue an ED of *Proposed Amendments to the Non-Assurance Services provisions of APES 110* (ED 04/22), including requests for specific comments on the most appropriate option for Australia.

Matters for Consideration

[ED 04/22](#) was issued on 1 July 2022 and was open for public comment until 7 October 2022. APESB received 10 submissions on ED 04/22 from:

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|--|---------------------------------------|
| ASIC (Confidential) – Agenda Item 5(a) | Deloitte Touche Tohmatsu (Deloitte) |
| ATO (Confidential) – Agenda Item 5(b) | Ernst & Young (EY) |
| BDO Australia Limited (BDO) | Institute of Public Accountants (IPA) |
| Chartered Accountants Australia and New Zealand (CA ANZ) | KPMG |
| CPA Australia | PricewaterhouseCoopers (PwC) |

ASIC and ATO comments are tabulated in the Regulators Comments Table (Agenda Item 5(c) – Confidential). Other stakeholders' comments are tabulated in General and Specific Comments Tables (Agenda Items 5(d) and 5(e)). Stakeholders' views on APESB adopting the IESBA NAS Revisions and responses to the Requests for Specific Comments in ED 04/22 and other substantive comments are summarised below.

1. **Request for Specific Comment 1** – *Do you support APESB's proposed Option 1 to address concerns relating to tax services by amending the threshold to 'almost certain to prevail'? Please provide reasons and justification for your response.*

Option 1 includes 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 IESBA NAS Revisions.

This option was based on ASIC's second preference in its May 2022 public submission (Agenda Item 5(f)). ASIC believes “*a basis in tax law that the firm is confident is likely to prevail*” is too low to ensure confidence in the independence and objectivity of auditors. ASIC's first preference was for the Board to prohibit auditors from providing tax advisory and tax planning services to PIE audit clients. However, the Board agreed with [Technical Staff's view](#) that insufficient evidence was provided by the regulators to support an outright prohibition.

While there is regulatory support for Option 1, all but one public submission opposes Option 1, with most believing APES 110 should not deviate from the IESBA Code without sufficient evidence in this regard and that this option would result in divergence from NZ's approach.

Technical Staff note APES 110 has deviated when required from the IESBA Code to ensure it is applicable for Australia due to legislative requirements or regulatory concerns. For example, the PIE provisions in APES 110 were strengthened in 2011 and prior to that, APESB prohibited the provision of accounting and bookkeeping services to PIE Audit Clients ahead of IESBA.

The IESBA Code is the ‘base Code’ and jurisdictions, including Australia, base their Codes on the IESBA Code and make adaptations to suit the specific requirements of the individual jurisdiction.

There are also instances where a jurisdiction will have its own drafting style for the Code which is different from IESBA. However, generally, the substance of the IESBA Code is incorporated and after that jurisdictional-specific matters will be addressed. Refer to the following examples:

- USA – American Institute of Certified Public Accountants [Code of Professional Conduct](#) and [PCAOB Rules](#)
- CPA Ontario, Canada – [Chartered Professional Accountants of Ontario - CPA Code of Professional Conduct](#)
- United Kingdom – [Financial Reporting Council Revised Ethical Standard 2019](#)

Some respondents believe ‘*almost certain to prevail*’ is equivalent to a prohibition or a probability as high as 99% (SC1, SC5 & SC8). However, Technical Staff note that whilst a high threshold, it is not absolute and IESBA intended “*firm is confident is likely to prevail*” to be a high threshold.

Technical Staff do not recommend adopting Option 1 in the Amending Standard.

- 2. *Request for Specific Comment 2*** – Do you support APESB's proposed Option 2 to address concerns relating to tax services by including guidance to clarify and establish the “*firm is confident is likely to prevail*” as a high threshold? Please provide reasons and justification for your response.

Option 2 maintains paragraphs R604.4, 604.4 A1 and 604.12 A2 per the IESBA NAS Revisions and includes Australian specific guidance paragraphs AUST 604.4 A1.1 and AUST 604.12 A2.1 to clarify and establish “*firm is confident is likely to prevail*” as a high threshold. The proposed AUST paragraphs note 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 NZAuASB's approach in relation to paragraph 604.12 A2.

Of the public submissions on ED 04/22:

- one supports Option 2 but requests further guidance on interpreting 'confident' and application of the reasonable and informed third party test (SC9);
- four believe APES 110 should retain the IESBA NAS Revisions but provide varying degrees of support for Option 2 due to its consistency with IESBA's intent and the NZ approach promoting Trans-Tasman harmonisation (SC10, SC12, SC13 and SC15). The respondents request additional guidance on, 'likely to prevail' requiring satisfaction of at least 'more likely than not' (SC10), steps required to reach the high level of confidence (SC13) and 'firm is confident is likely to prevail' (SC15);
- one prefers Option 2 due to its consistency with the IESBA NAS Revisions but does not support proposed paragraphs AUST 604.4 A1.1 and AUST 604.12 A2.1 due to the belief that using 'will prevail' is equivalent to the 'almost certain' threshold (SC11);
- one prefers Option 1 but believes Option 2 is workable and consistent with the IESBA's intent (SC6); and
- one does not support Option 2 believing APES 110 should retain the IESBA NAS Revisions and any guidance should be from the IESBA (SC14).

The IESBA based paragraph R604.4 on [PCAOB Rule 3522](#) but retained 'likely to prevail' to preserve extant language which is understood and translatable and added 'is confident' to clarify IESBA's expectations that the threshold is appropriately robust. PCAOB Rule 3522 uses the threshold "*at least more likely than not*", however, the IESBA noted "*the PIOB had expressed the view that the term "more likely than not" is perceived as being too low a threshold*".¹ IESBA's intention of a higher threshold is further clarified in Question 16 of its [Staff Questions & Answers to the Revised NAS Provisions of the Code](#):

The IESBA determined that, for subparagraph 604.12 A2 (c) to apply, the firm should have a high level of confidence that the basis in tax law is "likely to prevail." The IESBA, therefore, added the phrase "the firm is confident" to make it clear that the firm must have a robust rationale to support the proposed tax treatment.

'Likely to prevail' is in extant paragraph 604.7 A3 of APES 110 and was introduced into APES 110 in 2010, meaning it should be well understood in Australia. Proposed paragraphs AUST 604.4 A1.1 and AUST 604.12 A2.1 provide further 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. Technical Staff believe these guidance paragraphs, together with the IESBA's Basis for Conclusions and Staff Q & A provide sufficient guidance.

Technical Staff agree that 'will prevail' in proposed paragraphs AUST 604.4 A1.1 and AUST 604.12 A2.1 could be misinterpreted as a higher threshold than was intended (SC11). The second sentence of NZAuASB's *Professional and Ethical Standard 1* (PES 1) paragraph NZ604.12 A2.1 is the same as AUST 604.12 A2.1 except the following underlined part is in PES 1:

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 be likely to prevail.

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

'Be likely to' was not included in ED 04/22 to avoid two sets of probability in the same sentence ('high probability' and 'likely to prevail') and 'will prevail' was referring to 'likely to prevail' in the first sentence of the proposed AUST paragraphs.

Technical Staff recommend that proposed paragraphs AUST 604.4 A1.1 & AUST 604.12 A2.1 are adopted in the Amending Standard with the inclusion of 'be likely to'. This will also enhance Trans-Tasman harmonisation.

3. Request for Specific Comment 3 – Do you foresee any practical challenges in implementing the documentation requirements in proposed paragraphs AUST R604.4.1 and AUST R604.12.1? Please provide reasons and justification for your response.

Proposed paragraphs AUST R604.4.1 and AUST R604.12.1 require documentation of how the firm has assessed it satisfies paragraphs AUST R604.4 (Option 1) or R604.4 (Option 2) and AUST 604.12 A2 (Option 1) or 604.12 A2 (Option 2). Proposed paragraph AUST R604.12.1 is consistent with the NZAuASB's approach in paragraph NZ R604.12 of PES 1.

Of the public submissions on ED 04/22:

- four support the documentation requirements (SC17, SC20, SC21 and SC22);
- two do not believe the documentation requirements are necessary but do not foresee any practical challenges (SC19 and SC23);
- one believes there will be practical challenges depending on which Option the Board adopts, including documenting the application of the reasonable and informed third party test without further guidance (SC16); and
- one does not support the documentation 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 (SC18).

Technical Staff do not believe further guidance is required on the application of the reasonable and informed third party test. This test is used throughout APES 110, is set out in paragraph 120.5 A6, defined in the Glossary and is a fundamental component of applying the conceptual framework (para. R120.5).

Extant paragraph R400.60 of APES 110 requires firms to document compliance with Part 4A. Proposed paragraphs AUST R604.4.1 and AUST R604.12.1 are consistent with paragraph R400.60 but specific to the factors considered and conclusions reached that the tax services meet the relevant criteria/conditions. Proposed paragraph 600.27.A1 provides guidance on the types of documentation firms might prepare. As such, firms should already have processes in place regarding documenting compliance with Part 4A which will need adjusting for the proposed requirements.

Technical Staff believe the proposed requirements are also consistent with the [Australian Tax Advisory Firm Governance Best practice principles](#) published in August 2022, which are a voluntary framework developed by the Big 4 (Agenda Item 5(g)). Principle 2.6 – *Documenting the advice provided to the client* states "A written note is made of all final advice provided to the client including (as materially relevant) facts, assumptions, reasoning or analysis undertaken to reach the conclusion".

Technical Staff believe the proposed documentation requirements may not impact legal advice which relates to the tax service itself and whether such advice is required in the circumstances. Further, the 'carve out' in proposed paragraph 604.12 A2 intends to allow straightforward tax services which may not require legal advice. Additionally, the proposals do not require disclosure of the legal advice itself, meaning legal professional privilege may not be relevant.

Technical Staff believe the proposed requirements are in the public interest and will increase the veracity of the firm's decision that they meet the required criteria/conditions.

Technical Staff recommend that the documentation requirements in proposed paragraphs AUST R604.4.1 and AUST R604.12.1 are adopted in the Amending Standard.

4. Request for Specific Comment 4 – *Do you agree that the term 'tax avoidance' is inappropriate to use in proposed paragraphs AUST R604.4 (Option 1) or R604.4 (Option 2)? What alternative terminology could APESB use instead? Please provide reasons and justification for your response.*

Paragraph R604.4 of the IESBA NAS Revisions prevents firms from providing tax services or recommending transactions to audit clients where a significant purpose is tax avoidance unless the firm is confident it has a basis in tax law that is likely to prevail.

APESB was concerned 'tax avoidance' was 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 possible alternative language such as 'tax minimisation'. Respondents to the IESBA NAS Proposals noted 'tax avoidance' is unclear and ambiguous and IESBA believed "that local regulators, PAOs and NSS are well-positioned to provide additional guidance based on local tax law or regulation as appropriate to help address concerns about potential misunderstanding and inconsistent application of the term".²

'Tax avoidance' has different meanings in different jurisdictions. In the U.S., 'tax avoidance' is a legal action to reduce tax and is used in [PCAOB Rule 3522](#) (which paragraph R604.4 was based). However, if a professional accountant promotes 'tax avoidance' transactions or schemes in Australia, they will likely breach the law. The ATO notes taxpayers can keep taxes to a minimum if within the intent of the law (tax planning or tax-effective investing) but tax minimisation schemes that are outside the spirit of the law are tax avoidance schemes or arrangements, involving deliberate exploitation of the tax system.³

Principle 1 of the [Australian Tax Advisory Firm Governance Best practice principles](#) refers to the firm having procedures aimed at preventing it from knowingly or recklessly advising on arrangements which involve (amongst other things) promotion of tax exploitation schemes. 'Tax exploitation' and 'tax avoidance' are synonymous in the Australian context.

Technical Staff believe paragraph R604.4 would not have the same meaning in APES 110 as it is not logical from an Australian perspective. The requirement would essentially mean a firm must not provide a tax service where the significant purpose is outside the intent of tax law unless the firm is confident it is within the intent of the law (ie likely to prevail).

Most public submissions on ED 04/22 believe APES 110 should remain consistent with the IESBA NAS Revisions and maintain 'tax avoidance' in paragraph R604.4. However, two public

² Paras. 110 and 114-116 of IESBA's [Basis for Conclusions](#)

³ [Tax planning | Australian Taxation Office \(ato.gov.au\)](#)

submissions believe 'tax avoidance' is inappropriate with one suggesting replacing it with 'tax minimisation' (SC29) and the other providing the following options (SC24):

- a. 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*" which effectively prohibits advising on a tax treatment where the significant purpose is tax avoidance. Technical Staff believe this is unnecessary in APES 110 because promoting tax avoidance schemes is already prohibited in Australia.
- b. remove "*and a significant purpose of the tax treatment or transaction is tax avoidance*" which effectively makes the requirement to not be involved in such a tax treatment or transaction unless the firm is confident it is likely to prevail.

Technical Staff recommend deleting "*and a significant purpose of the tax treatment or transaction is tax avoidance*" from proposed paragraph R604.4 and making it AUST R604.4 (or AUST R604.4 in ED 04/22 if the Board adopts Option 1).

Technical Staff believe this is preferable to additional guidance (as suggested by the IESBA), which would require an additional paragraph stating that 'tax avoidance' for the purposes of proposed paragraph R604.4 does not mean 'tax avoidance' as understood in the Australian context.

- c. replace 'tax avoidance' with 'tax minimisation'. Technical Staff do not recommend this option as 'tax minimisation' may cause interpretation issues as to when it is, or is not, within the intent of the law.

5. Other Matters Raised by Respondents

5.1 Drafting of the IESBA NAS Revisions

One public submission raised concerns about the appropriateness of "*might create a self-review threat*" in Section 600 of the IESBA NAS Revisions believing it contradicts the conceptual framework in the IESBA Code/APES 110 (SC32).

APESB's [submission](#) on the IESBA NAS Proposals commented on the use of 'might create' threats. However, Technical Staff acknowledge the IESBA's rationale for including 'might create' self-review threats as a stricter position. Proposed paragraph 600.4 notes some services are prohibited because threats cannot be eliminated and safeguards are not capable of being applied to reduce threats to an acceptable level. In such circumstances, the IESBA has effectively applied the conceptual framework and deemed the service is not permissible.

The same respondent believes users of audit reports do not understand the difference between PIE and non-PIE audit clients or the differences in requirements even if there is heightened expectations regarding independence for PIE audit clients and that APESB should develop guidance (SC33).

Technical Staff agree that some users and the broader public may not understand the nuances that the respondent refers to. However, Technical Staff believe any guidance that clarifies and explains these concepts would be more appropriately considered in APESB's project on the Definition of Listed Entity and Public Interest Entity.

The same respondent believes proposed paragraphs 600.20 A1 to R600.24 are challenging to understand due to the use of 'will not', 'might' and 'would not' create threats (SC34). Technical Staff have reviewed these provisions and believe the IESBA's use of the terms is appropriate. The IESBA's [Staff Questions & Answers to the Revised NAS Provisions of the Code](#) questions 18 to 20 provide guidance on firms communicating with those charged with governance about NAS.

5.2 *Effective Date*

Two public submissions raised concerns that if Australia's NAS provisions become effective on 1 July 2023 (compared to 15 December 2022 for the IESBA NAS Revisions), it may create confusion in the market and disrupt firms (GC19 and GC22). APESB proposed the later effective date to provide firms, especially SMPs, adequate time to implement changes and permits earlier adoption.

Technical Staff recommend the effective date for the Amending Standard remains as 1 July 2023 but that a reference is included in the Basis for Conclusions on the difference of the effective date to the IESBA NAS Revisions.

5.3 *Marked-up Versions of Exposure Drafts*

Two public submissions requested that the Board provide marked-up versions of EDs (GC19 and GC22). Technical Staff note this issue was addressed at the September 2022 Board meeting and that marked-up versions of proposed EDs are included with Board papers, which was provided for the NAS ED ([Agenda Item 10](#)) and on the project page for this project.

Technical Staff propose that post Board meeting marked-up versions of EDs are included on APESB's website and that links to this are included within the Explanatory Memorandum of EDs.

6. **Stakeholder Engagement**

Technical Staff met with all ten respondents in November 2022 to discuss their submissions. The majority of respondents supported the direction of travel and the proposed Technical Staff recommendations in sections 4 & 5.

7. **Other Editorial Amendments**

During the preparation of the Compiled Code, Technical Staff have identified the following editorial amendments required to the following paragraphs:

- 360.21 A1 footnote 7 – to update the reference to draft whistleblowing legislation to the same wording as footnotes 4 and 8 in the Role and Mindset amending standard;
- 510.10 A3 footnote 18 – to change 'respects' to 'respect'; and
- R540.9 footnote 33 – to change 'Investment' to 'Investments'.

8. **PJC Inquiry**

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 Australian auditors, which was ultimately tasked to the FRC and ASIC, who are overseeing this recommendation. The Federal Government is yet to respond to the PJC Inquiry's final report.

9. Proposed Amending Standard and Basis for Conclusions

The proposed Amending Standard includes the IESBA NAS Revisions with marked-up changes to relevant tax services provisions per the above recommendations and other editorial amendments. The proposed effective date is 1 July 2023, with early adoption permitted. Technical Staff seek the Board's approval to issue the proposed Amending standard and related Basis for Conclusions as set out at Agenda Items 5(h) and 5(i).

10. Small to Medium Practices (SMPs)

The IESBA NAS Revisions will impact SMPs which provide NAS to Audit Clients. However, the most substantive changes relate to PIE audit clients, which are more likely to be clients of larger firms. The IFAC SMP Committee made a Submission on IESBA's NAS Proposals which IESBA considered. Technical Staff believe that APESB's proposed amendments will also provide further clarity to SMPs in Australia who have limited resources.

Recommendations

The Board approve, subject to the Board's review comments and editorials, the issue of an amending standard *Amendments to the Non-Assurance Services provisions of APES 110 Code of Ethics for Professional Accountants (including Independence Standards)*.

Materials presented

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| Agenda Item 5(a) | ASIC Submission on Tax Provisions – Confidential |
| Agenda Item 5(b) | ATO Submission on Tax Provisions – Confidential |
| Agenda Item 5(c) | Regulators Comments Table ED 04/22 – Confidential |
| Agenda Item 5(d) | General Comments Table ED 04/22 |
| Agenda Item 5(e) | Specific Comments Table ED 04/22 |
| Agenda Item 5(f) | ASIC Submission on Tax Provisions – Public |
| Agenda Item 5(g) | Australian Tax Advisory Firm Governance – Best practice principles |
| Agenda Item 5(h) | Proposed revisions to the NAS provisions of APES 110 (marked-up) |
| Agenda Item 5(i) | Proposed Basis for Conclusions NAS Provisions |

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