

25 May 2023

Mr Ken Siong  
Program and Senior Director  
International Ethics Standards Board for Accountants (IESBA)  
529 Fifth Avenue, 6<sup>th</sup> Floor  
New York, New York 10017 USA

By email: [kensiong@ethicsboard.org](mailto:kensiong@ethicsboard.org)

Dear Mr Siong,

**IESBA's Exposure Draft *Proposed Revisions to the Code Addressing Tax Planning and Related Services***

Accounting Professional & Ethical Standards Board Limited (APESB) welcomes the opportunity to make a submission on the IESBA's Exposure Draft *Proposed Revisions to the Code Addressing Tax Planning and Related Services* (the Tax Planning and Related Services ED).

APESB is governed by an independent board of directors whose primary objective is to develop and issue, in the public interest, high-quality professional and ethical pronouncements. These pronouncements apply to the membership of the three major Australian professional accounting bodies (Chartered Accountants Australia and New Zealand, CPA Australia and the Institute of Public 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.

**Overall comments**

APESB strongly supports the IESBA's project to revise the IESBA's *International Code of Ethics for Professional Accountants (including International Independence Standards)* (the IESBA Code) concerning Tax Planning and Related Services due to its public interest imperative.

APESB is of the view the proposed revisions are a vital step in enhancing the ethical framework to guide professional accountants in exercising their professional judgement, and supporting them to act in the public interest when providing tax planning and related services.

While we generally agree with the proposals, we believe additional guidance on key matters within the proposed ethical framework would assist professional accountants in clarifying how to implement the proposals in practice.

In developing APESB's response to the Tax Planning and Related Services Exposure Draft, we have considered local submissions made to the APESB on this exposure draft and Australian stakeholders' feedback from a roundtable event conducted by APESB in April 2023. The

stakeholders who attended the roundtables included standard setters, regulators, professional accounting bodies, and accounting firms.

APESB's key recommendations are noted below. In addition, Appendix A provides APESB's responses to the IESBA's specific and general questions.

## Recommendations

APESB's key recommendations in relation to the Tax Planning and Related Services Exposure Draft for the IESBA's consideration are:

- The description of tax planning services needs clarification concerning exclusions from tax planning and related services, the duration of related services and the ongoing treatment of transfer pricing compliance arrangements;
- The inclusion of related services in the scope of sections 280 and 380 needs to be clearly articulated to ensure the effective monitoring and enforceability of the provisions. As noted above, additional guidance is also required to clarify the time frame that related services are captured within these provisions when the tax planning service may have a long-term effect;
- Clarify the drafting of the public interest considerations, particularly whether a professional accountant has the necessary skill set to consider global public interest considerations;
- The provisions relating to the circumstances of uncertainty (proposed paragraphs 380.15 A1 to 380.17 A5, and 280.15 A1 to 280.17 A5) would be best placed before the requirements on determining a credible basis for a tax planning service (proposed paragraphs R380.12 and R280.12). Considering uncertainty, and addressing this uncertainty through discussions with the client, may lead to support for a tax planning arrangement;
- Clarification is needed on whether the credible basis determination should be reconsidered when circumstances change and what matters would indicate that there is not a credible basis for the tax planning service;
- A regulatory stakeholder recommended that the basis to be adopted should be higher than a credible basis or reinforce the need for professional accountants to apply the legal standard applicable in their jurisdiction to determine the credible basis;
- Reframe the stand-back test to focus on the consequences for the professional accountant and the firm rather than the consequences for the client (which may be construed as a management responsibility) and develop additional guidance on (a) clearly delineating the responsibilities of the taxpayer and the professional accountant and (b) potential actions a professional accountant can take to meet the requirements of the stand-back test;
- Review the proposed actions for a professional accountant in business when their employer is going to implement a tax planning service that the professional accountant believes does not have a credible basis and consider its consistency with like provisions in Section 260 *Responding to Non-Compliance with Laws and Regulations* of the IESBA Code;
- Given the public interest invariably attached to tax services and its role in collecting the relevant jurisdiction's (or multiple jurisdictions) tax revenue, we believe documentation should be required. However, if it is challenging to introduce documentation requirements globally, then we recommend that documentation is introduced for at least circumstances where there is uncertainty associated with a tax planning service or where the engagement would be regarded as high risk;

- Clarify the responsibility of the professional accountant when it refers a client to a third-party provider between circumstances where it is a referral for tax expertise and where the accountant is actively promoting the tax planning products or arrangements of a third party; and
- Review the proposed sections to ensure consistent use of terminology throughout the provisions.

### **Concluding comments**

We trust you find these comments helpful in your final deliberations. If you require additional information, please contact APESB's Principal, Ms. Jacinta Hanrahan, at [jacinta.hanrahan@apesb.org.au](mailto:jacinta.hanrahan@apesb.org.au).

Yours sincerely

A handwritten signature in black ink, appearing to read "Nancy Milne". The signature is written in a cursive, flowing style.

Nancy Milne OAM  
**Chairman**

## APPENDIX A

### APESB's Specific Comments

APESB's responses to the request for specific comments by the IESBA on the proposals in the Tax Planning and Related Service exposure draft are as follows:

#### *Proposed New Sections 380 and 280*

1. **Do you agree with the IESBA's approach to addressing Tax Planning (TP) by creating two new Sections 380 and 280 in the Code as described in Section VI of this memorandum?**

APESB is supportive of the creation of two new Sections, 380 and 280 in the IESBA Code. We believe the new sections establish a consistent framework for providing all Tax Planning and Related Services provided by professional accountants, whether to an employing organisation or a client.

#### *Description of Tax Planning and Related Services*

2. **Do you agree with IESBA's description of TP as detailed in Section VII.A above?**

APESB agrees that clearly describing tax planning and related services is important. This will establish a clear scope and assist professional accountants in understanding and implementing these new provisions.

However, APESB is concerned that the currently proposed Tax Planning and Related Services description may capture a broader range of taxation services than was intended. The definition of Tax Planning services in proposed paragraphs 280.5 A1 and 380.5 A1 is high-level and generic. While the examples of services set out in paragraphs 280.5 A2 and 380.5 A2 help clarify the intended scope and extent of Tax Planning, we believe it would enhance users' understanding if additional guidance were included in the IESBA Code on tax services that would not be captured within that term. For example, annual tax compliance work that did not involve tax planning, tax review services, management of communication with revenue authorities and certain tax dispute services.

APESB also encourages the IESBA to explain whether the references to transfer pricing arrangements/practices are to the initial advice and implementation of the transfer pricing arrangement or whether it includes the ongoing transfer pricing compliance aspects in the ensuing years.

The IESBA should consider clarifying the guidance and examples for 'Related Services' described in proposed paragraphs 280.5 A3 and 380.5 A3. In particular, the inclusion of '...preparing the client's tax return that reflects the position in the tax planning arrangement.' The proposed guidance about applying this application material is unclear when the tax planning services provided relate to structuring affairs that have a long-term effect. For example, if the tax planning service advised that a trust structure for business ownership be established, would the preparation of the tax return for that structure be considered a related service for the first year or the first few years the structure was in place, or would it capture all tax returns in the future years for that structure?

Stakeholders have noted concerns about the use of the terms 'related services' or 'related activities'. Paragraph 30 in the explanatory memorandum states that related activities and related services provided by professional accountants are scoped in the provisions in the proposed new sections 280 and 380, and therefore are not explicitly referred to further in those sections. However, this position is not clearly set out within the Sections themselves, and the requirements only refer to Tax Planning services.

APESB is concerned about whether the lack of reference to the inclusion of related activities or related services within the new sections will impact the monitoring and enforceability of these provisions. Therefore, to avoid unintended consequences, the IESBA should clarify the scoping of related activities or related services, consistent with how the scope of terms such as 'Member' and 'Audit' are described in the introductory paragraphs in Section 400 of the IESBA Code.

Alternatively, the complete phrase 'Tax Planning and Related Services' could be used to remove doubt and avoid misinterpretation or misapplication of the requirements.

### ***Role of the PA in Acting in the Public Interest***

#### **3. Do you agree with IESBA's proposals as explained in Section VII.B above regarding the role of the PA in acting in the public interest in the context of TP?**

APESB acknowledges the complexity of explaining the role of the professional accountant in acting in the public interest in the context of tax planning and related services. APESB agrees with the proposed application material in paragraphs 280.4 A1 and 380.4 A1, as it succinctly sets out the professional accountant's role and acknowledges that the accountant's public interest role is in assisting with the operation of a jurisdiction's tax system.

However, APESB is of the view that the understanding of the proposed paragraph 380.4 A2 would be enhanced by separating the obligations of the Client and the Professional Accountant in the following manner:

#### ***380.4 A2***

*Clients are entitled to organize their affairs for tax planning purposes. While there are a variety of ways to achieve such purposes, clients have a responsibility to pay taxes as determined by the relevant tax laws and regulations.*

#### ***380.4 A3 (new)***

~~*In this regard,*~~ *Professional accountants' role is to advise their clients on how best to meet their tax planning goals. In addition, accountants play an important role in assisting clients to meet their tax obligations and not seek to circumvent them through tax evasion. However, when accountants provide such assistance, it might involve certain tax minimization arrangements that, although not prohibited by tax laws and regulations, might create threats to compliance with the fundamental principles.*

The above separation will work well with the proposed 380.4 A1 and 380.4 A3 of the Exposure Draft.

Some stakeholders at the APESB's roundtable raised a concern that public interest could be interpreted more broadly, with the accountant needing to determine a global public interest position, especially when Tax Planning Services may impact multiple jurisdictions.

As a result, these stakeholders questioned whether it is within the professional accountant's skill set to assess global public interest considerations. They believed additional guidance was necessary to clarify IESBA's expectations if this aspect is included in the standard.

#### ***Basis for Recommending or Otherwise Advising on a Tax Planning Arrangement***

**4. Do you agree with the IESBA's proposals regarding the thought process for PAs to determine that there is a credible basis in laws and regulations for recommending or otherwise advising on a TP arrangement to a client or an employing organisation, as described in Section VII.E above?**

APESB is supportive of the requirement for professional accountants to determine that there is a credible basis in laws and regulations when providing tax planning services. We believe it formalises the best practice processes that professional accountants should undertake to develop an effective and appropriate tax planning service for their clients or employer.

However, when considering the process a professional accountant would follow in determining a credible basis, we are of the view that considering uncertainty would be a key element in making that determination. The discussion with the client about uncertainty (as per proposed paragraph R380.16) lends itself to gathering further information and facts that may support the determination of a credible basis. As such, APESB is of the view that the proposed requirements and application materials on circumstances of uncertainty (e.g., proposed paragraphs 380.15 A1 – 380.16 A1) should be relocated to be before the material on the basis for recommending or otherwise advising on a tax planning arrangement (e.g., before proposed paragraphs R380.11).

In reviewing the requirements and application material relating to a credible basis, APESB noted that there was no consideration for instances when the circumstances surrounding the tax planning advice changed. Accordingly, we encourage the IESBA to consider including additional guidance on circumstances where the determination of credible basis needs to be reassessed, including when circumstances change or where the implementation of the tax planning service occurs over an extended period.

We note that it is also unclear whether the provision of related activities or related services can only be performed if the professional accountant believes the initial tax planning arrangement has a credible basis. This consideration is particularly relevant when another party performs the initial tax planning arrangement.

A regulatory stakeholder has expressed concern that as tax law is complex, different interpretations could be argued as credible, including technically credible interpretations that do not meet the tax law's intent. Accordingly, this stakeholder believes the IESBA should introduce a test level higher than credible as it is in the public interest and helps to ensure fairness and equity in the tax system, and it will be consistent with the policy intent of the law.

The 'reasonable care' or 'reasonably arguable' standard is used in Australia. An entity will be liable for penalties if it doesn't abide by these legislative requirements in Australian Tax law.

If the IESBA is of the view that the proposed credible basis test is to be maintained at that level, this regulatory stakeholder suggested that the proposed paragraph 380.11 A2 be amended to include the following additional sentence at the end of the paragraph:

*“A failure to meet a jurisdiction’s relevant tax laws and regulations is likely to result in the tax planning arrangement not having a credible basis for the purpose of paragraph R380.11.”*

The additional text will reinforce the need for professional accountants to apply the legal standard applicable in their jurisdiction to determine the credible basis.

Some stakeholders at the APESBA roundtable believed that using professional judgement to determine if there is a credible basis would be challenging. Therefore, they suggested that additional guidance on what is not a credible basis would support the professional accountant in their application of professional judgement to determine what is a credible basis.

**5. Are you aware of any other considerations, including jurisdiction-specific considerations, that may impact the proper application of the proposed provisions?**

APESB is not aware of any other considerations, including jurisdiction-specific considerations that may impact the proper application of the proposed provisions.

An Australian stakeholder noted that different jurisdictions may have an established term higher than the IESBA term ‘credible basis.’ Therefore, to avoid arbitrage opportunities, the stakeholder was of the view that additional guidance could be provided to outline how the IESBA term interacts with each jurisdiction’s laws and regulations.

***Consideration of the Overall Tax Planning Recommendation or Advice***

**6. Do you agree with the proposals regarding the stand-back test, as described in Section VII.F above?**

APESB is supportive of the overall concept of a stand-back test within the tax planning services provisions. However, we have some concerns about the proposals as they are currently drafted and recommend the development of guidance to clarify IESBA’s intent, as we believe that such guidance material will facilitate implementation.

Paragraph 65 of the Explanatory Memorandum of the Exposure Draft states “...that the stand-back test is *not* about tax morality, tax justice or tax fairness.” However, proposed paragraph R380.12 effectively requires the professional accountant to consider these factors to understand how a stakeholder might perceive the arrangement and the reputational consequences.

The other concern with this test is that it covers the potential consequences for the client and the professional accountant. However, APESB believes the provisions would be more effective if the test focused solely on the professional accountant.

The provisions relating to circumstances involving uncertainty include a requirement to discuss uncertainty with the client (proposed paragraph R380.16). The guidance material

in proposed paragraph 380.16 A1 states that this discussion could provide the opportunity to discuss reputational, commercial or wider economic consequences with the client.

If, as suggested by APESB's response to question 4 above, the provisions dealing with uncertainty are relocated before establishing a credible basis, then the assessment from a client perspective should have been covered by the discussion with the client. The stand-back test could then focus solely on the professional accountant and the potential consequences they may face for being connected to the relevant tax planning service.

At the APESB Roundtable, stakeholders had mixed views concerning the stand-back test. Some supported the test, while others were concerned it would be challenging to implement in practice. In addition, concerns were raised about the obligations this places on the professional accountant to undertake an assessment which ultimately should be the responsibility of the client or the employer (as the taxpayer) and the difficulties in assessing the wider economic consequences and impact on tax base(s), especially when it is across multiple jurisdictions.

A stakeholder also stated that it is not a tax practitioner's responsibility to impose the tax practitioner's views through an assessment of non-technical issues and that this test could lead to unintended consequences. The stakeholder was of the opinion that it is the role of management of the taxpayer who would be in the best position to assess these factors and determine the implications of proceeding with the transaction than the professional accountant.

The stakeholder also questioned whether the obligation to carry out this assessment places the professional accountant in public practice in a quasi-management role after determining a credible basis for the transaction. The stakeholder argued that a more appropriate approach would be to require the professional accountant to draw to their client's attention any obvious commercial and economic consequences for the client to consider as, ultimately, it is the client's decision whether or not to proceed with a transaction.

APESB acknowledges the challenges associated with the development of the stand-back test and recommends that IESBA develop additional guidance on (a) clearly delineating the responsibilities of the taxpayer and the professional accountant and (b) potential actions a professional accountant can take to meet the requirements of the stand-back test.

### ***Describing the Gray Zone and Applying the Conceptual Framework to Navigate the Gray Zone***

- 7. Do you agree with the IESBA's proposals as outlined in Section VII.G above describing the grey zone of uncertainty and its relationship to determining that there is a credible basis for the TP arrangement?**

APESB supports the concept of the grey zone of uncertainty and the proposed requirement to discuss the uncertainty with the client. However, APESB believes the consideration of uncertainty in tax planning arrangements should be considered before determining whether there is a credible basis for the tax planning arrangement and, as suggested in question 4 above, these sections should be relocated.



8. In relation to the application of the CF as outlined in Section VII.H above, is the proposed guidance on:
- (a) The types of threats that might be created in the gray zone;
  - (b) The factors that are relevant in evaluating the level of such threats;
  - (c) The examples of actions that might eliminate threats created by circumstances of uncertainty; and
  - (d) The examples of actions that might be safeguards to address such threats sufficiently clear and appropriate?

APESB are of the view that the proposed guidance to assist professional accountants with the application of the conceptual framework navigating through the gray zone is sufficiently clear and appropriate.

A stakeholder at the APESB roundtable noted that the self-review threat was not included in the list of potential threats and noted that this threat might be relevant if the professional accountant also provides other services to the client, such as a valuation service for tax consolidation purposes, which will be relied upon when providing the tax planning service.

#### ***Disagreement with Management***

9. Do you agree with the proposals outlined in Section VII.I above which set out the various actions PAs should take in the case of disagreement with the client or with the PA's immediate superior or other responsible individual within the employing organization regarding a TP arrangement?

APESB supports the proposed provisions relating to disagreements with the client in Section 380. However, we are concerned about the proposed paragraph 280.20 A1 in Section 280.

This paragraph suggests a professional accountant might consider resigning from the employing organisation if the employing organisation undertakes the tax planning arrangement contrary to the professional accountant's advice. This recommended action seems quite a severe suggestion, especially as it does not consider the level of the professional accountant within the organisation.

In fact, this application material is setting the bar higher than the Non-compliance with Laws and Regulations provisions where only Senior Professional Accountants in Business are advised to consider resigning from their employer. Accordingly, APESB suggests the IESBA review the proposed paragraph 280.20 A1 in light of the NOCLAR provisions at 260.18 A1 and R260.24 to R260.26.

Stakeholders at the APESB roundtable believed that the provisions should also address the treatment of a disagreement where the outcome may be insignificant. Some stakeholders also queried whether paragraphs 380.19 to 380.21 is intended only to address situations where the client has developed the tax planning strategy which the professional accountant deems not credible or if it encompasses situations where the client has obtained a tax planning strategy from another advisor who believes it is credible.

APESB recommends that the IESBA reconsider the application of these paragraphs for related services.

### ***Documentation***

#### **10. Do you agree with the IESBA's proposals regarding documentation as outlined in Section VII.J above??**

We understand IESBA's rationale and proposed global approach concerning the proposed documentation paragraphs in Sections 280 and 380. However, APESB is of the view given the public interest that is invariably attached to tax services and its role in the collection of the relevant jurisdiction's (or multiple jurisdictions) tax revenue, the professional accountant should be required to document the factors considered and the conclusions reached in determining the tax planning service has a credible basis. Documentation should also be mandatory when uncertainty is associated with the tax service, or it is considered high-risk.

In Australia, APESB has issued a professional standard (since 2007) on tax services, [APES 220 Taxation Services](#), which has required documentation, and we are not aware that this has caused significant challenges for professional accountants in Australia.

In addition, APESB has included an Australian-specific requirement on documentation relating to providing taxation services to an audit client in its [Non-Assurance Services, Amending Standard](#) to APES 110. The paragraph (AUST R604.4.1) requires firms to document the factors considered and conclusions reached in determining that the tax treatment satisfies the conditions described in paragraph AUST R604.4, such as the proposed tax treatment has a basis in applicable tax law or regulation that is likely to prevail.

The big four firms in Australia have adopted voluntary [Large Market advisor principles](#). For example, principle 2.6 requires the firm to have a written note of all the final advice provided to the client when dealing with higher-risk arrangements. APESB is of the view this represents best practice for tax planning and related services.

Where multiple jurisdictions are involved and jurisdictions that don't require documentation interact with the Australian tax system that generally requires documentation to establish a reasonable basis, it creates challenges for the Australian revenue authorities to obtain appropriate information to administer Australia's tax system.

APESB encourages the IESBA to reconsider documentation requirements as that will also support evidencing how the professional accountant determined a credible basis for tax planning services. In addition, given the tax scandals over the last decade, we believe documentation is in the public interest and could act as a deterrent.

If mandating a global documentation requirement is challenging, then APESB strongly believes that documentation should at least be required for uncertain circumstances or higher-risk tax planning services in proposed sections 280 and 380.

For example, a new proposed requirement paragraph for section 380 could be drafted as follows:

R380.24 (new)

*The professional accountant shall document on a timely basis the matters set out in paragraph 380.23 A1 when providing a tax planning service that involves circumstances of uncertainty or when an engagement is assessed as high risk.*

### ***Tax Planning Products or Arrangements Developed by a Third Party***

**11. Do you agree with the IESBA's proposals as detailed in Section VII.K above addressing TP products or arrangements developed by a third-party provider?**

APESB supports the inclusion of provisions relating to tax planning products or arrangements developed by a third-party provider, especially the guidance pertaining to referral fees and commissions.

However, we disagree that the professional accountant should be responsible for determining the credible basis of the tax planning service if they have referred the client to another provider with the expertise to deal with the client's tax affairs.

The above circumstances must be distinguished from the situation when the accountant actively promotes a third party's tax planning products or arrangements. Accordingly, this obligation and its application need to be clarified to avoid unintended consequences.

### ***Multi-jurisdictional Tax Benefit***

**12. Do you agree with the IESBA's proposals regarding a multi-jurisdiction tax benefit as described in Section VII.L above?**

APESB supports the intent of proposed provisions regarding a multi-jurisdiction tax benefit.

Stakeholders at the APESB roundtable provided mixed feedback on these provisions. Some were supportive, whereas others did not believe it is reasonable for professional accountants to advise the client to voluntarily disclose to the tax authorities or government about multi-jurisdiction tax.

### ***Proposed Consequential and Conforming Amendments***

**13. Do you agree with the proposed consequential amendments to Section 321 as described in Section VII.M above?**

APESB agrees with the proposed consequential amendments to Section 321.

A stakeholder who attended the APESB Roundtable noted that the existing provisions in section 321 are appropriate when a client is "opinion shopping." However, the stakeholder believed that when a client seeks a legitimate second opinion to support or get further comfort on a transaction, it would be inappropriate to require the professional accountant to review the original opinion and interact with the initial accountant or other advisers as there should be independence of advisors.

The stakeholder believed it would taint the second adviser, particularly if the first adviser is seen as someone of "greater" standing in the profession and the community (i.e., intimidation threat). Accordingly, the stakeholder believed that the accountant should

determine if the client had previously received a negative opinion on the proposed transaction.

### **APESB's General Comments**

APESB's general comments on the Tax Planning and Related Service Exposure Draft for the IESBA's consideration are as follows:

**(a) *Small- and Medium- Sized Entities (SMEs) and SMPs***

Some aspects of these proposals will be very challenging for SMPs and SMEs to implement, such as public interest considerations and the stand-back test. However, if IESBA addresses APESB's recommendations and specific comments noted above, that should provide greater clarity to SMPs and SMEs.

**(b) *Regulators and Audit Oversight Bodies***

APESB has incorporated the comments and observations of tax regulators in its responses to IESBA's specific questions.

**(c) *Developing Nations***

Not applicable.

**(d) *Translations***

Not applicable.