

# Revisions to APES 110 Code of Ethics for Professional Accountants (including Independence Standards) Addressing Tax Planning and Related Services

EXPOSURE DRAFT 0X/24

ISSUED XXX 2024

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## Commenting on this Exposure Draft

This Exposure Draft, *Proposed Revisions to APES 110 Code of Ethics for Professional Accountants (including Independence Standards) Addressing Tax Planning and Related Services*, was developed and approved by the Accounting Professional & Ethical Standards Board Limited (APESB).

The proposals in this Exposure Draft may be modified in light of comments received before being issued in final form. **Comments are requested by XX August 2024.**

Comments should be addressed to:

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APESB would prefer that respondents express a clear overall opinion on whether the proposed amendments, as a whole, are supported and that this opinion be supplemented by detailed comments, whether supportive or critical, on any matter. APESB regards both critical and supportive comments as essential to a balanced view of the proposed amendments.

APESB also invites comments regarding these proposed amendments from small and medium-sized firms.

Respondents are asked to submit their comments electronically through the APESB website, using the link <https://apesb.org.au/current-projects/>.

Please submit comments in both a PDF and Word file. All comments will be considered a matter of public record and will ultimately be posted on the website [www.apesb.org.au](http://www.apesb.org.au).

APESB prefers that comments are submitted via its website. However, if there are practical difficulties, comments can also be sent to [sub@apesb.org.au](mailto:sub@apesb.org.au) or mailed to the address noted above. While APESB prefers formal submissions we also encourage opinions and comments to be sent via email to [sub@apesb.org.au](mailto:sub@apesb.org.au).

## Obtaining a copy of this Exposure Draft

This Exposure Draft is available on the APESB website: [www.apesb.org.au](http://www.apesb.org.au)

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## Reasons for issuing Exposure Draft 0X/24

Accounting Professional & Ethical Standards Board Limited (APESB) proposes to amend APES 110 *Code of Ethics for Professional Accountants (including Independence Standards)* (the Code) to incorporate changes made by the International Ethics Standards Board for Accountants (IESBA) to the *International Code of Ethics for Professional Accountants (including International Independence Standards)* (the International Code).

The revisions strengthen the Code in guiding professional accountants in both business and public practice when providing tax planning services to clients or performing tax planning activities for employing organisations. The enhanced guidance also assists professional accountants in exercising judgement in navigating the complexities and uncertainties of tax planning and determining the appropriate course of action in the circumstances.

## Key requirements and guidance in Exposure Draft 0X/24

This Exposure Draft sets out the proposed amendments to the current version of the Code. The key proposals are summarised below:

- New Sections 280 and 380 to assist Members in Business and Members in Public Practice in identifying and evaluating threats to the fundamental principles when engaging in tax planning. The new sections set out:
  - a description of tax planning activities or services (proposed paragraphs 280.5 A1 to 280.5 A4, and 380.5 A1 to 380.5 A4);
  - that the scope includes related services that are based on or linked to a tax planning arrangement developed by a third-party provider (proposed paragraphs 280.6 A1, 280.6 A2, 380.6 A1, and 380.6 A2);
  - the exclusion of illegal tax evasion practices (proposed paragraphs 280.7 A1 and 380.7 A1);
  - requirements on understanding applicable tax laws and regulations and advising employing organisations or clients to comply with them (proposed paragraphs R280.8 and R380.8);
  - References to Sections 260 and 360 when responding to non-compliance with tax laws and regulations (proposed paragraphs 280.8 A1 and 380.8 A1);
  - the responsibilities of management and Those Charged with Governance in relation to tax planning (proposed paragraphs 280.9 A1 and 380.9 A1);
  - requirements for Members to exercise professional judgement to establish a credible basis for tax planning advice in circumstances of uncertainty (proposed paragraphs R280.12, R280.14, R380.12 and R380.14);
  - new guidance for situations in relation to multi-jurisdictional tax benefits (proposed paragraphs 280.16 A1, 280.16 A2, 380.16 A1 and 380.16 A2);
  - new examples and factors to consider when identifying and evaluating threats arising from tax planning, including actions and safeguards to address such threats (proposed paragraphs 280.19 A1 to 280.19 A5, and 380.19 A1 to 380.19 A5);
  - New requirements and guidance on possible actions a Member can take when a disagreement arises with the client (proposed paragraphs R280.21 to 280.22 A2, and R380.21 to R380.23);
  - requirements and guidance where Members in Public Practice advise on a tax planning product or arrangement developed by a third party (proposed paragraphs R380.24 and R380.25);

- Consequential amendments to Section 321 when Members of Public Practice provide a second opinion on the application of tax laws and regulations (proposed paragraphs 321.3 A1, 321.3 A3 and R321.4); and
- Editorial amendments.

Stakeholders should not rely on this summary in the Exposure Draft to determine what changes, if any, are required to their current practices, policies or methodologies. Stakeholders should read the entire Exposure Draft to determine the significance of its proposals.

A marked-up version of ED 0X/24 compared to the extant provisions in the Code can be found on APESB's website at: [\[Link to be included when ED is approved and released\]](#).

For further details in relation to the proposed amendments in this Exposure Draft, refer to the IESBA's Basis for Conclusions available on the IESBA's website: [www.ethicsboard.org](http://www.ethicsboard.org).

### **Proposed Operative Date**

It is proposed that the proposed revisions will be effective for engagements commencing on or after 1 July 2025. Early adoption of the revised Standard will be permitted.

# Revisions to APES 110 Code of Ethics for Professional Accountants (including Independence Standards) Addressing Tax Planning and Related Services

XXX 2024

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# **CODE OF ETHICS FOR PROFESSIONAL ACCOUNTANTS (INCLUDING INDEPENDENCE STANDARDS)**

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## SCOPE AND APPLICATION

- 1.1 Accounting Professional & Ethical Standards Board Limited (APESB) issues APES 110 *Code of Ethics for Professional Accountants (including Independence Standards)* (**this Code**). This Code is operative from 1 January 2020 and supersedes APES 110 *Code of Ethics for Professional Accountants* (issued in December 2010 and subsequently amended in December 2011, May 2013, November 2013, May 2017 and April 2018). Earlier adoption of this Code is permitted. Transitional provisions relating to **Key Audit Partner** rotation, revisions to Part 4B, the role and mindset expected of **Members** provisions, the objectivity of **Engagement Quality Reviewers** and other appropriate reviewers, the fee-related provisions, the quality management-related conforming amendments, the non-assurance services provisions, the revisions to the definition of **Engagement Team** and **Group Audit**, the definitions of listed entity, **Publicly Traded Entity** and **Public Interest Entity**, ~~and~~ technology-related revisions, and tax planning and related services revisions apply as specified in the respective transitional provisions on page 26.

*[Paragraphs R1.2 to 1.8 of the extant Code's Scope and Application remain unchanged.]*

# **PART 2 – MEMBERS IN BUSINESS (INCLUDING EMPLOYMENT RELATIONSHIPS OF MEMBERS IN PUBLIC PRACTICE)**

## **SECTION 280**

### **TAX PLANNING ACTIVITIES**

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#### **Introduction**

- 280.1 Members are required to comply with the fundamental principles and apply the conceptual framework set out in Section 120 to identify, evaluate and address threats.
- 280.2 Performing tax planning activities might create self-interest, self-review, advocacy or intimidation threats to compliance with the fundamental principles.
- 280.3 This section sets out requirements and application material relevant to applying the conceptual framework in relation to the performance of tax planning activities. This section also requires a Member to comply with relevant tax laws and regulations when performing such activities.

#### **Requirements and Application Material**

##### **General**

##### *Members' Public Interest Role in Relation to Tax Planning Activities*

- 280.4 A1 Members play an important role in tax planning by contributing their expertise and experience to assist employing organisations in meeting their tax planning goals while complying with tax laws and regulations. In doing so, Members help to facilitate a more efficient and effective operation of a jurisdiction's tax system, which is in the public interest.
- 280.4 A2 Employing organisations are entitled to organise their affairs for tax planning purposes. While there are a variety of ways to achieve such purposes, employing organisations have a responsibility to pay taxes as determined by the relevant tax laws and regulations. In this regard, Members' role is to use their expertise and experience to assist their employing organisations in achieving their tax planning goals and meeting their tax obligations. However, when Members provide such assistance, it might involve certain tax minimisation arrangements that, although not prohibited by tax laws and regulations, might create threats to compliance with the fundamental principles.
- 280.4 A3 It is ultimately for a tribunal, court or other appropriate adjudicative body to determine whether a tax planning arrangement complies with the relevant tax laws and regulations.

##### *Description of Tax Planning Activities*

- 280.5 A1 Tax planning activities are advisory activities designed to assist an employing organisation in planning or structuring its affairs in a tax-efficient manner.



280.5 A2 Tax planning activities cover a broad range of topics or areas. Examples of such activities include:

- Advising management on structuring the employing organisation's international operations to minimise its overall taxes.
- Advising on the structuring of transfer pricing arrangements, taking into account tax-related transfer pricing guidelines.
- Advising management on the utilisation of losses in a tax-efficient manner for the employing organisation.
- Advising the employing organisation on the structuring of its capital distribution strategy in a tax-efficient manner.
- Advising management on structuring the employing organisation's compensation strategy for senior executives to optimise the tax benefits for the employing organisation.
- Advising a non-profit employing organisation on how to structure its business to avoid breaching its non-profit status.
- Advising management on structuring the employing organisation's investments to take advantage of tax incentives offered by jurisdictions or localities.

280.5 A3 Tax planning activities do not include activities that are generally referred to as tax compliance or tax preparation, which are activities to assist the employing organisation in fulfilling its filing, reporting, payment and other obligations under tax laws and regulations. However, if a tax activity comprises both tax planning and tax compliance, the portion that relates to tax planning is covered by this section.

280.5 A4 This section applies regardless of the nature of the employing organisation, including whether it is a Public Interest Entity.

### **Related Activities**

280.6 A1 There might be circumstances where a Member is involved in performing a related activity for an employing organisation that is based on or linked to a tax planning arrangement developed by a third-party provider. In such circumstances, the provisions of this section apply to the underlying tax planning arrangement.

280.6 A2 Examples of such related activities include:

- Assisting the employing organisation in resolving a dispute with the tax authority on the tax planning arrangement
- Representing the employing organisation in administrative or court proceedings regarding the tax planning arrangement.
- Implementing the tax planning arrangement for the employing organisation.
- Advising the employing organisation on an acquisition where the valuation depends on the tax planning arrangement established by the target.

### **Compliance with Laws and Regulations**

280.7 A1 This section does not address tax evasion, which is illegal.

Anti-avoidance Laws and Regulations

**R280.8** **Where there are laws and regulations, including those that might be referred to as anti-avoidance rules, that limit or prohibit certain tax planning arrangements, a Member shall obtain an understanding of those laws and regulations and advise the employing organisation to comply with them when performing tax planning activities.**

Non-compliance with Tax Laws and Regulations

280.8 A1 If, in the course of performing a tax planning activity, a Member becomes aware of tax evasion or suspected tax evasion, or other non-compliance or suspected non-compliance with tax laws and regulations by an employing organisation, management, Those Charged with Governance or other individuals working for or under the direction of the employing organisation, the requirements and application material set out in Section 260 apply.

**Responsibilities of Management and Those Charged with Governance of the Employing Organisation**

280.9 A1 In relation to tax planning, management, with the oversight of Those Charged with Governance, has a number of responsibilities, including:

- Ensuring that the employing organisation's tax affairs are conducted in accordance with the relevant tax laws and regulations.
- Maintaining all the books and records and implementing the systems of internal control necessary to enable the employing organisation to fulfill its tax compliance obligations.
- Engaging experts to advise on relevant aspects of the tax planning arrangement.
- Deciding whether to accept and implement the Member's recommendation or advice on a tax planning arrangement.
- Authorising the submission of the employing organisation's tax returns and dealing with the relevant tax authorities in a timely manner.
- Making such disclosures to the relevant tax authorities as might be required by tax laws and regulations or as might be necessary to support a tax position, including details of any tax planning arrangements.
- Making appropriate disclosure of tax strategy, policies or other tax-related matters in the Financial Statements or other relevant public documents in accordance with applicable reporting requirements.
- Ensuring that the employing organisation's tax planning arrangements are consistent with any publicly disclosed tax strategy or policies.

**Responsibilities of All Members**

**R280.10** **As part of performing a tax planning activity for an employing organisation, the Member shall obtain an understanding of the nature of the tax planning activity, including:**

- (a) The purpose, facts and circumstances of the tax planning arrangement; and**
- (b) The relevant tax laws and regulations.**

280.11 A1 A Member is expected to apply professional competence and due care in accordance with Subsection 113 when performing a tax planning activity. The Member is also expected to have an inquiring mind and exercise professional judgement in accordance with Section 120 when considering the specific facts and circumstances relating to the tax planning activity.

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

**R280.12 A Member shall recommend or otherwise advise on a tax planning arrangement for an employing organisation only if the Member has determined that there is a credible basis in laws and regulations<sup>1</sup> for the arrangement.**

280.12 A1 The determination of whether there is a credible basis involves the exercise of professional judgement by the Member. This determination will vary from jurisdiction to jurisdiction based on the relevant laws and regulations at the time.

280.12 A2 If the Member determines that the tax planning arrangement does not have a credible basis in laws and regulations, paragraph R280.12 does not preclude the Member from explaining to the Member's immediate superior or other responsible individual within the employing organisation the Member's rationale for the determination or advising on an alternative arrangement that has a credible basis.

280.12 A3 Paragraph R280.12 also does not preclude the Member from assisting the employing organisation to remediate or rectify a tax planning arrangement which lacks a credible basis. Such type of activity is a related activity as described in paragraphs 280.6 A1 and A2. This includes, for example:

- Assisting the employing organisation to restructure a tax planning arrangement to achieve a credible basis as part of a tax dispute resolution activity.
- Agreeing with the employing organisation appropriate changes to the tax planning arrangement to achieve a credible basis as part of representing the employing organisation in administrative or court proceedings.

280.12 A4 Examples of actions that a Member might take to determine that there is a credible basis in relation to a particular tax planning arrangement include:

- Reviewing the relevant facts and circumstances, including the economic purpose and substance of the arrangement.
- Assessing the reasonableness of any assumptions.
- Reviewing the relevant tax legislation.
- Reviewing legislative proceedings that discuss the intent of the relevant tax legislation.
- Reviewing relevant literature such as court decisions, professional or industry journals, and tax authority rulings or guidance.
- Considering whether the basis used for the proposed arrangement is an established practice that has not been challenged by the relevant tax authorities.

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<sup>1</sup> Members should consider applicable legal precedents, in addition to the laws and regulations relating to the promoter penalty regime in Division 290 of Schedule 1 to the *Taxation Administration Act 1953*.

- Considering how likely the proposed arrangement would be accepted by the relevant tax authorities if all the relevant facts and circumstances were disclosed.
- Consulting with legal counsel or other experts within or outside the employing organisation regarding what a reasonable interpretation of the relevant tax laws and regulations might be.
- Consulting with the relevant tax authorities, where applicable.

**R280.13 If the Member becomes aware of circumstances that might impact the previous determination of the credible basis, the Member shall re-assess the validity of that basis.**

*Consideration of the Overall Tax Planning Recommendation or Advice*

**R280.14 In addition to determining that there is a credible basis for the tax planning arrangement, the Member shall exercise professional judgement and consider the reputational, commercial and wider economic consequences that could arise from the way stakeholders might view the arrangement.**

280.14 A1 The reputational and commercial consequences might relate to personal or business implications to the employing organisation or implications to the reputation of the employing organisation and the profession from a prolonged dispute with the relevant tax or other authorities. The implications to the employing organisation might involve adverse publicity, costs, fines or penalties, loss of management time over a significant period, and potential adverse consequences for the employing organisation.

280.14 A2 An awareness of the wider economic consequences might take into account the Member's general understanding of the current economic environment and the impact of the tax planning arrangement on the tax base of the jurisdiction, or the relative impacts of the arrangement on the tax bases of multiple jurisdictions, where the employing organisation operates.

**R280.15 If, having considered the matters set out in paragraph R280.14, the Member decides not to recommend or otherwise advise on a tax planning arrangement that the employing organisation would like to pursue, the Member shall inform management and, if appropriate, Those Charged with Governance, of this and explain the basis for the Member's conclusion.**

*Tax Planning Arrangements Involving Multiple Jurisdictions*

280.16 A1 There might be circumstances where a Member becomes aware that an employing organisation is obtaining a tax benefit from accounting for the same transaction in more than one jurisdiction, especially if there is no tax treaty between the jurisdictions. In such circumstances, while the employing organisation might be in compliance with the tax laws and regulations of each jurisdiction, the Member might advise management to disclose to the relevant tax authorities the particular facts and circumstances and the tax benefits derived from the transaction in the different jurisdictions.

280.16 A2 Relevant factors the Member might consider in determining whether to make such disclosure include:

- The significance of the tax benefits in the relevant jurisdictions.
- Stakeholders' perceptions of the employing organisation if the facts and circumstances were known to the stakeholders.
- Whether there are globally or nationally accepted principles or practices regarding disclosure of similar situations to the tax authorities in the relevant jurisdictions.

### **Circumstances of Uncertainty**

280.17 A1 In determining whether there is a credible basis for the tax planning arrangement, a Member might encounter circumstances giving rise to uncertainty as to whether a proposed tax planning arrangement will be in compliance with the relevant tax laws and regulations. Such uncertainty makes it more challenging for the Member to determine that there is a credible basis in laws and regulations for the tax planning arrangement and might, therefore, create threats to compliance with the fundamental principles.

280.17 A2 Circumstances that might give rise to uncertainty include:

- Difficulty in establishing an adequate factual basis.
- Difficulty in establishing an adequate basis of assumptions.
- Lack of clarity in the tax laws and regulations and their interpretation, including:
  - Gaps in the tax laws and regulations.
  - Challenges to previous court rulings.
  - Conflicting tax laws and regulations in different jurisdictions in circumstances involving cross-border transactions.
  - Innovative business models not addressed by the current tax laws and regulations.
  - Recent court or tax authority rulings or positions that cast doubt on similar tax planning arrangements.
  - Complexity in interpreting or applying the tax laws and regulations from a technical or legal point of view.
  - Lack of a legal precedent, ruling or position.
- Lack of clarity regarding the economic purpose and substance of the tax planning arrangement.
- Lack of clarity about the ultimate beneficiaries of the tax planning arrangement.

**R280.18** **Where there is uncertainty as to whether a tax planning arrangement is or will be in compliance with the relevant tax laws and regulations, a Member shall discuss the uncertainty with management and, if appropriate, Those Charged with Governance.**

280.18 A1 The discussion serves a number of purposes, including:

- Explaining the Member's assessment about how likely the relevant tax authorities are to have a view that supports the tax planning arrangement where there is a lack of clarity in the interpretation of the relevant tax laws and regulations.

- Considering any assumptions made when establishing the basis on which the tax planning advice is provided.
- Obtaining any additional information from management and, if appropriate, Those Charged with Governance that might reduce the uncertainty.
- Discussing any reputational, commercial or wider economic consequences in pursuing the tax planning arrangement.
- Discussing potential courses of action to mitigate the possibility of adverse consequences for the employing organisation, including consideration of disclosure to the relevant tax authorities.

### **Potential Threats Arising from Performing a Tax Planning Activity**

280.19 A1 Performing a tax planning activity for an employing organisation might create a self-interest, self-review, advocacy or intimidation threat. For example:

- A self-review threat might be created when a Member has recently performed a valuation activity for the employing organisation for tax purposes, the output of which is then relied upon or is a key input to a tax planning activity for the employing organisation.
- A self-interest threat might be created when a Member's career advancement prospects depend on developing a creative tax planning arrangement for which the interpretation of the relevant tax laws and regulations is unclear.
- A self-interest threat might be created when a Member participates in an incentive compensation scheme impacted by the Member's design of a tax planning arrangement.
- A self-interest threat might be created when a Member is in possession of Confidential Information obtained from the Member's involvement in formulating or drafting tax policy, laws or regulations for a government agency and the Confidential Information would be valuable in advising the Member's employing organisation in its tax planning arrangements.
- Self-interest and advocacy threats might be created when a Member advocates an employing organisation's position in a tax planning arrangement which the Member previously advised on before a tax authority when there are indications that the arrangement might not have a credible basis in laws and regulations.
- Self-interest and intimidation threats might be created when a dominant owner or leader of the employing organisation exerts significant influence over the design of a particular tax arrangement, in a way that might influence the Member's determination that there is a credible basis for the arrangement in laws and regulations.
- Self-interest and intimidation threats might be created when a Member faces potential dismissal over the position the employing organisation is insisting on pursuing regarding a tax planning arrangement.

280.19 A2 Factors that are relevant in evaluating the level of such threats include:

- The degree of transparency regarding the underlying business transaction or circumstances, including, where applicable, the identity of the ultimate beneficiaries.
- Whether the tax planning arrangement has a clear economic purpose and substance based on the underlying business transaction or circumstances.
- The nature and complexity of the underlying business transaction or circumstances.
- The complexity or clarity of the relevant tax laws and regulations.
- Whether the Member knows, or has reason to believe, that the tax planning arrangement would be contrary to the intent of the relevant tax legislation.
- The number of jurisdictions involved and the nature of their tax regimes.
- The extent of the Member's expertise and experience in the relevant tax areas.
- The significance of the potential tax savings.
- The nature and significance of any incentives offered to the Member to develop the arrangement.
- The extent to which the Member is aware that the tax planning arrangement reflects an established practice that has not been challenged by the relevant tax authorities.
- Whether there is pressure being exerted on the Member.
- The degree of urgency in implementing the tax planning arrangement.
- Whether it is a tax planning arrangement used for multiple clients with little modification for the employing organisation's specific circumstances.
- The organisational culture of the employing organisation.

280.19 A3 Examples of actions that might eliminate such threats include:

- Advising the employing organisation to structure the tax planning arrangement so that it is consistent with an existing interpretation or ruling issued by the relevant tax authorities.
- Obtaining an advance ruling from the relevant tax or other authorities, where possible.
- Advising management not to pursue the tax planning arrangement.

280.19 A4 Examples of actions that might be safeguards to address such threats include:

- Establishing the identity of the ultimate beneficiaries.
- Advising the employing organisation to structure the tax planning arrangement so that it better aligns with the underlying economic purpose and substance.
- Advising the employing organisation to structure the tax planning arrangement based on an established practice that is currently not subject to challenge by the relevant tax authorities or is known to have been accepted by the relevant tax authorities.
- Consulting with a legal counsel or other expert within or outside the employing organisation in the relevant tax areas.

- Obtaining an opinion from an appropriately qualified professional (such as legal counsel or another Member) regarding the interpretation of the relevant tax laws and regulations as applied to the particular circumstances.
- Having a tax expert, who is not otherwise involved in the tax planning activity, review any work performed or conclusions reached by the Member with respect to the tax planning arrangement.
- Having the employing organisation provide full transparency about the tax planning arrangement to the relevant tax authorities, including the goals, business and legal aspects, and ultimate beneficiaries of the tax planning arrangement.

280.19 A5 Examples of steps a Member might take to establish the identity of the ultimate beneficiaries include:

- Making inquiries of management and others within or outside the employing organisation, having regard to the principle of confidentiality.
- Reviewing the employing organisation's tax records, Financial Statements and other relevant corporate records.
- Researching relevant public records.

#### Communication of Basis of the Tax Planning Recommendation or Advice

R280.20 A Member shall explain to management and, if appropriate, Those Charged with Governance the basis on which the Member recommended or otherwise advised on a tax planning arrangement to the employing organisation.

#### Disagreement on the Tax Planning Arrangement

R280.21 If the Member disagrees with the Member's immediate superior or other responsible individual within the employing organisation that a tax planning arrangement that the employing organisation would like to pursue has a credible basis, the Member shall:

- Inform the immediate superior or other responsible individual within the employing organisation, and if appropriate, Those Charged with Governance, of the Member's assessment;
- Communicate to them the potential consequences of pursuing the arrangement; and
- Advise them not to pursue the arrangement.

R280.22 If the immediate superior or other responsible individual within the employing organisation decides to pursue the tax planning arrangement, despite the Member's advice to the contrary, the Member shall consider:

- Taking steps to have the details of the arrangement and the difference of views communicated with the next higher level of authority within the employing organisation and, if appropriate, Those Charged with Governance;
- Advising the employing organisation to make full disclosure of the arrangement to the relevant tax authorities; and
- Communicating the details of the arrangement and the difference of views to the employing organisation's external auditor, if any.



280.22 A1 In light of the response of the immediate superior or other responsible individual within the employing organisation to the Member's advice, the Member might also consider whether there is a need to resign from the employing organisation.

280.22 A2 Many employing organisations have established protocols and procedures regarding how to raise ethical or other concerns internally. These protocols and procedures include, for example, an ethics policy or internal whistleblowing mechanism. Such protocols and procedures might allow matters to be reported anonymously through designated channels.

### Documentation

AUST R280.23 When performing a tax planning activity, a Member shall document on a timely basis:

- The purpose, circumstances and substance of the tax planning arrangement.
- The identity of the ultimate beneficiaries.
- The nature of any uncertainties.
- The Member's analysis, the courses of action considered, the judgements made, and the conclusions reached in advising the employing organisation on developing the tax planning arrangement.
- The results of discussions with the Member's immediate superior and appropriate levels of management, Those Charged with Governance and other parties.
- The response of the Member's immediate superior, management and, where applicable, Those Charged with Governance to the Member's advice.
- Any disagreement with the Member's immediate superior, management and, where applicable, Those Charged with Governance.

280.23 A1~~2~~ Preparing such documentation assists the Member to:

- Consider the reputational, commercial and wider economic consequences that could arise from the way stakeholders might view the arrangement.
- Develop the Member's analysis of the facts, circumstances, relevant tax laws and regulations and any assumptions made or changed.
- Record the basis of the professional judgements at the time they were made or changed.
- Support the position if the tax planning arrangement is challenged by the relevant tax authorities.
- Demonstrate that the Member has complied with the provisions in this section.

# PART 3 – MEMBERS IN PUBLIC PRACTICE

## SECTION 321

### SECOND OPINIONS

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#### Introduction

*[Paragraphs 321.1 to 321.2 of extant Section 321 remain unchanged.]*

#### Requirements and Application Material

##### General

321.3 A1 A **Member in Public Practice** might be asked to provide a second opinion on the application of [tax laws and regulations, and Australian Accounting Standards, Auditing and Assurance Standards](#), reporting or other standards or principles to (a) specific circumstances, or (b) transactions by, or on behalf of a company or an entity that is not an existing client. A threat, for example, a self-interest threat to compliance with the principle of professional competence and due care, might be created if the second opinion is not based on the same facts that the [Existing or Predecessor Accountant or other service provider](#) had, or is based on inadequate evidence.

*[Paragraph 321.3 A2 of extant Section 321 remains unchanged.]*

321.3 A3 Examples of actions that might be safeguards to address such a self-interest threat include:

- With the client's permission, obtaining information from the [Existing or Predecessor Accountant or other service provider](#).
- Describing the limitations surrounding any opinion in communications with the client.
- Providing the [Existing or Predecessor Accountant or other service provider](#) with a copy of the opinion.

*When Permission to Communicate is Not Provided*

R321.4 If an entity seeking a second opinion from a **Member in Public Practice** will not permit the **Member** to communicate with the [Existing or Predecessor Accountant or other service provider](#), the **Member** shall determine whether the **Member** may provide the second opinion sought.

## **SECTION 380**

### **TAX PLANNING SERVICES**

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#### **Introduction**

- 380.1 Members in Public Practice are required to comply with the fundamental principles and apply the conceptual framework set out in Section 120 to identify, evaluate and address threats.
- 380.2 Providing tax planning services might create self-interest, self-review, advocacy, or intimidation threats to compliance with the fundamental principles.
- 380.3 This section sets out requirements and application material relevant to applying the conceptual framework in relation to the provision of tax planning services. This section also requires a Member to comply with relevant tax laws and regulations when providing such services.

#### **Requirements and Application Material**

##### **General**

##### *Members in Public Practices' Public Interest Role in Relation to Tax Planning Services*

- 380.4 A1 Members in Public Practice play an important role in tax planning by contributing their expertise and experience to assist clients in meeting their tax planning goals while complying with tax laws and regulations. In doing so, Members help to facilitate a more efficient and effective operation of a jurisdiction's tax system, which is in the public interest.
- 380.4 A2 Clients are entitled to organise 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. In this regard, Members in Public Practice's role is to use their expertise and experience to assist their clients in achieving their tax planning goals and meeting their tax obligations. However, when Members provide such assistance, it might involve certain tax minimisation arrangements that, although not prohibited by tax laws and regulations, might create threats to compliance with the fundamental principles.
- 380.4 A3 It is ultimately for a tribunal, court or other appropriate adjudicative body to determine whether a tax planning arrangement complies with the relevant tax laws and regulations.

##### *Description of Tax Planning Services*

- 380.5 A1 Tax planning services are advisory services designed to assist a client, whether an individual or an entity, in planning or structuring the client's affairs in a tax-efficient manner.
- 380.5 A2 Tax planning services cover a broad range of topics or areas. Examples of such services include:
- Advising an individual to structure their tax affairs to achieve investment, retirement or estate planning goals.
  - Advising an individual business owner on structuring their ownership and income from the business to minimise their overall taxes.

- Advising an entity on structuring its international operations to minimise its overall taxes.
- Advising on the structuring of transfer pricing arrangements, taking into account tax-related transfer pricing guidelines.
- Advising on the utilisation of losses in a tax-efficient manner.
- Advising an entity on the structuring of its capital distribution strategy in a tax-efficient manner.
- Advising an entity on structuring its compensation strategy for senior executives to optimise the tax benefits.

380.5 A3 Tax planning services do not include services that are generally referred to as tax compliance or tax preparation, which are services to assist the client in fulfilling the client's filing, reporting, payment and other obligations under tax laws and regulations. However, if a tax service comprises both tax planning and tax compliance, the portion that relates to tax planning is covered by this section.

380.5 A4 This section applies regardless of the nature of the client, including whether it is Public Interest Entity.

### **Related Services**

380.6 A1 There might be circumstances where a Member in Public Practice is engaged to provide a related service to a client that is based on or linked to a tax planning arrangement developed by the client or a third-party provider. In such circumstances, the provisions of this section apply to the underlying tax planning arrangement.

380.6 A2 Examples of such related services include:

- Assisting the client in resolving a dispute with the tax authority on the tax planning arrangement.
- Representing the client in administrative or court proceedings regarding the tax planning arrangement.
- Implementing the tax planning arrangement for the client.
- Advising the client on an acquisition where the valuation depends on the tax planning arrangement established by the target.
- Advising the client on estate planning based on a tax planning arrangement established for the client's business.

### **Compliance with Laws and Regulations**

380.7 A1 This section does not address tax evasion, which is illegal.

#### Anti-avoidance Laws and Regulations

**R380.8 Where there are laws and regulations, including those that might be referred to as anti-avoidance rules, that limit or prohibit certain tax planning arrangements, a Member in Public Practice shall obtain an understanding of those laws and regulations and advise the client to comply with them when providing tax planning services.**

## Non-compliance with Tax Laws and Regulations

380.8 A1 If, in the course of providing tax planning services, a Member in Public Practice becomes aware of tax evasion or suspected tax evasion, or other non-compliance or suspected non-compliance with tax laws and regulations by a client, management, Those Charged with Governance or other individuals working for or under the direction of the client, the requirements and application material set out in Section 360 apply.

## Responsibilities of Management and Those Charged with Governance

380.9 A1 In relation to tax planning, management, with the oversight of Those Charged with Governance, has a number of responsibilities, including:

- Ensuring that the client's tax affairs are conducted in accordance with the relevant tax laws and regulations.
- Maintaining all the books and records and implementing the systems of internal control necessary to enable the client to fulfill its tax compliance obligations.
- Making available all the facts and other relevant information needed to enable the Member in Public Practice to perform the tax planning service.
- Engaging experts to advise on relevant aspects of the tax planning arrangement.
- Deciding whether to accept and implement the Members in Public Practice's recommendation or advice on a tax planning arrangement.
- Authorising the submission of the client's tax returns and ensuring that any matters raised by the relevant tax authorities are addressed in a timely manner.
- Making such disclosures to the relevant tax authorities as might be required by tax laws and regulations or as might be necessary to support a tax position, including details of any tax planning arrangements.
- Making appropriate disclosure of tax strategy, policies or other tax-related matters in the Financial Statements or other relevant public documents in accordance with applicable reporting requirements.
- Ensuring that the client's tax planning arrangements are consistent with any publicly disclosed tax strategy or policies.

## Responsibilities of All Members in Public Practice

R380.10 **As part of providing a tax planning service, a Member in Public Practice shall obtain an understanding of the nature of the engagement, including:**

- (a) Knowledge and understanding of the client, its owners, management and Those Charged with Governance, and its business activities;**
- (b) The purpose, facts and circumstances of the tax planning arrangement; and**
- (c) The relevant tax laws and regulations.**

380.10 A1 The requirements and application material in Section 320 apply with respect to client and engagement acceptance.

380.10 A2 A Member in Public Practice might be engaged to provide a second opinion on a tax planning arrangement. In addition to the provisions in this section, the requirements and application material in Section 321 also apply in such circumstances.

380.11 A1 A Member in Public Practice is expected to apply professional competence and due care in accordance with Subsection 113 when providing a tax planning service. The Member is also expected to have an inquiring mind and exercise professional judgement in accordance with Section 120 when considering the specific facts and circumstances relating to the tax planning service.

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

**R380.12 A Member in Public Practice shall recommend or otherwise advise on a tax planning arrangement to a client only if the Member has determined that there is a credible basis in laws and regulations<sup>2</sup> for the arrangement.**

380.12 A1 The determination of whether there is a credible basis involves the exercise of professional judgement by the Member in Public Practice. This determination will vary from jurisdiction to jurisdiction based on the relevant laws and regulations at the time.

380.12 A2 If the Member in Public Practice determines that the tax planning arrangement does not have a credible basis in laws and regulations, paragraph R380.12 does not preclude the Member from explaining to the client the Member's rationale for the determination or advising on an alternative arrangement that has a credible basis.

380.12 A3 Paragraph R380.12 also does not preclude the Member in Public Practice from being engaged by the client, or otherwise assisting the client, to remediate or rectify a tax planning arrangement which lacks a credible basis. Such type of service is a related service as described in paragraphs 380.6 A1 and A2. This includes, for example:

- Assisting the client to restructure a tax planning arrangement to achieve a credible basis as part of a tax dispute resolution service.
- Agreeing with the client appropriate changes to the tax planning arrangement to achieve a credible basis as part of representing the client in administrative or court proceedings.

380.12 A4 Examples of actions that a Member in Public Practice might take to determine that there is a credible basis in relation to a particular tax planning arrangement include:

- Reviewing the relevant facts and circumstances, including the economic purpose and substance of the arrangement.
- Assessing the reasonableness of any assumptions.
- Reviewing the relevant tax legislation.
- Reviewing legislative proceedings that discuss the intent of the relevant tax legislation.
- Reviewing relevant literature such as court decisions, professional or industry journals, and tax authority rulings or guidance.
- Considering whether the basis used for the proposed arrangement is an established practice that has not been challenged by the relevant tax authorities.
- Considering how likely the proposed arrangement would be accepted by the relevant tax authorities if all the relevant facts and circumstances were disclosed.
- Consulting with legal counsel or other experts within or outside the Member in Public Practice's Firm regarding what a reasonable interpretation of the relevant laws and regulations might be.

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<sup>2</sup> Members should consider applicable legal precedents, in addition to the laws and regulations relating to the promoter penalty regime in Division 290 of Schedule 1 to the *Taxation Administration Act 1953*.

- Consulting with the relevant tax authorities, where applicable.

**R380.13 If, during the course of the engagement, the Member in Public Practice becomes aware of circumstances that might impact the previous determination of the credible basis, the Member shall re-assess the validity of that basis.**

*Consideration of the Overall Tax Planning Recommendation or Advice*

**R380.14 In addition to determining that there is a credible basis for the tax planning arrangement, the Member in Public Practice shall exercise professional judgement and consider the reputational, commercial and wider economic consequences that could arise from the way stakeholders might view the arrangement.**

380.14 A1 The reputational and commercial consequences might relate to personal or business implications to the client or implications to the reputation of the client and the profession from a prolonged dispute with the relevant tax or other authorities. The implications to the client might involve adverse publicity, costs, fines or penalties, loss of management time over a significant period, and potential adverse consequences for the client's business.

380.14 A2 An awareness of the wider economic consequences might take into account the Member in Public Practice's general understanding of the current economic environment and the impact of the tax planning arrangement on the tax base of the jurisdiction, or the relative impacts of the arrangement on the tax bases of multiple jurisdictions, where the client operates.

**R380.15 If, having considered the matters set out in paragraph R380.14, the Member in Public Practice decides not to recommend or otherwise advise on a tax planning arrangement that the client would like to pursue, the Member shall inform the client of this and explain the basis for the Member's conclusion.**

*Tax Planning Arrangements Involving Multiple Jurisdictions*

380.16 A1 There might be circumstances where a Member in Public Practice becomes aware that a client is obtaining a tax benefit from accounting for the same transaction in more than one jurisdiction, especially if there is no tax treaty between the jurisdictions. In such circumstances, while the client might be in compliance with the tax laws and regulations of each jurisdiction, the Member might advise the client to disclose to the relevant tax authorities the particular facts and circumstances and the tax benefits derived from the transaction in the different jurisdictions.

380.16 A2 Relevant factors the Member in Public Practice might consider in determining whether to advise the client to make such disclosure include:

- The significance of the tax benefits in the relevant jurisdictions.
- Stakeholders' perceptions of the client if the facts and circumstances were known to the stakeholders.
- Whether there are globally or nationally accepted principles or practices regarding disclosure of similar situations to the tax authorities in the relevant jurisdictions.

**Circumstances of Uncertainty**

380.17 A1 In determining whether there is a credible basis for the tax planning arrangement, a Member in Public Practice might encounter circumstances giving rise to uncertainty as to whether a proposed tax planning arrangement will be in compliance with the relevant tax laws and regulations. Such uncertainty makes it more challenging for the Member to determine that there is a credible basis in laws and regulations for the tax planning arrangement and might, therefore, create threats to compliance with the fundamental principles.

380.17 A2 Circumstances that might give rise to uncertainty include:

- Difficulty in establishing an adequate factual basis.
- Difficulty in establishing an adequate basis of assumptions.
- Lack of clarity in the tax laws and regulations and their interpretation, including:
  - Gaps in the tax laws and regulations.
  - Challenges to previous court rulings.
  - Conflicting tax laws and regulations in different jurisdictions in circumstances involving cross-border transactions.
  - Innovative business models not addressed by the current tax laws and regulations.
  - Recent court or tax authority rulings or positions that cast doubt on similar tax planning arrangements.
  - Complexity in interpreting or applying the tax laws and regulations from a technical or legal point of view.
  - Lack of a legal precedent, ruling or position.
- Lack of clarity regarding the economic purpose and substance of the tax planning arrangement.
- Lack of clarity about the ultimate beneficiaries of the tax planning arrangement.

**R380.18** **Where there is uncertainty as to whether a tax planning arrangement is or will be in compliance with the relevant tax laws and regulations, a Member in Public Practice shall discuss the uncertainty with the client.**

380.18 A1 The discussion serves a number of purposes, including:

- Explaining the Member in Public Practice's assessment about how likely the relevant tax authorities are to have a view that supports the tax planning arrangement where there is a lack of clarity in the interpretation of the relevant tax laws and regulations.
- Considering any assumptions made when establishing the basis on which the tax planning advice is provided.
- Obtaining any additional information from the client that might reduce the uncertainty.
- Discussing any reputational, commercial or wider economic consequences in pursuing the tax planning arrangement.
- Discussing potential courses of action to mitigate the possibility of adverse consequences for the client, including consideration of disclosure to the relevant tax authorities.

### **Potential Threats Arising from Providing a Tax Planning Service**

380.19 A1 Providing a tax planning service to a client might create a self-interest, self-review, advocacy or intimidation threat. For example:

- A self-review threat might be created when a Member in Public Practice has recently provided a valuation service to a client for tax purposes, the output of which is then relied upon or is a key input to a tax planning service for the client.
- A self-interest threat might be created when a Member in Public Practice has a Direct Financial Interest in a client and the Member is involved in designing a tax planning arrangement that has an impact on the client's financial situation.



- Self-interest and advocacy threats might be created when a Member in Public Practice actively promotes a particular tax position a client should adopt.
- A self-interest threat might be created when a Member in Public Practice is in possession of Confidential Information obtained from the Member's involvement in formulating or drafting tax policy, laws or regulations for a government agency and the Confidential Information would be valuable to the Member in advising other clients on their tax planning arrangements.
- A self-interest threat might be created when a Member in Public Practice accepts a fee that might be perceived to be excessive for an engagement to develop a tax planning arrangement for which the interpretation of the relevant tax laws and regulations is uncertain or unclear.
- Self-interest and advocacy threats might be created when a Member in Public Practice advocates a client's position in a tax planning arrangement which the Member previously advised on before a tax authority when there are indications that the arrangement might not have a credible basis in laws and regulations.
- Self-interest and intimidation threats might be created when a Member in Public Practice provides services to a client who exerts significant influence over the design of a particular tax arrangement, in a way that might influence the Member's determination that there is a credible basis for the arrangement in laws and regulations.
- Self-interest and intimidation threats might be created when a Member in Public Practice is threatened with dismissal from the engagement or the Member's Firm concerning the position a client is insisting on pursuing regarding a tax planning arrangement.

380.19 A2 Factors that are relevant in evaluating the level of such threats include:

- The degree of transparency of the client, including, where applicable, the identity of the ultimate beneficiaries.
- Whether the tax planning arrangement has a clear economic purpose and substance based on the underlying business transaction or circumstances.
- The nature and complexity of the underlying business transaction or circumstances.
- The complexity or clarity of the relevant tax laws and regulations.
- Whether the Member in Public Practice knows, or has reason to believe, that the tax planning arrangement would be contrary to the intent of the relevant tax legislation.
- The number of jurisdictions involved and the nature of their tax regimes.
- The extent of the Member in Public Practice's expertise and experience in the relevant tax areas.
- The significance of the potential tax savings.
- The nature and amount of the fee for the tax planning service.
- The extent to which the Member in Public Practice is aware that the tax planning arrangement reflects an established practice that has not been challenged by the relevant tax authorities.
- Whether there is pressure being exerted by the client or another party on the Member in Public Practice.
- The degree of urgency in implementing the tax planning arrangement.
- Whether it is a tax planning arrangement used for multiple clients with little modification for the client's specific circumstances.

- The known previous behaviour or reputation of the client, including its organisational culture.

380.19 A3 Examples of actions that might eliminate such threats include:

- Referring the client to an expert outside the Member in Public Practice's Firm who has the necessary expertise and experience to advise the client on the tax planning arrangement.
- Advising the client to structure the tax planning arrangement so that it is consistent with an existing interpretation or ruling issued by the relevant tax authorities.
- Obtaining an advance ruling from the relevant tax or other authorities, where possible.
- Advising the client not to pursue the tax planning arrangement.

380.19 A4 Examples of actions that might be safeguards to address such threats include:

- Establishing the identity of the ultimate beneficiaries.
- Advising the client to structure the tax planning arrangement so that it better aligns with the underlying economic purpose and substance.
- Advising the client to structure the tax planning arrangement based on an established practice that is currently not subject to challenge by the relevant tax authorities or is known to have been accepted by the relevant tax authorities.
- Consulting with a legal counsel or other expert within or outside the Member in Public Practice's Firm in the relevant tax areas.
- Obtaining an opinion from an appropriately qualified professional (such as legal counsel or another Member in Public Practice) regarding the interpretation of the relevant tax laws and regulations as applied to the particular circumstances.
- Having an appropriate reviewer, who is not otherwise involved in providing the tax planning service, review any work performed or conclusions reached by the Member in Public Practice with respect to the tax planning arrangement.
- Having the client provide full transparency about the tax planning arrangement to the relevant tax authorities, including the goals, business and legal aspects, and ultimate beneficiaries of the tax planning arrangement.

380.19 A5 Examples of steps a Member in Public Practice might take to establish the identity of the ultimate beneficiaries include:

- Making inquiries of management and others within the client.
- Making inquiries of others within or outside the Firm who have dealt with the client, having regard to the principle of confidentiality.
- Reviewing the client's tax records, Financial Statements and other relevant corporate records.
- Making inquiries of registrars where the client or entities within its legal structure are incorporated concerning the relevant shareholders.
- Researching relevant public records.

**Communication of Basis of the Tax Planning Recommendation or Advice**

**R380.20 A Member in Public Practice shall explain the basis on which the Member recommended or otherwise advised on a tax planning arrangement to the client.**

## Disagreement with the Client

R380.21 If the Member in Public Practice disagrees that a tax planning arrangement that a client would like to pursue has a credible basis, the Member shall:

- (a) Inform the client of the basis of the Member's assessment;
- (b) Communicate to the client the potential consequences of pursuing the arrangement; and
- (c) Advise the client not to pursue the arrangement.

R380.22 If the client decides to pursue the tax planning arrangement despite the Member in Public Practice's advice to the contrary, the Member shall advise the client to:

- (a) Communicate internally to the appropriate level of management the details of the arrangement and the difference of views;
- (b) Consider making full disclosure of the arrangement to the relevant tax authorities; and
- (c) Consider communicating the details of the arrangement and the difference of views to the external auditor, if any.

380.22 A1 As part of communicating the matters set out in paragraphs R380.21 and R380.22, a Member in Public Practice might consider it appropriate to raise the relevant matters with Those Charged with Governance of the client.

R380.23 In light of the client's response to the Member in Public Practice's advice, the Member shall consider whether there is a need to withdraw from the engagement and the professional relationship.

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

R380.24 If a client engages a Member in Public Practice to advise on a tax planning product or arrangement developed by a third party, the Member shall:

- (a) Inform the client of any professional or business relationship the Member has with the third-party provider; and
- (d) Apply the provisions in this section with respect to the tax planning product or arrangement.

R380.25 If a Member in Public Practice recommends or refers a client to a third-party provider of tax planning services, the Member shall inform the client of any professional or business relationship the Member has with the third-party provider.

380.25 A1 Where the Member in Public Practice only recommends or refers a client to a third-party provider of tax planning services, the provisions of this section do not apply.

380.25 A2 If a Member in Public Practice receives a referral fee or commission from the third-party provider, the provisions in Section 330 apply.

## Documentation

AUST R380.26 When providing a tax planning service, a Member in Public Practice shall document on a timely basis:

- The purpose, circumstances and substance of the tax planning arrangement.
- The identity of the ultimate beneficiaries.
- The nature of any uncertainties.

- The Member's analysis, the courses of action considered, the judgements made, and the conclusions reached in advising the client on the tax planning arrangement.
- The results of discussions with the client and other parties.
- The client's response to the Member's advice.
- Any disagreement with the client.

380.26 A2 Preparing such documentation assists the Member in Public Practice to:

- Consider the reputational, commercial and wider economic consequences that could arise from the way stakeholders might view the arrangement.
- Develop the Member's analysis of the facts, circumstances, relevant tax laws and regulations and any assumptions made or changed.
- Record the basis of the professional judgements at the time they were made or changed.
- Support the position if the tax planning arrangement is challenged by the relevant tax authorities.
- Demonstrate that the Member has complied with the provisions in this section.

## TRANSITIONAL PROVISIONS

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*[Paragraphs 1 to 10 of the transitional provisions in the extant Code and amending standards remain unchanged.]*

### [Revisions to the Code for Tax Planning and Related Services](#)

11. [Revisions to the Code addressing Tax Planning and Related Services have effective dates as set out below.](#)

- [Section 280 will be effective for tax planning activities beginning on or after 1 June 2025.](#)
- [Section 380 and the consequential amendments to Section 321 will be effective for tax planning services beginning on or after 1 July 2025.](#)

[Tax planning services or activities commenced before 1 July 2025 may be continued and be completed under the extant provisions of the Code.](#)

## CONFORMITY WITH INTERNATIONAL PRONOUNCEMENTS

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### **APES 110 and the IESBA Code**

APES 110 incorporates the *International Code of Ethics for Professional Accountants (including International Independence Standards)* (IESBA Code) issued by the International Ethics Standards Board for Accountants (IESBA) in April 2018 and incorporating amendments up to April 2024<sup>3</sup>.

### **Compliance with the IESBA Code**

The principles and requirements of APES 110 and the IESBA Code are consistent except for the following:

- The addition of definitions prefixed as AUST in APES 110. The additional definitions are of AASB, Administration, [ASQM 1](#), AUASB, Auditing and Assurance Standards, Australian Accounting Standards, Member, Professional Bodies and Professional Standards.
- [Paragraphs AUST R280.23 and AUST R380.26 mandates the documentation of information, factors, actions taken, and conclusions reached when performing tax planning services.](#)

*[All other items on the extant list of compliance with the IESBA Code in the extant Code and Amending Standards remain unchanged.]*