

AGENDA PAPER

Item Number: 7
Date of Meeting: 22 March 2018
Subject: Proposed revision of APES 220 *Taxation Services*

Action required For discussion For noting For information

Purpose

To obtain the Board's approval to issue the Exposure Draft *Proposed Standard APES 220 Taxation Services* (APES 220 ED), subject to the Board's review comments and editorials.

Background

At the November 2017 Board Meeting the Board considered the outcome of the annual review of APES 220. Technical Staff had proposed revisions to APES 220 to address issues relating to references to laws and regulations, reported inconsistencies in the application of Independence requirements, outsourcing activities and cyber security.

One of the suggestions included amending APES 220 to clarify that Members need to comply with the 'spirit of the law', not just the 'letter of the law', to address concerns about some Members potentially offering services involving aggressive tax schemes.

The Board considered the implication of including a guidance paragraph about compliance with the 'spirit of the law'. Technical Staff were asked to consider this matter further and engage with relevant stakeholders.

The Board also requested Technical Staff consider including in the proposed Exposure Draft references to the Privacy Act in respect of the guidance on cyber security.

Consideration of Issues

1. **Tax Avoidance and tax planning schemes and 'spirit of the law'**

In considering this matter further Technical Staff have undertaken stakeholder engagement and researched similar requirements in other jurisdictions.

Stakeholder Engagement

Technical Staff have spoken to representatives from a Firm who raised their concerns in relation to the proposed inclusion of the wording 'spirit of the law'. The key points from this discussion were as follows:

- Tax law in Australia is not principles based and is rules based. Practitioners will not be able to apply the spirit of the law. They must follow the rules and regulations.
- Tax Agents are required under the *Tax Agents Service Act 2009* (TASA) to take reasonable care to ensure tax laws are applied correctly (provisions 30-10 (9)).
- ‘Spirit of the law’ was being discussed before the introduction of the Base Erosion Profit Shifting (BEPs) reporting by the Organisation for Economic Co-Operation and Development (OECD).
- BEPs is a move towards tax transparency and information sharing. A co-operative approach between entities and tax regulators.
- Concerns expressed that the suggested reforms could change the way in which firms structure their operations to ensure tax advice is provided by lawyers in large accounting firms rather than Members. Lawyers would be able to apply legal professional privilege, and potentially may not need to apply the TASA or APES 220.

Technical Staff also engaged with the Professional Body who originally suggested the inclusion of the ‘spirit of the law’. The Professional Body provided information on recent developments in the UK including the issue of guidance document [*Professional conduct in relation to Taxation*](#) by the Institute of Chartered Accountants in England and Wales (ICAEW) which is also reflected on Her Majesty’s Revenue and Customs (HMRC) website www.gov.uk/.../hmrc-the-standard-for-agents.

The PCRT was developed jointly by 7 professional bodies in the UK when the government challenged the bodies to take a greater lead in setting and enforcing clear professional standards around the facilitation and promotion of tax avoidance.

The PCRT requires accountants to avoid using tax planning arrangements that go against the clear intention of parliament in enacting legislation or are highly artificial or contrived.

Paragraph 4.10 of the PCRT contains a reference to ‘spirit of the law’. This paragraph sets out the view of the HMRC on what comprises tax avoidance.

“Tax avoidance involves bending the rules of the tax system to gain a tax advantage that Parliament never intended. It often involves contrived, artificial transactions that serve little or no purpose other than to produce this advantage. It involves operating within the letter – but not the spirit – of the law.”

Technical Staff noted that it would be difficult for a Member to determine the intent of the parliament and enforcement of such a provision could be difficult as well.

As part of this discussion, Technical Staff queried from the Professional Body whether the current provisions relating to tax schemes and arrangements were not adequate or did not sufficiently address these matters. Generally, it was agreed the current provisions were sufficient. However, it was noted that there is an opportunity to provide additional guidance to a Member who is not certain about whether a tax planning arrangement or scheme is appropriate.

Review of PCRT against Australian requirements

Technical Staff have analysed the PCRT and related provisions in the UK around tax planning and avoidance and contrasted this against relevant legislation and requirements in Australia.

Technical Staff are concerned about how the PCRT principles could be applied in practice by Members and whether regulators in Australia need such provisions (due to the scope of the current anti-avoidance rules in Part IVA of the *Income Tax Assessment*

Act 1936 (Cth)). Technical Staff are of the view that the PCRT provisions, in their current form, may not be appropriate for the Australian environment.

Way forward

Based on the stakeholder engagement undertaken and the additional research performed, Technical Staff are of the view that a reference to the 'spirit of the law' should not be added to APES 220.

The engagement with stakeholders has clarified that the existing requirements in APES 220 are still relevant and appropriate. However, there is the opportunity to provide additional guidance on when a Member is not certain about whether a tax planning arrangement or scheme is appropriate. Technical Staff have drafted an additional guidance paragraph, as set out below, which we propose to include in *Section 5 - Tax schemes and arrangements*.

5.5 If a Member is uncertain that a tax scheme or arrangement is of the type set out in paragraph 5.4, the Member should consider:

- (a) consulting with a Professional Body, Client or Employer;
- (b) obtaining legal advice, if necessary;
- (c) documenting the key considerations in determining whether the tax scheme or arrangement is not of the type set out in paragraph 5.4; or
- (d) whether to accept or continue to provide Professional Activities to the Client or Employer in relation to this tax scheme or arrangement.

Technical Staff will continue to monitor the issue of tax transparency to ensure our standards remain appropriate.

2. Reference to the Privacy Act

It was raised at the November 2017 meeting that Members who provide Taxation Services are privy to sensitive information (such as Tax File Numbers) and need to comply with privacy requirements, however this is not mentioned specifically in APES 220.

Technical Staff agree that a reference to the legal requirements of privacy should be included in APES 220 ED. Therefore, the following amendments are proposed for the APES 220 ED:

- paragraph 11.2 to include a reference to the legal requirements of privacy; and
- paragraph 11.3 to refer to the 'security and privacy risks' of storing information electronically.

Way Forward

Technical Staff have drafted an Exposure Draft which contains the amendments listed in this paper in addition to the other amendments presented in the annual review at the November 2017 Board Meeting. Subject to any review comments or editorial amendments from the Board, we are of the view that an Exposure Draft on APES 220 should be issued for public comment.

Recommendation

The Board approve the draft Exposure Draft *Proposed Standard APES 220 Taxation Services* for public comment.

Material Presented

Agenda Item 7 (a) Exposure Draft *Proposed Standard APES 220 Taxation Services*
(Marked-up version)

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