

## AGENDA PAPER

**Item Number:** 9  
**Date of Meeting:** 28 August 2020  
**Subject:** Update on Whistleblowing Project

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Action Required     For Discussion     For Noting     For Information

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### Purpose

To:

- (a) provide the Board with an update on the Whistleblowing project;
- (b) seek the Board's feedback on the draft Technical Staff Q&As on Whistleblowing and Confidentiality;
- (c) seek the Board's approval to revise the confidentiality provisions in APES 220 *Taxation Services* and other affected APESB pronouncements; and
- (d) request the Board's views on additional case studies to be included in the Technical Staff Q&A publication.

### Background

At the March 2020 Board Meeting, the Board approved a [project plan](#) on whistleblowing. The project is to review the provisions of the Code and determine how the provisions around confidentiality interact with the new whistleblowing protections under Federal whistleblower legislation, which became effective in 2019.

At the June 2020 Board Meeting, the Board noted that there is a pressing need for guidance on whistleblowing and the professional and ethical obligations of a Member as the Professional Bodies are reporting a high volume of enquiries relating to this topic. The Board determined that the Technical Staff should develop a Question and Answer Staff publication as the most efficient and effective way to publish guidance in a short time frame.

### Matters for Consideration

In line with the agreed approach to this project, Technical Staff have developed a preliminary draft of four case studies relating to whistleblowing and confidentiality, with 2 cases each for Members in Business and Members in Public Practice. At least one scenario for each type of

Member includes Non-Compliance with Laws and Regulations (NOCLAR) as a key consideration.

In developing the format of the case studies Technical Staff have applied the conceptual framework in APES 110 *Code of Ethics for Professional Accountants (including Independence Standards)* (the Code), which is consistent with the format used in the recent publications [The Independence Guide - 5<sup>th</sup> Edition](#) and [Applying the Code's Conceptual Framework in COVID-19 circumstances](#) (jointly issued by APESB & the International Ethics Standards Board for Accountants (IESBA)).

Technical Staff sought feedback from the Professional Bodies in relation to the four initial case studies. The Professional Bodies were very supportive of the draft case studies and thought this was a good base for the rest of the publication. Technical Staff have incorporated amendments suggested by the Professional Bodies into the case studies presented to the Board for their consideration at Agenda Item 9 (a).

### Confidentiality and APES 220

In drafting case studies 3 and 4, Technical Staff noted that APES 220 *Taxation Services* (APES 220) sets a higher level of confidentiality requirements than in the Code. This is partly because APES 220 refers to a legal, regulatory or professional obligation of disclosure (as shown in paragraphs 3.9 and 3.12 below), whereas the Code uses the term 'legal or professional duty or right to disclose' (paragraph R114.1(d)). The other reason is that APES 220 specifically requires disclosure to a client or employer where the Member chooses to disclose confidential information to another party, even if it is to comply with a legal, regulatory or professional obligation.

#### *Keys paragraphs from APES 220 relating to confidentiality:*

- 3.9 Unless the Member has a legal, regulatory or professional obligation of disclosure, a Member shall not convey any information relating to a Client's or Employer's affairs to a third party without the Client's or Employer's permission.
- 3.12 Where a Member provides confidential information in accordance with a legal, regulatory or professional obligation of disclosure, the Member shall notify the Client, Employer or relevant third party as soon as practical, provided that there is no legal prohibition against such notification.

When a Member in considering whistleblowing, there is an element of choice involved in making a disclosure and it is, therefore, considered a professional or legal right to disclose. As APES 220 does not include a reference to the right to disclose matters to a third party, a strict interpretation of APES 220 is that the Member must obtain the Client or employer's permission before disclosing matters to a third party, even in a whistleblowing situation. This does not strictly align with the intent of the whistleblower legislation and potentially with the provisions in the restructured Code.

Technical Staff considers that the mandatory notification required under APES 220 could be amended to align with provisions in the NOCLAR section of the Code where Members are required to consider whether it is appropriate to inform the client of the Member's intentions before disclosing the NOCLAR matter to a third party or appropriate authority (as per paragraph R360.37 of the Code).

Subject to the Board's views on the disclosure of taxation related matters to third parties, Technical Staff will undertake a review of the provisions relating to confidentiality in APES 220 and other APESB pronouncements.

At the November 2020 Board meeting, Technical Staff will present an exposure draft that proposes revisions to the confidentiality provisions of affected pronouncements for the Board's consideration and approval. Technical Staff will also reflect the intended position in the exposure draft in the relevant case studies in the Technical Staff Q&A document.

### Consideration of additional case studies

As part of the consultation process with the Professional Bodies, several suggestions were received as to additional scenarios to be included in the Technical Staff Q&A document.

The suggestions for additional case studies include:

- a) An external auditor finding a matter as part of conducting the audit.
- b) An external auditor receiving a disclosure from a whistleblower.
- c) A Member is aware an entity is trading while insolvent and is in breach of loan covenants – could be written as either a Member in Business or Member in Public Practice.
- d) A Member at a small accounting practice is approached to prepare an online tax return for a prospective client that is known to have criminal associations.
- e) A finance officer in local government authority discovering the inappropriate use of government credit card
- f) A Member employed in public practice, where the engagement partner (the sole practitioner) has a long association with the Chair of the Client. The Member has reported a matter to the partner who tells them the situation is ok, but the Member does not believe it is or that the partner will address the matter.

This consultation process also highlighted other scenarios which APESB Technical Staff believe could be included as additional examples in the next revision of APES GN 40 *Ethical Conflicts in the Workplace – Considerations for Members in Business* (APES GN 40) rather than being included in the whistleblowing Q&A document, such as :

- Family tax law situation where the accountant was engaged by the business owned by the parties and is now under pressure to act for both of the parties who have separated/divorced
- Awarding of a service contract to a related party by avoiding tender positions and using confidential information.

Technical Staff seek the Board's feedback on whether the potential case studies identified above should be included in the Technical Staff Q&A publication and if there are any other examples that should be addressed in the publication.

### **Way forward**

Subject to the Board's feedback on the preliminary case studies presented at agenda item 9 (a), Technical Staff will continue to develop the Q&A publication with the inclusion of an introduction and the additional case studies as agreed upon by the Board.

Technical Staff will work with the Professional Bodies in developing the additional case studies, with a revised draft document to be presented to the Board for their consideration at an out-of-session Board meeting in October 2020.

Technical Staff will also review the confidentiality provisions of the other APESB pronouncements to ensure that they do not cause Members issues with the right to make disclosures under the new whistleblower legislation.

## **Recommendations**

The Board:

- (a) note the progress of the whistleblowing project; and
- (b) provide feedback with respect to the draft Technical Staff Q & As on whistleblowing and confidentiality;
- (c) approve the approach to revise the confidentiality provisions in APES 220 and any other affected APESB pronouncement; and
- (d) provide feedback and suggestions on additional case studies to be included in the Technical Staff Q&A.

## **Materials Presented**

Agenda Item 9 (a)      Draft APESB Whistleblowing and Confidentiality Q&As

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