AGENDA ITEM 9 (a) DRAFT APESB TECHNICAL STAFF WHISTLEBLOWING & CONFIDENTIALITY Q&As

Case Study 1 – Substantial underpayment of wages

Issues: Whistleblowing/ NOCLAR

Case Outline: A Chief Financial Officer (CFO) for a large proprietary company recently discovered that the company had been substantially underpaying wages over many years, which affects over 150 employees. The underpayment is occurring due to staff being placed on annualised salary contracts that do not adequately cover all the entitlements and allowances that should be paid to the employees under the relevant industry award issued by Fair Work Australia.

The financial statements of the company would be significantly impacted due to this error with the CFO estimating the company would have made a large loss in last year's financial statements, instead of the profitable position which was reported to the Board and the shareholders. The CFO is not able to correct the underpayment without the CEO's or the Board's approval as the CFO does not have the delegated authority to process transactions of that dollar size.

The CFO reported the underpayment to the Chief Executive Officer (CEO) and the Chairman of the Board and suggested that the company should seek out legal advice about the impact of not complying with the Fair Work Act or the industry award and how to remedy the underpayments. Both the CEO and the Chairman expressed concern about the matter but have not spoken to the CFO about the issue since and have not appeared to have taken any action to address the underpayments.

The CFO is concerned about the inaction of the CEO and the Chairman and is assessing the options to disclose this matter to other parties. The CFO reviews the companies' whistleblower policy (which came into force on 1 January 2020) and notes that the matters can be disclosed to the Chairman of the Board, the external auditor, or ASIC or APRA. The CFO sends copies of notes and supporting documents to a personal email address, in the case supporting information is needed when making a disclosure under the company's whistleblower policy.

After considering all options, the CFO decided to approach the Chairman about this matter again to determine if any action was going to be taken to rectify the underpayments. When the CFO raised the matter again with the Chairman, the Chairman alleged that the CFO had breached the confidentiality and privacy terms of their employment contract as work files relating to the underpayment of wages were sent to a personal email address. The Chairman strongly suggested that the CFO should resign.

The CFO is not sure whether there is a legal or professional duty to disclose this matter further or even if the CFO would be protected under any applicable whistleblower legislation or regulations.

Identifying Threats

Self-interest

There are two self-interest threats created in this scenario. The first relates to the threat caused by the CFO's fear of losing their job. The second is the impact on the CFO's reputation as the underpayment implies that the CFO is not competent at their role. These self-interest threats could threaten the fundamental principles of integrity, objectivity, professional competence and due care, and professional behaviour. (para 120.6 A3(a))

Intimidation
There is a threat that the CFO will be deterred from acting with integrity, objectivity and professional behaviour due to actual or perceived pressures from the Chairman not to disclose the underpayment of wages. These pressures include the potential loss of a job or legal action due to perceived breaches of the CFO's employment contract. (para 120.6 A3(e))

Evaluating Threats

Are identified threats at an Acceptable Level?

The CFO must exercise professional judgement and apply the reasonable and informed third party test to determine whether the threats are at an acceptable level. Consideration of qualitative and quantitative factors is relevant in the evaluation of threats, as is the combined effect of multiple threats, if applicable. (para 120.8 A1)

Factors that may be relevant in evaluating the level of the threats include:

- Conditions, policies and procedures relating to the work environment of the business (paras 200.7 A1 to 200.7 A4), for example:
    - Leadership that stresses the importance of ethical behaviour and the expectation that employees will act ethically (also refer to para 270.3 A3). The evaluation of threats would be heightened in this situation as both the Chairman and the CEO are aware of illegal and unethical behaviour and appear to be pressuring the CFO to not act on the issue.
    - Policies and procedures to empower and encourage employees to communicate ethics issues that concern them to senior levels of management without fear of retribution (also refer to para 270.3 A3 and human resources policies that address pressure). From 1 January 2020, there is a requirement under legislation for a range of entities, including large proprietary companies, to have a whistleblower policy. The policies are required by legislation to provide protection to whistleblowers who meet the necessary criteria. While this policy is in place and the CFO might meet the criteria about disclosure, the Chairman and CEO do not appear to be adhering to the policy. The CFO could also consider accessing the professional ethics counselling service of the applicable professional body.
- The nature of the relationship between the CFO and the CEO and Chairman.
- Whether the company will acknowledge and address the underpayment or whether the company will continue paying employees below the legislated rates.
- The intent, timing and amount of the offer to pay-out a six-month notice period for the CFO. In this scenario, threats would be elevated as it appears the Chairman is trying to improperly influence the behaviour of the CFO with a financial incentive. (para 250.9 A3)
- The significance of the underpayment amount on the financial statements and whether the business has the financial capacity to correct the historical underpayments or to meet employment conditions at the appropriate level going forward (quantitative factor).
- The application of laws, regulations, and professional standards to the circumstances. The company has not met its legal obligations under employment laws and regulations. It is not clear if the company is planning to rectify this situation going forward, but an actual breach of laws and regulations has already occurred. As the historical underpayment is significant and affects many employees, the CFO should consider whether the Responding to Non-compliance with Laws and Regulations (NOCLAR) framework of the Code (section 260) applies. If the breach of laws is considered to cause substantial harm to investors, creditors, employees or the general public, as part of evaluating the threats to compliance with the fundamental principles, the CFO needs to obtain an understanding of the matter which includes:

- The nature of the NOCLAR and the circumstances in which it occurred;
- The application of the laws and regulations to the circumstances; and
- An assessment of the potential consequences to the employing organisation, investors, creditors, employees or the wider public. (para R260.12)

Discussing the circumstances creating the pressure to breach the fundamental principles with colleagues, those charged with governance or the CFO's professional body (para 270.3 A4) or seeking legal advice if it is likely the unethical actions will continue to occur (para 200.7 A4) are also important considerations to assist in evaluating the level of threats.

Based on an assessment of the factors, including the fact that laws and regulations have been breached, a reasonable and informed third party would likely conclude that the threats to one or more of the fundamental principles are not at an acceptable level and the threats would need to be addressed.

Addressing Threats

Eliminate Circumstances

The CFO may not be able to eliminate the circumstances, including interests or relationships, that are creating the threats (para R120.10(a)).

Apply Safeguards

The CFO must not knowingly be associated with reports, returns, communications or other information where the CFO believes that the information contains a materially false or misleading statement (para R111.2). Therefore, as the CFO is aware that the company's previous reports on financial performance are based on the underpayment and misstate employee obligations and entitlements, the CFO must take appropriate actions to seek to resolve the matter (para R220.8). The CFO has raised this matter with the CEO and Chairman, and it is likely that they are not going to take appropriate action to address the matter. The CFO could raise this matter with the other directors on the Board.

The CFO, as a senior Member in Business, is required to take action to address NOCLAR. This may mean reporting on the matter in line with the whistleblower policy (or similar policies) of the entity (para R260.9) or communicating the matter to the CFO's immediate superior or to those charged with governance (paras R260.13 and R260.14). The CFO has raised this matter with both the CEO and the Chairman but has been unable to obtain their agreement that they will take appropriate action to deal with the underpayment. The CFO could follow the reporting mechanism in the company's whistleblower policy and determine if disclosures should be made to parties other than the Chairman.

As the CEO and Chairman have not taken further action, the CFO needs to exercise professional judgement to determine if further action needs to be undertaken in the public interest (para R260.18). In making this determination, the CFO should consider whether a reasonable and informed person would think the CFO acted in the public interest as well as considering the following factors:

- The legal and regulatory framework.
- The urgency of the situation.
- The pervasiveness of the matter throughout the employing organisation.
- Whether the CFO has confidence in the integrity of the CEO and Those Charged with Governance.

- Whether the NOCLAR is likely to recur.
- Whether there is credible evidence of actual or potential substantial harm to the interests of the company, investors, creditors, employees or the general public. (para 260.17 A1)

In this scenario, the CFO is unlikely to have any confidence in the integrity of the CEO and Chairman. It would also be likely that the company may continue with the underpayments as it appears that they are trying to stop the CFO from taking action or disclosing the matter outside the company.

The CFO should consider whether to make a disclosure to an appropriate authority even if there is no legal or regulatory requirement to do so. Such a disclosure would be considered a professional duty to disclose per paragraph R114.1(d) of the Code and is therefore not a breach of the fundamental principle of confidentiality. However, before making the disclosure, the CFO should consider consulting with their professional body. In addition, the CFO should seek out legal advice, especially as this disclosure relates to employment laws and regulations set out in the *Fair Work Act 2009* and associated regulations, which may not be covered by whistleblower protections set out in the *Corporations Act 2001*.

The CFO must not allow pressure from the Chairman to result in a breach of compliance with the fundamental principles (para R270.3(a)). However, if the Chairman does exert pressure on the CFO, the CFO could take the following actions to ensure they do not breach the Code:

- The CFO could escalate the matter to those charged with governance and/or the chair of the audit committee.
- Document the processes they have followed to address the threats.

Even if the CFO does not allow pressure from the Chairman to act unethically, the level of the threats might still not be at an acceptable level, especially as there are multiple threats to the fundamental principles in this scenario and there is evidence of non-compliance with laws and regulations. A safeguard may be to discuss the matter with the Board of Directors of the entity; however, the CFO needs to apply professional judgment to determine if this will eliminate or reduce the identified threats to an acceptable level.

Decline or End Professional Activity

If the CFO cannot eliminate the circumstances creating the threats and no safeguards are available or capable of being applied to reduce the threats to an acceptable level, the CFO may need to resign from their position (para R120.10(c)). The CFO will also need to consider applicable legislative reporting obligations or the NOCLAR reporting obligations (which may not be satisfied by the CFO resigning as he is a Senior Member in Business).

In determining whether to make disclosures under the NOCLAR reporting obligations, the CFO should consider:

- The nature and extent of the actual or potential harm that is or might be caused by the matter to investors, creditors, employees or the general public (para 260.20 A2).
- Whether there is an appropriate authority able to receive the information and cause the matter to be investigated and action to be taken. (para 260.20 A3)
- Whether there exists robust and credible protection from civil, criminal or professional liability or retaliation afforded by legislation or regulation, such as under whistleblowing legislation or regulation. (para 260.20 A3)
- Whether there are actual or potential threats to the physical safety of the CFO or other individuals. (para 260.20 A3)

As the assessment of the NOCLAR matter is complex, the CFO should consider obtaining legal advice or consulting on a confidential basis with a regulatory or Professional Body (para 260.19 A1).

In making a disclosure under NOCLAR, the CFO shall act in good faith and exercise caution when making statements or assertions (para R260.21).

Case Study 2 – Inappropriate accounting treatment for revenue

Issues: Whistleblowing/Preparation and presentation of information

Case Outline: The finance officer at a small manufacturing proprietary company has noticed that unsubstantiated entries are being raised to boost revenue in the current financial period, which are to be reversed in the next period. The increase in revenue does not appear to have a material effect on the financial statements in the current financial period. However, the higher revenue levels mean the budget is exceeded, and bonuses will therefore be paid to senior staff.

The finance officer has reported this matter to the Finance Manager (the finance officer's superior). The finance officer has a good relationship with the Finance Manager, with the Finance Manager being a mentor to enable the finance officer to gain full membership of a professional body. The Finance Manager is the most senior person in the finance area and would be eligible for the bonus payment.

In reviewing the latest draft of the management reports, the finance officer realises no changes have been made to the revenue being reported for the current financial period. The finance officer is not sure if the Finance Manager has taken any action to review and correct the accounting treatment or even if the matter has been reported to the Managing Director.

The finance officer is not sure whether there is a legal or professional duty to disclose this matter further.

Identifying Threats

Self-interest
There is a threat that due to the finance officer's fear of losing their job or the loss of support from the Finance Manager, such a threat will inappropriately influence the finance officer's judgement and behaviour. This self-interest threat could threaten the fundamental principles of integrity, objectivity, professional competence and due care and professional behaviour. (para 120.6 A3(a))

Familiarity
There is a threat that due to the mentoring relationship between the Finance Manager and the finance officer, the finance officer will be too accepting of the approach undertaken by the Finance Manager. This could threaten the fundamental principles of integrity, objectivity, professional competence and due care and professional behaviour. (para 120.6 A3(d))

Intimidation
There is a threat that the finance officer will be deterred from acting with integrity, objectivity and professional behaviour due to actual or perceived pressures from the Finance Manager not to disclose the inappropriate accounting treatment being used for revenue. The Finance Manager will receive a financial benefit if the current accounting treatment is maintained, which may be perceived as an intimidation threat with the intent to pressure the finance officer not to take any further action. (para 120.6 A3(e))

Evaluating Threats

Are identified threats at an Acceptable Level?

The finance officer must exercise professional judgement and apply the reasonable and informed third party test to determine whether the threats are at an acceptable level. Consideration of qualitative and quantitative factors is relevant in the evaluation of threats, as is the combined effect of multiple threats, if applicable. (para 120.8 A1)

Factors that may be relevant in evaluating the level of the threats include:

- Conditions, policies and procedures relating to the work environment of the business (paras 200.7 A1 to 200.7 A4), for example:
    - Leadership that stresses the importance of ethical behaviour and the expectation that employees will act ethically (also refer to para 270.3 A3).
    - Policies and procedures to empower and encourage employees to communicate ethics issues that concern them to senior levels of management without fear of retribution (also refer to para 270.3 A3 and human resources policies that address pressure). As this is a small proprietary company, it is not required to have a whistleblower policy in line with whistleblower legislation. However, there may still be policies the finance officer should follow. The finance officer could also consider accessing the professional ethics counselling service of the applicable professional body.
- The nature of the relationship between the finance officer and the Finance Manager, and with the Managing Director (qualitative factor).
- The intent of the Finance Manager in not changing the accounting treatment for revenue, including the extent to which the inappropriate accounting treatment impacts the Finance Manager's compensation.
- The application of laws, regulations, and professional standards to the circumstances. Based on the facts in this scenario, the treatment may not be a breach of laws and regulations, does not have a material impact on the financial statements and it is unlikely that the inappropriate accounting treatment would cause substantial harm to investors, creditors, employees or the general public. Therefore, the Responding to Non-compliance with Laws and Regulations (NOCLAR) framework of the Code (set out in section 260) would not apply. (para 260.7 A2)

Discussing the circumstances creating the pressure to breach the fundamental principles with the Finance Manager, the Managing Director, those charged with governance or the finance officer's professional body may also be of assistance in evaluating the level of threats (para 270.3 A4).

Based on an assessment of the factors, a reasonable and informed third party would likely conclude that the threats to one or more of the fundamental principles are not at an acceptable level and the threats would need to be addressed.

Addressing Threats

Eliminate Circumstances

The finance officer may not be able to eliminate the circumstances, including interests or relationships, that are creating the threats (para R120.10(a)).

Apply Safeguards

The finance officer must not knowingly be associated with reports, returns, communications or other information where the finance officer believes that the information contains a materially false or misleading statement (para R111.2). Therefore, the finance officer must not be associated with the incorrect accounting treatment for revenue and should take appropriate actions to seek to resolve the matter (para R220.8). The finance officer could follow up with the Finance Manager to clarify whether there are valid reasons for the Finance Manager's position to allow the accounting treatment to be applied. If the Finance Manager does not provide the finance officer with any valid reasons, the finance officer could raise this matter with the Managing Director or other directors on the Board. The finance officer could also consider whether it would be appropriate to consult with the external auditor about the accounting treatment (para 220.8 A2).

If the company has a whistleblower policy, the finance officer could use it to determine if there is an appropriate reporting mechanism. The policy may allow disclosures to be made to individuals within the company, or other individuals or organisations such as the external auditor or a regulator.

The finance officer must not allow pressure from the Finance Manager to result in a breach of compliance with the fundamental principles (para R270.3(a)). Further, if the Finance Manager is subject to the Code, they must not place pressure on to the finance officer that they know, or have reason to believe, would result in the finance officer breaching the fundamental principles (para R270.3(b)).

However, if the Finance Manager does exert pressure on the finance officer, the finance officer could take the following actions to ensure they do not breach the Code:

- The finance officer could escalate the matter to the managing director and/or those charged with governance
- Document the processes they have followed to address the threats.

Even if the finance officer does not allow pressure from the Finance Manager to act unethically, the level of the threats might still not be at an acceptable level, especially as there are multiple threats to the fundamental principles in this scenario. A safeguard may be to discuss the matter with the Managing Director or the Board of Directors of the entity; however, the finance officer needs to apply professional judgment to determine if this will eliminate or reduce the identified threats to an acceptable level.

Decline or End Professional Activity

If the finance officer cannot eliminate the circumstances creating the threats and no safeguards are available or capable of being applied to reduce the threats to an acceptable level, the finance officer may need to decline future requests to record the revenue transactions or resign from their position (para R120.10(c)).

Case Study 3 – Misleading or false information used in taxation returns

Issues: Misleading or false information/Whistleblowing

Case Outline: A tax agent and partner at a small accounting firm has prepared the tax returns for one client for the last three years. In the course of preparing the current year's tax return, the tax partner has become aware that the client is making false statements with respect to the nature of various items of expenditure.

The tax partner explains to the client that this treatment is not allowable under the tax legislation and that the prior years' tax returns would need to be amended. The tax partner explains that the current year's tax return is unable to be prepared using the previous treatment. The client requests the tax partner to stop working on the client's tax return as the client will engage another accountant to complete this year's tax return and any future tax work.

The tax partner is not sure whether there is a need to contact the new accountant about the issue, and whether there is a legal or professional duty to disclose this matter further.

Identifying Threats

Self-interest
There is a self-interest threat created through the discovery of past errors in the tax returns and the impact on the tax partner's reputation, which could inappropriately influence the tax partner's judgement and behaviour. This threat could impact compliance with the fundamental principles of integrity, objectivity, confidentiality, professional competence and due care and professional behaviour. (para 120.6 A3(a))

Intimidation
There is a threat that the tax partner will be deterred from acting with integrity, objectivity, confidentiality and professional behaviour due to actual or perceived pressures by the client ending their engagement with the firm, including how the tax partner responds to those pressures. (para 120.6 A3(e))

Evaluating Threats

Are identified threats at an Acceptable Level?

The tax partner must exercise professional judgement and apply the reasonable and informed third party test to determine whether the threats are at an acceptable level. Consideration of qualitative and quantitative factors is relevant in the evaluation of threats, as is the combined effect of multiple threats, if applicable. (para 120.8 A1)

Factors that may be relevant in evaluating the level of the threats include:

- Conditions, policies and procedures relating to the client and its operating environment and the firm and its operating environment (paras 300.7 A1 to 300.7 A5 list several factors that may be relevant).
- The length and closeness of the relationships between the tax partner and the client (qualitative factor).

- The application of laws, regulations, and professional standards to the circumstances. Based on the facts in this scenario, it is unlikely that the misstatements in the individual's tax returns would cause substantial harm to investors, creditors, employees or the general public. Therefore, the Responding to Non-compliance with Laws and Regulations (NOCLAR) framework of the Code (set out in section 360) is less likely to apply. (para 360.7 A2)

Based on an assessment of the factors, a reasonable and informed third party would likely conclude that the threats to one or more of the fundamental principles are not at an acceptable level and the threats would need to be addressed.

Addressing Threats

Eliminate Circumstances

While the client has ended the professional relationship with the firm, there are still threats that the tax partner needs to address, such as the self-interest threat relating to reputation. The tax partner may not be able to eliminate the circumstances, including interests or relationships, that are creating the threats (para R120.10(a)).

Apply Safeguards

The tax partner must not knowingly be associated with reports, returns, communications or other information where the tax partner believes that the information contains a materially false or misleading statement (para R111.2). APES 220 *Taxation Services* (APES 220) sets out requirements and guidance for members on how this provision applies when providing taxation services to a client or employer.

In this scenario, the tax partner has now become aware that previous tax returns lodged for the client by the firm were incorrect. The tax partner has taken action and raised these concerns with the client about the false information in the prior years' tax returns (APES 220 para 7.3) and that this false information cannot be used in the current year's tax return (APES 220 para 7.1). The client has then discontinued the professional relationship.

The tax partner cannot disclose the inclusion of false information to the proposed new accountant without the ex-client's permission to do so (APES 220 para 3.9). If the proposed new accountant requests information about whether or not they should accept the new engagement, the tax partner needs to comply with relevant laws and regulations governing the request and provide any information honestly and unambiguously (para R320.7). However, the tax partner must comply with the fundamental principle of confidentiality (para 320.7 A1) and will therefore need permission from the ex-client to do so.

This is unlikely to be a NOCLAR situation, and there is no specific legal requirement for the tax partner to disclose this information to the Australian Taxation Office. However, the tax partner can make a choice to provide information to the Australian Taxation Office under the new whistleblower protections, if the tax partner meets the criteria established in the legislation. The tax partner has the legal right to make this disclosure (para R114.1(d)), so it will not be considered a breach of confidentiality of the Code. However, APES 220 enforces strict confidentiality in this matter, and the tax partner may need to notify the ex-client that they have made a disclosure to the Australian Taxation Office (para 3.12). If the tax partner is considering making this disclosure, they should consider consulting with their professional body or obtaining legal advice.

The tax partner needs to apply professional judgement to determine if the actions taken will eliminate or reduce the identified threats to an acceptable level.

Decline or End Engagement

The engagement with the client has already ended (para R120.10(c)). The tax partner needs to apply professional judgement to assess if further action is required if approached by the proposed new accountant or through disclosure to the Australian Taxation Office.

Case Study 4 – Potential misappropriation of funds at a charity

Issues: Misappropriation of funds/Whistleblowing

Case Outline: A Member in Public Practice, who is a registered Tax Agent, has an ongoing engagement to prepare the quarterly Business Activity Statement (BAS) for a large charity regulated by the Australian Charities and Not-for-Profits Commission.

In the most recent BAS return, the Member noticed there were a number of expenses being claimed for large quantities of building materials and for a luxury retreat/holiday, which were different from the regular transactions of the charity. The Member is not aware of any current building projects being undertaken by the charity and the payment for the luxury retreat/holiday does not seem appropriate as a business expense. The Member raised this with the Finance Manager at the charity and requested further information on the transactions. The Finance Manager provided the Member with supporting documentation and reinforced that the expenses should be recorded in the BAS.

The Member reviewed the additional information provided and determined that all the payments relating to the new expenses were made directly to the Chairman of the Board. The Member is now of the view that the Chairman may have been misappropriating funds.

The Member is not sure if there is a legal or professional duty to disclose this matter further.

Identifying Threats

Self-interest
There is a threat that due to the member's fear of losing this client, such threat will inappropriately influence the Member's judgement and behaviour. This self-interest threat could threaten the fundamental principles of integrity, objectivity, professional competence and due care and professional behaviour. (para 120.6 A3(a))

Familiarity
There might be a threat that due to the long or close relationship with the client, the Member will be too accepting of the information provided by the client. This could threaten the fundamental principles of integrity, objectivity, professional competence and due care and professional behaviour. (para 120.6 A3(d))

Intimidation
There is a threat that the Member will be deterred from acting with integrity, objectivity and professional behaviour due to actual or perceived pressures from the Finance Manager to include the items in the BAS as business expenses and the potential loss of a client. The Finance Manager may be subject to pressure by the Chairman to ensure the expenses are treated as legitimate business expenses. (para 120.6 A3(e))

Evaluating Threats

Are identified threats at an Acceptable Level?

The Member must exercise professional judgement and apply the reasonable and informed third party test to determine whether the threats are at an acceptable level. Consideration of qualitative and quantitative factors is relevant in the evaluation of threats, as is the combined effect of multiple threats, if applicable. (para 120.8 A1)

Factors that may be relevant in evaluating the level of the threats include:

- Conditions, policies and procedures relating to the client and its operating environment and the firms and its operating environment (paras 300.7 A1 to 300.7 A5 list several factors that may be relevant). From 1 January 2020, there is a requirement under legislation for a range of entities, including large charities to have a whistleblower policy. The policies are required by legislation to provide protection to whistleblowers who meet the necessary criteria. As a supplier to the large charity, the Member should consider the disclosure mechanism in the client's whistleblower policy. The Member's firm may also have policies in relation to dealing with ethical issues with clients. The Member could also consider accessing the professional ethics counselling service of the applicable professional body.
- The length and closeness of the relationships between the Member and the client (qualitative factor).
- The intent of the Finance Manager in allowing the items to be treated as business expenses.
- The nature of the organisation. The evaluation of threats would be heightened in this situation as the client is a charity which invokes higher levels of public interest.
- The application of laws, regulations, and professional standards to the circumstances. Based on the facts in this scenario, it is not clear if the inappropriate expenses significantly affect the financial statements of the large charity or if it would cause substantial harm to investors, creditors, employees or the general public. Therefore, the Responding to Non-compliance with Laws and Regulations (NOCLAR) framework of the Code (set out in section 360) should be considered by the Member. This would mean the Member needs to obtain an understanding of the matter, including the nature of the NOCLAR and the circumstances in which it occurred (para R260.12).

Discussing the circumstances that relate to NOCLAR with those charged with governance or the Member's professional body may also be of assistance in evaluating the level of threats (paras 360.10 A3 to R320.12).

Based on an assessment of the factors, a reasonable and informed third party would likely conclude that the threats to one or more of the fundamental principles are not at an acceptable level and the threats would need to be addressed.

Addressing Threats

Eliminate Circumstances

The Member may not be able to eliminate the circumstances, including interests or relationships, that are creating the threats (para R120.10(a)).

Apply Safeguards

The Member must not knowingly be associated with reports, returns, communications or other information where the Member believes that the information contains a materially false or misleading statement (para R111.2). APES 220 *Taxation Services* (APES 220) sets out requirements and guidance for members on how this provision applies when providing taxation services to a client or employer.

In this scenario, the Member believes the expenses are not legitimate business expenses. The Member shall not provide the taxation service if the service is based on false or misleading information (APES 220 para 7.1). The Member is required to discuss the matter with the client

(which could be the Finance Manager, Chairman or other members of the Board) and advise them of the consequences if no action is taken (APES 220 para 7.3). If the client does not take action to address the matter, the Member should consider the firm's policies around client acceptance and continuance (APES 220 para 7.6).

The Member could consider the whistleblower policy of the larger charity to determine if there is an appropriate reporting mechanism that the Member could follow. The policy may allow disclosures to be made to individuals within the charity, or to other individuals or organisations such as the external auditor or a regulator.

If the Member has determined that the NOCLAR provisions apply, the Member is required to raise this matter with Those Charged with Governance (as per paragraph R360.11). If the Member notifies the organisation and no further action is being taken, the Member should apply professional judgement to determine if further action would be considered necessary in the public interest (para R360.20). In making this determination, the Member should consider whether a reasonable and informed person would think the Member acted in the public interest as well as considering the following factors:

- The legal and regulatory framework.
- The urgency of the situation.
- The pervasiveness of the matter throughout the client.
- Whether the Member has confidence in the integrity of the Finance Manager, the Chairman and Those Charged with Governance.
- Whether the NOCLAR or suspected NOCLAR is likely to recur.
- Whether there is credible evidence of actual or potential substantial harm to the interests of the company, investors, creditors, employees or the general public. (para 360.20 A1)

If no action is taken by the charity to address the concerns of the Member, the Member should consider whether to make a disclosure to an appropriate authority even if there is no legal or regulatory requirement to do so. If the Member believes this is a NOCLAR matter, it would be considered a professional duty to disclose per paragraph R114.1(d) of the Code and is therefore not a breach of the fundamental principle of confidentiality. If this was not a NOCLAR matter, the Member could make a choice to provide information to the Australian Taxation Office under the new whistleblower protections, if the Member meets the criteria for disclosure established in the legislation. The Member has the legal right to make this disclosure (para R114.1(d)), so it will not be considered a breach of confidentiality of the Code.

However, when a Member is making a disclosure to a third party (whether due to NOCLAR or as a choice under the whistleblower legislation), the Member needs to consider whether they need to advise the client of this disclosure as required by APES 220 para 3.12. Therefore, before making such a disclosure, the Member should consider consulting with their professional body. In addition, the Member should seek out legal advice, especially as a disclosure made to the Australian Charities and Not-for-Profits Commission may not be covered by whistleblower protections set out in the *Corporations Act 2001* or the *Taxation Administration Act 1953*. However, a disclosure to the Australian Taxation Office may be covered by the whistleblower protections if the Member meets the relevant criteria in the whistleblower legislation.

Decline or End Engagement

If the Member cannot eliminate the circumstances creating the threats and no safeguards are available or capable of being applied to reduce the threats to an acceptable level, the Member may need to decline to prepare the BAS or withdraw from the engagement (para R120.10(c)).

The Member will also need to consider applicable legislative reporting obligations or the NOCLAR reporting obligations (which may not be satisfied by the Member withdrawing from the engagement) (para 360.21 A2).

In determining whether to make disclosures under the NOCLAR reporting obligations, the Member should consider:

- The nature and extent of the actual or potential harm that is or might be caused by the matter to investors, donors, donor recipients, creditors, employees or the general public (para 360.25 A2).
- Whether there is an appropriate authority able to receive the information and cause the matter to be investigated and action to be taken. (para 360.25 A3)
- Whether there exists robust and credible protection from civil, criminal or professional liability or retaliation afforded by legislation or regulation, such as under whistleblowing legislation or regulation. (para 360.25 A3)
- Whether there are actual or potential threats to the physical safety of the Member or other individuals. (para 360.25 A3)

As the assessment of the NOCLAR matter is complex, the Member might consider obtaining legal advice or consulting on a confidential basis with a regulatory or Professional Body (para 360.24 A1).

In making a disclosure under NOCLAR, the CFO shall act in good faith and exercise caution when making statements or assertions. The Member shall also consider whether it is appropriate to inform the client of the Member's intention before disclosing the matter. (para R360.26).