

AGENDA PAPER

Item Number: 8
Date of Meeting: 25 June 2020
Subject: Update on Whistleblowing Project

Action Required For Discussion For Noting For Information

Purpose

To:

- (a) provide the Board with an update on the Whistleblowing project; and
- (b) seek the Board's views on the proposed way forward for this project.

Background

In 2019, new Federal whistleblower legislation became effective, which broadened the protections and remedies for corporate and financial sector whistleblowers in the *Corporations Act 2001* and extended protection to whistleblowers regarding breaches of the tax law or misconduct relating to an entity's tax affairs (via the *Taxation Administration Act 1953*).

In February 2020, the Professional Standards department of Chartered Accountants Australia and New Zealand (CA ANZ) approached APESB to request assistance with the interaction of the confidentiality provisions in the Code with the new whistleblowing legislation. In particular, whether it is a breach of the confidentiality provisions of the Code if a member reports a matter to an external party using whistleblower protections.

At the March 2020 Board Meeting, the Board approved a [project plan](#) to review the whistleblowing protections and to determine if APESB need to issue specific requirements or guidance in relation to whistleblower protections.

Project progress update

In March 2020, Technical Staff met with Mr Sylvain Mansotte and Mr Charles Buolo from Whispli. The discussion focused on the act of whistleblowing and the product offering Whispli provides to help organisations deal with whistleblowing. The discussion provided a useful insight into the tool available for organisations. However, Technical Staff do not believe the tool is the solution to addressing any potential gaps in the APESB pronouncements or guidance.

In relation to this project, Technical Staff have been working on the following tasks.

Internal review/research into new whistleblowing legislation and current guidance available for members

APESB Technical Staff have performed a desktop review into the current guidance that is available to professional accountants in relation to whistleblowing and confidentiality. This review has been an important step in the project as it highlighted the lack of specific guidance available to professional accountants on how the new whistleblowing provisions interact with the requirements of APES 110 *Code of Ethics for Professional Accountants (including Independence Standards)* (the Code).

Technical Staff found that there was a range of articles that focused on the new whistleblowing legislation and also on the fundamental principles and requirements in the Code relating to Responding to Non-Compliance with Laws and Regulations (NOCLAR). Technical Staff did produce an on-line article for CA ANZ ([How to deal with an ethical conflict in your workplace](#)), which focussed on the revisions to APES GN 40 and the ethical decision-making process. The article did refer to the enhanced whistleblower protections but only at a high-level.

The only resource found as part of this review that focused on specific provisions in the Code and whistleblowing was a [publication](#) issued by CPA Australia in 2013. The publication focuses specifically on the obligations of its members in relation to APESB pronouncements and the whistleblowing legislation of the time. Technical Staff consider this publication to be outdated and is unlikely to assist a member in understanding their current obligations in relation to whistleblowing and NOCLAR.

Technical Staff have also monitored the International Ethical Standards Board of Accountant's (IESBA's) project on Technology. The [project proposal](#) that was approved at the IESBA March 2020 Board meeting notes the need to review the confidentiality provisions of the Code, but this will be focussed on the data privacy concerns rather than whistleblowing specific matters.

Technical Staff have concluded there is a pressing need for updated and current guidance in relation to a Member's professional and ethical obligations relating to whistleblowing and confidentiality.

High-level consideration of the current provisions in APESB pronouncements relating to confidentiality, privacy and whistleblowing

Technical Staff have reviewed and considered the current provisions in APESB pronouncements that aim to assist members deal with issues relating to confidentiality, privacy and whistleblowing.

The Code is a principles-based pronouncement and does not explicitly address all ethical matters a professional accountant may face. Whistleblowing is referred to in the Code but is not covered in detail. The key provisions for members thinking about whistleblowing would be those provisions that relate to confidentiality (Subsection 114) and NOCLAR (Sections 260 and 360).

Technical Staff note that with the introduction of the NOCLAR provisions into the Code in 2017, guidance material was produced that clarified how the NOCLAR provisions interacted with the fundamental principle of confidentiality. This guidance explained that when NOCLAR applied, the matters being dealt with were significant and could cause substantial harm.

This concept of substantial harm is then used as a threshold to allow professional accountants to set aside the requirement of confidentiality to report actual or suspected NOCLAR to third parties, as long as the NOCLAR requirements were met. For matters below the substantial harm threshold, professional accountants need to apply the requirements relating to confidentiality to determine the approach to undertake.

In addition to the provisions in the Code, guidance is available for professional accountants on dealing with ethical conflicts within APES GN 40 *Ethical Conflicts in the Workplace – Considerations for Members in Business* (APES GN 40). This Guidance Note sets out an ethical decision-making framework and examples of how the framework can be applied across a range of examples (without setting out a definitive solution to the matter). While this guidance has been updated to refer to the new whistleblowing legislation, it does not provide specific guidance on how this legislation interacts with the confidentiality provisions of the Code.

Note that as part of the restructuring project in 2018 and 2019, APESB updated the Code, APES GN 40 and APES GN 41 *Management Representations* to refer to the new whistleblowing protections.

Technical Staff are still considering whether clarification of a Member’s professional and ethical obligations relating to whistleblowing requirements amendments to the current pronouncements or whether additional guidance on the existing provisions would suffice.

Technical Staff have considered the advantages and disadvantages of different solutions or outcomes for this project, which are set out in the table below.

Potential Outcome	Advantages	Disadvantages
Amendments to the Code	<ul style="list-style-type: none"> Allows for the creation of new requirements (if necessary) and new guidance material. Guidance material could be located next to existing requirements or guidance. Allows for the extant references to the whistleblowing legislation to be updated. 	<ul style="list-style-type: none"> Due process will take a minimum of six months to issue the amending standard. It may create a difference to the IESBA Code (there is a need to ensure the change does not go below the level set in the IESBA Code).
Development or revision of a Guidance Note	<ul style="list-style-type: none"> Guidance will provide clarity on existing provisions. Will not create deviations from the International Code. 	<ul style="list-style-type: none"> This process does not allow the creation of new requirements. Due process will take a minimum of six months to issue a new or revised guidance note.
Development of Technical Staff guidance, such as a Q&A document.	<ul style="list-style-type: none"> Timeframe to develop & release shorter than for a pronouncement Will not create deviations from the International Code. It can be in any format so that guidance could include examples, diagrams, etc. 	<ul style="list-style-type: none"> This process does not allow the creation of new requirements or authoritative guidance.

Based on the analysis performed, Technical Staff have formed the preliminary view that the best way forward for this project is to develop a Technical Staff Q&A document. The assessment of the current APESB pronouncements did not highlight any issues with the current requirements and guidance material. Instead, it appears there is a need for implementation assistance. The necessary guidance could be delivered in a timely manner through the development of a Technical Staff Q&A document.

Way forward

Subject to the Board's feedback on the preliminary view that Technical Staff should develop a Technical Staff Q&A document on whistleblowing and confidentiality, Technical Staff will consult further with the professional bodies on the proposed outcome of the project. This consultation will focus on the analysis of the current pronouncements and the Professional Bodies' views as to the need for additional requirements or guidance relating to whistleblowing.

If this proposed approach is supported, Technical Staff will work with the Professional Bodies to develop relevant examples in the proposed Technical Staff Q&A document, with the initial draft document to be presented to the Board for their consideration at the August 2020 Board Meeting.

Recommendations

The Board:

- (a) note the progress of the whistleblowing project; and
- (b) provide feedback with respect to the Technical Staff's preliminary assessment to develop a Technical Staff Q & A document to address whistleblowing and confidentiality.

Authors: Jacinta Hanrahan
Benjamin Collins

Date: 16 June 2020