

AGENDA PAPER

Item Number: 8
Date of Meeting: 26 June 2024
Subject: Proposed Project on APES 110 and reporting breaches

Action Required For Discussion For Noting For Information

Purpose

To:

- (a) provide the Board with an update of desktop research performed in relation to reporting breaches requirements; and
- (b) seek the Board's direction on the way forward.

Background

Chartered Accountants Australia and New Zealand (CA ANZ) announced a comprehensive review of the CA ANZ By-Laws and related regulatory and administrative arrangements relating to the Professional Conduct Framework (PCF review) in July 2022. The PCF review concluded in May 2023, with the [final report](#) released alongside the Independent Review of the recommendations and the CA ANZ Committee's Response to the Independent Review. The review noted that some of the matters could be addressed through revisions to CA ANZ's By-Laws and some matters through other means.

In July 2023, CA ANZ wrote to APESB about the PCF review and a recommendation relating to the alignment of disclosure obligations for Australian and New Zealand members. The recommendation sought the introduction of a requirement in the By-Laws for Australian members to report wrongdoing committed by other members to align with current requirements imposed on New Zealand members.

The letter noted that the obligation in New Zealand is established by the NZICA Code of Ethics (NZICA Code) rather than NZICA Rules or By-Laws. Therefore, CA ANZ have requested the APESB consider whether a similar provision should be included in APES 110.

At the November 2023 Board Meeting ([Agenda Item 5](#)), the Board considered the request from CA ANZ and agreed to consider a project proposal on APES 110 and reporting breaches at a future Board Meeting.

The Board considered the [draft project proposal](#) at the March 2024 Board Meeting ([Agenda Item 6](#)). The Board raised the need for careful consideration of this request due to the potential consequences of whistleblowing without legislative protections.

The Board requested that Technical Staff conduct research on similar reporting of breach requirements by other organisations, such as the ICAEW, including any relevant whistleblowing protections and present the findings to the Board at the June 2024 Board meeting.

Consideration of issues

Subsequent to the March 2024 Board Meeting, APESB Technical Staff have considered the purpose of the proposed requirement and undertaken research into similar reporting of breach requirements by other professional accounting bodies in different jurisdictions and relevant whistleblowing protections. The outcomes of this research, including information on the whistleblowing protections in Australia and new breach requirements established by the Tax Practitioners Board (TPB), are set out below.

Consideration of the purpose of the proposed requirement to report unethical behaviour

Technical Staff have reviewed the reports and information released as part of the PCF review performed for CA ANZ. The review was performed to:

- clarify the purpose of the proposed requirement (e.g., to identify unethical behaviour to investigate, to ensure Members are fit and proper persons, to uphold the public interest and/or to protect the profession); and
- determine the rationale for the requirement to be included in APES 110 *Code of Ethics for Professional Accountants (including Independence Standards)* (APES 110).

On 16 May 2023, The Honourable Dennis Cowdroy AO KC, released his report [Chartered Accountants Australia & New Zealand: Independent Review of Disciplinary Framework](#) (the Independent Report) which analysed the proposals made by the Professional Conduct Framework Review Committee (PCFRC). Mr Cowdroy endorsed most of the Committee's recommendations and included some additional recommendations.

Section 4 of the Independent Report provides context on the basis and functions of the disciplinary framework, noting that 'the purpose of the Disciplinary Framework is to ensure the maintenance of the integrity of the profession of accountancy and public confidence that practitioners are both competent and fit to practice.'¹ Technical Staff note that paragraphs 4.4 and 4.5 of this report provide background information on APES 110 and specific requirements related to Professional Behaviour.

The Independent Report (in paragraph 4.7) notes that members of the International Federation of Accountants (IFAC) must comply with Statements of Membership Obligations (SMOs), including [SMO 6](#), which relates to investigation and discipline. Paragraph 5 of SMO 6, which is replicated in the Independent Report, states that [*emphasis added*]:

'IFAC member organizations responsible for the investigation and disciplinary system shall, in their constitution and rules, provide for the investigation and discipline of misconduct, including breaches of professional standards by individual members and, if local laws and practices permit, by firms.'

¹ Cowdroy et al, 2023, *Independent Review of the Disciplinary Framework of Chartered Accountants Australia and New Zealand*, page 18, paragraph 4.1

APESB Technical Staff also note that paragraph 4.23 of the Independent Report considers the objects of disciplinary systems as follows [*emphasis added*]:

*'The principal focus of the Disciplinary Framework is prospective to **ensure future obedience to the standards** of Chartered Accountants Australia & New Zealand and to **protect the public and the profession** from the consequences of future wrongdoing. It is directed to the **detection and investigation of Member conduct**, and the protection of the public to be achieved by correction, education, and sanction where necessary.'*

When considering the content of paragraphs 4.7 and 4.23 of the Independent Report, Technical Staff note that most aspects of the intent of the proposed requirement complement support the focus and objectives of the Disciplinary Framework for a professional body. This position is reinforced by the statement in paragraph 5.11 of the Independent Report that '(d)isclosure is to alert the PCC to facts and circumstances which might indicate the commission of an Offence, and which the PCC might be minded to investigate.'²

In relation to the recommendation relating to the harmonisation of the disclosure requirements in New Zealand and Australia, the Independent Report notes in paragraph 5.22 [*emphasis added*]:

*The Reviewer understands and **accepts the justification for that provision in the New Zealand regime, where the obligation is statutory**, and conduct in compliance with that obligation could not be criticised. Consideration was given as to whether such an obligation ought to exist in the Australian regime, for the purpose of harmonisation. The Reviewer notes the possibility of a conflict between a Member's contractual obligations to their employer on the one hand, and the same Member's contractual obligations towards CA ANZ. The Reviewer therefore considers that **a similar provision ought to be introduced in Australia, but subject to the requirement that the failure to report in accordance with that obligation must be without just cause.***

The Independent Report considers the proposed changes to disclosure requirements in conjunction with provisions on Offences and Sanctions. APESB Technical Staff note that the provisions on Offences and Sanctions are set out in either the By-Laws or the Rules for NZICA and CA ANZ.

In the [PCFRC's response to the Independent Report](#), the Committee have accepted in principle the reviewer's recommendations in relation to aligning disclosure provisions in Australia and New Zealand subject to two matters, which included a reference to the introduction of a requirement to report wrongdoing committed by others. It noted that implementing this recommendation requires an amendment to APES 110 to harmonise with the NZICA Code of Ethics.'³

It is not clear from the comments made whether the Committee considered whether the requirement to report wrongdoing belongs in a Code of Ethics or should be included in the constitution or rules of the professional body since it supports the disciplinary framework.

² Cowdroy et al, 2023, *Independent Review of the Disciplinary Framework of Chartered Accountants Australia and New Zealand*, page 28, paragraph 5.11.

³ PCFRC of CA ANZ, 2023, *PCFRC Response to Independent Review*, page 1.

Desktop research into Jurisdictions with similar reporting requirements

APESB Technical Staff have performed desktop research on other jurisdictions that require members to report the misconduct of other members to their professional body. APESB found similar requirements set out by professional bodies in New Zealand, the United Kingdom, Canada and South Africa.

The specifics of the requirements set by the relevant professional bodies in these jurisdictions are set out in Agenda Item 8(a). A summary of the findings is set out in the table below:

| Body | Required to report | Who must report | Location of Requirement | Legislative support | Whistleblowing protections |
|-------------------------------------------------------------------------|-------------------------------|------------------------------------------------------------|------------------------------------|---------------------|---------------------------------|
| New Zealand Institute of Chartered Accountants (NZICA) – New Zealand | Unethical behaviour | Members of NZICA | NZICA Code of Ethics | Yes | Yes |
| Chartered Professional Accountants in British Columbia (CPABC) – Canada | Breach of Code | Registrants (member, firm or student) | CPABC Code of Professional Conduct | No | Maybe – varies across provinces |
| Institute of Chartered Accountants in England and Wales (ICAEW) – UK | Misconduct | ICAEW members, firms, affiliates & relevant persons | Disciplinary Bye-Laws | No | Yes |
| Association of Chartered Certified Accountants (ACCA) – UK | Liable to disciplinary action | Members, students, & firms | ACCA Bye-Laws | No | Yes |
| Institute of Chartered Accountants of Scotland (ICAS) – UK | Liable to disciplinary action | Members | ICAS Investigations Regulations | No | Yes |
| Chartered Institute of Management Accountants (CIMA) – UK | Guilty of misconduct | Member or registered student | CIMA Bye-Laws (Discipline) | No | Yes |
| Chartered Institute of Public Finance & Accountancy (CIPFA) – UK | Liable to disciplinary action | Members & registered students | CIPFA Bye-Laws | No | Yes |
| Institute of Financial Accountants (IFA) - UK | Liable to disciplinary action | Member, student, affiliate, member firm or contracted firm | IFA Bye-Laws | No | Yes |
| South African Institute of Chartered Accountants (SAICA) | Punishable Conduct | Trainee Accountants and Training Officers | SAICA Training Regulations | No | Yes |

The research findings highlight the disparity between reporting obligations and the way in which the requirements are established (i.e., via Codes, Rules, or By-laws). It appears that most professional bodies with such a requirement to report place it in their By-Laws. In

addition, in jurisdictions where the reporting obligation to report on the conduct of another Member exists, the profession has whistleblowing protection in place to facilitate the member (or complainant) making such a disclosure.

Technical Staff note that both New Zealand and Canada have established their reporting requirement in their respective Codes. APESB Technical Staff are still in the process of engaging with CPABC personnel on the background of their requirement. However, we note that their Code of Professional Conduct contains elements based on the International Code of Ethics for Professional Accountants (including Independence Standards) (the IESBA Code), as well as rules for members of the professional body.

APESB Technical Staff met with NZICA Regulatory Board staff members on 14 May 2024 to discuss the background to the requirements in the [NZICA Code of Ethics](#). We were advised that the provision was included in the NZICA Code from 1982, and the NZICA Regulatory Board staff were unable to find information as to why the requirement was considered necessary or the rationale for its inclusion in the NZICA Code.

NZICA Regulatory Board staff did advise that the provision is used to gather information on members' behaviour and determine whether monitoring or enforcement action needs to be undertaken. Any reports received by NZICA for this matter are directed to the Professional Conduct Committee (PCC). The NZICA Regulatory Board staff members did not have access to information on how often reports are made based on this requirement in the NZICA Code.

APESB Technical Staff have sought out old versions of the NZICA Code and note that the requirement was initially established as a rule. Refer to agenda item 8(b) for an extract from the 2006 version of the NZICA Code, which sets out the extant rule and guidance. When NZICA adopted the *International Code of Ethics for Professional Accountants (including Independence Standards)* (the IESBA Code) as the basis for its Code, it appears to have merged the extant rules with the IESBA content.

Technical Staff conducted research on additional jurisdictions, including the United States, Hong Kong, China, Germany, and Singapore, but was unable to find a requirement to report misconduct by other members established by the respective professional bodies in these jurisdictions.

APESB Technical Staff did not find any other instances where a requirement to report the unethical behaviour of other members was included in a Code of Ethics based on the IESBA Code.

Whistleblowing protections in Australia

In Australia, whistleblower protection is addressed under the [Corporations Act 2001](#), the [Taxation Administration Act 1953](#) for the private sector, and the [Public Interest Disclosure Act 2013](#) for the federal public sector.

Protection depends on the applicable law and the subject matter of the disclosure. For example, the Taxation Administration Act protects disclosures related specifically to taxation matters, and the Corporations Act 2001 sets out protections applicable to companies regulated under the Act.

To be eligible for whistleblower protection in Australia under the *Corporations Act 2001* requirements, an individual must be or have been, in a relationship with the entity that the individual is reporting about. This can include the following:

- an employee or former employee;
- a current or former director, company secretary or any other officer of the entity;
- a current or former contractor, employee of a contractor or a volunteer,
- individuals who supply services or goods to the entity (such as a tax or BAS agent or tax (financial) adviser);
- an associate of the entity;
- a trustee, custodian, or investment manager of a superannuation entity; or
- a dependant or spouse of any of the people listed above.

It should be noted that the entity referred to in the paragraph above needs to be a company. Partnerships are not caught under Corporations Act requirements.

Due to the recent instances of significant ethical failures in Australia, the Government has taken several measures to extend tax whistleblower protections and establish guidance on breach reporting obligations to assist tax agents and BAS agents. They are considering a draft Bill ([Treasury Laws Amendment \(Measures for Consultation\) Bill 2023](#)) to extend whistleblower protections to eligible whistleblowers who make disclosures to the Tax Practitioner Board (TPB) where they believe the information may assist in restoring public confidence in the regulation of the tax profession by enhancing the TPB's investigation powers.

While some improvements are being made to protections in Australia, Technical Staff note that the whistleblower protections available under Australian legislation are narrower compared to New Zealand and that not all members of a professional accounting body in Australia would be legally protected if required to make a disclosure about the conduct of other members.

Reporting of breaches of the TPB Code of Professional Conduct

From 1 July 2024, registered tax practitioners are required under sections 30-35 and 30-40 of the *Tax Agent Services Act 2009* (TASA) to report:

- significant breaches of the Code of Professional Conduct in the TASA relating to their own conduct to the TPB; and
- significant breaches of the Code of Professional Conduct in the TASA by other registered tax practitioners to the TPB and recognised professional association(s) (RPAs) of that tax practitioner.

The TPB has released [draft guidance](#) on these breach reporting obligations to assist registered tax agents and BAS agents in understanding their obligations. The obligations apply to a "significant breach of the Code," which is defined in subsection 90-1(1) of the TASA as 'a breach that:

- constitutes an indictable offence, or an offence involving dishonesty, under Australian law;

- results, or is likely to result, in material loss or damage to another entity (including the Commonwealth);
- is otherwise significant, including taking into account any one or more of the following:
 - the number or frequency of similar breaches by the tax practitioner;
 - the impact of the breach on the tax practitioner's ability to provide tax agent services;
 - the extent to which the breach indicates that the tax practitioner's arrangements to ensure compliance with the Code are inadequate; or
- is a breach of a kind prescribed by the Tax Agent Services Regulations 2022 (TASR).'

Given the diverse practices adopted by different professional bodies regarding reporting breach requirements and the differing levels of whistleblowing protection offered to members between Australia and New Zealand, Technical Staff now seek the Board's views on the way forward for this matter.

Staff Recommendation

The Board:

- (a) note the outcomes of the desktop review and research performed by Technical Staff and
- (b) provide direction as to the way forward for this matter.

Material Presented

Agenda Item 8(a) Desktop Review – Information on reporting breaches requirements and whistleblowing in other jurisdictions

Agenda Item 8(b) Extract from NZICA Code of Ethics (2006)

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