

AGENDA PAPER

Item Number: 12
Date of Meeting: 26 August 2014
Subject: Proposed Revised APES 330 *Insolvency Services*

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Purpose

To provide the Board with an evaluation of the respondents' comments on the revision of APES 330 *Insolvency Services* and to obtain the Board's approval to issue the revised APES 330 *Insolvency Services*.

Background

Accounting Professional and Ethical Standards Board (APESB) originally issued APES 330 *Insolvency Services* (APES 330) in September 2009 and subsequently issued a revised standard in November 2011 with an effective date of 1 April 2012.

The Australian Restructuring Insolvency & Turnaround Association (ARITA) finalised the third edition of the ARITA Code of Professional Conduct (ARITA Code) in late 2013, with an effective date of 1 January 2014.

The purpose of the ARITA Code is to:

- educate ARITA members as to their professional obligations and responsibilities when they perform Insolvency Services; and
- to provide a reference for stakeholders against which they can gauge the conduct of insolvency practitioners.

APES 330 *Insolvency Services* sets out mandatory requirements and guidance for Members in Public Practice of the three major Australian accounting bodies who provide Insolvency Services. Due to ARITA's amendments to its Code, APESB commenced a project in late 2013 to update APES 330 in order to achieve alignment with the ARITA Code.

ARITA Code amendments

The revised ARITA Code incorporates a number of key changes which are summarised as follows:

- *Application* – guidance on its application to Practitioners practicing outside Australia and for Appointments in respect of members' voluntary liquidations.

- *Sources of referrals* – Practitioners are required to disclose the source of a referral where the Appointment follows a specific referral.
- *Pre-appointment Advice* – includes a requirement to declare in the *Declaration of Independence, Relevant Relationships and Indemnities* (DIRRI) that no information or advice, beyond that outlined in the DIRRI, was provided.
- *Conflict of interest* – Practitioners are required to make clear in the DIRRI their reasons for believing why the matters and relationships disclosed do not result in a conflict of interest.
- *Investigating accountant engagement leading to an Appointment* – additional guidance on issues to consider when deciding whether it is appropriate to accept subsequent Appointments that result from an investigating accountant’s engagement.
- *Relationships with associates* - additional guidance has been incorporated to encourage the Practitioner to consider disclosing relationships with Associates of the insolvent Entity that have occurred more than 2 years ago.
- *Business relationships with the insolvent* – the prohibition of Appointments due to previous business relationships has been amended to exclude immaterial relationships.
- *Remuneration pre-appointment* – where a Practitioner provides an estimate or quote of the likely fee for an Appointment, this estimate or fee quote must be in writing with clear explanations of the variables that may affect the estimate or fee quote.
- *Court Appointments* – additional guidance has been included around the processes associated with court Appointments.
- *Dealing with Property* – the previous ARITA Code referred to “respective households” when prohibiting the acquisition of assets by Practitioners. The intention has now been clarified and the term “respective households” replaced with “relatives and entities”. Further clarity has been provided by defining the term “material interest” in the ARITA Code.
- *Disclosure of basis and actual disbursements* – practitioners are required to disclose details of how disbursements will be charged to the Administration in the initial advice to creditors regarding remuneration.
- *Pre-appointment expenses* – expenses incurred prior to the Appointment are not Disbursements that can be reimbursed from the Administration.
- *Prospective fee approval* - in circumstances where remuneration has been prospectively approved, greater clarity has been provided in respect of when hourly rates can be subsequently revised.
- *Sources of funding* – additional guidance has been included on disclosure and approval requirements.
- *Payment of remuneration by secured creditors in non-controller appointments* - Where money is received by the Practitioner for the costs of the Administration, apart from funds received from the realisation of assets, this payment must be disclosed to the Approving Body. Professional Fees must not be drawn from these monies without the Approving Body’s consent.

- Checklists – the Practitioner is required to maintain and use an appropriate checklist for each type of insolvency Appointment.
- *Identity of directors* - Practitioners are required to make reasonable enquiries to confirm the identity of directors or a debtor prior to accepting an Appointment where the Appointment is being made by the directors or a debtor.
- *Joint appointments* – all Appointees are equally responsible for decisions made and the Firm should have policies in place that ensure all appointees are knowledgeable about the conduct of the Administration.
- *Template update* – the DIRRI template and Remuneration approval request report template have been updated to reflect changes in requirements and guidance.
- *New template* – A pre-appointment proposed basis of Remuneration disclosure template has been introduced for the Practitioner use.

APESB Board Meetings Update

January 2014 update

At the January 2014 APESB Board meeting, Technical Staff presented a table of proposed changes to APES 330 (2011) together with a marked up version of APES 330 reflecting changes due to ARITA's Code amendments and APES 110 *Code of Ethics for Professional Accountants* (APES 110) for the Board's consideration.

Representatives of ARITA, John Winters (CEO) and Kim Arnold (Technical Director) attended this Board meeting and provided the Board with a summary of the key changes to the ARITA Code.

The Board discussed the following matters:

- The need to clarify the definition of "Debtor" to eliminate confusion with the normal use of the term. The Board suggested that an alternative defined term "Insolvent Debtor" be used instead of "Debtor".
- The definitions of 'Professional Services' and 'Professional Activities' do not refer to Insolvency Services. The Board agreed to consider this as part of a project to redefine "Professional Activities" in the Australian context in a manner which captures the various activities undertaken by a Professional Accountant.
- Use of the term "jointly and severally" in paragraph 3.13 and agreed that the term could be deleted.
- The black letter reference to a Member's obligations to comply with the relevant law in respect of Independence in paragraph 4.1 and agreed that it is better included as guidance.
- The timeframe associated with paragraphs 4.9 and 4.10 and agreed that specific reference to relationships of more than 2 years duration is required.
- The location of paragraphs 4.20 and 4.21 and agreed that these paragraphs are better suited in section 3 of APES 330.
- Expert Witness obligations and directed Technical Staff to liaise with members of the APES 215 taskforce to determine whether there are any issues that would prevent making reference to APES 215 in APES 330 and therefore avoid repetition.

- Reference to the creation of a checklist in paragraph 9.4 and agreed that reference to “procedures to ensure statutory timeframes are met” or similar, is preferred.
- Consistency of Section 3 – *Fundamental Responsibilities of Members in Public Practice* with other APESB standards. The Board agreed that an acceptable alternative is to include the professional obligations of a Member contained in Section 3 on ‘*Marketing*’ under the heading of ‘*Professional behaviour*’ and to relocate the matters addressed under the heading of ‘*Capacity and resources*’ to ‘*Professional competence and due care*’.

The Board directed Technical Staff to revise APES 330 ED taking into consideration the issues noted above and to provide a revised draft of APES 330 for the Board consideration at the April 2014 Board meeting.

April 2014 update

In response to the Board’s comments in January 2014, a number of editorial amendments were made to the previous draft of ED 02/14 and were considered by Board at the April 2014 meeting. The Board agreed on the following matters:

- that the terms ‘*Expert Witness Services*’ and ‘*Other Evidence*’ should be defined;
- further work was required to define the term ‘*Insolvent Debtor*’;
- paragraph 4.11 should refer to a ‘relationship’ rather than a ‘material interest’;
- that further clarity was required in paragraph 9.4 to communicate the procedures to be undertaken to meet the statutory timelines for the Administration; and
- the requirement for the Appointee to seek approval of the Approving Body in circumstances where the cost of the Administration exceeds the initial amount paid in respect of Professional Fees (paragraph 8.2).

The Board discussed the treatment of monies received by a Member in Public Practice prior to acceptance of an Appointment in paragraph 8.23 and directed Technical Staff to liaise with Kim Arnold of ARITA to clarify the required treatment in these circumstances.

The Board noted and were supportive of the ‘*At a Glance APES 330 Insolvency Services ED*’ document.

Following resolution of the above matters, the Board approved by circular resolution the issue of the proposed Exposure Draft for public comment for a 45 day period.

Consideration of Issues

APESB received four submissions from the following stakeholders:

- CPA Australia and Chartered Accountants Australia and New Zealand;
- ARITA;
- ASIC; and
- Australian Financial Security Authority (AFSA).

Technical staff have analysed the respondents comments in the attached general comments and specific comments tables.

A meeting was also held with Kim Arnold (Technical Director – ARITA) to discuss the matters raised in the submissions.

Subsequent to the evaluation of the submissions received on the Exposure Draft, Technical Staff have incorporated the following proposed amendments to the revised APES 330:

- Amendments to paragraph 4.6 to broaden the requirement to consider relationships with Associates as part of the evaluation of prior relationships;
- Amendments to paragraph 4.9 to expand the category of relationships to include Associates and Related Entities;
- Paragraph 4.18 prohibits a Member in Public Practice from providing Pre-appointment Advice to an individual as well as a corporate entity associated with that individual. Amendments have been made to clarify that it is either a corporate entity controlled by that individual or a corporate entity in which the individual is a director or officer;
- Amendments to paragraph 4.22 to require specific disclosures in respect of the Referring Entity where a *Declaration of Independence, Relevant Relationships and Indemnities* (DIRRI) is required by law, or where the Member in Public Practice has obtained consent to disclose from the Referring Entity.
- Paragraph 4.22 requires the Member in Public Practice to make specific disclosures in the DIRRI. Paragraph 4.23 provides guidance on these requirements with the proposed amendment enhancing the guidance to encourage the Member who is considering whether to make additional independence disclosures in the DIRRI, to take into account the relevance of the information to creditors.
- In accordance with paragraph 4.25, where a threat to Independence is subsequently identified, which would have precluded the Member in Public Practice from accepting the Appointment, the Member is required to re-issue the DIRRI and send it to the creditors and notify regulatory authorities. The amendment to paragraph 4.25 clarifies that the Member is required to notify the appropriate regulatory authority applicable to the specific Appointment.
- Paragraphs 6.1 and 6.3 make reference to Controlled and Associated Entities with an amendment required to remove the capitalisation of the terms Controlled and Associated as they are undefined terms in the standard.
- A Member in Public Practice is required to apply monies received prior to the acceptance of an Appointment to meet the costs of an Administration in accordance with paragraph 8.23. An addition has been made to specify that the Member account for such monies as funds of the Administration.

Staff Recommendation

Subject to the Board's review comments and editorials, the Board approve the issue of the revised APES 330 *Insolvency Services*.

Material Presented

Agenda Item 12 (a) APES 330 General Comments Table;

Agenda Item 12 (b) APES 330 Specific Comments Table; and

Agenda Item 12 (c) Proposed Revised APES 330 *Insolvency Services* marked up for changes arising from General and Specific Comments tables.

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Date: 11 August 2014