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Basis for Conclusions: APES 330 Insolvency Services (Formerly APS 7)

Prepared by the Technical Staff of the Accounting Professional & Ethical Standards Board

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This basis for conclusions has been prepared by technical staff of Accounting Professional & Ethical Standards Board Limited (“APESB”). This document has been reviewed and approved by the Board of Directors of APESB and is provided for the benefit of stakeholders to gain an understanding of the background to the development of APES 330 *Insolvency Services*.

The basis for conclusions **does not** form part of APES 330 *Insolvency Services* and is not a substitute for reading the standard.

Background

APESB has issued the Standard APES 330 *Insolvency Services* (APES 330) setting out mandatory requirements and guidance for members in public practice who perform insolvency services.

APES 330 includes mandatory requirements and guidance in respect of:

- Fundamental responsibilities of members in public practice;
- Professional independence;
- Professional engagement matters;
- Dealings with property and other assets;
- Expert witness obligations;
- Professional fees and expenses; and
- Documentation and quality control.

APESB issued an Exposure Draft (ED 05/08) of the proposed standard in December 2008 with a comment deadline of 6 March 2009. Submissions were received from the professional accounting bodies, Insolvency Practitioners Association of Australia (IPA) and the corporate regulator. In response to the comments received, APESB made a number of changes to APES 330. The following summarises the significant issues raised by respondents, and how APESB addressed them.

Definitions

In response to suggestions made by respondents, the terms ‘Associate’, ‘Related Entity’, ‘Associate Entity’, ‘Committee’, ‘Controlled Entity’, and ‘Witness Report’ were defined. The definition of ‘Associate’ in the context of insolvency for an Entity is based on the *Corporations Act 2001* whilst the definition of ‘Related Entity’ for an individual is based on the *Bankruptcy Act 1966*. The term ‘Committee’ is defined as a committee of inspection or committee of creditors. The definitions for ‘Associated Entity’ and ‘Controlled Entity’ are based on the definitions in the Australian Accounting Standards Board’s glossary of defined terms. The ‘Witness Report’ definition is based on the definition of a “Report” in APES 215 *Forensic Accounting Services*.

Reference to section 220 and section 280 of the Code (now deleted)

The original drafting of paragraph 3.2¹ in APES 330 ED stated that a Member in Public Practice shall comply with Section 220 *Conflicts of Interest* and Section 280 *Objectivity – All Services* of APES 110 *Code of Ethics for Professional Accountants* (the Code). Some of the respondents noted that APES 330 ED contains extensive requirements and guidance in respect of conflicts of interest and independence and that there will be no benefit gained from referring a member to the general principles stated in Sections 220 and 280 of the Code. APESB agreed with this view and resolved to remove this paragraph from APES 330.

Capacity and resources (paragraph 3.5)

A respondent was of the opinion that the standard needs to include the requirement for members in public practice to consider whether they have the capacity to undertake the relevant appointment and access to the necessary resources. This is an issue as the demand for insolvency services can vary with the economic cycle. It is possible that the member may not have the capacity or sufficient resources in periods of high demand for insolvency services. Accordingly, a new paragraph was included to address this issue.

Guidance on non statutory advertisements (paragraph 3.15)

APES 330 prohibits a member in public practice who is providing an insolvency service from using statutory advertisements to promote the member's or firm's services. However, a member is allowed to include the Firm's logo in non statutory advertisements as long as it is not prominent. Accordingly, a new paragraph was inserted to provide guidance in respect of non statutory advertisements.

Professional independence (Section 4)

Some respondents noted that APES 330 ED differed in certain respects from the Code of Professional Practice issued by the Insolvency Practitioners Association of Australia (IPA) and that this would be a concern for members of the professional accounting bodies who are also members of the IPA. APESB agreed with this view and, after considering the differences, made appropriate amendments to align the independence requirements in Section 4 of APES 330 with the IPA's Code of Professional Practice.

Respondents noted that legal precedence has set out three separate duties for liquidators and administrators. These are the duties of independence, impartiality, and avoidance of conflict. Respondents were of the view that APES 330 should clearly state these principles at the beginning of Section 4. As paragraph 4.1 dealt with independence, APESB agreed to insert a new paragraph 4.3 which dealt with the duties of impartiality and conflict of interest.

¹ Paragraph numbering reflects the numbering in APES 330 and may not reflect ED 05/08.

Dealing with property and other assets (paragraph 6.4)

APES 330 ED prohibited a member from acquiring or deriving a benefit from property and other assets. Respondents noted that where a retail operation is under administration, the property and other assets of the retail operation will be available for sale to the general public. Respondents were concerned that in these circumstances members should not be seen as being in breach of the standard if they acquire property and other assets under the same terms and conditions as the general public. APESB agreed with this view and included a new paragraph 6.4 to address this issue.

Expert Witness Services (Section 7)

The expert witness services provisions in APES 330 ED were of concern to a few respondents. Whilst some respondents supported the inclusion, others were of the view that it should not be included in APES 330. However, all parties agreed that it may be possible for a member who is acting in an appointment, to be called upon to give expert evidence. Accordingly, APESB determined that it was appropriate for APES 330 to include expert witness obligations.

APESB made the following amendments in response to comments raised by respondents in relation to expert witness obligations:

- Defined 'Witness Report', limiting it to only expert evidence;
- Deleted the term 'unbiased' from paragraph 7.1(b), as a member initiating action cannot be considered to be 'unbiased' as they are not only one of the parties to the legal action, but also the instigator; and
- Deleted paragraph 7.1(c) as it is not possible for a member not to be considered an advocate after initiating the legal action.

Contingent fees (paragraphs 8.8 and 8.9)

Based on the comments made by the respondents, two new paragraphs have been included to deal with contingent fees in the insolvency services context. The IPA Code allows for success fee based remuneration arrangements in limited circumstances. APESB considered this issue and agreed for APES 330 to similarly allow contingent fees in limited circumstances. These paragraphs have been drafted taking into consideration the general principles of the Code.

Guidance to members on record retention (paragraph 9.3)

A member in public practice providing insolvency services must retain the books and working papers of an entity for a period of time in accordance with the firm's policies and procedures established to comply with APES 320 *Quality Control for Firms*. A new guidance paragraph was inserted to allow the member to destroy working papers where the member has obtained the necessary approvals in accordance with the *Corporations Act 2001* or *Bankruptcy Act 1966*.