

28 November 2011

APESB issues revised APES 330 Insolvency Services

Accounting Professional & Ethical Standards Board Limited (APESB) today announced the issue of the revised APES 330 *Insolvency Services* (APES 330) to update the existing APES 330 (Issued September 2009).

Please refer to Appendix 1 of this technical update for details of the revisions. The revised APES 330 will be effective for Insolvency Services commencing on or after 1 April 2012 with early adoption permitted.

The revised standard is available from APESB's website: www.apesb.org.au

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Appendix 1

Revision to APES 330 (Issued September 2009)

Accounting Professional & Ethical Standards Board Limited (APESB) has approved the following revisions to APES 330 *Insolvency Services* which was originally issued In September 2009.

| Paragraph Reference | Revisions |
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| 1.1 | Accounting Professional & Ethical Standards Board Limited (APESB) issues <u>has revised</u> professional standard APES 330 <i>Insolvency Services</i> (the Standard), which is effective for Insolvency Services commencing on or after 1 April 2010 <u>2012</u> . Earlier adoption of this Standard is permitted. |
| 2 | <p><u>Acceptable Level</u> means a level at which a reasonable and informed third party would be likely to conclude, weighing all the specific facts and circumstances available to the Member in Public Practice at that time, that compliance with the fundamental principles of the Code is not compromised.</p> <p><u>Appointee</u> means a Member in Public Practice who is appointed to an Administration.</p> <p><u>Appointment</u> means the appointment of a Member in Public Practice as a trustee <u>Trustee</u> in bankruptcy, a trustee <u>Trustee</u> appointed under Section 50, a debt agreement administrator under Part IX, or a trustee <u>Trustee</u> or controlling trustee <u>Trustee</u> under Part X of the <i>Bankruptcy Act 1966</i>; or as a liquidator or provisional liquidator (other than a liquidator in a members' voluntary liquidation), a voluntary administrator, an administrator of a deed of company arrangement, a Controller, or a scheme manager under Chapter 5 of the <i>Corporations Act 2001</i>; or an appointment to provide Insolvency Services under any other legislation.</p> <p><u>Network</u> means a larger structure:</p> <ul style="list-style-type: none"> (a) <u>That is aimed at co-operation; and</u> (b) <u>That is clearly aimed at profit or cost sharing or shares common ownership, control or management, common quality control policies and procedures, common business strategy, the use of a common brand-name, or a significant part of professional resources.</u> <p><u>Network Firm</u> means a Firm or entity that belongs to a Network.</p> <p><u>Office</u> means a distinct sub-group, whether organised on geographical or practice lines.</p> <p><u>Pre-appointment Advice</u> means any professional advice, whether giving an opinion or not, provided prior to an Appointment to an insolvent Entity or, if the insolvent Entity is a company, to its directors including advice given to advisors to the insolvent Entity or its directors.</p> <p><u>Trustee</u> means a person who administers a bankruptcy or Part X administration under the <i>Bankruptcy Act 1966</i>.</p> |
| 3.7 | <u>When dealing with other practitioners in transitioning Appointments or where there are parallel Appointments, a Member in Public Practice shall be professional and co-operative, without compromising the Member's obligations in the Member's Appointment.</u> |

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| 3.8 | <p>Where an Insolvency Service requires the consideration of matters that are outside the professional expertise of a Member in Public Practice, the Member shall seek expert assistance or advice from a suitably qualified third party, or decline the Insolvency Service. Where the Member relies on the advice of a third party, the Member shall disclose in any relevant reports or other relevant communications the name and qualifications of the third party and the areas in which third party advice has been obtained. <u>This obligation does not extend to legal advice where disclosure may result in a waiver of legal professional privilege.</u></p> |
| 3.9 | <p><u>Relevant reports are those reports that include a reference to the subject matter for which expert assistance or advice has been obtained.</u></p> |
| 4.4 | <p><u>For the purpose of this Standard, when seeking to identify relationships with an insolvent Entity, a Member in Public Practice shall take reasonable steps to identify and evaluate any threats the Member has reason to believe are created by the Firm's or Network Firms' interests and relationships with the insolvent Entity or its Related Entities. The Member shall consider the following matters when identifying relevant Network Firms:</u></p> <p>(a) <u>the geographical regions or countries in which the insolvent Entity or its Related Entities operate; and</u></p> <p>(b) <u>relationships with the directors or officers of the insolvent Entity or its Related Entities.</u></p> |
| 4.5 | <p>The following circumstances and relationships are not considered to create a threat to the Independence of a Member in Public Practice, who is considering accepting or continuing an Appointment:</p> <p>(a) the Engagement of the Member or, the Member's Firm <u>or a Network Firm</u> by a third party, who is not an Associate or Related Entity of an insolvent Entity, to investigate, monitor or advise on the affairs of the insolvent Entity on behalf of the third party; or</p> <p>(b) the transition of an Appointment from one type of insolvency Administration to another under the relevant legislation, subject to the terms of that legislation, for example, from an Appointment as administrator to voluntary liquidator under the <i>Corporations Act 2001</i>; or</p> <p>(c) an Appointment as Controller of an insolvent Entity of which that Member or another Partner of the Member's Firm <u>or Network Firm</u> has been a Controller under a different debenture or where the Appointment has been made by the court; or</p> <p>(d) advice provided by the Member or, the Member's Firm <u>or the Network Firm</u> to the insolvent Entity prior to the Appointment which was limited to:</p> <ul style="list-style-type: none"> • the financial situation of the Entity; • the solvency of the Entity; • the consequences of insolvency for the Entity; or • alternative courses of action available to the Entity. |
| 4.6 | <p>Trivial or inconsequential relationships are not a bar to acceptance or retention of an Appointment by a Member in Public Practice. The Member is not required to list trivial or inconsequential relationships in the <i>Declaration of Independence and, Relevant Relationships and Indemnities</i> referred to in paragraph 4.44 <u>4.20</u>. A relationship is trivial or inconsequential if it is remote, coincidental or insignificant.</p> |

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| 4.7 | <p><u>Subject to paragraph 4.8, a Member in Public Practice shall not accept an Appointment, other than to act as a Controller, where the Member, the Member's Firm, a Network Firm or their Partners or the Firm's those Managerial Employees in the Office in which the Member practises have, or have had, any of the following relationships:</u></p> <p>(a) a Close or Immediate Family relationship with:</p> <ul style="list-style-type: none"> • the insolvent Entity; • a director or officer of the insolvent Entity; or • an employee of or adviser to the insolvent Entity who is in a position to exert direct and significant influence over the insolvent Entity. <p>(b) a close personal relationship with:</p> <ul style="list-style-type: none"> • the insolvent Entity; • a director or officer of the insolvent Entity; or • an employee of or adviser to the insolvent Entity who is in a position to exert direct and significant influence over the insolvent Entity. <p>(c) a material business relationship, including the holding of a material Financial Interest, whether directly or indirectly in or jointly with:</p> <ul style="list-style-type: none"> • the insolvent Entity; • a director or officer of the insolvent Entity; or • an employee of or adviser to the insolvent Entity who is in a position to exert direct and significant influence over the insolvent Entity. <p>(d) a material loan to or from or material guarantee to or from:</p> <ul style="list-style-type: none"> • the insolvent Entity; • a director or officer of the insolvent Entity; or • an employee of or adviser to the insolvent Entity who is in a position to exert direct and significant influence over the insolvent Entity. <p>(e) employment with the insolvent Entity <u>in the preceding two years</u>, in a position to exert direct and significant influence over the insolvent Entity.</p> |
| 4.8 | <p><u>In respect of prior relationships of the nature referred to in paragraphs 4.7(c) and 4.7(d), a Member in Public Practice shall evaluate any threats a prior relationship is likely to create to the Member's Independence. In performing this assessment, the Member shall determine whether a reasonable person considering all of the facts and circumstances would conclude that there are significant threats to the Member's Independence posed by a prior relationship. Factors to consider include the:</u></p> <ul style="list-style-type: none"> • <u>nature of the prior relationship;</u> • <u>time elapsed since the relationship ended; and</u> • <u>reasons for the termination of the relationship.</u> |

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| 4.9 | <u>Where a Member in Public Practice, in a capacity other than as an Appointee, has a controlling interest in, or the ability to influence, a business operating in the same, or principally the same market as the insolvent Entity, the Member shall evaluate the significance of any threats to Independence and, when necessary, apply safeguards to eliminate the threats or reduce them to an Acceptable Level. Where there are no safeguards that can eliminate the threats or reduce them to an Acceptable Level, the Member shall decline the Appointment.</u> |
| 4.10 | A Member in Public Practice shall not accept an Appointment, other than to act as a Controller, where the Member or, the Member's Firm or a Network Firm has during the prior two years provided a Professional Service to the insolvent Entity, unless the Professional Service is considered immaterial or is referred to in paragraph 4.5. |
| 4.11 | A prior Professional Service is considered immaterial if it: <ul style="list-style-type: none"> • was of limited scope, limited time and limited fees; • will not be subject to review by the Member during the course of the Administration; • will not affect the Member's ability to comply with the statutory and fiduciary obligations associated with the Administration; and • does not create threats to the Member's ability to comply with the fundamental principles of the Code when performing the duties of the Administration. |
| 4.12 | <u>Where a Member in Public Practice is considering accepting an Appointment and two or more Firms or Network Firms have merged in the preceding two years, the Member shall evaluate any relationships that the Member is aware of or ought reasonably to be aware of which the insolvent Entity had with the Firm, previous Firm(s) or Network Firm(s) in the preceding two years in accordance with the requirements of this standard.</u> |
| 4.13 | <u>Where a Member in Public Practice is considering accepting an Appointment and has moved Firms in the preceding two years, the Member shall evaluate any relationships that the Member is aware of or ought reasonably to be aware of which the insolvent Entity had with the previous Firm or its Network Firms during the time that the Member was a Partner. Where there were prior relationships, the Member shall disclose the relationships in the Declaration of Independence, Relevant Relationships and Indemnities. Where the prior relationships pose significant threats to Independence and there are no safeguards that can eliminate the threats or reduce them to an Acceptable Level, the Member shall decline the Appointment.</u> |
| 4.14 | If the insolvent Entity is a company, a A Member in Public Practice shall not provide advice Pre-appointment Advice to both an insolvent the Entity and the insolvent Entity's its directors in their personal capacity, as the threat to Independence created would be so significant that no safeguard could reduce the threat to an acceptable level. |
| 4.15 | <u>The requirements of paragraph 4.14 do not prohibit a Member in Public Practice from providing general information on the insolvency process and the consequences of insolvency to both the Entity and its directors in their personal capacity.</u> |

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| 4.16 | <p>A Member in Public Practice shall not accept an Appointment where the Member or, the Member's Firm has, <u>a Network Firm or their Partners have provided a Professional Service Services</u> to the insolvent Entity or any other Entity which:</p> <ul style="list-style-type: none"> • has reasonable potential to lead to litigation claims against the Member or the Member's Firm by a stakeholder of the Administration; • is material to the Administration; or • was related to the structuring of assets of the insolvent Entity in order to avoid the consequences of insolvency, even if that advice was provided at a time when the Entity was solvent. |
| 4.19 | <p>A Member in Public Practice shall provide a <i>Declaration of Independence and, Relevant Relationships and Indemnities</i> in respect of an Insolvency Service (excluding an Appointment as a Controller). The Member shall provide the <i>Declaration</i> in the first communication to the creditors and table it at the first meeting of the creditors.</p> |
| 4.20 | <p>A Member in Public Practice shall include the following in the <i>Declaration of Independence and, Relevant Relationships and Indemnities</i>:</p> <ul style="list-style-type: none"> • a declaration that the Member has undertaken an evaluation of the significance of any threats to Independence and that the Member determined that the Member is independent for the purpose of accepting the Appointment in accordance with the requirements of the relevant legislation and this Standard; • <u>a declaration setting out the circumstances of the Appointment including the number of meetings with the Insolvent Entity or its advisors and the period over which Pre-appointment Advice was provided, a summary of the nature of the issues discussed, the amount of any Professional Fees received for the Pre-appointment Advice and an explanation as to why such Pre-appointment Advice does not result in a conflict of interest or duty;</u> • a declaration setting out all relationships the Member or, the Member's Firm has, <u>a Network Firm or their Partners or those Managerial Employees in the Office in which the Member practises, have had in the preceding two years with:</u> <ul style="list-style-type: none"> • the insolvent Entity; • an Associate or Related Entity of <u>if the insolvent Entity is a company - an Associate of the company;</u> • a former appointee of <u>if the insolvent Entity; or is an individual:</u> <ul style="list-style-type: none"> • <u>an Immediate or Close Family member of the individual;</u> • <u>a spouse or dependant of an Immediate or Close Family member of the individual; or</u> • <u>any Entity with which the individual or any of the persons noted above are associated;</u> • <u>a former Appointee of the insolvent Entity; and</u> • a person who has a charge over the whole or substantially the whole of the insolvent Entity's property and other assets; <p>and the reasons why these relationships, if any, do not result in a</p> |

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| | <p>conflict of interest or duty;</p> <ul style="list-style-type: none"> • a declaration of prior Professional Services provided <u>in the preceding two years to the insolvent Entity, by the Member, the Members' Firm, a Network Firm or their Partners, including the nature of the Professional Services, when the Professional Service was provided, the period over which the Professional Service was provided, the Professional Fees paid and the reasons why the these Professional Services do does not create threats to the Independence of the Member or the work to be performed or duties required under the proposed Appointment result in a conflict of interest or duty;</u> • a declaration that there are no other known prior Professional Services or other relationships that require disclosure; and • a declaration of indemnities (other than statutory indemnities) <u>and upfront payments, including the identity of each indemnifier or provider of an upfront payment (name and relationship with the insolvent Entity) and the extent and nature of each indemnity including any indemnities in respect of the Member's Professional Fees or Expenses or upfront payment, a statement as to where the funds are being held, when and how the funds will be applied and that there are no other indemnities or upfront payments to be disclosed.</u> |
| 4.21 | <p><u>Where more than one Member in Public Practice is appointed to an insolvent Entity, all Appointees shall sign the Declaration of Independence, Relevant Relationships and Indemnities prior to its issue. Where this is not possible and a Declaration of Independence, Relevant Relationships and Indemnities is issued before all Appointees sign it, the Member shall:</u></p> <ul style="list-style-type: none"> • <u>Provide an explanation in the Declaration of Independence, Relevant Relationships and Indemnities as to why all Appointees were not able to sign it; and</u> • <u>Sign a replacement Declaration of Independence, Relevant Relationships and Indemnities as soon as possible and ensure that it is provided to creditors .</u> |
| 4.22 | <p>When circumstances or relationships giving rise to a threat to Independence are identified after the commencement of an Administration, a Member in Public Practice shall evaluate that threat and:</p> <ol style="list-style-type: none"> a) continue performing the Administration if the Member determines that the threat would not have precluded the Member from accepting the Appointment had the threat been identified prior to the commencement of the Appointment. The Member shall amend the <i>Declaration of Independence and, Relevant Relationships and Indemnities</i> and send it to all the creditors; or b) where the threat to the Independence of the Member would have precluded the Member from accepting the Appointment had the threat been identified prior to the commencement of the Appointment, the Member shall notify the court, all creditors and regulatory authorities as appropriate of the following: <ul style="list-style-type: none"> • the nature of the threat; • the key facts and circumstances; • reasons why the circumstances or relationships giving rise to the threat were not identified prior to acceptance of the Appointment; |

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| | <ul style="list-style-type: none"> • the potential impact on the Independence of the Member; • the status of the Administration; • the costs of ceasing and transferring the Appointment; and • Professional Fees and Expenses billed and any outstanding amounts; and <p>c) in the circumstances described in paragraph 4.15 <u>4.22</u> (b), apply to the court to either continue or resign from the Appointment.</p> |
| 4.23 | Where a Member in Public Practice becomes aware that the <i>Declaration of Independence and, Relevant Relationships and Indemnities</i> is out of date or inaccurate, the Member shall update the <i>Declaration</i> and provide it to the creditors or the Committee with the next communication and table it at the next meeting of the creditors or the Committee. |
| 4.24 | Where a Member in Public Practice is requested by an insolvent Entity, its directors or its creditors to consent to an Appointment to replace another person who has commenced the Administration, and the Member intends to agree to the request, the Member shall: <p>(a) give reasonable notice to the other person being not less than one business day prior to the meeting of creditors, except when the request is received within one business day before that meeting;</p> <p>(b) not solicit proxies directly or indirectly and shall act, and be seen to act, in the creditors' interests;</p> <p>(c) provide a <i>Declaration of Independence and, Relevant Relationships and Indemnities</i> containing the information required by paragraph 4.14 <u>4.20</u> at the meeting where the creditors decide whether to replace the other person; and</p> <p>(d) disclose to the creditors the basis on which the Member proposes to charge Professional Fees and details of the Member's relationship with the Entity nominating the Member for the Appointment.</p> |
| 4.25 | A Member in Public Practice should be aware that disclosure of matters in a <i>Declaration of Independence and, Relevant Relationships and Indemnities</i> , and the tabling of such Declaration at a meeting of creditors, will not prevent a finding by a court, regulator or a professional body that a Member has breached the requirements of this Standard or the relevant law. |
| 6.1 | A Firm which provides Insolvency Services shall establish policies and procedures which prohibit the Firm, its <u>a Network Firm, their</u> Partners and employees, and the Close and Immediate Families, Controlled and Associated Entities of the Firm's <u>and Network Firms'</u> Partners and employees from acquiring or deriving a benefit from dealing with any assets including property which comes under the control of a Partner or employee due to an Appointment, without obtaining the prior approval of the court. |
| 6.3 | A Member in Public Practice shall take all reasonable steps to ensure that the Member does not knowingly sell property or other assets of an Administration to the Member's Firm, its <u>a Network Firm, their</u> Partners or employees, or to the Immediate and Close Families, Controlled or Associated Entities of the Member, the Member's <u>Firm's or Network Firms'</u> Partners and employees without obtaining prior approval of the court. |

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| 7.3(d) | the relationships, if any, the Member or, the Member's Firm, or a Network Firm has with any of the parties to the proceedings that may create a threat or a perceived threat to the Member's obligation to comply with the fundamental principles of the Code or the Member's paramount duty to the court, and any appropriate safeguards implemented; |
| 8.1 | A Member in Public Practice performing an Administration shall be remunerated for such service by way of Professional Fees in accordance with Section 240 Fees and other Types of Remuneration of the Code, subject to the limitations in paragraph 4.12 4.18. |
| 8.5 | A Member in Public Practice shall claim as Professional Fees, and not as Expenses, any fees for Insolvency Services provided by the Member, the Member's Firm, a Network Firm or a third party to an Administration. Where the Member or, the Member's Firm or a Network Firm provides Professional Services, other than Insolvency Services, the fees in respect of those services shall be claimed as Professional Fees. |
| 8.7 | A Member in Public Practice who has accepted an Appointment, other than as a Controller or a Trustee, shall obtain court approval when the Member makes a claim in respect of Professional Fees for any pre-appointment work performed in respect of an Appointment. |
| 8.9 | <p><u>When considering whether a proposed Contingent Fee arrangement in a particular Administration meets the requirements of paragraph 8.8, a Member in Public Practice shall consider the following:</u></p> <ul style="list-style-type: none"> • <u>funds available to the Administration;</u> • <u>funding from alternative sources such as creditors or a litigation funder;</u> • <u>the costs of the alternative sources of funds in comparison to the Contingent Fee arrangement;</u> • <u>the risk associated with the tasks to be undertaken for the Contingent Fee; and</u> • <u>the appropriateness of the amount of the proposed Contingent Fee in relation to the nature of the Administration and the risk associated with the task to be undertaken.</u> |
| 8.10 | <p>Subject to paragraph 8.8 wWhere a Member in Public Practice enters into an arrangement to receive a Contingent Fee for Insolvency Services, the Member shall obtain approval from the Approving Body prior to commencement of Professional Services after having disclosed the following information:</p> <ul style="list-style-type: none"> • details of the arrangement including the nature of the contingency and how achievement of the contingency will be assessed; • the Member's remuneration in the event the contingency is or is not achieved; • when the Member's remuneration is expected to be drawn; and • except in the case of an Appointment as a Controller, why the arrangement to receive a Contingent Fee is in the best interest of the creditors. |
| 8.17 | <p>Where a Member in Public Practice receives monies prior to acceptance of an Appointment to meet the costs of the proposed Administration, the Member shall ensure:</p> <ul style="list-style-type: none"> (a) the monies are held on trust; (b) there are no conditions on the conduct or outcome of the Administration attached to the monies; |

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| | <p>(c) full disclosure is made to creditors in the <i>Declaration of Independence and, Relevant Relationships and Indemnities</i>; and</p> <p>(d) approval of Professional Fees is obtained prior to them being withdrawn from the trust account.</p> |
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