

19 December 2019

Committee Secretary
Parliamentary Joint Committee on Corporations and Financial Services
PO Box 6100
Parliament House
CANBERRA ACT 2600
By email: corporations.joint@aph.gov.au

Dear Committee Secretary,

RE: Additional information for the Parliamentary Inquiry into the regulation of Auditing in Australia relating to auditors and insolvency services

APESB has noted that the provision of insolvency services to audit clients has been a topic raised in submissions and discussed at public hearings for the Parliamentary Inquiry into the regulation of Auditing in Australia (the Inquiry).

APESB's submission (Submission 42) to the Inquiry focused on a high-level overview of the professional and ethical requirements that apply to auditors in Australia. While the submission referred briefly to insolvency services, APESB wishes to draw to the Parliamentary Joint Committee on Corporations and Financial Services' (PJC's) attention the specific relevant prohibitions and requirements in APESB pronouncements relating to auditing and insolvency services.

1. *The APESB Code prohibits firms from undertaking audit and insolvency services in relation to the same client*

APES 110 *Code of Ethics for Professional Accountants (including Independence Standards)* (the APESB Code) prohibits a firm from providing audit and insolvency services to the same client.

A firm must refuse to perform, or must withdraw from, the audit engagement if a partner or employee of the firm were to serve as an officer (including management of an administration¹) of an audit client.²

This requirement is an Australian specific prohibition that has been in force since March 1998.³

¹ An administration is an insolvency arrangement arising from the appointment, other than a members' voluntary liquidation, under which an insolvent entity operates.

² Paragraph AUST R523.3.1 of the APESB Code.

³ Originally in APS 7 *Statement of Insolvency Services*, then the APESB Code from 2006.

2. Independence requirements of APES 330 Insolvency Services will effectively limit a firm providing Insolvency Services provided to an entity which has obtained funding from a bank audit client

APESB's standard on insolvency services, [APES 330 Insolvency Services](#) (APES 330), sets out requirements and application material in respect of providing insolvency services. A key aspect of the provision of insolvency services is the requirement to maintain independence.

Consistent with the APESB's Code and APES 330, this comprises independence of mind and appearance. Professional accountants and firms must also meet legal precedents established by Australian courts in relation to insolvency services and independence. An extract of APES 330 with primarily the liquidator's independence requirements is attached for your information.

Before accepting an insolvency appointment, the firm must identify, evaluate and address threats to independence. If a threat is identified, the firm must not accept the appointment unless:

- (a) permitted by APES 330 or law or regulations;
- (b) court approval is obtained; or
- (c) the threat is trivial and inconsequential.

These independence requirements in APES 330 will effectively prohibit most circumstances of firms providing insolvency services for an individual or entity that is a client of a bank in circumstances where that bank is also an audit client of the firm.

To be transparent about their independence obligations, the firm must disclose its assessment and evaluation of their assessment to creditors in the *Declaration of Independence, Relevant Relationships and Indemnities* (DIRRI).

Concluding comments

The comments above are at a high level and we welcome the opportunity to discuss with the PJC the specific prohibitions relating to firms providing insolvency services. If you wish to discuss further or should you require any additional information, please contact APESB's Chief Executive Officer, Channa Wijesinghe, at channa.wijesinghe@apesb.org.au.

Yours sincerely



Nancy Milne OAM

Chairman

Extract of APES 330 - Independence-related provisions only

APES 330 Insolvency Services

[Supersedes APES 330 Insolvency Services issued in September 2014]

REVISED: August 2019

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- (d) any other such arrangements that restrict the proper exercise of the **Member's** judgement and duties.

4. Professional Independence

- 4.1 The requirements in Section 4 of this Standard do not apply to **Appointments** as **Controller** or liquidator in a members' voluntary liquidation.
- 4.2 Paragraph 4.1 does not remove a **Member in Public Practice's** obligations to comply with the relevant law in respect of **Independence**.
- 4.3 Subject to paragraph 4.4, a **Member in Public Practice** accepting an **Appointment** or conducting an **Administration** shall maintain **Independence**.³
- 4.4 Prior to accepting an **Appointment**, a **Member in Public Practice** shall identify, evaluate and address threats to the **Independence** of the **Member**. Where the **Member** identifies a threat, the **Member** shall not accept the **Appointment** unless:
 - (a) the threat is trivial and inconsequential;
 - (b) the threat arises in circumstances or relationships that are permitted by this Standard or law or regulations; or
 - (c) the **Member** obtains court approval.
- 4.5 A **Member in Public Practice** shall not accept an **Appointment** where the **Member**, the **Member's Firm**, a **Network Firm** or their **Partners** have provided **Professional Services** to the insolvent **Entity** or any other **Entity** which:
 - (a) has reasonable potential to lead to litigation claims against the **Member** or the **Member's Firm** by a stakeholder of the **Administration**;
 - (b) is material to the **Administration**; or
 - (c) 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.
- 4.6 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:
 - (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;
 - (b) not solicit proxies directly or indirectly and shall act, and be seen to act, in the creditors' interests;
 - (c) provide to the other person a *Declaration of Independence, Relevant Relationships and Indemnities* (DIRRI), containing the information required by paragraph 4.24, to be tabled at the meeting where the creditors decide whether to replace the other person;
 - (d) provide details in the **DIRRI** of the **Member's** relationship with the **Entity** nominating the **Member** for the **Appointment**; and
 - (e) disclose to the creditors, at the meeting where the creditors decide whether to replace the other person, the basis (including rates where applicable) on which the **Member** proposes to charge **Professional Fees**.

³ Australian courts have established legal precedents in respect of independence in the context of **Insolvency Services**. **Members** should refer to the definition of **Independence** and Appendix 1.

- 4.7 A **Member in Public Practice** conducting an **Administration** shall:
- (a) act impartially in the discharge of the **Member's** duties and responsibilities;
 - (b) ensure that the **Member's** personal interests do not conflict with the **Member's** duties; and
 - (c) remain alert for new information or changes in facts and circumstances that may create threats to **Independence**.
- 4.8 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:
- (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 *Declaration of Independence, Relevant Relationships and Indemnities* (DIRRI) 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 all creditors and the appropriate regulatory authority of the following:
 - (i) the nature of the threat;
 - (ii) the key facts and circumstances;
 - (iii) reasons why the circumstances or relationships giving rise to the threat were not identified prior to acceptance of the **Appointment**;
 - (iv) the potential impact on the **Independence** of the **Member**;
 - (v) the status of the **Administration**;
 - (vi) the costs of ceasing and transferring the **Appointment**;
 - (vii) **Professional Fees** and **Expenses** billed and any outstanding amounts; and
 - (viii) how the threat will be addressed, such as applying to the court to continue the **Appointment**, or for the **Appointment** of a special purpose **Appointee**, or resigning from the **Appointment**; and
 - (c) in the circumstances described in paragraph 4.8(b), apply to the court to continue the **Appointment** or for the **Appointment** of a special purpose **Appointee**, or resign from the **Appointment**.

Interests and relationships

- 4.9 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**, its **Related Entities** or **Associates**. The **Member** shall consider the following matters when identifying relevant **Network Firms**:
- (a) the geographical regions or countries in which the insolvent **Entity**, its **Related Entities** or **Associates** operate; and
 - (b) relationships with the directors or officers of the insolvent **Entity**, its **Related Entities** or **Associates**.

- 4.10 The following circumstances and relationships are not generally considered to create a threat to the **Independence**⁴ of a **Member in Public Practice** who is considering accepting or continuing an **Appointment**:
- (a) engagement of the **Member**, the **Member's Firm** or a **Network Firm**, by a third party who is not an **Associate** or **Related Entity**, to investigate, monitor or advise on the affairs of the insolvent **Entity** on behalf of the third party:
 - (i) where the scope of the **Engagement** will not compromise the **Member's Independence**; and
 - (ii) will not be subject to review or challenge in a subsequent **Administration**; and
 - (iii) any **Professional Fees** received for the **Engagement** would not be a voidable transaction⁵ in a subsequent **Administration**; or
 - (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 *Corporations Act 2001*; or
 - (c) **Pre-appointment Advice** provided by the **Member**, the **Member's Firm** or the **Network Firm** to the insolvent **Entity**, which will not be subject to review or challenge in a subsequent **Administration** and was limited to:
 - (i) the financial situation of the **Entity**;
 - (ii) the solvency of the **Entity**;
 - (iii) the consequences of insolvency for the **Entity**; or
 - (iv) alternative courses of action available to the **Entity**; or
 - (d) an investigating accountant **Engagement** for the insolvent **Entity**, its **Associates** or **Related Entities**, subject to the same limitations in paragraph 4.10(c); or
 - (e) planning or preparation for a prospective **Appointment** that does not include:
 - (i) providing advice to the insolvent **Entity**, its **Associates**, **Related Entities** or creditors; or
 - (ii) the negotiation or conclusion of outcomes in advance of a planned **Appointment** of the **Member in Public Practice**.
- 4.11 Trivial or inconsequential relationships are not a barrier 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 *Declaration of Independence, Relevant Relationships and Indemnities* (DIRRI) referred to in paragraph 4.24. A relationship is trivial or inconsequential if it is remote, coincidental or insignificant.
- 4.12 **A Member in Public Practice shall not accept an Appointment, where the Member, the Member's Firm, a Network Firm or their Partners or those Managerial Employees in the Office in which the Member practises have, or have had, any of the following relationships:**
- (a) **an Immediate or Close Family relationship with:**
 - (i) **the insolvent Entity;**
 - (ii) **an Associate or Related Entity of the insolvent Entity;**
 - (iii) **an employee of, or adviser, to the insolvent Entity who is in a position to exert direct and significant influence over the insolvent Entity; or**

4 Australian courts have established legal precedents in respect of independence in the context of **Insolvency Services**. **Members** should refer to the definition of **Independence** and Appendix 1.

5 Including transactions described in Part 5.7B, Division 2 of the *Corporations Act 2001* and Part VI, Division 3, Subdivision A of the *Bankruptcy Act 1966*.

- (iv) an **Entity** or an **Associate** or **Related Entity** of that **Entity** that has provided finance to the insolvent **Entity**.
 - (b) a close personal relationship with:
 - (i) the insolvent **Entity**;
 - (ii) an **Associate** or **Related Entity** of the insolvent **Entity**; or
 - (iii) an employee of, or adviser to, the insolvent **Entity** who is in a position to exert direct and significant influence over the insolvent **Entity**.
 - (c) a material business relationship, including the holding of a material **Financial Interest**, whether directly or indirectly in or jointly in the previous two years with:
 - (i) the insolvent **Entity**;
 - (ii) an **Associate** or **Related Entity** of the insolvent **Entity**;
 - (iii) an employee of, or adviser to, the insolvent **Entity** who is in a position to exert direct and significant influence over the insolvent **Entity**; or
 - (iv) an **Entity** that has provided finance to the insolvent **Entity**.
 - (d) a material loan or material guarantee, in the previous two years, to or from:
 - (i) the insolvent **Entity**;
 - (ii) an **Associate** or **Related Entity** of the insolvent **Entity**; or
 - (iii) an employee of, or adviser to, the insolvent **Entity** who is in a position to exert direct and significant influence over the insolvent **Entity**.
 - (e) employment with the insolvent **Entity** in the preceding two years, in a position to exert direct and significant influence over the insolvent **Entity**.
- 4.13 A business relationship includes the provision of goods or services by the insolvent **Entity** to the **Member**, the **Member's Firm**, a **Network Firm** or their **Partners** or those **Managerial Employees** in the **Office** in which the **Member** practices.
- 4.14 In respect of prior relationships of the nature referred to in paragraphs 4.12(c), 4.12(d) and 4.12(e), notwithstanding that the relationship occurred more than two years prior to the proposed **Appointment**, a **Member in Public Practice** should evaluate any threats a prior relationship is likely to create to the **Member's Independence**. In performing this assessment, the **Member** should 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 nature of the prior relationship and the reasons for it being terminated.
- 4.15 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**⁶ 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**.

⁶ Australian courts have established legal precedents in respect of independence in the context of **Insolvency Services**. **Members** should refer to the definition of **Independence** and Appendix 1.

Prior Professional Services (including those provided at different Firms)

- 4.16 A **Member in Public Practice** shall not accept an **Appointment** where the **Member**, 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**:
- (a) will not affect the **Member's** ability to comply with the statutory and fiduciary obligations associated with the **Administration**;
 - (b) does not create threats to the **Member's** ability to comply with the fundamental principles of the **Code** and **Independence** when performing the duties of the **Administration**; and
 - (c) will not be subject to review by the **Member** during the course of the **Administration**.
- 4.17 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 accordance with the requirements of this Standard.
- 4.18 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** or **Managerial Employee**. Where there were prior relationships, the **Member** shall disclose the relationships in the *Declaration of Independence, Relevant Relationships and Indemnities* (DIRRI). 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**.

Pre-appointment Advice

- 4.19 If the insolvent **Entity** is a company, a **Member in Public Practice** shall not provide **Pre-appointment Advice** to both the company and 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**.
- 4.20 If the insolvent **Entity** is an individual, and a **Member in Public Practice** provides **Pre-appointment Advice** to that individual, the **Member** shall not provide **Pre-appointment Advice** to any company controlled by that individual or of which the individual serves as a director or an officer.
- 4.21 The requirements of paragraphs 4.19 and 4.20 do not prohibit a **Member in Public Practice** from providing general information on the insolvency process and the consequences of insolvency to both the company and its directors in their personal capacity, or the individual and related companies, as the case may be. General information is limited to information which is not specific to the insolvent **Entity's** particular facts and circumstances.

Declaration of Independence, Relevant Relationships and Indemnities

- 4.22 A **Member in Public Practice** shall provide a *Declaration of Independence, Relevant Relationships and Indemnities* (DIRRI) in respect of an **Insolvency Service**, other than an **Appointment** as a **Controller** or a liquidator in a members' voluntary liquidation. The **Member** shall provide the **DIRRI** in the first communication to the creditors and table it at the first meeting of the creditors.

- 4.23 A **Member in Public Practice** shall include all relevant relationships in the *Declaration of Independence, Relevant Relationships and Indemnities* (DIRRI) that may be relevant to a creditor in assessing the **Member's Independence**.
- 4.24 A **Member in Public Practice** shall include the following in the *Declaration of Independence, Relevant Relationships and Indemnities* (DIRRI):
- (a) a statement about the purpose of the DIRRI;
 - (b) a statement as to whom the DIRRI is being made in respect of;
 - (c) a declaration that the **Member** has undertaken an evaluation of the significance of any threats to **Independence**⁷ 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;
 - (d) where there is a **Referring Entity** and disclosure of the **Referring Entity** is:
 - required by law⁸; or
 - not required by law and the **Referring Entity** is not an individual; or
 - not required by law and the **Referring Entity** is an individual and the **Member** has obtained consent in writing from that individual;
 - (i) the name of the **Referring Entity**;
 - (ii) the connection to the insolvent **Entity** (if applicable) of the **Referring Entity**;
 - (iii) the **Member's** reasons for believing the relationship with the **Referring Entity** does not result in the **Member** having a conflict of interest or duty; and
 - (iv) a statement that there is no expectation, agreement or understanding with the **Referring Entity** regarding the conduct of the **Administration**;
 - (e) 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 the **Member's** reasons for believing why such **Pre-appointment Advice** does not result in a conflict of interest or duty;
 - (f) a declaration that no other information or advice beyond that outlined in the DIRRI was provided to the insolvent **Entity**, directors of the insolvent **Entity** (if the insolvent **Entity** is a company) or their advisors;
 - (g) a declaration setting out all relationships the **Member**, the **Member's Firm**, 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:
 - (i) the insolvent **Entity**;
 - (ii) if the insolvent **Entity** is a company – an **Associate** of the company;
 - (iii) if the insolvent **Entity** is an individual:
 - an **Immediate** or **Close Family** member of the individual;
 - a spouse or dependant of an **Immediate** or **Close Family** member of the individual; or
 - any **Entity** with which the individual or any of the persons noted above are associated;

7 Australian courts have established legal precedents in respect of independence in the context of *Insolvency Services*. **Members** should refer to the definition of **Independence** and Appendix 1.

8 **Members** should refer to section 60 and other relevant provisions of the *Corporations Act 2001* or relevant provisions of the *Bankruptcy Act 1966* to determine their obligations under the law.

- (iv) a former **Appointee** of the insolvent **Entity**; and
 - (v) a person who has a security over the whole, or substantially the whole, of the insolvent **Entity's** property and other assets;
- and the **Member's** reasons for believing why these relationships, if any, do not result in a conflict of interest or duty;
- (h) a declaration of prior **Professional Services** provided in the preceding two years to the insolvent **Entity** by the **Member**, the **Members' Firm**, a **Network Firm** or their **Partners**, including:
 - (i) the nature of the **Professional Services**;
 - (ii) when the **Professional Service** was provided;
 - (iii) the period over which the **Professional Service** was provided;
 - (iv) the **Professional Fees** paid; and
 - (v) the **Member's** reasons for believing why the **Professional Service** does not result in a conflict of interest or duty;
 - (i) a declaration of any other relevant relationships the **Member** has had in the preceding two years that may be relevant to the creditors in assessing the **Independence** of the **Member**;
 - (j) a declaration that there are no other known prior **Professional Services** or other relationships that require disclosure; and
 - (k) a declaration of indemnities (other than statutory indemnities) and **Upfront Payments**, including:
 - (i) the identity of each indemnifier or provider of an **Upfront Payment** (name and relationship with the insolvent **Entity**);
 - (ii) the extent and nature of each indemnity or **Upfront Payment**;
 - (iii) a statement as to where the funds are being held;
 - (iv) when and how the funds will be applied;
 - (v) whether there are any conditions imposed on the use of funds; and
 - (vi) that there are no other indemnities or **Upfront Payments** to be disclosed.

4.25 In addition to the requirements contained in paragraph 4.24, a **Member in Public Practice** should consider including in the *Declaration of Independence, Relevant Relationships and Indemnities* (DIRRI) a declaration setting out all relationships the **Member**, the **Member's Firm**, a **Network Firm** or their **Partners** or those **Managerial Employees** in the **Office** in which the **Member** practises have had more than two years prior to the **Appointment** with:

- (a) the insolvent **Entity**;
- (b) if the insolvent **Entity** is a company – an **Associate** of the company;
- (c) if the insolvent **Entity** is an individual:
 - (i) an **Immediate** or **Close Family** member of the individual;
 - (ii) a spouse or dependant of an **Immediate** or **Close Family** member of the individual; or
 - (iii) any **Entity** with which the individual or any of the persons listed above are associated; or
- (d) any other **Entity** that may be relevant to the creditors in assessing the **Independence** of the **Member**.

When determining whether to make additional disclosures, the **Member** should take into consideration the nature of the prior relationship, the reasons for termination of the relationship

and the relevance that additional information may have for creditors in assessing the [Member's Independence](#).

- 4.26 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* (DIRRI) prior to its issue. Where this is not possible and a [DIRRI](#) is issued before all [Appointees](#) sign it, the [Members](#) shall:
- (a) provide an explanation in the [DIRRI](#) as to why all [Appointees](#) were not able to sign it; and
 - (b) sign a replacement [DIRRI](#) as soon as possible and provide it to creditors in the next communication.
- 4.27 Where a [Member in Public Practice](#) becomes aware that the *Declaration of Independence, Relevant Relationships and Indemnities* (DIRRI) is out of date or inaccurate, the [Member](#) shall update the [DIRRI](#) and provide it to the creditors and the [Committee](#) with the next communication and table it at the next meeting of the creditors or the [Committee](#).
- 4.28 A [Member in Public Practice](#) should be aware that disclosure of matters in a *Declaration of Independence, Relevant Relationships and Indemnities* (DIRRI), and the tabling of such [DIRRI](#) 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.

A template of a Declaration of Independence, Relevant Relationships and Indemnities (DIRRI) is set out in Appendix 2.

5. Professional Engagement matters

- 5.1 A [Member in Public Practice](#) who has accepted an [Appointment](#) is not required to provide an [Engagement](#) document in accordance with APES 305 *Terms of Engagement*.
- 5.2 A [Member in Public Practice](#) who becomes aware of instances of non-compliance with laws and regulations when providing [Insolvency Services](#) shall comply with Section 360 *Responding to Non-Compliance with Laws and Regulations* of the [Code](#).
- 5.3 A [Member in Public Practice](#) should consider the guidance in APES GN 30 *Outsourced Services* if the [Member](#) engages or outsources to a third party, either components or all aspects of, the [Insolvency Services](#) provided. If work in an [Appointment](#) is outsourced, the [Member's](#) obligations under this Standard remain the same as if the [Member](#) or the [Member's](#) staff had performed the work.

6. Dealing with property and other assets

- 6.1 A [Member in Public Practice](#) shall not derive a profit or advantage from an [Administration](#), including through the sale or purchase of property or other assets of an [Administration](#), unless permitted by law, regulations or with prior approval of the court.
- 6.2 A [Firm](#) which provides [Insolvency Services](#) shall establish policies and procedures which prohibit the [Firm](#), a [Network Firm](#), their [Partners](#) and employees, and the [Immediate](#) and [Close Families](#), controlled and associated [Entities](#) of the [Firm's](#) and [Network Firms' Partners](#) and employees from purchasing assets 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](#), unless permitted by law, regulations or with prior approval of the court.

Appendix 1

Appointee's Independence

*This Appendix includes considerations for **Members in Public Practice** when assessing independence in the provision of **Insolvency Services**. **Members** shall maintain **Independence** in the provision of **Insolvency Services** as required by Section 4 of this Standard. However, **Members** providing **Insolvency Services** are also required to consider legal precedents set by Australian courts in respect of independence obligations, some of which are summarised below.*

*The information in this Appendix is not intended to be a comprehensive and/or definitive list and **Members** are cautioned that whether any of these principles apply to a particular **Appointment** is a matter of professional judgement, based on the particular facts and circumstances of the **Appointment**. The cases referred to in this Appendix must be read in full to be understood in their entirety.*

Independence is fundamental for **Members in Public Practice** when providing **Insolvency Services**. **Members** are required to comply with the independence requirements in the **Code**, APES 330 and relevant laws and regulations.

Accordingly, **Members** must be cognisant of legal precedence in relation to the duties of independence, impartiality, and avoidance of conflict when providing **Insolvency Services**. The legal precedence sets out a requirement for independence which may be perceived to be stricter than the **Code**. It focuses on whether a fair-minded lay observer might reasonably apprehend that the practitioner might not bring an impartial mind to their duties¹⁰ compared to the reasonable and informed third party test in the **Code**.

Decisions from cases in the Australian courts confirm that **Members** who provide **Insolvency Services** can be removed from their **Appointment** if there is an actual or apprehended (perceived) conflict of interest or bias. Note that the conflict of interest must be real and cannot be theoretical.¹¹

Members should consider the following matters when evaluating independence, including the perceived lack of impartiality:

- whether **Pre-appointment Advice** has been provided to a director(s) regarding their personal position and affairs¹²;
- whether they have a full understanding of the interests and relationships of all relevant parties, including their own employees, subcontractors and consultants¹³;
- whether a referral relationship creates threats to independence¹⁴; and
- whether it is better for the conduct of the **Administration** if the **Member** is removed (taking into consideration the stage of the **Administration** and the remaining functions to be performed).¹⁵

10 *Australian Securities and Investments Commission v Franklin (liquidator), in the matter of Walton Constructions Pty Ltd* [2014] FCAFC 85.

11 *Queensland Mining Corporation Ltd v Butmall Pty Ltd, in the matter of Butmall Pty Ltd (in liq)* [2016] FCA 16.

12 Refer to *Re Club Superstores Australia Pty Ltd (in liq)* (1993) 10 ACSR 730; *Advance Housing Pty Ltd (in liq) v Newcastle Classic Developments Pty Ltd* (1994) 14 ACSR 230; *Commonwealth of Australia v Irving* (1996) 65 FCR 291; and *Korda, in the matter of Ten Network Holdings Ltd (Administrators Appointed) (Receivers and Managers Appointed)* [2017] FCA 914.

13 *Bovis Lend Lease v Wily* [2003] NSWSC 467.

14 *Australian Securities and Investments Commission v Franklin (liquidator), in the matter of Walton Constructions Pty Ltd* [2014] FCAFC 85.

15 *Re Recycling Holdings Pty Limited* [2015] NSWSC 1016.