

## AGENDA PAPER

**Item Number:** 8  
**Date of Meeting:** 10 June 2021  
**Subject:** Proposed Revisions to APES 330 *Insolvency Services*

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Action required     For discussion     For noting     For information

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### Purpose

To:

- update the Board on Technical Staff's review and the implementation of the Government's insolvency reforms to support small businesses and matters impacting APES 330 *Insolvency Services* (APES 330);
- update the Board on Technical Staff's proposed changes to APES 330 and stakeholder engagement with the Australian Securities and Investments Commission (ASIC), Australian Restructuring Insolvency Turnaround Association (ARITA) and APES 330 Taskforce member Robyn Erskine; and
- obtain the Board's approval of Technical Staff's proposed way forward.

### Background

A [revised APES 330](#) was issued in August 2019 with significant changes set out in the [Basis for Conclusions](#).

Technical Staff provided updates to the Board on APES 330 at the following Board meetings:

- August 2020 ([Agenda Item 5](#)) that revised APES 330<sup>1</sup> could be interpreted more broadly than intended and that ARITA was updating their Declaration of Independence Relevant Relationships and Indemnities (DIRRI);
- November 2020 ([Agenda Item 9](#)) noting the addition of matters relating to subparagraph 4.12(c)(iv) of APES 330 and the DIRRI to the APESB Issues Register, ongoing liaison with ARITA and an overview of the Government's insolvency reforms to support small businesses; and

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<sup>1</sup> Paragraph 4.12(c)(iv) of APES 330.

- March 2021 ([Agenda Item 12](#)) on Technical Staff's initial analysis of the Government's reforms legislation issued in December 2020<sup>2</sup>, continued liaison with ARITA and proposals to finalise the legislative review, whether changes would be required to APES 330, and if so to prepare an Exposure Draft for the June 2021 Board meeting.

## Matters for Consideration

### Technical Staff's Review of Insolvency Reforms and matters impacting APES 330

Technical Staff have finalised a detailed review of the insolvency reforms and complex legislative changes, which commenced 1 January 2021. The reforms aim to enable small businesses (less than \$1m liabilities and other eligibility criteria) that are, or are likely to become, insolvent to come to an agreement with its creditors (restructure).

Technical Staff are of the view that certain aspects of APES 330 do not apply in the same manner as other insolvency appointment types due to the very different nature of small business restructuring appointments.

Restructuring Practitioners are appointed by the company and act as both an officer and as an agent of the company to which they are appointed.<sup>3</sup> Notwithstanding this dual role, the Restructuring Practitioner has important obligations to fulfil for the company's creditors and to remain independent.<sup>4</sup>

Some of the duties and obligations of Restructuring Practitioners differ from other forms of insolvency appointments. Therefore, various elements of the requirements in Section 4 *Professional Independence* of APES 330 are not applicable. In particular, Restructuring Practitioners are not subject to the level of independence requirements that have been established by legal precedents as summarised in [Appendix 1 of APES 330](#).

Technical Staff are aware of the following recent cases relating to Restructuring Practitioners:

- [Re DST Project Management and Construction Pty Ltd \(ACN 623 076 031\) \[2021\] VSC 108 \(9 March 2021\)](#) (DST); and
- [Re Dessco Pty Ltd \[2021\] VSC 94 \(26 February 2021\)](#)

Each case dealt with applications to wind up companies in restructuring. The level of inquiry required from Restructuring Practitioners on creditors debts was explored, and the court rejected both applications and allowed the restructuring processes to continue. While independence was not challenged in either case, in DST, the judgement highlights the importance of the Restructuring Practitioner exercising an independent mind (paragraph 34):

*On the other hand, Mr Preiner, whose independence is not in question and who is under a duty to make reasonable enquiry, has reviewed each of these creditor's claim and associated evidence, and has not raised any concern as to their veracity. It is*

<sup>2</sup> [Corporations Amendment \(Corporate Insolvency Reforms\) Act 2020](#), [Corporations Amendment \(Corporate Insolvency Reforms\) Regulations 2020](#) and [Insolvency Practice Rules \(Corporations\) Amendment \(Corporate Insolvency Reforms\) Rules 2020](#)

<sup>3</sup> Refer sections 9, 453B and 453H of the [Corporations Act 2001](#) in respect of Restructuring Practitioner of a company and section 9 of the [Corporations Act 2001](#) and regulations 5.3B.33 and 5.3B.40 of the [Corporations Regulations 2001](#) in respect of Restructuring Practitioner for a company's restructuring plan.

<sup>4</sup> Refer pages 76 and 79 of [Explanatory Statement Issued by authority of the Treasurer Corporations Act 2001 Corporations \(Fees\) Act 2001 Corporations Amendment \(Corporate Insolvency Reforms\) Regulations 2020](#).

*apparent from Mr Preiner's report that he has not simply accepted Mr Sun's claims on face value. Rather, in accordance with his duties, he has investigated the affairs of the Company exercising an independent mind, within the constraints of his role.*

Technical Staff believe the definition of Independence in APES 110 *Code of Ethics for Professional Accountants (including Independence Standards)* (APES 110) (and APES 330 excluding legal precedents as mentioned above), which focuses on acting with integrity and exercising objectivity and professional scepticism, should apply to Restructuring Practitioners. Further, the definition of Independence includes independence in appearance from the perspective of a reasonable and informed third party.

Legislative requirements for Restructuring Practitioners' remuneration are also significantly different from other insolvency appointments. Restructuring Practitioners are entitled to receive remuneration for necessary work properly performed that is:<sup>5</sup>

- (a) approved by the Board on or before the day the Restructuring Practitioner for a company is appointed consisting of:
  - (i) a fixed amount; and
  - (ii) remuneration worked out under a method approved by the Board in the event the board consents to proceedings; and
- (b) specified in a restructuring plan approved by the company's creditors consisting of:
  - (i) an amount as a specified percentage of payments made to creditors in accordance with the plan; and
  - (ii) remuneration worked out under a method specified in the plan in the event the board consents to proceedings.

Due to these differences, Technical Staff believe various requirements in Section 8 *Professional Fees and Expenses* of APES 330 do not apply to Restructuring Practitioners.

Technical Staff are of the view that Restructuring Practitioners should be 'carved out' of the requirements in Sections 4 and 8 of APES 330 and a new section (proposed Section 9) should be established setting out independence and professional fees requirements specific to Restructuring Practitioners.

#### *Implementation of the Government's Insolvency Reforms*

Technical Staff attended the *Business Support and Corporate Insolvency – Industry Roundtable* on 27 May 2021, convened by CPA Australia and CA ANZ, which included representatives from ASIC, ARITA, Australian Financial Security Authority, Australian Institute of Credit Management, various other government and industry bodies and insolvency firms.

The consensus at the Roundtable was that there has been a slow uptake of Restructuring Practitioner appointments due to various factors, including complexity and lack of understanding of the regime, creditors such as the ATO not pursuing debts in the current environment and potential insurance issues.

Based on the most recent [ASIC insolvency statistics](#) released 31 May 2021, since 1 January 2021, 9 restructuring Practitioners have been appointed and 4 of these have resulted in restructuring plans being implemented.

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<sup>5</sup> Refer sections 60-1B and 60-1C of [Insolvency Practice Rules \(Corporations\) 2016](#).

The slow uptake of Restructuring Practitioners reduces any urgency to amend APES 330. However, Technical Staff believe this may change as the impact of government stimulus packages diminishes and creditors' debt recovery actions increase.

Technical Staff note the Government released exposure drafts for consequential amendments to small business insolvency reforms for consultation between 23 April and 7 May 2021.<sup>6</sup> Further, as part of the Government's economic recovery plan, they have committed to further simplify and streamline insolvency law, including how trusts are treated under insolvency law, reviewing insolvent trading safe-harbour provisions, consulting on improving schemes of arrangement processes and increasing creditor's statutory demand threshold from \$2,000 to \$4,000.<sup>7</sup> Technical Staff will monitor these activities and potential impacts on APES 330.

### Stakeholder Engagement

Technical Staff have undertaken the following stakeholder engagement meetings on proposed changes to APES 330 since the March 2021 Board meeting:

- ARITA – 15 April and 3 June 2021
- ASIC – 5 May and 1 June 2021; and
- Robyn Erskine – 8 April and 1 June 2021.

Technical Staff have developed a preliminary working draft Exposure Draft for APES 330, which includes the following proposed amendments:

- inclusion in the objectives of the standard that it is to specify requirements applicable to Restructuring Practitioners;
- amendments to definitions for Appointment, Approving Body and including a definition for Restructuring Practitioner;
- carving Restructuring Practitioners out of Sections 4 and 8 of APES 330 (the remainder of APES 330 would remain applicable to Restructuring Practitioners);
- drafted a specific Section 9 for Restructuring Practitioners including requirements on Independence (based on the definition in APES 110/APES 330 and adjusted Appendix 1 of APES 330 accordingly) and Professional Fees and Expenses (relevant to Restructuring Practitioners remuneration entitlements); and
- drafted a new Appendix 4 to provide context on the nature of Restructuring Practitioner appointments, remuneration entitlements and the applicability of sections in APES 330 to Restructuring Practitioners.

Technical Staff believe including these proposed amendments, a new Restructuring Practitioner section, and requirements will assist in building trust and confidence in the small business restructuring regime. This includes increasing the level of trust from the perspective of creditors that the practitioner undertakes the appointment with integrity, objectivity and professional scepticism.

Technical Staff have sought feedback from ASIC, ARITA and Robyn Erskine on the preliminary working draft APES 330 Exposure Draft. Both ASIC and Robyn Erskine support Technical Staff's proposals and approach. However, there are some elements and structural components they believe need to be addressed. Technical Staff will provide a verbal update of the meeting with ARITA on 3 June 2021 at the June 2021 Board meeting.

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<sup>6</sup> [Consequential amendments to small business insolvency reforms | Treasury.gov.au](#)

<sup>7</sup> [Further insolvency reforms to support business dynamism | Treasury Ministers](#)

Another option addressed with ASIC and Robyn Erskine was for Technical Staff guidance material addressing the application of APES 330 to Restructuring Practitioners. However, the consensus was it was important for these requirements to be established to increase confidence in the system and to have this in one place (i.e., in APES 330). Technical Staff will also discuss this option with ARITA on 3 June 2021. However, at this stage, Technical Staff do not propose to pursue this option further.

## **Way Forward**

Technical Staff propose to:

- refine the drafting of the preliminary working draft APES 330 Exposure Draft to address initial comments received from ASIC, ARITA and Robyn Erskine;
- convene an APES 330 Taskforce meeting in July 2021 to discuss the proposed exposure draft;
- refine the drafting of the proposed exposure draft after the Taskforce meeting;
- if required, convene a second Taskforce meeting in August 2021; and
- prepare an exposure draft to amend APES 330 addressing the above matters and issues on the APESB Issues Register for consideration at the APESB September 2021 Board meeting.

## **Recommendations**

The Board:

- note the update on Technical Staff's review and the implementation of the Government's insolvency reforms to support small businesses and matters impacting APES 330;
- note the update on Technical Staff's proposed changes to APES 330 and stakeholder engagement with ASIC, ARITA and APES 330 Taskforce member Robyn Erskine; and
- approve Technical Staff's proposed way forward.

## **Materials presented**

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**Date** 2 June 2021