

August 2019



Basis for Conclusions: APES 330 Insolvency Services

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

BASIS FOR CONCLUSIONS:

Revised APES 330 Insolvency Services

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

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

Background

The APESB originally issued APES 330 in September 2009, and then revised it in November 2011 and again in September 2014. Subsequently, APESB initiated a project and engaged with stakeholders to ensure APES 330 was consistent with the *Insolvency Law Reform Act 2016* (Cth) and proposed revisions by the Australian Restructuring Insolvency and Turnaround Association (ARITA) to its *Code of Professional Practice* (ARITA Code).

APES 330 was also aligned with the restructured APES 110 *Code of Ethics for Professional Accountants (including Independence Standards)* (the Code), issued in November 2018.

APESB issued an exposure draft of the proposed revised Standard in November 2018 with a comment deadline of 1 March 2019. APESB received four submissions, and in response to the comments received, APESB has made several changes to APES 330.

Changes to APES 330

The significant changes made to the revised APES 330 (2019) include:

- Amendments to ensure consistency with legislative reforms;
- Updates and cross-referencing to the Code;
- Amendments to enhance consistency with the proposed ARITA Code and to refer to the ARITA Code;
- Additional guidance on independence considerations in a new Appendix 1;
- Enhancements to requirements for the *Declaration of Independence, Relevant Relationships and Indemnities* (DIRRI) and inclusion of a Template DIRRI in a new Appendix 2;
- Additional guidance on necessary and proper Professional Fees and Expenses in a new Appendix 3;
- Alignment to requirements in APES 310 *Client Monies* in respect of receipt of monies;
- Additional requirement and guidance regarding reasonable enquiries into the identity of the person(s) making the Appointment prior to acceptance;
- Re-ordering and adding sub-headings to Section 4 *Professional Independence* and Section 8 *Professional Fees and Expenses* to improve navigation and readability; and
- Other changes to align with other APESB pronouncements and to provide clarity on existing requirements in APES 330.

The following includes details of the key issues raised by respondents and stakeholders during the development of the revised APES 330 and how APESB addressed them.

Legislative Reforms

The *Insolvency Law Reform Act 2016* (Cth) was issued to streamline and ensure consistency across different legislative instruments¹ in relation to insolvency.

No substantive amendments were made as a result of these reforms as the legislation in many respects incorporated aspects already included in APES 330. Some requirements that are now covered in the new legislation were removed from the revised APES 330.

Consistency with the Code

Cross-references to the Code have been updated and additional references included in the revised APES 330, such as to Section 360 *Responding to Non-Compliance with Laws and Regulations* (NOCLAR) of the Code.

The Code includes a definition of Inducements, which is different from the definition in extant APES 330 (2014). Respondents raised concerns about activities excluded from an Inducement and that APES 330 could be better aligned to the Code.

APESB has included a cross reference to require compliance with Section 340 *Inducements, Including Gifts and Hospitality* of the Code and updated the definition of Inducement from the Code in the revised APES 330. The original definition of Inducement in extant APES 330 (2014) has been retained as application material (paragraphs 3.24 and 3.25).

Consistency with the ARITA Code

APESB Technical Staff engaged with ARITA in relation to the planned revisions to the ARITA Code and consideration of the alignment with APES 330. The proposed ARITA Code now predominantly aligns with APES 330. However, the ARITA Code and associated proposed ARITA Practice Statements are more prescriptive on specific content than APES 330, which is a principles-based standard developed in accordance with APESB's drafting conventions and may not necessarily align with the material in ARITA's Code and associated Practice Statements. A footnote has also been included to paragraph 3.11 of APES 330 reminding Members that are also ARITA members of their obligations under the ARITA Code.

Independence

Respondents were concerned that the definition of Independence in APES 330 and the Code was different to legal precedents set by Australian courts when assessing independence in the context of Insolvency Services.

The base definition of Independence remains unchanged in the revised APES 330 to maintain consistency with the Code and other APESB pronouncements. However, a reference has been included in the revised APES 330 to legal precedents established by Australian courts to highlight additional independence matters that Members in Public Practice need to comply with in relation to Insolvency Services. In addition, guidance is provided on considerations when assessing independence in the provision of Insolvency Services in a new Appendix 1 to APES 330.

¹ Reforms affected the *Bankruptcy Act 1966*, the *Corporations Act 2001* and the *Australian Securities and Investments Commission Act 2001*.

Declaration of Independence, Relevant Relationships and Indemnities (DIRRI)

Stakeholders raised concerns as to whether the requirements in relation to the DIRRI in the extant APES 330 (2014) adequately explained the purpose of a DIRRI and would require the disclosure of all relevant relationships. During the review of APES 330, some differences to ARITA's requirements were also noted.

APESB has addressed these concerns by enhancing requirements in the revised APES 330 including an overarching requirement to detail all relationships relevant to a creditor's assessment of the Member in Public Practice's Independence in the DIRRI (paragraph 4.23) and a statement about the purpose of the DIRRI (paragraph 4.24(a)). APESB has also included a template for a DIRRI in a new Appendix 2 to APES 330.

Referring Entities

The Australian Securities and Investments Commission (ASIC) issued a [Corporate Insolvency Update](#) in December 2018 requesting Insolvency Practitioners to provide details of referring entities including the individual's full name and their firm/business in the DIRRI. Extant APES 330 (2014) is consistent with this intent. However, of greater relevance is the requirement under the law to disclose referring entity details and not whether the DIRRI is required by law, particularly in respect of individuals. APES 330 subparagraph 4.24(d) has been amended to require disclosures where there are referring entities and disclosure of the referring entity is:

- required by law; 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 consent has been obtained.

A footnote has also been added to this subparagraph to refer Members to their obligations under the law.

Professional Fees and Expenses

A stakeholder noted that APES 330 could be enhanced to reflect key principles from recent court decisions in respect of necessary and proper Professional Fees and Expenses.

APESB has included additional guidance on matters to consider when determining what is necessary and proper Professional Fees and Expenses in a new Appendix 3 to the revised APES 330.

APES 330 uses the term Professional Fees in the body of the Standard, however, the legislation and the ARITA Code use the term remuneration. As such, a footnote to the definition of Professional Fees has been added to note that Professional Fees are also referred to as remuneration in the context of Insolvency Services.

Alignment to APES 310 *Client Monies*

Two respondents considered that APES 330 should be aligned with APES 310 *Client Monies* in particular, in respect of monies received prior to an Appointment for a proposed Administration. Another respondent disagreed due to the nature of the relationship between the Member in Public Practice and the insolvent Entity.

Insolvency Services

APESB is of the view that where such a payment is received, the Member does not have a present entitlement to the monies and it is in their control and therefore, the Member must comply with APES 310 *Client Monies* (APES 310) as if the Appointment related to a Client. APES 330 (paragraph 8.23) has been amended accordingly requiring the monies to be held in trust and in compliance with APES 310.

Reasonable Enquiries into Identity of Director(s) or Insolvent Debtors

Stakeholders raised concerns that reasonable enquiries to identify director(s) of an insolvent Entity or the Insolvent Debtor were not always made in the insolvency industry. A respondent also noted that reasonable enquiries should include a requirement to meet with the director(s) (or Insolvent Debtor).

APESB has addressed this by including a requirement (paragraph 3.13) in the revised APES 330 for Members to make such reasonable enquiries prior to an Appointment in accordance with APES 320 *Quality Control for Firms*. Further, a guidance paragraph has been included (paragraph 3.14) that reasonable enquiries should include meeting with and/or obtaining appropriate identification of the relevant person(s) where possible.