

AGENDA PAPER

Item Number: 12
Date of Meeting: 4 March 2021
Subject: Project Update APES 330 *Insolvency Services*

Action required For discussion For noting For information

Purpose

To:

- update the Board on the Government's insolvency reforms to support small businesses and matters impacting APES 330 *Insolvency Services* (APES 330); 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](#) and summarised in [Agenda Item 5](#) at the August 2020 Board meeting.

Technical Staff provided an update to the Board at the August 2020 board meeting in relation to APES 330. [Agenda Item 5](#) noted that revised APES 330¹ could be interpreted more broadly than intended and that the Australian Restructuring Insolvency Turnaround Association (ARITA) was updating the Declaration of Independence Relevant Relationships and Indemnities (DIRRI).

The Board was provided with a further update at the November 2020 Board meeting ([Agenda Paper 9](#)), including:

- 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 about the finalisation of the revised DIRRI; and
- an update and overview of the Government's insolvency reforms aimed at reducing complexity, time and costs of the insolvency process for small businesses and to enable certain businesses to restructure.

¹ Paragraph 4.12(c)(iv) of APES 330.

Matters for Consideration

Government's Insolvency Reforms

The following pieces of legislation were issued to enact the Government's insolvency reforms for small business and received Royal Assent in December 2020:

- [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](#)

The insolvency reforms commenced from 1 January 2021 and consist of complex amendments over 176 pages of legislation. The overarching aim of the reforms is to enable small businesses (less than \$1m liabilities and meet other eligibility criteria) that are, or are likely to become, insolvent to come to an agreement with its creditors (restructure).

Company directors remain in control during the restructuring process and are assisted by a restructuring practitioner in developing a restructuring plan to settle the liabilities. Creditors vote on whether to accept the plan and if a majority in value agree, the plan is enacted and comes to an end when terms are met, or the plan is terminated.

The Australian Securities and Investments Commission (ASIC) have developed useful guidance on [restructuring and the restructuring plan](#). A restructuring practitioner is a new class of registered liquidators with registered status granted by ASIC. To register only as a restructuring practitioner, the person must be a recognised accountant (a member of CA ANZ, CPA Australia or the IPA with a public practising certificate) and have demonstrated capacity to satisfy the functions and duties.

Specific academic qualifications of hours of experience are not prescribed in regulations for applying to register only as a restructuring practitioner. However, ASIC have provided a [detailed list](#) of things they will consider when assessing applications, including the ability to conduct a business viability review, provide insolvent trading safe harbour advice, prepare cashflow forecasts, develop restructuring plans, advise on ongoing trading, determine creditor claims, and demonstrated skills from an external administration context.

Technical Staff are aware that to date, there have only been a minimal number of appointments of a restructuring practitioner under Part 5.3B of the *Corporations Act 2001* and other companies which have declared an intention to appoint a restructuring practitioner, which provides those companies temporary protections up to 31 March 2021.

The insolvency reforms also provide for simplified creditors' voluntary liquidations for eligible companies, which aims to reduce costs due to less investigation, reporting, and dividend requirements. Eligibility includes that the company is unable to pay debts (less than \$1m) within 12 months, up to date with tax lodgements, and has not been under restructuring or simplified liquidation in the previous 7 years.

Liaison with ARITA

ARITA's revised DIRRI and Remuneration Approval Report were approved at the 24 November 2020 ARITA Board meeting.

Technical Staff met with ARITA technical staff in December 2020 and January 2021 in relation to the implementation and impact of the governments' small business insolvency reforms and the development of guidance material for members.

ARITA have issued the following fact sheets for directors:

- [Small Business Restructuring](#)
- [Simplified Liquidation](#)

ARITA have also developed a guidance note on the application of the ARITA Code and Practice Statements to small business restructuring. The guidance indicates that certain aspects of ARITA's Insolvency Services Practice Statement is unlikely to apply, including independence, certain parts of the DIRRI and remuneration requirements, and replacing an incumbent. The guidance note is to be presented for approval at the February 2021 ARITA Board meeting.

Technical Staff have reviewed the ARITA guidance and mapped this to APES 330 requirements and application material. From a preliminary review, Technical Staff generally agree with the contents of the ARITA guidance and propose to undertake a similar process and prepare Technical Staff guidance specific to APES 330 and other APESB pronouncements.

Exposure Draft for APES 330

Technical Staff intended to prepare an Exposure Draft of APES 330 for the March 2021 Board meeting. However, this was not feasible due to legislation changes only coming in late December 2020 and other APESB project commitments.

Technical Staff is in the process of reviewing the insolvency reforms legislation in detail. Should this review highlight that changes are required to APES 330, Technical Staff will prepare an Exposure Draft for the June 2021 meeting.

Alternatively, if no changes other than to subparagraph 4.12(c)(iv) and the DIRRI in Appendix 2 of APES 330 are required, Technical Staff will seek approval from the Board of an Exposure Draft out of session, as the Board has already considered these issues at its November 2020 Board meeting.

Way Forward

Technical Staff propose to:

- continue the detailed assessment of the Government's insolvency reforms legislation and regulations to determine the impact or if any changes are required for APES 330;
- develop Technical Staff guidance for restructuring practitioners on the applicability of APES 330 and seek Board approval subsequent to this Board meeting;
- review the final ARITA DIRRI for potential amendments to Appendix 2 of APES 330; and

- either prepare an exposure draft to amend APES 330 addressing the above and the matters on the APESB Issues Register for consideration at the APESB June 2021 Board meeting; or
- seek approval from the Board out of session for an exposure draft to amend APES 330 addressing the matters on the APESB Issues Register.

Recommendations

The Board:

- note the update on APES 330 and the Government's insolvency reforms to support small businesses; and
- approve Technical Staff's proposed way forward.

Materials presented

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