

## AGENDA PAPER

**Item Number:** 4  
**Date of Meeting:** 6 September 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 obtain the Board's approval:

- subject to the Board's review comments and editorials, to issue an Exposure Draft on proposed revisions to APES 330 *Insolvency Services* (APES 330) (ED 04/21); and
- of Technical Staff's proposed way forward in relation to APES 330.

### Background

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

- [August 2020](#) that subparagraph 4.12(c)(iv) revised APES 330 could be interpreted more broadly than intended and that ARITA was updating their *Declaration of Independence Relevant Relationships and Indemnities* (DIRRI);
- [November 2020](#) 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;
- [March 2021](#) on Technical Staff's initial analysis of the Government's insolvency reforms issued in December 2020<sup>1</sup>, continued liaison with ARITA, proposals to finalise the legislative review and to prepare an Exposure Draft for the June 2021 Board meeting; and
- [June 2021](#) on Technical Staff's detailed review of the insolvency reforms, implementation of the reforms, stakeholder engagement with ARITA, ASIC and Robyn Erskine and an overview of Technical Staff's preliminary working draft Exposure Draft for APES 330.

The Board approved Technical Staff's proposed way forward at the June 2021 Board meeting. The proposed way forward included convening a Taskforce meeting in July

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<sup>1</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](#)

2021. and to prepare an Exposure Draft to revise APES 330 for consideration at the September 2021 Board meeting.

## **Matters for Consideration**

### APES 330 Taskforce

Technical Staff refined the proposed APES 330 Exposure Draft to address initial comments received from ASIC, ARITA and APES 330 Taskforce member Robyn Erskine.

The revised proposed Exposure Draft for APES 330 was sent to the APES 330 Taskforce members on 21 July 2021 and was discussed at a Taskforce meeting on 29 July 2021. Draft minutes from the Taskforce meeting are attached at Agenda Item 4(a).

Taskforce members supported the approach taken by Technical Staff. The Taskforce also agreed for Technical Staff to add paragraphs addressing contingent fees for Restructuring Practitioners, update the definition of Approving Body to include the Australian Financial Security Authority (AFSA) and amend Appendix 2 to better align with ARITA's DIRRI. In addition, Technical Staff undertook to discuss the proposed updates to the Exposure Draft with ARITA and ASIC.

Technical Staff discussed proposed changes with ARITA on 9 August 2021. A revised draft was sent to Taskforce members on 10 August 2021 for further review and comments. No additional comments have been received from the Taskforce members.

### Engagement with ASIC and AFSA

Technical Staff sent the updated proposed Exposure Draft for APES 330 to ASIC on 10 August 2021 for further review and comments. Technical Staff met with ASIC on 19 August 2021 and discussed the definition of Appointment and an editorial change to the first footnote in Appendix 1. No further comments were received from ASIC.

Technical Staff also provided a copy of the proposed Exposure Draft for APES 330 to the Director of Enforcement at AFSA and requested any comments by 31 August 2021. Technical Staff will provide a verbal update at the September 2021 Board meeting.

### Implementation of the Government's Insolvency Reforms

Technical Staff note that the number of Restructuring Practitioner appointments remains low. Based on [ASIC insolvency statistics](#) on 17 August 2021, since 1 January 2021, 15 (9 as of 31 May 2021) restructuring practitioners have been appointed and 10 (4 at 31 May 2021) of these have resulted in restructuring plans being implemented.

Technical Staff note that this relatively slow uptake may result from various factors, including practitioners being unwilling to undertake untested procedures, companies' lack of awareness of the processes and creditors' perceptions that Restructuring Practitioners may not be independent as they are working with the company. However, appointments may increase as the impact of government stimulus packages continue to diminish and debt recovery actions increase.

Technical Staff believe the proposed requirements in APES 330 concerning Restructuring Practitioners will increase the level of trust in creditors in the restructuring process and the perception of Restructuring Practitioner's independence.

Further insolvency reforms being undertaken by the Government include:

- Exposure drafts for consequential amendments to small business insolvency reforms for consultation between 23 April and 7 May 2021.<sup>2</sup>
- Increasing creditor's statutory demand threshold from \$2,000 to \$4,000.<sup>3</sup>
- A commitment to further simplify and streamline insolvency law, including how trusts are treated and reviewing insolvent trading safe-harbour provisions.<sup>4</sup>
- Treasury consultation paper on [Improving schemes of arrangement to better support businesses](#) (issued 2 August 2021 and open till 10 September 2021) seeking views on the appropriateness of an automatic moratorium on creditor claims during the formation of the scheme and other improvements to schemes.

Technical Staff will continue monitoring these reforms and potential impacts on APES 330.

### Proposed revisions to APES 330

The following summarises the main changes that Technical Staff propose in the Exposure Draft for APES 330:

- including an objective of the standard to specify requirements applicable to Restructuring Practitioners;
- amending the definitions of Appointment and Approving Body and include a definition for Restructuring Practitioner;
- including a new paragraph 4.14 regarding the application of subparagraph 4.12(c)(iv) in respect of finance provided to insolvent entities to address any interpretation this subparagraph inadvertently prevents arm's length finance relationships;
- including a new Section 10 specific for Restructuring Practitioners with requirements on Independence and Professional Fees and Expenses;
- relocating material relating to the DIRRI to a new Section 5 to avoid duplicating information in Section 10, which results in relocation of Sections 5, 6, 7, 8 and 10 to Sections 6, 7, 8, 9 and 11;
- amending Appendix 1 relating to legal precedents for Restructuring Practitioners' independence;
- updating Appendix 2 and the template DIRRI align to recent changes to ARITA's DIRRI; and
- including a new Appendix 4 on the nature of Restructuring Practitioner appointments and fee entitlements and the applicability of sections in APES 330.

Technical Staff have considered whether the proposed provisions in the Exposure Draft relating to Professional Fees and Expenses for Restructuring Practitioners are consistent with other APESB pronouncements, including Section 330 *Fees and Other Types of Remuneration*

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<sup>2</sup> [Consequential amendments to small business insolvency reforms | Treasury.gov.au](#)

<sup>3</sup> [Corporations Amendment \(Statutory Minimum\) Regulations 2021 \(legislation.gov.au\)](#)

<sup>4</sup> [Further insolvency reforms to support business dynamism | Treasury Ministers](#)

in the Code and APES 230 *Financial Planning Services* (APES 230) in relation to professional fees other than fees for service.

In particular, a Restructuring Practitioner for a restructuring plan is entitled to receive fees for necessary work properly performed as a specified percentage of payments made to creditors as set out in the plan.<sup>5</sup> A restructuring plan is accepted if the majority in value of creditors agree to the plan.<sup>6</sup> In addition to creditors approving the plan, proposed paragraph 10.21 of APES 330 requires members to provide sufficient information to allow creditors to make an informed assessment of whether the fees are reasonable.

Technical Staff believe this is consistent with the Code and APES 230. [Paragraph 330.5 A1](#) of the Code notes that commissions may create a self-interest threat to compliance with objectivity and professional competence and due care and [paragraph 330.5 A2](#) of the Code includes safeguards to address these threats, including by disclosing and obtaining advance agreement from the client. [Section 8](#) and [9](#) of APES 230 allow fees based on the value of an asset or third-party payments if, amongst other things, informed consent is obtained from the client.

A marked-up and clean version of an Exposure Draft on proposed revisions to APES 330 ED 04/21 are attached at Agenda Items 4(b) and 4(c).

#### Impact on small and medium practices (SMPs)

As the restructuring process relates to small companies, it is more likely SMPs would be involved in the restructuring process compared to larger firms. However, Technical Staff believe any impact from the proposed amendments to APES 330 will be minimised for SMPs. The proposed section 10 is less onerous than sections 4 and 8 of extant APES 330 and provides greater clarity and guidance for practitioners. The proposed changes may also lead to greater trust in the restructuring process by creditors.

#### **Way Forward**

Subject to the Board's approval, Technical Staff propose to:

- issue the APES 330 Exposure Draft ED 04/21 by mid-September 2021 and request public comments over 45 days ending early November 2021;
- review and analyse submissions received on ED 04/21 and consider any further revisions in early November 2021;
- seek approval from the Board to issue the revised APES 330 at the November 2021 Board meeting; and
- release the revised APES 330 by mid-December 2021 (with an effective date of 1 April 2022).

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<sup>5</sup> Rule 60-C of the *Insolvency Practice Rules (Corporations) 2016*.

<sup>6</sup> Regulation 5.3B.25 of the *Corporations Regulations 2001*.

## **Recommendations**

The Board approve:

- subject to the Board's review comments and editorials, the issue of an Exposure Draft on proposed revisions to APES 330 (ED 04/21); and
- Technical Staff's proposed way forward in relation to APES 330.

## **Materials presented**

Agenda Item 4(a)      Minutes APES 330 Taskforce meeting 29 July 2021 (Draft)

Agenda Item 4(b)      Exposure Draft APES 330 ED 04/21 (Clean)

Agenda Item 4(c)      Exposure Draft APES 330 ED 04/21 (Marked Up)

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**Date**                              25 August 2021