

# Proposed Standard: APES 330 Insolvency Services

[Supersedes APES 330 Insolvency Services issued in August 2019]

**EXPOSURE DRAFT** 04/21

ISSUED September 2021

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## **Commenting on this Exposure Draft**

This Exposure Draft, Proposed Standard APES 330 *Insolvency Services*, was developed and approved by the Accounting Professional & Ethical Standards Board Limited (APESB).

The proposals in this Exposure Draft may be modified in light of comments received before being issued in final form. Comments are requested by 27 October 2021.

Comments should be addressed to:

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APESB would prefer that respondents express a clear overall opinion on whether the proposed amendments, as a whole, are supported and that this opinion be supplemented by detailed comments, whether supportive or critical, on any matter. APESB regards both critical and supportive comments as essential to a balanced view of the proposed amendments.

Respondents are asked to submit their comments electronically through the APESB website, using the link <https://apesb.org.au/current-projects/>.

Please submit comments in both a PDF and Word file. All comments will be considered a matter of public record and will ultimately be posted on the website [www.apesb.org.au/](http://www.apesb.org.au/).

APESB prefers that comments are submitted via its website. However, if there are practical difficulties, comments can also be sent to [sub@apesb.org.au](mailto:sub@apesb.org.au) or mailed to the address noted above. Whilst APESB prefers formal submissions we also encourage opinions and comments to be sent via email to [sub@apesb.org.au](mailto:sub@apesb.org.au).

## **Obtaining a copy of this Exposure Draft**

This Exposure Draft is available on the APESB website: [www.apesb.org.au/](http://www.apesb.org.au/)

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## Reasons for issuing Exposure Draft 04/21

Accounting Professional & Ethical Standards Board Limited (APESB) proposes to amend APES 330 *Insolvency Services* issued in August 2019 (extant APES 330).

The Federal Government announced on 24 September 2020 that insolvency reforms were required due to the Covid-19 pandemic. The reforms aimed to reduce complexity, time and costs of insolvency processes for small businesses to enable more companies to restructure or, if this is not possible, enable them to wind up faster and increase returns to employees and creditors.

The insolvency reforms' legislation and regulations were issued in December 2020 and commenced from 1 January 2021.<sup>1</sup> The overarching aim of the reforms is to enable small businesses (companies with less than \$1m in liabilities and that meet other eligibility criteria) that are, or are likely to become, insolvent to come to an agreement with its creditors to restructure their businesses.

The proposed revisions to APES 330 have been developed to ensure the standard applies appropriately to restructuring appointments under the new legislation and regulations.

## Key requirements and guidance in Exposure Draft 04/21

This Exposure Draft sets out the proposed amendments to the extant APES 330. The proposed key changes in ED 04/21 include:

- inclusion of an objective of the standard to specify requirements applicable to Restructuring Practitioners;
- amendments to definitions for Appointment and Approving Body and inclusion of a definition for Restructuring Practitioner;
- new paragraph 4.14 regarding the application of subparagraph 4.12(c)(iv) in respect of finance provided to insolvent entities;
- moving requirements and application material relating to the *Declaration of Independence, Relevant Relationships and Indemnities* (DIRRI) to a new Section 5 (and resultant relocation of Sections 5, 6, 7, 8 and 9 to Sections 6, 7, 8, 9 and 11);
- the development of new Section 10 specific for Restructuring Practitioners including requirements on Independence and Professional Fees and Expenses;
- amendments to Appendix 1 on the application of legal precedents in relation to independence for Restructuring Practitioners;
- updates to Appendix 2 and the template DIRRI; and
- the development of a new Appendix 4 providing context on the nature of Restructuring Practitioner appointments, entitlements to Professional Fees and the applicability of sections in APES 330 to Restructuring Practitioners.

## Proposed Operative Date

It is proposed that this Standard will be effective for engagements commencing on or after 1 April 2022.

Early adoption of the revised Standard will be permitted.

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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](#).

# APES 330 Insolvency Services

[Supersedes APES 330 Insolvency Services issued in August 2019]

REVISED: [Date] 2021

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## 1. Scope and application

- 1.1 The objectives of APES 330 *Insolvency Services* are:
- to mandate **Independence** requirements for **Members in Public Practice** who are responsible for **Appointments**;
  - to mandate that **Members in Public Practice** provide creditors with a *Declaration of Independence, Relevant Relationships and Indemnities* (DIRRI) and to specify the minimum requirements of the DIRRI;
  - to specify requirements for a **Member in Public Practice** who intends to replace another practitioner who has commenced an **Appointment**;
  - to specify requirements for a **Member in Public Practice** to disclose relevant information about **Professional Fees** and **Expenses** to the director(s) of the insolvent **Entity** or to the **Insolvent Debtor** prior to an **Appointment**;
  - to specify the requirements for **Members in Public Practice** who are responsible for **Appointments** as a **Restructuring Practitioner**; and
  - to specify the quality control and documentation obligations of a **Member in Public Practice** who provides **Insolvency Services**.
- 1.2 Accounting Professional & Ethical Standards Board Limited (APESB) issues APES 330 *Insolvency Services* (**the Standard**), which is effective for **Insolvency Services** commencing on or after 1 April 2022 and supersedes APES 330 *Insolvency Services* issued in August 2019. Earlier adoption of this Standard is permitted.
- 1.3 APES 330 sets the standards for **Members in Public Practice** in the provision of quality and ethical **Insolvency Services**. The mandatory requirements of this Standard are in **bold-type**, preceded or followed by discussion or explanations in normal type. APES 330 should be read in conjunction with other professional duties of **Members**, and any legal obligations that may apply.
- 1.4 **Members in Public Practice in Australia shall follow the mandatory requirements of APES 330 when they provide Insolvency Services.**
- 1.5 **Members in Public Practice practising outside of Australia shall follow the mandatory requirements of APES 330 when they provide Insolvency Services, to the extent to which they are not prevented from so doing by specific requirements of local laws and/or regulations.**
- 1.6 APES 330 sets the standards for **Members in Public Practice** in the provision of **Professional Services** to **Insolvent Debtors** and insolvent **Entities**. However, the Standard should also be applied by **Members**, to the extent practicable, for **Appointments** such as a members' voluntary liquidation.
- 1.7 **Members in Public Practice shall comply with other applicable Professional Standards and be familiar with relevant guidance notes when providing Professional Services. All Members shall comply with the fundamental principles outlined in the Code.**
- 1.8 The Standard is not intended to detract from any responsibilities which may be imposed by law or regulation.
- 1.9 All references to **Professional Standards**, guidance notes and legislation are references to those provisions as amended from time to time.

- 1.10 In applying the requirements outlined in APES 330, **Members in Public Practice** should be guided not merely by the words but also by the spirit of this Standard and the **Code**.
- 1.11 In this Standard, unless otherwise specified, words in the singular include the plural and vice versa, words of one gender include another gender, and words referring to persons include corporations or organisations, whether incorporated or not.

## 2. Definitions

Defined terms are shown in the body of the Standard in title case.

For the purpose of this Standard:

**Acceptable Level** means a level at which a **Member in Public Practice** using the reasonable and informed third party test would likely conclude that the **Member** complies with the fundamental principles.

**Administration** means an **Appointment** under either the *Bankruptcy Act 1966*, the *Corporations Act 2001* or any other legislation. Where appropriate, the term Administration applies to a solvent administration under Chapter 5 of the *Corporations Act 2001*.

**Appointee** means a **Member in Public Practice** who is appointed to an **Administration**.

**Appointment** means the appointment of a **Member in Public Practice**:

- (a) as a **Trustee**;
- (b) as a liquidator or provisional liquidator, a voluntary administrator, an administrator of a deed of company arrangement, a **Restructuring Practitioner**, a **Controller**, or a scheme manager under Chapter 5 of the *Corporations Act 2001*; or
- (c) to provide **Insolvency Services** under any other legislation.

**Approving Body** means the body with authority to approve **Professional Fees**. Depending on the type of **Appointment**, this body will be the creditors, the members, a secured creditor, a **Committee**, the director or board of directors of a company, the court or any other body prescribed under law or regulation. In limited circumstances, in an **Appointment** under the *Corporations Act 2001* or the *Bankruptcy Act 1966*, this approval is provided pursuant to those Acts.

**Associate** means an entity or person defined as an associate in the *Corporations Act 2001*.

**Close Family** means a parent, child or sibling who is not an **Immediate Family** member.

**Code** means APES 110 *Code of Ethics for Professional Accountants (including Independence Standards)*.

**Committee** means a committee of inspection.

**Contingent Fee** means a fee calculated on a predetermined basis relating to the outcome of a transaction or the result of the services performed by a **Member in Public Practice**. A fee that is established by a court or other public authority is not a Contingent Fee.

**Controller** means a **Member in Public Practice** appointed as controller or managing controller under Part 5.2 of the *Corporations Act 2001*, or a receiver appointed to property of an individual. It does not include a receiver appointed by the court.

**DIRRI** means the Declaration of Independence, Relevant Relationships and Indemnities.



**Engagement** means an agreement, whether written or otherwise, between a [Member in Public Practice](#) and a client relating to the provision of [Professional Services](#) by a [Member in Public Practice](#). However, consultations with a prospective client prior to such agreement are not part of an Engagement.

**Entity** means any legal, administrative or fiduciary arrangement, organisational structure or other party (including a person) having the capacity to deploy scarce resources in order to achieve objectives.

**Expenses** means the financial outlays incurred or paid by a [Member in Public Practice](#) to carry out an [Administration](#). The term includes costs and disbursements.

**Expert Witness** means a [Member](#) who has been engaged, assigned or otherwise obligated to provide an [Expert Witness Service](#). As an Expert Witness, the [Member](#) may express opinions or provide other evidence to the court based on the [Member's](#) specialised knowledge derived from the [Member's](#) training, study or experience on matters such as whether technical or professional standards have been breached, the amount of damages, the amount of an account of profits, or the amount of a claim under an insurance policy. Generally, all opinion evidence is expert evidence if it is wholly or substantially based on the specialised knowledge derived from the [Member's](#) training, study or experience; however, not all expert evidence is opinion evidence. Expert evidence may be opinion or other evidence.

**Expert Witness Service** means a [Professional Activity](#) provided in the context of legal proceedings to give expert evidence in a written report, affidavit or written statement or, in certain circumstances, orally.

**Financial Interest** means an interest in an equity or other security, debenture, loan or other debt instrument of an [Entity](#), including rights and obligations to acquire such an interest and derivatives directly related to such interest.

**Firm** means:

- (a) A sole practitioner, partnership, corporation or other entity of professional accountants;
- (b) An entity that controls such parties, through ownership, management or other means;
- (c) An entity controlled by such parties, through ownership, management or other means; or
- (d) An Auditor-General's office or department.

**Immediate Family** means a spouse (or equivalent) or dependant.

**Independence** comprises:

- (a) Independence of mind — the state of mind that permits the expression of a conclusion without being affected by influences that compromise professional judgement, thereby allowing an individual to act with integrity, and exercise objectivity and professional scepticism.
- (b) Independence in appearance — the avoidance of facts and circumstances that are so significant that a reasonable and informed third party would be likely to conclude that a [Member's](#), a [Firm's](#), a [Partner's](#), an employee's, an agent's, a consultant's, or a contractor's integrity, objectivity or professional scepticism has been compromised.

Australian courts have established legal precedents in respect of independence in the context of [Insolvency Services](#) (refer to Appendix 1).

**Inducement** means an object, situation or action that is used as a means to influence another individual's behaviour, but not necessarily with the intent to improperly influence that individual's behaviour.

**Insolvency Services** means a [Professional Service](#) provided by a [Member in Public Practice](#) to an [Entity](#) under an [Appointment](#).

**Insolvent Debtor** means a person who is unable to pay debts, whether or not they are subject to an [Administration](#).

**Managerial Employee** means an employee who acts in a managerial capacity within the structure of a [Firm](#), including providing oversight, in the provision of services to clients.

**Member** means a member of a [Professional Body](#) that has adopted this Standard as applicable to their membership, as defined by that [Professional Body](#).

**Member in Public Practice** means a [Member](#), irrespective of functional classification (for example, audit, tax or consulting) in a [Firm](#) that provides [Professional Services](#). This term is also used to refer to a [Firm](#) of Members in Public Practice and means a practice [Entity](#) and a participant in that practice [Entity](#) as defined by the applicable [Professional Body](#).

**Network** means a larger structure:

- (a) That is aimed at cooperation; and
- (b) That is clearly aimed at profit or cost sharing or shares common ownership, control or management, common quality control policies and procedures, common business strategy, the use of a common brand-name, or a significant part of professional resources.

**Network Firm** means a [Firm](#) or [Entity](#) that belongs to a [Network](#).

**Office** means a distinct sub-group, whether organised on geographical or practice lines.

**Partner** means any individual with authority to bind the [Firm](#) with respect to the performance of an [Administration](#).

**Pre-appointment Advice** means any professional advice, whether giving an opinion or not, provided prior to an [Appointment](#) to an insolvent [Entity](#) or, if the insolvent [Entity](#) is a company, to its directors, including advice given to advisors to the insolvent [Entity](#) or its directors.

**Professional Activity** means an activity requiring accountancy or related skills undertaken by a [Member](#), including accounting, auditing, tax, management consulting, and financial management.

**Professional Bodies** means Chartered Accountants Australia and New Zealand, CPA Australia and the Institute of Public Accountants.

**Professional Fees** means the amounts billed, or to be billed, by a [Member in Public Practice](#) on account of [Professional Services](#) performed, or to be performed, by the [Member](#).<sup>1</sup>

**Professional Services** means [Professional Activities](#) performed for clients.

**Professional Standards** means all standards issued by Accounting Professional & Ethical Standards Board Limited and all professional and ethical requirements of the applicable [Professional Body](#).

**Referring Entity** means an [Entity](#) that has introduced or referred a [Member in Public Practice](#) to a director(s), [Insolvent Debtor](#) or creditor for the purposes of the director(s), [Insolvent Debtor](#) or creditor seeking specialist insolvency advice that may result in an [Appointment](#).

**Related Entity** means an entity or person defined as a related entity in the *Bankruptcy Act 1966*.

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<sup>1</sup> [Professional Fees](#) are also referred to as remuneration in the context of [Insolvency Services](#).

**Restructuring Practitioner** means a **Member in Public Practice** appointed as a small business restructuring practitioner in relation to a company or a restructuring plan under Part 5.3B of the *Corporations Act 2001*.

**Trustee** means a person defined as a trustee in the *Bankruptcy Act 1966*.

**Upfront Payment** means any payment to an **Appointee** prior to the **Appointment** for the purposes of meeting **Professional Fees** and/or **Expenses** of the **Appointee**.

### 3. Fundamental responsibilities of Members in Public Practice

3.1 A **Member in Public Practice** providing an **Insolvency Service** shall comply with Part 1 *Complying with the Code, Fundamental Principles and Conceptual Framework* of the **Code** and relevant laws and regulations.

#### Public interest

3.2 In accordance with Section 100 *Complying with the Code* of the **Code**, a **Member in Public Practice** shall observe and comply with the **Member's** public interest obligations when the **Member** provides an **Insolvency Service**.

3.3 A **Member in Public Practice** shall not advise an insolvent **Entity** (nor, if the **Entity** is a company, its directors) on how to cause assets to be unavailable in an **Administration** or to otherwise avoid the consequences of the insolvency.

3.4 Paragraph 3.3 does not prevent a **Member in Public Practice** from providing **Professional Services** in respect of the structuring of the financial affairs of a solvent **Entity**.

#### Professional competence and due care

3.5 A **Member in Public Practice** providing an **Insolvency Service** shall maintain professional competence, take due care and act in a timely manner in the performance of the **Member's** work in accordance with Subsection 113 *Professional Competence and Due Care* of the **Code**.

3.6 When dealing with other practitioners in transitioning **Appointments** or where there are parallel **Appointments**, a **Member in Public Practice** shall be professional and co-operative, without compromising the **Member's** obligations in the **Appointment**.

3.7 Where an **Insolvency Service** requires the consideration of matters that are outside the professional expertise of a **Member in Public Practice**, the **Member** shall seek expert assistance or advice from a suitably qualified third party or decline the **Insolvency Service**. Where the **Member** relies on the advice of a third party, the **Member** shall disclose in relevant reports or communications the name and qualifications of the third party and the areas in which third party advice has been obtained. This obligation does not extend to legal advice where disclosure may result in a waiver of legal professional privilege.

3.8 Relevant reports are those reports that include a reference to the subject matter for which expert assistance or advice has been obtained.

3.9 When planning to use the work of a suitably qualified third party, a **Member in Public Practice** shall assess the professional competence and objectivity of that third party, the appropriateness and reasonableness of the work performed, and the fees charged.

- 3.10 A **Member in Public Practice** shall take all reasonable steps to communicate with **Entities** affected by an **Administration** in a timely and clear manner as to the insolvency processes and the rights and obligations of the **Entities**.
- 3.11 In undertaking an **Insolvency Service**, a **Member in Public Practice** shall consider any guidance issued by professional bodies<sup>2</sup> and appropriate regulatory authorities.
- 3.12 Prior to accepting an **Appointment**, a **Member in Public Practice** shall ensure that the **Member** has the capacity and has access to the necessary resources to conduct the proposed **Administration** in an effective and efficient manner.
- 3.13 Prior to accepting an **Appointment** from the director(s) of an insolvent **Entity** or an **Insolvent Debtor**, a **Member in Public Practice** shall make reasonable enquiries about the identity of the director(s) or **Insolvent Debtor** in accordance with the requirements of APES 320 *Quality Control for Firms* in relation to the *Acceptance and continuance of Client relationships and specific Engagements* as if an **Appointment** is an **Engagement**.
- 3.14 Reasonable enquiries described in paragraph 3.13 should include meeting with and/or obtaining appropriate documents to confirm the identity of the director(s) or **Insolvent Debtor**, where possible.
- 3.15 If a **Member in Public Practice** accepts an **Appointment** with another insolvency practitioner, all **Appointees** are equally responsible for all decisions made on the **Appointment**.
- 3.16 A **Firm** which provides **Insolvency Services** should establish policies and procedures to ensure that in **Appointments** involving more than one **Appointee**, all **Appointees** are knowledgeable about the conduct of the **Administration**.

## Confidentiality

- 3.17 A **Member in Public Practice** who acquires confidential information in the course of an **Insolvency Service** shall comply with Subsection 114 *Confidentiality* of the **Code**.

## Professional behaviour

- 3.18 A **Member in Public Practice** providing an **Insolvency Service** shall comply with Subsection 115 *Professional Behaviour* of the **Code**, in particular, the requirements in relation to marketing activities.
- 3.19 When placing an advertisement in respect of an **Administration**, a **Member in Public Practice** shall not use that advertisement to market the **Member's Professional Services**.
- 3.20 A **Member in Public Practice** shall not include slogans, logos, claims about the **Member's Firm**, or other promotional material in statutory advertisements.
- 3.21 A **Member in Public Practice** may include the **Firm's** logo in non-statutory advertisements, as long as that logo does not take prominence in the advertisement.
- 3.22 A **Member in Public Practice** providing an **Insolvency Service** shall comply with Section 340 *Inducements, Including Gifts and Hospitality* of the **Code**.

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<sup>2</sup> **Members in Public Practice** who are also members of the Australian Restructuring Insolvency and Turnaround Association (ARITA) need to consider their obligations in accordance with ARITA's Code of Professional Practice.

- 3.23 **A Member in Public Practice shall not provide any Inducement to any Entity to secure an Appointment for the Member, or to secure or prevent the Appointment or nomination of another person.**
- 3.24 An Inducement includes any benefit (whether monetary or not) given by a Member in Public Practice, the Member's Firm, Partners or an employee, an agent, a consultant, or a contractor of the Member, to an Entity which may, in the view of a reasonable person, influence that Entity's decision to refer or not refer, or to make or not to make, an Appointment.
- 3.25 An Inducement may not include:
- (a) benefits of insignificant value in aggregate to the Entity which referred or made the Appointment;
  - (b) sponsorship of events or publications open to the public, or members of a professional body; or
  - (c) retainers or other similar payments to marketing consultants.
- 3.26 **A Member in Public Practice shall not accept an Appointment or perform an Administration that involves:**
- (a) referral or other commissions, or monetary or non-monetary benefits;
  - (b) spotter's fees;
  - (c) understandings or requirements that work in the Administration will be given to a referrer; or
  - (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 a Controller a Restructuring Practitioner, or a liquidator in a members' voluntary liquidation. Restructuring Practitioners are required to comply with the requirements in Section 10 *Restructuring Practitioner's Independence, Professional Fees and Expenses* of this Standard.<sup>3</sup>
- 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.**<sup>4</sup>
- 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.

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<sup>3</sup> Appendix 4 sets out a high-level summary of the applicability of the sections of APES 330 to Restructuring Practitioners.

<sup>4</sup> 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.

- 4.5 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, other than through the **Administration**, 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 5.4, 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**.
- 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**<sup>5</sup> 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 transaction<sup>6</sup> 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

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<sup>5</sup> 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.

<sup>6</sup> 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*.

- (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 5.4. 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**
    - (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 in Public Practice**, the **Member's Firm**, a **Network Firm** or their **Partners** or those **Managerial Employees** in the **Office** in which the **Member** practices.
- 4.14 Subparagraph 4.12(c)(iv) does not include the provision of **Professional Services** to an **Entity** that has provided finance to the insolvent **Entity** and that finance **Entity** is not a related party of the **Member**, the **Member's Firm**, a **Network Firm** or their **Partners** or those **Managerial Employees** in the **Office** in which the **Member** practices.
- 4.15 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.
- 4.16 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**<sup>7</sup> 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**.

### Prior Professional Services (including those provided at different Firms)

- 4.17 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**.

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<sup>7</sup> 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.

- 4.18 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.
- 4.19 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

- 4.20 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**.
- 4.21 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.
- 4.22 The requirements of paragraphs 4.20 and 4.21 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.

## 5. Declaration of Independence, Relevant Relationships and Indemnities

- 5.1 The requirements in Section 5 of this Standard do not apply to **Appointments** as a **Controller** or a liquidator in a members' voluntary liquidation.
- 5.2 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.
- 5.3 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**.
- 5.4 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**<sup>8</sup> 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 law<sup>9</sup>; 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;
- (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;

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<sup>8</sup> 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.

<sup>9</sup> **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.

- (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.

5.5 In addition to the requirements contained in paragraph 5.4, 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**.

- 5.6 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.
- 5.7 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**.
- 5.8 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.*

## 6. Professional Engagement matters

- 6.1 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*.
- 6.2 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**.
- 6.3 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.

## 7. Dealing with property and other assets

- 7.1 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.
- 7.2 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.

7.3 A **Member in Public Practice** shall take all reasonable steps to ensure that the **Member** does not knowingly sell property or other assets of an **Administration** to the **Member's Firm**, a **Network Firm**, their **Partners** or employees, or to the **Immediate and Close Families**, controlled or associated **Entities** of the **Member**, the **Firm's** or **Network Firms' Partners** and employees, unless permitted by law, regulations or with prior approval of the court.

7.4 Paragraphs 7.1 and 7.3 do not apply where the **Member** has accepted an **Appointment** in respect of a retail operation under **Administration** and the assets are available for sale to the general public and no special treatment or preference over and above that granted to the general public is offered.

## 8. Expert Witness obligations

8.1 A **Member in Public Practice** who during the course of an **Administration** acts as an **Expert Witness** shall comply with APES 215 *Forensic Accounting Services* as if an **Appointment** is an **Engagement**.

## 9. Professional Fees and Expenses

9.1 The requirements in Section 9 of this Standard do not apply to **Appointments** as a **Restructuring Practitioner**. **Restructuring Practitioners** are required to comply with the requirements in Section 10 *Restructuring Practitioner's Independence, Professional Fees and Expenses* of this Standard.<sup>10</sup>

9.2 A **Member in Public Practice** performing an **Administration** shall be remunerated for such service by way of **Professional Fees** in accordance with Section 330 *Fees and Other Types of Remuneration* of the **Code**, subject to the limitations in paragraph 3.26.

9.3 When requested to consent to an **Appointment**, in the case of a company where the **Appointment** is made by the director(s) or members (other than a members' voluntary liquidation) or in the case of an **Insolvent Debtor**, by the **Insolvent Debtor**, a **Member in Public Practice** shall provide to the director(s) of the insolvent **Entity** or the **Insolvent Debtor** the following information prior to **Appointment**:

- (a) The basis of calculating **Professional Fees** the **Member** proposes to use in the **Administration**;
- (b) If the **Member** proposes to use a time basis, the scale of hourly rates that will be used;
- (c) An explanation that:
  - (i) **Professional Fees** drawn in the **Administration** will be those approved by the **Approving Body**;
  - (ii) creditors will be advised of the basis of calculating **Professional Fees** proposed to the director(s) of the insolvent **Entity** or the **Insolvent Debtor**; and
  - (iii) where the director(s) of the insolvent **Entity**, **Insolvent Debtor** or other **Entity** have made an **Upfront Payment**, the amount paid may not satisfy the full costs of the **Administration**. **Professional Fees** are subject to approval by the **Approving Body** and if an amount above the **Upfront Payment** is approved, it may be paid from the assets of the **Administration**;

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<sup>10</sup> Appendix 4 sets out a high-level summary of the applicability of the sections of APES 330 to **Restructuring Practitioners**.

- (d) If the **Member** provides an estimate of the cost of the **Appointment** to the director(s) of the insolvent **Entity** or the **Insolvent Debtor**:
  - (i) it shall be in writing clearly detailing any variables which may affect the estimate; and
  - (ii) the director(s) of the insolvent **Entity** or the **Insolvent Debtor** shall be informed that creditors will be advised of the estimate and that the actual **Professional Fees** drawn in the **Administration** may exceed that estimate and this higher amount can be approved by the **Approving Body**.
  
- 9.4 Where a **Member in Public Practice** provides an estimate of the cost of the **Appointment** to the creditors, or claims an amount of **Professional Fees**, which is different to the estimate provided to the director(s) of the insolvent **Entity** or the **Insolvent Debtor**, the **Member** shall provide an explanation of the reason for the variance to the creditors.
  
- 9.5 Where a **Member in Public Practice** provides a fixed fee or unconditional quote to the director(s) of the insolvent **Entity** or the **Insolvent Debtor**, the **Member** shall not ask the **Approving Body** for approval of **Professional Fees** greater than the fixed fee or unconditional quote.
  
- 9.6 **Members in Public Practice** should exercise care in providing a fixed fee or unconditional quote to the director(s) of the insolvent **Entity** or the **Insolvent Debtor** prior to accepting an **Appointment** as this may be perceived to restrict the proper conduct of the **Administration**.
  
- 9.7 **Members in Public Practice** should obtain acknowledgement from the director(s) of the insolvent **Entity** or the **Insolvent Debtor** of the receipt of the information provided under paragraphs 9.3 and 9.5 prior to accepting the **Appointment**.
  
- 9.8 **A Member in Public Practice** shall only claim reasonable **Professional Fees** and **Expenses** in respect of **Professional Services** performed or to be performed for an **Administration** which are necessary and proper.
  
- 9.9 The term 'necessary' in paragraph 9.8 means professional work that is:
  - (a) directly connected with the **Administration**; and
  - (b) performed in accordance with the duties of the **Appointment** and professional standards.
  
- 9.10 The term 'proper' in paragraph 9.8 means professional work that is performed in an effective and efficient manner in an **Administration**.

*Guidance on matters to consider when determining necessary and proper **Professional Fees** and **Expenses** is provided in Appendix 3.*
  
- 9.11 **A Member in Public Practice** shall claim as **Professional Fees**, and not as **Expenses**, any fees for **Insolvency Services** provided by the **Member**, the **Member's Firm**, a **Network Firm** or a third party to an **Administration**. Where the **Member**, the **Member's Firm** or a **Network Firm** provides **Professional Services**, other than **Insolvency Services**, the fees in respect of those services shall be claimed as **Professional Fees**.
  
- 9.12 **A Member in Public Practice** shall use the **Member's** commercial judgement, adopting the perspective of, and acting with the same care as, a reasonable person when incurring **Expenses** for the **Administration**.
  
- 9.13 **A Member in Public Practice** who has accepted an **Appointment**, other than as a **Controller** or a **Trustee**, shall obtain court approval when the **Member** makes a claim in respect of **Professional Fees** for any pre-appointment work performed in respect of an **Appointment**.

- 9.14 A **Member in Public Practice** who has accepted an **Appointment**, other than as a **Controller** or **Trustee**, shall not claim as an **Expense** any disbursements that were incurred prior to the date of **Appointment**.
- 9.15 A **Member in Public Practice** who has accepted an **Appointment** as a **Trustee**, may claim **Professional Fees** and **Expenses** for **Pre-appointment Advice** performed in respect of the **Appointment** in accordance with the *Bankruptcy Act 1966*.
- 9.16 Where a **Member in Public Practice** has accepted an **Appointment**, other than as a **Controller**, and is seeking approval for **Professional Fees** from the **Approving Body**, the **Member**, in addition to any statutory requirements, shall provide sufficient information so as to allow the **Approving Body** to make an informed assessment as to whether the **Professional Fees** are reasonable<sup>11</sup>, and shall:
- (a) provide details of how the **Professional Fees** are computed;
  - (b) state the terms of the approval sought from the **Approving Body**;
  - (c) compare the **Professional Fees** sought to be approved to any estimate previously provided to the **Approving Body** and if it differs provide an explanation of the reason for the variance;
  - (d) advise the total of **Professional Fees** previously determined and whether the **Member** may be seeking approval for additional **Professional Fees** in the future;
  - (e) provide details of **Expenses** paid from the **Administration**, including:
    - (i) where **Expenses** are paid for **Professional Services** that have not been provided by the **Firm**, who the **Expenses** were paid to;
    - (ii) what the **Expenses** were for;
    - (iii) for **Expenses** charged directly by the **Firm**, the basis of calculation of those **Expenses** including any profit or advantage; and
    - (iv) the amount paid and to be paid;
  - (f) provide a summary of receipts and payments to and from the **Administration** bank account; and
  - (g) provide a reconciliation to any prior prospective **Professional Fee** approvals, including actual **Professional Fees** to estimated **Professional Fees**, tasks undertaken and tasks that remain to be completed.

## Contingent Fees

- 9.17 A **Member in Public Practice** shall not enter into an arrangement to receive a **Contingent Fee** for **Insolvency Services** if that arrangement:
- (a) impairs the **Member's Independence**;
  - (b) results in the receipt of a **Contingent Fee** for performing professional work that the **Member** is required to complete under the relevant legislation governing an **Appointment**;
  - (c) is inconsistent with the fiduciary obligations of the **Member**; or
  - (d) results in the perception that the **Member** is acting in the **Member's** interests, rather than in the best interests of the creditors.

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<sup>11</sup> When making or reviewing a remuneration determination, the Court must have regard to whether remuneration is reasonable, taking in to account any or all of the matters set out in section 60-12 of *Corporations Act 2001* – Schedule 2 or section 90-21 of *Bankruptcy Act 1966* – Schedule 2.



- 9.18 When considering whether a proposed **Contingent Fee** arrangement in a particular **Administration** meets the requirements of paragraph 9.17, a **Member in Public Practice** shall consider the following:
- (a) funds available to the **Administration**;
  - (b) funding from alternative sources such as creditors or a litigation funder;
  - (c) the costs of the alternative sources of funds in comparison to the **Contingent Fee** arrangement;
  - (d) the risk associated with the tasks to be undertaken for the **Contingent Fee**; and
  - (e) the appropriateness of the amount of the proposed **Contingent Fee** in relation to the nature of the **Administration** and the risk associated with the task to be undertaken.
- 9.19 Where a **Member in Public Practice** enters into an arrangement to receive a **Contingent Fee** for **Insolvency Services**, the **Member** shall obtain approval from the **Approving Body** prior to commencement of **Professional Services** after having disclosed the following information:
- (a) details of the arrangement including the nature of the contingency and how achievement of the contingency will be assessed;
  - (b) the **Member's Professional Fees** in the event the contingency is or is not achieved;
  - (c) when the **Member's Professional Fees** are expected to be drawn; and
  - (d) except in the case of an **Appointment** as a **Controller**, why the arrangement to receive a **Contingent Fee** is in the best interest of the creditors.

### Drawing of Professional Fees and Expenses

- 9.20 A **Member in Public Practice** shall only draw **Professional Fees** once the proper resolution, order, or authority has been obtained from the **Approving Body** and in accordance with the terms of approval.
- 9.21 Where a **Member in Public Practice** has entered into a fixed fee arrangement in respect of **Professional Fees**, the **Member** shall draw the fixed fee at the conclusion of the **Administration** or in amounts and at milestones specified by the **Approving Body**.
- 9.22 Where a **Member in Public Practice** seeks approval from the **Approving Body** for the payment of prospective **Professional Fees** and **Expenses** charged directly by the **Firm** which include a profit or advantage for the **Firm**, the **Member** shall specify the maximum amount of the **Professional Fees** and relevant **Expenses** that may be drawn before requiring further approval from the **Approving Body**. The **Member** shall draw on these prospective **Professional Fees** and **Expenses** progressively as the work is completed.
- 9.23 Where a **Member in Public Practice** has prospective **Professional Fees** approved in accordance with paragraph 9.22, the scale of rates used to draw **Professional Fees** shall be the scale of rates provided by the **Member** to the **Approving Body** at the time of the approval, unless a specific formula to increase the scale of rates was incorporated into the resolution passed by the **Approving Body**. If a specific formula was not incorporated into the resolution, then the **Member** shall only change the scale of rates by obtaining further approval from the **Approving Body**.

## Receipt of monies

- 9.24 Where a **Member in Public Practice** receives an **Upfront Payment** in respect of a proposed **Administration**, the **Member** shall ensure:
- (a) the monies are held in trust and the **Member** complies with the requirements of APES 310 *Client Monies* as if the **Appointment** related to a client;
  - (b) there are no conditions on the conduct or outcome of the **Administration** attached to the monies;
  - (c) full disclosure is made to creditors in the *Declaration of Independence, Relevant Relationships and Indemnities* (DIRRI);
  - (d) approval of **Professional Fees** is obtained prior to them being paid to the **Appointee**; and
  - (e) the monies are accounted for as funds of the **Administration**.
- 9.25 Where a **Member in Public Practice** has accepted an **Appointment**, other than as a **Controller**, and receives money from an **Entity**, other than from the assets of the insolvent **Entity**, to meet the costs of the **Administration**, the **Member** shall disclose the receipt of this money to the **Approving Body** and shall obtain approval to apply the money to **Professional Fees** from the **Approving Body** in accordance with paragraph 9.20.
- 9.26 Approval of the **Approving Body** under paragraph 9.25 is not required if the *Corporations Act 2001, Bankruptcy Act 1966* or guidance issued by the Australian Securities and Investments Commission or Australian Financial Security Authority stipulates that approval is not required.

## 10. Restructuring Practitioner's Independence, Professional Fees and Expenses

- 10.1 The requirements in Section 10 of this Standard apply to **Appointments** as a **Restructuring Practitioner**.<sup>12</sup> **Appointments** other than as a **Restructuring Practitioner** are required to comply with the requirements in Section 4 *Professional Independence* as applicable and Section 9 *Professional Fees and Expenses* of this Standard.

### Restructuring Practitioner's Independence

- 10.2 **A Restructuring Practitioner shall maintain Independence.**<sup>13</sup>
- 10.3 Threats to a **Restructuring Practitioner's Independence** may be created by prior **Professional Services** performed by the **Restructuring Practitioner** or their interests or relationships. The **Restructuring Practitioner's** assessment of any such threats includes whether a reasonable and informed third party, considering all of the facts and circumstances, would conclude the threats to the **Restructuring Practitioner's Independence** are at an **Acceptable Level**.

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<sup>12</sup> Appendix 4 sets out a high-level summary of the applicability of the sections of APES 330 to **Restructuring Practitioners**.

<sup>13</sup> 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.

- 10.4 Prior to accepting an **Appointment** as a **Restructuring Practitioner**, a **Member in Public Practice** shall identify, evaluate and address threats to the **Independence** of the **Member**. Where the **Member** identifies a threat that is not at an **Acceptable Level**, the **Member** shall not accept the **Appointment** unless:
- (a) the threat can be eliminated or reduced to an **Acceptable Level** by;
    - (i) eliminating the circumstances, including interests or relationships, that are creating the threat;
    - (ii) applying safeguards, where available and capable of being applied, to reduce the threat to an **Acceptable Level**; or
  - (b) the threat arises in circumstances or relationships that are permitted by this Standard or law or regulations.
- 10.5 A **Restructuring Practitioner** shall:
- (a) act impartially in the discharge of the **Restructuring Practitioner's** duties and responsibilities;
  - (b) ensure that the **Restructuring Practitioner's** personal interests do not conflict with the **Restructuring Practitioner's** duties; and
  - (c) remain alert for new information or changes in facts and circumstances that may create threats to **Independence**.
- 10.6 A **Member in Public Practice** shall not accept an **Appointment** as a **Restructuring Practitioner** 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, other than through the **Administration**, even if that advice was provided at a time when the **Entity** was solvent.
- 10.7 When circumstances or relationships giving rise to a threat to **Independence** are identified after the commencement of an **Administration** as a **Restructuring Practitioner**, a **Restructuring Practitioner** shall evaluate that threat and:
- (a) continue performing the **Administration** if the **Restructuring Practitioner** determines that the threat would not have precluded the **Restructuring Practitioner** from accepting the **Appointment** had the threat been identified prior to the commencement of the **Appointment**. The **Restructuring Practitioner** 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 in Public Practice** would have precluded the **Member** from accepting the **Appointment** had the threat been identified prior to the commencement of the **Appointment**, the **Restructuring Practitioner** shall address the threat by resigning from the **Appointment** by written notice to the company to enable the **Appointment** of a replacement **Restructuring Practitioner**.

## Interests and Relationships

- 10.8 For the purpose of this Standard, when seeking to identify relationships with an insolvent **Entity** that are relevant to an **Appointment** as a **Restructuring Practitioner**, 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** or its **Associates**. The **Member** shall consider the following matters when identifying relevant **Network Firms**:
- (a) the geographical regions or countries in which the insolvent **Entity** or its **Associates** operate; and
  - (b) relationships with the directors or officers of the insolvent **Entity** or its **Associates**.
- 10.9 A **Member in Public Practice** shall not accept an **Appointment** as a **Restructuring Practitioner**, 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** 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** or an **Associate** of that **Entity** that has provided finance to the insolvent **Entity**.
  - (b) a close personal relationship with:
    - (i) the insolvent **Entity**;
    - (ii) an **Associate** 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**.
- 10.10 Prior to accepting an **Appointment** as a **Restructuring Practitioner**, a **Member in Public Practice** shall identify, evaluate and address threats to the **Independence** of the **Member** in accordance with paragraph 10.4, 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) a material business relationship<sup>14</sup>, 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** 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**.<sup>15</sup>
  - (b) a material loan or material guarantee, in the previous two years, to or from:
    - (i) the insolvent **Entity**;
    - (ii) an **Associate** of the insolvent **Entity**; or

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<sup>14</sup> Refer to paragraph 4.13 for the meaning of business relationship for the purposes of this subparagraph.

<sup>15</sup> Refer to paragraph 4.14 in relation to the application of this subparagraph.

- (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) employment with the insolvent **Entity** in the preceding two years, in a position to exert direct and significant influence over the insolvent **Entity**.

10.11 In respect of prior relationships of the nature referred to in subparagraphs 10.10(a), 10.10(b) and 10.10(c), 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.

#### Prior Professional Services (including those provided at different Firms)

10.12 A **Member in Public Practice** shall not accept an **Appointment** as a **Restructuring Practitioner** 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**, where that **Professional Service**:

- (a) affects the **Member's** ability to comply with the statutory and fiduciary obligations associated with the **Administration**; and
- (b) creates threats to the **Member's** ability to comply with the fundamental principles of the **Code** and **Independence** when performing the duties of the **Administration**.

10.13 Where a **Member in Public Practice** is considering accepting an **Appointment** as a **Restructuring Practitioner** 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.

10.14 Where a **Member in Public Practice** is considering accepting an **Appointment** as a **Restructuring Practitioner** 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

10.15 Where a **Member in Public Practice** is considering accepting an **Appointment** as a **Restructuring Practitioner** the **Member** shall not provide **Pre-appointment Advice** to both the company and its directors in their personal capacity if such **Pre-appointment Advice** might compromise the outcome from the **Administration** for the company's creditors.

## Restructuring Practitioner's Professional Fees and Expenses

10.16 **Restructuring Practitioners** shall be remunerated for such service by way of **Professional Fees** in accordance with **Section 330 Fees and Other Types of Remuneration** of the **Code**, subject to the limitations in paragraph 3.26.

10.17 **Restructuring Practitioners** shall only claim reasonable **Professional Fees** and **Expenses** in respect of **Professional Services** performed or to be performed for an **Administration** which are necessary and proper.

10.18 The term 'necessary' in paragraph 10.17 means professional work that is:

- (a) directly connected with the **Administration**; and
- (b) performed in accordance with the duties of the **Appointment** and professional standards.

10.19 The term 'proper' in paragraph 10.17 means professional work that is performed in an effective and efficient manner in an **Administration**.

*Guidance on matters to consider when determining necessary and proper **Professional Fees** and **Expenses** is provided in Appendix 3.*

10.20 **Restructuring Practitioners** shall only claim **Expenses** or fees for **Insolvency Services** or **Professional Services** other than **Insolvency Services** provided by the **Restructuring Practitioner**, the **Restructuring Practitioner's Firm**, a **Network Firm** or a third party to an **Administration**, that are specified in the:<sup>16</sup>

- (a) fixed amount of **Professional Fees** approved by the **Approving Body** for a **Restructuring Practitioner** for a company;
- (b) **Professional Fees** determined under a method approved by the **Approving Body** for a **Restructuring Practitioner** for a company in the event the board consents to proceedings; or
- (c) restructuring plan approved by the **Approving Body** for **Professional Fees** determined under a method specified in the plan in the event the board consents to proceedings.

10.21 **Restructuring Practitioners** seeking approval for **Professional Fees** from the **Approving Body**, in addition to any statutory requirements, shall provide sufficient information so as to allow the **Approving Body** to make an informed assessment as to whether the **Professional Fees** are reasonable.

### Contingent Fees

10.22 **Restructuring Practitioners** shall not enter into an arrangement to receive a **Contingent Fee** for **Insolvency Services** performed in relation to proceedings if that arrangement:

- (a) impairs the **Restructuring Practitioner's Independence**;
- (b) results in the receipt of a **Contingent Fee** for performing professional work that the **Restructuring Practitioner** is required to complete under the relevant legislation governing the **Appointment**;
- (c) is inconsistent with the fiduciary obligations of the **Restructuring Practitioner**; or

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<sup>16</sup> Appendix 4 sets out a high-level summary of the **Professional Fees** that **Restructuring Practitioners** are entitled to charge for **Insolvency Services**.

- (d) results in the perception that the **Restructuring Practitioner** is acting in the **Restructuring Practitioner's** interests, rather than in the best interests of the company and its creditors.
- 10.23 When considering whether a proposed **Contingent Fee** arrangement in a particular **Administration** meets the requirements of paragraph 10.22, a **Restructuring Practitioner** shall consider the following:
- (a) the risk associated with the tasks to be undertaken for the **Contingent Fee**; and
  - (b) the appropriateness of the amount of the proposed **Contingent Fee** in relation to the nature of the **Administration** and the risk associated with the task to be undertaken.
- 10.24 Where a **Restructuring Practitioner** enters into an arrangement to receive a **Contingent Fee** for **Insolvency Services** performed in relation to proceedings, the **Restructuring Practitioner** shall obtain approval from the **Approving Body** prior to commencement of **Professional Services** after having disclosed the following information:
- (a) details of the arrangement including the nature of the contingency and how achievement of the contingency will be assessed;
  - (b) the **Restructuring Practitioner's Professional Fees** in the event the contingency is or is not achieved;
  - (c) when the **Restructuring Practitioner's Professional Fees** are expected to be drawn; and
  - (d) why the arrangement to receive a **Contingent Fee** is in the best interest of the company and its creditors.

#### Drawing of Professional Fees and Expenses

- 10.25 A **Restructuring Practitioner** shall only draw **Professional Fees** once the proper resolution or authority has been obtained from the **Approving Body** and in accordance with the terms of approval.
- 10.26 Where a **Restructuring Practitioner** has entered into a fixed fee arrangement in respect of **Professional Fees** set out in subparagraphs 10.20(a), 10.20(b) and 10.20(c), the **Restructuring Practitioner** shall draw the fixed fee at the conclusion of the **Administration** or in amounts and at milestones specified by the **Approving Body**.
- 10.27 Where a **Restructuring Practitioner** seeks approval from the **Approving Body** for **Professional Fees** in relation to proceedings, the **Restructuring Practitioner** shall specify the method for determining those **Professional Fees**, which may include the scale of rates used by the **Firm**.
- 10.28 Where a **Restructuring Practitioner** has **Professional Fees** approved in accordance with paragraph 10.27, the scale of rates used to determine **Professional Fees** shall be the scale of rates provided by the **Restructuring Practitioner** to the **Approving Body** at the time of the approval, unless a specific formula to increase the scale of rates was incorporated into the resolution passed by the **Approving Body** or the restructuring plan approved by the **Approving Body**.

## Receipt of monies

- 10.29 Where a **Member in Public Practice** receives an **Upfront Payment** in respect of a proposed **Administration** as a **Restructuring Practitioner**, the **Member** shall ensure:
- (a) the monies are held in trust and the **Member** complies with the requirements of APES 310 *Client Monies* as if the **Appointment** related to a client;
  - (b) there are no conditions on the conduct or outcome of the **Administration** attached to the monies;
  - (c) full disclosure is made to creditors in the *Declaration of Independence, Relevant Relationships and Indemnities (DIRRI)*;
  - (d) approval of **Professional Fees** is obtained prior to them being paid to the **Appointee**; and
  - (e) the monies are accounted for as funds of the **Administration**.

## 11. Documentation and quality control

- 11.1 A **Member in Public Practice** shall comply with the requirements of APES 320 *Quality Control for Firms* as if an **Appointment** is an **Engagement**.
- 11.2 A **Member in Public Practice** shall prepare working papers in accordance with this Standard that appropriately document the work performed, including aspects of the **Insolvency Service** that have been provided, in writing. The documentation prepared by the **Member** shall:
- (a) provide a sufficient and appropriate record of the procedures performed for the **Insolvency Service**;
  - (b) identify threats to **Independence**, and how they have been evaluated and addressed; and
  - (c) demonstrate that the **Insolvency Service** was carried out in accordance with this Standard and other applicable professional standards, including policies and procedures established in accordance with APES 320 *Quality Control for Firms*, and any applicable ethical, legal and regulatory requirements.
- 11.3 A **Member in Public Practice** may destroy the working papers referred to in paragraph 11.2 in accordance with the requirements of the *Corporations Act 2001* or *Bankruptcy Act 1966*.
- 11.4 A **Member in Public Practice** shall establish and adhere to documented procedures for each type of **Administration** that the **Member** undertakes to guard against not complying with statutory timeframes.

### **Conformity with International Pronouncements**

The International Ethics Standard Board for Accountants (IESBA) has not issued a pronouncement equivalent to APES 330.



## 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 precedents in relation to the duties of independence, impartiality, and avoidance of conflict when providing **Insolvency Services**. The legal precedents set out a requirement for independence which may be perceived to be stricter than the **Code**.<sup>17</sup> It focuses on whether a fair-minded lay observer might reasonably apprehend that the practitioner might not bring an impartial mind to their duties<sup>18</sup> 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.<sup>19</sup>

**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 affairs<sup>20</sup>;
- whether they have a full understanding of the interests and relationships of all relevant parties, including their own employees, subcontractors and consultants<sup>21</sup>;
- whether a referral relationship creates threats to independence<sup>22</sup>; 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).<sup>23</sup>

<sup>17</sup> The legal precedents for requirements for independence set out in Appendix 1 may not apply to **Members in Public Practice** that have been appointed as a **Restructuring Practitioner** as such matters have not been tested by Australian courts. However, **Members** are required to consider legal precedents set by Australian courts in respect of independence obligations relating to **Restructuring Practitioners**.

<sup>18</sup> *Australian Securities and Investments Commission v Franklin (liquidator), in the matter of Walton Constructions Pty Ltd* [2014] FCAFC 85.

<sup>19</sup> *Queensland Mining Corporation Ltd v Butmall Pty Ltd, in the matter of Butmall Pty Ltd (in liq)* [2016] FCA 16.

<sup>20</sup> 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.

<sup>21</sup> *Bovis Lend Lease v Wily* [2003] NSWSC 467.

<sup>22</sup> *Australian Securities and Investments Commission v Franklin (liquidator), in the matter of Walton Constructions Pty Ltd* [2014] FCAFC 85.

<sup>23</sup> *Re Recycling Holdings Pty Limited* [2015] NSWSC 1016.

## Appendix 2 – Declaration of Independence, Relevant Relationships and Indemnities

*This Appendix contains a template of a Declaration of Independence, Relevant Relationships and Indemnities (DIRRI) that a [Member in Public Practice](#) is required to provide to creditors in accordance with the requirements of this Standard.*

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[\*Does not form part of the DIRRI\*

Important points for [Members in Public Practice](#) to note when preparing a [DIRRI](#):

- A [DIRRI](#) is required to be prepared under the Corporations Act 2001 for voluntary administrations (sections 436DA, 449CA), [Restructuring Practitioners](#) (section 453D) and creditors' voluntary liquidations (section 506A) and the Insolvency Practice Rules (Bankruptcy) 2016 (rule 70-30) for personal insolvency appointments. APES 330 requires [Members](#) to issue a [DIRRI](#) for court liquidations.
- In co-appointments, each [Appointee](#) must sign the [DIRRI](#). A [DIRRI](#) can only be issued without all signatures in exceptional circumstances, which must be documented on the file and a fully signed [DIRRI](#) must be provided to creditors as soon as possible. A signature may be affixed to the [DIRRI](#) by electronic means.
- If the [Appointment](#) is under Part X of the Bankruptcy Act 1966, [Appointees](#) must comply with the particular requirements for Part X arrangements under the Bankruptcy Act 1966.
- Although the use of a [DIRRI](#) may not be required under law in certain [Administrations](#), APES 330 requires a [DIRRI](#) to be issued on all [Administrations](#) except [Appointments](#) as [Controller](#) or liquidator in a members' voluntary liquidation.]

### Declaration of Independence, Relevant Relationships and Indemnities

[**CompanyName**] ([**Appointment suffix**]) / [**Appointment prefix**] [**Insolvent Debtor's Name**]

[**ACN:**] / [**Estate Number:**]

The purpose of this document is to assist creditors with understanding any relevant relationships that I/we have with parties who are closely connected to [insolvent [Entity/Insolvent Debtor](#)] and any indemnities or upfront payments that have been provided to me/us. None of the relationships disclosed in this document are such that my/our independence is affected.

The information is provided so you have trust and confidence in my/our independence and, if not, you can ask for further explanation or information and can act to remove and replace me/us if you wish.

This declaration is made in respect of myself/ourselves, my/our partners, [[Firm name](#)] and [*list or insert, attach or provide a website link to, the names of any entities covered by the extended definition of [Firm](#).*]

#### A. Independence<sup>24</sup>

I/We have assessed my/our independence in accordance with the law and applicable professional standards, have not identified any real or potential threats to my/our independence and I am/we are not aware of any reasons that would prevent me/us from accepting this appointment.

There are no other known prior professional services or relevant relationships, including personal, business and professional relationships that should be disclosed beyond those I/we have disclosed in this document.

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<sup>24</sup> Refer Section 4, Section 10 and Appendix 1 of this Standard in respect of [Independence](#) requirements for different [Appointment](#) types.

## B. Circumstances of Appointment

### How I was/we were referred this Appointment

This appointment was referred to me/us by [*Referring Entity* (firm/organisation name only unless disclosure is required by law or the *Member in Public Practice* has obtained consent in writing from that individual) and connection to insolvent *Entity/Insolvent Debtor*]. [Provide an explanation of the nature of *Appointments* or *Engagements* that the *Referring Entity* has previously referred to the *Member*].

I/We believe that this referral does not result in a conflict of interest or duty because:

- [*Explain here why, in your opinion, the referral does not result in a conflict of interest or duty*].

There is no expectation, agreement or understanding between me/us and [*Referring Entity*] regarding the conduct of the [*Appointment*] and I am/we are free to act independently and in accordance with the law and applicable professional standards.

### Did I/we meet with [the insolvent *Entity*/the directors/*Insolvent Debtor*] or their advisors before I was/we were appointed?

Yes

No

I/We had the following [*meetings OR if interactions other than meetings explain that*] with the [*insolvent Entity*/directors (if applicable, including names)/*Insolvent Debtor*/advisors] during [*time period*]:

- [*Set out details of meetings or other interactions*]

These [*meetings/phone calls/emails*] were for the purposes of:

- [*Explain relevant issues discussed having regards to the limitations imposed by this Standard in respect of *Pre-appointment Advice**].

I/We received [*amount of *Professional Fees* received/no *Professional Fees**] for this advice.

In my/our opinion, this/these meeting(s) does/do not affect my/our independence for the following reasons:

- [*Provide here the *Appointee's/Appointees'* reasons for believing that the relationship does not result in a conflict of interest or duty*].

I/We have provided no other information or advice to [*insolvent *Entity* name and/or its director(s) if applicable and/or advisors/Insolvent Debtor name and/or advisors*] prior to my/our appointment beyond that outlined in this DIRRI.

## C. Declaration of Relationships

Within the previous two years I/we, or my/our firm<sup>25</sup>, had a relationship with:

Name	Yes/No	Nature of relationship	Reasons
[insolvent Entity name/Insolvent Debtor name]:		<i>[Explain the nature of that relationship, including any prior professional services provided, when and the period over which the service was provided and Professional Fees paid for the Professional Services provided].</i>	I/We believe that this relationship does not result in a conflict of interest or duty because:
The directors of [insolvent Entity name (delete for personal insolvency)]:		<i>[Explain the nature of that relationship].</i>	I/We believe that this relationship does not result in a conflict of interest or duty because:
An associate of [insolvent Entity name/Insolvent Debtor name]:		<i>[Explain the nature of that relationship. Applies to both corporate and personal insolvency Appointments. Consider the meaning of associates for corporate and personal insolvency.<sup>26</sup> Include here group appointments or other appointments to companies with common ownerships or directorships]</i>	I/We believe that this relationship does not result in a conflict of interest or duty because:
A former insolvency practitioner appointed to [insolvent Entity name/Insolvent Debtor name]:		<i>[Explain the nature of that relationship].</i>	I/We believe that this relationship does not result in a conflict of interest or duty because:
A secured creditor entitled to enforce a security over the whole or substantially whole of [insolvent Entity name/Insolvent Debtor name]'s property and other assets:		<i>[Explain the nature of that relationship].</i>	I/We believe that this relationship does not result in a conflict of interest or duty because:
Any other relationships that I/we consider relevant to creditors assessing my/our opinion:		<i>[Explain the nature of that relationship. Consider whether there are any other relationships within two years AND any relationships more than two years ago, that a reasonable person would consider relevant to the creditors in assessing independence (for example, former directors, major unsecured creditors, pre-insolvency advisors etc)].</i>	I/We believe that this relationship does not result in a conflict of interest or duty because:

<sup>25</sup> This includes Network Firms or their Partners or those Managerial Employees in the Office in which the Member practices.

<sup>26</sup> For a corporate insolvency consider the definition of Associate. For personal insolvency consider Immediate or Close Family member of the Insolvent Debtor/a spouse or dependent of an Immediate or Close Family member of the Insolvent Debtor/an Entity associated with the Insolvent Debtor or any of the persons noted above.

[Note that if you have been requested by a creditor to consent to act as a replacement external administrator, you are required to disclose any relationship in the preceding 24 months with the creditor who nominated you for the [Appointment](#) in accordance with rule 75-265 in the *Insolvency Practice Rules (Corporations) 2016* and the *Insolvency Practice Rules (Bankruptcy) 2016 (IPR 75-265)*].

## D. Indemnities and up-front payments

I/We have been provided with the following [indemnities and/or [Upfront Payments](#)] for professional fees for the conduct of this [[Appointment](#) type]:

Name	Relationship with [insolvent Entity name/ Insolvent Debtor name]	Nature of indemnity or upfront payment
		<i>[Include amount, what the indemnity or upfront payment may be used for, where the funds are held, how funds will be applied and any conditions]</i>

This does not include any indemnities I/we may be entitled to under the law. I/We have not received any other indemnities or upfront payments.

OR

I/We have not received any up-front payments or indemnities for this appointment. This does not include any indemnities that I/we may be entitled to under the law

Dated:

.....

.....

[[Appointee](#) name]

[[Appointee](#) name]

Notes:

1. The assessment of independence has been made based on an evaluation of the significance of any threats to independence and in accordance with the requirements of the relevant legislation and professional standards.
2. If circumstances change, or new information is identified, I am/we are required under the *Corporations Act 2001/Bankruptcy Act 1966* and *APES 330 Insolvency Services* to update this declaration and provide a copy to creditors with my/our next communication as well as table a copy of any replacement declaration at the next meeting of the insolvent's creditors. For creditors' voluntary liquidations, voluntary administrations and restructuring practitioners, this document and any updated versions of this document are required to be lodged with ASIC.

## Appendix 3 – Necessary and proper Professional Fees and Expenses

*This Appendix contains additional information on matters to consider when determining what Professional Fees and Expenses are necessary and proper in accordance with paragraphs 9.8 to 9.10 and paragraphs 10.17 to 10.19 of this Standard.*

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A key aspect of ensuring that the necessary and proper Professional Fees and Expenses are claimed for Professional Services performed for an Administration is to ensure any work is completed in the most efficient and effective manner.

In determining how to perform the Administration in the most efficient and effective manner the Member in Public Practice should use their commercial and professional judgement and may consider:

- (a) the complexity of the Administration;
- (b) the level of expertise required to complete the necessary tasks in the Administration;
- (c) the availability of sufficient staff to complete the Administration;
- (d) the remuneration rates for staff that apply to the Administration (including, where relevant, consideration of different rates applicable in different locations);
- (e) the resources required to complete the Administration and each relevant task;
- (f) the urgency for tasks to be completed;
- (g) the location of the Administration (including travel requirements);
- (h) the specialised nature of the Administration (if any); and
- (i) whether the allocation of tasks is cost effective.

In addition, the Member in Public Practice should conduct regular reviews of any work-in-progress to ensure that all time charged to the Administration is for necessary work, properly performed.

### **Costs of claiming Professional Fees and Expenses**

A Member in Public Practice may claim the necessary and proper costs of record keeping and seeking approval or determination of their claim for Professional Fees and Expenses.

### **Costs of communicating with Regulators or professional bodies**

A Member in Public Practice may not claim Professional Fees and Expenses for time spent communicating with regulators or professional bodies in relation to:

- complaints about the Member or the conduct of a particular Administration;
- regulator surveillance, professional audits or inspection of files, or on peer reviews; or
- unsuccessfully defending a breach of the law or applicable professional and ethical standards, subject to any order of the court.

## Appendix 4 – Application of APES 330 to Restructuring Practitioners

*This Appendix contains additional information on the application of this Standard to **Members in Public Practice** who accept **Appointments** as **Restructuring Practitioners**. All Sections of this Standard apply to **Restructuring Practitioners** except for Section 4 Professional Independence and Section 9 Professional Fees and Expenses. Section 10 Restructuring Practitioner's Independence, Professional Fees and Expenses applies instead to **Restructuring Practitioners** due to the different nature of these **Appointments** as set out below.*

*Whilst Sections 4 and 9 of this Standard are not applicable to **Restructuring Practitioners**, **Members in Public Practice** conducting **Administrations** as **Restructuring Practitioners** may need to consider the elements and requirements in Sections 4 and 9, especially as **Appointments** as **Restructuring Practitioners** may evolve into another form of **Administration**.*

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**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>27</sup> Notwithstanding that a **Restructuring Practitioner** is appointed by the company and acts as an agent for the company, the **Restructuring Practitioner** has important obligations to fulfil for the company's creditors and to remain independent.<sup>28</sup>

As some of the duties and obligations of **Restructuring Practitioners** differ to other forms of **Administration** the requirements in Section 4 of this Standard are not applicable to **Restructuring Practitioners**. Alternatively, **Independence** requirements applicable to **Restructuring Practitioners** to reflect obligations to the company's creditors and to remain independent are set out in paragraphs 10.2 to 10.15 of the Standard.

**Members in Public Practice** conducting an **Administration** as a **Restructuring Practitioner** are entitled to receive **Professional Fees** for necessary work properly performed that is:<sup>29</sup>

1. approved by the board on or before the day the **Member** is appointed as **Restructuring Practitioner** for a company consisting of:
  - (a) a fixed amount of **Professional Fees**; and
  - (b) **Professional Fees** determined under a method approved by the board in the event the board consents to proceedings; and
2. specified in a restructuring plan approved by the company's creditors consisting of:
  - (a) an amount as a specified percentage of payments made to creditors in accordance with the plan; and
  - (b) **Professional Fees** determined under a method specified in the plan in the event the board consents to proceedings.

The methodology for obtaining approval for **Professional Fees** and **Expenses** of **Restructuring Practitioners** differs to other forms of **Administration**. As such, the requirements in Section 9 of this Standard are not applicable to **Restructuring Practitioners**. However, separate requirements applicable to **Restructuring Practitioners** relevant to obtaining **Professional Fees** and **Expenses** in accordance with the entitlement detailed above are set out in paragraphs 10.16 to 10.29 of the Standard.

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<sup>27</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>28</sup> Refer pages 76 and 79-80 of *Explanatory Statement Issued by authority of the Treasurer Corporations Act 2001 Corporations (Fees) Act 2001 Corporations Amendment (Corporate Insolvency Reforms) Regulations 2020*.

<sup>29</sup> Refer sections 60-1B and 60-1C of *Insolvency Practice Rules (Corporations) 2016*.

## Appendix 5 – Summary of revisions to the previous APES 330 (Issued August 2019)

APES 330 *Insolvency Services* was originally issued in September 2009 and revised in November 2011, September 2014 and August 2019 (extant APES 330). APES 330 has been revised by APESB in [Date] 2021. A summary of the revisions is given in the table below.

**Table of revisions\***

Paragraph affected	How affected
1.1	Amended
1.2	Amended
2 – Definition of Appointment	Amended
2 – Definition of Approving Body	Amended
2 – Definition of Restructuring Practitioner	Added
3.11	Amended
3.13	Amended
4.1	Amended
4.5	Amended
4.6	Amended
4.11	Amended
4.13	Amended
4.14	Added
4.15 to 4.21 – Paragraphs 4.14 to 4.20 in extant APES 330	Relocated
4.22 – Paragraph 4.21 in extant APES 330	Amended
5.1	Added
5.2 to 5.4 – Paragraphs 4.22 to 4.24 in extant APES 330	Relocated
5.5 – Paragraph 4.25 in extant APES 330	Amended
5.6 to 5.8 – Paragraphs 4.26 to 4.28 in extant APES 330	Relocated
6.1 to 6.3 – Paragraphs 5.1 to 5.3 in extant APES 330	Relocated
7.1 to 7.3 – Paragraph 6.1 to 6.3 in extant APES 330	Relocated
7.4 – Paragraph 6.4 in extant APES 330	Amended
8.1 – Paragraph 7.1 in extant APES 330	Relocated
9.1	Added
9.2 to 9.5 – Paragraphs 8.1 to 8.4 in extant APES 330	Relocated
9.6 – Paragraph 8.5 in extant APES 330	Amended
9.7 – Paragraph 8.6 in extant APES 330	Amended
9.8 – Paragraph 8.7 in extant APES 330	Relocated
9.9 – Paragraph 8.8 in extant APES 330	Amended
9.10 – Paragraph 8.9 in extant APES 330	Amended



<b>Paragraph affected</b>	<b>How affected</b>
9.11 to 9.17 – Paragraphs 8.10 to 8.16 in extant APES 330	Relocated
9.18 – Paragraph 8.17 in extant APES 330	Amended
9.19 to 9.22 – Paragraphs 8.18 to 8.21 in extant APES 330	Relocated
9.23 – Paragraph 8.22 in extant APES 330	Amended
9.24 – Paragraph 8.23 in extant APES 330	Amended
9.25 – Paragraph 8.24 in extant APES 330	Amended
9.26 – Paragraph 8.25 in extant APES 330	Amended
Section 10, paragraphs 10.1 to 10.29	Added
11.1 to 11.2 – Paragraphs 9.1 to 9.2 in extant APES 330	Relocated
11.3 – Paragraph 9.3 in extant APES 330	Amended
11.4 – Paragraph 9.4 in extant APES 330	Relocated
Appendix 1	Amended
Appendix 2	Amended
Appendix 3	Amended
Appendix 4	Added

\* Refer Technical Update 2021/X