

## APES 330 Insolvency Services

[Supersedes APES 330 Insolvency Services issued in September 2014]

REVISED: DATE

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## CONTENTS

	Section
Scope and application.....	1
Definitions.....	2
Fundamental responsibilities of Members in Public Practice .....	3
- Public interest	
- Professional competence and due care	
- Confidentiality	
- Professional behaviour	
Professional Independence .....	4
- Interests and relationships	
- Prior Professional Services (including those provided at different Firms)	
- Pre-appointment Advice	
- Declaration of Independence, Relevant Relationships and Indemnities	
Professional Engagement matters.....	5
Dealings <sup>SC21</sup> with property and other assets .....	6
Expert Witness obligations .....	7
Professional Fees and Expenses .....	8
- Contingent Fees	
- Drawing of fees	
- Receipt of monies	
Documentation and quality control .....	9
<i>Conformity with International Pronouncements</i>	
<i>Appendix 1: Declaration of Independence, Relevant Relationships and Indemnities</i>	
<i>Appendix 2: Necessary and proper Professional Fees and Expenses</i>	
<a href="#"><i>Appendix 3: Appointee's Independence</i></a>	
<i>Appendix 34: Summary of revisions to the previous APES 330 (Issued September 2014)</i>	

## 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](#); 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 [January 2020](#) <sup>SC1</sup> ~~July 2019~~ and supersedes APES 330 *Insolvency Services* issued in September 2014. 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.](#) <sup>SC23</sup>
- 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 the 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.

## 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 of the Code.

Commented [JR1]: To be consistent with the Code.

**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** as a **Trustee** or as a liquidator or provisional liquidator, a voluntary administrator, an administrator of a deed of company arrangement, a **Controller**, or a scheme manager under Chapter 5 of the *Corporations Act 2001*; or an appointment 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** or the court. 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)*<sup>†</sup> [SC1](#).

**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.

Commented [JH2]: Definition included to allow use of acronym in body of standard

**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.

<sup>†</sup>—APES 110 *Code of Ethics for Professional Accountants (including Independence Standards)* is effective from 1 January 2020. It will supersede the existing APES 110 *Code of Ethics for Professional Accountants*.

**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**, ~~or a Firm's~~, ~~or 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 \(refer to Appendix 3\).](#) <sup>SC2, ARITA1</sup>

**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 co-operation; 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**.

**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 ~~provided-introduced or referred~~ <sup>ARITA2</sup> a **Member in Public Practice**'s contact details 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*.

**Trustee** means a person ~~defined who as a trustee in administers a bankruptcy or Part X administration under~~ the *Bankruptcy Act 1966*.<sup>SC3</sup>

**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**.

Commented [JR3]: New definition to be consistent with ARITA Code.

## 2. 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**<sup>2 SC1</sup> of the **Code** and relevant laws and regulations.

<sup>2</sup>—Equivalent to Section 100 *Introduction and Fundamental Principles of the Compiled APES 110 Code of Ethics for Professional Accountants* (2017).

## Public interest

- 3.2 In accordance with Section 100 *Complying with the Code*<sup>3 SC1</sup> 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*<sup>4 SC1</sup> 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 Member's 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 Professional 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<sup>ARITA3</sup> ~~should~~ consider any guidance issued by the Professional Bodies 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.

<sup>3</sup>—Equivalent to Section 100 *Introduction and Fundamental Principles of the Compiled APES 110 Code of Ethics for Professional Accountants (2017)*.

<sup>4</sup>—Equivalent to Section 130 *Professional Competence and Due Care of the Compiled APES 110 Code of Ethics for Professional Accountants (2017)*.

Commented [JR4]: Strengthened to be mandatory to consider guidance but the change does not make it mandatory to follow the guidance.

3.13 Prior to accepting an Appointment from the director(s) or 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*.<sup>SC4, ARITA4</sup>

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.<sup>SC4, ARITA4</sup>

3.154 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.

3.165 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

3.176 A Member in Public Practice who acquires confidential information in the course of an Insolvency Service shall comply with Subsection 114 *Confidentiality*<sup>5 SC1</sup> of the Code.

### Professional behaviour

3.187 A Member in Public Practice providing an Insolvency Service shall comply with Subsection 115 *Professional Behaviour*<sup>6 SC1</sup> of the Code, in particular, the requirements in relation to marketing activities.

3.198 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.

3.2049 A Member in Public Practice shall not include slogans, logos, claims about the Member's Firm, or other promotional material in statutory advertisements.

3.2120 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*.<sup>SC6, SC7</sup>

3.234 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.

3.242 An Inducement includes any benefit, (whether monetary or not), given by a Member in Public Practice, the Member's Firm, Partners or an employee, ~~of 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~~<sup>SC5, ARITA5</sup>, or to make or not to make, an Appointment.

<sup>5</sup>—Equivalent to Section 140 *Confidentiality of the Compiled APES 110 Code of Ethics for Professional Accountants (2017)*.

<sup>6</sup>—Equivalent to Section 250 *Marketing Professional Services of the Compiled APES 110 Code of Ethics for Professional Accountants (2017)*.



3.253 An Inducement ~~does~~ <sup>may</sup><sup>SC7</sup> 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.

**Commented [JR5]:** Change made to be consistent with the Code.

3.264 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 Controller or liquidator in a members' voluntary liquidation.

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>7, SC2</sup>.

4.4 ~~Prior to accepting an Appointment, a~~ A Member in Public Practice shall identify, evaluate and address threats to the Independence of the Member, ~~prior to accepting an Appointment~~. 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.

**Commented [JR6]:** Included to address the exemption from certain relationships disqualifying a person from being a liquidator under section 532(5) of the Corporations Act 2001 (Corporations Act), where creditor approval is received in a creditors' voluntary liquidation.

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, even if that advice was provided at a time when the Entity was solvent.

<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 3.

- 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 4.245, to be tabled at the meeting (where the creditors decide whether to replace the other person) <sup>SC8, SC9</sup>;
  - (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) <sup>SC10</sup> 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~~ duty to the creditors; 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 ~~the court~~, all creditors and/or the appropriate regulatory authority of the following <sup>SC11, ARITAB</sup>:
    - (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**; ~~and~~
    - (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 <sup>SC11, ARITAB</sup>

- (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~~<sup>ARITAB</sup>, or resign from the Appointment.<sup>SC11</sup>

Commented [JR7]: To be consistent with ARITA Code

## 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<sup>ARITAG</sup> considered to create a threat to the Independence<sup>8, SC2</sup> of a Member in Public Practice, who is considering accepting or continuing an Appointment:

- (a) ~~engagement of a third party who is not an Associate or Related Entity of an insolvent Entity engaging~~ the Member, the Member's Firm or a Network Firm, ~~by a third party who is not an Associate or Related Entity~~<sup>SC13, SC14</sup>, 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>9</sup> preferential payment<sup>SC15, SC16</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
- (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~~<sup>SC17</sup> 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 4.10(c); or~~
  - (i) planning or preparation for a prospective Appointment that does not include:
    - (i) providing advice to the insolvent Entity, the Insolvent Debtor, Associates or creditors; or

Commented [JH8]: Changed to be consistent with ARITA Code

<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 3.

<sup>9</sup> Including transactions detailed in Part 5.7B, Division 2 of the Corporations Act 2001 and Part VI, Division 3, Subdivision A of the Bankruptcy Act 1966.

(ii) the negotiation or conclusion of ~~agreements or~~ outcomes in advance of a planned Appointment of the Member in Public Practice. <sup>ARITA10</sup>

4.11 Trivial or inconsequential relationships are not a barrier <sup>SC18</sup> 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 4.245. 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~~ <sup>ARITA11</sup> ~~a director or officer 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; ~~or~~.
  - (iv) an Entity or an Associate or Related Entity of that Entity that has provided finance to the insolvent Entity. <sup>SC12</sup>
- (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; ~~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; ~~or~~.
  - (iv) an Entity that has provided finance to the insolvent Entity. <sup>SC12</sup>
- (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 ~~material~~ business relationship includes the provision of goods or services by the insolvent Entity to the Member, the Member's Firm, a Network Firm or their Partners or those Managerial Employees in the Office in which the Member practises.

4.14 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

**Commented [JR9]:** Removed to address concerns raised at the Taskforce meeting that this paragraph was too narrow and may limit legitimate negotiations pre-appointment.

**Commented [JR10]:** To make consistent with other subparagraphs. Associate includes director, which makes this subparagraph wider.

**Commented [JR11]:** This paragraph explains what a business relationship would include not if it is material or not.

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.

- 4.15 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>10, SC2</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)

- 4.16 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** ~~is considered immaterial or is referred to in paragraph 4.10.~~<sup>SC19, ARITA12</sup>

~~4.17~~ A prior **Professional Service** is immaterial if it:

- ~~(a)~~ was of limited scope, limited time and limited fees;
- ~~(b)~~ will not be subject to review by the **Member** during the course of the **Administration**;
- ~~(c)~~ will not affect the **Member's** ability to comply with the statutory and fiduciary obligations associated with the **Administration**; ~~and~~
- ~~(d)~~ 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**.

- 4.17~~8~~ 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.

- 4.18~~9~~ 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

- 4.19~~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**.

<sup>10</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 3.](#)

4.204 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.

4.212 The requirements of paragraphs 4.1920 and 4.204 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. <sup>ARITA<sup>13</sup></sup>

### Declaration of Independence, Relevant Relationships and Indemnities

4.223 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.

4.234 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.

4.245 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;
- (a)(b) a statement as to whom the DIRRI is being made in respect of;
- (b)(c) a declaration that the Member has undertaken an evaluation of the significance of any threats to Independence<sup>11, SC2</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;
- (c)(d) where the DIRRI, or similar document, is required by law, or where it is not required by law and the Member has obtained consent from the Referring Entity:
  - (i) the name of the Referring Entity;
  - (ii) the connection to the insolvent Entity (if applicable) of the Referring Entity;  
~~and~~
  - (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;
- (d)(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;

Commented [JR12]: To be consistent with ARITA's Code.

<sup>11</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 3.

- ~~(e)~~(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;
- ~~(f)~~(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;
- ~~(g)~~(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;
- ~~(h)~~(i) a declaration of any other relevant relationships the **Members** have had in the preceding two years <sup>ARITA 15</sup> that may be relevant to the creditors in assessing the **Independence** of the **Member**;
- ~~(i)~~(j) a declaration that there are no other known prior **Professional Services** or other relationships that require disclosure; and
- ~~(j)~~(k) a declaration of indemnities (other than statutory indemnities) and **u**Upfront **p**Payments, including:
- (i) the identity of each indemnifier or provider of an **u**Upfront **p**Payment (name and relationship with the insolvent **Entity**);
  - (ii) the extent and nature of each indemnity or **u**Upfront **p**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 **u**Upfront **p**Payments to be disclosed.

4.265 In addition to the requirements contained in paragraph 4.245, 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<sup>12</sup>.

(d) any other Entity that may be relevant to the creditors in assessing the Independence of the Member.<sup>ARITA 15</sup>

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**.

**4.267** 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) ~~P~~rovide an explanation in the **DIRRI** as to why all **Appointees** were not able to sign it; and
- (b) ~~S~~ign a replacement **DIRRI** as soon as possible and ~~ensure that it is provided~~ it to creditors in the next communication.

**4.278** 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**.

**4.289** 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 1.*

## 5. Professional Engagement matters

5.1 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*.

5.2 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 Law and Regulations**<sup>12 SC1</sup> of the **Code**.

<sup>12</sup> ~~Equivalent to Section 225 Responding to Non-Compliance with Laws and Regulations of the Compiled APES 110 Code of Ethics for Professional Accountants (2017).~~



5.3 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.

## 6. Dealings<sup>SC21</sup> with property and other assets

6.1 ~~In accordance with laws and regulation which prohibit a~~ **Member in Public Practice shall not derive**ing a profit or advantage from an **Administration**, ~~a Member shall not including through the sale or purchase of~~ property or other assets of an **Administration**, unless permitted by law, regulations or ~~without obtaining~~ prior approval of the court.  
ARITA16

6.2 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 ARITA16 ~~acquiring~~ 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 ~~without obtaining the~~ prior approval of the court.

6.3 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 ARITA16 ~~without obtaining~~ prior approval of the court.

6.4 Paragraphs 6.1 and 6.3 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.

## 7. Expert Witness obligations

7.1 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**.

## 8. Professional Fees and Expenses

8.1 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*<sup>43</sup> SC1 of the **Code**, subject to the limitations in paragraph 3.264.

8.2 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 ARITA17, ~~other than as a Controller or in an Appointment by the court or a members' voluntary liquidation~~, 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**:

<sup>43</sup> Equivalent to Section 240 *Fees and other Types of Remuneration* of the Compiled APES 110 *Code of Ethics for Professional Accountants* (2017).

- (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 ~~paid money towards the cost of the Administration~~, the amount paid may not satisfy the full costs of the **Administration**. **Professional Fees** ~~above that amount of money~~ 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**;
- (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**; ~~and~~
  - (iii) ~~If the estimate provided to the director(s) of the insolvent Entity or the Insolvent Debtor differs to any subsequent estimate provided to creditors or the actual amount of Professional Fees claimed, the Member shall provide an explanation of the reason for the variance.~~

Commented [JH13]: Deals with subsequent estimates – moved to new paragraph 8.3

8.3 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.

8.43 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.

8.54 Members in Public Practice should exercise care in providing a fixed fee or unconditional quote to the director(s) of the insolvent Entity or Insolvent Debtor prior to accepting an Appointment as this may be perceived to restrict the proper conduct of the Administration.

8.56 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 8.2 and 8.34 prior to accepting the Appointment.

8.76 A Member in Public Practice shall only claim reasonable <sup>SC22</sup> Professional Fees and Expenses in respect of Professional Services performed or to be performed for an Administration which are necessary and proper.

8.87 The term 'necessary' in paragraph 8.67 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.

8.9~~8~~ The term 'proper' in paragraph 8.6~~7~~ 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 2.*

8.9~~10~~ 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](#).

8.10~~1~~ 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](#).

8.12~~4~~ 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](#).

8.12~~3~~ A Member in Public Practice who has accepted an [Appointment, other than as a Controller or Trustee](#),<sup>ARITA18</sup> shall not claim as an [Expense](#) any disbursements that were incurred prior to the date of [Appointment](#).

8.14 [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](#),<sup>ARITA18</sup>

8.15~~3~~ 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<sup>ARITA19</sup> information so as to allow the [Approving Body](#) to make an informed assessment as to whether the ~~remuneration is~~ [Professional Fees are](#) reasonable<sup>14 SC22</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~~<sup>will</sup> 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](#) <sup>ARITA21</sup>; ~~and~~
  - (iv) the amount paid ~~and~~ to be paid; ~~and~~

<sup>14</sup> [When making or reviewing a remuneration determination, the Court must have regard to whether remuneration is reasonable, by 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.](#)

Commented [JR14]: New paragraph to separate differences between corporate and personal insolvency.

~~the basis of recovery of future Expenses to be charged directly by the Firm;~~

- (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

8.164 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.

8.175 When considering whether a proposed **Contingent Fee** arrangement in a particular **Administration** meets the requirements of paragraph 8.164, 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.

8.186 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** remuneration in the event the contingency is or is not achieved;
- (c) when the **Member's** remuneration is 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 fees

8.197 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.

- 8.20~~48~~ 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**.
- 8.21~~49~~ 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 from the Approving Body, 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 this prospective **Professional Fee** and Expenses progressively as the work is completed.
- 8.22~~0~~ Where a **Member in Public Practice** has prospective **Professional Fees** approved in accordance with paragraph 8.21~~49~~, 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

- 8.23~~4~~ Where a **Member in Public Practice** receives ~~monies prior to acceptance of an Appointment to meet the costs of the~~ an Upfront Payment in respect of a proposed **Administration**, the **Member** shall ensure:
- the monies are held in trust and they comply with the relevant requirements of APES 310 Client Monies as if the Appointment related to a client a bank account that is separately identifiable from the Firm's bank accounts <sup>SC26, SC27, ARITA25</sup>;
  - there are no conditions on the conduct or outcome of the **Administration** attached to the monies;
  - full disclosure is made to creditors in the *Declaration of Independence, Relevant Relationships and Indemnities (DIRRI)*;
  - approval of **Professional Fees** is obtained prior to them being paid to the **Appointee**; and
  - the monies are accounted for as funds of the **Administration**.
- 8.24~~2~~ 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 8.19~~7~~.
- 8.25~~3~~ Approval of the **Approving Body** under paragraph 8.24~~2~~ 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.

## 9 Documentation and quality control

- 9.1 A **Member in Public Practice** shall comply with the requirements of APES 320 *Quality Control for Firms* as if an **Appointment** is an **Engagement**.
- 9.2 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 ~~including safeguards applied~~; 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.
- 9.3 A **Member in Public Practice** may destroy the working papers referred to in paragraph 9.2 in accordance with the requirements of the *Corporations Act 2001* or *Bankruptcy Act 1966*.
- 9.4 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

### 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.

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

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

[ACN] / [Estate Number]

Members in Public Practice/s appointed to an insolvent entity are required to make declarations as to:

- A. the Member's and/or Firm's independence;
- B. relationships, including
  - i. the circumstances of the Appointment;
  - ii. any relationships with the [company/insolvent Entity/Insolvent Debtor] and others within the previous 24 months;
  - iii. any prior Professional Services for the [company/insolvent Entity/Insolvent Debtor] within the previous 24 months;
  - iv. that there are no other relationships to declare; and
- C. any indemnities given, or Upfront Payments made, to the Member in Public Practice.

The purpose of this document is to assist creditors with understanding any relevant relationships of the [Appointee type] and any indemnities or upfront payments that have been provided to the [Appointee type]. None of the relationships disclosed in this document are such that the independence of the [Appointee type] is affected.

This declaration is made in respect of myself/ourselves, my/our partners, [Firm Name] and *[list any entities covered by the extended definition of Firm]*.

#### A. Independence

I/We, [Appointee Name(s)] of [Firm Name] have undertaken a proper assessment of the risks to my/our independence prior to accepting the Appointment as [Appointee tType] of [Company Name/insolvent Entity/Insolvent Debtor] in accordance with the law and applicable professional standards. This assessment identified no real or potential risks to my/our independence. I am/We are not aware of any reasons that would prevent me/us from accepting this appointment.

#### B. Declaration of Relationships

##### i. Circumstances of appointment

This Appointment was referred to me/us by ~~[firm/organisation of referrer]~~Referring Entity and connection to insolvent Entity/Insolvent Debtor/insolvent including 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].*

- [\[Include a declaration that there is no expectation, agreement or understanding between the Member and Referring Entity regarding the conduct of the Administration\].](#)

I/We had/have [\[include details of number of meetings, who they were with \(director\(s\) of the insolvent Entity/Insolvent Debtor/advisors\) and the period of time\]](#) for the purposes of:

*[Explain relevant issues discussed having regards to the limitations imposed in paragraphs 4.19-20 to 4.21 of this Standard in respect of pre-appointment advice].*

I/We received [\[amount of Professional Fees received\]](#) 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\(s\) and/or advisors/Insolvent Debtor name Company Name\]](#), ~~the directors~~ and/or ~~its~~ advisors] prior to my/our appointment beyond that outlined in this DIRRI.

**ii. Relevant Relationships (excluding Professional Services to the Insolvent)**

Neither I/of us, nor my/our [Firm/-network firm/partners/managerial employees](#) have, or have had within the preceding 24 months, any relationships with [\[insolvent Entity name/Insolvent Debtor name Company Name\]](#), ~~an associate of the insolvent Entity/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-of [Company Name]~~, a former insolvency practitioner appointed to [\[insolvent Entity name/Insolvent Debtor name Company Name\]](#) or any person or entity that has security over the whole or substantially whole of [\[insolvent Entity name/Insolvent Debtor name Company Name\]](#)'s property [and other assets](#).

*[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)]*

OR

I/we or a member of my/our [Firm/-network firm/our partners/managerial employees](#) have, or have had within the preceding 24 months, a relationship with:

Name	Nature of relationship	Reasons
		I/We believe that this relationship does not result in a conflict of interest or duty because:

**iii. Prior Professional services to the Insolvent**

Neither I/of us, nor my/our [firm/-network firm/partners](#) have provided any professional services to [\[insolvent Entity name/Insolvent Debtor name Company Name\]](#) in the previous 24 months.

OR



I/We, or a member of my/our Firm/~~network firm~~/partners have provided the following professional services to [insolvent Entity name/Insolvent Debtor nameCompany Name] in the 24 months prior to the acceptance of this appointment:

Nature of Professional Services	Reasons
<u>[Including when, period over which, and Professional Fees paid for, Professional Services provided]</u>	I/We believe that this relationship does not result in a conflict of interest or duty because:

**iv. No other relevant relationships to disclose**

There are no other known relevant relationships, including personal, business and professional relationships, from the previous 24 months with [insolvent Entity name/Insolvent Debtor nameCompany Name], an associate/related entity of [insolvent Entity name/Insolvent Debtor nameCompany Name], a former insolvency practitioner appointed to [insolvent Entity name/Insolvent Debtor nameCompany Name] or any person or entity that has security over the whole or substantially whole of [insolvent Entity name/Insolvent Debtor nameCompany Name]'s property and other assets that should be disclosed.

**C. Indemnities and up-front payments**

I/We have been provided with the following indemnities and/or upfront payments for remuneration for the conduct of this [Appointment Type]:

Name	Relationship with <u>[insolvent Entity name/Insolvent Debtor nameCompany Name]</u>	Nature of indemnity or <u>upfront</u> payment
		<u>[Including extent and nature of indemnity or Upfront Payment, where funds being held, when and how funds will be applied and whether there are any conditions on the use of the funds]</u>

This does not include statutory indemnities. I/We have not received any other indemnities or upfront payments that should be disclosed.

OR

I/We have not been indemnified in relation to this administration, other than any indemnities that I/we may be entitled to under statute and I/we have not received any up-front payments in respect of my/our remuneration or disbursements.

Dated:

.....  
 [Appointee Name] \_\_\_\_\_ [Appointee Name]

Notes:

**APES 330 Insolvency Services**

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1. 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 and voluntary administrations, this document and any updated versions of this document are required to be lodged with ASIC.](#)
2. Any relationships, indemnities or up-front payments disclosed in the DIRRI must not be such that the Member in Public Practice is no longer Independent. The purpose of components B and C of the DIRRI is to disclose relationships that, while they do not result in the Member having a conflict of interest or duty, ensure that creditors are aware of those relationships and understand why the Member nevertheless remains Independent.

## APPENDIX 2

### Necessary and proper Professional Fees and Expenses

*This Appendix contains additional information on matters to consider when determining what is necessary and proper Professional Fees and Expenses in accordance with paragraph 8.7.6 of this Standard.*

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A key aspect of ensuring that the necessary and proper Professional Fees and Expenses is 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 remuneration.

#### **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 3** SC2, ARITA1

**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 precedence in relation to the duties of independence, impartiality, and avoidance of conflict when providing Insolvency Services. The legal precedence sets out a requirement for independence which may be perceived to be stricter than the Code. 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>15</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>16</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>17</sup>
- whether they have a full understanding of the interests and relationships of all relevant parties, including their own employees, subcontractors and consultants<sup>18</sup>;
- whether a referral relationship creates threats to Independence<sup>19</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>20</sup>.

<sup>15</sup> *Australian Securities and Investments Commission v Franklin (liquidator), in the matter of Walton Constructions Pty Ltd* [2014] FCAFC 85

<sup>16</sup> *Queensland Mining Corporation Ltd v Butmall Pty Ltd, in the matter of Butmall Pty Ltd (in liq)* [2016] FCA 16 at 9.

<sup>17</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 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 at 20

<sup>18</sup> *Bovis Lendlease v Willy* [2003] NSWSC 467 at 363.

<sup>19</sup> *Australian Securities and Investments Commission v Franklin (liquidator), in the matter of Walton Constructions Pty Ltd* [2014] FCAFC 85 at 125.

<sup>20</sup> *Re Recycling Holdings Pty Limited* [2015] NSWSC 1016 at 94.

## APPENDIX 43

## Summary of revisions to the previous APES 330 (Issued September 2014)

APES 330 *Insolvency Services* was originally issued in September 2009 and revised in November 2011 and September 2014. APES 330 has been revised by APESB in [DATE]. A summary of the revisions is given in the table below.

Table of revisions\*

Paragraph affected	How affected
1.1	Amended
1.2	Amended
1.3	Amended
1.5	Amended
1.6	Amended
1.10	Added
2 – Definition of Acceptable Level	Amended
2 – Definition of Administration	Amended
2 – Definition of Approving Body	Amended
2 – Definition of Close Family	Amended
2 – Definition of Code	Amended
2 – Definition of Committee	Amended
2 – Definition of Expert Witness	Amended
2 – Definition of Firm	Amended
2 – Definition of Independence	Amended
2 – Definition of Inducement	Amended
2 – Definition of Member in Public Practice	Amended
2 – Definition of Other Evidence	Deleted
2 – Definition of Pre-appointment Advice	Amended
2 – Definition of Professional Activity	Amended
2 – Definition of Professional Bodies	Amended
2 – Definition of Professional Standards	Amended
2 – Definition of Related Entity	Amended
3.1	Amended
3.2	Amended
3.5	Amended
3.13	Added
3.14 – Paragraph 3.13 in existing APES 330	Relocated
3.15 – Paragraph 3.14 in existing APES 330	Relocated
3.16 – Paragraph 3.15 in existing APES 330 relocated	Amended
3.17 – Paragraph 3.16 in existing APES 330 relocated	Amended
3.18 – Paragraph 3.17 in existing APES 330	Relocated
3.19 – Paragraph 3.18 in existing APES 330	Relocated
3.20 – Paragraph 3.19 in existing APES 330	Relocated
3.21 – Paragraph 3.20 in existing APES 330	Relocated
3.22	Added
3.23	Added
3.24 – Paragraph 3.21 in existing APES 330	Relocated
4.4	Amended
4.5 – Paragraph 4.20 in existing APES 330 relocated	Amended
4.6 – Paragraph 4.27 in existing APES 330 relocated	Amended
4.7 – Paragraph 4.5 in existing APES 330 relocated	Amended
4.8 – Paragraph 4.25 in existing APES 330 relocated	Amended
4.9 – Paragraph 4.6 in existing APES 330	Relocated

Paragraph affected	How affected
4.10 – Paragraph 4.7 in existing APES 330 relocated	Amended
4.11 – Paragraph 4.8 in existing APES 330 relocated	Amended
4.12 – Paragraph 4.9 in existing APES 330	Relocated
4.13 – Paragraph 4.10 in existing APES 330	Relocated
4.14 – Paragraph 4.11 in existing APES 330 relocated	Amended
4.15 – Paragraph 4.12 in existing APES 330 relocated	Amended
4.16 – Paragraph 4.13 in existing APES 330 relocated	Amended
4.17 – Paragraph 4.14 in existing APES 330	Relocated
4.18 – Paragraph 4.15 in existing APES 330 relocated	Amended
4.19 – Paragraph 4.16 in existing APES 330 relocated	Amended
4.20 – Paragraph 4.17 in existing APES 330	Relocated
4.21 – Paragraph 4.18 in existing APES 330	Relocated
4.22 – Paragraph 4.19 in existing APES 330 relocated	Amended
4.23 – Paragraph 4.21 in existing APES 330 relocated	Amended
4.24	Added
4.25 – Paragraph 4.22 in existing APES 330 relocated	Amended
4.26 – Paragraph 4.23 in existing APES 330 relocated	Amended
4.27 – Paragraph 4.24 in existing APES 330 relocated	Amended
4.28 – Paragraph 4.26 in existing APES 330 relocated	Amended
4.29 – Paragraph 4.28 in existing APES 330 relocated	Amended
4.30	Added
5.2	Added
5.3	Added
6.1 – paragraph 6.2 in existing APES 330 relocated	Amended
6.2 – paragraph 6.1 in existing APES 330	Relocated
6.4	Amended
8.1	Amended
8.2	Amended
8.5	Amended
8.7	Amended
8.13 – Paragraph 8.18 in existing APES 330 relocated	Amended
8.14 – Paragraph 8.13 in existing APES 330	Relocated
8.15 – Paragraph 8.14 in existing APES 330 relocated	Amended
8.16 – Paragraph 8.15 in existing APES 330	Relocated
8.17	Deleted
8.17 – Paragraph 8.19 in existing APES	Relocated
8.18	Deleted
8.18 – Paragraph 8.20 in existing APES 330	Relocated
8.19 – Paragraph 8.21 in existing APES 330	Relocated
8.20 – Paragraph 8.22 in existing APES 330 relocated	Amended
8.21 – Paragraph 8.23 in existing APES 330	Relocated
8.22 – Paragraph 8.24 in existing APES 330 relocated	Amended
8.23 – Paragraph 8.25 in existing APES 330 relocated	Amended
Appendix 1 – Declaration of Independence, Relevant Relationships and Indemnities	Added
Appendix 2 – Necessary and proper remuneration	Added

\* Refer Technical Update 2019/X