

APES 330 Insolvency Services

[Supersedes APES 330 Insolvency Services Issued in November 2011]

Revised xxxx 2014

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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 the Approving Body 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 the professional obligations of a Member in Public Practice who is acting in the capacity of an Expert Witness during the course of an Administration;
 - 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; 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) has revised professional standard APES 330 *Insolvency Services* (**the Standard**), which is effective for Insolvency Services commencing on or after 1 January 2015. 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 (black lettering)**, preceded or followed by discussion or explanations in normal type (grey lettering). 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 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 **Members in Public Practice shall be familiar with relevant Professional Standards and guidance notes when providing Professional Services. All Members shall comply with the fundamental principles outlined in the Code.**
- 1.7 The Standard is not intended to detract from any responsibilities which may be imposed by law or regulation.
- 1.8 All references to Professional Standards, guidance notes and legislation are references to those provisions as amended from time to time.
- 1.9 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.

2. Definitions

For the purpose of this Standard:

Acceptable Level means a level at which a reasonable and informed third party would be likely to conclude, weighing all the specific facts and circumstances available to the Member in Public Practice at that time, that compliance with the fundamental principles of the Code is not compromised.

Administration refers to 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, the 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*.

Committee means a committee of inspection or committee of creditors.

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.

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 is:

- (a) Independence of mind - the state of mind that permits the expression of a conclusion without being affected by influences that compromise professional judgment, 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, weighing all the specific facts and circumstances, that the integrity, objectivity or professional scepticism of a Member, or a Firm, or Partner, or employee, or agent, or consultant, or contractor of the Member, has been compromised.

Inducement means any benefit, whether monetary or not, given by a Member in Public Practice, the Member's Firm, Partners or an employee, or agent, consultant, or contractor of the Member, to an Entity which may in the view of a reasonable person influence that Entity's decision to refer, or to make, an Appointment.

An Inducement does not include:

- benefits of insignificant value in aggregate to the Entity which referred or made the Appointment;
- sponsorship of events or publications open to the public, or members of a professional body; or
- retainers or other similar payments to marketing consultants.

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 (e.g. 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.

Other Evidence means evidence which does not provide an opinion, but which requires the application of the Expert Witness's specialised knowledge derived from the Expert Witness's training, study or experience. An example might be where a Member provides a summary of the sales by month by product by geography based on the information contained within a series of invoices and a general ledger. Whilst it may be a matter of fact as to what sales were made, the extraction and summary of this information is facilitated by the Member's specialised knowledge. Another example requiring specialised knowledge might be where a Member sets out the accounting standards that are relevant to particular types of transactions without actually expressing an opinion as to whether the actual treatment is in line with those standards.

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, taxation, management consulting, and financial management.

Professional Bodies means the Institute of Chartered Accountants Australia, 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 Bodies.

Referring Entity means an Entity that has provided 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 who administers a bankruptcy or Part X administration under the *Bankruptcy Act 1966*.

3. Fundamental responsibilities of Members in Public Practice

- 3.1 A Member in Public Practice providing an Insolvency Service shall comply with Section 100 *Introduction and Fundamental Principles* of the Code and relevant law.**

Public interest

- 3.2 In accordance with Section 100 *Introduction and Fundamental Principles* 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 Section 130 *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 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 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.**
- 3.13 **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.**
- 3.14 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

- 3.15 **In accordance with Section 140 *Confidentiality* of the Code, a Member in Public Practice who acquires confidential information in the course of an Insolvency Service shall not use that information for any purpose other than the proper performance of that Insolvency Service.**

Professional Behaviour

- 3.16 **A Member in Public Practice providing an Insolvency Service shall comply with Section 250 *Marketing Professional Services* of the Code.**
- 3.17 **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.**
- 3.18 **A Member in Public Practice shall not include slogans, logos, claims about the Member's Firm, or other promotional material in statutory advertisements.**
- 3.19 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.
- 3.20 **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.**
- 3.21 **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.
- 4.4 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
- the threat is trivial and inconsequential;
 - the threat arises in circumstances or relationships that are permitted by this Standard; or
 - the Member obtains court approval.
- 4.5 A Member in Public Practice conducting an Administration shall:
- act impartially in the discharge of the Member's duties and responsibilities; and
 - ensure that the Member's personal interests do not conflict with the Member's duty to the creditors.
- 4.6 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, ~~or~~ its Related Entities or Associates^{SC3, SC4}. 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 Related Entities or Associates^{SC3, SC4} operate; and
 - (b) relationships with the directors or officers of the insolvent Entity, ~~or~~ its Related Entities or Associates.^{SC3, SC4}
- 4.7 The following circumstances and relationships are not considered to create a threat to the Independence of a Member in Public Practice, who is considering accepting or continuing an Appointment:
- (a) 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 to investigate, monitor or advise on the affairs of the insolvent Entity on behalf of the third party where the scope of the engagement will not compromise the Member's Independence and will not be subject to review or challenge in a subsequent Administration and any Professional Fees received for the engagement would not be a preferential payment 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 was limited to:
 - the financial situation of the Entity;
 - the solvency of the Entity;
 - the consequences of insolvency for the Entity; or
 - alternative courses of action available to the Entity.

- 4.8 Trivial or inconsequential relationships are not a bar 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* referred to in paragraph 4.22. A relationship is trivial or inconsequential if it is remote, coincidental or insignificant.
- 4.9 **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) **a Close or Immediate Family relationship with:**
 - the insolvent Entity;
 - a director or officer of the insolvent Entity; or
 - an employee of or adviser to the insolvent Entity who is in a position to exert direct and significant influence over the insolvent Entity.
 - (b) **a close personal relationship with:**
 - the insolvent Entity;
 - ~~a director or officer~~ **an Associate or Related Entity^{SC5, SC6}** of the insolvent Entity; or
 - 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:**
 - the insolvent Entity;
 - ~~a director or officer~~ **an Associate or Related Entity^{SC5, SC6}** of the insolvent Entity; or
 - an employee of or adviser to the insolvent Entity who is in a position to exert direct and significant influence over the insolvent Entity.
 - (d) **a material loan or material guarantee, in the previous two years, to or from:**
 - the insolvent Entity;
 - ~~a director or officer~~ **an Associate or Related Entity^{SC5, SC6}** of the insolvent Entity; or
 - 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.**
- 4.10 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.

- 4.11 In respect of prior relationships of the nature referred to in paragraphs 4.9(c), 4.9(d) and 4.9(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.
- 4.12 **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 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.**
- 4.13 **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 4.7.**
- 4.14 A prior Professional Service is immaterial if it:
- was of limited scope, limited time and limited fees;
 - will not be subject to review by the Member during the course of the Administration;
 - will not affect the Member's ability to comply with the statutory and fiduciary obligations associated with the Administration; and
 - does not create threats to the Member's ability to comply with the fundamental principles of the Code when performing the duties of the Administration.
- 4.15 **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.**
- 4.16 **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. Where there were prior relationships, the Member shall disclose the relationships in the *Declaration of Independence, Relevant Relationships and Indemnities*. 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.**
- 4.17 **If the insolvent Entity is a company, a Member in Public Practice shall not provide Pre-appointment Advice to both the Entity 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.**

- 4.18 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 corporate Entity ~~associated with controlled by~~ that individual, or any corporate Entity in which the individual serves as a director or an officer.^{SC9, SC10}
- 4.19 The requirements of paragraphs 4.17 and 4.18 do not prohibit a Member in Public Practice from providing general information on the insolvency process and the consequences of insolvency to both the Entity and its directors in their personal capacity, or the individual and related corporate Entities, as the case may be.
- 4.20 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:
- has reasonable potential to lead to litigation claims against the Member or the Member's Firm by a stakeholder of the Administration;
 - is material to the Administration; or
 - 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.
- 4.21 A Member in Public Practice shall provide a *Declaration of Independence, Relevant Relationships and Indemnities* in respect of an Insolvency Service. The Member shall provide the *Declaration* in the first communication to the creditors and table it at the first meeting of the creditors.
- 4.22 A Member in Public Practice shall include the following in the *Declaration of Independence, Relevant Relationships and Indemnities*:
- a statement as to whom the *Declaration of Independence, Relevant Relationships and Indemnities* is being made in respect of;
 - a declaration that the Member has undertaken an evaluation of the significance of any threats to Independence 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;
 - where the *Declaration of Independence, Relevant Relationships and Indemnities*, or similar document, is required by law or when it is not required by law and the Member has obtained the consent to disclose from the Referring Entity:
 - the name of the, Referring Entity Firm;
 - the and connection to the insolvent Entity (if applicable) of the Referring Entity; and
 - 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.^{SC11, SC12}
 - 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;

- a declaration that no other information or advice beyond that outlined in the *Declaration of Independence, Relevant Relationships and Indemnities*, was provided to the insolvent Entity, directors of the insolvent Entity (if the insolvent Entity is a company) or their advisors.
- 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:
 - the insolvent Entity;
 - if the insolvent Entity is a company - an Associate of the company;
 - 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;
 - a former Appointee of the insolvent Entity; and
 - 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;
- 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 the nature of the Professional Services, when the Professional Service was provided, the period over which the Professional Service was provided, the Professional Fees paid and the Member's reasons for believing why the Professional Service does not result in a conflict of interest or duty;
- a declaration that there are no other known prior Professional Services or other relationships that require disclosure; and
- a declaration of indemnities (other than statutory indemnities) and upfront payments, including the identity of each indemnifier or provider of an upfront payment (name and relationship with the insolvent Entity) and the extent and nature of each indemnity or upfront payment, a statement as to where the funds are being held, when and how the funds will be applied and that there are no other indemnities or upfront payments to be disclosed.

4.23 In addition to the requirements contained in paragraph 4.22, a Member in Public Practice should consider including the following in the *Declaration of Independence, Relevant Relationships and Indemnities*:

- 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 ago with:
 - the insolvent Entity;
 - if the insolvent Entity is a company – an Associate of the company;
 - 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 listed above are associated.

When determining whether to make additional disclosures, the Member should take into consideration the nature of the prior relationship ~~and~~ the reasons for termination of the relationship: and the relevance that additional information may have for creditors in assessing the Member's Independence.^{SC13}

4.24 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* prior to its issue. Where this is not possible and a *Declaration of Independence, Relevant Relationships and Indemnities* is issued before all Appointees sign it, the Member shall:

- Provide an explanation in the *Declaration of Independence, Relevant Relationships and Indemnities* as to why all Appointees were not able to sign it; and
- Sign a replacement *Declaration of Independence, Relevant Relationships and Indemnities* as soon as possible and ensure that it is provided to creditors.

4.25 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* 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 the appropriate regulatory authorities ~~as appropriate~~ of the following^{SC14, SC15}:
 - the nature of the threat;
 - the key facts and circumstances;
 - reasons why the circumstances or relationships giving rise to the threat were not identified prior to acceptance of the Appointment;
 - the potential impact on the Independence of the Member;
 - the status of the Administration;
 - the costs of ceasing and transferring the Appointment; and
 - Professional Fees and Expenses billed and any outstanding amounts; and
- c) in the circumstances described in paragraph 4.25(b), apply to the court to either continue or resign from the Appointment.

4.26 Where a Member in Public Practice becomes aware that the *Declaration of Independence, Relevant Relationships and Indemnities* is out of date or inaccurate, the Member shall update the *Declaration* 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.

- 4.27 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 a *Declaration of Independence, Relevant Relationships and Indemnities* containing the information required by paragraph 4.22 at the meeting where the creditors decide whether to replace the other person;
 - (d) disclose to the creditors the basis on which the Member proposes to charge Professional Fees; and
 - (e) provide details of the Member's relationship with the Entity nominating the Member for the Appointment.
- 4.28 A Member in Public Practice should be aware that disclosure of matters in a *Declaration of Independence, Relevant Relationships and Indemnities*, and the tabling of such Declaration 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.

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*.

6. Dealings with property and other assets

- 6.1 A Firm which provides Insolvency Services shall establish policies and procedures which prohibit the Firm, a Network Firm, their Partners and employees, and the Close and Immediate Families, **C**controlled and **A**associated Entities of the Firm's and Network Firms' Partners and employees from 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, without obtaining the prior approval of the court. [SC16](#), [SC17](#)
- 6.2 A Member in Public Practice shall not purchase property or other assets of an Administration without obtaining 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, **C**controlled or **A**associated Entities of the Member, the Firm's or Network Firms' Partners and employees without obtaining prior approval of the court. [SC16](#), [SC17](#)

- 6.4 Paragraphs 6.2 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 240 *Fees and other Types of Remuneration* of the Code, subject to the limitations in paragraph 3.21.

- 8.2 When requested to consent to an Appointment, other than as a Controller or in an Appointment by the court, 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:

- The basis of calculating Professional Fees the Member proposes to use in the Administration;
- If the Member proposes to use a time basis, the scale of hourly rates that will be used;
- An explanation that:
 - Professional Fees drawn in the Administration will be those approved by the Approving Body;
 - 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
 - where the director(s) of the insolvent Entity, Insolvent Debtor or other Entity have 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 so approved, may be paid from the assets of the Administration;
- If the Member provides an estimate to the director(s) of the insolvent Entity or the Insolvent Debtor:
 - it shall be in writing clearly detailing any variables which may affect the estimate;
 - 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
 - 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.

- 8.3** 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.
- 8.4 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.
- 8.5 Members in Public Practice should obtain acknowledgement from the director(s) of the insolvent Entity or the Insolvent Debtor of the information provided under 8.2 and 8.3 prior to accepting the Appointment.
- 8.6** A Member in Public Practice shall only claim Professional Fees and Expenses in respect of Professional Services performed or to be performed for an Administration which are necessary and proper.
- 8.7 The term 'necessary' in paragraph 8.6 means professional work that is:
- directly connected with the Administration; and
 - performed in accordance with the duties of the Appointment and Professional Standards.
- 8.8 The term 'proper' in paragraph 8.6 means professional work that is performed in an effective and efficient manner in an Administration.
- 8.9** 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** 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.
- 8.11** 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** A Member in Public Practice who has accepted an Appointment shall not claim as an Expense any disbursements that were incurred prior to the date of Appointment.
- 8.13** A Member in Public Practice shall not enter into an arrangement to receive a Contingent Fee for Insolvency Services if that arrangement:
- impairs the Member's Independence;
 - 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;
 - is inconsistent with the fiduciary obligations of the Member; or
 - results in the perception that the Member is acting in the Member's interests, rather than in the best interests of the creditors.

- 8.14** When considering whether a proposed Contingent Fee arrangement in a particular Administration meets the requirements of paragraph 8.13, a Member in Public Practice shall consider the following:
- funds available to the Administration;
 - funding from alternative sources such as creditors or a litigation funder;
 - the costs of the alternative sources of funds in comparison to the Contingent Fee arrangement;
 - the risk associated with the tasks to be undertaken for the Contingent Fee; and
 - 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.
- 8.15** 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:
- details of the arrangement including the nature of the contingency and how achievement of the contingency will be assessed;
 - the Member's remuneration in the event the contingency is or is not achieved;
 - when the Member's remuneration is expected to be drawn; and
 - 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.
- 8.16** A Member in Public Practice who has accepted an Appointment, other than an Appointment as a Controller, shall provide the following information in the first communication to the creditors:
- the methods that may be used to calculate Professional Fees;
 - the basis upon which Professional Fees will be charged for the Administration;
 - why the Member considers that the chosen method is suitable for the Administration;
 - information that details the classes of Expenses that may be charged to the Administration; and
 - the basis for recovery of Expenses charged directly by the Firm.
- 8.17** Except in the case of an Appointment as a Controller, where the basis upon which Professional Fees for the Administration is time based a Member in Public Practice shall provide the creditors with the following additional information:
- the scale of rates that will be used; and
 - a best estimate of the costs of the Administration to completion, or to a specified milestone.
- If subsequent to providing the best estimate of the costs of the Administration there is significant change to that estimate, the Member shall provide a new estimate to the creditors together with an explanation of the variance.

- 8.18** 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 shall provide sufficient information so as to allow the Approving Body to make an informed assessment as to whether the remuneration is reasonable, and shall:
- provide details of how the Professional Fees are computed;
 - provide a description of the Professional Services performed, or to be performed, broken down into broad categories, and the costs associated with each category;
 - state the terms of the approval sought from the Approving Body;
 - advise the total of Professional Fees previously determined and whether the Member will be seeking approval for additional Professional Fees in the future;
 - advise when the Professional Fees will be drawn;
 - provide details of Expenses paid from the Administration, including:
 - where Expenses are paid for Professional Services that have not been provided by the Firm, who the Expenses were paid to;
 - what the Expenses were for;
 - for Expenses charged directly by the Firm, the basis of calculation of those Expenses;
 - the amount paid; and
 - the basis of recovery of future Expenses to be charged directly by the Firm; and
 - provide a summary of receipts and payments to and from the Administration bank account.
- 8.19** 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** 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** Where a Member in Public Practice seeks approval for the payment of prospective Professional Fees from the Approving Body, the Member shall specify the maximum amount of the Professional Fees that may be drawn before requiring further approval from the Approving Body. The Member shall draw on this prospective Professional Fee progressively as the work is completed.
- 8.22** Where a Member in Public Practice has prospective Professional Fees approved in accordance with paragraph 8.21, 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.

- 8.23 Where a Member in Public Practice receives monies prior to acceptance of an Appointment to meet the costs of the proposed Administration, the Member shall ensure:
- (a) the monies are held in a bank account that is separately identifiable from the Firm's bank accounts;
 - (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*; and
 - (d) approval of Professional Fees is obtained prior to them being paid to the Appointee; and
 - ~~(d)~~(e) the monies are accounted for as funds of the Administration. ^{SC18, SC19}
- 8.24 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.
- 8.25 Approval of the Approving Body under paragraph 8.24 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

Summary of revisions to the previous APES 330 (Issued November 2011)

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

Table of revisions*

Paragraph affected	How affected
1.1	Added
1.2 – Paragraph 1.1 in existing APES 330 relocated	Amended
2 – Definition of Administration	Amended
2 – Definition of Appointment	Amended
2 – Definition of Approving Body	Amended
2 – Definition of Associate	Amended
2 – Definition of Associated Entity	Deleted
2 – Definition of Contingent Fee	Amended
2 – Definition of Controlled Entity	Deleted
2 – Definition of Controller	Amended
2 – Definition of Expert Witness	Amended
2 – Definition of Expert Witness Service	Added
2 – Definition of Independence	Amended
2 – Definition of Insolvency Services	Amended
2 – Definition of Insolvent Debtor	Added
2 – Definition of Member	Amended
2 – Definition of Member in Public Practice	Amended
2 – Definition of Network Firm	Amended
2 – Definition of Other Evidence	Added
2 – Definition of Professional Activity	Added
2 – Definition of Professional Bodies	Added
2 – Definition of Professional Services	Amended
2 – Definition of Professional Standards	Amended
2 – Definition of Referring Entity	Added
2 – Definition of Related Entity	Amended
2 – Definition of Witness Report	Deleted
3.11 – Paragraph 3.12 in existing APES 330 relocated and amended	Amended
3.12 – Paragraph 3.5 in existing APES 330 relocated	Added
3.13	Added
3.14	Added
<u>3.19 – Paragraph 3.17 in existing APES 330 relocated</u>	<u>Amended</u>
3.20 – Paragraph 4.17 in existing APES 330 relocated	Added
3.21 – Paragraph 4.18 in existing APES 330 relocated	Added
4.1	Added
4.2	Added
4.3 – Paragraph 4.1 in existing APES 330 relocated and amended	Amended
<u>4.6</u>	<u>Amended</u>
4.7 – Paragraph 4.5 in existing APES 330 relocated and amended	Amended
4.8 - Paragraph 4.6 in existing APES 330 relocated and amended	Amended
4.9 – Paragraph 4.7 in existing APES 330 relocated and amended	Amended
4.10	Added
4.11 – Paragraph 4.8 in existing APES 330 relocated and amended	Amended
4.13 – Paragraph 4.10 in existing APES 330 relocated and amended	Amended

Paragraph affected	How affected
4.15 – Paragraph 4.12 in existing APES 330 relocated and amended	Amended
4.17 – Paragraph 4.14 in existing APES 330 relocated and amended	Amended
4.18	Added
4.19 – Paragraph 4.15 in existing APES 330 relocated and amended	Amended
4.21 – Paragraph 4.19 in existing APES 330 relocated and amended	Amended
4.22 – Paragraph 4.20 in existing APES 330 relocated and amended	Amended
4.23	Added
4.25 – Paragraph 4.22 in existing APES 330 relocated and amended	Amended
4.26 – Paragraph 4.23 in existing APES 330 relocated and amended	Amended
4.27 – Paragraph 4.24 in existing APES 330 relocated and amended	Amended
6.1	Amended
6.3	Amended
7.1	Amended
7.2	Deleted
7.3	Deleted
8.1	Amended
8.2	Added
8.3	Added
8.4	Added
8.5	Added
8.7 – Paragraph 8.3 in existing APES 330 relocated and amended	Amended
8.8 – Paragraph 8.4 in existing APES 330 relocated and amended	Amended
8.12	Added
8.14 – Paragraph 8.9 in existing APES 330 relocated and amended	Amended
8.16 – Paragraph 8.11 in existing APES 330 relocated and amended	Amended
8.18 – Paragraph 8.13 in existing APES 330 relocated and amended	Amended
8.22	Added
8.23 – Paragraph 8.17 in existing APES 330 relocated and amended	Amended
8.24	Added
8.25	Added
9.1	Amended
9.4	Added

* Refer Technical Update 2014/xx