9 April 2019

Mr Channa Wijesinghe
Chief Executive Officer
APESB

By email: channa.wijesinghe@apesb.org.au

Dear Mr Wijesinghe

APES 330 Insolvency Services

Thank you for the opportunity to provide feedback in the process to update APES 330 Insolvency Services.

ARITA - Australian Restructuring Insolvency & Turnaround Association has been highly involved in providing feedback, consultation and input into the development and review of APES 330. Part of this process is to ensure the ongoing alignment between APES 330 and ARITA's Code of Professional Practice (ARITA Code). This is of particular importance to ARITA as a significant portion of ARITA's members, and most registered liquidators and trustees, are bound to follow both the ARITA Code and APES 330.

Generally, we are very supportive of the amendments made to APES 330. However, we have a number of suggestions to ensure ongoing alignment and two key areas of concern.

Please find attached a table detailing ARITA's feedback in relation to APES 330 and alignment with the ARITA Code.

Key areas of concern

Our key areas of concern relate to the approach to managing threats to independence and the inclusion of a reference to APES 310 Client Monies in relation to monies received in advance of an appointment.

Independence

In APES 330 (paragraphs 4.4, 4.9, 4.15 and 4.16) reference is made to the member "addressing the threats" to independence by eliminating or reducing the threat to an acceptable level.

Although this concept is consistent with the approach to threats taken by the APESB in its standards, it is not consistent with the approach to independence taken by the Australian courts for insolvency appointments (noting that it is now proposed to reference legal precedents set by Australian Courts in the definition of Independence).

We are concerned that by including these words in APES 330, those applying the standard will infer that they are able to take steps to reduce or eliminate threats to independence, which we do not believe is the case, particularly in the case of relationships. Once a relationship is held that creates a threat to independence, it will always create a threat to independence.

This may potentially cause users of APES 330 to improperly accept appointments where they are not, or are not perceived to be, independent when considering legal precedent.

We ask that APESB remove any references to being able to "address threats" from APES 330.

Inclusion of APES 310 Client Monies

APES 330 now seeks to include a reference to APES 310 Client Monies in relation to monies received prior to acceptance of an appointment to meet the costs of the proposed administration.

We hold significant concerns regarding this proposed change.

We maintain the view that APES 310 does not apply to insolvency matters due to the terminology used within APES 310 – and this will extend to monies received prior to acceptance of an appointment. APES 310 refers to "Client", "Client Money", "Engagement" and "Professional Services". The key issue is that there is no "Client" in an insolvency appointment or in the period prior to the making of the appointment.

Although the appointment may be made by the directors (Voluntary Administration) or by the members (Creditors' Voluntary Liquidation) there is no "Client" and thus there cannot be any "Client Monies".

The relevant definitions are:

- "Client" - an individual, firm, entity or organisation to whom or to which Professional Services are provided by a Member in Public Practice in respect of Engagements of either a recurring or demand nature.
- "Engagement" - 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.
- "Professional Services" - Professional Activities performed for Clients.

Insolvency practitioners do not provide a Professional Service to a director or a company's members prior to an appointment and there is no Engagement. Certainly, the director(s) or company's members are not Clients of the insolvency practitioner. In fact, the provision of a

Professional Service or the entering into an Engagement with a director or the members of a company would mean that the insolvency practitioner could not take the subsequent formal insolvency appointment to a company due to independence issues (refer paragraphs 4.21 to 4.23 of APES 330).

As such, we believe that it is clear that APES 310 in its current form cannot be applied in this situation.

Counterbalance controls to the audit of the trust account exist, including:

- The need to disclose the receipt of the upfront monies to creditors in the Declaration of Independence, Relevant Relationships and Indemnities (refer APES 330 paragraph 4.26(k));
- The need for the funds to be accounted for as funds of the administration (refer APES 330 paragraph 8.21(e)). These bank accounts are monitored by the respective regulators, ASIC and AFSA, with the lodgement of regular accounts of receipts and payments, and the regulators' powers to review and/or audit these accounts.
- Professional fees must be approved by creditors (or other statutory process) before these funds can be drawn from the administration bank account and paid to the insolvency practitioner or their firm (APES 330 paragraph 8.21(d)).
- The law requires administration funds to be paid into the administration bank account within strict time limits (5 business days (IPS 65-5(1) Corporations Act, IPS 65-5(1) Bankruptcy Act) with substantial penalties on a strict liability basis if this is not done.

We ask that APESB revert to the prior wording in APES 330 which required the holding of funds in an account separately identifiable from the firm's bank account.

Should you wish to discuss any aspect of our submission, please contact Ms Kim Arnold, Policy & Education Director, on 02 8004 4340.

Yours sincerely

John Winter
Chief Executive Officer

Schedule of feedback

Section reference	Feedback
2	Definition of Independence - We suggest that a specific case reference not be included as the case mentioned is but one of a large number of decisions on independence. We agree with the inclusion of the reference to consideration of legal precedent.
2	Definition of Referring Entity – we suggest rather than “arranged a meeting with” wording such as “or placed a director(s), debtor or creditor in contact with a member”.

Paragraph reference	Feedback
3.11	We have converted this requirement to a “must consider” in the ARITA Code and limited the paragraph to guidance from regulatory authorities.
3.14	We propose to refer this to the ARITA Code Working Group (Working Group) for discussion as we have concerns that meeting with a person that purports to be the director or debtor may not be the best means of dealing with identity theft or “fake” persons issues.
3.24	We suggest that the words “or not refer” are included in the last line after “refer”.
4.4(c)	We suggest that the words “after full and proper disclosure of any relevant matters, including drawing the court’s attention to the requirements of APES 330 and any concerns expressed by a Professional Body, regulatory authority or creditors” at the end of this line.
4.8(b)	We suggest that the notification requirement be changed to “the Member shall notify the relevant body which may include the court, creditors, a professional body and the appropriate regulatory authority.”
4.10	We suggest that the word “generally” be added so that it reads “ …relationships are not generally considered …”. ARITA has also included a sentence explaining that it is the member’s responsibility to ensure that the relationship does not create a threat to independence.
4.10(e)	ARITA will be discussing the wording of this exception with our Working Group and we will revert to you on this.
4.12(a)(ii)	We suggest that this is changed to “Associated or Related Entity” from “director or officer”.
4.18	We will be discussing this with the Working Group. The problem is that the size of the firm and the size of the insolvent may be irrelevant to a perception of a lack of independence by a

	reasonable informed third party. For example, a $250,000 fee may be immaterial to a very large multidisciplinary accounting practice and a listed entity, but it is likely to be large enough to create a perception of a lack of independence.
4.23	We suggest including an explanation of “general information”, such as “For the purposes of paragraph 4.32, general information is limited to information which is not specific to the Insolvent’s particular facts and circumstances.”
4.26(d)	Please note that ARITA is seeking legal advice around the disclosure of referrers. We will keep you informed as to the final position that ARITA reaches having regard to regulatory guidance and the Privacy Act.
4.26(i)	This requirement has had negative feedback when we consulted on the ARITA Code. We will be discussing it with our Working Group and will keep you advised.
6.2	We do not believe including the word “selling” in this paragraph is appropriate as a Member will be selling assets of the insolvent entity as part of their appointment.
8.2	We suggest changing the focus of who is required to provide this information to who is making the appointment, rather than trying to exclude particular appointment types (refer our 3.2.1)
8.11 and 8.12	We suggest including particular wording to deal with the situation in Bankruptcy (refer our 3.2.2)
8.13	We query the inclusion of the words “and verifiable”. There are many instances of remuneration claims that are not verifiable at the time that approval is sought – eg. Prospective time based, percentage based, fixed fees, contingent fee arrangements. Instead they would be verifiable at the time that the fees are drawn – though this is not the point in time that creditors are reported to. All of these bases of remuneration are allowed.
8.13(a)	We suggest including an additional declaration about the review of WIP for retrospective time based remuneration claims (refer our 3.2.3)
8.13(f)	We suggest a change of wording to reflect the new approval requirements for Expenses that may have a profit or advantage for the appointee (refer our 3.2.3)
8.13	We suggest including a new point (i) “advise approving body on where they are able to obtain more information”.
8.19	We suggest a change of wording regarding the drawing of remuneration and expenses. “Once approved, the Member has discretion when to draw payment for Remuneration or Expenses but must not draw on this prospective Remuneration or Expenses approval until the work is completed or the Expense in incurred.”

8.22	We suggest including particular wording to deal with the situation in Bankruptcy (refer our 3.2.7)
NEW	ARITA has included a section on Animosity in the Independence section of the ARITA Code on Insolvency Services and we suggest that APESB could do the same (refer our 3.1.8).
NEW	ARITA has included a new section on Fixed Fee and we suggest that the APESB do the same (refer our 3.2.5)