Table of proposed changes to APES 330 arising from amendments made to the ARITA Code of Professional Conduct

ARITA (formerly IPAA) Explanatory Memorandum	Location of proposed changes in APES 330
Introduction This document summarises the more significant changes to the IPA Code of Professional Practice ("the Code") and discusses the reasons for the changes. It also addresses some of the concerns expressed by members and others during the consultation process.	n/a
Application of the Code (1.6) The Code now includes guidance on its application to Members practising outside of Australia and appointments to Members' Voluntary Liquidations.	MVLs – changes made to definition of "Administration", "Appointment", "Approving Body", "Insolvency Services", paragraph 4.1 and other paragraphs in Section 4 which refers to a Controller.
Disclosure of referrers (6.6) A requirement has been added to the Code that a Practitioner disclose the source of a referral (defined as the Referring Entity – being a 'must' requirement for name and firm/organisation, and a 'should' requirement for connection to the Insolvent if there is a connection) in the DIRRI where the appointment follows a Specific referral (a defined term). During the consultation process, concerns were raised about this new requirement, specifically around the commercial sensitivity of this information and the impact this may have on the reputation of the referral source. It is our view that the disclosure of the referral source of an appointment is important for the following reasons: • Creditors have a right to know how the appointment came about and part of that process is who (if anyone) referred the appointment maker (directors, debtor) to the Practitioner; • It may be relevant to creditors if the referral source is subsequently engaged to provide services in the administration and is subsequently paid by the administration; and • We have received numerous complaints about the practices of a number of referral agencies, however as their personnel are not members of the IPA (nor registered liquidators or registered trustees) we are unable to take any action in respect of these complaints. The disclosure of the referral source may assist the IPA in managing this industry issue. The guidance on the content of the DIRRI (6.17.1) and the standard template for a DIRRI provided in the Code (22.1) have also been updated for this change.	Definition of Referring Entity and Paragraph 4.23, 3rd dot point

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Declaration in respect of pre-appointment advice (6.8.1B) Where pre-appointment communications occur prior to an Appointment being made, the Code has always required disclosure of the details of those communications. In addition to that requirement, the Code now requires that Practitioners make a declaration in their DIRRI that no information or advice, beyond that outlined in the DIRRI, was provided to the Insolvent, officers of the Insolvent (if the Insolvent was a company) or their advisors. The guidance on the content of the DIRRI (6.17.1) and the standard template for a DIRRI provided in the Code (22.1) have also been updated for this change.	Paragraph 4.23, 5th dot point
Explanations of reasons for no conflict of interest in DIRRI (throughout 6) There have been amendments to the requirements for Practitioners' reasons to make it clear that it is the Practitioners' reasons for believing that the relationship disclosed does not result in a conflict of interest or duty. This is in line with the wording in section 60 of the Corporations Act. Furthermore, the examples of "reasons" given in the Code now commence with the sentence: *"I believe that this relationship does not result in a conflict of interest or duty because:"* Again, this better reflects the requirement to provide reasons and for it to be the Practitioners' belief.	Paragraph 4.23, 4th, 6th and 7th dot points
Investigating Accountant leading to an Appointment (6.8.1C) In relation to the exception to the two year rule at 6.8 of an Investigating Accountant assignment which leads to an Appointment, further guidance has been added around issues to consider when deciding whether it is appropriate to accept the subsequent Appointment. These factors are whether: • the IA appointment would compromise the Practitioner's independence or be subject to review or challenge; or • any remuneration received by the Practitioner for undertaking the IA may be a preference in a subsequent Appointment. Disclosure must also be made of the party that paid the remuneration for the IA assignment.	Paragraph 4.23 addresses exceptions to the two year rule at the 7th dot point. No additional guidance provided in APES 330.
Disclosure of relationships with Associates (6.10) The mandatory disclosure of relationships with Associates of the Insolvent within the prior 2 years remains. However, there is now a requirement for the Practitioner to consider whether relationships older than 2 years should also be disclosed.	Paragraph 4.24
Business relationships with the insolvent (6.12.2) Previously, a Practitioner was not able to consent to an appointment if they had had business dealings with the Insolvent. The guidance has been updated to exclude immaterial business dealings and where the business dealing occurred more than two years ago. The two year time period is consistent with other time periods relating to independence in the Code and the Corporations Act.	Paragraphs 4.8 – 4.10

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The materiality concept was added to account for the many situations where practitioners or their firms have had small (relative to firm size or the size of the business of the Insolvent) or inconsequential business dealings with the Insolvent in the past two years. This is particularly relevant to the provision of goods or services example in the Code.	
Disclosure of remuneration pre-appointment (6.13) A section has been added to the Code requiring Practitioners to provide certain information about remuneration to directors/debtor prior to a director/debtor appointment (not court or controller appointments). This is not a requirement to provide a quote or estimate, but if a quote or estimate is provided, it must be in writing. We have received a number of complaints from directors stating that they were given a fixed fee estimate by a Practitioner prior to the appointment and the actual fees sought/drawn in the administration were much higher. There is usually nothing in writing confirming the estimate, and its conditions, given to the director prior to the appointment. The provision of information about remuneration in writing to the directors/debtor will give the Practitioner protection from later misinterpretation and will provide evidence of the information in the event of a subsequent complaint. We have also received informal comments that some practitioners are providing directors/debtors with very low fixed fee estimates in order to secure appointments and are subsequently charging remuneration at hourly rates and then having that approved by creditors. Practitioners will also be required to disclose any estimates or quotes provided to directors/debtors prior to appointment in the initial remuneration advice sent to creditors. This will allow creditors to be informed of the practitioner's estimate and ensures transparency of the process. We have developed a template for use by Practitioners at 23.2.3.	Paragraph 8.2. The 4th dot point makes reference to estimates in writing. Paragraphs 8.2 – 8.4 Paragraph 8.2
Court Appointments (6.15) Guidance has been provided on: • consents to act in court liquidations; • maintaining currency of consents that remain outstanding for all court appointments; and • making a DIRRI following a court appointment.	No changes made
Dealing with Property (10) The Code has been updated to make it clear that a Practitioner, his or her partners, Firm, staff, their respective Relatives and any Entities that those parties have Material interest in, must not acquire assets. The Code previously used the phrase "respective households" which was not clear terminology. References to Relatives and Entities are clear and are also defined terms.	No changes required. Addressed by Section 6.

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Material interest is also a new defined term, which refers to ownership, which is material to either the owned Entity, or material to the Practitioner, his or her partners, Firm, staff, or their respective Relatives; or in which the Practitioner, his or her partners, Firm, staff or their respective Relatives has any management involvement whatsoever. For example, the concept of materiality means that if a Practitioner holds shares in a publicly listed company, this shareholding would not prevent the publicly listed company from purchasing assets from an administration, unless the Practitioner's shareholding was a material interest.	Material is not a defined term in APESB standards. No changes made to APES 330.
Disclosure of basis of and actual disbursements (15.3.2) Although creditors do not have the right to approve disbursements, they do have the right to understand on what goods or services were provided to the administration, and for what amounts. In particular, creditors are entitled to know if goods or services are provided by the Practitioner's firm and the amounts. To provide greater clarity to creditors on the basis on which internal disbursements (eg internal non-professional fee expenses) are recovered, Practitioners will be required to disclose details of how these disbursements will be charged to the administration in the initial advice to creditors regarding remuneration. This requirement has been built into the template at 23.2.1. To assist creditors with understanding what disbursements have actually been paid to the Practitioner, whether: • directly (eg photocopying, staff per diem travel allowance); or • by way of reimbursement for amounts previously paid by the practitioner's firm on the administrations behalf (eg. advertising or flight costs billed directly to the firm), the following information must now be included in the remuneration approval report: • general information on the different classes of disbursements; • a declaration that the disbursements were necessary and proper; • in relation to disbursements paid to the firm, whether directly or in reimbursement of a payment to a third party: - who the disbursement was paid to (only for externally provided professional services); - what the disbursement was for; - the quantity and rate (only for internal disbursements); and - the amount paid; and • details of the basis of any internal disbursements that will be charged to the Administration in the future (eg. Page rate for photocopying done internally). Note that payments direct to third parties by the Administration only need to be clearly included in the receipts and payments. These requirements have been built into the report template at 23.2.2.	Paragraphs 8.15 and 8.17

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Pre-appointment expenses (14.10.2F) The Code clarifies that expenses incurred prior to the Appointment are not Disbursements that can be reimbursed from the Administration.	Paragraph 8.11
Prospective fee approval (15.2.2) The Code provides greater clarity around when hourly rates can be later increased in circumstances where remuneration has been prospectively approved. This guidance is in line with the decision in *Gidley, in the matter of Aliance Motor Body Pty Limited (Subject to Deed of Company Arrangement)* [2006] FCA 102, where the court explained when and on what basis remuneration can be approved prospectively.	Paragraph 8.21
Sources of Funding (15.4) Guidance has been included in the Code on disclosure and approval requirements for funding from the Department of Employment (GEERS/FEG), ASIC (Assetless Administration Fund), litigation funding, creditor funding, indemnities and up-front payments and secured creditor funding (refer below for further comments on this specific type of funding). Please note the different guidance for personal insolvency administrations and corporate insolvency administrations for funding from the Department of Employment.	No changes made
Payment of remuneration by secured creditors in non-controller appointments (15.4.5) The Code now makes it clear that any payments by secured creditors for the realisation of secured assets, in any appointments other than controller appointments, must be disclosed to the approving body and approved in the same way as other remuneration. In our view, this is a codification of the law. Section 449E in respect of a VA is clear that an administrator is only entitled to remuneration that is determined by agreement of the COI, resolution of creditors or the Court. Similarly, section 473 for liquidators states that the liquidator is entitled to receive such remuneration as is determined by agreement between the liquidator and COI, resolution of creditors or the Court. In a bankruptcy, remuneration is fixed under section 162 by resolution of creditors or by the COI. A trustee may also make an application to the Inspector General. Under s 165, a trustee is not able to make an arrangement for receiving from any person any remuneration beyond the remuneration fixed in accordance with the Bankruptcy Act. In our view, it is clear that there is a statutory requirement for proper approval to be obtained to draw any remuneration in any such appointments. There was resistance to this change to the Code in the first round of consultation based on the belief that no approval of creditors was necessary. It was argued that the Practitioner is acting as the agent of the secured creditor and thus acting outside the VA/liquidation/bankruptcy. In our view, acting as agent of the secured creditor would be a conflict	Paragraph 8.23 – 8.24

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that would prevent the continuation of the underlying insolvency appointment. ASIC has similar concerns regarding conflict issues. Furthermore, we envisage that the administrator/liquidator/trustee would be using the ABN, GST registration and insurance coverage of the underlying administration in relation to such realisations. The proper view, in our opinion, is that the VA/liquidator/trustee is selling those assets in their role as VA/liquidator/trustee, at the request of with the agreement of the secured party, and remitting the proceeds to that secured creditor (subject to any prior ranking creditor, for example section 561 in a liquidation). The VA/liquidator/trustee may withhold sufficient funds to meet the cost of selling those assets, but that money cannot actually be drawn as remuneration until approval is obtained from the approving body.	
Checklists (18.3) Practitioners must maintain and use an appropriate checklist for each type of insolvency Administration they undertake. This was previously an inferred requirement of the Code, but now is specifically stated.	Paragraph 9.4
Identity of directors (20.2) There is a new requirement in the Code for Practitioners to make reasonable enquiries to satisfy themselves of the identity of directors or a debtor prior to accepting an appointment where the appointment is being made by the directors or a debtor. The requirement is to make reasonable enquiries, which means that the Practitioner should use professional judgement to determine what is appropriate in the circumstances. This requirement is consistent with AFSA's (previously ITSA) requirement to verify identity when lodging a debtor's petition.	No change required due to cross reference to follow the requirements of APES 320 in paragraphs 9.1 and 9.2
Joint appointments (20.3) General guidance has been added to the Code stating that joint and several appointments: • should be taken with the knowledge that all Appointees are equally responsible for all decisions made on joint and several appointments, and • the firm should have in place policies and procedures to ensure that all appointees are knowledgeable about the conduct of the administration, even if one appointee is leading the conduct of the administration.	Paragraphs 3.13 and 3.14
DIRRI template (21) and Remuneration approval request report template (22.2.2) Changes have been made to the templates to reflect the changes to guidance within the body of the Code which are referred to above. Members should take particular care to ensure that their firm's DIRRI and remuneration approval request pro-formas are compliant with the new requirements of the Code. Although use of the templates provided in the Code are not mandatory, Members are encouraged to use the templates.	No changes made as APES 330 does not have templates.

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Pre-appointment proposed basis of Remuneration disclosure (23.2.3) This is the new template for pre-appointment disclosure of the proposed basis of remuneration in director/debtor appointments (not court or controller appointments). Although use of the template provided in the Code is not mandatory, Members are encouraged to use the template.	No changes made as APES 330 does not have templates.
General application of the Code Members are reminded that they should be guided not only by the specific terms of the Code but also by the spirit of the Code (Chapter 1). Also, examples provided within the Code are for illustrative purposes only and Members must consider the particular facts of each case when determining how the Code applies to them. The fact that a situation or relationship encountered by a Member is not specifically covered in an example given in the Code does not mean that the situation or relationship would be acceptable under the Code.	Consistent with paragraph 1.8. No changes made.
Questions Questions about the Code can be directed to any member of the IPA's Insolvency Specialist Team – Kim Arnold (02 4283 2402, karnold@ipaa.com), Narelle Ferrier (039722 2371, nferrier@ipaa.com) or Michael Murray (02 9080 5826, mmurray@ipaa.com).	n/a