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Proposed Amendments due to ARITA's Code of Professional Service (3rd edn) and 2014 Annual Review

APES 330 Insolvency Services

[Supersedes APES 330 Insolvency Services Issued in September 2009]

Revised xxxx 2014 November 2014

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1. Scope and application

- 1.1 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 April 2012~~ XX XXX XXXX. Earlier adoption of this Standard is permitted.
- 1.2 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.
- 1.3 **Members in Public Practice in Australia shall follow the mandatory requirements of APES 330 when they provide Insolvency Services.**
- 1.4 **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.**
- 1.5 **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.**
- 1.6 The Standard is not intended to detract from any responsibilities which may be imposed by law or regulation.
- 1.7 All references to Professional Standards, guidance notes and legislation are references to those provisions as amended from time to time.
- 1.8 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* or the *Corporations Act*. In some cases, there may be corporate insolvency Appointments under other legislation such as co-operatives and Aboriginal corporations legislation. Where appropriate, the term applies to a solvent administration under Chapter 5 of the *Corporations Act*. means an insolvency arrangement arising from an Appointment, other than a members' voluntary liquidation, under which an insolvent Entity operates.~~

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 in bankruptcy, a Trustee appointed under Section 50, a debt agreement administrator under Part IX, or a Trustee or controlling Trustee under Part X of the *Bankruptcy Act 1966*; or as a liquidator or provisional liquidator ~~(other than a liquidator in a members' voluntary liquidation)~~, a voluntary administrator, an administrator of a deed of company arrangement, a Controller,

Comment [KA1]: MVL's now included in IPA Code except for Independence requirements

CW- can a MVL be described as an insolvent entity?

KA – refer IPA Code definition which may be better
RA – IPA Code definition now inserted

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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, ~~the 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.

Comment [NF2]: For mvls

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

Associated Entity means an Entity, including an unincorporated Entity such as a partnership, over which a Member in Public Practice has significant influence, that is neither a Controlled Entity nor an interest in a joint venture.

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 work performed by the Firm. A fee that is established by a court or other public authority is not a Contingent Fee.

Controlled Entity means an Entity over which a Member in Public Practice has the power to govern the financial and operating policies of the Entity so as to obtain benefits from its activities.

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.

Comment [RA3]: To address issue 4 of APES 330 Annual Review

Debtor means an individual experiencing financial distress.

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 in Public Practice who during the course of an Administration acts as an Expert Witness. As an Expert Witness, the Member may express opinions to the court based on the Member's specialised training, study or experience.

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.

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

Independence means:

- (a) Independence of mind - the state of mind that permits the expression of a conclusion provision of an opinion without being affected by influences that compromise professional judgment, thereby allowing an individual to act with integrity, and exercise objectivity and professional scepticism, ~~and~~
- (b) Independence in appearance - the avoidance of facts and circumstances that are so significant that a reasonable and informed third party, ~~having knowledge of all relevant information, including any safeguards applied,~~ would be likely to reasonably conclude, weighing all the specific facts and circumstances, that a Firm's, Partner's or an employee, or agent, consultant, or contractor of the Member's or a member of the Audit or Assurance Team's, integrity, objectivity or professional scepticism ~~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, ~~excluding those in respect of members' voluntary liquidations,~~ provided by a Member in Public Practice to an insolvent Entity under an Appointment.

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

Comment [KA4]: Cannot limit this to Audit or Assurance as this is independence in an insolvency context

RA- changed as discussed

Comment [CW5]: As per comment 1.

Can a MVL be an insolvent entity?

KA – take out insolvent. It is limited to services provided under an Appointment and Appointment is a defined term limiting to insolvency situations and includes MVLs

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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. ~~services requiring accountancy or related skills performed by a Member in Public Practice including accounting, auditing, taxation, management consulting and financial management services.~~

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 a Member's contact details to a director(s), Debtor or creditor for the purposes of the director(s), 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*.

Witness Report means a written report, affidavit or written statement that is for the purpose of communicating expert evidence in a matter that is to be considered by a court.

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

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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.

Capacity and resources

- 3.5 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.

Professional competence and due care

- 3.6 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.
- 3.7 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.
- 3.8 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.
- 3.9 Relevant reports are those reports that include a reference to the subject matter for which expert assistance or advice has been obtained.
- 3.10 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.
- 3.11 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.
- 3.12 In undertaking an Insolvency Service, a Member in Public Practice should consider any guidance issued by the professional accounting bodies and appropriate regulatory authorities.

3.13 If a Member in Public Practice accepts an Appointment jointly and severally with another insolvency practitioner, all Appointees are equally responsible for all decisions made on the Appointment.

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- 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.

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Marketing

- 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.

Identity

- ~~3.18 A Member in Public Practice shall make reasonable enquiries to satisfy themselves of the identity of:~~
- ~~if the insolvent Entity is a company, the directors; and~~
 - ~~if the insolvent Entity is an individual, the individual Debtor.~~

Comment [RA6]: APES 320 paragraph 38 requires the Firm to establish policies and procedures that allow the Firm to undertake relationships where the integrity of the Client has been considered. In accordance with paragraph 40, integrity of the Client includes consideration of the identity and business reputation of the Client's principle owners, key management, related parties and those charged with its governance.

APES 320 which is cross referred to in APES 330 addresses the requirement to establish the identity of the directors.

CW- Agree

KA - ok

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. This does not remove a Member in Public Practice's obligations to comply with the relevant law in respect of Independence.
- 4.2 Subject to paragraph 4.3, a Member in Public Practice accepting an Appointment or conducting an Administration shall maintain Independence.
- 4.3 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.

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4.4 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.

4.5 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. 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 operate; and
- (b) relationships with the directors or officers of the insolvent Entity or its Related Entities.

4.6 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) the Engagement of the Member, the Member's Firm or a Network Firm by a third party, who is not an Associate or Related Entity of an insolvent Entity, 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 Practitioner'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) an Appointment as Controller of an insolvent Entity of which that Member or another Partner of the Member's Firm or Network Firm has been a Controller under a different debenture or where the Appointment has been made by the court; or~~

~~(d)~~(c) advice provided by the Member, the Member's Firm or the Network Firm to the insolvent Entity prior to the Appointment 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.

4.7 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 4.2922. A relationship is trivial or inconsequential if it is remote, coincidental or insignificant.

Comment [KA7]: We have removed controllers from this section of the Standard, therefore this provision should no longer be required.

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4.8 ~~Subject to paragraph 4.8, a~~ Member in Public Practice shall not accept an Appointment, ~~other than to act as a Controller,~~ 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 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 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 ~~to or from~~ or material guarantee, in the previous two years, to or from:
 - 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.
- (e) employment with the insolvent Entity in the preceding two years, in a position to exert direct and significant influence over the insolvent Entity.

~~4.9~~ 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 practices.

~~4.9~~ In respect of prior relationships of the nature referred to in paragraphs 4.7(c) and (d), a Member in Public Practice shall evaluate any threats a prior relationship is likely to create to the Member's Independence. In performing this assessment, the Member shall 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;

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- ~~time elapsed since the relationship ended; and~~
- ~~reasons for the termination of the relationship.~~

4.10 In respect of prior relationships of the nature referred to in paragraphs 4.8(c) and 4.8(d) a Member in Public 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 termination of the relationship.

Comment [KA8]: Now that there is a two year rule associated with 4.7 (c) and (d) this paragraph should no longer be required.

4.11 **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.**

Comment [RA9]: could be beneficial to still include as guidance in respect of the need to consider the nature and reasons for termination of the prior relationship

CW – I tend to agree that this is useful guidance. Otherwise what happens to a prior relationship that is 2 years and a few months.

I would also leave the time frame in as it will make the Member think about it.

KA What about the overarching requirement to be independent? We should think about whether 4.3 needs to be clearer

RA – Board to consider whether to move this to 4.3. Work in progress.

4.12 **A Member in Public Practice shall not accept an Appointment, ~~other than to act as a Controller,~~ 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 4.56.**

4.13 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.

4.14 **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 the preceding two years in accordance with the requirements of this standard.**

4.15 **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.**

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- 4.16 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.
- 4.17 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 that individual.
- 4.18 The requirements of paragraphs 4.16 and 4.17 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.
- 4.19 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.
- 4.20 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.
- 4.21 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.
- 4.22 A Member in Public Practice shall provide a *Declaration of Independence, Relevant Relationships and Indemnities* in respect of an Insolvency Service ~~(excluding an Appointment as a Controller)~~. The Member shall provide the *Declaration* in the first communication to the creditors and table it at the first meeting of the creditors.
- 4.23 A Member in Public Practice shall include the following in the *Declaration of Independence, Relevant Relationships and Indemnities*:
- a statement as to who 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;

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- the name, Firm and connection to the Insolvent Entity (if applicable) of the Referring Entity;
- 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 an explanation as to why 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 DIRR, 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 charge 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.

Comment [CW10]: KA –the Corporations Act uses the term "believing" and that this why this term is being used.

Comment [CW11]: Refer to comment 10

Comment [CW12]: Refer to comment 10

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4.24 In addition to the requirements contained in paragraph 4.23, 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 noted 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.

4.25 **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.**

4.26 **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 regulatory authorities as appropriate of the following:**
 - **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;**

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- 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 4.26 (b), apply to the court to either continue or resign from the Appointment.
- 4.27 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 or the Committee with the next communication and table it at the next meeting of the creditors or the Committee.
- 4.28 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 4.20 at the meeting where the creditors decide whether to replace the other person; and
 - (d) disclose to the creditors the basis on which the Member proposes to charge Professional Fees; and
 - ~~(d)~~(e) provide details of the Member's relationship with the Entity nominating the Member for the Appointment.
- 4.29 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, Controlled and 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.
- 6.2 A Member in Public Practice shall not purchase property or other assets of an Administration without obtaining prior approval of the court.

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- 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 without obtaining prior approval of the court.
- 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 the following:
- (a) the paramount duty to the court which overrides any other duty;
 - (b) a duty to assist the court on matters relevant to the Member's area of expertise in an objective and unbiased manner; and
 - (c) a duty to make it clear to the court when a particular question or issue falls outside the Member's expertise.
- 7.2 A Member in Public Practice who during the course of an Administration acts as an Expert Witness should comply with ~~relevant~~—evidentiary and procedural requirements relating to Expert Witnesses.
- 7.3 Subject to any legal requirements or restrictions, a Member in Public Practice who during the course of an Administration acts as an Expert Witness shall clearly communicate in a Witness Report issued by the Member:
- (a) the scope of work performed by the Member;
 - (b) any limitations on the scope of work performed;
 - (c) ~~details whether any of the~~ opinions, findings or conclusions of the Member are not based wholly or substantially on the Member's specialised knowledge derived from training, study and experience ~~that are relevant to the matters on which the Member is providing expert evidence;~~
 - (d) the relationships, if any, the Member, the Member's Firm, or a Network Firm has with any of the parties to the proceedings that may create a threat or a perceived threat to the Member's obligation to comply with the fundamental principles of the Code or the Member's paramount duty to the court, and any appropriate safeguards implemented;
 - (e) the extent, if any, of reliance by the Member on the work of others;
 - (f) the opinions formed, or Other Evidence given, by the Member;
 - (g) whether an opinion, or Other Evidence, is provisional rather than concluded, and, if so, the reasons why a concluded opinion or concluded Other Evidence has not been ~~formed~~ provided;
 - (h) the significant facts upon which the opinions or Other Evidence are based;
 - (i) the significant assumptions upon which the opinions or Other Evidence are based and the reasons why the Member made those assumptions;

Comment [KA13]: Channa - Has this been changed at all by the updated Forensic Standard APES 215? RA – 215 changes have now been reflected

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- (j) if the Member considers that an opinion or Other Evidence of the Member may be misleading because a significant assumption is likely to mislead, then a statement to that effect and an explanation of why the assumption is likely to mislead;
- (k) where applicable, that the Member's opinion or Other Evidence is based upon subject to the veracity of another person's report ~~upon which the Member's Witness Report is based~~;
- (l) the reasoning by which the Member formed the opinions or arrived at the Other Evidence, including an explanation of any method employed and the reasons why that method was chosen;
- (m) a list of all documents and sources of information relied upon in the preparation of the Witness Report; and
- (n) any restrictions on the use of the Witness Report.

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 4.20.

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) or Debtor the following information prior to their Appointment:

- The basis of calculating Professional Fees that 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 that approved by the Approving Body;
 - creditors will be advised of the basis of calculating Professional Fees proposed to the director(s) or Debtor; and
 - that where the director(s), Debtor or other Entity have paid money up front towards the cost of the Administration, Professional Fees above that amount shall be approved by the Approving Body and paid from the assets of the Administration;
- If an estimate is provided to the director(s) or Debtor:
 - it shall be in writing clearly detailing any variables which may affect the estimate;
 - the director(s) or Debtor shall be advised 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 shall be approved by the Approving Body; and
 - If the estimate provided to the director(s) or Debtor differs to any subsequent estimate provided to creditors or the actual amount of Professional Fees claimed, an explanation of the reason for the variance shall be provided.

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8.3 Members in Public Practice shall exercise care in providing a fixed fee or unconditional quote to director(s) or Debtor prior to accepting an Appointment as this may be perceived to restrict the proper conduct of the Administration. Where a fixed fee or unconditional quote is provided, 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 obtain the director(s) or Debtors acknowledgement of the information provided under 8.1 and 8.2 prior to accepting the Appointment.

8.18.5 **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.**

8.6 The term 'necessary' in paragraph 8.52 means professional work that is:

- directly connected with the Administration; and
- performed in accordance with the duties of the Appointment and Professional Standards.

8.7 The term 'proper' in paragraph 8.5 means professional work that is performed in an effective and efficient manner in an Administration.

8.8 **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.**

8.9 **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.**

8.10 **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.**

8.108.11 **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.**

8.12 **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.

8.13 **When considering whether a proposed Contingent Fee arrangement in a particular Administration meets the requirements of paragraph 8.128, a Member in Public Practice shall consider the following:**

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- 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.

8.14 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.

8.15 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; ~~and~~
- why the Member considers that the chosen method is suitable for the Administration;
- information that details on the classes of Expenses that may be charged to the Administration; and
- the basis for recovery of Expenses charged directly by the Firm.

8.16 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.

8.17 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

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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 Expense was paid to (only for Expenses paid for professional services not provided by the Firm);
 - what the Expense was for;
 - for Expenses charged directly by the Firm, the quantity and rate (only for Expenses charged directly by the Firm); and
 - the amount paid;
 - 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.

8.18 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.

8.19 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.

8.20 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.

8.21 Where a Member in Public Practice has prospective Professional Fees approved in accordance with paragraph 8.20, 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.

8.22 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:

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- (a) the monies are held on trust;
- (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 withdrawn from the trust account.

8.23 Where a Member in Public Practice receives money from an Entity, other than from the assets of the insolvent Entity, to meet the costs of the Administration, the receipt of this money shall be disclosed to the Approving Body and approval to draw Professional Fees from these monies shall be obtained from the Approving Body in accordance with paragraph 8.18.

8.24 Approval of the Approving Body under paragraph 8.23 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 provides 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 maintain and use an appropriate checklist for each type of Administration that they undertake.

Comment [CW14]: Consider impact of APES 320. May not be required.

Conformity with International Pronouncements

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

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APPENDIX 1

To be updated following finalisation of revisions

Summary of revisions to the previous APES 330 (Issued September 2009)

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

Table of revisions*

Paragraph affected	How affected
1.1	Amended
2 – Definition of Acceptable Level	Added
2 – Definition of Appointee	Added
2 – Definition of Appointment	Amended
2 – Definition of Network	Added
2 – Definition of Network Firm	Added
2 – Definition of Office	Added
2 – Definition of Pre-appointment advice	Added
2 – Definition of Trustee	Added
3.7	Added
3.8	Amended
3.9	Added
4.4	Added
4.5	Amended
4.6	Amended
4.7	Amended
4.8	Added
4.9	Added
4.10	Amended
4.11	Amended
4.12	Added
4.13	Added
4.14	Amended
4.15	Added
4.16	Amended
4.19	Amended
4.20	Amended
4.21	Added
4.22	Amended
4.23	Amended
4.24	Amended
4.25	Amended
6.1	Amended
6.3	Amended
7.3(d)	Amended
8.1	Amended
8.5	Amended
8.7	Amended
8.9	Added
8.10	Amended
8.17	Amended

* Refer Technical Update 2011/3