



Exposure Draft of Proposed Standard: APES 330 Insolvency Services

ED XX/08

Preliminary Draft – For discussion purposes only

Commenting on this Exposure Draft

Comments on this Exposure Draft should be forwarded so as to arrive by **28th November 2008**.

Comments should be addressed to:

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A copy of all non-confidential submissions will be placed on public record on the APESB website: www.apesb.org.au.

Obtaining a copy of this Exposure Draft

This Exposure Draft is available on the APESB website: www.apesb.org.au. Alternatively, any individual or organisation may obtain one printed copy of this exposure draft without charge until **28th November 2008** by contacting:

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Reasons for issuing Exposure Draft XX/08

Accounting Professional & Ethical Standards Board Limited (APESB) proposes to issue the Standard APES 330 *Insolvency Services* setting out mandatory requirements and guidance for Members in Public Practice who provide insolvency services. The proposed standard will replace the existing APS 7 *Statement of Insolvency Standards*.

Key requirements and guidance in ED XX/08

The proposed APES 330 *Insolvency Services* includes mandatory requirements and guidance in respect of:

- <insert list of relevant / mandatory requirements>

Key changes:

Key changes in ED XX/08 compared to APS 7:

- <insert list of key changes>.

Proposed operative date

It is intended that this Standard will be operative for Insolvency Services Appointments entered in to on or after 01 July 2009.

Request for comments

Comments are invited on this Exposure Draft of APES 330 *Insolvency Services* by **28th November 2008**. APESB would prefer that respondents express a clear overall opinion on whether the proposed Standard, as a whole, is supported and that this opinion be supplemented by detailed comments, whether supportive or critical, on any matter. APESB regards both critical and supportive comments as essential to a balanced view of the proposed Standard.



APES 330 Insolvency Services

(Issued XXXX 2008)

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Appendix – Declaration of Independence, Relevant Relationships, and Indemnities (DIRRI)

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1. Scope and application

- 1.1 Accounting Professional & Ethical Standards Board Limited (APESB) issues professional standard APES 330 Insolvency Services (the Standard), which is effective for insolvency Appointments commencing on or after 01 July 2009.
- 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 the Standard are in **bold** type, preceded or followed by discussion or explanations in grey type. 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 and guidance notes are references to those provisions as amended from time to time.
- 1.8 In applying 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:

Administration means a formal insolvency arrangement under either the *Bankruptcy Act 1966* or the *Corporations Act 2001*. Where appropriate, the term also applies to solvent administration under Chapter 5 of the *Corporations Act 2001*. In certain instances, there may be corporate insolvency Appointments under other legislation. The word “Administrator” has a parallel meaning.

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Appointment means the formal legal appointment of a Member in Public Practice as a trustee in bankruptcy, a trustee appointed under Section 50 of the Bankruptcy Act, a debt agreement Administrator under Part IX, or a trustee under Part X; or as a liquidator or provisional liquidator, a voluntary Administrator or a deed Administrator under Part 5.3A of the *Corporations Act 2001*, or as a Controller under Part 5.2; or as a scheme manager under Part 5.1. The word "appointee" has a parallel meaning. (IPA Code)

Approving Body means the body with authority to approve remuneration or a course of conduct; usually the creditors, the committee or the court. (IPA Code)

Close Family

A parent, child or sibling, who is not an Immediate Family member. (APES 110 dfn)

Code means APES 110 *Code of Ethics for Professional Accountants*. (APES 110 dfn)

Company includes associated entities whether they be other companies, other incorporated or incorporated bodies, trusts or natural persons. (APS 7 dfn)

Contingent Fee means a fee calculated on a predetermined basis relating to the outcome or result of a transaction or the result of the work performed. A fee that is established by a court or other public authority is not a Contingent Fee. (APES 110 dfn)

Controller means a person appointed as controller or managing controller under Part 5.2 of the *Corporations Act 2001*. (IPA Code)

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. (APES 110 dfn)

Expenses means the necessary financial outlays incurred or paid by a Member in Public Practice in the Administration. The term includes costs and disbursements. (IPA Code)

Firm means

- (a) a sole practitioner, partnership, corporation or other entity of professional accountants;
- (b) an entity that controls such parties;
- (c) an entity controlled by such parties; or
- (d) an Auditor-General's office or department. (APES 110 dfn)

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. (APES 110 dfn)

Immediate Family means a spouse (or equivalent) or dependant. (APES 110 dfn)

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Insolvency Services means the rendering of Professional Services in relation to the insolvency of individuals and corporations pursuant to the provisions of the *Bankruptcy Act 1966*, the *Corporations Act 2001*, or other relevant Statutes. (APES7:dfn)

Legislation means the *Bankruptcy Act 1966* and the *Bankruptcy Regulations*, the *Corporations Act 2001* and *Corporations Regulations* and other legislation under which formal insolvency Appointments can be made. (IPA Code)

Member means a member of a professional body that has adopted this Standard as applicable to their membership, as defined by that professional body. (APES 110dfn)

Managerial Employee means an employee who acts in a managerial capacity within the structure of the Firm, including providing oversight, in the provision of services to Clients.

Member in Public Practice means a Member, irrespective of functional classification (e.g. audit, tax or consulting) in a Firm that provides Professional Services. The term is also used to refer to a Firm of Members in Public Practice and means a practice entity as defined by the applicable professional body. (APES 110dfn)

Professional Fees means the monies claimed by the Member in Public Practice on account of Professional Services performed or to be performed by the Member in the Administration. (IPA Code adapted)

Professional Relationship means any Engagement or Appointment under which a Member in Public Practice has previously provided Professional Services to the insolvent party. (IPA Code adapted)

Professional Services means services requiring accountancy or related skills performed by a professional accountant including accounting, auditing, taxation, management consulting and financial management services. (APES 110dfn)

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 legislation. (APES225p3.1)
- 3.2 A Member in Public Practice shall comply with Section 220 *Conflict of Interest* and Section 280 *Objectivity – All Services* in the Code. (APES 225 p3.2)
- 3.3 A Member in Public Practice shall consider whether there are threats to the Member's Independence or conflicts of interest prior to accepting an Appointment to perform an Insolvency Service. No threat, other than a situation specifically provided for at 4.3 or a trivial or inconsequential threat, can be safeguarded against.

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- 3.4 Where the Member in Public Practice is acting in an Appointment or wishes to accept an Appointment and there are threats to the Member's Independence or conflicts of interest, other than in a situation specifically excluded at 4.3, the Member shall obtain court approval to continue to act in the Appointment or accept the Appointment.
- 3.5 A Member in Public Practice shall not provide any inducement to any entity or person to secure an Appointment for the Member or to prevent the Appointment or nomination of another person. *(IPA Code 11.6)*

Marketing

- 3.6 A Member in Public Practice shall comply with Section 250 *Marketing Professional Services* of the Code. *(APS7p13)*
- 3.7 When placing an advertisement in a newspaper to comply with a statutory requirement under the Corporations Act or Bankruptcy Act, a Member in Public Practice shall not use that advertisement as a means to market themselves or their services. *(IPA Code adapted)*
- 3.8 Statutory advertisements should not include Firm slogans, claims about the Firm, logos or other promotional materials. *(IPA Code adapted)*

Public interest

- 3.9 In accordance with Section 100 *Introduction and Fundamental Principles* of the Code, Members in Public Practice shall observe and comply with their public interest obligations when they provide Insolvency Services. *(APES225p3.2)*
- 3.10 A Member in Public Practice shall not at any time advise an insolvent debtor or the directors of an insolvent entity on how to structure their financial affairs to avoid the consequences of insolvency. This does not prevent the provision of advice about the structuring of financial affairs to a solvent debtor or Company. *(APS7p3 adapted)*

Professional competence and due care

- 3.11 Members in Public Practice providing an Insolvency Service shall maintain professional competence and take due care in the performance of their work in accordance with Section 130 *Professional Competence and Due Care* of the Code. *(APES225p3.5, APS 7 para 18)*

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- 3.12 An Insolvency Service may require the consideration of matters that are outside a Member's professional expertise. In such cases, the Member in Public Practice shall either refuse the Insolvency Service or seek expert assistance or advice from a suitably qualified third party on those matters outside of the Member's professional expertise. The Member in Public Practice shall disclose in any reports or other relevant communications the extent of the reliance upon the advice of such a third party. *(APES225p3.6 adapted)*
- 3.13 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 and the appropriateness and reasonableness of the work performed. *(APES225p3.7 adapted)*
- 3.14 A Member in Public Practice shall communicate with affected parties of the Administration in a timely and clear manner to ensure the effective understanding of the insolvency processes, rights, and obligations of the parties. *(IPA Code 8)*
- 3.15 In undertaking an Insolvency Service, a Member in Public Practice should have regard to the contents of any guidance in respect of insolvency matters issued by the professional bodies and appropriate regulatory authorities. *(APES225p3.8, APS 7, para 1)*

Confidentiality

- 3.16 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 the professional work. *(APS7p15/APES225p3.9)*

4. Professional Independence and conflicts of interest

- 4.1 A Member in Public Practice shall act independently of all stakeholders when performing an Insolvency Service. A Member shall comply with Independence as defined in the Standard and relevant requirements stipulated in Legislation.
- 4.2 In cases other than a members' voluntary winding up or a request to provide services as a Controller or a situation specified in paragraph 4.3, a Member in Public Practice shall not accept Appointment to provide an Insolvency Service if the Member or the Firm has, or during the previous two years has had, a Professional Relationship with the insolvent debtor or Company. *(APS7p11(a)(i) adapted)*

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- 4.3 A Professional Relationship does not arise:
- (a) by reason only of the Appointment or Engagement of a Firm or any other person in the Firm or Member in Public Practice to investigate, monitor or advise on the affairs of a Company on behalf of a third party, so long as the professional obligation is to a party other than the Company being investigated; or
 - (b) by reason only of the transition of the Appointment of a Member in Public Practice from one type of insolvency Administration to another under the Legislation, subject to the terms of that Legislation; for example, a transition from an Appointment of a Member from that of an Administrator to voluntary liquidator under section 446A of the *Corporations Act 2001*, subject to the rights of creditors to appoint another liquidator under section 499(2A) of the Act; or
 - (c) by reason only of the Appointment of a Member in Public Practice as Controller of a Company in which that Member or any other person in the Firm has been Controller under a different debenture or where the Appointment has been made by the court;
 - (d) Where it is an immaterial Professional Relationship. An immaterial Professional Relationship would have the following characteristics:
 - Engagements were of very limited scope;
 - Would not be subject to review by the Member during the course of the Administration;
 - Will not impact on the Member's ability to fully comply with the statutory and fiduciary obligations associated with the proposed Appointment; and
 - Does not create threats to the Member's ability to comply with the fundamental principles in the Code when performing the duties of the Appointment.
 - (e) Where pre-appointment advice has been provided to the insolvent party. The pre-appointment advice given by the Member shall be limited to:
 - The financial situation of the insolvent party;
 - The solvency of the debtor/Company
 - Consequences of the insolvency;
 - Alternative courses of action available;
 - In the case of a Company the advice shall be provided to the Company;

(points c to e from the IPA Code)

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- 4.4 Generally a Member in Public Practice may accept an Appointment where the Professional Relationship with the insolvent party occurred two years prior to the date of Appointment.
- 4.5 **Notwithstanding paragraph 4.4, a Member in Public Practice shall not accept an Appointment where the prior Professional Relationship:**
- **Could lead to potential litigation claims against the Member by a stakeholder of the Administration;**
 - **Has a material impact on the Insolvency Service; or**
 - **Was related to the structuring of assets in order to avoid the consequences of the insolvency.**
- 4.6 **In cases other than a members' voluntary winding up or a request to provide services as a Controller, a Member in Public Practice shall not accept an Appointment to provide an Insolvency Service if the Member or the Firm has any of the following relationships with the insolvent debtor or Company;**
- (a) **A Close or Immediate Family relationship with the insolvent or a director or officer of a Company, or with an employee or adviser of the insolvent debtor or Company who is in a position to exert direct and significant influence over the insolvent;**
 - (b) **A close personal relationship with the insolvent or a director or officer of a Company, or with an employee or adviser of the insolvent debtor or Company who is in a position to exert direct and significant influence over the insolvent;**
 - (c) **A close business relationship with an insolvent debtor or Company involving a commercial or common Financial Interest;**
 - (d) **A business relationship involving the holding of a Financial Interest, whether directly or indirectly, jointly with an insolvent debtor or Company;**
 - (e) **A business relationship involving the holding of a Financial Interest, whether directly or indirectly, in an insolvent Company, or in an insolvent debtor;**
 - (f) **A loan or guarantee to or from an insolvent debtor or Company, or any director, officer or senior employee of a insolvent Company;**
 - (g) **Employment within the last two years by an insolvent debtor or Company in a position to exert direct and significant influence over the insolvent debtor or Company.**

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- 4.7 In cases other than a member's voluntary winding up or a request to provide services as a Controller, a Member in Public Practice shall not accept Appointment to provide an Insolvency Service if the Firm's partners or Managerial Employees have any of the following relationships with the insolvent debtor or Company:
- (a) A Close or Immediate Family relationship with the insolvent or a director or officer of a Company, or with an employee or adviser of the insolvent debtor or Company who is in a position to exert direct and significant influence over the insolvent.
 - (b) A close personal relationship with the insolvent or a director or officer of a Company, or with an employee or adviser of the insolvent debtor or Company who is in a position to exert direct and significant influence over the insolvent.
 - (c) A close business relationship with an insolvent debtor or Company involving a commercial or common Financial Interest.
 - (d) A business relationship involving the holding of a Financial Interest, whether directly or indirectly, jointly with an insolvent debtor or Company;
 - (e) A business relationship involving the holding of a Financial Interest, whether directly or indirectly, in an insolvent Company, or in an insolvent debtor;
 - (f) A loan or guarantee to or from an insolvent debtor or Company, or any director, officer or senior employee of a insolvent Company;
 - (g) Employment within the last two years by an insolvent debtor or Company in a position to exert direct and significant influence over the insolvent debtor or Company.
- 4.8 The exclusions in 4.6 and 4.7 do not apply to trivial or inconsequential relationships.
- 4.9 The exclusion of Members' Voluntary Liquidations and Appointments as a Controller from the operation of 4.2, 4.3, 4.6 and 4.7 in no way limits any restrictions placed on the acceptance of such Appointments under the *Corporations Act 2001*.
- 4.10 A Member in Public Practice shall provide a Declaration of Independence and Relevant Relationships and Indemnities (DIRRI) in respect of Insolvency Services (excluding Appointments as Controller and members' voluntary liquidations). The Member shall provide the DIRRI in the first communication to creditors and table it at the first creditors' meeting. *(IPA Code adapted)*

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4.11 A Member in Public Practice shall include the following in the DIRRI:

- A declaration of Independence which includes an assessment of actual or perceived risks to Independence and the how the Member determined that there were no potential risks to Independence;
- A declaration setting out prior personal or business relationships of the Member or the Firm in the last two years with the insolvent party, associates or a person who is in charge of whole or substantial portion of an insolvent's property;
- A declaration of Professional Relationships of the Member with the Insolvent in the last two years which include the nature of the Engagements or Appointments performed and the reasons why the acceptance of the Appointment is in the best interest of the creditors and does not pose a conflict of interest to the duties to be performed under the Administration;
- A declaration of indemnities which discloses the identity of each indemnifier and the extent and nature of the each indemnity (other than statutory indemnities). It will also include any payment made by or for the insolvent in respect of the Member's Professional Fees.

(IPA Code adapted)

4.12 Where a conflict or apparent conflict of interest arises after the commencement of the Appointment, the Member in Public Practice shall:

- a) Where the relationship or threat to Independence identified is one that would not have precluded the Appointment, then the Member may continue with the Administration subject to amending the DIRRI and sending it to the creditors;
- b) Where the relationship or threat to Independence identified is one that would have precluded the Appointment, then the Member shall prepare and deliver to the creditors, the court and regulatory bodies as appropriate:
 - The nature of the relationship and conflict;
 - The key facts and origin;
 - Reasons why the issue was not detected prior to acceptance of the Appointment;
 - The potential impact on perceived Independence;
 - The status of the Administration;
 - The costs of stepping down and transferring the Appointment; and
 - Professional Fees and Expenses taken and outstanding.

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- c) In the circumstances described in paragraph 4.8 (b), the Member shall apply to the court to either continue or resign from the Administration.

(IPA code 6.15)

4.13 Where a Member in Public Practice is requested to consent to act as trustee, liquidator or Administrator in competition with another Member who has already commenced an insolvency Appointment at the request of the debtor, the Company, its directors or its creditors:

- (a) where a request to consent to act has been received and the Member intends to accept it, reasonable notice shall be given by the competing Member in Public Practice to the other Member; and *(APS7p12(i))*

- (b) there shall be no solicitation of proxies directly or indirectly by the Members in Public Practice. Members shall act, and be seen to act, in the creditors' interests rather than in their own. *(APS7p12(ii))*

4.14 Reasonable notice is considered not less than one business day. Where the competing Member in Public Practice is requested to consent within one business day before the meeting, notice preferably by phone and facsimile should be given immediately the request to consent is received. *(APS7p12(i))*

5. Dealings with property

5.1 A Member in Public Practice, the Member's Firm or its employees, their relatives or controlled or associated entities shall not acquire any property nor derive a pecuniary interest from dealing with property which comes under the control of the Member for the benefit of others, without prior approval of the court or creditors to whom the full facts shall be disclosed. *(APS7p14)*

6. Professional Fees

6.1 A Member in Public Practice shall not enter into a Contingent Fee arrangement or receive a Contingent Fee for an Engagement to perform an Insolvency Service. *(APS7p19/APES225pp8.2)*

6.2 A Member in Public Practice shall only claim Professional Fees and Expenses in respect of Professional Services performed or to be performed, that are necessary for the Administration.

(IPA Code adapted)

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- 6.3 The term 'necessary' means professional work that was:
- connected with the Administration; and
 - performed in accordance with the duties of the Appointment which are required by Legislation and professional standards.
- (IPA Code adapted)*
- 6.4 **A Member in Public Practice shall obtain court approval when the Member makes a claim in respect of Professional Fees for any pre-appointment work performed prior to the Appointment.**
- 6.5 **A Member in Public Practice shall provide the basis upon which Professional Fees will be charged for the Insolvency Service in the first communication with the creditors.**
- (IPA Code adapted)*
- 6.6 **A Member in Public Practice seeking approval for Professional Fees from the Approving Body of the Administration shall provide sufficient meaningful, open and clear disclosure to the Approving Body so as to allow that body to make an informed decision and shall:**
- Provide details of how the professional fees were computed;
 - Provide a description of the Professional Services performed, or to be performed, for the Administration broken down in to broad categories of work performed;
 - State the terms of the approval sought from the Approving Body; and
 - Provide a summary of receipts and payments to and from the Administration bank account; *[IPA Code]*
- 6.7 **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.**
- (APS7p19)*
- 6.8 **Where a Member in Public Practice has entered in to a fixed fee arrangement in respect of Professional Fees, the Member shall draw the fixed fee at the conclusion of the Administration or in specified amounts at nominated milestones of the Administration.** *(IPA Code 14.1)*
- 6.9 **Where a Member in Public Practice is seeking approval for the payment of prospective Professional Fees from the Approving Body, the Member shall specify the maximum amount of the Professional Fee that may be drawn before requiring further approval from the Approving Body.** *[IPA Code adapted]*

7 Documentation and quality control

- 7.1 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 has been provided in writing. The documentation prepared by the Member shall:
- (a) provide a sufficient and appropriate record of the procedures performed for the Appointment;
 - (b) identify potential threats to independence, how they have been addressed including appropriate safeguards; and
 - (c) demonstrate that the Engagement was carried out in accordance with this Standard and all other Professional Standards applicable to the Engagement, including policies and procedures established in accordance with *APES 320 Quality Control for Firms*, and any applicable ethical, legal and regulatory requirements.

Conformity with International Pronouncements

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

Appendix – Declaration of Independence, Relevant Relationships, and Indemnities

[to be completed]