

Proposed Standard: APES 330 Insolvency Services

[Supersedes APES 330 Insolvency Services issued in September 2014]

Prepared and issued by
Accounting Professional & Ethical Standards Board Limited

EXPOSURE DRAFT **04/18**
ISSUED: September 2018

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Commenting on this Exposure Draft

This Exposure Draft, Proposed Standard APES 330 *Insolvency Services*, was developed and approved by the Accounting Professional & Ethical Standards Board Limited (APESB).

The proposals in this Exposure Draft may be modified in light of comments received before being issued in final form. Comments are requested by **31 October 2018**.

Comments should be addressed to:

The Chairman
Accounting Professional & Ethical Standards Board Limited
Level 11, 99 William Street
Melbourne Victoria 3000
Australia

APESB would prefer that respondents express a clear overall opinion on whether the proposed amendments, as a whole, are 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 amendments.

Respondents are asked to submit their comments electronically through the APESB website, using the link <http://www.apesb.org.au/apesb-exposure-drafts-open-for-comment>.

Please submit comments in both a PDF and Word file. All comments will be considered a matter of public record and will ultimately be posted on the website www.apesb.org.au.

APESB prefers that comments are submitted via its website. However, if there are practical difficulties, comments can also be sent to sub@apesb.org.au or mailed to the address noted above.

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 **31 October 2018** by contacting:

Accounting Professional & Ethical Standards Board Limited
Level 11
99 William Street
Melbourne Victoria 3000
Australia
E-mail: enquiries@apesb.org.au
Phone: (03) 9670 8911
Fax: (03) 9670 5611

Reasons for issuing Exposure Draft 04/18

APESB proposes to revise APES 330 *Insolvency Services* (APES 330) issued in September 2014. The proposed revisions have been developed to ensure consistency with the *Insolvency Law Reform Act 2016* and proposed revisions by the Australian Restructuring Insolvency and Turnaround Association (ARITA) to their Code of Professional Conduct (ARITA Code).

Key requirements and guidance in Exposure Draft 04/18

The key revisions to APES 330 proposed in ED 04/18 include:

- relocating the existing obligations of Members in Public Practice when providing Insolvency Services in Section 4 *Professional Independence* and Section 8 *Professional Fees and Expenses* in the Standard;
- a new definition of Inducement including guidance on what is, and what is not, an Inducement;
- a new requirement to clarify the responsibility of Members in Public Practice to determine the identity of the parties involved in the Administration;
- a new requirement to clarify that Members in Public Practice must include all relevant relationships in the *Declaration of Independence, Relevant Relationships and Indemnities* that are relevant to a creditors assessment of the Member's Independence;
- new application material on the outsourcing of some or all components of the Insolvency Services provided;
- amendments to reflect the new structure and definitions in the new APES 110 *Code of Ethics for Professional Accountants (including Independence Standards)*;
- new guidance template of a *Declaration of Independence, Relevant Relationships and Indemnities* (Appendix 1);
- new guidance on necessary and proper Professional Fees and Expenses (Appendix 2); and
- removal of extant requirements that are now included in laws and regulations.

Stakeholders should not rely on this summary in the Exposure Draft to determine what changes, if any, are required to their current practices, policies or methodologies. Stakeholders should read the entire Exposure Draft to determine the significance of its proposals.

Proposed Operative Date

It is proposed that this Standard will be effective for Insolvency Services commencing from **1 July 2019**.

Early adoption of the revised Standard will be permitted.

APES 330 Insolvency Services

[Supersedes APES 330 Insolvency Services issued in September 2014]

Prepared and issued by
Accounting Professional & Ethical Standards Board

REVISED: DATE

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1. Scope and application

1.1 The objectives of APES 330 *Insolvency Services* are:

- to mandate Independence requirements for Members in Public Practice who are responsible for Appointments;
- to mandate that Members in Public Practice provide ~~the Approving Body~~ creditors with a *Declaration of Independence, Relevant Relationships and Indemnities* (DIRRI) and to specify the minimum requirements of the DIRRI;
- to specify requirements for a Member in Public Practice who intends to replace another practitioner who has commenced an Appointment;
- ~~to specify the professional obligations of a Member in Public Practice who is acting in the capacity of an Expert Witness during the course of an Administration;~~
- to specify requirements for a Member in Public Practice to disclose relevant information about Professional Fees and Expenses to the director(s) of the insolvent Entity or to the Insolvent Debtor prior to an Appointment; and
- to specify the quality control and documentation obligations of a Member in Public Practice who provides Insolvency Services.

Commented [KA1]: DIRRI is to be provided to Creditors & not all parties included in the definition of Approving Body

Commented [JH2]: Deleted as not a key objective

1.2 Accounting Professional & Ethical Standards Board Limited (APESB)– issues– APES 330 *Insolvency Services (the Standard)*, which is effective for Insolvency Services commencing on or after 1 July 2019 ~~January 2015~~ and supersedes APES 330 *Insolvency Services* issued in ~~November 2014~~ September 2014. Earlier adoption of this Standard is permitted.

1.3 APES 330 sets the standards for Members in Public Practice in the provision of quality and ethical Insolvency Services. The mandatory requirements of this Standard are in **bold-type (black lettering)**, preceded or followed by discussion or explanations in normal type ~~(grey lettering)~~. APES 330 should be read in conjunction with other professional duties of Members, and any legal obligations that may apply.

1.4 **Members in Public Practice in Australia shall follow the mandatory requirements of APES 330 when they provide Insolvency Services.**

1.5 **Members in Public Practice practising 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.**

Commented [JH3]: Changed to be consistent with other APESB pronouncements

1.6 **Members in Public Practice shall be familiar with relevant Professional Standards and guidance notes when providing Professional Services. All Members shall comply with the fundamental principles outlined in the Code.**

1.7 The Standard is not intended to detract from any responsibilities which may be imposed by law or regulation.

1.8 All references to Professional Standards, guidance notes and legislation are references to those provisions as amended from time to time.

1.9 In applying the requirements outlined in APES 330, Members in Public Practice should be guided not merely by the words but also by the spirit of the Standard and the Code.

1.10 In this Standard, unless otherwise specified, words in the singular include the plural and vice versa, words of one gender include another gender, and words referring to persons include corporations or organisations, whether incorporated or not.

Commented [JH4]: New paragraph included to be consistent with other APESB pronouncements

2. Definitions

For the purpose of this Standard:

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

Commented [JH5]: Amended to be consistent with new definition in the restructured APES 110

Administration means an Appointment under either the *Bankruptcy Act 1966*, the *Corporations Act 2001* or any other legislation. Where appropriate, the term 'Administration' applies to a solvent administration under Chapter 5 of the *Corporations Act 2001*.

Appointee means a Member in Public Practice who is appointed to an Administration.

Appointment means the appointment of a Member in Public Practice as a Trustee or as a liquidator or provisional liquidator, a voluntary administrator, an administrator of a deed of company arrangement, a Controller, or a scheme manager under Chapter 5 of the *Corporations Act 2001*; or an appointment to provide Insolvency Services under any other legislation.

Approving Body means the body with authority to approve Professional Fees. Depending on the type of Appointment, this body will be the creditors, the members, ~~the a~~ secured creditor, a Committee or the court. In limited circumstances in an Appointment under the *Corporations Act 2001* or the *Bankruptcy Act 1966*, this approval is provided pursuant to those Acts.

Commented [JH6]: Amended for singular creditor.

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

Close Family means a parent, child or sibling, who is not an Immediate Family member.

Code means APES 110 *Code of Ethics for Professional Accountants (including Independence Standards)*¹.

Committee means a committee of inspection or committee of creditors.

Contingent Fee means a fee calculated on a predetermined basis relating to the outcome of a transaction or the result of the services performed by a Member in Public Practice. A fee that is established by a court or other public authority is not a Contingent Fee.

Controller means a Member in Public Practice appointed as controller or managing controller under Part 5.2 of the *Corporations Act 2001*, or a receiver appointed to property of an individual. It does not include a receiver appointed by the court.

Engagement means an agreement, whether written or otherwise, between a Member in Public Practice and a client relating to the provision of Professional Services by a Member in Public Practice. However, consultations with a prospective client prior to such agreement are not part of an Engagement.

Entity means any legal, administrative or fiduciary arrangement, organisational structure or other party (including a person) having the capacity to deploy scarce resources in order to achieve objectives.

Expenses means the financial outlays incurred or paid by a Member in Public Practice to carry out an Administration. The term includes costs and disbursements.

Expert Witness means a Member who has been engaged, assigned or otherwise obligated to provide an Expert Witness Service. As an Expert Witness, the Member may express opinions or provide ~~Other~~ e~~E~~vidence to the court based on the Member's specialised knowledge derived from the Member's

¹ APES 110 Code of Ethics for Professional Accountants (including Independence Standards) is effective from 1 January 2020 and supersedes APES 110 Code of Ethics for Professional Accountants.

training, study or experience on matters such as whether technical or Professional Standards have been breached, the amount of damages, the amount of an account of profits, or the amount of a claim under an insurance policy. Generally, all opinion evidence is expert evidence if it is wholly or substantially based on the specialised knowledge derived from the Member's training, study or experience, however not all expert evidence is opinion evidence. Expert evidence may be opinion or ~~o~~Other ~~E~~evidence.

Expert Witness Service means a Professional Activity provided in the context of legal proceedings to give expert evidence in a written report, affidavit or written statement or, in certain circumstances, orally.

Financial Interest means an interest in an equity or other security, debenture, loan or other debt instrument of an Entity, including rights and obligations to acquire such an interest and derivatives directly related to such interest.

Firm means:

- (a) A sole practitioner, partnership, ~~or~~ corporation or other entity of professional accountants;
- (b) An entity that controls such parties, through ownership, management or other means;
- (c) An entity controlled by such parties, through ownership, management or other means; or
- (d) An Auditor-General's office or department.

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

Independence ~~is~~comprises:

- (a) Independence of mind - the state of mind that permits the expression of a conclusion without being affected by influences that compromise professional judgement, thereby allowing an individual to act with integrity, and exercise objectivity and professional scepticism.
- (b) Independence in appearance - the avoidance of facts and circumstances that are so significant that a reasonable and informed third party would be likely to conclude, ~~weighing all the specific facts and circumstances, that the a Member's, or a Firm's, or a Partner's, employee's, agent's, consultant's, or contractor's~~ integrity, objectivity or professional scepticism ~~of a Member, or a Firm, or Partner, or employee, or agent, or consultant, or contractor of the Member,~~ has been compromised.

Inducement means an ~~object, situation or action that is used as a means to influence another individual's behaviour, but not necessarily with the intent to improperly influence that individual's behaviour, y benefit, whether monetary or not, given by a Member in Public Practice, the Member's Firm, Partners or an employee, or agent, consultant, or contractor of the Member, to an Entity which may in the view of a reasonable person influence that Entity's decision to refer, or to make, an Appointment.~~

An Inducement does not include:

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

Insolvency Services means a Professional Service provided by a Member in Public Practice to an Entity under an Appointment.

Insolvent Debtor means a person who is unable to pay debts, whether or not they are subject to an Administration.

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

Member means a member of a Professional Body that has adopted this Standard as applicable to their membership, as defined by that Professional Body.

Commented [JH7]: Amended to be consistent with definition in APES 110

Commented [JH8]: Definition amended to align with revised definition in new APES 110

Commented [JH9]: Definition amended to align with revised definition in new APES 110. Existing definition content moved into standard as guidance in paragraphs 3.22 and 3.23.

Member in Public Practice means a Member, irrespective of functional classification (e.g. for example, audit, tax or consulting) in a Firm that provides Professional Services. This term is also used to refer to a Firm of Members in Public Practice and means a practice Entity and a participant in that practice Entity as defined by the applicable Professional Body.

Network means a larger structure:

- (a) That is aimed at co-operation; and
- (b) That is clearly aimed at profit or cost sharing or shares common ownership, control or management, common quality control policies and procedures, common business strategy, the use of a common brand-name, or a significant part of professional resources.

Network Firm means a Firm or Entity that belongs to a Network.

Office means a distinct sub-group, whether organised on geographical or practice lines.

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

Commented [JH10]: Definition removed as not referred to in body of text and not needed to understand definition of expert witness.

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 ~~and New Zealand~~, CPA Australia and the Institute of Public Accountants.

Professional Fees means the amounts billed or to be billed by a Member in Public Practice on account of Professional Services performed or to be performed by the Member.

Professional Services means Professional Activities performed for clients.

Professional Standards means all standards issued by Accounting Professional & Ethical Standards Board Limited and all professional and ethical requirements of the applicable Professional Bodies.

Referring Entity means an Entity that has provided a Member in Public Practice's contact details to a director(s), Insolvent Debtor or creditor for the purposes of the director(s), Insolvent Debtor or creditor seeking specialist insolvency advice that may result in an Appointment.

Related Entity means an Entity or person defined as a related entity in the *Bankruptcy Act 1966*.

Trustee means a person who administers a bankruptcy or Part X administration under the *Bankruptcy Act 1966*.

3. Fundamental responsibilities of Members in Public Practice

3.1 A Member in Public Practice providing an Insolvency Service shall comply with ~~Section 100~~Part 1 – Complying with the Code, Fundamental Principles and Conceptual Framework² Introduction and Fundamental Principles of the Code and relevant laws and regulations.

Commented [JH11]: Updated cross reference to new APES 110 sections

Public interest

3.2 In accordance with Section 100 ~~Introduction and Fundamental Principles~~Complying with the Code³ of the Code, a Member in Public Practice shall observe and comply with the Member's public interest obligations when the Member provides an Insolvency Service.

Commented [JH12]: Updated cross reference to new APES 110 section

3.3 A Member in Public Practice shall not advise an insolvent Entity (nor, if the Entity is a company, its directors) on how to cause assets to be unavailable in an Administration or to otherwise avoid the consequences of the insolvency.

3.4 Paragraph 3.3 does not prevent a Member in Public Practice from providing Professional Services in respect of the structuring of the financial affairs of a solvent Entity.

Professional competence and due care

3.5 A Member in Public Practice providing an Insolvency Service shall maintain professional competence, take due care and act in a timely manner in the performance of the Member's work in accordance with ~~SubSection~~1130 Professional Competence and Due Care⁴ of the Code.

Commented [JH13]: Updated cross reference to new APES 110 subsection

3.6 When dealing with other practitioners in transitioning Appointments or where there are parallel Appointments, a Member in Public Practice shall be professional and co-operative, without compromising the Member's obligations in the Member's Appointment.

3.7 Where an Insolvency Service requires the consideration of matters that are outside the professional expertise of a Member in Public Practice, the Member shall seek expert assistance or advice from a suitably qualified third party, or decline the Insolvency Service. Where the Member relies on the advice of a third party, the Member shall disclose in relevant reports or communications the name and qualifications of the third party and the areas in which third party advice has been obtained. -This obligation does not extend to legal advice where disclosure may result in a waiver of legal professional privilege.

3.8 Relevant reports are those reports that include a reference to the subject matter for which expert assistance or advice has been obtained.

3.9 When planning to use the work of a suitably qualified third party, a Member in Public Practice shall assess the professional competence and objectivity of that third party, the appropriateness and reasonableness of the work performed, and the Professional Fees charged.

² Equivalent to Section 100 *Introduction and Fundamental Principles of the superseded APES 110 Code of Ethics for Professional Accountants.*

³ Equivalent to Section 100 *Introduction and Fundamental Principles of the superseded APES 110 Code of Ethics for Professional Accountants.*

⁴ Equivalent to Section 130 *Professional Competence and Due Care of the superseded APES 110 Code of Ethics for Professional Accountants.*

- 3.10 A Member in Public Practice shall take all reasonable steps to communicate with Entities affected by an Administration in a timely and clear manner as to the insolvency processes and the rights and obligations of the Entities.
- 3.11 In undertaking an Insolvency Service, a Member in Public Practice should consider any guidance issued by the Professional Bodies and appropriate regulatory authorities.
- 3.12 Prior to accepting an Appointment, a Member in Public Practice shall ensure that the Member has the capacity and has access to the necessary resources to conduct the proposed Administration in an effective and efficient manner.
- 3.13 Prior to accepting an Appointment from the director(s) or Insolvent Debtor, a Member in Public Practice shall make reasonable enquiries about the identity of the director(s) or Insolvent Debtor.
- 3.134 If a Member in Public Practice accepts an Appointment with another insolvency practitioner, all Appointees are equally responsible for all decisions made on the Appointment.
- 3.145 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

- 3.165 ~~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 comply with not use that information for any purpose other than the proper performance of that Insolvency Service~~Subsection 114 Confidentiality⁵ of the Code.~~

Professional ~~b~~Behaviour

- 3.176 A Member in Public Practice providing an Insolvency Service shall comply with ~~Sub~~section ~~250-Marketing Professional Services~~115 Professional Behaviour⁶ of the Code, in particular the requirements in relation to marketing activities.
- 3.178 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.
- 3.198 A Member in Public Practice shall not include slogans, logos, claims about the Member's Firm, or other promotional material in statutory advertisements.
- 3.2049 A Member in Public Practice may include the Firm's logo in non-statutory advertisements as long as that logo does not take prominence in the advertisement.
- 3.201 A Member in Public Practice shall not provide any Inducement to any Entity to secure an Appointment for the Member or to secure or prevent the Appointment or nomination of another person.
- 3.22 An Inducement includes 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.

Commented [JH14]: New paragraph. Matters arising in industry highlight need to specifically cover this point in APES 330. Matter is addressed in APES 320 para 38 and consistent with ARITA Code 20.2.

Commented [JH15]: Amended to reflect revised confidentiality section of the Code (which includes references to NOCLAR)

Commented [JH16]: Updated cross reference to new APES 110 section and emphasised the requirements on marketing of services.

Commented [JH17]: Extant definition of Inducement moved into body of Standard (as new APES 110 now defines Inducements).

⁵ Equivalent to Section 140 Confidentiality of the superseded APES 110 Code of Ethics for Professional Accountants.

⁶ Equivalent to Section 250 Marketing Professional Services of the superseded APES 110 Code of Ethics for Professional Accountants.

- 3.23 An Inducement does not include:
- (a) benefits of insignificant value in aggregate to the Entity which referred or made the Appointment;
 - (b) sponsorship of events or publications open to the public, or members of a professional body; or
 - (a)(c) retainers or other similar payments to marketing consultants.

Commented [JH18]: Extant definition of Inducement moved into body of Standard (as new APES 110 now defines Inducements).

- 3.214 **A Member in Public Practice shall not accept an Appointment or perform an Administration that involves:**
- (a) **referral or other commissions, or monetary or non-monetary benefits;**
 - (b) **spotter's fees;**
 - (c) **understandings or requirements that work in the Administration will be given to a referrer; or**
 - (d) **any other such arrangements that restrict the proper exercise of the Member's judgement and duties.**

4. **Professional Independence**

- 4.1 The requirements in section 4 of this Standard do not apply to Appointments as Controller or Liquidator in a members' voluntary liquidation.
- 4.2 Paragraph 4.1 does not remove a Member in Public Practice's obligations to comply with the relevant law in respect of Independence.
- 4.3 **Subject to paragraph 4.4, a Member in Public Practice accepting an Appointment or conducting an Administration shall maintain Independence.**
- 4.4 **A Member in Public Practice shall identify, evaluate and address threats to the Independence of the Member, prior to accepting an Appointment. Where the Member identifies a threat, the Member shall not accept the Appointment, unless:**
- (a) **the threat is trivial and inconsequential;**
 - (b) **the threat arises in circumstances or relationships that are permitted by this Standard; or**
 - (c) **the Member obtains court approval.**

Commented [JH19]: Section 4 content has been reordered to create sub headings within the section (to aid readers find relevant contents more easily).

- 4.5 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:
- (a) has reasonable potential to lead to litigation claims against the Member or the Member's Firm by a stakeholder of the Administration;
 - (b) is material to the Administration; or
 - (c) 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.

Commented [JH20]: Extant paragraph 4.20. No substantive changes – only formatting of bullet points.

- 4.6 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:

Commented [JH21]: Extant paragraph 4.27 – No substantive changes. Changes includes:

- update cross-referenced paragraphs
- include DIRRI acronym; and
- Re-order points (d) and (e) to improve flow of paragraph

- (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 (DIRRI) containing the information required by paragraph 4.25 at the meeting where the creditors decide whether to replace the other person;
- (d) provide details in the DIRRI of the Member's relationship with the Entity nominating the Member for the Appointment; and
- (e) disclose to the creditors, at the meeting where the creditors decide whether to replace the other person, the basis on which the Member proposes to charge Professional Fees.

Commented [KA22]: The law now requires the DIRRI to be provided prior to the meeting to the incumbent and it has to be sent with the notice of meeting

4.75 A Member in Public Practice conducting an Administration shall:

- (a) act impartially in the discharge of the Member's duties and responsibilities; and
- (b) ensure that the Member's personal interests do not conflict with the Member's duty to the creditors; and
- ~~(b)~~(c) remain alert for new information or changes in facts and circumstances that may create threats to Independence.

Commented [JH23]: Change to clarify ongoing responsibility re Independence – consistent with new conceptual framework in APES 110 and also with para 6.1.3 of the ARITA Code

4.8 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 (DIRRI) 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/or the appropriate regulatory authority of the following:
 - (i) the nature of the threat;
 - (ii) the key facts and circumstances;
 - (iii) reasons why the circumstances or relationships giving rise to the threat were not identified prior to acceptance of the Appointment;
 - (iv) the potential impact on the Independence of the Member;
 - (v) the status of the Administration;
 - (vi) the costs of ceasing and transferring the Appointment; and
 - (vii) Professional Fees and Expenses billed and any outstanding amounts; and
- (c) in the circumstances described in paragraph 4.8(b), apply to the court to continue the Appointment, or resign from the Appointment.

Commented [JH24]: Extant paragraph 4.25. No substantive changes – changes to include DIRRI acronym, formatting of bullet points and updating cross references.

Interests and relationships

4.96 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, its Related Entities

or Associates. The Member shall consider the following matters when identifying relevant Network Firms:

- (a) the geographical regions or countries in which the insolvent Entity, its Related Entities or Associates operate; and
- (b) relationships with the directors or officers of the insolvent Entity, its Related Entities or Associates.

4.107 The following circumstances and relationships are not considered to create a threat to the Independence of a Member in Public Practice, who is considering accepting or continuing an Appointment:

- (a) a third party who is not an Associate or Related Entity of an insolvent Entity engaging the Member, the Member's Firm or a Network Firm to investigate, monitor or advise on the affairs of the insolvent Entity on behalf of the third party where the scope of the Engagement will not compromise the Member's Independence and will not be subject to review or challenge in a subsequent Administration and any Professional Fees received for the Engagement would not be a preferential payment in a subsequent Administration; or
- (b) the transition of an Appointment from one type of insolvency Administration to another under the relevant legislation, subject to the terms of that legislation, for example from an Appointment as administrator to voluntary liquidator under the *Corporations Act 2001*; or
- (c) Pre-appointment Advice provided by the Member, the Member's Firm or the Network Firm to the insolvent Entity, which was limited to:
 - (i) the financial situation of the Entity;
 - (ii) the solvency of the Entity;
 - (iii) the consequences of insolvency for the Entity; or
 - (iv) alternative courses of action available to the Entity; or-
- (d) planning or preparation for a prospective Appointment that does not entail include providing advice to the insolvent Entity or the negotiation or conclusion of agreements or outcomes in advance of a planned Appointment of the Member in Public Practice.

Commented [JH25]: Amendment to reflect current court decision in relation to planning/preparing for an appointment versus providing advice, for example a pre-appointment engagement to plan for an insolvency if restructuring process fails.

4.118 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 (DIRRI)* referred to in paragraph 4.252. A relationship is trivial or inconsequential if it is remote, coincidental or insignificant.

4.129 A Member in Public Practice shall not accept an Appointment, where the Member, the Member's Firm, a Network Firm or their Partners or those Managerial Employees in the Office in which the Member practises have, or have had, any of the following relationships:

- (a) an Immediate or ~~Close or Immediate~~ Family relationship with:
 - (i) the insolvent Entity;
 - (ii) a director or officer of the insolvent Entity; or
 - (iii) 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:
 - (i) the insolvent Entity;

- (ii) an Associate or Related Entity of the insolvent Entity; or
 - (iii) 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:
- (i) the insolvent Entity;
 - (ii) an Associate or Related Entity of the insolvent Entity; or
 - (iii) an employee of or adviser to the insolvent Entity who is in a position to exert direct and significant influence over the insolvent Entity.
- (d) a material loan or material guarantee, in the previous two years, to or from:
- (i) the insolvent Entity;
 - (ii) an Associate or Related Entity of the insolvent Entity; or
 - (iii) 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.

4.103 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.

4.144 In respect of prior relationships of the nature referred to in paragraphs 4.129(c), 4.912(d) and 4.912(e), notwithstanding that the relationship occurred more than two years prior to the proposed Appointment, a Member in Public Practice should evaluate any threats a prior relationship is likely to create to the Member's Independence. In performing this assessment, the Member should determine whether a reasonable person considering all of the facts and circumstances would conclude that there are significant threats to the Member's Independence posed by a prior relationship. Factors to consider include the nature of the prior relationship and the reasons for it being terminated.

4.152 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.

Prior Professional Services (including those provided at different Firms)

4.163 A Member in Public Practice shall not accept an Appointment where the Member, the Member's Firm or a Network Firm has during the prior two years provided a Professional Service to the insolvent Entity, unless the Professional Service is considered immaterial or is referred to in paragraph 4.107.

4.147 A prior Professional Service is immaterial if it:

- (a) was of limited scope, limited time and limited fees;
- (b) will not be subject to review by the Member during the course of the Administration;
- (c) will not affect the Member's ability to comply with the statutory and fiduciary obligations associated with the Administration; and
- (d) 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.

4.158 Where a Member in Public Practice is considering accepting an Appointment and two or more Firms or Network Firms have merged in the preceding two years, the Member shall evaluate any relationships that the Member is aware of or ought reasonably to be aware of which the insolvent Entity had with the Firm, previous Firm(s) or Network Firm(s) in accordance with the requirements of this standard.

4.169 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 (DIRRI)*. 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.

Pre-appointment Advice

4.2047 If the insolvent Entity is a company, a Member in Public Practice shall not provide Pre-appointment Advice to both the company 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.

4.2148 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 company controlled by that individual or of which the individual serves as a director or an officer.

4.2249 The requirements of paragraphs 4.2047 and 4.2148 do not prohibit a Member in Public Practice from providing general information on the insolvency process and the consequences of insolvency to both the company and its directors in their personal capacity, or the individual and related companies, as the case may be.

~~**4.20** A Member in Public Practice shall not accept an Appointment where the Member, the Member's Firm, a Network Firm or their Partners have provided Professional Services to the insolvent Entity or any other Entity which:~~

~~(a) has reasonable potential to lead to litigation claims against the Member or the Member's Firm by a stakeholder of the Administration;~~

~~(b) is material to the Administration; or~~

~~(c) 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.~~

Commented [JH26]: New paragraph 4.5

Declaration of Independence, Relevant Relationships and Indemnities

4.234 A Member in Public Practice shall provide a *Declaration of Independence, Relevant Relationships and Indemnities (DIRRI)* in respect of an Insolvency Service, other than an Appointment as a Controller or a liquidator in a members' voluntary liquidation. The Member shall provide the Declaration-~~DIRRI~~ in the first communication to the creditors and table it at the first meeting of the creditors.

4.24 A Member in Public Practice shall include all relevant relationships in the Declaration of Independence, Relevant Relationships and Indemnities (DIRRI) that may be relevant to a creditor in assessing the Member's Independence.

Commented [JH27]: New paragraph to require Members to include all relevant relationships in a DIRRI relevant to a creditor's assessment of the Member's independence. This amendment should be considered in conjunction with the new paragraph 4.25 (h). This amendment was suggested by the APES 330 Taskforce at a meeting on 21 August 2018.

~~4.252~~ A Member in Public Practice shall include the following in the *Declaration of Independence, Relevant Relationships and Indemnities (DIRRI)*:

- (a) a statement as to whom the ~~*Declaration of Independence, Relevant Relationships and Indemnities (DIRRI)*~~ is being made in respect of;
- (b) 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;
- (c) where the ~~*Declaration of Independence, Relevant Relationships and Indemnities (DIRRI)*~~, or similar document, is required by law, or where it is not required by law and the Member has obtained consent from the Referring Entity:
 - (i) the name of the Referring Entity;
 - (ii) the connection to the insolvent Entity (if applicable) of the Referring Entity; and
 - (iii) the Member's reasons for believing the relationship with the Referring Entity does not result in the Member having a conflict of interest or duty;
- (d) a declaration setting out the circumstances of the Appointment including the number of meetings with the insolvent Entity or its advisors and the period over which Pre-appointment Advice was provided, a summary of the nature of the issues discussed, the amount of any Professional Fees received for the Pre-appointment Advice and the Member's reasons for believing why such Pre-appointment Advice does not result in a conflict of interest or duty;
- (e) a declaration that no other information or advice beyond that outlined in the ~~*Declaration of Independence, Relevant Relationships and Indemnities (DIRRI)*~~, was provided to the insolvent Entity, directors of the insolvent Entity (if the insolvent Entity is a company) or their advisors;
- (f) 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:
 - (i) the insolvent Entity;
 - (ii) if the insolvent Entity is a company – an Associate of the company;
 - (iii) 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;
 - (iv) a former Appointee of the insolvent Entity; and
 - (v) a person who has a security over the whole or substantially the whole of the insolvent Entity's property and other assets;

and the Member's reasons for believing why these relationships, if any, do not result in a conflict of interest or duty;

~~(g)~~ 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:

~~(i)~~ the nature of the Professional Services;

~~(ii)~~ when the Professional Service was provided;

~~(iii)~~ the period over which the Professional Service was provided;

- (iv) the Professional Fees paid; and
- (v) the Member's reasons for believing why the Professional Service does not result in a conflict of interest or duty;
- (h) a declaration of any other relevant relationships the Members have had that may be relevant to the creditors in assessing the Independence of the Member;
- (i) a declaration that there are no other known prior Professional Services or other relationships that require disclosure; and
- (j) a declaration of indemnities (other than statutory indemnities) and upfront payments, including:
 - (i) the identity of each indemnifier or provider of an upfront payment (name and relationship with the insolvent Entity);
 - (ii) and the extent and nature of each indemnity or upfront payment;
 - (iii) a statement as to where the funds are being held;
 - (iv) when and how the funds will be applied; and
 - (v) that there are no other indemnities or upfront payments to be disclosed.

Commented [JH28]: New requirement to include in the DIRRI other relevant relationships relevant to a Member's independence. (as suggested at the APES 330 Taskforce Meeting on 21 August 2018). To be considered with the inclusion of new paragraph 4.24.

4.263 In addition to the requirements contained in paragraph 4.252, a Member in Public Practice should consider including ~~the following~~ in the *Declaration of Independence, Relevant Relationships and Indemnities (DIRRI)*: 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 prior to the Appointment with:

- (a) the insolvent Entity;
- (b) if the insolvent Entity is a company – an Associate of the company;
- (c) if the insolvent Entity is an individual:
 - (i) an Immediate or Close Family member of the individual;
 - (ii) a spouse or dependant of an Immediate or Close Family member of the individual; or
 - (iii) any Entity with which the individual or any of the persons listed above are associated.

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

4.274 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 (DIRRI)* prior to its issue. Where this is not possible and a ~~Declaration of Independence, Relevant Relationships and Indemnities~~ DIRRI is issued before all Appointees sign it, the Members shall:

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

4.25 ~~When circumstances or relationships giving rise to a threat to Independence are identified after the commencement of an Administration, a Member in Public Practice shall evaluate that threat and:~~

Commented [JH29]: New paragraph 4.8

~~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~~

~~where the threat to the Independence of the Member would have precluded the Member from accepting the Appointment had the threat been identified prior to the commencement of the Appointment, the Member shall notify the court, all creditors and the appropriate regulatory authority 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;~~

~~the costs of ceasing and transferring the Appointment; and~~

~~Professional Fees and Expenses billed and any outstanding amounts; and~~

~~in the circumstances described in paragraph 4.25(b), apply to the court to either continue the Appointment, or resign from the Appointment.~~

4.268 Where a Member in Public Practice becomes aware that the *Declaration of Independence, Relevant Relationships and Indemnities (DIRRI)* is out of date or inaccurate, the Member shall update the *Declaration- DIRRI* and provide it to the creditors and the Committee with the next communication and table it at the next meeting of the creditors or the Committee.

~~4.27 Where a Member in Public Practice is requested by an insolvent Entity, its directors or its creditors to consent to an Appointment to replace another person who has commenced the Administration, and the Member intends to agree to the request, the Member shall:~~

~~(a) give reasonable notice to the other person being not less than one business day prior to the meeting of creditors, except when the request is received within one business day before that meeting;~~

~~(b) not solicit proxies directly or indirectly and shall act, and be seen to act, in the creditors' interests;~~

~~(c) provide a Declaration of Independence, Relevant Relationships and Indemnities containing the information required by paragraph 4.22 at the meeting where the creditors decide whether to replace the other person;~~

~~(d) disclose to the creditors the basis on which the Member proposes to charge Professional Fees; and~~

~~(e) provide details in the DIRRI of the Member's relationship with the Entity nominating the Member for the Appointment.~~

4.298 A Member in Public Practice should be aware that disclosure of matters in a *Declaration of Independence, Relevant Relationships and Indemnities (DIRRI)*, and the tabling of such *Declaration- DIRRI* 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.

~~A template of a Declaration of Independence, Relevant Relationships and Indemnities (DIRRI) is set out in Appendix 1.~~

Commented [JH30]: New paragraph 4.6

Commented [JH31]: New paragraph to refer to a new Appendix containing a template of a DIRRI (as suggested at the APES 330 Taskforce meeting on 21 August 2018)

5. Professional Engagement matters

5.1 A Member in Public Practice who has accepted an Appointment is not required to provide an **e**Engagement document in accordance with APES 305 *Terms of Engagement*.

5.2 A Member in Public Practice who becomes aware of instances of non-compliance with laws and regulations when providing Insolvency Services shall comply with Section 360 Responding to Non-Compliance with Law and Regulations⁷ of the Code.

Commented [JH32]: New paragraph. Includes a cross reference to NOCLAR provisions in APES 110.

5.3 A Member in Public Practice should consider the guidance in APES GN 30 Outsourced Services if the Member engages or outsources to a third party, either components or all aspects of, the Insolvency Services provided.

Commented [JH33]: New paragraph. Includes a cross reference to APES GN 30. Consistent with ARITA Code para 14.4.

6. Dealings with property and other assets

6.1 In accordance with laws and regulation which prohibit a Member in Public Practice deriving a profit or advantage from an Administration, A Member in Public Practice shall not purchase property or other assets of an Administration without obtaining prior approval of the court.

Commented [JH34]: The content in Section 6 has been updated to refer to the requirements of IPS 60-20. This has also resulted in amendments to the order of the paragraphs.

6.16.2 A Firm which provides Insolvency Services shall establish policies and procedures which prohibit the Firm, a Network Firm, their Partners and employees, and the **Immediate and 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.

~~**6.26.1** A Member in Public Practice shall not purchase property or other assets of an Administration without obtaining prior approval of the court.~~

6.3 A Member in Public Practice shall take all reasonable steps to ensure that the Member does not knowingly sell property or other assets of an Administration to the Member's Firm, a Network Firm, their Partners or employees, or to the Immediate and Close Families, 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 6.21 and 6.3 do not apply where the Member has accepted an Appointment in respect of a retail operation under Administration, and the assets are available for sale to the general public and no special treatment or preference over and above that granted to the general public is offered.

7. Expert Witness obligations

7.1 A Member in Public Practice who during the course of an Administration acts as an Expert Witness shall comply with APES 215 *Forensic Accounting Services* as if an Appointment is an Engagement.

8. Professional Fees and Expenses

8.1 A Member in Public Practice performing an Administration shall be remunerated for such service by way of Professional Fees in accordance with Section ~~240~~ **330** *Fees and Other Types of Remuneration*⁸ of the Code, subject to the limitations in paragraph 3.241.

Commented [JH35]: Updated cross reference to new APES 110 section

⁷ Equivalent to Section 225 Responding to Non-Compliance with Laws and Regulations of the superseded APES 110 Code of Ethics for Professional Accountants.

⁸ Equivalent to Section 240 Fees and other Types of Remuneration of the superseded APES 110 Code of Ethics for Professional Accountants.

- 8.2 When requested to consent to an Appointment, other than as a Controller or in an Appointment by the court or a members' voluntary liquidation, a Member in Public Practice shall provide to the director(s) of the insolvent Entity or the Insolvent Debtor the following information prior to Appointment:
- (a) The basis of calculating Professional Fees the Member proposes to use in the Administration;
 - (b) If the Member proposes to use a time basis, the scale of hourly rates that will be used;
 - (c) An explanation that:
 - (i) Professional Fees drawn in the Administration will be those approved by the Approving Body;
 - (ii) creditors will be advised of the basis of calculating Professional Fees proposed to the director(s) of the insolvent Entity or the Insolvent Debtor; and
 - (iii) where the director(s) of the insolvent Entity, Insolvent Debtor or other Entity have paid money towards the cost of the Administration, the amount paid may not satisfy the full costs of the Administration. Professional Fees above that amount of money are subject to approval by the Approving Body and if so approved, may be paid from the assets of the Administration;
 - (d) If the Member provides an estimate of the cost of the Appointment to the director(s) of the insolvent Entity or the Insolvent Debtor:
 - (i) it shall be in writing clearly detailing any variables which may affect the estimate;
 - (ii) the director(s) of the insolvent Entity or the Insolvent Debtor shall be informed that creditors will be advised of the estimate and that the actual Professional Fees drawn in the Administration may exceed that estimate and this higher amount can be approved by the Approving Body; and
 - (iii) If the estimate provided to the director(s) of the insolvent Entity or the Insolvent Debtor differs to any subsequent estimate provided to creditors or the actual amount of Professional Fees claimed, the Member shall provide an explanation of the reason for the variance.
- 8.3 Where a Member in Public Practice provides a fixed fee or unconditional quote to the director(s) of the insolvent Entity or the Insolvent Debtor, the Member shall not ask the Approving Body for approval of Professional Fees greater than the fixed fee or unconditional quote.
- 8.4 Members in Public Practice should exercise care in providing a fixed fee or unconditional quote to the director(s) of the insolvent Entity or Insolvent Debtor prior to accepting an Appointment as this may be perceived to restrict the proper conduct of the Administration.
- 8.5 Members in Public Practice should obtain acknowledgement from the director(s) of the insolvent Entity or the Insolvent Debtor of the receipt of the information provided under paragraphs 8.2 and 8.3 prior to accepting the Appointment.
- 8.6 A Member in Public Practice shall only claim Professional Fees and Expenses in respect of Professional Services performed or to be performed for an Administration which are necessary and proper.
- 8.7 The term 'necessary' in paragraph 8.6 means professional work that is:
- (a) directly connected with the Administration; and
 - (b) performed in accordance with the duties of the Appointment and Professional Standards.

Commented [JH36]: New appendix with guidance on necessary and proper remuneration.

8.8 The term 'proper' in paragraph 8.6 means professional work that is performed in an effective and efficient manner in an Administration.

[Guidance on matters to consider when determining necessary and proper Professional Fees and Expenses is provided in Appendix 2.](#)

8.9 A Member in Public Practice shall claim as Professional Fees, and not as Expenses, any fees for Insolvency Services provided by the Member, the Member's Firm, a Network Firm or a third party to an Administration. Where the Member, the Member's Firm or a Network Firm provides Professional Services, other than Insolvency Services, the fees in respect of those services shall be claimed as Professional Fees.

8.10 A Member in Public Practice shall use the Member's commercial judgement, adopting the perspective of, and acting with the same care as, a reasonable person when incurring Expenses for the Administration.

8.11 A Member in Public Practice who has accepted an Appointment, other than as a Controller or a Trustee, shall obtain court approval when the Member makes a claim in respect of Professional Fees for any pre-appointment work performed in respect of an Appointment.

8.12 A Member in Public Practice who has accepted an Appointment shall not claim as an Expense any disbursements that were incurred prior to the date of Appointment.

8.13 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, in addition to any statutory requirements, shall provide sufficient information so as to allow the Approving Body to make an informed assessment as to whether the remuneration is reasonable, and shall:

- (a) provide details of how the Professional Fees are computed;
- (b) state the terms of the approval sought from the Approving Body;
- (c) advise the total of Professional Fees previously determined and whether the Member will be seeking approval for additional Professional Fees in the future;
- (d) provide details of Expenses paid from the Administration, including:
 - (i) where Expenses are paid for Professional Services that have not been provided by the Firm, who the Expenses were paid to;
 - (ii) what the Expenses were for;
 - (iii) for Expenses charged directly by the Firm, the basis of calculation of those Expenses;
 - (iv) the amount paid/to be paid; and
 - (v) the basis of recovery of future Expenses to be charged directly by the Firm;
- (e) provide a summary of receipts and payments to and from the Administration bank account; and
- (f) provide a reconciliation to any prior prospective Fee approvals, including actual Fees to estimates Fees, tasks undertaken and tasks that remain to be completed.

Contingent Fees

8.134 A Member in Public Practice shall not enter into an arrangement to receive a Contingent Fee for Insolvency Services if that arrangement:

- (a) impairs the Member's Independence;

Commented [JH37]: Extant paragraph 8.18 – Substantive changes include:

- new wording highlighted in yellow
- remove two bullet points covered by legislation (70-45) (extant 2nd bullet point on description of services to be performed & 5th bullet point on the drawing of fees) &
- new dot point on reconciliation for fee approvals

- (b) 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;
- (c) is inconsistent with the fiduciary obligations of the Member; or
- (d) results in the perception that the Member is acting in the Member's interests, rather than in the best interests of the creditors.

8.154 When considering whether a proposed Contingent Fee arrangement in a particular Administration meets the requirements of paragraph 8.134, a Member in Public Practice shall consider the following:

- (a) funds available to the Administration;
- (b) funding from alternative sources such as creditors or a litigation funder;
- (c) the costs of the alternative sources of funds in comparison to the Contingent Fee arrangement;
- (d) the risk associated with the tasks to be undertaken for the Contingent Fee; and
- (e) 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.

8.165- 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:

- (a) details of the arrangement including the nature of the contingency and how achievement of the contingency will be assessed;
- (b) the Member's remuneration in the event the contingency is or is not achieved;
- (c) when the Member's remuneration is expected to be drawn; and
- (d) except in the case of an Appointment as a Controller, why the arrangement to receive a Contingent Fee is in the best interest of the creditors.

~~8.16 A Member in Public Practice who has accepted an Appointment, other than an Appointment as a Controller, shall provide the following information in the first communication to the creditors:
the methods that may be used to calculate Professional Fees;
the basis upon which Professional Fees will be charged for the Administration;
why the Member considers that the chosen method is suitable for the Administration;
information that details the classes of Expenses that may be charged to the Administration; and
the basis for recovery of Expenses charged directly by the Firm.~~

Commented [JH38]: Deleted as now covered by IPR 70-35 for both external administrations and regulated debtor estates.

~~8.17 Except in the case of an Appointment as a Controller, where the basis upon which Professional Fees for the Administration is time based a Member in Public Practice shall provide the creditors with the following additional information:
the scale of rates that will be used; and
a best estimate of the costs of the Administration to completion, or to a specified milestone.
If subsequent to providing the best estimate of the costs of the Administration there is significant change to that estimate, the Member shall provide a new estimate to the creditors together with an explanation of the variance.~~

Commented [JH39]: Deleted as now covered by IPR 70-35 for both external administrations and regulated debtor estates.

~~8.18 Where a Member in Public Practice has accepted an Appointment, other than as a Controller, and is seeking approval for Professional Fees from the Approving Body, the Member shall provide sufficient information so as to allow the Approving Body to make an informed assessment as to whether the remuneration is reasonable, and shall:
(a) provide details of how the Professional Fees are computed;~~

Commented [JH40]: New paragraph 8.13 – substantive change to remove items required by legislation (highlighted in yellow)

- ~~(b) provide a description of the Professional Services performed, or to be performed, broken down into broad categories, and the costs associated with each category;~~
- ~~(c) state the terms of the approval sought from the Approving Body;~~
- ~~(d) advise the total of Professional Fees previously determined and whether the Member will be seeking approval for additional Professional Fees in the future;~~
- ~~(e) advise when the Professional Fees will be drawn;~~
- ~~(f) provide details of Expenses paid from the Administration, including:
 - ~~(i) where Expenses are paid for Professional Services that have not been provided by the Firm, who the Expenses were paid to;~~
 - ~~(ii) what the Expenses were for;~~
 - ~~(iii) for Expenses charged directly by the Firm, the basis of calculation of those Expenses;~~
 - ~~(iv) the amount paid; and~~
 - ~~(v) 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; and~~
- ~~(g) provide a reconciliation to any prior prospective Fee approvals, including actual Fees to estimates Fees, tasks undertaken and tasks that remain to be completed.~~

Drawing of fees

- 8.179 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.
- 8.1820 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.
- 8.1924 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.
- 8.202 Where a Member in Public Practice has prospective Professional Fees approved in accordance with paragraph 8.1924, 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.

Receipt of monies

- 8.213 Where a Member in Public Practice receives monies prior to acceptance of an Appointment to meet the costs of the proposed Administration, the Member shall ensure:
- (a) the monies are held in a bank account that is separately identifiable from the Firm's bank accounts;
 - (b) there are no conditions on the conduct or outcome of the Administration attached to the monies;

- (c) full disclosure is made to creditors in the *Declaration of Independence, Relevant Relationships and Indemnities*;
- (d) approval of Professional Fees is obtained prior to them being paid to the Appointee; and
- (e) the monies are accounted for as funds of the Administration.

8.242 Where a Member in Public Practice has accepted an Appointment, other than as a Controller, and receives money from an Entity, other than from the assets of the insolvent Entity, to meet the costs of the Administration, the Member shall disclose the receipt of this money to the Approving Body and shall obtain approval to apply the money to Professional Fees from the Approving Body in accordance with paragraph 8.179.

8.235 Approval of the Approving Body under paragraph 8.242 is not required if the *Corporations Act 2001*, *Bankruptcy Act 1966* or guidance issued by the Australian Securities and Investments Commission or Australian Financial Security Authority stipulates that approval is not required.

9 Documentation and quality control

9.1 A Member in Public Practice shall comply with the requirements of APES 320 *Quality Control for Firms* as if an Appointment is an Engagement.

9.2 A Member in Public Practice shall prepare working papers in accordance with this Standard that appropriately document the work performed, including aspects of the Insolvency Service that have been provided, in writing. The documentation prepared by the Member shall:

- (a) provide a sufficient and appropriate record of the procedures performed for the Insolvency Service;
- (b) identify threats to Independence, and how they have been evaluated and addressed including safeguards applied; and
- (c) demonstrate that the Insolvency Service was carried out in accordance with this Standard and other applicable Professional Standards, including policies and procedures established in accordance with APES 320 *Quality Control for Firms*, and any applicable ethical, legal and regulatory requirements.

9.3 A Member in Public Practice may destroy the working papers referred to in paragraph 9.2 in accordance with the requirements of the *Corporations Act 2001* or *Bankruptcy Act 1966*.

9.4 A Member in Public Practice shall establish and adhere to documented procedures for each type of Administration that the Member undertakes to guard against not complying with statutory timeframes.

Conformity with International Pronouncements

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

APPENDIX 1

Declaration of Independence, Relevant Relationships and Indemnities

This Appendix contains a template of a Declaration of Independence, Relevant Relationships and Indemnities that a Member in Public Practice is required to provide to creditors in accordance with the requirements of this Standard.

Commented [JH41]: New appendix to include a template of a DIRRI (consistent with the template issued in the ARITA Code)

Declaration of Independence, Relevant Relationships and Indemnities

[CompanyName] ([Appointment Suffix])

[ACN]

Members in Public Practice/s appointed to an insolvent entity are required to make declarations as to:

- A. their independence generally;
- B. relationships, including
 - i. the circumstances of the appointment;
 - ii. any relationships with the [company/debtor] and others within the previous 24 months;
 - iii. any prior Professional Services for the [company/debtor] within the previous 24 months;
 - iv. that there are no other relationships to declare; and
- C. any indemnities given, or up-front payments made, to the Member in Public Practice.

This declaration is made in respect of myself, my partners, [Firm Name] and [list any entities covered by the extended definition of Firm].

A. Independence

I, [Appointee Name] of [Firm Name] have undertaken a proper assessment of the risks to my independence prior to accepting the appointment as [Appointee Type] of [Company Name] in accordance with the law and applicable professional standards. This assessment identified no real or potential risks to my independence. I am not aware of any reasons that would prevent me from accepting this appointment.

B. Declaration of Relationships

i. Circumstances of appointment

This appointment was referred to me by [firm/organisation of referrer and connection to Insolvent]. I believe that this referral does not result in a conflict of interest or duty because:

1 [Explain here why, in your opinion, the referral does not result in a conflict of interest or duty].

I had [include details of number of meetings, who they were with and the period of time] for the purposes of:

2 [Explain relevant issues discussed having regards to the limitations imposed under Principle 2 in respect of pre-appointment advice].

I received [amount of fees received] for this advice.

In my opinion, these meetings does/do not affect my/our independence for the following reasons:

3 [provide here the Appointee's reasons for believing that the relationship does not result in a conflict of interest or duty].

I have provided no other information or advice to [Company Name], the directors and its advisors prior to my appointment beyond that outlined in this DIRRI.

ii. Relevant Relationships (excluding Professional Services to the Insolvent)

Neither I, nor my firm, have, or have had within the preceding 24 months, any relationships with [Company Name], an associate of [Company Name], a former insolvency practitioner appointed to [Company Name] or any person or entity that has security over the whole or substantially whole of [Company Name]'s property.

[Note that if you have been requested by a creditor to consent to act as a replacement external administrator, you are required to disclose any relationship in the preceding 24 months with the creditor who nominated you for the appointment IPR75-265]

OR

I or a Member of my/our Firm, have, or have had within the preceding 24 months, a relationship with:

Name	Nature of relationship	Reasons
		I believe that this relationship does not result in a conflict of interest or duty because:

iii. Prior Professional services to the Insolvent

Neither I, nor my firm, have provided any professional services to [CompanyName] in the previous 24 months.

OR

I, or a Member of my Firm, have provided the following professional services to [CompanyName] in the 24 months prior to the acceptance of this appointment:

Nature of Professional Services	Reasons
	I believe that this relationship does not result in a conflict of interest or duty because:

iv. No other relevant relationships to disclose

There are no other known relevant relationships, including personal, business and professional relationships, from the previous 24 months with [Company Name], an associate of [Company Name], a former insolvency practitioner appointed to [Company Name] or any person or entity that has security over the whole or substantially whole of [Company Name]'s property that should be disclosed.

C. Indemnities and up-front payments

I/We have been provided with the following indemnities and/or upfront payments for remuneration for the conduct of this [Appointment Type]:

<u>Name</u>	<u>Relationship with [CompanyName]</u>	<u>Nature of indemnity or payment</u>

This does not include statutory indemnities. I have not received any other indemnities or upfront payments that should be disclosed.

OR

I have not been indemnified in relation to this administration, other than any indemnities that I may be entitled to under statute and I have not received any up-front payments in respect of my remuneration or disbursements.

Dated:

.....

[Appointee Name]

Notes:

1. If circumstances change, or new information is identified, I am/we are required under the Corporations Act 2001 and APES 330 Insolvency Services to update this Declaration and provide a copy to creditors with my/our next communication as well as table a copy of any replacement declaration at the next meeting of the insolvent's creditors.
2. Any relationships, indemnities or up-front payments disclosed in the DIRRI must not be such that the Member in Public Practice is no longer independent. The purpose of components B and C of the DIRRI is to disclose relationships that, while they do not result in the Member having a conflict of interest or duty, ensure that creditors are aware of those relationships and understand why the Member nevertheless remains independent.

APPENDIX 2

Necessary and proper Professional Fees and Expenses

This Appendix contains additional information on matters to consider when determining what is necessary and proper Professional Fees and Expenses in accordance with paragraph 8.6 of this Standard.

A key aspect of ensuring that the necessary and proper Professional Fees and Expenses is claimed for Professional Services performed for an Administration is to ensure any work is completed in the most efficient and effective manner.

In determining how to perform the Administration in the most efficient and effective manner the Member in Public Practice should use their commercial and professional judgement and may consider:

- (a) the complexity of the Administration;
- (b) the level of expertise required to complete the necessary tasks in the Administration;
- (c) the availability of sufficient staff to complete the Administration;
- (d) the remuneration rates for staff that apply to the Administration (including, where relevant, consideration of different rates applicable in different locations);
- (e) the resources required to complete the Administration and each relevant task;
- (f) the urgency for tasks to be completed;
- (g) the location of the Administration (including travel requirements);
- (h) the specialised nature of the Administration (if any); and
- (i) whether the allocation of tasks is cost effective.

In addition, the Member in Public Practice should conduct regular reviews of any work-in-progress to ensure that all time charged to the Administration is for necessary work, properly performed.

Costs of claiming Professional Fees and Expenses

A Member in Public Practice may claim the necessary and proper costs of record keeping and seeking approval or determination of their claim for remuneration.

Costs of communicating with Regulators or professional bodies

A Member in Public Practice may not claim Professional Fees and Expenses for time spent communicating with regulators or professional bodies in relation to:

- complaints about the Member or the conduct of a particular Administration;
- regulator surveillance, professional audits or inspection of files, or on peer reviews; or
- unsuccessfully defending a breach of the law or applicable professional and ethical standards, subject to any order of the court.

Commented [JH42]: New appendix to highlight aspects of necessary and proper remuneration currently covered in the ARITA Code Section 14

APPENDIX 34**Summary of revisions to the previous APES 330 (Issued ~~November~~ September 2014)**

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

Table of revisions*

Paragraph affected	How affected
1.1	Amended
1.2	Amended
1.3	Amended
1.5	Amended
1.10	Added
2 – Definition of Acceptable Level	Amended
2 – Definition of Administration	Amended
2 – Definition of Approving Body	Amended
2 – Definition of Close Family	Amended
2 – Definition of Code	Amended
2 – Definition of Expert Witness	Amended
2 – Definition of Firm	Amended
2 – Definition of Independence	Amended
2 – Definition of Inducement	Amended
2 – Definition of Member in Public Practice	Amended
2 – Definition of Other Evidence	Deleted
2 – Definition of Pre-appointment Advice	Amended
2 – Definition of Professional Activity	Amended
2 – Definition of Professional Bodies	Amended
2 – Definition of Professional Standards	Amended
2 – Definition of Related Entity	Amended
3.1	Amended
3.2	Amended
3.5	Amended
3.13	Added
3.14 – Paragraph 3.13 in existing APES 330	Relocated
3.15 – Paragraph 3.14 in existing APES 330	Relocated
3.16 – Paragraph 3.15 in existing APES 330 relocated	Amended
3.17 – Paragraph 3.16 in existing APES 330 relocated	Amended
3.18 – Paragraph 3.17 in existing APES 330	Relocated
3.19 – Paragraph 3.18 in existing APES 330	Relocated
3.20 – Paragraph 3.19 in existing APES 330	Relocated
3.21 – Paragraph 3.20 in existing APES 330	Relocated
3.22	Added
3.23	Added
3.24 – Paragraph 3.21 in existing APES 330	Relocated
4.4	Amended
4.5 – Paragraph 4.20 in existing APES 330 relocated	Amended
4.6 – Paragraph 4.27 in existing APES 330 relocated	Amended
4.7 – Paragraph 4.5 in existing APES 330 relocated	Amended
4.8 – Paragraph 4.25 in existing APES 330 relocated	Amended
4.9 – Paragraph 4.6 in existing APES 330	Relocated
4.10 – Paragraph 4.7 in existing APES 330 relocated	Amended

Paragraph affected	How affected
4.11 – Paragraph 4.8 in existing APES 330 relocated	Amended
4.12 – Paragraph 4.9 in existing APES 330	Relocated
4.13 – Paragraph 4.10 in existing APES 330	Relocated
4.14 – Paragraph 4.11 in existing APES 330 relocated	Amended
4.15 – Paragraph 4.12 in existing APES 330 relocated	Amended
4.16 – Paragraph 4.13 in existing APES 330 relocated	Amended
4.17 – Paragraph 4.14 in existing APES 330	Relocated
4.18 – Paragraph 4.15 in existing APES 330	Relocated
4.19 – Paragraph 4.16 in existing APES 330 relocated	Amended
4.20 – Paragraph 4.17 in existing APES 330	Relocated
4.21 – Paragraph 4.18 in existing APES 330	Relocated
4.22 – Paragraph 4.19 in existing APES 330 relocated	Amended
4.23 – Paragraph 4.21 in existing APES 330 relocated	Amended
4.24	Added
4.25 – Paragraph 4.22 in existing APES 330 relocated	Amended
4.26 – Paragraph 4.23 in existing APES 330 relocated	Amended
4.27 – Paragraph 4.24 in existing APES 330 relocated	Amended
4.28 – Paragraph 4.26 in existing APES 330 relocated	Amended
4.29 – Paragraph 4.28 in existing APES 330 relocated	Amended
4.30	Added
5.2	Added
5.3	Added
6.1 – paragraph 6.2 in existing APES 330 relocated	Amended
6.2 – paragraph 6.1 in existing APES 330	Relocated
6.4	Amended
8.1	Amended
8.2	Amended
8.5	Amended
8.13 – Paragraph 8.18 in existing APES 330 relocated	Amended
8.14 – Paragraph 8.13 in existing APES 330	Relocated
8.15 – Paragraph 8.14 in existing APES 330 relocated	Amended
8.16 – Paragraph 8.15 in existing APES 330	Relocated
8.17	Deleted
8.17 – Paragraph 8.19 in existing APES	Relocated
8.18	Deleted
8.18 – Paragraph 8.20 in existing APES 330	Relocated
8.19 – Paragraph 8.21 in existing APES 330	Relocated
8.20 – Paragraph 8.22 in existing APES 330 relocated	Amended
8.21 – Paragraph 8.23 in existing APES 330	Relocated
8.22 – Paragraph 8.24 in existing APES 330 relocated	Amended
8.23 – Paragraph 8.25 in existing APES 330 relocated	Amended
Appendix 1 – Declaration of Independence, Relevant Relationships and Indemnities	Added
Appendix 2 – Necessary and proper remuneration	Added

* Refer Technical Update 20148/4X