

AGENDA PAPER

Item Number: 4
Date of Meeting: 5 June 2019
Subject: Proposed revised APES 330 *Insolvency Services*

Action required For discussion For noting For information

Purpose

To obtain the Board's approval to issue the revised APES 330 *Insolvency Services* (APES 330), subject to the Board's review comments and editorials.

Background

At the September 2018 Board Meeting, the Board approved the release of the [Exposure Draft 04/18 Proposed Standard APES 330 Insolvency Services](#) (APES 330 ED). The APES 330 ED included proposed revisions to the Standard to address:

- legislative reforms in the *Insolvency Law Reform Act 2016* (Cth);
- disclosures in the Declaration of Independence, Relevant Relationships and Indemnities (DIRRI);
- consistency with the new APES 110 *Code of Ethics for Professional Accountants (including Independence Standards)* (the Code); and
- consistency with Australian Restructuring Insolvency and Turnaround Association (ARITA) Code of Professional Conduct (ARITA Code).

APES 330 ED was issued for comment in November 2018 and comments were due by 1 March 2019.

APESB Technical Staff have continued consultations with ARITA who are undertaking significant changes to the ARITA Code and proposed Code of Professional Practice: *Insolvency Services* (ARITA CoPP), to promote consistency and alignment wherever possible. In some areas, the ARITA CoPP is more prescriptive on specific content, including in relation to Professional Fees and Expenses. Technical Staff do not consider it appropriate to include that level of detail in APES 330, which is a principles-based standard.

Consideration of Issues

Three submissions on APES 330 ED were received from stakeholders. ARITA subsequently lodged a submission on 9 April 2019 based on a later version of APES 330 which incorporated some changes reflecting other respondents' comments. Therefore, the marked-up copy of APES 330 (Agenda Item 4(a)) includes references to the Specific Comments Table (SC) and the ARITA Specific Comments Table (ARITA) in superscript (Agenda Items 4(c) and 4(e) respectively).

Stakeholders were generally supportive of the proposed revisions to APES 330, however, the key issues raised and how these are proposed to be addressed are discussed below.

Section 1 – Scope & Application

A submission was concerned that requirements to provide information to director(s) about how Members in Public Practice propose to calculate their Professional Fees should also be provided in members' voluntary liquidations. Technical Staff propose the inclusion of guidance paragraph 1.6 stating that Members should apply APES 330 for Appointments such as members' voluntary liquidations to the extent practicable.

Section 2 – Definitions

A submission was concerned that the definition of Trustee in APES 330 ED excluded a trustee of a composition or scheme arrangement and a deceased estate. Technical Staff propose the definition of Trustee be changed to as defined in the *Bankruptcy Act 1966*.

Section 3 – Fundamental responsibilities of Members in Public Practice

A submission noted that reasonable enquiries into the identity of the director(s) of an insolvent Entity (or Insolvent Debtor) (in paragraph 3.13) should include a requirement to meet with the relevant person(s).

Technical Staff propose that this be addressed by extending the requirement (in paragraph 3.13) to make such reasonable enquiries in accordance with APES 320 *Quality Control for Firms* and include a guidance paragraph (paragraph 3.14) that such enquiries should include meeting with and/or obtaining appropriate identification documentation of the relevant person(s).

Submissions raised concerns about activities excluded from being an Inducement and that APES 330 could be better aligned to the Code. Technical staff propose a cross reference to require compliance with section 340 *Inducements, Including Gifts and Hospitality* of the Code (paragraph 3.22) and to change the guidance paragraph on activities excluded from being an Inducement to “*may not include*” (paragraph 3.25).

Section 4 –Definition of Independence

Two submissions raised concerns that the definition of Independence in APES 330 ED and the Code are different to legal precedents set by Australian courts when assessing independence in the context of Insolvency Services.

Technical Staff propose that the definition of Independence remains unchanged in APES 330 to maintain consistency with the Code and other pronouncements. However, additional explanatory material is proposed to be included in APES 330 to refer to legal precedents established by Australian courts to highlight additional independence matters that Members in Public Practice need to comply with in relation to Insolvency Services. In addition, guidance on considerations when assessing independence in the provision of Insolvency Services is proposed in a new Appendix 3 to APES 330.

The following are other matters raised and Technical Staff proposals to address these concerns:

- Uncertainty about notification requirements where a threat to Independence is identified after the commencement of an Administration (paragraphs 4.8(b) & (c)). Technical Staff propose amendments to clarify that creditors and regulators should be notified in all instances (whether continuing or resigning) and how the threat will be managed, and the Appointee must apply to the court if intending to continue (including for the Appointment of a special purpose Appointee).
- Paragraph 4.10(e) may limit legitimate negotiations undertaken prior to an Appointment. Technical Staff propose the removal of “*of agreements or*” from this paragraph. Note that ARITA is currently consulting with their members over the matters addressed in this paragraph.
- Extant requirements may not capture situations where Members in Public Practice accept Appointments from financiers where the relationship is not at arm’s length and therefore creating threats to Independence. Technical Staff propose adding additional subparagraphs (4.12(a)(iv) and 4.12(c)(iv)) to capture these potential relationships.
- Reference to “*limited time, limited scope and limited fees*” (paragraph 4.17) was problematic including in relation to different perspectives of Appointees and other stakeholders. Technical Staff propose that paragraphs 4.16 and 4.17 be combined, with removal of references to immaterial and limited scope, time and fees, and a focus on whether the Appointment would create threats to the fundamental principles and Independence.
- The requirement to include any other relevant relationship in the DIRRI should be limited to a two year period and that Members should consider such relationships beyond that time. Technical Staff propose to limit paragraph 4.24(i) to the preceding two years and include guidance paragraph 4.25(d) that Members should consider whether any other relevant relationships beyond that two year period should be disclosed in the DIRRI.

During the review of APES 330 ED, Technical Staff have made a number of additional proposed amendments to Appendix 1 – Template DIRRI to ensure consistency with the requirements in APES 330 paragraph 4.24.

Section 8 – Professional Fees & Expenses

Two respondents considered that APES 330 should be aligned with APES 310 *Client Monies*, in particular, in respect of monies received prior to an Appointment for a proposed Administration. Another respondent disagreed due to the nature of the relationship between the Member in Public Practice and the insolvent Entity.

Technical Staff are of the view that where such a payment is received, the Member does not have a present entitlement to the monies and it is in their control and therefore, the Member should be required to comply with APES 310 *Client Monies* (APES 310) as if the Appointment related to a Client. It is proposed that APES 330 be amended accordingly (paragraph 8.23) requiring; the monies to be held in trust; and compliance with APES 310.

Taskforce Views

Technical Staff met with the APES 330 Taskforce on 6 May 2019 to consider the proposed revisions to APES 330. Some additional matters were raised by ARITA on 7 May 2019 with Technical Staff, which were subsequently considered (together with Technical Staff proposals) by the Taskforce.

The Taskforce were supportive of the proposed changes to APES 330, in particular the inclusion of the proposed Appendix 3 on Appointee's Independence. Refer to Agenda Item 4(f) for the draft minutes of the APES 330 Taskforce Meeting.

Subsequent to the Taskforce meeting, Technical Staff spoke with ARITA who have indicated that they expect to finalise their updated Code and ARITA CoPP by September 2019. In particular, ARITA is undertaking further consultation on specific matters including guidance material relating to Member's Independence (included in APES 330 at paragraph 4.10(e)).

APESB Technical Staff have also undertaken consultations with Australian Securities and Investments Commission (ASIC) during the review process of APES 330.

A marked-up copy of APES 330 incorporating the proposed revisions from the exposure draft process is presented as Agenda Item 4 (a).

Recommendation

Subject to the Board's review comments, the Board approve the issue of the revised APES 330.

Materials Presented

Agenda Item 4(a)	Revised APES 330 <i>Insolvency Services</i> (Marked-up version)
Agenda Item 4(b)	General Comments Table – ED 04/18
Agenda Item 4(c)	Specific Comments Table – ED 04/18
Agenda Item 4(d)	ARITA General Comments Table – revised APES 330
Agenda Item 4(e)	ARITA Specific Comments Table – revised APES 330
Agenda Item 4(f)	Draft Taskforce Meeting Minutes 6 May 2019
Agenda Item 4(g)	Draft Basis for Conclusions APES 330

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