

Constituents' Submissions – Specific Comments Table

Exposure Draft 01/14: APES 330 Insolvency Services

Note: General comments relating to APES 330 are addressed in a separate table. This table excludes minor editorial changes.

Item No.	Paragraph No. in Exposure Draft	Respondent	Respondents' Comments
1	2	ASIC	<p>Definition of independence</p> <p>Although consistent with the definition in APES 110 <i>Code of Ethics for Professional Accountants</i>, the definition of "independence" as a "state of mind" is in direct contrast with the definition used in the ARITA Code of Professional Practice and also our understanding of the term as developed through case law relating to corporate insolvency</p>
2	3.19	CPA Australia/ Chartered Accountants	<p>Proposed paragraph 3.19 provides that; "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." The corresponding provision in the ARITA Code does not have the qualification "does not take prominence" and we would like to draw the Board's attention to attributes of insolvency practice, particularly around the sale of debtor assets, where a firm's logo might form an important part of alerting potential buyers.</p>
3	4.6	ASIC	<p>We believe this paragraph needs to refer to the term "Associate" as defined in the Standard. Presently, the paragraph refers to "Related Entities" which the Standard defines in a way that relates to personal insolvency only. When seeking to identify relevant relationships in corporate insolvency, the Member in Public Practice should have regard to relationships with both "Related Entities" and "Associates".</p>
4	4.6	ARITA	<ul style="list-style-type: none"> • Relationships with Related Entities (paragraph 4.6) <p>This paragraph currently only refers to Related Entities of an insolvent Entity. Related Entities is a defined term limited to insolvent individuals. The paragraph also needs to refer to Associates, which is the mirror defined term for insolvent companies. With this change, members will need to have regard to relationships with Related Entities and Associates of the insolvent Entity, covering situations where the insolvent entity is an individual or a company.</p>
5	4.9	ARITA	<ul style="list-style-type: none"> • Limited relationships (paragraph 4.9) <p>Sub-paragaphs (b), (c) and (d) currently refer to directors or officers of the Insolvent Entity. This necessarily limits the insolvent entity to a company. We suggest that this may more appropriately refer to Associates and Related Entities of the insolvent Entity.</p>
6	4.9	ASIC	<p>Similar to comments relating to paragraph 4.6, we suggest that sub-paragaphs (b)-(d) should reference both "Associate" and "Related Entity"</p>
7	4.9 (c)	CPA Australia /Chartered Accountants	<p>Proposed paragraph 4.9(c) deals with material business relationships and the disqualification from accepting an Appointment. We would like again to draw the Board's attention to possible characteristics of insolvency practice whereby a referral may come from a company's solicitor or advising accountant who may themselves have acted for, or otherwise engaged with, the insolvency practitioner on a prior non-related administration matter. We are aware of some concerns that this prior circumstance might be deemed a material business relationship. If it is so viewed, it could preclude the insolvency practitioner from accepting the Appointment.</p>

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8	4.15	ASIC	Although this paragraph requires a Member in Public Practice to, "evaluate these relationships in accordance with the requirements of this standard", to promote clarity and avoid doubt, we suggest that the paragraph include a specific requirement to disclose relationships as required by the Standard
9	4.18	CPA Australia /Chartered Accountants	We understand that this new clause is intended to prevent the insolvency practitioner advising both a director in their personal capacity and the company. However the term "any corporate entity associated with that individual" potentially extends that to a broader group for which there does not need to be a prohibition. We suggest the wording should be "controlled by" the individual or "an entity to which the individual is an officer".
10	4.18	ARITA	<ul style="list-style-type: none"> • Advising an insolvent individual (paragraph 4.18) <p>This paragraph currently requires that where advice is provided to an insolvent individual, the Member shall not provide pre-appointment advice to any corporate Entity associated with that individual. We suggest that instead it should say "to any corporate entity where that individual is an officer or a director". The phrase "associated with" is not clear, whereas "officer or director" is more specific.</p>
11	4.22	ARITA	<ul style="list-style-type: none"> • Disclosure of Referring Entity (paragraph 4.22 bullet point 3) <p>This bullet point is consistent with a requirement at 6.6 of the 3rd edition of the ARITA Code which came in effect on 1 January 2014. Due to changes in the Privacy Act earlier this year, ARITA has recently decided that the Code will be amended from 1 August 2014 to only require the mandatory disclosure of the Referring Entity firm name in administrations where a Declaration of Relevant Relationships is required under law. A Declaration of Relevant Relationships is currently required in a Creditors' Voluntary Liquidation and Voluntary Administration under the Corporations Act. This requirement is extended under the ARITA Code and APES 330 to all corporate and personal insolvency appointments and is referred to as a Declaration of Independence, Relevant Relationships and Indemnities (DIRRI). In administrations where a Declaration of Relationships is not required under law, our members are required to seek consent from the referrer to the disclosure of the referrer's firm name. If that consent is received, disclosure must be made. If consent is not received, then disclosure is not required. Members will not be required to disclose an individual's name, only a firm name. Members should continue to disclose the referrer's connection to the Insolvent.</p> <p>We suggest that to ensure continued consistency between the Code and APES 330, the APESB consider amending the third bullet point of 4.22 to the following:</p> <p>"the name of the Firm and connection to the insolvent Entity (if applicable) of the Referring Entity where a Declaration of Relevant Relationships, or similar document, is required under law. In all other Administrations, the Member in Public Practice shall request the consent of the Referring Entity to disclose their firm name in the DIRRI and shall disclose it, and any connection of the Referring Entity to the insolvent Entity, where consent is provided."</p>

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12	4.22	CPA Australia /Chartered Accountants	We make specific reference to the third dot point dealing with the naming of a Referring Entity. The recent changes to the Privacy Act 1988 and the National Privacy Principles contained therein, may limit ability to comply with this requirement. We believe disclosure of personal information may only be possible if referrals were made under specific statute or where there is written consent from the referring entity.
13	4.23	ASIC	When considering whether to make additional disclosure, we suggest that the Member in Public Practice should also consider whether the additional information might be relevant for creditors in assessing the Member's independence in addition to the nature of the relationship and the reasons for termination of the relationship
14	4.25 (b)	ASIC	We suggest this paragraph be amended to say that the Member in Public Practice should, "notify the court, creditors and the appropriate regulatory authority". As presently drafted, it might appear that the Member in Public Practice determines who they consider it is appropriate to notify
15	4.25 (b)	ARITA	<ul style="list-style-type: none"> • Notification (paragraph 4.25(b)) <p>As currently worded, the sub-paragraph could be interpreted as the member determining who it is appropriate to notify. It should correctly be that the member shall notify the appropriate regulatory authority. So rather than "regulatory authorities as appropriate", it should be "appropriate regulatory authority". For example, if it is a corporate administration the appropriate regulatory authority is ASIC.</p>
16	6.1 6.3	ASIC	We suggest that these paragraphs be clarified. The Standard does not define, "Controlled or Associated Entities" such that the scope of this requirement is clear
17	6.1 6.3	ARITA	<ul style="list-style-type: none"> • Dealing with property and assets (paragraphs 6.1 and 6.3) <p>The paragraphs currently refer to Controlled and Associated Entities. "Controlled and Associated Entities" is capitalised as if it were a defined term, however, it is not a defined term. ARITA suggests either amending the wording or defining the term.</p> <p>ARITA's Code prohibits dealings in assets of an administration by a Practitioner, his or her partners, Firm, staff, their respective Relatives and Entities that any of those parties have a Material interest in.</p> <p>Material interest is defined in the Code as "ownership, which is material to either the owned Entity, or material to the Practitioner, his or her partners, Firm, staff, or their respective Relatives; or in which the Practitioner, his or her partners, Firm, staff or their respective Relatives has any management involvement whatsoever."</p>
18	8.23	ARITA	<ul style="list-style-type: none"> • Monies received in advance (paragraph 8.23) <p>We suggest that sub-paragraph (e) be added to paragraph 8.23 as follows:</p> <p>(e) accounted for as funds of the administration.</p>

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			This requirement to account is consistent with the Code.
19	8.23 8.24	ASIC	To improve transparency and accountability, we suggest that money received from third parties should be accounted for by the Member in Public Practice as funds of the administration and disclosed in the Form 524 <i>Presentation of Accounts and Statement</i> for the particular company in Administration

Staff Instructions:

- Comments of a “general” nature should be dealt with first, followed by paragraph specific comments.
- Respondents’ comments must be copied verbatim into this table.
- Comments should be dealt with in paragraph order, not respondent order.
- Use acronyms only for respondents. Update the attached table with details of additional respondents.

RESPONDENTS

1	CPA Australia/Chartered Accountants	CPA Australia & Chartered Accountants Australia and New Zealand
2	ARITA	Australian Restructuring Insolvency & Turnaround Association
3	ASIC	Australian Securities & Investments Commission
4	AFSA	Australian Financial Security Authority