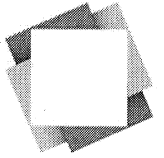


# APESB



17<sup>th</sup> February 2010

Mr. John Hawkins  
Committee Secretary  
Senate Standing Committee on Economics  
Department of the Senate  
PO Box 6100  
Parliament House  
Canberra ACT 2600



Dear Mr Hawkins,

## **Re: Inquiry into Liquidators and Administrators**

Accounting Professional & Ethical Standards Board Limited (APESB) welcomes the opportunity to make a submission to the Inquiry into Liquidators and Administrators by the Senate Standing Committee on Economics.

### **Background to APESB**

APESB was established in February 2006 as an initiative of the Institute of Chartered Accountants in Australia (ICAA) and CPA Australia. In November 2006, the National Institute of Accountants (NIA) was admitted to the APESB. APESB is an independent standard setter with the primary objective of developing and issuing, in the public interest, appropriate professional and ethical standards which apply to the membership of the three Australian professional accounting bodies. A secondary objective of the APESB is to provide the opportunity or forum for the discussion and consideration of issues relating to professional standards for accountants.

APESB has issued the Code of Ethics that all professional accountants in Australia must abide by as well as professional standards in specialist areas such as Valuation Services, Forensic Accounting, Taxation Services and Insolvency Services.

### **Standards applicable for professional accountants engaged in insolvency services**

APESB issued APES 330 *Insolvency Services* (APES 330) in September 2009. This professional standard was developed over an 18 month period and mandates the professional and ethical obligations of members of the three Australian professional accounting bodies who conduct insolvency services.

APES 330 is effective for insolvency services commencing on or after 1 April 2010 with early adoption permitted. APES 330 will replace the existing *APS 7 Statement of Insolvency Standards* which was originally issued by the accounting profession in March 1984 (subsequently revised in 1989 and 1998). Members of the three Australian professional accounting bodies must comply with APES 330 from 1 April 2010 when they undertake roles as liquidators or administrators. Failure by members to do so will make them subject to the disciplinary procedures of the applicable body.

During the development phase of APES 330, APESB worked collaboratively with the Insolvency Practitioners Association of Australia (IPA) to ensure that the principles of APES 330 are consistent with the principles in the IPA's Code of Professional Practice.

APES 330 addresses the following key areas which will be of interest to your Inquiry:

- the fundamental responsibilities of members which include public interest obligations and professional obligations relating to professional competence and due care, confidentiality and marketing (Section 3);
- the critical importance of professional independence of liquidators and administrators (Section 4);
- dealing with property and other assets (Sections 6)
- expert witness obligations (Section 7);
- professional fees and expenses (Section 8); and
- Documentation and quality control (Section 9).

We have included the following information for the Inquiry's consideration:

- Appendix A – A brief overview of APES 330 *Insolvency Services*; and
- Appendix B – APES 330 *Insolvency Services*.

If you would like to discuss APES 330 further or require any additional information, please do not hesitate to contact me or Channa Wijesinghe, Technical Director on (03) 9642 4372 or email at [channa.wijesinghe@apesb.org.au](mailto:channa.wijesinghe@apesb.org.au).

Yours sincerely



Kate Spargo  
**Chairperson**

## **A brief overview of APES 330 *Insolvency Services***

### ***Scope of APES 330***

APES 330 mandates the professional and ethical obligations of members of the three Australian professional accounting bodies (ICAA, CPA Australia and NIA) who undertake insolvency services. The scope of the standard includes appointments undertaken as a liquidator or administrator (excluding members' voluntary liquidations) under the *Corporations Act 2001*, the *Bankruptcy Act 1966*, or any other similar legislation.

### ***Fundamental responsibilities***

The fundamental responsibilities of members relating to *public interest, professional competence and due care, confidentiality and marketing* have been substantially revised from the existing APS 7 in line with APES 110 *Code of Ethics for Professional Accountants* (APES 110). By way of background APES 110 is based on the *Code of Ethics for Professional Accountants* prepared by the International Ethics Standards Board of Accountants of the International Federation of Accountants (IFAC Code). In substance APES 330 has similar requirements and guidance to the IFAC Code.

The fundamental responsibilities of a member conducting insolvency services include:

- The overriding public interest obligations of the member;
- An assessment whether the member has adequate capacity and resources;
- Seeking appropriate expert advice when required;
- Confidentiality requirements; and
- Prohibitions in respect of marketing the member's services when placing statutory advertisements.

### ***Professional independence***

Professional independence requirements for members of the three Australian professional accounting bodies who undertake insolvency services have been significantly updated in APES 330. The standard stipulates that members must determine whether there are threats to their independence prior to accepting an appointment to conduct an insolvency service. APES 330 mandates that members have an obligation to consider prior or existing personal and/or professional relationships with the insolvent entity as these relationships can create actual or perceived threats to the member's independence. Where there are threats to a member's independence which are not trivial or inconsequential, and it is not a circumstance permitted by the standard, then the member must obtain court approval if the member wishes to accept or continue the insolvency service.

APES 330 prohibits members from providing advice to an insolvent entity as well as the insolvent entity's directors in a personal capacity. Members are also prohibited from accepting an insolvency service which results in payment of referral or recurring commissions, spotters' fees, or any other arrangements that restrict the proper exercise of the member's judgement.

APES 330 includes a mandatory requirement that a member shall provide a *Declaration of Independence and Relevant Relationships and Indemnities* which considers the following matters in respect of the proposed insolvency service:

- an assessment of actual or perceived threats;
- disclosure of prior business relationships;
- disclosure of prior professional services; and
- a declaration of indemnities.

Further, where circumstances change subsequent to the commencement of the insolvency service, the member has a mandatory obligation to update the *Declaration of Independence and Relevant Relationships and Indemnities*.

### ***Dealing with property and other assets***

The standard includes a prohibition that members or their employees cannot derive a benefit from dealing with the insolvent entity's property or other assets, without the prior approval of the creditors or the court. The only exception to these rules is when the insolvency service is in respect of a retail operation and the relevant assets are also available for sale to the general public at the same price.

### ***Expert Witness obligations***

In certain circumstances a member who is providing an insolvency service will be requested to act as an expert witness in respect of the administration. The applicable expert witness obligations are also specified in the standard. The expert witness obligations are based on APESB's professional standard APES 215 *Forensic Accounting Services*.

### ***Professional Fees and Expenses***

The professional obligations in respect of professional fees and expenses in APES 330 have been substantially updated compared to APS 7. APES 330 stipulates that a member can only claim professional fees and expenses that are necessarily incurred for the administration. Where the member's firm provides other professional services to the administration, the standard mandates that these fees must be claimed as professional fees and not as expenses. Further, the member can only draw fees after the proper authority has been obtained from the creditors or the court.

The standard limits the circumstances in which a member can receive contingent fees in respect of an insolvency service. The member is prohibited from entering into a contingent fee arrangement that would impair the member's independence or fiduciary obligations. The member is also required to make specific disclosures to the creditors or the court if entering into a contingent fee arrangement. Further, the standard mandates that (except for controllerships) the member must disclose the methods that can be used to calculate professional fees and justify the chosen method. Where a member receives money prior to acceptance of an appointment to conduct an insolvency service, the member must hold this money in a trust account and obtain appropriate approvals prior to withdrawing the funds.

### ***Documentation and Quality Control***

APES 330 mandates that a member must establish quality control policies and procedures in accordance with APES 320 Quality Control for Firms. The member must also maintain appropriate working papers to substantiate compliance with APES 330.



## APES 330 Insolvency Services

(Issued September 2009)

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#### *Conformity with International Pronouncements*

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## 1. Scope and application

- 1.1 Accounting Professional & Ethical Standards Board Limited (APESB) issues professional standard APES 330 Insolvency Services (**the Standard**), which is effective for Insolvency Services commencing on or after 1 April 2010. Earlier adoption of this Standard is permitted.
- 1.2 APES 330 sets the standards for Members in Public Practice in the provision of quality and ethical Insolvency Services. The mandatory requirements of this Standard are in **bold-type (black lettering)**, preceded or followed by discussion or explanations in normal type (grey lettering). APES 330 should be read in conjunction with other professional duties of Members and any legal obligations that may apply.
- 1.3 **Members in Public Practice in Australia shall follow the mandatory requirements of APES 330 when they provide Insolvency Services.**
- 1.4 **Members in Public Practice outside of Australia shall follow the mandatory requirements of APES 330 when they provide Insolvency Services, to the extent to which they are not prevented from so doing by specific requirements of local laws and/or regulations.**
- 1.5 **Members in Public Practice shall be familiar with relevant Professional Standards and guidance notes when providing Professional Services. All Members shall comply with the fundamental principles outlined in the Code.**
- 1.6 The Standard is not intended to detract from any responsibilities which may be imposed by law or regulation.
- 1.7 All references to Professional Standards, guidance notes and legislation are references to those provisions as amended from time to time.
- 1.8 In applying the requirements outlined in APES 330, Members in Public Practice should be guided not merely by the words but also by the spirit of the Standard and the Code.

## 2. Definitions

For the purpose of this Standard:

**Administration** means an insolvency arrangement arising from an Appointment, other than a members' voluntary liquidation, under which an insolvent Entity operates.

**Appointment** means the appointment of a Member in Public Practice as a trustee in bankruptcy, a trustee appointed under Section 50, a debt agreement administrator under Part IX, or a trustee or controlling trustee under Part X of the *Bankruptcy Act 1966*; or as a liquidator or provisional liquidator (other than a liquidator in a members' voluntary liquidation), a voluntary administrator, an administrator of a deed of company arrangement, a Controller, 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 secured creditor, the 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.

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

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

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

**Code** means APES 110 *Code of Ethics for Professional Accountants*.

**Committee** means a committee of inspection or committee of creditors.

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

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

**Controller** means a Member in Public Practice appointed as controller or managing controller under Part 5.2 of the *Corporations Act 2001*.

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

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

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

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

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

**Firm** means

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

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

**Independence** means

- (a) Independence of mind - the state of mind that permits the provision of an opinion without being affected by influences that compromise professional judgment, allowing an individual to act with integrity, and exercise objectivity and professional scepticism; and
- (b) Independence in appearance - the avoidance of facts and circumstances that are so significant a reasonable and informed third party, having knowledge of all relevant information, including any safeguards applied, would reasonably conclude a Firm's, or a member of the Engagement team's, integrity, objectivity or professional scepticism had been compromised.

**Inducement** means any benefit, whether monetary or not, given by a Member in Public Practice, the Member's Firm, Partners or an employee, or agent, consultant, or contractor of the Member, to an Entity which may in the view of a reasonable person influence that Entity's decision to refer, or to make, an Appointment.

An Inducement does not include:

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

**Insolvency Services** means a Professional Service, excluding those in respect of members' voluntary liquidations, provided by a Member in Public Practice to an insolvent Entity under an Appointment.

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

**Member** means a member of a professional body that has adopted this Standard as applicable to their membership, as defined by that professional body.

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

**Partner** means any individual with authority to bind the Firm with respect to the performance of an Administration.

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

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

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

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



### **3. Fundamental responsibilities of Members in Public Practice**

- 3.1 A Member in Public Practice providing an Insolvency Service shall comply with Section 100 *Introduction and Fundamental Principles* of the Code and relevant law.**

#### **Public interest**

- 3.2 In accordance with Section 100 *Introduction and Fundamental Principles* of the Code, a Member in Public Practice shall observe and comply with the Member's public interest obligations when the Member provides an Insolvency Service.**
- 3.3 A Member in Public Practice shall not advise an insolvent Entity (nor, if the Entity is a company, its directors) on how to cause assets to be unavailable in an Administration or to otherwise avoid the consequences of the insolvency.**
- 3.4 Paragraph 3.3 does not prevent a Member in Public Practice from providing Professional Services in respect of the structuring of the financial affairs of a solvent Entity.**

#### **Capacity and resources**

- 3.5 Prior to accepting an Appointment, a Member in Public Practice shall ensure that the Member has the capacity and has access to the necessary resources to conduct the proposed Administration in an effective and efficient manner.**

#### **Professional competence and due care**

- 3.6 A Member in Public Practice providing an Insolvency Service shall maintain professional competence, take due care and act in a timely manner in the performance of the Member's work in accordance with Section 130 *Professional Competence and Due Care* of the Code.**
- 3.7 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 any reports or other relevant communications the name and qualifications of the third party and the areas in which third party advice has been obtained.**
- 3.8 When planning to use the work of a suitably qualified third party, a Member in Public Practice shall assess the professional competence and objectivity of that third party, the appropriateness and reasonableness of the work performed, and the Professional Fees charged.**
- 3.9 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.**
- 3.10 In undertaking an Insolvency Service, a Member in Public Practice should consider any guidance issued by the professional accounting bodies and appropriate regulatory authorities.**

#### **Confidentiality**

- 3.11 In accordance with Section 140 *Confidentiality* of the Code, a Member in Public Practice who acquires confidential information in the course of an Insolvency Service shall not use that information for any purpose other than the proper performance of that Insolvency Service.**

## Marketing

- 3.12 **A Member in Public Practice providing an Insolvency Service shall comply with Section 250 Marketing Professional Services of the Code.**
- 3.13 **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.**
- 3.14 **A Member in Public Practice shall not include slogans, logos, claims about the Member's Firm, or other promotional material in statutory advertisements.**
- 3.15 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.

## 4. Professional Independence

- 4.1 **Subject to paragraph 4.2, a Member in Public Practice accepting an Appointment or conducting an Administration shall maintain Independence.**
- 4.2 **A Member in Public Practice shall identify, evaluate and address threats to the Independence of the Member, prior to accepting an Appointment. Where the Member identifies a threat the Member shall not accept the Appointment, unless**
- **the threat is trivial and inconsequential;**
  - **the threat arises in circumstances or relationships that are permitted by this Standard; or**
  - **the Member obtains court approval.**
- 4.3 **A Member in Public Practice conducting an Administration shall:**
- **act impartially in the discharge of the Member's duties and responsibilities; and**
  - **ensure that the Member's personal interests do not conflict with the Member's duty to the creditors.**
- 4.4 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 and Relevant Relationships and Indemnities* referred to in paragraph 4.14. A relationship is trivial or inconsequential if it is remote, coincidental or insignificant.
- 4.5 The following circumstances and relationships are not considered to create a threat to the Independence of a Member in Public Practice, who is considering accepting or continuing an Appointment:
- (a) the Engagement of the Member or the Member's Firm by a third party, who is not an Associate or Related Entity of an insolvent Entity, to investigate, monitor or advise on the affairs of the insolvent Entity on behalf of the third party; or
  - (b) the transition of an Appointment from one type of insolvency Administration to another under the relevant legislation, subject to the terms of that legislation for example, from an Appointment as administrator to voluntary liquidator under the *Corporations Act 2001*; or
  - (c) an Appointment as Controller of an insolvent Entity of which that Member or another Partner of the Member's Firm has been a Controller under a different debenture or where the Appointment has been made by the court; or
  - (d) advice provided by the Member or the Member's Firm to the insolvent Entity prior to the Appointment which was limited to:

- the financial situation of the Entity;
- the solvency of the Entity;
- the consequences of insolvency for the Entity; or
- alternative courses of action available to the Entity.

**4.6 A Member in Public Practice shall not accept an Appointment, other than to act as a Controller, where the Member, the Member's Firm or Partners or the Firm's Managerial Employees have, or have had, any of the following relationships:**

- (a) a Close or Immediate Family relationship with:**
  - the insolvent Entity;
  - a director or officer of the insolvent Entity; or
  - an employee of or adviser to the insolvent Entity who is in a position to exert direct and significant influence over the insolvent Entity.
- (b) a close personal relationship with:**
  - the insolvent Entity;
  - a director or officer of the insolvent Entity; or
  - an employee of or adviser to the insolvent Entity who is in a position to exert direct and significant influence over the insolvent Entity.
- (c) a material business relationship, including the holding of a material Financial Interest, whether directly or indirectly in or jointly with:**
  - the insolvent Entity;
  - a director or officer of the insolvent Entity; or
  - an employee of or adviser to the insolvent Entity who is in a position to exert direct and significant influence over the insolvent Entity.
- (d) a material loan to or from or material guarantee to or from:**
  - the insolvent Entity;
  - a director or officer of the insolvent Entity; or
  - an employee of or adviser to the insolvent Entity who is in a position to exert direct and significant influence over the insolvent Entity.
- (e) employment with the insolvent Entity, in a position to exert direct and significant influence over the insolvent Entity.**

**4.7 A Member in Public Practice shall not accept an Appointment, other than to act as a Controller, where the Member or the Member's 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 4.5.**

**4.8 A prior Professional Service is considered immaterial if it:**

- was of limited scope;
- will not be subject to review by the Member during the course of the Administration;
- will not affect the Member's ability to comply with the statutory and fiduciary obligations associated with the Administration; and
- does not create threats to the Member's ability to comply with the fundamental principles of the Code when performing the duties of the Administration.

- 4.9 A Member in Public Practice shall not provide advice to both an insolvent Entity and the insolvent Entity's directors in their personal capacity, as the threat created would be so significant that no safeguard could reduce the threat to an acceptable level.
- 4.10 A Member in Public Practice shall not accept an Appointment where the Member or the Member's Firm has provided a Professional Service to the insolvent Entity or any other Entity which:
- has reasonable potential to lead to litigation claims against the Member or the Member's Firm by a stakeholder of the Administration;
  - is material to the Administration; or
  - was related to the structuring of assets of the insolvent Entity in order to avoid the consequences of insolvency, even if that advice was provided at a time when the Entity was solvent.
- 4.11 A Member in Public Practice shall not provide any Inducement to any Entity to secure an Appointment for the Member or to secure or prevent the Appointment or nomination of another person.
- 4.12 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.
- 4.13 A Member in Public Practice shall provide a *Declaration of Independence and Relevant Relationships and Indemnities* in respect of an Insolvency Service (excluding an Appointment as a Controller). The Member shall provide the *Declaration* in the first communication to the creditors and table it at the first meeting of the creditors.
- 4.14 A Member in Public Practice shall include the following in the *Declaration of Independence and Relevant Relationships and Indemnities*:
- 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;
  - a declaration setting out all relationships the Member or the Member's Firm has had in the preceding two years with:
    - the insolvent Entity;
    - an Associate or Related Entity of the insolvent Entity;
    - a former appointee of the insolvent Entity; or
    - a person who has a charge over the whole or substantially the whole of the insolvent Entity's property and other assets;and the reasons why these relationships, if any, do not result in a conflict of interest or duty;
  - a declaration of prior Professional Services provided to the insolvent Entity, including the nature of the Professional Services and the reasons why those Professional Services do not create threats to the Independence of the

Member or the work to be performed or duties required under the proposed Appointment;

- a declaration that there are no other known prior Professional Services or other relationships that require disclosure; and
- a declaration of indemnities (other than statutory indemnities) including the identity of each indemnifier and the extent and nature of each indemnity, including any indemnities in respect of the Member's Professional Fees or Expenses.

**4.15** 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 and Relevant Relationships and Indemnities* and send it to all the creditors; or
- b) where the threat to the Independence of the Member would have precluded the Member from accepting the Appointment had the threat been identified prior to the commencement of the Appointment, the Member shall notify the court, all creditors and regulatory authorities as appropriate of the following:
  - the nature of the threat;
  - the key facts and circumstances;
  - reasons why the circumstances or relationships giving rise to the threat were not identified prior to acceptance of the Appointment;
  - the potential impact on the Independence of the Member;
  - the status of the Administration;
  - the costs of ceasing and transferring the Appointment; and
  - Professional Fees and Expenses billed and any outstanding amounts; and
- c) in the circumstances described in paragraph 4.15 (b), apply to the court to either continue or resign from the Appointment.

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

**4.17** 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 and Relevant Relationships and Indemnities* containing the information required by paragraph 4.14 at the meeting where the creditors decide whether to replace the other person; and

- (d) **disclose to the creditors the basis on which the Member proposes to charge Professional Fees and details of the Member's relationship with the Entity nominating the Member for the Appointment.**

4.18 A Member in Public Practice should be aware that disclosure of matters in a *Declaration of Independence and Relevant Relationships and Indemnities*, and the tabling of such Declaration at a meeting of creditors, will not prevent a finding by a court, regulator or a professional body that a Member has breached the requirements of this Standard or the relevant law.

## **5. Professional Engagement matters**

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

## **6. Dealings with property and other assets**

6.1 **A Firm which provides Insolvency Services shall establish policies and procedures which prohibit the Firm, its Partners and employees, and the Close and Immediate Families, Controlled and Associated Entities of the Firm's Partners and employees from acquiring or deriving a benefit from dealing with any assets including property which comes under the control of a Partner or employee due to an Appointment, without obtaining the prior approval of the court.**

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

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, its Partners or its employees, or to the Immediate and Close Families, Controlled or Associated Entities of the Member, the Member's Partners and employees without obtaining prior approval of the court.**

6.4 Paragraphs 6.2 and 6.3 do not apply where the Member has accepted an Appointment in respect of a retail operation under Administration, and the assets are available for sale to the general public and no special treatment or preference over and above that granted to the general public is offered.

## **7. Expert Witness obligations**

7.1 **A Member in Public Practice who during the course of an Administration acts as an Expert Witness shall comply with the following:**

- (a) **the paramount duty to the court which overrides any other duty;**
- (b) **a duty to assist the court on matters relevant to the Member's area of expertise in an objective manner; and**
- (c) **a duty to make it clear to the court when a particular question or issue falls outside the Member's expertise.**

7.2 A Member in Public Practice who during the course of an Administration acts as an Expert Witness should comply with relevant evidentiary and procedural requirements relating to Expert Witnesses.

7.3 **Subject to any legal requirements or restrictions, a Member in Public Practice who during the course of an Administration acts as an Expert Witness shall clearly communicate in a Witness Report issued by the Member:**

- (a) the scope of work performed by the Member;
- (b) any limitations on the scope of work performed;
- (c) details of the Member's training, study and experience that are relevant to the matters on which the Member is providing expert evidence;
- (d) the relationships, if any, the Member or the Member's Firm has with any of the parties to the proceedings that may create a threat or a perceived threat to the Member's obligation to comply with the fundamental principles of the Code or the Member's paramount duty to the court, and any appropriate safeguards implemented;
- (e) the extent, if any, of reliance by the Member on the work of others;
- (f) the opinions formed by the Member;
- (g) whether an opinion is provisional rather than concluded, and, if so, the reasons why a concluded opinion has not been formed;
- (h) the significant facts upon which the opinions are based;
- (i) the significant assumptions upon which the opinions are based and the reasons why the Member made those assumptions;
- (j) if the Member considers that an opinion of the Member may be misleading because a significant assumption is likely to mislead, then a statement to that effect and an explanation of why the assumption is likely to mislead;
- (k) where applicable, that the Member's opinion is subject to the veracity of another person's report upon which the Member's Witness Report is based;
- (l) the reasoning by which the Member formed the opinions, including an explanation of any method employed and the reasons why that method was chosen;
- (m) a list of all documents and sources of information relied upon in the preparation of the Witness Report; and
- (n) any restrictions on the use of the Witness Report.

## **8. Professional Fees and Expenses**

- 8.1** A Member in Public Practice performing an Administration shall be remunerated for such service by way of Professional Fees in accordance with Section 240 *Fees and other Types of Remuneration* of the Code, subject to the limitations in paragraph 4.12.
- 8.2** 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.
- 8.3** The term 'necessary' in paragraph 8.2 means professional work that is:
- directly connected with the Administration; and
  - performed in accordance with the duties of the Appointment and Professional Standards.
- 8.4** The term 'proper' in paragraph 8.2 means professional work that is performed in an effective and efficient manner in an Administration.
- 8.5** 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 or a third party to an Administration. Where the Member or the Member's Firm provides

Professional Services, other than Insolvency Services, the fees in respect of those services shall be claimed as Professional Fees.

- 8.6 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.
- 8.7 A Member in Public Practice who has accepted an Appointment, other than as a Controller, 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.
- 8.8 A Member in Public Practice shall not enter into an arrangement to receive a Contingent Fee for Insolvency Services if that arrangement:
- impairs the Member's Independence;
  - results in the receipt of a Contingent Fee for performing professional work that the Member is required to complete under the relevant legislation governing an Appointment;
  - is inconsistent with the fiduciary obligations of the Member; or
  - results in the perception that the Member is acting in the Member's interests, rather than in the best interests of the creditors.
- 8.9 Subject to paragraph 8.8, where a Member in Public Practice enters into an arrangement to receive a Contingent Fee for Insolvency Services, the Member shall obtain approval from the Approving Body prior to commencement of Professional Services after having disclosed the following information:
- details of the arrangement including the nature of the contingency and how achievement of the contingency will be assessed;
  - the Member's remuneration in the event the contingency is or is not achieved;
  - when the Member's remuneration is expected to be drawn; and
  - except in the case of an Appointment as a Controller, why the arrangement to receive a Contingent Fee is in the best interest of the creditors.
- 8.10 A Member in Public Practice who has accepted an Appointment, other than an Appointment as a Controller, shall provide the following information in the first communication to the creditors:
- the methods that may be used to calculate Professional Fees;
  - the basis upon which Professional Fees will be charged for the Administration; and
  - why the Member considers that the chosen method is suitable for the Administration.
- 8.11 Except in the case of an Appointment as a Controller, where the basis upon which Professional Fees for the Administration is time based a Member in Public Practice shall provide the creditors with the following additional information:
- the scale of rates that will be used; and
  - a best estimate of the costs of the Administration to completion, or to a specified milestone.
- If subsequent to providing the best estimate of the costs of the Administration there is significant change to that estimate, the Member shall provide a new estimate to the creditors together with an explanation of the variance.



- 8.12** 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:
- provide details of how the Professional Fees are computed;
  - provide a description of the Professional Services performed, or to be performed, broken down into broad categories, and the costs associated with each category;
  - state the terms of the approval sought from the Approving Body;
  - advise the total of Professional Fees previously determined and whether the Member will be seeking approval for additional Professional Fees in the future;
  - advise when the Professional Fees will be drawn; and
  - provide a summary of receipts and payments to and from the Administration bank account.
- 8.13** 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.
- 8.14** 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.
- 8.15** 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.
- 8.16** 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 on trust;
  - (b) there are no conditions on the conduct or outcome of the Administration attached to the monies;
  - (c) full disclosure is made to creditors in the *Declaration of Independence and Relevant Relationships and Indemnities*; and
  - (d) approval of Professional Fees is obtained prior to them being withdrawn from the trust account.

## **9 Documentation and quality control**

- 9.1** A Member in Public Practice shall comply with the requirements of APES 320 *Quality Control for Firms*.
- 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*.

### ***Conformity with International Pronouncements***

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