

AGENDA PAPER

Item Number: 9
Date of Meeting: 16 November 2020
Subject: Project Update APES 330 *Insolvency Services*

Action required For discussion For noting For information

Purpose

To:

- update the Board on matters impacting APES 330 *Insolvency Services* (APES 330); and
- update the Board on the Government's insolvency reforms to support small businesses; and
- obtain the Board's approval of Technical Staff's proposed way forward.

Background

A [revised APES 330](#) was issued in August 2019 with significant changes set out in the [Basis for Conclusions](#) and summarised in [Agenda Item 5](#) at the August 2020 Board meeting. Technical Staff also provided an update to the Board at the August 2020 board meeting in relation to APES 330, in particular, that revised APES 330¹ could be interpreted more widely than intended and that ARITA was updating the DIRRI.

Matters for Consideration

Technical Staff added the matters relating to subparagraph 4.12(c)(iv) of APES 330 and the DIRRI to the APESB Issues Register. New Scenario 6 in APESB's Technical Staff publication [Applying APESB pronouncements in COVID-19 circumstances](#) (October 2020) also applies subparagraph 4.12(c)(iv) of APES 330.

It was anticipated that APESB Technical Staff would develop an Exposure Draft of APES 330, including amendments for the matters discussed above for the November 2020 Board meeting. However, this process has been delayed due to the introduction of the Government's proposed insolvency reforms to support small businesses (discussed below).

¹ Paragraph 4.12(c)(iv) of APES 330.

Liaison with ARITA

Technical Staff continued to liaise with ARITA since the August 2020 Board meeting. ARITA consulted on their proposed amendments to the DIRRI and the Remuneration Approval Report (RAR) templates during late August 2020 and September 2020. Technical Staff provided staff comments to ARITA on the proposed amendments.

ARITA received a good representation and feedback on the draft DIRRI and RAR from members, professional bodies, government bodies and regulators. The DIRRI and RAR, which have been amended post-consultation, will be presented for approval at the 24 November 2020 ARITA Board meeting. Technical Staff will consider the final DIRRI and RAR once approved by the ARITA Board.

Government's Insolvency Reforms

Treasury released the [Corporations Amendment \(Corporate Insolvency Reforms\) Bill 2020](#) and associated [Explanatory Materials](#) on 5 October 2020 for only a 7 day consultation period to 12 October 2020.

This followed a Government announcement on [24 September 2020](#) that insolvency reforms were required due to the Covid-19 pandemic. The proposed changes aim to reduce complexity, time and costs of insolvency processes for small businesses to enable more companies to restructure or, if this is not possible, enable them to wind up faster and increase returns to employees and creditors.

A Government [fact sheet](#) provides a high-level summary of the proposals, which include that the reforms:

- will be available to businesses with liabilities of less than \$1 million;
- use a '*debtor in possession model*' where owners continue to trade in the ordinary course of business whilst debt restructuring is voted on by creditors;
- include small business restructuring practitioners (SBRP) with a streamlined role and powers that will help determine if the company is eligible, support the development of a plan and do not take on personal liability;
- enable practitioners to choose to register as a SBRP only and qualifications for this will be aligned to the streamlined process and registered liquidators will be able to take on these roles²;
- have protections to be enacted to prevent phoenix activity or using the process more than once within a proposed 7-year prescribed period;
- enable creditors to be protected by SBRP's independence, creditors rights are preserved, and creditors can vote on the proposed plan; and
- allow for simplified liquidation processes where restructuring is not available.

The proposed changes are due to commence from 1 January 2021, subject to the legislation being passed. However, the more granular details of the reforms, including powers, duties and functions of SBRPs, will be set out in the *Corporations Regulations 2001* and the *Insolvency*

² Note that only registered liquidators can be appointed, however, new classes of registered liquidator can be established – [Explanatory Materials page 15](#).

Practice Rules (Corporations) 2016,³ which are yet to be released. The Government's [fact sheet](#) notes potential transitional relief between 1 January 2021 and 31 March 2021 to extend the temporary relief for directors from potential personal liability for trading whilst insolvent.⁴

Technical Staff note that SBRPs may become open to more practitioners in other 'classes' of registered liquidators, potentially impacting the number of members subject to APES 330.

Technical Staff will continue to monitor the insolvency reforms and liaise with ARITA subsequent to the respective APESB and ARITA November 2020 Board meetings in relation to the potential impacts on APES 330.

Further, Technical Staff intend to prepare an Exposure Draft of APES 330 for the March 2021 Board meeting. However, depending on the reforms' progress and nature, matters may need to be brought to the Board's attention out of session before the March 2021 meeting.

Way Forward

Technical Staff propose to:

- review the final DIRRI and RAR once approved by the ARITA Board;
- monitor the progress of the Government's insolvency reforms, and undertake a detailed review of these reforms to determine the impact on APES 330; and
- prepare an exposure draft to amend APES 330 for consideration at the APESB March 2021 Board meeting (unless required to be brought to the Board's attention out of session before the March 2021 meeting).

Recommendations

The Board:

- note the update on APES 330 and the Government's insolvency reforms to support small businesses; and
- approve Technical Staff's proposed way forward.

Materials presented

Author Jon Reid

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³ <https://www.minterellison.com/articles/small-business-insolvency-reforms-draft-legislation-what-you-need-to-know-now>

⁴ The *Coronavirus Economic Response Package Omnibus Act 2020* passed on 24 March 2020 (since extended until 31 December 2020) included, amongst other matters, six-months temporary relief for directors from potential personal liability for trading whilst insolvent. This is described in the Explanatory Memorandum as a 'safe harbour from directors' duty to prevent insolvent trading'.