

## AGENDA PAPER

**Item Number:** 7  
**Date of Meeting:** 26 November 2021  
**Subject:** Proposed revisions to APES 330 *Insolvency Services*

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Action required     For discussion     For noting     For information

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### Purpose

To:

- provide the Board with an update on submissions received on the APES 330 *Insolvency Services* (APES 330) Exposure Draft 04/21 (ED 04/21);
- obtain the Board's approval, subject to the Board's review comments and editorials, to issue the proposed revised APES 330; and
- obtain the Board's approval to undertake a post-implementation review of the revised APES 330 in 12 months from the effective date of 1 April 2022.

### Background

Technical Staff have provided updates on APES 330 at recent Board meetings:

- [August 2020](#) that subparagraph 4.12(c)(iv) revised APES 330 could be interpreted more broadly than intended and that ARITA was updating their *Declaration of Independence Relevant Relationships and Indemnities* (DIRRI);
- [November 2020](#) noting the addition of matters relating to subparagraph 4.12(c)(iv) of APES 330 and the DIRRI to the APESB Issues Register, ongoing liaison with ARITA and an overview of the Government's insolvency reforms to support small businesses;
- [March 2021](#) on Technical Staff's initial analysis of the Government's insolvency reforms issued in December 2020, continued liaison with ARITA, proposals to finalise the legislative review and to prepare an Exposure Draft for the June 2021 Board meeting; and
- [June 2021](#) on Technical Staff's detailed review of the insolvency reforms, implementation of the reforms, stakeholder engagement with ARITA, ASIC and Robyn Erskine and an overview of Technical Staff's preliminary working draft Exposure Draft for APES 330.

A Taskforce meeting was held in July 2021. An Exposure Draft to revise APES 330, including a new Section 10 covering restructuring practitioner's independence, fees and expenses, was considered at the September 2021 Board meeting ([Agenda Item 4](#)). The Board approved the issue of ED 04/21 *Proposed Revisions to APES 330 Insolvency Services*.

## Matters for Consideration

### 1. Submissions Received on APES 330 ED 04/21

[ED 04/21](#) was issued on 10 September 2021 for public comment until 27 October 2021. APESB received 5 submissions that are all generally supportive of the proposed amendments:

- Australian Restructuring Insolvency and Turnaround Association (ARITA);
- Chartered Accountants Australia and New Zealand (CA ANZ);
- CPA Australia;
- Deloitte; and
- The Institute of Public Accountants (IPA).

The submissions are summarised below, and comments are set out in full in General and Specific Comments Tables (Agenda Items 7(a) and (b)).

ARITA note they were highly involved in providing feedback on the review of APES 330 and are supportive of the amendments.

CA ANZ support the proposed revisions to APES 330 and applaud the Board for ensuring the standard remains fit-for-purpose with the insolvency reforms. They believe the revisions should increase trust by creditors in restructuring and restructuring practitioner's independence. CA ANZ strongly support the inclusion of the new Section 10 specifically clarifying independence requirements for restructuring practitioners and the opportunity to enhance the Declaration of Independence Relevant Relationships and Indemnities (DIRRI).

CPA Australia supports the amendments including:

- incorporating restructuring practitioners into the standard and a separate section to acknowledge the different role;
- the importance of a standard of best practice where the restructuring practitioners may not be a member of a specialised insolvency professional body;
- reflecting restructuring practitioner's remuneration separately due to the differences in approval processes;
- proposed changes to the DIRRI making it easier to read for stakeholders; and
- the amendments should give stakeholders confidence that practitioners will adhere to the standards.

Deloitte are generally supportive and believe the new Section 10 adequately captures the purpose and intention of the new insolvency regime regarding independence and is consistent with remuneration provisions in the *Insolvency Practice Rules (Corporations)*.

Overall, the IPA supports the revisions to APES 330 and agree that the new Section 10 is aligned with the insolvency reforms in respect of independence and fees. However, the IPA raised some high-level concerns, which in short are (refer to full comments in Agenda Item 7(a)):

- Need to ensure that the proposals do not act as an unnecessary barrier to members registering as restructuring practitioners.
- It may be too early to assess the new regime and other insolvency reforms may require additional revisions to APES 330 (refer to section 3 below).

- Whether the effective date should be extended (refer to section 6 below).
- The policy objectives of the insolvency reforms include reducing the compliance burden.
- To conduct a post-implementation review in due course (refer to section 6 below).

Technical Staff believe the proposed changes and new Section 10 are less onerous than Sections 4 and 8 of extant APES 330, properly reflect these new appointments and will hopefully build trust in restructuring, including from creditors.

Technical Staff also believe the proposed revisions do not create unnecessary barriers and will assist restructuring practitioners to understand how APES 330 applies and their professional and ethical requirements when undertaking these types of engagements, which should also reduce the compliance burden.

### 1.1 ARITA – Claiming Fees for Dealing with Complaints

ARITA raised a separate issue unrelated to the insolvency reforms, highlighting a point of difference between APES 330 and ARITA’s Code of Professional Practice (CoPP) (refer Specific Comment 11).

ARITA’s Practice Statement Insolvency (PSI) 8 of the CoPP at paragraph 8.2.3 notes that remuneration for time spent communicating with regulators is not ‘necessary and proper’ including regarding “*complaints about the Member or the conduct of a particular Administration, unless the complaint is deemed spurious by the Regulator*”.

Appendix 3 of APES 330 is substantively the same but excludes the underlined wording. Technical Staff agree that practitioners should be able to claim remuneration for time spent dealing with the regulator in relation to complaints that are proven false or without substance. This matter was raised with the APES 330 Taskforce members, and it was suggested that APES 330 should refer instead to “*failed to uncover a breach of duties*”.

Technical Staff also note PSI 8 includes ‘*or disciplinary actions*’ which is not in Appendix 3 of APES 330, and for completeness and alignment, we believe that it should be.

Technical Staff propose to amend the final paragraph of Appendix 3 of APES 330 as marked-up below:

#### **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** unless the relevant regulator has failed to uncover a breach of duties in respect of the complaint;
- regulator surveillance, professional audits, ~~or~~ inspection of files, disciplinary actions, 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.

## 1.2 Proposed Amendment to Appendix 4

Technical Staff believe Appendix 4 should include “*and the company’s director(s) retain control of the company*” to reflect how restructuring differs from other appointments where technically the insolvency practitioner acts as an agent. However, they are also in control. For example, under section 437B of the *Corporations Act 2001*, an Administrator:

*When performing a function, or exercising a power, as administrator of a company under administration, the administrator is taken to be acting as the company’s agent.*

However, the Administrator controls the company. Whereas, under restructuring, the director(s) retain control of the company, and the restructuring practitioner acts as an agent and assists the directors to develop and implement a restructuring plan.

Technical Staff propose to amend the first paragraph after the introduction of Appendix 4 of APES 330 as follows (footnotes have been removed for this purpose only and will remain in the standard):

**Restructuring Practitioners** are appointed by the company and act as both an officer and as an agent of the company to which they are appointed and the company’s director(s) retain control of the company. Notwithstanding that a **Restructuring Practitioner** is appointed by the company and acts as an agent for the company, the **Restructuring Practitioner** has important obligations to fulfil for the company’s creditors and to remain independent.

## 1.3 Comments Received from AFSA

The Australian Financial Security Authority (AFSA) have provided the following informal feedback on the proposed APES 330 ED:

- The definition of Trustee in APES 330 would not apply to the rare appointment of administrators of a debt agreement under the *Bankruptcy Act 1966*. Technical Staff agree that APES 330 is not intended to capture these appointments.
- Whether paragraph 3.4 of APES 330 should state that providing professional services in respect of restructuring a solvent entity are not prevented ‘*provided the restructuring does not leave the entity insolvent*’. Technical Staff believe this is implied in paragraph 3.4 as it is structuring a solvent entity’s financial affairs, whereas if the restructuring resulted in insolvency, it would be an insolvent entity and paragraph 3.3 would apply and prevent the services.
- Whether paragraph 4.12(a)(iv) should also include a close family relationship with a creditor. Technical Staff note this has not previously been raised and any change would create misalignment with the ARITA CoPP. Further, we are not aware of any evidence these relationships are causing specific concerns and it may already be captured under material business relationships in paragraph 4.12(c).
- Paragraph 4.15 is inconsistent with the ‘double might’ test but noting Appendix 1 covers this. Technical Staff also note paragraph 4.15 uses the defined term ‘Independence’ which in turn refers to Appendix 1.
- Whether Appendix 3 should also refer to ‘reasonable’. Technical Staff note this Appendix focusses on necessary and proper and including ‘reasonableness’ may cause confusion.

Technical Staff do not recommend any further changes to APES 330 in relation to the above and the taskforce is supportive of this approach.

## 2. Restructuring Appointments

Restructuring practitioner appointments currently remain reasonably low. Based on [ASIC insolvency statistics](#) on 8 November 2021, since 1 January 2021, 23 (15 as of 17 August 2021) restructuring practitioners have been appointed and 17 (10 at 17 August 2021) have resulted in restructuring plans being implemented. This may be impacted the newness of the regime, untested processes and creditors' lack of trust.

Technical Staff believe that and consistent with submissions received, the proposed Section 10 in APES 330 should increase trust and improve perceptions of restructuring practitioner's independence, potentially increasing appointments. Appointments may also increase as the impact of government COVID stimulus packages decrease.

## 3. Other Federal Government Insolvency Reforms

As noted in the IPA's submission, the Federal Government is undertaking other insolvency reforms (refer to General Comment 13 for further discussion).

Exposure drafts for consequential amendments to small business insolvency reforms<sup>12</sup> propose amendments to various Acts, including minor changes to the *Corporations Act 2001* and *Corporations Regulations 2001*.

One proposed change to the *Corporations Regulations 2001* means the restructuring plan may provide that the restructuring practitioner for a restructuring plan is taken to act as the company's agent, whereas this is the default position under the current provision. Technical Staff do not believe this impacts the proposed changes to APES 330 as it is likely in most cases to be included in the plan and irrespective, the restructuring practitioner of the company (before the plan commences) acts as the company's agent.

Treasury is currently consulting on the treatment of trusts under insolvency law.<sup>3</sup> At this stage, potential changes appear to relate to statutory mechanisms for how insolvency laws apply to trusts and may not impact the obligations of members under APES 330.

On behalf of the Treasury, an independent panel of experts is reviewing whether insolvent trading safe-harbour provisions established in 2017 remain fit-for-purpose.<sup>4</sup> The safe-harbour protects directors from personal liability for insolvent trading and any changes may not impact the obligations of members under APES 330.

Treasury consulted on improving schemes of arrangement to better support businesses seeking views on the appropriateness of an automatic moratorium on creditor claims during the formation of the scheme and input other improvements to schemes.<sup>5</sup>

While some of the above reforms may impact APES 330, the timing of changes is uncertain. Technical Staff will continue monitoring these reforms for any potential impacts on APES 330.

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<sup>1</sup> [Consequential amendments to small business insolvency reforms | Treasury.gov.au](#)

<sup>2</sup> [Consequential amendments to regulations supporting small business insolvency reforms | Treasury.gov.au](#)

<sup>3</sup> [Clarifying the treatment of trusts under insolvency law | Treasury.gov.au](#)

<sup>4</sup> [Review of the insolvent trading safe harbour | Treasury.gov.au](#)

<sup>5</sup> [Improving schemes of arrangement to better support businesses | Treasury.gov.au](#)

#### 4. APES 330 Taskforce and ASIC

Technical Staff provided an update to the Taskforce members on 11 November 2021 on the submissions received, AFSA's comments and the proposed changes set out above. Due to the minor nature of the proposed changes, a separate Taskforce meeting was not convened. Taskforce members agree with Technical Staff's proposed approach.

Technical Staff have also provided ASIC with details of the proposed changes and will provide a verbal update at the Board meeting.

#### 5. Proposed Revised APES 330

Due to the limited changes being presented to the Board in relation to Appendices 3 and 4 highlighted above, Technical Staff have not reproduced the complete proposed revised APES 330 in this agenda paper.

#### 6. Proposed Effective Date of APES 330 and Proposed Post-Implementation Review

ED 04/21 included a proposed effective date for the revised APES 330 of 1 April 2022. The IPA recommend this be delayed to determine if additional changes are required due to the other insolvency reforms or to delay the start date until 1 July 2022.

Technical Staff believe there is a level of urgency to address the restructuring practitioner reforms as the legislation has been effective since 1 January 2021 and can increase trust in such appointments. Accordingly, technical Staff do not recommend delaying the effective date beyond 1 April 2022.

The IPA also recommend APESB undertake a post-implementation review of the revised APES 330 to ensure it is working as intended and enhancing the post-COVID policy objectives.

Technical Staff agree a post-implementation review is warranted due to the newness of the reforms and significantly different nature of the appointments. This also provides an opportunity to assess the Federal Government's other insolvency reforms.

*Technical Staff recommend APESB undertakes a post-implementation review of the proposed revised APES 330 in 12 months from the effective date of 1 April 2022.*

#### 7. Impact on small and medium practices (SMPs)

The restructuring process relates to small companies and SMPs are more likely to be involved compared to larger firms. Technical Staff believe any impact from the proposed amendments will be minimised for SMPs. The proposed Section 10 is less onerous than Sections 4 and 8 of extant APES 330 and provides greater clarity and guidance for practitioners.

## Way Forward

Subject to the Board's approval, Technical Staff propose to:

- issue the revised APES 330 by mid-December 2021; and
- include on APESB's Issues Register to undertake a post-implementation review of revised APES 330 in 12 months from 1 April 2022.

## Recommendations

The Board:

- note the update on submissions received on ED 04/21;
- approve, subject to the Board's review comments and editorials, to issue the proposed revised APES 330; and
- approve APESB undertaking a post-implementation review of the revised APES 330 in 12 months from the effective date of 1 April 2022.

## Materials presented

Agenda Item 7(a)      General Comments Table ED 04/21

Agenda Item 7(b)      General Comments Table ED 04/21

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