

## Report of the Committee convened under s 40-50 of the Insolvency Practice Schedule (Bankruptcy) to make a decision about Mr Daniel Moore, a registered trustee

### Committee members

- Mr Paul Eric, delegate of the Inspector-General in Bankruptcy (the **Inspector-General**) (Chair)
- Dr Jennifer Dickfos, the Attorney-General's appointee
- Ms Kelly-Anne Trenfield, a registered trustee chosen by ARITA

### Decision

The Committee has decided under s 40-55(1) of the *Insolvency Practice Schedule (Bankruptcy)* (the **Schedule**) which is at Schedule 2 to the *Bankruptcy Act 1966* (the **Act**) that:

1. Grounds One and Two in the Show Cause Notice are made out in part;
2. Mr Moore should continue to be registered with the conditions specified at paragraph 111 of the Committee's report, under s 40-55(1)(f) of the Schedule; and
3. The Inspector-General should publish the Committee's report with pseudonyms to protect the personal information of third parties, under s 40-55(1)(h) of the Schedule.

The Committee recommends that:

4. The Inspector-General conduct an inspection of Mr Moore's practice within 12 months of the date that this decision takes effect; and
5. The Inspector-General give effect to this decision no earlier than 10 business days from the date of this report.

### Introduction

1. On 10 March 2021 the Committee was convened under section 40-50 of the Schedule by Mr Tim Cole (the **Delegate**), representing the Inspector-General, to consider the referral of Mr Daniel Moore (**Mr Moore**), a registered trustee, and make a decision about him under section 40-55 of the Schedule.
2. Under section 50-90 of the *Insolvency Practice Rules (Bankruptcy) 2016* (the **Rules**), the Committee must use its best endeavours to decide the matter within 60 days after the matter is referred to it. The Committee notes that 60 days from the date of referral lapsed on 9 May 2021. The series of events contributing to this time frame is set out below at paragraphs [12]-[14].

### Background

3. Mr Moore became a registered trustee on 23 December 2008. He has over 28 years of experience in insolvency accounting, having begun his career working at the Insolvency and Trustee Service Australia<sup>1</sup> (**ITSA**). He later worked with various firms including Ernst & Young, PPB, Howarth & Horwath, R.E. Murphy & Co, Lucas & Currie, P.A. Lucas & Co, Currie Biazos Insolvency, BRI Ferrier, and DPM Recovery (as a sole practitioner). In 2019 Mr Moore joined BCR Advisory where he currently practises.
4. Mr Moore described his current practice to the Committee as one that he keeps to a "manageable level." He indicated that he does not currently employ anyone, and that he is very "hands-on",

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<sup>1</sup> Now called the Australian Financial Security Authority (AFSA).

apart from having one person assist with “back of house stuff”, such as billing.<sup>2</sup> He also stated that he is “selective” about the types of administrations that he consents to, in order to ensure that his practice is financially viable: “I’m selective in what I do and I do what I’m – what I have a capacity to do.”<sup>3</sup>

5. Mr Moore also indicated that, in his current practice he is able to obtain assistance from a larger organisation, which in turn is supported by the BCR Advisory network, and this is helpful in larger matters.<sup>4</sup>
6. The facts and circumstances leading to the Committee’s formation are contained in the bundle of documents before the Committee, comprising 373 pages (the **Materials**). These include the Show Cause Notice (**SCN**) issued by the Inspector-General on 3 December 2020, and seven further documents, which were provided by the Inspector-General in response to a request by the Committee on 29 March 2021.
7. In summary, the SCN described conduct by Mr Moore in four different bankrupt estates, between approximately 30 June 2014 and 20 March 2020. The SCN contained two grounds:
  - 7.1. First, that Mr Moore failed to carry out adequately and properly the duties of a trustee or any duties or functions that a registered trustee is required to carry out under a law of the Commonwealth or of a State or Territory, or under the general law, as set out in paragraph 40-40(1)(l) of the Schedule; and
  - 7.2. Second, that Mr Moore failed to comply with a standard prescribed for the purposes of subsection (4) (under paragraph 40-40(1)(p) of the Schedule).<sup>5</sup>
8. The SCN identified conduct under the first ground in three bankrupt estates administered by Mr Moore, and conduct under the second ground in four bankrupt estates administered by Mr Moore. Further detail about each instance of Mr Moore’s conduct identified in the SCN is set out below at paragraphs 31-88.
9. Under paragraph 40-50(b)(i) of the Schedule, the Delegate sought a response from Mr Moore to the SCN within 20 business days of the date of the SCN (i.e. by 5 January 2021). Mr Moore, through his legal representative, sought, and was granted, an extension of time to respond to the SCN. On 8 February 2021 Mr Moore provided an explanation in response to the SCN (the **Response**), which was also included in the Materials.
10. The Delegate was not satisfied by the Response, and on 10 March 2020 referred Mr Moore to this Committee under paragraph 40-50(b)(ii) of the Schedule.

### **Process**

11. The Committee’s role is to decide one or more of the matters set out at sub-section 40-55(1) of the Schedule with respect to Mr Moore.
12. As part of this process, the Committee interviewed Mr Moore at AFSA’s offices in Brisbane on 24 May 2021 (the **Interview**). The Interview was originally scheduled for 14 April 2021, with the Committee Chair giving Mr Moore notice by email on 29 March 2021. However, Mr Moore’s legal representatives replied on that date advising that they were not available on 14 April 2021.

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<sup>2</sup> Transcript, page 19, para 65.

<sup>3</sup> Transcript, page 18, para 61.

<sup>4</sup> Transcript, page 18, para 61.

<sup>5</sup> The Standards for Registered Trustees in Division 42 of the Rules commenced on 1 September 2017. Before this date the relevant Performance Standards were in Schedule 4A to the *Bankruptcy Regulations 1996*.

13. In the intervening period, a Covid-19 related lockdown occurred from 30 March 2021 until 6 April 2021 in Greater Brisbane. These restrictions, which included limits on gatherings, remained in place in Greater Brisbane for 14 days until 12:00pm on 15 April 2021. Public holidays also fell on 2 April, 5 April, 25 April and 3 May 2021.
14. The Committee Chair sent a further notice on 29 April 2021 to Mr Moore's legal representative, inviting Mr Moore to attend an interview on 24 May 2021. Attempts were made by the Committee to confirm Mr Moore's attendance at the interview, by email correspondence addressed to his legal representatives on 7 May 2021, and by telephone calls to his legal representatives on Monday 10 May and Tuesday 11 May 2021.
15. On 12 May 2021 the Committee Chair personally delivered the Materials to the office of Mr Moore's legal representatives.
16. A solicitor from the firm representing Mr Moore wrote to the Committee Chair on 20 May 2021, indicating that Mr Moore would attend the interview on 24 May 2021, and requesting a copy of the Materials. The Committee Chair responded by letter dated 20 May 2021, providing the Materials once more.
17. The Interview, conducted at AFSA's offices at 1:00pm on 24 May 2021, was transcribed (the **Transcript**) and made available to the Committee and Mr Moore on 30 May 2021.
18. The Committee considers that the Interview was conducted as soon as practicable, in light of the events described above at paragraphs 12 and 13.
19. At the Interview, counsel for Mr Moore provided a Statutory Declaration made by Mr Moore on 24 May 2021 (the **Statutory Declaration**) to the Committee. When the Committee Chair asked why the Statutory Declaration was being provided at such a late stage, counsel for Mr Moore explained that Mr Moore had been occupied with other matters relating to the SCN, including the engagement of an expert to review all of Mr Moore's files, however this had not been able to be completed prior to the Interview.<sup>6</sup>

#### ***Notification to Mr Moore of Committee's conclusions***

20. The Committee provided a draft of this report and decision to Mr Moore's legal representatives on 21 June 2021 and further submissions were received by the Committee by letter dated 5 July 2021 (the **Further Submissions**).
21. The Committee considers that Mr Moore has been accorded procedural fairness.

#### ***Information before the Committee***

22. The Committee has had regard to:
  - 22.1. the Materials;
  - 22.2. the Response;
  - 22.3. the Transcript;
  - 22.4. Inspector-General Practice Direction 14<sup>7</sup>;
  - 22.5. Inspector-General Practice Direction 22<sup>8</sup>;

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<sup>6</sup> Transcript, page 7, paragraph 14.

<sup>7</sup> Entitled [Proper performance of duties of a trustee](#) (issued March 2010, updated April 2021).

<sup>8</sup> Entitled [Effective practitioner communication](#) (issued June 2011, updated April 2021).

- 22.6. Inspector-General Practice Direction 5<sup>9</sup>;
  - 22.7. Inspector-General Practice Direction 6<sup>10</sup>;
  - 22.8. Inspector-General Practice Direction 1<sup>11</sup>;
  - 22.9. the Statutory Declaration;
  - 22.10. List of cases referred to by the Committee (attached at **Annexure A**); and
  - 22.11. the Further Submissions.
23. The Further Submissions contained proposed inclusions for paragraphs 49-58 of the draft version of this report, and enclosed a statutory declaration by Mr Jason Porter dated 4 July 2021 and a statutory declaration by Mr Alan Scott dated 1 July 2021.
24. Where the Committee agreed that it was appropriate to include the information proposed in the Further Submissions, this has been noted in the report.

### **Summary of reasons for decision**

25. The Committee has found that Grounds One and Two in the SCN are made out in part.

#### ***Principles***

26. In respect of Ground One, the Committee has had regard to the principles, articulated by Tamberlin J in his consideration of sub-paragraph 1292(2)(d)(ii) of the *Corporations Act 2001*, which required a decision as to whether a person had "...failed...to carry out or properly perform adequately and properly: (i) the duties of a liquidator; or (ii) any duties or functions required by Australian law to be carried out or performed by a registered liquidator ..."<sup>12</sup>
27. These principles, broadly stated, are as follows:
- 27.1. The level of performance called for is that of "adequacy". The standard is that the duty must be performed "properly";
  - 27.2. The emphasis is on the adequacy level or sufficiency of performance of the function or role;
  - 27.3. The provision is designed to enable a board representative of the commercial and accounting communities to consider whether the function has been adequately and properly carried out;
  - 27.4. To evaluate the level of performance is a question of fact and degree which calls for the application of a standard; and
  - 27.5. It is not a qualitative consideration whether there has been performance, but rather calls for consideration as to the sufficiency of the acts or omissions of the administration.
28. In addition, the Committee has taken into account the decision of Hill J, in relation to the phrase "adequately and properly" in section 1292 of the *Corporations Act 2001*.<sup>13</sup>

*The question of whether duties or functions of an auditor have been carried out or performed 'adequately' is obviously a question which involves judgment in a particular case...If the failure to perform a statutory*

<sup>9</sup> Entitled [Trustees' guidelines relating to handling funds and keeping records](#) (issued June 2017, updated September 2021).

<sup>10</sup> Entitled [Remuneration entitlements of a registered bankruptcy trustee](#) (issued December 2010, updated April 2021).

<sup>11</sup> Entitled [Independence of personal insolvency practitioners](#) (issued June 2017, updated April 2021).

<sup>12</sup> *Dean-Willcocks v CALDB* (2006) 59 ASCR 698, at 709.

<sup>13</sup> *Davies v ASC* (1995) 18 ACSR 129 at 147-9.

or other duty was such as to be insignificant, de minimis or trivial, it could perhaps be possible to argue that the auditor had not failed to carry out or perform the relevant duty or function adequately.

29. In respect of Ground Two, the Committee has had regard to dictionary definitions of the words “fail” and “comply”, in the absence of judicial consideration of the phrase “failed to comply” in the context of the Schedule.<sup>14</sup> The *Macquarie Dictionary* relevantly contains the following definitions of “fail” as a verb:

*verb (i)* **1.** to come short or be wanting in action, detail, or result; disappoint or prove lacking in what is attempted, expected, desired, or approved...

*verb (t)* **6.** to neglect to perform or observe...

30. The *Macquarie Dictionary* also relevantly contains the following definitions of “comply”:

*verb (i)* (**complied, complying**)

**1.** to do as required or requested.

...

**3. comply with**, to act in accordance with (wishes, commands, requirements, conditions, etc.)

### Findings on specific grounds

#### ***Particularised Ground One - paragraph 40-40(1)(l) of the Schedule***

31. By this ground, Mr Moore was said to have failed to carry out adequately and properly the duties of a trustee, or any other duties or functions that a registered trustee is required to carry out under a law of the Commonwealth or of a State or Territory or under the general law. The Committee has concluded that this ground is made out in part.

#### ***Material before the Committee***

32. The Material contained information about two instances in which Mr Moore failed to carry out adequately and properly the duties of a trustee.

*First Instance - failure to carry out adequately and properly the duties of a trustee under ss 12 and 19(1)(i) of the Act:*

#### **Section 12 of the Act**

33. There were two aspects to this reference to s 12 of the Act:
- 33.1. Paragraph 12(2)(a) of the Act - failing to produce books to the Inspector-General in the bankrupt estates of Person 1 and Person 2, and by failing to answer an inquiry under the administration of Person 2; and
- 33.2. Paragraph 12(2)(b) of the Act - failing to answer an inquiry by the Inspector-General in the administration of Person 2.
34. The Committee considered the way in which the SCN framed section 12 as a “duty” which a trustee must comply with and had regard to correspondence by Mr Moore’s legal representatives dated 17 December 2020<sup>15</sup> and the Response.<sup>16</sup>

<sup>14</sup> The *Insolvency Practice Schedule (Corporations) 2016* does not contain an equivalent provision to s 40-40(1)(p) of the Schedule.

<sup>15</sup> Materials, page 256.

<sup>16</sup> Response, paragraphs 22.1 and 24.1.

35. The Committee did not think that paragraphs 12(2)(a) and (b) of the Act impose an *explicit* duty on trustees, but rather describe the Inspector-General's powers to require a trustee to produce books and answer an inquiry. The Committee took into account the reference to sub-section 12(2) of the Act at paragraphs 2.6-7 of *Inspector General Practice Direction 14*, which, in the Committee's view, identifies an *implicit* duty for trustees to comply when required to produce books or answer an inquiry. However, the Committee not aware of any reported judicial consideration of this point.
36. The Committee has concluded that Mr Moore's conduct did not amount to a failure to carry out adequately and properly a duty under the Act in this instance.

#### **Paragraph 19(1)(i) of the Act**

37. This instance also gave rise, under the SCN, to a failure to carry out adequately and properly a duty under paragraph 19(1)(i) of the Act, by failing to refer evidence of an offence to the Inspector-General in the administration of Person 2.
38. The Committee did not think the facts in the Material before it supported a finding that this part of the first ground was made out, noting the points in the Response.<sup>17</sup>
39. The Committee took into account the information in the Statutory Declaration<sup>18</sup> regarding this instance, however, the Committee found that this instance was not made out.

*Second Instance – failure to carry out adequately and properly the duties or functions that a registered trustee is required to carry out under ss 19(1) of the Act.*

#### **Sub-section 19(1) of the Act**

40. There were two aspects of sub-section 19(1) of the Act, by which a trustee has a duty to:
- 40.1. under paragraph (f), take appropriate steps to recovery property for the benefit of the estate, and
- 40.2. under paragraph (g), take whatever action is practicable to try to ensure that the bankrupt discharges all of the bankrupt's duties under the Act in the bankrupt estate of Person 3 in respect of the recovery of income contributions.
41. The Committee took into account the information in the Statutory Declaration<sup>19</sup> regarding this instance, as well as the matters raised in the Response<sup>20</sup> and in Mr Moore's response to the Inspector-General's 2019-20 Annual Inspection.<sup>21</sup>
42. The Committee also considered whether the term "property" in paragraph 19(1)(f) of the Act applied to income contributions, given the distinction between after-acquired income of a bankrupt (assessable for contributions) and vesting property (divisible for creditors). However, it was noted that sub-section 139ZG(3) of the Act provides that:

*[t]he total of any contributions or instalments that are not paid by the bankrupt is recoverable by the trustee as a debt due to the estate of the bankrupt. (underline inserted)*

The Committee therefore concluded that, on this basis, income contributions fall within the scope of the term "property".

<sup>17</sup> Response, paragraphs 29.1, 30-37 and 38.1.

<sup>18</sup> Statutory Declaration, paragraphs 38-56.

<sup>19</sup> Statutory Declaration, paragraphs 57(a), 58-73.

<sup>20</sup> Response, paragraphs 41.1, 41.2, 45-46, 47.1-47.5, 47.7 47.8, 47.9 and 48.

<sup>21</sup> Materials, pages 329-332.

43. The Committee was not persuaded that Mr Moore's actions were appropriate or reasonable, given his level of professional knowledge and experience. Nor could the Committee give much weight to Mr Moore's subsequent responses and explanations in the absence of contemporaneous file notes to support his decision making.
44. The Committee's view was that a prudent trustee would have taken timely action to recover unpaid income contributions, and utilised the powers available to him under the Act (such as section 139ZL, which empowers a trustee to issue a notice to garnishee the bankrupt's wages and/or paragraph 149D(1)(f) by which a trustee may object to the bankrupt's discharge) to achieve compliance. In this regard, the Committee agreed with comments in the Inspector-General's 2019-20 Final Inspection Report.<sup>22</sup>

#### **Committee's conclusion**

45. The Committee has concluded that the first instance under Ground One was not supported on the information before it, but the second instance was.
46. Accordingly, Ground One is made out in part.

#### **Particularised Ground Two - paragraph 40-40(1)(p) of the Schedule**

47. By this ground, Mr Moore failed to comply with a standard prescribed for the purposes of subsection (4), namely, Division 42 of the Rules in respect of conduct after 1 September 2017 and, in respect of conduct prior to that date, the Performance Standards in Schedule 4A to the *Bankruptcy Regulations 1996* (together, the **Prescribed Performance Standards**).

#### **Material before the Committee**

48. The Material contained information about seven instances in which Mr Moore was said to have failed to comply with a Prescribed Performance Standard.

#### **First Instance - Failure to comply with s 42-30(j) of the Rules in the administrations of Person 1 and Person 2.**

49. Sub-section 42-30(j) of the Rules requires registered trustees to co-operate with the Inspector-General by, for example, responding to reasonable requests for information. This instance was based on the same conduct identified above at paragraph 33.
50. In both the Person 1 and Person 2 administrations, the Committee's view was that a prudent trustee with Mr Moore's level of professional knowledge and experience, including having been employed at ITSA for 4 years, should have clearly understood the Inspector-General's role and the importance of giving timely and proper cooperation and assistance to enable him to effectively carry out his regulatory functions.
51. The Committee considered the matters raised in the Response<sup>23</sup> and the explanations in the Statutory Declaration.<sup>24</sup> In particular, the Committee noted, as requested in the Further Submissions, that Mr Moore stated in his Statutory Declaration that he considered he needed to seek legal advice about providing his file for the Person 1 administration to the Inspector-General as parts of it may have been subject to legal professional privilege.<sup>25</sup>

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<sup>22</sup> Materials, pages 183-188.

<sup>23</sup> Response, paragraphs 24.3, 25-27; 29.2 and 30-40.

<sup>24</sup> Statutory Declaration, paragraphs 10(d) and 38-56.

<sup>25</sup> Statutory Declaration, paragraphs 40-41.

52. However, the Committee also noted that, while the Inspector-General's request to Mr Moore to provide his file was made on 21 October 2019, it was not until 16 January 2020 that he delivered a CD-ROM purporting to contain the file to AFSA's Brisbane Office. The Committee has taken into account Mr Moore's concession, in the Statutory Declaration, that he could have sought legal advice more quickly.<sup>26</sup>
53. No further information has been provided by Mr Moore about his dilatory response to the Inspector-General's request for the file for the Person 1 administration. However, the Committee has taken into account Mr Moore's statement, in the Statutory Declaration, that he genuinely believed the CD-ROM delivered to AFSA's offices on 16 January 2020 contained the file.<sup>27</sup>
54. With regard to the Inspector-General's request for material in the Person 2 administration, made on 2 November 2015, the Committee noted, as proposed in the Further Submissions, that Mr Moore stated in his Statutory Declaration that he sought the material from Person 2 on 23 November 2015.<sup>28</sup> Mr Moore also stated that "No response was received from Person 2. After several attempts were made, I received a response from Person 2."<sup>29</sup>
55. Mr Moore also requested, in the Further Submissions, that the Committee note the fact that he assisted the Inspector-General by giving evidence at the prosecution of Person 2 in Launceston, Tasmania, on or about 15 January 2019.<sup>30</sup> The Committee has taken this into account, but is hesitant to characterise Mr Moore's actions in giving evidence at a criminal trial as providing "assistance", "at the request of" the Inspector-General. In the Committee's view, Mr Moore was under a duty, first, as an officer of the Court, and second, as a person capable of providing relevant and admissible evidence in a criminal proceeding, to appear as a witness. The Committee also considered that Mr Moore's physical attendance at Launceston Magistrates' Court did not amount to "assistance" provided to the Inspector-General *per se*, but rather compliance with a summons issued by the Court in a proceeding conducted by the Commonwealth Director of Public Prosecutions - an independent prosecuting authority.
56. As requested by the Further Submissions, the Committee also noted Mr Moore's statement in the Statutory Declaration that he "can only assume" that he was unable to assist the Inspector-General with requests for information made by telephone after he departed the Court in Launceston on 15 January 2019 because he did not have the file in front of him.<sup>31</sup> However, given Mr Moore's statement that he has "absolutely no recollection"<sup>32</sup> of this telephone call, the Committee considered it was not in a position to make any findings as a result of Mr Moore's explanation in the Statutory Declaration, as this explanation appears to be based on speculation.
57. In light of Mr Moore's admissions about delays in providing his files and responding to inquiries, and apology to the Inspector-General, the Committee found this instance was supported on the Material before it.

*Second Instance – Failure to comply with s 42-15(3) of the Rules, and failure to comply with s 42-10(1) of the Rules, in relation to a confidential psychiatric report in the bankrupt estate of Person 1.*

58. There were two elements to this instance, which was based on Mr Moore's disclosure of a confidential psychiatric report provided to him by Person 1, in response to a request:

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<sup>26</sup> Statutory Declaration, paragraph 44.

<sup>27</sup> Statutory Declaration, paragraph 42.

<sup>28</sup> Statutory Declaration, paragraphs 48-49.

<sup>29</sup> Statutory Declaration, paragraph 50 (pseudonym "Person 2" added).

<sup>30</sup> Statutory Declaration, paragraph 53.

<sup>31</sup> Statutory Declaration, paragraph 54.

<sup>32</sup> Statutory Declaration, paragraph 53.

- 58.1. First, sub-section 42-15(3) of the Rules provides that a registered trustee must preserve confidential information where necessary, unless disclosure of such information is required by law; and
- 58.2. Second, sub-section 42-10(1) of the Rules requires a registered trustee to act honestly and impartially in relation to each administration.
59. With regard to the requirement that Mr Moore preserve confidential information where necessary, the Committee was not persuaded or convinced by the explanations in the Response<sup>33</sup> or the Statutory Declaration.<sup>34</sup> The Committee's view was that a prudent trustee with Mr Moore's level of professional knowledge and experience, including having been employed at ITSA for 4 years, should have clearly understood the importance of keeping confidential information and exercised greater care and judgement in handling sensitive medical reports.
60. While the Committee noted that Mr Moore did not "publish" the confidential medical report widely and entered into a subsequent deed of release with Person 1, he accepts that he failed to preserve the confidentiality of the information, with the other factors merely going to mitigate the consequences of his actions.
61. Mr Moore submitted, in the Further Submissions, that the Committee should note his statement in the Statutory Declaration that:
- As I am not a psychiatrist or a psychologist, I was not qualified to make such an assessment as to whether Person 3 required the treatment referred to in the Documents; as such I decided that I should seek advice from a person who was so qualified.*<sup>35</sup>
62. The Committee has taken into account Mr Moore's stated motivation for disclosing the confidential medical report and the context in which this occurred.
63. Mr Moore also submitted, in the Further Submissions, that the Committee should note his statement in the Statutory Declaration that he spoke with the person to whom he sent the confidential medical report prior to sending it to them, and said words to the effect of "I am seeking a confidential opinion on a matter."<sup>36</sup>
64. The Committee has taken this statement into account, but is unable to place much weight on it for the reasons at paragraph 66 below.
65. Finally, Mr Moore submitted, in the Further Submissions, that due to the context in which the report was disclosed, the recipient would have understood that it was confidential. This submission appears to be based on the statement in the Statutory Declaration that Mr Moore believed the recipient "had an obligation" to keep the report confidential: first, because of the words uttered by him during the telephone call prior to the disclosure, and second, because that person was a medical professional.<sup>37</sup>
66. The Committee does not regard these submissions as persuasive, given that they are based on Mr Moore's subjective beliefs as to the obligation that he considered the recipient of the confidential medical report to be under, as a result of his recollection of his own verbalisations during a telephone call and the recipient's status as a medical professional. The Committee considered that the gravamen of this instance lay in Mr Moore's conduct in disclosing the confidential medical report in circumstances where he was under an obligation to preserve the

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<sup>33</sup> Response, paragraphs 5.2 and 8-15.

<sup>34</sup> Statutory Declaration, paragraphs 10(a), 11-23.

<sup>35</sup> Statutory Declaration, paragraph 16 (Pseudonym "Person 3" added).

<sup>36</sup> Statutory Declaration, paragraph 18.

<sup>37</sup> Statutory Declaration, paragraph 19(b).

confidentiality of the information contained in it (noting that Mr Moore does not dispute that he was under such an obligation).

67. The Committee also considered that Mr Moore's subjective beliefs about the obligation that the *recipient* of the report may have been under to keep the information confidential are not relevant to its assessment under sub-section 42-15(3) of the Rules. For that reason, the Committee has not attempted to inform itself or determine whether Mr Moore's subjective beliefs as to the requirements for confidentiality upon medical practitioners at the relevant time were reasonable or correct, particularly in circumstances where the confidential medical report provided did not contain – to the Committee's knowledge – the information of a patient of the person to whom Mr Moore made the disclosure.
68. Finally, the Committee was concerned that Mr Moore did not comprehend that the private information in the medical report was that of Person 3 and that they (not the bankrupt) were entitled to have that kept confidential.
69. As noted above at paragraph 58, according to the SCN, this conduct also failed to comply with the requirement in section 42-10(1) of the Rules for a registered trustee to act honestly and impartially in relation to each administration. The Committee found that this element was made out in part.
70. The Committee considered the matters set out in the Response<sup>38</sup> and the explanation in the Statutory Declaration.<sup>39</sup> While not bound by rules of evidence under section 50-55(2) of the Rules, the Committee felt that there should be strong evidence to support alleged dishonesty (noting the principle in *Briginshaw v Briginshaw* (1938) 60 CLR 336 (**Briginshaw**)<sup>40</sup>, to which Mr Moore's counsel referred in his submissions at the Interview<sup>41</sup>).
71. The Committee did not think there was adequate information before it to show that Mr Moore acted dishonestly. However, the Committee did think aspects of Mr Moore's conduct toward Person 1 lacked impartiality, given the adverse complaint finding by AFSA dated 3 April 2020 in respect of Mr Moore's conduct: filing a third objection, making a threat to bankrupt Person 1 a second time, and not taking proper account of his personal situation.<sup>42</sup>

*Third Instance - as required by s 42-15 of the Rules, failure to communicate in an objective and professionally courteous tone and manner, in connection with the report to creditors in the Person 1 administration dated 31 July 2019.*

72. The Committee had regard to the Response<sup>43</sup> and the explanation in the Statutory Declaration.<sup>44</sup> The Committee's view was that a prudent trustee with Mr Moore's level of professional knowledge and experience, including having been employed at ITSA for 4 years, should have exercised greater skill and judgement in reporting to creditors in a way that was objective and did not impugn the Inspector-General.

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<sup>38</sup> Response, paragraphs 5.1, 5.3, 6, 7, 10, 12.1, 13-16.

<sup>39</sup> Statutory Declaration, paragraphs 10(b) and 24-30.

<sup>40</sup> See Dixon J, at 362: "The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal."

<sup>41</sup> Transcript, page 10, paragraph 20.

<sup>42</sup> Materials, page 157.

<sup>43</sup> Response, paragraphs 17-21.

<sup>44</sup> Statutory Declaration, paragraphs 10(c) and 31-37.

73. The Committee noted Mr Moore's admission (and apology to the Inspector-General) that his report to creditors dated 31 July 2019 was not objective or professionally courteous. Accordingly, the Committee found this instance was made out.
74. As for the SCN reference to the Person 4 administration, the Committee had regard to the Response<sup>45</sup> and the explanation in the Statutory Declaration.<sup>46</sup> After taking these into account, and given the lack of detail in the SCN, the Committee did not think this instance should be pursued at Interview and it was not included in the Chair's opening statement.

*Fourth Instance - conduct in the bankrupt estate of Person 5 in respect of the recovery of income contributions, amounting to non-compliance with s 42-185 and s 42-190 of the Rules. Section 42-185 of the Rules prescribes certain requirements for registered trustees in respect of income and contribution assessments, and s 42-190(2) of the Rules sets out the requirements for registered trustees to monitor the payment of contributions by regulated debtors.*

75. The Committee had regard to the Response<sup>47</sup> and the explanation in the Statutory Declaration<sup>48</sup> in respect of this instance. However, it was not persuaded that Mr Moore's actions were appropriate or reasonable, given his level of professional knowledge and experience. Nor could the Committee give much weight to Mr Moore's subsequent responses and explanations, absent contemporaneous file notes to support his decision making.
76. The Committee's view was that a prudent trustee would have taken timely action to recover unpaid income contributions, and utilised powers available to him under the Act (such as a notice under section 139ZL to garnishee the bankrupt's wages and/or an objection to discharge under paragraph 149D(1)(f)) to achieve compliance.
77. In this regard, the Committee agreed with the comments in the Inspector-General's 2019-20 Final Inspection Report<sup>49</sup> and the Committee considered that this instance was made out.

*Fifth Instance - non-compliance with the requirements, in s 42-10 and s 42-70 of the Rules, to act honestly and impartially, and to keep proper records in relation to work done, in relation to the bankrupt estate of Person 5.<sup>50</sup>*

78. With respect to the requirement in section 42-70 of the Rules of keeping proper records in relation to work done, the Committee had regard to the Response<sup>51</sup> and the explanation in the Statutory Declaration.<sup>52</sup>
79. The Committee's view was that a prudent trustee with Mr Moore's level of professional knowledge and experience, including having been employed at ITSA for 4 years, should have clearly understood the importance of proper record keeping and thought this was a serious issue, given that the Inspector-General, creditors and the bankrupt expect – and have a right under the Act – to request information and documents relating to the estate and/or inspect the administration file.<sup>53</sup>

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<sup>45</sup> Response, paragraphs 55.1 and 59-68.

<sup>46</sup> Statutory Declaration, paragraphs 73(a), and 74-76.

<sup>47</sup> Response, paragraphs 41.3-41.4, 42, 45-47.4, 47.7-47.10, 48 and 49.2.

<sup>48</sup> Statutory Declaration, paragraphs 57(a), 58-63.

<sup>49</sup> Materials, pages 183-8.

<sup>50</sup> To the extent that this conduct occurred prior to 1 September 2017, the relevant Performance Standards were s 2.2 of Division 2.2 (Duty to act honestly and impartially), s 2.12 of Division 2.4 (Records), and s 2.17(2) of Division 2.5 (File Maintenance).

<sup>51</sup> Response, paragraphs 41.6, 41.8-41.9, 44.1-44.4, 45-47.5, 47.7-47.9, and 51-53.

<sup>52</sup> Statutory Declaration, paragraphs 57(b), 58, and 66-67.

<sup>53</sup> As outlined in Inspector-General Practice Direction 22 at Annexure A, and Inspector-General Practice Direction 5 at paragraphs 1.20-2.13.

80. The Committee agreed with the comments in the Inspector-General's 2019-20 Final Inspection Report,<sup>54</sup> while also noting Mr Moore's admission in the Statutory Declaration that he could have kept more detailed file notes.<sup>55</sup> The Committee therefore found that Mr Moore failed to comply with the requirement to keep proper records in relation to work done in this instance.
81. In respect of the requirement in section 42-10 of the Rules and section 2.2 of the Performance Standards to act honestly and impartially, the Committee found this element was made out in part. In forming this view, the Committee considered the Response<sup>56</sup> and explanation in the Statutory Declaration.<sup>57</sup>
82. While not bound by rules of evidence (under sub-section 50-55(2) of the Rules), the Committee agreed that there should be strong evidence to support a finding of alleged dishonesty (noting the principle in *Briginshaw*, which Mr Moore's counsel referred to in his submissions at the Interview<sup>58</sup>). Taking this into account, the Committee was not satisfied that Mr Moore acted dishonestly.
83. However, the Committee found aspects of Mr Moore's conduct toward Person 5 lacked impartiality, given the apparently favourable treatment shown in granting him 'informal' hardship relief without proper basis. In this regard, the Committee agreed with comments in the Inspector-General's 2019-20 Final Inspection Report.<sup>59</sup>
84. Accordingly, the Committee found that this instance was made out in part.

*Sixth Instance - conduct in connection with the bankrupt estate of Person 5 in relation to failure to distribute estate funds in a timely manner. To the extent that this conduct occurred prior to 1 September 2017 it was subject to s 3.7 of Division 3.4 of the Performance Standards.*

85. The Committee had regard to the Response<sup>60</sup> and the explanation in the Statutory Declaration.<sup>61</sup> However, it was not persuaded that Mr Moore's actions were appropriate or reasonable, given his level of professional knowledge and experience. Nor could the Committee give much weight to Mr Moore's subsequent response and explanation, in the absence of contemporaneous file notes to support his decision making. In this regard, the Committee agreed with the comments in the Inspector-General's 2019-20 Final Inspection Report.<sup>62</sup>

*Seventh Instance – failure to make inquiries into an equitable property interest in the Person 4 administration, as required by paragraph 2.6(d) of the Performance Standards.*

86. Before the Interview, the Committee identified concerns about whether the wording of the provision (i.e. undertake preliminary inquiries and actions *at the start of each administration*) applied to the facts in this instance, given that the Person 4 administration was transferred to Mr Moore from the Official Trustee.

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<sup>54</sup> Materials, pages 183-188.

<sup>55</sup> Statutory Declaration, paragraph 66.

<sup>56</sup> Response, paragraphs 41.5, 41.7, 45, 46-47.4, 47.7-47.9, 49.3 and 50.

<sup>57</sup> Statutory Declaration, paragraphs 57(b), 58 and 64-65.

<sup>58</sup> Transcript, page 10, paragraph 20.

<sup>59</sup> Materials, pages 183-188.

<sup>60</sup> Response, paragraphs 41.10, 46-47.4, 47.6-47.11, 48-49.1 and 51.

<sup>61</sup> Statutory Declarations, paragraphs 57(c), 68-72.

<sup>62</sup> Materials, pages 183-188.

87. In view of this, and taking into account the Response<sup>63</sup>, the explanation in the Statutory Declaration<sup>64</sup> and Mr Moore's response to the Inspector-General's 2019-20 Annual Inspection,<sup>65</sup> the Committee's found that the facts did not support the ground being relied upon. As a result, this instance was not pursued at Interview or included in the Chair's opening statement.

***Committee's conclusion***

88. The Committee therefore found that the first, second, third, fourth and sixth instances under Ground Two were made out.
89. The Committee found that the fifth instance was made out in part.
90. The Committee was not satisfied on the information and evidence before it that the seventh instance under Ground Two was made out.
91. Therefore, the Committee concluded that Ground Two was made out in part.

**Decision of the Committee**

92. Under section 40-55 of the Schedule, the Committee must decide one or more of the options listed in sub-section 40-55(1). In making this decision, the Committee may have regard, relevantly, to:
- 92.1. any information provided by the Inspector-General;
- 92.2. any explanation given by Mr Moore to the Committee; and
- 92.3. any other matter that the committee considers relevant.

***Relevant Material***

*Information provided by the Inspector-General to the Committee*

93. On 10 June 2021, the Committee made an inquiry under s 50-75 of the Rules with the Inspector-General (the **Inquiry**) about Mr Moore's proposal in his Statutory Declaration regarding supervision by another registered trustee<sup>66</sup>, which the Committee had discussed with him during the Interview<sup>67</sup>.
94. On 16 June 2021, the Inspector-General replied to the Committee. A copy of the Inquiry, and the response received on 16 June 2021, were provided to Mr Moore on 21 June 2021.

*Information provided by Mr Moore to the Committee*

95. On 5 July 2021, Mr Moore provided the Further Submissions, and:
- 95.1. Statutory declaration by Mr Jason Porter dated 4 July 2021; and
- 95.2. Statutory declaration by Mr Alan Scott dated 1 July 2021.

*Comments by Mr Moore during the Interview*

96. The Committee covered four main areas with Mr Moore during the Interview:

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<sup>63</sup> Response, paragraphs 54.2, 57-58, 67.1 and 69.

<sup>64</sup> Statutory Declaration, paragraphs 77-80.

<sup>65</sup> Materials, pages 337-338.

<sup>66</sup> Statutory Declaration, paragraphs 94-96.

<sup>67</sup> Transcript, pages 24-25, paragraphs 106-115.

- 96.1. his professional background<sup>68</sup>;
  - 96.2. his current practice<sup>69</sup>;
  - 96.3. the types of continuing professional education he has undertaken in the past year<sup>70</sup>; and
  - 96.4. the contents of his Statutory Declaration.<sup>71</sup>
97. When asked about his relationship with AFSA, Mr Moore stated that he has often provided feedback: “I’ve sought to alert them of issues if they were coming, including in providing a heads up of somebody might be aggrieved and wants to make a complaint.”<sup>72</sup>
98. Mr Moore was also asked whether there had been any alteration to his practice as a trustee that has resulted from the inspections and the SCN. He responded:
- Every time I get an inspection, if there are comments made. Sometimes in the post-inspection report there’s a discussion. Sometimes I agree with the comments that are made in the report and sometimes I don’t .... They’re not judicial documents. They’re merely opinions of people who come and inspect.*<sup>73</sup>
99. Finally, Mr Moore was asked to describe how he proposed to interact with the people nominated in his Statutory Declaration<sup>74</sup> as potential supervisors for his practice in future, given that they were not located in the same city<sup>75</sup>, and he noted that Mr Bill Cotter (a registered trustee who he had engaged to conduct an audit of all his files, referred to in his Statutory Declaration<sup>76</sup>) was based in Brisbane.

#### **Relevant principles**

100. During the Interview, counsel for Mr Moore referred the Committee to a list of authorities annexed to a decision by a previous Committee, which was publicly available. Mr Moore’s counsel submitted that the Committee ought to have regard to these authorities, in addition to the decision in *Rich v Australian Securities and Investments Commission* (2004) 220 CLR 129.<sup>77</sup> The Committee has accordingly reviewed the relevant cases and identified the following, relevant, principles:
- 100.1. The powers to cancel or suspend registration of a trustee are not punitive. The function of the Committee is not to punish or exact retribution. It is entirely protective in the public interest;<sup>78</sup>
  - 100.2. The protection of the public includes deterrence;<sup>79</sup>
  - 100.3. It also includes the maintenance of a system under which the public can be confident that trustees will know that breaches of duty will be appropriately dealt with and that the

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<sup>68</sup> Transcript, pages 16-18, paragraphs 49-59.

<sup>69</sup> Transcript, pages 18-19, paragraphs 61-65.

<sup>70</sup> Transcript, page 23, paragraphs 93-97.

<sup>71</sup> Transcript, pages 24-25, paragraphs 106-115.

<sup>72</sup> Transcript, page 22, para 83.

<sup>73</sup> Transcript, pages 22-3, para 85.

<sup>74</sup> Statutory Declaration, paragraph 95.

<sup>75</sup> One of the people nominated in the Statutory Declaration did not ultimately provide a Statutory Declaration agreeing to supervise Mr Moore, however, the Committee notes that Mr Alan Scott, who provided a Statutory Declaration made on 1 July 2021, is located in the same city as the person nominated in the Statutory Declaration.

<sup>76</sup> Statutory Declaration, paragraph 89.

<sup>77</sup> The Committee found this decision was of limited application to the Committee’s task, as it primarily concerned a claim of “penalty privilege” in the context of an order for discovery, before a Court.

<sup>78</sup> *Re Inspector-General in Bankruptcy v Matthews* [1990] FCA 519, [18] (Von Doussa J).

<sup>79</sup> *NHPT v Members of the Companies Auditors & Liquidators Disciplinary Board* [2015] AATA 245 [18] (DP Tamberlin QC).

regulatory regime applicable to trustees is effective in maintaining high standards of professional conduct;<sup>80</sup>

- 100.4. The impact of the Committee's decision on the practitioner is to be given limited consideration, as the prime concern of the Committee is the protection of the public;<sup>81</sup>
- 100.5. Relevant matters include the practitioner's recognition and acceptance of the breaches of duty, attitude to compliance generally and willingness to improve. Genuine acceptance of failure, contrition and remorse are necessary requirements to rehabilitation;<sup>82</sup> and
- 100.6. A trustee in bankruptcy is a person who must command and retain the confidence of the Court, of the creditors and debtors in bankruptcy proceedings and of the general community. Their competence must be, and remain, of a high order.<sup>83</sup>
101. The Committee has also had regard to the Explanatory Memorandum to the *Insolvency Law Reform Bill 2015*,<sup>84</sup> which introduced a new framework for the regulation of registered trustees:
- 2.6 The insolvency profession must be skilled, honest and accountable in order for the insolvency regime to operate efficiently. Creditors and stakeholders are often unable to tell how the overall result of a liquidation or administration corresponded to the quality of the service provided by the insolvency practitioner and whether the costs incurred are reasonable. They must therefore be able to place a high degree of trust in the insolvency practitioner's integrity. Regulation that promotes a high level of professionalism and competence of insolvency practitioners is therefore essential to retaining confidence in the insolvency system as a whole.*

### **Submissions**

102. Mr Moore's submissions regarding the Committee's decision may be summarised as follows:
- 102.1. The condition at sub-paragraph 111.1 below should not apply to smaller administrations where the anticipated recovery will be less than \$30,000.00. The basis for this submission was that, first, to impose such a condition on smaller administrations would not be commercial or in the best interests of creditors; and, second, the condition at sub-paragraph 111.3 below will ensure that Mr Moore is appropriately supervised.
- 102.2. Mr Moore made the submission that conditions be imposed as a sensible and co-operative way in which to address the concerns raised by the Inspector-General over conduct which relates to file maintenance and processes and in this regard that there has been no findings of dishonest or similar misconduct.
103. The Committee confirms that no findings have been made of dishonest conduct by Mr Moore.

### **Committee's Decision**

104. Given the factual findings by the Committee at paragraphs 31-88 above, the Committee considered potential disciplinary action that might be appropriate in respect of Mr Moore, taking into account the admissions in the Statutory Declaration, in particular the proposed remedial action set out by Mr Moore in paragraphs 88-102.

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<sup>80</sup> *NHPT v Members of the Companies Auditors & Liquidators Disciplinary Board* [2015] AATA 245 [18] (DP Tamberlin QC).

<sup>81</sup> *NHPT v Members of the Companies Auditors & Liquidators Disciplinary Board* [2015] AATA 245 [18] (DP Tamberlin QC).

<sup>82</sup> *NHPT v Members of the Companies Auditors & Liquidators Disciplinary Board* [2015] AATA 245 [18] (DP Tamberlin QC).

<sup>83</sup> *Muir v Bradley* (1984) 57 ALR 155.

<sup>84</sup> [ParlInfo - Insolvency Law Reform Bill 2015 \(aph.gov.au\)](http://aph.gov.au).

105. The Committee also carefully considered the information provided to it by the Inspector-General (described at paragraph 94 above), the material before it (described at paragraph 22 above) and the statutory declarations provided by Mr Jason Porter and Mr Alan Scott described at paragraph 95 above.

106. The Committee's decision under section 40-55 of the Schedule is as follows:

*Registration*

107. The Committee considered the disciplinary outcomes in the matters of (former trustees) Ms Louise Thomson<sup>85</sup> and Mr Loke Wong<sup>86</sup> for reference, and noted that the nature and extent of the misconduct and seriousness of errors in those matters was absent in Mr Moore's case.

108. Therefore, the Committee did not think that Mr Moore's registration should be cancelled under paragraph 40-55(1)(c) of the Schedule. Accordingly, the Committee decided that Mr Moore should continue to be registered under paragraph 40-55(1)(a) of the Schedule, subject to conditions to be imposed on his practice under paragraph 40-55(1)(f) of the Schedule.

*Conditions*

109. The Committee reflected on the apparent lack of effective systems and controls in place in Mr Moore's practice, and the absence of support resources, to enable him to fully comply with his duties under the Act, the general law, and the standards required by the Schedule and the Rules, as well as the expectations of the Inspector-General.

110. While noting that Mr Moore moved from working as a sole practitioner (trading as DPM Recovery) to BCR Advisory in early 2019, it was apparent to the Committee from the Inspector-General's 2019-20 Inspection (in particular, Mr Moore's responses to the Systems and Controls Questionnaire)<sup>87</sup> and Mr Moore's responses during the Interview (set out above at paragraphs 4, 5 and 96.2) that he continues to do most (if not all) of the work in his administrations himself.

111. The Committee's concern was that there was a real risk that, without appropriate support, supervision, and updates to Mr Moore's systems and controls, errors identified in previous inspections (i.e. record keeping and timeliness) would be repeated. In this regard, the Committee agreed that the following conditions should be imposed on Mr Moore under paragraph 40-55(1)(f) of the Schedule from the date that this decision takes effect:

111.1. that he does not consent to act as a registered trustee of any regulated debtor's estate, unless he is to be jointly and severally appointed with another registered trustee, other than the registered trustees approved by the Committee for the purposes of paragraph 111.3 below, for a period of 24 months;

111.2. that he engage an independent registered trustee, approved by the Committee, to undertake an audit of his current files and provide a report to the Inspector-General within 3 months;

111.3. that he be supervised by two independent registered trustees, approved by the Committee, for a period of 24 months, during which time one or both of the supervising trustees shall, either jointly or separately, as agreed upon with each other and with Mr Moore:

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<sup>85</sup> Report of the Committee convened under s 40-50 of the Insolvency Practice Schedule (Bankruptcy) to make a decision about Ms Louise Thomson, a Registered Trustee, 30 July 2020.

<sup>86</sup> *Wong and Inspector-General in Bankruptcy and Ors* [2008] AATA 487.

<sup>87</sup> Systems and Controls Questionnaire, Materials, pages 368-72.

- 111.3.1. review all substantive correspondence to regulated debtors, and creditors, before being sent;
  - 111.3.2. meet with Mr Moore monthly to review active matters and actions taken since the last meeting; and
  - 111.3.3. provide professional and/or ethical advice and assistance to Mr Moore in administering regulated debtor estates.
- 111.4. that he shall ensure that any fees and expenses (if any) incurred as a result of complying with the condition at paragraph 111.3 are not borne by any regulated debtor's estate for which he is the registered trustee; and
- 111.5. that, of the 10 hours of Continuing Professional Education required to be completed each year of registration under sub-section 20-5(3) of the Rules, he completes 2 hours on the topics of ethics and professionalism, for a period of 24 months.
112. For the purposes of the condition at sub-paragraph 111.2 above, the Committee approves Mr William Cotter, registered trustee, of Robson Cotter Insolvency Group.
113. For the purposes of the condition at sub-paragraph 111.3 above, the Committee approves Mr Jason Porter and Mr Alan Scott, both registered trustees, of SV Partners.
114. The Committee also recommends that the Inspector-General conduct an inspection of Mr Moore's practice within 12 months of the date that this decision takes effect. The purpose of this recommendation is to enable the Inspector-General to form a view as to whether Mr Moore has made the required changes to his systems, controls, practices and procedures arising from the audit process referred to above at paragraph 111.2, and that they are working effectively.
115. Under sub-paragraph 40-60(c)(ii) of the Schedule, the Committee's reasons for imposing the conditions set out above at paragraph 111 are as follows:
- 115.1. In respect of the condition at sub-paragraph 111.1, Mr Moore indicated in his Statutory Declaration<sup>88</sup> that he currently only has 7 bankruptcy administrations on hand, therefore a direction that he not accept any further appointments for 24 months under paragraph 40-55(1)(d) of the Schedule was not considered necessary or appropriate. However, the Committee considered that a jointly appointed trustee who is responsible (i.e. jointly and severally) for each and every action taken in an appointment will provide a high level of assurance, over and above the professional supervision and support provided for in sub-paragraph 111.3;
  - 115.2. The Committee considered that it was necessary to clarify that the two independent registered trustees approved for the purposes of the condition at sub-paragraph 111.3 above would not be eligible to be jointly appointed (i.e. jointly and severally) to any regulated debtor's estate under the condition at sub-paragraph 111.1 above. The Committee's reasoning for this decision was that to allow such an arrangement would likely create an actual or perceived conflict for the registered trustees approved by the Committee to act as supervisors for Mr Moore for the purposes of sub-paragraph 111.3 above. That is, a fair-minded lay observer knowing the obligations of the independent supervisors to provide oversight and guidance to Mr Moore (outlined in sub-paragraphs 111.3.1-111.3.3 above) might reasonably apprehend that they could not do so impartially

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<sup>88</sup> Statutory Declaration, paragraph 87.

or without undue influence, if they stood to benefit from (or had liability under) joint and several appointments with Mr Moore.<sup>89</sup>

- 115.3. The Committee also considered, in respect of the condition at sub-paragraph 111.1 above that a joint and several appointee can provide ongoing day-to-day support to Mr Moore which a supervisor might not. In the Committee's view, the roles and responsibilities of the supervisor and joint and several appointee are different but complimentary, and together they provide a greater overall assurance than either could alone.
- 115.4. The Committee did not consider that 12 months would be an adequate period for the Inspector-General to assess a change in Mr Moore's conduct and practice until his current administrations were finalised and new ones were accepted (which the Committee anticipated would take longer than usual, given the published statistics showing falling rates of personal insolvency as at April 2021<sup>90</sup>), therefore a period of 24 months for joint appointments and supervision under the conditions at sub-paragraphs 111.1 and 111.3 was assessed as appropriate;
- 115.5. Based on the extent of suggested improvements noted in the preliminary audit of Mr Moore's files by registered trustee Bill Cotter, which Mr Moore described in his Statutory Declaration<sup>91</sup>, and which underpin the condition at sub-paragraph 111.2, the Committee did not consider that 12 months would be an adequate period for all of them to be implemented, and for the Inspector-General to assess the results of that implementation, within that timeframe (including a subsequent inspection<sup>92</sup>), therefore a period of 24 months for joint appointments and supervision under the conditions at sub-paragraphs 111.1 and 111.3 was assessed as appropriate; and
- 115.6. In respect of the condition at sub-paragraph 111.5, the Committee assessed that the topics of ethics and professionalism should form a specific focus of Mr Moore's Continuing Professional Education during the next 24 months, noting that these topics are directly relevant to the conduct discussed above at paragraphs 58-62 and 72-73.
116. With regard to the submission by Mr Moore that the condition at sub-paragraph 111.1 above should not apply to smaller administrations where the anticipated recovery will be less than \$30,000.00, the Committee rejected this submission for the following reasons:
- 116.1. First, such a condition is uncertain because it relies on a dollar figure in respect of an anticipated recovery, which requires a subjective assessment being made by Mr Moore at the commencement of an administration and is therefore open to a perception of manipulation or the real possibility of unexpected future recoveries (e.g. undisclosed assets, interest in deceased estate etc.);
- 116.2. Second, the primary concern of the Committee in formulating the conditions is the protection of the community rather than the commercial interests of Mr Moore; and
- 116.3. Third, Mr Moore's interests are adequately protected by section 20-40 of the Schedule, which enables him to apply to the Inspector-General to vary or remove this condition, for example, by showing that his practice and conduct no longer warrant the condition being maintained.

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<sup>89</sup> [Inspector-General Practice Direction 1 – Independence of personal insolvency practitioners](#) paragraphs 2.23-2.28 and 2.33-2.44.

<sup>90</sup> See <https://www.afsa.gov.au/about-us/newsroom/statistics> (viewed by the Committee on 10 June 2021).

<sup>91</sup> Statutory Declaration, paragraph 89.

<sup>92</sup> See <https://www.afsa.gov.au/about-us/newsroom/statistics> (viewed by the Committee on 10 June 2021).

117. The Committee also considered that the secondary trustee's remuneration in any regulated debtor's estate administered under the condition at sub-paragraph 111.1 above must follow the same guidelines<sup>93</sup> as the primary trustee (i.e. be reasonable and necessary). Accordingly, they should be taking a supervisory role to ensure the proper conduct of the estate rather than participating in the day to day tasks. As such the remuneration incurred will be commensurate with the size of the regulated debtor's estate and should be minimal for a small administration.

#### *Publication*

118. In formulating its decision, the Committee noted the submissions made on Mr Moore's behalf at the Interview regarding the deleterious effects of publication of a formal condition, in terms of "professional reputation and economic adverse effects."<sup>94</sup> The Committee has also taken these matters into account in deciding whether the contents of this report should be made public (in whole or part) under paragraph 40-55(1)(h) of the Schedule.
119. The Committee has also reviewed judicial and administrative determinations of applications for non-publication orders in regulatory matters<sup>95</sup> and considered the provisions of the Schedule and the Rules relevant to the Committee's role and statutory functions, and the contents of the Explanatory Memorandum referred to above at paragraph 101.
120. The Committee noted that sub-section 15-1(4) of the Schedule read together with paragraphs 15-1(2)(f) and (g) of the Rules prescribes certain information that must be included on the Register of Trustees maintained by the Inspector-General, including particulars of any disciplinary action taken against the person and a summary of the current conditions imposed on the person as a registered trustee.
121. The Committee also assessed that, provided the names of regulated debtors and their associates and other third parties were substituted or redacted in the report, the material in the report was not of an inherently sensitive nature.
122. Finally, the Committee considered that there was no material before it to indicate that publication would cause harm or prejudice to third parties.
123. Accordingly, the Committee decided that the Inspector-General should publish its decision and this report in full (subject to the personal details of third parties being redacted or de-identified), under paragraph 40-55(1)(h) of the Schedule. While it had regard to the contents of the Statutory Declaration<sup>96</sup> and the submissions by Mr Moore's counsel during the Interview<sup>97</sup> the Committee did not accept the arguments advanced.
124. In particular, the Committee felt that transparency was important for the protection of the general public and for the integrity of the disciplinary system under Part 2 of the Schedule. Given that the primary purpose of disciplinary tribunals is protective (rather than punitive), the Committee's view was that publication of its report and decision would be beneficial as it would promote public confidence in the personal insolvency system and serve an educative purpose for other practitioners.

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<sup>93</sup> [Inspector-General Practice Direction 6 - Remuneration entitlements of a registered bankruptcy trustee](#) paragraphs 1.3-1.5 and 5.1-5.6.

<sup>94</sup> Transcript, pages 26-27, paragraph 119.

<sup>95</sup> *Australian Securities and Investments Commission v Administrative Appeals Tribunal* (2009) 181 FCR 130; *Re Opus Capital Ltd and Australian Securities and Investments Commission* [2009] 181 FCR 130; *Australian International College Pty Ltd v Australian Skills Quality Authority* [2018] AATA 4753; *Sahai v Australian Securities and Investments Commission* [2021] AATA 590.

<sup>96</sup> Statutory Declaration, paragraphs 100-102.

<sup>97</sup> Transcript, paragraph 119.

*Timing of Decision*

125. The Committee recommends that the Inspector-General give effect to this decision no earlier than 10 business days from the date of this report.



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Mr Paul Eric  
Delegate of the  
Inspector-General (Chair)

Date: 15 July 2021



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Dr Jennifer Dickfos  
Attorney-General's  
appointee

Date: 15 July 2021



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Ms Kelly Trenfield  
Registered Trustee  
chosen by ARITA

Date: 15 July 2021

For Publication

## ANNEXURE A

### List of cases referred to by the Committee

<i>Sahai v Australian Securities and Investments Commission</i> [2021] AATA 590
<i>Australian International College Pty Ltd v Australian Skills Quality Authority</i> [2018] AATA 4753
<i>Joubert v Members of the Companies Auditors &amp; Liquidators Disciplinary Board</i> [2018] AATA 994
<i>NHPT v Members of the Companies Auditors &amp; Liquidators Disciplinary Board</i> [2015] AATA 245
<i>Re Opus Capital Ltd and Australian Securities and Investments Commission</i> [2009] 181 FCR 130
<i>Australian Securities and Investments Commission v Administrative Appeals Tribunal</i> (2009) 181 FCR 130
<i>Wong and Inspector-General in Bankruptcy and Ors</i> [2008] AATA 487
<i>Dean-Willcocks v CALDB</i> (2006) 59 ASCR 698
<i>Rich v Australian Securities and Investments Commission</i> (2004) 220 CLR 129
<i>Davies v ASC</i> (1995) 18 ACSR 129
<i>Re Inspector-General in Bankruptcy v Matthews</i> [1990] FCA 519
<i>Muir v Bradley</i> (1984) 57 ALR 155
<i>Briginshaw v Briginshaw</i> (1938) 60 CLR 336