# CALDB to Part 2 Committee — A review of disciplinary matters from 2017 to 2021

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*The Insolvency Law Reform Act 2016 (Cth) introduced significant changes to the disciplinary regime of registered liquidators and registered trustees. One such reform was the transfer of jurisdiction of liquidators from the Companies Auditors and Liquidators Disciplinary Board ('CALDB') to a Part 2 Disciplinary Committee ('Part 2 Committee'). This article presents the findings of a study of publicly available Part 2 Committee referrals and decisions from the period 1 March 2017 to 1 March 2021 to address the research questions: What kinds of conduct matters appear before Part 2 Committees and how is misconduct dealt with by the Committees? The study found that disciplinary matters involved either serious misconduct, or a series of 'low-risk' breaches together amounting to serious misconduct. There were generally consistent outcomes across the Part 2 Committees that were proportionate to the conduct. The study found there was significant improvement in time to resolution of matters compared to CALDB. This article also presents the author's novel findings regarding legal representation and the application of codes of conduct and 'soft law'. Consistent publication of decisions may provide more insight into the functions and processes of the Part 2 Committees which will benefit all stakeholders.*

## I Introduction

In 2017, the *Insolvency Law Reform Act 2016* (Cth) ('*ILRA*') was enacted which introduced significant changes to the disciplinary regime of registered liquidators and registered trustees (together known as insolvency practitioners).[1] A key objective of the *ILRA* was to harmonise the regulation of insolvency practitioners where there had been a divergent approach under the respective personal and corporate insolvency regulatory schemes.[2] Previously, serious offences relating to registered trustees were referred to a Bankruptcy Committee, and registered liquidators to the Companies Auditors and Liquidators Disciplinary Board ('CALDB').[3] The 2009 Senate Economics References Committee Inquiry found that separate approaches produced 'slow

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1 *Insolvency Law Reform Act 2016* (Cth). See, eg, Catherine Robinson, 'An Early Response to Regulatory Changes under the Insolvency Law Reform Act 2016 (Cth): A Survey of Registered Liquidators and Registered Trustees' (2019) 27(4) *Insolvency Law Journal* 211 ('An Early Response to Regulatory Changes under the Insolvency Law Reform Act 2016 (Cth)').

2 Explanatory Memorandum, Insolvency Law Reform Bill 2015 (Cth) 3 ('Explanatory Memorandum').

3 On 1 March 2017, the Companies Auditors and Liquidators Disciplinary Board ('CALDB') became the Companies Auditors Disciplinary Board.

and inflexible practitioner disciplinary systems'.[4] Specifically, there were concerns about CALDB on issues of transparency, a perceived lack of independence from Australian Securities and Investments Commission ('ASIC') and the prolonged time to hear and conclude conduct matters.[5] There were three options considered during reform.[6] The first two options included retaining the status quo and establishing a co-regulatory system.[7] The third option was preferred which saw an aligned disciplinary regime with expanded powers given to regulatory entities including Industry Bodies,[8] the Courts, the ASIC and the Australian Financial Security Authority ('AFSA') (together with the 'Regulators'). In addition, the *ILRA* ultimately saw jurisdiction of liquidators transferred to a newly formed Schedule 2 Disciplinary Committee ('Part 2 Committee') based on the committee in bankruptcy.

This article evaluates one aspect of the disciplinary process under the *ILRA*, that is referrals to and decisions of the Part 2 Committees. The research questions are: *What kinds of conduct matters appear before Part 2 Committees and how is misconduct dealt with by the Committees?*

This article addresses a gap in the literature as there has not been a review of Part 2 Committee disciplinary decisions since its commencement on 1 March 2017. Analysis of all available decisions are of particular relevance where there is no statutory requirement for Committee decisions to publish, and not all decisions are published. For this reason, analysis of Committee processes such as consistency and transparency of procedure are outside the scope of this study. This article also does not comment on the prevalence of misconduct in the profession. Rather it analyses the practitioner demographics, case statistics, the main heads and subtypes of misconduct, outcomes and important findings.

In this article, all publicly available Part 2 Committee referrals and decisions concerning registered liquidators and registered trustees were collated and analysed from March 2017 to March 2021. There were eight referrals from ASIC and three referrals from AFSA. Two of AFSA's referrals involved the one practitioner on two separate conduct matters. In the case of another practitioner, separate referrals were made by ASIC and AFSA

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4 Department of the Prime Minister and Cabinet, *Regulation Impact Statement — The Harmonisation and Modernisation of the Regulatory Framework Applying to Insolvency Practitioners in Australia,* Australian Government (Report, 2012) 1 ('*Regulation Impact Statement*').

5 Senate Economics References Committee, Parliament of Australia, *The Regulation, Registration and Remuneration of Insolvency Practitioners in Australia: The Case for a New Framework* (Report, September 2010) 76 ('*The Regulation, Registration and Remuneration of Insolvency Practitioners in Australia*').

6 *Regulation Impact Statement* (n 4) 1.

7 Ibid. The government rejected a co-regulatory approach. See also Catherine Robinson, 'Regulation of Insolvency Practitioners in a Pandemic' (2020) 28(4) *Insolvency Law Journal* 181 ('Regulation of Insolvency Practitioners in a Pandemic').

8 *Insolvency Practice Rules (Corporations) 2016* (Cth) ('*Insolvency Practice Rules (Corporations)*'); *Insolvency Practice Rules (Bankruptcy) 2016* (Cth) r 40-1 ('*Insolvency Practice Rules (Bankruptcy)*'). This provision sets out the industry bodies as prescribed for the purposes of s 40-110.

concerning the same conduct. Of the 11 referrals there were seven published Part 2 Committee decisions, and one decision of the Administrative Appeals Tribunal ('AAT').

This article found there were two types of conduct matters appearing before the Part 2 Committees. Serious breaches of an insolvency practitioners' legal duties and obligations, or a number of 'low-risk' breaches that together amounted to serious breach. The outcomes across all cases were largely consistent and ranged from continued unconditional registration to cancellation of registration. The author's novel findings may provide useful implications for insolvency practitioners and stakeholders generally, and form the basis of a wider review into the functions and processes of the Part 2 Committees.

This article is structured as follows. After this introduction, Parts II and III outline the policy background to the establishment of the Part 2 Committees and the current legislative framework in which they operate. Part IV examines the demographics of practitioners and key case statistics including time to resolution of the matter. Part V considers the individual sub-types of misconduct and presents useful Part 2 Committee insights and commentary which may inform the Committee's further decision-making. The discussion that follows in Part IV analyses the author's novel findings of the study. From these, key insights are identified which aim to inform insolvency practitioners, particularly those appearing before a Part 2 Committee. The article then reaches some conclusions.

## II Background of the regulatory framework from CALBD to Part 2 Committee

There is extensive commentary on the background to the *ILRA*.[9] This part will focus on the legislative and policy objectives behind transferring jurisdiction from a tribunal to individually convened Part 2 Committees.

Previously, the CALDB was formed to act as an independent expert disciplinary tribunal in respect of company auditors and liquidators who failed to carry out their obligations.[10] Between 2000 and 2016, there were 18 cancellations and 16 suspensions in respect of approximately 760 liquidators.[11] This was also seen as a relatively small number of practitioner

9 See, eg, Robinson, 'An Early Response to Regulatory Changes under the Insolvency Law Reform Act 2016 (Cth)' (n 1); Jason Harris, 'Insolvency Law Reform Act', *Australian Insolvency Law Blog* (Blog Post, 1 March 2017) <https://australianinsolvencylaw.com/2017/03/01/insolvency-law-reform-act/>.

10 CALDB was established under s 202 of the *Australian Securities and Investments Commission Act 1989* (Cth) ('*ASIC Act*'). The powers and functions of CALDB were provided in pt 9.2 of the *Corporations Act 2001* (Cth) ('*Corporations Act*') and pt 11 of the *ASIC Act*. CALDB is independent of ASIC, although it receives its funding from ASIC's budget (registration inquiry). See also Ian Ramsay and Miranda Webster, 'An Analysis of ASIC Enforcement against Auditors and Liquidators' (2021) 38(2) *Companies and Securities Law Journal* 112, 112–37.

11 CALDB, *Companies Auditors and Liquidators Disciplinary Board Annual Reports* (Report, 2000–16).

misconduct or default given there were 113, 000 formal insolvency appointments of registered liquidators from 2000 to 2009.[12]

The objectives under the *Corporations Act 2001* (Cth) ('*Corporations Act*') were designed for the discipline of registered liquidators by CALDB to be a fast and efficient process.[13] The move to a Part 2 Committee was designed to address the prolonged time for CALDB to reach a finding, with the process leading up to the hearing previously taking around 6 months to complete.[14] The time to hearing was approximately 2–3 weeks. After the hearing, if a determination was made against the respondent, a final, short hearing was held to determine what order the board should make. The whole process was generally completed within 12 months. There are high stakes in the decision of a disciplinary Committee or Tribunal. Given the effect upon a practitioners' livelihood, there is a need for matters be resolved as quickly and efficiently as possible.

There were also other concerns with CALDB. One is related to issues of transparency. The Senate Committee expressed concern about transparency of the CALDB's investigative and adjudicative processes.[15] The Senate Committee described the issue and its recommendation as follows:

> concerned with the transparency in decision making to make public the hearings, evidence and reasons for decisions of the CALDB would, subject to court order preventing disclosure, permit all evidence presented to the CALDB to be disclosed to any member of the public and enable members of the public to inspect past cases. Such an amendment would provide greater scrutiny and increased transparency in respect of actions before the CALDB.[16]

There was concern about CALDB's perceived lack of independence from ASIC, and the number of ad hoc referrals to CALDB. One commentator expressed the view that:

> when ASIC picks you as the one that they want to target and can find one of the things that go wrong and you are not one of the chosen ones, they will put you up to CALDB and they will rubberstamp it.[17]

In the commentators' opinion there were a group of insolvency practitioners that ASIC did not target, and ASIC appeared to then only target a limited number of offences in which to refer to CALDB.

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12 Working Party, *Review of the Regulation of Corporate Insolvency Practitioners* (Report, June 1997) 44. *The Regulation, Registration and Remuneration of Insolvency Practitioners in Australia* (n 5) 19, 59. See also Tabled evidence to Senate, Parliament of Australia, Canberra, 12 March 2010 (Insolvency Practitioners Association of Australia).

13 *The Regulation, Registration and Remuneration of Insolvency Practitioners in Australia* (n 5) 76. Evidence to Senate, Parliament of Australia, Canberra, 13 April 2010, 76 (Mr Geoff Slater).

14 *The Regulation, Registration and Remuneration of Insolvency Practitioners in Australia* (n 5) 76.

15 Department of Treasury, Australian Government, *A Modernisation and Harmonisation of the Regulatory Framework Applying to Insolvency Practitioners in Australia* (Options Paper, 2011) 73 ('*A Modernisation and Harmonisation of the Regulatory Framework Applying to Insolvency Practitioners in Australia*').

16 Ibid 75.

17 *The Regulation, Registration and Remuneration of Insolvency Practitioners in Australia* (n 5) 76 [6.40].

The overall aim of the *ILRA* was for the Part 2 Committees to be the primary forum for an expeditious resolution of disciplinary matters, by increasing the speed and informality of proceedings.[18] The Federal Government considered that ASIC may still:

> take the most complex matters directly to Court. However, this may see the committee dealing with a more refined set of simpler cases allowing it to develop the expertise to be a more streamlined process than currently possible through the Tribunal structure.[19]

The 2010 Senate Committee Inquiry Report recommended that establishment of a new disciplinary committee would align the corporate and personal insolvency systems and promote greater consistency of outcomes for practitioners.[20] In 2016, the Federal Government went on to adopt this recommendation under the *ILRA*. From 1 March 2017, CALDB would no longer have jurisdiction over liquidators and would have oversight in respect of auditors only, in its current form as the Companies Auditors Disciplinary Board. A new committee based on the disciplinary committee in Bankruptcy would assume the functions of the CALDB in disciplining liquidators. The Part 2 Committee was established to strengthen the discipline and regulatory oversight of practitioners and ensure a 'fair, timely, effective and transparent process' for resolving disciplinary matters.[21]

## III Summary of Part 2 Committee — Process and powers

This part will provide a brief overview of the process and powers of the Part 2 Committees.

The corporate insolvency regulator, the ASIC and the personal insolvency regulator, the AFSA (together with the 'Regulators') can convene a Part 2 Committee where they have issued a 'show-cause' notice ('SCN') to a practitioner. There are a number of grounds for issuing a SCN[22] including contravention of a provision of the *Corporations Act* or *Bankruptcy Act 1966* (Cth).[23] The lack of transparency in the substantive reasons for issuing SCN

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18 In 2011, the Parliamentary Secretary to the Treasurer and the Attorney-General jointly released an options paper, followed by a proposals paper: *A Modernisation and Harmonisation of the Regulatory Framework Applying to Insolvency Practitioners in Australia* (n 15). Department of Treasury, *A Modernisation and Harmonisation of the Regulatory Framework Applying to Insolvency Practitioners in Australia* (Proposals Paper, December 2011) <https://treasury.gov.au/sites/default/files/2019-03/Proposals_Paper_insolvency.pdf> ('*A Modernisation and Harmonisation of the Regulatory Framework Applying to Insolvency Practitioners in Australia*').

19 Explanatory Memorandum (n 2).

20 *The Regulation, Registration and Remuneration of Insolvency Practitioners in Australia* (n 5) 77.

21 Institute of Chartered Accountants in Australia, Submission to The Treasury, Australian Government, *A Modernisation and Harmonisation of the Regulatory Framework Applying to Insolvency Practitioners in Australia*, (3 February 2012).

22 *Corporations Act* (n 9) sch 2 ('*Insolvency Practice Schedule (Corporations)*'); *Bankruptcy Act 1966* (Cth) sch 2 ('*Insolvency Practice Schedule (Bankruptcy)*') s 40-40.

23 *Insolvency Practice Schedule (Corporations)* (n 22); *Insolvency Practice Schedule (Bankruptcy)* (n 22) s 40-40(f).

has been previously examined.[24] The power to convene a Part 2 Committee can only be enlivened where the Regulators issued a SCN and did not receive an explanation within 20 business days, or were not satisfied by the explanation.[25]

The functions of the Part 2 Committee are to administer the objectives of the legislation in ensuring any person registered as a trustee or liquidator has an appropriate level of expertise and behaves ethically.[26] The Part 2 Committee can make a range of orders to this effect including continuing a registered liquidator or registered trustee's registration, cancelling and suspending registration for a period or indefinitely, and imposing conditions on the liquidator or trustee.[27] Orders can also be imposed on *all other* insolvency practitioners preventing them from allowing the subject practitioner to carry out functions or duties for a period of up to 10 years.[28]

The Part 2 Committee's processes are prescribed in the legislature. These include experience and membership of the Committees, time to convene a Committee, processes in keeping records, making inquiries, interviewing an insolvency practitioner regarding a proposed cancellation of a registration, requirement to make a decision, and timeframe and disclosure of decisions and reports.[29] Following criticism of CALDB, it was implicit in the policy reasoning behind the *ILRA* that a Part 2 Committee be required to use its best endeavours to make a decision in relation to disciplinary matters within 60 days.[30]

A key issue for the Part 2 Committees relates to transparency in decision-making. There is no requirement to state the grounds upon which the committee came to a decision, other than to include in the report a statement of reasons of any minority in the decision.[31] There is an expectation that the Committees are conducted in accordance with procedural fairness and natural justice.[32] The hearings are conducted in private, and the individual Committees may determine its own procedures throughout the disciplinary process.[33]

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24 Robinson, 'Regulation of Insolvency Practitioners in a Pandemic' (n 7).

25 *Insolvency Practice Schedule (Corporations)* (n 22); *Insolvency Practice Schedule (Bankruptcy)* (n 22) s 40-50.

26 Explanatory Memorandum (n 2) 7.

27 *Insolvency Practice Schedule (Corporations)* (n 22); *Insolvency Practice Schedule (Bankruptcy)* (n 22) s 40-55.

28 *Insolvency Practice Schedule (Corporations)* (n 22); *Insolvency Practice Schedule (Bankruptcy)* (n 22) s 40-55(g).

29 *Insolvency Practice Schedule (Corporations)* (n 22); *Insolvency Practice Schedule (Bankruptcy)* (n 22) div 50; *Insolvency Practice Rules (Corporations)* (n 8); *Insolvency Practice Rules (Bankruptcy)* (n 8) div 50.

30 *Insolvency Practice Rules (Corporations)* (n 8)*; Insolvency Practice Rules (Bankruptcy)* (n 8) r 50-90.

31 *Insolvency Practice Schedule (Corporations)* (n 22); *Insolvency Practice Schedule (Bankruptcy)* (n 22) s 40-55; *Insolvency Practice Rules (Corporations)* (n 8); *Insolvency Practice Rules (Bankruptcy)* (n 8) r 50-95.

32 *Insolvency Practice Rules (Corporations)* (n 8); *Insolvency Practice Rules (Bankruptcy)* (n 8) r 50-55.

33 *Insolvency Practice Rules (Corporations)* (n 8); *Insolvency Practice Rules (Bankruptcy)* (n 8) r 50-5.

Whilst Part 2 Committees cannot disclose confidential information, the Committee members can provide information they have obtained during the hearing process to enable or assist a prescribed body to perform its disciplinary function in relation to its members.[34] In respect of transparency of publication, Committees have the discretion to direct ASIC or AFSA to publish its decisions. A right of review of a Committee decision can be made to the AAT.[35]

A significant observation is that although the intent of the legislation is to bring formality and clarity to the hearing process by stipulating time frames, as noted the *conduct* and general approach of the hearings is a matter for the individual Committees. This allows the Committees to adopt a less technical approach than the judicial system. An issue which has been raised is the limited legal reporting and published guidance on the process rules that apply to the committees.[36]

## IV Research methodology for this study (2017–21)

All publicly available Part 2 Committee referrals and decisions concerning registered liquidators and registered trustees were analysed from 1 March 2017 to 1 March 2021. The period represents commencement of the *ILRA* to present date.

The decisions were identified from ASIC and AFSA's websites, and reference to an AAT decision was further located within the Australasian Legal Information Institute ('AustLII') database.[37] The dataset comprised 11 referrals (eight from ASIC and three from AFSA), 7 published Part 2 Committee decisions and 1 AAT decision. Of the 11 referrals, in two matters, the Committees were not satisfied the practitioner's actions warranted disciplinary action and they continued to be registered. In one matter, the Committee did not consider the case as the practitioner's registration was cancelled by ASIC following orders of the Federal Court.[38] In four matters, no decision was made, or the decisions were not published including by order of non-publication by the AAT.[39]

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34 *Insolvency Practice Schedule (Corporations)* (n 22); *Insolvency Practice Schedule (Bankruptcy)* (n 22) s 50-35(2)(b)(iv); *Insolvency Practice Rules (Corporations)* (n 8); *Insolvency Practice Rules (Bankruptcy)* (n 8) r 50-100.

35 This must be in writing, set out reasons for the application and within 28 days of the date the committees report is received by the practitioner: *Insolvency Practice Schedule (Corporations)* (n 22); *Insolvency Practice Schedule (Bankruptcy)* (n 22) s 96-1.

36 Robinson, 'Regulation of Insolvency Practitioners in a Pandemic' (n 7).

37 'De-Registered Trustees', *Australian Financial Security Authority* (Web Page) <https://www.afsa.gov.au/practitioners/deregistered-trustees>; 'Registered Liquidator Disciplinary Decisions', *Australian Securities and Investments Commission* (Web Page) <https://asic.gov.au/for-finance-professionals/registered-liquidators/your-ongoing-obligations-as-a-registered-liquidator/liquidator-compliance/registered-liquidator-disciplinary-decisions/>.

38 *Commissioner of Taxation v Iannuzzi [No 2]* (2019) 140 ACSR 497.

39 *Kukulovski v A Committee Convened under Section 40-45 of the Insolvency Practice Schedule (Corporations)* [2020] AATA 40 ('*Kukulovski*').

## A Demographics

The 11 referrals related to nine insolvency practitioners. One matter involved a dual registered liquidator and registered trustee, and the same misconduct case was separately referred to Part 2 Committees by ASIC and AFSA.[40] In another case, one registered trustee had two different conduct matters referred to Part 2 Committees by AFSA. These were counted as separate entries so as to record the alleged grounds of misconduct and the final outcomes.

The majority of referrals involved men (n= 6, 55%). A further breakdown shows this comprised five liquidators and one dual registered liquidator and registered trustee. The four female referrals involved two liquidators and one trustee (on two separate occasions). The gender disproportion is consistent with the gender breakdown of registered liquidators and registered trustees in Australia. According to the Regulators' public data of registered liquidators and registered trustees over the 4-year period, women comprised on average 0.08% of registered liquidators and 0.09% of registered trustees.[41] It is important to note that practitioner age, an otherwise key demographic, could not be ascertained from public information. However, time in practice as a registered insolvency practitioner based on data from the start date of practice, was able to be obtained from the Regulators' publicly available data.[42] The duration of experience ranged from 9 years to 32 years. Given the wide range it is inconclusive as to whether inexperienced practitioners were the subject of misconduct, or otherwise. It is important to note however that the number of years of experience refers only to the time as a *registered* practitioner and the actual experience as an *unregistered* practitioner, and at a senior level, is longer.[43] A legislative requirement for registration as a liquidator or trustee is evidence of at least 4,000 hours of relevant employment at a senior level during the five years immediately preceding the day on which the application for registration is made.[44]

NSW was over-represented with majority (n= 8, 72%) of referrals involving NSW based insolvency practitioners. Two practitioners were from QLD and one practitioner was from VIC. This can likely be explained given NSW has the most registered liquidators and registered trustees and is Australia's largest state economy.[45]

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40 Australian Financial Security Authority ('AFSA'), *Report of the Committee Convened Pursuant to Schedule 2, Section 40-45 of the Bankruptcy Act 1966 to Make a Decision about Mr David Leigh, a Registered Trustee* (Report, 31 January 2019).

41 'Register of Trustees', *Australian Financial Security Authority* (Web Page) <https://www.afsa.gov.au/practitioners/registered-trustee?page=3> ('Register of Trustees'); 'Insolvency Statistics — Series 4A Registered Liquidator Lists', *Australian Securities and Investments Commission* (Web Page) <https://asic.gov.au/regulatory-resources/find-a-document/statistics/insolvency-statistics/insolvency-statistics-series-4a-registered-liquidator-lists/> ('Insolvency Statistics').

42 'Insolvency Statistics' (n 41).

43 Eg, the 2021 Australian Securities and Investments Commissions' ('ASIC') statistics show that the average experience of a registered liquidator is 5–15 years and the average age group is 40–9 years.

44 ASIC, 'Registered Liquidators: Registration, Disciplinary Actions and Insurance Requirements' (Regulatory Guide 258, 1 March 2017) 12 [22] Table 4.

45 'Register of Trustees' (n 41); 'Insolvency Statistics' (n 41); 'About the NSW Economy',

## B Case statistics

There were approximately equal numbers of referrals to Committees across the years.[46] Decisions of Part 2 Committees ranged from three pages to 37 pages in length but were generally around 10 pages long. Four matters involved legal representation. In all but one case, decisions were made within the statutory timeframe of 60 days.[47] In the particular case, the Committee acknowledged the delay and comprehensively set out the events leading to this, which included requests for further information and extension of time for interview.[48] The average time for conclusion of referrals (taken as time from issue of SCN to decision of a Part 2 Committee) was 203 days or approximately 3 months. The longest matter was 591 days which also included a referral from a Part 2 Committee to the AAT, and published decision of the AAT. The shortest referral was concluded in just 72 days. Referrals were accompanied with timely media releases by the Regulators, except the two matters where the Part 2 Committees found disciplinary action was not warranted.

Consistent with the literature on professional misconduct, most of the matters decided by a Part 2 Committee involved multiple grounds and allegations.[49]

## C Outcomes of Part 2 Committees and the AAT

*Table 1. Typology of misconduct*

| **Misconduct** | | | |
|---|---|---|---|
| | **Misappropriation of funds in the course of appointment** | **Failure to carry out adequately and properly the duties or functions of a practitioner under law and general law** | **Lack of Independence and Failure to Avoid Conflict of Interest** |
| **Subtypes** | | | |
| | Falsification of documents and | Failure to adequately | Accepting appointment in circumstance of |

*New South Wales Government Treasury* (Web Page) <https://www.treasury.nsw.gov.au/nsw-economy/about-nsw-economy>.

46 There were two referrals in 2017, two referrals in 2018, four referrals in 2019 and three referrals in 2020.

47 *Insolvency Practice Rules (Corporations)* (n 8); *Insolvency Practice Rules (Bankruptcy)* (n 8) r 50-90.

48 AFSA, *Report of the Committee Convened Pursuant to Section 40-45 of the Insolvency Practice Schedule (Bankruptcy) to Make a Decision about Ms Louise Thomson, a Registered Trustee* (Report, 30 July 2020) 4 ('*Report of the Committee Convened Pursuant to Section 40-45 of the Insolvency Practice Schedule (Bankruptcy) to Make a Decision about Ms Louise Thomson, a Registered Trustee*').

49 Katherine Elkin et al, 'Doctors Disciplined for Professional Misconduct in Australia and New Zealand, 2000–2009' (2011) 194(9) *Medical Journal of Australia* 452, 455.

| | | | |
|---|---|---|---|
| | records (**n= 2**) al | supervise staff **(n= 2)** | conflict or potential conflict (**n= 2)** |
| | Misleading staff (**n= 2**) | Failure to lodge forms, delay of lodgement, and/or lodgement of false or misleading forms required under the Act (**n= 2**) | Continuing to act in circumstances of conflict or potential conflict **(n= 2)** |
| | | Failure with respect to closure of bank account, deposits of monies to correct bank accounts and transactions (**n= 2**) | Failure to make proper disclosure including to creditors and the Court, (**n= 2**) |
| | | Failure to obtain books and records investigate affairs including assets of bankrupt adequately (**n= 3**) | |
| | | Issues with respect to creditors, notices, meetings, failure to adequately report to creditors or consider views of creditors (**n= 2**) | |

*Table 2. Part 2 Committee/ AAT decisions*

| **Types of Outcomes** | |
|---|---|
| Cancellation | **4** |
| Suspension* | 1 |
| Unconditional registration | 1 |

| | |
|---|---|
| Conditional registration | 2 |
| **Total** | **8** |

* The decision of the AAT was suspension by consent of the Part 2 Committee and the practitioner. There were a number of reasons behind the AAT's order that the Part 2 Committee decision should not be published, including the best interest of the public.[50]

The majority of cases subject to disciplinary action by a Part 2 Committee were male (n= 5, 71%). The most common type of misconduct related to funds of an administration. The two most severe cases of this type involved concurrent criminal proceedings.[51] In demonstrating the level of criminality and seriousness of misconduct, in addition to cancellation of registrations by the Part 2 Committees, there was associated custodial sentences. One practitioner was jailed following criminal proceedings in the QLD for period of 6 years. In the other matter, the practitioner plead guilty to dishonesty and fraud and was sentenced on 10 February 2022.[52]

## V Findings

As outlined above, the most common type of misconduct involved funds of an administration.

### Funds

#### Misappropriation of funds

Within this head of misconduct there was one male and one female.[53] The male practitioner was a dual registered liquidator and registered trustee. Individual Part 2 Committees were convened first by ASIC and then AFSA, following the outcomes of which the practitioners' registration was cancelled by the Regulators. The misappropriation of funds involved the transfer of sums of $800,000 ('Case L')[54] and $238,502.33 ('Case Y')[55] respectively from liquidations to personal bank accounts. In Case L, $100,000 of the $800,000 was repaid. Both cases involved falsification of records and concealment of

50 Robinson, 'Regulation of Insolvency Practitioners in a Pandemic' (n 7), citing *Kukulovski* (n 39).

51 ASIC, 'Former Liquidator David Leigh Sentenced to Seven Years Imprisonment for Fraud' (Media Release 19-104MR, 3 May 2019); ASIC, 'Former Sydney Liquidator Charged with Dishonesty Offences' (Media Release 20-160MR, 15 July 2020); ASIC, 'Sydney Liquidator Pleads Guilty to Dishonesty and Fraud Charges' (Media Release 21-008MR, 22 January 2021) ('Sydney Liquidator Pleads Guilty to Dishonesty and Fraud Charges').

52 ASIC, 'Former Sydney Liquidator Sentenced to Three Years' Imprisonment for Dishonesty and Fraud Offences' (Media Release 22-019MR, 14 February 2022).

53 The discussion about demographics in Part IV identified that women are underrepresented in the Part 2 Disciplinary Committee referrals however, they are overrepresented in the most severe sanctions. This will be comprehensively analysed in forthcoming research by the author.

54 ASIC, *David John Leigh: Report of Committee Convened to Make a Disciplinary Decision about David John Leigh, a Registered Liquidator* (Report, February 2019).

55 ASIC, *Amanda Young: Report of Committee Convened to Make a Disciplinary Decision about Amanda Young, a Registered Liquidator* (Report, March 2020).

payments through instruction employees to record and reconcile payments for other fees. In both cases, the practitioner ceased practice prior to internal investigations of the transfers by their firms (who reported the findings to ASIC).

The mitigating circumstances in both cases included ongoing domestic, financial and professional pressures although these problems were not particularised. This is consistent with the literature that misconduct arises during a 'turbulent' time in a practitioner's life.[56]

### Other dealings with funds

In other matters involving funds of an administration, one involved the failure to close a bank account of a company and failure to investigate post appointment transactions ('Case B').[57] Whilst the Committee did not specify the quantum of the transactions, it was considered as part of evidence of an ongoing failure to perform the duties of a liquidator.

The other matter involved a failure to adequately supervise staff which resulted in monies being paid in the sum of $190,000 and $10,000 from two administrations toward legal fees for an unrelated external administration ('Case K').[58] The monies were deposited into the firm account instead of liquidation bank account. The effect of this was the practitioner failed to report receipt of monies to creditors, and subsequently lodged false or misleading forms with ASIC.

### Failure to carry out duties of liquidator including:

#### *Failure to supervise staff*

Cases B and K both involved a failure to supervise staff. In Case K, this shortcoming resulted in the mishandling of the funds discussed above.

Case B was less particularised. In this case, the practitioner submitted that the liquidation was accepted for fees significantly below cost and he subsequently 'delegated the conduct of the matter to junior staff and spent as little time as possible working on the matter'. It was interesting to note that the Committee found it was 'not necessary to set the conduct out in detail' so it is not known what the severity of the circumstances were, or the consequences of the failure to supervise staff were, if any. However, the Committee referred to the fact the practitioner had taken steps to rectify this through the commencement of monthly staff training sessions and use of third-party consultants to assist with human resources and professional development to address staffing issues.

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56 Tara Sklar et al, 'Vulnerability to Legal Misconduct: A Profile of Problem Lawyers in Victoria, Australia' (2020) 27(3) *International Journal of the Legal Profession* 269, 284.

57 ASIC, *Report of Committee Convened to Make a Disciplinary Decision about Mitchell Warren Ball, a Registered Liquidator* (Report, November 2019) ('*Report of Committee Convened to Make a Disciplinary Decision about Mitchell Warren Ball, a Registered Liquidator*').

58 *Kukulovski* (n 39).

### *Failure to lodge forms and documents with ASIC*

The consequences of a failure to lodge forms may be wide ranging given the large number and different nature of the type of forms that insolvency practitioners are required to lodge.[59] However, according to ASIC, the significance of failure to lodge forms and documents is that 'it can be symptomatic of wider systemic failure by registered liquidators in the conduct of external administrations'.[60] In addition, if a registered liquidator fails to lodge forms, stakeholders (including ASIC) may not be fully informed of the extent of a company's financial failure or possible officer misconduct.[61]

In Cases B and K, the shortcomings relating to lodgement of forms were significant. They represented a pattern of ongoing behaviour and/or had serious consequences. In Case K, the failure to supervise staff led to the mishandling of the funds such that the lodged forms failed to properly account for the monies and were false or misleading. Following the Committee decision, ASIC independently reviewed the lodgement of all forms by the practitioner from 1 November 2017 to 15 January 2020 and identified separate concerns relating to: non-lodgement of forms under the *Corporations Act*, late lodgements, other issues related to non-lodgement or lodgement of forms separate to non-lodgements. The particulars of these offences were not disclosed by ASIC.

In Case B, the practitioner failed to investigate forms lodged in respect of three unrelated liquidations. In each matter, forms were lodged with ASIC to show the directors of each company resigned up to 2 years before the forms were lodged. At the same time these forms were lodged, the same 'jump-on director' had been appointed to all three companies by the 'referrer' of the matters to the practitioner. The practitioner acknowledged that whilst unintentional, the failure to investigate the suspicious circumstances and report them to ASIC, either potentially facilitated or could have facilitated illegal phoenix activity. In addition, the Part 2 Committee found this could have undermined the integrity of insolvency practitioners as a profession.

Notably, since this 2019 decision, new laws were introduced in 2021 whereby a company director is prohibited from backdating their resignation by more than 28 days, or from resigning if it means the company would be left without a director.[62]

### *Issues relating to the investigation of administrations, bankruptcies*

This sub-type of misconduct relates to failure to investigate matters in the liquidation or bankruptcy with potentially serious consequences.

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59 Eg, forms include application for consent to early destruction of books that have been wound up by the court, and wound up voluntarily pursuant to s 542 of the *Corporations Act* (n 9) to lodgement of a statutory report by a liquidator to creditors pursuant to r 70-40 of the *Insolvency Practice Rules (Corporations)* (n 8) and *Insolvency Practice Rules (Bankruptcy)* (n 8).

60 ASIC, *Registered Liquidators' Compliance with Lodgement and Publication Requirements* (Report 573, June 2018) [2].

61 Ibid [5].

62 *Treasury Laws Amendment (Combating Illegal Phoenixing) Act 2020* (Cth) s 203AA.

In Case B above, the Part 2 Committee found the practitioner did not adequately investigate:

- the circumstances of the appointment of the 'jump-on directors';
- reasons behind the back-dated appointment of the 'jump-on directors';
- the resignation of the previous directors; and
- the conduct of the referrer.[63]

The Committee also found the practitioner had failed to obtain the books and records of an administration/s and failed to request ASIC assistance.[64] The precise nature of the failure was not detailed by the Committee, for example, whether the practitioner had in fact made sufficient requests to company officers for books and records and failed to obtain them and then failed to seek assistance from ASIC, or some other circumstance. However, the failure to obtain these books and records is serious given they are relevant to the insolvency practitioner's first steps in the investigations of the company. In a situation where the director had failed to hand over the books, a presumption of insolvency arises for the period of time records were not adequately kept.[65]

The other matters concerning investigative issues related to the same trustee in two separate decisions. In the 2018 decision ('Case Th-1'),[66] one of the grounds for issue of a SCN was in response to Federal Court proceedings in respect of the failure to make necessary investigations and take appropriate steps to recover property for the benefit of the trustee.[67] On this occasion, the Part 2 Committee ultimately found the trustee had taken adequate steps to secure the most significant asset and decided that the trustee should continue to be registered without condition.

The 2020 matter ('Case Th-2')[68] related to three breaches of statutory duties in respect of investigations in a bankruptcy which can be summarised as follows:

1. Failing to properly investigate a property right. The practitioner had accepted the bankrupts' assessment that the interest was too difficult to recover without an independent investigation;

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63 *Report of Committee Convened to Make a Disciplinary Decision about Mitchell Warren Ball, a Registered Liquidator* (n 57) 3.

64 ASIC can contact company officers or third parties to remind them of their statutory obligations to assist liquidators and administrators when companies enter external administration. See 'External Administration Compliance Assistance: Report on Company Activities and Property, Books and Records', *Australian Securities and Investments Commission* (Web Page) <https://asic.gov.au/for-finance-professionals/registered-liquidators/your-ongoing-obligations-as-a-registered-liquidator/external-administration-compliance-assistance-report-on-company-activities-and-property-books-and-records/>.

65 *Corporations Act* (n 9) s 588E(4).

66 AFSA, *Report of the Committee Convened Pursuant to Schedule 2, Section 40-45 of the Bankruptcy Act 1966 to Make a Decision about Ms Louise Thomson, a Registered Trustee* (Report, 5 April 2018).

67 This decision has been analysed in Catherine Nguyen, 'A New Era in Insolvency Practitioner Discipline' (September 2018) *Insolvency Law Bulletin* 123.

68 *Report of the Committee Convened Pursuant to Section 40-45 of the Insolvency Practice Schedule (Bankruptcy) to Make a Decision about Ms Louise Thomson, a Registered Trustee* (n 48).

2. undertaking an assessment for the purpose of calculating contributions which did not take into account fringe benefits; and
3. approved three requests to travel overseas without appropriately assessing whether or not to grant the requests.[69]

The Part 2 Committee found that each of these issues were breaches of statutory duties and the investigations formed fundamental obligations of the trustee with serious consequences including to deprive the creditors and estate.

In respect of (1), the consequence of failing to investigate property right was that it precluded an assessment of property that could be realised to pay a dividend to creditors. The Committee noted the investigation into property right could have been undertaken by a real estate agent at minimal cost to the firm or the estate.

The Committee observed that in respect of (2), the business class airfares warranted a higher level of scrutiny in order to properly and adequately assess the inclusion of the value of those benefits. The consequence of this failure to properly and adequately assess the compulsory income contributions may have deprived the estate and creditors.

In respect of all three issues, the Committee found a key component of failing to investigate was the lack of documentation of assessment of information required and to adequately and properly record decisions. It was interesting to note that the Committee held that each matter consider individually was on the 'lower end of the scale of seriousness' but taken together they were serious breaches of the failure to discharge a trustees' duties.[70]

### *Dealings with creditors*

This sub-type specifically refers to dealings with creditors, notwithstanding all other sub-types above may impact upon creditors and the company/estates.

In Case T, there were issues relating to notices of meetings of creditors, minutes of meetings of creditors and timing of lodgement related to meetings of creditors held.[71] As noted above, there was insufficient information to ascertain the seriousness of these offences, however there exists the *potential* to adversely affect the interest of creditors.

In Case Th-2, the practitioner did not take steps to inform the general body of creditors on the issues of conflict of interest at the time, or during the administrations, take steps to have a replacement trustee appointed or seek directions from the Court.[72] In addition, disclosure to creditors could have empowered creditors to exercise their powers under the *ILRA* to request further information or to even replace the trustee due to a potential lack of independence (discussed further below).

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69 Ibid 17.

70 Ibid 23.

71 *Kukulovski* (n 39).

72 *Report of the Committee Convened Pursuant to Section 40-45 of the Insolvency Practice Schedule (Bankruptcy) to Make a Decision about Ms Louise Thomson, a Registered Trustee* (n 48) 13.

## Lack of Independence

### *Conflict of Interest*

A fundamental duty of an insolvency practitioner is they must be, and must be seen to be, independent.[73]

There were two matters on the issue of a lack of independence. In the first case, ASIC alleged on two separate grounds: (i) that the practitioner had accepted an appointment; and (ii) continued to act as an administrator in circumstances of conflict or potential conflict ('Case DT').[74] In relation to the first ground, the practitioner had been the trustee in bankruptcy of an individual in mid-2014 and in December 2015 became the joint administrator of four companies. The bankrupt had an association with a company that was indebted to three of these companies. The Committee found there was nothing remarkable about information obtained as a trustee that they should have been able to subsequently recall in late 2015. On the second ground, the Committee found that the 4 days in between knowledge of the connection to ceasing to be joint administrator (having been replaced by court appointed provisional liquidators) was insufficient time for the liquidator to have taken active steps to cease as administrator.

Ultimately, the Committee held that ASIC's concerns on two grounds of conflict or potential conflict were not made out. It seemed to be at odds that the Committee decided the practitioner should continue to be registered as a liquidator yet be subject to a condition to undertake further education in the Australian Restructuring Insolvency and Turnaround Association ('ARITA') course titled 'Essential Skills Insolvency: Independence' within 4 months of the decision. It can be hypothesised that given this was the first Part 2 Committee decision under the *ILRA*, the Committee were being particularly cautious in sending a strong message in the public interest regarding a liquidators' duty to avoid conflict of interest.

Case Th-2 concerned a number of conflict issues which can be summarised as follows:

1. provided consent to act as trustee of the bankrupt estate where the bankrupt had referred three administrations to the trustee in the preceding 10 months. The overall referral relationship was over a prolonged period of 3 years and 10 months;
2. received direct communication from two individuals raising concerns about the issue of conflict of interest;
3. failed to disclose to creditors the pre-existing relationship and referral relationship upon appointment;
4. during the course of appointment as trustee, subsequently became the trustee in two estates in which the bankrupt was involved and the bankrupt had voted on its behalf to approve the trustees remuneration;
5. failed to further disclose to creditors the trustee had accepted the two

73 The proposition is well established see, eg, *Re Lamb; Ex parte Registrar in Bankruptcy v Lamb* (1984) 1 FCR 391.

74 ASIC, *Form 986: Referral of Matter to Schedule 2 Committee* (Report, 2018) <https://download.asic.gov.au/media/5057999/20180410-dennis-anthony-turner-summary-of-committee-report-030219212.pdf>.

subsequent referrals from the bankrupt; and

6. whilst acting as his trustee, attended two lunches with the bankrupt at which the bankrupt's travel requests were discussed.

The Committee ultimately found that the trustee had failed to discharge the general law duty to avoid conflicts of interest in respect of all the above issues. Notably, the Committee went to great lengths to outline best practice the trustee should have undertaken on each issue, which would have necessarily included full disclosure and active steps to have a replacement trustee appointed.

The Part 2 Committee also emphasised that its decision was not based on 'intentionally dishonest behaviour, bad faith or criminality'. Rather the Committee was concerned with the failure to recognise and accept the existence of an actual conflict of interest, and appreciation of the seriousness of this. In the Committee's view, this revealed the extent of the lack of understanding of the scope of the no conflict duty which could not be overcome by imposing further educational and training requirements (which in any event were not provided by the trustee despite submissions referencing improvements to this effect).

The Part 2 Committee gave detailed consideration to the different outcomes. Supervision of the trustee would incur significant costs given their range and depth of experience. An imposition of a suspension would mean all the trustee's files would need to be managed by another practitioner. The Committee held that cancellation of registration was proportionate to the conduct given the 'grave misunderstanding of one of the most fundamental duties of a trustee under the general law'.[75]

## VI Discussion

### Limitations

The limitations of this article include that it only analyses publicly available Committee decisions and in one case also a subsequent appeal to the AAT. The discretion of the Committees to direct the Regulators to publish their decisions, the possible reasons for this and the limitations has been analysed elsewhere.[76] Relevantly for this article, the analysis is not reliable as the reviewed decisions do not accurately reflect the true extent of (any) misconduct in the insolvency profession, and how all of these matters are dealt with by the Part 2 Committees. However, it is argued that the aim of this article is still achieved as it does not purport to analyse the prevalence of misconduct. Rather, this research aims to demonstrate an *overview* of misconduct matters and the processes and outcomes of the Part 2 Committees from which key observations and lessons can be gleaned.

Another limitation of the dataset is the small sample size. It is well documented in the literature that small numbers can affect reliability, bias and

75 *Report of the Committee Convened Pursuant to Section 40-45 of the Insolvency Practice Schedule (Bankruptcy) to Make a Decision about Ms Louise Thomson, a Registered Trustee* (n 48) 172.

76 Robinson, 'Regulation of Insolvency Practitioners in a Pandemic' (n 7) 196.

efficiency of the data, may prevent findings from being extrapolated and over interpretation of violation of assumptions.[77] It is, however, contended that small sample size will continue to be a limitation in relation to referrals and decisions to Part 2 Committees. As identified in Part II above, there were previously low levels of misconduct before CALDB. The ongoing trend of relatively low levels of misconduct in the insolvency profession generally has been written about.[78] The author suggests that serious matters warranting disciplinary action before a Part 2 Committee will continue to be correspondingly lower.[79]

A further limitation is the Part 2 Committee decisions, with the exception of conflicts of interest matters, typically do not disclose the specific circumstances of each sub-type of misconduct. The individual sub-types of misconduct can have a broad range of legislative consequences from very minor to severe, including criminal sanctions and imprisonment. The author has identified throughout the article where there is data lacking regarding the severity of the misconduct. It is likely that the Part 2 Committees have withheld confidential information in situations that involve third parties and may impact upon their livelihood. The author has attempted to overcome this limitation by explaining the potential for the *most serious* consequence of that type of offending, notwithstanding this conduct was not alleged to have occurred in the individual cases.

## The rules of natural justice

Observation of natural justice is of great interest given the expectation that the Part 2 Committees are conducted in accordance with these rules and are not bound by any rules of evidence.[80] In addition, the individual Committees may determine its own procedures throughout the disciplinary process.[81] This section will discuss key findings of the study in the following three aspects of natural justice:

- Legal Representation;
- Rules of Evidence; and
- Consistency with Outcomes and Reasons

### Legal representation

As identified in Part IV, only four of the seven published Part 2 Committee cases were legally represented.[82] It can be observed from these cases that there were no complex legal issues, and the practitioners presented as competent

77 See, eg Joop Hox, 'Important yet Unheeded: Some Small Sample Issues that Are Often Overlooked' in Rens van de Schoot and Milica Miočević (eds), *Small Sample Size Solutions: A Guide for Applied Researchers and Practitioners* (Taylor and Francis Group, 2020) 255, 264.

78 Robinson, 'Regulation of Insolvency Practitioners in a Pandemic' (n 7).

79 Ibid.

80 *Insolvency Practice Rules (Corporations)* (n 8); *Insolvency Practice Rules (Bankruptcy)* (n 8) r 50-55(1).

81 *Insolvency Practice Rules (Corporations)* (n 8); *Insolvency Practice Rules (Bankruptcy) 2016* (n 8)

82 *Kukulovski* (n 39) is not included in this discussion as that matter relates to legal representation before the AAT.

and well-versed in their own matters to self-represent before the Committee. There was no correlation between legal representation and outcomes. In all cases the presence of lawyers appeared to facilitate the process, including communicating on behalf of their client to seek extensions of time to provide further information and expert documentation before a Part 2 Committee.

In Case Y, no information was subsequently provided following the request for extension of time, and the Committee rejected the lawyer's proposal that the decision be adjourned, or suspended, pending further information. In Case Th-2, the legal representative proposed that the Part 2 Committee *first* make a decision as to whether the alleged grounds outlined in the SCN were made out against the practitioner.[83] The Committee found the two grounds were made out and further information was adduced in respect of that decision. In this case, engaging a lawyer improved the efficiency of process where the practitioner faced a number of allegations of breaches under the two grounds, and to address them absent a decision could have been time-consuming and costly.

### Rules of evidence — Codes

A key finding may be made regarding the information the Part 2 Committees can refer to in the decision making. In Case Th-2, the practitioner raised a concern about the inclusion of the Code of Professional Practice ('Code') published by ARITA, in the list of documents submitted by the Delegate of the Inspector-General in Bankruptcy.

The practitioner submitted that the Code did not apply at the time of the events alleged in the SCN, and further, she was not bound by it as she was not a member of ARITA. The Committee decided that it was neither required, nor authorised, to determine if the practitioner's conduct complied with the Code (whether at the relevant time, or otherwise). However, the Committee rejected the argument that it was not entitled to take the contents of the ARITA Code of Conduct into account, where relevant. In the alternative, the practitioner sought to rely on the Accounting Professional and Ethical Standards ('APES') but was unable to demonstrate 'the relevance of APES 330/12 and APES 330/15 or the use that the Committee could or should make of these documents in its decision-making'.[84]

This finding is important as it reflects the current legal and policy position in Australia. In Australia, practitioners are bound by various codes. The role of codes has been summarised as: 'Soft law codes are useful mechanisms to maintain standards not necessarily found in the law underlying the particular profession to which they apply. They can support the law and be relied upon by courts.'[85]

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83 In *Report of the Committee Convened Pursuant to Section 40-45 of the Insolvency Practice Schedule (Bankruptcy) to Make a Decision about Ms Louise Thomson, a Registered Trustee* (n 48), the Part 2 Committee referred to *Joubert v Members of the Companies Auditors and Liquidators Disciplinary Board* [2018] AATA 944.

84 *Report of the Committee Convened Pursuant to Section 40-45 of the Insolvency Practice Schedule (Bankruptcy) to Make a Decision about Ms Louise Thomson, a Registered Trustee* (n 48) 7.

85 Michael Murray, 'Accountants Insolvency Code Updated', *Murrays Legal* (Blog Post,

Whilst the courts have observed that the Code has no legal status,[86] it has been relied upon as 'a useful guide to the common practice in such matters, and to the profession's own view of proper professional standard'.[87] The Part 2 Committee's reference to the Code is consistent with this view. In Case Th-2, use of the Code was appropriate where it has been previously referred to by the Regulators and is well-recognised including internationally.[88] The Committee did not expressly reference specific parts of the Code or detail how it could be used in the particular matter. Rather, the Committee emphasised that it was within its ambit to reference it where warranted.

Further, the Committee's acknowledgment that it was *not required nor authorised* to determine conduct in accordance with the Code also reflects the fact that Australia does not have a formal co-regulatory system.[89] The 14 prescribed Industry Bodies do not have authority to regulate insolvency practitioners (beyond its own membership rules) and issuing a s 100-5 notice to the Regulators.[90] A possible reason for the reluctance of Industry Bodies to assume a greater role includes potentially conflicting roles as both advocate and regulator for the profession.[91] However, the inclusion of the ARITA Code by the Part 2 Committee in Case Th-2 highlights the increasing importance of Industry Bodies in regulation. The *ILRA* introduced the above statutory power to the Industry Bodies in an expansion of the role of professional bodies. The benefit of this approach has been identified as potentially reducing regulatory burden by Industry Bodies assuming less intrusive forms of self-regulation.[92]

A practical lesson for practitioners and their legal advisors, is to be prudent and aware of other Codes and 'soft law' as these may be taken into account by a Part 2 Committee.[93] Case Th-2 also demonstrated that insolvency practitioners may also adduce other laws to rely on. This decision confirms however, that the onus will be on the practitioner to demonstrate its relevance and use to the Committee's decision-making.

## Consistency of outcomes

The findings in this study suggest consistent outcomes in the matters and relevantly are proportionate to the conduct.

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2 September 2019) <https://murrayslegal.com.au/blog/2019/09/02/new-insolvency-code-of-conduct/>.

86 *Re Monarch Gold Mining Co Ltd; Ex parte Hughes* [2008] WASC 201.

87 *Bovis Lend Lease Pty Ltd v Wily* (2003) 45 ACSR 612, 653 [163].

88 Elaine Kempson, *Review of Insolvency Practitioner Fees* (Report, July 2013) 43 ('*Kempson Report*'). The *Kempson Report* referred to the Insolvency Practitioners Association of Australia ('IPAA') (now known as the Australian Restructuring Insolvency and Turnaround Association ('ARITA') and its development of the IPAA Code of Professional Practice.

89 See, eg Robinson, 'Regulation of Insolvency Practitioners in a Pandemic' (n 7).

90 *Insolvency Practice Schedule (Corporations)* (n 22); *Insolvency Practice Schedule (Bankruptcy)* (n 22) s 100-5.

91 For a comprehensive discussion about the regulatory role of Industry Bodies see Robinson, 'Regulation of Insolvency Practitioners in a Pandemic' (n 7).

92 Ibid.

93 For a comprehensive discussion of Codes see Michael Murray, 'Codes of Conduct', *Murrays Legal* (Blog Post, 4 October 2017) <https://murrayslegal.com.au/blog/2017/10/04/codes-of-conduct/)>.

Cancellation of registration was imposed in Cases Y and L concerning misappropriation of funds in an administration as well as concurrent criminal proceedings. The Part 2 Committee also found a cancellation order was warranted in Case Th-2 where there were multiple breaches of a conflict of interest. In so doing, the Committee expressed concerned that the practitioner had 'failed to recognise the existence of a potential conflict of interest ... coupled with the failure to appreciate the continued occupation of this role constituted an ongoing and actual interest'.[94] According to the Committee this represented a serious misunderstanding of 'one of the most fundamental duties of a trustee under the general law'.[95] Further, the Committee was not satisfied the practitioner had demonstrated any further education or training to address such gap in knowledge.

It can be seen that the recognition of, and active steps to overcome wrongdoing are important considerations in decision-making. In Case B, the decision against an insolvency practitioner in respect of 20 areas of concern also involved serious and ongoing failure to adequately and properly perform the duties of a liquidator, including to supervise his staff. However, in contrast to Case Th-2 above, the Committee stated, 'Indeed but for the particular circumstances, the contrition demonstrated and the strength of the character references provided to the committee, such action would have included cancellation of the registration'.

## VII Conclusion

This article analysed published referrals from ASIC and AFSA to Part 2 Committees, decisions of the Committees and one appeal to the AAT between 1 March 2017 and 1 March 2021. The findings from this study reflect the types of conduct matters that the Committees found, inter alia were in the public's best interest to be published. This study makes an original contribution to the scholarship on the regulation and discipline of insolvency practitioners in three ways. It is the first study of its kind to examine Part 2 Committee decisions under the *ILRA* based on a data set of 11 referrals, seven decisions of the Part 2 Committees and one subsequent AAT decision. Second, rather than focus on the specifics of the misconduct itself (which in any event was often lacking in Committee decisions) it focuses on the potential impacts of such conduct, specifically upon insolvency stakeholders and the integrity of the insolvency profession. This might help to explain how the Committee arrived at the respective outcomes. Third, the findings and insight from Part 2 Committee decision-making may assist with informing the insolvency profession as a whole as to the expected standards of conduct and the types of misconduct which warrants disciplinary action.

Key findings from this study included a general consistency and proportionality in outcomes. Matters referred by the Regulators and appearing before the Part 2 Committees involve serious breaches, or a series of breaches amounting to serious misconduct. The study also found that the Committees

94 *Report of the Committee Convened Pursuant to Section 40-45 of the Insolvency Practice Schedule (Bankruptcy) to Make a Decision about Ms Louise Thomson, a Registered Trustee* (n 48) 35.

95 Ibid 36.

placed emphasis on the importance of understanding wrongdoing, contrition, and active steps to mitigate further wrongdoing in its decision-making. Other novel findings include the potential significance and application of 'soft law' such as Industry Body codes and the role of legal representation.

A comparative analysis of CALDB and the Part 2 Committees is outside the scope of this article. However, the research has identified significant improvements particularly with respect to efficiency and timeliness to resolution of decision. As discussed in part IV above, the longest matter, which also included an AAT decision, was only 3 months compared to an average of 12 months with CALDB.

It is acknowledged that whilst the sample size is small over a 4-year period, this is consistent with historically low levels of insolvency practitioner misconduct, especially serious misconduct. Consistent publication of decisions by the Part 2 Committees will help insolvency practitioners better understand the type of misconduct that warrants disciplinary action. This will also assist stakeholders generally, and informing the author's wider body of research: how the disciplinary bodies are interpreting and applying the *ILRA*, and whether the reforms to disciplinary regime are achieving their intended legislative and policy objectives.