

## **REPORT OF THE COMMITTEE**

convened to make a disciplinary decision about

**STEVEN NAIDENOV**

a registered liquidator.

### **Members of the Committee**

Ms Sarah Thrift, a delegate of ASIC<sup>1</sup> and Chair of the Committee

Mr Anthony Elkerton, a registered liquidator chosen by ARITA<sup>2</sup>

Mr Stephen Parbery, Appointee of the Minister

### **Decision**

1. That ASIC should direct Mr Naidenov not to accept any further appointments as a liquidator from the date on which the direction is given to him until 30 April 2024 under IPS s 40-55(1)(d);<sup>3</sup>

2. That the following condition be placed on Mr Naidenov's registration, pursuant to IPS s40-55(1)(f):

1. Peer Review

The Registered Liquidator must, at his own cost, arrange for peer review of 6 external administrations for which he is an appointed external administrator (each being a Peer Review). Each Peer Review must meet the requirements of conditions 2 to 6 below.

2. Selection of an External Administration for Review

Each Peer Review must be of an external administration chosen by ASIC. For the purposes of ASIC selecting an external administration for review, the Registered Liquidator must provide ASIC on 1 June 2024 and thereafter every 4 months for a period of 2 years, with a schedule of external administrations on which the Registered Liquidator has undertaken work during the period. The schedule must set out details of the total number of hours of work undertaken by the Registered Liquidator on each external administration included in the schedule.

3. Selection of a Peer Reviewer

Each Peer Review must be conducted by a person selected by the Registered Liquidator from a pool of no less than 3 possible reviewers nominated by ASIC for that review (the Peer Reviewer). The same Peer Reviewer need not conduct each Peer Review.

4. Terms of a Peer Review and Review Report

The Registered Liquidator must advise ASIC of the proposed terms of a Peer Review, including the scope and timing of the Peer Review, with 28 days of being notified by ASIC of the external administration selected for review.

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<sup>1</sup> Australian Securities and Investments Commission

<sup>2</sup> Australian Restructuring Insolvency and Turnaround Associate ACN 002 472 362

<sup>3</sup> References to the "IPS" are references to the *Insolvency Practise Schedule (Corporations)* which is Schedule 2 to the *Corporations Act 2001* (Cth) (**the Act**). Schedule 2 has effect because of s600K of the Act. References to the "IPR" are references to the *Insolvency Practise Rules (Corporations)* 2016.

The terms of engagement for each Peer Review must:

- a) be agreed to by ASIC;
- b) require the Peer Reviewer to prepare a report setting out the findings of the Peer Review (the Report) with 14 days of the completion of the review; and
- c) require the Peer Reviewer to provide ASIC with a copy of the Report (including any draft of the Report) at the same time that the Peer Reviewer provides the Report (including any draft of the Report) to the Registered Liquidator.

5. **Timing of a Peer Review**

The Registered Liquidator must retain a Peer Reviewer with 14 days of ASIC notifying the Registered Liquidator of its agreement to the terms of engagement for a Peer Review. The Peer Review must commence within 14 days of the Registered Liquidator retaining the Peer Reviewer.

6. **Assistance with a Peer Review**

The Registered Liquidator must use his best endeavours to assist a Peer Reviewer in the conduct of a Peer Review, including making available to the Peer Reviewer, within the timeframe requested by the Peer Reviewer, any book relating to the external administration which is the subject of the Peer Review.

3. That ASIC should publish the fact of the decision, and this report, pursuant to IPS s 40-55(1)(h).

**Summary of the decision**

1. When a group of companies with intermingled affairs and finances enter external administration, it can cause problems for administrators who do not carefully consider the issues raised by the intermingling, and act appropriately. This Committee's decision arises out of circumstances in which a registered liquidator, Mr Naidenov:
  - a. Was appointed on a joint and several basis with another registered liquidator to be the administrator, and then the liquidator, of several companies that together formed a group;
  - b. During the course of the administration, and then the liquidation, payments were made by one of the companies in the group for expenses that were attributable to other companies in the group, or which didn't relate to the administration, in circumstances where no pooling order had been obtained.
2. Against this background ASIC raised concerns regarding the use of the funds of one company to pay expenses of other companies, in relation to the adequacy of the supporting documentation for the payments, if some of the payments were appropriate and also if Mr Naidenov has the integrity, diligence, competency and judgement to be a fit and proper person to continue to be a registered liquidator. Mr Naidenov responded to ASIC's concerns. ASIC was unsatisfied by Mr Naidenov's response, and so referred the matter to this Committee to make a decision under IPS s40-55.
3. Mr Naidenov attended an interview before the Committee at which he was represented. Mr Naidenov made submissions and provided material in support of those submissions.
4. Having considered all of the material before it, the Committee was satisfied Mr Naidenov failed to act with the degree of due care and diligence required, in that he failed to turn his mind to the

issues of obtaining a pooling order and if the payments were in the best interest of the company making the payments in the absence of a pooling order. The Committee was not satisfied that there was sufficient material before it to determine that Mr Naidenov was not a fit and proper person to remain a registered liquidator.

5. The Committee takes into account the admissions Mr Naidenov made regarding his conduct, and the funds that Mr Naidenov has repaid to the company, and the change in his professional circumstances since the events that are of concern.
6. The Committee is satisfied that a period prohibiting Mr Naidenov from accepting new appointments is the appropriate regulatory outcome as it will allow Mr Naidenov time to reflect on the personal and systemic errors that led to his failure to fulfil his duties to the requisite standard, with a view to Mr Naidenov continuing to educate himself and put in place practises that will ensure that the same errors are not repeated. The Committee is satisfied that a period of peer review of 6 administrations that Mr Naidenov is appointed to will further ensure that Mr Naidenov meets the high standards expected of an insolvency professional in future. The Committee considers that it is appropriate that ASIC publish this report and the fact of this decision to ensure that there is transparency around disciplinary decision making for the profession, to reinforce to Mr Naidenov the seriousness of the conduct, and to deter the insolvency profession from similar misconduct.

### **Reasons for the Decision**

#### *Relevant Procedural History*

7. On 18 October 2022 ASIC issued Mr Naidenov with a Show Cause Notice which required him to explain why he should continue as a registered liquidator under IPS s40-40(1) (**the Notice**).
8. ASIC believed that Mr Naidenov had contravened provisions of the *Corporations Act*, failed to carry out adequately or properly the duties of a liquidator, and was not a fit and proper person to be a registered liquidator. The basis of these beliefs were the conduct that was of concern set out in Schedule B to the Notice, which can be summarised as:-
  - a. While an administrator and liquidator, Mr Naidenov used money from an administration bank account to pay the expenses of related companies, contrary to s180 and s182 of the *Corporations Act* and for the payments made after 1 September 2017, contrary to IPS s65-25 ;
  - b. While an administrator and liquidator, Mr Naidenov paid monies from an administration bank account without adequate supporting documentation as required by s531, regulation 5.06.01 and r70-10, in breach of his obligations under the *ARITA Code of Professional Practise (3<sup>rd</sup> edition) Part 18: Practise Quality and Assurance* (the ARITA COPP) section 18.2; and
  - c. While a liquidator, Mr Naidenov made payments from an administration bank account that were not necessary and proper contrary to IPS 65-25(1) and (2), ss180(1) and 182(1) and IPS s70-10(1).
9. Mr Naidenov responded to the Notice by way of correspondence dated 12 December 2022 (**the preliminary response**), 1 February 2022 (**the explanation**), 9 March 2023 (**the further Explanation**) and 29 March 2023 (**29 March response**).

10. By letter dated 18 May 2023 ASIC wrote to Mr Naidenov setting out why it was not satisfied by his explanations (**the referral letter**).
11. On 16 July 2023 Mr Naidenov provided a written statement and further documents to the Committee. On 17 July 2023 Mr Naidenov attended an interview before the Committee at which he was represented. Mr Naidenov also provided further information to the Committee by way of emails dated 18 July 2023, 24 July 2023, and 25 July 2023.
12. Following the interview, the Committee made enquiries of ASIC, to which ASIC responded. The ASIC response was provided to Mr Naidenov to allow him the opportunity to respond, and Mr Naidenov's response was provided to the Committee on 4 September 2023.
13. Mr Naidenov provided further information to the Committee on 21 September 2023.

#### **Consideration of the facts and circumstances**

14. On 10 October 2016 Mr Naidenov and Mr I [*Name known to Committee*] were appointed as the voluntary administrators of MK QLD, MK ACT, MK NSW, MK VIC, and MK Aust, collectively known as the MK Floors Group. Between 14 November 2016 and 17 January 2017, each company in the MK Floors Group was placed into liquidation and Mr Naidenov and Mr I were appointed as the liquidators.
15. Across the group there were still projects that multiple entities, including MK QLD, had afoot and which the administrators had assessed as being profitable, and determined that the completion of which would preserve value in the business for sale or reorganisation. The material before the Committee indicates that MK QLD was the only company that had substantial funds on hand. Mr Naidenov stated that he decided to cause MK QLD to lend funds to the other entities in the MK Floors Group as to not do so would substantially lessen the prospects of achieving a sale or recapitalisation.<sup>4</sup> Mr Naidenov considered that there were benefits to each of the companies in the MK Floors Group, including MK QLD, in his seeking to trade the businesses and complete certain projects with the aim of preserving as much value in the businesses and assets, for a sale or reorganisation. Mr Naidenov "*was of the view that there was a benefit to MK QLD in pursuing three key contracts in liquidation.*" The revenue was largely earned by MK QLD with respect to the three contracts.<sup>5</sup>
16. Attached to ASIC's Schedule B of the Show Cause Notice was Annexure A which set out 27 payments totalling \$271,574.22 made from MK QLD's administration account between 10 October 2016 and 31 August 2017, of which \$170,042.11, ASIC believed, related to expenses that should have been apportioned to related entities. 5 of those payments were made while MK Qld was in administration and 22 were made once it was wound up.
17. Attached to Schedule B of the Show Cause Notice was Annexure D which set out 5 payments totalling \$54,477.21 made from the MK QLD administration account, of which ASIC believed \$51,263.11 related to expenses of MK ACT and MK NSW other companies in the group, and not MK QLD.
18. Attached to Schedule B of the Show Cause Notice was Annexure E which set out, amongst others, a payment made to Mr Naidenov's legal advisers in relation to legal fees incurred advising in relation to regulatory action taken by ASIC.

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<sup>4</sup> Naidenov Prelim response at [23]

<sup>5</sup> Naidenov Feb explanation at [23]

19. Attached to Schedule B of the Show Cause Notice was Annexure C and E which also set out a number of payments made from MK QLD's Administration account which ASIC alleged the supporting documentation was inadequate.
20. In his responses to ASIC, Mr Naidenov provided further information and explanation in relation to each payment, including further documents to support the basis for each payment. Following Mr Naidenov's responses to the Show Cause notice, ASIC no longer maintained its concern in relation to some of these payments.<sup>6</sup>
21. For the reasons that follow, the Committee is satisfied that Mr Naidenov contravened a provision of the *Corporations Act*, specifically, the Committee is satisfied that Mr Naidenov contravened his obligations under s180(1). Under s180(1) an external administrator, or liquidator, as an officer of a company, must exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they occupied the same office of a company in the same circumstances. Our reasons for finding so are as follows.
22. It is not in dispute that funds from the administration account of MK Floors QLD Pty Ltd were used to pay expenses for other related entities, without a pooling order being obtained. In the mind of the Committee, a pooling order ought to have been obtained.
23. Mr Naidenov's submissions were that he considered a pooling order early on in the administration, and indeed received legal advice in relation to the same. The advice, which is before the Committee in the form of a short email and is dated early in the administration, states that the most "cost effective" way to achieve pooling would be to wait until all the companies are in liquidation, rather than putting it to creditors at a s439A meeting. The advice addresses the timing of when and how to achieve pooling, not if it is required or even how to continue to trade the companies in the absence of a pooling order. Mr Naidenov could not explain why he did not revisit the need for a pooling order once all of the companies were in liquidation, and he acknowledged that he did not discuss it with his co-appointee.<sup>7</sup> Mr Naidenov, correctly concedes that his failure to obtain a pooling order constitutes a failure by him in the fulfilment of his duties.<sup>8</sup>
24. It is not in dispute that Mr Naidenov authorised some of those payments, some were authorised by Mr Naidenov's co-appointee, and some were seemingly authorised by a senior staff member who was not an appointee. Mr Naidenov accepted that it was inappropriate that she was able to authorise these payments.<sup>9</sup> Mr Naidenov accepts that he still had obligations in regard to the payments authorised by his joint appointee<sup>10</sup> and by staff members. Mr Naidenov has put before the Committee information setting out the processes of his current workplace in relation to payments made in the course of an administration and the Committee is satisfied that similar errors of non appointees approving payments would not occur again.
25. Mr Naidenov accepted that his conduct in utilising MK QLD monies to pay the expenses of other companies in the circumstances of this group was conduct which fell short of the high standards that an insolvency practitioner ought to uphold.<sup>11</sup> Mr Naidenov conceded that a pooling order

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<sup>6</sup> See ASIC referral letter – Annexure C ASIC maintained 16 concerns out of 21, and in Annexure E it was one payment.

<sup>7</sup> Mr Naidenov's statement at [65]

<sup>8</sup> Naidenov statement at [64]

<sup>9</sup> Naidenov statement of 16 July 2023 at [15]

<sup>10</sup> Naidenov statement at [21]

<sup>11</sup> Naidenov statement of 16 July 2023 at [58] and [64]

ought to have been obtained.<sup>12</sup> Mr Naidenov accepted that in the absence of a pooling order, he ought to have exercised greater analysis of the perceived benefits to MK QLD, rather than to the group as a whole, or the limited analysis he did undertake, when considering the payments.<sup>13</sup>

26. The Committee is satisfied that Mr Naidenov breached his obligations under s180(1) to act with due care and diligence in the administration of MK QLD. The Committee considers that if Mr Naidenov had fulfilled his obligations, he would have sought legal advice as to if it was proper for MK QLD to pay the expenses of other entities in the group in the absence of a pooling order, and turned his mind again to obtaining a pooling order once all of the companies were in liquidation, he also would have considered the benefit to MK QLD individually, rather than to the companies as a group, more substantially and recorded his rationale for each payment.
27. The Committee considers that how to deal with related entities in a group, and what expenses are entitled to be paid out of the administration account, is knowledge that a reasonable registered liquidator ought to have. While it is clear from the material before the Committee that Mr Naidenov early on raised the issue of if a pooling order was needed with his legal advisors, he did not continue to turn his mind to what his obligations to MK QLD were as the administrations progressed and each payment was authorised. Had he done so, he would have identified that there was an issue in paying and continuing to pay the funds from the MK QLD administration account.
28. ASIC believed that documentation in support of the transactions listed in Annexure C and Annexure E in showing that the expenses paid related to MK QLD was inadequate or should have been provided earlier to ASIC.
29. Over the course of this matter Mr Naidenov has provided considerable documentation in support of the basis of the payments that are set out in Annexures C and E. Mr Naidenov submitted that the documentation existed, and was maintained, and when called upon to do so, he was able to provide them. The Committee accepts that Mr Naidenov has provided the documentation that was maintained, however the Committee also accepts that, as stated by ASIC in the referral letter, this documentation should have been kept with the payment vouchers for each payment and so there should not have been a need for considerable time to pass for Mr Naidenov to provide the documents, they should have been readily available to him.
30. The documents do not evidence how the debts related to MK QLD in most cases because, as has been discussed, the expenses either in their entirety or just in part, did not relate to solely MK QLD, but rather to other companies in the group or to the group as a whole. In order to be in accordance with ARITA COPP that was in place at the relevant time,<sup>14</sup> the documents should be sufficient to form an appropriate record of the procedures performed and how key issues were dealt with and significant decisions were made. In circumstances where Mr Naidenov failed to turn his mind to the key issues and so significant issues were not dealt with, it follows that the documents will be silent on those key issues too. In short, the documents provided do not evidence Mr Naidenov's thought process around how the payments were in the interest of MK QLD or related to the administration of MK QLD, or if a pooling order was required because, as

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<sup>12</sup> Naidenov statement of 16 July 2023 at [61]

<sup>13</sup> Naidenov statement at [69]

<sup>14</sup> ARITA's Code of Professional Practice 3rd edition at Part 18: Practice Quality Assurance, section 18.2 - Maintenance of Administration files states

submitted by Mr Naidenov, he did not turn his mind to those issues to the level that he should have as the administration progressed.

31. The Committee accepts that it is relevant that at the time of the conduct, Mr Naideov was an employee of the firm he worked for and was more junior to his co-appointee, despite being a registered liquidator. While Mr Naidenov still had the obligations of a registered liquidator, the Committee does accept that as an employee, rather than director of the firm, he was able to exercise less control over the processes, practises and procedures that the firm had in place around the conduct of administrations. More rigorous record keeping practises may have ensured that the documents were easily available for production at an earlier stage. However, the Committee is of the opinion that real failing here is not that Mr Naidenov did not keep sufficient records, but that he failed to identify and consider the key issues, and therefore his records do not identify how those issues were dealt with.
32. At the interview Mr Naidenov conceded that it was improper that an invoice for legal advice that pertained to dealings with ASIC<sup>15</sup> was paid by MK QLD.<sup>16</sup> Following the hearing Mr Naidenov repaid the sum of \$32,844.50 to MK QLD (the GST having previously been remitted to the company already). The Committee considers that it was appropriate that Mr Naidenov did so, but the Committee is mindful that the invoice should never have been paid by the company in the first place.
33. The Committee is satisfied that \$130,271.02 has been repaid to MK QLD of the \$170,042.11<sup>17</sup> set out in Annexure A. The Committee is also satisfied that, in accordance with a deed of settlement with the Department of Employment and Workplace Relations, that the Committee has seen, Mr Naidenov has contributed further funds to meet the debts of the priority creditors.
34. It is of concern that Mr Naidenov submitted that he and his fellow former administrator Mr I have not repaid a further \$82,821.39 to MK QLD because, he submitted, as Mr I and Mr Naidenov are owed in excess of that amount in approved but unpaid fees, *"the only consequence would have been that Mr Naidenov would be entitled to pay out those monies to himself by way of payment of his undrawn but approved remuneration."* It is the privileged position of a registered liquidator, acting as an external administrator, to review the affairs of a company, including if proper process has occurred in the running of the company. In order to do this correctly, an external administrator must maintain unimpeachable standards of transparency and process in their own administration. A failure to appreciate why proper process should be followed, even if the direct consequence is circular in nature, indicates a lack of understanding by Mr Naidenov of his obligations and the privileged position he holds as a registered liquidator.
35. To the Committee's mind, the contravention of his obligations is the crucial failing, and all other possible contraventions flow from that. Therefore, the Committee does not consider that it needs to turn its mind to whether or not Mr Naidenov's conduct contravened the other individual sections.
36. In light of Mr Naidenov's admissions that his conduct did not meet the requisite standard, and the payments Mr Naidenov has made to the company, the Committee does not consider that it can be satisfied that Mr Naidenov is not fit and proper to be a registered liquidator. Had Mr Naidenov failed to appreciate the serious and significant dereliction of his obligations that his actions

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<sup>15</sup> Show Cause Notice Annexure E transaction 5

<sup>16</sup> Confirmed via email on 19 July 2023.

<sup>17</sup> ASIC response to the committee enquiry at question 3.

represent, and failed to make any repayments to the company, the Committee may have considered this matter differently.

37. The Committee takes into consideration the funds that Mr Naidenov had paid back to MK QLD, the passage of time since these issues were raised and the absence of continuing concerns in relation to the work Mr Naidenov has completed in that intervening time, the changes of procedure that has been implemented at Mr Naidenov's current workplace in relation to record keeping and process around payments, and the admissions and concessions made by Mr Naidenov which indicate he has turned his mind to ASIC's concerns in a meaningful way.
38. The Committee considers that it is appropriate that ASIC direct Mr Naidenov not to accept any further appointments as a liquidator from the time he is served with this Report until 30 April 2024. The Committee understands that this would have financial impacts on Mr Naidenov's business, but the Committee feels it is appropriate given the seriousness of the failings and the importance to the work of a registered liquidator of ensuring issues are identified and addressed and that proper processes around the use of funds is followed. The Committee also considers that this would give Mr Naidenov further time to reflect on his failings, and to refamiliarize himself with the high expectations and obligations of a registered liquidator.
39. The Committee considers that it is appropriate, that Mr Naidenov be subject to a period of peer review which can ensure that Mr Naidenov has applied the lessons he has learnt from his previous poor conduct to ensure he is not repeating them. The Committee considers that it is appropriate that ASIC nominate a pool of persons who are suitably independent of Mr Naidenov, who are appropriately experienced as a registered liquidator and who are still actively taking insolvency appointments so as to ensure that they are up to date with current requirements and expectations. The Committee considers that ASIC should select the matters for review, from a list provided by Mr Naidenov which sets out the administrations he has been working on, and the hours he has worked, so as to ensure the matters selected are appropriate for review. The Committee considers that it is appropriate that ASIC approve the terms of engagement, which will detail inter alia the scope and timing of the reviews, so as to ensure that the peer review process is conducted suitably independently. The peer reviewer of each administration, and it can be the same person but does not have to be, should provide a written report to ASIC in accordance with the terms of engagement. Mr Naidenov should pay the costs of each review and the preparation of the report.
40. The Committee also directs that ASIC publish this report given the importance of meeting professional obligations, in order to preserve the transparency of the disciplinary process for the profession, to act as a deterrent to others.

### ***Decision of the Committee***

4. That ASIC should direct Mr Naidenov not to accept any new appointments as registered liquidator from the date of the service of this notice until 30 April 2024 under IPS s 40-55(1)(d);<sup>18</sup>
5. That the following condition be placed on Mr Naidenov's registration, pursuant to IPS s40-55(1)(f):
  1. Peer Review

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<sup>18</sup> References to the "IPS" are references to the *Insolvency Practise Schedule (Corporations)* which is Schedule 2 to the *Corporations Act 2001* (Cth) (the Act). Schedule 2 has effect because of s600K of the Act. References to the "IPR" are references to the *Insolvency Practise Rules (Corporations)* 2016.



The Registered Liquidator must, at his own cost, arrange for peer review of 6 external administrations for which he is an appointed external administrator (each being a Peer Review). Each Peer Review must meet the requirements of conditions 2 to 6 below.

**2. Selection of an External Administration for Review**

Each Peer Review must be of an external administration chosen by ASIC. For the purposes of ASIC selecting an external administration for review, the Registered Liquidator must provide ASIC on 1 June 2024 and thereafter every 4 months for a period of 2 years, with a schedule of external administrations on which the Registered Liquidator has undertaken work during the period. The schedule must set out details of the total number of hours of work undertaken by the Registered Liquidator on each external administration included in the schedule.

**3. Selection of a Peer Reviewer**

Each Peer Review must be conducted by a person selected by the Registered Liquidator from a pool of no less than 3 possible reviewers nominated by ASIC for that review (the Peer Reviewer). The same Peer Reviewer need not conduct each Peer Review.

**4. Terms of a Peer Review and Review Report**

The Registered Liquidator must advise ASIC of the proposed terms of a Peer Review, including the scope and timing of the Peer Review, with 28 days of being notified by ASIC of the external administration selected for review.

The terms of engagement for each Peer Review must:

- a) be agreed to by ASIC;
- b) require the Peer Reviewer to prepare a report setting out the findings of the Peer Review (the Report) with 14 days of the completion of the review; and
- c) require the Peer Reviewer to provide ASIC with a copy of the Report (including any draft of the Report) at the same time that the Peer Reviewer provides the Report (including any draft of the Report) to the Registered Liquidator.

**5. Timing of a Peer Review**

The Registered Liquidator must retain a Peer Reviewer with 14 days of ASIC notifying the Registered Liquidator of its agreement to the terms of engagement for a Peer Review. The Peer Review must commence within 14 days of the Registered Liquidator retaining the Peer Reviewer.


**6. Assistance with a Peer Review**

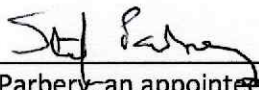
The Registered Liquidator must use his best endeavours to assist a Peer Reviewer in the conduct of a Peer Review, including making available to the Peer Reviewer, within the timeframe requested by the Peer Reviewer, any book relating to the external administration which is the subject of the Peer Review.

6. That ASIC should publish the fact of the decision, and this report, pursuant to IPS s 40-55(1)(h).

Signed:   
Sarah Thrift, a delegate of ASIC

Date: 21/12/2023

Signed:   
Anthony Elkerton, a registered liquidator chosen by Australian Restructuring Insolvency and  
Turnaround Association ACN 002 472 362

Signed:   
Stephen Parbery, an appointee of the Minister

Date: 21/12/2023

The decision of the committee is taken to be made on the last date on which a member of the  
committee signs a copy of this report.