# LEGAL SCHOLARSHIP: A ROLE IN RECONCILING DIFFERING VIEWS ABOUT A BANKRUPTCY TRUSTEE'S CONDUCT?

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ABSTRACT

A Full Federal Court judgement contained stinging criticism of the conduct of a registered trustee in bankruptcy. The Inspector-General in Bankruptcy subsequently issued a show-cause notice to the trustee. After deciding the response was not satisfactory, a disciplinary committee was convened under the *Bankruptcy Act 1966* (Cth). The committee's decision was that the trustee should continue to be registered and no further action be taken. This article explores the role of legal scholarship in this context and the demands of the current academic research environment that discourage a legal academic from pursuing such scholarship.

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## I INTRODUCTION

Legal academic scholarship is currently exploring an increasing range of legal issues from an expanding variety of perspectives. At the same time, it appears that university research policies and practices are leading to its retreat from one of its significant roles — as a bridge between the courts on the one side and the many stakeholders with an interest in court decisions on the other. This article explores this issue generally, and then discusses a case study that both illustrates an instance where legal academic scholarship could have played this important role, and reflects some of the reasons why a legal academic would be reluctant to take it on.

## II CURRENT ENVIRONMENT OF LEGAL SCHOLARSHIP

In earlier times, it was usual to see legal academics writing about case law in industry journals as well as academic journals. It was not uncommon for some legal academics to use the opportunity to develop an article from its original state as a brief case note, through to a more detailed industry journal article and, finally, to a full-fledged academic journal article. At the same time, it was also usual to see legal academics as members of professional and/or industry associations, with some taking up leadership positions in these organisations. Such connections would have enabled legal academic scholars to communicate their ideas and expertise more directly with the professions and industry.

The current environment for legal academic scholarship is very different. There are significant demands and constraints placed on legal academics. University research output is now highly regulated under a national research evaluation framework (Excellence in Research for Australia ['ERA']) administered by the Australian Research Council.[1] Universities must also undertake research income information-gathering exercises as part of the national Higher Education Research Data Collection framework.[2]

Universities now often adopt policies setting minimum research outputs. Many university faculties prescribe lists of journals they will recognise for research reporting, promotion, and workload allocation purposes. Journals within the prescribed lists are often ranked for these same purposes. Academic articles in non-prescribed list journals do not count and the writing of articles for lower-ranked journals on the prescribed list is discouraged. Academic and research organisations have also generated journal lists, some of which provide rankings for the listed journals. Examples of lists are the 2009 list compiled by the Council of Australian

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[1] 'Excellence in Research for Australia', *Australian Research Council* (Web Page, 16 June 2021) <www.arc.gov.au/excellence-research-australia>. As noted in the latest STM report, '[t]here is clear evidence that research assessment exercises such at the REF (UK's Research Excellence Framework) or ERA (Excellence in Research for Australia) have changed researcher behaviour.' Rob Johnson, Anthony Watkinson and Michael Mabe, *The STM Report: An Overview of Scientific and Scholarly Publishing, 1968–2018* (Report, International Association of Scientific, Technical and Medical Publishers, 5th ed, October 2018) 67. See also Kathy Bowrey, 'Audit Culture: Why Law Journals Are Ranked and What Impact This Has on the Discipline of Law Today' (2013) 23(2) *Legal Education Review* 291.

[2] 'Home', *Department of Education, Skills and Employment* (Web Page) <www.dese.gov.au>; Bowrey (n 1) 308.

Law Deans,[3] the 2010 ERA list (a ranked list that was discontinued in 2011),[4] and the 2019 Australian Business Deans Council Journal Quality List.[5] Professional and industry journals often are not included in these lists, and where they are included are generally not ranked highly. The ranking and audit of journals has generated its own legal academic literature.[6]

More recently, the national research evaluation framework has included reference to 'engagement and impact'.[7] This has generated questions about what might count as engagement and impact for academic legal scholarship. One aspect of information-gathering on the impact of academic scholarship is citation metrics, that is, tracking the number of citations a journal article receives (for example, Google Scholar, Scopus, Clarivate).[8] These systems have been used to help evaluate the impact of academic journal articles. However, the systems for gathering such metrics have generally not included many Australian law journals.[9]

These developments in the ranking of journals have resulted in a narrowing of the range of law journals in which an academic can publish to ensure acceptable scholarship output. Legal academics are under pressure to submit their work to a shorter list of higher-ranked journals, and must tailor their scholarship to the particular topics and approaches favoured by these journals. For instance, there appears to be a growing tendency for some law journals to preference articles that adopt a theoretical or empirical methodology, and a preference against those characterised by some as descriptive articles where legal cases are central.[10]

The above discussion has concentrated on journal articles because they remain the main currency for the recognition of academic scholarship. Social networks and online blogs provide other means to communicate academic scholarship. However, their standing in the academic research environment has yet to be established.[11]

Other developments in the general academic scholarship environment also have an impact on the nature of legal academic scholarship. With the widespread use of text matching software

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[3] Kathy Bowrey, *A Report into Methodologies Underpinning Australian Law Journal Rankings* (Report, Council of Australian Law Deans, February 2016) 31.

[4] Bowrey, 'Audit Culture' (n 1) 307. Although out of date, the list is '*still today* widely used within Australian law schools': Kimberlee Weatherall and Rebecca Giblin, 'Inoculating Law Schools against Bad Metrics' in Kathy Bowrey (ed), *Feminist Perspectives on Law, Law Schools and Law Reform* (The Federation Press, 2021) 196 (emphasis in original).

[5] 'ABDC Journal Quality List', *Australian Business Deans Council* (Web Page) <https://abdc.edu.au/research/abdc-journal-quality-list>.

[6] See, eg, Bowrey, 'Audit Culture' (n 1); Ian Murray and Natalie Skead, 'Who Publishes Where?: Who Publishes in Australia's Top Law Journals and Which Australians Publish in Top Global Law Journals' (2020) 47(2) *University of Western Australia Law Review* 220.

[7] Australian Research Council, *Engagement and Impact Assessment 2018–19: National Report* (Report, 2019) <https://dataportal.arc.gov.au/EI/NationalReport/2018>.

[8] Johnson, Watkinson and Mabe (n 1) 64–9.

[9] Bowrey, *A Report into Methodologies* (n 3) 5.

[10] Chief Justice Susan Kiefel, in an address to the Australian Legal Academy, notes the potential diversion of legal scholarship away from such areas. 'Today there are pressures on the academy which may have the effect of limiting the kind of research and writing which is useful to judges and professional lawyers. Funding may divert academic resources away from doctrinal law': Chief Justice Susan Kiefel, 'The Academy and the Courts: What Do They Mean to Each Other Today?' (Patron's Address, Australian Academy of Law, 31 October 2019).

[11] Johnson, Watkinson and Mabe (n 1) 9.

(for example, Turnitin) by universities and publishers, there is increased sensitivity about issues such as self-plagiarism.[12] In the past, it was not unusual to see an academic writing about a particular issue in several different contexts, communicating to different audiences (for example, academic, professional and industry). Nowadays, care must be taken to acknowledge all the earlier references to avoid a charge that the material is merely a recycling of the same content. In a similar vein, with much closer scrutiny and more regulated reporting of research outputs by universities, the use of the same dataset by researchers may come under criticism as an act of improper 'salami slicing' of the data — that is, slicing the same dataset to generate multiple articles rather than a single research output.[13] A legal academic researcher examining case law in a particular area and, for example, discussing cases when they first occur and then later writing about those same cases on appeal may fall foul of these processes. In this legal academic environment, outside a funded research project, there is little or no time to engage with the legal profession, with other professions such as accounting, or with industry, even if this type of contribution could help to maintain or enhance an academic's position, which, generally, it does not or its influence is minimal.

## III CASE STUDY: BANKRUPTCY AND REGISTERED TRUSTEES

This section looks at an area of bankruptcy law that in the past would have attracted academic scholarship useful to the various stakeholders in this context. It is used as a case study to highlight some of the reasons why legal academics would be unlikely to address the issues in a way that would provide an important bridge between the courts and those stakeholders.[14] In this example, after a Full Federal Court judgement was highly critical of the conduct of a registered trustee in bankruptcy, a disciplinary committee was convened under the *Bankruptcy Act 1966* (Cth) ('*Bankruptcy Act*'). Despite the Court's criticism of the registered trustee's conduct being the main reason why the committee was convened, the committee decided no action would be taken against the registered trustee. How could the committee arrive at a decision so very different from the Court? Surely legal academic scholarship has a role in reconciling apparently conflicting views of the proper conduct of a bankruptcy trustee. However, increasingly there are factors that might dissuade a legal academic from pursuing this role.

### A *Context*

To understand what was involved in the litigation, it is necessary to provide some brief background information to explain its context. Under the Australian bankruptcy regime, a

[12] Patrick M Scanlon, 'Song from Myself: An Anatomy of Self-Plagiarism' (2007) *Plagiary: Cross-Disciplinary Studies in Plagiarism, Fabrication, and Falsification* 57; Mary Wyburn, 'The Confusion in Defining Plagiarism in Legal Education and Legal Practice in Australia' (2009) 7(1) *Journal of Commonwealth Law and Legal Education* 37, 42–3.
[13] Scanlon (n 12) 59.
[14] See also the view of judges on academic scholarship: Chief Justice Susan Kiefel (n 10); former Chief Justice Robert French, 'Judges and Academics: Dialogue of the Hard of Hearing' (2013) 87 *Australian Law Journal* 96; Justice Sarah Derrington, 'What Is the Value of the Legal Academy and to Whom? (Keynote Speech, 2021 ALAA Conference, 5 July 2021).

bankrupt's estate is administered either by the Australian Financial Security Authority ('AFSA') (a Federal Government agency) or by a registered trustee. A registered trustee is registered under the *Bankruptcy Act*. To obtain registration, an applicant must have accounting qualifications, undertake some external administration studies, have relevant experience in insolvency work in the past five years and have the capacity to perform the functions and duties of a registered trustee.[15] There are 199 registered trustees in bankruptcy.[16]

A trustee's registration may be cancelled or suspended in various circumstances.[17] The Inspector-General in Bankruptcy, the chief executive of AFSA, has certain powers to suspend or cancel the registration.[18] Among the procedures under which the Inspector-General may exercise these powers is giving a show-cause notice ('SCN') to the trustee under the *Bankruptcy Act* sch 2 'Insolvency Practice Schedule (Bankruptcy)' ('IPSB') s 40-40.[19] After not receiving a response or not being satisfied with the response, the Inspector-General may refer the matter to a disciplinary committee under s 40-50. The committee, convened under s 40-45, comprises the Inspector-General, a member appointed by the prescribed body (that is, the Australian Restructuring Insolvency and Turnaround Association),[20] and a member appointed by the Minister (Attorney-General). The committee must decide on any action to be taken and provide a report to the Inspector-General.[21] The Inspector-General must give effect to the decision.[22] The decision is appealable to the Administrative Appeals Tribunal.[23]

## B *Background to the Litigation*

The background to the dispute before the Full Federal Court is complex, and will be outlined here in a general fashion only. The main parties involved in the matter were the bankrupt, Mr Young ('B'), his former spouse, Mrs Young ('Y'), B's de facto partner, Ms Smith ('S'), and the trustee of B's bankrupt estate ('T').

In 2013, Y obtained judgement against B in the amount of AUD2,828,000 (AUD2,663,000 relating to family law proceedings and AUD165,000 in damages in common law proceedings for tortious conduct [owed by B and his company]).[24] In a preliminary step before bringing a creditor's petition against B, Y had attempted to serve a bankruptcy notice on B from June 2014. It was eventually served on 3 September. However, B had become bankrupt on 2

[15] *Insolvency Practice Rules (Bankruptcy) 2016* (Cth) s 20-1 ('IPRB').
[16] Australian Financial Security Authority, *Personal Insolvency Compliance Report 2019–20* (Report, 2020) 7.
[17] *Bankruptcy Act 1966* (Cth) sch 2 'Insolvency Practice Schedule (Bankruptcy)' div 40 sub-divs C, D ('IPSB').
[18] IPSB ss 40-25, 40-30.
[19] Among the grounds for the SCN is IPSB s 40-40(1)(l)(i) — 'the trustee has failed to carry out adequately and properly … the duties of a trustee'.
[20] IPRB s 50-10.
[21] IPSB ss 40-55, 40-60.
[22] IPSB s 40-65.
[23] IPSB s 96-1.
[24] *Young v Thomson (Trustee), in the matter of Young (Bankrupt) (No 2)* [2017] FCA 8, [17].

September, when he presented a debtor's petition and T was appointed trustee of B's bankrupt estate.[25]

At this point, the main asset in B's bankrupt estate was a half interest in an apartment in Pyrmont, New South Wales, purchased (for over AUD4.5 million) by B and S as joint tenants in 2007.[26] In 2011, B and S had commenced litigation against Brookfield Multiplex ('Brookfield claim'), the builder of the Pyrmont property, in respect of claimed defects and resultant damage to the apartment.[27] On 31 July 2014, B executed a power of attorney in favour of S, and on 7 August 2014, S, acting under the power of attorney from B, transferred B's half interest in the apartment to herself.[28] The consideration of AUD1.8 million for the transfer was 'never paid'.[29]

With a large debt due her from B's now bankrupt estate and in the absence of T taking action, Y took the main role in a range of litigation directed at undoing the transfer of the half interest in the apartment. This included obtaining freezing orders restraining B and S from dealing with the property until further order, and bringing successful proceedings against B and S under the *Conveyancing Act 1919* (NSW) s 37A (transfer of property to defeat creditors).[30] Unfortunately, the freezing orders were not noted on the title to the property at the time. S, in breach of the freezing orders, granted a mortgage over the apartment to Westpac Banking Corporation ('Westpac'), to secure a loan to a company that used the funds to purchase a hotel. Westpac was joined in the s 37A proceedings. Y later brought proceedings against S for contempt of the Court orders restraining S from dealing with the property.[31] Y also obtained leave to intervene in Family Court proceedings commenced by S, in which S was seeking an adjustment of property rights between S and T as trustee of B's bankrupt estate. The contested pool of assets in this matter was estimated at over AUD11 million.[32] Despite having been unable to work since 2006 and in receipt of social security benefits, Y was able to pursue this litigation because her solicitor and barristers had been willing to act on the basis that fees incurred would only be determined and payable when Y received a dividend from B's bankrupt estate. Y was the primary creditor in the estate.

T, as trustee of B's bankrupt estate, pursued some investigations and recoveries of assets for the benefit of the estate. These included an unsuccessful application to wind up a company that was trustee for the Young and Smith family trusts, and a successful settlement with the Australian Tax Office in respect of claimed preferential payments.[33] However, T did not give consent to Y bringing the s 37A proceedings against B and S, which meant Y had to obtain court leave (*Bankruptcy Act* s 58(3)). T was later joined in the s 37A proceedings. T agreed to

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[25] *Young v Smith* [2015] NSWSC 400 [26].
[26] *Young v Thomson (Trustee), in the matter of Young (Bankrupt) (No 2)* [2017] FCA 8, [19].
[27] Ibid [21].
[28] Ibid [22].
[29] *Young v Smith* [2015] NSWSC 400 [22].
[30] Ibid.
[31] *Young v Smith* [2016] NSWSC 1051.
[32] *Young v Thomson (formerly trustee of the property of Young)* [2017] FCAFC 140 [54].
[33] Ibid [54], [74].

join the Brookfield claim as co-plaintiff with S, after S covenanted to indemnify T against the costs of the action.[34]

### C *The Federal Court Proceedings*

The matter that ultimately came before the Federal Court concerned Y questioning T's conduct in entering a litigation funding agreement with Ironbark Funding Red Pty Ltd ('Ironbark') in September 2016. The agreement related to funding matters including the application to wind up the trustee company, the Family Court proceedings commenced by S, and the Brookfield claim. Under the agreement, Ironbark was to provide T with up to AUD253,900 to fund the litigation and general expenses of the trustee, and assume liability for adverse costs orders. Ironbark's fee, after reimbursement of its outlays, was 35% of the net proceeds recovered and these proceeds were to include the half share in the Pyrmont property recovered by Y's litigation. In October 2016, Y obtained orders restraining T from incurring costs under the funding agreement, other than in respect of the Family Court and winding up proceedings, until the date of the hearing in the main proceedings.

In the Federal Court, Y sought orders under the *Bankruptcy Act* s 178, setting aside the litigation funding agreement between T and Ironbark or, alternatively, an inquiry under s 179 into T's conduct, seeking, among other orders, orders removing T from office and setting aside the funding agreement. Y later joined Ironbark in the proceedings. Y argued that T was in breach of the *Bankruptcy Act* s 19(1)(j) (duty to administer the bankrupt estate 'as efficiently as possible by avoiding unnecessary expense'). Y had litigated her rights against B and then against B and S, the result of which was B's half interest in the apartment being brought back into the bankrupt estate (subject to the rights of the secured creditor, Westpac). Y was the principal unsecured creditor in B's bankruptcy (judgement debt plus interest now amounted to AUD3,016,264.39) and she was concerned about the reduction in the value of the assets in B's bankruptcy resulting from the entry by T into the litigation funding agreement. The Court noted that T had been hospitalised for 'most of August and September 2016'.[35]

This article does not explore in detail the arguments of the parties in the proceedings, but rather it discusses the outcome of the litigation and the role of legal academic scholarship in this context.

At first instance, Y was unsuccessful in her application against T.[36] The trial judge was of the view that, without funding to conduct the litigation and with neither T (T having conducted the administration unfunded for two years) nor any of the bankrupt's creditors willing to provide the necessary funding, it was appropriate for T to obtain commercial funding.[37] The Court accepted T's evidence as to the funding agreement being on commercial terms in the absence of contrary evidence being brought by Y. It commented that some of the correspondence from

[34] Ibid [16].
[35] *Young v Thomson (Trustee), in the matter of Young (Bankrupt) (No 2)* [2017] FCA 8, [65].
[36] Ibid.
[37] Ibid [111].

Y's solicitor to T 'intruded into the role of the trustee'.[38] The Court found that, except in relation to the funding agreement, there was 'no material cause for criticism' of T's reporting to creditors.[39] The Court accepted that T 'can fairly be criticised for the limited information she provided to creditors in relation to the funding agreement and its implications for the return to creditors'.[40] It criticised T's failure to recognise Y's interest, as the major unsecured creditor, in the funding agreement and the brief timeframe for a response to be made by Y when T sought responses from creditors to the agreement. The Court recognised this failure as being a significant factor in Y bring the proceedings but considered this aspect of the case could be dealt with in the determination of any application for costs.

When Y appealed the matter, the Full Federal Court came to a very different conclusion about T's conduct. By this time, T had ceased to be trustee of the bankrupt estate. A new trustee had been appointed to B's estate, having taken over the administration from the Official Trustee.[41] At the time of the appeal the Brookfield proceedings had yet to be finalised.

The Appeal Court was critical of T's conduct in a number of respects. T had failed to take the benefit of the freezing orders obtained by Y to protect the bankrupt estate. It was critical of the notices sent by T to creditors about the need to seek litigation funding and T's intention to enter the litigation funding agreement. The Appeal Court found T had breached her duties under the *Bankruptcy Act* ss 19(1)(d), (j) and (k) and her fiduciary duty 'to take an informed view' of whether or not to exercise her discretion to enter the funding agreement.[42] T had 'acted irresponsibly' in entering the agreement in circumstances where T had a 'conflict of interest and duty'.[43] T had incurred significant liabilities in litigation without seeking directions from either the creditors (s 177(1)) or the Court (s 134(4)). In the Court's view, 'the terms and consequences of the funding agreement were manifestly detrimental to the creditors and to the estate as a whole and were not the product of reasoned or careful consideration to the standard of a prudent businessperson'.[44] The decision to enter the litigation funding agreement on the terms negotiated with Ironbark was 'commercially unsound', 'without any reasonable regard for, or genuine consideration of, the interests of the creditors', in particular Y as 'virtually the only substantial creditor'.[45] T entered an agreement 'that had the effect, as she knew, of squandering 35% of the, or the major, net assets of the estate'.[46] The Court inferred from what it found to be T's lack of understanding of the issues in the Brookfield claim, that T 'has little interest or knowledge of the position of the estate generally'.[47] T's failure to undertake a title

[38] Ibid [117].
[39] Ibid.
[40] Ibid.
[41] *Young v Thomson (formerly trustee of the property of Young)* [2017] FCAFC 140 [1].
[42] Ibid [118].
[43] Ibid.
[44] Ibid [128].
[45] Ibid [139]–[140].
[46] Ibid [140].
[47] Ibid [147].

search of the Pyrmont property between her appointment and her discovery of the Westpac mortgage showed T's 'inattention and supinely negligent approach to her duties'.[48]

The Court ordered the funding agreement be set aside under the *Bankruptcy Act* s 178, provided Y undertook to reimburse Ironbark for moneys already expended by Ironbark under the agreement. T and Ironbark were ordered to pay Y's costs of the proceedings, but T was to bear the costs personally and was not to have any right of indemnity from the bankrupt estate for her liability to Y or her own costs. In relation to the application under s 179, the Court considered that, had T remained as trustee of the estate, it would have ordered her removal as trustee; her conduct 'fell short of the high standard expected of a trustee'.[49] In the circumstances, the Court would have ordinarily ordered an inquiry into her conduct and 'her justification for the significant financial burden' she appeared to have 'imposed on the estate', but the Court did not want to increase the financial burden on the estate.[50] Instead, its response was to require T to apply to the Court to pass her accounts for the administration of the estate.

### D *Committee Decision*

AFSA responded to the Court's criticism of the registered trustee. An SCN was issued to T in relation to the bankrupt estate of B. The notice relied 'almost exclusively' on the Full Federal Court judgement.[51] It referred to T's failure to adequately and properly carry out the duties of a trustee (IPSB s 40-40(1)(l)) and failure to comply with a standard prescribed for the purposes of IPSB s 40-40(1)(p). The standard applicable at the time of the conduct under review was *Bankruptcy Regulations 1996* (Cth) ('*Bankruptcy Regulations*') sch 4A 'Performance Standards for Trustees'. The particular grounds and standards were *Bankruptcy Act* ss 19(1)(f), (j) and (k), *Bankruptcy Regulations* standards 2.3, 2.7(1) and 4.3, and the common law. T's response to the SCN was not found to be satisfactory by the Inspector-General and the matter was referred to a disciplinary committee.

In light of the Full Federal Court's strident criticism of T's conduct, it is somewhat surprising that the committee decided T should continue to be registered as a trustee and there should be no suspension, restriction on appointments, public admonishment or reprimand, or condition imposed.[52] It did, however, recommend AFSA 'strongly consider' conducting an annual review of up to five of T's files during the next two years, and that T demonstrate she had met the continuing professional development requirement at each of these annual reviews.[53] In reaching its decision, the committee relied upon the two judgements, its interviews with T, and 'relevant documents' from T's estate file for B.[54]

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[48] Ibid.
[49] Ibid [152].
[50] Ibid [153].
[51] *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* (Committee Report, 5 April 2018) 2.
[52] Ibid 1.
[53] Ibid.
[54] Ibid 4.

Contrary to the findings of the Full Federal Court, the committee considered T did take reasonable steps to protect the property of the bankrupt estate (was not in breach of s 19(f) or standard 4.3). The committee did not consider T's entry into the funding agreement a breach of duty under ss 19(j) or (k), nor did it find there was a conflict of interest within standard 2.3. The committee considered T's reporting to creditors was 'adequate' as required by standard 2.7(1).[55] T was considered to have breached the standard by providing too little time for creditors to respond to the notice about the funding agreement, but no alternative funding arrangement would have resulted even if further time had been given. In relation to the common law duty, the committee considered T had properly relied on the advice of her lawyers, her experience and specialist knowledge in relation to the administration of the estate and in particular the Brookfield claim.[56] The committee was not convinced entry into the funding agreement was a conflict of interest on the grounds that T would benefit from her remuneration being paid, because this was not seen as 'the sort of mischief that the professional standards seek to address'.[57]

The committee noted that it had not been provided with material suggesting any concerns with the administration by T of other bankrupt estates. It said that it took into account T's response to the SCN and demeanour at the interviews. These had suggested to the committee that T had 'taken to heart the criticism of the Full Court, while contending that in the main the various actions she took were defensible'.[58] It noted T was now the subject of a Full Federal Court judgement containing severe criticisms of her actions in the administration of B's estate and that a costs order had been imposed on her personally. The committee also noted that it was not aware of any action being brought against T by any professional association to which she belonged. The committee acknowledged the referral to it of the matter was on the public record (AFSA's Register of Trustees) and the referral had been commented on by online media. The committee decided that the Inspector-General publish a media release to explain the reasoning of the committee.

## IV A ROLE FOR LEGAL ACADEMIC SCHOLARSHIP?

There is no doubt there would have been a wide potential audience for any legal academic discussion of the issues raised in the litigation and the decision of the disciplinary committee. Those interested most directly would be Y, the principal creditor in B's bankruptcy, who had taken a leading role in the recovery of property for the benefit of the bankrupt estate, and the solicitors and barristers who had acted for Y and who looked to the bankrupt estate distribution for payment. Also directly interested would be the litigation funder party to the agreement with T. More generally, the interested parties would include the insolvency profession, its legal advisors and litigation funders, the professional accounting organisations whose membership includes insolvency practitioners, the regulator (AFSA), the Minister (Attorney-General) and

[55] Ibid 5.
[56] Ibid 6.
[57] Ibid 12.
[58] Ibid 18.

the Attorney-General's Department. In the context of increased scrutiny of the insolvency profession in recent years and insolvency reforms intended in part to shore up public confidence in insolvency external administrations, the matter would also be of interest to the general public.

There would have been several issues of interest to these various stakeholders, including what this decision means for the day-to-day practice of insolvency practitioners, for the Department and for the Minister, whether there are matters that may need to be addressed or addressed in more detail in the standards established under IPSB s 40-40(4) and IPRB div 43, and whether the regulator, AFSA, should revise the information and advice it provides for insolvency practitioners, including in its Practice Directions and Practice Statements.

The courts at first instance and on appeal were not disagreeing about the relevant case authorities to apply in relation to the duties of a registered trustee in bankruptcy. They disagreed about how those authorities were to be applied in the circumstances. There was no suggestion of the need for legislative change. The disciplinary committee was a group with special expertise in bankruptcy practice. Its considerations included interviews with the trustee conducted on two occasions, documents comprising the trustee's response to the SCN, and further documents including 'relevant documents' from the estate file.[59] It came to a very different conclusion to that of the Full Federal Court.

There are a number of reasons why a legal academic might choose not to explore the many issues raised in these circumstances. One of these is the nature of the articles most likely to be published by journals ranked highly in the current legal academic environment.[60] As discussed earlier, there are clear expectations around the journals to which a legal academic should be directing their research and the type of research those journals will more likely publish. Insights into this case study, although important to the many stakeholders involved, would not appear to have the elements necessary to make it attractive to the types of journals legal academics are meant to target. While the above case study will not be viewed as important in terms of precedent or theory, it is an example of where academic scholarship has the opportunity to operate as a bridge between the courts and the wider range of stakeholders, exploring why there could be such a disjuncture between the findings of the courts and the decision of the disciplinary committee in relation to the registered trustee's conduct.

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[59] Ibid 4, 5.

[60] There are other reasons why a legal academic may choose not to undertake research about a case study like this one. For instance, increasingly, the background of legal academics may mean they are less interested in, and less suited to, exploring the practical aspects of the operation of a particular legal area, where detailed knowledge of the topic is required. The Hon Justice Sarah Derrington, in her address to the 2021 ALAA Conference, refers to the Hon Judge Richard Posner's statement that (in the US context) legal academics 'now have higher degrees by research, become academics at a younger age (often without time in practice), increasingly come from other fields and therefore focus on specialised, interdisciplinary research'. Justice Derrington also refers to Chief Justice Kiefel's observation that 'an increasing number of legal academics have no practical legal experience'. See Justice Sarah Derrington (n 14).

## V CONCLUSION

Legal academic scholarship is pursuing an increasing range of topics from a growing number of different perspectives. At the same time, the current research environment in universities is imposing many demands and limitations on legal academic scholars that affect the choices they make about where to direct their research outputs. One of the issues in this context is whether legal academic scholarship can maintain its role of a bridge between the courts and the many different stakeholders affected by the courts' judgements.

This article discussed a particular instance where academic legal scholarship could have played a significant role in communicating some of the reasons for conflicting views about the role of a registered trustee in administering a bankrupt estate. It then discussed some of the reasons why a legal academic would choose not to take up the role of communicating the issues to the various stakeholders involved. While legal academic scholarship may be viewed as boldly exploring new areas and new perspectives, this paper has argued that the demands and limitations of the current academic scholarship environment mean that, at the same time, there has been a rapid retreat from what has, up to now, been seen as one of its significant roles.