BAIN AND THE WEAKENING OF SARS:

OVERSIGHT OBSERVATIONS AND SUGGESTED REMEDIAL FRAMEWORK

Interim Report

Submitted to the Commission of Inquiry into Tax Administration and Governance

Prepared by: Athol Williams

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About the Author

Athol Williams was contracted by Bain SA to provide independent oversight of the independent investigation into Bain SA's work at SARS (2014-2017), which has come under investigation by the Commission of Inquiry into Tax Administration and Governance.

Mr Williams is an Independent Advisor in Corporate Responsibility and Ethics, a Senior Lecturer at the Allan Gray Centre for Values-Based Leadership, UCT Graduate School of Business, and a Research Fellow at the Centre for Applied Ethics, University of Stellenbosch. He is a member of the Scholars and Practitioners Network for the Corporate Responsibility Initiative at Harvard University. He is a former Adjunct Professor at the Wits School of Governance and served on boards and committees at Wits University (Centre for Entrepreneurship, Convocation and Wits Enterprise).

He has over 20 years' business experience, mostly as a strategy advisor (Bain & Company[1], Taurus Associates) or senior strategy executive (Old Mutual, Rio Tinto, RMB Corvest). He has served on numerous boards and served as Chairman of the Family Life Centre and Shalamuka Capital. He is the founder and Chairman of Read to Rise, a youth literacy NGO that works in under-resourced communities. Mr Williams's work as a social advocate for education has earned him an Inyathelo Award in Education, a Lead SA award and recognition by the City of Cape Town with a bollard erected in his name.

Mr Williams holds Masters degrees from Harvard, Massachusetts Institute of Technology, London Business School, London School of Economics and Oxford University in public administration, business strategy, corporate finance, ethics, and political theory respectively, as well as a mechanical engineering degree from Wits University.

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[1] Employment was in multiple blocks as follows: 1995 (Boston), 1996-1997 (Boston), 1999-2001 (London, Boston, New York), 2009-2010 (Johannesburg). During 2017, Mr Williams supported the company's talent development efforts on a contractual basis.

Background

<u>A note about references to *Bain*</u>: Bain & Company South Africa (Bain SA) is the South African office of Bain & Company Inc (Bain Inc), a Boston-based management consulting firm that operates globally. In this report, when I write “Bain Inc” I am referring to the global Bain business headquartered in Boston, USA. When I write “Bain SA” I am referring specifically to the South African business. When I write “Bain” I mean the firm generally, referring neither to the global nor South African business specifically.

Bain SA engaged with, and provided consulting services to, the South African Revenue Service (SARS) between 2014 and 2017. Owing to a deterioration in the performance of SARS and allegations of state capture, in May 2018, President Cyril Ramaphosa established a Commission of Inquiry, headed by retired Judge Robert Nugent, to investigate SARS’s decline with a focus on tax administration and governance. This inquiry included investigating Bain SA’s relationship with SARS and the consulting work that Bain SA delivered at SARS, particularly relating to Bain SA’s work to develop a new operating model.

Between May and August 2018, Bain SA’s submissions to the Commission were led by Mr Vittorio Massone, managing partner for Bain’s operations in South Africa, and head of Bain SA’s consulting team that worked at SARS. Following Mr Massone’s testimony at the Commission’s public hearings on 30 and 31 August 2018, Bain Inc launched an internal investigation led by Bain’s US-based and Europe-based legal counsel and an independent investigation led by external legal advisors. Both investigations cover the circumstances leading up to Bain SA entering the initial procurement process, subsequent procurement processes and all three phases of work.

Mr Massone was relieved of his duties of leading Bain’s South African office so that he could focus on the Commission of Inquiry. Due to his ill health, Mr Massone was unable to appear at the Commission’s public hearing on 25 September 2018. Mr Stuart Min, Bain’s global head of legal, represented Bain at this hearing instead. The Commission offered Bain SA the opportunity to send representatives to appear before the Commission on 22 October 2018 – an offer which Bain SA did not accept. Subsequent to Mr Min’s appearance at the Commission there have been several rounds of written exchanges between Bain and the Commission.

Mr Massone resigned from Bain on 9 November 2018.

Introduction

On 7 September 2018, Bain SA appointed me on a short-term contract to contribute to the Commission's and Bain's investigation processes by providing independent oversight of the company's investigation. I understand that the reasons I was hired was my knowledge of management consulting and my expertise in corporate governance and business ethics.

My agreement with Bain SA explicitly allows me to communicate with the Commission on an unrestricted basis without violating any confidentiality obligations or legal privilege. Annex A of my agreement states:

> "Mr Williams and the Commission are free to communicate directly on matters relating to the Commission's investigation, including any concerns that could not be resolved with Mr Moolman[2]. With respect to any such communication:
>
> - Bain agrees that it shall not deem any such communication by Mr Williams with the Commission to be a breach of Mr Williams' confidentiality obligations to Bain
> - Bain agrees that is shall not seek to assert a claim of legal privilege to prevent Mr Williams from bringing his concerns to the attention of the Commission"

This provision allows me to publish this report.

As part of this contract Bain SA covered my travel-related costs (flights, accommodation and incidental expenses) and paid me a professional fee. I have instructed Bain SA to pay half of this professional fee to charity.

This interim report relates to my independent oversight role from 7 September 2018 to 20 November 2018, the date of this report. The interim nature of this report reflects the fact that Bain's independent investigation is incomplete, and no findings have yet been made. I will revise this report upon the completion of the independent investigation.

[2] Mr Tiaan Moolman is Bain SA's interim Office Head. More details of my interactions with Mr Moolman follows

In addition to reporting on the investigation, I offer my independent views on Bain SA's involvement at SARS and what remedy Bain SA ought to make, and place these in the context of responsibilities that businesses bear to act to strengthen a society's weakened public institutions. I offer these as an independent observer, knowing full well that the Commission will form its own view of Bain SA's involvement and issue its own recommendations as to remedial action.

The report is divided into three parts as follows: **Part 1** reports on the process of my oversight of Bain's independent investigation. I report on the comprehensiveness of this investigation and the transparency and truthfulness of the subsequent reporting, as well as Bain's fulfilment of its transparency and cooperation commitments to the Commission. In **Part 2**, I reflect upon the role Bain played in the set of events that led to the weakening of SARS. I base this reflection upon my experience during and exposure to the evidence of the ongoing independent investigation. Given the role that I deem Bain to have played in the weakening of SARS, in **Part 3**, I offer my independent view of what remedy Bain owes SARS and South Africa more broadly by suggesting a 6-step remedy programme and I offer a brief argument that it is not just companies like Bain, who have erred, who bear a responsibility to our society, but that businesses in general ought to step up to defend our public institutions and advance social justice.

This report represents my independent views as a scholar and advisor. I submit this report voluntarily in support of the work of the Commission of Inquiry into Tax Administration and Governance, Bain's efforts to determine what transpired at SARS and in the interest of the people of South Africa in our efforts to rid our society of corruption and state capture.

Part 1

INDEPENDENT OVERSIGHT OF BAIN'S INVESTIGATION INTO BAIN SA's WORK AT SARS (2014 – 2017)

1.1 Introduction

In a press statement on 10 September 2018, Bain announced my appointment as follows:

> "To reinforce the independence of the investigation and Bain's commitment to addressing any new facts, we have established an oversight committee made up of senior global Bain partners and outside directors. Athol Williams, a Bain alumnus and a respected independent advisor, will chair this committee on an interim basis. He is a distinguished academic in the area of corporate responsibility, a corporate leader and lifelong social advocate. Bain's contract with Mr Williams calls for him to do what is right for South Africa, without restrictions."

While the oversight committee was not established, I was contracted to play an oversight role to Bain's independent investigation into Bain SA's work at SARS. My role was focused on aiding the work of the Commission of Inquiry into Tax Administration and Governance headed by Judge Nugent which was enabled by the following clause in Annex A of my contract:

> "While engaged, should Mr Williams at any time determine that Bain is not behaving transparently with the Commission, Mr Williams will:
>
> - First raise his concerns with the Bain South Africa Interim Office Head, Mr Tiaan Moolman, and seek resolution in good faith
> - If resolution cannot be reached, Mr Williams has the liberty to share his concerns with the Commission"

This section of the report proceeds as follows: I start with a summary of the scope of the independent investigation. This is followed by the objectives of my oversight role and what I set out to achieve, followed by the activities that I undertook in my best efforts to meet these objectives. Lastly, I offer an assessment of the outcomes of my oversight role and the extent to which Bain fulfilled its commitment to support the Commission's work.

1.2 Scope of Independent Investigation

I had oversight of Bain's SARS-related investigation, whose scope was as follows (for the review period 2012 to 2017):

- All SARS procurement processes in which Bain SA participated and all contracts that Bain SA entered into with SARS, including the three-phased SARS project at the focus of the Commission's inquiry, and including the pre-contractual "CEO coaching" sessions with Mr Moyane.

- Bain SA's interactions, communications, and dealings with government officials, related associates, and third party intermediaries in connection with the contracts referenced above.
- Whether Bain SA improperly supported Mr Moyane, prior to his appointment as Commissioner of SARS, in exchange for future work from SARS.
- Whether anything of value was improperly provided to any government official, directly or through a third party, in connection with the business under review.
- Whether Bain SA had prior knowledge of the tender and/or tender requirements for the review of the SARS operating model.
- The relationship between Mr Massone and former President Zuma and any other government official, with a focus on the evidence provided to the Commission.

1.3 Objectives of My Oversight Role

In order to ultimately comment on the quality of the investigation, I set the following broad objectives and tasks: (words are underlined for emphasis)

1. ***Monitor the comprehensiveness of the investigation:*** My two main questions were (a) Are the right sources being reviewed with sufficient rigour? (b) Are the right questions being asked of the right people with sufficient rigour?
2. ***Monitor cooperation and truthfulness of reporting:*** This relates to Bain SA's cooperation with the Commission and to reports submitted to the Commission. My main question was: Is all the relevant information uncovered by the investigation being truthfully shared with the Commission?
3. ***Assist the Commission***, where I can, in establishing the truth.

Note that I did not perform any investigations of my own, rather, I engaged directly with the investigation team and relied on the findings of their investigation. I have taken the results of the external counsel's investigation at face value so have not audited nor verified these.

My work has been guided by the commitment on my part, and that of Bain, that I **do what is right for South Africa**, without restrictions. I have interpreted this commitment to mean that I will contribute to ensuring that the truth is revealed and that where trade-offs are to be made or tensions emerge, they are to be resolved in the favour of South Africa's interest.

I have also been guided by the principle of fairness in all my deliberations.

1.4 Activities to Fulfil the Objectives of My Role

Activities relating to objectives 1 and 2: Comprehensiveness, reporting and cooperation:

To provide independent oversight, my agreement with Bain SA stipulated that I:

- Have full access to findings of the investigation and have weekly meetings with the leads of the investigation.
- Have access to all communications between Bain and the Commission.
- Attend all meetings that relate to Bain's preparation for meetings with the Commission and all meetings that relate to Bain's preparation for submissions to the Commission.
- Review all documentary submissions to the Commission before submission.

Throughout the investigation I have had multiple update meetings per week and had access to relevant communications. I've reviewed documents reporting progress on the investigation, affidavits and legal agreements. I have reviewed the evidence and materials submitted to the Commission and reviewed the transcripts of Bain SA's testimony. I have reviewed the relevant media reports and the Commission's interim report.

I recommended a whistle-blower email address be distributed to Bain staff and alumni which has borne some fruit.

On occasion I have advised Bain on courses of action. While this might seem to go contrary to my role as independent overseer, it is more aligned with my commitment to see Bain do the right thing by SARS and South Africa.

Activities Relating to Objective 3: Assist the Commission of Inquiry: In pursuing Objectives 1 and 2 I have been indirectly furthering Objective 3. The more I could ensure that Bain's investigation is comprehensive, and their results reported truthfully, the more I was assisting the Commission in its pursuit of the truth of what transpired at SARS. Additionally, I also had periodic communications directly with Judge Nugent via emails and two in-person meetings to support its efforts to uncover everything that Bain knows about what transpired at SARS.

Beyond these activities, I have provided periodic updates to Bain SA and members of Bain Inc verbally, via email and through presentations to staff. I have chosen to engage with the media only to give the public assurances that I am performing this role and by way of update.

1.5 Outcomes of my oversight

The outcomes of my oversight actions are summarised in the table below and discussed in the text that follows. The table and discussion tie back to the objectives of my oversight role.

I have had the opportunity to provide input into the scope of the investigation. As far as I can tell, the actual execution of the investigation is run fully independent of Bain. Bain legal representatives join in weekly update meetings and I also have a weekly update meeting with external counsel which excludes any Bain representatives.

OUTCOMES OF MY OVERSIGHT		
Comprehensiveness – Documents & files		
Right questions	Yes	Appropriate set of search terms used for electronic searches
Sufficient rigour	Yes	Searched over 2 million files
Comprehensiveness - People		
Right questions	Yes	I did not attend the interviews but am aware of the scope of questions
Right people	Yes	Interviews with 17 current or former Bain staff, including Mr Massone
Sufficient rigour	Yes	I did not attend but know the rigour of external counsel's process
Reporting & Cooperation		
All relevant information	No	Not all relevant documents were shared with the Commission
Truthfully reported	Somewhat	Generally but some doubts about Mr Massone's affidavit
Cooperation with Commission	Somewhat	Responsive to requests but not as proactive as Commission would like
Enabling my ability to perform oversight		
Access to investigation findings	Yes	Updates and will see full final findings, expected in December
Weekly meetings with investigation team	Yes	Separate meetings - Bain, Bain/external counsel & external counsel
Access to comms with Commission	Yes	All relevant ones
Attend preparation meetings	Yes	All relevant ones
Review submissions	Yes	All relevant ones

Comprehensiveness of the Investigation – Documents & Files

The investigation started with a deep forensic analysis of documents and communications found on servers and laptops of Bain SA staff involved in the SARS project. The investigating team searched through over two million files using relevant search terms. This search yielded 187,000 documents of which 3,000 were found to be relevant and 114 classified as heightened relevance documents. Many, but not all, of these documents were supplied to the Commission.

Note that the scope of Bain's internal investigation is broader than the scope of the Commission. Accordingly, certain documents found to be relevant for the purpose of the investigation do not relate to the matters under review by the Commission. In addition, the investigation team collected and reviewed data found on the work-issued cell phones of Bain SA staff involved in the SARS projects.

Comprehensiveness of the Investigation – People

The second phase of the investigation was to conduct extensive interviews with key individuals who were known to be involved with the SARS projects or whose names surfaced during the document reviews. The investigation team intends to conduct interviews with at least 17 individuals. The interviewees include current Bain SA and Bain Inc employees as well as former employees. Most of the interviews conducted to date ran for multiple hours and in one case ran over two days. Those interviewed are mainly at the Partner level, located in South Africa, Europe and the US. Included among the 17 was the former managing partner of Bain SA, Mr Massone.

Reporting & Cooperation

Judge Nugent has expressed to me what he considered to be Bain's lack of co-operation with his Inquiry. The Judge has occasionally urged me to remind Bain that he would not tolerate what he termed their "obfuscation" and "evasion." Bain would argue that they voluntarily submitted themselves to scrutiny by the Commission, that they have responded timeously to every information request, even offering the Commission open access to their offices. By this narrow definition of co-operation, Bain may rightly claim to have been co-operating. But the Commission has a broader, almost simpler requirement. It simply wanted to know everything that Bain knew about what transpired at SARS with regard to the circumstances surrounding Bain SA being awarded the contracts and the damage to SARS that occurred during its tenure there. The Commission wanted the full truth to be reported proactively, which Judge Nugent has told me he considers Bain SA's managing partner not to have done when he gave evidence, and which he considers Bain not to have done since.

Bain has expressed some reluctance about sharing information with the Commission because of the access the media has had to information submitted and the damaging reports that have emerged given the media's use of this information without any context. The reluctance is also understandable for a business motivated to protect its interests and to avoid vulnerability should future investigations emerge.

Despite Bain expressing their intent to help the Commission, intent which I don't doubt, Mr Massone's failure to testify at the follow-up hearing hampered the inquiry and deprived Bain of the opportunity to state its case. While Mr Massone would certainly have had the most to offer the Inquiry, there were other senior Bain SA staff who could have shed some light on certain matters which may have been valuable to the Inquiry. Bain SA determined that these potential witnesses would not offer the Inquiry any information of value and so forewent the opportunity to appear at the public hearings of 22 October, although they did submit affidavits to the Commission.

Having Mr Massone oversee Bain SA's response to the Commission was unhelpful to the Commission and unhelpful to Bain SA's relationship with the Commission. This action wasted valuable time as Mr Massone presented information that did not address the Commission's real concerns. As I understand events, Mr Massone initially withheld information from Bain Inc about the Inquiry, including the very fact that Bain SA was part of the Inquiry, only informing them about it as he was finalising the first written submission. A more forthright approach from Mr Massone may have ensured that Bain SA cooperated with the Commission more fully and timeously. Furthermore, Bain was slow to include senior employees in its investigation. Understandably, in a business structured as a partnership and built on trust, it was inconceivable for some partners to suspect improper behaviour on the part of others. This slowed down the process of focusing the investigation searches. As I've already written, decisions to withhold certain information also caused delays. While the independent investigation was adequately scoped and comprehensively executed, my opinion is that Bain continues to fall short of the Commission's expectations, especially with regard to making available to the Commission all relevant information that has been uncovered during the investigation. The investigating team has not shared all relevant findings with the Commission partly in response to the Commission's stance more recently of wanting to see witnesses rather than additional documents or explanations. Where the Commission has requested specific information, Bain has provided that information where it had access to the required information. The biggest inhibitor to reaching full disclosure is Mr Massone's unavailability to appear before the Commission.

Since the independent investigation was still ongoing at the time of writing this report, no investigation findings have been reported upon which I could base my assessment of truthful reporting. I will make this final assessment upon reviewing the findings of the investigation and Bain's reporting of these findings. Other than doubts about the truthfulness of Mr Massone's affidavit, I have not seen anything to suggest that Bain's reporting to the Commission has been untruthful.

<u>Enabling my ability to perform oversight</u>

In establishing my role, Bain SA committed itself to independence of its investigation, and transparency in its dealing with the findings. It also committed to allowing me freedom to provide independent oversight and to communicate any concerns with the Commission. As indicated in the table above I am satisfied that Bain SA met all the requirements of my terms of reference to allow me to perform my role without restrictions.

Bain should be commended for taking the unprecedented step of appointing an independent overseer with the access and rights that I had. This appointment demonstrated intent to be fully transparent with the Commission and the South African public, and to get to the bottom of what transpired at SARS.

This section has commented on the process of the investigation. In the next section I offer my independent opinion on the substantive issues being considered by the Commission, that is, the role Bain SA may have played in the weakening of SARS's institutional capability.

Part 2

BAIN AND THE WEAKENING OF SARS’S INSTITUTIONAL CAPABILITY

2.1 Introduction

The loss of skilled staff and organisational functionality, and the resultant reduction in SARS's ability to collect taxes, are widely reported and are core to what prompted the establishment of the Commission of Inquiry. In this section I consider what contribution Bain SA might have made to weakening SARS's institutional capability.

My goal here is to offer a synthesis of what I have seen and heard, along with my interpretation as they relate to the issues under consideration. I reiterate that I have not conducted my own investigation; rather what I present here is my own synthesis based on my view of Bain's independent investigation and my access to Bain SA staff. These remarks are not based on any report by the investigating team and do not replace any report that the investigating team or the Commission of Inquiry will produce. Both the independent investigation and the Commission of Inquiry are ongoing so these remarks are based on what I have observed to date and a set of assumptions. I will revise these views if the investigation or Commission reveal information that sheds new light on what I have observed, introduces new relevant information or calls for a change in my assumptions.

I present this view in two sections. I start with a brief outline of the background and key events to the overall engagement between Bain SA and SARS, then present my view of where Bain SA erred and contributed to the weakening of SARS's institutional capability.

By way of summary, I close with descriptions of two narratives, the first which sees Bain SA as intimately part of a state capture plan, and an alternative which sees Bain SA as unwitting enablers of a hidden plan to damage SARS.

2.2 Background and Key Events

In South Africa, as globally, Bain ordinarily focuses on serving clients in the private sector. In South Africa, Bain saw a commercial opportunity in the public sector, both in terms of serving government departments and state-owned companies. While it had served clients in this sector before, this had not been the case in recent years. Despite pursuing growth in the public sector, it has remained a small part of Bain SA's business.

To facilitate meeting public sector leaders, Bain SA contracted the services of Ambrobrite, a company headed by Mr Duma Ndlovu. While there were some within Bain SA and Bain Inc, including the global head of legal, who raised concerns about this relationship and the nature of the contract, the relationship with Ambrobrite proceeded. This relationship yielded numerous public sector introductions across the spectrum. During this period Bain SA, through their managing partner, Mr Vittorio Massone, also met with the President of South Africa, Mr Jacob Zuma. Evidence shows that there were at least 12 separate meetings between Mr Massone and Mr Zuma. As a management consultant, it is unusual to be meeting with the president of a country, although it is every consultant's dream to be advising a country's most senior public official. Meeting the president 12 times is even more unusual. Doing so unaccompanied is counter to Bain's usual practice, as I understand it, of having partners meet with senior external parties in pairs or more. When a president is embroiled in corruption scandals and linked to state capture allegations, such meetings and their quantity rightly raise important questions about what was discussed in these meetings and the nature of the relationship that had developed between Mr Massone and Mr Zuma. While Mr Massone broadcast the fact of his meetings to anyone that he could, including internally, I get the impression that most internal senior staff imagined that the two met two to three times, not the number of times we now know.

One of the relationships that developed from the Ambrobrite contract was that between Bain SA and Mr Tom Moyane. There is speculation that Mr Massone's relationships with Mr Moyane and Mr Zuma are connected, given the strong relationship between the latter pair, but this has not been confirmed. Expressing his ambition to fill the job as Commissioner of SARS and requesting Bain SA's support, Bain SA set out to offer Mr Moyane support in his preparation for the role and to share ideas relating to SARS, including discussions about possible reorganisation at SARS. It is not unusual for a Partner at a consulting firm to meet with prospective senior executives ahead of them filling a position. Consulting firms offer such support to CEOs who are between jobs, those thinking of moving or newly appointed CEOs. It is mostly done in the context of an existing relationship to further strengthen this relationship, and ultimately such a strengthened relationship improves the firm's odds of being hired to deliver consulting work if the CEO was to hire consultants. Mr Massone described his approach in an internal email: "We work with the person to create a high level strategy plan for the company. If the plan is approved, most likely we are going to work with the CEO in its detailing and implementation." While this concept of "CEO coaching" is common, and consulting firms routinely allocate resources to deliver this coaching, a number of factors make this particular situation unusual. It is unlikely that Bain SA would have invested in Mr Moyane for the length of time that it did had it not had some certainty that Mr Moyane would be appointed as Commissioner. This is strange since the appointment ordinarily follows a rigorous public process before the President makes an appointment. We can only surmise that Mr Moyane had been given some assurance that he would get the job and that this assurance was shared with Mr Massone such that he was willing to allocate company resources to investing in Mr Moyane. More significantly though, as seen in the email extract above, is that Mr Massone seems to pre-emptively believe that Bain SA would be hired as a consultant; he makes no mention here of the fact that as a public institution, SARS would most likely need to follow a tender process to hire consultants. Mr Massone's bet paid off because, as we know, Bain SA was appointed as consultants by Mr Moyane once he took the role as SARS's Commissioner.

Not only did various members of Bain SA's staff meet with Mr Moyane multiple times before he was appointed to SARS, Bain SA also met with or received internal information about SARS from senior SARS officials. This seems to be a precursor to a potentially irregular tender process that led to Bain SA being awarded the contract to deliver an organisational diagnostic. Evidence seems to point to communications between Bain SA and SARS, relating to the tender process, even before the process had formally begun and there is evidence that appears to point to Bain SA contributing to the content of the Request for Proposal (RFP) document that SARS eventually issued.

That Bain SA offered SARS a 50% discount on their fee for the diagnostic work (Phase 1) has received much attention on the suggestion that this was done to undercut the price of the next-highest bidder. I have not seen any evidence to support this claim and find nothing sinister in the idea of offering a price discount to win a piece of work when the possibility exists for future work. Since SARS wanted a diagnostic, it was always likely that there would be additional phases of work. In virtually every project-based business where projects are delivered in multiple phases, service providers follow this approach. There is nothing unethical or sinister about it. That Bain SA would act to ensure that there *would be* future phases and that they were hired to deliver them should receive greater attention than the price discount issue.

Bain SA was eventually hired to perform the organisational diagnostic. This was a short intervention to gauge the health of the SARS organisation and determine what interventions may be required to get SARS to the state required for it to deliver on its mandate. That the Bain SA team only spoke to a small sample of managers, all selected by the Commissioner is in and of itself not unusual. Because diagnostics are by design quick assessments, only a sample of people can be interviewed. Coming in from the outside, the consultant may know which officers it would want to speak to but the consultant would naturally rely on the senior executive to guide this phase of the work. It is not unusual for a new senior executive to arrive and have some people hostile to his/her arrival and so they may exclude the hostile members from the diagnostic. Again, it is not the sample size of the interviews or the fact that Mr Moyane selected the interviewees per se which is concerning but the *significance of the recommendations* made by Bain SA given the brief diagnostic. That Bain SA could identify the need for a "profound strategy refresh"[3] of a high-functioning state institution, based on their cursory diagnostic is astounding. In this way Bain SA made the case for change at SARS, and established the need for a major organisational transformation, that opened the door to the destructive actions that were to come.

Bain SA's *intention* matters here. I have seen no evidence to suggest that the firm made the case for transformational change to support any plan to damage SARS. It is my opinion that it was entirely Bain SA's commercial interests that drove this decision. This is not intended to be an excuse – there can be no excuse for exaggerating the need for change in any organisation, especially when the party making the recommendation stands to gain from it. Bain SA's incentive to establish the need for a major transformational change programme was the consulting fees that it would derive from delivering such a programme. Some may object, claiming that if SARS didn't need the change then any change recommended by Bain SA would lead to damage at SARS. But this isn't necessarily the case – unnecessary change does not necessarily mean damage. A tyre shop could recommend that I change the tyres on my car when I don't really need the change. This wouldn't damage my car but would certainly be an unethical way of the tyre shop gouging money from me and making me spend unnecessarily. My read of the evidence is that this what happened at SARS particularly with the operating model part of the project.

However, for those actors determined to damage SARS, Bain SA's overstated recommendations for change provided the opportunity to cause their damage. With Bain SA they found perfect alignment of incentives – Bain SA wanted fees so exaggerated the need for

[3] This language was used even before Bain started working at SARS – the themes continued when they started working at SARS, ultimately recommending that a major transformational change programme was needed.

change, and they wanted the go-ahead that major change was needed - even though intentions were different. This is a significant point which I will return to in the next section.

The transformation project proceeded for 27 months. It is important to note that across the three phases of the project, only Phase 1 and some of Phase 2 related to the operating model. The bulk of Bain SA's work at SARS was in Customs where Phase 2 and Phase 3 were concentrated. The work on the operating model is estimated to constitute only a quarter of Bain SA's work and around a quarter of the fees earned.

Along the way and subsequent to the project a wide range of changes were made to the organisation, many of which we now know caused damage to SARS. This knowledge has led to the public narrative that Bain "broke" or "damaged" SARS. This may be a step too quick. Bain is an advisory firm and can only offer advice and recommendations. Ultimately management at SARS would have to implement recommendations. A more accurate statement might be that the implementation of Bain SA's recommendations caused damage to SARS, but even this statement would not reflect what appears to have happened. It is acknowledged that SARS ignored many of Bain SA's recommendations. There is evidence of significant back-and-forth between Bain SA and SARS management on organisation design elements, often to the frustration of Bain SA staff. In fact, Bain SA recorded over 130 changes to its design recommendation based on feedback from SARS. We can then lay at Bain SA's door that they accommodated or facilitated many of the changes at SARS that might have caused damage to the organisation. Had they realised that a hidden plan to damage SARS was unfolding, Bain SA should have walked away. Staying true to its stated mission of only working with clients where together they can create positive results, Bain SA should have terminated its arrangement with SARS. I acknowledge that this is much easier said than done since doing so would most likely have had significant business, contractual and reputational costs.

2.3 Where Bain Went Wrong

Bain Inc employs 8,000 people in 36 countries and has for 45 years advised many of the CEOs of the Global 500 companies, generating around $4 billion in fees in its most recent financial year. Globally and in South Africa, Bain regularly tops rankings of the best company to work for and reports that its listed clients generate returns that are four times that of the US stock market. How then does an organisation with Bain's global stature and track record, a company seen as one of the most prestigious and preeminent management consulting firms in the world, get it so wrong at SARS? Before I get to *how* they got it wrong, I want to summarise *what* I believe they got wrong, leading them to the position of contributing to the harm at SARS. I offer four ways in which Bain SA acted to damage SARS:

***Poor choice of business associates*:** Bain SA would have known that Mr Zuma faced extensive charges of fraud and corruption. It is difficult to understand why a firm of its stature would engage with someone this embroiled in improper behaviour. The firm should either have stayed far away from Mr Zuma and his associates (such as Duma Ndlovu of Ambrobrite) or implemented extra measures to guard against contamination. Judging from the materials discussed at the meetings with Mr Zuma, Mr Massone had grand ideas of engineering macro changes to many aspects of the South African economy and even offered advice on matters relating to Mr Zuma's political party, the ANC. Mr Massone appears to have made a political bet of aligning with the Zuma faction, including working with Nkosazana Dlamini-Zuma who he referred to as "the future President of South Africa," according to internal sources. The commercial potential for Bain SA of this relationship would have been astronomical which, in my view, explains why they may have been blinded to the risks. It does appear that Mr Massone saw no risk in the Zuma association, rather seeing it as an asset as he wrote in an internal email: "I wouldn't feel ashamed of an article associating us with Duma and the President … I believe it could be quite positive and strengthening as an association."

Bain SA should also have been circumspect about developing a close relationship with Mr Moyane knowing his close proximity to Mr Zuma. Nor should Bain SA have met with senior SARS officials and accepted confidential information on SARS as Mr Massone did from Mr Jonas Makwakwa in August 2014. Note that this information was shared prior to the tender process, and in it Mr Makwakwa outlines organisational problems within SARS which could be deemed useful for a consultant preparing a proposal. It is unknown whether this information was shared with other consultants bidding for the work at SARS.

While these relationships per se didn't cause damage at SARS, they were a precursor to the damage to come and by growing these relationships, Bain, perhaps inadvertently, lent its prestigious global brand to legitimising their actions.

***Actively participated in a potentially flawed procurement processes*:** Evidence suggests that SARS went through great lengths to ensure that Bain SA were the winning bidder for all three phases. While the investigation is ongoing into the propriety of the tender processes, Bain SA were willing participants in these processes. Furthermore, it appears that Bain SA may have contributed to the content of the RFP document before it was ultimately issued which, in my view, would constitute serious impropriety. Knowing that regulations such as PFMA govern procurement by public entities and observing what should have appeared to be an unusual if not irregular tender process, I believe Bain SA should have disengaged from the tender process.

At each new phase of the project, regulations covering public procurement would typically require that SARS enter a new tender process, with certain limited exceptions allowing for single sourcing. Bain SA would have known this yet actively sought to find ways to avoid a tender process, ultimately succeeding with respect to the work extensions following the initial tendered work. This shows, in my view, disregard for South Africa's procurement laws, lack of interest in fair competition which the tender process seeks to facilitate and lack of commitment to getting SARS the best value for money which a competitive tender process is intended to yield.

Some might see Bain SA's participation in the potentially flawed tender processes as evidence that it was in cahoots with Mr Moyane and others to damage SARS. Alternatively, I argue, it was Bain SA's commercial interests in earning significant fees that led them to willingly participating in these processes.

***Enabled the damage by overstating the initial case for change*:** I made reference to this point earlier. While it is generally true that every organisation has room for improvement and that when a leader calls in consultants it is usually because something in the organisation is deemed to require improvement, we'd be hard pressed to find anyone who would claim that SARS was in need of a major transformation. In fact, SARS had been on a path of quite substantial improvement for some years and needed to continue on that path, perhaps at best with isolated tweaks. Instead Bain SA argued for a change on the scale of a "profound strategy refresh" as Mr Massone wrote in one of his documents to Mr Moyane before he became Commissioner. This to me sounds like Bain SA saw SARS as completely dysfunctional and needing to be rebuilt from the ground up, at least in terms of its strategy. Bain SA appears to have planted and continuously watered the seed in Mr Moyane's mind that SARS needed transformational change by overstating the problems and the upside. That Bain SA spoke of a profound strategy refresh before both Mr Moyane or Bain SA arrived at SARS, and that Bain SA's diagnostic yielded recommendations which amounted to such profound change may be interpreted as premeditation on Bain SA's part to cause damage at SARS. Why else would major change be pre-meditated? While I cannot know what Mr Moyane's intentions were, there is a possible alternate, more likely explanation, and that is Bain SA's commercial interest. The bigger the gaps and opportunities the more consulting services would be needed and this more fees for Bain. This is a common (mis)selling technique in business in most industries. In following this technique Bain SA not only flouted ethical business behaviour and its own operating principles so that it could gouge fees from SARS, but provided the platform for those within SARS intent on undermining the organisation. With the plan to make major change at SARS rubberstamped by a prestigious global consulting firm, Mr Moyane and his associates could get on with the business of making the changes that suited them, which is why they ignored many of Bain SA's later recommendations. As I read the situation, this is the turning point and the start of the damage at SARS – *the overstated case that Bain SA makes for change*, not the new operating model that it eventually proposes. By acting in its selfish interests, rather than to create positive results for its client, Bain SA unwittingly endorsed the hidden plan to damage SARS.

Those claiming that Bain "broke SARS" by implementing a flawed operating model fall into the same trap that Bain SA fell into of overstating matters. Consultants present recommendations based on their analysis and relying on their experience, they do not *implement* changes in organisations. Only the client can implement recommendations. So Bain SA's recommendations could reasonably be criticised, which interestingly doesn't seem to receive much attention, but the responsibility for implementation lies squarely with clients, even though consulting firms and client organisations typically share the burden of success and failure, and consultants worth their salt would stand by their recommendations. The fact that SARS ignored many of Bain SA's operating model recommendations further points to the fallacy of Bain SA's work per se causing damage at SARS.

It is important to note that assertions of SARS being a world-class organisation refer mainly to the tax collection part of the organisation. It is here where I believe it was an overstatement to argue that major change was required. However, my understanding is that this was not the case at Customs, quite the contrary. Customs did require significant change, and this is where the majority of Bain's time was spent and fees earned, roughly three-quarters of the total fees was earned here. Available evidence suggests that SARS implemented most of Bain SA's recommendations in the Customs part of the organisation and that this implementation has yielded positive results.

***Stood by while SARS got damaged*:** When SARS rejected many of Bain SA's recommendations and designed their own operating model solution, Bain SA should not have continued to support the implementation of the latter design. Bain SA should have recognised that this was no ordinary transformation programme by the scale of the internal resistance and the individual agendas at play evidenced by the clear jostling for positions in the organisational structure design. Bain SA was not achieving the positive results they claim guides their work and client engagements and so should have disengaged if the situation could not be changed.

But rather than leave, Bain SA continued with the programme, accommodating the many changes. This gave legitimacy to the hidden plan and enabled its implementation using Bain's resources and intellectual property. Even when Bain SA's junior consultants raised concerns about the quality of the work being done and its receptiveness, they were ignored by Bain SA's senior staff. Even as media reports emerged of sinister happenings at SARS, Bain SA's senior staff directed junior staff to ignore media reports and stay focused on the work at hand.

The best explanation that I have for this behaviour is that Bain SA was not acting in the interest of SARS but in its commercial interests, not only at SARS but the broader set of opportunities that Mr Massone had been discussing with the President.

If anyone could have protected or rescued SARS from those intent on damaging the organisation it was Bain because they were on the inside, had the ear of the new SARS leadership and had enormous power to speak up given its prestigious global reputation. This is the tragedy of the situation – the very ones who were in a position to rescue SARS took advantage of its weakness.

From what I have seen and heard, and understanding their motivations, Bain was not party to the macro-plan to cause damage to SARS. They were initially unwitting accomplices and then later, as they became aware of what was transpiring, became knowing by-standers.

Earlier I asked the question about how an organisation with Bain's global reputation as one of the most prestigious and preeminent management consulting firms could get it so wrong at SARS? Having shared my thoughts of what Bain SA got wrong, I now answer this question of how this came to be, that is, what underpinned Bain SA's behaviour.

***Blind commercial interests*:** I have already mentioned Bain's commercial interests as their driving force. I have encountered nothing that suggests Bain SA entered SARS to cause it damage. Bain SA entered SARS with commercial interests. Ordinarily there is nothing wrong with that. As a service provider it is acceptable to seek to earn fees in exchange for providing a valuable service. However, Bain SA did not always provide a valuable service. It allowed its commercial interest to blind it to what was happening at SARS, that is, its work being used to justify damage at SARS. Blinded by the economic opportunities that lay ahead, Bain SA simply behaved in ways unbecoming of an ethical service provider and went along with the damage that others were causing.

***A cavalier culture dominated by arrogance and fear*:** Bain SA might offer to concede that there were lapses in their governance while working at SARS. This suggests that perhaps a rule or two needs to be tightened or that an additional rule is required. In my view, what went wrong was more than a failure of governance but a cultural failure, that is, something endemic to the culture of Bain's business in South Africa. It is too easy and far too simplistic to conclude that Mr Massone acted alone and should be identified as a lone rogue within the company. There is little doubt that he is the main protagonist in the saga – he was the head of the South African business and led the client relationship at SARS. It was he who developed the relationship with Mr Moyane. And it was he who directed or endorsed many of the actions the Bain SA teams took during the 27-month long engagement. It was also he who failed to coherently explain Bain SA's involvement at SARS and answer basic questions during his public testimony in August, and then fail to appear at the follow-up hearing. There is evidence as well that he may have misstated facts during his testimony and in his affidavit to the Commission. Mr Massone has a lot to answer for.

However, Mr Massone was supported from below and endorsed from above. Any wrongdoing deemed to have been committed by Mr Massone was done with some awareness of Bain's South African leadership, notwithstanding my observation that some members of the leadership were intimidated by him so would not have challenged the wrongdoing. While Bain Inc might not have been aware of Mr Massone's actions, he was fully endorsed in his role by Bain's global leadership. I am not suggesting that Bain Inc or the rest of Bain SA necessarily endorsed Mr Massone's *actions* – there is evidence to suggest that most people were unaware of most of Mr Massone's activities; even his diary was vague with cryptic meeting descriptions.

What I am suggesting is that Bain Inc endorsed Mr Massone as the *leader of Bain SA* by appointing him to the role and keeping him there for 9 years despite concerns being raised by senior Bain SA staff – this is one of the longest Office Head tenures at Bain globally. By their long-term endorsement of Mr Massone as Office Head of Bain SA, I suggest that Bain Inc acquires some responsibility for the consequences of Mr Massone's behaviour. Similarly the Bain SA leadership bear some responsibility as well.

Bain SA, and particularly Mr Massone as the leader for 9 years, inculcated a culture where questionable professional and ethical behaviour was tolerated or when there were dissenters, they were ignored or penalised. As I've already mentioned, the concerns of junior consultants were disregarded at SARS. But even senior members of staff, partners in the firm, were chastised or penalised for challenging Mr Massone, such that eventually, some senior staff were too afraid to speak up. Other senior staff simply disengaged from what Mr Massone was doing. In a range of different ways, the firm culture ensured that Bain would be placed at the disposal of those with ill-intent at SARS.

This is not to suggest that Mr Massone didn't have any supporters in South Africa; and he certainly had supporters within Bain Inc as gauged by his long tenure as Office Head and the fact that when South African partners raised concerns with Mr Massone's superiors about his behaviour no actions were taken.

Ultimately the local and global leadership became knowing beneficiaries of what transpired at SARS and bystanders while SARS got damaged. Many insiders report a culture of arrogance towards clients and even a dismissive attitude towards South Africa. Coupled with a culture that rewards commercial performance over much else and you have a recipe for disaster.

Bain espouses what they term "True North values" as their moral guide – "our unwavering commitment to always do the right thing by our clients, our people and our communities." At SARS Bain SA appears to have strayed significantly from these stated values. An organisation's actual values are revealed when they are in tension with something else – Bain SA, and the broader Bain Inc, might need to reflect upon the fact that while claiming to operate with integrity, the SARS example shows, with the prospect of significant fees (both from the current project and the broader projects with the President), Bain SA showed that when it came to a trade-off, it placed profit above principle. Even with all the concerns about unethical behaviour at SARS, concerns being raised about the culture being created and questions over his leadership style, Mr Massone was still celebrated within the global firm and received a standing ovation at the local office's retreat in recognition of his leadership.

It should be cause for great concern for Bain Inc's global leadership that consistently across the South African business, staff talk about fear of speaking up or asking probing questions. Besides being an awful environment in which to work, a culture of fear is a constraint to doing the right thing because it stifles innovation and silences those with conviction to challenge unethical behaviour. This case shows that an organisational culture of arrogance and fear will erode the meaning and effectiveness of any values or principles by which an organisation may have set out to guide its behaviour.

Even with the best intentions, this experience highlights the gap between intent and action. I have no reason to doubt Bain's intent but its actions at SARS and even some aspects of the investigation, do point to the considerable work required to close this gap if it hopes to regain trust in South Africa.

I have had to keep reminding myself that what I was observing was not Bain Inc but Bain SA since there appears to have been a departure in this office from the global Bain culture and operating standards. Even within the firm I could observe the bewilderment as "Bain" was described as unethical and unprofessional. I do not believe this to be true of the global firm. This case demonstrates the difficulty that multinational companies face in ensuring that all offices operate according to its core principles. With the South African office representing only a small fraction of Bain Inc's global business, it is likely that monitoring of the office was insufficient, something that Bain Inc would need to address going forward.

I will summarise this section by presenting two narratives of Bain SA's involvement at SARS.

2.4 The Two Narratives

I draw a distinction between the public narrative which has been developed in the public domain over recent months, and the alternative narrative which I have laid out in this report. Both narratives rely on the same facts and present reasonable arguments built on different interpretation and stringing together of the facts.

The public narrative proceeds as follows: Bain SA met with the president and Mr Moyane to design a plan to weaken SARS's institutional capability as part of a broader state capture plan and as a way to halt investigations into Mr Zuma's tax affairs and those of his associates. Bain SA developed the detailed plans to damage SARS and shared an overview of these plans with Mr Moyane months before he started at SARS so that even before either of them entered SARS they had already set out what they would do once they got in. Bain SA, through Mr Massone and others, met repeatedly with Mr Moyane to coach him in this plan and prepared him for his role to lead the damage to SARS. To ensure that Bain SA could support him with the implementation of the plan, Mr Moyane manipulated the SARS tender process to ensure that Bain SA got hired. Bain SA cooperated with the manipulated tender process including offering a 50% discount on its fees for the first phase of work. Once at SARS, Bain SA produced low quality work because the script had already been written for what the outcomes needed to be – the weakening of the institutional capability of SARS. Bain SA's diagnostic for example was a sham during which Bain SA superficially interviewed a group of individuals hand-picked by Mr Moyane, and then presented their pre-determined recommendations to the effect that SARS needed a major transformation, which SARS did not need. Bain SA continued to cooperate with the tender process rigging to ensure that it could continue at SARS through phases 2 and 3, to implement its recommendations and operating model design. Bain SA proceeded to implement its recommendations which ultimately resulted in the large-scale damage to SARS.

The alternative narrative would proceed as follows:

Bain SA met with the president numerous times to discuss project ideas, for example Project Phoenix. These meetings did not include Mr Moyane but SARS may have been discussed. A state capture plan and a plan to weaken SARS may have existed, it certainly seems that Mr Moyane acted as though according to such a plan, but Bain was not part of its design or knowingly part of its execution.

Upon the request of Mr Moyane, Bain SA developed a set of materials, using public information and their experience, to offer possible ideas of what an improvement agenda may look like for a new SARS Commissioner.

Bain SA, through Mr Massone and others, met repeatedly with Mr Moyane to offer a form of CEO coaching to help him prepare for the role as Commissioner should he get it. Bain used its standard materials for new CEOs in which it lays out a plan of action for the first 100 days, the key period for a new CEO to establish himself/herself in the new organisation. This CEO coaching is standard practice for Bain and other management consulting firms and most of the materials used are generic. Bain SA would have customised some of the materials based on the external view of SARS that they had developed. Bain SA also shared with Mr Moyane a vision of a new SARS, without having entered the organisation, the details of which would be subject to actual data and further analysis.

Seeing that Bain SA could be a useful partner in his new role, Mr Moyane set out to do all that he could to ensure that Bain SA was hired. At this stage Mr Moyane's motives probably parted with that of Bain. Nevertheless, Bain SA cooperated with Mr Moyane and others at SARS in this process. Bain SA offered SARS a 50% discount on its fees for the first phase of work as a competitive tactic to ensure that at least on price, they would be the preferred candidate. Offering discounts on the first phase of a multi-phase project is common in virtually every sphere of business. It was known that the project at SARS would entail multiple phases as envisaged in the RFP.

Once at SARS, Bain SA produced work below its usual quality, particularly in the operating model part of the overall project. Although Bain did resist a number of SARS recommendations, their arrogance led them to ignore legitimate objections or resistance to their work and their blind commercial interests saw them bow to Mr Moyane and his associates. While management consultants co-create solutions for their clients to ensure most likely chances of success and results, it is not usual management consulting practice to allow the client to ignore recommendations or make significant changes to the recommendations, as happened at SARS. A situation where a client made as significant changes to a consultant's recommendations as SARS did would be a sure indicator of a failed consulting engagement. Bain SA would have known this.

That Bain SA's diagnostic only engaged with a sample of executives is itself not unusual. By definition a diagnostic is a "dipstick" into the organisation and while the consultant would have some idea of which managers they would want to interview, it is not unusual to rely on the guidance of the CEO for who to speak to. I consider it strange for example that Bain SA did not interview the CFO of SARS during the diagnostic but from Bain SA's standpoint it would not be unreasonable for them to assume that Mr Moyane had good reason for this. As I noted earlier, it was not so much the nature of the diagnostic that surprises me but the scale of the recommendations derived from this diagnostic. That Bain SA could conclude that SARS needed a major transformation when it is well-established that SARS was a high-functioning organisation is surprising.

Bain SA continued to cooperate with Mr Moyane and his associates inside SARS to ensure that it could continue at SARS through phases 2 and 3, to develop the details of the transformation plan and to establish the organisational capability to guide and monitor the implantation, for example, by creating the RDO.

It is known that SARS did not implement any of the operating models that Bain SA designed. While Bain SA did offer some resistance to what Mr Moyane set out to do, ultimately they opined and supported the implementation. It is my view that Bain SA's commercial interests, particularly as they related to the large projects that were being discussed with the president, and knowing Mr Zuma and Mr Moyane's closeness, led them to drop their usually high professional standards to go along with Mr Moyane's plan even when Bain SA began to realise that all was not well.

Bain SA provided the perfect, if unwitting, partner for those intent on damaging SARS. Overstating the case for change opened the door for Mr Moyane to rip apart the organisation as he had planned, and remaining at SARS even as the organisation rejected its recommendations, legitimised the damage.

This second narrative agrees with the first in that Bain SA contributed to the damage at SARS but differs on the point of being part of the hidden plan to damage SARS, and differs on the point that Bain SA's operating model solution caused the damage.

Part 3

WHAT DOES BAIN SA OWE SARS AND SOUTH AFRICA FOR ITS ROLE IN THE WEAKENING OF SARS?

3.1 Introduction

Bain SA has already repaid to SARS the fees that it earned during the period under consideration. Is this the full account of what Bain SA owes SARS and South Africa?

The Commission will no doubt make recommendations for the consequences of what it deems to be Bain SA's role in the weakening of SARS. What I present here is not a legal view but a broad conceptual programmatic approach, that of an applied ethics scholar and an advocate for the remedying of social harms.

If it is ultimately shown to be true that Bain SA contributed to the weakening of SARS, what should we expect from the company by way of remedy? A framework for systematically determining remedy for social harms caused by companies has not been well developed in South Africa. This is a major oversight given the numerous companies that have been involved in social injustices in our country for many decades. Criminal activity must be dealt with in our criminal justice system, but there are matters of justice that sit outside the criminal justice system, matters of social and economic justice. We have not developed a framework to guide our claims of remedy from these companies, and equally, society has not presented these companies with guidelines on how they can regain our trust. What follows here may be a step towards such a framework, which I demonstrate using the case of Bain.

3.2 *True* Corporate Responsibility

Ask any business executive about the scope of their responsibility to society and you'll hear that business should focus on driving the economy, pay taxes and leave the rest to the state[4]. But what if the state itself is being attacked? And what if the state is unable or unwilling to offer social protections or to restore justice where there is injustice? This has been the situation in South Africa for at least the last century and certainly over the last decade as our state institutions have systematically come under the influence of parties with private interests. What should businesses do in such situations? I believe that simply carrying on with business-as-usual is a failure of *true* corporate responsibility.

[4] I would offer contrary arguments to this response, but this is not relevant to the matters at hand.

In a situation in which state institutions are weakened, and particularly where the integrity of these institutions has been compromised, as is the case in South Africa, business has a responsibility to proactively act to strengthen our state institutions, even if this comes at the expense of profit.[5] This responsibility derives from business's responsibility to do no harm, which entails avoiding doing harm itself and supporting those institutions which prevent harm. When state institutions are weakened, businesses run the risk of committing harms themselves, even in the normal course of business, when state institutions are unable to act to prevent harm.

In South Africa we've been paying lip service to ethical behaviour, social and ethics monitoring and corporate responsibility. The wave of corporate scandals are just the tip of the iceberg. Corporate South Africa has largely adopted the cynical approach of "do as little social good as you can get away with." We don't have corporate social responsibility, we have corporate social *optionality*, that is, corporations don't behave as though they bear a moral responsibility to society, rather than behave as though they have a charitable option to do some good, on *their* terms rather than what society needs. The reality is that corporations bear specific tangible moral obligations to remedy injustices that they have caused or are party to, yet this is not the frame used when companies approach their social obligations nor is it the frame used when society assesses their behaviour. Large companies wield significant power to act to shore up our institutions, yet most have failed to act. Yet real people continue to suffer the injustices at the hands of business's neglect. The idea of doing no harm, which ought to govern all our actions, speaks not only of direct actions that cause harm, but also not contributing to conditions that can cause harm and not weakening public institutions that provide social protections and serve the common good. Both actions that cause these harms, and omissions that fail to avoid these harms, fall into this category.

This is an area of unethical corporate behaviour often overlooked. Companies view their responsibility to society to entail making voluntary contributions to charities; they view any social responsibility as optional or even supererogatory, something that may be good but not morally required. They make a 'business case' for corporate responsibility arguing that if a social intervention benefits the business then it is good to do. This approach causes companies to ignore desperate social needs, even when they have the ability and resources to help, because

[5] This may strike most business people as odd since they'd consider their responsibility to shareholders as paramount. I acknowledge fiduciary duty and responsibility to shareholders but suggest that in the situation where state institutions are weakened, or injustices have been caused through some social scheme in which businesses have participated, the order of their moral duties are rearranged such that remedy to restore justice becomes paramount.

such interventions offer no business benefit. Furthermore, every business bears a responsibility to uphold the integrity of state institutions – to fix where it has been damaged, to defend where it is being attacked, to build defences against future attacks, and certainly not to take advantage of its weakness. In fulfilling their responsibility, we would expect for example that companies would speak out or act against our current scourge of state capture, yet very few have. Instead, many are taking advantage of our weak public institutions.

A responsibility cannot be optional, it is an obligation. What we need in South Africa is for companies to begin living up to these obligations to our society.

In the case of Bain, not only did Bain SA not act to fulfil its responsibility to contribute to strengthening our weakened institutions, it supported efforts to harm these institutions and took advantage of the institutional weakness at SARS and our broader state vulnerability due to state capture.

3.3 Remedying Harms Caused by Corporate Irresponsibility

I propose a *6-step remedy programme* that a company can implement to remedy the social harms of its action whether it has been the wrongdoer or allowed other to act wrongly, or in many cases where it has been a beneficiary of a wrong by others. There are many cases where companies are not actual perpetrators but participate in the social scheme that causes, upholds or perpetuates harms done to individuals, other organisations or our broader society.

For each of the steps I first provide a general description of the requirement and then apply it to the case of Bain SA.

Step 1 – Identify the harm(s) caused and the harmful acts

The first step to any remedial programme is to gain a factual understanding of who performed which harmful acts, who the victims were and what the nature of the harms were. This can be a complex and time-consuming process that may require forensic investigations and the input of expert advisors. The longer the elapsed time between the actual events and the present, the even more complex this fact-finding process becomes. A company serious about remedy would need to invest adequately in this step, since all subsequent steps in the remedial programme rely substantially on what is discovered here.

Bain SA has already begun its investigation into what happened at SARS. We expect that findings will be known in December. These findings will inform the scope and scale of the remedy that Bain SA ought to make.

Perhaps it should become standard practice in South Africa, that in the face of allegations of fraud, corruption or massive social harm that companies are required to appoint an independent oversight advisor, similar to the role I played at Bain SA, to give the public assurances of the rigour of the investigation and to vouch for truthful reporting especially when the full findings of such investigations cannot be made public for legal reasons. Such a role also keeps the company honest since the independent oversight advisor is free of confidentiality constraints so can reveal to the public any improper behaviour.

Step 2 – Acknowledge the company's role in the harm

This should be in the form of internal and public announcements which highlight specific actions and contributions to harmful outcomes. At best we see companies make vague acknowledgements but in most cases there is no acknowledgement at all. In the absence of concrete specific acknowledgment everything that a company does rings hollow and inhibits its progress to social trust and legitimacy.

Bain SA's behaviour has significantly eroded its social legitimacy in South Africa. While it has made a first step towards remedy by returning to SARS the fees it earned, it will always bear a moral debt to our society until it acknowledges the wrongs it did. A significant contributor to this acknowledgement would be to determine exactly what happened at SARS and report this truthfully. I have reported in Part 1 of this report the extent to which Bain has done and is still doing this.

Step 3 – Issue an apology to the victims of the harm done

The company needs to issue a public apology to the victims of the social harms to which it was a party. The connection between its specific actions or contributions to harm need to be made with specific victims, if possible. Where the general society has been victim this should be acknowledged.

Once Bain SA has acknowledged its specific wrongs, it needs to issue an apology for these wrongful acts or harmful outcomes. The victims to whom apologies are owed would include the South African society, SARS, in general, and specific individuals, Bain SA's clients and its staff.

Step 4 – Implement a programme of reparations

The first three steps of the remedy programme offer credibility to what comes in this fourth step. Often companies rush to show some act of contrition but neglect to acknowledge specific wrongs and issue specific apologies, thus never fully repaying its debt to society. Similarly, fulfilling Steps 1 to 3 without reparation, especially where there has been tangible harm, will be insufficient.

Reparation might be considered to have two constituent parts, namely *restitution* and *compensation*. Restitution seeks to remedy the harmful act, while compensation seeks to remedy opportunity cost or deprivation suffered by a victim. If A stole B's truck, then restitution requires that A returns the truck to B, while compensation requires that A pay to B any loss of income and any inconvenience suffered due to B not having his truck. Determining what constitutes adequate restitution must start with the consideration of the harms done to victims. Who is worse off as a result of the wrong action, what is the nature of this harm that makes them worse off, and how can the company eliminate this harm? In the case of Bain SA and SARS we would need to determine the total harm done – to SARS's institutional capability, to SARS individuals and to the broader South African society – and then determine Bain SA's share of this harm. This is not a simple exercise but can be done to yield meaningful results.

Bain SA's repayment of fees and interest could be considered over-payment when we consider that only Bain SA's operating model work is being questioned not the work it did for Customs, which has delivered tangible benefit to SARS. But perhaps the 'over-payment' covers other areas where Bain SA may bear a justice debt – the damage to SARS, to individual careers and perhaps to our broader society. With regard to harm to the broader society, some have claimed that Bain should bear the full burden of the tax collection shortfall. This claim overlooks the fact that numerous factors contribute to a tax collection shortfall, including macro-economic factors. While SARS's tax collections capability is reported to have been diminished, this diminished capability would explain only part of the tax collection shortfall. If we agree, as I have argued, that Bain is only partly responsible for the weakening of SARS and that a weakened organisation only partly explains the tax shortfall, then is seems overly and unfairly demanding on Bain to have to fill the tax shortfall. At the same time, it is plausible that Bain may bear *some* responsibility for the shortfall. The same would be true of other areas where harm has been done, that Bain would bear some of the responsibility.

In determining what Bain SA owes we should not overlook that it has access to two valuable resources, other than cash, namely IP and skilled professionals. Especially for those areas of SARS or our broader society where we cannot quantify the harm done or where cash won't necessarily repair the harm, we could call on Bain SA to make these two resources available. Perhaps Bain SA could offer consulting teams at no cost to contribute to the institutional repair at SARS. Perhaps they could broaden the scope of the Bain Academy, which now upskills potential executives, to focus on SARS employees, or public sector employees more generally, and establish a permanent source of funding for the Bain Academy to give it greater financial stability. Or perhaps Bain SA could offer a set number of consulting teams per year to address social challenges South Africa faces, challenges that would benefit from Bain SA's skills.

In my Daily Maverick op-ed on 16 October 2018 titled 'What do we want from Bain?' I issued a challenge to Bain SA that they would need to do something extraordinary to gain South Africa's trust. It is not for me to decide what constitutes 'extraordinary' but what I have described above may be the first steps towards something extraordinary. It is important to note that what may be required is not necessarily a once-off act – I have used the term remedial *programme* consciously, to reflect the need for a sustained effort.

Step 5 – Commit to and demonstrate change of behaviour

A question certain to be asked of any company involved in harmful behaviour is how they will ensure that this will never happen again. This will require a demonstration of changed behaviour. But this change of behaviour is also critical to the meaningfulness of the apology in Step 3. An apology without change of behaviour is meaningless. There is absolutely no value in a company issuing an apology for harm done and then continuing with the same behaviour or continuing to operate in the same way.

I have pointed to Bain SA's internal operations that may have led to the harmful outcome, namely blind commercial interest and their cavalier culture. Internally, Bain may need to rethink its incentive structures and its governance procedures to ensure that the events at SARS are not repeated. Culturally, it would need to begin rooting out the arrogance and fear that seems pervasive, and create space for dissent and whistleblowing.

But this needs to have an external component as well, such that society can observe the commitment to change. In addition to reporting on internal changes, perhaps all senior members of the Bain office in South Africa should sign an annual pledge to be more constructive contributors to South Africa. Perhaps introducing a governance board with independent representation will be meaningful.

Step 6 – Commit to delivering products or services at high quality and fair prices

In this sixth step of the remedy programme, the company must commit to delivering the best that it can. This is particularly relevant to multinationals who may have lowered the quality of their products or services in South Africa. These companies need to commit and deliver the same quality of work in South Africa as they deliver in other markets.

Other than in Phase 1 of the SARS project there is no indication that Bain SA has not been providing consulting services of the highest standard to their clients, although the Phase 1 experience does demonstrate that this standard can slip. As part of Bain SA's commitment to behaviour changes (per Step 5) and a culture overhaul to root out the arrogance, it would be expected that lapses in delivery of client results, as happened at SARS, would not recur.

It is important to note that *all 6 steps **must** be delivered* to start the process of remedying the harm done. The scale of each part must match the social harm done. This is not a PR exercise, but an exercise in pursuit of social justice and public trust.

Conclusion

It is right that the South African public is angry about corporate corruption, public corruption and state capture. Coordinated plunder of our public resources must not be tolerated and must be punished. These destructive and despicable behaviours contribute significantly to the suffering many South Africans face by depriving our public programmes of the resources needed and retard our social and economic progress. In addition, they undermine our democracy and our faith in our public institutions, never mind the loss of confidence we suffer in the international arena.

Given what we know about Bain SA's role in the weakening of SARS, one of South Africa's key public institutions, we are right to be angry at the company and to call for justice. As I have outlined, Mr Massone, Bain SA and Bain Inc have a lot to account for. So too do some who held leadership positions at SARS at the time, particularly Mr Moyane.

What I have sought to do with my oversight of Bain SA's investigation, and in writing this report, is to convey as objectively as I can what I have observed and my best interpretation of the facts to form a coherent picture of what transpired during Bain SA's engagement at SARS. I have tried to be fair to all parties but have pointed firmly to wrongdoing where I have seen evidence of it.

It is my hope that this report will serve as meaningful input to the Commission of Inquiry's deliberations and serve to provide the South African public with a richer understanding of what transpired at SARS.

Those who have done wrong must be punished. However punishment is insufficient to achieve social justice. Our pursuit of social justice must extend beyond punishment to remedy. In this pursuit I have offered a suggested 6-Step remedy programme that Bain could follow, and hopefully one that can serve as a guide for any company seeking to sincerely remedy social harm that it may have been party to. Corporate SA has some way to go to fulfil its true corporate responsibility to our society, that of contributing to the remedy of the harms it has perpetrated in the past and acting to prevent these from recurring. This requires a significant departure from the current superficiality of CSI which in most cases sets us back rather than advances our society towards social justice.

Ultimately it is my hope that this report contributes in some small way to eradicating corruption in South Africa and freeing us of the burden of the suffering caused when a few elites abuse their positions to exploit public resources for their private gain.