



23 April 2015

Dr Kathleen Dermody
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Dear Dr Dermody

Insolvency in the Australian construction industry

I am pleased to enclose a submission prepared by the Federal Circuit Court Liaison Committee of the Federal Litigation and Dispute Resolution Section of the Law Council of Australia in consultation with Committees of the Business Law Section.

The Committee would welcome the opportunity to discuss the submission further.

Yours sincerely

MARTYN HAGAN
SECRETARY-GENERAL



Corporate insolvency jurisdiction and the Federal Circuit Court of Australia

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Executive summary

This submission responds to the [inquiry by the Senate Standing Committee on Economics](#) into insolvency in the Australian construction industry.

The Law Council recommends that Corporations Law jurisdiction in corporate insolvency matters be conferred on the Federal Circuit Court of Australia (FCCA).

The proposed expansion of the jurisdiction of the FCCA would enable a range of Corporations Law matters to be determined more quickly and cost effectively than is currently the case.

The amendment to the *Corporations Act 2001* (Cth) proposed in this submission would not affect the existing law, practice and procedure under which proceedings more appropriately dealt with in the Federal Court of Australia can be transferred there, nor will it affect existing avenues of appeal.

This submission also recommends that:

- the Assistant Treasurer recommends the expansion of the FCCA's jurisdiction as proposed in this submission be taken to the Legislative and Governance Forum for Corporations; and that
- the bankruptcy and corporate insolvency jurisdiction under the [Cross-Border Insolvency Act 2008](#) (Cth) also be vested in the FCC.

Introduction

1. The Law Council of Australia welcomes the opportunity to respond to the [inquiry by the Senate Economics References Committee](#) into insolvency in the Australian construction industry.
2. This submission responds primarily to para (i) in the terms of reference for the inquiry, as it deals with a matter incidental to the main terms of reference.
3. This submission was prepared for the Law Council of Australia by the Federal Circuit Court Liaison Committee (FCCLC) of the Federal Litigation and Dispute Resolution Section, in consultation with Committees of the Law Council's Business Law Section. The Law Council of Australia is the peak national representative body of the Australian legal profession and represents some 60,000 legal practitioners nationwide. [Attachment A](#) outlines further details in this regard.
4. The Law Council recommends that Corporations Law jurisdiction in corporate insolvency matters be conferred on the FCCA. This would enable the Court to deal with matters such as applications for the winding up of companies, the appointment and supervision of receivers, voidable transaction proceedings and public examinations of the examinable affairs of directors and officers. It would also enable the FCCA to hear matters concerned with the service of documents, legal capacity, civil obligations of care and diligence, the just and equitable winding up of companies and the rights of a trustee of the estate of a bankrupt shareholder.
5. Expanding the FCCA's jurisdiction in this way would improve the efficiency and effectiveness of the allocation of federal court funding. The Federal and Family Courts of Australia have such jurisdiction.

The Federal Circuit Court of Australia

6. The Federal Magistrates Court that was established in 1999 was renamed the Federal Circuit Court of Australia (the FCCA) by the [Federal Circuit Court of Australia Legislation Amendment Act 2012](#).
7. The FCCA was established to resolve less complex disputes in the areas of family law and general federal law, to relieve the workload of the superior federal courts.¹
8. The FCCA consists of a Chief Judge and other Judges. It is assisted by a Chief Executive Officer (CEO) who administers the FCCA and the Family Court as a single agency.
9. The jurisdiction conferred on the FCCA under Commonwealth legislation in matters other than family law is exercised in the General Division or the Fair Work Division.
10. Matters can be transferred from the FCCA to the Federal Court of Australia (Federal Court) or the Family Court of Australia (Family Court).
11. The FCCA has a substantial jurisdiction in bankruptcy, concurrent with the Federal Court, with harmonised rules and forms.

¹ Federal Circuit Court of Australia, [Annual Report 2013–14](#), 24.

12. FCCA proceedings are regulated by the Federal Circuit Court Rules 2001 and the Federal Circuit Court (Bankruptcy) Rules 2006.
13. The FCCA promotes the use of informal dispute resolution processes including mediation, conciliation and counselling.

FCCA jurisdiction in bankruptcy

14. In the Court's General Division, bankruptcy matters comprise a significant proportion of the Court's workload. The *2013–14 Annual Report* for the FCCA notes that the Court received filings in 4285 bankruptcy matters that financial year, and finalised 4010, up from 3984 filings and 4105 finalisations in 2012–13. The total number of filings in the Court was 8665, and finalisations 7508 in 2013–14. Bankruptcy applications comprised 49.5% of the FCCA's general federal law applications, and 5% of its total workload in 2013–14.²
15. The Registrars of the FCCA manage most of the Court's bankruptcy workload in the exercise of delegated powers. Panel judges deal with matters on review from Registrars or which otherwise require judicial attention.
16. In both bankruptcy matters and company matters, the Acts require matters to be dealt with in open court, which requires the attendance in person, of lawyers. Principally this is because of the public policy nature of insolvency proceedings, both for individuals and companies. Consent matters may be dealt with at the beginning of lists, thereby reducing the attendance time in court for lawyers, with contested matters tending to be heard later in the list. Most courts are mindful of the need for practitioners to spend less time in court, and the use of Registrars in uncontested matters, including by the FCCA, tends to be very efficient.

FCCA jurisdiction and Corporations Law matters

17. The FCCA currently has no jurisdiction in corporate insolvency under the *Corporations Act 2001 (Cth)* (Corporations Act). Nor does the FCCA have jurisdiction under the [Cross-Border Insolvency Act 2008 \(Cross Border Insolvency Act\)](#), either in bankruptcy or corporate insolvency.³ In its most recent annual report (2013–14) the FCCA said

*The conferral of some insolvency corporations law jurisdiction is seen as desirable to complement the significant personal bankruptcy jurisdiction exercised by the Court.*⁴

18. The FCCA made similar comments in its annual reports for 2011–12⁵ and 2012–13.⁶
19. The Law Council respectfully agrees that jurisdiction in corporate insolvency matters should be conferred on the FCCA.

² Ibid 4, 40, 51.

³ [Section 10](#)

⁴ Federal Circuit Court of Australia, [Annual Report 2013–14](#), 53.

⁵ Federal Magistrates Court of Australia, [Annual Report 2011–12](#), 48.

⁶ Federal Circuit Court of Australia, [Annual Report 2012–13](#), 47.

20. The Law Council suggests that this is an opportune time for the jurisdiction of the FCCA to be expanded to include corporate insolvency matters, including applications for the winding up of companies, the appointment and supervision of receivers, voidable transaction proceedings, and public examinations of the examinable affairs of directors and officers. Expanding the FCCA's jurisdiction in this way would improve access to justice for litigants, remove wasteful duplication and multiplicity of proceedings and contribute to a more efficient allocation of federal court funding. The Federal Court and the Family Court have such jurisdiction, as should the FCCA.
21. It is recognised that the differential fee structure that applies to bankruptcy matters in the FCCA is a significant cost advantage for litigants in that jurisdiction. It would improve access to justice for litigants if similar cost savings were achieved by having corporate insolvency matters dealt with in the FCCA.
22. Corporations Law jurisdiction in corporate insolvency matters could be conferred on the FCCA by amending s 58AA(1) of the Corporations Act by inserting a new subparagraph (e) in the definition of 'Court' in s 58AA(1) reading "(e) in Chapter 5 ('External Administration'), the Federal Circuit Court of Australia".
23. Section 58AA(1) provides:
- Meaning of court and Court*
- (1) Subject to subsection (2), in this Act:*
- court means any court.*
- Court means any of the following courts:*
- (a) the Federal Court;*
- (b) the Supreme Court of a State or Territory;*
- (c) the Family Court of Australia;*
- (d) a court to which section 41 of the Family Law Act 1975 applies because of a Proclamation made under subsection 41(2) of that Act.*
- (2) Except where there is a clear expression of a contrary intention (for example, by use of the expression "the Court"), proceedings in relation to a matter under this Act may, subject to Part 9.6A, be brought in any court.*
- Note: The matters dealt with in Part 9.6A include the applicability of limits on the jurisdictional competence of courts.*
24. Part 9.6A of the Corporations Act, which is concerned with the jurisdiction and procedure of courts, may also need to be amended, mindful of national scheme implications.
25. [Section 10\(b\) of the Cross-Border Insolvency Act](#) could also be amended to give the FCCA jurisdiction in relation to cross-border corporate insolvency matters by inserting in that section ", and (iii) Federal Circuit Court of Australia."
26. The expense and inefficiency created by the current jurisdictional arrangements is evident when consideration is given to those sections of the Corporations Act under which disputes may arise in corporate insolvency matters, and in relation to which

the Federal Circuit Court currently has no jurisdiction. Those sections include, for example:

- service of documents (s [109X](#))
- the legal capacity and powers of a company (s [124](#))
- civil obligations of care and diligence (s [180](#))
- the rights of a trustee of the estate of a bankrupt shareholder (s [1072C](#))
- the just and equitable winding up of a company (s [461\(1\)\(k\)](#))

27. The Law Council considers that the present arrangements with personal insolvency work well, and that in general, litigants and their lawyers make appropriate choices about the court in which to commence proceedings under the *Bankruptcy Act 1966* (Cth) (Bankruptcy Act). The Law Council anticipates that a similar level of common sense would be shown in Corporations Act proceedings. As is already the case with bankruptcy and personal insolvency matters, parties could choose to commence a corporations proceeding in either Court, with provision to transfer a proceeding from one Court to the other if it was considered more appropriately dealt with in the other Court.⁷ For example, a relatively straightforward company winding up or voidable transaction proceeding involving modest amounts could be dealt with in the FCCA, while more complex matters involving large enterprises or sums, or complex factual or legal questions could be commenced in, or transferred to, the Federal Court. Further, an appeal to the Federal Court would lie from a decision of the FCCA in a corporations matter in the usual way.⁸
28. The incentive to commence less complex corporations matters in the FCCA would be that, as with personal insolvency at present, the FCCA would usually be quicker and cheaper. Routine matters such as company winding up applications on the ground of insolvency would still be heard in the first instance by Registrars holding dual appointments with both Courts. Again, the present arrangement of having those Registrars hear creditors' petitions in whichever Court the petition was commenced in seems to work well, with most petitions being presented in the FCCA, but some more complex matters (or those involving very large amounts) still being commenced in, or transferred to, the Federal Court. In relation to personal insolvency, Registrars of the Federal Court and of the FCCA conduct public examinations under [s 81](#) of the Bankruptcy Act. Similarly, Registrars of the Federal Court currently preside over public examinations under [Part 5.9](#) of the Corporations Act and could efficiently do so in relation to any such examinations conducted in the FCCA.
29. Permitting the FCCA to exercise corporate insolvency jurisdiction under the Corporations Act will, in the Law Council's view, enable appropriate proceedings, to be determined more quickly and cost effectively than is currently the case, while retaining current safeguards that include an ability to have proceedings more appropriately dealt with in the Federal Court transferred there, and to take matters on appeal.
30. The concurrent jurisdiction of the Federal Court and FCCA in bankruptcy and personal insolvency matters has, in the Law Council's view, worked well. With the resources that have been devoted to the ongoing development of the FCCA, it is now time to replicate the benefits of this system in Corporations Law insolvency matters.

⁷ *Federal Circuit Court of Australia Act 1999* (Cth), [ss 39, 41](#); *Federal Court Rules 2011*, [Rule 27.13](#).

⁸ *Federal Court of Australia Act 1976*, [s 24\(1\)\(d\)](#).

Law reform process

31. The Law Council understands from Treasury officials that the Legislative and Governance Forum for Corporations (LG Forum)⁹ considers matters of corporate and financial services regulation including consumer credit, and the Australian Securities and Investments Commission, and amendments to the Corporations Act. The Forum is chaired by the Assistant Treasurer, the Hon Josh Frydenberg MP. The members are the Attorneys-General of each State and Territory and the Assistant Treasurer.
32. The Law Council recommends that the Senate Standing Committee on Economics in the report of this inquiry, recommends that:
 - the Assistant Treasurer take to the Legislative and Governance Forum for Corporations the proposed expansion of jurisdiction. This could be effected by including in s 58AA(1) the Corporations Act a new subparagraph (e) in the definition of 'Court' in s 58AA(1) "(e) in Chapter 5 ('External Administration'), the Federal Circuit Court of Australia",
 - Part 9.6A of the Corporations Act be amended in a consequential fashion in relation to jurisdiction and procedure of courts, mindful of national scheme implications, and
 - the FCCA also be given corporate insolvency jurisdiction under the Cross-Border Insolvency Act. This could be done by amending [s 10\(b\) of the Cross-Border Insolvency Act](#) to include “, and (iii) Federal Circuit Court of Australia.”

⁹ The inter-governmental forum established in 1990 previously known as the Ministerial Council for Corporations.

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Large Law Firm Group, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2015 Executive are:

- Mr Duncan McConnel, President
- Mr Stuart Clark, President-Elect
- Ms Fiona McLeod SC, Treasurer
- Dr Christopher Kendall, Executive Member
- Mr Morry Bailes, Executive Member
- Mr Ian Brown, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.
