



Law Council  
OF AUSTRALIA

*Business Law Section*

Senator the Hon Mathias Cormann  
Minister for Finance and Acting Assistant Treasurer,  
Parliament House,  
CANBERRA ACT 2600

**Via email:**

26 July 2014

Dear Minister,

### **Automatic Stays on Corporate Insolvency Events**

1. This submission concerning the automatic stays that are applicable on corporate insolvency events is made by the Insolvency and Reconstruction Committee of the Business Law Section of the Law Council of Australia (the Committee)
2. The Committee is made up of senior legal practitioners working in the insolvency area across Australia who specialise in the insolvency and reconstruction field.
3. The Committee wishes to bring to the Minister's attention that at present under the *Corporations Act 2001 (Cth) (Act)* there are two types of automatic stays that operate upon an insolvent appointment occurring:
  - (a) Stays that are restricted to proceedings in a court against a company or the property of a company; and
  - (b) Stays that apply to all actions or other civil proceedings or the enforcement against the property of the company.
4. The automatic stay restricted to court proceedings against a company or the property of a company applies or operates in instances of court ordered winding ups and voluntary administrations.<sup>1</sup> In creditors voluntary liquidations the automatic stay applies to all civil proceedings,<sup>2</sup> as is the case where an application is made for a stay between the time of filing the application to wind up the company and the making of the winding up order.<sup>3</sup>

<sup>1</sup> *Corporations Act 2001 (Cth)* ss 440D, 471B

<sup>2</sup> *Ibid* s 500(2)

<sup>3</sup> *Ibid* s 467

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5. The dichotomy between the structures of automatic stays manifests in relation to arbitration proceedings. Stays operating in instances of court ordered winding ups and voluntary administrations are confined to court proceedings and fail to halt arbitration proceedings or some proceedings before tribunals or commissions.<sup>4</sup> Contrastingly those stay's which apply to all actions or other civil proceedings do capture all arbitration, tribunal and civil commission proceedings encompassing claims against a company the subject of insolvency proceedings.<sup>5</sup>
6. Both State and Federal governments in Australia have effectively adopted the United Nations Commission on International Trade Law's UNCITRAL *Model Law on International Commercial Arbitration* to encourage arbitration in Australia as an alternate dispute resolution mechanism.<sup>6</sup> This will give rise to ongoing issues as to the extent of the automatic stays upon the insolvency of a respondent to such proceedings.

## Submission

7. It is submitted that given the present legislative structure of Part 5 of the Act and the fact there is no real difference as to how voluntary and court ordered liquidations are run there is no reason to keep this dichotomy and rather a consistent automatic stay should apply across the board.
8. Allowing certain types of proceedings to continue and causing the insolvent company to incur costs and expenses in defending such proceedings especially were there is a valid defence, counterclaim or set off not in the interests of all creditors. This is especially the case where the *Corporations Act 2001* provides a summary procedure for the determination of such claims via the proof of debt procedures, if and when there are sufficient monies available to the administration to pay a dividend.
9. Further as voluntary administrations are meant to be used to encourage restructuring it is submitted that it is appropriate for the automatic stay in such circumstances to include all proceedings rather than allowing a tactical advantage to those creditors who included an arbitration clause in their contracts.
10. Difficulties with this dichotomy are further highlighted under the *Cross Border Insolvency Act 2008* (Cth) which requires a court to apply the relevant domestic stay of an equivalent domestic proceeding to a foreign main proceeding upon granting recognition.<sup>7</sup> This requires the court to grapple with what is the closest domestic type of insolvency proceeding is in order to determine the stay applicable and whether such stay should be extended pursuant to Article 21 of the UNCITRAL *Model Law on Cross Border Insolvency* which is incorporated in that Act .
11. The issue of whether an appeal constitutes a 'proceeding' has also been previously questioned and should be clarified at the same time<sup>8</sup> It is submitted that leave should be

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<sup>4</sup> *Auburn Council v Austin Australia Pty Ltd* ( Administrator Appointed) (2004) 22 ACLC 766; *Brian Rochford Ltd (Administrator Appointed) v Textile Clothing and Footwear Union of NSW* (1999) 17 ACLC 152; *Moorabool Shire Council v J & B Taitapanui* [2002] VSC 418;

<sup>5</sup> *Re Vassal Pty Ltd* [1983] 2 Qd R 769.

<sup>6</sup> *International Arbitration Act 1974* (Cth) and relevant state Commercial Arbitration Acts

<sup>7</sup> *Cross-Border Insolvency Act 2008* (Cth) s 16; United Nations Commission on International Trade Law "The UNICTRAL Model Law on Cross Border Insolvency" GA res, A/RES/52/158 (1997) (30 January 1998) Art 20.

<sup>8</sup> See, *Skinner v Jeogla* (2001) 37 ACSR 106, 109 [17]; *Distinctive FX9 Pty Ltd v Statewide Developments Pty Ltd* [2013] NSWCA 110 [12]-[13]

required to take a step in any proceeding and that an automatic stay should operate in respect of appeals.

12. The Law Council proposes that the automatic stays granted upon the commencement of a liquidation or voluntary administration be amended so as to provide that:

*"no person can commence or proceed with any action or other civil proceedings against the company (including the appeal of any decision) or enforcement against the property of the company without leave of the court and on such terms as the court imposes".*

13. It is suggested for the sake of uniformity that the exception provided by section 440D(a) of the Act should be deleted so as to not allow a voluntary administrator to consent to the commencement of proceedings in a court against the company or its property. Rather an administrators consent should be one factor the court weighs up in determining whether to grant leave to proceed with an arbitration proceeding under section 440D(b) of the Act. This will also prevent major creditors exerting pressure upon administrators to consent with a view to giving themselves a tactical advantage.

#### **Conclusion and further contact**

14. The Committee would be pleased to discuss any aspect of this submission.
15. Please contact the chair of the Committee, Michael Lhuede on 03 8665 5506 if you would like to do so.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'John Keeves', with a long horizontal flourish extending to the right.

John Keeves  
**Chairman, Business Law Section**