Law Council
OF AUSTRALIA

28 February 2014

Ms Carmen Miragaya
Commercial Law Policy Section
Attorney-General's Department
3–5 National Circuit
BARTON ACT 2600

By email: bankruptcy@ag.gov.au.

Dear Ms Miragaya

Better regulation and governance, enhanced transparency and improved competition in superannuation

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

The Committee would welcome the opportunity to discuss the submission further. In the first instance, please contact the Chair of the Federal Circuit Court Liaison Committee, Mr David Gaszner on (08) 8236 1354 or david.gaszner@thomsonslawyers.com.au.

Yours sincerely

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Proposed new fee arrangements for personal insolvency

Attorney-General's Department

27 February 2014

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Executive summary

This submission responds to the Cost Recovery Impact Statement (CRIS) released by the Attorney-General's Department concerning proposed new and revised fees and charges for personal insolvency and trustee services provided by the Australian Financial Security Authority (AFSA). The proposed changes relate to the introduction of new fees for the processing of debtors' petitions and overseas travel requests commencing 1 April 2014, and increased realisations charges commencing 1 July 2014. These proposed new and increased charges were announced as part of the Mid-Year Economic and Fiscal Outlook (MYEFO) 2013–14 and are said to be consistent with the Australian Government's cost recovery policy.[1]

The Law Council of Australia opposes increases in fees for court-related administrative services in bankruptcy matters as they can impose a significant burden and create an unreasonable and inequitable barrier to accessing the justice system, particularly for persons experiencing financial hardship.

The Law Council also takes this opportunity to suggest that the concurrent jurisdiction of the Federal Court of Australia and the Federal Circuit Court of Australia should be reviewed, with a view to enabling the Federal Circuit Court to deal with some applications in corporate insolvency matters, including applications for the winding up of companies.

[1] Australian Government, Attorney-General's Australian Financial Security Authority, *Cost Recovery Impact Statement: Personal Insolvency and Trustee Services 2013–14 and 2014–15*.

Introduction

1. The Law Council of Australia welcomes the opportunity to comment on the Attorney-General's Department's Cost Recovery Impact Statement (CRIS) concerning proposed new and revised fees and charges for personal insolvency and trustee services provided by the Australian Financial Security Authority (AFSA).

2. The proposed changes relate to the introduction of new fees for the processing of debtors' petitions and overseas travel requests commencing 1 April 2014; and increased realisation charges commencing 1 July 2014.

3. These proposed new and increased charges were announced as part of the Mid-Year Economic and Fiscal Outlook (MYEFO) 2013–14 and are said to be consistent with the Australian Government's cost recovery policy.[2]

4. The Law Council of Australia opposes increases in fees relating to court-related administrative services as they can impose a significant burden and create an unreasonable and inequitable barrier to accessing the justice system, particularly for persons experiencing financial hardship, such as personal insolvency. Court-related administrative services ought to remain accessible to all, as those services are part of the fabric of democratic governance in Australia funded by taxpayers.

Background

5. The CRIS suggests that the Australian Government's policy to recover costs in bankruptcy matters was formalised through the *Bankruptcy Legislation Amendment (Fees and Charges) Act 2006*, as evidenced in the explanatory memorandum to the 2006 Bill and the MYEFO 2013–14. It is proposed that two new fees be introduced, and effective from 1 July 2014, that the realisations charge be increased from 4.7% to 6%.

6. The new fees are:

    - $120 for the lodgement of a debtor's petition under s 55, s 56B and s 57 of the *Bankruptcy Act 1966* (Cth) effective from 1 April 2014, and

    - $150 for the processing of requests by undischarged bankrupts whose bankruptcy is being administered by the Official Trustee or registered Trustees for permission to travel overseas pursuant to s 272(c) of the Act, effective from 1 April 2014.

7. The statutory authority to impose cost recovery charges derives from the *Bankruptcy Act 1996* (Cth),[3] which provides that the Minister may make legislative instruments determining the amounts of the fees payable in respect of bankruptcy matters, and the *Bankruptcy (Estate Charges) Act 1997*.[4]

8. The CRIS suggests that many fees and charges have not been changed since June 2006. However new fees for bankruptcy matters came into effect on 1 January 2013, including fees for examinations in bankruptcy. Other fees were increased in respect of

[2] Australian Government, Attorney-General's Australian Financial Security Authority, *Cost Recovery Impact Statement: Personal Insolvency and Trustee Services 2013–14 and 2014–15*.
[3] See s 316 (1).
[4] Above n 2 [paras 2.1–2.2].

bankruptcy applications in the *Bankruptcy (Fees and Remuneration) Determination 2013* effective from 1 July 2013, as had occurred for some fees in 2010.

9. The CRIS estimates that the increased revenue arising from the proposed fee increases, compared with the projections for 2013–14, will be approximately:

   - $1.8M for Debtors' Petitions in 2014–15[5]
   - $.5M for Overseas Travel Requests in 2014–15[6]
   - $3.8M for the higher Realisations Charges in 2014–15.[7]

10. The proposed increase in the Realisations Charges will increase the revenue received from trustees in bankruptcies, debt agreements, compositions and personal insolvency agreements, from 4.7% to 6% of the amount received.

'User-pays' policy

11. The Law Council is of the view that access to government services of a legal nature is fundamental to the functioning of a free and democratic society, and that the administration of justice is an inappropriate domain for the imposition of a full cost recovery policy. Australian citizens and taxpayers should be able to have access to the justice system without having to pay additional fees.

12. This Law Council's policy position is particularly apposite where application fees are likely to have a disproportionate impact on economically disadvantaged persons, or have been justified on the basis that the funds raised may be used to fund essential government services. The Law Council often expresses concern about the impact of rising court filing fees on access to justice. The Law Council has expressed its views in various submissions and media releases, most recently including:

    - Law Council of Australia, Submission to the Productivity Commission's Inquiry into Access to Justice Arrangements (2013);
    - 'Law Council says Inquiry fails to recognise impact of increased fees on court access' Media release, 19 June 2013; and
    - Law Council of Australia, Submission to the 2013 Senate Legal and Constitutional Affairs Reference Committee Inquiry into the Impact of Changes to Court Filing Fees since 2010 on Access to Justice, 15 April 2013.

13. In the Law Council's view, insolvency matters are especially inappropriate for a 'user-pays' approach. Insolvency matters have a public interest aspect as all creditors stand to benefit from equitable and efficient proceedings that assist insolvent debtors, whether individual or corporate, to resolve their legal and financial difficulties. Imposing new or higher fees on insolvent debtors is likely to reduce the assets that are available for distribution amongst creditors. The imposition of a cost-recovery policy on debtors is also effectively shifting the costs of payment for government functions and services to creditors.

14. Imposing additional costs on individuals who are in financial difficulties can be harsh and unfair, and create consequential legal difficulties. By definition, the persons who are likely to be adversely affected by these increased fees will be those already

[5] Ibid. Table 4B.
[6] Ibid. Table 4B.
[7] Ibid. Table 5.

experiencing financial hardship resulting in their bankruptcy or personal insolvency, and especially so for those for whom a debtors' petition is being lodged. People experiencing insolvency will be even less able to pay the increased fees than other users of the courts and justice system.

15. In a practical sense, fees for debtors' petitions paid by credit card (which is AFSA's preference according to some of the Law Council's practitioner members), are likely to cause serious concern to financial institutions including banks, as such credit card debts immediately become unrecoverable and provable in the bankruptcy. It may also be that AFSA would be committing an offence if they become knowingly concerned in the incurring of debts on credit that may not be able to be repaid. For these reasons the Law Council strongly opposes such fees.

16. The Law Council acknowledges that some practitioners, including some Law Council Section members, have no difficulty in principle with a user pays policy, but those consulted in relation to this submission take the view that in the bankruptcy field, some fees should be waived. For example, registered Trustees in Bankruptcy are required pursuant to s 19 of the Bankruptcy Act to carry out a range of public functions including investigations, and as part of the investigation to issue statutory notices and conduct public examinations or other litigation. A fee waiver in favour of registered Trustees in Bankruptcy is regarded as important where there are no funds in the administration. A requirement could be included in the proposed determination that registered Trustees provide undertakings that fees be paid immediately funds become available in the administration. Registered Trustees may be more forthright in their investigations if they are not having to pay out of their own pocket:

    - fees to the Official Receiver on issue of statutory notices such as s 139ZQ notice and s 77C notices.

    - fees to the FCA and/or the FCCA and/or the Family Court on application for public examination and/or applications to recover assets.

17. The current costs recovery policy imposes a burden on registered Trustees and the Official Trustee to conduct matters in circumstances where there may be no funds, but very serious matters of public policy, including offences, need to be investigated. To this end the Australian Security and Investments Commission (ASIC) has an assetless administration fund available to liquidators, and although there is similar funding for registered Trustees and the Official Trustee under s 305 of the Bankruptcy Act, the Law council is advised that such applications are rarely accepted and that the cost of making preliminary enquiries for an application are a deterrent for Trustees.

Matters of Court jurisdiction

18. The Federal Circuit Court of Australia ('FCCA') has a significant concurrent jurisdiction with the Federal Court of Australia ('FCA') in matters of bankruptcy, and the two Courts have harmonised bankruptcy rules and forms. According to the Court's *Annual Report 2012–13*, the bankruptcy jurisdiction of the FCCA 'continues to comprise a significant proportion of the general federal law work of the Court',[8] notwithstanding that there was a 'steady downturn' in the number of bankruptcy applications filed in 2012–13 (3,984) compared with 2011–12 (4,591). About 96% of all applications were filed in the FCCA. The Registrars of the FCCA manage most of this workload, and a

[8] Federal Circuit Court of Australia, *Annual Report 2012–13*, http://www.federalcircuitcourt.gov.au/pubs/html/AR1213P3.html, and see the *Federal Circuit Court (Bankruptcy) Rules 2006.*

bankruptcy panel of judges with expertise in commercial law and bankruptcy deal with matters on review from registrars, or which are beyond the scope of the delegated powers of registrars. The *Annual Report* also noted that in the Court's view:

> The conferral of some insolvency corporations law jurisdiction is seen as desirable to complement the significant personal bankruptcy jurisdiction exercised by the Court.[9]

19. The Law Council respectfully agrees, and suggests that given the Australian Government's current interest in improving the efficiency and effectiveness of federal court funding, this is an opportune time for the jurisdiction of the FCCA to be expanded to include some corporate insolvency matters such as applications for the winding up of companies, voidable transaction proceedings, and public examinations of directors and officers. The Family Court has such jurisdiction, as should the FCCA.

20. 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.[10] 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 FCA. Further, an appeal to the FCA would lie from a decision of the FCCA in a corporations matter in the usual way.[11]

21. The Law Council considers that the present arrangements with personal insolvency work well, and that generally speaking litigants and their lawyers make appropriate choices about which Court to commence proceedings in under the Bankruptcy Act. We anticipate that a similar level of common sense would be shown in Corporations Act proceedings. 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 FCA. Again, it is the Law Council's understanding that it is relatively rare for a proceeding to have to be transferred from one Court to the other, due to creditors and their advisers usually making a sensible choice about where to present their petitions.

22. The Law Council expects that, as noted at paragraph 21, the majority of any corporations work undertaken by the FCCA will, like the personal bankruptcy work, be managed by the Registrars, with the balance being undertaken by judges of the Court. While some of those judges may not have had significant experience of corporations and corporate insolvency matters prior to their appointment, the Law Council anticipates that the judges (and particularly those sitting primarily in the exercise of the Court's general federal jurisdiction) will rapidly acquire the necessary expertise as they have with personal insolvency and bankruptcy law. Permitting the FCCA to exercise

[9] Ibid.
[10] *Federal Circuit Court of Australia Act* 1999 (Cth), ss 39, 41; *Federal Court Rules* 2011, Division 27.2.
[11] *Federal Court of Australia Act* 1976, s 24(1)(d).

jurisdiction under the Corporations Act will, in the Law Council's view, enable appropriate corporations proceedings, including in particular, corporate insolvency proceedings, to be determined more quickly and cost effectively than is currently the case, while retaining the safeguards of an ability to have proceedings more appropriately dealt with in the FCA transferred there, as well as a right of appeal to the FCA.

23. The 'concurrent' jurisdiction of the FCA and FCCA in bankruptcy and personal insolvency matters has, in the Law Council's view, worked well. It is time to replicate the benefits of this system in corporations law matters.

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 Independent 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 approximately 60,000 lawyers across Australia.

The Law Council is governed by a board of 17 Directors – one from each of the Constituent Bodies and six elected Executives. 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, led by the President who serves a 12-month term. The Council's six Executive are nominated and elected by the board of Directors. Members of the 2013 Executive are:

- Mr Michael Colbran QC, President
- Mr Duncan McConnel President-Elect
- Ms Leanne Topfer, Treasurer
- Ms Fiona McLeod SC, Executive Member
- Mr Justin Dowd, Executive Member
- Dr Christopher Kendall, Executive Member

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