

29 October 2020

Ms Claire Crawford
Principal Legal Officer – Courts Section
Legal System Branch
Attorney-General's Department
3-5 National Circuit
BARTON ACT 2600

By email: claire.crawford@ag.gov.au

Dear Ms Crawford

Civil Dispute Resolution Regulations 2011

1. This submission concerning Regulations 4(a), (b) and (c) of the *Civil Dispute Resolution Regulations 2011* is made by the Insolvency & Restructuring Committee of the Business Law Section of the Law Council of Australia (the **Committee**).
2. The Committee sincerely appreciates the opportunity which you afforded to us in your email of 16 October 2020 to comment on the sunset repeal of Regulations 4(a), (b) and (c) and whether those regulations should be extended.

Summary

3. The Committee submits that Regulations 4(a), (b) and (c) should be extended and made permanent. Doing so is consistent with the objectives of the *Civil Dispute Resolution Act 2011* (the **Act**).

Submissions

4. The object of the Act is to seek “*to ensure that, as far as possible, parties take genuine steps to resolve disputes before certain proceedings are instituted.*”¹
5. The Act gives a number of examples that could be undertaken in this regard, all generally requiring notice to be given to a respondent of the matters in dispute so that parties can take steps to resolve the dispute if possible.²
6. However, it is clearly appreciated in the terms of the Act that there may be circumstances in which requiring such steps to be taken will be unnecessary or counter-productive. Part 4 of the Act lists numerous excluded proceedings such as, for example, proceedings that relate to a review of a decision that has already been made by certain types of administrative bodies and proceedings in the

¹ Section 3 of the Act.

² See examples in section 4 of the Act.

appellate jurisdiction of an eligible court. These examples illustrate the logic of not requiring further steps to resolve disputes where such disputes have already been the subject of some process of notification and possible determination.

7. Section 17 of the Act specifically allows for regulations to be made to exclude further categories of proceedings “*in a way including, but not limited to, by reference to the following: (a) the nature of the proceedings; (b) the subject matter of the proceedings; (c) the Act or regulations, or provision of an Act or regulations, under which the proceedings arise.*”
8. In explaining the need or appropriateness of excluding certain proceedings, the Explanatory Memorandum for the Bill stated, “*Matters are excluded if the subject matter is inappropriate, for example a civil penalty proceeding and related matters, or if there are already specific mandatory pre-action steps that would make further steps inappropriate ...*”³ (emphasis added).
9. An applicant in proceedings can avoid taking genuine steps to resolve a dispute if there are appropriate reasons such as the urgency of the proceedings or where safety or security of property would be compromised by taking such steps.⁴
10. The above explanation provides the rationale for the Regulations excluding three types of proceedings from the operation of the Act:
 - a. Regulation 4(a): proceedings for a sequestration order under section 43 of the *Bankruptcy Act 1966*, if the act of bankruptcy relied on arose under paragraph 40(1)(g) of that Act;
 - b. Regulation 4(b): proceedings for an order under section 459A of the *Corporations Act 2001* to wind up a company in insolvency, if the application for the order relies on a failure by the company to comply with a statutory demand; and
 - c. Regulation 4(c): proceedings for review of a decision of a Registrar of an eligible court.
11. Each of the above categories of proceedings relate to circumstances in which either:
 - a. There have already been specific mandatory pre-action steps that would make further steps inappropriate;
 - b. Such pre-action steps will have already allowed the parties to know the issues in dispute and take the opportunity to resolve them;
 - c. The disputes have already been the subject of some process of notification and possible determination; or
 - d. Any further delay in the commencement of proceedings could compromise the security of property or claims that would be available in subsequent insolvency administrations.
12. Specifically, we note the following with respect to each of the subject Regulations:

³ Explanatory Memorandum, Civil Dispute Resolution Bill 2010, General Outline.

⁴ Section 6(2)(b) of the Act.

- a. Regulation 4(a) excludes proceedings for a sequestration order under section 43 of the *Bankruptcy Act 1966*, if the act of bankruptcy relied on arose under paragraph 40(1)(g) of that Act. In such cases, the respondent has already received a bankruptcy notice, issued only after the respondent has had a judgment of another court entered against him or her, and has not only had the opportunity to deal with the applicant creditor but has also had an opportunity to set aside the bankruptcy notice. It would be a complete waste of time and resources to require an applicant, who has already sued the respondent in another court, obtained judgment and served a bankruptcy notice, to then have to issue a further notice and seek to consult with the respondent again.
 - b. Similarly, Regulation 4(b) excludes proceedings to wind up a company that has already received a statutory demand and failed to comply with it.
 - c. Regulation 4(c) excludes proceedings for review of a decision of a Registrar of an eligible court. For example, where the Registrar of the Federal Court makes a sequestration order, the respondent is entitled to apply to the Court to review that decision⁵. In such cases, the issues have already been identified in earlier proceedings.
13. Equally of importance, further delay in the commencement of such proceedings may well compromise the rights of the parties, for example:
- a. where there are strict time limits in place for the commencement of proceedings⁶; and
 - b. where the recoverability of assets or proceeds of voidable transactions depend upon the commencement of the insolvent administration, being the consequent bankruptcy of the respondent individual or winding up of the respondent company⁷.

Conclusion and further contact

14. The Committee would be pleased to discuss any aspect of this submission. Please contact the chair of the Committee, Scott Butler, on (07) 3231 7722 or at scott.butler@hallandwilcox.com.au, if you would like to do so.

Yours faithfully



Greg Rodgers
Chair, Business Law Section

⁵ Section 35A(5) of the *Federal Court of Australia Act*.

⁶ Creditors' petitions must be issued within 6 months of the act of bankruptcy. A winding up application based on non-compliance with a statutory demand must be issued within 3 months of the non-compliance.

⁷ Voidable transactions are usually determined, in part, by reference to strict time periods based on when the bankruptcy or winding up proceedings commenced.