



Law Council  
OF AUSTRALIA

*Business Law Section*

4 February 2016

John Mathieson  
Deputy Registrar  
Federal Court of Australia  
Via email: [john.mathieson@fedcourt.gov.au](mailto:john.mathieson@fedcourt.gov.au)

Dear Deputy Registrar

### **Harmonisation of Court Rules – Corporate and Personal Insolvency and Remuneration of Insolvency Practitioners**

I refer to the Honourable Justice Brereton's letter dated 23 December 2015 in which he invited the Insolvency & Reconstruction Law Committee of the Business Law Section of the Law Council of Australia (**BLS**) to respond to the Working Party on the issue of harmonisation of Court Rules.

Due to the holiday period, many of the Committee's members have been away and the BLS is therefore not in a position to provide as fulsome a submission as it otherwise might. I would therefore be grateful if you could keep the BLS informed about any opportunity to provide a further submission or comment upon specific amendment proposals.

In this letter, the BLS addresses three aspects of the possible harmonisation of the various Court Rules:

1. Are there differences between the various Federal Court and State Court Rules in relation to corporate insolvency that ought be addressed;
2. Are there differences between the Court Rules relating to corporate insolvency and the Court Rules relating to personal insolvency that ought to be addressed; and
3. Can the Court Rules be harmonised in relation to applications regarding insolvency practitioners' remuneration?

As an aside, it occurs to the BLS that consideration could well be given at some stage to a consolidation of the laws relating to insolvency (personal and corporate) under one overarching piece of legislation. Appreciating that this is likely outside the scope of the Working Party, that would, the BLS suggests, be a matter for later consideration.

GPO Box 1989, Canberra  
ACT 2601, DX 5719 Canberra  
19 Torrens St Braddon ACT 2612

Telephone +61 2 6246 3788  
Facsimile +61 2 6248 0639

Law Council of Australia Limited  
ABN 85 005 260 622  
[www.lawcouncil.asn.au](http://www.lawcouncil.asn.au)

**BLS**

## Harmonisation as between the Federal Court and State Court Rules in relation to corporate insolvency

There are some differences between the Federal Court and State Court Rules in relation to such things as powers of Registrars and Court processes (eg. whether electronic transmission is available and the existence of special lists). We assume that these matters are outside the scope of the Working Party.

However, there are some other inconsistencies that the BLS raises for consideration:

1. There are some discrepancies in the requirements for publication. With the introduction of the ASIC notices website, the Federal Court and most of the State Courts removed the requirement to publish notices in a daily newspaper. However, the following States and Territories still require the publication of notices in a daily newspaper as well as on the ASIC notices website:
  - (a) Victoria and Queensland – for publication of notice of winding up application<sup>1</sup>;
  - (b) Victoria, Queensland and Northern Territory – for publication of notice where plaintiff in application for winding up is substituted<sup>2</sup>;
  - (c) Victoria, Queensland and Northern Territory – for publication of notice of winding up order<sup>3</sup>;
  - (d) Victoria, Queensland and Northern Territory – for publication of notice of appointment of provisional liquidator<sup>4</sup>;
  - (e) Victoria, Queensland and Northern Territory – for publication of notice of application for special leave to distribute surplus<sup>5</sup>.

The BLS submits that the requirements for publication of the notices outlined above in a daily newspaper be removed to bring the Court Rules for Victoria, Queensland and Northern Territory in line with the Federal Court and other State Courts' rules.

2. Unlike Rule 2.13(1)(c) of the *Federal Court (Corporations) Rules 2000* (Cth) and other State Court Rules, the South Australian and Queensland Rules do not

---

<sup>1</sup> Rules 5.6(2)(b) and 2.11 of the *Supreme Court (Corporations) Rules 2013* (Vic) and *Corporations Proceedings Rules* in Schedule 1A to the *Uniform Civil Procedure Rules 1999* (Qld).

<sup>2</sup> Rules 5.10(2)(b)(i) and 2.11 of the *Supreme Court (Corporations) Rules 2013* (Vic), the *Corporations Proceedings Rules* in Schedule 1A to the *Uniform Civil Procedure Rules 1999* (Qld) and *Corporations Law Rules* (NT).

<sup>3</sup> Rules 5.11(4)(b) and 2.11 of the *Supreme Court (Corporations) Rules 2013* (Vic), the *Corporations Proceedings Rules* in Schedule 1A to the *Uniform Civil Procedure Rules 1999* (Qld) and *Corporations Law Rules* (NT).

<sup>4</sup> Rules 6.2(4)(b) and 2.11 of the *Supreme Court (Corporations) Rules 2013* (Vic), the *Corporations Proceedings Rules* in Schedule 1A to the *Uniform Civil Procedure Rules 1999* (Qld) and *Corporations Law Rules* (NT).

<sup>5</sup> Rules 7.9(3)(b) and 2.11 of the *Supreme Court (Corporations) Rules 2013* (Vic), the *Corporations Proceedings Rules* in Schedule 1A to the *Uniform Civil Procedure Rules 1999* (Qld) and *Corporations Law Rules* (NT).

provide for “any other interested person” to be granted leave to be heard in a proceeding without becoming a party to the proceeding.<sup>6</sup>

### **Harmonisation as between the Court Rules re corporate insolvency and the Court Rules re personal insolvency**

The BLS’s preliminary submission is that there is benefit from harmonisation of the Court Rules for personal and corporate insolvencies. Notwithstanding the different legislative basis for each, given the commonality in goals and stakeholders, a uniform approach to each would be of benefit to the community.

The BLS anticipates that the following issues (amongst others) would need to be addressed as part of the process of harmonisation: \_

- Publication of application – Under the Court Rules relating to corporate insolvencies, there is a requirement to publish notice of a winding up application<sup>7</sup>. There is no publication requirement in relation to an application for a sequestration order; and
- Timing of notification - The applicant must notify the trustee in writing of a sequestration order on the same day that it is made<sup>8</sup>. The plaintiff must notify the liquidator of a winding up order by no later than the day after the making of the order<sup>9</sup>.

### **The Rules and insolvency practitioners’ remuneration**

The BLS’s preliminary submission is that there is no benefit to be obtained from harmonisation of rules as between corporate insolvency and personal insolvency for insolvency practitioners’ remuneration because the processes for review of remuneration are very different.

In the context of personal insolvency, the Inspector-General reviews a trustee’s remuneration and disbursements in certain circumstances with the possibility of an appeal from the Inspector-General’s decision<sup>10</sup>. In the case of corporate insolvency, there is no review of remuneration by an authority prior to an application to the Court<sup>11</sup>.

Unless a new, independent body was established to assess practitioners’ fees, harmonising the two approaches would seem impractical.

It is the BLS’s understanding that the Court Rules for the Federal Court and State Courts are identical in relation to the requirements for an affidavit in support of a remuneration application.

The BLS is aware of the body of case law considering the appropriate basis for remuneration of insolvency practitioners, including the issue of proportionality. The issue

---

<sup>6</sup> Rules 2.13 of the *Corporations Rules 2003* (SA) and the *Corporations Proceedings Rules* in Schedule 1A to the *Uniform Civil Procedure Rules 1999* (Qld)

<sup>7</sup> eg. Rule 5.6 of the *Federal Court (Corporations) Rules 2000* (Cth)

<sup>8</sup> Rule 4.08 of the *Federal Court (Bankruptcy) Rules 2005* (Cth)

<sup>9</sup> Rule 5.11 of the *Federal Court (Corporations) Rules 2000* (Cth)

<sup>10</sup> Section 167 of the *Bankruptcy Act 1966* (Cth)

<sup>11</sup> Sections 449E and 473 of the *Corporations Act 2001* (Cth)

of proportionality is, in the BLS's experience, a difficult one and rarely can it be applied *carte blanche* on a matter and its application can be problematic. This was highlighted in the recent decision in *Templeton v Australian Securities and Investments Commission*<sup>12</sup>.

It is the BLS's preliminary view that the various Federal and State Court Rules requirements for an affidavit in support of a remuneration application adequately outline the information that should be given. The BLS accepts that there is some uncertainty as to what remuneration a Court will approve in any given situation and there is always some benefit in reducing uncertainty.

However, as with most discretionary matters considered by a Court, there will always be some element uncertainty as to what information will be taken into account. This is exacerbated given the relevant Corporations Act provisions require the Courts to potentially take into account "any other relevant matters"<sup>13</sup>. While the uncertainty does remain, it is appropriate that a judicial officer considering approval of the fees of another officer of the Court should have a wide discretion to look at the full circumstances of the case.

At present, the material required to obtain fee approval is substantial and can take quite some time to produce and collate. See for example *ACN 104 635 369 Pty Ltd (in liq) (formerly Total Plant Services Pty Ltd) v Hamilton*<sup>14</sup> where the total time for fee approval took a year to complete at what must have been no small cost to all parties (including the practitioners involved).

If the Working Party proposes to add to the requirements for the affidavits in support of the remuneration application, then it would be useful to consider the additional costs (if any) associated with providing the information, whether added complexity (if any) will detract from creditors' understanding of the affidavits and whether the additional information is better requested by a Court on a specific application rather than on all applications.

Perhaps consideration could be given to whether it is useful for the liquidator/administrator to better outline those tasks that creditors may not perceive as resulting in a direct return to them but are important tasks in the external administration and/or are in the public interest (eg. investigating books and records, finalising returns, reporting to creditors and ASIC). However, the BLS reiterates the need to balance the cost and level of complexity involved with a remuneration application with the type and amount of information that is necessary to be given to the creditors and the Court in the majority of cases.

The BLS notes that the various Court rules are likely to be affected by the *Insolvency Law Reform Bill 2015* and its regulations. As a general proposition, it would be preferable to minimise the number of changes to the same Rules if that is at all practicable.

In summary, the BLS does not, at this stage, have any specific suggestions as to additional information that the Rules should require for affidavits in support of remuneration applications. However, the BLS would be happy to comment on any specific proposals that the Working Party may have in due course.

---

<sup>12</sup> (2015) 108 ACSR 545; [2015] FCAFC 137 delivered on 18 September 2015

<sup>13</sup> eg. section 449E(4)(l) of the *Corporations Act 2001* (Cth)

<sup>14</sup> [2015] FCA 1219 delivered on 13 November 2015

## Conclusion

The BLS appreciates again that the submissions herein are relatively brief. The BLS would welcome the opportunity to supplement them and to discuss any other matters that may be relevant or of concern to the Working Party. If we can be of any further assistance, please contact Victoria Butler, Chair of the Insolvency and Reconstruction Law Committee on 08-9426 6694 or via email: [ybutler@jacmac.com.au](mailto:ybutler@jacmac.com.au)

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Teresa Dyson', written in a cursive style.

**Teresa Dyson, Chairman**  
Business Law Section