



Law
Institute
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The Hon. Robert McClelland MP
Attorney General
Parliament House
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By post and email to: R.McClelland.MP@aph.gov.au

Dear Minister,

Review of the operations of the Family Court of Australia and the Federal Magistrates Court of Australia – (“Review”)

The Law Institute of Victoria, through its association with the Law Council of Australia Insolvency and Reconstruction Committee (*IRC*), has recently considered the evidence available to you for the Review. We provide the following comments:

In considering the terms of reference, we find that they have a starting premise of the accepted existence of *"continuing difficulties in the administration of the delivery of family law services by the Family Court and the Federal Magistrates Court..."*. This inquiry is not directed to delivery of bankruptcy law services.

The IRC refers to and repeats (copy enclosed) the policy considerations it raised in Part 4 of its submission to the House of Representatives Standing Committee in its review of the *Bankruptcy Legislation (Anti-avoidance and other measures) Bill 2004*. The regulation of business insolvency has no place in the Family Court save to the limited extent such regulation clashes with family law issues.

Of important note, The Federal Magistrates Court (FMC) has concurrent jurisdiction with the Federal Court of Australia (FCA) in all matters under the *Bankruptcy Act 1966* (Act). The FMC also presently has jurisdiction in matters under the Trade Practices Act, the immigration and human rights legislation and, of course, the Family Law Act (FLA). The Family Court's jurisdiction in bankruptcy matters arising under the Act is limited (see sections 35, 35A and 35B of the Act) but has broad powers under sections 79 and 79A of the FLA that can and do impact upon bankruptcy administrations.

In relation to bankruptcy cases having no connection with matters under the FLA (other than straightforward petitions for bankruptcy), there is anecdotal evidence of a preference amongst practitioners to litigate such matters in the FCA. The reasons being advanced for such preference include:

1. A perception that there is a significant risk that commercial bankruptcy matters having no issue under the FLA are being heard and considered by Federal Magistrates appointed for their specific family law (or other non-bankruptcy) expertise and having little or no experience in bankruptcy matters.

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2. More specifically, practitioners apprehend that there will be the perceived "risk" referred to in 4.1 of the policy considerations raised by the IRC in part 4 of its submission to the House of Representatives standing committee, which give rise to the following concerns:
- (a) Longer hearings due to the need to educate the Federal Magistrate on fundamentals of bankruptcy law;
 - (b) Delays in obtaining judgments in what might be considered non-complex matters; and
 - (c) Judgments and findings reflective of a lack of understanding of fundamentals of bankruptcy law.

Although we are not privy to any statistical analysis, it appears a large portion of bankruptcy work undertaken in the FMC is undertaken by Registrars holding concurrent Registrar appointments in the FCA. To this extent the FMC would not appear to add value to the judicial process in that such work would (absent the FMC) otherwise be undertaken by the same Registrars as now undertake such work.

The IRC would support a move to remove the bankruptcy jurisdiction of the FMC in favour of retention of the FCA's existing jurisdiction in bankruptcy matters. (While the IRC is presently reviewing the operation of the amendments to the Act effected by the *Bankruptcy and Family Law Legislation Amendment Act 2005* it is accepted the present review is not required to consider the operation of section 79 of the FLA in the bankruptcy context and the jurisdiction of the FMC/Family Court in this regard).

If there were to be any suggestion that the Family Court be granted concurrent jurisdiction in all bankruptcy matters then such a move would be opposed by the IRC. Such matters may rarely be commenced in the Family Court, the resources of which are already stretched in dealing with its existing demanding and highly specialised role. However, the FCA already has the resources necessary to processing both straight-forward and complex bankruptcy matters.

Some of the members of the IRC recall the short-lived period many years ago when bankruptcy matters were transferred by the FCA to the Family Court (despite their having no family law connotations). Family law practitioners vigorously complained that such matters were occupying so much time that Family Court judges were not available to deal with that Court's core business, resulting in blow-outs in the FCA's lists. The practice soon lapsed. History would undoubtedly repeat itself if the Family Court were to acquire concurrent (or worse, exclusive) jurisdiction in bankruptcy matters.

We are delighted to have the opportunity to comment on the draft reforms. Please do not hesitate to contact either myself or Michael Hayes, LIV Commercial Lawyer, on 03 9607 9382 if you require any further particulars.

Yours respectfully

Anthony Burke
President
Law Institute of Victoria