



Law Council  
OF AUSTRALIA

# Civil Law and Justice Amendment Bill 2017

Senate Legal and Constitutional Affairs Committee

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## About 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 Law Firms Australia, 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 Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. 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 members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2017 Executive as at 1 January 2017 are:

- Ms Fiona McLeod SC, President
- Mr Morry Bailes, President-Elect
- Mr Arthur Moses SC, Treasurer
- Ms Pauline Wright, Executive Member
- Mr Konrad de Kerloy, Executive Member
- Mr Geoff Bowyer, Executive Member

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

## Acknowledgement

The Law Council is grateful for the assistance of its Family Law Section, International Law Section and the Law Society of South Australia in the preparation of this submission.

## Executive Summary

1. The Law Council is grateful for the opportunity to provide a submission in relation to the Civil Law and Justice Amendment Bill 2017 (**the Bill**).
2. The Bill would make amendments to ten Commonwealth Acts<sup>1</sup> and consequential amendments to a number of others to 'modernise, simplify and clarify the legislation, and to repeal redundant provisions.'<sup>2</sup>
3. The Law Council's comments on the Bill are confined to Schedule 3 (amendments to the *Bankruptcy Act 1966* (Cth) (**the BA**)), Schedule 6 (amendments to the *Family Law Act 1975* (Cth) (**the FLA**)), Schedule 7 (amendments to the *International Arbitration Act 1974* (Cth) (**the IAA**)) and Schedule 10 (amendments to the *Sex Discrimination Act 1984* (Cth) (**the SDA**)).
4. The Law Council's recommendations in relation to the Bill include:
  - Subsection 4(1) of the *Family Law Act 1975* (Cth) should include the following definition: bankrupt and bankrupt party to a marriage means a person who is bankrupt and includes, for the avoidance of doubt, a person who has been discharged from bankruptcy but whose estate remains vested in the trustee of their estate;
  - Proposed subparagraph 44(5)(a)(ii) and subparagraph 44(3B)(c)(ii) of the *Family Law Act 1975* (Cth) should include the words '... was set aside, or found not to be binding, as the case may be ...';
  - Australia should become a party to the *United Nations Convention on Transparency in Treaty-based Investor-State Arbitration 2014* (**the Mauritius Convention**) in order to put Australia in alignment with the international standard for transparency in investor-state arbitration;
  - The words 'settle' and 'taxable' in section 27 of the IAA be replaced with the words 'fix' and 'may be fixed'; and
  - Section 43 of the SDA should be repealed.

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<sup>1</sup> *Acts Interpretation Act 1901* (Cth); *Archives Act 1983* (Cth); *Bankruptcy Act 1966* (Cth); *Domicile Act 1982* (Cth); *Evidence Act 1995* (Cth); *Family Law Act 1975* (Cth); *International Arbitration Act 1974* (Cth); *Legislation Act 2003* (Cth); *Marriage Act 1961* (Cth); and *Sex Discrimination Act 1984* (Cth).

<sup>2</sup> Commonwealth of Australia, *Parliamentary Debates, Senate*, Second Reading Speech Civil Law and Justice Amendment Bill 2017 (22 March 2017), 77.

## Schedule 3 – Bankruptcy Amendments

5. The Law Council's comments in relation to Schedule 3 of the Bill are consequent upon the recent decision of the *Official Trustee in Bankruptcy & Galanis and Anor.*<sup>3</sup>
6. The effect of this decision is that the phrase 'bankruptcy trustee of a bankrupt party to the marriage' is confined to the trustee of an undischarged bankrupt.
7. The decision was in the context of an application to set aside a Financial Agreement to which a discharged bankrupt was party, and the trustee was found to have no standing to do so consequent upon the use of the above phrase in paragraph (cb) of the definition of 'matrimonial cause' in subsection 4(1) of the FLA.
8. The consequence of the decision for the proposed amendments is that, notwithstanding the Explanatory Memorandum to the Bill, the jurisdiction of the Family Court ought be understood as being confined to proceedings involving an undischarged bankrupt, notwithstanding, inter alia:
  - the effect of discharge from bankruptcy upon the bankrupt person and the continuing obligations of the bankrupt thereafter;<sup>4</sup>
  - that the estate of the bankrupt remains vested in the trustee notwithstanding discharge of the bankruptcy and there remains, absent more, until the 6th anniversary after the bankrupt's discharge from bankruptcy;<sup>5</sup>
  - the continued role of the trustee until completion of the administration of the estate, notwithstanding discharge. A trustee has a continued role and obligations until either the order of a court pursuant to section 183 or release pursuant to section 184A(2) of the BA, which occurs 7 years after entry in the National Personal Insolvency Index of the fact that the administration of the estate has been finalised; and
  - the continued role of a trustee in bankruptcy in administration of a bankrupt estate following discharge, including in the ability to maintain relevant claims against such estate for a period of up to 20 years.<sup>6</sup>
9. Thus the proposed amendments do not provide jurisdiction to the Family Court in bankruptcy in circumstances where a person has been discharged from bankruptcy, albeit that their estate remains vested in the trustee in bankruptcy.
10. The Law Council thus recommends that the Bill should also provide, perhaps in subsection 4(1) of the FLA, for a definition as follows:

***bankrupt and bankrupt party to a marriage*** means a person who is bankrupt and includes, for the avoidance of doubt, a person who has been discharged from bankruptcy but whose estate remains vested in the trustee of their estate.

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<sup>3</sup> [2017] FamCAFC 20 (17 February 2017).

<sup>4</sup> *Bankruptcy Act 1966* (Cth), ss 152, 153.

<sup>5</sup> *Ibid.*, ss 58(1), 129AA.

<sup>6</sup> *Ibid.*, s 127. See also *Official Receiver in Bankruptcy v Todd and Others* (1986) 70 ALR 119 at 125.

## Schedule 6 – Family Law Act Amendments

11. Proposed subparagraph 44(5)(a)(ii) uses the phrase 'or found to be invalid' which it is accepted mirrors the present subparagraph 44(3B)(c)(ii) of the FLA.
12. A potential difficulty emerges in that a Court does not relevantly determine whether a Financial Agreement is 'invalid' or not – indeed, this is not the question ultimately relevant to whether jurisdiction pursuant to Part VIII of the FLA exists or not. One can have a valid agreement which is not binding upon the parties for the purpose of the FLA. Thus, the question of whether there exists a valid agreement or otherwise, is antecedent to the ultimate question to be answered.
13. The question to be addressed pursuant to section 71A of the FLA is whether there exists a Financial Agreement which is 'binding' upon the parties – which in turn is a question to be determined pursuant to section 90G. Further, a Court may make an order pursuant to paragraph 90G(1A)(d) of the FLA that an Agreement is to be 'binding' upon the parties to it.
14. Thus, it is suggested that the wording which ought be adopted in the proposed subparagraph 44(5)(a)(ii) and also in subparagraph 44(3B)(c)(ii) of the FLA is as follows:

*... was set aside, or found not to be binding, as the case may be ...*

## Schedule 7 – Arbitration Amendments

15. Schedule 7 of the Bill includes a number of amendments to the IAA. The purpose of these amendments, as summarised in the Explanatory Memorandum to the Bill, is to:
  - specify expressly the meaning of 'competent court' for the purpose of the *UNCITRAL Model Law on International Commercial Arbitration (Model Law)*;<sup>7</sup>
  - clarify procedural requirements for enforcement of an arbitral award;
  - modernise provisions governing arbitrators' powers to award costs in international commercial arbitrations; and
  - clarify the application of confidentiality provisions to arbitration subject to the *United Nations Commission on International Trade Law Rules on Transparency in Treaty-based Investor-State Arbitration (UNCITRAL Transparency Rules)*.<sup>8</sup>
16. The proposed amendments are said to reflect the Government's commitment to ensure that Australian arbitral law and practice 'stay on the global cutting edge' and improve Australia's position as a 'competitive arbitration friendly jurisdiction'.<sup>9</sup>

### The definition of competent court

17. The Bill proposes to amend the IAA to clarify the meaning of 'competent Court' for the purposes of the Model Law. The reason for this is that there is currently no definition of

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<sup>7</sup> *UNCITRAL Model Law on International Commercial Arbitration* (As adopted by the United Nations Commission on International Trade Law on 21 June 1985, and as amended by the United Nations Commission on International Trade Law on 7 July 2006).

<sup>8</sup> *UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration*, GA Res 68/109, UN GAOR, 68th sess, 68th plen mtg, Agenda Item 79, UN Doc A/Res/68/109 (18 December 2013).

<sup>9</sup> Commonwealth of Australia, *Parliamentary Debates*, Senate, 22 March 2017, 76-77 (Senator the Hon George Brandis QC).

'competent court' in the IAA or the Model Law. The concern is that there are a number of articles<sup>10</sup> in the Model Law which designate the power in respect of the functions to be performed in accordance with the articles to a 'competent court'. This has caused issues of jurisdiction in instances where a court has been engaged in relation to such articles.<sup>11</sup>

18. The Bill seeks to address this issue by amending the IAA to expressly provide that both the Federal Court and the Supreme Courts of the States and Territories are competent courts.
19. The Law Council encourages the Australian Government to seek the views of the Solicitor-General of the Commonwealth as to the constitutional validity of designating a Federal Court as a competent court for the purposes of the UNCITRAL Model Law. Subject to advice by the Solicitor-General that such a measure is within power, the changes are welcomed and would hopefully prevent any further costly and confusing litigation as to which courts have jurisdiction for these purposes.

### Procedural requirements for enforcement of an arbitral award

20. As drafted, subsection 8(1) of the IAA provides that a foreign award is binding on parties to the arbitration agreement. The IAA, including subsection 8(1), mirrors and implements the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (1958) (**NY Convention**).<sup>12</sup> There is currently conflicting authority on the correct interpretation of subsection 8(1) of the IAA. The reason for this is that it is not clear when interpreting subsection 8(1) of the IAA, whether the award creditor has an onus to prove that an award debtor, who is not named in the arbitration agreement, was a party to the arbitration agreement.<sup>13</sup>
21. The Bill seeks to amend subsection 8(1) of the IAA to replace 'parties to the arbitration agreement' with 'parties to the award'. The Law Council agrees with the proposed amendment in that the arbitration creditor should only be required to produce the award and the arbitration agreement to enforce the award. An award debtor has multiple opportunities to challenge the arbitral proceedings commenced under the agreement or the subsequent award (for example, the enforcement of the award can be challenged by proving one of the grounds set out in Article V of the NY Convention). The requirement to provide proof that the award does in fact bind the award debtor introduces an unnecessary procedural step and is likely to delay enforcement. The amendment also puts Australia in line with international arbitration and the position of leading arbitral jurisdictions.<sup>14</sup>

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<sup>10</sup> For example, *UNCITRAL Model Law on International Commercial Arbitration* (As adopted by the United Nations Commission on International Trade Law on 21 June 1985, and as amended by the United Nations Commission on International Trade Law on 7 July 2006), arts 17H, 27, 35 and 36, which relate to enforcement of awards, interim measure and taking of evidence.

<sup>11</sup> *Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd* (2012) 201 FCR 209.

<sup>12</sup> *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, opened for signature 10 June 1958, 330 UNTS 3 (entered into force 7 June 1959).

<sup>13</sup> See *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* (2011) 38 VR 303; *Dampskibsselskabet Norden A/S v Beach Building & Civil Group Pty Ltd* (2012) 292 ALR 161.

<sup>14</sup> See for example, *Dallah* [2011] 1 AC 763, where it was determined that the enforcing court is not required to undertake any further inquiry.



## Application of confidentiality provisions

22. As drafted, sections 23C to 23G of the IAA set out the circumstances in which confidential information may be disclosed by either the parties to the arbitral proceedings or the arbitral tribunal. Section 22 of the IAA allows parties, via agreement, to opt out of the application of sections 23C to 23G of the IAA.
23. The Bill seeks to amend the IAA so that if any parties are subject to the UNCITRAL Transparency Rules, whether by force of the Mauritius Convention<sup>15</sup> or not, this would have the effect of suspending the operation of sections 23C to 23G of the IAA. Accordingly, the UNCITRAL Transparency Rules take priority in these instances. However, as Australia is not a party to the Mauritius Convention, the Transparency Rules will not apply to an investor state arbitration where Australia is a respondent state or where the investor claimant is Australian.
24. The Law Council's position is that Australia should become a party to the Mauritius Convention in order to put Australia in alignment with the international standard for transparency in investor-state arbitration.

## Costs

25. The Bill proposes to amend the IAA to remove references to 'taxation' in respect of costs in international arbitration. The process of taxation is inherently a judicial process and the amount of costs awarded is often governed by the appropriate rules and legislation applicable to each Court.<sup>16</sup>
26. In general, arbitration distinguishes itself from the Courts in giving power and flexibility to the parties and the arbitrator or tribunal to determine how a variety of procedural issues should be dealt with.
27. It is for this reason that the Law Council welcomes the proposed amendment which expressly states that in settling the issue of costs to be paid in relation to an award, an arbitral tribunal is not required to use any scales or other rules used by a court when making orders in relation to costs. Arbitration proceedings should not be bound by any scales or rules used by a court unless requested and/or agreed upon by the parties and the arbitral tribunal.
28. However, while the Law Council supports the intention of the amendments to section 27 of the IAA, the Law Council considers that the amendment may, by virtue of its drafting, create an unintended distinction between the power of the tribunal to 'settle' costs and the power of the Court to 'tax' costs.
29. Such a distinction may give rise to arguments that certain powers have been delineated exclusively either to the Court or the tribunal and require the need to determine the distinction between the power to 'settle' and the power to 'tax', which will be further complicated by the proposed subsection 27(2AA).

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<sup>15</sup> *United Nations Convention on Transparency in Treaty-based Investor-State Arbitration* GA Res 69/116, UN GAOR, 69th sess, 68th plen mtg, Agenda Item 76, UN Doc A/RES/69/116 (18 December 2014) annex, 3.

<sup>16</sup> For example, Schedule 3 of the *Federal Court Rules 2011* (Cth) provides a scale for the amounts that can be claimed, by reference to the type of work carried out by practitioners and counsel, on taxation in respect of party/party costs.

30. Thus, while the Law Council supports the amendments, it does not support the implicit suggestion that powers should be reserved either to the tribunal or the Court.
31. The Law Council thus recommends that the words 'settle' and 'taxable' in section 27 of the IAA be replaced with the words 'fix' and 'may be fixed' respectively. This would clarify that the powers of the Court and the tribunal (subject, of course, to the agreement of the parties and the arbitral tribunal) are not inherently distinct. The use of the term 'fix' would also be consistent with the terminology in Article 40 of the *UNCITRAL Arbitration Rules*.<sup>17</sup>

## Schedule 10 – Sex Discrimination Act Amendments

32. The Law Council supports the repeal of section 43 of the SDA, which creates an exemption for discrimination against women in connection with employment, engagement or appointment in Australian Defence Force positions involving combat duties.

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<sup>17</sup> *UNCITRAL Arbitration Rules* GA Res 69/116, UN GAOR, 69th sess, 68th plen mtg, Agenda Item 76, UN Doc A/RES/69/116 (18 December 2014).