



Law Council  
OF AUSTRALIA

*Office of the President*

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Courts and Tribunals Branch  
Attorney-General's Department  
Robert Garran Offices  
3–5 National Circuit  
BARTON ACT 2600

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Dear Courts and Tribunal Branch

**Exposure Draft Federal Court of Australia Amendment (Extending Criminal Jurisdiction and Other Measures) Bill 2022**

In the brief time provided, the Law Council of Australia has had limited opportunity to canvass with its Constituent Bodies the complex issues arising from the Federal Court of Australia Amendment (Extending Criminal Jurisdiction and Other Measures) Bill 2022 (**the Exposure Draft Bill**).

However, the Law Council has had the benefit of considering the detailed submissions of the New South Wales Bar Association, and many of the technical issues discussed in this letter reflect that feedback.

The Law Council appreciates the objective of ensuring greater resourcing for Commonwealth criminal trials, particularly in the context of corporate crime. However, on balance, the Law Council's position is that the Exposure Draft Bill represents a substantial change to the federal and state court system that requires further detailed justification and consultation. In that regard, the Law Council notes that its evaluation of the Exposure Draft Bill has been hampered by the absence of an issues paper or explanatory material setting out the detailed rationale for the approach taken in the Exposure Draft Bill.

The Law Council's recommendation is that the Exposure Draft Bill be deferred for further consultation and an issues paper or explanatory memorandum be drafted that sets out the rationale for change.

Illustratively, such an issues paper might include detailed consideration of the relative costs of conducting criminal proceedings in the Federal Court as compared with State and Territory courts. Detailed consideration might also be given to identifying the existing procedural rules in state courts that require revision in order to reduce delays.

Despite the limited opportunity for detailed consideration, the Law Council raises a number of specific concerns regarding the approach taken in the Exposure Draft Bill, as set out below.

## Background

The Law Council notes that the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (**Royal Commission**) generally favoured a change in approach to allow for a greater number of prosecutions of corporate crime related offences, noting that 'adequate deterrence of misconduct depends upon visible public denunciation and punishment'.<sup>1</sup>

Subsequently, the Government response to the Royal Commission provided an additional \$70.1 million to boost the Australian Securities and Investments Commission's (**ASIC's**) increased enforcement activity as a result of ASIC's shift to a 'why not litigate' approach, and \$41.6 million to the Commonwealth Director of Public Prosecutions (**CDPP**) to prosecute an increased number of briefs from ASIC.<sup>2</sup>

Crucially, the Government response to the Royal Commission reasoned that an extension to the Federal Court's jurisdiction was necessary to 'boost the overall capacity' of the Australian court system and 'to ensure the prosecution of financial crimes does not face delays as a result of heavy caseloads in the courts'.<sup>3</sup>

To that end, according to the Attorney-General's Department's website, the Exposure Draft Bill aims to do three things:

- Part 1 of Schedule 1 to the Draft Bill would confer jurisdiction on the Federal Court to hear a range of indictable and summary corporate crime offences within the regulatory remit of the Australian Securities and Investments Commission and enable the Federal Court to exercise its jurisdiction concurrently with state and territory courts.
- Part 2 of Schedule 1 to the Draft Bill makes several technical and procedural amendments to give effect to the Federal Court's expanded corporate crime jurisdiction. The proposed amendments would allow related summary offences to be heard alongside indictable offences when based on the same factual situation and would allow the Federal Court and state and territory superior courts to transfer corporate crime matters between them.
- Schedule 2 to the Draft Bill allows the Federal Court to enter into a formal arrangement with a state or territory to use its established jury-preparation processes. In cases in which the Federal Court elects to use the new procedure, and the state or territory superior court agrees, the state or territory process for recruitment of jury panels would apply.<sup>4</sup>

## Addressing delays in prosecution

It appears that the Exposure Draft Bill is intended to address delays in prosecuting Commonwealth corporate crime briefs. However, the Law Council is concerned that insufficient justification has been provided for inferring that delays in the prosecution of Commonwealth corporate crime briefs are attributable to the jurisdiction in which they are being tried.

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<sup>1</sup> Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, Final Report, Volume 1 (February 2019) 433.

<sup>2</sup> Government response to the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry 39. <<https://treasury.gov.au/sites/default/files/2019-03/FSRC-Government-Response-1.pdf>>.

<sup>3</sup> Ibid.

<sup>4</sup> See further, Attorney General's Department Consultation Hub, <<https://consultations.ag.gov.au/legal-system/federal-court-of-australia-amendment/>>

Anecdotally, it has been the experience of the Law Council's Constituent Bodies that the delay in the prosecution of these Commonwealth matters may arise because matters involving corporate and/or 'white collar' offending generally involve extensive documentary evidence. These matters are of a complexity that means that there are often ongoing investigations at the point of charge, leading to multiple tranches of brief service. Furthermore, it is not unusual for there to be a reformulation of the prosecution case over time by the CDDP, including in some cases proximate to trial.

These issues are not dependent on jurisdiction but arise for a number of reasons, including inadequate resourcing of the federal agencies involved in investigating and prosecuting Commonwealth crime and issues concerning eligibility for legal aid for accused persons in large Commonwealth prosecutions. The same issues are apt to arise, and have arisen in recent times, in prosecutions in the Federal Court.

### **Existing constraints on the Federal Court of Australia**

The Exposure Draft Bill does not appear to fully address the existing constraints on the exercise of criminal jurisdiction by the Federal Court, including:

- **Expertise**—whilst the Law Council recognises that some Federal Court judges have significant experience in Federal criminal law, many Federal Court judges have limited criminal law experience, reflecting the current focus of the Federal Court on federal legislation and commercial matters. In contrast, state superior courts have a greater number of judges with criminal law experience;
- **Docket system**—the Federal Court operates on a docket system which means that each prosecution is supervised from the same judge from beginning to end, while state criminal courts do not take the same approach; and
- **Appeals**—in the absence of a dedicated court of appeal for the Federal Court, determining criminal appeals in the existing Full Federal Court system is undesirable because of the limited number of judges with criminal law experience (see above). If it is anticipated that criminal appeals are only to be determined by judges with criminal law experience in the Full Federal Court, then this would lead to a very small number of trial judges sitting in judgment of each other's rulings and directions.

### **The risk of forum shopping**

The rule of law requires that, where the law distinguishes between different classes of persons, there should be a rational basis for that differentiation.<sup>5</sup> Furthermore, it is a fundamental principle of the criminal justice system that like cases be treated alike.<sup>6</sup>

It is undesirable that the same criminal proceedings could be brought in one of two different courts (one federal and one state), with different procedures, merely based on the choice by a prosecutor as to where a defendant will be indicted. This could give rise to the perception that a prosecutor is opting for a jurisdiction based on the court in which the prosecutor prefers to lay an indictment.

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<sup>5</sup> Law Council of Australia, Policy Statement: Rule of Law Principles (March 2011), <<https://www.lawcouncil.asn.au/publicassets/046c7bd7-e1d6-e611-80d2-005056be66b1/1103-Policy-Statement-Rule-of-Law-Principles.pdf>>

<sup>6</sup> Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders* (Report No 103, 2006) 14.

## Definition of ‘corporate crime offence’

The Exposure Draft Bill seeks to insert subsection 67G(4) into the *Judiciary Act 1903* (Cth) which would confer jurisdiction on the Federal Court for a range of offences under the *Criminal Code Act 1995* (Cth). Such offences are to be defined in the *Federal Court of Australia Act 1976* (Cth) (the **Federal Court Act**) (together with other offences arising under federal legislation) as ‘corporate crime offences’ in proposed section 32AE, and would permit the discretionary transfer of criminal proceedings between that Court and a court of a State or Territory that has jurisdiction to hear and determine the proceedings.

The Law Council notes that a number of offence categories in proposed subsection 67G(4) are not necessarily associated with corporate criminal conduct, in particular, forgery and related offences, identity crime, money laundering, and computer offences. The Law Council is concerned that the positive disclosure obligations on accused persons under Part III Subdivision C of the Federal Court Act may be unduly onerous if applied generally to accused persons whose alleged offending was not related to corporate criminal conduct.

In that context, the Law Council notes the New South Wales Bar Association’s recommendation that the proposed expansion of Federal Court criminal jurisdiction be limited to matters involving financial services in relation to Chapter 7 of the *Corporations Act 2001* (Cth), noting the special extended corporate liability provisions in section 769B of that Act.

## Transfer of proceedings

Clause 18 of the Exposure Draft Bill would provide for the discretionary transfer of certain criminal proceedings where it appears to the Court that it is ‘more appropriate’ for the proceeding to be determined by another court.

The Law Council suggests that the test for transfer of proceedings be better specified by stipulating relevant considerations such as the overriding consideration that the transfer of proceedings be in the interests of justice. Further matters would include the nature of the offence, the location of the alleged offending conduct, the location of the witnesses, and the costs and expense to the parties of the trial being conducted in any particular jurisdiction or location.

Importantly, no justification is provided in the Exposure Draft Bill for why a transfer order should only be available on the application of the prosecution or made by the Court of its own motion. If there were to be a mechanism for transfer of proceedings between federal and state courts, the Law Council suggests the accused should also have a right to make such an application.

In light of the risk of perceived forum shopping highlighted above, if a prosecutor is to be allowed to apply to transfer proceedings, then the prosecutor should be required to do so prior to committal for trial or sentence. Any decision as to whether to seek committal of an accused to a State/Territory or Federal Court should be communicated to the accused prior to the committal date to afford them the opportunity to make representations as to the appropriate jurisdiction.

In that context, it is essential for there to be clear published policy documents from the CDPP, ASIC or other relevant prosecutor as to the relevant considerations which will apply to such an election.

## Proposed Division 1B—related summary offences

The Exposure Draft Bill proposes a new Division 1B of the Federal Court Act to provide a mechanism to deal with related summary offences. Proposed section 23L of the Federal Court Act would allow the court to determine a related summary offence solely or primarily on the basis of the prosecution brief of evidence without providing an accused person with the opportunity to object to or test that evidence.

Whilst the Law Council accepts there is merit in dealing with related summary offences after trial without recourse to a full hearing, it is concerned the Exposure Draft Bill may encroach on the right of the accused to a fair trial. As noted above, the inclusion of explanatory material as part of this consultation could provide justification for this potential encroachment.

Illustratively, proposed paragraph 23L(1)(a) of the Federal Court Act would allow the Court to receive copies of witness statements from the brief of evidence, including unsigned written summaries. On one reading of the provision, after the Court has received that material into evidence, the accused would not have the right to cross-examine witnesses and would be required to seek leave to do so pursuant to proposed subsection 23L(2). That would be a significant encroachment on the right of an accused to a fair trial.

The Law Council suggests consideration be given to the equivalent mechanism in Division 7 of Part 3 of Chapter 3 of the *Criminal Procedure Act 1986* (NSW), which limits evidence to that adduced in the trial, subject to leave being granted to adduce further evidence.

### **Hybrid scheme for jury selection**

The Law Council is concerned that inadequate consideration has been given to the implications of two different methods for the empanelment of jurors at the election of the Sheriff as proposed in the new Subdivision D of Part III of the Federal Court Act.

In particular, proposed new Subdivision DB provides that, where there is consent to do so, the Sheriff may request the Supreme Court of a State or Territory to provide a jury panel to the Court for a trial in that State or Territory.

The Attorney-General Department's website indicates:

*This will not replace the Federal Court's ability to recruit a jury panel under the Federal Court of Australia Act 1976. Rather, it will provide an additional option for preparing a jury panel. The additional option for preparing a jury panel would help make recruiting jury panels more effective and help prevent delays in indictable proceedings.<sup>7</sup>*

That discretionary mechanism is problematic in light of the important differences between existing state and territory jury provisions and Subdivision D of the Federal Court Act which currently provides for preparation of a jury roll and list by the Sheriff for the purposes of the Federal Court.

To demonstrate, there are some significant differences between the *Jury Act 1977* (NSW) (**the Jury Act**) and both the existing Federal Court provisions and those in the hybrid scheme proposed in the Exposure Draft. For example, the procedure for challenging jurors under the Federal Court Act and the Jury Act differ significantly. Challenges are required to be made before a juror takes a seat under the Federal scheme (as opposed to prior to being sworn in NSW under section 45 of the Jury Act). Further, there are differences in challenges available to the Crown and to defence. Crown challenges are essentially limited to standing jurors aside in the Federal Court, whereas under the Jury Act the Crown has the right to make peremptory challenges. Under the Jury Act, both the Crown and defence have three challenges, with scope to agree more.<sup>8</sup>

If the hybrid approach taken in the Exposure Draft Bill to jury selection were to be retained, the differences between the process in Subdivision D of the Federal Court Act and state jury selection rules should be examined in greater detail. Further, the Exposure Draft Bill should provide greater

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<sup>7</sup> See further, Attorney General's Department Consultation Hub, <<https://consultations.ag.gov.au/legal-system/federal-court-of-australia-amendment/>>

<sup>8</sup> *Jury Act 1977* (NSW), s 42.

specification of the criteria to be applied by the Sherriff in utilising the hybrid procedure in new Subdivision DB.

### **Conclusion**

The Law Council maintains that, given the complexity of issues arising from the Draft Exposure Bill, a longer period of consultation and expanded reasoning for the approach taken in the Draft Exposure Bill (in the form of an issues paper or exposure draft explanatory memorandum) are warranted.

Yours sincerely

A handwritten signature in blue ink that reads "Tass Liveris". The signature is written in a cursive, flowing style.

**Mr Tass Liveris**  
**President**