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## *Cross-Border Co-operation in Australian Corporate Insolvency Law*

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# **Cross-Border Co-operation** **in Australian Corporate Insolvency Law**

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## *Introduction*

The Australian system for dealing with pre-insolvency and insolvency contains a number of familiar institutions: schemes of arrangement, receivership, liquidation and voluntary administration. This last procedure was introduced in 1993 to replace official management, itself based on South African law and brought into use in 1961, however falling into disrepute owing to its use as an unofficial debtor-driven liquidation procedure with opportunities for fraud.<sup>1</sup> The desire to innovate and reform in Australia extends to the approach taken by Australian courts and institutions to insolvencies with an international element. The cross-border provisions in Australia are as a rule more universalist in approach than many comparable jurisdictions and contain both unique jurisdiction rules as well as co-operation measures.

## *The Traditional Common-Law Position*

It is a general principle that a foreign liquidation order which has been granted in the home jurisdiction, or domicile, of the company is recognised in Australia.<sup>2</sup> In addition, orders pronounced by other jurisdictions may also be recognised provided the basis of jurisdiction approximates to grounds normally accepted by an Australian court. This is subject to certain common-law exceptions to recognition based on whether foreign proceedings are final in nature, whether they comply with perceived notions of natural justice, whether jurisdiction has been exercised validly and whether recognition would offend Australian public order rules.<sup>3</sup> Although a foreign liquidation order is not directly enforceable in Australia, it is assisted by the recognition of the appointment of the foreign liquidator and allowing him capacity to act in certain instances.<sup>4</sup> A number of statutory measures are available to the court to afford assistance under the Corporations Law 1989.<sup>5</sup>

## ***I - Jurisdiction to Wind Up a Foreign Company***

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<sup>1</sup>By the Corporations Law Reform Act 1992 ('CLRA 92'), based on proposals contained in the Australian Law Reform Commission Report No. 45 (1988) ('ALRC Report No. 45'). For an outline, see Harmer, An Overview of Recent Developments and Future Prospects in Australia, chapter 4 in Ziegel (ed.), Current Developments in International and Comparative Corporate Insolvency Law (OUP, 1994) and Brown, Corporate Rescue: Insolvency Law in Practice (Wiley, 1997) at para. 24.160 et seq.

<sup>2</sup>Re: Alfred Shaw and Co. (1897) QLJ 93. This accords with the principle outlined in Rule 178 in Dicey & Morris, The Conflict of Laws (Stevens & Sons, 1987) at 1150.

<sup>3</sup>Wood, Principles of International Insolvency (Sweet & Maxwell, 1995) at 250 (para. 5-13).

<sup>4</sup>Cooper and Jarvis (eds), Recognition and Enforcement of Cross-Border Insolvency: A Guide to International Practice (Wiley, 1997) at 7.

<sup>5</sup>The Corporations Act 1989, retitled Corporations Law ('CL') by the Corporations Legislation Amendment Act 1990 ('CLAA 90'). This act is a federal legislative model law and has been adopted in all states and territories of Australia.

## A: Specific Jurisdiction to Wind Up a Foreign Registered Company

The law provides that companies wishing to conduct business in Australia must not carry out business in Australia unless they have been registered or are about to register with the appropriate authority.<sup>6</sup> The law provides that where a registered foreign company commences to be wound up, or has been dissolved, in its home jurisdiction, any person who is a local agent of the foreign company must lodge notice of that fact and notice of the appointment of a liquidator, where one is appointed, within a time period of one month calculated by reference to the beginning of winding up proceedings. The ASC may extend this period in special circumstances.<sup>7</sup> The courts have the power to entertain an application by the ASC or the person who is the liquidator for the foreign company in its home jurisdiction to appoint a liquidator of the foreign company in Australia.<sup>8</sup>

A liquidator of a registered foreign company appointed by the courts must invite all creditors to make their claims against the foreign company within a reasonable time before any distribution of the foreign company's property is made. This is usually performed by advertising in a daily newspaper circulating generally in all states or territories where the foreign company has carried on business at any time during a period of 6 years prior to liquidation.<sup>9</sup> In addition, the liquidator may not pay out a creditor of the foreign company to the exclusion of another creditor of the foreign company without obtaining a court order authorising him to do so.<sup>10</sup>

Furthering the principle of co-operation, the liquidator must recover and realise all property belonging to the foreign company in Australia and pay the net amount to the liquidator of the foreign company for its home jurisdiction unless the courts otherwise order.<sup>11</sup> This is only where there exist good grounds for refusing to do so, for example where there is a risk that the liquidator in the foreign company's home jurisdiction might not divide assets equitably.<sup>12</sup> Where there is no liquidator for the home jurisdiction, the liquidator may apply to the Court for directions about the disposal of the net amount recovered following winding up of the registered foreign company insofar as its property in Australia is concerned.<sup>13</sup>

The specific jurisdiction rule allows for proceedings in Australia involving a foreign company. These proceedings are generally treated as being ancillary to proceedings being conducted in the foreign company's home jurisdiction. Nevertheless, there exist some instances when these rules may not be of application, firstly, where there are no proceedings in the home jurisdiction or these proceedings fall short of what are considered insolvency procedures

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<sup>6</sup>s343, CL. The appropriate authority is the Australian Securities Commission ('ASC'), which is the overall regulatory body for companies with general authority to act under the Corporations Law.

<sup>7</sup>s350(14)(a), CL.

<sup>8</sup>s350(14)(b), CL.

<sup>9</sup>s350(15)(a), CL.

<sup>10</sup>s350(15)(b), CL.

<sup>11</sup>s350(15)(c), CL.

<sup>12</sup>Re: Australian Life and General Assurance Company [1931] VLR 317.

<sup>13</sup>s350(16), CL.

and, second, where the foreign company has not in fact registered to conduct business in Australia.<sup>14</sup> In addition, there is some debate about which jurisdiction the Australian courts will regard as the home jurisdiction or place of origin, the term used in the law, where there is evidence that the company has closer attachments to another jurisdiction in which incorporation was not actually carried out.<sup>15</sup>

### B: The General Jurisdiction Rule

In instances where specific jurisdiction rules are not of application, additional jurisdiction in Australia to wind up a company not incorporated in Australia is available in Part 5.7 of the law. The rules in this part are stated to be in addition to those contained in s350.<sup>16</sup> The rules do not supersede any provisions contained in the Corporations Law or any other law dealing with the winding up of companies. The same powers are, in fact, given to the courts or appointed liquidator to perform any act in the case of a company falling under these rules as is normally performed in respect of the winding up of companies.<sup>17</sup> The rules are also designed not to affect the operation of the Bankruptcy Act 1966, which covers personal insolvency.<sup>18</sup> As a general principle, a company falling within Part 5.7 may be wound up notwithstanding that it is being wound up or has been dissolved or has otherwise ceased to exist as a company by virtue of the laws of the place where it was incorporated.<sup>19</sup>

A company falling within Part 5.7 is defined as including a registrable body that is either registered under Part 4.1, Divisions 1 or 2,<sup>20</sup> or carries on business in the relevant jurisdiction. The body may be wound up under Chapter 5, which deals with insolvency proceedings in general, subject to certain necessary adaptations. These include, in relation to foreign companies, the fact that the principal place of business in Australia for the purpose of winding up is taken to be the registered office of the foreign company and that a foreign company may not be subject to voluntary winding up.<sup>21</sup>

Proof that a foreign company is in fact carrying on business in Australia is to be inferred from the establishment of a place of business, the establishment of a share transfer or registration office or frequent dealings with property in

<sup>14</sup>Cooper & Jarvis (eds.), op. cit. at 6, where it is stated that as a rule “where a foreign company is not registered in Australia, ancillary proceedings may not be commenced”.

<sup>15</sup>See Grace, Law of Liquidations: The Recognition and Enforcement of Foreign Liquidation orders in Canada and Australia - A Critical Comparison (1986) 35 ICLQ 664 at 683.

<sup>16</sup>The definition of a Part 5.7 body also includes Australian companies incorporated in another state or territory. Specific jurisdiction rules for winding up this type of company are also provided by s342, CL, which uses wording similar to s350, CL.

<sup>17</sup>s582(1), CL.

<sup>18</sup>s582(2), CL. The Bankruptcy Act also contains a co-operation provision in s29.

<sup>19</sup>s582(3), CL. See similar wording in s225, Insolvency Act 1986 (United Kingdom). The provision as first enacted included the words “incorporated outside Australia”. Schedule 1, CLAA 90, removed this qualification so as to extend Part 5.7 to bodies incorporated in other Australian states.

<sup>20</sup>These deal with requirements relating to, respectively, Australian and foreign companies.

<sup>21</sup>s583(a)-(b), CL.

Australia.<sup>22</sup> Activities which of themselves do not signify that the foreign company is carrying out business include acting as a party to legal proceedings, holding company meetings in Australia, maintaining a bank account, creating security over property or debt, investing funds or holding property, procures the conclusion of contracts binding outside Australia and conducting a single or isolated transaction within a 31-day period, unless this transaction is one of a similar series conducted over a period of time.<sup>23</sup>

Circumstances in which a company falling under Part 5.7 may be wound up include where it is unable to pay its debts, where it has been dissolved, where it has ceased to carry on business in Australia, where it has a place of business in Australia only for the purpose of winding up its business, where the court is of the opinion that it is just and equitable that it should be wound up and, finally, where the ASC has stated an opinion in a report that the company cannot pay its debts and should be wound up or that it is in the interests of the public, shareholders or creditors, that it should be wound up.<sup>24</sup>

Instances in which a company falling within Part 5.7 is deemed to be unable to pay its debts include where it fails to pay or otherwise secure or compound within three weeks following the presentation of a demand made by a creditor for payment of a sum in excess of the statutory minimum,<sup>25</sup> where it fails to take steps upon the service of notice of an action or other proceedings by another party on either a shareholder or the company concerned by paying any debt due or taking steps to meet any demands which have been made, where execution or enforcement of a judgment obtained in any court, whether in Australia or not, has not been satisfied by the company and, lastly, where it is proved to the satisfaction of the Court that the company is unable to pay its debts.<sup>26</sup>

One particular difference between the specific jurisdiction and general jurisdiction rules relates to the disposal of the property recovered from liquidation. Following dissolution of a registrable body, where any property belonging to that body remains in Australia, the legal or equitable estate or other interest in that property, together with any claim, right or remedy affecting that property will vest in the person entitled under the law of the body's place of origin only if that body was incorporated in Australia or an Australian territory. In all other instances, including especially where the body was incorporated overseas, the property and attendant rights will vest in the ASC.<sup>27</sup>

### C: Additional Considerations for Exercising Jurisdiction

#### (i) Further Jurisdictional Requirements

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<sup>22</sup>s21(1)-(2), CL.

<sup>23</sup>s21(3), CL.

<sup>24</sup>s583(c), CL.

<sup>25</sup>AUS\$ 2000, following Schedule 1, CLRA 92.

<sup>26</sup>s585, CL.

<sup>27</sup>s588, CL.

Commentators argue that, in addition, to the statutory requirements for the assertion of jurisdiction over foreign companies, it is necessary to show stronger evidence of a connection with the jurisdiction. A case which illustrates the complexity of determining whether the evidence shows this connection is Re: Norfolk.<sup>28</sup> A shipping company, incorporated on Norfolk Island,<sup>29</sup> operated between Sydney and ports in New Zealand via Norfolk Island. Its sole asset, a ship, was stranded in Auckland. The company had not registered in New South Wales as a foreign company and did not have an office in New South Wales, its affairs being managed by an agent company, incorporated in that jurisdiction. The company filed for winding up and the appointment of a provisional liquidator under provisions in the Companies Code.<sup>30</sup> The company also sought to rely on cross-vesting legislation.<sup>31</sup>

The court began consideration as to whether it had jurisdiction by analysing the powers given it to wind up a company under the Code. The powers were held to also apply to foreign companies if these were subject to registration, which was required if the company wished to establish a place of business or carry out business in New South Wales. As the company had no place of business or any office in the jurisdiction, the court asked the question whether the company did in fact carry on business in New South Wales, a question answered in the affirmative, based on the observation that the company carried out, through its agent, more than a limited number of isolated transactions with view to pecuniary gain.

In determining whether it was then appropriate for the court to exercise jurisdiction, the court considered a number of English cases on similar points, and concluded that there must also be a proper commercial connection with the jurisdiction, defined to include the presence of assets and personnel within the jurisdiction competent to distribute the assets concerned, as well as a reasonable possibility that benefit would accrue to creditors from a winding up order being obtained in that jurisdiction.<sup>32</sup> The court could not establish the presence of any assets within the jurisdiction with any certainty and could not hold that creditors owed a total amount of more than a million dollars would benefit. The court thus had doubts as to whether the presumptions under s470<sup>33</sup> were met but justified appointment of a provisional liquidator under the cross-vesting legislation.<sup>34</sup>

In the above case, the court opined that the law with respect to whether assets, whether these are negligible or not, are required as a basis of

<sup>28</sup>Re: Norfolk Shipping Line Pty. Ltd. (1988) 6 ACLC 990.

<sup>29</sup>A external territory of Australia with self-governing status situated in the Tasman Sea.

<sup>30</sup>The Companies Code 1981 was a federal model code adopted in each of the states which preceded the Corporations Law.

<sup>31</sup>The Jurisdiction of Courts (Cross-Vesting) Act 1987 is a uniquely Australian piece of legislation which vests federal civil jurisdiction in all state Supreme Courts and original and appellate civil jurisdiction of a state Supreme Court in the Supreme Court of any other state or territory.

<sup>32</sup>Following Re: Compagnia Merabello San Nicholas SA [1973] Ch 75 and Re: A Company (No. 00359 of 1987) [1988] 1 Ch 210.

<sup>33</sup>Analogous to s583, CL.

<sup>34</sup>See Re: Atlantic Isle Shipping Co. Inc. (1988) 6 ACLC 992, where a provisional liquidator was appointed for a related company on the basis of the presence of minimal assets and a soupçon of evidence suggesting the company carried on business in New South Wales.

jurisdiction is not yet certain.<sup>35</sup> There is authority to suggest that a winding up will only be ordered if there are assets present within the jurisdiction,<sup>36</sup> although the New South Wales Supreme Court has in fact made an order in respect of an insolvent foreign company with negligible assets in Australia where almost all of the creditors were resident within the jurisdiction.<sup>37</sup> The question of whether the existence of assets and concomitant benefit to creditors as grounds for jurisdiction is necessary has also been raised by commentators.<sup>38</sup>

## (ii) Discretion to Refuse a Petition

The granting of an order following a winding up petition is said to involve the exercise of a court's discretionary powers. Illustrating the discretionary nature of a winding up petition and considerations for the exercise of this discretion is the case of Mercantile Credits.<sup>39</sup> An appeal was brought to the Federal Court of Australia against an order of the Supreme Court of South Australia dismissing a creditor's petition for the winding up of a company which was incorporated in the United Kingdom and, although registered as a foreign company in New South Wales, was not registered in South Australia to conduct business.

The state court had held that the company carried on business in South Australia for some time after the commencement of relevant legislation and was thus liable to be wound up on the appellant's petition in the same way as if it were an unregistered company.<sup>40</sup> The state court held that it had jurisdiction in the circumstances of the case to make a winding-up order, the basis of which was not questioned in the appeal.<sup>41</sup> What the appeal court questioned was the state court's contention that it had an unfettered discretion in the matter of whether to permit the claim for a winding-up. The appeal court accepted the existence of a discretion.<sup>42</sup> This discretion was, nevertheless, to be exercised in accordance with established principles, the foremost one being that a creditor has a prima facie right to a winding-up order.<sup>43</sup>

At that point in time, the case was said to be unique in that the company was a foreign company not then carrying on any active business in the jurisdiction, not appearing to have any assets in the jurisdiction except moneys paid into court and not being in liquidation in any other jurisdiction. It was stated that there was no reported case of a foreign company being wound up except to assist a foreign liquidation, to secure assets of a company which is being

<sup>35</sup>Per Young J. at 991.

<sup>36</sup>Re: Kailis Groote Eylandt Fisheries Pty. Ltd. [1977] 2 ACLR 574.

<sup>37</sup>Re: Buildmat (Australia) Pty. Ltd. (1981) CLC 40-714.

<sup>38</sup>Grace, op. cit. at 689, citing in support Banque des Marchands de Moscou v Kindersley [1951] 1 Ch 112 and Re: Azoff-Don Commercial Bank [1954] Ch 315.

<sup>39</sup>Mercantile Credits v Foster Clark (Australia) Ltd. (1964) 112 CLR 169.

<sup>40</sup>The Companies Act 1934-1960 (South Australia).

<sup>41</sup>Following the rule in Re: Commercial Bank of South Australia (1886) 33 Ch D 174 and Re: Hibernian Merchants Ltd. (1958) Ch 76.

<sup>42</sup>Following the rule in Re: Chapel House Colliery Co. (1883) 24 Ch D 259.

<sup>43</sup>Following the rule in Re: James Millward & Co. (1940) Ch 333, Re: Home Remedies Ltd. (1943) Ch 1 and Re: B. Karsberg Ltd. (1955) 3 All ER 854.

wound up in a jurisdiction where liquidation proceedings do not ensure an equitable distribution of assets or to distribute assets of a company already dissolved in its home jurisdiction. The court dismissed the contention that the fact relevant legislation could not operate to produce the dissolution of the company following winding up was grounds to deny the petition.<sup>44</sup> The court considered that as the company was unable to pay its debts, it was manifestly just and equitable that the company should be wound up. In the court's opinion there was no ground upon which a winding-up order might properly be refused in those circumstances.

Although it is accepted by commentators that the courts have a discretion to refuse to order winding up, opinion suggests that, as the principal objective of local proceedings is to protect local assets and procure an equitable division between creditors, the court is likely to make a winding up order if there are available assets and creditors present within the jurisdiction. It is reported that there is authority to suggest that the court will also take into account the wishes of all creditors, including those resident abroad. Opinion further suggests that where there are few assets present within Australia and the foreign liquidator will not be impeded in obtaining these, a winding up petition may be denied in order to effect a saving in costs.<sup>45</sup>

### (iii) Forum Non-Conveniens/Lis Alibi Pendens

Although rarely invoked in the context of insolvency proceedings, a plea of forum non conveniens or lis alibi pendens may be raised where litigation is already in contemplation or has been initiated on an issue which will be affected by the onset of insolvency proceedings, especially where the rules of insolvency proceedings prevent the determination of issues, including the fate of priorities, set-offs, and dispositions of assets, except by application of insolvency principles. This may result in great detriment to an individual creditor in comparison to the benefit available for all creditors as a class. This is of particular relevance where the court is petitioned to open winding up proceedings in respect of a foreign company on just and equitable grounds.<sup>46</sup>

A creditor might seek an advantage by litigating in Australia ahead of the competition for assets in insolvency proceedings elsewhere, especially as Australian courts can only decline jurisdiction, whether the plea is forum non conveniens or lis alibi pendens, where Australia is a clearly inappropriate forum. Factors relevant in a determination include the connection between the action and the forum selected, any legitimate advantage to the plaintiff in choosing Australia's courts as a forum and whether adequate relief is available to the plaintiff in the foreign jurisdiction.<sup>47</sup> Nevertheless, where a stay or adjournment of Australian proceedings is sought, the court will look only at the nature of both proceedings afoot, the stage reached in both

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<sup>44</sup>Following Re: Matheson Brothers Ltd. (1884) 27 Ch D 225.

<sup>45</sup>See chapter dealing with Australia, contributed by Clark & Kann, Solicitors (Brisbane) in Campbell (ed.), International Corporate Insolvency Law (Butterworths, 1992) at 29.

<sup>46</sup>Grace, *op. cit.* at 689 (fn. 230 cites as authority Mills v Mills (1938) 60 CLR 150).

<sup>47</sup>Voth v Manildra Flour Mills Pty. Ltd. (1990) 171 CLR 538.

proceedings and the effect of any foreign judgment on the outcome of local proceedings.<sup>48</sup>

## ***II - Mutual Assistance Measures***

### **A: Co-operation with Foreign Courts**

Law reform proposals highlighting the increased significance of cross-border elements in insolvency proceedings were the genesis of the provisions now to be found in Division 9 of Part 5.7 of the Law, titled "Co-operation between Australian and foreign courts in external administration matters". The provisions have been applied in a number of instances, including proceedings involving the BCCI.<sup>49</sup> For the purpose of this division, "external administration matter" is defined as including the winding up in any Australian state or territory of an Australian or foreign company, the winding up outside Australia of a body corporate or a Part 5 body and the insolvency of similar bodies. "Prescribed country" is defined to mean any country which has been prescribed or a colony, overseas territory or protectorate of that country.<sup>50</sup>

Where the court of any state or territory has jurisdiction in any matter arising under the Corporations Law of that jurisdiction, the judges of that court and any of its officers are required to act in aid of, and be auxiliary to each other and to all courts, as well as judges and officers of those courts, that have jurisdiction under corresponding laws in all external administration matters.<sup>51</sup> The Court is required to afford mandatory assistance and auxiliary help to the courts of Australian territories and prescribed countries. Assistance at the discretion of the court may be given to the courts of other countries that have jurisdiction in external administration matters.<sup>52</sup>

On receipt of a Letter of Request from a court in an Australian territory or other country, an Australian court may exercise such powers with respect to the matter as it could exercise if the matter had arisen within its own jurisdiction.<sup>53</sup> An Australian court may also issue a Letter of Request to other courts, including courts in an Australian territory or other country, with jurisdiction in comparable matters to act in aid of, and be auxiliary to the Australian court.<sup>54</sup>

The leading case in both Australian and English law with respect to co-operation measures is Re: Dallhold.<sup>55</sup> Dallhold Investments, itself in liquidation, had applied for an order for the winding up of its wholly owned

<sup>48</sup>Sterling Pharmaceutical Pty. Ltd. v Boots & Co. (Aust) Pty. Ltd. (1992) 34 FCR 287.

<sup>49</sup>Harmer, op. cit. at para. 6.5.3, citing ALRC Report No. 45 para. 383.

<sup>50</sup>s580, CL. Nine countries have in fact been prescribed under this section and s29, Bankruptcy Act: Canada, Jersey, Malaysia, New Zealand, Papua New Guinea, Singapore, Switzerland, the United Kingdom and the United States.

<sup>51</sup>s581(1), CL.

<sup>52</sup>s582(2), CL.

<sup>53</sup>s583(3), CL.

<sup>54</sup>s583(4), CL.

<sup>55</sup>Re: Dallhold Investments Pty. Ltd. and Re: Dallhold Estates (UK) Pty. Ltd. (1991) 6 ACSR 378, (1991) 10 ACLC 1374 (Australia); Re: Dallhold Estates (UK) Pty. Ltd. [1992] BCLC 621 (UK).

subsidiary Dallhold Estates. Dallhold Investments, with the support of the Australian provisional liquidator of Dallhold Estates also sought the issue of a Letter of Request addressed to the High Court of Justice in London seeking assistance by the making of an administration order in respect of the latter under Part II of the United Kingdom Insolvency Act. Other creditors opposed that course and sought to be substituted as applicants in lieu of Dallhold Investments and for a winding up order pursuant to the original application to be made in respect of Dallhold Estates.

The court noted the effect of the provision was to permit the court to request a foreign court to act in aid of the Australian court in an "external administration matter", a phrase defined to include matters relating to the winding up of Dallhold Investments. The court accepted the submission by Dallhold Investments, also the principal creditor of Dallhold Estates, that an administration offered the possibility that the value of an agricultural lease owned by the subsidiary might be preserved for the benefit of the creditors as a whole through administration proceedings. This would not be achieved by the making of a winding up order either in Australia or in England. The court also accepted advice given by English solicitors that there were significant doubts as to whether an administration order may be made except at the request of this Court under the co-operation measures and concluded that was desirable that the best possible realisation of the assets of Dallhold Estates be achieved for the benefit of all its creditors. The court made a declaration that it is desirable to request the assistance of the English Courts and ordered the issue of a Letter of Request.

## B: Co-operation with Other Australian Courts

Within Australia, measures are available for co-operation between courts for the enforcement of orders made by courts in other states and territories. These provisions apply when an order in connection with the winding up of a body that is an Australian company or other company falling within Part 5.7 is made in a number of instances, including where the Federal Court makes an order the Corporations Law as applied in another jurisdiction, where the Supreme Court of another state or territory makes an order under its Corporations Law or the law as applied in any other jurisdiction and where the Supreme Court of the jurisdiction where enforcement is sought makes an order under the Corporations Law of another state or territory.<sup>56</sup>

Any order thus made has effect in the jurisdiction in which enforcement is sought and will be enforced by the Federal Court where it makes the order or the Supreme Court of that jurisdiction where the order is made by that or any other Supreme Court.<sup>57</sup> The liquidator of a body being wound up under the Corporations Law in another Australian state may perform any function or power available to a liquidator in the state in which enforcement is sought.<sup>58</sup>

<sup>56</sup>See fn. 30 above. The Federal Court of Australia, acting as a court of appeal from state courts may make orders under the laws of any state or territory.

<sup>57</sup>s588A, CL in Part 5.7A, inserted by Schedule 1, CLAA 90. There also exist measures under ss588AA-AB to assist intra-Australian voluntary administrations under Part 5.3A, CL, but which owing to differences in terminology used, do not apply to foreign companies.

<sup>58</sup>s588B. This section uses the term "recognised company", which includes a company recognised as such by the Corporations Law of another state and territory.

After dissolution in another state or territory, there remains in the state where the order has been enforced outstanding property of the body or any legal or equitable estate or interest in that property and any claim, right or remedy affecting that property vests in the person entitled to the property under the law of the home jurisdiction.<sup>59</sup>

### ***III - Future Trends for Jurisdiction and Co-operation Measures***

The attitude of Australian courts and institutions is favourable, in principle and in practice, to cross-border assistance measures. As part of the general report into insolvency law, a recommendation was made that Australia should actively promote multilateral treaties with respect to the adoption by nations of common elements of insolvency law and further recognition of insolvency laws as between nations.<sup>60</sup> Talks are said to have been proceeding between Australia and New Zealand for closer co-operation in insolvency matters, including adoption of common legal provisions dealing with insolvency administrations as well as automatic reciprocity and recognition of insolvency orders.<sup>61</sup> This is very much in line with existing measures allowing recognition and enforcement of judgments between these two countries.<sup>62</sup>

The latest consideration of insolvency matters by the Australian Law Reform Commission Report appeared in 1996.<sup>63</sup> A general summary of the consultations received by the ALRC stated that Australian insolvency law is more responsive than most jurisdictions in assisting foreign insolvencies. Nevertheless there is a consensus that there exists a need for greater international co-operation and solutions to two specific problems: investigations in relation to insolvent bodies and management of cross border procedures.<sup>64</sup>

#### **A. Investigations and Evidence**

To obtain information during the currency of proceedings, a liquidator can use civil litigation provisions to obtain evidence outside Australia. Problems arise when information before proceedings is necessary, which at present can only be effected under special investigation powers available in the Corporations Law, specifically s581(4).<sup>65</sup> The report states as a concern that production of Letters of Request will only be effective if foreign courts are receptive to them. Australian courts are said to be reluctant to issue such Letters of Request unless there is evidence that the foreign court is likely to accede to

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<sup>59</sup>s588C.

<sup>60</sup>Harmer, op. cit. at para. 6.5.3, citing ALRC Report No. 45 para. 387.

<sup>61</sup>Harmer, op. cit. at para. 7.

<sup>62</sup>See Part 1A, titled "Enforcement of Judgments and Orders of Federal Court of Australia" in the New Zealand Reciprocal Enforcement of Judgments Act 1934 (reprinted 1992) and Australia's Foreign Judgments Act 1991, which also permits recognition of judgments recovering New Zealand tax and registration of judgments in New Zealand currency.

<sup>63</sup>ALRC Report No. 80.

<sup>64</sup>Para. 4.38.

<sup>65</sup>Para. 4.39.

the request.<sup>66</sup> Experience even with the prescribed countries is said not to be uniform.<sup>67</sup>

A recommendation was made for a government review of the basis on which co-operation arrangements could be improved to supplement work being carried out by UNCITRAL.<sup>68</sup> A further review of the Foreign Evidence Act 1994 was suggested so as to provide for the admissibility of material obtained outside Australia under any Letters of Request.<sup>69</sup> In addition, the report raises the possibility of information obtained by regulatory agencies, which often have better access to evidence abroad through mutual assistance treaties or memoranda of understanding with their regulatory counterparts, being pooled with liquidators, provided that doing so is consistent with their statutory obligations and interest in ensuring maximum co-operation with their regulatory counterparts in other countries.<sup>70</sup>

## B. International Management

The report states that Australian insolvency law generally tends towards a universalist, as opposed to a strictly territorial, approach on jurisdiction. Citing the specific and general jurisdiction rules, the report concentrates on three specific areas of possible reforms relating to the work of UNCITRAL, the possibility of direct communication between courts as well as the extraterritorial reach of certain insolvency law provisions.<sup>71</sup>

At the time the report was prepared, the UNCITRAL Working Group on Insolvency was still working on a model law to deal with judicial co-operation as well as issues of access and recognition in cases of cross border insolvency. The group focused on three aspects of insolvency administration in particular: facilitating international judicial co-operation, access to courts for foreign insolvency personnel and recognition of foreign insolvency proceedings, the emphasis being on the formulation of general guidelines to be implemented by national insolvency courts and practitioners. A recommendation was made that a high priority should be given to Australia's participation in the UNCITRAL Working Group on Insolvency.<sup>72</sup>

The report highlighted one particular issue considered by the UNCITRAL Working Group on Insolvency on direct communication between courts. A factor presented to the Commission during the inquiry as a promising development that could help co-ordinate insolvency proceedings across a number of jurisdictions. The development of a protocol for direct communications would need to address considerations, including the relationship with diplomatic communications, the duty to be placed on insolvency administrators to co-operate, the level of formality required and of due process within procedures as well as the language to be used. The report

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<sup>66</sup>Para. 4.41.

<sup>67</sup>Para. 4.42.

<sup>68</sup>Para. 4.43.

<sup>69</sup>Para. 4.44.

<sup>70</sup>Paras. 4.45-4.46.

<sup>71</sup>Paras. 4.48-4.49.

<sup>72</sup>Paras. 4.50-4.51. The text of the UNCITRAL Model International Insolvency Co-operation Act was adopted on 30 May 1997 in Vienna.

suggested that these considerations would make it difficult to pursue a multilateral agreement, although bilateral arrangements with countries with closely related legal systems may be possible.<sup>73</sup>

The report also highlighted a third area in which submissions for reform have been proposed relating to the extraterritorial reach of various bankruptcy and insolvency laws, in particular where asset transfers constitute fraudulent, unfair or voidable preferences under the Corporations Law. Currently, in order to increase the property available for distribution in an Australian winding up, a liquidator would have to establish that the Australian court has jurisdiction to avoid the relevant transactions and arguments have been raised as to whether the voidable transaction provisions in the Corporations Law were capable of extraterritorial effect without an express reference in the law. A recommendation was made that the government should review the possibility of amendments in relation to the extraterritorial operation of the voidable transaction provisions as a priority.<sup>74</sup>

### *Summary*

The rise of international commerce and the ease of setting up in more than one jurisdiction now means that many companies have little difficulty in gearing their economic expansion to a global scale. Just as expansion has brought considerations of conflicts of law and choice of law in international contracts and litigation, so too the periodic downturns in the world economy have brought considerations of private international law rules in relation to insolvencies. Insolvencies with an international dimension raise a number of important issues, including the diversity of laws which are potentially applicable to the transactions of a single company and which have important consequences at the time of insolvency.

This phenomenon has induced courts to begin to co-operate with each other, realising that insolvency can have far-reaching consequences on society and economies, both local and foreign. With the number of international insolvencies likely to increase, as a function of periodic decline in the world economy, this spirit of co-operation, though not universal in coverage, can only be applauded. In Australia, the statutory regime in place contains a number of measures which assist cross-border co-operation. These provisions are certainly far in advance of those available, even in a number of jurisdictions, which are *soi disant* international commercial centres. Reports produced by the ALRC contain further areas of reform, which if acted upon, can ensure that Australia remains at the forefront of the universalist tradition for co-operation in the management of international insolvency procedures.

**26th August 1998**

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<sup>73</sup>Para. 4.52. The example used was New Zealand.

<sup>74</sup>Para. 4.53.