# *Australia and the International Insolvency Paradigm*

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***Abstract***

Australia's response to international insolvency is the *Cross-Border Insolvency Act 2008* (Cth), which implements the UNCITRAL *Model Law on Cross-Border Insolvency*. The Act is designed to facilitate international trade and investment by improving the administration of cross-border insolvency cases, including the recovery of assets located overseas. However, the Act is not a comprehensive international insolvency statute. Apart from the ubiquitous and overarching common law and the *Cross-Border Insolvency Act*, Australian law relevant to cross-border insolvency includes the *Corporations Act 2001* (Cth) ss 580–81, s 583 and s 601CL (the ancillary liquidation provision). Currently, the procedures overlap in a complex and confusing way, with cases potentially falling through gaps in the law and important provisions being overlooked. The end result for the administration of cross-border insolvency cases is incongruity and inconvenience, with added cost and complication. The time has come for a rethink and redesign of Australia's international insolvency framework. The revised framework should include reconceptualisation of the basis for international insolvency cooperation, with incorporation of the Model Law standards as the basic threshold for insolvency assistance and provision for enhanced cooperation and assistance in certain circumstances. The conceptual redesign should also tackle some of the current limitations of the *Cross-Border Insolvency Act*.

## I Introduction

Australia's response to the challenge of international insolvencies is the *Cross-Border Insolvency Act 2008* (Cth), which implements the United Nations Commission on International Trade Law ('UNCITRAL') *Model Law on Cross-Border Insolvency* (1997) ('Model Law').[1] The Act is designed to facilitate international trade and investment by improving the administration of cross-border

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[1] For an overview of the Model Law and the *Cross-Border Insolvency Act 2008* (Cth), see the judgment of Allsop CJ in *Akers v Deputy Commissioner of Taxation* (2014) 223 FCR 8, 16–24 [27]–[69] ('*Akers*'). On UNCITRAL's role in the international insolvency sphere see generally Christoph G Paulus, 'Global Insolvency Law and the Role of Multinational Institutions' (2007) 32(3) *Brooklyn Journal of International Law* 755; Susan Block-Lieb and Terence Halliday, 'Harmonization and Modernization in UNCITRAL's Legislative Guide on Insolvency Law' (2007) 42(3) *Texas International Law Journal* 475, 481; and also Terence C Halliday, 'Legitimacy, Technology, and Leverage: The Building Blocks of Insolvency Architecture in the Decade Past and the Decade Ahead' (2007) 32(3) *Brooklyn Journal of International Law* 1081.

insolvency cases including the recovery of assets located (or secreted) overseas. But the Australian Parliament failed to put into place a comprehensive international insolvency statute. Adopting the words of then Chief Justice Spigelman of the Supreme Court of New South Wales, Australia has been left with 'a patchwork quilt of particular provisions of varying degrees of comprehensiveness and efficiency'.[2] Apart from the overarching common law and the *Cross-Border Insolvency Act*, Australian law relevant to cross-border insolvency includes the *Corporations Act 2001* (Cth) ('*Corporations Act*') ss 580–81 (the aid and auxiliary provisions); s 583 (the winding up of foreign companies provision); and s 601CL (the ancillary liquidation provision). At the moment, the procedures overlap in a complex and confusing way, with cases potentially falling through gaps in the law and important provisions being overlooked. The end result is likely to be incongruity and inconvenience, with the potential for added cost and complication in the administration of cross-border insolvency cases. In the light of this, a rethink and redesign of Australia's international insolvency framework is desirable. The revised framework should include reconceptualising the basis for international insolvency cooperation, with the incorporation of the Model Law standards as the basic threshold for insolvency assistance, coupled with provision for enhanced cooperation and assistance in certain circumstances.[3] The conceptual redesign should also tackle some of the current *Cross-Border Insolvency Act* limitations, such as the exclusion of certain types of foreign entity from the statutory benefits and the rejection of foreign revenue debts as admissible claims under Australian insolvency law. The continuing controversy associated with the cross-border recognition of foreign revenue debts is illustrated by the decision of the Full Federal Court in *Akers*.[4]

The article consists of five parts. After this first introductory part, Part II points out the deficiencies in the present statutory foundations for insolvency cooperation; namely overlaps, complexity, the potential for confusion, and extra costs. It also situates the current regime in the context of the contrasting paradigms of universalism and territorialism of insolvency proceedings.[5] Part III looks at the contrasting approaches taken towards implementation of the Model Law in the United States (US) and United Kingdom (UK) and the lessons that may be learned by Australia. Part IV explains why the opportunity for a complete overhaul and reformulation was rejected when Australia implemented the Model Law. It also argues that the time is now ripe for a reconsideration of the matter and looks at how a remodelling may work including statutory enhancements of existing provisions. The fifth part concludes and calls for pragmatic realism in a new era of international insolvency cooperation.

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2 Chief Justice J J Spigelman, 'Cross-Border Insolvency: Co-operation or Conflict?' (2009) 83(1) *Australian Law Journal* 44, 45.

3 This is hinted at by Justice R I Barrett, 'Commentary on "Cross-Border Insolvency — Judicial Assistance in the Post-Hoffmann Era"' [2013] *New South Wales Judicial Scholarship* 26, 30–1.

4 (2014) 223 FCR 8.

5 For the universalism versus territorialism debate see Jay Lawrence Westbrook, 'A Global Solution to Multinational Default' (2000) 98(7) *Michigan Law Review* 2276; Lynn M LoPucki, 'The Case for Cooperative Territoriality in International Bankruptcy' (2000) 98(7) *Michigan Law Review* 2216; Lynn M LoPucki, 'Universalism Unravels' (2005) 79(1) *American Bankruptcy Law Journal* 143; Robert K Rasmussen, 'Where are all the Transnational Bankruptcies? The Puzzling Case for Universalism' (2007) 32(3) *Brooklyn Journal of International Law* 983.

# II The Present Regime

## A *Cross-Border Insolvency Act 2008* (Cth)

The *Cross-Border Insolvency Act* gives effect in Australia to the provisions of the UNCITRAL *Model Law on Cross-Border Insolvency*, with some suitable modifications to take account of local conditions.[6] The Act was promoted on the basis that implementation by Australia of the Model Law would support development of a well-understood, uniform, internationally recognised framework for administering cross-border insolvencies. While Australia already had some laws that dealt with cross-border insolvency cases, 'they [were] not well suited to dealing with all of the consequences and complexities of cross-border insolvencies'.[7] An international model law was 'more likely to attract support and cooperation from other countries than the current mechanisms of the law which have been adopted unilaterally'.[8]

The Model Law has been explained as reflecting a universalist, rather than a territorialist approach towards insolvency proceedings.[9] This analysis was adopted by the Full Federal Court of Australia in *Akers*,[10] which accepted the statement of general approach propounded by the US Court of Appeals, 3rd Circuit, in *Re ABC Learning Centres Ltd*:

> The Model Law reflects a universalism approach to transnational insolvency. It treats the multinational bankruptcy as a single process in the foreign main proceeding, with other courts assisting in that single proceeding. In contrast, under a territorialism approach a debtor must initiate insolvency actions in each country where its property is found. This

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6 Australian cross-border insolvency law has been covered comprehensively by Rosalind Mason in a series of scholarly articles including the following: 'Cross-Border Insolvency and Legal Transnationalisation' (2012) 21(2) *International Insolvency Review* 105; 'Cross-Border Insolvency Bill 2007: The UNCITRAL Model Law Enters the Parliamentary Stage Yet Australia Still Awaits the Final Act' (2007) 15(4) *Insolvency Law Journal* 212; 'Local Proceedings in a Multi-State Liquidation: Issues of Jurisdiction' (2006) 30(1) *Melbourne University Law Review* 145. See also Anil Hargovan, 'The *Cross-Border Insolvency Act 2008* (Cth) — Issues and Implications' (2008) 22(2) *Australian Journal of Corporate Law* 188.

7 See Corporate Law Economic Reform Program ('CLERP'), *Cross-Border Insolvency: Promoting International Cooperation and Coordination*, Proposals for Reform: Paper No 8 (2002) 14.

8 Ibid.

9 Ibid 17, 21. See also the judgments of Lord Hoffmann in *Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2007] 1 AC 508 ('*Cambridge Gas*') and *Re HIH Casualty & General Insurance Ltd* [2008] I WLR 852 ('*HIH*') distinguishing between the universalism and territorialism of insolvency proceedings and referring to the principle of modified universalism as the 'golden thread' of the common law. It should be noted that although Lord Collins in *Rubin v Eurofinance SA* [2013] 1 AC 236, 269 [92] ('*Rubin*') hailed 'Lord Hoffmann's brilliantly expressed opinion in *Cambridge G*as and his equally brilliant speech in *HIH*', the UK Supreme Court in *Rubin* held that Lord Hoffmann was effectively wrong in *Cambridge Gas*. See also, to the same effect, the Privy Council in *Singularis Holdings Ltd v PricewaterhouseCoopers* [2015] 2 WLR 971 ('*Singularis*') where *Cambridge Gas* was further discredited. Lord Neuberger referred to 'the extreme version of the "principle of universality", as propounded by Lord Hoffmann in *Cambridge Gas*': *Singularis* [2015] 2 WLR 971, 1021 [157].

10 (2014) 223 FCR 8, 35 [111]–[113].

> approach is the so-called 'grab' rule where each country seizes assets and distributes them according to each country's insolvency proceedings.[11]

One might also distinguish between unity of proceedings and universalism. The former signifies a single set of proceedings, while the latter imports the idea that the collection and distribution of assets should be done on a global basis. The universalism approach is consistent with the existence of separate insolvency proceedings in jurisdictions where the debtor's assets happen to be located so long as these separate proceedings are merely mechanisms for the more convenient collection of assets which are then remitted to the insolvency representative in the principal proceedings.[12] If however, separate insolvency proceedings have their own independent rules governing the distribution of assets, then the universalism ideal is compromised.[13] The Model Law has been described as embodying a principle of 'modified universalism'[14] and in *Akers*, Allsop CJ was prepared to accept this characterisation 'for what such an appellation is worth'.[15] *Akers* shows how the universalism ideal is modified in the Model Law through the possible application of 'local' law in respect of the distribution of assets collected locally, rather than the law of the main insolvency proceedings. Chief Justice Allsop observed that 'the sacrifice of the rights (or the value in the rights) of local creditors upon an altar of universalism may be to take the general informing notion of universalism too far'.[16]

Respect for local or national sensitivities is hardly surprising, since insolvency proceedings often bring to the fore matters on which countries may take strongly divergent views. These matters include the priority afforded to secured creditors; whether tax or environmental claims should receive preferential treatment; how best to protect employees; and how to achieve the optimum use of assets including the balance between liquidation of assets on the one hand, and debtor restructuring and rehabilitation on the other. Sir Peter Millett has suggested that no branch of the law 'is moulded more by considerations of national economic

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11 *In re ABC Learning Centres Ltd* (2013) 728 F 3d 301, 306 (citations omitted). The Court cited Andrew T Guzman, 'International Bankruptcy: In Defense of Universalism' (2000) 98(7) *Michigan Law Review* 2177, 2179.

12 See Jay Lawrence Westbrook, 'Multinational Enterprises in General Default: Chapter 15, The ALI Principles, and the EU Insolvency Regulation' (2002) 76(1) *American Bankruptcy Law Journal* 1, 10–12.

13 See the description in the US case *Re Treco*, 240 F 3d 148, 153 (2001):

> Under the 'universality' approach, a primary insolvency proceeding is instituted in the debtor's domiciliary country, and ancillary courts in other jurisdictions — typically in jurisdictions where the debtor has assets — defer to the foreign proceeding and in effect collaborate to facilitate the centralized liquidation of the debtor's estate according to the rules of the debtor's home country.

14 But see LoPucki, 'Universalism Unravels', above n 5, 166 (citations omitted): 'Universalists are trying to bring their system in through the back door. The UNCITRAL Model law was negotiated by a delegation led by universalist Jay L Westbrook, and then sold to Congress as not really universalist'. See also Sefa M Franken, 'Cross-Border Insolvency Law: A Comparative Institutional Analysis' (2014) 34(1) *Oxford Journal of Legal Studies* 97, 116 who suggests that both 'the Model Law and Chapter 15 essentially offer a co-operative territorial approach to cross-border insolvency law'.

15 (2014) 223 FCR 8, 37 [120].

16 Ibid 36 [118].

policy and commercial philosophy'.[17] The shape of insolvency law in a particular country owes a lot to the political forces at work in that country and whether other social arrangements such as wage guarantee funds are in operation.[18]

The Model Law is, in fact, a very pragmatic instrument. It has been described by Fletcher as an exercise in realism and the art of the possible so to speak.[19] There are three key elements to the Model law:

1. recognising and providing relief to assist foreign proceedings;
2. giving foreign creditors, or foreign insolvency representatives, access to local courts; and
3. cooperation between courts in countries where the debtor's assets happen to be located.

International harmonisation and cooperation efforts are concentrated in these areas.

The Model Law applies to collective insolvency proceedings whose purpose is the reorganisation or liquidation of the debtor, and where the assets and affairs of the debtor are subject to court control or supervision.[20] The definition of collective insolvency proceedings is sufficiently wide so as to embrace both 'debtor-in-possession' corporate reorganisation regimes along the lines of ch 11 of the *US Bankruptcy Code*[21] and the internationally more widespread manager displacing insolvency regimes like voluntary administration in Australia and company administration in the UK.

The Model Law accords recognition to foreign insolvency proceedings, but the degree of recognition varies depending on whether the proceedings are 'main' or 'non-main'. Foreign main proceedings are defined as proceedings taking place in the state where the debtor has the 'centre of its main interests' or 'COMI'.[22] The definition of COMI may be difficult to apply in practice.[23] This is particularly the case where a debtor has its business operations spread over several states and

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17 Sir Peter Millet, 'Cross-Border Insolvency: The Judicial Approach' (1997) 6(2) *International Insolvency Review* 99, 109.

18 See Jose M Garrido, 'No Two Snowflakes the Same: The Distributional Question in International Bankruptcies' (2011) 46(3) *Texas International Law Journa*l 459, 461 that 'there are no two priority systems that are identical, and that harmonization or unification of the law in this area is extremely unlikely to happen' and see generally John A E Pottow, 'Greed and Pride in International Bankruptcy: The Problems of and Proposed Solutions to "Local Interests"' (2006) 104(8) *Michigan Law Review* 1899.

19 Ian F Fletcher*, Insolvency in Private International Law* (Oxford University Press, 2nd ed, 2005) 453.

20 Model Law art 2(a).

21 11 USC §§ 1101–1174 (1978).

22 Model Law art 2(b). The concept of 'centre of main interests' is also found in art 3(1) of *Council Regulation (EC) No 1346/2000 of 29 May 2000 on Insolvency Proceedings* [2000] OJ L 160/1 ('*EU Insolvency Regulation*'), and in the UK it has been held that cases on the interpretation of COMI under the *EU Regulation* are also relevant to the interpretation of COMI under the Model Law: see *Re Stanford International Ltd* [2011] Ch 33, 67 [54].

23 As noted by the Court in *Gainsford v Tannenbaum* (2012) 216 FCR 543, 551 [38], the authorities discussed by Rares J in *Ackers v Saad Investments Co Ltd* [2013] FCA 738 (30 July 2013) provide ample authority for his Honour's observation that the question as to what is a COMI is by no means settled. But see the comment by Westbrook that 'COMI is a very interesting issue but is generally not a major problem in the American courts': Jay Lawrence Westbrook, 'An Empirical Study of the Implementation in the United States of the Model Law on Cross Border Insolvency' (2013) 87(2) *American Bankruptcy Law Journal* 247, 261.

where head office functions are performed in a state that is not the state of incorporation, and may in turn be different from the state where the bulk of economic activities are carried out.[24] It is also controversial where a company's COMI is alleged to have shifted during the course of its corporate history, especially if the change occurred in the period just prior to the commencement of formal insolvency proceedings. Article 16(3) of the Model Law contains a presumption that the debtor's registered office, or habitual residence in the case of an individual,[25] is the centre of main interests, but this presumption is subject to rebuttal by proof to the contrary.[26] Foreign non-main proceedings means foreign proceedings other than foreign main proceedings, taking place in a state where the debtor has an 'establishment'.[27] 'Establishment' is defined as 'any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services'.[28]

The Model Law simplifies the recognition of foreign proceedings doing away with complicated legalisation requirements involving notarial or consular procedures. A court may presume that 'documents submitted in support of the application for recognition are authentic, whether or not they have been legalized'.[29] The applicant for recognition, though, must have been duly appointed in the foreign proceedings and the application must be accompanied by a certificate from the foreign court, or a certified copy of its decision.[30]

The Model Law is designed on the basis that the decision on recognition should be made as quickly as possible. There may be certain cases, nevertheless, where the debtor's assets are perishable, prone to devaluation or otherwise in jeopardy. In these circumstances, urgent interim relief may be needed and the court is empowered to act on application by a foreign representative.[31] Provisional relief of this kind may take various forms including staying execution against the debtor's assets or entrusting the administration of these assets to the foreign representative.[32]

Recognition of foreign main proceedings has certain consequences. First, there is an automatic stay on individual proceedings against the debtor's assets.[33] Second, there is a stay on execution against the debtor's assets.[34] Third, 'the right

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24 For cases on COMI in the context of the *EU Insolvency Regulation*, see *Re Eurofood IFSC Ltd* (Case C-341/04) [2006] ECR 1-03813 and the more recent decisions in *Interedil Srl (in liq) v Fallimento Interedil Srl* (C-396/09) [2011] BPIR 1639 and *Davide v Hidoux* (C-191/10) [2012] All ER (EC) 239 (European Court of Justice).

25 For discussion on the judicial approach to determine 'habitual residence', see *Kapila, Re Edelsten* (2014) 320 ALR 506, 516–17 [45]–[50].

26 For application of the presumption in Australia see *Crumpler v Global Tradewaves Ltd (in liq)* [2013] FCA 1127 (28 October 2013) [10]. For a discussion of whether the presumption can only be rebutted by evidence that is objectively ascertainable by third parties, see *Gainsford v Tannenbaum* (2012) 216 FCR 543, 556 [46]. See also *Akers v Saad Investments Co Ltd (in liq)* (2010) 190 FCR 285.

27 Model Law art 2(c). See, eg, *Kapila, Re Edelsten* (2014) 320 ALR 506.

28 Model Law art 2(f).

29 Ibid art 16(2).

30 Ibid art 15(2).

31 Ibid art 19.

32 Ibid art 19(1).

33 Ibid art 20(1)(a).

34 Ibid art 20(1)(b).

to transfer, encumber or otherwise dispose of any assets of the debtor is suspended'.[35] The court, however, may modify the effects of recognition and grant more appropriate relief in suitable cases.[36]

Article 21 of the Model Law allows additional relief to be given as a matter of discretion and this relief can take the form, inter alia, of:

1. providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities;
2. entrusting the administration or realisation of all or part of the debtor's assets to the foreign representative or another person designated by the court;
3. extending interim relief; or
4. granting any further relief that might be available to an insolvency officeholder in domestic proceedings.[37]

There are no automatic consequences from the recognition of foreign non-main proceedings, although similar relief to that which applies in main insolvency proceedings is available on a discretionary basis.

Entrusting the distribution of domestic assets to the foreign representative is a particularly far-reaching form of relief, since the foreign priorities regime may be significantly different from that in Australia. This possibility is, however, catered for in art 21(2) of the Model Law, subject to the proviso that creditors in Australia should be 'adequately protected'.[38] The provision was considered by the Full Federal Court in *Akers*,[39] where the Court modified the recognition of main proceedings in the Cayman Islands (also 'the Caymans') so as to protect the interests of local creditors (that is, the Australian revenue), who were not entitled to prove in the Caymans main proceedings. If the assets were remitted to the Caymans without qualification, then the Australian revenue would get a nil return. According to the Court, there was nothing in the Model Law or in the *Cross-Border Insolvency Act* to suggest that local law should be construed to deny or diminish the rights of the sovereign power to collect a debt locally.[40] It said that the notion of adequate protection involved an evaluation of the protection afforded to relevant creditors.[41] Even though there were no actual liquidation proceedings in

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35 Ibid arts 20(1)(c).

36 Ibid art 20(2); *Cross-Border Insolvency Act 2008* (Cth) s 16.

37 In *Singularis*, the UK Privy Council held that there was no common law power to assist foreign liquidators by exercising powers analogous to those that would have been exercisable in a domestic insolvency. Lord Collins suggested that the notion of legislation by analogy was 'profoundly unconstitutional': *Singularis* [2015] 2 WLR 971, 1005 [108].

38 For a discussion of the Court's power to order the handover of assets to a foreign insolvency representative at common law and under s 426 of the *Insolvency Act 1986* (UK) c 45, see *HIH* [2008] 1 WLR 852. See also the discussion of 'adequate protection' in the Court of Appeal and at first instance: *Re HIH Casualty & General Insurance Ltd* [2006] 2 All ER 671, 712–4 [147]–[154] (David Richards J) and *Re HIH Casualty & General Insurance Ltd* [2007] 1 All ER 177, 200 [54] (Sir Andrew Morritt C). *HIH* was considered at length in *Akers*, but the Court avoided having to make any choice between the different views expressed in *HIH*.

39 (2014) 223 FCR 8.

40 Ibid 32–4 [98]–[106].

41 Ibid 42 [139]–[140].

Australia, the Court in effect created a form of Australian mini-liquidation by tailoring the terms of the recognition order so that the revenue creditors would receive the same return had they been entitled to prove in the Cayman Islands proceedings. Chief Justice Allsop observed:

> Any hypothesised liquidation is just that: an hypothesis — a posited framework to assist in the organisation of informing principle. The most potent informing principle is the notion of fair and equal treatment of all creditors, and the pari passu distribution of the assets of the debtor company. … Though there is no local winding up, [the Deputy Commissoner of Taxation] has access only to one fund of the company's assets and other creditors have access to more than one fund.[42]

Article 13 of the Model Law gives foreign creditors the same right as domestic creditors to institute and participate in insolvency proceedings. Australian insolvency law, on its face, does not discriminate against foreign creditors, but it was considered desirable to make this point expressly so as to provide clarity and transparency for foreign creditors and liquidators. Foreign creditors, and in particular foreign preferential creditors, may find that their claims do not have the same status as they would had the matter been litigated in the foreign forum — although there is a general provision that foreign creditors should not be ranked lower than the class of general non-preference domestic claims.

Many states exclude foreign revenue claims from recognition in insolvency proceedings altogether. The Cayman Islands is an example of this, as shown in *Akers*. UNCITRAL has acknowledged national sensitivities in this regard and its *Guide to Enactment and Interpretation of the Model Law* envisages that states may wish to maintain the exclusion of foreign revenue claims as indeed Australia did in s 12 of the *Cross-Border Insolvency Act*.[43] From 1 December 2012, however, the position is more nuanced following Australia's ratification of the Organisation for Economic Co-Operation and Development ('OECD') *Convention on Mutual Administrative Assistance in Tax Matters*.[44] The Commissioner of Taxation is obliged to assist in the recovery of tax claims from a large number of foreign jurisdictions that are party to this Convention and, subject to certain conditions, the Commissioner is empowered to recover the foreign tax claim as if it were its own.[45] In the UK, when implementing the Model Law, the opportunity was taken to overturn the long-established principle enshrined in *Government of India v*

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42 Ibid 41–2 [138] (citations omitted).

43 UNCITRAL, *Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency* (1997) [103]–[105] ('*Original Guide to Enactment of the Model Law*'). See also the discussion in Fletcher, above n 19, 477. Somewhat confusingly, in 2013 UNCITRAL produced a revised *Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency* and the matter is dealt with at 60 [119]–[120] ('*Revised Guide to Enactment of the Model Law*'). It seems the background to the revision are concerns by the US delegation about judicial interpretations of the Model Law. But perhaps such concerns are best addressed by changes to domestic law that implements the Model Law. For a general discussion explaining the background see Look Chan Ho, 'The Revised UNCITRAL Model Law Enactment Guide — A Welcome Product?' [2014] *Journal of International Banking Law and Regulation* 325.

44 (1988) as amended by Protocol in 2010, opened for signature on 1 June 2011 (entered into force in Australia on 1 December 2012).

45 See Australian Taxation Office, 'Practice Statement Law Administration: Cross-Border Recovery of Taxation Debts' (2011/13).

*Taylor*[46] that a claim by or on behalf of a foreign state to recover taxes was unenforceable in the English courts.[47] However, it is still the general position in the US that foreign tax claims are unenforceable.[48]

An essential foundation of the Model Law is the provision of access to the domestic courts by a foreign insolvency representative. Article 9 states succinctly that a foreign representative is entitled to apply directly to a court and, in particular, there is no need to obtain a licence or other form of prior authorisation from a domestic regulator. As well as applying for the recognition of foreign insolvency proceedings, the foreign representative is also empowered to apply for the commencement of domestic insolvency proceedings.[49] This provision, however, goes only to standing and the requisite grounds for commencement of such proceedings under Australian law would still have to be met. Article 31 of the Model Law helps in this regard by providing that the recognition of foreign insolvency proceedings introduces a presumption that the debtor is insolvent for the purpose of domestic proceedings.

Another central plank of the Model Law is encouraging cooperation between courts and insolvency representatives in different jurisdictions.[50] While however, the Model Law provides for international cooperation in the insolvency field, it does not go nearly as far as the *EU Insolvency Regulation*.[51] This failure is understandable since the *EU Regulation* springs from the European Union whose member states have agreed to work towards an ever closer Union,[52] whereas the Model Law emanates from a UN body where the link between Member States is more diffuse. In terms of differences, the *EU Regulation* contains mandatory uniform rules on jurisdiction to open insolvency proceedings and conflict of laws,[53] whereas the Model Law does not specify which law should govern insolvency proceedings that are opened in a particular jurisdiction. Under the *EU Regulation*,

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46 [1955] AC 491.

47 See *Cross-Border Insolvency Regulations 2006* (UK) SI 2006/1030, sch 1, art 13(3). A foreign tax claim may still be challenged, however, on the basis that it is in the nature of a penalty.

48 Section 1513(b)(2)(B) of the *US Bankruptcy Code* provides that the admissibility and priority of a foreign tax claim is governed by any applicable tax treaty of the US, under the conditions and circumstances specified therein: 11 USC § 1513 (2012). The implementation of the Model Law in the US does not change US law on the (non)admissibility of foreign revenue claims. Some of the reasons for the exclusion were articulated by in *British Columbia v Gilbertson*, 597 F 2d 1161, 1165 (1979). It was suggested that requiring countries to enforce foreign tax claims would require some analysis of the tax claim, and could be embarrassing to the foreign State. US courts may not be able to understand and evaluate foreign tax claims and enforcing such claims would 'have the effect of furthering the governmental interests of a foreign country, something which our courts customarily refuse to do'. For a general discussion see Jonathan M Weiss, 'Tax Claims in Transnational Insolvencies: A "Revenue Rule" Approach' (2010) 30(1) *Virginia Tax Review* 261.

49 Model Law art 11.

50 Ibid arts 25–7. See generally Sheryl Jackson and Rosalind Mason, 'Developments in Court to Court Communications in International Insolvency Cases' (2014) 37(2) *University of New South Wales Law Journal* 507.

51 [2000] OJ L 160/1. On the *EU Insolvency Regulation*, see generally Gabriel Moss, Ian F Fletcher and Stuart Isaacs, *The EC Regulation on Insolvency Proceedings* (Oxford University Press, 2nd ed, 2009).

52 See art 1 of the *Treaty on European Union* [2012] OJ C 326/01, which refers to the Treaty marking 'a new stage in the process of creating an ever closer union among the peoples of Europe'.

53 *EU Insolvency Regulation* [2000] OJ L 160/1, arts 3–4.

recognition of insolvency proceedings opened in another EU Member State is automatic,[54] while under the Model Law, it is contingent upon an application to the court. Under the *EU Regulation*, insolvency proceedings have the same effect in other EU states as they have in the law of the insolvency forum.[55] However, under the Model Law, the consequences of recognition depend on the law of the recognising state.

## B *The Aid and Auxiliary Provisions*

Sections 580 and 581 of the *Corporations Act* enable the Australian courts to issue and receive letters of requests for assistance in insolvency matters from courts in other countries. These provisions parallel a provision found in the *Bankruptcy Act 1966* (Cth) and can be traced back to 19th century bankruptcy legislation.[56] A distinction is drawn in the legislation between 'prescribed countries' and other countries. In the case of prescribed countries, they are required to act in aid of and be auxiliary to the foreign courts, although the statute does not specify how the relevant assistance should be delivered. In the case of other countries, the courts have a discretion whether to provide assistance at all.

Sections 580 and 581 may be criticised on various grounds. First, the prescribed/non-prescribed country distinction and the discretion to refuse any assistance for non-prescribed countries sit rather uneasily with the Model Law regime. The Model Law as implemented in Australia requires cooperation between Australian courts and all qualifying foreign courts or representatives in foreign proceedings. Second, the language of the provisions is somewhat archaic and this may give rise to difficulties of interpretation and application. The expressions 'acting in aid of' and being 'auxiliary to' are more convoluted than a simple reference to providing assistance. Third, the sections apply to 'external administration matters' and it is unclear the extent to which this description embraces restructuring as well as liquidation proceedings. The definition of 'external administration matter' in s 580 contains a reference to 'insolvency', but it would provide greater clarity if there was further amplification along the lines of the definitional provisions in art 2 of the Model Law.

Sections 580 and 581 bear some similarities with s 426 of the *Insolvency Act 1986* (UK), but there are at least two significant differences. First, s 426 of the UK statute authorises the application of foreign insolvency law and this power was exercised most notably in *HIH*, where Australian insolvency law was applied. The Australian provisions, by contrast, only permit the application of local law. The courts entrusted with the exercise of 'such powers with respect to the matter as it could exercise if the matter had arisen in its own jurisdiction'.[57] On the other hand, under the UK regime the statutory duty of assistance applies only as between courts and therefore the UK court must have received a request from a foreign court before it can act. However, s 581 contains no such limitations and in

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54 Ibid art 16.
55 Ibid art 17.
56 For the legislative history, see *Re Ayres; Ex parte Evans* (1981) 51 FLR 395.
57 *Corporations Act 2001* (Cth) s 581(3).

*Re Chow Cho Poon (Private) Ltd*,[58] Barrett J was able to act in aid of a Singapore liquidation on the application of the Singapore liquidator without having received any request to act from the courts in Singapore. In many cases, however, the request from the foreign court will be useful, if not essential, in setting the parameters of what constitutes acting as an aid and auxiliary to the foreign court.[59]

## C *Ancillary Liquidations*

The notion of a local liquidation acting essentially as a convenient asset collection and transmission mechanism is familiar to the common law. In *Re English, Scottish and Australian Chartered Bank*, the Court said that

> where there is a liquidation of one concern the general principle is — ascertain what is the domicil of the company in liquidation; let the Court of the country of domicil act as the principal Court to govern the liquidation; and let the other Courts act as ancillary, as far as they can, to the principal liquidation.[60]

In *Re Bank of Credit and Commerce International SA (No 10)*,[61] Sir Richard Scott V-C explained that the local liquidation was 'ancillary' in the sense that it would not be within the power of the local liquidators to get in and realise all the assets of the company worldwide. They would necessarily have to concentrate on getting in and realising the local assets. Moreover, to achieve a pari passu distribution between all the company's creditors, it was necessary for there to be a pooling of the company's assets worldwide and for a dividend to be declared out of the assets comprised in that pool. The local winding up was also ancillary in the sense that it was the liquidators in the principal liquidation who were best placed to declare the dividend and to distribute the assets in the pool accordingly.

Sections 601CL(14)–(15) of the *Corporations Act* are essentially a statutory codification of the law relating to ancillary liquidations, although the statute does not use that term. Section 601CL(14) provides that '[w]here a registered foreign company commences to be wound up, or is dissolved or deregistered, in its place of origin', the company's local agent of the company must lodge notice of that fact with the Australian Securities and Investments Commission ('ASIC'). Also under that provision, the Australian court, on an application by the foreign liquidator, must appoint an Australian liquidator of the foreign company. Under s 601CL(15), the Australian liquidator is required to recover and realise the property of the foreign company in Australia, and to pay the net amount so recovered and realised to the foreign liquidator. The statutory framework deals expressly with some situations, but not with others. It enables the liquidator to apply to the court for directions where there is no foreign liquidator in place (s 601CL(16)) and implies that the Australian liquidator may make distributions to creditors in Australia. Presumably this covers payment of secured and preferential creditors under

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58 (2011) 80 NSWLR 507.

59 See *Hughes v Hannover Ruckversicherungs AG* [1997] BCC 921, 932–8 (Morritt LJ).

60 [1893] 3 Ch 385, 394 (Vaughan Williams J). See also on ancillary liquidations Sir Richard Scott V-C in *Banco Nacional de Cuba v Cosmos Trading Corp* [2000] BCC 910, 915, and Lords Hoffmann and Neuberger in *HIH* [2008] 1 WLR 852, 859 [19], 875 [75].

61 [1997] Ch 213, 239–40.

Australian law, but s 601CL(15)(c) directs that net realisations should be handed over to the foreign liquidator in the company's place of origin.

In the UK, there has been great controversy over the extent to which ancillary liquidations should apply local law, in particular to asset distributions. In *Re Bank of Credit and Commerce International SA (No 10)*, Sir Richard Scott V-C suggested that in an ancillary winding up an English court was not relieved of 'the obligation to apply English law, including English insolvency law, to the resolution of any issue arising in the winding up which is brought before the court'.[62] In that case, English insolvency rules, including set-off rules, were applied in determining whether and to what extent debts could be admitted to proof. However, once proofs of debts have been admitted and secured and preferential debts paid off, the remaining assets are generally admitted to the jurisdiction where the principal liquidation is taking place.

In *HIH*,[63] the question was whether the power to remit assets could and should be exercised where there were differences between English law and the relevant foreign law applying to asset distributions. The principal liquidation of an insolvent insurance company was taking place in Australia and, under Australian law, insurance creditors were treated better and non-insurance creditors worse than under the currently applicable English law.[64] At first instance, it was it was held that

> in an English liquidation of a foreign company, the court has no power to direct the liquidator to transfer funds for distribution in the principal liquidation, if the scheme for pari passu distribution in that liquidation is not substantially the same as under English law.[65]

The Court of Appeal confirmed the broad thrust of this principle with some modifications to take account of circumstances where there were some countervailing advantages to local creditors in ordering an asset transfer, such as cost savings through a larger pool of assets being available for distribution.[66] The House of Lords were evenly divided on whether the remission of assets to Australia could be ordered at common law.[67] Lord Hoffmann, with whom Lord Walker agreed, suggested that the differences between English and foreign systems of distribution were relevant only to discretion and in his view the application of Australian law in this case to the distribution of all the assets was more likely to give effect to the expectations of creditors as a whole than the distribution of some of the assets according to English law.[68] Lords Scott and Neuberger however took a more limited view on the common law position,[69] whereas Lord Phillips decided not

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62 Ibid 246.

63 [2008] 1 WLR 852.

64 As Lord Hoffmann pointed out in *HIH* [2008] 1 WLR 852, English law has now adopted a regime for the winding-up of insurance companies that gives preference to insurance creditors: see *Insurers (Reorganisation and Winding Up) Regulations 2004* (UK) SI 2004/353, reg 21(2), giving effect to *Council Directive 2001/17/EC on the Reorganisation and Winding Up of Insurance Companies* [2001] OJ L 110/28: *HIH* [2008] 1 WLR 852 862 [32].

65 *Re HIH Casualty & General Insurance Ltd* [2006] 2 All ER 671, 704 [112].

66 *Re HIH Casualty & General Insurance Ltd* [2007] 1 All ER 177, 196–7 [41].

67 *HIH* [2008] 1 WLR 852, 860 [24], 863 [36].

68 Ibid 862 [33], 872 [63].

69 Ibid 870 [59], 874 [72]. But see, however, the article by Lord Neuberger, 'The International Dimension of Insolvency' (2010) 23(3) *Insolvency Intelligence* 42.

'to stray from the firm area of common ground onto the controversial area of whether, in the absence of statutory jurisdiction, the same result could have been reached under a discretion available under the common law'.[70] In light of this divergence of view, Newey J in *Re Alitalia Linee Aeree Italiane SpA*[71] said that *HIH* could not be taken as authority for the proposition that there was power at common law to order an English liquidator to remit assets to a foreign liquidator where they would then be distributed otherwise than in accordance with English rules.

In *Re Chow Cho Poon (Private) Ltd*,[72] Barrett J showed some sympathy for the philosophy articulated by Lord Hoffmann in *HIH* that universalism was the golden thread of the common law and that the court should facilitate a universal scheme for distribution of assets. Moreover, in an extra-curial address (then) Chief Justice Spigelman was critical of the notion of ring-fencing local assets for the benefit of local creditors.[73] He suggested that the policy of ensuring that local assets were retained for the purpose of maximising the payout to local creditors was a form of preferential treatment, equivalent to non-tariff barriers on trade and investment.[74]

Nevertheless, in *Akers*[75] Allsop CJ said that it was unnecessary to attempt to resolve the fundamental difference between the rival views in *HIH* about the authority of the court, at common law, to remit assets to a foreign liquidation with a different insolvency regime. Be that as it may, where a foreign scheme of distribution differs from the Australian scheme, we suggest that it would take a brave Australian judge who would order the transfer of Australian assets abroad, especially given the ambiguities in the wording of s 601CL(15) of the *Corporations Act*. There is nothing in the Australian statutory landscape equivalent to s 426 of the UK *Insolvency Act* that would nudge Australian courts in the direction of applying foreign insolvency law or that acknowledges the legitimacy of the practice. Sometimes the common law needs a push from statute and, in the Australian context, it is absent.

This issue has been hotly debated in the offshore Caribbean jurisdictions and the courts have held that there is no basis in the common law for a local court to apply foreign insolvency law, even consequent on the recognition of foreign

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70 *HIH* [2008] 1 WLR 852, 864 [44].

71 [2011] 1 WLR 2049, 2064 [54].

72 (2011) 80 NSWLR 507, 525 [76]–[79].

73 Spigelman, above n 2, 53–4.

74 For a defence of ring-fencing, see the article by then Chief Justice of Singapore, Chan Sek Keong, 'Cross-Border Insolvency Issues Affecting Singapore' (2011) 23(2) *Singapore Academy of Law Journal* 413, 419, who suggests that the 'argument based on non-tariff barriers overstates the case against the practice of ring-fencing of assets, especially by developing countries with small economies'. The Chief Justice points to the ring-fencing provisions in Singapore law. For different Singapore voices on this point, see Wee Meng Seng, 'A Lost Opportunity towards Modified Universalism' [2009] *Lloyd's Maritime and Commercial Law Quarterly* 18 and Tham Chee Ho, 'Ancillary Liquidations and Pari Passu Distribution in a Winding-up by the Court' [2009] *Lloyd's Maritime and Commercial Law Quarterly* 113. See also the decision of the Singapore Court of Appeal in *Beluga Chartering GmbH v Beluga Projects (Singapore) Pte Ltd* [2014] 2 SLR 815 (CA) limiting the application of the ring-fencing provision.

75 (2014) 223 FCR 8.

insolvency proceedings and in aid of those proceedings.[76] For instance, in *Picard v Primeo Fund*,[77] the Cayman Islands Court of Appeal refused to interpret the provisions of an ambiguous local statute so as to permit the application of foreign law. The Court of Appeal suggested that the contrary was so radically different from the common law that the legislature could have been expected to state clearly if it had intended that result.[78]

The leading decision on the limits of common law judicial assistance is now that of the Privy Council in *Singularis*.[79] We submit that, properly interpreted, this case provides no support for the proposition that an Australian court would have inherent jurisdiction to remit assets to a foreign insolvency proceeding whose substantive law of distribution is different from that in Australia. In *Singularis*, it was held that under the principle of 'modified universalism', the court had a common law power to assist foreign winding-up proceedings. However Lord Sumption, speaking for a majority of the Privy Council, suggested that there was no simple universal answer to the question of how far it was appropriate to develop the common law — this depended on the precise nature of the particular power that the court was being asked to exercise. In principle, there was a power to assist a foreign court by ordering the production of information, whether in oral or documentary form, that was necessary for the administration of a foreign winding up.[80] Nevertheless, this power was subject to certain limits including those imposed by local law and local public policy.

Translated into an Australian remission of assets context, this limitation would mean that a foreign liquidator should not be allowed to take control of Australian assets and distribute them in a manner that was at variance with Australian substantive law. Lord Sumption said explicitly that an order providing assistance 'must be consistent with the substantive law and public policy of the assisting court'.[81]

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[76] See, eg. the Privy Council decision in *Singularis* [2015] 2 WLR 971 involving an appeal from the Court of Appeal of Bermuda.

[77] (Unreported, Cayman Islands Court of Appeal, Chadwick P, Mottley and Campbell JJA, 16 April 2014).

[78] Ibid [54]. See also the decision of Bannister J in *Picard v Madoff Investment Securities LLC* (Unreported, British Virgin Islands Eastern Caribbean Supreme Court, BVIHCV 140/2010, 12 November 2012) [7]–[12]. While acknowledging that the Court could grant recognition at common law to proceedings in other jurisdictions, Bannister J did not accept that a foreign insolvency representative could have access to voidable transactions provisions under local law.

[79] [2015] 2 WLR 971. For another Privy Council decision applying the principle of 'modified universalism', see *Stichting Shell Pensioenfonds v Krys* [2015] AC 616.

[80] Lord Clarke said that:

> the right and duty to assist foreign office-holders … would be an empty formula if it were confined to recognising the company's title to its assets … or to recognising the office-holder's right to act on the company's behalf in the same way as any other [duly-appointed corporate] agent: *Singularis* [2015] 2 WLR 971, 1006 [112].

See also Lord Sumption's comment that the 'recognition by a domestic court of the status of a foreign liquidator would mean very little if it entitled him to take possession of the company's assets but left him with no effective means of identifying or locating them': 987 [23].

[81] *Singularis* [2015] 2 WLR 971, 988 [25].

### D *Winding Up Registered and Unregistered Foreign Companies*

Under s 583 within pt 5.7 of the *Corporations Act*, Australian courts are authorised a court to wind up a foreign company that is registered under the Act, as well as an unregistered foreign company that carries on business in Australia. There is an overlap between this winding up facility and that afforded by s 601CL, but pt 5.7 is wider in that it does not just apply where the foreign company is in the process of being wound up in its place of incorporation. The advantage of using s 583 is that it is not simply an ancillary liquidation — it is a full Australian liquidation with all the features and standard powers, procedures and avenues of redress available to a liquidator in a typical Australian winding up.

The s 583 winding up mechanism is useful in that it covers situations where there may be benefits to creditors in having an Australian liquidation — not least because a winding up may not be convenient or suitable in the company's place of incorporation. The place of incorporation may be an inconvenient forum for a number of reasons. For instance, the company may have been incorporated in some tax haven jurisdiction; not carried on business there; and have its operational headquarters and centre of main operations in Australia.

## III Implementation of the Model Law in the US and UK

The US implementation of the Model Law is very different from that in Australia.[82] The US put the Model Law directly into its *Bankruptcy Code* in the shape of a new ch 15, which replaces the previous provision in the *Bankruptcy Code* (§ 304) dealing with cooperation and comity in international insolvency matters.[83]

It has been held, in *Re Bear Stearns High-Grade Structured Credit Strategies Master Fund Ltd* ('*Bear Stearns*'),[84] that ch 15 constitutes the sole gateway for a US court to provide assistance to a foreign insolvency representative. That case concerned a structured investment vehicle incorporated in the Cayman Islands that was also being liquidated in the Caymans. However, the US courts held that the Caymans liquidation was not entitled to recognition in the US as either 'foreign main proceedings' or 'foreign non-main proceedings'.[85] On the facts, it was held that the statutory presumption that the COMI was in the Caymans, being the place of incorporation, was rebutted by contrary evidence.[86] Moreover, the Caymans liquidation did not qualify as a 'foreign non-main

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[82] See generally Gerard McCormack, 'Comi and Comity in UK and US Insolvency Law' (2012) 128(1) *Law Quarterly Review* 140; and more generally Irit Mevorach, 'On the Road to Universalism: A Comparative and Empirical Study of the UNCITRAL Model Law on Cross-Border Insolvency' (2011) 12(4) *European Business Organization Law Review* 517.

[83] On ch 15, see generally Westbrook, above n 12; Jay Lawrence Westbrook, 'Chapter 15 at Last' (2005) 79(3) *American Bankruptcy Law Journal* 713. Under § 304, a US bankruptcy court could exercise various powers in a 'case ancillary to a foreign proceeding': *Bankruptcy Code*, 11 USC § 304 (1978).

[84] 374 BR 12 (2007) and affirmed in 389 BR 325 (2008). See Anil Hargovan, 'Centre of Main Interests Under the Australian *Cross-Border Insolvency Act 2008*: Lessons from the United States' (2008) 1 *Journal of the Australasian Law Teachers Association* 11.

[85] *Bear Stearns* 389 BR 325 (2008).

[86] Ibid 338.

proceeding' because the investment vehicle did not have any place of operations in the Caymans, where it carried out 'non-transitory economic activity'. It was held that ch 15 heralded a shift from an earlier subjective comity-based process under § 304 to a more fixed and definite recognition standard. The Court said that there was no room for a residual common law discretion to recognise foreign insolvency proceedings.[87] Under ch 15, there could be no recognition without a concomitant determination that the proceedings qualified as either a foreign main or non-main proceeding.[88]

It has been argued by some that there is a serious lacuna if ch 15 is construed as the only mode of providing assistance in the US for foreign insolvency proceedings.[89] Reference may be made, in this connection, to para 90 of UNCITRAL's *Original Guide to Enactment of the Model Law*, which explains that the purpose of the Model Law is not to displace national provisions to the extent that they provide assistance that is additional to, or different from, the type of assistance dealt with in the Model Law.

This argument, however, is clearly out of line with the arrangement of provisions in ch 15 and its legislative history. According to art 7 of the Model Law, states are free to provide additional assistance to a foreign insolvency representative, but the US equivalent — § 1507 of the *Bankruptcy Code* — clearly makes the provision of any additional assistance contingent on the foreign proceedings satisfying the criteria for recognition under ch 15 in the first place. According to one judicial commentator, ch 15 consists of 'a series of carefully crafted compromises'.[90] These compromises are said to include

> a specific definition of what constitutes a foreign proceeding, a definition of foreign representative sufficiently broad to accommodate proceedings similar to the U.S. Chapter 11 debtor-in-possession model, a simplified procedure for proving up a foreign representative's authority to act … and a mechanism for recognition designed to promote speed.[91]

Some discretion to render assistance to foreign insolvency proceedings, outside the framework of ch 15, would undermine the 'carefully crafted compromises' at the heart of ch 15 and run counter to the spirit of the legislation.

The Australian implementation of the Model Law is more similar in style to that in the UK, where the Model Law was implemented through a standalone set of regulations, the *Cross-Border Insolvency Regulations 2006* (UK),[92] with no changes being made to s 426 of the *Insolvency Act 1986* (UK). As noted above, s 426 allows UK courts to respond to requests for assistance in insolvency matters from foreign courts in designated countries. A small number of countries including

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87 Ibid 333–5.

88 Ibid 334. See generally Daniel M Glosband, 'SPhinX Chapter 15 Opinion Misses the Mark' (2006) 25(10) *American Bankruptcy Institute Journal* 44; Jay Lawrence Westbrook, 'Locating the Eye of the Financial Storm' (2007) 32(3) *Brooklyn Journal of International Law* 1019.

89 See, eg, Gabriel Moss, 'Beyond the SphinX — Is Chapter 15 the Sole Gateway?' (2007) 20(4) *Insolvency Intelligence* 56.

90 Judge Leif M Clark, '"Centre of Main Interests" Finally Becomes the Center of Main Interest in the Case Law' (2008) 43 *Texas International Law Journal Forum* 14, 17.

91 Ibid.

92 SI 2006/1030.

Australia that have been designated for s 426 — principally, it appears, because of their analogous common law background.[93] It is open to a foreign insolvency representative in a designated country to ask his/her local court to make a request for assistance under s 426, rather than himself/herself seeking recognition of the foreign insolvency proceedings under the Model Law. Section 426 of the UK *Insolvency Act* is similar in some respects to s 581 of the Australian *Corporations Act*, but is broader in the sense that the UK court, in responding to the request, can apply UK law or the relevant foreign insolvency law.

## IV The Need for a Statutory Update in Australia

This section argues that there is a need for a new comprehensive cross-border insolvency regime in Australia, which collects all the international insolvency cooperation provisions that are currently scattered across the Australian legislation. There are three reasons for our view. The first is that the Australian Government Treasury erred in its 2002 reform proposals,[94] which informed implementation of the Model Law in Australia. The second reason is that subsequent case law has shown how the current procedures may overlap in a complex and confusing way resulting in additional costs and complication in the administration of cross-border insolvency cases. Cases may also potentially fall through gaps in the law. The third reason centres on the appropriateness of revisiting some of the policy choices made when enacting the *Cross-Border Insolvency Act*. Finally, in this section we will outline the building blocks of a new regime.

### A *The Treasury Reform Proposals*

As part of the Corporate Law Economic Review Program ('CLERP'), the Australian Government Treasury did consider the possibility of having a single comprehensive cross-border insolvency regime.[95] However, the Treasury ultimately proposed enacting the UNCITRAL Model Law as a standalone statute, albeit making appropriate adjustments to other insolvency law provisions. The Treasury acknowledged the advantages of having the whole of the law in the one place, but took the view that these considerations were outweighed by other factors.[96] For instance, the Model Law was said to be styled and arranged somewhat differently from other Commonwealth statutes and therefore could not be integrated very easily with existing Acts.[97] The Treasury noted that a separate standalone statute would have greater international visibility.[98] The new law would

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93 Certain countries and territories have been designated by the *Co-Operation of Insolvency Courts (Designation of Relevant Countries and Territories) Order 1986* (UK) SI 1986/2123, as amended by SI 1996/253 and SI 1998/2766. These consist of Commonwealth countries and territories with the addition of Ireland and Hong Kong, but not the US.

94 See CLERP, above n 7.

95 Ibid.

96 Ibid 24, 25.

97 Ibid 24.

98 Ibid.

also be drafted as a coherent whole and would be more useful to the courts in that form.[99]

The Treasury's general line of reasoning did not convince everybody at the time and certainly not the International Trade and Business Committee of the Law Council, which submitted that the Model Law should be incorporated into the bankruptcy and corporations laws, instead of being relegated to a standalone statute.[100] In the Committee's opinion, this was likely to be more user-friendly and useful in the medium and long term.[101] The positive signal to other countries by Australia's adoption of the Model Law would not be diluted by the provisions being incorporated within Australia's insolvency legislation.[102] On the contrary, this might reinforce the message that the Model Law was central to Australia's insolvency law.[103] Moreover, it would not involve scattering the Model Law provisions in 'bits and pieces'.[104]

In promoting the idea of a separate standalone statue, the Treasury relied on the proposition that this was not very different from the way in which the Model Law had been implemented in the US.[105] But this is not really the case. The US implementation of the Model Law involved incorporating it into the *Bankruptcy Code*, making it the only means of aiding foreign insolvency proceedings and making consequential amendments to other provisions of the Code. The Model Law became an integral part of the *Bankruptcy Code*, but the legislative record indicates significant rewriting to 'comport with United States terminology' and the expression of concepts 'more clearly in United States vernacular'.[106] It has been held that the Model Law provisions in ch 15 of the *Bankruptcy Code* have to be interpreted in the light of general bankruptcy norms, including the requirement that an applicant should be a 'debtor' under the general definitional conditions in the Code.[107] More substantive changes in the US included limiting the effect of art 23 of the Model Law, which empowers a foreign representative, on conditions similar to domestic insolvency officeholders, to initiate proceedings for the avoidance of actions, or transactions, detrimental to creditors. There was a concern that foreign insolvency representatives might 'forum shop' avoidance actions to the US and, thus, it was provided that a foreign representative only had the standing to use the US avoidance provisions where fully blown domestic bankruptcy proceedings had been commenced under the Code.[108]

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99 Ibid 24 quoting the US National Bankruptcy Review Commission.

100 International Trade and Business Committee of the International Law Section of the Law Council of Australia, Submission to the Corporate Governance Division of the Australian Treasury in response to the publication of CLERP Paper No 8, 20 January 2003.

101 Ibid 1.

102 Ibid.

103 Ibid.

104 Ibid.

105 CLERP, above n 7, 24.

106 See Committee on the Judiciary, 109th Congress, House of Representatives, *Bankruptcy Abuse Prevention and Consumer Protection Act of 2005* (Report No 109–31, 2005) [106]–[107], [109].

107 See *Re Barnet*, 737 F 3d 238 (2013).

108 11 USC § 1523 (2012) and see the discussion in Committee on the Judiciary, Report No 109–31, above n 106, [152].

## B *Current Cross-Border Insolvency Procedure Confusion*

Confusion caused by the overlap of cross-border insolvency procedures is illustrated by reference to the 'aid and auxiliary' provisions in s 581 of the *Corporations Act*. It might plausibly be argued that these provisions operate in an effective way, are a longstanding feature of insolvency/bankruptcy law and provide extra avenues for recognition and cooperation.[109] On the other hand, apart from facilitating the recognition of foreign insolvency proceedings and providing for the consequences of recognition, the Model Law in arts 25–7 sets out a more comprehensive set of principles and practices for formal cooperation and direct communication between courts in different countries and also mandated it. There are also specific provisions in the Model Law dealing with the procedures to be followed in respect of concurrent insolvent proceedings involving the debtor in more than one state and specifying the rights of creditors in these circumstances. Having the 'aid and auxiliary' provisions sitting in conjunction with the Model Law provisions, may cause complication in the administration of cross-border insolvency cases and detract from the perceived efficiency and effectiveness of the Model Law.

In principle, s 581 of the *Corporations Act* does not seem to permit anything to be done that could not be done under a flexible interpretation of the Model law and provided the Australian implementation of the Model Law is revisited in the way that we suggest.[110] Section 581 is more complicated than the Model Law in that it generally involves a two-stage process — seeking the intervention of the foreign court, which in turn seeks assistance from its Australian counterpart. It creates confusion for foreign practitioners in that Australia is perceived as having two parallel insolvency cooperation regimes. Complication and confusion add significantly to the cost of managing insolvencies. Of course, s 581 has the advantage of familiarity,[111] but its continued existence may serve to 'crowd out' the Model Law provisions and the *Cross-Border Insolvency Act*. In this connection, it is notable that Barrett J in *Re Chow Cho Poon (Private) Ltd*[112] gave the concept of cooperation in art 25 of the Model Law a narrow interpretation when there were the provisions of s 581 to fall back upon.

The fact that s 581 is unnecessary is also demonstrated by the decision of the Federal Court in *Crumpler v Global Tradewaves Ltd (in liq)*,[113] where insolvency proceedings in the British Virgin Islands were recognised as foreign main proceedings in Australia under the Model Law. An order was also made for the examination of a person in Australia concerning the affairs of the insolvent company and the production by him of related books, records and other documents in his possession or control. Logan J held that there were no less than three separate

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109 See CLERP, above n 7, 29–30.

110 The exclusions from the *Cross-Border Insolvency Act* relating to banks and insurance companies would have to be reconsidered in this connection. See, in particular, the text accompanying nn 107–130 below.

111 See Rosalind Mason, 'Implications of the UNCITRAL Model Law for Australian Cross-Border Insolvencies' (1999) 8(2) *International Insolvency Review* 83, 107.

112 (2011) 80 NSWLR 507.

113 [2013] FCA 1127 (28 October 2013).

bases for the order — s 581 of the *Corporations Act* and two provisions of the Model Law: art 21(1)(d) and the additional assistance provision in art 21(1)(g).[114]

It might be argued that s 581 (and s 29 of the *Bankruptcy Act* dealing with individual bankrupts) is needed to deal with the situation that confronted the Federal Court of Australia in *Gainsford v Tannenbaum*[115] and the High Court of New Zealand in *Williams v Simpson*.[116] Both these cases concerned internationally mobile individuals who had formerly carried on business or professional activities in a foreign jurisdiction and then relocated to Australia and New Zealand, respectively. In *Gainsford v Tannenbaum* a bankruptcy order was made in respect of the foreign debtor in his country of origin (South Africa), and then an application was made by his bankruptcy trustees to have the order recognised in Australia with a view to tracing assets that might have been hidden by the debtor in Australia. Logan J held that the South African proceedings could not be recognised, since the debtor had neither his 'COMI' nor an establishment in South Africa at the time of the commencement of the relevant foreign proceedings.[117] Nevertheless, his Honour was prepared to give assistance to the South African proceedings under the aid and auxiliary provisions of the *Bankruptcy Act*.[118] In this connection, the Court applied the observations of Heath J in *Williams v Simpson*[119] and Lord Hoffmann in *Cambridge Gas*[120] about recognising the universality of bankruptcy proceedings.

The decision in *Gainsford v Tannenbaum* is open to criticism on the basis, inter alia, that Lord Hoffmann was talking implicitly about recognising the primacy and universality of insolvency proceedings that emanated from a jurisdiction where the debtor had its domicile or, in more modern terminology, centre of main interests.[121] This assumption was made explicit in *HIH*, where Lord Hoffmann said that '[t]here should be a unitary bankruptcy proceeding in the court of the bankrupt's domicile which receives worldwide recognition and it should

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114 Ibid [17]–[19].

115 (2012) 216 FCR 543.

116 [2011] 2 NZLR 380.

117 There has been extensive discussion in the US on 'timing' issues under the Model Law, ie whether the debtor must have a 'COMI' or 'establishment' in the relevant foreign jurisdiction at the time of commencement of the foreign insolvency proceedings or whether a 'COMI' or 'establishment' must be present at the time of the application for recognition. In the US, it was held somewhat controversially by the Second Circuit Court of Appeals in *Re Fairfield Sentry Ltd*, 714 F 3d 127 (2013) that the relevant time is the time of the application for recognition. The UNCITRAL *Revised Guide to Enactment of the Model Law* suggests the relevant time is the time of commencement of the foreign proceedings: above n 43, [157]–[160]. Neither the Australian courts, nor the English courts, have yet had to grapple in detail with this issue. For discussion on the complexities in this area, see *Kapila, Re Edelsten* (2014) 320 ALR 506.

118 (2012) 216 FCR 543.

119 [2011] 2 NZLR 380, 401 [82].

120 [2007] 1 AC 508, 516–20 [14]–[20].

121 Ibid 517 [16]:

> [The] common law has traditionally taken the view that fairness between creditors requires that, ideally, bankruptcy proceedings should have universal application. There should be a single bankruptcy in which all creditors are entitled and required to prove. No one should have an advantage because he happens to live in a jurisdiction where more of the assets or fewer of the creditors are situated.

apply universally to all the bankrupt's assets'.[122] If the debtor did not have his centre of main interests in South Africa, and indeed this was found by Logan J to be the case, then *Cambridge Gas* provides no warrant for recognising the South African proceedings. Since the debtor in *Gainsford v Tannenbaum* was now resident in Australia, then arguably the main bankruptcy forum should have been Australia. But the opening of fresh bankruptcy proceedings in Australia would have caused additional expense for the bankruptcy estate and, at a practical level, one can understand the desire of the judge to facilitate the South African proceedings.

In a statutory update to Australian cross-border insolvency law, the practical problem thrown up by *Gainsford v Tannenbaum* could be dealt with by adjusting the definition of 'foreign non-main proceedings', rather than by retaining the 'aid and auxiliary' provisions in the *Corporations Act*. This has been done in Canada, where foreign non-main proceedings are defined as foreign proceedings that are not foreign main proceedings.[123] In other words, it is not necessary that the debtor should have an establishment in a foreign jurisdiction before insolvency proceedings emanating from that jurisdiction are recognised. Changing the definition in this respect would not be incompatible with the policy goals of the Model Law.

## C *Revisiting the Policy Choices Made in the Cross-Border Insolvency Act*

The Model Law, in the countries where it has been implemented, has achieved a high degree of international uniformity, but it is not complete uniformity. In many countries, local legislative adjustments have been made, for whatever reason, in the implementation process.[124] When Australia adopted the Model Law through the *Cross-Border Insolvency Act*, it made certain policy choices and it now seems appropriate to revisit some of these choices. There are five areas that merit particular attention. The first is the list of statutory exclusions. The Model Law itself acknowledges that a state may wish to exclude the insolvency of particular types of undertaking such as banks or insurance companies from its application. The *Original Guide to Enactment of the Model Law* points out that often these types of undertaking are subject to special national insolvency regimes since vital regulatory and consumer protection policies may be at work, such as the need to reinforce

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[122] *HIH* [2008] I WLR 852, 856 [6] and see also his Lordship's statement:

> [P]rinciple requires that English courts should, so far as is consistent with justice and UK public policy, co-operate with the courts in the country of the principal liquidation to ensure that all the company's assets are distributed to its creditors under a single system of distribution: 861–2 [30].

[123] Bill C-55, now ch 47 of the *Statutes of Canada, 2005*, introduced new definitions into s 45 of the *Bankruptcy and Insolvency Act* RSC 1992, c B-3 and s 268 of the *Companies' Creditors Arrangement Act* RSC c C-36. For a general discussion see Janis Sarra, 'Northern Lights, Canada's Version of the UNCITRAL Model Law on Cross-Border Insolvency' (2007) 16(1) *International Insolvency Review* 19, 42.

[124] See generally S Chandra Mohan, 'Cross-Border Insolvency Problems: Is the UNCITRAL Model Law the Answer?' (2012) 21(3) *International Insolvency Review* 199; Franken, above n 14.

public confidence and to avoid a run on deposits.[125] Regulations made under the *Cross-Border Insolvency Act* exclude specialist types of institutions including deposit-takers and insurance companies. But since the *Cross-Border Insolvency Act* we have had the global financial crisis. Financial institutions invariably conduct business overseas and have as much, if not, greater, need for international cooperation in facilitating restructuring and liquidation. It is also the situation that a lot of the Australian cases raising issues under the *Cross-Border Insolvency Act* have involved financial institutions such as Lehman Brothers, MF Global, Landsbanki and Bank of Nauru. Nobody seems to have taken the point that some of these institutions may have been denied the benefits of the Model Law because of the wording of the Australian exclusions. These exclusions should be reviewed.

The second policy choice that requires revisiting is the treatment of foreign tax claims. Australia retained the rule that foreign revenue debts are not admissible to proof in a domestic liquidation, whereas the UK has abolished the rule, but retained the possibility of challenging such debts as a penalty.[126] Australia led the way over the UK with the abolition of the preferential status of tax claims,[127] yet lags behind the UK with the refusal to recognise that foreign tax claims can be proved on a non-preferential basis as ordinary, unsecured claims. The time has come for Australia to move beyond the confines of narrow nationalism and to recognise that other countries have a legitimate interest in collecting taxes owing to them. It is noteworthy in this connection that Allsop CJ in *Akers*[128] cited approvingly the ideas expressed by Holmes J in *Compania General de Tabacos de Filipinas v Collector of Internal Revenue* that '[t]axes are what we pay for civilized society'.[129] Arguably, sentiments have been turned into legislative action by Australia's ratification and implementation of the OECD *Convention on Mutual Administrative Assistance in Tax Matters*.[130] But the recognition and enforcement of foreign tax claims only applies in respect of states that are also party to the Convention. As one noted champion of universalism in insolvency has remarked,

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125 See generally the *Original Guide to Enactment of the Model Law*, above n 43, [60]–[65] and the *Revised Guide to Enactment of the Model Law*, above n 43, [56].

126 See *Cross-Border Insolvency Regulations 2006* (UK) SI 2006/1030, sch 1, art 13(3).

127 In the UK the preferential status of tax claims was abolished by the *Enterprise Act 2002* (UK) c 40, s 251 and in Australia by the *Insolvency (Tax Priorities) Legislation Amendment Act 1993* following the recommendations of the Harmer Report — see Law Reform Commission, *General Insolvency Inquiry*, Report No 45 (1988) 302–3 [738]–[741]. For a discussion and comparison see Christopher F Symes, 'Reminiscing the Taxation Priorities in Insolvency' (2005) 1(2) *Journal of the Australasian Tax Teachers Association* 435. See generally Andrew Keay and Peter Walton, 'Preferential Debts: An Empirical Study' (1999) 3 *Insolvency Lawyer* 112; Andrew Keay and Peter Walton, 'The Preferential Debt Regime in Liquidation Law: In the Public Interest?' (1999) 3 *Company Financial and Insolvency Law Review* 84.

128 (2014) 223 FCR 8, 43 [145]. See also the comments of the judge at first instance and endorsed by Allsop CJ at 43 [144]: 'It is fundamental to any society that its government be able to require its citizens and others who operate a business or reside within that society, to pay taxation so as to maintain the State': *Ackers v Saad Investments Co Ltd* [2013] FCA 738 (30 July 2013) [45].

129 275 US 87, 100 (1927).

130 (1988) as amended by Protocol in 2010, opened for signature on 1 June 2011 (entered into force in Australia on 1 December 2012).

'acts of helpful cooperation, without an initial requirement of reciprocity, breed reciprocity'.[131]

The third policy choice that requires attention is the additional assistance provision in art 21(1)(g) of the Model Law. This authorises the grant of additional relief consequent on the recognition of foreign insolvency proceedings. The provision does not go into detail as to the type and form of additional relief may be granted. If the Treasury considers that Australia is missing some weapon from its cross-border insolvency armoury as a result of the proposal repeal of the 'aid and auxiliary' provision in s 581, then it could be included here.

An expanded art 21(1)(g) could also sanction the application of foreign insolvency law if that was considered appropriate in suitable cases — although an English court has denied the possibility of applying foreign law in a Model Law context. The case in point is *Re Pan Ocean Co Ltd*,[132] where the Court acknowledged that the words 'appropriate relief' in art 21 had a wide literal meaning, but nevertheless found that a recognising court was only allowed to grant relief that was available in a domestic insolvency to a foreign insolvency representative. The Court concluded, on the basis of a consideration of the preliminary materials leading up to the elaboration of the Model Law, that the grant of relief available only under provisions of foreign insolvency law was not appropriate.[133]

The fourth policy choice that should be addressed, particularly in light of *Akers*, is the 'adequate protection' point in art 21(2) of the Model Law. Article 21(2) stipulates that upon recognition of a foreign insolvency proceeding, the court may entrust the distribution of all or part of the debtor's assets located in Australia to the foreign insolvency representative 'provided that the court is satisfied that the interests of creditors in [Australia] are adequately protected'. Of course *Akers* is a somewhat extreme example because the Australian creditor would have received nothing in the foreign liquidation, whereas in the 'normal' scenario, the Australian creditor would receive some return in the foreign proceedings, albeit less than under a local distribution.[134] This was the fact situation in *HIH*[135] and it raises the question whether local creditors are adequately protected in these circumstances — although a decision on this issue was not necessary in *HIH*, since it was not a case under the Model Law. It is difficult however, to see how creditors are 'adequately protected' unless there are very significant cost savings in transferring the assets to

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131 See Westbrook, above n 12, 29. Westbrook suggests that the 'experience in the United States … is that helpful and cooperative actions … produce reciprocal assistance from courts in other countries'.

132 [2014] EWHC 2124 (Ch). But for a different view, in the context of the US incorporation of art 23 of the Model Law, see *Re Condor Insurance Ltd*, 601 F 3d 319 (2010).

133 [2014] EWHC 2124 (Ch) [81]–[87]. See also Explanatory Memorandum, Cross-Border Insolvency Bill 2008 (Cth) [63]; which states that the

> recognition of a foreign proceeding does not mean extending the effects of the foreign proceeding as they may be prescribed by the law of the foreign State. Instead, recognition of a foreign proceeding entails attaching to the foreign proceeding consequences envisaged by the law of the enacting State.

134 See generally Keith D Yamauchi, 'The UNCITRAL Model Cross-Border Insolvency Law: The Stay of Proceedings and Adequate Protection' (2004) 13(2) *International Insolvency Review* 87.

135 [2008] 1 WLR 852.

the foreign insolvency representative — whether through having a single scheme of distribution with a larger asset pool, or otherwise.

Unless the Australian legislature, in a redraft of the *Cross-Border Insolvency Act*, redefines 'adequate protection', one is likely to be left with the anomalous result that while a UK court could transfer assets to Australia,[136] an Australian court could not reciprocate. Interestingly, ch 15 of the US *Bankruptcy Code* requires that the interests of creditors should be 'sufficiently protected' and not 'adequately protected' when authorising the transfer of assets to a foreign insolvency representative.[137] A US congressional report suggests, however, that the change was only made to avoid confusion with a very specialised legal term in US bankruptcy law and not necessarily with an intention to bring about a different substantive result.[138]

The fifth policy choice that requires consideration is the notion of cooperation in arts 25–7 of the Model Law.[139] Article 25 states that the (Australian) court shall cooperate to the maximum extent possible with foreign courts or foreign representatives and art 27 says that cooperation may be implemented by any appropriate means. Article 27 refers to:

*(a)* Appointment of a person or body to act at the direction of the court;

*(b)* Communication of information by appropriate means;

*(c)* Coordination of the administration and supervision of the debtor's assets and affairs;

*(d)* Approval or implementation by courts of agreements concerning the coordination of proceedings;

*(e)* Coordination of concurrent proceedings regarding the same debtor.

Section 18 of the *Cross-Border Insolvency Act* states that to avoid doubt, no additional forms or examples of cooperation are added in Australia apart from those expressly stated. The form of wording adopted in Australia would appear to rule out the enforcement of foreign money judgments handed down in the course of insolvency proceedings. This analysis derives support from the views expressed by Barrett J in *Re Chow Cho Poon (Private) Ltd*,[140] who held that the Court does not cooperate with a plaintiff by giving a debt judgment or awarding damages or an account of profits.

The question whether cooperation under art 27 of the Model Law should include enforcement of foreign money judgments was considered by the English

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136 Through the operation of s 426 of the *Insolvency Act 1986* (UK), which specifically authorises the application of foreign insolvency law.

137 *Bankruptcy Code*, 11 USC § 1521(b) (2012).

138 Committee on the Judiciary, Report No 109–31, above n 106, [115]. Section 361 of the *Bankruptcy Code* uses, but does not define, the term 'adequate protection': 11 USC § 361 (2012). The section refers to a situation where a secured creditor is prevented from enforcing its security by the stay on enforcement that derives from bankruptcy proceedings. It gives examples of 'adequate protection': periodical payments to the creditor; a replacement security interest on substitute property or something that is the 'indubitable equivalent'. See also the discussion of adequate/sufficient protection in *Akers* (2014) 223 FCR 8, 38 [125]–[128].

139 For valuable practical guidance in this regard, see generally Jackson and Mason, above n 50.

140 (2011) 80 NSWLR 507, 522 [65].

courts in *Rubin*.[141] In the Court of Appeal. Ward LJ, while acknowledging that the forms of cooperation provided by art 27 did not include enforcement, commented that 'co-operation "to the maximum extent possible" should surely include enforcement'.[142] This possibility was however, rejected by the Supreme Court. Lord Collins observed that

> [i]t would be surprising if the Model Law was intended to deal with judgments in insolvency matters by implication. Articles 21, 25 and 27 are concerned with procedural matters. No doubt they should be given a purposive interpretation and should be widely construed in the light of the objects of the Model Law, but there is nothing to suggest that they apply to the recognition and enforcement of foreign judgments against third parties.[143]

In *Rubin*, the UK Supreme Court reaffirmed what it considered to be a fundamental principle of private international law — that the judgment of a foreign court was not enforceable unless the defendant was either present within the jurisdiction, or had, in some way, submitted himself to the jurisdiction of the foreign court. In *New Cap Reinsurance Corporation Ltd v Grant* ('*New Cap*'), however, decided alongside *Rubin*, the Court took a broad view as to what constituted 'submission' for this purpose, stating that 'whether there is a submission is to be inferred from all the facts'.[144] The issue of submission also depended on the law of the state in which enforcement was sought and the fact that the foreign court would not regard the steps taken abroad as a submission did not mean that they would not be so regarded by the English court.[145] *New Cap* involved an Australian insolvency practitioner seeking the enforcement in the UK of an Australian money judgment given in the course of Australian insolvency proceedings. The UK Supreme Court held that the party disputing enforcement had submitted to the Australian jurisdiction by choosing to prove in the Australian insolvency proceedings. It concluded that a party should not be allowed to benefit in this way from the insolvency proceeding without the burden of having to comply with orders made in those proceedings.[146]

More generally, the Court in *Rubin* said that it would not expand what it considered to be settled rules governing the recognition and enforcement of foreign judgments. Lord Collins said that laws relating to the enforcement of foreign judgments and to international insolvency had not been left to development by judge-made law.[147] His Lordship commented that '[t]ypically today the

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141 [2013] 1 AC 236.

142 *Rubin v Eurofinance SA* [2011] Ch 133, 161 [63].

143 *Rubin* [2013] 1 AC 236, 280 [143].

144 Ibid 283 [161].

145 See the comments of Justice R I Barrett, above n 3, 26–7:

> Having myself decided the *New Cap* case in New South Wales, I was unaware that the defendants had submitted to the jurisdiction until I read it in the decision of the UK Supreme Court. The case before me at all times proceeded on the very clear footing that there had been no submission to the jurisdiction. The liquidators never sought to argue otherwise.

146 *Rubin* [2013] 1 AC 236, 284 [167]. On 'submission' see also *Stichting Shell Pensioenfonds v Krys* [2015] AC 616, 632–3 [31]–[32]: '[a] submission may consist in any procedural step consistent only with acceptance of the rules under which the court operates'. Note too Adrian Briggs, 'In For a Penny, In For a Pound' (2013) 1 *Lloyd's Maritime and Commercial Law Quarterly* 26.

147 *Rubin* [2013] 1 AC 236, 277 [129].

introduction of new rules for enforcement of judgments depends on a degree of reciprocity' and that the Model Law was 'the product of lengthy negotiation and consultation'.[148]

However, critics have argued that *Rubin* is a timorous judgment[149] and have also pointed out that the UK, like Australia, declined to make reciprocity a condition for recognising and granting assistance under the Model Law. Be that as it may, certainly Australia needs to respond to the issues thrown up by *Rubin* and whether enforcement of money judgments given in insolvency proceedings should be allowed through the mechanism of the cooperation provisions in the Model law. There is much to be said for the view that *Rubin* raises more general issues concerning the recognition of foreign judgments under standard private international law rules and should be dealt with in that context.[150]

## D *The Building Blocks of a New Comprehensive Cross-Border Insolvency Regime*

This article has made the case for a statutory update in Australia — a rational reorganisation. There is a need for a coordinated integrated set of provisions dealing with international insolvency that would encompass the *Cross-Border Insolvency Act*. The existing Act would form the centerpiece of the new statutory dispensation, but there is room for additional legislative provisions such as provisions authorising the winding up of foreign incorporated companies.

These provisions would mirror the current s 583 of the *Corporations Act*, dealing generally with the winding up of registered foreign companies or companies that have carried on business in Australia. In this era of outsourcing and off-shoring, it is essential to have provisions that permit the winding up in Australia of foreign-incorporated enterprises. Such enterprises may have very little connection with their place of incorporation apart from the fact of their registration there and the bulk of their activities may have been carried out in Australia.

Insofar as the Model Law deals with insolvency jurisdiction, as distinct from the recognition of foreign insolvency proceedings, it is premised on the assumption that the principal insolvency proceedings shall take place where the company has its centre of main interests (COMI), rather than where it is incorporated. There is a presumption that COMI and place of incorporation are the same,[151] but it is only a presumption and it may be rebutted in appropriate cases — though opinions differ on the weight to be given to the presumption.[152] The notion

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148 Ibid 277 [128].

149 For criticism of *Rubin*, see, eg, Jodie Kirshner, 'The (False) Conflict Between Due Process Rights and Universalism in Cross-Border Insolvency' (2013) 72(1) *Cambridge Law Journal* 27.

150 For a tentative suggestion that foreign money judgments might be enforced through the 'appropriate relief' provisions in art 21 of the Model Law see Barrett, above n 3, 30–3.

151 Model Law, art 16(3).

152 For the weight of the presumption in the *EU Insolvency Regulation – Regulations 1346/2000*, see *Re Eurofood IFSC Ltd* (Case C-341/04) [2006] ECR 1-03813, and the more recent cases of *Interedil Srl (in liq) v Fallimento Interedil Srl* (C-396/09) [2011] BPIR 1639 and *Davide v Hidoux* (C-191/10) [2012] All ER (EC) 239 (European Court of Justice). For the lesser weight of the presumption in the context of ch 15 of the *Bankruptcy Code*, where the courts apply a multi-factoring balancing test, see *Bear Stearns*, 374 BR 122 (2007), affirmed in 389 BR 325 (2008). It appears that, except in

that the country of incorporation was the most appropriate forum to conduct a company liquidation has been rendered redundant by the rise of the multinational corporation carrying on business across frontiers and the phenomenon of incorporation in off shore jurisdictions with 'letterbox' registrations.

A new statutory dispensation might also accommodate the provisions of s 601CL of the *Corporations Act* — perhaps by expanding the framework of cooperation and communication with foreign courts and foreign insolvency representatives under arts 25–27 of the Model Law.

# V Conclusion

Australia took a decisive step forward with the enactment of the *Cross-Border Insolvency Act*, but the steps could have been bolder and more coordinated. It stuck to familiar forms in the shape of the 'aid and auxiliary' provisions in s 581 of the *Corporations Act* and the ancillary winding up procedure in s 601CL(14). Instead of reconceptualising the framework for international insolvency cooperation, the Australian legislature went for piecemeal addition, grafting a new set of provisions onto the existing statutory framework by means of a separate statute — the *Cross-Border Insolvency Act*. The existing provisions were preserved intact and the end result is overlapping provisions, complexity, the potential for confusion and, consequently, the potential for extra costs. A statutory overhaul will assist in ensuring that international insolvency cooperation functions smoothly and efficiently. In the preceding sections of this article, we have set the blueprints for reform — a coherent, integrated set of provisions with the UNCITRAL Model Law forming the centrepiece and with supplementation as considered appropriate.

The statutory redesign provides the opportunity for Australia to acknowledge that each state has a legitimate interest in safeguarding its tax receipts and, therefore, to concede the admissibility of foreign tax claims as capable of proof in an Australian liquidation. It also affords the opportunity to revisit the exclusion of certain financial institutions from the *Cross-Border Insolvency Act*, thereby recognising the centrality of cross-border cooperation in financial crisis resolution measures.

Australia also has to address the 'adequate protection' point in art 21(2) and whether this allows asset transfers abroad where the foreign scheme of distribution is different from the Australian scheme. The UK had to confront this issue in *HIH* and sanctioned a transfer of assets to Australia even though the Australian law favoured certain creditors in a way that then had no counterpart in the UK. It would be anomalous if Australia was precluded by statute from repaying the

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circumstances where there is no contrary evidence, the location of the registered office does not have any special evidentiary value. COMI is determined by where the most material contacts are to be found, especially management direction and control of assets. These contacts include the location of the debtor's headquarters, the location of those who actually manage the debtor, the location of the debtor's primary assets, the location of a majority of the debtor's creditors who would be affected by the case and the jurisdiction whose law would apply to most disputes. On an 'administrative nerve centre' test, see also *Hertz Corp v Friend*, 559 US 77 (2010).

favour. *Akers*[153] does raise the issue of asset transfers abroad, but the facts of the case were so extreme — complete denial of the Australian claim under the law of the main proceedings — that the Federal Court quite wisely avoided making any general pronouncements on the meaning of 'adequate protection' in art 21 (2).

Australia has to decide whether it is permissible to apply foreign insolvency law in certain circumstances. The enforcement of foreign money judgments handed down in the course of insolvency proceedings is another bone of contention, but it raises issues that go beyond insolvency law. To construe the notion of 'cooperation' in the Model Law as encompassing enforcement of money judgments seems a stretch too far.

Some 15 years ago, one of the drafters of the *EU Insolvency Regulation* suggested that 'a trend toward undogmatic, flexible, and problem-oriented mutual recognition and cooperation in insolvency [was] sweeping the world'.[154] This prediction seems to have been somewhat premature, but he was perhaps on surer ground in arguing that the barren choice of either universality or territoriality of bankruptcy had almost lost its meaning. Chief Justice Spigelman (as he then was), took up the same theme in recognising that courts and legislatures are not usually faced with a binary choice between universalism and territorialism.[155] The debate has to move beyond sterile doctrinal stereotypes into a new functional framework of international insolvency cooperation recognising, of course, that there is a spectrum of cooperation with shades of gray.[156] There is need for a new realism acknowledging that the solutions to complex problems are normally nuanced and seldom simple. In this article, we hope to have put down the paving stones of new foundations for international insolvency cooperation in Australia.

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153 (2014) 223 FCR 8.

154 Manfred Balz, 'The European Union Convention on Insolvency Proceedings' (1996) 70(4) *American Bankruptcy Law Journal* 485, 531.

155 See Spigelman, above n 2, 46.

156 Where economies are closely integrated within an internal market, as is the case with the European Union, the case for a much greater level of cooperation in insolvency matters becomes compelling, and the *EU Insolvency Regulation* is much further advanced along the spectrum of cooperation than the Model Law.