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Cross-Border Insolvency Bill 2008

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Cross-Border Insolvency Bill 2008

Date introduced: 13 February 2008

House: The Senate

Portfolio: Superannuation and Corporate Law

Commencement: The Act commences on Royal Assent, except for Parts 2, 3, 4, and Schedule 1, which will commence on a day fixed by Proclamation, or 6 months after Royal Assent, whichever is the earlier.

Links: The relevant links to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at http://www.aph.gov.au/bills/. When Bills have been passed they can be found at ComLaw, which is at http://www.comlaw.gov.au/.

Purpose

To give effect to the Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law ('the Model Law'). The Model Law outlines a system of insolvency procedures to be used in cases where the insolvent party has assets in more than one country; or when there are foreign creditors present in a domestic insolvency proceeding. Through use of the Model Law, the Government aims to achieve:

- Co-operation between local and foreign courts, and local and foreign insolvency professionals, who are involved in cross-border insolvency cases
- Greater legal certainty for trade and investment
- Fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interest persons, including the debtor
- Protection and maximisation of the value of the debtor's assets, and
- Facilitation of the rescue of financially troubled businesses, thereby protecting investment and employment.[1]

Background

What is cross-border insolvency?

Cross-border insolvency is a term used to describe circumstances in which an insolvent debtor has assets and/or creditors in more than one country.[2]

1. Explanatory Memorandum, Cross-Border Insolvency Bill 2008, p. 5.

Basis of policy commitment

The United Nations Commission on International Trade Law (UNCITRAL) website describes the Model Law as follows:

> Adopted by UNCITRAL on 30 May 1997, the Model Law is designed to assist States to equip their insolvency laws with a modern, harmonized and fair framework to address more effectively instances of cross-border insolvency. Those instances include cases where the insolvent debtor has assets in more than one State or where some of the creditors of the debtor are not from the State where the insolvency proceeding is taking place. The Model Law respects the differences among national procedural laws and does not attempt a substantive unification of insolvency law. It offers solutions that help in several significant ways, including: foreign assistance for an insolvency proceeding taking place in the enacting State; foreign representative's access to courts of the enacting State; recognition of foreign proceedings; cross-border cooperation; and coordination of concurrent proceedings.

Enactment of the Model Law in Australia was first proposed in the CLERP 8 paper titled 'Cross-Border Insolvency' released in 2002. The paper discussed the need for Australia to adopt a 'leadership role' in enacting the Model Law, in order to encourage other jurisdictions to do so.[3] It was also noted that:

> Given Australia's active involvement in developing the Model Law and its position in the international insolvency community, other jurisdictions will be monitoring progress of Australia's consideration of the Model Law's implementation. If Australia were not to proceed with enactment in the near to medium term, this is likely to have a direct influence on the position of other countries, particularly in the Asia-Pacific.[4]

Subsequently, the Government announced its intention to enact the Model Laws in late 2002.

Other jurisdictions

Other jurisdictions that have adopted the Model Law include the United Kingdom, Colombia, Eritrea, Japan, Mexico, Montenegro, New Zealand,[5] Poland, Romania, Serbia, South Africa and the United States of America. Both the UK and USA enacted the Model

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2. http://www.treasury.gov.au/documents/448/HTML/docshell.asp?URL=4CrossBorder.asp
3. Treasury, *Cross-Border Insolvency - Corporate Law Economic Reform Program Proposals for Reform: Paper No. 8*, public discussion paper prepared for the Commonwealth Government, Treasury, Canberra, 2002, p. 13.
4. ibid, p. 14.
5. Commencement of the enacted Model Law in New Zealand has been postponed until Australia follows suit.

Law in 2005.[6] In Great Britain, public consultation on the implementation of the Model Law showed general widespread support for its enactment throughout industry groups and associations.

As the Model Law is not based on a principle of reciprocity between States,[7] it will, if enacted, operate in Australia to provide access to foreign representatives. This is regardless of whether that foreign representative's country has enacted the Model Law also. Therefore, the adoption of the law in other jurisdictions will not immediately impact on the use of the Model Law within Australia.

Position of significant interest groups/press commentary

Generally there has been little comment in media and interest groups regarding the introduction of the legislation. However, in the years following the CLERP 8 review (2002-2005), commentary and articles emerged observing that Australia should follow through with its commitment to enact the Model Law. One industry representative commented on the urgent need for introduction of the Model Law:

> ...if there were to be an economic downturn, and a rise in insolvencies, the system could get swamped with jurisdictional issues... The time for implementing these changes is when you're not facing crisis.[8]

Financial implications

The Explanatory Memorandum states that the financial impact of the Bill is nil, and that the compliance cost impact will be minimal, as there already exists cooperation and coordination with other nations in cases of cross-border insolvency.[9]

Key issues

Justice Barrett of the Supreme Court of New South Wales, in his consideration of the aspects of the Model Law in 2005,[10] applied the hypothetical enactment of the Model Law

6. As indicated on the UNCITRAL website at http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html.
7. The term 'State' as used in the Model Law refers to Sovereign state (i.e. country or nation), not a State or Territory within Australia.
8. Drummond, Shaun, *Time to ratify cross-border insolvency*, Lawyers Weekly Online, 24 March 2005, accessed at http://www.lawyersweekly.com.au/articles/Time-to-ratify-cross-border-insolvency-law_z66535.htm on 6 March 2008.
9. Explanatory Memorandum, p. 4.

against recent cases in Australia's history. He noted when applying it to the *HIH Insurance*[11] case that the benefits for Australian liquidators would not lie in Australian adoption of the Model Law, but rather in foreign adoption of the law (in that case, where the UK might have adopted the law). The CLERP 8 report makes a similar observation that adoption of the law might provide immediate benefit for foreign representatives, rather than provide a domestic benefit.[12]

The reservations expressed in these comments emphasise the desirability of having the Model Law speedily adopted by Australia's major trading partners and those countries in which Australian entities have made significant investments, or are looking to do so. It is notable that of East and South-East Asian nations, only Japan has adopted the Model Law.[13]

The CLERP 8 discussion about enactment also pointed to the disadvantages of enacting the Model Law as a stand-alone enactment (while ultimately recommending that this be done regardless) on the grounds that:

- the whole of the law concerning corporate/personal insolvency would not be in the one place; and
- there may be more risk for argument about legislative intention and conflict of laws — for example, unintentional 'override' of domestic provisions, by enacting a later law outside the existing framework.[14]

The Bill clarifies that the Model Law overrides any inconsistencies in laws dealing with bankruptcy and insolvency.[15] It also clarifies that it will not apply to certain insolvency laws relating to banking and insurance.[16] Any current or future inconsistencies can only be addressed on a case-by-case basis; however, as the laws relating to insolvency proceedings are well-contained within a few key enactments, the risk identified in CLERP 8 does not appear to be particularly onerous.

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10. Barrett, RI, *Cross Border Insolvency – Aspects of the UNCTRAL Model Law*, 22nd Annual Banking and Financial Services Law Association Annual Conference Cairns 2005, accessed at http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_barrett060805 on 6 March 2008.
11. (2005) 215 ALR 562, and (2005) NSWSC 536
12. Treasury, op. cit., p. 13.
13. As indicated on the UNCITRAL website at http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html.
14. ibid, p. 24.
15. Cross-Border Insolvency Bill 2008, clauses 21 and 22.
16. Explanatory Memorandum, p. 8, paragraph 1.14.

Main provisions

The Bill is structured in two main parts – the full text of the Model Law contained within a Schedule, and a number of clauses containing provisions that supplement the content of the Model Law, and address implementation issues. As a result, the Model Law contained within Schedule 1 cannot be viewed in isolation to the rest of the Bill. Preserving the Model Law in its original state allows for a clear indication of the areas where the Bill has added to, or departed from, the base model of the legislation.

Parts 2 - 4 of the Bill contains provisions which are necessary for implementation of the Model Law, contained within **Schedule 1**.

Part 2 makes a number of preliminary provisions which are necessary to ensure correct and accurate application of the Model Law in Australia. For instance, although the Australian use of the term 'insolvency' is typically associated with corporate finance (and 'bankruptcy' with personal finance) it is the intention that the Model Law apply to cases of both corporate insolvency and personal bankruptcy of individuals. **Clause 8** specifies that Model Law applies to circumstances of personal bankruptcy and corporate insolvency, with references to the *Bankruptcy Act 1966* (the Bankruptcy Act) and the relevant sections[17] about insolvency in the *Corporations Act 2001* (the Corporations Act).[18]

Part 2 also clarifies which courts are competent to perform the functions in the Model Law (the Federal Court of Australia, and in some cases, the Supreme Court of a State or Territory): **clause 10**; and gives retrospective application to current cross-border insolvency proceedings (but not foreign proceedings): **clause 20**.

Part 3, clauses 21 - 22 outline the interaction of the Model Law with other Acts. They state that where the Model Law is inconsistent with a provision in the Bankruptcy Act or the Corporations Act, the Model Law prevails over the inconsistent law. According to the Explanatory Memorandum, the potential for inconsistency with the Model Law lies principally in section 29 of the Bankruptcy Act which deals with the provision of the court's assistance to foreign courts and relevant authorities.[19]

The reason is that the Model Law has a mandatory obligation on the court to cooperate with courts or representatives of foreign jurisdictions. By comparison, the Bankruptcy Act imposes a mandatory obligation on the court to assist only the courts which are prescribed by subsection 29(5) of the Bankruptcy Act.

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17. The applicable provisions of the *Corporations Act 2001* are Chapter 5 (other than Parts 5.2 and 5.4A), and section 601CL.
18. Page 8 of the Explanatory Memorandum states that it is not intended that the Model Law will also apply to special insolvency arrangements with banks and insurance companies.
19. Explanatory Memorandum, p. 13, paragraph 1.41.

Clause 23 provides a regulation-making power to the Governor-General for the Act.

The Model Law

Schedule 1 of the Bill sets out the Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law. The Model Law consists of a Preamble and thirty-two Articles.

Article 1 sets out the scope of the Model Law's application. It states that the Model Law applies where a foreign court or representative seeks Australia's assistance with a foreign insolvency proceeding; or assistance is needed in a foreign country relating to an Australian insolvency proceeding; or where Australia and a foreign country have concurrent proceedings against the same debtor; or whether foreign creditors or other interested persons have an interest in an Australian proceeding.

Article 1, paragraph 2 enables the Governor-General (via his regulation-making power under **clause 23**) to prescribe a list of types of entities that might be excluded from the Model Law. The Explanatory Memorandum states that regulations will be made to specifically exclude special insolvency arrangements which apply to authorised deposit-taking institutions and insurance companies under the *Banking Act 1959,* the *Insurance Act 1973* and the *Life Insurance Act 1995*.[20] Exclusion of banks and insurance companies is consistent with the Model Law's suggestions for excluded entities, on the basis that such entities are subject to special insolvency regimes.

Article 2 contains relevant definitions. In particular, the definitions of 'foreign proceeding' and 'foreign representative' limit the scope of the application of the Model Law to only those matters which satisfy the relevant definition.

A **'**foreign proceeding**'** is a judicial or administrative proceeding in a foreign State, pursuant to a law relating to insolvency in which the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganisation or liquidation.

A 'foreign representative' is a person or body authorised in a foreign proceeding to administer the reorganisation or the liquidation of the debtor's assets or to act as a representative of the foreign proceeding.

Article 3 clarifies that the Model Law will not override any conflicting obligation arising under another treaty or international agreement.

20. Explanatory Memorandum, p. 8, paragraph 1.15.

Article 4 sets out the courts which may deal with 'foreign proceedings' and courts under the Model Law. These are the Federal Court of Australia, and for some corporate insolvency cases, the Supreme Court of a State or Territory.[21]

Article 5 authorises a trustee or registered liquidator to act in a foreign country on behalf of an Australian insolvency proceeding.[22]

Access to foreign representatives and creditors to courts in this state

Articles 9 – 14 deal with access of 'foreign representatives' and creditors to courts in Australia. Overall, these articles enable foreign liquidators, trustees in bankruptcy or creditors to apply directly to local courts. **Article 11** enables a 'foreign representative' to commence insolvency proceedings in Australia; **article 12** allows a 'foreign representative' to take part in a current Australian insolvency proceeding. **Articles 13-14** deal with access and notification issues in these circumstances.

Recognition of a 'foreign proceeding' and relief

Articles 15 - 24 deal with recognition of a 'foreign proceeding' and relief. Overall, these articles allow a 'foreign representative' (such as a liquidator or trustee) to apply to the local court for recognition of the insolvency proceeding in their foreign country.

Of note is **article 15** which sets out the requirements for an application for recognition of a 'foreign proceeding'. This article is supplemented by additional requirements under **clause 13** of the Bill, thus increasing the amount of information required from 'foreign representatives'.

Similarly, **article 18** (which requires 'foreign representatives' to inform the court of particular information regarding the insolvency proceedings) is supplemented by **clause 14** of the Bill, which increases instances for which this obligation may occur.

Clauses 13 and 14 appear to be the only instances where the Government has chosen to impose a greater responsibility than that set out in the Model Law.

Cooperation with foreign courts and 'foreign representatives'

Articles 25 - 27 facilitate the cooperation of Australian courts with foreign courts which are currently holding insolvency proceedings against a debtor. The articles require the relevant Australian court to 'cooperate to the maximum extent possible' with foreign courts or 'foreign representatives'.

21. Also see **clause 10**.
22. Also see **clause 11**.

Concurrent proceedings

Articles 28 – 32 deal with concurrent proceedings between Australia and a foreign country. Once a court has recognised a foreign main proceeding[23] (see **article 17**), the Model Law states that an Australian proceeding should only be commenced if the debtor has assets in Australia (**article 28**).

Article 29 outlines how to coordinate and Australian proceeding and a 'foreign proceeding' concurrently. For instance, it specifies certain articles in the Model Law for which a court should seek cooperation and coordination from the foreign jurisdiction.

Concluding comments

The enactment of this legislation, while long overdue, may not have an immediately apparent effect on the operation of insolvency proceedings in Australia. According to the Explanatory Memorandum, the law will simply give force to arrangements that are already in place.[24] However, clear benefits lie in the creation of increased certainty for parties to an insolvency proceeding – particularly as the occurrences of cross-border insolvency cases will inevitably increase, given the steady pattern of globalisation in individuals and corporations.

23. "Foreign main proceeding" is defined in **article 2** as a foreign proceeding taking place in the State where the debtor has the centre of its main interests.

24. Explanatory Memorandum, p. 4.

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